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## ARTICLE

# ONLINE PLATFORMS, AGENCY, AND COMPETITION LAW: MIND THE GAP

*Pınar Akman\**

### ABSTRACT

*Many of the world's most valuable companies adopt the online platform business model to bring together different groups of customers—suppliers and customers—seeking to transact with one another. This Article aims to establish the correct legal characterization of these platforms and the implications thereof for competition law purposes. To do so, it explores two related questions: first, whether platforms are agents of their suppliers; and, second, whether the competition law prohibition of anticompetitive agreements should apply to agreements between platforms and suppliers, which restrict competition on the relevant market for the products/services regarding which the platform facilitates a transaction. The first question arises because the platform business model resembles an agency arrangement more than any other, and many platforms self-proclaim to be agents of their suppliers. Yet, the decisional practice and commentary have developed on the premise that they are not agents. The second question arises due to the “agency rule” under the “single economic entity doctrine,” according to which restrictive agreements between an agent and a principal take place within the same “undertaking” and are consequently immune from the competition law prohibition of anticompetitive agreements between separate undertakings. After applying concepts of agency and similar*

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*delegation models found in different areas of law to the standard contracts of six major platforms—Amazon Marketplace, Apple App Store, Uber, eBay, Booking.com, and, Airbnb—this Article finds that, as a matter of positive law, all of these platforms are agents of their suppliers. Consequently, platforms’ agreements with their suppliers that restrict competition on the relevant products/services market cannot be scrutinized due to the agency rule under the “single economic entity doctrine” as currently conceived. This represents a significant “platform gap” in the application of competition law in digital markets. Following these findings, this Article conducts a normative assessment to demonstrate that in the context of platforms that not only intermediate transactions for, but also compete with their suppliers on the relevant market, the “single economic entity doctrine” should be (re)interpreted. The “agency rule” should not apply to agreements of such platforms and suppliers that contain restrictions of competition on the relevant market. This is because the conflict of commercial and competitive interests between a “principal” (supplier) and an “agent” (platform) that competes with its principal fundamentally violates the principles of agency and the reasoning underlying the single economic entity doctrine. This Article develops a “competitive neutrality” principle to inform and underlie this proposed (re)interpretation of the “single economic entity doctrine.” This (re)interpretation fills the “platform gap” identified in this Article by subjecting the agreements of platforms that are not in a competitively neutral position with their suppliers to the full application of the prohibition of anticompetitive agreements.*

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### I. INTRODUCTION

Many of the world’s most valuable companies, such as Amazon and Apple, conduct much of their business using the “platform” model. A “platform,” for the purposes of this Article, can be defined as an online marketplace which “provides a discrete set of services to the parties using it, facilitating their efforts to transact effectively and efficiently, including searching for potential transacting partners, agreeing to terms with them, and performing the contract.”<sup>1</sup> This is a *factual* definition of a platform based on what a platform does in bringing together suppliers and customers who would like to transact with one another. Although this definition is useful for conceptual

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1. FED. TRADE COMM’N STAFF REPORT, THE “SHARING” ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS 3 (Nov. 2016), [https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200\\_ftc\\_staff\\_report\\_on\\_the\\_sharing\\_economy.pdf](https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf) [https://perma.cc/Z2XR-WTYC] [hereinafter FTC Report]. Although the Federal Trade Commission report’s definition has been offered in the context of the sharing economy, it is broad enough to cover platforms of all types that are relevant to this article’s inquiry. David Evans and Richard Schmalensee aptly define what platforms do as “matchmaking” because platforms operate physical or virtual places where members of different groups of customers are brought together. See DAVID S. EVANS & RICHARD SCHMALENSEE, MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS 1-2 (2016). As such platforms bring together different groups of customers, they operate as two-sided or multi-sided businesses. The seminal paper by Jean-Charles Rochet and Jean Tirole provides a technical, economic model of the two-sided platform business and platform competition. See generally Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS’N 990 (2003).

delineation and for distinguishing between different types of online commercial enterprises, it is not a *legal* definition of what a platform is. The question of what a platform is and the implications of this characterization for legal purposes—and in particular, for EU competition law purposes—are the focus of this Article.

Platforms that operate in digital markets raise two fundamental questions regarding their legal characterization for the purposes of this Article. First, whether platforms are *agents* of the suppliers for whom the platforms enable transactions with customers. Second, how the scope of the competition law prohibition of anticompetitive agreements should be drawn in relation to agreements between platforms and suppliers, which restrict competition on the market for the products/services, for which the platform facilitates a transaction between a supplier and a customer (hereinafter, the “relevant market”).<sup>2</sup> These questions arise out of the fact that the platform business model, in the way that it functions through the facilitation of contracts between suppliers and customers, displays the qualities of an agency relationship more than any other commercial arrangement. In fact, many of the platforms self-proclaim to be agents of their suppliers in their agreements with them and with customers.<sup>3</sup> Further, agreements between platforms and suppliers can contain clauses which restrict competition in relation to price, quantity, availability, etc. of the products/services supplied to customers on the relevant market. Yet, Article 101 of the Treaty on the Functioning of the European Union

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2. This Article does not pursue an inquiry as to whether platforms are also agents of the “customers” (buyers) who enter into transactions with the suppliers on the platform to the extent that such customers are “consumers” (i.e. end users). This is because for competition law to apply to an agreement/practice at all, both of the parties to the agreement have to be “undertakings.” Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Sept. 5, 2008, 2008 O.J. (C115) 89 [hereinafter TFEU]. For the competition law definition of undertaking, see accompanying text to *infra* note 118. Similarly, such an inquiry requires examination of the particular formation details of the contract facilitated by the platform under the relevant contract law, which goes beyond the scope of this Article. Where the buyers on the platform are also “undertakings,” namely the platform facilitates business-to-business transactions (and the contract is formed, indeed, in such a way that the platform acts as an agent for both parties to the contract), the legal assessment of the relationship between the platform and the supplier should equally apply to the assessment of the relationship between the platform and the buyer. However, where the platform is found to be an agent for both of these parties, one pertinent question will be whether the platform can act for two parties with conflicting interests in a given transaction. For the legal position on this under the common law, see *infra* note 53 below.

3. See text after *infra* note 197.

(TFEU) (hereinafter, “Article 101”) which prohibits anticompetitive agreements, concerted practices and decisions of association of undertakings, which have the object or effect of restricting, distorting or preventing competition within the internal market, does *not* apply to agreements between principals and agents where such an agreement restricts, distorts or prevents competition on the relevant market.<sup>4</sup> This stems from the doctrine according to which Article 101 does not apply to agreements between two or more legal persons that form a “single economic entity” (e.g. an agent and a principal) since the application of the provision requires an agreement between separate undertakings.<sup>5</sup> The implication of finding platforms to be agents of their suppliers and thus, part of the same “single economic entity” as their suppliers is that anticompetitive agreements between a platform and suppliers would fall outside the scope of, and cannot be scrutinized by, EU competition law, and any other competition law system modelled thereon. The same goes for all jurisdictions whose competition law includes a similar doctrine that prevents the application of competition law to agreements between a principal and an agent.<sup>6</sup> This is a matter of *scope* of

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4. Art. 101 TFEU. Although occasionally reference is made to “genuine agents” regarding this limitation of scope in competition law, a “genuine” agent is simply an agent who satisfies the criteria for agency as provided for by competition law. Therefore, it does not further the inquiry beyond distinguishing agents from entities that are not agents (but may appear as such) and will not be used as a term of significance in this Article. For a comparison between “genuine” and “sham” agents, see *Simpson v. Union Oil Co.*, 377 U.S. 13, 21-22 (1964) (clarifying that it is the substance of the relationship between two entities and not its form or description that determines antitrust liability).

5. See Case C-73/95, *Viho Europe VB v. Comm’n*, 1996 E.C.R. I-5457 [hereinafter *Viho*]; Case 30/87, *Bodson v. Pompes Funèbres des Régions Libérées SA*, 1988 E.C.R. 2479; Case 15/74, *Centrafarm BV v. Sterling Drug Inc.*, 1974 E.C.R. 1147; Case 22/71, *Béguelin Import v. GL Import Export*, 1971 E.C.R. 950. On the single economic entity doctrine, see Okeoghene Odudu & David Bailey, *The Single Economic Entity Doctrine in EU Competition Law*, 51 COMMON MKT. L. REV. 1721 (2014). See also EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL COMPETITION LAW AND ECONOMICS* 814-816 (2d ed. 2011) and the case law cited therein.

6. This includes, for example, the United States where the “intra-enterprise conspiracy” doctrine can exclude the possibility of liability for infringement of Sherman Act, Section 1 (equivalent to art. 101) where there is an agreement between a principal and an agent, and the agreement does *not* “deprive the marketplace of ... actual or potential competition.” *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 195 (2010) [hereinafter *American Needle*]. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) (holding that elimination of the intra-conspiracy doctrine with respect to corporations and their wholly owned subsidiaries will not cripple antitrust enforcement). See also *American Needle*, 560 U.S. at 192. Compare *U.S. v. Gen. Elec.*, 272 U.S. 476, 488 (1926) (holding that the *per se* prohibition against resale price maintenance does not apply in cases where there is a genuine relationship of principal and agent) with *Online-Booking Platforms for Hotels*, 2016 (Swiss Competition Comm’n) (stating

application. Further, under Regulation 1/2003, EU Member States are obliged *not* to prohibit agreements and concerted practices by their national competition laws if the same practice is not prohibited in EU competition law provided that there is an “effect on trade between Member States.”<sup>7</sup> This obligation is likely to apply to the agreements of some of the largest global platforms such as Amazon, Apple’s App Store, and Uber. Consequently, this inquiry into the scope of application has significant implications for applying competition law in digital markets, and in particular for e-commerce, given the ubiquity of the platform model. Thus, the agency rule under the single economic entity doctrine can immunize a large part of the business model of these undertakings from the application of EU competition law, as well as Member State competition laws depending on the legal characterization of platforms under the single economic entity doctrine. Therefore, there is a potentially significant “platform gap” in the application of competition law in digital markets. An exploration and critical analysis of this “platform gap,” and how it may be filled, if necessary, is what this Article aims to conduct.

The overall research question of this Article concerns the correct scope of the application of competition law to agreements between a platform and its suppliers, which restrict competition on the relevant market. To that end, this Article first conducts a positive assessment of the law to explore whether platforms are agents of the suppliers on the

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that Swiss competition law does not contain any provisions that would exclude the application of the prohibition of anticompetitive agreements to those agreements between principals and agents).

7. Council Regulation 1/2003, art. 3, 2002 O.J. (8 (EC) L1). Art. 3(2) stipulates that: “[t]he application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of art. 81(1) of the Treaty, or which fulfil the conditions of art. 81(3) of the Treaty or which are covered by a Regulation for the application of art. 81(3) of the Treaty.” *Id.* The question of whether platforms are agents is a question of scope in determining whether art. 101(1) applies to an agreement at all. Where EU competition law would find a lack of applicability due to the single economic entity doctrine, *argumentum a fortiori*, there cannot be a restriction of competition within the meaning of art. 101(1). Thus, Member States cannot find infringement under those circumstances either, where there is an effect on trade between Member States and Regulation 1 is applicable. This Author has argued elsewhere in this context that the German Federal Cartel Office (Bundeskartellamt) proceedings concerning the most-favored-customer clauses of certain online travel agents were possibly, as a result of this provision, in violation of Regulation 1/2003, due to their prohibition of an agreement which would not have been prohibited under art. 101 were the single economic entity doctrine correctly applied as per the EU competition rules. Pinar Akman, *A Competition Law Assessment of Platform Most-Favored-Customer Clauses*, 12(4) *J. COMPETITION L. & ECON.* 781, 806 (2016).

platform. After an exploration of the concepts of agency found in different areas of law including competition law, this Article answers that question in the affirmative and posits that as the law stands, platforms are the agents of their suppliers. This is the first contribution of this Article. The implication of this finding is that because platforms are agents, under the single economic entity doctrine, their agreements with their suppliers which restrict, distort or prevent competition on the relevant market cannot be scrutinized under Article 101. This competition law “immunity” means that potentially substantial restrictions of competition in digital markets fall outside the scope of the competition law prohibition. Thus, an assessment of the appropriateness of this “immunity” becomes necessary. Subsequently, this Article conducts a normative assessment to explore whether, and if so how, the single economic entity doctrine and the agency rule thereunder *should* be (re)interpreted to apply to the agreements of these platforms with their suppliers. This Article identifies the common thread between the general principles of agency and the single economic entity doctrine to be that of an *alignment* of commercial and competitive interests between the principal and the agent. Consequently, this Article posits that there is one particular scenario in which the single economic entity doctrine should be (re)interpreted to include within the scope of Article 101 those restrictive agreements between platforms and suppliers that currently fall outside of its scope of application: where the platform in question competes with the suppliers on the relevant market. The proposed (re)interpretation is based on the premise that in circumstances where the platform competes with suppliers, there is a *conflict* of commercial and competitive interests between the agent (platform) and the principal (supplier). This conflict fundamentally goes against the principles of agency and the reasoning underlying the single economic entity doctrine.<sup>8</sup> This Article advances this proposed (re)interpretation of the single economic entity doctrine based on a concept of “competitive neutrality,” which it develops.<sup>9</sup> This proposal to (re)interpret the single

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8. See text around *infra* note 345.

9. The concept of “competitive neutrality” is traditionally used to refer to the principle that state-owned and private businesses compete on a level playing field. See *Achieving Competitive Neutrality*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/daf/ca/achievingcompetitiven neutrality.htm> (last visited Mar. 6, 2019). This Article’s concept of “competitive neutrality” is similar in substance to the traditional use of the concept but transposes that concept to the context of competition between *private* businesses.



economic entity doctrine for the agreements of platforms that compete with their suppliers using the concept of “competitive neutrality” is the second contribution of this Article. With this (re)interpretation, this Article fills the “platform gap” by making the prohibition of anticompetitive agreements, which is currently inapplicable, applicable to those restrictive agreements of platforms and suppliers to the extent that the platform competes with the suppliers on the relevant market.

This assessment of platforms’ legal characterization and how competition law does and should apply to their agreements with their suppliers is fundamental to correctly assessing the business practices of major platforms such as Amazon, Apple App Store, Booking.com, Uber and others, some of which have already been scrutinized by competition authorities around the world for their various agreements.<sup>10</sup> The literature and decisional practice thus far have either proceeded on the premise that these platforms are *not* agents of their suppliers or have not engaged with this legal question at all.<sup>11</sup> The EU

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The proposal is one of reinterpreting the single economic entity doctrine because the doctrine has not yet been interpreted by the EU Courts in the context of platforms, although it has been interpreted in the context of other agency agreements.

10. See cases cited in *infra* notes 11 and 12.

11. See ORG. FOR ECON. CO-OPERATION & DEV., VERTICAL RESTRAINTS FOR ON-LINE SALES, DAF/COMP(2013)13, 30 (2013), <http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf> [<https://perma.cc/67WL-DBKR>] (last visited Mar. 18, 2019). See, e.g., *U.S. v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016) (representing decisional practice with *no* explicit discussion of agency in the context of the single economic entity doctrine/intra-enterprise conspiracy doctrine); Bundeskartellamt [Federal Cartel Office], *Meistbegünstigstenklauseln bei Booking.com*, 9th Decision Division B 9-121/13, Dec. 22, 2015 (Ger.) [hereinafter *Booking.com*]; Konkurrensverket [Swedish Competition Authority], *Decision Ref. no. 596/2013*, Apr. 15, 2015 (same); *Hotel online booking: Decision to accept commitments to remove certain discounting restrictions for Online Travel Agents 2014*, OFT1514dec (UK) [hereinafter *Booking/Expedia/IHG*]; Comm’n Decision Case COMP/39.847/E-BOOKS, C(2013) 4750 (EC). See also *Online-Booking Platforms for Hotels*, *supra* note 6 (representing decisional practice which discusses single economic entity doctrine/intra-enterprise conspiracy doctrine but rules it out); Bundeskartellamt [Federal Cartel Office], *HRS Bestpreisklausel*, 9th Decision Division B 9-66/10, Dec. 20, 2013 (Ger.) [hereinafter *HRS*]. Notably, these decisions relate to more or less identical conduct by similarly-situated/identical platforms and apply similar/identical legal provisions, so it is curious that some authorities have engaged with the issue whilst others have not. Academic commentary considering the possibility that platforms and suppliers may be part of the same economic entity for the purposes of competition law is sparse, but some of the existing literature discusses the question in the context of sharing economy platforms. See Niamh Dunne, *Competition Law (and its Limits) in the Sharing Economy*, in *CAMBRIDGE HANDBOOK ON LAW AND REGULATION OF THE SHARING ECONOMY* 91-107 (Nestor M. Davidson et al. eds., 2018); Mark Anderson & Max Huffman, *The Sharing Economy Meets the Sherman Act: Is Uber a Firm, A Cartel, or Something*

Courts have not yet dealt with this particular legal issue, but given the prevalence of the platform model and the ongoing scrutiny of platforms by the EU Commission and national competition authorities, it is highly likely that they soon will need to determine the application of the single economic entity doctrine and the agency rule to restrictive agreements between platforms and their suppliers.<sup>12</sup> This Author has argued elsewhere that, in particular, the various competition authority proceedings in Europe concerning most-favored-customer clauses adopted by certain platforms have proceeded on the erroneous basis

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*in Between?*, 2017 COLUM. BUS. L. REV. 860 (2018); Margherita Colangelo & Mariateresa Maggiolino, *Uber in Europe: Are There Still Judges in Luxembourg?*, 1 COMPETITION POL'Y INT'L ANTITRUST CHRON. 6 (2018); Julian Nowag, *When sharing platforms fix sellers' prices*, 6 J. ANTITRUST ENFORCEMENT 382 (2018). See also Andrei Gurin & Luc Peeperkorn, *Vertical Agreements*, in THE EU LAW OF COMPETITION 1363, 1363-81 (Jonathan Faull & Ali Nikpay eds., 2014) (discussing the issue more generally in the context of platforms, but arguing that it is difficult to find platforms to be agents).

12. Other than an E-commerce Sector Inquiry (2015-2017), in the last few years, the EU Comm'n has pursued investigations and reached infringement decisions in relation to Google Search (AdSense) (European Comm'n Press Release, Antitrust: Comm'n fines Google €1.49 billion for abusive practices in online advertising (March 20, 2019)); Google Android (Comm'n Decision 1/2003 of July 18, 2018 relating to a proceeding under art. 102 of the Treaty on the Functioning of the European Union and art. 54 of the EEA Agreement (AT.4099 – Google Android) (EC)); Google Search (Shopping) (Comm'n Decision 1/2003 of June 27, 2017 relating to proceedings under art. 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 – Google Search (Shopping) (EC)); Apple (State Aid) (Comm'n Decision of August 30, 2016 On State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (EC)); online vertical restraints of electronics manufacturers (Comm'n Decision of July 24, 2018 relating to a proceeding under art. 101 of the Treaty on the Functioning of the European Union (AT.40465 – Asus (vertical restraints)) (Sept. 21, 2018)); Comm'n Decision of July 24, 2018 relating to proceedings under art. 101 of the Treaty on the Functioning of the European Union (AT.40469 Denon & Marantz) (EC); Comm'n Decision of July 24, 2018 relating to proceedings under art. 101 of the Treaty on the Functioning of the European Union (AT.4018 – Philips) (EC); Comm'n Decision of July 24, 2018 relating to proceedings under art. 101 of the Treaty on the Functioning of the European Union and art. 53 of the EEA Agreement (AT.40182 – Pioneer) (EC)). It also adopted commitment decisions in relation to e-books, Amazon MFNs and other matters; see Comm'n Decision of May 4, 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and art. 54 of the EEA Agreement (AT.40153 – E-Book MFNs and related matters) (EC). See Final Report from the Comm'n to the Council and the Parliament, Final report on the E-commerce Sector Inquiry (COM (2017) 229 final) (EC). Most recently, it has been reported that the European Commission is to launch a formal competition inquiry into Apple's position in relation to Apple App Store following a complaint by Spotify alleging that Apple App Store abuses its dominant position to favor Apple Music over rivals such as Spotify; see Rochelle Toplensky, Brussels poised to probe Apple over Spotify's fees complaint, FIN. TIMES, (May 6, 2019), <https://www.ft.com/content/1cc16026-6da7-11e9-80c7-60ee53e6681d> [<https://perma.cc/R9XR-D4GP>].

that these platforms are not agents of the suppliers.<sup>13</sup> This Article takes this work further by investigating the publicly available terms and conditions of the relevant standard contracts of six major platforms operating in different business sectors—Amazon Marketplace, eBay, Apple App Store, Uber, Airbnb, and Booking.com. This is done with a view to attaining a robust understanding of the operation of the platform business model in relation to agreements between platforms and suppliers. This Article is not concerned with the examination of a particular type of contractual clause, but with the legal characterization of platforms in their dealings with their suppliers and third parties. Its findings have implications for all clauses of agreements between platforms and suppliers, which restrict, distort, or prevent competition on the relevant market. Other than most-favored-customer clauses, examples of contract clauses which would fall outside the scope of Article 101 if platforms are agents of suppliers, include many vertical restraints<sup>14</sup> such as restrictions on pricing, including the fixing of the price;<sup>15</sup> discounting restrictions;<sup>16</sup> non-discrimination clauses;<sup>17</sup> restrictions on output, and imposition of supply conditions. Any such

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13. See Akman, *supra* note 7, 805 et seq. The author argued therein that proceedings and decisions against, for example, Booking.com should have been pursued on the basis of TFEU art. 102 prohibiting the abuse of a dominant position (assuming that the conditions of that art. would have been fulfilled) rather than on the basis of art. 101 *because* Booking.com is the agent of the hotels and their agreements fall outside the scope of art. 101.

14. A “vertical agreement” is an agreement between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production/distribution chain, and relates to the conditions under which the parties may purchase, sell or resell certain goods or services; Comm’n Regulation 330/2010 of Apr. 20, 2010 on the application of art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 2010 O.J. (L 102) 1, 1 [hereinafter VBER]. A “vertical restraint” is a restriction of competition found in a vertical agreement. *Id.*

15. For a case in the United States which dismissed a claim against twelve major hotel chains and nine online travel agents on the basis that, *inter alia*, the liability arising out of a resale price maintenance agreement cannot be made out because the agency defence has not been overcome, see *In Re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, No. 3:2012-cv-03515-B (N.D. Tex. 2014). The author has not used the term “resale price maintenance” in the text corresponding to this footnote since technically, if the intermediary in question is an agent, there is no “resale” but only a “sale” (because any “sale” is being made on behalf of/for the principal by the agent). In the context of a platform (e.g. Uber) setting the price for suppliers on the platform and the competition law treatment of this, see Nowag, *supra* note 11.

16. See, e.g., *Booking/Expedia/IHG*, *supra* note 11; *ACCC v. Flight Centre* [2016] HCA 49 (Austl.).

17. See *Ohio et al. v. Am. Express Co. et al.*, 138 S.Ct. 2274, 2293 (2018) (where the vertical restraint imposed by Amex on merchants required them not to discriminate against purchases made using an Amex card through the steering of customers to use other cards).

restrictions imposed by the platform on the supplier or vice versa in relation to the transaction facilitated by the platform between the supplier and third parties (i.e. customers) would be implicated by the findings of this Article.<sup>18</sup>

The findings of this Article are timely and important in several aspects. First, the EU rules applicable to vertical restraints, which cover agreements between agents and their principals, are due to expire in 2022, and the current review period presents an opportunity to revisit the agency rule in the context of platforms.<sup>19</sup> Indeed, the Commission has already emphasized the importance of online sales and the emergence of new market players as factors that need to be taken into consideration regarding future legislative steps.<sup>20</sup> Second, there is growing global concern and litigation in relation to how competition law should apply to platforms that compete with their suppliers on the relevant market.<sup>21</sup> Third, there is a real possibility that different areas

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18. This Author has argued elsewhere that the source and direction of the competitive restraint being imposed (i.e. whether it is the putative agent or the principal imposing the restriction on the other) is not relevant to establishing the nature of the relationship between the two parties (i.e. the existence or absence of agency) since the assessment of the restraint in question only becomes possible *if* the relationship is identified not to be one of agency; Akman, *supra* note 7, 807. Thus, it is irrelevant to the legal assessment of agency whether it is the platform that is imposing the restraint on the supplier or vice versa. This position is in contrast to the Bundeskartellamt decision in *HRS* where because the restriction in question was imposed by the platform on the supplier rather than the other way around, the platform was found not to be the agent of the supplier; *see HRS, supra* note 11, ¶ 147. Same goes for *Online Booking, supra* note 6, ¶ 99 where the Swiss COMCO noted that the contractual clauses at issue—most-favoured-customer clauses—were “clearly at odds with the primacy of principal,” which was a factor justifying the finding that the relationship was not one of agency. Again, the nature of the imposed restraint should not matter for the legal characterisation of the arrangement, which is independent of the types of restrictions that such an arrangement may ensue.

19. The EU VBER came into force on June 1, 2010 and is due to expire on May 31, 2022. *See VBER, supra* note 14, at 7. The VBER exempts vertical agreements that satisfy certain criteria from the application of the prohibition of art. 101(1) through the mechanism of art. 101(3) without the need for individual assessment of agreements. Namely, those agreements which satisfy the criteria of VBER are assumed to fall within the scope of the exception rule found in art. 101(3). At the time of writing, the Commission is reviewing the VBER to decide the course of action to take in relation to the Regulation. The Commission can decide to prolong the duration of the existing VBER or revise it or allow it to lapse. *See Comm’n Consultation Strategy for the Evaluation of the Vertical Block Exemption Regulation*, EUR. COMM’N, [https://ec.europa.eu/competition/consultations/2018\\_vber/consultation\\_strategy.pdf](https://ec.europa.eu/competition/consultations/2018_vber/consultation_strategy.pdf) [https://perma.cc/JAT5-BT9R] (last visited Mar. 11, 2019) [hereinafter *Comm’n Consultation Strategy*].

20. *See Comm’n Consultation Strategy, supra* note 19.

21. *See, e.g., EU: Vestager Opens Probe into Amazon*, COMPETITION POL’Y INT’L (Sept. 19, 2018), <https://www.competitionpolicyinternational.com/eu-vestager-opens-probe-into->

of law (most notably, agency, employment, tax, and, competition law) and different jurisdictions may develop contradictory approaches to the legal characterization of platforms with the consequence of diminishing legal and business certainty, as well as threatening the internal coherence of the legal system. Given the significance of the digital economy and its increasing share in commerce and economic growth, such an outcome should be avoided to the extent possible. Unfortunately, such divergence can already be observed, leading to undesirable fragmentation of the legal treatment of such platforms. For example, in the context of free movement, the Court of Justice of the European Union (“CoJ”) held that Uber is a transport service provider

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amazon-use-of-data-about-merchants/ [https://perma.cc/5H5W-FVR6] (articulating concerns regarding Amazon’s dual role as a competitor *and* host to third-party merchants in relation to Amazon Marketplace). Soon after the Commissioner’s statement, the Bundeskartellamt opened abuse of dominance proceedings against Amazon in relation to the same concerns regarding Amazon Marketplace. See *Bundeskartellamt Initiates Abuse Proceeding Against Amazon*, BUNDESKARTELLAMT (Nov. 29, 2018), [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29\\_11\\_2018\\_Verfahrenseinleitung\\_Amazon.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.html) [https://perma.cc/KE8N-MJTS]. These proceedings were closed after Amazon voluntarily agreed to make changes to its terms of business for Amazon Marketplace worldwide. *Case Summary (Online Sales, B2-88/18)*, BUNDESKARTELLAMT (July 17, 2019), [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?\\_\\_blob=publicationFile&v=5](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=5) [https://perma.cc/M8S7-7KZ5]. In the United States, Senator Elizabeth Warren has expressed a similar view in relation to platforms participating as sellers on their own platforms in a call to break up some technology companies. Colin Lecher, *Elizabeth Warren says she Wants to Break up Amazon, Google, and Facebook: A Proposal to Unwind Big Tech*, (Mar. 8, 2019), <https://www.theverge.com/2019/3/8/18256032/elizabeth-warren-antitrust-google-amazon-facebook-break-up> [https://perma.cc/4BCJ-V8KK]. See also Nilay Patel, *Elizabeth Warren Wants to Break up Apple, too*, THE VERGE (Mar. 9, 2019), <https://www.theverge.com/2019/3/9/18257965/elizabeth-warren-break-up-apple-monopoly-antitrust> [https://perma.cc/5PYS-9R4G]. Spotify, a competitor of Apple, has recently lodged a complaint to the EU Comm’n that Apple is infringing the competition rules through its role in App Store by “essentially acting as both a player and referee to deliberately disadvantage other app developers.” Daniel Elk, *Consumers and Innovators Win on a Level Playing Field*, FOR THE RECORD (Mar. 13, 2019), <https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/> [https://perma.cc/6GEB-QUQU]. See also Toplensky, *supra* note 12 (indicating that the EU Commission may, indeed, launch an investigation into this alleged practice by Apple); see generally Lina Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019) (suggesting structural separation for platforms). For a critique of the proposal that platforms should not be allowed to sell their own goods alongside third-party sellers’ goods, and why the proposal might hurt consumers and labour, see Herbert Hovenkamp, *The Warren Campaign’s Antitrust Proposals*, UNIV. OF PA. L. SCH. INST. FOR L. & ECON., Research Paper No 19-14, <https://ssrn.com/abstract=3353716> [https://perma.cc/X7BE-7X4N] (last visited Nov. 30, 2019).

(and not an information society services provider).<sup>22</sup> In the United Kingdom, there is growing employment jurisprudence concerning Uber—currently at the Supreme Court—finding Uber to be an employer of their drivers.<sup>23</sup> These two legal findings together would mean that agreements between Uber and its drivers, which may restrict competition on the market for services provided to customers (i.e. riders) through, for example, fixing of the fares, are completely

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22. Judgment of the Court (Grand Chamber) of Dec. 20, 2017 C-434/15, *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981, ¶ 40 [hereinafter *Uber Spain*]. In contrast, for example, the US FTC notes that such platforms are often referred to as “transportation network companies”; FTC Report, *supra* note 1, 13. In *Uber Spain*, the CoJ held that the intermediation service which Uber provided was an “integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as “an information society service” . . . but as “a service in the field of transport.” *Id.* ¶ 40. The distinction is significant because, *inter alia*, freedom to provide information society services from another Member State cannot be restricted, but the rules facilitating the exercise of the freedom of establishment for service providers and the free movement of services do *not* apply to transport services. In contrast, a first instance commercial court in Spain has found a platform similar to Uber, namely Blablacar, to constitute a platform offering an information society service rather than a transportation company. *See* Judgment of Feb. 2, 2017, *Confibus v. Comuto Iberia S.L. and Comuto S.A.*, (Mar. 2017), <https://s3.amazonaws.com/documents.lexology.com/79537ac5-cd17-4261-836a-a8ebe7fe7274.pdf> [<https://perma.cc/HA5N-8ZVX>]. Interestingly, Advocate General (AG) Szpunar in his Opinion in *AIRBNB Ireland* found that Airbnb, in contrast to Uber, *does* offer a service that corresponds to the definition of “information society services,” which would benefit from the free movement of services; *see* Opinion of AG Szpunar in Case C-390/18, *Criminal proceedings against YA and AIRBNB Ireland UC* — other parties: *Hotelière Turenne SAS, Pour un hébergement et tourisme professionnel (AHTOP), Valhotel*, ECLI:EU:C:2019:336.

23. *Aslam v. Uber B.V.*, (2016) No. 2202550/2015 (Employment Trib.) (U.K.) [hereinafter *Uber (ET)*]; *Uber B.V. v. Aslam*, (2017) Appeal No. UKEAT/0056/17/DA (appeal taken from ET) (U.K.) [hereinafter *Uber (EAT)*]; *Uber B.V. v. Aslam*, [2018] EWCA (Civ) 2748 (appeal taken from UKEAT) (Eng.) [hereinafter *Uber (CA)*]. In the ongoing litigation, Uber argues that it is an *agent* of the drivers; *Uber (CA)*, *id.* ¶ 33. The Court of Appeal (CA) judgment has been appealed to the Supreme Court. *Employment Tribunal Result – Wednesday 19 December*, UBER (Dec. 19, 2018), <https://www.uber.com/en-GB/blog/employment-tribunal-uk/> [<https://perma.cc/PRM5-JYKU>]. The CA (in similar fashion to CoJ in *Uber Spain*, *supra* note 22) in agreeing with the Employment Tribunal’s findings, noted that Uber does not work for the drivers but the drivers work for Uber, and Uber runs a transportation business. *Uber (CA)*, *id.* ¶ 95. Notably, the dissenting opinion of Underhill LJ in *Uber (CA)* aptly describes the issue being not that of whether Uber provides transportation services—because it all depends on what one means by that term and in one sense, Uber obviously provides transportation services—but rather that of “whether it does so by providing the services of the drivers itself or by providing a service for booking (and paying for) them.” *Id.* ¶ 137. *See* also the recently enacted California Assembly Bill No. 5 Chapter 296 (approved by Governor on Sept. 18, 2019) which could be interpreted to give employee status to “gig economy” workers including, e.g. Uber drivers. *AB-5 Worker Status: Employees and Independent Contractors*, CAL. LEGIS. INFO., [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB5](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5) [<https://perma.cc/G56N-DDFB>] (last visited Nov. 30, 2019).

immunized from competition law scrutiny. This is because the competition law prohibition of anticompetitive agreements is not applicable to agreements between employers and employees under the single economic entity doctrine, in similar fashion to agreements between agents and principals.<sup>24</sup> Yet, it is conceivable that a national competition authority or court may find drivers on a platform such as Uber, or sellers on a platform such as Amazon Marketplace, to be competing undertakings and the platform a common intermediary between competitors as parties to a possible cartel.<sup>25</sup> In fact, in a case concerning a competitor of Uber, the Luxembourg competition authority found there to be a horizontal cartel agreement between the drivers operating on the platform.<sup>26</sup> In other proceedings, the Bundeskartellamt similarly opined that Amazon Marketplace is effectively a horizontal cartel agreement between Amazon and the suppliers (i.e. third-party sellers).<sup>27</sup> Yet, some of these findings

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24. On art. 101 not applying to agreements between employers and employees, see Case C-22/98, Criminal Proceedings against Jean Claude Becu, Annie Verweire, Smeg NV, Adia Interim NV, 1999 E.C.R. I-5682. Technically, in the UK, there is a distinction between “employees” and “workers” under the Employment Rights Act 1996, which is the applicable Act in question relevant to the dispute in *Uber (CA)*, *supra* note 23. This distinction does not make a difference in terms of the competition law assessment as both concepts denote someone being in an employment relationship with another party, which is the relevant factor in competition law.

25. See, e.g., the class action in the United States against Uber alleging that the company has orchestrated and facilitated an illegal price-fixing conspiracy between the drivers using an algorithm that sets the prices for rides in violation of Sherman Act, Section 1. *Meyer v. Uber Tech., Inc.*, 868 F.3d 66, 70 (2d Cir. 2017); *Meyer v. Kalanick*, 291 F. Supp. 3d 526, 530 (S.D.N.Y. 2018). This dispute is likely to go to arbitration for resolution after the Second Circuit’s finding that the compulsory arbitration clause in the standard contract is valid. *Uber Tech.*, 868 F.3d at 80; *Kalanick*, 291 F. Supp. 3d at 535. For the argument that if Uber’s drivers are deemed to be in agreement with each other to price according to Uber’s algorithm, Uber’s entire business model would be a violation of Sherman Act, Section 1, see Anderson & Huffman, *supra* note 11, at 908. See Nowag, *supra* note 11, for an exploration of the possible antitrust treatments of centralised, platform-driven price-fixing.

26. See *Webtaxi – Luxembourg Competition Council (2018-FO-01)* (June 8, 2018) available at <https://conurrence.public.lu/dam-assets/fr/decisions/ententes/2018/decision-n-2018-fo-01-du-7-juin-2018-version-non-confidentielle.pdf> [<https://perma.cc/TNS6-6RHH>] (last visited Mar. 18, 2019). The Authority has exempted the agreement due to the benefits it brings to consumers, which outweigh the restrictive effects on competition; *id.*

27. Although no infringement decision was taken in this case as the proceedings were terminated when Amazon voluntarily removed the price parity (most-favoured-customer) clauses which it had imposed on the retailers selling on the Marketplace, in the relevant Case Report, the Bundeskartellamt expressed its finding that Amazon Marketplace was a “horizontal trade cooperation between Amazon and third-party sellers that has as its object and effect various restrictions of competition,” and that the price parity clauses in question were horizontal price-

concerning the legal characterization of these platforms by different authorities in different contexts are legally mutually exclusive.<sup>28</sup> For example, although the CoJ finding in *Uber Spain* does not preclude a finding that a business model, such as Uber's, represents a horizontal cartel between competitors, it *does* exclude a finding that the same business model represents *both* an employment relationship between the platform and suppliers, *and*, a cartel. This is because the latter requires the suppliers of the relevant products/services (e.g. drivers) to be "undertakings" competing with one another, and not "employees" of another undertaking (i.e. the platform) regarding the relevant economic activity.<sup>29</sup> In contrast to the various authority findings, interestingly, Uber itself argues that its relationship with drivers is legally one of agency.<sup>30</sup> This is identical to what Apple had argued in *Apple (iPhone)*, recently decided by the United States Supreme Court in a 5-to-4 split, where Apple was held to be a "retailer" selling the apps of app developers directly to iPhone owners through the App Store.<sup>31</sup> A finding of agency, as this Article posits to exist, places

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fixing agreements. *Case Report: Amazon Removes Price Parity Obligation for Retailers on Its Marketplace Platform*, Ref. B6-46/12, BUNDESKARTELLAMT 1, 2-3 (Dec. 9, 2013) (Ger.), [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf?__blob=publicationFile&v=2) [<https://perma.cc/PQH5-2EHC>] (last visited Mar. 19, 2019). Notably, the Bundeskartellamt does not appear to distinguish between the different entities involved as regards their position in this arrangement: it does not distinguish Amazon, the *retailer*, which may (or may not) be in competition with third-party sellers depending on the relevant range of products, from Amazon Marketplace, the *platform* (i.e. marketplace) which brings together the suppliers (including Amazon, the retailer, and the third-party sellers). *Id.* Technically, Amazon Marketplace is not a competitor to the third-party sellers as it is Amazon (the retailer) which may be in competition with them if Amazon (the retailer) has its own product range which it sells alongside third-party sellers' products on Amazon Marketplace. Having said that, as the Bundeskartellamt also notes in the Case Report, these two segments are presented by Amazon as a "single integrated platform that makes no distinction between Amazon's own retail business and the Marketplace business." *Id.* at 1.

28. On the need to appreciate the different business models and competition concerns that may arise with different types of technology platforms, see D. Daniel Sokol, *Antitrust's Curse of Bigness Problem*, 118 MICH. L. REV. (forthcoming 2020).

29. A finding that drivers are employees, by definition, excludes the possibility that they are undertakings. This appears also to be part of the underlying reasoning of the employment cases which found Uber to be the drivers' employer where the Tribunals found that Uber drivers did not "operate businesses on their own account" in explaining why the drivers were employees. See e.g., *Uber (EAT)*, *supra* note 23, ¶ 109.

30. See accompanying text to *infra* note 200.

31. *Pepper v. Apple Inc.*, 846 F.3d 313, 324 (9th Cir. 2017) [hereinafter *Apple (iPhone)*]. The correct legal characterization of this relationship is, indeed, of fundamental importance not just in Europe, but also in jurisdictions such as the United States, where standing to sue in private actions is limited to direct purchasers, and identifying the exact role of the platform in a



platforms somewhere in the middle of the spectrum of competition law applicability. This is because the agency rule only “immunizes” those agreements between platforms and their suppliers that restrict competition on the relevant (products/services) market from the application of the prohibition of anticompetitive agreements.<sup>32</sup> Other restrictions of competition arising out of the agreement between a platform and suppliers (e.g. restrictions of competition on the platform market or the supplier market), as well as any unilateral practices which may constitute abuse of dominance, would continue to be subject to competition law.<sup>33</sup> If the (re)interpretation of the single economic entity

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transaction which takes place over the platform is, therefore, essential to establishing the existence or absence of an antitrust cause of action. The legal characterization of a platform as an agent, as opposed to, for example, a distributor has immediate bearing on who the “supplier” and the “direct purchaser” are, with consequences in relation to standing for a private right of action in the United States. This was exactly the pertinent legal issue in *Apple (iPhone)* litigation in which a class of consumers who purchased iPhone apps sued Apple for monopolization and attempted monopolization of the market for iPhone apps. *Id.* at 315. The legal question was whether the consumers are direct purchasers of iPhone apps from Apple, rather than from app developers, which the Ninth Circuit answered in the affirmative (in disagreement with the Eighth Circuit’s analysis in a similar case), with the implication that the plaintiffs had standing to sue under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Apple (iPhone)*, *id.* at 322-24. The Ninth Circuit found that Apple was a *distributor* of iPhone apps, selling them directly to purchasers through its App Store. *Id.* at 324. The alternative legal characterization would have involved a finding that it was the app developers who sold the apps to consumers through Apple’s agency, in which case the consumers would have had no standing to sue Apple. In the United States, standing to sue for antitrust damages is reserved for the *direct* purchasers of the alleged infringer of competition law. *Illinois Brick*, 431 U.S. at 729. The judgment of the Eighth Circuit with which the Ninth Circuit disagreed is *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 865 (1999), which is discussed in the accompanying text to *infra* notes 371-75. The US Supreme Court majority held, without discussing *Campos* or the particular issue of agency, that iPhone users were direct purchasers who may sue Apple for alleged monopolization and their claim is not barred by *Illinois Brick*. *Apple Inc. v. Pepper*, No. 17-204, slip op. at 14 (2019) [hereinafter *Pepper*].

32. This is the case for EU competition law as established by CoJ in *Suiker Unie* in that the agency exception is only relevant in relation to (restrictions of competition found in) agency agreements concerning the relevant market where the contracts are entered into with third parties, and not in relation to the agreement between the agent and the principal more generally. See Joined Cases 40 to 48, 50, 54 to 56, 113 & 114/73, *Coöperatieve Vereniging “Suiker Unie” UA and others v. EC Comm’n*, 1975 E.C.R. 1668, ¶¶ 482-83 [hereinafter *Suiker Unie*]. See also Case C-217/05, *Confederacion Espanola de Empresarios de Estaciones de Servicio v. Compania Espanola de Petroleos SA*, 2006 E.C.R. I-12018, ¶ 62 [hereinafter *CEPSA*]. It is in the context of these contracts with third parties on the relevant market that the agent is deemed to be part of the same “undertaking” as the principal.

33. The single economic entity doctrine limiting the application of art. 101 is not applicable in case of art. 102 because the application of art. 102 does not require an agreement between undertakings and concerns unilateral conduct adopted by an undertaking in a dominant position. The CoJ has explicitly held that a practice to which art. 101 is not applicable due to

doctrine and the agency rule as proposed in this Article is adopted, then those restrictions of competition on the relevant market arising out of agreements of platforms that are not in a competitively neutral position with regard to their suppliers would also be subject to the application of Article 101. Given the developing state of conflicting legal assessments of the platform model and the current opportunity to review the applicable rules at the EU level, the correct legal assessment of the relationship and agreements between such platforms and their suppliers is of fundamental practical, legal and commercial importance.

This Article comprises seven sections. In Section II, this Article presents the relevant concepts of agency and similar business models recognized in common law and commercial law, whilst also distinguishing agency from similar contractual arrangements. The purpose of this inquiry is to identify the main characteristics of agency found in these areas of law and to establish what distinguishes agency from other similar delegation models, to inform a more robust understanding of agency in competition law. This is necessary because these other areas of law are more advanced than competition law in relation to assessing such different business models. Thus, identifying the general principles underlying the delegation model of agency in these other areas of law can inform the construction of the concept of agency in competition law. Section III sets out the single economic entity doctrine and the operation of the agency rule thereunder in competition law to discuss the conditions under which competition law would treat intermediaries as agents. Section IV exposes the relevant terms and conditions of the standard contracts of the platforms under study. Section V applies the agency principles established in Sections II and III to the terms and conditions set out in Section IV to demonstrate how, when the general principles of agency and the agency rule within the single economic entity doctrine are applied to the contracts of platforms under study, the application leads to the finding that these platforms are, as a matter of positive law, agents of their suppliers. This inquiry encompasses findings on agency from different areas of law, not just from competition law, to ensure consistency in the way different areas of law treat identical business models, which is desirable for legal and business certainty. As the finding of agency implies immunity from competition law scrutiny of anticompetitive

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the single economic entity doctrine may still be challenged as an abuse under art. 102. Case 66/86, *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, 1989 E.C.R. 82, ¶ 35; *Viho*, *supra* note 5, ¶ 17.

agreements for potentially substantial restrictions of competition in digital markets, Section VI normatively assesses the appropriateness of this immunity and proposes a (re)interpretation of the agency rule within the single economic entity doctrine based on the concept of “competitive neutrality.” It argues that the single economic entity doctrine and the agency rule should *not* apply to agreements between platforms and suppliers restricting competition on the relevant market to the extent that the platform competes with the suppliers on that relevant market. Thus, these agreements *should* be made subject to full scrutiny by competition law. Section VII concludes.

## II. AGENCY AND SIMILAR DELEGATION MODELS

Although “agency” within the “single economic entity” doctrine is a concept of EU law, and, compliance with national law governing the relationship is not determinative when assessing whether the agreement is caught by EU competition law,<sup>34</sup> there is limited guidance on the general concept of agency in EU competition law. This is because the competition law jurisprudence has developed in piecemeal fashion, responding to legal disputes concerning whether a given intermediary is an agent or not, to answer the question of whether that entity is part of another “undertaking” under the “single economic entity” doctrine. This inquiry method has led to case-by-case assessments without robust theoretical or conceptual foundations concerning the component elements of an agency agreement, which could be used as guidance for future cases in which the question of agency may arise.<sup>35</sup> Further, as will be demonstrated here, the EU concept of agency is one that broadly reflects the same underlying principles found in different areas of law. Consequently, this Section outlines the constituent elements of agency, and how they differ from other common means of delegation in common law and commercial law, whilst also explaining how agency can be distinguished from similar delegation arrangements such as independent contracting and

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34. *Suiker Unie*, *supra* note 32, ¶ 478.

35. Guidelines on Vertical Restraints, 2010 O.J. (C130) 1 [hereinafter Verticals Guidelines], accompanying the EU VBER, *supra* note 14, contains the most detailed expressions of agency for EU competition law purposes. Yet, the entire discussion of agency in the Guidelines—although helpful—takes up around 3 pages in total, and beyond providing a definition and some factors in relation to when an agreement will constitute an agency agreement, only deals with the question of when agency agreements will be deemed to fall within or outside of the prohibition of art. 101. *Id.* It does not offer any detailed principles concerning, for example, the factors that distinguish agency from other delegation and distribution models.

employment. The principles and findings from this Section provide essential guidance in terms of setting out the relevant criteria for agency, which can aid to fill in the “gaps” in competition law concerning aspects of an agency arrangement where competition law has not yet established its own criteria.

*A. The Common Law (and Equity) Principles Relating to Agency*

Agency is a common means of delegation in commerce where the “agent” acts on behalf of a “principal” in return for payment, normally a “commission.” Put more formally, agency is the (fiduciary) relationship that exists between two persons, “one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation.”<sup>36</sup>

There are two aspects of agency: internal and external. The internal aspect is the relationship between the principal and the agent, which imposes special duties (arising out of the fiduciary liability) on the agent vis-à-vis the principal.<sup>37</sup> In contrast, the external aspect is that under which the agent has powers to affect the principal’s legal position in relation to third parties.<sup>38</sup> To an agent in the full sense, both aspects are relevant, but some persons (e.g. “introducing agents”) may be agents by virtue of their internal relationship despite having no external powers.<sup>39</sup>

The typical, internal features of agency which distinguish it from other relationships are that: first, the agent undertakes to use due diligence on behalf of the other (as opposed to undertaking strict duties

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36. PETER G. WATTS & FRANCIS M.B. REYNOLDS, *BOWSTEAD & REYNOLDS ON AGENCY* ¶ 1-001 (21st ed. 2018) [hereinafter *BOWSTEAD & REYNOLDS*]. The fiduciary nature of the relationship is subject to debate and appears to be a matter of degree. *Id.* See EWAN MCKENDRICK, *GOODE ON COMMERCIAL LAW* ¶ 5.23 (5th ed. 2016). The justification for the agent’s power is the idea of a *unilateral* manifestation by the principal of willingness to have his legal position altered by the agent. Thus, strictly speaking, there is no requirement for a contract to achieve this creation of power. It is sufficient for the principal to manifest to the agent that he is willing for the agent to act and that the agent does so in circumstances which indicate that her acts arise from the manifestation of the principal. *Id.* 1-006.

37. *BOWSTEAD & REYNOLDS*, *supra* note 36, ¶ 1-019. The duties arising out of the internal aspect “follow from the need to control the agent’s opportunities to exploit his position . . .” *Id.*

38. *Id.*

39. *Id.*

to the other in a situation commercially adverse to that other); she is subject to fiduciary duties; and she is remunerated by commission or an equivalent (as opposed to making her own profit).<sup>40</sup> Bowstead and Reynolds note that agency situations should first be viewed from the point of view of the third party.<sup>41</sup>

A person who has a fiduciary relationship with a principal so that she acts on behalf of the principal, but has no authority to affect the principal's relations with third parties may still be an agent because of the fiduciary relationship.<sup>42</sup> This type of agent may be an example of "incomplete agency" (e.g. an "introducing agent" or "canvassing agent") in that the *internal* parts of agency law apply to these agents, but they are not agents in the full sense of the word due to the limited nature of their *external* powers to affect their principals' legal positions.<sup>43</sup> These intermediaries do not conclude contracts and do not dispose of property, but are hired as an employee or an independent contractor, to introduce parties who would like to contract and leave them to contract between themselves.<sup>44</sup> Estate agents are obvious examples of this type of agent.<sup>45</sup> Such canvassing agents have very limited powers to alter their principals' legal relations.<sup>46</sup> Nevertheless, by virtue of the fact that they may have the authority to receive and communicate information on their principals' behalf, they may have

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40. *Id.* ¶ 1-024.

41. *Id.* ¶ 1-025.

42. *Id.* ¶ 1-001. RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 1.01 (AM. LAW INST. 2006) only refers to "acting on behalf" of the principal for an intermediary to be an agent without also requiring the agent to act so as to affect the principal's relations with third parties. Thus, under that wider definition of agency, the intermediary's not having authority to change the legal position of the principal would *not* render the position one of "incomplete" agency.

43. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-020. Under this reasoning, an agent in a strict sense, is someone who has the power to affect her principal's legal relations. *Id.* ¶ 1-019. Legal rules attach to such an agent relating to internal and external aspects of agency. *Id.*

44. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-020. Notably, such agents do not undertake any duties, but are entitled to certain contractual rights if they do certain things and may be liable for misconduct. *Id.* ¶ 6-001.

45. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-020. Another type of "incomplete agency" can be found in so-called "indirect representation" "whereby a principal appoints a person, who may be called an agent, to deal on his behalf on the understanding that the agent will deal with any third party in her own name as principal . . ." *Id.* ¶ 1-021. Again, in such a situation, "the internal aspect of agency [exists] . . . but not the external . . ." *Id.* ¶ 1-021. Bowstead and Reynolds find no doctrinal objection in common law to the creation of such a situation of indirect representation. *Id.* ¶ 1-022.

46. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-020.

the capacity to alter the principals' legal position.<sup>47</sup> Similarly, they are also subject to typical rules, mostly developed in estate agency cases, as to entitlement to commission and they may sometimes hold money for their principals.<sup>48</sup> Another relevant distinction is that between "general agent," and "special agent," where the former has authority to act for her principal in all matters concerning a particular trade business, etc. and the latter has only authority to do some particular act, or to represent her principal in some particular transaction.<sup>49</sup>

Where the power to create legal relations exists (i.e. the agent not only acts on behalf of the principal, but acts so as to affect the principal's relations with third parties), the normal implications of agency are likely to follow "even if the parties' contract expressly disavows one being the 'agent' of the other."<sup>50</sup> Conversely, the mere use of the label "agency" in the parties' contract may not lead to the application of agency law if there is no authority to alter the principal's legal position.<sup>51</sup> The rules of agency will apply, in common law, even if the existence of the principal or his connection with the transaction is unknown, if there is preceding authority to act for the principal.<sup>52</sup>

Bowstead and Reynolds point out a particular feature of agency resulting from the agent's fiduciary duties in that

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47. *Id.* Similarly, they may be subject to the fiduciary duties of agents to their principals because they may act in a capacity which involves the repose of trust and confidence. *Id.* In fact, even an agent, properly defined, may owe fiduciary duties in some respects, but not others. *Id.* ¶ 6-037.

48. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-020.

49. *Id.* ¶ 1-039.

50. *Id.* ¶ 1-004 (referencing *South Sydney District Rugby League Football Club Ltd. v News Ltd.* [2000] FCA 1541 (3 November 2000) (Austl.), *aff'd*, [2003] HCA 45 (13 August 2003) (Austl.).

51. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-004 (citing *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2013] FCAFC 29 (12 March 2013) (Austl.)); *see also* *UBS AG (London Branch) and another v. Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA (Civ) 1567, [91] (Eng.) [hereinafter *UBS AG*].

52. *See* BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-009. Such a principal whose existence or connection with the transaction is not known is referred to as an "undisclosed" principal. *Id.* Note that in some jurisdictions (e.g. France) even though the principal need not actually be named, agency rules would normally only apply in the case of an agent who when acting purported (or at least was understood) to do so on behalf of or "in the name of" a principal, even though the principal need not actually be named. *Id.* They also note that regarding undisclosed agents, the results in some civil law systems now approach some of the results in common law. *Id.* Mere economic interdependence between two parties does not create a relationship of agency. *Id.* ¶ 1-012 (referencing *inter alia*, *UBS AG*, *supra* note 51, and *Plevin v. Paragon Personal Finance Ltd* [2014] UKSC 61, [33] (Eng.)).

[i]t is inconsistent with those duties that an agent should act in respect of h[er] relationship with the principal for h[er] own profit (unless [s]he discloses this to the principal and the principal consents). H[er] relationship with h[er] principal is commercially related rather than commercially adverse. Thus, [s]he should be remunerated by commission in respect of the services [s]he has rendered, and not take h[er] own undisclosed profit as an independent intermediary. The commission need not however be related to the value of the transaction: it can be by a mark-up. The essence of the payment received by the agent is that it is not an independent profit taken by the agent, but rather a fee paid to h[er] by the principal in return for acting on his behalf.<sup>53</sup>

Thus, in the heart of the agency relationship lies the fact that the agent and the principal have commercial interests that are aligned, rather than adverse. This is directly reflected in the way agency is conceptualized as a mode of delegation where the agent provides a service to its principal and is remunerated for that service by commission, in contrast to an intermediary who pursues profit from its commercial relation with the other party independently of the commercial interests of that other party. As explained more fully below,<sup>54</sup> the criterion of absence of risk-taking by the agent on the relevant market under the “single economic entity doctrine” in competition law can be conceptualized as similarly requiring an alignment of (competitive) interests between the agent and the principal. This alignment of commercial and competitive interests will, indeed, be used to inform the criterion of “competitive neutrality” in Section VI, which this Article proposes to be adopted in the (re)interpretation of the single economic entity doctrine to apply to platforms.

A useful example in relation to this issue of commercial interest alignment is that of distributors, concessionaires and franchisees, all of which are arrangements that differ from agency for the same reason.

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53. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-016. The agent of one party can act as the agent of the other party (including the other party to the transaction) (*e.g.* solicitors), but the rules of equity would apply: equity presumes that a person in a fiduciary position must avoid conflicts of interest unless the parties assent to the conflict. *Id.* ¶ 2-013. The fact that commission is paid by one party is not inconsistent with the agent’s acting for the other party as well. *Id.* ¶ 2-033. RESTATEMENT, *supra* note 42, §8.01 (AM. LAW INST. 2006) (stipulating that “an agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship”).

54. See text around *infra* note 143.

With these arrangements, the relationship is an adverse commercial relationship, and the analogy of agency is normally not pursued where a purchase for resale exists.<sup>55</sup> Nevertheless, the contractual restrictions sometimes imposed on distributors, such as a non-compete clause, can place them under the manufacturer's control in such a way that the relation may resemble that of agency.<sup>56</sup> The underlying principle is that a person cannot be an agent if she is a seller or buyer to her principal and vice versa because a sale is a commercially adverse relationship, whereas agency involves a fiduciary relationship of trust and confidence.<sup>57</sup> The distinction normally turns on whether the person concerned acts for herself to make such profit as she can or whether she is remunerated by pre-arranged commission.<sup>58</sup> Similarly, whereas a seller answers for defects in description and quality, an agent may not do so because she is not a party to the contract.<sup>59</sup> Much also turns on the extent to which the principal can call for an account because the duty to account is a typical feature of an agent's position.<sup>60</sup>

A further distinction can be drawn between agents and persons supplying services (e.g. a repairer, painter, etc.) who do so normally on a commercially adverse basis.<sup>61</sup> Such persons normally owe a duty of best endeavors only, owe no fiduciary duties, and are not remunerated by commission.<sup>62</sup> There is, however, also an intermediary category where their work is directed toward a fixed target which may be valued and they may be remunerated by commission (e.g. travel agents, patent agents), as well as those who offer personal services and charge fees

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55. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-035.

56. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-035. *See, e.g., Hospital Products Ltd. v. United States Surgical Corp.* (1984) 156 CLR 41 (Austl.); *Cadbury Schweppes Inc. v. FBI Foods Ltd.* [1999] 1 S.C.R. 142 (Can.).

57. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-036 (arguing that if in a manufacturer/supplier relationship, if the supplier, on true construction of the contract, is a buyer from the manufacturer, then the manufacturer may be in breach of contract if he sells the goods himself, but if the supplier is a genuine agent, the manufacturer would usually be entitled to sell himself, too). *See id.* (referencing *WT Lamb & Sons v. Goring Brick Co.* [1932] 1 KB 710 (Eng.) and *Bentall, Horsley & Baldry v. Vicary* [1931] 1 KB 253 (Eng.)).

58. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-036. Yet, the fact that the resale price is fixed by the manufacturer does not necessarily make the supplier an agent and exceptionally, a buyer for resale may also be paid commission or an agent remunerated by being allowed to keep the excess over a stipulated price. *Id.* ¶ 1-036. *See, e.g.,* the cases cited therein.

59. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-036.

60. *Id.*

61. *Id.* ¶ 1-038.

62. *Id.*



rather than commission (e.g. solicitors) who may attract some, but not all, of the features of agency law.<sup>63</sup> Having said that, in general, an agent does not normally warrant success in what she does, but only to use reasonable endeavors.<sup>64</sup>

In sum, there are some fundamental features of agency in common law, which distinguish it from other arrangements. These include the agent's warrant to use due diligence (as opposed to warrant success or a particular outcome), and the alignment of commercial interests between the agent and the principal. The alignment of commercial interests implies, *inter alia*, that the agent's remuneration is comprised of fees for her services to the principal rather than of profit generated from the activity (e.g. through resale). Beyond these, there are several grey areas in agency law, including the scope and boundaries of the agent's fiduciary duties, as well as the line between those intermediaries who are agents and those who are otherwise not on the basis of the (lack of) completeness of the internal and external aspects of agency in a given arrangement. All in all, it appears that—outside of the clear-cut cases—establishing whether a given intermediary is an agent requires a balancing of the factors some of which may suggest the presence and some of which may suggest the absence of agency. This is also a feature of the analysis adopted in competition law, which ultimately requires an assessment of the relevant factual and commercial context in qualifying an arrangement as agency or otherwise.<sup>65</sup>

### *B. The Concept of the “Commercial Agent”*

A particular notion of agency is that of a “commercial agent” which has certain legal implications due to the Commercial Agents Regulations transposing the EU Directive on the same subject.<sup>66</sup> The term stems from continental European law and is not known to the

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63. *Id.* Yet, some travel agents may supply services as principal and not merely as agent; see *Wong Mee Wan v. Kwan Kin Travel Services Ltd* [2011] EWCA (Civ) 1569, ¶ 16; *Moore v. Hotelplan Ltd (t/a Inghams Travel)* [2010] EWHC 276 (QB).

64. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 6-001.

65. See accompanying text to *infra* note 152.

66. The Commercial Agents (Council Directive) Regulations 1993 (SI 1993 No 3053) [hereinafter Regulations] transposing Council Directive on the Coordination of the Law of the Members States Relating to Self-Employed Commercial Agents, 1986 O.J. (L382) 17 [hereinafter Directive].

common law.<sup>67</sup> Importantly, the Directive and Regulations only cover agents who intermediate the sale/purchase of products as opposed to provision of services.<sup>68</sup> Although every commercial agent in the sense of the Regulations is an agent (under common law), not every agent is a commercial agent, but can still be an agent for legal (i.e. common law) purposes, despite not being able to benefit from the protection of the Regulations. Much of the commercial case law in the United Kingdom has revolved around establishing whether a given party is a “commercial agent” for the purposes of the Regulations. Although the Regulations only apply to the *internal* aspects of the relationship between the principal and agent,<sup>69</sup> the case law concerning commercial agents is particularly illuminating for competition law purposes in its establishing of relevant criteria for agency as distinct from other methods of delegation.

A commercial agent does not trade on her own account; thus, she is not a distributor.<sup>70</sup> The most important question to ask regarding this distinction has been noted to be that of the title to the products being sold: if the agent never owns the products, but simply finds customers for the supplier, “no matter how extensive the agent’s role otherwise is, then the agent will be in all probability a commercial agent of the supplier.”<sup>71</sup> In this context, to “negotiate” a contract means more than simply negotiating a sale, as established in *Fryer* where the Court held that an agent who introduced customers, suggested indicative prices and encouraged a customer to place orders at the prices agreed or specified by the principal comes “well within the ordinary meaning of ‘negotiate.’”<sup>72</sup> In fact, one commentator has likened the operator of an

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67. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-044. According to the Directive and Regulations, “commercial agent” means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the “principal”), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal; Regulations, *supra* note 66, art. 2(1); Directive, *supra* note 66, art. 1(2).

68. See Regulations, *supra* note 66, art. 2(1); Directive, *supra* note 66 art. 1(2).

69. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 11-005.

70. SUSAN SINGLETON, COMMERCIAL AGENCY AGREEMENTS: LAW AND PRACTICE 2 (4th ed. 2015).

71. *Id.* at 2.

72. Nigel Fryer Joinery Services Ltd v. Ian Firth Hardware Ltd. [2008] EWHC 767 (Ch), ¶ 20. For the position that what matters in establishing whether the agent satisfies the Regulations’ requirement to “negotiate” is whether the agent has the *authority* to negotiate rather than whether the agent actually negotiates, see FERGUS RANDOLPH AND JONATHAN DAVEY, THE EUROPEAN LAW OF COMMERCIAL AGENCY 42 (3rd ed. 2010). The authors note that the reality in many mature commercial agencies is that the agent does little day-to-day negotiating

internet site for various principals such as a “virtual shopping mall,” which facilitates the contract between principals and consumers, but sets up the website itself and receives the money from the customer to deduct commission before sending the money to the principal to an “agent walking from shop to shop with [her] bag of samples.”<sup>73</sup> The online platforms studied in this Article are some obvious examples of such virtual shopping malls.

In fact, even the intermediary’s charging a mark-up of its own choosing on top of the input price it pays to the principal to establish the price to the third party (rather than charging a commission) does not render the intermediary a non-agent. Thus, the way in which the final product is priced for the consumer is not determinative in establishing agency. In *Mercantile International Group PLC v. Chuan Soon Huat Industrial Group* (“MIG”), the principal was content for the agent to retain an undisclosed margin on contracts made with third parties.<sup>74</sup> In this case, the contracts with third parties had stipulated that the contracts were made with the principal and the intermediary was acting as agent only.<sup>75</sup> The putative agent received no commission (or other remuneration), but simply charged more to customers than it confirmed to the putative principal which the latter did not mind as it was receiving the price that it stipulated to the agent.<sup>76</sup> The agent was keeping for itself an undisclosed margin.<sup>77</sup> The Court of Appeal held

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and long-established customers communicate their repeat orders via different media on the basis of a published price list. Although this involves no meaningful negotiation as such, the agent undeniably has authority to negotiate, which is what matters; *id.* 42.

73. SINGLETON, *supra* note 70, at 35. The question whether the Regulations (or the underlying Directive) applies to such websites to protect these agents is not directly relevant to this work and will not be discussed further. Whether the Regulations protect such websites as agents does not have any bearing on the question whether these websites are agents since the Regulations explicitly only cover certain types of agents (e.g. notably only those who intermediate sale of goods as opposed to services; and, where customers select the goods themselves and merely place their orders through the agent, etc.). See Regulations, *supra* note 66, art. 2(1). Singleton, in fact, argues that the fact that the website invests substantial efforts to ensure customers find the right page for the item and the website is attractive, etc. may mean that the Regulations will provide protection despite customers technically choosing what they would like to purchase themselves on such websites.

74. *Mercantile International Group Plc v. Chuan Soon Huat Industrial Group Ltd* [2002] 1 All ER (Comm) 788, [2002] EWCA (Civ) 288 [Hereinafter *MIG*].

75. *MIG*, *supra* note 74, ¶¶ 5, 13, 15.

76. *Id.* ¶ 5.

77. *Id.* In *MIG*, when the agent had an order, it would send the details to the principal who would confirm the feasibility of the order or suggest changes. *Id.* ¶ 12. However, it is noteworthy that the products at issue in the case were timber products such as door and window frames,

that that documentation had to be conclusive unless it could be shown to be a sham; other factors allegedly inconsistent with the claimant's being an agent (e.g. the mark-up) could not be relied on to displace that documentation.<sup>78</sup> The Court noted that the test of whether the intermediary was an agent or distributor "was one of substance rather than form."<sup>79</sup> Interestingly, on the facts, the agent was receiving payment for the products from the customer after paying the principal itself and thus, in the interim bearing the commercial risk (even if it charged interest to the buyer).<sup>80</sup> Further, the agent had signed some important contracts with purchasers "for and on behalf" of itself; negotiated a refund in its own discretion with purchasers who complained of defective products and sometimes bore the cost of such refunds; negotiated its own marketing support, rebate or discount arrangements with important purchasers; and, did not account to the principal for any sale proceeds obtained from the purchasers.<sup>81</sup> It was argued by counsel that the contracts between the alleged agent, principal and customers were "contracts in chain" and the agent bore financial risks incompatible with agency which suggested that the contract, in reality, was essentially a distributor/resale contract.<sup>82</sup> The Court of Appeal rejected this contention (as well as the contention that the existence of a mark-up, which is how the agent gets paid, is in conflict with agency).<sup>83</sup> This case is important for demonstrating that even in situations where the intermediary appears close to a retailer in

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which were made to order and would have required such confirmation from the principal (the manufacturer) regarding specifications, etc.

78. *MIG*, *supra* note 74, ¶ 36. In *AMB Imballaggi Plastici SRL v. Pacflex Ltd.* [1999] EWCA (Civ) 1618, the CA held that the intermediary in question was not a commercial agent in consideration of the fact that the trade between the putative principal and agent was conducted on the basis of a sale by the principal to the agent who resold the goods to the end users after adding a mark-up of her own choosing, namely on the basis of a resale model. Thus, the intermediary was a distributor and not an agent (despite the goods being delivered by the principal to the end users directly). The CA distinguished *MIG* from *Pacflex* on the basis that in the latter, there was no documentation that described the relationship between the manufacturer and the intermediary as one of agency; *MIG*, *supra* note 74, ¶ 31.

79. *MIG*, *supra* note 74, ¶ 6.

80. *Id.* ¶ 16.

81. *Id.* ¶¶ 18-19.

82. Arguments of defendant's counsel at *MIG*, *supra* note 74, ¶ 20.

83. *MIG*, *supra* note 74, ¶ 36 citing *Ex parte Bright, re Smith* (1879) 10 Ch D 566 on the issue of mark-up. According the CA, this mark-up also justified the fact that the agent was prepared to offer customers rebates, credit customers in case of defective goods, etc.; *MIG*, *supra* note 74, ¶ 36. On the point that mark-up is not conclusive against commercial agency, *see also* *Sagal (Trading as Bunz UK) v. Atelier Bunz GmbH* [2009] EWCA (Civ) 700, ¶ 15.

terms of the commercial risks which it takes, and the way in which it operates (e.g., negotiating and bearing the costs of refunds for defective performance), there may still be agency, in particular where the contract between the supplier and the intermediary stipulates it to be so, and the contract is not a sham.

An interesting question, particularly for platforms under discussion here, is whether the fact that a platform acts for potentially competing principals is: (i) a feature that would prevent a finding of agency, or (ii) an infringement of an agent's duty to act in good faith or fiduciary duty. Although good faith is not normally implied into commercial relationships in English law, the Regulations explicitly imply a duty of good faith which obliges the agent to look after the interests of her principal and act dutifully and in good faith.<sup>84</sup> In fact, in one case, the Court of Appeal reached the conclusion that such acting for competing principals may breach an agency agreement by falling foul of the fiduciary position of the agent vis-à-vis the principal without any reference to the duty of good faith in the Regulations.<sup>85</sup> Thus, the issue of acting for competing principals is directly relevant to establishing the existence or infringement of an agency agreement in English law even for those agents that do not fall within the scope of the Regulations. In *RML*, the Court of Appeal held that an agent occupies a fiduciary position and owes her principal the single-minded duty of loyalty, so that she must not place herself in a position where her duty and her interest conflict, and she may not act for the benefit of a third party without the informed consent of her principal.<sup>86</sup> The Court

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84. SINGLETON, *supra* note 70, 45. See Regulations, *supra* note 66, arts. 3(1) and 4(1), and Directive, *supra* note 66, arts. 3 and 4.

85. SINGLETON, *supra* note 70, 46. See UNIDROIT Principles of International Commercial Contracts (2016) art. 2.2.7 stipulating that a contract concluded with a third party, which involves the agent in a conflict of interest with the principal, may be avoided by the principal. See *UNIDROIT Principles of International Commercial Contracts (2016)*, UNIDROIT (May 2016), <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf> [https://perma.cc/DRE7-T9VF] (last visited Nov. 30, 2019) [hereinafter UNIDROIT Principles].

86. *Rossetti Marketing Ltd v. Diamond Sofa Company* [2012] EWCA (Civ) 1021, ¶ 20 (referencing to *Bristol and West Building Society v. Mothew* [1998] Ch1, 18A-B) [hereinafter *RML*]. In *Mothew*, a solicitor was acting for the bank as well as the purchaser in the purchase of a property, but the bank knew that the solicitor was acting for the purchaser and in fact, appointed the solicitor to act for itself for this very reason. *Bristol and West Building Society v. Mothew* [1998] Ch1, 19A. *Id.*, ¶ 18 (noting that the “distinguishing obligation of a fiduciary” is the obligation of loyalty, and that the principal “is entitled to the single-minded loyalty of his fiduciary”).

of Appeal went further to note that, as held by the Privy Council in *Kelly*, it is normally a “breach of an agent’s duty to act for competing principals.”<sup>87</sup> However, crucially for the purposes of this work, the Court of Appeal decided that an agent can act for two principals with conflicting interests in two types of cases: first, where both principals give fully informed consent for this; and, second, where “the principal must have appreciated that the nature of the agent’s business [i.e. a residential estate agent] is ‘to act for numerous principals.’”<sup>88</sup> In the second case, despite the conflict of interest, such agents must be free to act for several competing principals since otherwise they will be unable to perform their function.<sup>89</sup> Although in *Kelly* it was held that the starting point is that agents appointed to sell a particular type of product are not expected to be acting for competing principals in the same market, in the case of estate agents and travel agents, it may be expected that they will be acting for competing principals in the same market.<sup>90</sup> Thus, in cases where the nature of the business so requires, acting for competing principals does not prevent the qualification of the intermediary as an agent (or breach the agent’s fiduciary duty), which is a point directly relevant to platforms studied in this Article, as discussed below.<sup>91</sup> The Court of Appeal’s findings in *RML* are also noteworthy in establishing that the fiduciary nature of agency implies that the agent must not place herself in a position where her duty and interest conflict vis-à-vis the principal. This ties in directly with the feature of agency, discussed above,<sup>92</sup> concerning the commercial interest alignment between the agent and the principal, and also underlies the concept of “competitive neutrality” proposed in this Article to distinguish those platforms which should be treated as agents

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87. *RML*, *supra* note 82, ¶ 20 (referring to *Kelly v. Cooper* [1993] AC 205, 214).

88. *Id.* ¶ 23, with reference to *Kelly* for the second case, *supra* note 87.

89. *See RML*, *supra* note 86, ¶¶ 23, 25. In *Kelly*, the Privy Council implied a term into estate agent contracts that the agent was entitled to act for competing principals (and that her keeping confidential information obtained from different principals was not a breach of her fiduciary duty to any principal) since it was the business of estate agents to act for numerous principals. The Privy Council suggested that stockbrokers would also be categorized in this way. *Kelly*, *supra* note 87.

90. *BOWSTEAD & REYNOLDS*, *supra* note 36, ¶ 6-015. In a Scottish case, namely *Lothian*, an agent (perhaps, technically, a distributor) was also found to be entitled to deal in competing products. *Id.* ¶ 6-015 with reference to *Lothian v. Jenolite Ltd* 1969 SC 111 (Scot.).

91. *See* text after *infra* note 356. *See also* comment on UNIDROIT Principles, *supra* note 85, art. 2.2.7 (noting that a relevant conflict of interests does *not* exist where “the agent’s acting for two principals may be in conformity with the usages of the trade sector concerned”).

92. *See* accompanying text to *supra* note 53.

and those which should not for the purposes of competition law, as will be seen below.<sup>93</sup>

*C. Agency Distinguished from Other Relationships: Independent Contracting and Employment*

A relevant distinction for the purposes of this Article is the relationship between an agent, an employee, and an independent contractor, which originates from tort law, but is also significant in employment law and tax law.<sup>94</sup> As will be seen below,<sup>95</sup> there have already been cases in relation to platforms in employment law and tax law where this distinction was instrumental in the outcome of the dispute. The difference turns on the degree of control exercised.<sup>96</sup> Indeed, a major reason for imposing liability on one person (e.g. the principal) for the torts of another is the degree of control exercised over the latter.<sup>97</sup> In agency, despite usually referring to control by the principal as a defining characteristic, such control plays a more limited role than in, for example, employment law.<sup>98</sup> In fact, agents will often not accept control by their principals as to the manner they act in and some will only accept instructions to act which are in line with usages of their own market.<sup>99</sup> An employee (a “servant”) works for the other on terms that the employee is under the control and directions of her employer regarding the manner in which the work is to be done.<sup>100</sup> In contrast, an independent contractor undertakes to produce a given

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93. See *infra* Part VI.

94. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-034 (this is because liability for the torts of one’s employees is more readily established than liability for one’s independent contractors; *id.* ¶ 1-034). See generally Mark Loewenstein, *Agency Law and the New Economy*, 72(4) BUS. LAW. 1009, 1012 (2017).

95. See text after *infra* note 107.

96. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-034; Loewenstein, *supra* note 94, 1015.

97. See generally, BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-026 (a principal will usually not be prevented from suing an agent for breach of duty owed to principal, including that which results from the agent’s having exposed the principal to liability to a third party). *Id.* ¶ 1-028 with reference to *Bilta (UK) Ltd v. Nazir (No 2)* [2015] UKSC 23; *HKSAR v. Luk Kin* [2016] HKCFA 81, [41].

98. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-018.

99. *Id.* In many cases, the principal’s only control will be his power to revoke the authority of the agent. *Id.* Yet, the authors note that if the principal gives up all control of his supposed agent, the relationship is only doubtfully one of agency. *Id.* (referencing *CFTO-TV Ltd v Mr Submarine Ltd* (1994) 108 DLR (4th) 517; *aff.d* (1997) 151 DLR (4th) 382); *Alliance Craton Explorer Pty Ltd. v Quasar Resources Pty Ltd* [2013] FCAFC 29, [74] (Austl.).

100. *Hewitt v. Bonvin* [1940] 1 KB 223, 224.

result, but is not under the orders or control of the person for whom she does it in the actual execution of the work and may use her discretion for things not specified in advance.<sup>101</sup> If the employer lacks the right to control the worker, the worker is likely to be an “independent contractor.”<sup>102</sup>

In relation to agency, “independent contractor” as a category covers those who are agents and those who are technically not agents; the distinction is pertinent in relation to whether a person is an employee or not.<sup>103</sup> Thus, although an agent may be an employee, the typical agent is not and “acts in an independent manner.”<sup>104</sup> Bowstead and Reynolds note that an agent may still be an employee even when she is rewarded principally by commission.<sup>105</sup> An independent contractor who has authority to change another person’s legal relations is likely to be an agent, and one who does not is unlikely to be so.<sup>106</sup> Thus, the common law categorizations of agent, employee, and independent contractor cut across each other and are not mutually exclusive, and the specific characterization is dependent arguably on the degree of control exercised by the “principal.” This makes it difficult to clearly demarcate, for competition law purposes, between these different persons. Yet, the distinction, for example, between an employee and independent contractor is fundamental for the

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101. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-034 referring to PHILIP A. LANDON, POLLOCK’S LAW OF TORTS 63 (15th ed. 1951) and *Honeywell & Stein Ltd v. Larkin Bos Ltd* [1934] 1 KB 191, 196.

102. Loewenstein, *supra* note 94, at 1015. *See e.g.*, RESTATEMENT, *supra* note 42, § 7.07.

103. *See e.g.*, RESTATEMENT, *supra* note 42, § 7.07.

104. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-026. If the agent is an employee, she may be entitled to compensation for unfair dismissal, etc. under employment law. *Id.* ¶ 10-040. If the agent is engaged not as an employee but as an independent contractor, her rights will turn on whether she acts under a bilateral or unilateral contract. *Id.* ¶ 10-042.

105. *Id.* ¶ 1-034 n. 204 with reference to *Hanna v. Imperial Life Assurance Co. of Canada* [2007] UKPC 29. They also note that some employees have agency powers (e.g. managers) and many agents could be called independent contractors (e.g. brokers) whilst other independent contractors (e.g. repairers) are unlikely to have agency powers; *id.* If the agent undertakes duties towards her principal, e.g. to use her best endeavours (usually found in exclusive agency), etc., the contract is a bilateral one involving reciprocal obligations; *id.* In other cases, the agent’s rights will be based on a single or continuing offer of a unilateral contract (under which the agent is not obliged to do anything, but is entitled to commission if she does); *id.* ¶ 10-043. According to Bowstead and Reynolds, estate agents and possibly other canvassing agents fall under this latter category. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 10-043. The platforms examined in this Article are notably similar to estate agents in this sense. For the analogy with estate agents, *see also* Nowag, *supra* note 11, 384, 386, 395.

106. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-034.



competition law doctrine of single economic entity, as discussed in Section III below.

The distinction in cases which straddle the boundary between employment, agency and independent contracting appears to be essentially that between a contract *of* service (employment) and a contract *for* services (independent contractor).<sup>107</sup> For example, in *Hong Kong Golf Club*, the Privy Council held that a golf caddie who worked at a golf club was *not* an employee on the basis of facts such as that the caddie could decide whether to turn up at the golf course and how long to stay if he turned up; the club made no guarantee that there would be work for him; where the caddie did get to work, the payment would be made by the club at a rate fixed by the club which debited the amount from club members, etc.<sup>108</sup> The Privy Council noted that even if the caddies entered into individual contracts with club members for their services, this would not be inconsistent with the finding that the club acted as members' agent in collecting the fees and making payments to the caddies.<sup>109</sup> Notably, in *Hong Kong Golf Club*, the club was not making any money through caddie fees and arguably was making a loss due to the administration costs of the arrangement. Thus, the Privy Council held the relationship to be one of agency despite the agent's not necessarily receiving remuneration for its agency.<sup>110</sup> The Privy Council further held that even though it is the club that establishes certain terms of conduct (e.g. to wear uniform, behave well on premises, etc.), and pays the caddies, it would be the player who availed of the caddies' actual work/ services and who would be in control.<sup>111</sup>

Similarly, in *Mingeley*, the Court of Appeal held that the relationship between a private hire taxi driver and the taxi company was not one of employment despite the fact that the driver was required to wear the company uniform and the company enforced a scale of

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107. See *Stringfellow Restaurants Ltd. v. Nadine Quashie* [2012] EWCA (Civ) 1735, ¶ 51 (where the CA held that it would be unusual to find a contract of service (employment) where the putative worker takes the economic risk and is paid exclusively by third parties); Cf. *Uber (EAT)*, *supra* note 23 (where the EAT found Uber to be an employer of the drivers despite the fact that the drivers are exclusively paid by third parties (*i.e.* riders) and it is, in fact, the drivers who pay the "employer" (*i.e.* Uber). This is discussed further *infra* in Section V).

108. *Cheng Yuen v. the Royal Hong Kong Golf Club* [1997] UKPC 40, ¶¶ 20-21 [hereinafter *Hong Kong Golf Club*]. See also *Cheng Yuen v. the Royal Hong Kong Golf Club*, Hong Kong Court of Appeal, 1996, No 146 (Civil) (further facts established).

109. *Hong Kong Golf Club*, *supra* note 108, ¶¶ 21-22.

110. *Id.* ¶ 6.

111. *Id.* ¶¶ 20-21.

charges for the rides, which could not be amended by the driver, as well as the fact that the company sought to impose a code of conduct on the drivers and had power to order a refund to the customer in case of complaints, etc.<sup>112</sup> Although this arrangement between the taxi driver and the taxi company was not identified as one of agency—as this was not relevant to the dispute at hand—the Employment Appeal Tribunal (EAT) (whose characterization the CA did not take issue with) described the arrangement as a contract whose dominant purpose was the supply of services by the taxi company to the taxi driver in return for a fixed fee “to enable him to ply his trade as a self-employed taxi driver.”<sup>113</sup> Thus, the way in which the contractual arrangement is described is very similar to an agency arrangement where the taxi company provides the drivers a service in enabling them to reach customers. The agency relation was explicitly accepted in a case concerning VAT liability, which held that the taxi company that was paid rent for the use of its base by “self-employed drivers” (which the Tribunal equated to “commission”) was an agent of the drivers.<sup>114</sup> The rental fee was essentially the commission of the agent and the agency nature of the business was also justified by the fact that there was no other generation of profit through the difference between the remuneration received from customers and the cost of acquiring the services in question.<sup>115</sup> The transport service was supplied by the drivers for whom the taxi company was the agent in arranging the jobs.<sup>116</sup> Finally, in another case concerning a taxi company, the EAT held, obiter, that the relation between a private hire taxi driver and the taxi company was analogous to the relation between the golf caddy and the golf club in *Hong Kong Golf Club* (as well as that in *Mingeley*), namely one of agency.<sup>117</sup> As will be discussed in Section V, the facts of these cases are very similar to the operation of the agreements between platforms and suppliers studied in this Article, and thus, these

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112. *John Mingeley v. Anthony Pennock and Frederick Ivory (t/a Amber Cars)* [2004] EWCA (Civ) 328. The finding was based on the holding that the driver was never under an obligation to personally execute any work or labour under his contract with the taxi company. *Id.* ¶ 14.

113. *Mingeley v Pennock & Anor (t/a Amber Cars)* [2003] UKEAT 1170\_02\_0906, ¶¶ 22, 29. The contract between the driver and the taxi company was not in writing. *Id.* ¶ 13.

114. *See Mahmood v. Revenue & Customs* [2016] UKFTT 0622 (TC).

115. *Id.* ¶¶ 43-45. The FTT interestingly found that “account customers” (as opposed to cash customers) were contracting with the taxi company. *Id.* ¶ 7.

116. *Id.* ¶¶ 23-26, 34, 38. *See also Lafferty & Anor v. Revenue & Customs* [2014] UKFTT 358 (TC).

117. *Khan v. Checkers Car Ltd.* [2005] UKEAT (unreported), ¶ 32.

findings are illuminating for assessing the legal characterization of platforms. The application of these principles to platforms is left for Section V.

### *III. SINGLE ECONOMIC ENTITY DOCTRINE AND THE AGENCY RULE IN COMPETITION LAW*

This Section sets out the application of the single economic entity doctrine to agents in competition law. To do so, first, it explains the concept of “undertaking” in competition law. Then, it discusses the operation of the agency rule within the single economic entity doctrine as the case law currently stands. Both of these are necessary preliminary steps before the application of the single economic entity doctrine and the agency rule to platforms can be discussed, which is left for Section V after an exposé of the terms and conditions of the standard contracts of platforms in Section IV.

For the purposes of EU competition law, the concept of an “undertaking”—which is the subject of the application of the rules—encompasses “every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.”<sup>118</sup> As clarified by the CoJ in *CEPSA*, in EU competition law, the concept of “undertaking” must be understood as designating an economic unit “for the purpose of the subject matter of the agreement in question” even if in law the economic unit consists of several natural or legal persons.<sup>119</sup> The reason for the concept’s being centered around economic activity rather than legal personhood is because not all economic interactions between separate legal entities are capable of having competitive significance, whereas it is possible that economic interactions within the same legal entity can have competitive significance.<sup>120</sup> According to the General Court (GC), the prohibition in Article 101 is “aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can

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118. Case C-41/90, *Höfner & Elser v. Macrotron GmbH*, 1991 E.C.R. I-01979, ¶ 21. “Economic activity,” in turn, is “any activity consisting in offering goods or services on a given market.” Cases C-180/98 etc., *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten*, 2000 E.C.R. I-06451, ¶ 75.

119. *CEPSA*, *supra* note 32, ¶ 40. *See also* Case 170/83, *Hydrotherm Geraetebau GmbH v. Compact del Dorr. Ing. Mario Andreoli & C. SAS*, 1984 E.C.R. 2999, ¶ 11.

120. *Odudu & Bailey*, *supra* note 5, at 1725.

contribute to the commission of an infringement of the kind referred to in that provision.”<sup>121</sup> Thus, where the agreement is not between “undertakings” understood as *separate* economic entities, the prohibition of Article 101 does not apply, and this is known as the “single economic entity doctrine.” Odudu and Bailey interpret the case law to mean that it is the impossibility of competition between different natural or legal persons, which determines whether separate legal entities are to be treated as a single economic entity.<sup>122</sup> Namely, the constituent elements of an economic entity are the minimum necessary to exert a single competitive force on the market.<sup>123</sup> Although the most obvious application of the single economic entity doctrine is in the context of an agreement between a parent and a subsidiary company, the relationships between an employer and an employee, and a principal and agent are similar.<sup>124</sup>

For the purposes of competition law, an “agent” is defined in almost identical manner to the common law concept discussed above.<sup>125</sup> Namely, an “agent” is a “legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent’s own name or in the name of the principal” for the purchase (sale) of products/services (supplied) by the principal.<sup>126</sup> The agency rule within the single economic entity doctrine is that where “. . . an agent works for the benefit of h[er] principal [s]he may in principle be treated as an auxiliary organ forming an integral part of the latter’s undertaking, who must carry out h[er] principal’s instructions and thus, like a commercial employee, forms an economic unit with this undertaking.”<sup>127</sup> Notably, this is to be distinguished from a situation where the agreement between the intermediary and the principal confers upon the intermediary, or allows

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121. Case T-11/89, *Shell Int’l Chemical Company Ltd v. EC Comm’n*, 1992 E.C.R. II-00757, ¶ 311.

122. Odudu & Bailey, *supra* note 5, at 1726.

123. *Id.*

124. RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 93-94 (9th ed. 2018).

125. *See supra* note 36 and accompanying text.

126. Verticals Guidelines, *supra* note 35, ¶ 12. For the assessment of whether an intermediary is an “agent,” it is not material how the parties or national legislation qualify the agreement between the parties in question, see *id.* ¶ 13. *See also* Comm’n Notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to art. 85 (1) of the EEC Treaty, 1979 O.J. (C1) 2, ¶ 1 (for the Comm’n’s definition of a “subcontracting agreement,” which can cover agency).

127. *Suiker Unie*, *supra* note 32, ¶ 480.

the intermediary to perform duties, which are approximately the same as those carried out by an “independent dealer,” because it provides for the intermediary’s accepting the “financial risks of the sales or of the performance of contracts entered into with third parties.”<sup>128</sup>

The importance of the existence or absence of an agency relationship between two entities is that, agreements between them are covered by Article 101 only where they can both be regarded as independent economic operators, and there is, thus, an agreement between two separate undertakings.<sup>129</sup> In *CEPSA*, the CoJ noted that the prohibition of Article 101 TFEU does not apply to the relationship between the intermediary and the principal, despite the intermediary’s having separate legal personality where an intermediary (such as a petrol-station operator) does not independently determine its conduct on the market.<sup>130</sup> This is so where the intermediary depends entirely on the principal (such as the fuel supplier) because the principal assumes the financial and commercial risks as regards the economic activity concerned (i.e. sale of fuel to third parties). The Court noted that the formal separation between two parties resulting from their separate personality is not conclusive, the decisive test being the unity of their conduct on the market.<sup>131</sup> In contrast, where the agreement between the principal and the intermediary confers on or allows the intermediary functions which—from an economic viewpoint—are broadly the same as those performed by an “independent economic operator,” because they provide for the intermediary to “assume the financial or commercial risks linked to sales or the performance of contracts entered into with third parties,” then such an intermediary cannot be regarded as an auxiliary organ “forming an integral part of the principal’s undertaking.”<sup>132</sup> In that case, a clause restricting competition may be an agreement between separate undertakings for the purposes of Article 101.<sup>133</sup> Notably, the agency rule applies only to

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128. *Id.* ¶ 482.

129. *CEPSA*, *supra* note 32, ¶ 38.

130. *Id.* ¶¶ 44, 47. *Cf. Simpson* where the US Supreme Court held the dependence of the petrol station on the oil company and its not having another business (which demonstrates the “coercive power” of the principal over the agent) to be the main factor for its finding that the entity is a *retailer* rather than an agent. *Simpson*, *supra* note 4, at 24.

131. *CEPSA*, *supra* note 32, ¶ 41.

132. *Id.* ¶ 45. *See also* Case C-279/06, *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL*, 2008 E.C.R. I-06681.

133. *CEPSA*, *supra* note 32, ¶ 45.

the obligations imposed on the intermediary in the context of the provision of the products/services to third parties on behalf of the principal, and not to clauses (such as non-compete and exclusivity requirements) concerning the relationship between the principal and the agent in the context of which the agent continues to be an “independent economic operator.”<sup>134</sup> Thus, for example, an obligation to sell the product at a specific price in the agreement between the supplier and the intermediary (e.g. “resale” price maintenance) would fall outside the provision of Article 101, and would be inherent in the supplier’s ability to delimit the scope of the activities of its agents.<sup>135</sup>

It is important at this point to distinguish between two markets, as done by Advocate General Kokott in *CEPSA*: the market on which the agent offers her agency services to potential principals, and the other market on which she offers her principal’s products/services to potential customers (i.e. third parties).<sup>136</sup> On the first market, in relation to the agency services that the agent offers, the agent is normally an independent economic operator and thus, an undertaking for competition law purposes.<sup>137</sup> This continues to be the case even when on the second market (i.e. the relevant (product/services) market in which the agent negotiates/concludes transactions on behalf of the principal for the sale/provision of the principal’s products/services), the agent is not an “undertaking” because she is deemed to constitute an economic unit with the principal on that second market.<sup>138</sup> It is the risks which the agent undertakes on this second market (i.e. the relevant

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134. *Id.* ¶ 62.

135. *Id.* ¶ 63. *Cf. Simpson* where the US Supreme Court’s objection to the resale price agreement in question (i.e. the anticompetitive *conduct* itself) as an “evil . . . destroying competition” essentially leads the Court to “pierce the veil” of the agency contract (the consignment agreement) between the parties (which the Court deemed to be a “cloak” to avoid antitrust liability) to find liability under Sherman Act, Section 1; *Simpson, supra* note 4, at 18, 21. In contrast to the US approach, in the EU, the focus of the inquiry is on the *entity* itself (i.e. the single economic entity as an “undertaking”) and at the point of assessing whether the entity in question is an “undertaking,” the *conduct* or its restrictive nature does not come into play. If the entity in question is not an “undertaking,” the assessment never reaches the point of examining the practice in question, and therefore, the issue of whether the entities have the capacity to restrict competition by their agreement is not part of the inquiry. *See supra* note 15, explaining why the practice in question is technically not “resale” price maintenance.

136. Opinion of Advocate General Kokott, Case C-217/05, *Confederacion Espanola de Empresarios de Estaciones de Servicio v. Compania Espanola de Petroleos SA*, 2006 E.C.R. I-11987, ¶¶ 43-46 [hereinafter AG Opinion].

137. *Id.* ¶ 44.

138. *Id.* ¶ 46.

market) that determine whether the intermediary in question falls within the agency rule under the single economic entity doctrine, and thus, is part of the same “undertaking” as the principal. For example, in *DaimlerChrysler*, the GC reiterated that “where an agent, although having separate legal personality, does not independently determine his own conduct on the market, but carries out the instructions of his principal,” Article 101 does not apply to the relationship between the agent and the principal.<sup>139</sup> According to the GC, where the principal sells the product and takes, “on a case-by-case basis, the decision to accept or reject the orders negotiated by the agent,” the agent has extremely limited commercial freedom in relation to the sale of products.<sup>140</sup> The agent is, thus, not in a position to influence competition on the market in question, which in *DaimlerChrysler* was the retail market for Mercedes passenger cars.<sup>141</sup>

The issue of the agent’s ability to influence competition on the market where the principal’s products/services are provided to third parties (i.e. the “relevant market”) was, thus, a central point in the findings. As will be discussed below, this is also a crucial factor in relation to the legal characterization of platforms under competition law and the concept of “competitive neutrality” developed in this Article in pointing out the necessity of distinguishing between the “agency market” and the “relevant market” in the legal assessment.<sup>142</sup>

Despite the fact that the case law does not explicitly acknowledge this or specify it as the underlying reasoning for the single economic entity doctrine, the reference in the jurisprudence to “assumption of risks by the agent” on the “relevant market” can be linked to the possibility of competition on the relevant market between the agent and the principal. Consequently, the underlying *assumption* in the case law is possibly that where the intermediary assumes risks on the relevant market, it acts as an economic entity for its own account with potential competitive consequences on that market.<sup>143</sup> Namely, it is the

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139. Case T-325/01, *DaimlerChrysler AG v. EC Comm’n*, 2005 E.C.R. II-03319, ¶ 88.

140. *Id.* ¶ 100.

141. *Id.*

142. See text around *infra* note 370.

143. See also Odudu & Bailey, *supra* note 5, at 1734. In that vein, Odudu & Bailey argue that the principal and its agent are unable to compete when the principal bears the financial and commercial risks related to the agent’s trading on the relevant product/service market. However, they also argue that there is a second condition which precludes competition, which is when, *in addition to the first condition concerning risk*, the agent is integrated into the principal’s

assumption of risks on the relevant market which puts the agent in a position to influence competition on the relevant market. Thus, it may be possible to rationalize the case law in the following way: where the agent and the principal act as one competitive unit on the relevant market, they are a single undertaking, despite the agent's continuing to be a separate undertaking in its own right on the separate market for agency services. Where on the relevant market, the agent undertakes such commercial and financial risks in that it acts as a market actor that can affect the competitive conditions on that market, then it is no longer part of a single undertaking with the principal.<sup>144</sup> What the case law does *not* recognize is that in those circumstances where the agent assumes such risks that it can affect competition on the relevant market, something else also happens: the agent's and the principal's *commercial interests* are no longer aligned because they are no longer in a competitively neutral position in relation to one another. This results from the fact that in that case, the putative agent and the principal essentially become competitors of one another. The alignment of commercial interests is, as noted above,<sup>145</sup> a central factor in agency law, in establishing whether an intermediary is an agent or a retailer, etc. As will be seen below in Section VI, the "competitive

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organization for the purposes of the transactions with the third parties. This author has argued elsewhere that the case law on agency does not have such a separate criterion in relation to the nature of the agent's position being an "auxiliary organ" forming part of the principal's undertaking. Akman, *supra* note 7, at 807 n. 142. Rather, this author has remarked that the agent's being an "auxiliary organ" is part of the assessment of whether the agent bears any significant risks resulting from the contracts concluded with third parties, as opposed to a separate criterion in addition to the assessment of risk. It appears that AG Kokott also agrees with this understanding that there are not two, cumulative criteria, but a single criterion, under which the agent's operating as an auxiliary organ forming an integral part of the principal's undertaking and the principal's bearing of the transactional risks are "two sides of the same coin"; AG Opinion, *supra* note 136, ¶ 48 n. 52.

144. In the literature, it has been suggested that the key economic question is whether the agent will make the same decision as the principal, or whether it will make its own decisions independently of the principal, i.e. to what extent are the principal's and agent's incentives aligned. Matthew Bennett, *Online Platforms: Retailers, Genuine Agents or None of the Above?*, COMPETITION POL'Y INT'L, 5 (2012). Offering a different perspective, Zhang remarks that the appropriate inquiry when discerning (genuine) agency should focus on the business justifications for the parties' adoption of the agency model: the real question is whether agency rather than distribution is a more efficient contractual form for the parties, i.e. whether they would choose the contractual form of agency instead of distribution in the absence of a desire to get around the competition rules. Angela H. Zhang, *Toward an Economic Approach to Agency Agreements*, 9(3) J. COMPETITION L. & ECON. 553, 576-90 (2013).

145. See accompanying text to *supra* note 53.



neutrality” criterion, which this Article proposes to use to (re)interpret the single economic entity doctrine and the agency rule in relation to platforms is built precisely upon this underlying premise of commercial (and competitive) interest alignment in agency relations.

In competition law, agents can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal’s undertaking.<sup>146</sup> Thus, the key issue is whether the agent assumes the financial and commercial *risks* linked to sales or the performance of *contracts entered into with third parties* (i.e. risks on the relevant market).<sup>147</sup> Examples provided by the CoJ are the risks relating to costs of distributing the products; maintaining stock at the agent’s expense; assuming responsibility for any damage caused to/by the products by/to third parties; investments specifically linked to the sale or advertising of products, etc.<sup>148</sup> In short, to determine whether Article 101 is applicable, the allocation of the financial and commercial risks between the principal and the agent has to be analyzed on the basis of such criteria concerning the relevant market as stipulated by the CoJ.<sup>149</sup> The Court also noted that the fact that the intermediary bears only a negligible share of risks does not render Article 101 applicable.<sup>150</sup>

The Court further remarked that the decisive factor (to determine whether a petrol-station operator is an independent economic operator) is to be found in the agreement between the principal and the intermediary, and particularly, the implied or express clauses of that agreement relating to assumption of the financial and commercial risks

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146. *CEPSA*, *supra* note 32, ¶ 43. In relation to agents’ operating as auxiliary organs forming an integral part of the principal’s undertaking not being a separate criterion to that concerning assumption of risks, see *supra* note 143.

147. *CEPSA*, *supra* note 32, ¶¶ 44-46.

148. *Id.* ¶¶ 51-59.

149. *Id.* ¶ 60.

150. *Id.* ¶ 61. See Verticals Guidelines, *supra* note 35, ¶ 15 which stipulates that the intermediary may bear some insignificant risks but still be considered an “agent.” Recently, in *FNV*, the CoJ paraphrased its earlier findings in *CEPSA* to remark that “a service provider can lose h[er] status of an independent trader, and hence of an undertaking, if [s]he does not determine independently h[er] own conduct on the market, but is entirely dependent on h[er] principal, because [s]he does not bear any of the financial or commercial risks arising out of the latter’s activity and operates as an auxiliary within the principal’s undertaking.” Case C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, ECLI:EU:C:2014:2411, ¶ 33. Thus, the key is whether the intermediary bear risks arising out of the activity of the putative principal in question.

linked to sales of products to third parties.<sup>151</sup> The question of risk has to be analyzed on a case-by-case basis, taking into account “the real economic situation” rather than “the legal classification of the contractual relationship in national law.”<sup>152</sup> In the context of risks, the CoJ distinguished between two types of risks: first, those risks linked to the sale of the products (e.g. financing of fuel stocks); and, second, those risks linked to investments specific to the market (i.e. those necessary to enable the intermediary to negotiate or conclude contracts with third parties).<sup>153</sup> In the context of the relationship between the petrol-station operator and the supplier of fuel, the CoJ noted that, for example, if the payment made by the station operator to the supplier corresponds to the quantity of fuel actually sold and the period of payment to the supplier reflects the actual turnover period for the products at the service-station, then it would have to be concluded that the commercial risk is borne by the supplier.<sup>154</sup> However, the CoJ also noted (regarding the second type of risks which are “linked to investments specific to the market”) that if the petrol-station operator makes investments *specifically linked to the sale of the products*, such as premises or equipment such as a fuel tank, or commits itself to investing in advertising campaigns, such risks are transferred to the operator.<sup>155</sup> It is noteworthy that both types of risk relate to risks on the relevant market (arising *specifically* out of contracts with third parties in relation to the provision of the principal’s products/services to third parties), and *not* to risks arising out of the intermediary’s activities on the separate agency market.

The European Commission’s Guidelines on Vertical Restraints, which accompany the Verticals Block Exemption Regulation, similarly note that the determining factor in defining an agency agreement for the application of Article 101 is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent.<sup>156</sup> For the purposes of applying Article 101, the agreement will be qualified as an agency agreement if the agent does not bear any or bears only insignificant risks in relation to: the contract concluded

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151. *CEPSA*, *supra* note 32, ¶ 46.

152. *Id.*

153. *Id.* ¶ 51.

154. *Id.* ¶ 58.

155. *Id.* ¶ 59.

156. Verticals Guidelines, *supra* note 35, ¶ 13.

and/or negotiated on behalf of the principal; market-specific investments for the field of activity; and, other activities required by the principal to be undertaken on the same product market.<sup>157</sup> The risks that relate to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in premises or personnel, are *not* material to this assessment.<sup>158</sup> Thus, an agreement will be generally considered an agency agreement where property in the contract goods does not vest in the agent or the agent does not herself supply the contract services and where the agent does not contribute to the costs relating to the supply of goods/services. The same applies where the agent does not maintain at her own cost or risk stock of the contract goods; does not undertake responsibility towards third parties for damage caused by the product; and, does not take responsibility for customers' non-performance of the contract, with the exception of the loss of the agent's commission. Similarly, the agreement will be considered an agency agreement, where the agent is not obliged to invest in sales promotion; does not make market-specific investments in equipment, premises, personnel, etc.; and, does not undertake activities within the same product market required by the principal, unless they are fully reimbursed by the principal; etc.<sup>159</sup> According to the Guidelines, since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods and services, all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside the prohibition of Article 101.<sup>160</sup> As one of the obligations that will be considered an inherent part of an agency agreement, the Guidelines note "the prices and conditions at which the agent must sell or purchase" the contract goods/services.<sup>161</sup> Such obligations relate to the ability of the principal to fix the scope of activity of the agent in relation to the contract goods/services, which is essential if the principal is to take the risks, and therefore, to be in a position to determine the commercial strategy.<sup>162</sup> It is noteworthy that the

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157. *Id.* ¶ 15.

158. *Id.*

159. *Id.* ¶ 16.

160. *Id.* ¶ 18.

161. *Id.* Other similar restrictions include restrictions on the territory where the agent may sell the goods/services, and, limitations on the customers to whom the agent may sell the goods/services.

162. *Id.*

Guidelines do not recognize the possibility that the obligations in relation to the contracts with third parties may be found in standard contracts of the agent to which the principal agrees (as opposed to being “imposed” by the principal on the agent). Where the agent is a business acting for more than one principal and operating on the basis of standard contracts, as is common in many areas of commerce including the platforms, such conditions and obligations may be contractually “imposed” by the agent on the principal. Yet, such a contractual setting between the agent and the principal does not imply that the principal no longer takes the financial or commercial risks arising out of the separate contract with the third party facilitated by the agent for the principal on the relevant market. As will be seen below in Sections IV and V, this is exactly the case regarding the standard terms and conditions of platforms studied here.

A look at the case law on the issue of risk suggests that the criterion of risk is not interpreted rigidly, but with a view to balancing the various components in relation to the risks involved in the relevant activity. For example, in *Peugeot*, a dispute which concerned an intermediary (Eco System) acting as an agent on behalf of French final consumers wishing to purchase (through parallel imports) Peugeot and Talbot vehicles, an assessment of risks involved was undertaken by the GC with the ultimate conclusion that the intermediary was an agent.<sup>163</sup> Eco System offered final consumers a service by *purchasing* vehicles in countries where the price was most advantageous.<sup>164</sup> The GC had to decide whether such an intermediary was essentially carrying on an activity equivalent to that of a reseller or an activity as a provider of services.<sup>165</sup> It is notable that the GC put the relevant legal question in very similar terms to the common law assessment provided above, which also inquires into whether the contract is one of providing services to another party or one of making independent profit.<sup>166</sup> On the facts, Eco System did not offer a guarantee service; an after-sales service; take customers’ used cars in part-exchange, or keep a stock of cars owned by it.<sup>167</sup> Eco System was remunerated by commission,

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163. Case T-9/92, *Automobiles Peugeot SA and Peugeot SA v. Comm’n*, 1993 E.C.R. II-493, ¶ 1 [hereinafter *Peugeot 2*].

164. *Id.* ¶ 2.

165. *Id.* ¶ 47.

166. See accompanying texts to *supra* notes 55 and 107.

167. *Peugeot 2*, *supra* note 163, ¶ 2.

which was calculated as a percentage of the invoice price, and this was found to be a normal form of remuneration in this type of contracts.<sup>168</sup> Yet, Eco System itself initially payed the approved reseller who supplied the vehicles, the basic price with VAT and the costs of importing the vehicle.<sup>169</sup> Namely, at face value, Eco System was *buying* the vehicle first to then resell it, which could have been interpreted to constitute activities of a retailer, thus a separate undertaking in its own right. The GC found that in doing so, Eco System was essentially providing in each transaction a credit to the consumer equal to the amount over and above the deposit it received (since it was seeking reimbursement for the price and the costs from the purchaser).<sup>170</sup>

The Court considered that such grant of credit did not alter the legal designation even if such credit is not inherent in the activity of an agent.<sup>171</sup> According to the Court, such incurring of expenses, which the principal had to repay was a normal part of activities of an agent.<sup>172</sup> Eco System's undertaking the storage risk by indemnifying the principal in the event of loss of or damage to the vehicle during the period between the receipt of the vehicle by Eco System and delivery to the final consumer was also found to be a normal activity for an agent.<sup>173</sup> This is notable since in this case, Eco System was essentially undertaking risks in relation to the supply of the specific product on the relevant market, which is a risk noted in *CEPSA* to suggest absence of agency.<sup>174</sup> Furthermore, in this case, Eco System was also arguably involved in promotional activities on the relevant market.<sup>175</sup> The GC noted that

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168. *Id.* ¶ 55.

169. *Id.* ¶ 51.

170. *Id.* ¶ 51. The facts of this case are remarkably similar to *MIG*, *supra* note 74, and it is striking that the GC's legal interpretation of the arrangement as one of agency is also in line with the commercial law approach to the same legal question.

171. *Id.* ¶ 51.

172. *Id.*

173. *Id.* ¶ 54.

174. See text around *supra* note 132. This case predates *CEPSA*, *supra* note 32, but see text around *infra* note 182, where the agent's incurring expenses in relation to the activities entrusted to her was also not seen as a factor to render her a non-agent in a judgment rendered after *CEPSA*.

175. It was argued by Peugeot that Eco System had displayed a number of Peugeot cars in the Carrefour chain of stores and used an advertising brochure issued by Carrefour which according to Peugeot created confusion in the public mind regarding Eco System's activity and was bound to lead the consumers to consider that Eco System was carrying on an activity equivalent to that of a reseller (i.e. a distributor or dealer) rather than a party providing services; *Peugeot 2*, *supra* note 163, ¶ 22. Carrefour had issued a brochure under its own name, repeating

such an intermediary's activity may entail promotional measures aimed at the public as well as accepting the risks inherent in any undertaking providing services.<sup>176</sup> The Court found that Eco System was acting as an agent in that it was "providing a service consisting in establishing contact between a customer and . . . a reseller" in "creating the necessary direct contractual relationship between the two parties and in carrying out the associated formalities."<sup>177</sup> The Court noted that Eco System, as agent, was not a party to the contract of purchase and sale, which it concluded with a reseller on behalf and for account of the final consumer, and consequently, never acquired ownership of the vehicle which was the subject of the transaction.<sup>178</sup> Another factor noted was the fact that Eco System never bore any risk arising from this (double) transfer of ownership including the risk of having to sell the vehicle if the final consumer withdrew, etc.<sup>179</sup> It must be noted that in this case, the agent in question was acting on behalf of numerous principals (i.e. final consumers). Relying on *Binon*, Peugeot argued that this factor should mean that Eco System was not an agent. The GC noted that, "a purely quantitative criterion based on the number of authorizations received by an intermediary" cannot by itself alter the nature of the intermediary's operations.<sup>180</sup> This finding of the GC is significant and

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the contents of the brochure published by Eco System during a temporary collaboration between two companies. *Id.* ¶ 58. The Court held that because any misunderstanding could only arise from the cover of the brochure and the true nature of Eco System's activity was clearly indicated in the brochure, the legal assessment did not change. *Id.* ¶ 59. Interestingly, similar arguments were made in litigation against Uber in relation to Uber's alleged creation of confusion in consumers' minds in that consumers were under the impression that it was Uber providing the transportation services; see, e.g., *Uber (ET)*, *supra* note 23, ¶ 67.

176. *Peugeot 2*, *supra* note 163, ¶ 43.

177. *Id.* ¶ 48.

178. *Id.*

179. *Id.* ¶ 50.

180. *Id.* ¶ 61. The GC also made note of the factual difference in that Eco System acted on behalf of final consumers rather than as a distribution agent for producers, *id.* In *Binon*, the CoJ held that art. 101(1) applies to a set of agreements between an agency specializing in the distribution of newspapers and periodicals in one Member State and a number of publishers in that and another Member State whose products are distributed in the first Member State, if the effect of that set of agreements is that the approval of retail sales outlets is a matter for that agency (or a body set up by it) within the framework of those agreements. Case 243/83, SA Binon & Cie v. SA Agence et messageries de la presse, 1985 E.C.R. 284. However, it is noteworthy that in this case, the CoJ proceeded on the basis that the contractual relationship between the distribution agency and the publishers is closer to a relationship binding the publishers to an *independent distributor*. The Court did not conduct any further assessment of the relationship as this was a preliminary ruling reference and the factual analysis had to be conducted by the national court, see *supra* note 157, ¶ 21. Notably, the distribution agency in

appears to be in contradiction with the CoJ's earlier holding in *Reisbureaus* where the CoJ held that a travel agent was not an agent of the tour operator due to the multiplicity of tour operators the agent worked for and the multiplicity of the agents through which the tour operator sold travel.<sup>181</sup> The relevance of multiple principals for the assessment of platforms as agents will be returned to in Sections V and VI.

In *voestalpine*, another case in which the assumption of risks by the agent was analyzed, the GC elaborated on the relevant case law and held that where according to the terms of the contract between the intermediary and the putative principal, a sale is concluded between the customer and the principal, rather than between the agent and the customer, then “[t]hat contract is . . . to be [analyzed] as an agency agreement.”<sup>182</sup> The GC also noted that where there is no provision in the contract which makes the “agent” responsible for financing stocks or which requires her to make specific investments to represent that particular principal, the economic risk associated with sales negotiated by the putative agent and concluded with the principal is essentially borne by the principal, and not the agent.<sup>183</sup> This finding was not contradicted by the fact that the agent may assume certain expenses, which may be regarded as ancillary to the activities entrusted to the agent or covered by the fixed nature of remuneration in the form of commission (e.g. expenses linked with the incidental obligations associated with the conclusion of contracts, costs of legal advice, etc.).<sup>184</sup> Regarding the exclusive nature of the relationship between the agent and the principal, the GC noted in this case (where the agent *did* work for more than one principal) that it was necessary to determine whether the agent was in a position, “as regards the activities entrusted to h[er] by [the] principal, to act as an independent trader free to determine h[er] own business strategy.”<sup>185</sup> Interestingly, in this case,

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question was active on the market in the retail sale of the products in question (newspapers and periodicals) through its holding in another entity. *Id.* ¶ 22.

181. Case 311/85, *VZW Vereniging van Vlaamse Reisbureaus v. VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, 1987 E.C.R. 516., ¶ 20. It appears that AG Kokott also agrees with the GC on the possibility of the agent acting for more than one principal when the AG interprets both *Reisbureaus* and *Binon* to relate to the market for agency services rather than the relevant goods/services market. AG Opinion, *supra* note 136, ¶ 46.

182. Case T-418/10, *voestalpine AG v. European Comm'n*, 2015 E.C.R., ¶¶ 144-45.

183. *Id.* ¶ 146.

184. *Id.* ¶¶ 146-47.

185. *Id.* ¶ 153.

the GC ultimately concluded that the same intermediary can be acting as the agent, and thus be part of a “single economic entity” with two different members of the same cartel at the same time.<sup>186</sup> Importantly, the GC related this point on exclusivity back to the factor of risk, and remarked that the “decisive factor” in establishing a single economic entity that covers the principal and the agent lies in the assessment of the financial risks associated with sales or the performance of the contracts concluded with third parties through the agent.<sup>187</sup> Notably for the purposes of this Article, the issue of exclusivity can also be related to the alignment of commercial interests between the principal and the agent in the context of the fiduciary duties of an agent, as noted in common law above.<sup>188</sup> This will be returned to in Section VI in discussing the role of such exclusivity under the “competitive neutrality” concept of this Article.

In the Commission’s Guidelines on Vertical Restraints, two occasions are envisaged where an agent would no longer be deemed to be part of the same economic entity with the principal and their agreement would no longer be immune from the application of Article 101. Thus, the Guidelines stipulate there to be two exceptions to the agency rule under the single economic entity doctrine. The first exception is where because “the agent is a separate undertaking from the principal” (on the agency market), the relationship between the agent and principal may infringe Article 101 due to, for example, provisions preventing the agent from acting as an agent or distributor to undertakings that compete with the principal, and post-term non-compete provisions.<sup>189</sup> The second exception is where the agency agreement facilitates collusion.<sup>190</sup> This can happen where, for example, multiple principals use the same agent to collude on marketing strategy

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186. *Id.* ¶ 163. Further, in this case, it was held that even if the principal was not aware of the agent’s participation in a cartel, where the agent acted on behalf and on account of the principal (without assuming the economic risk of the activities entrusted to her), the anticompetitive conduct of that agent in the context of those activities can be imputed to the principal. *Id.* ¶ 175. See FLORENCE THÉPOT, *THE INTERACTION BETWEEN COMPETITION LAW AND CORPORATE GOVERNANCE* 74 (2019) for the argument that such an application of the single economic entity doctrine to extend liability for the conduct to a separate legal entity is problematic for corporate law reasons as well as for the absence of an available defense to the principal.

187. *voestalpine*, *supra* note 182, ¶ 154.

188. See text around *supra* note 53.

189. Verticals Guidelines, *supra* note 35, ¶¶ 19-20.

190. *Id.* ¶ 20.



or to pass on sensitive information to one another. Neither of these exceptions have implications for the subject matter of this current Article, namely for establishing the presence or absence of agency regarding platforms (i.e. the first research question) or for determining the scope of competition law application to restrictions of competition found in agreements between platforms and suppliers on the relevant market (i.e. the second research question). In some ways, both exceptions in the Guidelines are *non sequitur* because the agency rule as established in the case law *only* immunizes the agency agreement from the application of Article 101 in relation to restrictions of competition concerning the sale/provision of products/services to third parties on the relevant market, anyway.<sup>191</sup> The first exception relates to “provisions which concern the relationship between the agent and the principal” and *not* to “conditions of sale or purchase of the contract goods or services by the agent on behalf of the principal.”<sup>192</sup> Neither the findings of this Article nor the agency rule have any bearing on the assessment of such restrictions of the former type as they fall outside of scope, which is limited to restrictions of competition on the “relevant market,” so this exception is irrelevant to the subject matter at hand. As for the second exception, if the agent facilitates collusion between principals, then as stipulated in the Guidelines, Article 101 can be applied to the agreement which facilitates that collusion. Yet, this would not necessarily render that intermediary a non-agent for other purposes including that of assessing whether it is, nevertheless, part of the same undertaking as the principal in relation to restrictions of competition on the “relevant market” for products/services provided to third parties. Where the agent facilitates collusion between principals, this is normally conducted through the agent’s activities on the agency market—where the agent acts as a common intermediary between competing principals—rather than the agent’s activities on the market concerning the relevant products/services where it acts on behalf of and/or for a given principal in relation to contracts concluded with third parties.<sup>193</sup> Facilitating collusion between principals as an

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191. It is notable that the Verticals Guidelines, *supra* note 35, does not provide any authority from the case law (or elsewhere) in support of the explanation concerning the facilitation of collusion.

192. *Id.* ¶ 19.

193. This is in line with the case law, such as findings in, see, e.g., Case C-194/14 P, AC-Treuhand AG v. European Comm’n, 2015 E.C.R. ¶ 37, concerning an intermediary (a consultancy firm) being found to be a member of a cartel despite not having any operations on

anticompetitive activity is not an activity concerning restrictions of competition concerning the products/services in the contracts with third parties, so is already *not* excluded from the full application of Article 101 due to the agency rule. Consequently, even where the agency agreement can be scrutinized for facilitating collusion between principals, and the agent can be treated as an “undertaking” facilitating or participating in that collusion, for restrictions of competition on the “relevant market” resulting from the agency agreement, the agent may still be part of the same undertaking as the principal.<sup>194</sup> Thus, the second exception does not have any bearing on the assessment of this Article, either, as the findings of this Article would continue to be applicable to the assessment of whether the intermediary is an agent on the relevant market in relation to the restrictions of competition found in the contracts with third parties. Consequently, the exceptions will not be further elaborated on in this Article.

#### IV. RELEVANT TERMS AND CONDITIONS OF PLATFORMS’ STANDARD CONTRACTS

After an overview of the fundamental concepts of agency and its operation in different areas of law in Section II and of the position of agency under the single economic entity doctrine in competition law in Section III, this Section sets out the relevant terms and conditions of six major platforms—Uber, Amazon Marketplace, eBay, Apple App Store, Airbnb, and Booking.com—on the basis of their publicly available standard contracts.<sup>195</sup>

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the cartelized market (the heat stabilizers market). *See also* Gurin & Peepkorn, *supra* note 11, ¶ 9.56 (referring to this exception in the Guidelines as one concerning facilitation of “horizontal collusion between competing principals”). Thus, the exception relates to *horizontal* competition between principals, and not to *vertical* restraints imposed by the contract between the principal and the agent.

194. As noted in *voestalpine*, the agent can, in fact, be an agent for multiple principals which are parties to a cartel agreement and be part of a single economic entity with those different cartel members at the same time. *voestalpine*, *supra* note 182, ¶ 160.

195. Unless otherwise stated, terms and conditions relate to UK operations of the platforms studied. The findings of the Article are limited to the publicly available standard terms and conditions, and the possibility of there being privately negotiated versions of these terms and conditions with different clauses is acknowledged. Due their confidential nature, any such terms and conditions—if/where they exist—cannot be studied. Similarly, some of the terms and conditions (e.g. in the case of Uber) relate to the contract between users (i.e. riders) and the platform (i.e. Uber) rather than the suppliers (i.e. drivers) and the platform (i.e. Uber) due to lack of public availability of any other terms and conditions. This is not deemed to be detrimental for

This is done with a view to later assessing in Section V whether these platforms are agents of their suppliers on the basis of the relevant contractual terms given the elements of agency exposed in Sections II and III above. The platforms chosen represent a variety of business activities all of which are organized around the platform model and are some of the most popular platforms used by millions of consumers around the world. As also revealed in this Section, their contracts contain very similar clauses, reflecting the similarity of the essential activity in which they are engaged (i.e. facilitating transactions between suppliers and customers), despite the platforms' operating in very different business sectors. The relevance of the terms and conditions studied in this Section is that although none of the areas of law examined above are bound by the wording of the contracts in question when assessing whether a given relationship between parties is that of agency, and all are guided by the "real economic situation," they all start by examining the relevant contract in assessing the legal nature of the relationship between two parties.<sup>196</sup> In establishing the nature of an entity, it also makes commercial sense to start with the terms and conditions which the entity stipulates to be applicable to dealings with that entity as these terms and conditions reveal the parameters of those dealings.

This Section is structured along the lines of pertinent factors concerning agency as established in Sections II and III, and examines the standard terms and conditions of the platforms under three categories in three subsections. The first subsection examines the contractual stipulations concerning the legal nature of the agreement found in platforms' standard contracts because the legal nature of the

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the subject matter of this Article because the Article's focus is on the relevant market for products/services provided to third parties and its inquiry concerns the position of platforms in relation to the transactions facilitated on that market in relation to third parties, namely users/customers (e.g. riders). This is also in line with agency law where what matters foremost is the point of view of the third party. Bowstead and Reynolds, *supra* note 36, ¶ 1-025. Notably, in the employment litigation concerning Uber in the UK, the courts have also used terms of Uber's agreement with riders in assessing Uber's legal relationship with its drivers; *see, e.g., Uber (CA)*, *supra* note 23, ¶ 13. In fact, Uber itself argues in this litigation that there is no contract between Uber London Ltd and drivers (despite an "agreement" between Uber's parent company and drivers), so that the relation is governed by the agreements applicable to riders, which create a contract between riders and drivers (for whom Uber London Ltd is an agent). *See id.* ¶¶ 33, 53-54. Finally, on occasions this Article refers to contractual statements found outside of the standard terms and conditions where such statements are found on different parts of the platform website.

196. See accompanying text to *supra* note 78, for commercial law, and *CEPSA*, *supra* note 32, ¶ 46, for competition law.

agreement between two parties as stipulated in their contract represents the starting point for the assessment of the relationship between them in all areas of law studied. The second subsection studies the terms and conditions regarding price-setting and remuneration because the power to set price and the mode of remuneration are informative in relation to the real operation of the business arrangement, as well as for identifying any risk-taking on the relevant market, and, in particular, for distinguishing between intermediaries such as retailers and agents. Finally, the third subsection focuses on ownership, investments, liability, and risks undertaken on the relevant market because the ownership of contract goods as well as any investments, liability, and risks undertaken on the relevant market are fundamental factors in all the areas of law studied above in establishing a position of agency. A diagram summarizing the findings of this Section can be found at the end of the Section.

*A. Contractual Stipulations Concerning the Legal Nature of the Agreement*

According to Uber's terms and conditions, Uber "is not a Transportation Provider and does not provide transportation services."<sup>197</sup> Transportation services are provided to the passenger under a contract (the "transportation contract") between the passenger and the "transportation provider" that is identified to the passenger in the booking confirmation which Uber provides.<sup>198</sup> According to the terms that passengers agree to when logging onto the app, Uber accepts bookings as the agent for the transportation provider and Uber's acceptance gives rise to a contract between the passenger and the transportation provider for the provision to the passenger of transportation services.<sup>199</sup> According to these terms, "Uber UK is not a

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197. *Uber UK Terms and Conditions* (pt. 1 § 4), UBER, <https://www.uber.com/legal/terms/gb/> [<https://perma.cc/C4CM-3NCQ>] (last visited Nov. 30, 2019).

198. *Id.* "Transportation Provider" means a provider of transportation services, including any drivers licensed to carry out private hire bookings in accordance with the legislation. *Id.* at Part 1 Section 1.

199. *See Uber (ET)*, *supra* note 23, ¶ 28. Elsewhere in the agreement, Uber identifies itself as a "disclosed payment collection agent" of the transportation provider (who is the principal). *Uber UK Terms and Conditions*, *supra* note 197, at Part 2 Section 4. In the ongoing employment litigation concerning Uber, the CA raises questions as to the accuracy of Uber's terms in relation to when and between whom a contract is formed. *See Uber (CA)*, *supra* note 23, ¶¶ 76-82.

party to the Transportation Contract and acts as a disclosed agent for the Transportation Provider in communicating the Transportation Provider's agreement to enter into the Transportation Contract."<sup>200</sup> Further, Uber describes itself as a platform that facilitates users to contract with "independent third party providers" of various services.<sup>201</sup> The agreement also requires users to agree to the condition that Uber does not provide any of the transportation, etc. services, and that these are provided by independent third-party contractors who are not employed by Uber.<sup>202</sup> Some of Uber's terms and conditions stipulate rules for the contract between the passenger and the driver—despite Uber's not being a party to it—such as the one relating to the responsibility of the passenger for the cost of repair or damage to the vehicle in excess of normal wear and tear.<sup>203</sup>

According to Amazon's standard terms and conditions applicable to the relation between Amazon and third-party sellers on Amazon Marketplace,<sup>204</sup> Amazon and the sellers selling on its Marketplace "are independent contractors, and nothing in this Agreement will be construed to create a partnership, joint venture, agency, franchise, sales representative, or employment relationship between the parties."<sup>205</sup> According to the same terms, Amazon is not an intermediary between the buyer and the seller, either.<sup>206</sup> Nevertheless, "[a] buyer's obligation to pay for an item purchased . . . is satisfied when the buyer properly

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200. *Uber UK Terms and Conditions*, *supra* note 197.

201. *Id.* pt. 2 § 2.

202. *Id.* pt. 2 § 2. The term also covers other services that Uber intermediates such as logistics, delivery, etc. *Id.*

203. *Uber UK Terms and Conditions*, *supra* note 197, pt. 2 § 4. It also appears that on occasions (e.g. where passenger claims to be overcharged) Uber may be making refunds to passengers without necessarily referring to the driver, which may or may not lead to a deduction from the payment made by Uber to the driver. *Uber (ET)*, *supra* note 23, ¶ 23.

204. Amazon Marketplace is the platform owned and operated by Amazon where third-party suppliers sell their products on Amazon, sometimes, but not always, alongside Amazon's own products (for which Amazon is the retailer). Therefore, Marketplace is the legally relevant aspect of Amazon's business model for the purposes of this Article since it is the "platform" where Amazon acts as an intermediary between suppliers and consumers (rather than as a retailer selling its own products for its own profit). For a brief overview of how Amazon Marketplace works, see *About Ordering from a Third-Party Seller*, AMAZON, <https://www.amazon.co.uk/gp/help/customer/display.html?nodeId=201889310> [<https://perma.cc/R7QA-VEJS>] (last visited Nov. 30, 2019).

205. *Amazon Services Europe Business Solutions Agreement* (§ 13), AMAZON, [https://sellercentral.amazon.co.uk/gp/help/external/201190440?language=en\\_GB&ref=efph\\_201190440\\_cont\\_521](https://sellercentral.amazon.co.uk/gp/help/external/201190440?language=en_GB&ref=efph_201190440_cont_521) [<https://perma.cc/NZW6-8GAB>] (last updated Oct. 1, 2019).

206. *Id.*

pays [Amazon] in full for that item . . . .”<sup>207</sup> Thus, Amazon not only receives and holds funds on behalf of/for the supplier, it also imposes into the contract between the supplier and the buyer the clause that receipt of payment by Amazon discharges the contractual obligation of the customer (i.e. third party) to pay the seller. eBay’s standard terms and conditions are similar to Amazon’s in stating that “[n]o agency, partnership, joint venture, employee-employer or franchiser-franchisee relationship is intended or created” by the agreement.<sup>208</sup> Moreover, eBay “is not involved in the actual transaction between buyers and sellers.”<sup>209</sup> Further, the agreement notes that the “contract for the sale is directly between buyer and seller.”<sup>210</sup> Yet, similar to Amazon, eBay can *automatically* charge the seller’s account to collect fees and charges, including reimbursements to buyers where a dispute is resolved in favor of the buyer, etc.<sup>211</sup> Thus, eBay also clearly has access to, and authority to dispose of, the seller’s funds on the seller’s behalf. Further, it is notable that the buyer “enter[s] into a legally binding contract to purchase an item when [she] commit[s] to buy an item, or if [she has] the winning bid (or [her] bid is otherwise accepted).”<sup>212</sup> Hence, in practically all purchases, there is no further “negotiation” between the buyer and the seller beyond the facilitation of the contract provided by eBay; the contract of sale is concluded by the intermediation of eBay through the interaction of the third party merely with the platform. Further, the clause establishing when the contract is formed is inserted into the contract of the supplier and the customer by eBay.

In the Apple “iPhone Developer Program License Agreement,” it is stipulated that the app developer

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207. *Amazon Payments – Selling on Amazon User Agreement* (§ 1.3), AMAZON, [https://sellercentral.amazon.co.uk/gp/help/external/help.html?itemID=201190410&language=en\\_GB&ref=efph\\_201190410\\_relt\\_201190440](https://sellercentral.amazon.co.uk/gp/help/external/help.html?itemID=201190410&language=en_GB&ref=efph_201190410_relt_201190440) [<https://perma.cc/8X7K-CUSG>] (last updated Aug. 16, 2019). Notably, according to the same section, Amazon is not a fiduciary or trustee of either the seller or the buyer. *Id.*

208. *eBay User Agreement*, EBAY, <https://pages.ebay.co.uk/help/policies/user-agreement.html> [<https://perma.cc/MGV6-2DE3>] (last visited Mar. 15, 2019). The agreement applies to sellers as well as buyers on eBay. *Id.*

209. *Id.* According to the user agreement, “eBay is a marketplace that allows users to offer, sell and buy just about anything in a variety of pricing formats and locations.” *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

appoint[s] Apple and Apple Subsidiaries (collectively “Apple”) as [his] worldwide agent for the delivery of the Licensed Applications to end-users, during the Delivery Period. [The developer] . . . acknowledge[s] that Apple will deliver the Licensed Applications to end users in Apple’s own name, through one or more App Stores, but for [the developer] and on [the developer’s] behalf.<sup>213</sup>

Indeed, Apple’s Media Services Terms and Conditions, which are aimed at users, also stipulate that “Apple acts as an agent for App Providers in providing the App Store and is not a party to the sales contract or user agreement between [the user] and the App Provider.”<sup>214</sup> Apple charges the user’s account automatically for any paid transactions.<sup>215</sup> Given that the majority of the payment in relation to an app purchase is due to the app developer since Apple only retains a certain percentage of that amount as its commission, this clause demonstrates that Apple holds funds for the app developers and has the ability to impose contractual terms into the contract between the app developer and the third party.<sup>216</sup>

According to Airbnb’s terms, Airbnb is “an online marketplace that enables registered users (‘Members’) and certain third parties who offer services . . . to publish . . . Host Services on the Airbnb Platform (‘Listings’) and to communicate and transact directly with Members that are seeking to book such Host Services . . . .”<sup>217</sup> Airbnb’s terms

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213. *iPhone Developer Program License Agreement* (Schedule 1, 1.1), ELE. FRONTIER FOUND., [https://www.eff.org/files/20100302\\_iphone\\_dev\\_agr.pdf](https://www.eff.org/files/20100302_iphone_dev_agr.pdf) [<https://perma.cc/PA76-SFET>] (last visited Nov. 20, 2019). Note that the agreement is from 2010 and has been acquired and made available on the internet using a Freedom of Information Request Act, and may no longer be up-to-date. In contrast, according to the separate Apple Developer Agreement, which a developer has to agree to be bound by, “no legal partnership or agency relationship is created” between a developer and Apple. *Apple Developer Agreement*, APPLE ¶ 1, <https://developer.apple.com/terms/apple-developer-agreement/Apple-Developer-Agreement-English.pdf> [<https://perma.cc/S5F2-ZWED>] (last visited Jan. 18, 2019).

214. *Apple Media Services Terms and Conditions*, APPLE, <https://www.apple.com/legal/internet-services/itunes/us/terms.html> [<https://perma.cc/26EE-JBNW>] (last visited Mar. 19, 2019).

215. *Id.*

216. *Cf. Pepper*, *supra* note 31, where the US Supreme Court found Apple to be the “retailer” of apps, which implies that the sale of contract takes place between Apple and the iPhone owner (i.e. customer) rather than the app developer and iPhone owner.

217. *Airbnb Terms of Service for European Users* (§ 1.1), AIRBNB <https://www.airbnb.co.uk/terms> [<https://perma.cc/S3NH-XH9S>] (last visited Aug. 3, 2018) [hereinafter *Airbnb Terms of Service*]. Members and third parties who offer services on the platform are referred to as “Hosts” and the services which they offer are referred to as “Host

stipulate that “[w]hen Members make or accept a booking, they are entering into a contract directly with each other. Airbnb is not and does not become a party to or other participant in any contractual relationship between Members, nor is Airbnb a real estate broker or insurer.”<sup>218</sup> These terms also stipulate that Airbnb does not act as an agent in any capacity for any Member.<sup>219</sup> However, this is except for when it comes to payment services as in that case, “. . . Airbnb Payments acts as the Providing Member’s payment collection agent for the limited purpose of accepting payments from [the user] on behalf of the Providing Member.”<sup>220</sup> In fact, “Airbnb Payments will deduct any Host Fees from the Listing Fee before remitting the payout to the Host,” meaning that Airbnb will hold funds on behalf of/for the host.<sup>221</sup> When the host “accept[s] or [has] pre-approved a booking request by a Guest, [she is] entering into a legally binding agreement with the Guest.”<sup>222</sup> Yet, “[i]n certain circumstances, Airbnb may cancel a pending or confirmed booking on behalf of a Host or Guest and initiate corresponding refunds and payouts.”<sup>223</sup> Thus, Airbnb can directly influence the formation and operation of the contract between the host and the guest. Further, similar to Uber, some of the terms of the contract between the host and the guest are imposed by the terms of Airbnb. For example, according to Airbnb’s terms, a confirmed booking of accommodation is a limited license granted to the guest by the host to enter, occupy and use the accommodation, during which time the host retains the right to re-enter the accommodation “in accordance with [the guest’s] agreement with the host.”<sup>224</sup> Similar to Amazon

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Services.” Members using Host Services offered on the platform are referred to as “Guests.” Host Services can include the offering of vacation or other properties for use (“Accommodations”), single or multi-day activities in different categories (“Experiences”), access to events and locations (“Events”), and a variety of other travel and non-travel related services. *Id.* “Members” are registered users and include the consumers and suppliers.

218. *Id.* Section 1.2.

219. *Id.*

220. See *Airbnb Payments Terms of Service* (§ 9.3), AIRBNB, [https://www.airbnb.co.uk/terms/payments\\_terms](https://www.airbnb.co.uk/terms/payments_terms) [<https://perma.cc/T92S-S7WL>]. Also, according to these Payments Terms, Airbnb is a “payment collection agent solely for the limited purpose of accepting funds from Members purchasing” services on the platform. *Id.* Section 9.1. The same Payments Terms also include a liability disclaimer and indemnification clause in favour of Airbnb. *Id.* §§ 18, 19.

221. *Airbnb Terms of Service*, *supra* note 217, § 6.3.

222. *Id.* § 7.1.7.

223. *Id.* § 9.5.

224. *Id.* § 8.2.1.



Marketplace, Airbnb's terms stipulate that the relationship between a host (or co-host) and Airbnb is "limited to being an independent, third-party contractor, and not an employee, agent, joint venturer or partner of Airbnb for any reason."<sup>225</sup> Further, the host or co-host acts exclusively on his own behalf and for his own benefit.<sup>226</sup>

In contrast, according to Booking.com's terms, the platform "acts as an intermediary (agent) between guests wanting to make an online hotel reservation and [the hotel partner] offering rooms."<sup>227</sup> Furthermore, "the agreement and transaction is made directly between [the hotel partner] and the guest. . . . Booking.com is not a contracting party in the transaction between [the hotel partner's] property and the guest."<sup>228</sup> The payment is made by the guest directly to the hotel and Booking.com does not sell the accommodation.<sup>229</sup> Notably, "[w]hen a guest makes a booking, their reservation is confirmed immediately. So it [is] not possible to reject a reservation."<sup>230</sup> Thus, the contract is concluded through the agency of Booking.com with no further "negotiation" or other contractual dealings taking place between the actual contracting parties (i.e. the guest and the hotel) and Booking.com imposes the clause into the parties' contract concerning the impossibility to reject a reservation.

To summarize, all of the platforms stipulate in their standard terms and conditions that the relevant transaction, which is facilitated by the platform, takes place between the supplier and the third party (i.e. that the contract is concluded between the supplier and the third party) where the platform is *not* a party to the contract. Except for Amazon, eBay and Airbnb, the platforms describe themselves as agents in their standard contracts. Some of the platforms' contracts also reveal

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225. *Id.* § 1.4. A "co-host" is a Member whom a host authorizes to administer the host's listings and make bookings, etc. on the host's behalf. *Id.* § 7.4.1. This authorization by the host has to be "enabled" by Airbnb. *See id.*

226. "[A]nd, not on behalf, or for the benefit, of Airbnb." *Airbnb Terms of Service, supra* note 217, § 1.4.

227. *How Does Booking.com Work for Property Owners?*, BOOKING.COM <https://partnerhelp.booking.com/hc/en-gb/articles/213302145-How-does-Booking-com-work-> [https://perma.cc/4B3R-3LCU] (last visited Aug. 6, 2018).

228. *Id.*

229. *How our online booking service works*, BOOKING.COM, [https://www.booking.com/content/how\\_we\\_work.en-gb.html](https://www.booking.com/content/how_we_work.en-gb.html) [https://perma.cc/6PH5-5GNZ] (last visited Aug. 6, 2018).

230. *Can I Cancel a Reservation?*, BOOKING.COM, <https://partnerhelp.booking.com/hc/en-gb/articles/213302445> [https://perma.cc/5BA6-WLDT] (last visited May 10, 2019).

that the contract between the supplier and the third party is concluded at the time of the third party's interaction with the platform with no further contractual steps taken by either party to the contract at a later stage (e.g. Booking.com; eBay; Uber). All of the platform contracts insert terms and conditions into the contract concluded between suppliers and customers. Nearly all of the platforms (i.e. Amazon; Uber; Apple App Store; Airbnb; eBay) hold funds on behalf of/for their suppliers for various reasons (e.g. because they receive payment from the third party before passing on the funds (minus their commission, etc.) to the supplier, etc.).

### *B. Price-Setting and Remuneration*

Price-setting powers of the intermediary and how the intermediary is remunerated are some of the significant factors in establishing the legal nature of the operations of any intermediary. Amongst the platforms studied here, Uber is unique when it comes to price-setting power as it is the only platform studied, which has relatively direct influence on the price paid by the customer for the subject matter of the contract between the supplier and the customer.<sup>231</sup> This is because at the end of a trip, Uber's servers calculate a fare for a given ride, taking account of time spent and distance covered.<sup>232</sup> The figure provided by Uber is a "recommended fare" and the driver can agree a lesser (but not greater) sum with the passenger.<sup>233</sup> In terms of remuneration, Uber does not charge a fee to passengers, but deducts a "service fee" from the fare paid by the passenger before passing the remainder to the driver.<sup>234</sup> If a lower fare than suggested by Uber is agreed, Uber is entitled to the service fee (i.e. commission) on the basis of the recommended amount. Passenger pays Uber, who makes weekly payments to drivers.<sup>235</sup>

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231. As will be discussed below, the reason for Uber's having such influence can be related to the particular regulatory context in which it operates and may not be detrimental to a finding of agency. See *infra* note 331 and accompanying text.

232. *Uber (ET)*, *supra* note 23, ¶ 18. In surge areas, a multiplier is applied to fares resulting in a charge above the standard level.

233. *Id.* ¶ 19.

234. *Uber UK Terms and Conditions*, *supra* note 197. According to the facts established in the employment law litigation against Uber in the UK, the service fee ranges between 20% to 25% of the fare; *Uber (ET)*, *supra* note 23, ¶ 21. The rates that apply for the "transportation services provided by the Transportation Provider can be found on the Website and through the Uber App"; *Uber UK Terms and Conditions*, *supra* note 197.

235. *Uber (ET)*, *supra* note 23, ¶¶ 20-21.

In relation to price-setting, Airbnb provides a “pricing tool that can recommend competitive rates,” but the rate charged is up to the landlord.<sup>236</sup> Airbnb charges the guests before arrival and the landlord is paid automatically after check in with Airbnb deducting a “service fee.”<sup>237</sup> Similarly, Booking.com operates on a commission basis and the hotel partner has to pay Booking.com a set percentage on each reservation made through the site.<sup>238</sup> The rates are determined by the hotel partner.<sup>239</sup> Booking.com’s “Preferred Partner Programme” allows certain hotels (“which stand out”) to be ranked higher in the results than others all else being equal. These hotels pay a higher commission rate for this ranking. Notably, the commission percentage is also a factor taken into account by the *standard* algorithm that ranks the properties.<sup>240</sup> In contrast, Airbnb’s ranking algorithm does not appear

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236. See *Overview*, AIRBNB, [https://www.airbnb.co.uk/host/homes?from\\_nav=1](https://www.airbnb.co.uk/host/homes?from_nav=1) [<https://perma.cc/9HWM-LBVX>] (last visited Aug. 3, 2018) [hereinafter *Airbnb Overview*].

237. *Id.*

238. *How Much Commission Do I Pay?*, BOOKING.COM, <https://partnerhelp.booking.com/hc/en-gb/articles/212708929-How-much-commission-do-i-pay> [<https://perma.cc/4MKM-6G79>] (last visited Aug. 6, 2018) [hereinafter *Booking.com Commission*]. Commission is normally paid on confirmed bookings after the guest has checked out and paid, but is due on non-refundable bookings irrespective of whether the guest stayed at the hotel or not. *Id.*

239. For rates being set by the hotel, see *supra* note 221. For the price-matching-guarantee, see *Trip Terms and Conditions*, BOOKING.COM, <https://www.booking.com/content/terms-en-gb.html?label=gen173nr-1FCAEeggI46AdIM1gEaFCIAQGyAQm4ARfIAQzYAQH0AQH4AQuIAGGoAgM;sid=94ae90ce16060ed32b20c5dd267e4d9a> [<https://perma.cc/MNY7-BRFP>] (last visited Mar. 19, 2019). Interestingly, Booking.com offers a price-matching-guarantee to guests. Where such a guarantee is activated, the ultimate price paid by the guest will have been *indirectly* determined by Booking.com rather than the hotel partner. This author has argued elsewhere that the various investigations and decisions concerning Booking.com by competition authorities in Europe were misguided in their lack of attention to this price-matching-guarantee by limiting their investigations to the most-favored-customer clauses of Booking.com. See Akman, *supra* note 7, at 786-87. Interestingly, Booking.com also appears to provide a “rate intelligence tool,” which allows property owners to check rates at competitors; *Rate Intelligence*, BOOKING.COM, <https://partnerhelp.booking.com/hc/en-gb/community/posts/360020765514-Rate-Intelligence> [<https://perma.cc/C6JT-B4DC>] (last visited Feb. 15, 2019).

240. The hotels are listed on Booking.com in default order called “our top picks” which is “created by a complex ever changing and evolving automatic system. This algorithm considers a multitude of criteria including the popularity of a provider among their customers, the prices, the customer service record, certain booking data, the commission percentage and the on-time payment of commission.” *How our online booking system works*, BOOKING.COM, [https://www.booking.com/content/how\\_we\\_work.html](https://www.booking.com/content/how_we_work.html) [<https://perma.cc/3RAQ-76QZ>] (last visited Nov. 30, 2019). The user can change the ranking list on the basis of their own preference in relation to location, review score, etc.

to take into account the commission percentage, at least not explicitly.<sup>241</sup>

In return for the services of Amazon Marketplace, Amazon charges suppliers a “referral fee” (a percentage of the sales proceeds), a non-refundable subscription fee (monthly or per transaction) and where applicable, a “variable closing fee.”<sup>242</sup> eBay charges sellers a fee per transaction (usually a percentage of the selling price), an additional subscription fee for business sellers, and, it retains the right to charge a fee even where the item does not sell “for the introduction to a buyer for that item on the eBay site.”<sup>243</sup> It is particularly clear from this latter term that eBay is charging for *services* that it provides to buyers and sellers, which consist in the introduction of contract parties to one another, rather than making a profit through resale, in remarkably similar fashion to a traditional estate agent business.

Finally, for Apple App Store, many of the apps sold in the App Store are developed by third-party developers, and Apple earns a

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241. *What factors determine how my listing appears in search results?*, AIRBNB, <https://www.airbnb.co.uk/help/article/39/what-factors-determine-how-my-listing-appears-in-search-results?q=algorithm> [<https://perma.cc/6996-LTKZ>] (last visited Mar. 15, 2019).

242. *Amazon Payments – Selling on Amazon User Agreement*, *supra* note 207, § 4. The closing fee only applies to media items such as books, DVDs, etc. and is £0.50 per item at the time of writing. See *UK Amazon site*, AMAZON, [https://sellercentral.amazon.co.uk/gp/help/external/help.html?itemID=H78LW99F4XF3Z38&language=en\\_GB&ref=efph\\_H78LW99F4XF3Z38\\_cont\\_200336920](https://sellercentral.amazon.co.uk/gp/help/external/help.html?itemID=H78LW99F4XF3Z38&language=en_GB&ref=efph_H78LW99F4XF3Z38_cont_200336920) [<https://perma.cc/8VE4-5FLM>] (last visited Oct. 1, 2019). The referral fee ranges between 7% and 45% depending on the item (and depending on the particular Amazon site); *id.* The range provided is for the UK. For sellers using the “Fulfilment by Amazon” service where Amazon stores and ships the seller’s products to customers, there is a different compensation scheme. The sellers pay a “fulfilment fee” (a flat rate per unit fee based on product attributes) and a “storage fee” (per cubic foot per month). There is no subscription fee for this service. See *Pay only for the services you use*, AMAZON, <https://services.amazon.co.uk/services/fulfilment-by-amazon/pricing.html> [<https://perma.cc/BJK2-NJJH>] (last visited Oct. 1, 2019). For Fulfilment by Amazon orders, Amazon sets the shipping fee to customers. *Amazon Services Europe Business Solutions Agreement*, *supra* note 205, F.10.2.

243. *eBay User Agreement*, *supra* note 208. At the time of writing, eBay’s fee structure (for private sellers) works in the following way: no listing fees for the first 25 items (and a set fee per item to list thereafter); 10% of the final price (including shipping costs) when the item sells up to a set cap (£250 in the UK) per item; *What Fees You’ll Pay*, EBAY, <https://sellercentre.ebay.co.uk/private/what-fees-youll-pay> [<https://perma.cc/TL7S-PRMQ>] (last visited Aug. 3, 2018). For sellers making a lot of sales, eBay offers the option to set up an “eBay Shop” for a flat fee per month which allows the sellers to list up to 100 free listings a month. *Id.* eBay also has different fee structures for business (professional) sellers which include a subscription fee in addition to a final value fee calculated as a percentage of the selling price ranging between 6% to 11% at the time of writing (excluding motors sales). *Id.*

commission on each app purchased.<sup>244</sup> The price charged for the app is determined by the developer.<sup>245</sup> There are also annual fees that the developers have to pay to join Apple's developer program.<sup>246</sup>

In sum, except for Uber, none of the platforms have any (direct) influence over price-setting in relation to the products/services of the suppliers, which are offered on the platform. In terms of remuneration, all of the platforms are remunerated by a fee that reflects a percentage of the value of the transaction intermediated by the platform. Occasionally, there are also fees to join the platform. Notably, the main remuneration is through a fee that reflects a commission for the intermediation services provided by the platform rather than the platform's making profit through the sale/provision of the contract goods/services to third parties.

*C. Ownership, Investments, Liability and Risks Undertaken on the Relevant (Product/Services) Market*

Only two of the platforms explicitly state in their standard contracts that they do not have ownership of the subject matter of the transactions over their platform. eBay's terms and conditions stipulate that eBay does not have possession of things listed or sold through its website.<sup>247</sup> Similarly, Airbnb's terms also note that "Airbnb does not own, create, sell, resell, provide, control, manage, offer, deliver, or supply any Listings or Host Services, nor is Airbnb an organizer or retailer of travel packages."<sup>248</sup> However, it is worth noting that there is nothing in the business models or terms and conditions of the other platforms, which would suggest that they (could) have ownership of the subject matter of the contracts concluded on their platforms. In fact, in the case of Uber and Booking.com, the subject matter is a service (rides or room-booking). In the case of Booking.com, an explicit clause

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244. When a customer purchases a third-party app, arguably, the payment is submitted to the App Store, and 30% of that amount goes to Apple, with 70% going to the developer. See the alleged facts in *Pepper*, *supra* note 31, at 2-3. Technically, the apps made available through the App Store are licensed, not sold, to the user. *Apple Media Services Terms and Conditions*, *supra* note 214.

245. Apple also imposes a condition that the app is priced in dollar increments of .99 cents; *Pepper*, *supra* note 31, at 6 (Gorsuch, J. dissenting).

246. *iPhone Developer Program License Agreement*, *supra* note 213. See also *Pepper*, *supra* note 31, at 6 (confirming that there is an annual fee of \$99 for membership).

247. *eBay User Agreement*, *supra* note 208.

248. *Airbnb Terms of Service*, *supra* note 217.

stipulates that “Booking.com does not (re)sell, rent out, offer any (travel) product or service.”<sup>249</sup> Regarding Amazon Marketplace, where Amazon itself is not the supplier, it has no ownership of the products in question and an express term stipulates that it is the third-party seller (i.e. supplier) who sells the product.<sup>250</sup> In case of Apple App Store, it appears that for apps of developers, it is the third-party developer who licenses the app to the user (through the agency of Apple).<sup>251</sup>

In terms of investments or potential risks undertaken on the relevant market in relation to products/services provided to third parties, in the case of Booking.com, Amazon Marketplace, eBay and Apple App Store, it is not possible to detect relevant clauses in standard contracts (or elsewhere) regarding any investments or risks undertaken on the relevant market.

In the context of Uber, regarding investments on the relevant market, it is the drivers who supply the vehicle and the drivers are responsible for all costs related to owning and running the vehicle.<sup>252</sup> Thus, Uber does not appear to make investments or take risks in relation to the transport activity. Uber does vet the drivers in checking that they have the necessary documents, that their car meets the requirements set by Uber, etc. before they can offer their services on the platform, and Uber offers advice to drivers who do not have the compulsory private car hire license on how to get one.<sup>253</sup> Given that all of these relate to Uber’s efforts in facilitating more drivers to join the platform, these can be deemed to be investments in Uber’s platform business (i.e. the agency services market) rather than the relevant market concerning the services provided to customers. However, as of June 2018, Uber also appears to provide automatic insurance coverage for drivers satisfying certain eligibility criteria for the costs of on-trip as well as off-trip events, which can be seen as takings risks on the relevant market.<sup>254</sup> Having said that, given that the insurance provided

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249. *Trip Terms and Conditions*, *supra* note 239, ¶ 1.

250. *Amazon Services Europe Business Solutions Agreement*, *supra* note 205.

251. *Apple Media Services Terms and Conditions*, *supra* note 214. Users also have to agree that “Apple is a third-party beneficiary” of the license agreement applicable to each Third Party App and may enforce such an agreement. *Id.*

252. *Uber (ET)*, *supra* note 23, ¶¶ 44-45.

253. *The Basics: How to Drive with Uber in the UK*, UBER, <https://www.uber.com/en-GB/drive/requirements/> [<https://perma.cc/35YB-CU54>] (last visited May 15, 2019).

254. *Partner Protection Insurance*, UBER, <https://www.uber.com/en-GB/drive/insurance/> [<https://perma.cc/YGF3-HLSP>] (last visited May 15, 2019).

covers off-trip events as well, one could also consider this insurance to be an investment in Uber's platform business in order to attract more drivers to the platform. Airbnb also provides insurance for every property against accidental damage, as well as liability insurance to protect hosts against claims, which can be more easily considered as an investment in the relevant product/service market as the insurance is directly related to the services provided to third parties by the hosts.<sup>255</sup> Although this could also be seen as an investment in the Airbnb platform, it is to a lesser degree than the case with Uber as the insurance coverage is limited to the contingencies of the contract between the host and the third party. Nevertheless, both provisions of insurance can be part of the platform's strategy to combat the risk of "disintermediation" and keep users on the platform, as discussed in more detail below.<sup>256</sup>

In terms of promotional activities in relation to the contract goods/services, Booking.com promotes the properties listed on Booking.com on search engines as well as through affiliate partners, and offers assistance to hotels and their guests.<sup>257</sup> Such assistance could be seen as investment in the relevant market, but could equally be deemed an investment in Booking.com's own platform business. Similarly, Amazon Marketplace terms and conditions stipulate that Amazon will promote third-party products as determined by Amazon including via advertising.<sup>258</sup> Airbnb has similar terms on advertising the listed properties (and the platform).<sup>259</sup>

All of the standard contracts contain clauses of liability waivers and indemnity. For example, Uber disclaims all liability for the reliability, timeliness, quality, suitability or availability of the services or third-party providers (i.e. drivers).<sup>260</sup> Similarly, Amazon's standard terms include an indemnification clause by which Amazon excludes any liability for any claim, loss, damage, settlement, cost, expense, etc. in relation to products of sellers on the Marketplace.<sup>261</sup> The terms also limit liability of Amazon (and sellers) to damages resulting from willful

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255. *See Airbnb Overview, supra* note 236.

256. *See infra* note 341 and accompanying text.

257. *Booking.com Commission, supra* note 238. Booking.com provides verified guests reviews on the platform, as well as customer service in over forty languages.

258. *Amazon Services Europe Business Solutions Agreement, supra* note 205, § 1.2.

259. *Airbnb Terms of Service, supra* note 217, § 1.5.

260. *Uber UK Terms and Conditions, supra* note 197, pt. 2 § 5.

261. *Amazon Services Europe Business Solutions Agreement, supra* note 205, § 6.

conduct and gross negligence.<sup>262</sup> Similarly, the terms stipulate that the supplier is responsible for any non-performance, non-delivery, incorrect delivery, theft or other mistake or act in connection with the fulfilment and delivery of the products.<sup>263</sup>

In the same vein, eBay's agreement stipulates that while eBay may provide pricing, postage, listing and other guidance in [their] Services, such guidance is solely informational and [users] may decide to follow it or not. eBay does not review users' listings or content. . . . eBay has no control over and does not guarantee the existence, quality, safety or legality of items advertised; the truth or accuracy of users' content, listings or feedback; the ability of sellers to sell items; the ability of buyers to pay for items; or that a buyer or seller will actually complete a transaction or return an item.<sup>264</sup>

Similar to eBay's terms, Airbnb's terms also indicate that Airbnb does not control or guarantee "(i) the existence, quality, safety, suitability, or legality of any Listings or Host Services, (ii) the truth or accuracy of any Listing descriptions, Ratings, Reviews, or other Member Content . . . , or (iii) the performance or conduct of any Member or third party."<sup>265</sup> Booking.com has similar liability exclusion terms.<sup>266</sup> According to Airbnb's "Terms of Service," hosts alone are responsible for "identifying, understanding, and complying with all laws, rules and regulations that apply to their Listings and Host Services."<sup>267</sup>

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262. *Id.* § 7.2b. Prior to changes to Amazon's business terms following a Bundeskartellamt investigation (*supra* note 21), the terms had released Amazon from any claim, demand, damages, etc. in relation to any such disputes between market participants because Amazon was stipulated not to be involved in transactions between customers and sellers.

263. *Amazon Services Europe Business Solutions Agreement*, *supra* note 205, § 3.1. Prior to changes to Amazon's business terms following a Bundeskartellamt investigation (*supra* note 21), Amazon also required parity between the supplier's different sales channels and Marketplace in relation to quality of products and level of customer service. Amazon used to require price parity across sales channels, too, but it abandoned this practice in the United States in Mar. 2019, and earlier in the EU as a result of an investigation by the Bundeskartellamt. See Ahiza Garcia, *Amazon will no longer dictate how sellers price their products*, CNN (Mar. 12, 2019), <https://edition.cnn.com/2019/03/11/tech/amazon-price-stipulations/index.html> [<https://perma.cc/GE93-QA26>]; *Amazon abandons price parity clauses for good*, BUNDESKARTELLAMT (Nov. 26, 2013), [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26\\_11\\_2013\\_Amazon-Verfahrenseinstellung.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html) [<https://perma.cc/7DQ3-8E2P>].

264. *eBay User Agreement*, *supra* note 208.

265. *Airbnb Terms of Service*, *supra* note 217.

266. *Trip Terms and Conditions*, *supra* note 239.

267. *Airbnb Terms of Service*, *supra* note 217.



Finally, according to Apple's terms, "the App Provider of any Third Party App is solely responsible for its content, warranties, and claims that [the user] may have related to the Third Party App."<sup>268</sup> Apple sets content usage rules for consumers, and "may monitor [users'] use of the Services and Content to ensure that [they] are following these Usage Rules."<sup>269</sup> Both user and developer terms and conditions include liability waiver terms in favor of Apple.<sup>270</sup>

There are two further sets of terms found in the standard contracts of platforms, which are possibly unusual for traditional agency agreements. The first type of terms involves a prohibition/restriction of contact imposed by the platform (i.e. putative agent) between supplier (i.e. putative principal) and customer (i.e. third party) outside of the platform. All but one of the platforms studied impose restrictions of contact between the contracting parties. For example, with Uber, drivers can neither obtain passengers' contact details nor provide their own to the passengers.<sup>271</sup> Similarly, Amazon Marketplace sellers are prohibited from circumventing the Amazon sales process or diverting customers to another website or sales process.<sup>272</sup> Sellers are also prohibited from sending unsolicited emails to customers (other than those necessary for order fulfilment and related customer service), and marketing emails; they must contact buyers only through the messaging tool provided by Amazon.<sup>273</sup> Similar to Uber and Amazon, eBay has a policy of preventing buyers and sellers from using eBay to contact each other to make offers to buy or sell outside of eBay.<sup>274</sup> Similar to Amazon, eBay prohibits the use of the contact information of other users for any purpose other than in relation to a specific eBay

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268. *Apple Media Services Terms and Conditions*, *supra* note 214.

269. *Id.*

270. *Id.*

271. This was one of the facts relied on by the Employment Tribunal in rejecting the finding that the drivers are the principal and Uber is the agent. *Uber (ET)*, *supra* note 23, ¶ 92.

272. See *Prohibited seller activities and actions*, AMAZON, [https://sellercentral.amazon.co.uk/gp/help/external/G200386250?language=en\\_GB](https://sellercentral.amazon.co.uk/gp/help/external/G200386250?language=en_GB) [<https://perma.cc/HYS8-NCSA>] (last visited Oct. 1, 2019). Previously, *Amazon Services Europe Business Solutions Agreement*, *supra* note 205, § 15, obliged sellers not to contact Amazon users directly about an order that they have placed with the aim of influencing them to make an alternative purchase or indirectly target them by communications of any kind.

273. *Id.*

274. *Offers to buy or sell outside eBay*, EBAY, <https://pages.ebay.co.uk/help/policies/rfe-spam-non-ebay-sale.html> [<https://perma.cc/9EJ5-PK7P>] (last visited Aug. 2, 2018). As mentioned above, sellers are liable for fees arising out of all sales made using some or all eBay services, even if sales terms are finalized or payment is made outside of eBay. *Id.*

transaction.<sup>275</sup> Airbnb also has rules against members contracting with each other outside of Airbnb to circumvent their agreement with Airbnb.<sup>276</sup> Booking.com has similar restrictions in relation to allowing property/hotel owners and guests to contact each other, through the provision of anonymous alias email addresses, etc. although some contact outside the platform remains possible.<sup>277</sup> Such a clause is not found in Apple's terms and conditions since the issue of contact is not relevant to Apple App Store: the apps on App Store can only be used on iPhones and only those apps on App Store can be used on iPhones, so contact between a developer and user outside of the App Store is a non-issue for Apple unlike for all the other platforms.

The second set of peculiar terms found in platform contracts relate to mechanisms put in place by platforms to exclude suppliers (i.e. putative principal) (and occasionally customers) from the platform if they do not comply with certain terms and conditions as well as in case of "poor performance." For example, concluding a sale outside of eBay after using eBay to make initial contact can lead to the seller's and/or buyer's exclusion from using the site.<sup>278</sup> In the same vein, it is possible for riders as well as drivers to lose access to the Uber App as a result of poor ratings.<sup>279</sup> Similar to Uber's business model, Amazon also regularly reviews "the performance of all sellers and notify them when

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275. *eBay User Agreement*, *supra* note 208. For further details of eBay's seller performance policy, see *Seller performance policy*, EBAY, <https://www.ebay.com/help/policies/selling-policies/seller-performance-policy?id=4347> [<https://perma.cc/YKB6-RTDM>] (last visited Nov. 30, 2019).

276. *Airbnb Terms of Service*, *supra* note 217. Airbnb allows contact between them to ask questions about a booking, etc. *Id.*

277. Booking.com reveals guests' contact details to property owners after a booking is made, so technically property owners may be able to contact guests outside the platform (e.g. by phone). *What information about reservations can I see in the extranet?*, BOOKING.COM, <https://partnerhelp.booking.com/hc/en-gb/articles/360001423048-What-information-about-reservations-can-I-see-in-the-extranet> [<https://perma.cc/Z659-A3CD>] (last visited Feb. 15, 2019). However, the email addresses provided are not the actual, private addresses, and Booking.com has access to all communication sent via Booking.com; *Does Booking.com have access to the messages I send to guests*, BOOKING.COM, <https://partnerhelp.booking.com/hc/en-gb/articles/115003976749-Does-Booking-com-have-access-to-the-messages-I-send-to-guests> (last visited Feb. 15, 2019).

278. *Offers to buy or sell outside eBay*, *supra* note 274.

279. Uber "Community Guidelines" is available as only applicable to US riders and drivers. *Uber Community Guidelines*, UBER, <https://www.uber.com/legal/community-guidelines/us-en/> [<https://perma.cc/XR28-NJZM>] (last visited Oct. 1, 2018). The fact that Uber subjects drivers to a rating system was held to be a "powerful point" indicating that drivers work for Uber as "workers" in *Uber (CA)*, *supra* note 23, ¶ 96.

they are off-target.”<sup>280</sup> Amazon “occasionally” suspends or blocks sellers with “very poor performance” with immediate effect and otherwise gives sellers 60 days for measurable improvement in performance.<sup>281</sup>

Airbnb also retains the right to suspend or terminate accounts (of guests and hosts) based on performance (e.g. cancelled bookings, etc.).<sup>282</sup> Booking.com has similar rules in relation to hotels where, for example, legitimate and serious complaints from guests can lead to termination of the contract by the platform.<sup>283</sup> Similarly, Apple reserves the right to terminate or suspend the developer as a registered Apple Developer at any time in Apple’s sole discretion, in the same way that the developer may terminate his participation as a registered Apple Developer at any time, for any reason.<sup>284</sup> Unlike the other platforms’ terms and conditions, Apple’s terms do not explicitly relate this to “poor performance.”

In sum, none of the platforms studied have ownership of what is being sold/provided to third parties through the facilitation of the platform. Some of the platforms take on some limited risks and undertake some limited investments in relation to the relevant market. All but one of the platforms restrict direct contact between suppliers and customers (i.e. contracting parties). All of the platforms have measures in place for excluding users from their platform. Finally, all of the platforms have clauses that exclude their liability for various contractual failures and malfunctions in relation to the products/services provided by the suppliers to third parties. Diagram 1 below summarizes the pertinent aspects of the platform standard contracts to illustrate the factors that are relevant to the legal characterization of the platform business model.

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280. See *Seller Performance Measurement*, AMAZON [https://sellercentral.amazon.co.uk/gp/help/external/200370550?language=en\\_GB&ref=efph\\_200370550\\_cont\\_521](https://sellercentral.amazon.co.uk/gp/help/external/200370550?language=en_GB&ref=efph_200370550_cont_521) [<https://perma.cc/Z89H-UY7L>] (last visited Oct. 1, 2019). Performance is measured on the basis of the “Order Defect Rate” which relates to the percentage of orders on which the seller received negative feedback, etc.

281. *Id.*

282. *Airbnb Terms of Service*, *supra* note 217, Section 15.5. Similar to eBay’s terms and conditions, Airbnb’s also include terms on excluding liability and indemnification. *Id.* Sections 17-18.

283. *General Delivery Terms*, BOOKING.COM, <https://partner.booking.com/en-gb/help/working-booking/what-are-bookingcom's-hospitality-standards> [<https://perma.cc/3PJC-NXHD>] (last visited Nov. 20, 2019).

284. *Apple Developer Agreement*, *supra* note 213, ¶ 10.

	Customer price-setting	Commission model payment	Contractual stipulation of agency	Contractual stipulation that transaction between supplier & customer	Terms imposed into contract with customer	Restriction of contact between supplier & customer outside of platform	Ability to exclude supplier and/or customer from the platform	Liability waiver for contract with customer
Uber	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Amazon	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
eBay	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Apple	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Airbnb	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Booking	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

Diagram 1 – Platform standard terms and conditions

#### V. APPLICATION OF AGENCY PRINCIPLES AND SINGLE ECONOMIC ENTITY DOCTRINE TO PLATFORMS

This Section brings together the relevant factors indicating agency from the different areas of law discussed in Sections II and III, and applies these to the platform standard contracts as exposed in Section IV to establish whether platforms are agents of their suppliers on the basis of these factors and their standard contracts. It should be noted at the outset that this exercise is one of balancing in trying to establish whether the factors which point towards the existence of agency outweigh any factors that may suggest otherwise. This is because in commercial relations, where an authority looks beyond the contract between parties in determining what the “real” economic and commercial context is, it is inevitable that such determination will be

the outcome of a balancing act. As noted above,<sup>285</sup> the areas of law studied do look beyond the contract to establish the real economic and commercial context, and the balancing act becomes necessary in such assessments. This Section applies the findings on agency from all of the areas of law studied, rather than just competition law, in its striving for consistency, and legal and business certainty, which can be established to a greater degree if the legal characterization of platforms were uniform under different areas of the law. Given that the concepts of agency found in these different areas of law broadly reflect the same principles, it is, indeed, also to be expected that these different areas of law adopt the same legal characterization of the same business arrangement in establishing whether it is one of agency. The holistic treatment of principles of agency from different areas of law is also justified by the fact that, as noted above,<sup>286</sup> these other areas of law have dealt with many more questions concerning the commercial delegation model of agency and its fundamental, operational principles than competition law, and thus provide important general guidance for the competition law assessment of such arrangements where competition law lacks such established general principles. When it comes to platforms in particular, competition law has not yet established general principles in any aspect of the legal question of agency.

Reviewing the findings from Sections II and III in relation to factors demonstrating the existence or absence of agency leads to the identification of the following factors as being significant. Concerning common law and commercial agents, these relate to: contractual stipulations as to the existence of agency; how the intermediary is remunerated (i.e. being remunerated for services as opposed to by profit); commercial interest alignment (resulting from the fiduciary relationship with the principal); scope of authority in changing the principal's legal position; warranting to use reasonable endeavors (as opposed to warranting success), and, ownership of contract goods. Intermediaries which introduce contracting parties to one another even if they do not conclude contracts on behalf of either party can also be agents (e.g. estate agents). Notably, factors which do *not* prevent a finding of agency include those such as: the principal's lack of control over the agent; the agent's ability to influence and even set the final price paid by the third party; the undisclosed nature of the principal;

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285. *See supra* notes 78 and 152 and accompanying text.

286. *See supra* note 34 and accompanying text.

the agent's acting for competing principals (where the nature of the business so requires); the agent's occasional bearing of costs of refunds for defective goods and some commercial risk arising out of the contracts between the principal and third parties. In competition law, the contract is also the starting point for the assessment with the main criterion revolving around the agent's undertaking of commercial or financial *risks* on the relevant market (i.e. those risks which relate to the performance of the contract with third parties). These risks can result from investments in relation to the contract goods/services or from other activities required by the principal on the relevant market. Negligible risks undertaken by the intermediary do not prevent it from being an agent. Some promotional measures aimed at the public on the relevant market do not prevent a finding of agency, either. Similarly, risks undertaken on the agency market as opposed to the market for the products/services provided to third parties (i.e. relevant market) are *not* relevant risks in this assessment. Ownership of the goods and the contract's being concluded between the third party and the putative principal are also relevant factors in competition law, similar to the other areas of law studied. Price-setting power is relevant in competition law in the context of risk-taking as it suggests the ability to determine commercial strategy and influence competition on the market, which would normally imply the absence of agency.<sup>287</sup> This is a factor regarding which competition law differs from the other areas of law studied in the emphasis it places on it in relation to the existence or absence of agency.

After applying all of the findings from Sections II and III to the terms and conditions set out in Section IV, one can conclude that platforms studied in this article appear to be, on balance, independent contractors (as opposed to employees) who are agents of their suppliers.<sup>288</sup> Further, given that platforms facilitate particular transactions on behalf of their suppliers on the relevant market, and it is only in this context that they act for and/or on behalf of the suppliers, they appear to be "special agents" under the traditional distinction

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287. This is reflected in the treatment of agency in the Verticals Guidelines, *supra* note 35, ¶ 18 as noted in accompanying text to *supra* note 162.

288. This author has argued that this is the case for platforms such as Apple eBooks and Booking.com in the context of an assessment of most-favored-customer clauses; *see* Akman, *supra* note 7, at 812.

recognized in English law between special and general agents.<sup>289</sup> The rest of this Section explains the reasons for which platforms are agents under the existing case law and rules found in the different areas of law studied.

As an initial remark, it is worth reiterating the relevance of internal and external aspects of agency, as discussed above.<sup>290</sup> Notably, the EU Verticals Guidelines as well as the EU Directive on Commercial Agents (and the UK Commercial Agent Regulations) define agents as persons vested with the power to negotiate *and/or* conclude contracts on behalf of another, so concluding contracts to change the principal's legal position does not appear essential for qualification as agency.<sup>291</sup> The power to *negotiate* contracts suffices for it. In fact, in the context of the single economic entity doctrine, given that the inquiry relates to establishing whether the two entities in question are part of a single undertaking, even relations which demonstrate only the *internal* aspects of agency may qualify the relevant intermediaries as agents. In any case, applying the common law rules, it appears that platforms demonstrate not only the internal, but also *external* aspects of agency. This is because all of the platforms studied at least hold money for their principals and/or receive and communicate information on their principals' behalf and/or ultimately conclude the contract on the principal's behalf through the interaction of the customer with the platform with no further dealings between customer and the supplier. The platforms also have a degree of control in the operation of some aspects of the contract between the suppliers and customers through insertion of clauses in these contracts which they facilitate, demonstrating the ability to change the principal's legal position without any further negotiation between the actual contracting parties (i.e. the principal and the third party). Thus, both internal and external aspects of agency are present in the case of platforms.

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289. According to Bowstead and Reynolds, the distinction between special and general agents may no longer be of much utility in English law despite being a well-established one; BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 1-045. Because the doctrine of apparent authority in England is explained without reference to this distinction these days instead by invoking estoppel, etc.. *Id.* ¶ 1-045.

290. See accompanying text to *supra* note 39.

291. See Verticals Guidelines, *supra* note 35, ¶ 12. See also Directive, *supra* note 66, arts. 1, 2(1). This is also the case for RESTATEMENT, *supra* note 42, § 1.01, which only refers to acting "on the principal's behalf" in defining agency.

In terms of contractual stipulations as to the nature of the agreement being that of agency, as exposed in Section IV, whilst Uber, Booking.com and Apple App Store self-proclaim to be agents, the opposite is true for Amazon, eBay, and Airbnb. Interestingly, there is nothing obvious or inherent in the business models of these six platforms that would justify this difference in the legal characterization of their business models. In fact, what they all do in facilitating transactions between contracting parties is remarkably similar in nature despite their activities being focused in different business sectors. As also noted above,<sup>292</sup> no area of law studied is bound by the wording of the contract in terms of the legal characterization, and the assessment is conducted on the basis of the “real” commercial context. Having said that, where there is no reason to disregard the contractual wording, in commercial disputes, the contractual wording will be held to be valid in its characterization of the relevant business relation.<sup>293</sup> Thus, in such cases where the platforms’ contracts stipulate the existence (or absence) of agency, to rebut that clause, one will need to provide sufficient evidence to demonstrate that the “real” economic and commercial context proves a different business arrangement. For all the platforms studied in this Article, including those that self-proclaim not to be agents, the nature of their commercial activities points to the existence of an agency arrangement rather than any other arrangement, as demonstrated by the overall content of their standard contracts studied in Section IV. The rest of this Section elaborates further on the reasons for this finding.

None of the platforms studied have ownership of the products/services for which they facilitate transactions. In fact, all of the platforms’ terms and conditions *exclude* liability in relation to the performance of the contract between the supplier and the customer. These are factors that qualify them as agents in all the areas of law studied. Normally, these platforms neither make market-specific

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292. See *supra* notes 78 and 152 and accompanying text.

293. See *MIG*, *supra* note 74, discussed in accompanying text to *supra* note 78. In the ongoing employment litigation against Uber in the UK, the courts appear to be suggesting that some of Uber’s contracts may be “sham” contractual arrangements; see e.g., *Uber (CA)*, *supra* note 23, ¶ 105. *But see Uber (CA)* (Underhill LJ, dissenting), *supra* note 23, ¶ 146 (finding that “the relationship argued for by Uber is neither unrealistic nor artificial.”). The current Article proceeds on the assumption that the standard contracts studied here are not “sham” contracts, not least because such a factual assessment needs to be conducted on a case-by-case basis with relevant factual evidence, which is beyond the scope of this Article.



investments nor invest in sales promotion for particular products/services of their suppliers.<sup>294</sup> Crucially, platforms do not assume any significant financial or commercial risks related to the sales or performance of the contract with *third parties* (i.e. on the relevant market).<sup>295</sup> There appear to be some limited exceptions to this in cases of, for example, provision of insurance or advertising. Yet, these appear to be, overall, negligible, and certainly within the scope of the case law

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294. Cf. Gurin & Peepkorn, *supra* note 11, ¶ 9.58, who argue that “investments to create, maintain, and update [a platform’s] specialized website to be active on a particular market” are “market-specific investments” that entail “risks” of the type which cannot be borne by the “principal” (i.e. supplier) and thus, lead to the conclusion that platforms are not agents. This author would respectfully disagree with the characterization of such investments as relevant risks in the assessment of agency under the single economic entity doctrine since those investments (and the ensuing risks) relate to investments in the “agency market” and *not* in the “relevant market” (i.e. the relevant market for the particular products/services provided to third parties). Such market-investments by a platform are not made in relation to a given product/service of a given supplier, but are made in relation to the platform’s own business, which by being an online business requires the creation and maintenance of a website. This is implicitly acknowledged by Gurin & Peepkorn, *supra* note 11, ¶ 9.58, when they remark that “[i]t is, in particular, difficult to imagine how these market-specific investment costs and risks can be transferred to the supplier if other suppliers’ products are also sold on the same distributor’s website.” Although the authors make this point to support the argument that because of this impossibility of transfer of these risks to the supplier, the platforms are not agents, the same point demonstrates why the market-specific investments referred to by the authors are *not* the relevant type of investments/risks. Had they been of the relevant type of risks (i.e. those risks that arise out of the contract with the third parties), then it would have been possible for such risks to be borne either by the supplier or by the principal. The fact that the investments/risks identified by Gurin & Peepkorn can only be borne by the platform is proof that those investments/risks relate to the “agency market” and not to the “relevant market,” and thus, are not relevant risks in the assessment of agency under the single economic entity doctrine.

295. Cf. *HRS*, *supra* note 11, ¶ 148 where the Bundeskartellamt found that HRS was “not a dependent agent since HRS bears its own financial and economic risk” on the basis of factors such as the HRS investment in advertising the HRS “brand,” the establishment of a contractual network with a large number of hotels and cooperation partners (e.g. major travel companies), as well as the establishment and ongoing technical refinement and development of the content of the HRS website, and cooperation with major Internet providers, such as Amadeus, Google, Facebook, etc. With all respect to the Bundeskartellamt, all of these relate to investments and risks related to the market for the agency business, and not the relevant market on which products/services are provided to third parties, which is the relevant market for the assessment of risks. The Swiss Competition Comm’n has followed a similar approach in *COMCO Online Booking*, *supra* note 6, ¶ 99 when it held that the online travel agents such as Booking.com are not agents for competition law purposes because of “the fact that operating an online-booking platform requires high market-specific investments, for example investments concerning marketing for the platform as well as for the respective distribution infrastructure (homepage, reservation systems, IT-infrastructure etc.)” With all respect to COMCO, this finding also confuses the two markets and focuses on the wrong market in relation to the assessment of risks (i.e. the agency market). For the distinction between the two markets, see AG Opinion, *supra* note 136 and accompanying text.

on agency in common law and commercial law. Further, some of these investments (e.g. advertising) and risks can be deemed to relate to the platform market (i.e. the agency market) as opposed to the relevant market, which would imply that they are not relevant to the assessment of agency. The main, and perhaps the only, non-negligible risk that any of the platforms studied takes is the risk of not earning a commission where the contract between a supplier and a third party is not concluded on the platform. This, however, is a risk that relates to the activity of providing agency services in general and is not material to the assessment of agency.<sup>296</sup>

All of the platforms' standard contracts stipulate that the contract is formed between the supplier and the customer, which is another factor indicating agency under all areas of law studied. Indeed, it appears that irrespective of the time of contract formation, namely, whether the platform in question concludes the contract for the supplier, or, whether the supplier and the customer conclude the contract between themselves (after being "introduced" by the platform), the platform can be an agent. This is important because in the online services offered by platforms, it is not always clear at which point the contract is concluded between the supplier and the customer, which can blur the precise role played by the intermediary facilitating the transaction. There is normally not a separate dealing between the supplier and the customer other than the interaction that takes place between the customer and the platform. However, for contract law purposes, the time of contract formation may or may not be when the customer engages with the platform, depending on the platform and the activity in question.<sup>297</sup> For example, the time of contract formation may be when the supplier accepts the order placed by the customer on a platform where products are sold. In contrast, the time of formation for booking accommodation may be when the platform accepts the guest's request to book a room with immediate confirmation. These different scenarios can have different consequences in relation to whether the contract has been concluded *by* the agent *for* the principal or not. The important point for the purposes of this Article is that intermediaries who do not technically conclude the contract for the principal may also be agents in common law (e.g. estate agents). This is because it is sufficient for the intermediary to *negotiate* the contract to qualify as an

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296. See accompanying text to *supra* note 158; Verticals Guidelines, *supra* note 35, ¶ 15.

297. For a contract law assessment of the agreement between a rider and a driver using Uber's platform, see, e.g., *Uber (CA)*, *supra* note 23, ¶¶ 76-82.

agent. Thus, the contractual inquiry is not strictly necessary for or relevant to establishing the legal position of platforms as agents. As already mentioned, this is also the approach of the EU Verticals Guidelines and the EU Directive on Commercial Agents (and the UK Commercial Agents Regulations), which all acknowledge that agents may simply negotiate contracts rather than having to conclude contracts.<sup>298</sup> In fact, in the context of platforms, the nature of the business model and of e-commerce might suggest that even “negotiating” contracts in the traditional sense is not necessary for the intermediary to qualify as an agent. This was the outcome upheld by the Court of Appeal in *Insurancewide.com* concerning a tax law dispute, where the court held that an insurance comparison website was an intermediary that qualified as an (insurance) agent despite the fact that the website had nothing to do with the negotiation of the terms of the insurance contract or its preparation or the collection of premiums or the handling of claims.<sup>299</sup> This is because the comparison site in question was providing services characteristic of an insurance broker or agent, which were vital to the process of *introducing* those seeking insurance with insurers.<sup>300</sup> Given that the platforms studied here not only introduce the contracting parties, but also impose terms into the contract between the supplier and the customers, they arguably do more than what was accepted to be sufficient “negotiating” in *Insurancewide.com*, and *argumentum a fortiori* satisfy the requirement of negotiating contracts as agents.

Another relevant point for platforms derived from agency law is that the fact that on some platforms the supplier (i.e. principal) is not disclosed to the consumer does not render the platform a non-agent. Thus, for example, the fact that a passenger may not know with whom she is entering the contract of transport when using Uber which facilitates a match with a driver, does not prevent Uber from being an

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298. See *supra* note 291. See also *Peugeot 2*, *supra* note 163, ¶ 48 in the same vein.

299. The Commissioners for HM Revenue & Customs v. *Insurancewide.com Services Ltd.*, *Trader Media Group Ltd.* [2010] EWCA (Civ) 422, ¶ 87. The case concerned VAT and the application of a VAT exemption to insurance intermediaries.

300. *Id.* It was also immaterial that *Insurancewide.com*'s terms and conditions included a denial that it was an insurance broker or intermediary. *Id.* ¶ 88. See also *Fryer*, *supra* note 72, on the interpretation of “negotiate” in this context.

agent of that “undisclosed principal.”<sup>301</sup> It is also notable that in agency law, limited control of the principal over the intermediary does not prevent agency. This is also relevant to platforms since in relation to most platforms studied in this article, the supplier does not necessarily have much control over the actions of the platform in its facilitation of transactions with users, which is usually a more powerful commercial entity than the supplier itself (e.g. Amazon Marketplace versus a retailer; Uber versus a single driver). Yet, an agent-principal relationship need not assume that power lies with the principal.<sup>302</sup> For example, in *Secret Hotels2*, the UK Supreme Court held that Secret Hotels2, a platform which marketed holiday accommodation consisting of thousands of hotels, villas, etc. through a website—similar to Booking.com and Airbnb in business activity—was an agent of the hoteliers which had their hotels listed on the website.<sup>303</sup> According to “terms of use” on the website, the customer (travel agents and holiday-makers) had to pay the whole of the sum which she had agreed with Secret Hotels2 (at the time “Med”) to pay for the holiday before the holiday-maker arrived at the hotel.<sup>304</sup> Med, however, only paid the hotel a lower sum when the holiday ended.<sup>305</sup>

The case concerned the VAT liability of Med which in turn hinged upon whether it was Med who supplied the room to the customer in return for the whole of the sum (in which case Med would have essentially booked the room for the lesser sum) or whether it was through Med’s agency that the hotelier supplied a hotel room to a customer for the larger sum (in which case Med would have been entitled to the difference between the two sums as a commission from the hotelier acting as his agent).<sup>306</sup> Essentially, the question was whether Med was the principal or the agent when making the supplies of hotel accommodation. Thus, the legal issue was remarkably similar to that of, for example, whether it is Uber that provides the transport

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301. In situations where the customer believe that she is dealing only with the agent and the terms and conditions have the agent’s name on them rather than that of the supplier, the agent becomes an undisclosed agent; SINGLETON, *supra* note 70 at 3, 48.

302. *Uber (EAT)*, *supra* note 23, ¶ 111. *See also* The Commissioners for Her Majesty’s Revenue & Customs v. Secret Hotels2 Ltd. [2014] UKSC 16. *Cf.* Gurin & Peeperkorn, *supra* note 11, ¶ 9.58.

303. *Secret Hotels2*, *supra* note 302, ¶¶ 45-50.

304. *Id.* ¶ 4.

305. *Id.*

306. *Id.* ¶¶ 10, 12.

service to riders or whether it is the drivers who provide the services to riders through Uber's agency. The Supreme Court found that the hotel room was provided by the hotelier to the customer through the agency of Med.<sup>307</sup> This was despite the fact that Med was, as a result of its superior bargaining power, able to impose terms on the hoteliers such as that relating to the hotelier having to compensate Med for its losses (including loss of commission) if the hotelier could not provide the accommodation it had agreed to provide to a customer. Further, the agreement was very one-sided in that it contained no express obligations on Med other than basic obligations (such as dealing accurately with the requests for bookings and relating all monies received from customers to hoteliers) whilst containing many obligations imposed on the hotelier.<sup>308</sup> In fact, even Med's ability to fix its own commission did not mean that the relationship was one other than that of agency.<sup>309</sup> The UK Supreme Court also emphasized the fact that it was the hotelier, not Med, who owns the accommodation and it is the customer, not Med, to whom it is ultimately supplied.<sup>310</sup> The similarity of the facts in these cases and the business model of platforms studied in this Article is striking, which suggests that in the United Kingdom, the business models of these platforms would be considered as that of agency if this Supreme Court precedent were applied by analogy.<sup>311</sup>

Indeed, the facts noted by the PC in *Hong Kong Golf Club* which relate to the control that the agent had over the principal, as well as the collection of fees from customers before making payments to the caddies,<sup>312</sup> are also highly similar to the facts of how the platform business model works, and would suggest that the platforms studied here are also agents, even if they may "recruit" the suppliers (e.g. drivers) and have the power to discipline them (e.g. by excluding them from the platform), etc. Interestingly, the factors noted in *Hong Kong Golf Club* are comparable to the facts which the CoJ used to justify its finding in *Uber Spain* that Uber was a transport service and *not* an intermediation service (e.g. that Uber exercises "decisive influence"

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307. *Id.* ¶ 36.

308. *Id.* ¶¶ 41, 39.

309. *Id.* ¶ 41.

310. *Id.* ¶ 57.

311. This appears to be also how Underhill LJ interprets *Secret Hotels2* in his dissenting opinion in *Uber (CA)*. *Uber (CA)*, *supra* note 23, ¶ 153. See *infra* note 314 for further discussion.

312. See generally *Hong Kong Golf Club*, *supra* note 108.

over the conditions under which the drivers provide the service).<sup>313</sup> This suggests that a UK court may reach the opposite outcome to that reached by the CoJ in *Uber Spain* in a similar dispute concerning a platform if it applies *Hong Kong Golf Club* and *Secret Hotels2* to a case concerning such a platform. In fact, the similarity between cases such as *Hong Kong Golf Club* and *Mingeley* concerning taxi companies and *Insurancewide.com* and *Secret Hotels2* concerning online intermediaries and the business model of the platforms studied in this article is clear: there appears to be no apparent reason which would justify a different legal characterization of platforms than that of agency given this case law, at least in English law.<sup>314</sup> This outcome is

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313. See Case C-434/15, *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:98 (2017) ¶¶ 10, 12. See Advocate General Szpunar Opinion in Case C-390/18, *YA, AIRBNB Ireland UC, Hôtelière Turenne SAS, Pour un hébergement et tourisme professionnel (AHTOP), Valhotel*, ECLI:EU:C:2019:33 (2019) ¶¶ 69-71, where AG Szpunar differentiates the service provided by Airbnb from that provided by Uber in emphasizing, *inter alia*, that Airbnb does not exercise decisive influence over the conditions under which the relevant services are provided.

314. In *Uber (CA)*, the CA refused to apply *Secret Hotels2* in the ongoing employment litigation between Uber and drivers, and instead held that *Autoclenz*—which was not cited to the UK Supreme Court in *SecretHotels2*—is the relevant precedent. *Uber (CA)*, *supra* note 23, ¶ 54. The CA appears to distinguish *SecretHotels2* on the basis that the case did not concern employment and there was no suggestion in the case that the written terms represented what was occurring on the ground, and that there was undoubtedly a contract between each hotel and Med unlike Uber’s argument in the ongoing litigation that there was no contract between Uber London Limited and drivers. *Id.* ¶ 53. The CA also distinguished *Mingeley*, *supra* note 112, on the facts in *Uber* in finding that the “critical finding in *Mingeley* was the absence of any requirement for the driver to accept a fare offered to him by the system.” *Id.* ¶ 57. The Court held that this was in contrast to the situation with Uber. *Id.* ¶ 56. However, Uber drivers can also request different fares than that recommended by Uber’s algorithm in that they can accept a lower sum from the rider. See *supra* note 233 and accompanying text. If it is unusual on the facts for an Uber driver to do so, it is presumably just as unusual for a minicab driver as the one in *Mingeley* to accept a different fare than that provided by the taxi company’s system in practice. In fact, see the dissenting opinion of Underhill LJ in *Uber (CA)* noting that “it is very common for minicab operators to prescribe set fares, but the drivers may nonetheless contract as principals.” *Uber (CA)*, *supra* note 23, ¶ 138. There is one notable difference in the facts of two cases, namely that drivers in *Mingeley* paid a weekly sum to the taxi company rather than commission per ride as is the case with Uber drivers. As also noted by the CA, in *Mingeley* the driver kept all the fare money. *Id.* ¶ 56. However, in another case with very similar facts to *Mingeley*, it was held that such payment was essentially “commission” by a tax tribunal, and the CA in *Uber* does not elaborate on why the same would not be the case for the weekly sum paid by the driver in *Mingeley*. See *Khalid Mahmood v. the Commissioners for HM Revenue and Customs* [2016] UKFTT 0622 (TC) ¶¶ 43-45. The CA also distinguished *Khan* on the grounds that the question in that case was whether there was a contract of employment and not whether the driver was providing services as the same type of “worker” as relevant in *Uber*. *Uber (CA)*, *supra* note 23, ¶ 58. With all respect to the CA, given how much emphasis it put on the relevant

diametrically opposed to, for example, the findings of the Bundeskartellamt which used, *inter alia*, the fact that the restraint in question was imposed by the platform over the supplier as a result of the superior bargaining power that the platform had over the supplier to justify its finding that the platform (i.e. online travel agent) was not an agent of the supplier (i.e. hotels) in the provision of hotel rooms to guests in *HRS*.<sup>315</sup> Thus, the potential for adopting different legal characterizations of identical business models—and possibly identical businesses—with the consequence of diminishing business and legal certainty for platforms operating globally on standard contracts is clear.<sup>316</sup>

The issue of the interests of the principal and the agent being commercially aligned rather than commercially adverse—a reflection of the fiduciary relationship between the principal and the agent—is also relevant to the characterization of platforms and needs to be further elaborated on. In relation to a platform’s facilitating a transaction between a customer and a supplier on the platform, the commercial interests of the platform and the supplier are normally aligned and not adverse. This is because when a transaction is facilitated on the platform in relation to the sale/provision of a product/service on the relevant market to the third party (i.e. customer), both the supplier and

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commission and fares in explaining why *Mingeley* is not applicable to the facts in *Uber*, given the similarity of facts in *Khan* and *Uber* including how commission is paid, it would have been helpful for the Court to elaborate further on this. Having said that, unlike *Mingeley* which is a judgment of the CA itself, *Khan* is an unreported EAT decision, which would *not* have been binding on the Court, anyway. In *Uber*, the CA also distinguished *Hong Kong Golf Club*, *supra* note 108, on the facts and held that it was of no assistance in the case at hand because it concerned the question whether the golf caddie was an independent contractor or an employee rather than whether he was a “worker” as is the case in *Uber*. *Id.* ¶ 68. Again, with all respect, the CA appears to have dismissed the relevance of the case perhaps too easily—not least because Uber’s argument is that it is an agent of the drivers as was the finding in relation to the golf club in *Hong Kong Golf Club*. The dissenting opinion of Underhill LJ in *Uber (CA)* also supports the point that *Mingeley*, *Khan* and *Hong Kong Golf Club* are of assistance in the case. *Id.* ¶ 144. In fact, the Dissenting Opinion also accepts that *SecretHotels2* confirms that “the operator of an internet platform which puts together suppliers of services and customers of those services can effectively stipulate that it is acting only as an agent even if it has its own strong customer-facing brand and exercises a high degree of control over aspects of the transaction between supplier and customer.” *Id.* ¶ 153.

315. See *HRS*, *supra* note 11, ¶ 147.

316. As noted by the current author elsewhere, this has already happened in the case of online travel agents such as Booking.com which have been subject to significantly different legal treatments of their business model in relation to most-favored-customer clauses around Europe, See Akman, *supra* note 7, at 832-33.

the platform generate revenue as a result of that *same* transaction. Thus, the platforms studied demonstrate this characteristic feature of an agency arrangement in relation to commercial interest alignment on the relevant market concerning the products/services provided to third parties. This also reflects the fact that, for competition law purposes, platforms and suppliers are in a vertical relationship to one another in the production chain, and the platform is a channel for reaching customers for the supplier.<sup>317</sup> There are, however, important nuances to this, such as the relation between Amazon and third-party sellers on Amazon Marketplace or app developers and Apple on App Store, which may *also* offer products/apps in competition with one another.<sup>318</sup> Such a conflict of commercial interests, indeed, clashes with the fundamental operation of an agency relationship, and will be returned to in Section VI in the (re)interpretation of the single economic entity doctrine and the agency rule in the context of platforms on the basis of the concept of “competitive neutrality.”

It may be argued that the fact that some platforms’ (e.g. Booking.com) algorithms take into account the commission rate in ranking results also creates a degree of commercial adversity, as discussed above in the context of agency in common law.<sup>319</sup> Thus, for example, Booking.com can increase its revenue by preferring the higher-commission-paying principals over principals that pay a lower commission, which may be deemed to potentially infringe an agent’s fiduciary duty towards her principal. However, unlike in Amazon’s case, this is *not* about commercial interest alignment between Booking.com and the particular hotel on the “relevant market” concerning the particular room-booking activity where either Booking.com *or* that hotel generates revenue. In other words, the conflict does not concern the agent’s putting herself in a position where her duties as agent conflict with her own interests, but one where her duties as agent conflict with the interests of another principal. Thus, it

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317. See, e.g., the US Supreme Court characterization of the relationship between Apple App Store, app developers and iPhone owners as parties on a vertical chain of distribution in *Pepper*, *supra* note 31. Cf. Nowag who argues that the link between a platform and a supplier is difficult to classify as a vertical relationship. Nowag, *supra* note 11, at 395.

318. A leading Australian case found that although there was no implied term that a distributor would not do anything inimical to the market for the manufacturer’s products, it was a breach of contract to defer fulfilling orders for the manufacturer’s products in anticipation of fulfilling them themselves; BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 6-015 with reference to *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 (Austl.).

319. See accompanying text to *supra* notes 53 and 55.



is about a commercial conflict arising out of the fact that Booking.com non-exclusively acts for principals (i.e. hotels) who are potentially in competition with another. Hence, this conflict arises out of the fact that the agent (i.e. platform) in question works for multiple principals (i.e. suppliers). It is the multiplicity of principals that creates the possibility that the agent (i.e. platform) may prefer some principals over others because they are more profitable for her agency business (and not for her separate business on the relevant market) due to higher commission. This is not dissimilar to the position of an estate agent—which is legally an agent—in being able to achieve different levels of commission in promoting and enabling the sale of potentially competing properties for different principals where one would generate higher revenue due to, for example, higher sales price or higher commission rate. As discussed above in the context of *Kelly* and *RML*,<sup>320</sup> acting for competing principals is not inimical to a finding of agency in commercial law where the nature of the agent's business requires this. Therefore, this should not be seen as a commercial conflict that would prevent a finding of agency in the context of platforms, either.

Indeed, all of the platforms discussed in this Article facilitate transactions between customers and numerous suppliers, many of which may also be each other's potential competitors. The commercial law position contrasts to that of the CoJ in *Suiker Unie*, where the Court noted that, in general, the fact that a supplier prohibits its agents who sell in its name and for its account from acting simultaneously for competing suppliers without its consent "corresponds to the nature and spirit of a legal and economic relationship of the kind in question."<sup>321</sup> This suggests that for the CoJ, exclusivity of the agent is a normal feature of agency.<sup>322</sup> Yet, the CoJ also accepts that such exclusivity can be validly contracted against by consent. Further, requiring exclusivity for there to be an arrangement of agency reflects an outdated view of commerce and commercial agency, which is no longer fit for the realities of commerce where agents are no longer individuals walking from door to door with a bag of samples, but companies acting on behalf of other companies, etc. Thus, the competition law position should be updated to align with the position in commercial law to bring

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320. See accompanying text to *supra* note 85.

321. *Suiker Unie*, *supra* note 32, ¶ 479.

322. See *Reisbureaus*, *supra* note 181, ¶ 20.

it in line with the realities of 21st century commerce and e-commerce, in particular.<sup>323</sup> As discussed above in relation to the position in commercial law, the online platforms analyzed in this work clearly fall under the second type of agency as per *Kelly* and *RML*, where the *nature* of the business requires the agent to act for competing principals as this *is* their business function.<sup>324</sup> This is, indeed, also the position found in some of the judgments of the GC, as noted above.<sup>325</sup> Similarly, according to the EU Verticals Guidelines, it is immaterial for the assessment whether the agent acts for one or several principals.<sup>326</sup> Both the commercial law position and the position of the GC and the Guidelines are preferable to that of the CoJ in their accommodation of the requirements of modern day agency business model.

Applying the remainder of principles set out in the EU Verticals Guidelines other than that concerning exclusivity, online platforms studied here satisfy those criteria for agency, too. This is because, as exposed by their relevant standard contracts, the platforms do not buy any products from the suppliers to resell them to customers.<sup>327</sup> Similarly, they do not bear any of the risks related to *not* selling/providing the products/services other than the risk of not generating any commission income. They also do not bear any of the risks related to the *sale/provision* of the products/services to the

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323. The CoJ position requiring exclusivity appears to be in line, however, with the German position that a commercial agent is obliged not to work for competing principals; German Commercial Code section 86 cited in Randolph & Davey, *supra* note 72, at 135. In the United States, it has been accepted that it is a common form of organization for travel agents to work with many airlines, hotel chains, etc., similar to estate agents, without this preventing them from being “genuine agents” for antitrust purposes. *See* Ill. Corp. Travel v. Am. Airlines, 889 F.2d 751, 752-53 (7th Cir. 1989).

324. In *Suiker Unie*, although the CoJ remarked that, for the purposes of applying EU competition rules, the relationship between an economic operator and his intermediaries must only be determined in the light of EU law and compliance with national law governing the particular type of contract is not determinative when assessing whether the contract is caught by EU competition rules, it still made reference to the “nature and spirit” of the relevant legal and economic relationship, which can only be informed by concepts of national law (e.g. common law) where there is no particular body of EU law which can establish these factors as in agency. *See Suiker Unie*, *supra* note 32, ¶ 478.

325. *See* accompanying text to *supra* notes 179 and 186.

326. Verticals Guidelines, *supra* note 35, ¶ 13. This clearly contrasts with the CoJ ruling in *Reisbureaus*, *supra* note 181, ¶ 20.

327. *Cf. Pepper*, *supra* note 31, where the US Supreme Court found that Apple is a *retailer* of iPhone applications. This is difficult to understand given the context: the apps in question are software and the supply activity in question is licensing of software. To compare Apple App Store to a retailer is, therefore, not entirely illuminating.

customers due to numerous liability exclusion clauses (with limited exceptions concerning refunds, etc.). They get remunerated by the suppliers when a contract is concluded with the customer, in proportion to the value of the contract goods/services (i.e. by commission). The commission paid to platforms by suppliers represents a fee for the services of intermediation rather than profit received as an independent intermediary, which again suggests a relation of agency in all of the areas of law studied. Indeed, these factors also reflect the fact that platforms only warrant to use reasonable efforts in facilitating transactions for the parties involved rather than warrant a particular outcome for their principals (i.e. suppliers), which is again, in line with agency principles. Importantly, the platforms do not set the price of the products/services in question, unlike, e.g., a retailer, with the exception of influence on price in the case of Uber. Interestingly, as seen above,<sup>328</sup> in commercial law the way in which the price paid by the customer is arrived at is not determinative for a finding of agency.<sup>329</sup> Thus, price-setting power appears more important in competition law than in the commercial law characterization of an arrangement as agency, which suggests that in the case of a business model such as that of Uber's, common law may find agency where competition law does not.<sup>330</sup> However, it is important to note that in the case of Uber, specific regulations apply *requiring* an element of price-setting.<sup>331</sup> Further,

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328. See accompanying text to *supra* note 74.

329. Cf. the European Comm'n position that where the sharing economy platform sets the final price to be paid by the user, this indicates that platform may not only be providing information society services, but also the underlying service (e.g. transport); *Communication from the Comm'n to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM(2016) 356 final (June 2, 2016), § 2.1, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A356%3AFIN> [https://perma.cc/A6BP-WPVK] (last visited Mar. 19, 2019) [hereinafter *Communication from the Comm'n*].

330. Interestingly, it appears less important in US competition law than in EU competition law, too; see e.g., *Williams*, where the US District Court found that the relationship between fast-food franchises and the common franchisor was one of a single economic entity, despite the fact that the franchisees had the ability to vary their prices (i.e. had some pricing control). *Williams v. IB Fischer Nevada*, 794 F. Supp. 1026, 1031 (D. Nev. 1992), *aff'd* 999 F.2d 445, 447 (9th Cir. 1993). Consequently, the *no-switching* agreement whereby the franchisees agreed not to offer employment to the manager of another franchise within six months of that manager's termination of employment, unless the manager obtains a release from their former employer, was found not to fall within the scope of Sherman Act, Section 1.

331. It is a standard regulatory requirement, across the private-hire industry, for fares to be agreed between the operator (e.g. Uber or a traditional minicab firm) and the passenger; Appellant's Skeleton Argument in *Uber (EAT)*, *supra* note 23, ¶ 16. Importantly, the Private

Uber exercises limited influence on the final price because Uber uses an algorithm that recommends a maximum fare to the driver in question who can accept a lower price from the customer.<sup>332</sup> It is also notable that in the context of platforms, it is the suppliers (e.g. drivers) who pay the platform (e.g. Uber) for the platform's services (which e.g. Uber deducts from the payment by the customer, i.e. rider) rather than the platform paying the suppliers (e.g. Uber paying the drivers). This not only supports the assessment of the relationship as that of agency through its exclusion of alternatives such as a retail arrangement, but the direction of payment also casts doubts on alternative characterizations, such as that of employment, which would require the platform (e.g. Uber) to pay the suppliers (e.g. drivers).<sup>333</sup>

The application of the CoJ's holdings in *CEPSA* to platforms is also of notable value in relation to remuneration and risks.<sup>334</sup> First, the online platforms are in a very similar situation to the petrol-station operator in that they only receive remuneration as a result of enabling

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Hire Vehicles (London) (Operators' Licences) Regulations 2000 originally stipulated that the private hire operator has to "agree the fare for the journey booked, or provide an estimate of that fare" if required by the person making the booking. Private Hire Vehicles (London) (Operators' Licences) Regulations 2000, SI 2000/3146, art. 9(3) (Eng.). By an amendment in 2016, this was changed to require the operator to "[a]gree the fare with the person making the booking or; . . . [p]rovide an accurate estimate of the fare to the person making the private hire booking." See Private Hire Vehicles (London) (Operators' Licences) (Amendment) Regulations 2016, art. 4.

332. See Nowag, *supra* note 11, at 399 (arguing that Uber does not directly "fix" the prices or a price range for drivers). See also accompanying text to *supra* note 235, however, in relation to Uber's contracts which stipulate that the commission paid to Uber will be based on the fare recommended by Uber even if the driver agrees to a lesser sum.

333. This point was also made by the Employment Tribunal in *Stringfellow* which relied on the direction of payment as a factor in finding that the claimant (a lap dancer) was not an employee of the club. This finding was overturned by the Employment Appeal Tribunal, but reinstated by the Court of Appeal which agreed that the claimant was not an employee; *Stringfellow*, *supra* note 107. In fact, the CA held this (i.e. the putative employer being under no obligation to pay the putative employee anything) to be the most important finding in relation to the conclusion that the relevant contract was not one of employment. *Id.* ¶ 45. It should be noted, however, that in this case, the putative employee was negotiating her own fees with the clients at the club, in contrast to the case in e.g. Uber, where Uber sets the maximum fare. Having said that, there is, indeed, a line of tax cases in which private hire operators have been found to be agents for individual drivers. See, e.g., *Lafferty v. The Commissioners for HMRC* [2014] UKFTT 358 (TC); *Khalid Mahmood v. The Commissioners for HMRC* [2016] UKFTT 622 (TC). See also HMRC Guidance (VAT Notice 700/25: taxis and private hire cars), *How VAT applies to taxis and private cars (VAT Notice 700/25)* ¶ 3, GOV.UK (Sept. 19, 2016), <https://www.gov.uk/guidance/how-vat-applies-to-taxis-and-private-hire-cars-notice-70025#para32> [<https://perma.cc/A44Y-ADNW>].

334. *CEPSA*, *supra* note 32, discussed in the accompanying text to *supra* note 129.

the conclusion of the contract between the third party and supplier (i.e. commission is paid after the transaction is facilitated and in proportion to the number and value of transactions so facilitated, etc.). This suggests the existence of agency not just in competition law, but in all areas of law studied. Second, the CoJ's reference to investments in advertising suggesting a transfer of risk to the intermediary, if taken at face value, may suggest that platforms studied here are not agents because they invest in online advertising, etc. However, one has to distinguish between the advertising of the platform business itself and the advertising or other investment "specifically linked to the sale of the goods" which in case of, for example, Booking.com or Amazon Marketplace would be investing in advertising for the sale of a given room at a given hotel or a particular product of a third-party seller. If an investment in the agency business as such (including investment in advertising the business) renders an agent a separate undertaking, then no agreement between any agent and principal is likely to fall outside of Article 101 because any agency business will require some investment in the business, and advertising online is a core part of online business models. Thus, it must be that the CoJ here refers to risks other than those resulting from investing in the agency business as a separate business in itself. The relevant investments must be those made in the "relevant market," not in the "agency market."<sup>335</sup> Similarly, even in the case of advertising for the sale of a given hotel room or a given product, the financial risk of the room going vacant or the product not selling still lies with the hotel or the third-party seller. The only risk involved for the platform remains the risk of not generating commission income. Thus, even in such a case where the platform invests in advertising, the supplier continues to bear the main financial and commercial risk, a fact which would suggest the existence of agency on the part of the platform.

As noted above, there are some terms in the platforms' standard contracts, which are unusual for traditional agency contracts: terms that prevent the suppliers (i.e. principals) from contacting their contracting parties outside the platform (i.e. agent), and, terms that allow the platform (i.e. agent) to exclude suppliers (i.e. principals) from concluding future contracts on the platform.<sup>336</sup> It could be legitimately questioned whether these terms prevent platforms from being agents of

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335. For the distinction between these two markets, see accompanying text *supra* note 136.

336. See accompanying text *supra* note 271.

their suppliers. With the first type of term, the agent restricts/prohibits contact between the actual contracting parties. This can be deemed unusual in a traditional agency relationship where the principal would be expected to be able to contact its contracting party.<sup>337</sup> Further, such clauses also essentially involve the agent's imposing terms and conditions into the contract between the third party and its principal, which may raise questions concerning the provider of the underlying products/services in the contract with the third party.<sup>338</sup> With the second type of clause, the agent has the means to prevent its principal from entering into a transaction with third parties through the intermediation of the agent in future where the supplier and/or third party fail to meet certain performance criteria. This can also be seen as a clause foreign to traditional agency relations as it involves the agent's imposing rules of conduct on the principal, which could be deemed to clash with the *agent's* duty to account to the principal.<sup>339</sup>

Both types of terms are, however, to be expected in the platform business model studied here because they seek either to prevent free-riding by suppliers and users, or, to preserve the quality of the platform. Both sets of these terms and conditions reflect the two-sided nature of the platform business model.<sup>340</sup> The first type of terms aims to prevent

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337. See e.g., *Uber (EAT)*, *supra* note 23, ¶ 110 (where the EAT noted that it is questionable that agency is the right characterization of the business when the "principal" is prevented from building up a business relationship with the end user of the service).

338. This is one of the factors which the European Comm'n states to suggest that in the context of a sharing economy platform, the platform not only offers an information society service, but also provides the *underlying service* (e.g. transport, short-term accommodation, etc.). See *Communication from the Commission*, *supra* note 329, § 2.1. In contrast, in the context of agency, the fact that the agent can make contractual decisions on behalf of and for the principal demonstrates that the agent is capable of changing the principal's legal relations with third parties, demonstrating the existence of the *external* aspects of agency, confirming the presence of agency.

339. See accompanying text to *supra* note 60.

340. Two-sided (or multisided) markets refer to those markets where a business (e.g. a "platform") facilitates direct interactions between different types of customers; see EVANS & SCHMALENSEE, *supra* note 1, at 15. Interestingly, the CA found that Uber's rating system for drivers amounts to a performance management/disciplinary procedure which is a "powerful point supporting the case that the drivers work for Uber"; *Uber (CA)*, *supra* note 23, ¶ 96. Yet, given that such review procedures are in place in contracts of all of the platforms studied here, the CA may have failed to appreciate the reasoning and function of such procedures, which result from the two-sided nature of the business model and relevant network effects. It is difficult to agree that such procedures signify an employment arrangement due to the performance management quality that they demonstrate when all of the platforms studied here contain such clauses and employment is clearly not the correct characterization of the relationship between third-party sellers and Amazon Marketplace, etc. That such terms are simply measures to ensure

free-riding and counter the risk of “disintermediation” that would result from parties’ contracting outside of the platform once they “find” each other on the platform.<sup>341</sup> Such contracting would eliminate the possibility of remuneration for the platform due to the loss of commission, as these platforms only generate revenue when the transaction between the parties who have found each other on the platform is actually concluded on the platform. In the long run, such free-riding can also diminish the incentives to invest in the platform business model, and could be welfare-decreasing.<sup>342</sup> It is, indeed, telling that Apple App Store terms do not contain a term restricting contact between the third-party app developer and customers: it appears that where there is no possibility of free-riding as in the case of Apple (resulting from the fact that only apps in the App Store can be used on iPhones), the platform has not adopted restriction of contact rules, which suggests that the rationale behind the rules may, indeed, be that of preventing free-riding. The second type of these terms can be justified by the platforms’ aiming to preserve the quality of the interactions on the platform in order to sustain the network effects enjoyed by the platform.<sup>343</sup> These terms may arguably be necessary to preserve the investments made in the platform by ensuring a certain

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quality of the product/service provided by the intermediary from which it makes profit is acknowledged in the dissenting opinion of Underhill LJ in *Uber (CA)*, *supra* note 23, ¶ 138.

341. “Disintermediation” refers to network members bypassing a hub to connect directly. For the definition and a discussion of the risk of intermediation for platforms and how platforms try to avoid this risk, see Feng Zhu & Marco Iansiti, *Why Some Platforms Thrive and Others Don’t*, 2019 HARVARD BUS. REV. 118 (2019). Mechanisms used by platforms to deter disintermediation include prohibiting users from concluding transactions off the platform and blocking users from exchanging contact information as well as attempts at increasing the value of conducting business on the platform by, for example, providing insurance, dispute resolution, communication tools, etc. *See id.*

342. This was, indeed, the reason for the distinction made between “narrow” and “wide” platform most-favored-customer clauses by some authorities in Europe, which found that narrow most-favored-customer clauses may be necessary for the business model to be sustainable; see Akman, *supra* note 7, 792, 799.

343. Network effects relate to the fact that on two-sided markets, demands on the two sides of the market are interlinked. See Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10(2) J. COMPETITION L. & ECON. 293, 296 (2014). There are two types of network effects: direct and indirect. A “direct network effect” exists where consumers’ willingness to pay for a product depends on the number of other consumers (or the quantity bought) of the same product; *id.* n. 8. An “indirect network effect” exists where consumers’ willingness to pay for a product depends on the number of consumers (or the quantity bought) of another product. *Id.* In the context of two-sided markets, the indirect network effect relates to demand on one side of the market depending on demand on the *other* side of the market.

quality level in the dealings facilitated between suppliers and customers. This is because erosion of such quality on one or both sides of the platform can lead to a loss of network effects and of the necessary scale of operations for the platform, which can ultimately lead to the collapse of the business model.<sup>344</sup> Thus, although both of these types of terms may be unusual for traditional agency relations, they do not appear to be unusual for the standard contracts of platforms given how the platform business model functions. Consequently, they should not be deemed to be factors preventing the existence of agency where, as demonstrated throughout this Section, the balance of the relevant factors points in the direction of a relationship of agency.

All in all, as the law currently stands, the relationship between a platform and a supplier in the context of the relevant products/services market where the platform facilitates a transaction between the supplier and the third party (i.e. customer) cannot be legally explained in any other way than that the platform acts as the agent of the principal (i.e. supplier) in that transaction facilitated between the supplier and the third party. The implication for competition law purposes, as noted above, is that the application of the single economic entity doctrine and the agency rule thereunder exclude the restrictions of competition on the relevant market found in the agreements between platforms and suppliers from the scope of the prohibition in Article 101. The next Section explores whether, and if so, how, the single economic entity doctrine *should* be (re)interpreted in this context to render the competition law prohibition of anticompetitive agreements applicable to contracts of platforms with their suppliers.

#### VI. (RE)INTERPRETING THE SINGLE ECONOMIC ENTITY DOCTRINE AND THE AGENCY RULE: COMPETITIVE NEUTRALITY

Section V demonstrated, based on the principles of agency from different areas of law and the single economic entity doctrine, that the

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344. For example, if riders stop using Uber after dissatisfaction with the quality of the ride that they booked on the platform, this not only reduces the number of riders on one side of the market, but can also lead to a reduction in the number of drivers who offer their services on the platform *because* there will be fewer riders to offer their transport services to on the platform. Further, given that commission is *only* generated as a result of successful transactions, the lowering of the quality of the interactions on the platform can lead to a loss of the necessary scale of operations to generate any revenue. In the long run, the loss of the network effects and the necessary scale can lead to the collapse of the two-sided business model which operates on the basis of commission.



platforms studied in this Article are legally agents of their suppliers in relation to the transactions that they facilitate on the relevant market between their suppliers and third parties. As noted above, the agency rule under the single economic entity doctrine means that once it is accepted that platforms are agents of their suppliers, the agreements between platforms and suppliers fall outside the scope of competition law in relation to restrictions of competition on the relevant market where the platform is acting as the agent of the supplier. Given the ubiquity of the platform model and the growing share of e-commerce in the digital economy, this finding implies that there is a significant “platform gap” in competition law as currently conceived, which immunizes potentially substantial restrictions of competition from scrutiny. The next legal question, therefore, becomes whether this application of the single economic entity doctrine *should* be modified, and if so, on what basis such (re)interpretation should take place, so that such agreements which contain restrictions of competition come under the scope of application of Article 101.

This Article would argue that the agency rule and its operation under the single economic entity doctrine should be modified and/or (re)interpreted to the extent that there is a commercial conflict of interest between the platform (i.e. putative agent) and a given supplier (i.e. putative principal) in relation to the transaction to be facilitated with the customer on the relevant market. Namely, where there is a commercial conflict of interest between the platform and the supplier in relation to the transaction to be facilitated on the relevant market, the platform should not be deemed to be an agent of the supplier in that context. This is because, as agency law demonstrates, the concept of agency is fundamentally built upon an alignment of commercial interests between the agent and the principal, rather than upon commercial adversity.<sup>345</sup> This results from the fact that agency is a mode of delegation where the principal appoints the agent to act in the principal’s commercial interest to conclude transactions, which ultimately benefit both the principal and the agent, when successful. This reflects the fiduciary nature of the relationship between the agent and the principal, which requires the agent’s “loyalty” to her principal: the agent’s “duty and interest” need to be aligned and not in conflict.<sup>346</sup>

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345. See accompanying text to *supra* note 53.

346. See *RML*, *supra* note 86, ¶ 20 discussed in the accompanying text to *supra* note 86. The proposal in this Section is also partly in line with Restatement, *supra* note 42, § 8.04, which

This fundamental feature of agency, namely that of commercial interest alignment resulting from the fiduciary nature of the relationship, can be transposed into competition law as a guiding principle to establish which commercial arrangements represent that of agency and, subsequently, justify the agency rule under the single economic entity doctrine and which do not. This is because despite this not being acknowledged in competition law jurisprudence, soft law or commentary, in such cases where their commercial interests are aligned, for competition purposes, the agent and the principal are also in a state of *competitive neutrality*: they do not compete with one another and their business operations are complementary in nature rather than rivalrous. Under such circumstances, there is no reason not to treat the platforms as part of the same undertaking with the suppliers under the single economic entity doctrine, as the doctrine currently provides, as discussed in Section V. In fact, the principles and operation of agency in all areas of law studied point towards this outcome. Where the platform and supplier are in a competitively neutral position, the platform simply constitutes a means for the principal to conclude transactions with customers, and in this activity, they act as a single economic entity. It also makes commercial sense to treat them as one under such circumstances because the two entities would be acting as one on the relevant market in relation to the transactions concluded with third parties. This normally holds for the platform business model in that it is in the commercial interest of both the platform and the supplier to conclude a transaction on the platform where they both benefit from such a transaction by way of a commission and a profitable sale, respectively. This results from the fact that a platform and the suppliers thereon are normally in a vertical relation to one another, where the former provides a sales channel for the latter, enabling the latter to reach more customers more effectively, etc. This author would posit that in cases where the vertical relation between the platform and the supplier entirely holds, so that the platform is merely providing a service to the supplier (e.g. a sales channel), which the supplier uses for reaching its customers to provide its products/services, the platforms should continue to be held to be agents

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stipulates that throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal. However, the proposal departs from the stipulation in the remainder of Section 8.04, according to which the agent also has a duty to refrain from taking action on behalf or otherwise assisting the principal's competitors; *see* accompanying text to *infra* note 356.

under the single economic entity doctrine as they are in a competitively neutral position in relation to their suppliers.

By contrast, where the relation between the platform and the supplier turns from a vertical into a horizontal one, then the agency rule under the single economic entity doctrine should be modified because in this case, commercial alignment is replaced with commercial adversity and *competitive neutrality* is replaced with *competitive rivalry*: the parties become competitors on the relevant market. Platforms that are in a position where their interests are commercially adverse to the interests of the suppliers in that the platform is also a competitor of the supplier on the relevant market (through activities it carries out for her own account) should not be able to make use of the agency rule under the single economic entity doctrine in relation to restrictions of competition on that market. In such situations, not only does the platform become a competitor to the supplier and can conclude a contract for its own benefit *instead of* for the benefit of the supplier (i.e. its duties as agent conflict with its own interests), but it also has an automatic cost advantage in comparison to the same supplier because it does not have to bear the commission due on every transaction completed by the supplier on the platform. Thus, in situations where “competitive neutrality” no longer holds, the platform and the supplier should no longer be deemed part of a single economic entity, and the single economic entity doctrine should be (re)interpreted to accommodate this exception to the agency rule in relation to platforms. The implication of this (re)interpretation would be that those agreements between platforms and suppliers that restrict competition on the relevant market would be subject to the full application of the prohibition of Article 101 where the platform competes with the suppliers in question on the relevant market.

This (re)interpretation is not only in line with the principles of agency found in different areas of law, according to which the most specific fiduciary duty of an agent is “not to make a profit at h[er] principal’s expense,” but also with the *implicit* reasoning underlying the treatment of certain separate entities as part of the same economic entity in competition law.<sup>347</sup> In fact, the rules concerning agency in these other areas of law and the operation of the agency rule in

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347. BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 6-042. See accompanying text to *supra* note 143.

competition law demonstrate remarkable similarity in essence. Despite this not having been acknowledged in the competition law jurisprudence, soft law or commentary, as noted above,<sup>348</sup> the centrality of risk-taking on the relevant market for a finding of agency (or lack thereof) suggests that once the agent adopts a course of conduct taking risks on the relevant product/services market (where it is appointed to facilitate transactions between the principal and third parties), and thereby puts herself in a position of competition with the principal, *then* she should no longer be deemed to constitute part of the same economic entity as the principal. In such a scenario, what agency law denotes to be “commercial interest alignment” reflecting the fiduciary nature of the agency relationship is replaced with “commercial adversity.”<sup>349</sup> For competition law purposes, this corresponds to a state of “competitive neutrality” being replaced with “competitive rivalry.” Thus, in such circumstances where agency law would likely find a lack of agency, competition law should also find a lack of agency with the outcome that the single economic entity doctrine does not apply to the entities in question where there is no “competitive neutrality.” Where there is competition between two parties on the relevant market in that the agent can, as a market actor in her own right, affect competition on that market, the rationale underlying the single economic entity doctrine should be deemed to no longer hold, and thus, the doctrine should not be applicable.

It is noteworthy that this conflict of interest between platforms and their suppliers has recently not only gained attention from competition authorities around the world exploring its compatibility with competition law, but also led to outright bans of platforms’ ability to sell on their own marketplace in competition with their suppliers in some jurisdictions.<sup>350</sup> However, such an outright ban on platforms’

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348. See accompanying text to *supra* note 143. The Verticals Guidelines may implicitly acknowledge this in stating that an intermediary is generally considered to be an agent, *inter alia*, where it “does not undertake other activities within the same product market required by the principal.” Verticals Guidelines, *supra* note 35, ¶ 16(g). Unfortunately, it is unclear what the Guidelines mean by referring to activities “required by the principal” because it is in the nature of agency that the principal would require the agent to undertake activities on the relevant market on his behalf.

349. For the agency law concepts, see text around *supra* note 53.

350. For example, Amazon is banned from selling its own products as a retailer on Amazon Marketplace in India due to new e-commerce regulations; see, Sasha Fedorenko, *Amazon India Removes Products Over New Marketplace Regulation*, TAMEBAY, Feb. 1, 2019,

selling on their platforms alongside third-party suppliers can itself have anticompetitive effects by leading to lower output and higher prices for consumers.<sup>351</sup> The (re)interpretation of the single economic entity doctrine presented here is, thus, more appropriate from a competition as well as a commercial perspective than such outright bans on the platforms' ability to sell on their own platform. This is because the (re)interpretation proposed on the basis of "competitive neutrality" enables a flexible application of competition law by reinterpreting its scope of application in particular instances where conflicts of interest actually matter in relation to competition, whilst allowing the business model to continue to function as intended in all other aspects. The policy revision in line with this finding in the European Union would be for the EU Commission to include a provision in a revised EU VBER and/or in the accompanying Guidelines to the effect that platforms that compete with their suppliers on the relevant market in relation to the products/services provided to third parties (i.e. customers) will not be treated as agents of their suppliers in relation to agreements which restrict, distort or prevent competition on that market. This would make their agreements with their suppliers subject to the full application of Article 101. Thus, a third exception should be created in addition to the two exceptions already stipulated in the Guidelines concerning when an agency agreement "exceptionally" falls within the scope of the prohibition of Article 101.<sup>352</sup> Such a provision could read as follows: "an agency agreement will fall within the scope of Article 101(1), even if the principal bears all the relevant financial and commercial risks, where the agreement is between a platform and a supplier, and the platform competes with the supplier on the relevant market in relation to the products/services sold/provided to third parties through the intermediation of the platform."

It is noteworthy that in an earlier judgment—outside the agency context—clarifying the concept of "undertaking" for competition law purposes, the CoJ referred to the fact of competition between the persons participating together in a given agreement being impossible

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<https://tamebay.com/2019/02/amazon-india-removes-products.html> [https://perma.cc/G27F-JGXX]. Regarding Bundeskartellamt's investigation into Amazon, see *supra* note 21.

351. See Hovenkamp, *supra* note 21.

352. See Verticals Guidelines, *supra* note 35, ¶¶ 19-20 and accompanying text to *supra* note 189 in relation to the existing two exceptions.

as a sign of the persons' not being considered to be separate undertakings.<sup>353</sup> This is strikingly similar to the position in US law concerning the assessment of when two entities make up a single economic entity. For example, in *Siegel Transfer*, the United States Court of Appeals found that in the case of agents, whose only function was to make arrangements for the transport of the putative principal's freight with authorized carriers, *because* these agents did not compete with the putative principal and because they received commission from the principal based on the loads they arranged for the company to transport (which meant that the parties' economic interests were entirely congruent), there was a single economic entity.<sup>354</sup> Indeed, the US Supreme Court clarified in *American Needle* that in establishing whether liability under Sherman Act, Section 1 (equivalent to Article 101) arises, the question is whether the agreement between parties "deprives the market of actual or potential competition."<sup>355</sup> Thus, (re)interpreting the single economic entity doctrine in line with the competitive neutrality concept of this Article could potentially bring the EU and US competition law treatment of platforms closer to one another, which would be desirable due to the global nature of the businesses of the platforms.<sup>356</sup>

It should be noted that the relevant conflict or alignment of commercial interests and the position of "competitive neutrality" should be established regarding the position of the platform in relation to the one and the same principal (i.e. supplier), not in relation to the platform and competing principals. It has to be accepted that the online platform business model inevitably involves the platform's acting for

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353. *Hydrotherm*, *supra* note 119, ¶ 11.

354. *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1135 (3d Cir. 1995). For the argument that actors in a sharing economy arrangement pursue their own separate economic interests and would not be protected by the single economic entity doctrine in the United States, see *Anderson & Huffman*, *supra* note 11, at 900.

355. *American Needle*, *supra* note 6, at 197.

356. This is not to say that in their overall operation the US intra-enterprise conspiracy doctrine and the EU single economic entity doctrine would become significantly aligned. Indeed, the focus of the inquiry in the United States appears to be whether the allegedly anticompetitive *conduct* in question deprives the market of actual or potential competition, whilst the EU inquiry is focused on whether the *entities* in question can be deemed as separate undertakings in relation to their competitive position on the market. Namely, the EU inquiry does not conduct an assessment of the conduct in this initial step of establishing the existence of separate undertakings, which only becomes possible *if* it is established that there are separate undertakings. This is in contrast to the US position, which puts the emphasis on the capacity to *conspire*, which necessitates an assessment of the *conduct* in terms of whether it can be deemed as an instance of such conspiracy.

different (and potentially competing) principals as is the case with more traditional agents, such as estate agents. What matters for the purposes of establishing that the platform is the agent of the supplier and that subsequently, their restrictive agreement on the relevant market should fall outside of competition law scrutiny is whether the platform competes with *that* principal whose agreement is in question on the relevant market (where products/services are provided to customers) in relation to which the restriction of competition exists. After all, the legal question is whether the platform is the agent of a given supplier by being part of the same single economic entity as *that* supplier in the context of the restrictive agreement on the relevant market with *that* supplier. Consequently, the fact that the platform acts for numerous principals at the same time is not prohibitive of a finding of agency, as seen above also in agency law and in some competition cases and Guidelines,<sup>357</sup> and should not make a difference in relation to the competitive neutrality assessment, either. The pertinent issue here is whether the platform has operations on the relevant market concerning the products/services provided to customers and concludes transactions with customers for its own account in competition with the supplier, for whom it simultaneously acts as an agent.

This is also how the GC's findings in *Minoan Lines* should be interpreted. In *Minoan Lines*, the GC considered a new factor for determining whether there is a single economic entity in addition to the factor of economic risk: whether the services provided by the intermediary are exclusive.<sup>358</sup> This is how the GC interpreted *Suiker Unie*, which the GC took to mean that there is unlikely to be a single economic entity if, at the same time as it conducts business for the account of its principal, the agent undertakes, as an independent dealer, "a very considerable amount of business for its own account on the market for the product or service in question."<sup>359</sup> However, taken in consideration alongside agency law, the conflict in such a situation is better explained as an issue of commercial adversity or lack of competitive neutrality rather than that of exclusivity, because it is not so much about whether the agent acts exclusively for one principal or

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357. See accompanying text to *supra* note 323. The proposition supported in this Section is in line with common law principles of agency under which the principal should not have to anticipate that an agent might wish to act for parties with opposed interests in the *same* transaction; BOWSTEAD & REYNOLDS, *supra* note 36, ¶ 6-015.

358. Case T-66/99, *Minoan Lines SA v. Comm'n*, 2003 E.C.R. II-5515, ¶ 126.

359. *Minoan Lines*, *supra* note 358, ¶ 128. See also *voestalpine*, *supra* note 182, ¶¶ 139-41.

not that determines the crux of the potential conflict of interest. It is whether the agent itself is in a commercially adverse position (and thus not in a competitively neutral position) with regard to the principal irrespective of how many principals it acts for that creates a conflict of interest. In other words, the conflict of interest in such a scenario would continue to exist even if the agent acted exclusively for one principal, but at the same time also conducted business for its own account and its own benefit on the same, relevant market in competition with the principal. Thus, it is the financial and commercial risk that the intermediary undertakes on the relevant market, whereby it puts itself in a position in which it can influence competition on that market and compete with its principal, that (should) prevent(s) it from being an agent. In that context, whether it acts exclusively for one principal or not is neither here nor there, and thus, irrelevant.

Application of the criterion of competitive neutrality to the platforms studied in this Article would rule out Amazon's being an agent of suppliers on Amazon Marketplace in cases where Amazon, the retailer, competes with the third-party sellers on Amazon Marketplace, selling its own products on the same, relevant market.<sup>360</sup> The criterion of competitive neutrality would also rule out Apple's position as an agent in relation to the App Store to the extent that Apple competes with app developers through the provision of Apple apps in competition with third-party developer apps on the same, relevant market. All of the other platforms—and Amazon Marketplace and Apple App Store to the extent that they do not compete with their suppliers on the relevant market—would continue to qualify as agents given their operations at the time writing.<sup>361</sup> This is because currently, none of the other platforms (Uber, eBay, Airbnb, Booking.com) are active on the relevant product/services market where they facilitate transactions between suppliers and customers. For example, Uber does not operate its own vehicles to provide rides in competition with drivers

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360. See the potential investigation into Amazon's use of data from sellers in the context; *EU: Vestager opens probe into Amazon*, *supra* note 21.

361. This approach would be preferable to, for example, the Bundeskartellamt's position which found Amazon Marketplace to be equivalent to a horizontal cartel because such a position is a less nuanced approach than focusing on competitive neutrality. Amazon is not in a horizontal relation to all third-party sellers on Marketplace because it does not sell the same products as all of the third-party sellers. For the Bundeskartellamt position, *see supra* note 25.



supplying their services on the platform.<sup>362</sup> eBay does not have a retail arm selling its own products on eBay. Airbnb does not own flats that it rents out in competition with the landlords supplying their own accommodation on the platform.<sup>363</sup> Booking.com does not own any hotels where it rents out rooms in competition with its hotel partners, etc. In the same vein, Amazon Marketplace and Apple App Store do not compete with their suppliers in relation to all the products/apps that they facilitate the sale/licensing of on their platforms. Thus, in transactions facilitated on these platforms between a supplier and a customer, where the platform is not a competitor on the relevant market, these platforms act as one with their suppliers in relation to those transactions with third parties, and should continue to be covered as agents under the single economic entity doctrine. Where the platform is a competitor on the relevant market to the supplier for whom it also facilitates transactions on the same relevant market, the agency rule under the single economic entity doctrine should *not* apply, and any restrictions of competition on the relevant market found in agreements between such platforms and their suppliers *should* be subject to the full application of the prohibition in Article 101.<sup>364</sup>

A relevant question here is whether this concept of competitive neutrality should be limited to actual competition between the platform

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362. Uber is reportedly testing self-driving cars. *Advanced Technologies Group*, UBER, <https://www.uber.com/info/atg/> [<https://perma.cc/4NVE-LS9L>](last visited Nov. 12, 2019). When such self-driving cars start operating in competition with the services of drivers on the Uber platform in relation to rides provided to customers, Uber would no longer be an agent of the drivers on the relevant market.

363. *But see* Paris Martineau, *Airbnb and Marriott Each Want What the Other Has*, WIRED (Apr. 29, 2019), <https://www.wired.com/story/airbnb-marriott-each-want-what-other-has/> [<https://perma.cc/SUNJ-HQLW>] (noting that Airbnb is in the process of entering the “hotel market” in New York City through the conversion of commercial property into apartment-style suites to be exclusively listed on Airbnb). When this happens, then Airbnb would become a competitor to those landlords for whom it facilitates transactions on the platform, and could no longer count as their agent on the relevant market.

364. *See* Comm’n’s approach on the definition of relevant market for the purposes of Community competition law, 1997 O.J. (C 372) 5 (detailing the European Commission’s approach to market definition). The assessment of whether the platform competes with its suppliers on the “relevant market” would need to be conducted on the basis of defining the relevant market per the usual competition law assessment regarding market definition, i.e. in its product, geographical, and temporal dimensions. Admittedly, this involves a case-by-case analysis, but a competition assessment of any potentially restrictive agreement requires a case-by-case analysis of the allegedly infringing restriction/agreement with a view to establishing whether the particular restriction/agreement takes place between separate undertakings, so this does not add a particular complication to the requisite legal assessment.

and the supplier, or, whether potential competition between them is also sufficient to establish the absence of competitive neutrality. This Article argues that the relevant competition is that of actual competition, and not that of potential competition between the platform and the supplier. This is because at the stage of establishing whether two entities are part of a single economic entity and whether their agreement falls within the *scope* of the prohibition of anticompetitive agreements, one should not need to assess potential competition between them, which would involve second-guessing the future business conduct of the entities in question. Such prospective assessments are normally reserved for assessment of *conduct* (e.g. in merger control cases) and an application of the single economic entity doctrine is more aptly conducted on a factual basis at the time of the assessment in relation to the *entities* as they stand.<sup>365</sup> Further, in cases where the platform is not actually in competition with the suppliers on the platform, there is no reason why the platform should not continue to count as an agent *unless and until* it starts competing with the suppliers because it is only then that there will be a relevant conflict of commercial interests between the platform and (only) the suppliers with whom the platform competes. The limited, relevant EU Commission decisional practice on agency (none of which concerned platforms) also suggests that a case-by-case assessment of actual competition is what is required.

In *Eirpage*, the Commission held that “if one day” agents start competing with their principals (i.e. they start offering the same services for which they are agents in direct competition with the principals), they could no longer act as agents.<sup>366</sup> In another case, namely, *ARG/Unipart*, the Commission found the same entity (Unipart) to be an agent bearing no entrepreneurial risk when the entity promoted the sales of the “principal” (Austin Rover Group) for account of the latter and in consideration of a commission from the latter, but to be an independent undertaking when it came to activities regarding which each bore its own entrepreneurial risk.<sup>367</sup> In this case, the two undertakings in question were in competition with one another for the

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365. In this respect, the EU and US treatment of when two entities are part of the same undertaking differ. *See supra* note 356.

366. Case IV/32.737 – *Eirpage*, Comm’n Decision, 1991 O.J. (L 306) 22, ¶ 21. The Comm’n also explicitly refers to the potential “conflict” in such a case. *Id.*

367. Case IV/31.914 – *ARG/Unipart*, Comm’n Decision, 1988 O.J. (L 45) 34, ¶¶ 26-27.

provision of certain spare parts, and Unipart was selling Rover's parts for certain other spare others (for which it was the agent). Concerning the activities of the latter type, the Commission found that Article 101 was not applicable because the "agent" bore no entrepreneurial risk.<sup>368</sup> In contrast, the obligations imposed on Unipart in relation to spare parts other than those Rover branded parts fell under the scope of Article 101 because for those activities, each entity bore its own entrepreneurial risk and the obligations restricted the separate entities' "scope for competition."<sup>369</sup> This is notably similar to the position of Amazon on Amazon Marketplace where Amazon, the retailer, may or may not compete with third-party suppliers depending on the relevant product range. The same goes for Apple in relation to App Store where Apple, the app developer, may or may not compete with independent app developers depending on the relevant apps. Thus, where platforms do actually compete with their suppliers on the relevant market, they should not count as agents, but they should continue to count as agents on relevant markets where they do not actually compete with their suppliers at the time of the competition law assessment.

In individual cases, the concept of competitive neutrality may require an initial assessment of the nature of the platform business in relation to the business of the suppliers, so as to establish whether the platform is in competition with the supplier. In fact, to some degree, the question of agency is closely related to the definition of the relevant market and the activity in question in which the intermediary is engaged because this determines whether the agent is in a vertical relation to the supplier in the production chain, as discussed above.<sup>370</sup> The positioning of the platform and the agent in this vertical chain is also relevant to establishing *who* buys/receives *what* from *whom*. This becomes particularly important, *inter alia*, to determine standing to sue in private damages actions in jurisdictions such as the United States. For example, if the activity of an intermediary in question is defined as "distribution services to suppliers" (as opposed to the provision of the supplied products to consumers) as was the position in *Campos*, then it follows that the intermediary is more likely to be an agent than not.<sup>371</sup> In *Campos*, Ticketmaster (a ticketing service company) had long-term

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368. *Id.* ¶ 26.

369. *Id.* ¶¶ 27, 33.

370. See accompanying text to *supra* note 350.

371. See *Campos*, *supra* note 31.

exclusive contracts with almost every promoter of concerts in the United States.<sup>372</sup> The legal issue was whether consumers, who purchased tickets from Ticketmaster, which distributed the tickets at outlets, over the phone, at the venue, etc. to consumers and charged consumers a fee for its distribution services, had standing to sue Ticketmaster as “direct purchasers” for inflated, supracompetitive fees.<sup>373</sup> The consumers argued that they are the direct purchasers of the ticket distribution services because they pay the service fees directly to Ticketmaster.<sup>374</sup> The United States Court of Appeals disagreed and found that, despite such billing practices, consumers were not direct purchasers because the ticket delivery services were an *input* in the product that the *venues* sold to the public, which the venues were unable to obtain in a competitive market, making the consumers’ dealings with Ticketmaster “derivative” and thus, indirect.<sup>375</sup> Namely, it was the venues and promoters to whom Ticketmaster provided a service, and they consumed Ticketmaster’s service, which was the distribution of tickets to consumers. This points out that in relation to the product provided to consumers (i.e. third parties) on the “relevant market,” Ticketmaster had no relevant operations because it provided distribution services to the venues (not to consumers) and any tickets that it sold to consumers, it sold them on behalf of the venues as their agent. This is because the relevant market in relation to consumers concerned tickets (i.e. consumers were “consuming” tickets, not ticket distribution services), and on that relevant market, Ticketmaster was only acting as the agent of the event promoters.<sup>376</sup> The same legal issue

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372. *Id.* at 1171.

373. *Id.* at 1169.

374. *Id.* at 1171.

375. *Id.* at 1171. Notably, the same Court also held that this indirect purchaser status does not bar the consumers from seeking *injunctive* relief because the payment of the fees to Ticketmaster establishes standing to pursue such a claim for monopolistic fees; *id.* 1172. *But see Pepper, supra* note 31, at 4 n.1 (questioning the access to injunctive relief given the proximate cause requirement which stipulates that under normal rules of construction, a plaintiff who is not proximately harmed by a defendant’s unlawful conduct has no cause of action to sue the defendant for *any* type of relief).

376. This distinction is made implicitly by the dissent in *Campos* where Sheppard Arnold, J. argued that the consumers should have been able to sue Ticketmaster for treble damages as direct purchasers *because* the “monopoly product” at issue in the case was ticket distribution services, not tickets, and Ticketmaster supplied that product directly to consumers; *Campos, supra* note 31, at 1174. Thus, he disagreed with the majority’s characterization of the distribution services as being provided to venues, in indicating that it was the tickets that were being sold to

of establishing who sells what to whom also lay at the heart of *Apple (iPhone)*, which the US Supreme Court decided to be one of Apple's selling apps as a "retailer" to iPhone owners, strikingly without discussing the issue of agency or *Campos* at all.<sup>377</sup> In its approach, the Supreme Court did not adopt the position of the amicus curiae brief for the United States, which had characterized Apple as providing distribution services that were a necessary input for app developers' sales of their apps to customers and that were provided directly to app developers in line with *Campos*, with the consequence that consumers could not sue Apple as indirect purchasers of that service.<sup>378</sup> The Supreme Court's characterization of Apple as a "retailer" in an arrangement where the subject matter of contracts is *licensing* of software (which technically excludes any possibility of "resale" as Apple does not and cannot "buy" a license from app developers to "resell" the license to consumers) and where the price of the product in question is *not* set by the "retailer" muddles the established conceptual distinctions between different commercial distribution models including retail and agency. In effect, it guts agency as a business model by equating it to retail, a distribution model which operates on completely different terms in relation to ownership, commercial risk, etc.<sup>379</sup> In not recognizing the possibility that Apple acts as the agent of the app developers to whom it provides a service on the relevant market in relation to app sales to consumers (rather than selling the apps as a "retailer" on its own behalf), the Supreme Court essentially throws into question the operating business model of all of the platforms studied in

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consumers on behalf of the venues by Ticketmaster as the agent of the venues, rather than the distribution services, which Sheppard Arnold, J. held to be provided directly to consumers.

377. *Pepper, supra* note 31. Had the US Supreme Court decided that Apple was the agent of third-party app developers who supply their apps to consumers, this would have made the consumers indirect purchasers with no standing against Apple. *See* the Brief for the United States as Amicus Curiae in *Apple Inc. v. Robert Pepper, et al* No.17-204 in the US Supreme Court at 16-17 (internal quotations omitted) ("[a]lthough Apple acts as an intermediary or distributor, it does not buy apps from app developers and then resell them to consumers at prices of its choosing . . . [i]nstead, it acts as an agent for the developers, completing sales on the developers behalf at prices the developers set . . . and [t]hat difference is critical to the proper application of *Illinois Brick* rule").

378. *See* Brief for the United States, *supra* note 377, 19.

379. It appears that the Supreme Court deems agency to be a "retail" arrangement based on a "commission-pricing model." *Pepper, supra* note 31, at 8. The Dissent appears to accept that it is the app developers from whom the consumers bought the apps, which can be interpreted to suggest that the purchase was concluded through the agency of Apple, but the Dissent also denotes Apple to be a "retailer." *Id.* at 5 (Gorsuch, J., dissenting).

this work and of any other platforms which operate on similar business models.<sup>380</sup>

The characterization of the relevant market and the evaluation of *who* provides *what* to *whom* in the context of a platform is, indeed, a thorny legal issue that has led to questionable approaches by different authorities around the world. For example, in *Flight Centre*, the Australian High Court adopted a somewhat puzzling interpretation of the arrangement in place. In this case, Flight Centre—a travel agent operating through shops, call centers and the internet—sold tickets on behalf of airlines and in line with airlines’ tariffs, conditions of carriage and instruction.<sup>381</sup> The agent could not vary or modify any terms and conditions, but it could sell tickets to consumers at the price which it determined.<sup>382</sup> With each sale, Flight Centre created a contractual relationship between the customer and the airline.<sup>383</sup> The agent had no proprietary rights to tickets and was remunerated by “at-source” commission for each ticket sold.<sup>384</sup> The commission was a percentage of the published fare, which was a fare fixed by the airline for the relevant seat on the relevant flight.<sup>385</sup> If Flight Centre sold a ticket above this fare, it would keep the difference between the published fare and the actual fare as well as the commission.<sup>386</sup> Flight Centre was free under the agency agreement to sell or not to sell an international airline ticket of any airline and to sell any ticket to any customer at any price.<sup>387</sup> Thus, Flight Centre was operating under an agency model for

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380. Because the class action in *Apple (iPhone)* litigation does not concern, for example, an agreement concerning the price of the apps as agreed between the app developers and Apple, but rather the allegedly supracompetitive commission that Apple charges to app developers (resulting from monopolizing the distribution of apps), the concept of competitive neutrality has no direct application. Had the action concerned app prices, the application of competitive neutrality—assuming that the EU single economic entity doctrine applies—would mean that for apps where Apple competes with the third-party app developers, such restrictions of competition concerning, e.g. the price level, would be brought under the scope of application of art. 101. For apps where Apple does not compete with third-party app developers with its own apps, the single economic entity doctrine would apply and restrictions of competition including those on price would fall outside the scope of application of art. 101.

381. *Flight Centre*, *supra* note 16, ¶ 10.

382. *Id.*

383. *Id.* ¶ 22.

384. *Id.* ¶¶ 11-12.

385. *Id.* ¶ 12.

386. *Id.*

387. *Id.* ¶ 34.

competing principals (i.e. airlines) and had some pricing freedom in relation to the fares.

The substantive question on appeal was whether Flight Centre was in competition with three airlines when it attempted to induce each airline to agree not to discount the price at which that airline offered international airline tickets directly to customers.<sup>388</sup> The majority opinion held that the critical question of whether Flight Centre competed with the airlines depended on two considerations: namely, that Flight Centre could not only decide to sell or not sell an airline's tickets, and also to set its own price for the tickets; and that Flight Centre was not constrained in its authority to prefer its own interests over those of the airlines.<sup>389</sup> The latter point is clearly, directly relevant to the inquiry of "competitive neutrality" as discussed in this Section. The High Court remarked that "[w]hen Flight Centre sold an international airline ticket to a customer, the airline whose ticket was sold did not."<sup>390</sup> Chief Justice French, dissenting, noted that "[t]he proposition that an agent and a principal, both selling the services of the principal, compete with each other in a market for the sale of those services does not command ready assent."<sup>391</sup> Making reference to the EU doctrine of single economic entity, Chief Justice French took issue with the majority's finding that an agent and the principal can be in competition with one another irrespective of whether the agent is an integral part of the other entity or not (although such a finding would

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388. *Id.* ¶ 25. Whether or not Flight Centre was "in competition" with the airlines whose tickets it sold was fundamental for this case as the relevant part of the Trade Practices Act expressly required this for applicability.

389. *Id.* ¶ 89. However, if Flight Centre's agreement with airlines did not allow it to set the price, such a ban might have contravened other parts of competition law such as the prohibition against resale price maintenance. Having said that, such price freedom does bring the agent closer to a retailer than an agent by giving it pricing freedom. Indeed, in such agency cases, who has pricing freedom appears to be a central issue. Yet, one needs to distinguish between true pricing freedom as in a usual retail arrangement and pricing freedom where the agent can forego (some of) the commission (i.e. its remuneration) that it can normally charge on top a fare initially fixed by the principal, which is different to the situation of a retailer.

390. *Id.* ¶ 90.

391. *Id.* ¶ 15. The court below, namely the Full Court of Australia, had also found on appeal that a travel agent selling airline tickets does not compete with the airlines in a market for distribution and booking services; *Flight Centre Ltd. v Australian Competition & Consumer Comm'n* [2015] FCAFC 104 (Austl.) ¶ 8. This followed from the fact that the travel agent supplied any booking services as an "agent" of the airlines on behalf of the airlines; *id.* ¶ 154. Consequently, the agent's attempts to induce the airlines into a price fixing agreement was not an anticompetitive agreement. *Id.* ¶182.

indeed be sufficient for that conclusion).<sup>392</sup> Thus, whereas the Australian Competition and Consumer Commission found that the agency relationship between Flight Centre and the airlines did not defeat the proposition that Flight Centre supplied a service to consumers in competition with the airlines, Chief Justice French concluded that what Flight Centre did in selling a ticket was properly regarded as the action of the airline itself.<sup>393</sup> According to Chief Justice French's dissenting opinion, there is "no 'market' for the supply of the tickets of a particular carrier" and Flight Centre was not in competition with the airlines for which it sold tickets on any relevant market.<sup>394</sup> In contrast, Justices Kiefel and Gageler opined that Flight Centre was in competition with each airline on a market for the supply, to customers, of contractual rights to international air carriage.<sup>395</sup> They found that this was the case despite Flight Centre's supplying on that market as agent for each airline.<sup>396</sup> Justice Nettle examined the issue of competition from the perspective of the consumer and found that an airline ticket sold by Flight Centre on behalf of an airline would, in most respects, be identical to an airline ticket sold by the airline, which connotes high degree of substitutability, and therefore, competition between tickets sold by the airline and the agent.<sup>397</sup>

With all respect to the majority in *Flight Centre*, it is difficult to see how "[w]hen Flight Centre sold an international airline ticket to a customer, the airline whose ticket was sold did not."<sup>398</sup> This is literally

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392. *Flight Centre*, *supra* note 16, ¶ 19.

393. *Id.* ¶ 21.

394. *Id.* ¶¶ 21, 24.

395. *Id.* ¶ 26. They distinguished this market from the market for supplies of carriage services. Thus, they found that the market was the one for international airline tickets, but they held this market to be a market for "contractual rights" to carriage services and not a market for carriage services. *Id.* ¶ 92. With all respect to the majority, such a market for airline tickets that is separate from air travel services is a rather artificial way of constructing the market since passengers are not purchasing "tickets" *per se*, but air travel services where the ticket simply confirms the purchase of air travel services; there is no separate demand for airline tickets outside of a demand for air travel services unless, for example, the market concerns collecting airline tickets as memorabilia, etc.

396. *Id.* ¶ 26.

397. *Id.* ¶ 127.

398. *Id.* ¶ 90. *See also* a merger decision in which the Comm'n appears to agree that travel websites offering flights are substitutes for airlines' own websites; Case COMP/M.6163 – *Axa/Permira/Opodo/Go Voyages/Edreams*, Comm'n Decision, C(2011) 3913 final (May 30, 2011), ¶¶ 26-28. Interestingly, in *HRS* the Bundeskartellamt found that "[t]he website of hotels offering real-time booking are not part of the same product market as hotel portals," and that the hotel websites are not substitutes for hotel portals since the former do not offer the same bundles



counterfactual because every time Flight Centre sold an international airline ticket to a customer, a ticket of *that* airline was sold: the airline did sell a ticket, just not through its proprietary sales channels. The “high degree of substitutability” between the tickets sold by Flight Centre and the airlines results from the fact that they are *identical*, and one and the same thing. More importantly, what the majority may have confused is the difference between two relationships. First, the relationship between a principal and an agent who have a conflict of commercial interest and are not in a competitively neutral position (i.e. they compete with one another on the same, relevant market) where they are both selling the same (or competing) products. In such a scenario, the agent has a choice to make a sale either on her own behalf and for her own profit, *or* on behalf of the principal and for the principal’s profit.

Second, the relationship between an agent and a principal both of whom are selling *only* the product of the principal. In such a scenario, the benefit of the transaction to the principal differs depending on who made the sale because the direct sales channel is less costly to the principal (i.e. the principal makes a greater profit if he sells the product directly, due to not paying any commission to the agent). Commercially, the second relationship still involves the principal making a profitable sale irrespective of whether the sale was concluded by the agent on his behalf or by the principal himself. In the context of a particular sale of a particular ticket of a particular airline, the commercial interests of Flight Centre and the airline are still aligned: they both make a profit when the sale takes place. In contrast, the first relationship involves a situation where, indeed, when the agent sells for her own benefit a product that competes with the principal’s, the principal loses the opportunity to enter into that profitable transaction and, incurs the opportunity cost of that profitable transaction. Although it is clear that in the first relationship, the two entities are in competition with one another because either one *or* the other realizes the gains from trade, in the second relationship the item being sold is literally the same and only the method of sale differs (and the issue is that of distribution of profits between the principal and the agent). Thus, it is difficult to argue that in the second relationship the principal and the agent are in

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of services as hotel portals; *HRS*, *supra* note 11, ¶ 88. See also the Bundeskartellamt’s similar findings in *Booking.com*, *supra* note 11, ¶ 143.

competition with another for the sale of the *very same thing*. The only scope of unconstrained “authority to prefer its own interests over those of the airlines” that Flight Centre might have had relates to its own interests in relation to its agency business;<sup>399</sup> it cannot have preferred its own interests over those of the airlines in the sale of airline tickets since Flight Centre does not operate its own airline. In relation to the platforms studied in this Article, Flight Centre is commercially in a very different situation to, for example, Amazon Marketplace where Amazon, the retailer, and third-party sellers may compete with one another to sell the same/competing products to the same group of customers. Therefore, the dissenting opinion in *Flight Centre* was correct in finding that Flight Centre was an agent of the airlines and not in competition with them. Applying the findings and normative suggestions of the current Article, this position of “competitive neutrality” would have required the application of the agency rule under the single economic entity doctrine in the European Union with the outcome that restrictions of competition in the separate *vertical* agreements between Flight Centre and *individual* airlines concerning ultimately the pricing of the product on the relevant market would not be scrutinized under Article 101.<sup>400</sup> This is because in relation to the product sold to third parties on the relevant market (i.e. airline tickets), Flight Centre was in a competitively neutral position with its principals and their interests were aligned in aiming to make a sale. Indeed, in some of the US cases examined in *Flight Centre*, US courts also found that similarly situated travel agents were agents of the airlines, which the majority of the Australian High Court clearly did not follow despite considering them as potential precedents.<sup>401</sup>

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399. *Flight Centre*, *supra* note 16, ¶ 89.

400. This is to be contrasted with a scenario where Flight Centre tries to facilitate collusion between airlines in coordinating the applicable price reductions. In that case, where Flight Centre essentially would be attempting to orchestrate a *horizontal* restriction of competition between airlines in getting them to agree not to discount in concert, the conduct in question would no longer be the vertical arrangement between a given airline and Flight Centre which can benefit from the single economic entity doctrine, but a horizontal restriction of competition, which falls outside the scope of the single economic entity doctrine and this Article’s inquiry. See accompanying text to *supra* note 190 in relation to facilitation of collusion.

401. For example, in *Ill. Corp. Travel*, the US Court of Appeals held that a travel agent was an agent of an airline as distinct from a reseller of the airline’s tickets (and consequently, the airline’s prohibition of agent’s discounts to consumers was *not* caught by the *per se* prohibition of price fixing). *Ill. Corp. Travel, Inc., Mctravel Travelservices v. Am. Airlines*, 806 F2d 722, 726 (7th Cir. 1986). Similarly, in *American Airlines*, *supra* note 323, at 752 the Seventh Circuit did not accept the existence of two separate markets for air travel (one for the

What *Apple (iPhone)*, *Flight Centre* and *Campos* demonstrate is that it is important to identify the nature of the platform business in relation to the business of the supplier when determining the competitive positioning of the platform and supplier with regard to one another and the relevant market on which they may be competing. Under the concept of “competitive neutrality” developed in this Article, the competitive position that has to be neutral relates to competition on the relevant market concerning the products/services provided to third parties, and, not competition on the market concerning, for example, the agency services of the platform, which it provides to the suppliers, in competition with, for example, other platforms. In the case of *Flight Centre*, therefore, the relevant market would have been that of air travel tickets and not airline ticket distribution services in deciding whether Flight Centre was part of the same undertaking as an airline in relation to airline ticket sales to consumers. In the case of *Campos*, the relevant market would have been that of event tickets (rather than that of distribution services), which was the product provided to consumers by Ticketmaster. In the context of *Apple (iPhone)*, the relevant market would be that of apps rather than app distribution services, regarding which competitive neutrality would be assessed.

In sum, despite no explicit acknowledgement to this effect in any area of law studied, the concepts of agency in different areas of law including competition law are built on a remarkably similar foundation, namely that of alignment of commercial interests which implies a position of competitive neutrality between the principal and the agent. Although in the vast majority of the platforms studied, there is, indeed, such alignment of commercial interests and competitive neutrality between the platform and the supplier in relation to transactions facilitated on the relevant market, there are also important instances where this does not hold. In such circumstances where the commercial interests of the platform and supplier are no longer aligned because the platform is not in a competitively neutral position in relation to its supplier on the relevant market for the products/services supplied to third parties, this Article proposes a (re)interpretation of the single economic entity doctrine so that such platforms do not benefit from the agency rule to the extent that their agreements contain restrictions of competition on the relevant market. This Section has demonstrated that

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transportation and one for the ticketing service) on very similar facts to *Flight Centre*, *supra* note 16, in holding that the relationship between travel agent and an airline was one of genuine agency.

such a (re)interpretation is necessary and justified on the basis of the principles underlying agency in different areas of the law studied, as well as the single economic entity doctrine in competition law.

#### VII. CONCLUSION

This Article explored two related questions regarding the legal characterization of platforms that facilitate transactions: first, whether they are agents of the suppliers for whom they facilitate transactions with third parties; and second, whether competition law should apply to their agreements with their suppliers that contain clauses, which restrict competition on the relevant market concerning the products/services provided to third parties. This Article found, after studying concepts of agency in different areas of law including competition law, and the relevant terms and conditions of six different platforms—Uber, Amazon Marketplace, eBay, Booking.com, Apple App Store, and Airbnb—that these platforms are, as a matter of positive law, on balance, agents of their suppliers. The implication of this finding in EU competition law and in any competition law modelled on that of the European Union is that agreements between these platforms and their suppliers which contain restrictions of competition on the relevant market cannot be scrutinized under the prohibition of anticompetitive agreements due to the *single economic entity* doctrine. The doctrine treats agreements between agents and their principals as taking place within one and the same undertaking, which renders Article 101 inapplicable following the requirement that the agreement takes place between *separate undertakings* for the provision to be applicable. This implies that terms which restrict competition on the relevant market by, for example, fixing prices or restricting output, cannot be scrutinized as anticompetitive agreements. Thus, there is a potentially significant *platform gap* in the application of competition law to agreements between platforms and suppliers. Establishing that platforms are agents of their suppliers as the law currently stands and the existence of the consequent gap in the scope of competition law application to platform agreements is the first contribution of this Article.

The finding of agency as regards the relation between platforms and suppliers is in line with the operation of agency as a delegation model established in different areas of law, despite this not having been recognized as such in the competition law jurisprudence, soft law or commentary. This Article has demonstrated that, in fact, the underlying

principles of the agency relationship are more or less the same in all the areas of law studied including EU competition law. This is important because it means that where competition law has not established general principles determining whether a given business arrangement between two parties is one of agency, it can make use of the relevant principles established in these other areas of law. The similarity of the fundamental principles of agency across different areas of law is also important because it makes it possible to adopt a common legal characterization of platforms, which would align with the concepts of agency in different areas of law, all of which may be applicable to the practices of the same platforms in different disputes.

The identification of the gap in the application of EU competition law to platforms' agreements with their suppliers leads to a subsequent question, which this Article has explored. Given the ubiquity of the platform model and the growing importance of e-commerce in the digital economy, the immunization of potentially substantial restrictions of competition from scrutiny by competition law requires a normative assessment. Namely, it becomes necessary to undertake a normative assessment of whether the identified *platform gap* should be filled, and if so, how. In this normative aspect, the Article has found that the gap *should* be filled, but only in relation to one type of platform arrangement: where the platform in question not only facilitates transactions on behalf of its suppliers, but also competes with those suppliers on the relevant market where the products/services of the suppliers are sold/provided to third parties. This is because all of the areas of law studied place great emphasis on the alignment of commercial interests between the agent and the principal, and such alignment lies at the heart of an agency arrangement where the duties and the interests of the agent are expected not to be in conflict as a result of the fiduciary nature of the relationship. As competition law currently does not explicitly recognize this factor in its assessment of agency relations, but relies on risk-taking, which this Article has identified to be a factor that *implicitly* requires a position of competitive alignment between the agent and the principal, the Article has developed a concept of *competitive neutrality* to inform a (re)interpretation of the agency rule under the single economic entity doctrine. This concept of "competitive neutrality" aligns the competition law assessment of agency with the assessment of agency found in different areas of law, and facilitates a general, principled understanding of agency under the single economic entity doctrine, and

in particular its application to platforms, which currently does not exist. In the context of platforms, the concept of *competitive neutrality* reflects the fact that platforms are normally in a vertical relation to their suppliers in the production chain where they provide a service as an input for the suppliers' business, for example, in the form of a distribution or sales channel. Where the competitive positioning between the platform and suppliers turns into a horizontal relationship because the platform starts competing with its suppliers for whom it simultaneously acts for as an agent, this goes fundamentally against the existence of a position of agency. In such circumstances, by participating in the relevant market as an economic actor in its own right, the intermediary also takes risks and places itself in a position in which it can affect competition on the market. Thus, where *competitive neutrality* is replaced with *competitive rivalry* between the platform and the suppliers on the relevant market, it is not possible to justify why the platform and suppliers should count as one and the same entity on the relevant market in relation to contracts negotiated/concluded with third parties. Consequently, this Article proposed a (re)interpretation of the single economic entity doctrine so that the agency rule does *not* apply to platforms that not only facilitate transactions for their suppliers, but also compete with their suppliers on the relevant market. In the context of the rules applicable in the European Union, this Article has proposed a revision of the EU Verticals Block Exemption Regulation and/or the accompanying Guidelines to include a provision to the effect that vertical agreements between platforms and suppliers, which contain restrictions of competition on the relevant market for the products/services provided to third parties cannot benefit from the agency rule under the single economic entity doctrine, to the extent that the platform competes with the suppliers on that market.<sup>402</sup> Such a clause can read as follows: "an agency agreement will fall within the scope of Article 101(1), even if the principal bears all the relevant financial and commercial risks, where the agreement is between a platform and a supplier, and the platform competes with the supplier on the relevant market in relation to the products/services sold/provided to third parties through the intermediation of the platform."

The findings of this Article are important for the correct legal treatment of platforms in different areas of law and in different

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402. VBER, *supra* note 14; Verticals Guidelines, *supra* note 35.

jurisdictions, not least because of the growing importance of e-commerce in the economy and the widespread adoption of the platform model. As demonstrated throughout the paper, different jurisdictions and different areas of law within the same jurisdiction (e.g. commercial, employment, tax, competition laws) are already approaching the same legal question of how to legally characterize what a platform is in significantly different ways. This is unfortunate because it can lead to legal and business uncertainty to the detriment of economic growth and technological development. It can also lead to undesirable fragmentation in the legal treatment of different businesses that despite operating in different business sectors adopt essentially the same model of operation, as demonstrated by the similarity of the contracts of the platforms studied in this Article. The similarity of the standard contracts also demonstrates that agency *is* the business model of platforms across the board and is not a type of arrangement adopted by some platforms to conceal their real operation method. Acknowledging this would go a long way in ensuring that the law does not penalize legitimately adopted business models in treating them as if they were fundamentally different arrangements. It would also ensure that the law's treatment of potentially anticompetitive outcomes does not depend on the form of the business model adopted by a given undertaking because it is only after accepting the arrangement for what it is, the law can respond effectively to the effects of the undesirable aspects of that arrangement.<sup>403</sup> Where technology and the use of technology develop at speeds with which the legal system cannot keep up, there is a danger that the law will either become irrelevant or an impediment to the commercial use of technology that can benefit society. This Article has demonstrated in the context of some of the most popular platforms that that danger is real when it comes to the legal characterization of platforms and the implications thereof for competition law. This requires speedy adaptation of some of the existing concepts and rules of competition law, such as the single economic entity doctrine and the agency rule thereunder, regarding which this Article has set forth a means for (*re*)interpretation.

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403. This is most interestingly demonstrated by the majority and the Dissenting Opinion in *Pepper*, *supra* note 31, at 8-9, both of which use practically the same facts from a hypothetical business arrangement to argue that agreeing with the other opinion's assessment would be putting form over substance. *See id.*

