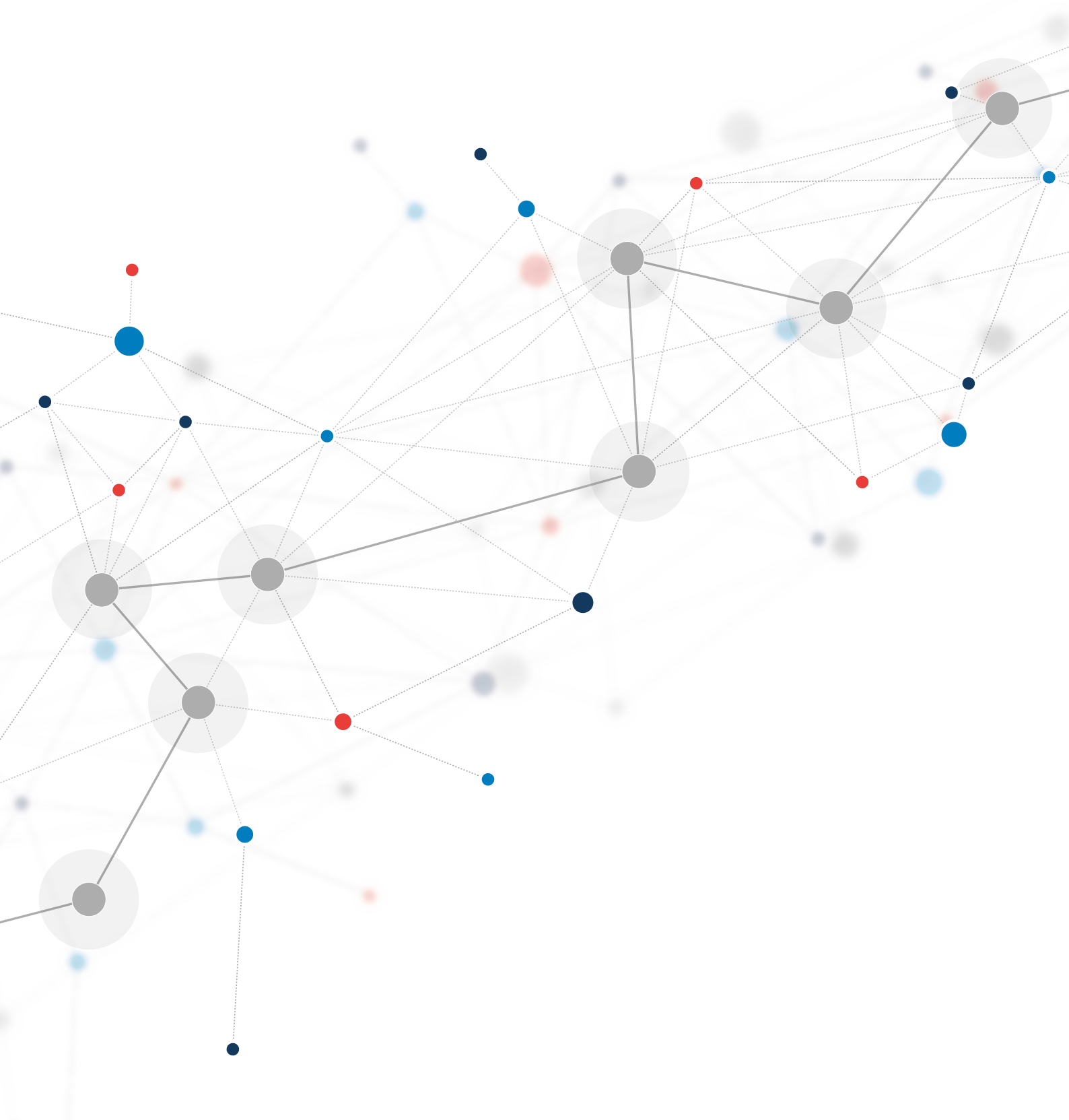


---

# THE DIGITAL MARKETS ACT BACK TO THE "FORM-BASED" FUTURE?

Miguel de la Mano, Valérie Meunier, Angelos Stenimachitis, Zsolt Hegyesi  
May 2021



This report has been prepared by Compass Lexecon experts and commissioned by Google LLC. The views expressed in this report are the authors only and do not necessarily represent the views of Compass Lexecon, its management, its subsidiaries, its affiliates, its employees or clients.

The report is based on information available to Compass Lexecon at the time of writing of the report and does not take into account any new information. We accept no responsibility for updating the report or informing any recipient of the report of any such new information.

This report and its contents may not be copied or reproduced without the prior written consent of Compass Lexecon.

All copyright and other proprietary rights in the report remain the property of Compass Lexecon and all rights are reserved.

UK Copyright Notice

© 2021 Compass Lexecon (a trading name of FTI Consulting Belgium S.A.). All rights reserved.

# Contents

<b>Section 1</b>	Executive Summary	1
<b>Section 2</b>	Digital Platforms: Their Properties, Diversity and Their Benefits to Society	4
	Introduction	4
	Definition	4
	Diversity of business models	6
	Benefits of digital platforms	7
	Benefits to end users	8
	Benefits to business users	10
	Benefits to innovation	11
	Strong network effects as an economic property of digital platforms	12
<b>Section 3</b>	Potential Competition Concerns in Digital Markets	15
	Introduction	15
	Potential concerns that can be addressed with existing competition law	15
	Envelopment	17
	Lack of interoperability	18
	Tying/Bundling	19
	Data as a barrier to entry	19
	Mergers – Acquisitions of nascent firms	20
	Perceived inadequacy of current enforcement tools	22
	Settings where platforms’ conduct would not fall under current competition law	22
	Settings and platforms’ conduct for which competition law might not work effectively	25
	Failure of effective intervention under current competition law	26
	Gatekeeper position	27
<b>Section 4</b>	Comments on the Proposed DMA	29
	Introduction	29
	The proposed gatekeeper designation	30
	Narrow quantitative thresholds and wide range of core platform services	31
	The lack of relationship between gatekeeper status and dominance	33
	Chilling effects of the generalised obligations	34
	Non-dominant gatekeepers and dominant non-gatekeepers	34
	On the merits and appropriateness of DMA proposals	36
	The unclear fit of the proposed <i>ex ante</i> obligations to its stated objectives	37
	Conducts outside the scope of the application of EU competition law	40
	On the timing of intervention	41
	Making a generality out of a few specific cases is likely ineffective and entails a great risk of unintended consequences	43

	Presumptions of illegal conducts are not rebuttable	43
	The approach of the proposed DMA	47
	The formalistic approach of the DMA	47
	On the enforcement powers and the broad discretion left to the EC	48
	Structural remedies	50
	It is unclear whether the benefits of the <i>ex ante</i> obligations will outweigh their costs	50
<b>Section 5</b>	Conclusions and Recommendations	52
	Key findings of preceding sections	52
	Design of regulation	53
	Technological and business model neutrality	53
	Avoiding intervention in newly formed markets	54
	Avoiding hardcore restrictions	54
	Alignment with key principles for interventions	54
	Clear thresholds for antitrust intervention	54
	Avoiding type I and type II errors	54
	Case by case examination and participative antitrust	54
	Final recommendations on the proposed approach	55
<b>Section 6</b>	Bibliography	56

## Section 1

# Executive Summary

- 1.1 The proposed Digital Markets Act ('DMA') prescribes the designation of so-called gatekeepers by the European Commission ('EC'), a set of obligations they must adhere to and the enforcement of the obligations.
- 1.2 Despite claims that its objectives are different to those of existing competition law, and that it is a complement to competition law, the proposed DMA is nevertheless to a large extent intimately intertwined with competition law. Its fairness and contestability objectives are not complementary to those of competition law; they are a subset of the latter.
- 1.3 As such, the proposal raises serious concerns in connection with competition policy enforcement.
  - i. First, the overlap and interplay between the proposed DMA and Article 102 TFEU is likely to lead to enforcement conflicts and legal uncertainty. Furthermore, assuming enforcement of the DMA will be an exclusive competence of the EC, inconsistent enforcement by national authorities of existing or new competition rules is a likely outcome.
  - ii. Second, the proposal might set precedents that could be carried over to other markets and settings where there is no consumer harm.
  - iii. Third, whereas EU antitrust rules rely on a consumer welfare standard that sets limiting principles to enforcement, the proposed legislation sets no requirements or analytical criteria to determine in what way or to what extent the conduct at issue harms consumers, competition or society. The absence of limiting principles may result in arbitrary and unpredictable enforcement activity.
- 1.4 The designation of gatekeepers is possible based on both qualitative and quantitative criteria. We have identified several concerns in this respect.
  - i. The thresholds are designed to capture the largest companies.
  - ii. Gatekeeper status is not related to the concept of market dominance and it is not the result of a market-by-market assessment. Indeed, the determination of gatekeeper status is entirely disconnected from standard antitrust market delineation.
  - iii. Enforcement of the proposed rules will almost surely result in distorted competition between designated gatekeepers and other market players.

- iv. An unexpected consequence of the lack of robust limiting principles is uncertainty by which platforms and services will be affected in the medium to long run. This will likely chill pro-competitive activity between firms that compete to become the leading platform in a particular market or activity.
- v. In the long run, mere uncertainty associated with potential or actual gatekeeper status and the difficulties in (self) assessing *ex ante* whether certain conduct falls within the scope of the regulation would likely have a chilling effect on innovation and growth. The business users of platforms may also experience adverse effects.

1.5 The obligations specified in the proposed DMA do not unambiguously serve the stated objectives.

- i. Many of the conducts in scope are already covered by existing competition rules. However, the number and duration of the investigations suggest that the addressed conducts are not necessarily harmful, to competition or to consumers. Thus, inevitably, strict enforcement of the DMA will conflict with ongoing and future enforcement of competition rules.
- ii. Due to their rigidity, the obligations may become outdated relatively quickly. This is the same problem that led DG COMP to move away from a form-based approach to an effects-based approach in the enforcement of Articles 102 and 101 TFEU over a decade ago.
- iii. The proposal lacks procedural safeguards as well as a feedback mechanism for the EC to adjust it.
- iv. For conducts outside the scope of existing competition law, it is unclear how the DMA would interact with other related policy provisions (GDPR, P2B regulation).
- v. Since the DMA sets out to fill a legal void in some cases, the possibility remains that the conducts are not unfair.

1.6 The proposed DMA intends to intervene more quickly than previous antitrust action. This, however, ignores that the main impact of antitrust enforcement is through its deterrence effect. The deterrence effect, however, requires proportionality and transparency in the application of the rules. Rushed intervention under the DMA would undermine the deterrence effect and likely result in unintended consequences.

- i. Early intervention may stop the expansion of some platforms before they can reach the optimal size that maximises user welfare.
- ii. The potential for competition should be assessed over a sufficiently long timeframe with milestones established to remove regulation and attract new entrants as soon as reasonably possible.
- iii. It might also chill the creation or expansion of platforms that wish to avoid additional regulation.

- 1.7 The proposed DMA generalises a few specific cases to universally applicable obligations, which also entails considerable risks.
- i. The conducts targeted by the obligations are not unequivocally detrimental to consumers and across all markets, so hardcore restrictions might hurt consumers.
  - ii. Some experts argue that black and grey lists could be introduced, which would allow companies to show the pro-competitive effects of certain conducts.
- 1.8 In conclusion, the benefits of *ex ante* obligations might not outweigh their costs. In particular, it is a likely unintended consequence that several innocuous practices could also be affected by the DMA.
- 1.9 We believe the proposal would more successfully and efficiently achieve its stated objectives by being rebalanced away from a patchwork of hardcore obligations that do not address clearly stated theories of harm to an adjustment of the existing regulations and strengthening of the market investigation tool. Carefully designed investigatory powers that allow all market participants to have a voice, combined with guidance on the criteria leading to enforcement action under the DMA would complement and strongly enhance current antitrust rules. Adapting the DMA proposal in this way will offer a modern, targeted and proportionate solution to address the challenges posed by leading digital platforms across the EEA. As it stands, however, the DMA echoes a form-based approach to enforcement that has proven ineffective and ultimately detrimental for consumers and businesses.

## Section 2

# Digital Platforms: Their Properties, Diversity and Their Benefits to Society

### Introduction

- 2.1 Digital platforms are diverse in their business models and practices, which makes a 'one-size-fits-all' regulation attempt problematic.
- 2.2 Several empirical studies have demonstrated the benefits of digital platforms to end users, business users and innovation. Evidence shows that the emergence of digital platforms may reduce prices, increase product variety, allow access to new markets and foster innovation. The entry of digital platforms often prompts traditional incumbents in the market to innovate.
- 2.3 Digital markets have some inherent traits which may raise competition concerns, especially with respect to the presence of network effects and markets prone to tipping in favour of one platform.

### Definition

- 2.4 Online platforms are online intermediaries that enable interactions between two or more groups of users. They cover a wide range of activities including online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services, payment systems, and platforms for the collaborative economy.<sup>1</sup>
- 2.5 Digital platforms interact with end users and business users in different ways. The corollary is that the different platforms generate revenue (that is, monetise their services) in different ways and might rely on advertising revenues, licencing fees, subscriptions, or product sales to varying degrees.
- 2.6 The concept and operation of online multi-sided platforms generally are hardly novel. Legacy media, such as radio stations, television channels, newspapers and magazines as well as financial exchanges, operating systems, payment cards, shopping malls, tour operators and real estate agents are familiar concepts of multi-sided platforms that are established parts of most economies. The economics literature on the properties and role of these various platforms is

---

<sup>1</sup> European Commission (2016). "Online Platforms and the Digital Single Market Opportunities and Challenges for Europe", COM/2016/0288.



extensive, with most reaching a consensus that platforms can be beneficial to both providers and users of a good or service. They increase consumer choice, improve efficiency and competitiveness of many economic sectors and can enhance civil participation in society.

- 2.7 Online platforms share key characteristics, such as the use of information and communication technologies ('ICT') to facilitate interactions between users, the collection and use of data about such interactions, and generate positive network effects.
- 2.8 Digital platforms commonly share the following characteristics:
- i. **Network effects (direct and indirect).** Network effects refer to the property that in some markets, the value that each user derives from a good or service depends on the number of users of the same or compatible goods or services. For instance, a user's benefit of joining a social media platform is increasing with the number of friends or acquaintances who are also members. This is an example of direct network effects, as these arise within the same group of users. Indirect (or cross-group) network effects arise on multi-sided platforms that connect different but interdependent groups of users, when the benefits derived by one group of users of the platform increases as the size of the other group grows. For instance, users of a PC operating system derive increasing value from that platform as the number of developers of applications running on it increases; symmetrically, developers derive higher benefit from their applications as the number of users of the compatible operating system grows larger.
  - ii. **Economies of scale.** Economies of scale arise when average production costs decrease, or average revenue increase, as total output increases. In the context of digital platforms, the addition of users to the platform usually comes at very low, if not zero marginal cost and can generate additional revenues.
  - iii. **Economies of scope.** The term refers to a firm gaining efficiencies from producing a wider variety of products. These efficiencies can involve lower average costs or increased revenue from being able to increase sales in new, adjacent markets.
  - iv. **Collection and analysis of data.** Data collection and data analytics are a main feature of digital platforms. Platforms rely on data analysis to improve the quality of their services, be them matching users, or suggesting or providing goods, services or content to users. The richer the data available and the better their analysis, the higher the likelihood of efficiently offering better services and content.
  - v. **Connection between different groups.** Digital platforms are often multi-sided, as they bring together several distinct but interconnected groups of consumers and business users.
  - vi. **Free or inexpensive consumer access.** Online platforms' products and services are often provided to consumers at zero or subsidised prices, and their revenues are generated on other sides of the market (e.g. advertising or data sales), potentially alongside paid premium offerings ('freemium' business model).

## Diversity of business models

- 2.9 Digital platforms come in different shapes and size. They engage in a wide variety of activities and operate according to different business models.
- 2.10 For many digital platforms, the inputs and outputs are chiefly intellectual property in the form of proprietary algorithms or digital content complemented by an infrastructure that is both non-rivalrous and inexhaustible. Other digital platforms are proprietors of tangible goods or services and generate revenue by selling them (e.g. online retailers).
- 2.11 A broad taxonomy could identify three types of business models based on monetisation avenues.
- i. Intermediation platforms, that bring end users and business users together and retain a fee on transactions concluded between the two types of users. Examples are Amazon Market Place, Uber and Airbnb.
  - ii. Platforms providing services relying on funding through ads, such as Google's search engine, Facebook, Bing and Twitter.
  - iii. Finally, there are ecosystems, for instance operating systems, cloud services and app stores monetised through hardware and software sales. These include the Apple operating system (iOS) and App store, Google's Android and Google Play Store and Microsoft's Windows and Azure, among others.
- 2.12 Depending on the groups of users that they connect and the goods or services that they provide, online platforms operate along notably different business models, which ultimately implies that their incentive to adopt certain behaviours and the impact of these behaviours on their users and on competition will vary to a great extent. Marketplaces provide an illustration of the diversity of models that can coexist:
- i. Pure or hybrid marketplaces. A pure marketplace aims only at connecting providers and users of a good or service, whereas a hybrid marketplace, in addition to catering to third-party providers, can also be active as a provider itself. A hybrid marketplace, because it can find itself in competition with third-party providers it hosts on its platform to serve some end users, may behave differently to a pure marketplace.
  - ii. Two-sided or multi-sided platforms. A multi-sided marketplace will take into account the interdependence of three or more groups of users, which may affect its relationship with business and end users.<sup>2</sup>
- 2.13 The diversity of business models means that there are fundamental differences in "(a) the type of economies of scale they rely on (data scale, R&D costs); (b) the type and direction of network effects (direct/indirect, one/both directions); (c) the potential for multihoming (on one or both sides)

---

<sup>2</sup> See: Hagiu, A., & Wright, J. (2015). Multi-sided platforms. *International Journal of Industrial Organization*, 43, 162-174.

[...]; and (d) the potential for disintermediation, either by someone else ‘introducing a different layer’ intermediating two sides of the platform or finding a way for two sides to connect to each other directly.”<sup>3</sup>

- 2.14 Accordingly, these differences entail that not all online platforms affect users, competitors, business users, or other key dimensions of competition in the same way or to the same extent. **From this perspective, in order to be effective, a regulation intended to address fairness or competition concerns associated with large online platforms would need to be flexible enough to tailor each rule to the appropriate context it seeks to address.** The EC’s proposed DMA, however, does not provide this flexibility, as the definition of ‘gatekeepers’ and the obligations expected to be imposed on them do not depend on the diversity of markets on which online platforms operate or the diversity of business models they employ.

### Benefits of digital platforms

- 2.15 The proposed DMA intends to curb the ability of large platforms to potentially exploit the characteristics of the services they provide, so as to ensure fair economic outcomes. An ill-designed regulatory framework that puts unnecessary constraints or dictates the way online platforms can operate and behave would negatively impact the benefits that users derive from them.
- 2.16 The introduction to the DMA proposal highlights the benefits and utility of digital platforms<sup>4</sup> as does a report published by the Joint Research Centre (‘JRC’, the EC’s science and knowledge service), where a panel of economic experts emphasise the social and economic welfare gains provided to all users by platforms.<sup>5</sup>

---

<sup>3</sup> See: Caffarra, C. & F. Scott Morton (2021). “The European Commission Digital Markets Act: A translation”.

<sup>4</sup> “Digital services have brought important innovative benefits for users and contributed to the internal market by opening new business opportunities and facilitating cross-border trading. Today, these digital services cover a wide range of daily activities including online intermediation services, such as online marketplaces, online social networking services, online search engines, operating systems or software application stores. They increase consumer choice, improve efficiency and competitiveness of industry and can enhance civil participation in society.” - See the explanatory memorandum to proposal COM(2020)0842.

<sup>5</sup> “Users can benefit from network effects or positive externalities. An increase in the number of users, products and services on the same or on other sides of the market, gives them a wider variety of parties to interact with and makes it more likely that they find what they are looking for. Some users may get free access to the platform while others pay for access – for example advertisers. Because of network effects, users may still enjoy surplus benefits over and above their payment. Platforms monetise and internalise only part of the social value that they generate. Network effects in digital platforms are driven by economies of scale and scope in data re-use and data aggregation. They play a crucial role in increasing matching efficiency, reducing transaction costs for users and improving service quality. The social value of data often exceeds their private value.” See: Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., & Van Alstyne, M. (2021). The EU Digital Markets Act. Publications Office of the European Union, p.7.

2.17 Other jurisdictions also have underlined the great benefits that online platforms are bringing to users.<sup>6</sup>

### **Benefits to end users**

2.18 Digital platforms have given end users the ability to use search engines, data storage facilities, social media networks, media consumption sites and marketplaces at no or very little monetary cost. The existence of such options increases welfare through the expansion of consumption possibilities. The availability and use of digital platforms thus produce gains in various ways.

2.19 Digital platforms have reduced market frictions as they decreased search and transaction costs substantially in various industries. This by itself offers great benefits to consumers, both in monetary terms as well as in time and effort. In addition, digital platforms have allowed consumers to get access to products and services which were previously inaccessible to them.

2.20 Empirical studies have estimated the surplus generated by those platforms which help reduce transaction costs and match sellers and buyers in various markets. Considering that even a simple peer-to-peer website which enables the outsourcing of domestic tasks generates USD37 of surplus per transaction, as evidenced by an analysis of data spanning from 2010 to 2014 in major US and UK cities, the surplus from more complex platforms with sophisticated and personalised recommendation algorithms is likely to be even greater.<sup>7, 8</sup>

2.21 The empirical analysis carried out by Brynjolfsson et al. (2019) addresses well-known digital platforms. According to a large-scale experiment carried out in 2016 and 2017 in the US, a median user derives, on an annual basis, a surplus of USD15,000 from the use of search engines, a surplus of USD800 from using e-commerce platforms, and a surplus of USD300 from using social

---

<sup>6</sup> For instance, the UK's Digital Competition Expert Panel stated that "[w]ithin the digital economy, markets based on platforms that connect different groups of users have played a prominent and distinctive role. Online search, social media, digital mapping and other applications frequently provide consumers with services at no monetary cost. Having companies operating at such scale and across multiple digital markets delivers substantial benefits for consumers and the UK economy." See para. 1.5 and 1.7: Furman, J., Coyle, D., Fletcher, A., McAuley, D., & Marsden, P. (2019). *Unlocking digital competition: Report of the digital competition expert panel*. UK government publication, HM Treasury.

<sup>7</sup> The peer-to-peer platform in question is TaskRabbit. See: Cullen, Z., & Farronato, C. (2020). Outsourcing tasks online: Matching supply and demand on peer-to-peer internet platforms. *Management Science*.

<sup>8</sup> Several other empirical analyses are providing interesting insight and estimates of the benefit provided by online platforms. Gentzkow (2007) shows, based on 2000–2003 data from the US, that the online edition of a newspaper generated a total consumer surplus of USD45 million annually. See: Gentzkow, M. (2007). Valuing new goods in a model with complementarity: Online newspapers. *American Economic Review*, 97(3), 713-744. As a large variety of free or relatively cheap media outlets are available online, this suggests that news content available online allows consumers to enjoy a very sizable benefit. McKenzie et al. (2019) analysed online news content in Australia and estimated that consumer surplus of around USD10 was generated for each user watching one piece of content in an on-demand subscription video setting. See: McKenzie, J., Crosby, P., Cox, J., & Collins, A. (2019). Experimental evidence on demand for "on-demand" entertainment. *Journal of Economic Behavior & Organization*, 161, 98-113.

media.<sup>9</sup> Furthermore, Brynjolfsson and Oh (2012) estimate that the total welfare gain of digital services is USD160 billion per year based on a time-based estimation approach.<sup>10</sup>

- 2.22 Indeed, the example of eBay has shown that consumers can benefit from algorithm-supported search results as opposed to simple lists. Dinerstein et al. (2018) estimate that transaction prices fell by up to 15% when, in 2011, the search function on eBay was changed from a mere product list to a product comparison tool with algorithm-selected substitutes.<sup>11</sup> Very similar conclusions have been drawn for online hotel booking platforms, based on data on search and booking behaviour in 2017 for a specific city via a major online travel agency. Because clicking is costly, consumers might be discouraged and leave the site before they could find the appropriate offer for them. Welfare and matching could be improved by personalised choice sets, thus reducing costly clicks and increasing transactions.<sup>12</sup>
- 2.23 According to another study, a significant reduction in real estate turnaround times of up to 50% can be attributed to Internet platforms in the US, which benefits clients on both sides of sales and lease agreements.<sup>13</sup> In the US insurance industry between 1992 and 1997, online platforms connecting consumers with insurers and providing price information decreased insurance prices by up to 15%, which was estimated to generate over USD200 million of consumer surplus there annually.<sup>14</sup>
- 2.24 Digital platforms have also enabled remote work, which reduces the time and money spent on commuting and business travel, leaving consumers with more resources and contributing to lower emissions. Empirical findings based on surveys of Swedish public workers between 2011 and 2014 reveal that an overwhelming majority of people feel that they save time through virtual meetings and experience increased productivity at work because of them.<sup>15</sup> As a result of the

---

<sup>9</sup> See: Brynjolfsson, E., Collis, A., & Eggers, F. (2019). Using massive online choice experiments to measure changes in well-being. *Proceedings of the National Academy of Sciences*, 116(15), 7250-7255.

<sup>10</sup> See: Brynjolfsson, E., & Oh, J. (2012). The attention economy: measuring the value of free digital services on the Internet. *Proceedings of the 33rd International Conference on Information System* (2012).

<sup>11</sup> See: Dinerstein, M., Einav, L., Levin, J., & Sundaresan, N. (2018). Consumer price search and platform design in internet commerce. *American Economic Review*, 108(7), 1820-59.

<sup>12</sup> The online travel agency is Expedia and the city that users searched for is Budapest. See: Anghel, A. P. (2020). "Demand estimation with learning and search costs". Working paper.

<sup>13</sup> See: Dermisi, S. (2004). Internet Reduces the Time before Lease-up or Sale of Office Properties. *Real Estate Review*, 33(1), 22-28.

See: Goldmanis, M., Hortaçsu, A., Syverson, C., & Emre, Ö. (2010). E-commerce and the Market Structure of Retail Industries. *The Economic Journal*, 120(545), 651-682.

<sup>14</sup> See: Brown, J. R., & Goolsbee, A. (2002). Does the Internet make markets more competitive? Evidence from the life insurance industry. *Journal of Political Economy*, 110(3), 481-507.

<sup>15</sup> See: Arnfalk, P., Pilerot, U., Schillander, P., & Grönvall, P. (2016). Green IT in practice: virtual meetings in Swedish public agencies. *Journal of Cleaner Production*, 123, 101-112.

COVID-19 pandemic, working from home is now required or encouraged for an unprecedented share of the labour force.<sup>16</sup>

### **Benefits to business users**

- 2.25 Digital platforms have been instrumental in allowing business users scaling up their activities more easily by accessing broader or even global markets without incurring the full costs of both physical and digital infrastructure.
- 2.26 An example of a digital technology which is frequently and successfully adopted by business users is cloud computing. Platforms offering cloud computing services can provide innovative and convenient solutions to such enterprises. A 2012 survey of SMEs (small and medium enterprises) in Southeast Asia and the US revealed that business users particularly valued the security and privacy offered by cloud computing platforms and benefit from the resulting cost reductions.<sup>17</sup>
- 2.27 Business users participating in retail and commerce also benefit from digital technologies. Analyses of trade data collected on eBay between 2004 and 2009 covering 61 countries have shown that the reduction in search costs enabled by e-commerce platforms largely reduces the role of distance in trade flows. This allows business users to have access to more and larger markets. The gains from enhanced global trade and interconnectivity can be traced throughout the economy.<sup>18</sup>
- 2.28 Empirical studies have addressed industries where many market participants are SMEs or self-employed people. In the music industry, for example, the emergence of digital streaming platforms has benefited smaller creators as they enjoy a larger reach than ever before. Research findings, using 2012–2015 US data and 2012–2013 German data, suggest that streaming revenues more than offset potentially lost traditional sales.<sup>19</sup> Real estate is another industry with many self-employed people and SMEs who take part and manage sale and lease agreements for different types of property. According to an empirical study based on a 2000 survey of realtors, real estate

---

<sup>16</sup> In the European Union, almost half of the workforce have worked remotely in some form since the onset of the pandemic. See: Eurofound (2020). Living, working and COVID-19. COVID-19 series, Publications Office of the European Union, Luxembourg. Furthermore, a large-scale US survey carried out in 2020 suggests that workers feel more productive working remotely and are likely to work from home for a number of days every week even after the pandemic. See: Barrero, J. M., Bloom, N., & Davis, S. J. (2020). Why Working From Home Will Stick. *University of Chicago, Becker Friedman Institute for Economics Working Paper*, (2020-174).

<sup>17</sup> See: Gupta, P., Seetharaman, A., & Raj, J. R. (2013). The usage and adoption of cloud computing by small and medium businesses. *International Journal of Information Management*, 33(5), 861-874.

<sup>18</sup> See: Lendle, A., Olarreaga, M., Schropp, S., & Vézina, P. L. (2016). There goes gravity: eBay and the death of distance. *The Economic Journal*, 126(591), 406-441.

<sup>19</sup> See: Aguiar, L., & Waldfogel, J. (2018). As streaming reaches flood stage, does it stimulate or depress music sales? *International Journal of Industrial Organization*, 57, 278-307. Wlömert, N., & Papies, D. (2016). On-demand streaming services and music industry revenues—Insights from Spotify's market entry. *International Journal of Research in Marketing*, 33(2), 314-327.

intermediation also benefited from the prevalence of online platforms: one standard deviation change in Internet-based technology usage increased realtors' earnings by almost 10%.<sup>20</sup> In the used book industry, where many sellers are also small business users, an analysis of 2009–2012 US data has demonstrated higher profits among sellers as well as greater consumer welfare as a result of online matching.<sup>21</sup>

### **Benefits to innovation**

- 2.29 Digital platforms have fundamentally transformed how information is retrieved, data are stored and how businesses promote and sell their products and services. The changes have had positive effects on both innovation and productivity.
- 2.30 A comprehensive empirical investigation based on OECD productivity and Internet search data between 2004 and 2017 has found that digital aggregator platforms increase industry productivity by 2.5% if platform development is high and by 1% if platform development is low.<sup>22</sup>
- 2.31 The peer-to-peer accommodation sharing site, Airbnb, is a good example of an innovative digital platform. It matches previously unmet demand with previously unused supply. An analysis of 2009–2012 data shows that in the top 10 US cities alone, annual total welfare would decrease by USD137 million and consumer surplus by USD276 million without Airbnb. This translates to a surplus of USD41 and USD26 per night per guest and host, respectively.<sup>23</sup> The flexibility of the platform is especially beneficial in that it allows peak demand to be served.<sup>24</sup>
- 2.32 As discussed above, digital platforms have enabled various forms of remote work, which endows employees with more free time but is also beneficial to firm productivity. Results from an experiment carried out in China in 2010 and 2011 show that working from home can increase productivity by 13% if people are assigned at random and by as much as 22% if employees self-select into remote work. In addition, an annual USD2,000 could be saved per employee.<sup>25</sup> Digital platforms thus enable higher productivity and cost savings for businesses.

---

<sup>20</sup> See: Jud, G., Winkler, D., & Sirmans, S. (2002). The impact of information technology on real estate licensee income. *Journal of Real Estate Practice and Education*, 5(1), 1-16.

<sup>21</sup> See: Ellison, G., & Ellison, S. F. (2018). Match quality, search, and the Internet market for used books (No. w24197). National Bureau of Economic Research.

<sup>22</sup> See: Rivares, A. B., Gal, P., Millot, V., & Sorbe, S. (2019). "Like it or not? The impact of online platforms on the productivity of incumbent service providers". OECD Working Paper.

<sup>23</sup> See: Farronato, C., & Fradkin, A. (2018). *The welfare effects of peer entry in the accommodation market: The case of airbnb* (No. w24361). National Bureau of Economic Research.

<sup>24</sup> In addition, a study based on US listings between 2008 and 2014 indicates that the presence of Airbnb also results in lower hotel room pricing, which benefits all consumers, not just platform users. See: Zervas, G., Proserpio, D., & Byers, J. W. (2017). The rise of the sharing economy: Estimating the impact of Airbnb on the hotel industry. *Journal of marketing research*, 54(5), 687-705.

<sup>25</sup> See: Bloom, N., Liang, J., Roberts, J., & Ying, Z. J. (2015). Does working from home work? Evidence from a Chinese experiment. *The Quarterly Journal of Economics*, 130(1), 165-218.

- 2.33 An additional aspect of the labour market where the Internet and digital platforms have caused a major transition is job search. Empirical evidence based on US data from 2005–2008 suggests that job search using online platforms reduces unemployment duration by 25%.<sup>26</sup> This has contributed to larger flexibility and lower frictions in the labour market.

### **Strong network effects as an economic property of digital platforms**

- 2.34 Network effects arise where the utility derived by a user of a service or product increases with the number of other users of that same or a compatible service or product. Network effects can be direct, when the utility derived by a user increases as the number of users in the same group increases (e.g. a classic example arose when telephone networks were rolled out: the gain from subscribing to telephone services increased as the total number of subscribers increased); or indirect, when the utility of users in one group depend on the size of the other group with which they interact (e.g. the utility of a user of an online hotel booking platform increases as the number of hotels available on the platform increases, and vice versa).
- 2.35 The presence of network effects thus becomes a primary factor in the dynamics of platforms and their strategic decisions, because their success will depend to a great extent on their initial investments to attract a critical mass of customers with the expectation of being able to recoup these investments at a later stage.
- 2.36 As network effects can be self-reinforcing by creating a positive feedback loop, the concern is that firms that benefit from strong network effects and grow could also enjoy market power which they could then abuse or exploit. Alongside other characteristics, very strong network effects have been identified as a feature of digital platform markets that adversely affects competitive interaction between platforms. While measuring these effects is challenging, recent research is starting to develop providing tools able to address this issue.<sup>27</sup>
- 2.37 Network effects are not decidedly beneficial to incumbent or large firms in a market and there are multiple factors that can affect the potential success of platforms. Specifically:
- i. Strong network effects in digital markets can imply that a platform can quickly disappear, therefore making the position of an incumbent highly contestable (examples of successful platform services that rapidly lost their strong position are Netscape, Myspace, Blackberry; TikTok and Zoom are examples of platforms that rapidly gained large number of users thanks to strong network effects).
  - ii. Network effects can be localised and therefore less relevant to overall size.

---

<sup>26</sup> See: Kuhn, P., & Mansour, H. (2014). Is internet job search still ineffective? *The Economic Journal*, 124(581), 1213-1233.

<sup>27</sup> See: Hinz, O., Otter, T., & Skiera, B. (2020). Estimating Network Effects in Two-Sided Markets. *Journal of Management Information Systems*, 37(1), 12-38.



iii. Network effects are not always positive but can be negative.<sup>28</sup>

2.38 The cumulative implication of all three factors suggest that digital platform markets can be competitive even in the presence of incumbents with large user bases benefiting from network effects. This suggests policy makers should be cautious not to predicate enforcement purely on the size of user bases.<sup>29</sup>

2.39 As noted, these positive feedback effects can work in the opposite direction as the same properties that can drive swift growth can reinforce a negative feedback loop where a platform is dropped by users on one or more sides exponentially. Consequently, the presence of network effects should not be considered a fail-proof way to market dominance and entrenchment of market power. Rather the impact should be considered on a case-by-case basis, where the assessment of the effects would be the prominent issue.

2.40 Furthermore, a recent paper finds that “consumers are, on average, not substantially better off with a single combined platform than with two separate and competing platforms. On one hand, users of the acquiring platform benefited from the merger because of network effects. On the other hand, users of the acquired platform experienced worse outcomes. Our results highlight the importance of platform differentiation even when platforms enjoy network effects”.<sup>30</sup> This demonstrates how network effects might have ambiguous overall effects, with different outcomes for different sets of users.

2.41 The presence of these strong network effects has raised concerns about markets ‘tipping’. Tipping was first defined as “the tendency of one system to pull away from its rivals in popularity once it has gained an initial edge”.<sup>31</sup> Tipping can occur in markets characterised by strong network effects, potentially significant fixed costs but low marginal costs which enable strong economies of scale, or significant demand- or supply-side complementarities between markets which result in significant economies of scope.

2.42 As these features are characteristic of digital platform markets, the claim arose that antitrust intervention was required in these markets to prevent them from tipping. This would prevent one business from reaching a monopolistic position and creating an anti-competitive environment. Commentators claim that current antitrust enforcement tools lack effectiveness to prevent tipping

---

<sup>28</sup> See: Tucker, C. (2018). Network Effects and Market Power: What Have We Learned in the Last Decade? *Antitrust*, 72-79; Tucker, C. (2017). Network Stability, Network Externalities, and Technology Adoption. In *Entrepreneurship, Innovation, and Platforms*. Emerald Publishing Limited, pp. 151-175; Tucker, C. (2008). Identifying formal and informal influence in technology adoption with network externalities. *Management Science*, 54(12), 2024-2038; Tucker, C. (2019). Online Advertising and Antitrust: Network Effects, Switching Costs and Data as an Essential Facility. *CPI Antitrust Chronicles*, April 2019.

<sup>29</sup> Ibid.

<sup>30</sup> See: Farronato, C., Fong, J., & Fradkin, A. (2020). Dog Eat Dog: Measuring Network Effects Using a Digital Platform Merger. *NBER Working Paper*, (28047).

<sup>31</sup> See: Katz, M. L., & Shapiro, C. (1994). Systems competition and network effects. *Journal of Economic Perspectives*, 8(2), 93-115.

because they do not allow the speedy intervention that would be required to respond when a market is close to tipping. They therefore argue the current competition policy framework should be completed with a tool allowing for a faster intervention into markets prone to tipping.

- 2.43 The suggestion for an *ex ante* tool that would prevent markets from tipping raises an interesting issue relating to the proper identification of a tipping market. Tipping markets are easily identified with the benefit of hindsight. In this respect, *ex post* intervention is well placed to address competition issues in markets on the verge of tipping, for instance because it can assess whether there are declining levels of investment and innovation. *Ex ante* intervention could not rely on such an assessment and would therefore likely be based on a risk assessment of very uncertain outcomes and could therefore unnecessarily affect some platforms and their users.<sup>32</sup>
- 2.44 When considering the risk of markets tipping and the response of competition policy, various factors that mitigate tipping must be taken into account, such as the presence of multi-homing, users heterogeneity and horizontal differentiation, negative and 'local' network effects, as well as the prospect of disruptive innovation. Any factor that enables within-market segmentation reduces the likelihood of a market tipping.
- 2.45 After discussing the benefits and economic properties of digital platforms, we proceed to Section 3 to examine the perceived competition issues.

---

<sup>32</sup> The case of MySpace being unseated by Facebook provides an illustration of the uncertainties that can exist when assessing a platform market from an *ex ante* perspective. MySpace was launched in 2003, and by 2007 commentators were concerned it would form a natural monopoly. By 2008, it was surpassed in user numbers by Facebook, which apparently was not foreseen just one year before. Also see Tarver, E. (2020). 3 Social Media Networks Before Facebook. Investopedia, 3 April 2020.

## Section 3

# Potential Competition Concerns in Digital Markets

### Introduction

- 3.1 There are concerns that some conducts of digital platforms are not well addressed by existing competition law.
- 3.2 Digital platforms may try to leverage their dominant position by:
- i. tying or bundling services;
  - ii. enveloping other markets;
  - iii. raising barriers to entry: either by means of technical or behavioural measures;
  - iv. refusing to provide interoperability; and
  - v. acquiring emerging competitors.
- 3.3 Some argue that current antitrust tools cannot capture certain practices or are insufficient in keeping harmful conduct under control. The potential problems vary across platforms and are often caused by market characteristics, so intervention must be careful.

### Potential concerns that can be addressed with existing competition law

- 3.4 Some issues associated with digital platforms fall outside the scope of this report and the fields of expertise of its authors. Potential issues relating to national or regional competitiveness, data privacy, political power, or social issues can be relevant to economic policy in general but are not related to competition or antitrust policy. This report and this section focus on the perceived competition issues.
- 3.5 For the reasons discussed in the preceding section, a number of platforms have achieved massive scale and captured the attention of the general public and public officials in various spheres.
- 3.6 The current discussion is reminiscent of the antitrust action against Microsoft 20 years ago, in the context of antitrust cases brought in the US and in the EU. Over the last decade, other prominent investigations involving online platforms have led to infringement or commitment decision and

have concerned e-books (Apple in the US,<sup>33</sup> Amazon in the EU<sup>34</sup>), hotel booking online platforms (Booking.com, Expedia, etc.),<sup>35</sup> various products and services provided by Google, in the EU and the US,<sup>36</sup> Facebook's conduct with respect to user data in Germany.<sup>37</sup> There are also several ongoing investigations concerning Apple and Amazon in the EU.<sup>38</sup>

3.7 Many of these cases addressed issues and conducts that are not novel to competition law and illustrate that a careful case-by-case assessment of the economic and legal environment was necessary to reach the final decision. However, some authorities and stakeholders, reviewing the results of these remedies with the benefit of hindsight, have argued that these remedies were not effective and did not succeed in restoring competition.<sup>39</sup>

3.8 Against this background, the DMA proposal seems to be *incited* by four basic presumptions, namely:

- i. The high levels of concentration and profitability exhibited in many digital markets are characteristics of a lack of competition.
- ii. These levels of concentration are compounded by algorithmic pricing that facilitates tacit collusion.<sup>40</sup>
- iii. Digital platforms that are vertically integrated and benefit from economies of scale, network effects, and the availability of large amounts of data are able to act as gatekeepers of digital ecosystems. Furthermore, they can impose unfair trading conditions and limit contestability in their core markets.

---

<sup>33</sup> United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

<sup>34</sup> Case AT.40153 E-book MFNs and related matters (Amazon).

<sup>35</sup> In the EU, many national competition authorities investigated hotel booking platforms, among others: the OFT (now CMA), the Bundeskartellamt in Germany, the Autorité de la Concurrence in France, as well as the Italian and Swedish competition authorities.

<sup>36</sup> In the EU, Cases AT.39740 Google Search (Shopping), AT.40099 Google Android, AT.40411 Google Search (AdSense). In the US, the FTC conducted an investigation of the search business of Google that it closed in January 2013. In 2020, several complaints against Google were filed in the US, e.g. US vs Google, Case 1:20-cv-03010.

<sup>37</sup> See Bundeskartellamt's decision of 7 February 2019.

<sup>38</sup> Cases AT.40437 Apple - App Store Practices (music streaming), AT.40452 Apple - Mobile payments, AT.40652 Apple – App Store Practices (e-books/audiobooks), AT.40703 Amazon - Buy Box, AT.40462 Amazon Marketplace.

<sup>39</sup> See: Whalen, J. (2020). "Europe fined Google nearly \$10 billion for antitrust violations, but little has changed" *Boston Globe*, 10 November 2020.

<sup>40</sup> See: Autorité de la concurrence and Bundeskartellamt (2019), *Algorithms and Competition*.

- iv. Current tools and competition law are insufficient to tackle both the structural risks for competition and the structural lack of competition in these markets (in the most effective manner).

3.9 However, these presumptions are not accompanied or substantiated by a coherent set of theories of harm or empirical evidence. In the annexes of the impact assessment support study of the proposed DMA, no further evidence is provided other than a descriptive summary of potential problems, the description of certain affected markets and a small number of case studies.<sup>41</sup> The proposed DMA therefore appears indifferent to the current economic and legal literature which explains that many of the perceived issues and conducts it targets are not unequivocally harmful and can actually result in welfare-enhancing outcomes.<sup>42</sup>

3.10 Parts of the literature even suggest that industrial concentration is not necessarily a source of concern or a result of poor competitive outcomes.<sup>43</sup> Furthermore, recent papers suggest that explanations other than market power, such as superior productivity/efficiency or intensified international competition can cause increased levels of concentration.<sup>44</sup>

3.11 In the last subsection of the previous Section, we looked at some of the economic properties that underlie these concerns and we summarise below some further conducts that have caused concern.

### **Envelopment**

3.12 In their seminal article, Eisenmann, Parker and Van Alstyne (2001) explored how a platform operator could expand from one market to another by way of an envelopment strategy. Through envelopment, the authors explained that a provider in one platform market could enter another platform market and combine its own functionality in its origin market with that of the target market in a multi-platform bundle, thereby leveraging shared user relationships. In this way the platform operator creates a multi-platform bundle that leverages pre-existing users. According to the authors, digital platforms enveloping can almost effortlessly capture market share “by foreclosing incumbent’s access to users; in doing so, they harness the network effects that previously had protected the incumbent”.<sup>45</sup>

---

<sup>41</sup> Annexes of the impact assessment support study of the Digital Markets Act.

<sup>42</sup> See para. 2.22 for a discussion of this.

<sup>43</sup> See: Bork, R. H. (1993). *The Antitrust Paradox: A Policy at War with itself*. [1978] Maxwell Macmillan, pp.164–196; Posner, R. A. (2001). *Antitrust Law*. University of Chicago Press, pp.101–117; Autor, D., Dorn, D., Katz, L. F., Patterson, C., & Van Reenen, J. (2020). The fall of the labor share and the rise of superstar firms. *The Quarterly Journal of Economics*, 135(2), 645-709; Werden, G. J., & Froeb, L. M. (2018). Don't Panic: A Guide to Claims of Increasing Concentration. *Antitrust* 33(1).

<sup>44</sup> See: Van Reenen, J. (2018). “Increasing differences between firms: market power and the macro-economy”. CEP Discussion Paper No 1576.

<sup>45</sup> See: Eisenmann, T., Parker, G., & Van Alstyne, M. (2011). Platform envelopment. *Strategic Management Journal*, 32(12), 1270-1285.

- 3.13 Envelopment has been raised as a concern in markets with established platforms due to the likelihood of these platforms trying to ‘envelope’ adjacent markets and leverage their market power on their traditional markets.<sup>46</sup> The prevalence of positive network effects and potential switching costs in platform markets mean new entrants or even smaller incumbents are typically not able to succeed in these markets.
- 3.14 Condorelli and Padilla (2020) have examined platforms’ envelopment strategy, as the practice of a multi-sided platform harnessing its user base to enter another multi-sided market and where the platform may combine data from the origin and target markets. In such a setting, potential remedies include mandating access to data to competing platforms and prohibiting the aggregation of data collected on separate platforms.<sup>47</sup>

### **Lack of interoperability**

- 3.15 The lack of interoperability has been identified as a competition issue in digital markets as early as 2004.<sup>48</sup> Specifically, the EC concluded that Microsoft was abusing its dominant position by refusing to supply interoperability information to developers.<sup>49</sup>

---

<sup>46</sup> Eisenmann et al. (2011) set out “a typology of envelopment attacks based on whether platform pairs are complements, weak substitutes, or functionally unrelated” and could “analyse conditions under which these attack types are likely to succeed”.

<sup>47</sup> See: Condorelli, D., & Padilla, J. (2020). Harnessing Platform Envelopment in the Digital World. *Journal of Competition Law & Economics*, 16(2), 143-187.

<sup>48</sup> Though a noted example of the essential facility doctrine, a precursor to interoperability antitrust concerns in the digital ecosystem could be the Magill case, concluded in 1995, in which an independent publisher complained that it has been denied access to weekly TV listings by TV stations. See: Idelberger, F. (2013). The concept of interoperability in European Union law—An analysis in competition law and intellectual property law, PhD thesis.

The European Court of Justice confirmed that TV stations had indeed abused their dominant position in breach of Article 86 of the Treaty of Rome (now Article 102 TFEU). See: Decision on *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)* (1995) C-241/91 P and C-242/91 P 1995 I-00743 (CJEU).

<sup>49</sup> See: Case 37792 Microsoft I (2004). Microsoft abused its dominant position by:

(a) refusing to supply interoperability information and allow its use for the purpose of developing and distributing work group server operating system products, from October 1998 until the date of the Decision;

(b) making the availability of the Windows Client PC Operating System conditional on the simultaneous acquisition of Windows Media Player (WMP) from May 1999 until the date of this Decision.

See: Summary of EC Decision of 24 May 2004 in case COMP/C-37.792 – Microsoft.

- 3.16 These types of cases were certain to become more common, as in network industries, access to information and collaboration are integral for competitors of strong incumbents to be able to compete.<sup>50</sup>

### **Tying/Bundling**

- 3.17 Similarly, tying of products and services in digital markets has been the subject of past investigations and decisions, in cases involving Microsoft. Specifically, since Microsoft was found to be abusing its dominant position by making the availability of its Windows operating system conditional on the simultaneous acquisition of Windows Media Player through pre-installation.<sup>51</sup>
- 3.18 The concern arising from tying and bundling strategies is that a company could leverage a dominant position in one market in order to foreclose rivals and thereby impede effective competition in another market. However, bundling practices are not invariably and unequivocally harmful to consumers. Empirical research shows that consumers value bundles with complementarity. In other words, if two products or services are complements to a nontrivial degree and consumers are aware of it, they benefit from bundling. This suggests that intervention against such practices requires a careful assessment of the relevant markets, of the bundling form's dominance and of the actual or potential effects on the market.

### **Data as a barrier to entry**

- 3.19 As described above, many online platform services rely on the collection and analysis of users data, either to improve the quality of the services they offer (e.g. matching users from different groups, suggesting content, finding response to search queries) or to generate revenue (e.g. selling advertising space). In many markets, such as general search and word processing, the ability to compete and innovate rely to some extent on the size and quality of the available data that enable the training of the underlying machine-learning algorithms.
- 3.20 Hence lack of access to data at a large scale has been coined as a competition issue, because it is thought to inhibit the ability of smaller players to compete effectively in the relevant markets. At the same time, data does not play the same role in the quality and attractiveness of all types of services, and many services have started without it and have managed to attract considerable traffic.
- 3.21 To corroborate this, one has to look at examples of platforms that have managed to attain critical mass after starting without any data endowment, even in cases where the ability to offer a

---

<sup>50</sup> See: Shapiro, C., Carl, S., & Varian, H. R. (1998). *Information rules: A strategic guide to the network economy*. Harvard Business Press, p.246. ("For as long as there have been networks, there has been interconnection: passengers or cargo brought by one network to its extremities are carried farther along by an adjacent network.")

<sup>51</sup> See: Case 37792 Microsoft I (2004).

minimum service quality might be dependent on network effects or position of a large amount of data.<sup>52</sup>

3.22 The pertinent question however from a competition law perspective is the essential status of such data for entering the market and competing effectively. A starting point for this would be examining how digital platforms can achieve critical mass without any prior data endowment.

3.23 Without a proper and case-by-case assessment of this standard, new legislation risks facilitating access to data for inefficient competitors and reducing innovation in the market.

### **Mergers – Acquisitions of nascent firms**

3.24 Concerns arising from large companies acquiring small, nascent firm, captured under the term ‘killer acquisitions’, originated within the context of transactions in the pharmaceutical industry, in cases where a large pharmaceutical company acquired novel drugs or research and development pipelines from small ones, with the intention of terminating them to avoid competition to their own products.<sup>53</sup>

3.25 More recently, similar concerns have extended to acquisitions in the technology sector, where acquisitions of nascent firms and start-ups by larger platforms is a common occurrence.<sup>54</sup> These concerns are that established platforms would acquire start-ups with the aim to prevent them from developing into competitive threats in the future.<sup>55</sup> Industry participants and other commentators view these as primarily ‘talent acquisitions’, replacing traditional hiring processes,<sup>56</sup> or attempts to incorporate new features to existing products.

3.26 The current merger regime would not allow for many of these acquisitions to be reviewed by competition authorities because, when acquisitions target start-ups that have not yet brought a product to market or have not reached any meaningful size, they are often not captured by legislated turnover thresholds and are thus not require to be notified to competition authorities.

---

<sup>52</sup> Examples are the apps Waze and WhatsApp. See: Hansley, M. (2013). “Succeeding Because of Social; Learn from The Must-Try App Waze.” *Silverback Social*, 13 August 2013; Constine, J. (2015). “A Year Later, \$19 Billion For WhatsApp Doesn't Sound So Crazy.” *Techcrunch*, 20 February 2015.

<sup>53</sup> Specifically, an empirical study in the US attempting to quantify this phenomenon suggested that 5-7% of the sample’s pharmaceutical transactions resulted in the ‘killing’ of a new drug under development. See: Cunningham, C., Ederer, F., & Ma, S. (2020). Killer acquisitions. *Journal of Political Economy*, forthcoming.

<sup>54</sup> Wikipedia articles report that Alphabet has acquired more than 240 companies since 2001; Facebook has acquired 89 companies since 2005; Amazon has acquired more than 100 companies since 1998; Apple has acquired more than 100 companies since 1988; and Microsoft has acquired over 225 companies since 1986.

<sup>55</sup> Note that there is a conceptual contradiction between the position that digital platforms markets exhibit high barriers to entry and the concerns that firms would acquire smaller or potential entrants in an attempt to eliminate the threat they could impose on their position.

<sup>56</sup> Also termed ‘acqui-hiring’, see: Polsky, G. D., & Coyle, J. F. (2013). Acqui-Hiring. *Duke Law Journal*, 63(2), 281-346.



- 3.27 Some have argued in favour of lowering turnover thresholds. However, even if thresholds were lowered to ensure such acquisitions would trigger an investigation, the competitive assessment of acquisitions of small firms would remain a difficult exercise. For instance, in most such cases, there would be no material overlap between the core platform service of the acquiring firm and that of the acquired one, or the merging parties would belong to distinct markets, such that credible theories of harm could be very difficult to uphold. Even overlooking this obstacle, uncertainty about future potential competition would make it very difficult to formulate a counterfactual scenario against which the proposed merger would need to be examined and could significantly weaken the competition authority's conclusions.
- 3.28 In this regard, the *ex post* review of the acquisition of Instagram by Facebook is interesting and notes that, while “[t]he assessment of the market structure which has arisen after the merger shows that the acquisition of Instagram has provided a competitive advantage to the merged entity across all three dimensions (user base, size of the user base and accuracy in targeting), which has resulted in unmatched growth in terms of users and advertising revenues” also recognises that “there are reasons to believe that Instagram’s growth has significantly benefited from the integration with Facebook: Snapchat’s case shows that transforming users’ attention into advertising revenue is no easy task, and Instagram’s success in this respect has likely benefited from Facebook’s guidance and expertise.”<sup>57</sup> This study suggests that the extent to which Instagram, absent the merger, would have evolved into an important player in the social network market is near impossible to determine *ex post*.
- 3.29 While the acquirer would reasonably have a better understanding of the likely development of its target, it would share the difficulty of a competition authority in describing a counterfactual situation (the market absent the merger). Furthermore, and especially given the challenges in forecasting the evolution of start-up firms in new markets,<sup>58</sup> any arguments or analyses from the notifying parties would be easy for competition authorities to dismiss. In this context, reversing the burden of proof, as suggested by some, does not seem to resolve the inherent difficulties resulting from uncertainties about future outcomes.<sup>59</sup>
- 3.30 Another issue identified by the authors of the *ex post* study of the Facebook/Instagram merger is that “whether the decision has ultimately harmed consumers also depends on the benefits accrued through the merger, which may have countervailed anti-competitive effects. Being able to monitor consumers’ behaviour on its platform and on Instagram, Facebook can effectively target advertising and reduce inefficient ads duplications on its platforms. This may have

---

<sup>57</sup> See: Argentesi, E., Buccirosi, P., Calvano, E., Duso, T., Marrazzino, A., & Nava, S. (2019). Ex-post assessment of merger control decisions in digital markets. *Document prepared by Lear for the Competition and Markets Authority*.

<sup>58</sup> Examples come readily to mind, for instance, it is unlikely that anyone would have predicted the introduction and quick uptake of TikTok as a social media.

<sup>59</sup> As argued by US academics in a submission to the USA Congress, see: Baker, J. B., Farrell, J., Gavil, A. I., Gaynor, M., Kades, M., Katz, M. L., ... & Shapiro, C. (2020). Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets. SSRN n° 3632532.

generated benefits to consumers, which may have not arisen in the absence of the merger. These efficiencies seem also to be merger-specific, and it is difficult to assume that they would have arisen in a counterfactual scenario where Instagram was not acquired by Facebook or another social network”.<sup>60</sup>

- 3.31 The discussion above shows that premature or over enforcement could have the potential to undermine growth and innovation in these markets.<sup>61</sup> In this regard, a historic review of acquisitions by digital platforms suggests that acquired firms end up finding their way to market separately or by being incorporated in the acquirer’s core service,<sup>62</sup> such that there is no strong evidence that these acquisitions would have impaired innovation.

### **Perceived inadequacy of current enforcement tools**

- 3.32 The proposed DMA is meant to fill a perceived gap that neither competition law nor other European regulations would address, or would address effectively.

### **Settings where platforms’ conduct would not fall under current competition law**

- 3.33 Some conducts of concern that the proposed DMA aims at addressing either would not fall under Article 102 TFEU because there is no dominance by competition law standards, nor under Article 101 TFEU because they are not the result of any infringing agreements. Similarly, ‘killer acquisitions’ concerns could not be addressed in cases where turnover thresholds defined in the merger regulations are not met. Therefore, as noted in the Crémer report, even if “the basic framework of competition law, as embedded in Articles 101 and 102 of the TFEU, continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era”, there are reasonable concerns that gaps remain.<sup>63</sup>
- 3.34 However, some conducts targeted by the proposed DMA might fall under different legal frameworks. For example, EU consumer law has introduced an online ban on opt-out selling of

---

<sup>60</sup> See: Argentesi, E., Buccirosi, P., Calvano, E., Duso, T., Marrazzio, A., & Nava, S. (2019). Ex-post assessment of merger control decisions in digital markets. *Document prepared by Lear for the Competition and Markets Authority*.

<sup>61</sup> For example, by preventing (pro-competitive) integration of complementary assets into larger organisations and undermining funding to and innovation by start-ups that benefit from the prospect of being acquired by larger players. Furthermore, start-ups might not always aim to develop a new product or competitor but aspire to sell out to a major platform at a high price. See: Lemley, M. A., & McCreary, A. (2019). Exit strategy. Stanford Law and Economics Olin Working Paper #542.

<sup>62</sup> See: Gautier, A., & Lamesch, J. (2020). Mergers in the digital economy. *Information Economics and Policy*, 100890.

<sup>63</sup> See: Crémer, J., Y.-A. de Montjoye and H. Schweitzer (2019). “Competition policy for the digital era” Publications Office of the EU.

add-on products (also termed ‘ban on pre-ticked boxes’) that is intended to combat default bias, identified in behavioural economics.<sup>64</sup>

- 3.35 Another set of tools is the GDPR, directly addressing issues pertaining to processing of personal data. For example, data portability issues are the subject of GDPR Article 20, noting that each “data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided”. Within this framework, companies have been testing how various forms of data sharing and pooling work. An assessment should be made whether any emerging arrangements address competition issues and what the effects on innovation and welfare are.
- 3.36 It should be noted that even if consumer law or privacy regulations can be of assistance, their focus is on consumer or seller protection and thus cannot suitably address competition concerns. But they can address concerns of fairness, privacy, or others not directly related to competition. As noted in the Crémer report, “[m]ore demanding regimes of data access, including data interoperability, can be imposed (1) by way of sector-specific regulation (as in the context of the PSD2 Directive) – in particular where data access opens up secondary markets for complementary services; or (2) under Article 102 TFEU – but then confined to dominant firms”.<sup>65</sup>
- 3.37 Another type of conduct that is deemed outside existing competition policy tools is that of platforms acting as regulators (i.e. ‘competition on the platform’). As some digital platforms are intermediaries of services, they function as regulators, able to ensure competition is impartial and benefits end users. Though this is not an unprecedented setting, as sport associations have been employing the same model, the novelty is that digital platforms can be both intermediaries and providers of services that they intermediate. An example of a conduct identified as potentially problematic in this context is self-preferencing.<sup>66</sup>
- 3.38 However, self-preferencing can be addressed by Article 102 TFEU. It is not prohibited by Article 102 TFEU *per se* but can be subject to a case-by-case examination of the economic and legal context and an assessment of the effects of the conduct. This means that self-preferencing may constitute an abuse of a dominant position depending on its effects on competition and consumers. The reason for this is that the question of whether self-preferencing should be

---

<sup>64</sup> Commonly referred to as Consumer Rights Directive, officially Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

<sup>65</sup> Crémer, J., Y.-A. de Montjoye and H. Schweitzer (2019). “Competition policy for the digital era” Publications Office of the EU, p.82.

<sup>66</sup> It should be noted, however, that self-preferencing is also not a novel practice. Grocery retailers often have ‘own-label’ products displayed in more prominent positioning and in competition with third-party products. See: Gasparro, A. & J. Kang (2020). Grocers Wrest Control of Shelf Space From Struggling Food Giants. *The Wall Street Journal*, 19 February 2020.

prohibited by competition law is not straightforward, and the answer may well vary from case to case.<sup>67</sup>

- 3.39 Issues such as conducts relating to data privacy and use of third-party data in the recent case of the Bundeskartellamt against Facebook are being captured by current enforcement tools. The Bundeskartellamt concluded that Facebook had abused its dominant position in the social media market by collecting user data not only from Facebook but also from a wide range of third-party apps and websites, as a result of users having to agree to Facebook terms and conditions in order to sign up to the social media. The Bundeskartellamt concluded that Facebook's dominant position allowed the social media to violate GDPR and privacy rules.<sup>68</sup>
- 3.40 On the existence of a data endowment acting as barrier to entry, based on the current competition law provisions, there are two routes for competitors to claim access to data held by another digital platform:
- 3.41 First, under Article 101 TFEU, an undertaking could invoke the prohibition of anticompetitive agreements, if the data controller's refusal is based on an agreement with other companies. This would apply in a setting of multiple undertakings collecting data which was subsequently not shared with other undertakings under an explicit agreement.
- 3.42 Second, under Article 102 TFEU, an undertaking could rely on the prohibition of the abuse of a dominant position. This would apply in a setting where an undertaking with a monopoly over certain data refuses access without objective reasons or offers access only under discriminatory or unfair conditions.
- 3.43 The scope of these provisions is limited by the requirement to identify collective agreements or establishing dominance, while a concern might be that single non-dominant but powerful data controllers are able to refuse access to data to undertakings with limited bargaining power.
- 3.44 After an infringement to competition law has been established, through either of the aforementioned avenues, competition authorities (or the courts) would need to specify an appropriate remedy, such as the conditions of access to the data. The monitoring of these conditions would only be possible in settings where the access request is fairly standardised and not likely to materially change.
- 3.45 Other conducts branded as problematic in digital platforms are linked to concerns on the demand-side. Notably, these would differ from the usual supply-side issues that are typically addressed

---

<sup>67</sup> Furthermore, this conduct relates to the underlying business model of the platform which might rely on the cross-subsidisation of different services. Banning the conduct might equate to a shift in the business model that could endanger the viability of some or all of the services, leading to reduced competition or consumer choice.

<sup>68</sup> The Bundeskartellamt's order was suspended by Higher Regional Court in Düsseldorf but then allowed to be executed by the Federal Court of Justice. See: Decision VI-Kart 1/19 (V) of the Higher Regional Court of Düsseldorf; Decision KVR 69/19 of the Federal Court of Justice.

by existing legislation. The EC has not specified novel theories of harm in its proposals that are not suitably addressed by current competition law tools. Furthermore, as noted in the EC's expert studies accompanying the IIA, typically "[s]pecific regulation is usually adopted and tailored to correct perceived market failures in part of the economy. Market failures can have different causes, and economic literature on this point is constantly evolving. The main ones are market power, externalities, asymmetry of information and coordination issues. Whereas competition law is mostly concerned with market failures on the supply side, specific regulation often extends to both supply-side and demand-side failures."<sup>69</sup>

### **Settings and platforms' conduct for which competition law might not work effectively**

- 3.46 There are situations where structure rather than conduct is the issue. These are situations of market failures such as asymmetric information, market design issues, etc. Given the fast-moving nature and complexity of digital platform markets, standard *ex post* antitrust enforcement might be insufficient to address the substantial dominance-related issues arising, and that supplementary *ex ante* regulation is required.
- 3.47 Regulation can be a useful complement to competition law and there may be areas where regulation might be appropriate, in particular where similar issues arise continuously, and intervention may be needed on an ongoing basis. Due to the nature of digital markets, a number of concerns have been raised on aspects unrelated to products, such as data collection practices, privacy and forced free riding. These concerns fall loosely within current legislation and could be evaluated as excessive prices or unfair trading terms, contingent on the jurisdiction.<sup>70</sup>
- 3.48 As noted in the preceding subsection on the acquisition of nascent firms (paragraphs 3.24 to 3.31 above), a primary concern is the context within which large digital platforms acquiring smaller or emerging competitors can be an impediment to competition. As noted, such mergers often result in new services being added to existing platforms, but a concern has been voiced that they eliminate potential competition. Furthermore, they can result in the merging parties acquiring essential and non-replicable data, along with any standard horizontal, vertical or conglomerate effects. The overall result can be the establishment or entrenchment of a dominant position, leveraging of market power to adjacent markets or input foreclosure. The EC has investigated these issues in various cases recently, bringing forward coherent theories of harm, within the existing EUMR framework.<sup>71</sup>
- 3.49 The speed of intervention using competition law *ex post* intervention has been discussed as a major issue in fast-moving digital markets. A case sometimes held up as an example of enforcement moving slowly is the seven-year long Google Shopping one. Though the closure of the case did require a long time, one should query how representative it is of agencies' ability to

---

<sup>69</sup> See: Larouche, P., & De Streel, A. (2020). "Interplay between the New Competition Tool and Sector-Specific Regulation in the EU". Expert study.

<sup>70</sup> See: OECD (2020). "Abuse of dominance in digital markets".

<sup>71</sup> Prominent examples are Google/Double (M.4731 - 2008), Facebook/WhatsApp (M.7217 - 2014), Microsoft/LinkedIn (M.8124 - 2016), Apple/Shazam (M.8788 - 2018).

intervene swiftly. The case involved multiple rounds of commitments and changes in scope (i.e. moving to focus on Shopping rather than a broader base of affected verticals). These features could be taken as suggesting opportunities for procedural reform (e.g. narrower scope of investigations and time-limited commitments processes) rather than an irredeemable problem with antitrust enforcement as a tool for addressing purported leveraging concerns. The Bundeskartellamt's case against Facebook investigated complex digital technologies, developed a novel theory of harm, and managed to go from opening the case to reaching its conclusion in under three years, concluding in 2019.

- 3.50 The acceleration of new cases brought in front of competition authorities and currently open investigations<sup>72</sup> engaging an assortment of theories of harm and issues, highlights how current tools can be extended to capture conducts that might be considered outside the scope of current enforcement. As more cases conclude and various types of conduct are scrutinised in the context of existing legislation, we would expect enforcement to accelerate, with both enforcers and practitioners developing their expertise. Alongside this effect, the emergence and familiarity with new technologies and techniques mean that the speed and accuracy of data and other evidence will further expedite scrutiny. These effects should be taken into account before abandoning the current tools for new enforcement approaches.<sup>73</sup>

#### **Failure of effective intervention under current competition law**

- 3.51 In calling for complementary competition law tools, instances where intervention under current competition law might have not worked effectively are commonly used as examples of the current tools' shortcomings. The relevant question for cases where existing tools were applied with limited success is whether the issue has been the nature of the markets, the remedy applied or limitations of current competition law.
- 3.52 One source of potential concerns is that antitrust intervention often takes very long to carry out and finalise. Another concern is that remedies designed to restore competition are sometimes ineffective or not as potent as envisioned.
- 3.53 Due to the characteristics of digital markets, most notably network effects, a company might be able to tip a market in its favour. This can occur either intentionally or even unintentionally. As discussed above in para. 2.41 onwards, it is almost impossible to identify which markets are about to or likely to tip before the fact. While some may believe after the fact that competition policy should have intervened earlier to prevent tipping, it must be considered that antitrust action in all situations where tipping may occur would necessarily involve cases where intervention is not justified.

---

<sup>72</sup> See, for example: *Epic Games v. Apple Inc.*, Case No. 4:20-cv-05640-YGR (N.D. Cal. Oct. 9, 2020); European Commission AT.40462 Amazon Marketplace; European Commission AT.40703 Amazon – Buy Box.

<sup>73</sup> For a more detailed discussion also see: Bethell, O. J., Baird, G. N., & Waksman, A. M. (2020). Ensuring innovation through participative antitrust. *Journal of Antitrust Enforcement*, 8(1), 30-55.

- 3.54 The challenge of designing remedies in a way that restores effective competition is illustrated by the case in relation to the default search engine on Android phones, which was resolved with the remedy of a ‘default choice screen’.<sup>74</sup> Several years after the decision, the remedy of search preference menus is still being modified and debated. In particular, there is discussion about the number of choices the consumer faces, the possibility of a scroll-down menu or the logo size and description visibility of each search provider. This lengthy and iterative process illustrates that effective remedies are difficult to design, a conclusion that is not specific to this particular case or industry and could also apply to a potential *ex ante* regulatory framework.<sup>75</sup>
- 3.55 The market for internet browsers also highlights how market developments cannot always be altered by competition policy. In spite of antitrust proceedings in the US, Microsoft’s Internet Explorer managed to tip the market in its favour around the turn of the century.<sup>76</sup> To prevent such an outcome, the EC also intervened by forbidding the tying of a browser to an operating system and requiring the presentation of a choice screen to consumers.<sup>77</sup> Just as antitrust action could not halt the rise of Internet Explorer, the market share of Microsoft’s browser declined before and after the EC’s decision at a similar rate.<sup>78</sup>

#### **Gatekeeper position**

- 3.56 Although there seems to be a relative consensus on the general concept of a gatekeeper, the EC propositions have not specified a set of legal and economic conditions that would objectively identify whether a digital platform has the status of a gatekeeper in its relative market. The criteria used to designate a gatekeeper are not direct measures of the strength of a platform in a specified relevant market. In this way, the proposal sidesteps the delimitation of relevant markets or the assessment of the relative strength of operators active in that relevant market and thus departs from the normative limiting pre-conditions required to establish dominance along the current practice in Article 102 cases.
- 3.57 Competition policy should aim to protect the competitive process regardless of the business model or type of technology of a company. Hence the EC should assess how horizontal measures across large platforms would address issues pertaining to different business models. An assessment of whether a platform occupies a gatekeeper position would expectedly lead to the conclusion that it is also dominant. If this is the case, it would follow that there is no clear gap in current competition law.<sup>79</sup> What might be a shortcoming in the existing economic tools traditionally employed to define relevant markets should not be mistaken for a gap in competition law.

---

<sup>74</sup> See: EC decision of 18 July 2018, relating to AT.40099 – Google Android.

<sup>75</sup> Even under the proposed DMA, there is scope for negotiations and even legal challenges, of the actual design of the gatekeepers’ services to be implemented in order to comply with the regulation.

<sup>76</sup> See: *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>77</sup> See EC press release IP/10/2016 of 2 March 2010.

<sup>78</sup> See sources [1](#) and [2](#) (Last accessed on 24/03/2021).

<sup>79</sup> See: Decision on E-Book MFNs (AT.40153) and related matters.

- 3.58 The CJEU has formerly aligned with the following definition of dominance: “The dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment”.<sup>80</sup> Based on this definition, any concept of gatekeeper the EC would adopt would meet the dominance standard.
- 3.59 This calls into question why new legislation is required and any obligations are not implemented following the route of an Article 102 investigation, which would also ensure they are only applied to the appropriate markets and conducts. The running track record of the EC’s Article 102 prohibition decisions upheld in appeal is not suggestive of the EC being limited in its assessment of dominance, and shows that there is no obvious obstacle to utilising that tool in the enforcement against ‘gatekeeper’ digital platforms. Another tool available under current competition law and enforcement practice are interim measures, which allow for swift intervention if there is a pressing concern on the damage to the competitive process in a particular setting.<sup>81</sup> Concerns relating to time or resource constraints are inadequate justifications for lowering the standard of proof or increasing uncertainty on what conduct is in accordance with competition law.
- 3.60 We move on to analyse the proposed DMA in the following section.

---

<sup>80</sup> See: Case 85/76, *Hoffmann-La Roche v Commission*, EU:C:1979:36, para. 38-39.

<sup>81</sup> These were notably implemented in the case of *Broadcom* (AT.40608) and *Google/Amadeus* directory in France See Interim Measures Decision in Case AT.40608 – *Broadcom*; and Decision 19-MC-01 of 3 January 2019 regarding a request for interim measures from *Amadeus*.



## Section 4

# Comments on the Proposed DMA

### Introduction

- 4.1 This section discusses, based on the relevant concerns identified above, whether the proposed DMA could effectively resolve issues not appropriately addressed by existing competition tools.
- 4.2 The discussion focuses on the proposed *ex ante* regulation and in particular, this section:
- i. Discusses issues raised by the criteria used to ‘select’ the platforms to which *ex ante* regulation will apply, and how these criteria intend to avoid matters related to market definition, market power, network effects. It also questions the indicators that are proposed to be relied upon and how they will be measured/quantified.
  - ii. Suggests that the *ex ante* obligations proposed in the DMA likely are not the right tool to meet the stated objectives of the regulation. The *ex ante* obligations of the DMA are the result of the generalisation of a few specific observations (specific issues in relation to a few emblematic large platform operators). This generalisation means that some prohibited conducts may not always be harmful to consumers or competition, depending on markets and market players.
  - iii. Concludes that on balance, it is unclear that the expected benefits of the proposed DMA will outweigh the risks and costs.
- 4.3 It should be noted from the outset that despite claims that its objectives are different and complementary to those of existing competition law, <sup>82</sup> the proposed DMA is to a large extent

---

<sup>82</sup> DMA recital 10 states: “This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims at protecting a different legal interest from those rules and should be without prejudice to their application.” At the same time Article 101 TFEU also aims to ensure contestable and fair markets: “The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices [...] which have as their object or effect the prevention, restriction or distortion of

enshrined in competition law. Its fairness and contestability objectives are not complementary to those of competition law, they are a subset of the latter.

- 4.4 Furthermore, several practices that the proposed DMA aims at tackling could fall under Article 102 TFEU and indeed relate to past and ongoing antitrust investigations. For example, Article 5(b) on price parity clauses is an illustrative example of conduct tackled by competition law<sup>83</sup> and specifically one that is currently in the process of being incorporated into the VBER.<sup>84</sup> Article 6(d) on self-preferencing offers another salient example.
- 4.5 Based on both its stated objectives and on existing competition law targeting some of the same issues, it is hard to credibly claim that the DMA is not intended as an additional competition tool.

### The proposed gatekeeper designation

- 4.6 The notion of ‘gatekeeper’ refers to providers of one or more intermediary services that are unavoidable for business users in the digital economy seeking to access their markets in the European Union. The term is closely related to the notions of ‘companies with strategic market status’, ‘companies with bottleneck power’, ‘platforms with substantial market power’, ‘companies with paramount cross-market significance’.<sup>85</sup> As pointed out by some experts, this notion is not necessarily linked to the traditional market dominance concept.<sup>86</sup> This is problematic.
- 4.7 The proposed DMA would allow the EC to impose obligations on platforms designated as gatekeepers, without having to go through the hurdle of (i) defining relevant markets,

---

competition within the internal market, and in particular those which [...] limit or control production, markets, technical development, or investment [...] or] apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”. See Article 101(1) TFEU.

<sup>83</sup> See: EC press release regarding Amazon’s commitments on 4 May 2017. [Link](#) (Last accessed on 24/03/2021).

<sup>84</sup> In the evaluation of the VBER, parity clauses are explicitly mentioned by the EC as a field which requires more regulatory guidance. See: EC press release “Antitrust: Commission publishes findings of the evaluation of the Vertical Block Exemption Regulation” on 8 September 2020. [Link](#) (Last accessed on 20/04/2021).

<sup>85</sup> Companies with strategic market status: see Furman, J., Coyle, D., Fletcher, A., McAuley, D., & Marsden, P. (2019). *Unlocking digital competition: Report of the digital competition expert panel. UK government publication, HM Treasury*. Companies with bottleneck power: see Stigler Center (2019). *Stigler Committee on Digital Platforms. Final Report*; Platforms with substantial market power: see Australian Competition and Consumer Commission. (2019). *Digital Platforms Inquiry: Preliminary Report*; Companies with paramount cross-market significance: see Monopolkommission (2020). *10th amendment to the Competition Act – meeting challenges in digital and regional markets. Policy brief*.

<sup>86</sup> “Due to economies of scale and scope, network effects and winner-takes-all outcomes, online platforms tend to grow fast and expand in adjacent and future markets. They tend to become what is perceived as omnipresent and gigantic and one is tempted to label such platforms as ‘dominant platforms’. However, dominance is a specific legally and economically defined concept for which size and (omni)presence are not the only metrics for establishing it.” Batura, O., N. van Gorp and P. Larouche (2015). *Online Platforms and the EU Digital Single Market*.

(ii) assessing platforms' dominance in clearly identified markets, or (iii) demonstrating an abuse. One would expect that such leeway would be acceptable only in very rare situations where the EC would be very confident that a platform is behaving in ways that are unambiguously harmful to consumers or business users. On the contrary, the proposed DMA aims at imposing strict *ex ante* restrictions on an improperly designated and potentially varied set of platforms providing diverse services in different sectors and segments for which no precedent exists.

4.8 We discuss below the various issues that the proposed definition of gatekeepers raises.

#### **Narrow quantitative thresholds and wide range of core platform services**

4.9 The **quantitative thresholds meant to designate gatekeepers** do not rely on economic principles and are solely based on quantitative approximations for size. They are chosen to select platforms that reach a large number of users and generate large enough turnover, but they fail to capture the relative importance of a core platform services in its specific relevant market.

The quantitative criteria proposed are not founded in economic properties but are arbitrarily high **so likely to only capture a very narrow set of companies**. This method fails to consider how each relevant market is impacted by the players wielding market power within them. On the other end, the definition of what constitutes 'core platform services' is relatively broad. Depending on the interpretation, the quantitative criteria proposed carry the risk of imposing the obligations of the DMA to a wide range of **services** that would otherwise unlikely be the subject of an investigation into an abuse of dominance.

4.10 Cloud computing services provide an illustrative example. Eurostat data show that almost 6 million businesses in the European Union use some form of cloud computing services.<sup>87</sup> As a result, multiple market participants are likely to fall within the designation thresholds<sup>88</sup> and face potential obligations, or at least scrutiny from the EC to determine whether the gatekeeper presumption is accurate.<sup>89</sup> At the same time, it is hard to argue that the market for cloud computing services is not competitive, as there are multiple players with considerable size but unable to wield significant market power, regardless of their user base and financials. This exemplifies one

---

<sup>87</sup> See: Eurostat (2021): Cloud computing - statistics on the use by enterprises. [Link](#) (Last accessed on 24/03/2021).

<sup>88</sup> Based on this, multiple companies would reach 10 thousand business users, which is one of the thresholds for gatekeeper designation and, understanding that a cloud provider could host a variety of websites, multiple companies would easily reach 45 million end users in total, another of the thresholds.

<sup>89</sup> This will likely include both large and small cloud service providers could meet some or all criteria, including Amazon, Microsoft, Oracle, IBM, Salesforce, Cisco, Hewlett Packard, Dell, SAP, Workday, ServiceNow, Rackspace, RingCentral, Kamatera, Softchoice, and various others.

dimension where the fact that the number of users of a platform is not necessarily predictive of the platform's market power.<sup>90</sup>

- 4.11 Another dimension is on the classification of the core platform services. The EC designates 'online intermediation services' as a possible type of core platform services. Although app stores and online marketplaces are the primary candidates to be described by the term,<sup>91</sup> services providing financial information and data, such as Bloomberg or S&P Capital IQ, might also be reasonably characterised as 'online intermediation services', although they are unlikely to be 'gatekeepers' in the sense that the EC finds problematic. In this case, the definition of end users and business users is also ambiguous: it is not entirely clear whether end users would be employees at companies using, say, a Bloomberg terminal, the companies themselves or the clients of the financial providers whose investment information heavily relies on financial data from Bloomberg.
- 4.12 In addition to the criteria set out in Article 3 of the proposed DMA, Article 4(6) grants the ability to the EC to exercise discretion in designating as gatekeepers and 'emerging gatekeepers' platforms that do not formally meet the quantitative criteria of Article 3. The elements that the EC should take into account include, in addition to the size of the platforms and the number of business users that depend on the platforms' service, the assessment of characteristics such as scale and scope effects, user lock-in, entry barriers resulting from network effects and data-driven advantages, etc. As these elements exist to some extent for all platforms, the DMA should provide clear limiting principles, to enhance legal certainty and protect enforcers from undue pressure.<sup>92</sup>
- 4.13 To avoid any ambiguity relating to the implementation of the high-level definition of 'gatekeeper', more clarity would be required on how the primary effects will be measured (e.g. network effects, market scope, margins/profits, user base, etc.). The EC should set out the collection of settings that determine if a digital platform acts as a gatekeeper between markets. In this regard, the EC would not be departing from the normative limiting pre-conditions for establishing dominance, as is currently the practice in Article 102 TFEU cases.

To avoid the risk of overreaching and imposing undeserved burden and obligations to 'emerging gatekeepers', the EC's regulatory action should be based on a market-by-market or individual platform assessment of the conditions of competition and not rely on a broad designation of platforms as bearing a 'special status' without relying on transparent and economically justified principles.

- 4.14 Vague criteria of application could trigger intervention on platforms that would be far from being considered dominant in the context of standard antitrust proceedings while potentially side-stepping markets that raise concerns. The EC needs to consider the effect this has on legal

---

<sup>90</sup> The same could be illustrated in other core platform services that are not currently part of the DMA proposal but could be considered for inclusion, such as software licensed by software and cloud service providers.

<sup>91</sup> This is highlighted in the explanatory memorandum to the proposal COM(2020)0842.

<sup>92</sup> For a detailed discussion also see Colomo, P. I. (2021). Be Careful What You Wish For, *CONCURRENTIALISTE*, 23 January 2021.

certainty along other probable implications and set out a collection of criteria to govern these exercises.

#### **The lack of relationship between gatekeeper status and dominance**

- 4.15 In proceedings, according to the proposed DMA, the EC is not obliged to define the relevant market, despite the fact that the indispensability of a certain platform service is very much dependent on an adequate definition of the relevant market in which this service exists.
- 4.16 For instance, an online retailer or marketplace meeting the criteria of the gatekeeper designation might be a necessary gateway to consumers for some products (e.g. books) but not for others (e.g. batteries). Depending on which product markets are considered, competition from traditional brick-and-mortar providers or specialised online providers may be more or less intense, which could depend on local conditions. This raises the question as to whether the commercial practices of a platform designated as a gatekeeper should be subject to the same *ex ante* rules regardless of the products or services it provides, even those for which access to consumers is contestable and competitive.
- 4.17 This remark further suggests that regulatory action such as the one laid down in the proposed DMA should be based on a market-by-market or individual platform assessment of the conditions of competition instead of relying on a broad-brush approach whereby a platform is given a gatekeeper designation and therefore a 'special responsibility' even when it is not a significant gateway to end users.
- 4.18 *Ex ante* obligations such as the ones provided in the proposed DMA should be imposed as a result of a 'case-by-case' investigation and assessment of potential competitive harm, rather than using a blunt instrument of hardcore restrictions that will reach even markets that are undeniably contestable.<sup>93</sup>

---

<sup>93</sup> In the annexes to the impact assessment support study of the proposed DMA, (Section iii - "Mapping criteria to indicators for gatekeeping power" of Annex 2 of the impact assessment support study of the Digital Markets Act) a section is devoted to the cluster analysis which helped determine the thresholds set out in Article 3(2) of the proposed DMA to designate gatekeepers. The analysis started out from a list of platform services (Table 1 of Annex A). A cluster analysis was then conducted across multiple dimensions to delineate GAFAM from other market players, which yielded the gatekeeper thresholds in the proposal. The process reveals a circular logic in that the selection criteria were chosen by cherry-picking metrics from the very companies they would later 'objectively' identify as gatekeepers. The analysis comes down to finding allegedly quantitative and objective criteria that would select the so-called GAFAM (Alphabet, Amazon, Facebook, Apple, Microsoft) out of a longer list of platforms. It starts by building a list of platforms including GAFAM and a few other platforms, and then analysing the observable and quantifiable criteria along which GAFAM would rank above the other platforms. Hence, this analysis had the objective of confirming the assumption it starts from, namely that GAFAM are gatekeepers. However, this analysis only aims at validating a presumption that GAFAM are gatekeepers. It does not provide any supporting evidence that the criteria selected and their magnitude are clearly and unambiguously correlated with the likelihood that such

### **Chilling effects of the generalised obligations**

- 4.19 As further detailed below,<sup>94</sup> the proposed obligations have generalised each case away from its specific setting in order to apply a rule across the board. However it is clear that some rules are specific to one – or perhaps two – platforms’ services, but it is unclear how they might or should apply to others, both within and outside the traditional ‘GAFAM’ list.<sup>95</sup> This further raises the question of whether there will be unintended consequences for both consumers and businesses in the effort to comply with the obligations of gatekeepers.
- 4.20 Furthermore, different business and monetisation models impact the way in which the power of gatekeepers can materialise. Consequently, gatekeepers could be faced with obligations which have been intended for other platforms and which do not result in any detriment for their end or business users. The result would be high compliance costs and welfare loss without any benefit to users.
- 4.21 This has been highlighted by other commentators as well, such as the experts of the JRC report suggesting that the proposed DMA in its current form contributes to legal uncertainty as various articles would require further specification. They also highlight the importance of legal certainty, since “legal uncertainty may have a chilling effect on innovation.”<sup>96</sup>

### **Non-dominant gatekeepers and dominant non-gatekeepers**

- 4.22 As noted above, the designation of gatekeepers in the proposed DMA is completely detached from the definition of dominance, which presupposes delineating one or more relevant markets. In fact, one of the objectives of the proposal is for the EC to be able to prescribe *ex ante* obligations without having to carry out the complex and often time-consuming exercise of delineating a relevant market.
- 4.23 The case of cloud computing services, where providers might be designated as gatekeepers and remain in competition with strong competitors of slightly smaller size, is an illustrative example of how the proposed thresholds are not linked to the realities of an economic market. It would be

---

platforms are dominant from the perspective of competition law, nor that the conducts that are targeted by Articles 5 and 6 of the DMA, if implemented by these platforms, would necessarily be harmful to consumers and business users. Furthermore, this analysis does not exclude that other platforms will be designated as gatekeepers, and it does not seem that the impact assessment has evaluated the risk of over-enforcement that would result from too many platforms being potentially designated as gatekeepers.

<sup>94</sup> See para. 4.57 onwards.

<sup>95</sup> For example, Article 5(a), which prohibits the combination of personal data from multiple sources, is primarily aimed at Google or Facebook. At the same time, the prohibition could also mean that Amazon would not be able to provide age-specific recommendations on Prime Video to someone who disclosed their age in the marketplace service.

<sup>96</sup> See: Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., & Van Alstyne, M. (2021). The EU Digital Markets Act. Publications Office of the European Union, p.10.

hard to argue that multiple market players with a large but far from dominant market share can constitute a gatekeeper in the economic notion of the term.<sup>97</sup>

- 4.24 The gatekeeper that does not hold a dominant position in a product market that is considered a ‘core platform service’, must nevertheless adhere to a wide range of obligations under the proposed DMA and might face a competitive disadvantage over rivals unaffected by the proposed regulation.
- 4.25 The lack of delineation of a relevant market would be especially unfavourable for online marketplaces, which usually offer a wide variety of products and services in competition with other sellers operating online and physical outlets.<sup>98</sup> The DMA treats online marketplaces as strictly distinct from other retailers or sellers, although those online marketplaces face considerable competitive constraints from traditional stores and are not in a dominant position.<sup>99</sup>
- 4.26 The market for holiday accommodation is another salient example. Consumers are able to use a platform offering the full range of services of an online travel agency (‘OTA’), such as flight and accommodation booking services, car rentals, etc. (e.g. Booking.com, Expedia), or a combination of specialised platforms for flights (e.g. Skyscanner) and home rental platforms (e.g. Airbnb), or home sharing platforms, all in competition with one another and with traditional OTA services and local providers. Based on the existing proposal, a large OTA such as Booking.com could be designated a gatekeeper, though it might be far from holding a dominant position in a number of geographies and product markets.
- 4.27 Messaging services illustrate another type of issue. It is plausible that the messaging service of a gatekeeper, which is potentially dominant in other markets, must compete with messaging service providers that are dominant in that market. For instance, Google Hangouts might be designated as a core platform service as it is developed by Google, a highly likely gatekeeper candidate,

---

<sup>97</sup> The impact assessment support study of the proposed DMA cannot identify a clear gatekeeper or overly dominant player in the market for cloud services, in which technology companies as well as European telecommunications firm participate. In fact, the study predicts that the largest player (AWS), which controls over a quarter of certain market segments, is likely to lose some of its position to competitors. See Table 22 and preceding paragraphs in Section iii - “Mapping criteria to indicators for gatekeeping power” of Annex 2 of the impact assessment support study of the Digital Markets Act.

<sup>98</sup> In its decision over Fnac’s acquisition of Darty, the Autorité de la concurrence noted that physical stores exerted competitive pressure on online marketplaces, and vice versa, which was also supported by survey data. The majority of market participants believe that “online sales and in-store sales are in the same market”. See: Autorité de la concurrence decision 16-DCC-111 on 27 July 2016, para. 80-83.

<sup>99</sup> Book retail provides an example, in which traditional bookstores as well as online marketplaces (including gatekeeper candidate Amazon) participate. Traditional book retail allows the customer to touch, observe and inspect any book before the purchase, which is a clear advantage over online transactions. The fact that a relevant market for book retail would include traditional stores is also supported by a report produced for the EC: “On retail level, books are sold in several types of outlets (bookshops, specialised superstores, supermarkets, newsagents, etc).” See: Institute of European Media Law e.V. (EMR) (2005). Market Definitions in the Media Sector. Comparative Legal Analysis. Para. 1.69.

although the messaging service is not particularly popular in itself. According to the proposed DMA, Google Hangouts would be subjected to constraints to compete with larger providers of messaging services, such as WhatsApp or Snapchat, that other rivals would not.

- 4.28 Another source of adverse impact is the lack of clearly defined geographic markets. Designated gatekeepers would by definition be multinational companies which operate in several EU member states. Due to local idiosyncrasies, it is conceivable that a national market is dominated by a domestic company and the international competitor is a mere fringe player. Even in that case, the proposed DMA would only restrict the conduct of the international platform. This, however, entails the possibility that a designated gatekeeper platform is not in a position to compete in certain product and geographic markets, while its rivals in that market are dominant.<sup>100, 101</sup> As a consequence, gatekeeper obligations for platforms with large potential user base but small actual user count could be affected adversely.
- 4.29 This illustrates how gatekeeper designation in the proposed DMA, due to the lack of a market investigation, could result in unequal outcomes.

### **On the merits and appropriateness of DMA proposals**

- 4.30 The proposed DMA contains two sets of instruments: (i) a set of obligations to be imposed on gatekeepers in respect of their core platform services ('*ex ante* regulation') and powers granted to the EC to monitor and enforce them, and (ii) provisions for a new market investigation tool.
- 4.31 Based on appropriate principles, a market investigation tool could be a valuable addition to existing antitrust measures in ensuring fair and contestable conditions in markets where digital platforms are present. At the same time, the DMA's proposed *ex ante* regulation gives concerning leeway for the EC to depart from the established principles of competition law and to circumvent the established standards for the application of Articles 101 and 102 TFEU.

---

<sup>100</sup> For example, a key participant in the market for short-term accommodations in Hungary is the Hungarian-owned Szallas.hu, which is only available in Hungarian and is therefore restricted to Hungarian end customers. Its limited international presence practically guarantees exemption from gatekeeper status. In contrast, Booking.com, which is also available in Hungarian but is less popular than the domestic platform, is a likely gatekeeper candidate. Since the proposed DMA detaches gatekeeper status from market dominance, it is quite possible that Booking.com would face several restrictions but Szallas.hu would not, even though the latter attracts almost four times as much search traffic in Hungary. See sources [1](#), [2](#) and [3](#) (Last accessed on 24/03/2021).

<sup>101</sup> Videoconferencing services provide another example. Certain videoconferencing applications are by default installed on mobile devices, implying hundreds of millions of potential users. Depending on the practice of the EC in defining user count, such applications are likely candidates for a gatekeeper core service. However, recent developments have shown that it is not always the pre-installed platforms that are the most popular. Both iOS and Android offer default videoconferencing applications. Moreover, those registered with Google services have automatic access to its videoconferencing tool Google Meet. However, Zoom seems to attract three times as many meeting participants as Google Meet. See [source](#) (Last accessed on 24/03/2021).



4.32 This subsection discusses the merits and appropriateness of the additional instruments that the proposed DMA would introduce.

#### **The unclear fit of the proposed *ex ante* obligations to its stated objectives**

4.33 In its reasoning for the DMA proposal, the EC often cites previous antitrust action against digital platforms and their providers.<sup>102</sup> The introduction to the proposed DMA claims that the proposal complements existing EU (and national) competition rules, so as to address unfair practices by gatekeepers that either fall outside the existing EU competition rules or “that cannot be as effectively addressed by these rules”.<sup>103</sup> The two main reasons raised to explain the lack of effectiveness of EU competition rules are that intervention happens after the facts (after the anticompetitive conduct took place) and that investigations take time.

4.34 This raises the question as to whether the proposed DMA is the best instrument to fit the objective of correcting at the same time (i) the absence of existing rules to address some practices, and (ii) the lack of effectiveness of existing rules to address other practices (those that are within the scope of EU competition law).

*Regarding conducts that otherwise fall within the scope of EU competition rules, is the proposed DMA the right instrument?*

4.35 Several of the obligations listed in Article 5 and Article 6 of the DMA aim at curbing conducts that have been investigated under existing competition law (namely Articles 101 or 102 TFEU), albeit not always in a large number of cases. As an illustration, Article 5(b) aims at preventing wide parity clauses, Article 6(d) aims at preventing self-preferencing conducts: both types of conducts have been the subject of competition investigations under Articles 101 or 102 TFEU. This raises the following comments:

- i. The fact that such cases exist suggests that the EC already has at its disposal the tools necessary to address the potential concerns raised by these conducts, and sheds some doubts on the necessity to add a new range of tools to the EC’s arsenal in the form of the proposed DMA.
- ii. The fact that, in relation to some conducts, these cases are not numerous suggests that the experience developed by the EC likely is not extensive enough to form a basis for a clear presumption that the conducts in question are (more likely than not) anticompetitive.
- iii. In addition, the fact that these investigations spanned over several years, generating the feeling that their outcome occurred too late after the facts, shows, *inter alia*, that the conducts under scrutiny might not have been clearly and unambiguously harmful and therefore deserved being carefully investigated.

---

<sup>102</sup> See the section on problem definition in the impact assessment to proposal COM(2020)0842.

<sup>103</sup> Proposal COM(2020)0842, page 3 (last paragraph).

- 4.36 The risk is therefore that the proposed DMA, and in particular the *ex ante* regulation part, is targeting behaviours that are not unambiguously harmful and will deprive gatekeepers of the possibility to defend or justify their actions. Many of the obligations listed in Articles 5 and 6 of the proposal refer to conducts that may have both beneficial and harmful effects, depending on the specific context in which they take place. In addition, the understanding of these conducts and their overall effects of consumers is still evolving, as the economic literature, theoretical and even more so empirical, is still in its infancy. In this context, it is difficult to understand how the EC could form such strong presumptions of illegality that it would impose the strict obligations of the proposed DMA.
- 4.37 Moreover, the provisions of the *ex ante* regulation will have the consequence of entrenching the approach taken by the EC to assess platforms' conducts in its current state, negating its chances to adapt to the development of the platforms themselves and the evolution of the economic and legal knowledge and understanding of digital markets, which are still to some extent in their infancy.
- 4.38 Furthermore, this approach carries serious risks that the EC's application of competition law and regulations will eventually (maybe quickly) become outdated/obsolete: due to the rigidity of the regulatory framework and the lack of gain in experience in investigating platforms' conducts on a case by case basis, based on sound economic evidence, the EC will not have the experience required to adjust its assessment of these conducts or of new conducts.

A parallel could be drawn with the VBER.

The VBER, first introduced in 1999, also includes a list of hardcore restrictions (Article 4) that are presumed to be anticompetitive. Case precedents demonstrate that some competition authorities have enforced the VBER quite strictly and literally, without much regard for the actual or even potential effects of these conducts.

The revisions of the VBER (in 2008-2010, and those currently ongoing) demonstrate that it is close to impossible to change the EC's position, even with the support of more than 20 years of additional economic evidence (empirical and conceptual) and case precedents.

This experience with the VBER can lead to a pessimistic view of the outcome of the application of the DMA and of its adaptability to the evolution of digital markets. Digital markets evolve fast, their environment can change quickly, and these paces do not coincide with the lack of agility of the proposed regulations.

#### *Absence of procedural safeguards*

- 4.39 Further to this, there is a noted absence of procedural safeguards. Designated and emerging gatekeepers, as well as affected business users, should have a right to judicial review and appeal

even in cases when no fine or penalty payment has been imposed.<sup>104</sup> Similarly to the CMA's market investigation powers<sup>105</sup> as well as the EU telecommunications regulatory framework,<sup>106</sup> there should exist a judicial review mechanism providing firms with robust appeal procedures against both the gatekeeper designation and ensuing obligations.

- 4.40 Moreover, the legislation should include a commitment to a regular review of decisions and assessment of market outcomes. Again, the blueprint already exists in the EU telecommunications regulatory framework, where market reviews are conducted every five years.<sup>107</sup> Obviously, given the dynamism of the digital platform markets and pace of technological progress, the relevant period for these reviews could be shorter.

*Different regulatory regimes could cause disparities in treatment*

- 4.41 The proposed DMA forbids Member States from legislating any supplementary obligations on designated gatekeepers but does not clarify the interplay with existing competition laws. As a result, it does not prevent the divergences in treatment between Member States that are already in the process of introducing new legislation for digital platform markets.<sup>108</sup> The EC's Inception

---

<sup>104</sup> Article 35 of the proposed DMA specifies the review of fining decisions only: "the Court of Justice of the European Union has unlimited jurisdiction to review decisions by which the Commission has imposed fines or periodic penalty payments. It may cancel, reduce or increase the fine or periodic penalty payment imposed."

<sup>105</sup> See the Guidelines for market investigations para. 87, stating "Parties may, during the two months following the release of the CC's findings, lodge an appeal with the CAT against the decisions."

<sup>106</sup> See Directive (EU) 2018/1972 para. 76, stating "[a]ny party subject to a decision of a competent authority should have the right to appeal to a body that is independent...Member States should grant effective judicial review against such decisions."

<sup>107</sup> Also, as a result of these, only the undertakings which continue to have SMP being subject to further regulatory interventions, and only to the extent necessary to address such SMP.

<sup>108</sup> Article 114 TFEU, on the harmonisation of rules designed to enhance the functioning of the internal market is used as the legal basis for the proposed DMA. This means that to prevent regulatory fragmentation individual Member States are precluded from legislating similar rules. Furthermore, the proposed DMA prevents individual Member States from legislating national rules "for the purpose of ensuring contestable and fair markets." This does not prevent Member States from adopting legislation on the basis of competition law, consumer, privacy or data protection. This suggests that the approach taken can still lead to fragmented national rules targeting the same type of conduct with the justification of "protecting undistorted competition" and not "for the purpose of ensuring contestable and fair markets." Similar issues could be raised for national laws utilising the concept of 'market dependency'. It is thus understood that the consistent practical enforcement and application of the proposed obligations is likely to prove challenging.

Impact Assessment, preceding the proposed DMA, acknowledges that Member States may also implement their own additional rules.<sup>109</sup>

4.42 An example of the potential conflicts between the proposed DMA and national laws can be found in the recent revision of Article 19a of the German Act against Restraints of Competition.<sup>110</sup> The article empowers the Bundeskartellamt to designate companies with ‘paramount cross-market significance’ based on qualitative criteria<sup>111</sup> and subsequently ban conducts such as self-preferencing or combining of data. The exercise of these powers is bound to lead to a fragmented regulatory landscape and distortions in the markets. For example, as self-preferencing is noted as a practice targeted in this legislation, the different approaches by different regulatory regimes risk leading to disparities in treatment.<sup>112</sup>

4.43 In the same vein, another issue with the proposed DMA is the conflict with other areas of legislation. For example, under Article 6(h) and 6(i) designated gatekeepers are obliged to share data with other businesses and users. Although the text of the proposed DMA invokes GDPR, stating that gatekeepers can allow access for business users only to consenting end users’ personal data, the potential problem of liability still remains. Under GDPR, the data controller, which is the gatekeeper in this case, bears the responsibility and liability for any data leak or further dissemination of data, while also being required to share that data with thousands of business users.<sup>113</sup>

#### **Conducts outside the scope of the application of EU competition law**

4.44 The proposed DMA aims at resolving harmful effects of conducts that do not fall within the scope of the application of EU competition law or of other policy provisions (P2B Regulation, proposed DSA, data protection laws, GDPR). Although this is not the main purpose of this report, whose

---

<sup>109</sup> “Although some national administrations such as those in France and Germany, have taken steps to implement national measures, these may be seen as supportive of and potentially complementary to EU solutions”. See: European Commission (2020). Inception impact assessment to the Digital Services Act package. Ares(2020)2877647. Similarly, the proposed DMA does not prevent Member States from introducing legislation on national gatekeepers that might have an impact only nationally or in fewer than three Member States and are thus not considered to be impacting the internal market.

<sup>110</sup> France is also debating proposals to address concerns relating to ‘structuring platforms’. See: Autorité de la concurrence (2020): “The Autorité de la concurrence’s contribution to the debate on competition policy and digital challenges”.

<sup>111</sup> The criteria taken into account in the law are “1. Its dominant position on one or more markets, 2. Its financial strength or its access to other resources, 3. Its vertical integration and its activities in otherwise related markets, 4. Its access to competitively sensitive data, 5. The significance of its activities for the access of third parties to procurement and sales markets as well as its related influence on the business activities of third parties.” Gesetz gegen Wettbewerbsbeschränkungen (GWB), Article 19a(1).

<sup>112</sup> Other conducts which the Bundeskartellamt may prohibit include: refusing or hindering access, hindering competitors, raising barriers of entry, refusing interoperability or data portability, insufficient information provision. Gesetz gegen Wettbewerbsbeschränkungen (GWB), Article 19a(2).

<sup>113</sup> See Regulation (EU) 2016/679, with special regard to Articles 4(2), 4(7) and 5(2).

authors are not expert in these other policies and regulations, one can wonder whether some of the obligations of Articles 5 and 6 of the proposed DMA would not have been more efficiently governed by them. For instance, the P2B regulation applies to online intermediation services and online search engines, and its stated objectives are:

- i. “to ensure a fair, predictable, sustainable and trusted online business environment within the internal market”;<sup>114</sup>
- ii. “to promote fairness and transparency, especially as regards the ranking of corporate website users in the search results generated by online search engines”;<sup>115</sup>
- iii. while “recognis[ing] and safeguard[ing] the important innovation potential of the wider online platform economy and allow[ing] for healthy competition leading to increased consumer choice.”<sup>116</sup>

4.45 These objectives overlap with those of the proposed DMA, and it is unclear how the two sets of regulations will interact.

4.46 Moreover, the stated objective of the proposed DMA, i.e. to resolve issues not covered by other EU laws and regulations, suggests that there exists a legal void that the DMA is trying to fill. This also suggests that the conducts in question might not have very clear-cut effects on users (otherwise it would be expected they would have been the subject of previous investigations or proceedings, contradicting the premise that there are not addressable by other legal or regulatory instruments), such that it appears unintuitive to consider that they could be associated with a presumption of illegality and therefore be prohibited or imposed by *ex ante* rules.

4.47 In cases associated with such conducts, one would expect therefore that the proposed DMA would provide for an instrument allowing the collection and examination of data and information on a case by case basis, in order to conduct a careful assessment of whether the conducts in question are unfair and impede healthy competition. In this case also, if the DMA’s proposed market investigation tool can be justified and triggered on grounds other than competition law, the same cannot be said about the *ex ante* obligations set out in the DMA proposal.

#### **On the timing of intervention**

4.48 One stated objective of the proposed DMA is to provide the EC with tools to intervene more quickly than with existing policy and regulations. This objective may well however prevent welfare to increase, as intervention may (i) stop the expansion of some platforms before they can reach the optimal size that can maximise user surplus, and (ii) chill the creation or expansion of platforms who do not want to take the risk of becoming the subject of the additional regulation.

---

<sup>114</sup> P2B regulation, para. 7.

<sup>115</sup> P2B regulation, para. 8.

<sup>116</sup> P2B regulation, para. 8.

- 4.49 First, the DMA's objective of expediency might be a matter of resources allocated to antitrust enforcement rather than the need for statutory deadlines.<sup>117</sup> The fact that investigations are time consuming is not reason enough to impose a set of otherwise problematic regulations. There can be other ways to shorten investigations, such as allocating more resources to some investigations, and allocating better suited resources (e.g. staff with specific skills to deal with digital markets and large amounts of data).
- 4.50 Second, expediency may also be ill-suited in dynamic markets where consumer benefits, firms' profits, potential consumer harm, materialise at different times (if they materialise at all), such that swift enforcement could compromise not only the expected ability of platforms to recoup investments but also users surplus to fully materialise.
- 4.51 As set out in Section 2 and recognised by the EC,<sup>118</sup> digital platforms are most often beneficial to their end users and business users. These welfare-enhancing effects, however, can take time to materialise and reach their full potential. This is because the positive welfare effects of digital platforms require time (sometimes years) to be established, as they rely on network effects or require sufficient scale. Only after a certain critical mass of users is reached can a platform take advantage of these network effects and economies of scale, which then result in greater consumer surplus and positive spill-over effects, as also shown in Section 2.<sup>119</sup>
- 4.52 In this context, it is particularly worrisome that providers of digital platform services may have to demonstrate that their practices might cause significant benefits, for example in compliance with Article 7(2) of the proposed DMA. Since the efficiencies brought about by a platform might only materialise in the future, the scrutinised undertaking could be forced to terminate a practice which would later have provided appreciable benefits.
- 4.53 The dynamic aspects of efficiencies also imply that economic profits can take time to materialise. This is well recognised by financial and equity markets, which allow technology firms to sustain losses for many years before requiring them to be profitable.<sup>120</sup>
- 4.54 For instance, platforms such as Amazon and Netflix have had to invest substantially into their platforms and incurred negative financial returns for many years before turning a positive profit. If, because they reach a size that triggers the application of regulation, they have to modify their conducts and business models, there is a risk that their ability to recoup their investments will be impaired. This in turn may chill investment by other platforms who may be impaired in finding capital if there are risks that their success in attracting users will also restrict their ability to earn future profits.

---

<sup>117</sup> See: Article 7(2) of proposal COM(2020)0842.

<sup>118</sup> First paragraph of the explanatory memorandum to proposal COM(2020)0842.

<sup>119</sup> See para. 2.18.

<sup>120</sup> See: Markman, J. (2020): The Amazon Era: No Profits, No Problem. *Forbes*, 23 May 2017.

- 4.55 This implies that regulatory intervention to curb potentially adverse effects, if occurring too early in the development phase of a platform, might not consider the benefits which would have arisen without intervention.
- 4.56 The nature of digital markets and the ambiguous and uncertain effects of many of the conducts targeted by the proposed DMA could justify market investigations with statutory time limits, enabling the EC to gather and analyse market data and evidence to form an informed view before intervening. They however militate against the imposition of a rigid *ex ante* regulation that increases the risk of over-enforcement and chilling effects on platforms' expansion and innovation.

### **Making a generality out of a few specific cases is likely ineffective and entails a great risk of unintended consequences**

- 4.57 The *ex ante* rules listed in Articles 5 and 6 of the DMA resemble an unorganised catalogue of obligations and prohibitions that target different dimensions of different platforms' commercial strategies and behaviours while concurrently pursuing several (not necessarily related) objectives. In reality, these obligations can be associated to specific issues and practices of specific companies which have been investigated or are under investigation by the EC and NCAs and are now proposed to apply to a wider set of companies.<sup>121</sup>
- 4.58 It seems therefore that the proposed DMA was designed as a general, wide-ranging tool but in fact aims at resolving a narrow, specific set of issues arising from a very small number of platforms. **As such, the proposed regulation translates the EC's stand about some of GAFAM's practices into a set of general obligations that would all be applicable to a broader group of gatekeeper platforms**, regardless of the core services markets in which they operate.
- 4.59 This is concerning because the effects of the targeted practices, first, are not always very well known, and second, likely depend on the specific characteristics of the markets in which they take place, which makes the proposed regulation a likely cause of unforeseen detrimental impact on digital markets.<sup>122</sup>

### **Presumptions of illegal conducts are not rebuttable**

- 4.60 The obligations inscribed in Article 5 of the proposed DMA are expected to be self-executing and imposed on gatekeepers without exception. Those listed in Article 6 are "susceptible of being further specified", although it is not entirely clear what this means. It therefore implies that, once

---

<sup>121</sup> As Caffarra and Scott-Morton have pointed out, "[w]ith experience and familiarity with past, current and pipeline EC antitrust cases, one can just about assign each entry to a particular company and its issue." See: Caffarra, C. & F. Scott Morton (2021). "The European Commission Digital Markets Act: A translation".

<sup>122</sup> A detailed examination of each obligation would highlight how a number of the targeted conducts are not unambiguously harmful to consumers and their effect depends on the setting and market conditions in which they take place.

designated as gatekeepers, core services platforms are not expected to have the opportunity to justify their conducts or demonstrate that they do not negatively affect market outcomes. This means that the proposed DMA goes beyond setting out rebuttable presumptions of illegal conducts, as there is no scope for gatekeepers to rebut these presumptions. This contrasts with other regulations (for instance the regulation of vertical agreements) in which the EC leaves room for undertakings to substantiate the likely efficiencies of conducts otherwise designated as hardcore restrictions.

4.61 This feature of the proposed DMA was also underlined in a report commissioned by the EC,<sup>123</sup> which argues that it would be preferable to refine the obligations by creating “(a) a black list of forbidden behaviours to which only extreme considerations would justify an exception; and (b) a grey list of practices which are in principle considered anti-competitive but for which a pro-competitive justification is possible, with the gatekeeper bearing the burden of proof for that efficiency defence.”<sup>124</sup>

4.62 This highlights that a gradual approach would enable to reach the delicate balance which could “separate the positive efficiency and welfare gains that platforms generate through (data-driven) network effects from negative anti-competitive and welfare-reducing platform behaviour.”<sup>125</sup>

#### *Likely type I and type II errors*

4.63 The risks and costs associated with imposing irrebuttable obligations or prohibitions can be examined through the lens of an error cost framework.

4.64 In the absence of a clear gatekeeper definition and of an effect-based intervention, there is a significant likelihood of type I errors, where intervention occurs when it is not warranted. This is also highlighted in the position paper of the CNMC, which was prepared in reaction to an earlier form of the DMA proposal.<sup>126</sup> This suggests that particular attention should be given to weighing the costs of type I and type II errors that could result from the strict obligations provided by the proposed DMA, along with assessing which sectors or actors will have to carry these costs, to assess whether the provisions of the proposed DMA are the most efficient and least detrimental route to intervention in digital markets.

4.65 Condorelli and Padilla (2020) propose interesting views as to which legal standard would be better suited for the assessment of the competitive effects of platform envelopment strategies in digital

---

<sup>123</sup> The Joint Research Centre (JRC), the EC’s science and knowledge service has published a report in which a panel of economic experts provide an academic assessment of the proposed DMA. For further details see: Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., & Van Alstyne, M. (2021). The EU Digital Markets Act. Publications Office of the European Union.

<sup>124</sup> Ibid., p.3.

<sup>125</sup> Ibid., p.7.

<sup>126</sup> See: CNMC (2020). Position paper for the public consultation on the Digital Services Act (DSA) and a New Competition Tool (NCT).



markets, applying an error cost framework.<sup>127</sup> Policy errors are commonly categorised as the following:

- i. Type I errors occur when a conduct is found anticompetitive when it is not (leading to over-enforcement).
- ii. Type II errors result from a finding that a conduct is legitimate when it should have been considered anticompetitive (leading to under-enforcement).

4.66 As argued by Judge Easterbrook, a competition enforcement system must select legal rules so as to minimise the expected costs of decision errors. Based on this framework of analysis, Condorelli and Padilla (2020) propose the following:

- i. When type I errors are extremely unlikely *a priori* (that is, the conducts under scrutiny are always anticompetitive), the conducts should be presumed *per se* illegal (an analysis of the effects is unnecessary).
- ii. When both type I and type II errors are likely, but the expected costs of type II errors are larger than those of type I errors – that is, the potential harm to consumers is large and outweighs the welfare implications of prohibiting lawful conducts – the conduct should be subject to a rebuttable presumption of illegality. In other words, it should be presumed anticompetitive, but a dominant firm could avoid a prohibition decision if it can demonstrate the efficiency effects of its conduct. The authors suggest this may be the case when a market is likely to ‘tip’ into a monopoly.
- iii. When both type I and type II errors are likely, but the expected cost of type I errors is larger relative to that of type II errors – that is, the potential efficiencies lost by prohibiting a lawful conduct are large relative to the welfare cost of allowing a conduct leading to an abuse of dominance – the conduct should be subject to a rebuttable presumption of legality. In other words, it should be presumed procompetitive, but a competition authority could prove an infringement by showing the detrimental effects of the conduct.
- iv. When the risk of type II error is considered extremely unlikely, the conduct should be legal in all circumstances.

4.67 The theories of harm associated with abuse of dominance cases may often fall into the middle two categories – that is, they are not always likely to result in harm or an absence of harm, so that *per se* rules would not be appropriate. Because they are sceptical about the use of a rule of reason, Condorelli and Padilla (2020) argue in favour of the use of rebuttable presumptions, and provide some insight as to the type of evidence and analyses that could usefully support the

---

<sup>127</sup> See: Condorelli, D., & Padilla, J. (2020). Harnessing Platform Envelopment in the Digital World. *Journal of Competition Law & Economics*, 16(2), 143-187 (in particular section VII).

direction of these presumptions and therefore the legal rules that could be applied towards particular conducts.<sup>128</sup>

- 4.68 In the context of digital platform markets, where the likelihood and expected costs of both types of errors are significant, outright obligations (akin to *per se* rules) such as those provided in the proposed DMA are not appropriate.

*Absence of feedback mechanism for objective justifications*

- 4.69 The current proposal does not allow companies to substantiate the pro-competitive effects of their practices in order to receive exemption from the DMA's *ex ante* obligations, which is a missed opportunity to establish the balance between positive network effects and anticompetitive conduct.<sup>129</sup>

- 4.70 Another parallel to the VBER, is the absence of a mechanism for designated gatekeepers to provide objective justification for obligations that are presumed to be anticompetitive without empirical corroboration. While the burden should be on the EC to illustrate the harm of these practices within relevant markets and for each designated gatekeeper, the designated or even 'emerging' gatekeepers should be able to obtain exemption from an obligation if they are able to substantiate the lack of competitive harm from it.

- 4.71 As noted throughout this report, the lack of economic literature establishing the harm the targeted conducts bring to consumers and concurrent proof that some conducts are not unambiguously harmful should be reflected in the enforcement of the proposed DMA.<sup>130</sup>

- 4.72 The absence of any such mechanism as a safeguard against unwarranted intervention in highly dynamic markets risks distorting competition in these markets by preventing efficient players from competing, chilling innovation and the creation of new services. This issue is exacerbated by the fact that the proposed obligations are not applicable to all likely gatekeepers and are generalised out of a few specific cases, as detailed in the preceding paras.

- 4.73 Assessing the need for an extensive intervention or regulation and the best possible policy instrument entails relying on a substantive evidence-based effects analysis of the harmful

---

<sup>128</sup> Ibid.

<sup>129</sup> As it has been noted, "[n]etwork competition also provides some unique pro-competitive justifications for practices that have traditionally received antitrust scrutiny, such as tying, exclusive dealing, and low-pricing strategies," concluding that "network effects can be a double-edged sword" See: Schanzenbach, M. M. (2002). Network Effects and Antitrust Law: Predation, Affirmative Defenses, and the Case of U.S. v. Microsoft. *Stanford Technology Law Review*, 2002, 4.

<sup>130</sup> As also recognised by the UK's DMT, "[t]his would mean it [the DMU] had the power to adopt principles which prohibit SMS firms from prescribed conduct, except where specified conditions apply – for example that the conduct is necessary, or objectively justified, based on the efficiency, innovation or other competition benefits it brings. This is in recognition of the fact that conduct which may in some circumstances be harmful, in others may be permissible or desirable as it produces sufficient countervailing benefits". See paras 35-36 of Appendix C of the Advice of the Digital Markets Taskforce.

conducts and their impact. Generic hardcore obligations might only serve as a starting point on how to further refine and tailor enforcement and cannot be the preferred mode.<sup>131</sup> Such an approach ignores that competition happens along several different dimensions and across variable business models and that the resolution of potential concerns depend on the relevant characteristics of each service and market participant.

## The approach of the proposed DMA

### The formalistic approach of the DMA

- 4.74 The approach of the DMA in designating gatekeepers and imposing strict obligations is purely formalistic and does not require demonstrating the detrimental effects of the conducts it aims at prohibiting. Indeed, recital 10 of the proposed DMA states that “[t]his Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims at protecting a different legal interest from those rules and should be without prejudice to their application”.
- 4.75 The proposed DMA appears as a tool designed for the EC to address the same set of conducts already under scrutiny based on existing competition law but without the burden of defining relevant markets, demonstrating dominance and assessing likely effects. The proposed DMA therefore will greatly simplify enforcement against particular conducts, by brushing aside the requirement to establish the dominance of an online platform and that of showing an ‘appreciable effect on competition’. **The proposed regulation is a clear departure from the established concepts and practice of competition law of the last few decades.**
- 4.76 The departure from the established effects-based approach, grounded in the practice of competition law of the last decades, is justified by some commentators as a necessary approach to expedite urgently required intervention. However, this departure carries various risks, some of which undermine the stated objectives of the DMA, and contrasts with the position taken in the past by the EC on the need for a case-by-case examination of these markets.<sup>132</sup> Given the paucity or even absence of established literature on the theories supporting intervention and the limited precedents, well-developed experience is lacking for many of the conducts targeted by the

---

<sup>131</sup> As also recognised by the UK’s DMT, noting that though ‘a rules-based’ approach may be preferable in enhancing certainty for designated firms it has other drawbacks. See para. 18 onwards of Appendix C of the Advice of the Digital Markets Taskforce.

<sup>132</sup> “The existence of network effects as such does not *a priori* indicate a competition problem in the market affected by a merger. Such effects may however raise competition concerns in particular if they allow the merged entity to foreclose competitors and make more difficult for competing providers to expand their customer base. Network effects have to be assessed on a case-by-case basis.” See: Commission decision of October 3, 2014, Case COMP/M.7217, Facebook/WhatsApp, para. 130.

DMA.<sup>133</sup> In this context, more flexible tools, such as a market investigation tool, rather than legislating rigid obligations, would be better suited and allow policy makers and enforcers gaining useful experience.

4.77 In addition to bypassing the constraints otherwise imposed by the substantive standard to demonstrate the detrimental effects of conducts on end users and competition, the proposed DMA also circumvents the obligation to define relevant markets and establish dominance. This is in contrast with the spirit of competition law prohibiting the abuse of a dominant position, where the prohibition on some conducts can only be imposed after a careful delimitation of the relevant market in which the conducts take place and a finding of a dominant position in that relevant market. The burden placed on the competition authority is a means to provide a safe harbour to companies and safeguard them from inefficient overenforcement.

4.78 Overall, the formalistic framework of the proposed DMA runs counter to the progress made on effects-based analysis in the last couple of decades. As the proposed DMA adopts a set of strict and unescapable obligations to be imposed on some firms, one would have expected that (i) the reasons for their imposition would have been very clearly justified and grounded on well-established precedents and economic studies, and (ii) the assessment of the market position of the online platforms to which they will be imposed would be at least as demanding as the one required in the context of an investigation into a potential abuse of a dominant position. However, this is not the case. On the contrary, the proposed DMA is designed to allow the imposition of stringent constraints on firms without imposing on the enforcer the burden of assessing the markets concerned or the position of the firms therein and without the requirement to examine the potential extent of the detrimental effects of the conducts it is trying to curb.

#### **On the enforcement powers and the broad discretion left to the EC**

4.79 A mandate to intervene into digital platform markets accompanied with broad enforcement powers is not without drawbacks. The legislative scope and design of any regulatory regime should balance between the amount of power required to achieve its stated objective and the amount of discretion granted to the enforcing authority. Though tempting for enforcers to enjoy discretion in their preferred remedies, this discretion can also result in regulatory capture and excessive engagement from market participants.

4.80 Built-in restrictions in the powers of enforcement authorities are also, perhaps counter-intuitively, empowering. It allows them to withstand undue pressure from stakeholders such as market participants and even governments. Contrary to what one might expect, if the enforcer has the

---

<sup>133</sup> As one expert commentator, Alfonso Lamadrid puts it: “This is not about presuming harm in the light of clear lessons from economics and experience. It is about presuming harm absent those lessons, or against those lessons. It is about a dogma, believing in what we cannot see or prove. It may be somehow contradictory to argue that there is an abundance of obvious anticompetitive practices in the digital sector, but then recommend that their existence and anticompetitive potential be presumed, not shown on the basis of evidence. If a practice is truly anticompetitive, the evidence will be there”. For a detailed discussion, see: Lamadrid, A. (2019). Meeting and Shifting- The Burden of Proof (in Digital and Beyond). *Chillin’ Competition*, 31 October 2019.

power and discretion to impose any remedy and with limited justification, it is more challenging to signal why particular outcomes have been pursued and powers employed. Furthermore, it is more challenging to withstand calls to exercise more of its powers and more often, given its broad discretion.<sup>134</sup>

- 4.81 At the same time, market participants and other stakeholders are incentivised to ask for and steer enforcement in favour of their preferred outcomes. Regulatory intervention based on the proposed DMA could be ultimately called upon by stakeholders to opine on practices that are more akin to business disputes as they understandably aim to secure the outcomes that align with their own interests. One further example is the proposed ability to enforce structural measures. Stakeholders aiming to benefit from such a remedy would bear no cost in pushing for these powers to be used and claim that this is the most effective measure in ensuring competitive outcomes in relevant markets.
- 4.82 Furthermore, the proposed DMA allows the EC to impose further obligations following a market investigation. In this respect, the scope of the DMA is broader than the proposed obligations and extends to any conduct in digital platform markets that the EC determines is not aligned with the aim of 'contestability or fairness', though these concepts are not defined within the context of the proposal. This could put the EC in a place of requiring to constantly withstand such undue pressure and further increase the likelihood of type I errors.
- 4.83 As a result of the built-in limitations of existing competition law, the EC would not be able to heed to these requests, insofar as remedies under Regulation 1/2003<sup>135</sup> are only aimed at halting the infringement.
- 4.84 The EC (and DG COMP) already has experience dealing with broad discretion and facing pressure to promote certain outcomes, in particular in the area of State Aid rules. Under Article 107(3) TFEU, the authority is empowered to define the instances in which government aid in the form subsidies and other measures are not incompatible with the Single Internal Market. This naturally incentivises Member States to lobby for their preferred decisions.<sup>136</sup> Looking at State Aid instruments such as the General Block Exemption Regulation,<sup>137</sup> it becomes apparent that the EC has specified the type and intensity of aid permissible in exhaustive detail. This can only be interpreted as the means by which the EC constrains its decision making to withstand external pressure and forgoing discretion to the benefit of effective policy.

---

<sup>134</sup> The case in relation to the default search engine of Android phones is an illustrative example. Multiple market participants continue to lobby for amendments to the implemented remedy of search preference menus, in a debate that carries on years after the decision.

<sup>135</sup> See: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>136</sup> See: Friederiszick, H. W., Röller, L. H., & Verouden, V. (2006). European state aid control: an economic framework. *Handbook of antitrust economics*, 625-669.

<sup>137</sup> General Block Exemption Regulation, Regulation (EU) N651/2014.

### **Structural remedies**

- 4.85 Breaking up any monopoly with significant scale and scope would be socially costly. It would force inefficiencies on both portions as well as induce consumer harm.
- 4.86 Compelled divestitures in digital platform markets are economically risky and likely to do more harm than good, even in dominated markets. For example, one of Amazon's largest market shares is in eBooks so one might suggest divesting Amazon's eBook to a different firm. Currently a user can call up a book title on Amazon and select from available formats, whether hardback, paperback, Kindle (eBook), or audio. Forcing a divestiture of Kindle would require a customer who wanted the eBook version to go to a different firm's website. However, eBooks are not a monopoly and are sold by a variety of resellers, including the publishers themselves. The principal impact of such a divestiture would be to make it less convenient for readers to select a book format. That is not likely to be a consumer welfare improvement.<sup>138</sup>
- 4.87 It quickly becomes evident that effective structural remedies would be hard to conjure, even setting aside the uncertainty and risks associated around implementation.

### **It is unclear whether the benefits of the *ex ante* obligations will outweigh their costs**

- 4.88 The aspiration of the proposed DMA to reshape products and business models can be a challenging duty for enforcers, given the complexity of the task and the dynamism of the markets involved would make it prone to errors. The fact that this is undertaken without an accompanying obligation to demonstrate the anticompetitive effect of the targeted conducts simply confounds the burden.
- 4.89 Instead of treating the need to delineate relevant markets, demonstrate dominance and assess the pro- and anti-competitive effects of conducts targeted by the proposed DMA as an inconvenience that can only delay necessary intervention, the EC should embrace the challenge as a necessary process in ensuring optimal outcomes. As noted throughout this section, the proposed generalised obligations are likely disproportionate and risk distorting rather than enhancing competition.
- 4.90 Competition law as it stands today is flexible, as it allows firms the freedom to set terms and conditions within a potentially wide range of acceptable behaviour. The expected benefits of regulation correcting any market failures should be weighed against the costs. For example, and as is often the case in digital markets, when an investment is subject to significant *ex ante* risk, it may be necessary to refrain from imposing regulations that could have a disproportionately negative impact on the likelihood or magnitude of the expected return on this investment and could in turn reduce incentives to invest in the first place.

---

<sup>138</sup>

Hovenkamp, H. J. (2021). "Antitrust and Platform Monopoly". Forthcoming in *The Yale Law Journal*.

- 4.91 The difficulty of designing and implementing remedies in these settings further speaks to how *ex ante* obligations are not an appropriate tool and how a case by case assessment tool would more likely avoid enforcement errors.

## Section 5

# Conclusions and Recommendations

### Key findings of preceding sections

- 5.1 The **designation of gatekeepers**, according to the proposed DMA, is possible based on both qualitative and quantitative criteria. We have identified several concerns in this respect.
- i. First, the thresholds are designed to capture the largest companies with no regard to the economic realities of the markets they operate in. Gatekeeper status is not directly related to the concept of market dominance and does not result from a market-by-market assessment. This could lead to a distortion of competition between designated gatekeepers and other market players.
  - ii. Conversely, several companies and many of their services may be concerned about gatekeeper designation being expanded to niche markets because of the significant discretion exercised by the EC in the qualitative designation. The uncertainty associated with potential, ‘emerging’ or actual gatekeeper status could have a chilling effect on innovation and growth. The business users of platforms may also experience adverse effects.
- 5.2 We find that the **obligations** specified in proposed DMA do not unambiguously serve its stated objectives and can lead to a fragmented internal market with conflicting or overlapping rules.
- i. Firstly, the interplay with existing competition rules is unclear, with the possibility of additional national legislation further compounding the issue. To the extent that national competition authorities are also involved in enforcement, market participants could be faced with divergent interpretations of the DMA provisions across the internal market.
  - ii. In the same vein, it is unclear how the DMA would interact with other related policy provisions such as the GDPR. This is especially salient with respect to data portability obligations such as those set out in Article 6(h) of the proposed DMA or the provision of business users “with effective, high-quality, continuous and real-time access and use of [...] data” prescribed by Article 6(i).
  - iii. For conducts already covered by existing competition rules, there have been only a few antitrust investigations, indicating that the targeted conducts might only be harmful in very specific settings. A direct consequence of this is that a large enough body of evidence is not available to authorities, practitioners or firms, to form a credible presumption that these conducts are harmful. In addition, the obligations listed in the proposed DMA may become



outdated relatively quickly due to their inherent rigidity which contrasts with the innovative and dynamic nature of digital markets.

- iv. We find it problematic that the proposed DMA generalises a few specific cases to universally applicable obligations as it also entails substantial risks. The conducts targeted by the obligations are not always detrimental to consumers and across all markets, so strict obligations and prohibitions might hurt consumers. To this point, some experts argue that black and grey lists could be introduced, which would allow companies to show the pro-competitive effects of certain conducts.<sup>139</sup>
- v. In our view, the potential benefits of *ex ante* obligations might not outweigh their costs. Furthermore, it is a likely unintended consequence that innocuous practices could also be affected by the DMA. In other words, the likelihood of type I errors is high.
- vi. Overall, the proposal lacks procedural safeguards and a feedback mechanism for the EC to adjust the proposed provisions.

5.3 On its **enforcement**, the proposed DMA also raises a number of concerns.

- i. The proposals are intended to allow quicker intervention than current antitrust action beyond the use of interim measures, which could however have unintended consequences. Early intervention may stop the expansion of some platforms before they can reach the optimal size that maximises user welfare. It might also chill the creation or expansion of platforms that wish to avoid additional regulation.
- ii. Concerns are also raised in connection with competition policy enforcement. The proposal might set precedents in various markets, and the overlap between the proposed DMA and Article 102 TFEU might be problematic.
- iii. Because the proposed DMA exempts the EC from proving the detrimental effects (to end users, business users or to the competitive process) of the targeted conducts, it grants the EC with substantial discretion.

## Design of regulation

### Technological and business model neutrality

5.4 Regulation should be indifferent to technological standards or practices as well as business models. The proposed DMA appears designed to capture a very specific set of companies and conducts. In this, it is also not considering how the proposed obligations might handicap certain business models to the benefit of others and how it forces firms to adjust their monetisation approach.

---

<sup>139</sup> For example, Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., & Van Alstyne, M. (2021). The EU Digital Markets Act. Publications Office of the European Union.

### **Avoiding intervention in newly formed markets**

- 5.5 Regulation should take into account the individual characteristics of each market, including in this case the possibility that network effects might provide benefits only after a nontrivial period of time. Early and strict intervention could jeopardise the welfare-increasing potential of digital markets.

### **Avoiding hardcore restrictions**

- 5.6 As the example of the VBER has shown, the EC is not likely to ease or lift hardcore restrictions within a reasonable timeframe, even though the targeted practices and the EC's approach are expected to be rapidly outdated given the rapid transformation of digital markets. The inflexibility of the obligations imposed on gatekeepers in the proposed DMA raises the risk that this regulation will become outdated and ill-suited within a short timeframe.

## **Alignment with key principles for interventions**

### **Clear thresholds for antitrust intervention**

- 5.7 Intervention should be prompted on the basis of a coherent and sound theory of harm established on the basis of clear legal provisions. This provides market participants with legal certainty on what conducts are likely to trigger intervention and contributes to the proper functioning of the market. The proposed DMA would need to follow the same approach and provide clear guidance on both the foundation and practical application of the proposed provisions.

### **Avoiding type I and type II errors**

- 5.8 As discussed in para. 4.63 and onwards, there is a high probability of both type I and II errors in implementing the proposed DMA obligations.
- 5.9 Considering that theories of harm associated with abuse of dominance cases are often neither always likely to result in harm nor a lack of harm, they are not good candidates to be stamped as *per se* illegal. For such settings, in line with Condorelli and Padilla (2020) recommendations, an effects-based approach or the use of rebuttable presumptions might be more appropriate than outright, irrebuttable, prohibitions or obligations.

### **Case by case examination and participative antitrust**

- 5.10 The EC is an administrative court, asked to act both as the prosecutor and judge handing down the verdict. The proposed DMA add to these roles the responsibility to police companies' compliance with the regulation and to sanction violations without the burden of an adversarial process.
- 5.11 Instead, to pursue the minimisation of the aforementioned errors and reach more efficient outcomes with less regulatory burden, the EC could embrace a more participative antitrust.
- 5.12 The DMA could form the basis on which a complainant can rely on to formally complain (in the spirit of the dispute settlement responsibilities held by many regulators). The defendant gatekeeper would then have a specified amount of time to respond and prepare its defence. During that time, the EC could request information from all parties involved and investigate, which would also enable other potential complainants to come forward. After the specified period, there

could be a public hearing in which both sides have a limited amount of time to present their arguments. The EC would take these into account and prepare a recommendation for the College to remedy any problems, if necessary.

- 5.13 This process would avoid the need for fines on conducts that are not *per se* illegal and is possible on the basis of the existing rules. A Notice on the same legal basis as that of Articles 101 and 102 TFEU would suffice for this approach, and would avoid the need for a new regulation or directive.

### **Final recommendations on the proposed approach**

- 5.14 The final provisions of the proposed DMA are likely to govern digital markets in the EU for the foreseeable future and it is thus important that they are conceptually sound.
- 5.15 Though digital platforms have brought novel challenges for enforcement authorities and practitioners alike, these are not so far removed from existing competition law. And because these challenges are novel, they deserve careful examination and a cautious approach, rather than a broad brush, formalistic approach that departs from the established standards and safeguards built over the past decades.
- 5.16 The proposed DMA is the starting point to the legislative process. This report hopes to inform the ensuing discussion and to contribute to a beneficial and sensible outcome for all stakeholders.

## Section 6

# Bibliography

- Aguiar, L., & Waldfoegel, J. (2018). As streaming reaches flood stage, does it stimulate or depress music sales?. *International Journal of Industrial Organization*, 57, 278-307. [Link](#).
- Anghel, A. P. (2020). "Demand estimation with learning and search costs". Working paper. [Link](#).
- Argentesi, E., Buccirossi, P., Calvano, E., Duso, T., Marrazzino, A., & Nava, S. (2019). Ex-post assessment of merger control decisions in digital markets. *Document prepared by Lear for the Competition and Markets Authority*. [Link](#).
- Arnfolk, P., Pilerot, U., Schillander, P., & Grönvall, P. (2016). Green IT in practice: virtual meetings in Swedish public agencies. *Journal of Cleaner Production*, 123, 101-112. [Link](#).
- Australian Competition and Consumer Commission. (2019). Digital Platforms Inquiry: Preliminary Report. [Link](#).
- Autor, D., Dom, D., Katz, L. F., Patterson, C., & Van Reenen, J. (2020). The fall of the labor share and the rise of superstar firms. *The Quarterly Journal of Economics*, 135(2), 645-709. [Link](#).
- Autorité de la concurrence and Bundeskartellamt (2019), *Algorithms and Competition*. [Link](#).
- Autorité de la concurrence (2020): "The Autorité de la concurrence's contribution to the debate on competition policy and digital challenges". [Link](#).
- Baker, J. B., Farrell, J., Gavil, A. I., Gaynor, M., Kades, M., Katz, M. L., ... & Shapiro, C. (2020). Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets. *Available at SSRN 3632532*. [Link](#).
- Barrero, J. M., Bloom, N., & Davis, S. J. (2020). Why Working From Home Will Stick. *University of Chicago, Becker Friedman Institute for Economics Working Paper*, (2020-174). [Link](#).
- Batura, O., N. van Gorp and P. Larouche (2015). Online Platforms and the EU Digital Single Market. [Link](#).
- Bethell, O. J., Baird, G. N., & Waksman, A. M. (2020). Ensuring innovation through participative antitrust. *Journal of Antitrust Enforcement*, 8(1), 30-55. [Link](#).
- Bloom, N., Liang, J., Roberts, J., & Ying, Z. J. (2015). Does working from home work? Evidence from a Chinese experiment. *The Quarterly Journal of Economics*, 130(1), 165-218. [Link](#).
- Bork, R. H. (1993). *The Antitrust Paradox: A Policy at War with itself*. [1978] Maxwell Macmillan, pp.164–196.
- Brown, J. R., & Goolsbee, A. (2002). Does the Internet make markets more competitive? Evidence from the life insurance industry. *Journal of Political Economy*, 110(3), 481-507. [Link](#).

- Brynjolfsson, E., Collis, A., & Eggers, F. (2019). Using massive online choice experiments to measure changes in well-being. *Proceedings of the National Academy of Sciences*, 116(15), 7250-7255. [Link](#).
- Brynjolfsson, E., & Oh, J. (2012). The attention economy: measuring the value of free digital services on the Internet. *Proceedings of the 33rd International Conference on Information System* (2012). [Link](#).
- Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., & Van Alstyne, M. (2021). The EU Digital Markets Act. Publications Office of the European Union. [Link](#).
- Caffarra, C. & F. Scott Morton (2021). "The European Commission Digital Markets Act: A translation". [Link](#).
- CMA (2020). Advice of the Digital Markets Taskforce. [Link](#).
- CNMC (2020). Position paper for the public consultation on the Digital Services Act (DSA) and a New Competition Tool (NCT). [Link](#).
- Colomo, P. I. (2021). Be Careful What You Wish For, *CONCURRENTIALISTE*, 23 January 2021. [Link](#).
- Condorelli, D., & Padilla, J. (2020). Harnessing Platform Envelopment in the Digital World. *Journal of Competition Law & Economics*, 16(2), 143-187. [Link](#).
- Constine, J. (2015). "A Year Later, \$19 Billion For WhatsApp Doesn't Sound So Crazy." *Techcrunch*, 20 February 2015. [Link](#).
- Crémer, J., Y.-A. de Montjoye and H. Schweitzer (2019). "Competition policy for the digital era" Publications Office of the EU. [Link](#).
- Cunningham, C., Ederer, F., & Ma, S. (2020). Killer acquisitions. *Journal of Political Economy*, forthcoming. [Link](#).
- Cullen, Z., & Farronato, C. (2020). Outsourcing tasks online: Matching supply and demand on peer-to-peer internet platforms. *Management Science*. [Link](#).
- Dermisi, S. (2004). Internet Reduces the Time before Lease-up or Sale of Office Properties. *Real Estate Review*, 33(1), 22-28. [Link](#).
- Dinerstein, M., Einav, L., Levin, J., & Sundaresan, N. (2018). Consumer price search and platform design in internet commerce. *American Economic Review*, 108(7), 1820-59. [Link](#).
- Eisenmann, T., Parker, G., & Van Alstyne, M. (2011). Platform envelopment. *Strategic Management Journal*, 32(12), 1270-1285. [Link](#).
- Ellison, G., & Ellison, S. F. (2018). *Match quality, search, and the Internet market for used books* (No. w24197). National Bureau of Economic Research. [Link](#).
- Eurofound (2020). Living, working and COVID-19. COVID-19 series, Publications Office of the European Union, Luxembourg. [Link](#).
- European Commission (2020). Annexes of the impact assessment support study of the Digital Markets Act. [Link](#).

- European Commission (2020). Inception impact assessment to the Digital Services Act package. Ares(2020)2877647. [Link](#).
- European Commission (2016). "Online Platforms and the Digital Single Market Opportunities and Challenges for Europe", COM/2016/0288. [Link](#).
- European Commission (2020). Proposal COM(2020)0842 on contestable and fair markets in the digital sector (Digital Markets Act). [Link](#).
- Eurostat (2021): Cloud computing - statistics on the use by enterprises. [Link](#).
- Farronato, C., Fong, J., & Fradkin, A. (2020). Dog Eat Dog: Measuring Network Effects Using a Digital Platform Merger. *NBER Working Paper*, (28047). [Link](#).
- Farronato, C., & Fradkin, A. (2018). *The welfare effects of peer entry in the accommodation market: The case of airbnb* (No. w24361). National Bureau of Economic Research. [Link](#).
- Friederiszick, H. W., Röller, L. H., & Verouden, V. (2006). European state aid control: an economic framework. *Handbook of antitrust economics*, 625-669. [Link](#).
- Furman, J., Coyle, D., Fletcher, A., McAuley, D., & Marsden, P. (2019). Unlocking digital competition: Report of the digital competition expert panel. *UK government publication, HM Treasury*. [Link](#).
- Gasparro, A. & J. Kang (2020). Grocers Wrest Control of Shelf Space From Struggling Food Giants. *The Wall Street Journal*, 19 February 2020. [Link](#).
- Gautier, A., & Lamesch, J. (2020). Mergers in the digital economy. *Information Economics and Policy*, 100890. [Link](#).
- Gentzkow, M. (2007). Valuing new goods in a model with complementarity: Online newspapers. *American Economic Review*, 97(3), 713-744. [Link](#).
- Goldmanis, M., Hortaçsu, A., Syverson, C., & Emre, Ö. (2010). E-commerce and the Market Structure of Retail Industries. *The Economic Journal*, 120(545), 651-682. [Link](#).
- Gupta, P., Seetharaman, A., & Raj, J. R. (2013). The usage and adoption of cloud computing by small and medium businesses. *International Journal of Information Management*, 33(5), 861-874. [Link](#).
- Hagiu, A., & Wright, J. (2015). Multi-sided platforms. *International Journal of Industrial Organization*, 43, 162-174. [Link](#).
- Hansley, M. (2013). "Succeeding Because of Social; Learn from The Must-Try App Waze." *Silverback Social*, 13 August 2013. [Link](#).
- Hinz, O., Otter, T., & Skiera, B. (2020). Estimating Network Effects in Two-Sided Markets. *Journal of Management Information Systems*, 37(1), 12-38. [Link](#).
- Hovenkamp, H. J. (2021). "Antitrust and Platform Monopoly". Forthcoming in *The Yale Law Journal*. [Link](#).
- Idelberger, F. (2013). The concept of interoperability in European Union law—An analysis in competition law and intellectual property law, PhD thesis. [Link](#).

- Institute of European Media Law e.V. (EMR) (2005). Market Definitions in the Media Sector. Comparative Legal Analysis. [Link](#).
- Jud, G., Winkler, D., & Simans, S. (2002). The impact of information technology on real estate licensee income. *Journal of Real Estate Practice and Education*, 5(1), 1-16. [Link](#).
- Katz, M. L., & Shapiro, C. (1994). Systems competition and network effects. *Journal of Economic Perspectives*, 8(2), 93-115. [Link](#).
- Kuhn, P., & Mansour, H. (2014). Is internet job search still ineffective?. *The Economic Journal*, 124(581), 1213-1233. [Link](#).
- Lamadrid, A. (2019). Meeting and Shifting- The Burden of Proof (in Digital and Beyond). *Chillin' Competition*, 31 October 2019. [Link](#).
- Larouche, P., & De Streel, A. (2020). "Interplay between the New Competition Tool and Sector-Specific Regulation in the EU". Expert study. [Link](#).
- Lemley, M. A., & McCreary, A. (2019). Exit strategy. Stanford Law and Economics Olin Working Paper #542. [Link](#).
- Lendle, A., Olarreaga, M., Schropp, S., & Vézina, P. L. (2016). There goes gravity: eBay and the death of distance. *The Economic Journal*, 126(591), 406-441. [Link](#).
- Markman, J. (2020): The Amazon Era: No Profits, No Problem. *Forbes*, 23 May 2017. [Link](#).
- McKenzie, J., Crosby, P., Cox, J., & Collins, A. (2019). Experimental evidence on demand for "on-demand" entertainment. *Journal of Economic Behavior & Organization*, 161, 98-113. [Link](#).
- Monopolkommission (2020). 10th amendment to the Competition Act – meeting challenges in digital and regional markets. Policy brief. [Link](#).
- OECD (2020) "Abuse of dominance in digital markets". [Link](#).
- Polsky, G. D., & Coyle, J. F. (2013). Acqui-Hiring. *Duke Law Journal*, 63(2), 281-346. [Link](#).
- Posner, R. A. (2001). *Antitrust Law*. University of Chicago Press, pp.101–117.
- Rivares, A. B., Gal, P., Millot, V., & Sorbe, S. (2019). "Like it or not? The impact of online platforms on the productivity of incumbent service providers". OECD Working Paper. [Link](#).
- Schanzenbach, M. M. (2002). Network Effects and Antitrust Law: Predation, Affirmative Defenses, and the Case of U.S. v. Microsoft. *Stanford Technology Law Review*, 2002, 4. [Link](#).
- Shapiro, C., Carl, S., & Varian, H. R. (1998). *Information rules: A strategic guide to the network economy*. Harvard Business Press.
- Stigler Center (2019). Stigler Committee on Digital Platforms. Final Report. [Link](#).
- Tarver, E. (2020). 3 Social Media Networks Before Facebook. Investopedia, 3 April 2020. [Link](#).
- Tucker, C. (2008). Identifying formal and informal influence in technology adoption with network externalities. *Management Science*, 54(12), 2024-2038. [Link](#).
- Tucker, C. (2018). Network Effects and Market Power: What Have We Learned in the Last Decade?. *Antitrust*, 72-79. [Link](#).

- Tucker, C. (2017). Network Stability, Network Externalities, and Technology Adoption. In *Entrepreneurship, Innovation, and Platforms*. Emerald Publishing Limited, pp. 151-175. [Link](#).
- Tucker, C. (2019). Online Advertising and Antitrust: Network Effects, Switching Costs and Data as an Essential Facility. *CPI Antitrust Chronicles*, April 2019. [Link](#).
- Van Reenen, J. (2018). "Increasing differences between firms: market power and the macro-economy". CEP Discussion Paper No 1576. [Link](#).
- Werden, G. J., & Froeb, L. M. (2018). Don't Panic: A Guide to Claims of Increasing Concentration. *Antitrust* 33(1) [Link](#).
- Whalen, J. (2020). "Europe fined Google nearly \$10 billion for antitrust violations, but little has changed" *Boston Globe*, 10 November 2020. [Link](#).
- Wlömert, N., & Papies, D. (2016). On-demand streaming services and music industry revenues—Insights from Spotify's market entry. *International Journal of Research in Marketing*, 33(2), 314-327. [Link](#).
- Zervas, G., Proserpio, D., & Byers, J. W. (2017). The rise of the sharing economy: Estimating the impact of Airbnb on the hotel industry. *Journal of marketing research*, 54(5), 687-705. [Link](#).



**Berlin**

Frierichstrasse 88  
Berlin, 10117

**Brussels**

23 Square de Meeûs  
Brussels, 1000

**Copenhagen**

Bredgade 6  
Copenhagen, 1260

**Düsseldorf**

Kö-Bogen  
Königsallee 2B  
Düsseldorf, 40212

**Helsinki**

Aleksanterinkatu 15B  
Helsinki, 00100

**London**

5 Aldermanbury  
Square London,  
EC2V 7HR

**Madrid**

Paseo de la Castellana 7  
Madrid, 28046

**Milan**

Via San Raffaele, 1  
Milan, 20121

**Paris**

Place de la Madeleine  
Paris, 75008

**Singapore**

8 Marina View  
Asia Square Tower 1  
Singapore, 018960

**Tel Aviv**

Yigal Alon Street 114  
Toha Building  
Tel Aviv, 6744320