Digital markets act

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REPORT

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Coordinated by
Alexandre de Streel

DIGITAL MARKETS ACT

MAKING ECONOMIC REGULATION OF PLATFORMS FIT FOR THE DIGITAL AGE

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The Issue Papers and the recommendations were prepared by a team of academics coordinated by CERRE Academic Co-Director, Alexandre de Streel, and including Martin Cave, Richard Feasey, Jan Krämer and Giorgio Monti. The academic team also benefited greatly from very useful comments by Amelia Fletcher. The non-attributable summaries of the discussions were prepared by Claire-Marie Healy, project manager at CERRE.

As provided for in CERRE's by-laws and the procedural rules from its "Transparency & Independence Policy", this report has been prepared in strict academic independence. At all times during the development process, the research authors and the CERRE Co-Academic Directors and Director General remain the sole decision-makers concerning all content in the report.

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BACKGROUND AND CONTEXT

BACKGROUND AND CONTEXT

This research report comprises of several documents, including **four Issue Papers**, **four summaries of the discussions** organised by CERRE throughout the second half of 2020, and the **recommendations paper** drafted by a team of academics on the basis of the Issue Papers and the related discussions.

This report is in line with CERRE's ambition to remain at the cutting edge of regulatory developments in the digital and network industries and to constructively and independently contribute to the EU policy making process.

Objective and topics

Building on previous and on-going CERRE work[1] on the regulation of the online platform economy, this report focuses more specifically on the following four main sets of topics:

1. The conduct and theories of harm;
2. The thresholds for intervention;
3. The remedies;
4. The institutional considerations.

Methodology

For **each of the four sets of topics**, the following steps were followed:

- The CERRE academic team prepared **Issue Papers** that summarised, on the basis of the most recent academic literature and policy reports, the issues and their trade-offs as well as the main policy proposals made so far.
- Each Issue Paper structured a **brainstorming discussion during an exclusive e-workshop** reserved for representatives of the CERRE members supporting the project and the academic team. A **summary** of the discussion, underlining the main issues, trade-offs and possible solutions, as well as divergent views, was also written under Chatham House Rule after each webinar.
- On the basis of these issue papers and the brainstorming discussions, the CERRE academic team drafted **a recommendations paper** aimed at feeding the policy makers' reflections for the DMA.

[1] These include 'Big Data and Competition Policy', 'Internet Platforms & Non-Discrimination', 'Market Definition and Market Power in the Platform Economy', 'Remedies for anti-competitive intermediation bias' and 'Big Tech Acquisitions'

ISSUE PAPER + DISCUSSION SUMMARY

CONDUCT AND THEORIES OF HARM

ALEXANDRE DE STREEL

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ISSUE PAPER | Conduct and theories of harm

1 Introduction

In its February 2020 Digital Strategy Communication,[2] the Commission announced that the proposal of the **Digital Services Act package** would include one pillar aiming to achieve a fair and competitive economy through economic regulation. In their June 2020 Inception Impact Assessment, the Commission services indicated that they are considering the following **three policy options**:

1. Revising the horizontal framework set in the Platform-to-Business Regulation;

2. Adopting a horizontal framework empowering regulators to collect information from large online platforms acting as gatekeepers;

3. Adopting a new and flexible *ex ante* regulatory framework for large online platforms acting as gatekeepers. This option is divided into the following sub-options:

    3a. Prohibition or restriction of certain unfair trading practices ("*blacklisted*" practices);

    3b. Adoption of tailor-made remedies addressed on a case-by-case basis where necessary and justified.[3]

This Issue Paper is organised as follows. After this introduction, Section 2 deals with the main difficulties and trade-offs in assessing the competitive and welfare effects of a conduct in the digital economy. Section 3 deals with the forms of unilateral conduct which are mainly exclusionary. Section 4 deals with the forms of conduct which are mainly exploitative. Of course, some types of conduct may be at the same time exclusionary and exploitative (for instance, the decision of the German competition authority against Facebook mentions that the data collection by Facebook could have exclusionary and exploitative effects).

2 Assessing the competitive and welfare effects of firms' conduct in the digital economy

2.1 Main characteristics of the digital economy

The Crémer Report mentions three key characteristics of the digital economy, namely the extreme return to scale, network externalities and the crucial role of data as a key input for many online services and AI. Those characteristics lead to strong economy of scope and favour the development of ecosystems. Petit (2020:127-150) identifies six properties common to many of the big tech firms: (i) diversification in different markets and conglomeralism; (ii) discontinuity due to the uncertain evolution of technology, entry and regulation; (iii) long-termism relying on patient capital; (iv) growth, (v) exploration and discovery and (vi) flexibility.

On that basis and different other policy reports, we can identify the following **key characteristics of the digital economy**:

- Economies of scale and scope on the supply-side;
- Direct and indirect network effects on the demand-side;
- Conglomeralism and creation of an ecosystem;
- High rate of innovation, hence the importance of controlling the key innovation capabilities: data, skills, computing power, user base, risky and patient capital;

[2] Communication from the Commission of 19 February 2020, Shaping Europe's digital future, COM(2020) 67.
[3] Inception Impact Assessment on Digital Services Act package: *Ex ante* regulatory instrument for large online platforms with significant network effects acting as gate-keepers , available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers

- Uncertainty in the evolution of technology and markets.

Some platforms may have a **gatekeeper** function when their customers mostly single-home and have no – or little - ability and incentive to multi-home because of lack of information, high switching costs or biases and heuristics. In this case, such a platform is the main gate, or bottleneck, to this customer base. This may raise competitive issues when the platform is providing intermediation services and competing with other firms in providing some of the intermediated services.

2.2 Assessing competitive effects in the digital economy

2.2.1 Economic and non-economic effects

Online platforms bring many benefits which can be estimated in different manners.[4] One way is to assess how much users are ready to pay for the service. Brynjolfsson, Collis, and Eggers (2019) ask Facebook users to specify what monetary compensation they would need to give up their use of the service for a month and found that in 2016-7, the monthly figure for US participants in the survey was at the $35-50 level. The figure for access to search engines was even higher. Another way is to estimate the value of the content provided by attention platforms. Evans (2017) indicates that, in 2016, American adults spent 437 billion hours on ad-financed attention platforms. On the basis of the opportunity cost of the time, Evans calculates that this time was worth $7.1 trillion using the average after-tax hourly wage rate and $2.8 trillion using the average after tax minimum wage rate, which can thus be the value of the content of those platforms.

However, **online platforms also increase risks. Some risks are broad and societal**. For instance, Allcott et al. (2020) found that a four-week period without Facebook 'improves subjective well-being and substantially reduces post-experiment demand, suggesting that forces such as addiction and projection bias may cause people to use Facebook more than they otherwise would.' Also, some intermediaries have become so large that they do not merely manage a private space but control part of the public sphere, or that they have acquired very substantial information and surveillance power, which may need to be tamed (Cohen, 2019; Zuboff, 2019). **Other risks raised by the platforms are linked to the working and the contestability of the markets** as the size and business models of some platforms may threaten competition and innovation. This issue paper focuses on those latter risks.

2.2.2 Assessing economic effects

In the digital economy, the assessment of the economic effects of firms' conduct is particularly complex because a **behaviour often leads, at the same time, to pro and anti-competitive effects**. For instance, the growth of a digital platform within the same relevant market and the tipping of such a market is beneficial to consumers when there are important direct or indirect network effects and when interoperability is difficult, impossible or costly to do or to impose. Similarly, the extension of a digital platform from one core market to another related market in order to offer a more complete suite of products and enlarge the ecosystem may benefit consumers as such an extension increases the ecosystem's synergies; such conglomerate diversification may also increase the economies of scope on the supply-side.[5] However, such an extension may also lead to the exclusion of as-efficient niche competitors. Thus, assessing the competitive effects of conduct in digital markets often requires a difficult balancing of pro and anti-competitive effects. This is not specific to digital markets, but possibly more frequent in digital markets.

Thus, assessing the economic effects of digital firms' conduct **involves several trade-offs between different values and interests**. Examples of those trade-offs are the following:

- **Short-term and long-term**: a type of conduct may increase consumer welfare in the short-term, for instance by increasing short-term competition or innovation, but at the expense of consumer welfare in the long-term, for instance by decreasing the ability and incentive to compete and/or innovate in the future. The most difficult situation occurs where there are

[4] See Cave (2020).
[5] As explained in Bourreau and de Streel (2019).

clear short run efficiency benefits and a long-term competitive harm that is more uncertain but potentially very serious. This is even more difficult is when there are short-run benefits to one type of **competition**, to be traded off against a long-term risk to another type of competition. For example, self-preferencing can sometimes make it easier for one large gatekeeper platform to enter or grow in a market to compete against other large gatekeeper platforms (e.g. in untipped markets, competition between large gatekeeper platforms could be especially important and potentially a more sustainable type of competition)[6].

- **Competition and innovation**: a type of conduct may increase the development and/or propagation of innovation (at least in the short run), but at the expense of competition. To make matters more complex, there can be trade-offs between different types of innovation. Indeed, Ofcom (2019, para.5.29) notes that: "Consumers can benefit from different types of innovation, realised by different types of competitors. The ideal would be for regulatory intervention to preserve incentives for all types of beneficial innovation. However, intervention aimed at promoting one type of innovation may have a detrimental effect on another. As such, regulators may have to trade off different types of innovation. This may occur where requiring an incumbent to give access to its data provides opportunities for innovation by smaller players and entrants, but weakens incentives for innovation by the incumbent."

- **Sustaining and disruptive innovation**: a type of conduct may stimulate sustaining innovation, for instance big tech acquisition may stimulate entry for buy out, but at the expense of disruptive innovation which takes place outside the value network of the existing firms.

Arbitrating trade-offs is one of the main roles of regulatory agencies and the judiciary (hence, Themis is often represented with a balance in her hands), but **such arbitration is particularly difficult in the digital economy because the trade-offs are amplified and have to be decided in a highly uncertain environment**.

Given those difficulties, the **risks of regulatory failures and errors, of type I and type II, may also be amplified in the digital** economy.[7] Those risks can be decreased by reducing the information asymmetry between the digital firms and the public authorities and by increasing the learning curve of the authorities. This can be achieved with better understanding of the digital economy through studies, sector enquiries and market investigation and individual cases, as well as with information disclosure through appropriate rules and presumptions. Also, the costs of type I and type II errors may also be amplified in the digital economy. Those costs should also be decreased, in particular through timely intervention when necessary.

Some commentators[8] point to the amplified difficulties in assessing the competitive effects of conduct and the higher costs of type II errors in the digital economy compared to the other sectors of the economy to **call for more structural analysis**. They do not call for a return to the Structure-Conduct-Performance paradigm of the sixties and pure structural analysis but to complement conduct analysis with structural analysis.

Moreover, the assessment of firms' conduct in the digital economy involves two additional difficulties that will be dealt in the forthcoming Issue Papers:

- First, a **conduct may be welfare-detrimental, even though the firm does not enjoy a dominant position**. In this case, the market failure is due to a structural problem, which is often situated on the demand-side of the market. This could be solved with the imposition of remedies on all the firms or at least on the most important firms in the market, even

[6] See Petit (2020).
[7] On the difficulties in regulating the digital economy and the risks of regulatory failures, see Ofcom (2019: Section 5).
[8] Valletti (2020).

when they are below the dominant threshold. This issue will be discussed in the second Issue Paper on remedies.

- Second, the **same welfare-detrimental conduct may violate different legal rules** such as competition law, consumer protection or data protection rules. This is not specific to digital but seems to be more common in the digital economy. Remedying such conduct requires an efficient allocation of tasks between different regulatory agencies. This issue will be discussed in the third Issue Paper on institutional design.

3 Unilateral conduct with potential exclusionary effects

3.1 Disincentives to switching and multi-homing

Next to conduct which may have an exclusionary effect on the supply-side of the market, other conduct may have exclusionary effects on the demand-side of the market by increasing, for users, the costs of switching and/or multi-homing. They can cover a series of practices:

- ***Vertical restraints such as exclusivity, MFNs or anti-steering clauses***

One way to increase switching costs is with vertical restraints contractual practices. This can be in the cases of:

- Long duration or exclusivity clauses[9] or cases of requiring default/pre-installation status on entry points such as handsets or browsers, which is not strictly exclusivity but can have very similar effects given consumer default bias. Examples are the Google Android decision as well as concerns about Google paying Apple for default position on the iPhone/iPad;
- Retail price Most Favoured Nations (MFNs) Clauses which may disincentivise consumers from searching around, and thus create more single homing;
- Steering behaviour which may keep consumers within ecosystems. One example could be Amazon's steering of its customers towards taking Amazon Prime

As explained in the economic literature, those practices may have positive and negative competitive and welfare effects. On the positive side, exclusivity clauses may alleviate free-riding, for instance on distributor investment and ensure quality in distribution; alleviate hold-up of client-specific investment made by the supplier or the distributor or solve double marginalisation when supplier and distributor take a margin. On the negative side, exclusivity clauses may raise rival costs and foreclose suppliers or buyers; may reduce inter-brand competition (between suppliers of competing brands) and soften competition and/or facilitate collusion between suppliers and may reduce of intra-brand competition (between distributors of the same brand): soften competition and/or facilitate collusion between buyers.

- ***Data portability***

Another way to increase the costs of switching and multi-homing is by limiting the portability of data between platforms. Indeed, data represent a key asset, not only for the platforms as explained above, but also for users of social networks (e.g. posts on Facebook), music streaming (e.g. the playlist) or booking sites (e.g. the customer's reviews and evaluations). In those cases, users may be reluctant to switch or multi-home if they cannot bring 'their' data with them.

Recent EU legislations, in particular the GDPR,[10] provide the right to data portability and should contribute to make the markets work better. However, Krämer, Senellart and de Streel (2020) show

[9] See Commission Decision of 20 March 2019, Case AT.40411 *Google Search (AdSense)*.
[10] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation), OJ [2016] L 199/1, art.20.

that the scope of those portability rights is still legally uncertain and is, in any case, too limited to facilitate switching or multi-homing across several attention intermediaries.

3.2 Leverage and envelopment

According to Eisenmann, Parker and Van Alstyne (2001:1271), "envelopment entails entry by one platform provider into another's market by bundling its own platform's functionality with that of the target's so as to leverage shared user relationships and common components". This is common practice on the digital markets and allows entry in new markets without Schumpeterian innovation. The authors give the examples of Microsoft having enveloped Netscape's Web browser by bundling for free Explorer with Windows OS;[11] or Google entering many platform markets by linking new products to its search platform such as online payment services (Google Checkout), productivity software (Google Docs), Web browser software (Chrome), and mobile phone operating systems (Android).

Such envelopment strategy requires two main ingredients: (i) First, the dominant platform should be able to leverage its customer and attention base from its core market to new markets, and thus benefit from significant network effects when it enters the new markets; these network effects can be of much larger magnitude than those enjoyed by the entrant. (ii) Second, operating the two attention services together may entail significant economies of scope because of shared components or modules between them. The potential exclusionary effects from envelopment are mitigated when consumers can multi-home: in this case, even if the dominant platform bundles its core service with the new services, there might still be room for a rival platform.

In the digital economy, one specific method for envelopment can be based on consumer privacy consents where consumers have to sign up for one platform but in doing so click to accept privacy T&Cs that allow their data to be used across platforms.[12]

As already indicated, envelopment may *at the same time* have pro and anti-competitive effects. On the positive side, it enables the large platform to enjoy economies of scope in product development and the customers to enjoy synergies within the platform's ecosystem. It may also contribute to increased competition between platforms in markets which have not yet tipped.[13] On the negative side, envelopment allows the large platform to exclude competitors which may be as-efficient but have a smaller user base and/or are active on less different markets. Thus, envelopment may generate efficiencies in the short-term but at the expense of effective competition, hence efficiencies and innovation, in the longer term.

3.3 Self-preferencing and internal discrimination

When a digital platform has a dual role and offers an intermediation service but also the intermediated services, there is a risk that the platform will rely on its first service (intermediation) to favour its second service (intermediated) to the detriment of others. For instance, some have accused Amazon of relying on its role as a platform for third party sellers to favour its own selling operations to the detriment of some third party sellers. This may create a competitive harm when **the platform has the ability and the incentive to favour its own services at the expense of the others** which requires a series of conditions, in particular that the intermediation platform is not typically by-passed by the majority of the users (i.e. has a gatekeeper function) and that the benefits of self-preferencing are higher than the costs.

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[11] This envelopment practice led to antitrust actions in the US and in the EU: *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part, rev'd in part,* 253 F.3d 34 (D.C. Cir. 2001). Decision of the Commission of 16 December 2009, Case 39.530 *Microsoft (tying)* and Decision of the Commission of 6 March 2013 condemning Microsoft for ne respecting the first (commitments) decision. The European Commission also condemned another Microsoft envelopment practice involving Media Player: Decision of the Commission of 24 March 2004, Case 37.792-*Microsoft*, paras. 792-989 which was confirmed by the General Court in Case T-201/04 *Microsoft v. Commission*, EU:T:2007:289, paras.839-1193.
[12] See Condorelli and Padilla (2020).
[13] See Petit (2020).

Self-preferencing can take place with different methods. It can take place **via pricing**, for example Spotify's concerns regarding Apple Music's commissions, which are currently being reviewed. It can also take place **via steering** which relies on consumer behavioural biases. Examples may include an array of vertical search allegations against Google, based on the Shopping precedent, as well as self-preferencing through ranking in the Apple app store and Amazon's marketplace.

In other sectors when firms are vertically integrated, such as telecommunications, competition law (with price squeeze cases)[14] and regulation prohibit internal discrimination under some strict conditions. It should be determined whether the same conditions should be applied in the digital economy and for non-price behaviours.

3.4 Refusal to give access to key innovation capabilities

Next to extending its position from one market to another, a digital firm may also want to protect its position in a core market by limiting market contestability on the supply-side and may refuse to give access to key tangible or intangible components of their platforms, such as data or service interoperability.

- ***Data access***

The **key issue in deciding whether compulsory data sharing may be imposed is to determine whether the benefits of data sharing outweigh the costs**. Such analysis should be applied in light of the data's features. On the one hand, the benefits of sharing data are higher than for other facilities because data are general-purpose input that can be used for many different attention services. On the other hand, the costs (in incentives) of sharing data are lower than for other facilities because data are non-rival and its holder can continue to use them while sharing them with others. Costs are also lower when data are collected as by-products of another service, and therefore, would continue to be collected even if they have to be shared. Therefore, applying the *same* cost-benefit analysis which is at the core of the duty to deal in light of the *different* characteristics of data and competitive dynamics of the attention economy implies that the threshold for imposing data sharing should be lower than the threshold to impose access to other products or inputs. However, antitrust authorities should be mindful that there are costs to imposing such data sharing, as it may reduce the incentives to collect and store data.

In another CERRE report on data sharing, three cases studies are analysed, including the need to give access to the click and query data on the main search engines.[15] Also, two US antitrust cases are interesting. In both cases, a digital start-up relied on the data of a larger attention platform to provide data analytics services and then, at some point, was cut off from the access to that data. In the first case, *PeopleBrowsr* analysed Twitter data to sell information about customer reactions to products or about Twitter influencers in certain communities. At some point, Twitter decided that its data would no longer be accessible directly, but should be bought from certified data resellers. Following a complaint by PeopleBrowsr, a Californian Court ordered, with interim measures, that Twitter had to continue to provide its data directly. Then the parties settled the case deciding that after a transition period, PeopleBrowser will get the data from the certified data resellers.[16] In the second case, *hiQ* analysed LinkedIn publicly available data to provide information to business about their workforces. At some point, LinkedIn limited access to this data by legal and technical means, because it wanted to provide similar services itself. Following a complaint by hiQ, a US federal district judge ordered LinkedIn to resume the supply of its data.[17] Those two cases illustrate a theory of

[14] Case C-208/08P *Deutsche Telekom*, ECLI:EU:C:2010:603; Case C-52/09 *Telia Sonera*, ECLI:EU:C:2011:83; Case C-295/12P *Telefonica*, ECLI:EU:C:2014:2062.
[15] Krämer J., D. Schnurr D. and S. Broughton-Micova (2020).
[16] http://blog.peoplebrowsr.com/2012/11/peoplebrowsr-wins-temporary-restraining-order-compelling-twitter-to-provide-firehose-access/ and http://blog.peoplebrowsr.com/2013/04/peoplebrowsr-and-twitter-settle-firehose-dispute/
[17] *HIQ Labs v. LinkedIn.*

harm based on the free-riding by large attention platforms on the experimentation costs - which may constitute an important part of the innovation costs - incurred by start-ups. [18]

The possible harmful conduct may also cover issues relating to data access between trading parties. These relate to the platform requiring data from its business users, without reciprocating by providing data on the trades it makes on behalf of those business users. Examples include the concerns around app stores and also Amazon Marketplace. Essentially, the platform intermediation process may deprive business users of valuable customer data that they would have in a non-intermediated environment, and then puts the platform in a strong position to compete against them or exploit them.

- ***Interoperability***

To reduce market contestability, a dominant attention intermediary may also refuse or degrade (including continually changing APIs) interoperability with a smaller platform or with app developers.[19] For instance, one question which is now reviewed by the Commission is whether Apple should allow other payment providers than Apple Pay to access its contactless payment technology. Another question is whether Facebook should be required to be more interoperable with other social networks not owned by Facebook, for example by allowing cross-posting.

The **welfare effects of interoperability obligations are complex to determine** as, on the positive side, it may facilitate entry and help to internalise network externalities while allowing multiple firms but, on the negative side, it may limit the development of new and superior standards.

4 Unilateral conduct with potential exploitative effects

4.1 What constitutes an unfair/exploitative practice?

In addition to the conduct which can exclude as-efficient existing or potential competitors, other types of conduct may directly exploit the consumers or the users of the digital firm. **What constitutes an 'exploitation' is not always clear in law and in economics and often mixes efficiency and distribution rationale**. Some clarification may be found in the legal instruments prohibiting exploitations.

When exploitation is **detrimental to a consumer** (i.e. someone acting outside her professional activities), the conduct is regulated by **consumer protection rules**. Those rules prohibit unfair practices generally defined as being contrary to professional diligence and materially distorting the economic behaviour of the average consumer.[20]

When exploitation is **detrimental to a professional user** (i.e. someone acting within her professional activities), the conduct is regulated by **B2B-specific rules** at the EU level (which is rare) or at the national level (which is more frequent). In the digital economy, the Platform-to-Business Regulation aims to ensure more transparency in B2B relationships when an online intermediation platform is involved and refer to business users' practices which grossly deviate from good commercial conduct, or are contrary to good faith and fair dealing.[21]

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[18] Newman (2016:106-107) mentions two other cases where US Courts refused to impose data access where no prior voluntary access to data had been granted: *LiveUniverse v. MySpace* , No. CV 06−6994 AHM (RZx), 2007 WL 6865852, at *1 (C.D. Cal. June 4, 2007), *aff'd*, 304 Fed. App'x. 554 (9th Cir. 2008) and *Facebook v. Power Ventures* No. C 08−05780 JW, 2010 WL 3291750 (N.D. Cal. July 20, 2010).

[19] If the four conditions of the essential facility doctrine are met, such refusal could be sanctioned by an antitrust authority: Decision of the Commission of 24 March 2004, Case 37.792-*Microsoft*, paras.546-791 which was confirmed by the General Court in Case T-201/04 *Microsoft v. Commission*, paras.291-712.

[20] Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ [2005] L 149/22, as amended by Directive 2019/2161, art.5. The Directive identifies in particular misleading and aggressive commercial practices.

[21] Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ [2019] L 186/55, recital 2. See also art.1(1) of Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in

Those conducts are also regulated by **competition law** which prohibits conduct of a dominant firm which directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions. Although competition authorities have been reluctant in the last twenty years to investigate and condemn exploitative abuses, there seems to be a resurgence of those cases, in particular in the digital economy. However, the authorities and the Courts have not yet defined clear normative criteria for what constitutes an unfair practice under competition law. Some criteria have been given in the context of excessive price cases.[22] Other criteria have been given for other types of unfair practices such as imposing obligations which are not absolutely necessary.[23]

4.2 Unfair practices in the retail supply chain and in the digital economy

In its 2013 Green Paper on unfair B2B practices in the **retail supply chain**,[24] the Commission identified, on the basis of several surveys and enquiries done at both EU and national levels, seven categories of unfair B2B terms and practices:

- *Lack of written contracts* such that the parties have no lasting proof of the terms agreed upon;
- *Ambiguous contract terms* allowing the stronger contractual party to impose additional obligations during the execution of the contract;
- *Unfair transfer of commercial risk* such as the transfer of risks to the weaker party which is not the best placed to avoid them, the financing of proprietary business activities of the stronger party or the abusive use of reverse margin practices;
- *Unfair use of information*, in particular confidential information by the stronger party for instance to develop competing products which would deprive the weaker party of the results of its innovation;
- *Retroactive contract changes* which have not been agreed in a sufficiently precise manner, such as deductions from the invoiced amount to cover promotion fees, unilateral discounts based on quantities sold, listing fees;
- *Unfair termination of commercial relationship*, such termination or disruption which is sudden and unjustified or without a reasonable period of notice;
- *Territorial supply constraints* which may be imposed by some multi-national suppliers to impede retailers from sourcing identical goods cross-border in a central location and distributing them to other Member States.

As a follow-up to the Green Paper, Renda et al. (2014) did a very comprehensive study on the EU and national legal frameworks covering the B2B unfair trading practices in the retail supply chain. Out of a list of 30 terms and practices surveyed, the study identified 11 considered as representative of the core of the unfairness problem in B2B relationships. These are mapped to the seven categories of the Green Paper as elaborated in Table 2 below.

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the agricultural and food supply chain, OJ [2019] L111/59, referring to "practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another."

[22] Case *United Brands*: Price should be unfair in itself or compared to other products, but 'other ways may be devised, and economic theorists have not failed to think up of several, of selecting the rules for determining whether the price of a product is unfair.

[23] Case *BRT/Sabam*: imposes on its members obligations which are not absolutely necessary for the attainment of [the collecting society's] object … encroach unfairly upon a member's freedom to exercise his copyright.

[24] Commission Green Paper of 31 January 2013 on unfair trading practices in the business-to-business food and non-food supply chain in Europe, COM(2013)37.

Table 2: Main B2B unfair terms and practices in the retail supply chain

Commission Green Paper	Main unfair B2B terms and practices identified by the CEPS study
Lack of written contracts	- Lack of written contract
Ambiguous contract terms	- Lack of clarity in contract offer
Unfair transfer of commercial risk	- Liability disclaimers - Unilateral modification clauses - Terms unreasonably imposing or shifting risks
Unfair use of information	- Unfair use of confidential information - Unfair use of confidential information after contract expiry
Retroactive contract changes	- Abuse of economic dependence
Unfair termination of a commercial relationship	- Unfair breaking off of negotiation - Unfair contract termination - Refusal to negotiate

Source: Renda et al. 2014, p. 11

Online intermediation in a business to consumer environment is a form of retail supply. To be sure, Martens (2016:13-18) explains that online intermediation, and the more general concepts of platforms and multi-sided markets, may be defined more or less broadly. Depending on this choice, online intermediation platforms can either be considered as retailers or not, but in any case, online intermediation shares many characteristics of the retail supply.[25]

In 2016-2017, the Commission undertook an extensive fact-finding exercise on B2B practices in the online platforms environment.[26] In this context, Ecorys (2017) observed that: '*a total of 46% of business users responded that they have experienced problems and disagreements with the platforms in the course of their business relationship. Among the business users with more than half of turnover generated via online platforms (heavy users), the share of those that experienced problems is significantly higher (75%). Out of those who have experienced problems 21% indicated that they occurred often over the course of the business relationship. For heavy users of online platforms, significantly higher shares (32%) have experienced problems often*.'[27] The study has then identified the six most important unfair terms and practices. Most of them relate to conduct taking place before or during the execution of the contract while one group of practices relates to dispute resolution possibilities.

[25] Interestingly, in a case regarding the interpretation of the concept of 'intermediaries' of Article 11 of the Intellectual Property Enforcement Directive 2004/48, the Court of Justice of the EU judged that online and offline intermediaries should be treated in the same way and that the Directive covers both types of intermediaries. The Court decided that: '*The fact that the provision of sales points concerns an online marketplace or a physical marketplace such as market halls is irrelevant in that connection. It is not apparent from Directive 2004/48 that the scope of the directive is limited to electronic commerce. Moreover, the objective stated in recital 10 of that directive of ensuring a high, equivalent and homogeneous level of protection of intellectual property in the internal market would be substantially weakened if an operator which provides third parties with access to a physical marketplace such as that at issue in the main proceedings, on which those third parties offer in that marketplace the sale of counterfeit branded products, could not be the subject of the injunctions referred to in the third sentence of Article 11 of that directive*': Case C-494/15 *Hilfinger et al. v Delta Center*, ECLI:EU:C:2016:528, para 29.

[26] The results are summarised in the Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD (2018)138 and its Annexes. See also EY (2018).

[27] See p. ix of the Study.

Table 3 below presents the **main unfair P2B practices** according to the categories of the Commission Green Paper on B2B unfair practices.

Table 3: Main unfair terms and practices in the online intermediation chain

Commission Green Paper	Main unfair P2B terms and practices identified by the Ecorys Study
Lack of written contracts	
Ambiguous contract terms	- Search and ranking: practices related to search and ranking (lack of transparency, rules and means for users to control the results).
Unfair transfer of commercial risk	- Terms and conditions: lack of or very short-term prior notice about changes and continuation of use as a presumption of acceptance of changes - Data access and portability: Lack of transparency of the platforms' terms and conditions and/or their practice on data and limitation of the extent to which users can access, use and transfer data relating to or generated based on the transactions carried out through platforms - Liability disclaimers - Lack of penalties for platforms.
Unfair use of information	- Platforms competing with business users or limiting options: platform favouring their own products and limitations of choice of auxiliary services.
Retroactive contract changes	
Unfair termination of a commercial relationship	- Access to the platform: content or product removal / delisting / termination of an account or product.

Source: Author on the basis of Ecorys (2017)

Regarding dispute resolution, business users surveyed voiced concerns on the choice of applicable law or jurisdiction, which is often made outside the EU. They also complained about the restrictions on access to redress possibilities. Ecorys (2017: xvii) analysed the reasons for not taking steps to resolve a problem. For the heavy users, the three main reasons are: (1) uncertainty about the outcome, (2) fear of damaging the relationship with the platform and (3) procedural difficulties. For the non-heavy users, the three main reasons are: (1) marginal importance of the problem, (2) uncertainty about the results and (3) procedural difficulties.

One important unfair practice in the digital economy which is at the heart of the German Facebook case may be related to the exploitation of consumers through **data extraction**.

Exploitative practices can also cover **excessive prices conduct**. An interesting aspect in a digital environment is that these are sometimes being achieved through bundling additional high-cost services. For example, there are concerns about the Apple app store requiring app sellers to use the costly Apple payment system.

Some of those practices have also exclusionary effects and have been analysed in Section 3. More importantly, the **welfare assessment of such practices is complex** for the following reasons:

- As indicated in Section 2, some of those practices may have exploitative and/or exclusionary effects, but they may also be **justified by efficiency or other objective reasons** (for instance, the protection of security or privacy); in this case, the negative and the positive effects of the conduct should be balanced;

- As indicated at the beginning of this section, the normative criteria, in particular the **efficiency or the distribution rationale**, is not always clear when assessing exploitative conduct; prohibiting a conduct for its distributional effect is much more politically sensitive than prohibition for efficiency reasons and, for this reason, may not be left to an independent authority or decided at the EU level.

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DISCUSSION SUMMARY | Conduct and theories of harm

The purpose of this section is to list the questions and discussion points that arose from the overview presented in the Issue Paper on 'conduct and theories of harm' and the exclusive workshop organised in July 2020. The non-attributable summary of the discussion was prepared by Claire-Marie Healy, project manager at CERRE.

Assessing effects in the digital economy: dealing with amplified trade-offs in a highly uncertain environment
How should regulators approach efficiency benefits/objective justification? The most difficult situation occurs where there are clear short-run efficiency benefits and a long-term competitive harm that is more uncertain but potentially very serious.
RESPONSES The rapid change in technologies requires a more flexible regulatory approach that can adapt in time and target the specific harms arising which may change very rapidly.
In that regard, the current approach and burden of proof may be unsatisfactory because it makes the question binary and legalistic (has the standard of proof been met or not?) when the debate should be economic and commercial. Do you agree? Do you have some suggestions for improving this?
RESPONSES The legal and economic importance of maintaining a binary approach and the legal duty of the burden of proof on the person alleging a market failure or a wrong-doing was underlined by some participants during the discussion.
How should the different trade-offs in assessing the effects of the conduct in the digital economy be arbitrated? How should one consider the trade-offs between: short and long-term consumer welfare; efficiency and diversity; competition and innovation, and between sustaining versus disrupting innovation?
RESPONSES The characteristics of some online services can generate market failures which harm consumers and society in several ways. The links that may exist between different harms can create overlaps and tensions between policy aims. Interventions to address harms should be carefully designed to overcome these challenges and avoid undesirable unintended consequences. Interventions will need to be flexible to deal with fast evolving services and markets, and regulators can use new techniques to understand the complexity of online business models and consumers' decisions.
The adjudication of those trade-offs is made even more difficult by the high uncertainty of the evolution of many digital technologies and markets. Because of this complexity, should the analysis of the conduct be complemented with structural analysis, for instance by creating presumption in case of market concentration?
RESPONSES Structural features are recognised by some participants as necessary to ensure a quick intervention and prevent markets from tipping.

Structural and conduct features can also be looked at in parallel, as is already done by some regulators in their market analysis.

RESPONSES

While the need for rapid actions to fix online market failures/harms was highlighted several times throughout the discussion, some participants also raised the importance of looking at the effects of regulatory failures and the profound and substantial unintended consequences (good or bad) that interventions can have for the nature of the concern elsewhere. Because of the close connections within the online world, introducing measures such as interoperability could profoundly change competition.

Unilateral conduct with potential exclusionary effects

What are the main types of welfare-detrimental unilateral conduct which public authorities (regulatory and/or antitrust) should prioritise?

Should the authorities focus on supply-side issues (leverage, self-preferencing, and access to key capabilities) or demand-side issues (costs of switching and multi-homing, consumer bias and inertia)?

RESPONSES

Most participants support the idea of a regulatory focus on supply and demand-side issues as they are strongly interlinked and less easy to disentangle in the digital sector than in any other sectors. However, in case priorities needed to be made, some participants were in favour of the supply-side issues to be prioritised as it is where most of the problems are and where solutions should be found.

Some participants consider the demand-side issues as equally important, especially when it comes to transparency measures for consumers for instance. Before deciding on which side should be prioritised, the effects of the P2B Regulation that is mainly addressing demand-side considerations should also be considered.

In addition to looking at the welfare-detrimental conducts, it is equally important to look at the different business models of the platforms as well, and not only look at the supply and demand side.

Some participants supported the idea to go beyond the simple distinction between supply and demand (as it is not particularly useful in the context of online platforms where those two sides interact continuously together). In the case of the recently published market study from the Competition and Markets Authority (CMA), the CMA's far-reaching remedies proposals, and its decision to propose a new regulatory system, rather than make a market investigation reference is one alternative approach to be considered. In its study, the CMA propose that within the new regime a 'Digital Markets Unit' should have the ability to enforce a code of conduct to ensure that platforms with a position of market power do not engage in exploitative or exclusionary practices, or practices likely to reduce trust and transparency, and to impose fines if necessary.

What has the paper missed in terms of types of unilateral conduct that might create consumer harm?

RESPONSES

The description of the conducts in the paper is comprehensive as they are relatively broad. A participant suggested considering data harvesting as a new area of conduct to be added into this paper as it refers to a conduct that is specific to the digital sector.

As part of the trade-off issue to be looked into in terms of market intervention, some participants suggested covering also in this paper the opportunity cost of platforms, especially when it comes to opportunity cost for SMEs for instance, compared with the opportunity cost of using more traditional and established tools.

Regarding leveraging, a recommendation was made to distinguish 'tight leveraging' within the same vertical value chain and 'loose leveraging' of related markets and eco-system. In general, it is agreed that the usual analytical tools can be applied but that some level of adaption will probably be required to adapt to some of the specificities of the digital market as well.

To help with assessing type I and type II errors from intervention, are there major costs and benefits of this conduct that the paper has not included? Which are the most likely to be on balance harmful or is this impossible to say on the basis of form of conduct without more evidence?

RESPONSES

To avoid strong network effects, multi-homing and interoperability can be efficient tools to help markets from tipping. Market tipping per say can also bring a lot of economic efficiencies and should not be prevented by all means. Access to assets (innovation capabilities) is key to prevent abuse of conducts in the more narrow sense of those that have a tipped market or own a tipped market.

Some participants suggested that the incentives as well as the ability to influence single homing may have actually increased substantially relative to other markets, due to the cost structure and the assets involved in the digital markets. On the other side, while it is rather easy to capture the incentives and ability for single/multi-homing, it is rather difficult to understand in this specific market what the legitimate competitive conducts are that drive consumers from choosing one platform in particular (quality, nudging etc.).

Are the new challenges in digital largely focused on (non-price) self-preferencing, access to data and interoperability, or do you think that there are other new types of abuse or harm in the digital economy? For the more 'traditional' form of abuses, such as bundling or contractual exclusion, is there some 'special' aspect in the digital economy?

RESPONSES

Some participants agreed that dominant firms are in a position to strongly influence where innovation happens or don't happen.

According to some participants, having more data and information is part of the solution but that is not where most of the problem lies. It is possible indeed to identify harm but the fear factor of retaliation from large platforms represents a strong disincentive to smaller platforms.

Besides innovation, a general problem identified is the lack of non-price competition parameters that are more relevant to the digital market (level of quality of services; privacy levels, etc.) which makes it more difficult for authorities to have a clear overview of the digital market.

Do you think that one of the specific features of the digital economy is the difficulty to detect abuse and harm? If yes, is the solution having more data and information, which is not always easy to get, especially when user and potential complainant depends on some digital firms?

RESPONSES

Often, the harm is in the innovation that did not happen and it is very difficult to quantify harm empirically.

Instead of using a data review, a historical review of all the cases in the industry for the last 20 years looking at how those cases have resolved themselves, and what innovation came out of them was suggested by one participant.

Unilateral conduct with potential exploitative effects

What are the main forms of unfair/exploitative conduct which public authorities (regulatory and/or antitrust) should prioritise? How the authorities should balance positive and negative effects?

RESPONSES

Some other aspects of exploitation that aren't about unfair type of P2B conducts and that may also be relevant for public authorities to look into includes for instance pricing and its associated bundling behaviour effect.

While some conducts are clearly exploitative and should be prioritised by public authorities to intervene, one participant suggested not only thinking in terms of exploitation but also in terms of other features such as market efficiency, as with the P2B Regulation. Using such a market design perspective should then include looking at the right package of measures to be put in place involving both symmetric and asymmetric regulations such as in telecoms where both already work well together.

Introducing a flexible ex ante regulation with some asymmetric and personalised aspects seem to be a very suitable solution for some participants, to complement existing competition tools when addressing the more complex issues of online markets.

An additional comment was made about the importance that the remedies are crafted by an organisation capable of maintaining a deep understanding of the problems and the sources of the detriments to users that may arise.

How to determine which aspects of these rules should be horizontal (i.e. applied to all platforms as in the P2B Regulation) and which need only apply to the largest online platforms?

RESPONSES

One participant raised the necessity for authorities to carefully examine the question of market definition, and the level of market intervention that EU policy makers will feel comfortable setting as a standard for the burden of proof to intervene.

Instead of applying horizontal rules to all platforms, a suggestion was made to create a regulatory sandbox or a threshold for intervention which should be proportionate to the size and scale of the data processing activities. This will help protecting smaller players with the extra burden of implementing horizontal rules, such as currently the case with the GDPR.

While some participants are in favour of applying a threshold to intervention, some participants however are in favour of applying a common set of rules for all platforms to ensure consumers are being protected equally online.

ISSUE PAPER + DISCUSSION SUMMARY

THRESHOLD FOR INTERVENTION

ALEXANDRE DE STREEL

Table of contents

ISSUE PAPER | Threshold for intervention

1 Introduction

1.1 Scope of the issue paper

In its 2020 Digital Strategy Communication of February,[28] the Commission announced that the proposal of the **Digital Services Act package** would include one pillar aiming at achieving a fair and competitive economy through economic regulation. In their Inception Impact Assessment of June 2020, the Commission services indicate that they are considering the following **three policy options**:

1. Revise the horizontal framework set in the Platform-to-Business Regulation;

2. Adopt a horizontal framework empowering regulators to collect information from large online platforms acting as gatekeepers;

3. Adopt a new and flexible *ex ante* regulatory framework for large online platforms acting as gatekeepers. This option is divided into the following sub-options:

    3a. Prohibition or restriction of certain unfair trading practices ("*blacklisted*" practices);

    3b. Adoption of tailor-made remedies addressed on a case-by-case basis where necessary and justified.[29]

In contrast to the P2B Regulation which applies to all platforms irrespective of market power, the Commission suggests in option 3 that the ex ante regulation would only apply to **large online platforms that benefit from significant network effects and act as gatekeepers**. This option would involve the use of a threshold for intervention to determine the subset of large online platforms subject to the additional rules. Those platforms would be identified on the basis of a set of clear **quantitative and qualitative criteria**, such as significant network effects, the size of the user base and/or an ability to leverage data across markets.

1.2 Proposals made so far: use of composite indicators

To feed this reflection on the definition of the criteria, several recent reports and policy initiatives have proposed to define a stricter threshold that would trigger additional antitrust oversight and/or some form of ex ante regulation in the digital sector. Those thresholds are generally based on a complex set of quantitative and qualitative indicators.[30]

In the UK, the Furman Report (2019, p.10 and 55) proposes the threshold of ***significant market status***, defined as enduring market power enjoyed by a firm over strategic bottleneck market or a position to exercise market power over a gateway/bottleneck and control others' market access.

In Germany, the draft 10th amendment to the Act against Restraints of Competition proposes to introduce the threshold of ***paramount significance*** determined on the basis of five criteria:

- a dominant position on one or more markets,
- financial strength or access to other resources,
- vertical integration and activities on otherwise related markets,
- access to data relevant for competition,

[28] Communication from the Commission of 19 February 2020, Shaping Europe's digital future, COM(2020) 67.
[29] Inception Impact Assessment on Digital Services Act package: *Ex ante* regulatory instrument for large online platforms with significant network effects acting as gate-keepers , available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers
[30] Some academic papers have also proposed test: Alexiadis and de Streel (2020), Scott Morton et al. (2019).

- and importance of activities for third parties' access to supply and sales markets and related influence on third parties' business activities.[31]

In France, the Autorité de la Concurrence proposes to introduce the threshold of ***structuring digital platforms*** defined as:

- a company that provides online intermediation services for exchanging, buying or selling goods, content or services,
- which holds structuring market power because of its size, financial capacity, user community and/or data,
- enabling it to control access to or significantly affect the functioning of the market(s) in which it operates) with regard to its competitors, users and/or third-party companies that depend on access to the services it offers for their own economic activity.[32]

The French telecommunications regulator ARCEP proposes the threshold of ***systemic digital platforms***, defined on the basis of three main criteria:

- the existence of bottleneck power,
- a certain number of users in the EU - or as a proxy, sufficiently high EU turnover
- and the existing of integration of that firm into an ecosystem enabling leverage effects

which are complemented by four secondary criteria:

- gatekeeper position,
- access to many high-quality data
- market shares for online advertising
- and the market value of the platform.[33]

1.3 Use of simple quantitative indicators

Quantitative indicators are also used to trigger regulatory intervention in the digital economy and beyond.

- ***In the digital economy***

The Commission Proposal for the digital service tax would only apply to online platforms with total annual worldwide **revenues** of €750 million and EU revenues of €50 million.[34]

Several EU legislative instruments applicable to online platforms, in particular regarding moderation of online content use the **number of users on a platform**. For instance, the DSM Copyright Directive imposes additional stay-down obligations for content sharing platforms when the average number of *monthly unique visitors* exceeds 5 million, calculated on the basis of the previous calendar year.[35] The proposal for a Regulation on preventing the dissemination of terrorist content online imposes some duty of care on the hosting platforms which are established in the EU or which have *significant number of users* in one or more Member States.[36] This is also the case at national level.

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[31] Proposed new Section 19a(1), for an English version see https://www.d-kart.de/wp-content/uploads/2020/02/GWB10-Engl-Translation-2020-02-21.pdf

[32] Autorité de la concurrence's contribution of 19 February 2020 to the debate on competition policy and digital challenges available at: https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf

[33] ARCEP, *Systemic digital platforms*, December 2019.

[34] Commission Proposal of 21 March 2018 for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148, art.4.

[35] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9 and 2001/29, OJ [2019] L 130/92, art.17(6).

[36] Proposal of the Commission of 12 September 2018 for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM (2018) 640, art.2(3). See also Directive 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative

In France, platforms with over 5 million unique visitors per month are subject to enhanced transparency obligations.[37]

- ***Outside the digital economy***

The **UTP Food Supply Directive applies to the B2B Unfair Trading Practices** applies when there is an unbalanced relationship between suppliers (the weakest party) and buyers (the strongest party) which is measured by the gap between the annual turnover of the supplier and the buyer.[38]

Suppliers	Buyers
< €2m	> €2m
€ 2m – 10m	> € 10m
€10m – €50m	> €50m
€50m – €150m	> €150m
€150m – € 350m	> €350m

The **EU's Financial Supervision Regulation provides for a significance/systemic power** analysis based on the following criteria:

- the size - total value of its assets exceeds €30 billion,
- the economic importance for the specific Member State or the EU economy as a whole,
- the size of the cross-border activities - the total value of its assets exceeds €5 billion and the ratio of its cross-border assets/liabilities in more than one other participating Member State to its total assets/liabilities is above 20%,
- or the direct public financial assistance when the bank has requested or received funding from the European Stability Mechanism or the European Financial Stability Facility.

The banks meeting the "significance" threshold are regulated at the EU level by the Single Supervisory Mechanism while the other banks (namely, the "less significant" institutions) continue to be supervised by their national supervisory bodies.[39]

However, these approaches may be **unsuited to the problem** at hand. A key problem is that firms on both sides of the transaction may be engaged in multiple activities in different sectors, and a threshold that is overly simplistic could risk both failing to capture "large" dependent firms (but which are seeking a digital route to market), and identify as gatekeepers large firms which operate a platform (perhaps within the context of a wider business), but do not wield gatekeeper power in relation to potential users of that platform. It is also relevant to note that these solutions have been pursued in specific market segments i.e. food and farming, whereas the scope of the DSA may be considerably wider and apply across multiple sectors, each of which may have differing thresholds and drivers for gatekeeper power.

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action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ [2010] L 95/1, as amended by Directive 2018/1808, art.28b(3) which refers to the size of the video-sharing platforms to determine the appropriate content moderation measures that should be adopted.

[37] Article D 111-15, French Consumer Code.

[38] Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ [2019] L111/59, art.1(2).

[39] Council Regulation 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. [2013] L 287/63.

2 Market definition

The designation of Large Gatekeeper Platform (LGP) may be a two-step process: first, the determination of the scope of competition with the definition of a relevant market and, second, the determination a LGP position on the defined market. Alternatively, the designation may be a one-step process with direct designation without defining a market. The two-step process is used in competition law or in some competition law-based regulatory regimes (such as the telecommunications regulation). The one-step process is used, for instance, when the regulatory threshold is based on simple quantitative indicators as illustrated above.

2.1 Relying on market definition/business areas

Defining a relevant market in line with competition law requires an assessment of demand and short-term supply-side substitution. This has traditionally been carried out with the SSNIP test – whereby consumers' response to a "small but significant non-transitory increase in price" is viewed as indicating whether they would switch to an alternative service; while in parallel, a similar conception exercise is conducted to assess whether additional suppliers would enter the market if prices increased.[40] However, this step should be adapted to take the characteristics of the digital economy into account.

2.1.1 Adapting antitrust methodologies

In case of **multi-sided markets**, the first question is whether the antitrust authority should define one single market covering all sides or different markets for each side. [41] Contrary to the US Supreme Court in *Amex*,[42] the EU Courts went for the second option in *Master Card*[43] and *Cartes Bancaires;*[44] they **define a market for each side while noting that the relationship between both slides would be taken into account in assessing market power** and theories of harm.

After a detailed analysis of the pros- and cons of each option, Franck and Peitz (2019:22-39) support the multi-markets approach because it is more flexible and allows for different substitution possibilities by the user groups on each sides of the platform. Moreover, the scope of the markets on each side may be different as substitutability preferences may not be the same on each side of the market. For instance, Newman (2016:110) explains that: "advertisers may view search results and online email services as close substitutes to deliver ads to consumers; they may even view offline venues like billboards as fairly close substitutes for online platforms.[45] However, viewers may not see social networks and email services as closely substitutable, and billboards are so distant as to be irrelevant."

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[40] Commission Notice on the definition of the relevant market for the purposes of Community competition law, O.J. [1997] C 372/5.

[41] Also OECD (2018).

[42] *Ohio v. American Express Co*., 585 U.S. (2018).

[43] Case T-11/08 *MasterCard*, para 176-177 : "It is indeed the case that there are certain forms of interaction between the "issuing" and "acquiring" sides, such as the complementary nature of issuing and acquiring services, and the presence of indirect network effects, since the extent of merchants' acceptance of cards and the number of cards in circulation each affects the other. However, it must be pointed out that despite such complementarity, services provided to cardholders and those provided to merchants can be distinguished, and, moreover, cardholders and merchants exert separate competitive pressure on issuing and acquiring banks respectively."

[44] Case C-67/13P Cartes bancaires, paras. 78-79: "It is necessary to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market. That must be the case, in particular, when that aspect is the taking into account of interactions between the relevant market and a different related market […] and, all the more so, when, as in the present case, there are interactions between the two facets of a two-sided system."

[45] In *Person v. Google*,, No. C 06−7297 JF (RS), 2007 WL 1831111, at 3 (N.D. Cal. June 25, 2007), a US Court has held that "search-based advertising is reasonably interchangeable with other forms of Internet advertising."

The next question is how to run the SSNIP test in a multi-sided context where there are prices on different sides of the market (and where it is the structure of prices that matters and not the level of price on each individual side). It is important that the **SSNIP test accounts for the cross-group externalities**. If this is not the case, there is a risk that the market will be defined too narrowly as explained in OECD (2018:46). Franck and Peitz (2019:63-64) propose to run the SSNIP test on each of the various prices while maintaining the other prices unchanged. They complement this analysis by applying the SSNIP test on each price separately but allowing the other prices to be adjusted optimally.

In addition, **in case of 'free' products**, the General Court of the EU recognised in *Topps* that: "the SSNIP test may also prove unsuitable (…) where there are free goods or goods the cost of which is not borne by those determining the demand." There is thus a need to adapt the substitutability logics of the SSNIP test to markets without monetary price.[46]

With the same logic, Newman (2016:66) proposes the **Small but Significant and Non-transitory Increase in Costs (SSNIC) test** which is analogous to the SSNIP test, but with the costs for users in terms of attention and information, instead of the price. Thus the antitrust authority should assess whether a market-wide five percent increase in the amount (or length, duration, etc.) of advertisements would cause viewers to substitute away to a different attention service. However, the author points to several difficulties in the use of the SSNIC test: (i) the identification of the relevant cost unit: attention, information or a combination of both; (ii) the difficulty for customers in evaluating the costs in terms of attention and information, due, for example, to distorted perceptions of attention costs (and related information costs); and (iii) the heterogeneity of both attention and information costs.

In the same vein, the OECD (2013:14) or Gal and Rubinfeld (2016:551) propose to use the **Small but Significant and Non-Transitory Increase in Quality (SSNIQ)** test which examines switching behaviours with reduction of quality, covering both increase in efficiency or decrease in non-monetary costs (such as privacy, exposure to ads …). In *Qihoo 360 v. Tencent* , the Chinese Supreme People's Court relied on a variant of this test, the *Small but Significant and Not-transitory Decline of Quality (SSNDQ)* to define online instant messaging services.[47] This is also the approach followed by the Commission in Google Android.

Finally, Wu (2019) proposes an **Attentional-SSNIP (A-SSNIP)**, a test that determine how consumers might react to a Small but Significant and Non-Transitory Increase in undesired messages or advertising load for a given product. He explains the test as follows: "if one added a five-second advertising video that played before every usage of Google search, would some number of consumers switch to Bing? Presumably yes, meaning that Google search and Bing are substitutes and competitors. But what if the additional load was added to all search engines—would consumers spend less time on search and spend more time on Facebook or Twitter instead? If not—if consumers continue using search, even at the new, higher attentional price—then this would suggest that search is, in fact, the right market definition and that a hypothetical search engine monopolist is in a position to raise attentional prices."

It is therefore relevant to consider how an approach based on "**business areas**" or some equivalent term might be used as a first step in the approach of identifying potential LGP which might be susceptible to ex ante regulation.

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[46] Case T-699/14 *Topps*, para.82. Similarly, Decision of the Commission of 27 June 2017, Case AT.39 740, *Google Search (Shopping)*, para. 245.

[47] *Beijing Qihoo 360 Technology v. Tencent Technology (Shenzhen)*, (Sup. People's Ct. 2013). See https://www.competitionpolicyinternational.com/qihoo-360-v-tencent-first-antitrust-decision-by-thesupreme-court.

2.1.2 Pros and cons of relying on market definition

An **advantage of maintaining an approach which is similar to that of market definition** in relation to digital platforms is that the gatekeeping power is likely to be specific to, or to stem from control over a given market / business area. Moreover, because self-preferencing and tying and bundling may be harmful and in need to be addressed through ex ante legislation, it is necessary to identify the core market which should be isolated from conducts with aim to leverage power downstream or horizontally. Moreover, other potential obligations that might be imposed such as access to the platform, regulation of terms and conditions, and interoperability should in principle relate to the problem identified which stems from control over functionality, presentation and access in specific markets.

A **challenge with this approach** is that the process of defining markets or business areas could in itself be a complex process, involving at least some of the questions and uncertainties that current arise in the application of competition law to market definition as just explained. For example, there are open questions around the degree to which a possible category of "social media" should be confined to platforms which offer a range of functions in this area such as Facebook, or should also include platforms which provide specific elements of social media functionality such as Twitter or unaffiliated messaging services. The potential for specific or niche services to replace the full-service functionality of Facebook from a consumer perspective, would need to be investigated.

Additionally, in the area of "e-commerce" – there is a question as to whether this business area should be treated in a very wide sense (and if so whether it should just include e-commerce platforms offering a wide range of goods and services or should also include specialist platforms), or whether this business area may fragment into segments e.g. for the sale of books, groceries etc.

The views on channels to market of business users may be particularly important in the case of e-commerce, in terms of whether business users perceive the need to be present on a general platform as equivalent to participation in sector-specific platforms. Equally, it would be of interest to understand whether consumers could consider the use of multiple sectorally specific platforms as an appropriate substitute for a platform which offers a wide range of products, or at least – what would constitute the "cost" of replacing general platforms with multiple sectoral platforms, and whether this is sufficiently high that a specific business area for general e-commerce platforms would be found.

Guidance might be needed in order to provide clarity on how the concept of a "business area" or similar test would be applied, and thus which companies would likely be captured.

Overall, one advantage of an approach which involves business areas or concepts similar to markets, is that it should provide a flexible tool that could evolve alongside the nature of platforms and consumer tastes. However, it also necessitates a step in the process that may be time consuming and subject to challenge.

2.2 Bypassing market definition

An alternative might be to set out within the legislation, a number of clearly defined and generic features which are likely to indicate gatekeeper power, such as the fact that the platform is used by a high proportion of Internet users which do not multi-home or switch. Such an approach might help platforms concerned to self-identify and avoid some of the elements of debate and potential challenge relating to the definition of "business areas". Similarly, the Furman report investigating the case for ex ante regulation of platforms in the UK avoided relying on existing dominance concepts and instead proposes the identification of a company with "Strategic Market Status", which may have an "enduring market power over a strategic bottleneck or gateway *market*". [48]

[48] Furman review, para. 2.10, 2.25–2.27 and 3.69.

However, at least in cases relating to self-preferencing and tying, there would still be a need to identify a core market for any prohibitions and/or obligations to be made operational. Moreover, potential prohibitions and/or obligations in other areas such as access obligations and any regulation of terms and conditions may be restricted to areas in which the platform acts as a gatekeeper, in order not to avoid disincentives to innovation by the gatekeeper platform outside its core market. Thus, **uncertainties and debate around the relevant scope of the remedy or obligation could replace uncertainty around the scope of the relevant market or business area concerned**.

3 Criteria to designate Large Gatekeeper Platforms

Once markets/business areas have been defined, it is necessary to designate platforms which have the potential to impede fair trading and innovation in the business areas concerned. The four main criteria we consider are: (i) large gatekeeper intermediation platforms, (ii) the ability to act as a gatekeeper (thereby creating dependency and the conditions for unfair trading); (iii) the ability to maintain an enduring gatekeeper position through the control of innovation capabilities; and (iv) structural features that exacerbate these problems and facilitate the defence or the extension of such gatekeeper power.

3.1 Criteria 1: Large Intermediation Platform

3.1.1 Rationale

Given the possible harmful practices identified in the previous issue papers, the new ex ante framework, if justified, should possibly focus mainly on digital platforms with an **intermediation function**.[49]

The first designation criterion relates to **the size of the intermediation platforms** which can be determined relatively easily on the basis of relevant quantitative indicators. One issue is to determine whether this indicator should be absolute and independent of the size of the market or relative and reflect the market power of the platforms. To limit the risk of over-regulation (and catch small platforms which have market power on a small market) and because the market power issue will be taken into account in the second criterion, one option will be to base this first criterion on the absolute size of the platforms, as it is the case of some EU law applicable to digital platforms mentioned above.

The size of the platform can be used as a substantive criteria to trigger the intervention of ex ante regulation, but also as a **jurisdictional criterion** to determine the scope of EU law versus national law, as it is the case in EU Merger control.[50] Thus the DSA may provide that for the platforms have a certain size at the EU level, EU law (and EU enforcement system) will apply while for the other gatekeeper platform, national law will be applicable (see also the issue paper on institutional design).

3.1.2 Indicators

- ***Monetary revenues***

As for the Digital Service Tax proposal, the **revenues** of the online platforms, at the global or EU level, is a relevant indicator to measure the size of the platforms

[49] Article 2(2) of the P2B Regulation gives the following definition of online intermediation services: 'services which meet all of the following requirements: (a) they constitute information society services, (b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; and (c) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers

[50] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. [2004] L 25/1, art.1.

– ***Number of unique visitors and time on site***

As for some online content platform laws, the **number of unique visitors** is another relevant indicator to measure the size, this is the number of contacts by different devices identified by an IP address during a standard period of time, typically a month.

This is also an indicator that is often used by **competition agencies** to measure market power, in particular for attention intermediaries.[51] However, the number of users is an indicator which is simplistic and does not carry enough information on the market power in several circumstances. This is the case when viewers multi-home on different platforms but do not allocate their attention equally among them, which is often the case in practice. This is also the case when the usage of a platform is heterogeneous among users.[52] In those cases, it is better to consider usage volumes rather than number of users.

To do that, Wu (2019:26) suggests relying on **Time on Site**. For instance, he indicates that: "a 2017 comScore report suggests that Facebook held roughly 1 000 monthly minutes of the average American's time, as compared with about 250 for Instagram and Snap, respectively, and less than 200 for Twitter, and 50 for Google+. Relying on these data for hypothetical purposes, and presuming that "online social networking" is an appropriate market definition, if consumers nationwide spent a total of some 2 000 minutes per week on all social networking apps, and overall spent 55 percent of those hours on Facebook and 12.5 % on Instagram, we would have some sense of the structural importance of a transaction like the Facebook-Instagram combination. In this hypothetical, it would leave the combined company with a 67.5 % market share in the presumed social networking market."

Alexa, an Amazon company, measures the daily time on site which estimates daily time on site per visitor to an Internet website (and is updated daily on the basis on the trailing 3 months). Alexa also collects the *Daily Pageviews per Visitor* which estimates the daily unique pageviews per visitor on a specific site (and is updated daily on the basis on the trailing 3 months).[53]

Interestingly, a similar Time on Site criterion is used in the European Electronic Communications Code to designate the telecommunications operators subject to **must carry obligations**. The EECC provides that Member States may impose reasonable 'must carry' obligations for the transmission of specified radio and television broadcast channels on the providers of electronic communications networks if *a significant number of end–users* of such networks and services use them as their *principal means to receive* radio and television broadcast channels.[54]

– ***Volume of transactions mediated by the platform***

For intermediation platforms, a specific indicator linked to the **transactions mediated by the platform** is also relevant. As explained by the Expert Group for the Observatory on the Online Platform Economy (2020), "the natural measurement unit for trade volume is its monetary value, but other measures, such as Internet traffic flows or advertising impressions could be also relevant in specific verticals".

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[51] Franck and Peitz (2019:71) give the following examples: Decision of the Bundeskartellamt of 22 October 2015, Case B6-57/15, *Parship/Elitepartner*, paras 132–133; Decision of the Bundeskartellamt of 6 February 2019, Case B6- 22/16, *Facebook*, paras 390–413. Also Decision Bundeskartellamt of 8 September 2016, Case B6-126/14, *Google/VG Media*, paras 154–155: Google's market shares calculated on the basis of search queries are clearly important in regard to Google's position in the market for search advertising. In *Google Shopping*, the Commission notes that there are several methods to calculate market shares by volume, including "per number of queries, users, page views or per number of sessions."[51]

[52] Franck and Peitz (2019:71) echoing the need to calculate market share in value when products are differentiated.

[53] Krämer, Schnurr and Broughton-Micova (2020) notes that the distribution of users' attention is going to be highly skewed, following a long tail distribution and that an appropriate concentration measure may rather be more similar to a Gini coefficient than to a Herfindahl index.

[54] Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ [2018] L 321/36, art.114(1).

3.2 Criteria 2: Gatekeeper Power

3.2.1 Rationale

- *Gatekeeper and bottleneck*

There is no clear definition of gatekeeper in EU law, although the European institutions have used the term in antitrust[55] and regulatory contexts.[56] The simplest definition of gatekeeper is an undertaking which determines who can pass through a gate. Lynskey (2017) defines gatekeeper as an undertaking which **controls the flow and accessibility of information and structures the digital environment**.[57] With this perspective, she explains that gatekeeper power is distinct from market power in terms of how it is measured, and in terms of its potential impact on the rights and interests of individuals. She also claims that not all harms to individuals are captured by the ex post application of competition rules, or visible from a purely economic perspective.

Leaving aside those broader and societal harms and adopting a narrower economic perspective, a loose definition of a gatekeeper would be that it is an undertaking that can **control access by a group of users to some goods or another group of users**. In this perspective, a digital platform is a gatekeeper if it manages to control the access to the customers. This level of control depends on the incentives and ability of those customers to multi-home and to switch and increases with the proportion of single homers. A possible market configuration is to have single-homing on one side of the market and multi-homing on the other side. This is what Armstrong (2006) calls a *competitive bottleneck* as the business users need to be on the platform if they want to reach the customers who single home on that platform.[58]

A competitive bottleneck **may lead to a narrow relevant market definition in competition law** where each platform constitutes a relevant antitrust market on its own. For instance in *Android,* the Commission defines a market for app stores for the Android mobile operating system[59] and a US plaintiff in an *Apple* case claims that there is a market for app stores for the iOS mobile operating system.[60] As explained by Franck and Peitz (2019: 55), such market definition by mobile OS is based on the assumption that consumers are single-homers as they make a discrete choice of either using a device based on Apple's or Android's mobile operating system while app developers tend to be multi-homers. Parallels may be drawn with the definition of the wholesale termination market in telecommunications. In this case, the Commission recommends to define the market per operator because the called parties single-home (as they do not directly pay the wholesale termination fee in a Calling Party-Pays system) while the operators of the calling party have to multi-home on the different operators.[61]

Franck and Peitz also recall that the relationship between the different sides of the market should be taken into account and that the monopoly power on one side of the market (such as the side of app stores for the Android/iOS mobile operating system) may be mitigated through interaction with

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[55] For instance in Case M.2876 *NewsCorp/Telepiu*, para.198, the Commission considered the merging parties would have been "the *gatekeeper* of a tool (Videoguard CAS) that may facilitate entry for any alternative pay DTH operator and of an infrastructure (the platform) that may ease the conditions for the broadcasting of pay and free TV satellite channels."

[56] Explanatory Memorandum of the Commission Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238: "This growing intermediation of transactions through online platforms, combined with strong indirect network effects that can be fueled by data-driven advantages by the online platforms, lead to an increased dependency of businesses on online platforms as quasi *gatekeepers* to markets and consumers."

[57] Lynskey O. (2017). "Regulating 'Platform Power'," LSE Law, Society and Economy Working Papers 1/2017, p.9-10. Laidlaw E. (2010) differentiates between two types of gatekeeper: 'Internet gatekeepers' who control information flows and 'Internet information gatekeepers' which as a result of this function of controlling information flows can have an impact on 'participation and deliberation in democratic culture'. Helberger et al (2015) argue that much of the concern regarding the influence of gatekeepers lies in their control over access to individuals and the way in which the relationship between gatekeepers and users is shaped. .

[58] For more development, see Franck and Peitz (2019:54-57).

[59] Commission Decision of 18 July 2018, Case AT.40 099, *Google Android,* paras. 268-322.

[60] *In re Apple iPhone Antitrust Litigation*, 846 F.3d 313, 315 (9th Cir. 2017).

[61] Commission Recommendation 2014/710 of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante, OJ [2014] L 295/79, Annex: markets 1 and 2.

the other user group, in particular if large parts of the revenues that are generated on the monopolised side are passed to the users on the other side.62

- ***Gatekeeper and dependency***

A complementary conception of gatekeeper is related to economic dependency. As explained by the Expert Group for the Observatory on the Online Platform Economy (2020), **dependence occurs "if and to the extent that the business faces a high cost from switching away from the platform to a substitute**. Such switching costs can arise for instance if a business has made significant platform-specific investments, such as building its technology to be compatible with the platform's specification; these investments would have to be written down ("sunk costs") and new investments made if the business were to switch to a substitute. Switching costs can also arise from the fact that any substitutes are far inferior, such as when a single platform is a gatekeeper to a given market or market segment, and there are few other means of reaching that market or segment".

Ex ante regulation also deals with various types of dependency relationships in the digital markets. One example relates to **access to technical services for digital TV which may constitute a key capability for media firms**. Some Commission decisions in competition law have imposed compulsory access to those technical services as a condition to clear pay-TV merger.[63] To complement competition law, ex ante rules were adopted in 1995 to force the providers of Conditional Access Systems (CAS) to offer to broadcasters, on a FRAND basis, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers.[64] This obligations has been carried forward in the EECC but is now limited to the providers of CAS from which broadcasters depend to reach any group of potential viewers.[65]

Another example of dependency relates to interoperability. The EECC imposes on providers of number–independent interpersonal communications services, such as Skype, the obligations to **render their services interoperable if those providers reach a significant level of coverage and user up-take**.[66]

Situation of economic dependency also triggers **antitrust intervention** in some Member States. The longstanding doctrine of economic dependency under German antitrust law,[67] which has also been embraced by several Member States[68] such as France[69] and, more recently, Belgium,[70] aims

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[62] On the remedies side, a related debate took place several years ago when regulatory authorities were about to regulate the mobile termination tariffs and were warned to take into account the effects of their decisions on the other sides of the market (the so-called waterbed effects). See for instance, Valletti and Houpis (2005).

[63] Decision of the Commission of 2 April 2003, Case M.2876 *NewsCorp/Telepiu*, para 225. When those access commitments could not have been obtained, mergers have been prohibited: Decisions of the Commission of 27 May 1998, Case M.993 *Beterlsmann/Krich/Premiere* and Case M.1027 *Deutsche Telekom/BetaResearch*. The merger was prohibited because it would have resulted in BetaDigital and BetaResearch having a dominant position on the German market for the supply of technical services for pay-TV, besides Premiere strengthening its dominance on the pay-TV market and Deutsche Telekom strengthening its dominance on the cable networks.

[64] Directive 95/47 of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals OJ [1995] L281/51, art.4(c). This article also reminded that the providers of CAS should comply with EU competition law, in particular if a dominant position appears.

[65] EECC, art.62(1) and Annex II, Part I.

[66] EECC, art.61(2c).

[67] Section 20(1) of the German Act against Restraints of Competition, available at: http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf, this section applies "*to undertakings and associations of undertakings to the extent that small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (relative market power). A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers*".

[68] For a comparative analysis of the legislations in the Member States, see Renda et al. (2012:42-68).

[69] Article L 420-2 of the Commercial Code, available at: http://www.autoritedelaconcurrence.fr/doc/code_commerce_gb.pdf . The state of economic dependence requires that that it is impossible for the plaintiff to resort to another undertaking for the supply, or the sale, of a given product or service, due to technical or economic reasons. In essence, four types of economic dependence have been addressed by the French Competition Authority, namely: (i) scarcity-based dependence; (ii) dependence associated with long-lasting business relationships; (iii) assortment-based dependence; and (iv) demand-based buyer power dependence.

[70] Economic Law Code, art. I-6 (4) which defines economic dependency as: "the absence of reasonably equivalent alternatives available within a reasonable period of time, on reasonable terms and at reasonable costs, allowing it for each of them to impose services or conditions that could not be obtained under normal market conditions".

to prevent digital platforms from exercising unfettered commercial freedom in those situations where business users do not have realistic alternative solutions to connect with their target audience.

3.2.2 Indicators

- ***Control of a bottleneck – Low incentives and ability to switch or multi-home***

From the economic perspective explained above, a digital platform enjoys a gatekeeper position when its **customers have no or little ability and incentive to switch or multi-home**. As the economic theory has shown and the EU courts have decided, the size of the platforms needs to be balanced with the ability and the incentive of customers to multi-home.[71] Indeed, if a digital platform counts many customers but most of them multi-home and can be reached across different platforms, the market power of each of the platform is limited. Note that in a data environment, the ability to multi-home among intermediaries offering the same type of digital services depends to a great extent on the capacity of the customers to move and port their data across digital platforms.

- ***Economic dependency***

To measure economic dependency, the Expert Group for the Observatory on the Online Platform Economy (2020) mentions the set of **surveys** conducted by Ecorys (2017) which indicated, for instance, that 42% of companies surveyed declare that platforms play a significant role for turnover and that they are important for the business and of these 42% of companies, almost a third obtained more than half of their revenues via platforms. The Expert Group also suggests measuring how large a share of the businesses' revenues is coming through a platform or platforms, as opposed to the businesses' own websites and brick-and-mortar sales channels.

Alexa also calculates the dependency of a site on others, such as **how much of the traffic originates** from search which is the percentage of all referrals that came from Search engines over the trailing month. Finally, the statistics also include measures of relevancy, such as the number of total sites linking in on that website.

3.3 Criteria 3: Lack of contestability

3.3.1 Rationale

- ***Entry barriers to existing services***

As digital markets are very dynamic, the analysis should also be dynamic and therefore, give the same importance to potential competition than to existing competition. Authorities have always recognised the importance of contestability of market power and **potential competition**. Already in the 1997 Market Definition Notice, the Commission observes that: "The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view."[72]

The potential competition is measured with the size of **entry barriers**. In its Article 102 Guidance Paper, the Commission lists the three main types of entry barriers (legal, economic and strategic). The Commission defines the economic barriers as forms of advantages specifically enjoyed by the

[71] Case T-79/12 *Cisco and Messagenet v. Commission*, para.79.

[72] Commission Notice on the definition of the relevant market for the purposes of Community competition law, O.J. [1997] C 372/5, para.24. The Commission gives more indications on the criteria to take into account potential competition in the 2004 Horizontal Merger Guidelines by noting that: "For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion. Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger: Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. [2004] C 31/5, para.60.

dominant undertaking. Then, the Commission gives the following examples: "economies of scale and scope, privileged access to essential inputs or natural resources, important technologies or an established distribution and sales network; other costs and other impediments, for instance resulting from network effects, faced by customers in switching to a new supplier."[73]

Digital markets are characterised by the presence of important **cross-groups externalities and network effects** between the different sides of the markets as more users on one side the platform tends to lead to more users on the other side and vice-versa. Those network effects are often the most important entry barriers to the digital markets. As Shapiro and Varian (1999:185) have explained "precisely because various users find it so difficult to coordinate to switch to an incompatible technology, control over a large installed base of users can be the greatest asset (a platform) can have".

This was already the case in traditional media or communications markets, but the development of **big data and AI have amplified those network effects**. The collection and use of customers' data exhibit important (users and monetisation) feedback loops which can entrench the market power of a digital platform.[74] Moreover, data-driven network effects may encourage the expansion of dominant intermediary from their core markets to other (data-related) markets and diffuse their market power through the economy.[75]

Another more specific possible entry barrier to digital markets is linked to the so-called **"zero price effect".**[76] Several studies in behavioural economics show that consumers treat a price at zero very differently than any other price; they appear to act as if zero pricing of a product not only decreases its cost but also adds to its value.[77] This is well understood by the General Court in *Cisco and Messagenet*, which notes that: "In so far as users expect to receive consumer communications services free of charge, the potential for the new entity to set its pricing policy freely is significantly restricted. The Commission rightly observes that any attempt to make users pay would run the risk of reducing the attractiveness of those services and of encouraging users to switch to other providers continuing to offer their services free of charge. Likewise, if the new entity decided to stop innovating in terms of its communications services, it would also run the risk of reducing their attractiveness given the level of innovation on the market in question."[78] Thus with free products, entry strategies are more limited. They may focus on product and quality differentiation but not on price differentiation.

Finally and more generally, **barriers to entry tend to increase with the development and the maturation of a market**. Franck and Peitz (2019:77) observe that entry barriers are lower in quickly growing markets in which many unattached users arrive and in markets with fast technological changes. Thus, it is not because a digital platform has displaced a previous incumbent when the market was nascent that this platform can easily been displaced when the market has matured. For instance, the fact that Friendster has been replaced by Myspace which, in turn, was replaced by Facebook - or that AltaVista has been displaced by Google - several years ago does not mean that Facebook or Google can easily be displaced today.

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[73] Guidance of 3 December 2008 on the Commission's Enforcement Priorities in Applying Articles [102 TFUE] to Abusive Exclusionary Conduct by Dominant Undertakings, para.17.
[74] Lerner (2014).
[75] Bourreau and de Streel (2019).
[76] The zero price effect has also implications on market definition and, when not taken into account, may lead to a new fallacy similar to the old Cellophane fallacy. As Newman (2016:75) explains: "where two products are offered at zero prices, the fact that customers would switch away from one product and toward the other in the event of a price increase does not necessarily indicate that the two belong in the same product market. Such switching likely reflects nothing more than the zero price effect in action."

[77] Shampanier et al. (2007). Some other behavioural studies on the zero price effect are summarised in Gal and Rubinfeld (2016: 528-530).
[78] Case T-79/12 *Cisco and Messagenet v. Commission*, para.73.

- ***Entry barriers to future services***

The determination of the entry barriers to existing markets should be complemented with a determination of the entry barriers to future markets and the control of innovation. This complementary analysis is key in the digital economy because, as put by Teece (2009), "when innovation is high, capabilities are more stable than products."

Yet, this complementary analysis is challenging because the types of innovation capabilities and their role in product innovation are complex and uncertain, in particular in industries where the innovative process is not clearly structured. However, Teece (2009:255) also observes that: "the tools for assessing capabilities may not be well developed yet, but they are developed enough to allow tentative application. Clearly, product market analysis can be unhelpful and misleading in dynamic contexts. Using the right concepts imperfectly is better than a precise application of the wrong ones."

In this regard, the antitrust authorities have already developed several concepts to go up the innovation value chain and identify the state of competition at the input level.[79] For instance, the European Commission has relied on the following concepts:

- First, competition in innovation refers to R&D poles which may compete with each other depending on the "the nature, scope and size of any other R&D efforts, their access to financial and human resources, know-how/patents, or other specialised assets as well as their timing and their capability to exploit possible results."[80] Cautiously, the Commission notes that R&D poles may be identified when the process of innovation is well structured, like in the pharmaceutical industry, but that the concept will normally not be used when the process of innovation is not clearly structured;

- Second, innovation space is "not a market on its own, but an input activity for both the upstream technology markets and the downstream products markets",[81] and corresponds to the discovery targets over which firms compete.[82]

Thus, when assessing potential competition between digital platforms, the authorities should analyse which platforms control the innovation capabilities and what the entry barriers to innovation markets and spaces are. This approach may be more difficult to apply in the digital sector than in the pharmaceutical sector because the innovation process is less structured and shorter in the former than in the later. However, it is not impossible[83] and innovation markets may be defined for the main capabilities of the digital sector such as data, some type of engineering skills, high computing power and very risky capital. This assessment will also require extensive access to internal documents of the LDG, hence the investigative power of the enforcement authorities should be extensive.

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[79] See Federico, Scott Morton, and Shapiro (2019) and Petit (2019).

[80] Commission Guidelines of 14 December 2010 on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. [2010] C 11/1, para 119-122 and Communication Guidelines of 21 March 2014 on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements O.J. [2014] C 89/3, para 26. The Commission has also developed the concept of *technology market* which consists of "the licensed technology rights and its substitutes, that is to say, other technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology rights, by reason of the technologies' characteristics, their royalties and their intended use.": Commission Guidelines on horizontal co-operation agreements, paras 116-118 and Communication Guidelines on technology transfer agreements, para 22.

[81] Commission Decision of 27 March 2017, Case M. 7932 *Dow/DuPont*, para. 348.

[82] para.2168. The R&D undertaken in innovation spaces "generate[s] early pipeline products." Para.2159.

[83] Also Kerber and Kern (2014).

3.3.2 Indicators

- ***High Entry barriers to existing areas of business***

The barriers to entry could be measured with the size of **direct and indirect network effects and feedback loops**.

- ***High Entry barriers to future areas of business***

Control and barriers to entry to innovation capabilities, in particular data, risky and patient capital, computing infrastructures, digital skills.

3.4 Criteria 4: Market features favouring conglomerate presence and creation of ecosystem

3.4.1 Rationale

For the last group of indicators, we consider the market feature which lead to conglomerate presence and creation of ecosystem. Teece (2012) defines an ecosystem as "a group of interacting firms that depend on each other's activities… reliant on the technological leadership of one or two firms that provide a platform around which other system members, providing inputs and complementary goods, align their investments and strategies". Jacobides et al (2018) define ecosystems as "groups of firms that must deal with either unique or super modular complementarities that are non-generic, requiring the creation of a specific structure of relationships and alignment to create value." Thus, an ecosystem often includes **a core (digital) platform orchestrator and a select group of their complementors** – for example, app developers, network operators and device manufacturers.

A draft law to amend the Greek competition law defines an ecosystem as:

a) "the web of interconnected and to a large degree interdependent economic activities carried out by different undertakings with the intention of supplying one or more products or services which impact the same set of users,

b) the platform of economic activities which are supplied by different undertakings with the intention of supplying one or more products or services which impact the same set of users or different categories of users."

The explanatory Memorandum of this draft law explains that:

> "The undertakings which form an ecosystem and undergo such economic activities are usually independently owned, but are financially and technologically interconnected due to:
>
> (i) the highly complementary relationship of the resources (technological, financial and human) for carrying out the specific activities, and
>
> (ii) the existence of a unitary, from a financial perspective, competitive offer to the user, group of users or different categories of users, which are connected due to the relationship of positive or negative feedback loops which exist between the various users or various categories of users with regards to the specific economic activity and
>
> (iii) eventually, the significant sunk costs which must be made in this complementary relationship, which may, among other factors, lock the users in this particular choice. Complementors who participate in the ecosystem would be materially worse off if they were to choose *not* to participate in the ecosystem if the latter depends on the development of a key technological platform, which constitutes a central point for the harvesting of data, provision of specific economic activities and eventually source of incentives for the coordination of the ecosystem".

In practice, Bourreau and de Streel (2019) explain that **two key characteristics**, often present in the digital economy, lead to conglomerate presence:

- First, digital products and services involve a modular design, which generates strong economies of scope in product development, and allows firms to create variants from basic products for relatively low development costs.

- Second, the joint consumption of digital products from the same product ecosystem may generate consumption synergies for consumers. Firms thus have an incentive to expand to create product ecosystems and generate consumption synergies, which they can then capture through higher prices

A conglomerate footprint or control of an ecosystem can be an important factor which increases the harm caused by a gatekeeper platform and its enduring nature, as it allows defensive leveraging to protect existing gatekeeper position or offensive leveraging to extend gatekeeper position.

3.4.2 Indicators

Relevant indicators associated with conglomerate presence include:

- Presence in multiple (related) business areas,
- Control of ecosystems as a web of interconnected and to a large degree interdependent economic activities carried out by different undertakings with the intention of supplying one or more products or services which impact the same set of users.
- Modular design innovation
- Consumer synergies within ecosystems

3.5 Summary on indicators

Summary potential criteria to designate a Large Gatekeeper Platform

1. Large Intermediation Online Platform

- Monetary revenue

- Number of unique visitors and time on site

- Volume of transactions mediated by the platform

2. Gatekeeper Power

- Control of a bottleneck – Low incentives and ability to switch or multi-home

- Economic dependency

3. Control of innovation capabilities – lack of contestability

- High barriers to entry on existing areas of business: Direct and indirect network effects, Feedback loops, Zero price effects

- Control and barriers to entry to data, risky and patient capital, computing infrastructures, digital skills

4. Control of an Ecosystem – Conglomerate footprint

- Presence in multiples (related) business areas

- Control of ecosystems with core digital platform orchestrator

- Modular design innovation

- Consumer synergies within ecosystems

As shown in Table 1, the criteria proposed by the different policy initiatives presented above can be organised on the basis of our four proposed criteria

Table 1: Possible criteria to define the systemic digital platforms

	Furman (March 2019)	**Draft German 10th Amendment (Jan 2020)**	**French NCA (Feb 2020)**	**French NRA (Dec 2019)**
Test	**Significant Market Status**	**Paramount significance**	**Systemic**	**Systemic**
Large intermediation		- Dominance on one or more markets	- Structural market power because of Size, financial capacity, user's community	- Market value
Gatekeeper Power	Control of bottleneck	- Importance of its activities for third parties' access to supply and sales markets and related influence on third parties' business activities	- Provide intermediation services - Control access to market - Dependency Users/suppliers	- Many users (or turnover) - User attention - Bottleneck - Gatekeeper
Control on innovation capabilities	Enduring market power	- Financial strength and access to resources - Access to data relevant for competition		- Access to data
Control of ecosystem		- Vertical integration and activities on otherwise related markets		- Part of ecosystem

4 Competition law test as a trigger for regulatory intervention

In electronic communications the legislator tried to divide the competences of the national regulatory authority and the competition authorities by the following technique: the national regulatory authority would apply the regulatory framework only when there is a finding of significant market power and the following criteria are met:

a) high and non-transitory structural, legal or regulatory barriers to entry are present;

b) there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry;

c) competition law alone is insufficient to adequately address the identified market failure(s).[84]

For present purposes **the final requirement is of interest for it serves to create a distinct space for regulation**. The philosophy informing the framework for the liberalisation of electronic communications foresees that nearly all markets will become open to competition so that the imposition of regulatory remedies is temporary and designed to facilitate entry. This vision may be contested, but for present purposes the relevant consideration is whether the application of the ex ante regulation should be made conditional on a finding that competition law is insufficient to address the market failures adequately, like in the field of electronic communications.

Arguments **in favour** of applying a similar approach may be that the kinds of harm the regulator wishes to prevent are possibly competition law infringements (e.g. envelopment, refusals to deal, self-preferencing). It may be argued that the application of competition law leads to less severe remedies and is too slow and so this approach ensures that one applies the ex ante tool when no other less aggressive forms of regulation would do. In legal parlance, it serves to ensure that in applying the ex ante tool the principle of proportionality is respected.

Arguments **against** using the inability of competition law to solve the market failure is that the ex ante regulatory framework on large gatekeeper platforms might prohibit conduct which competition law does not prohibit either because it is conduct that harms competition but there is no breach of Articles 101 or 102 (e.g. unilateral conduct by non-dominant undertakings) or because the regulatory framework is designed to protect an interest beyond those protected by competition law (e.g. fairness between two contracting parties)

On the other hand, it may be prudent to use the competition law filter for some of the remedies. It is worth recalling that the Commission foresees the adoption of a black list and/or tailor-made remedies. Thus one may wish to have a competition law filter for tailor-made remedies (e.g. access to data or a structural remedy/line of business restriction).

[84] ECC article 67

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DISCUSSION SUMMARY | Threshold for intervention

The purpose of this section is to list the questions and discussion points that arose from the overview presented in the Issue Paper on 'threshold for intervention' and the exclusive workshop organised in September 2020. The non-attributable summary of the discussion was prepared by Claire-Marie Healy, project manager at CERRE.

Market definition/ Business areas
Should the designation of Large Gatekeeper Platform (LGP) be a two-step approach starting with the definition of the relevant market, or should it be a one-step approach by-passing some kind of market definition?
RESPONSES Some views strongly stress the need for a detailed understanding of the market and how firms have a market power as well as the competitive constraints, incentives, and consumer's attitudes. The current accepted and tested methods of market intervention which rely on the definition of markets, assessment of market power, and then the consideration of the appropriate remedy to resolve the market failure has proven to work. By-passing market definition could leave too much discretion to the regulators and undermine procedural fairness and regulatory certainty. Another view shared is that the traditional market definition is difficult to use in the case of digital platforms because large digital platforms have distinctive features, they are often present across diverse markets and they are integrated in an ecosystem linked through common inputs (data, customer base, technical modules, etc.). A smart arrangement was suggested, combining i) a case by case with a simpler threshold (quantitative) to identify platforms that are most likely to cause harm, leading to applicable remedies in an automatic way; and ii) a case-by-case assessment where an authority looks at a specific case and suggests tailor made remedies. Such an arrangement would address the EC idea on automatic applicable remedies, and would also allow a more efficient use of authorities and of market definition at this stage.
Should new legal concepts, other than market definition, be developed to base regulatory intervention on LGPs, given the difficulties of adapting the antitrust concept of market definition?
RESPONSES Some participants view the criteria to define markets of business areas described in the Issue Paper as not useful if there is no comparison with the overall size of the market. Some also underlined the need to look at what the alternatives are to switching, or single homing, even in the medium term for instance. To identify gatekeepers, some participants support a combination of a quantitative and a set of qualitative characteristics, based on the Commission's glossary on large online platforms, and some support the reference to the platform's share of active users and/or single-homing users at the Member State and/or EU level given that active users and single homing users are a universally shared characteristic, and it can easily be applied to any platform.

According to some participants, the scope of the DMA is much broader than the antitrust approach only and should therefore consider moving away from the formal approach to market definition. One of the alternatives proposed is a two-step approach using Area of Business (AoB), looking at sub divided markets and sub divided issues in order to have efficient remedies. The list of AoBs should be laid down in (an) EU-level legal act(s) and should be subject to regular revision. An AoB could be, for example, e-commerce, app stores, online search, OS, voice assistants etc., and would be characterised by features such as strong direct and indirect network effects, significant economies of scale and scope, significant barriers to entry and expansion relating to technical and/or legal aspects, high switching costs and/or consumer inertia. Reasonable and easily observable absolute thresholds (e.g. revenues, number of unique users, etc.) for each AoB, would then be defined in (an) EU-level legal act(s), in order to quickly identify the LGPs.

Criteria to designate large gatekeeper platforms (LGP)
Should a criterion based on the mere size of the platforms (independently of its market power and possible dominant position) be part of the LGP test? What specific quantitative indicators should be used for this criterion?
RESPONSES While size or large user base is an important criterion, using broad models of assessment for these criteria might not be particularly relevant unless users are locked in. Indeed, gatekeepers in niche markets or even a gatekeeper operating in one or fewer member states can also cause potential harm to competition or consumer harm and should therefore be looked at too. There is also a strong view that too narrow an approach to gatekeepers could lead to ineffective remedies and could result in distorting competition. Therefore, there is a strong view that LGPs should be assessed on a case-by-case basis rather than assessed on the basis of broad and vague criteria.
Should the gatekeeper be defined according to the economic concept of bottleneck and economic dependency (which mainly relate to single homing customers) or be based on other criteria? What degree of market power should be required to determine that ex ante regulation should apply? How should entry barriers be assessed?
RESPONSES For some participants, the notion of a gatekeeper is important to define and the question of whether entry barrier should be part of this definition remains to be answered. On the other hand, for some participants, the ability to enter new markets by using existing assets and advantages can hardly be a distinguishing factor as it is a common theme across industry and is pro-competitive and enhances consumer welfare.

Should a criterion linked to the control of innovation capabilities be part of the LGP test?

What specific indicators should be used for this criterion?

RESPONSES

Although most participants agree that this criterion could be part of the cumulative list of criteria to define LGPs, the loose definition of the term 'capability' in strategic management and in innovation economic literature makes this criterion more difficult to define and apply.

There is also a strong view that capabilities such as knowledge and skills are very difficult to transfer and to treat with regulation and that not all LGPs have control of innovation capabilities.

If we take a broader concept of innovation capabilities, however, some questions remain open: whether access to fundamental services (such as fundamental software, or fundamental API for instance) could be considered an enabler for innovation capabilities, and whether easily transferable elements could include data or control of key elements of platforms, such as API or software, that make transferability easier.

Should a criterion linked to the control of ecosystems and/or the possibilities and incentive to leverage market power across conglomerate markets be part of the LGP test?

What specific indicators should be used for this criterion?

RESPONSES

The leveraging power of LGPs to enter new markets or to leverage their assets in one area of their activity to improve or develop new services in adjacent areas is seen as a relevant criterion for some participants.

What should the jurisdictional criterion be to determine the border between EU law and national law for regulating the LGP?

RESPONSES

For some participants, all the criteria mentioned in the Issue Paper are relevant but the questions of how to organise them, in which category, and whether to consider the criteria cumulative or not remain.

While our understanding of digital markets and LGPs is still in its infancy, some participants are more in favour of leaving a high degree of discretion and not mentioning criteria for the legislation in order to keep the list more flexible/non-exclusive. The relevant criteria could then be adapted as we learn more about the markets in the coming years.

Other criteria to define large gatekeeper platforms (LGP)
Should the regulator only be allowed to intervene when it demonstrates that the application of competition law would be insufficient to remedy the market failure? Should this principle apply always, or only for certain kinds of regulatory concerns (e.g. yes for leveraging concerns but not for fairness concerns)?
RESPONSES Some participants share the view that there is a need to incrementally strengthen in parallel the new NCT and the P2B Regulation, while keeping this new regulatory tool for the most problematic platforms as a priority for the moment. The relationship between the NCT and the DMA also needs to be carefully considered, especially to ensure compliance with the remedies. An assessment of the extent to which the policy objectives and potential remedies are already being addressed by the existing regulatory framework needs to be considered before adoption of a new framework. This is crucial to avoid duplication, which would bring legal uncertainty for economic operators. Another suggestion was to use a more generalised definition of gatekeeper as a higher threshold for intervention than market dominance. This higher threshold could help identify companies that have the capacity to dictate conditions of the market without defining specific criteria in the legislation yet. Public authorities should therefore be left to assess the details over the coming years.
Which other qualitative or quantitative criteria should be used to determine the LGPs that should be subject to ex ante regulation (if this regulation is justified and adopted)?
RESPONSES Additional obligations that reflect other EU law principles and objectives, such as consumer protection, are also suggested to be applicable to all platforms, for example, to deal fairly with consumers (principle of fairness by design). Although the quantitative criteria seem easier to apply, some participants have doubts concerning the practicability of setting comparable indicators such as turnover, profits or user numbers which are difficult to compare between platforms. There is little evidence of a causal link between the potential characteristics of digital platforms and the risk of them creating consumer harm. This approach risks failing to consider the benefits for consumer and business users alike associated with these very characteristics. It also risks limiting the ability of regulators to capture and explore differences across digital platform business models. Using those criteria as the first steps may lead to a low level of intervention.

ISSUE PAPER + DISCUSSION SUMMARY

REMEDIES

RICHARD FEASEY

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ISSUE PAPER | Remedies

1 Scope and Aim of the paper

In its February 2020 Digital Strategy Communication,[85] the Commission announced the proposal of the **Digital Markets Act package** would include one pillar aiming at achieving a fair and competitive economy through economic regulation in their Inception Impact Assessment of June 2020, the Commission services indicate that they are considering **three policy options**:

1. Revise the horizontal framework set in the Platform-to-Business Regulation;

2. Adopt a horizontal framework empowering regulators to collect information from large online platforms acting as gatekeepers;

3. Adopt a new and flexible *ex ante* regulatory framework for large online platforms acting as gatekeepers, which is divided into the following sub-options:

> 3a. Prohibition or restriction of certain unfair trading practices ("*blacklisted*" practices); or
>
> 3b.Adoption of tailor-made remedies addressed on a case-by-case basis where necessary and justified.[86]

This Issue Paper deals with the application of remedies to competition concerns in digital platform markets, whether by competition authorities (as would be the case if the Commission's proposal for a New Competition Tool were to be adopted) or by a new ex ante regulatory regime (on which the Commission is currently consulting in relation to the contents of a new Digital Services Act). It is not intended to provide a taxonomy of all the potential remedies for specific theories of harm, but to promote discussion of how remedies might in future be devised and applied to address competition concerns arising in digital platform markets (having regard to the Commission's proposals).

After this introduction, Section 2 discusses how public authorities have applied remedies in relation to competition concerns, distinguishing between the approaches adopted by competition authorities and those adopted by regulatory bodies (with particular reference to the telecommunications regulatory regime on which some of the options of the Commission's inception impact assessment for an ex ante regulatory regime for digital platforms appear to be based). Then Section 3 considers some remedies that feature heavily in discussions about digital platforms.

2 Remedies in antitrust and regulation markets

2.1 Types of remedies

Public authorities have a large palette of remedies at their disposal. Approaches differ in terms of how they are selected and applied. In most cases public authorities will be seeking to identify measures which effectively remedy the competition concerns that have been identified, but which are otherwise proportionate with the objective. That objective is to re-establish compliance with the law in Article 102 cases (by bringing the abuse to an end and, perhaps, restoring the market to its pre-abuse state) and to remove a significant impediment to effective competition arising from a merger. Regulators may go further and adopt measures intended to improve the functioning of the market and promote competition, relative to the current position. Competition authorities in possession of the 'new competition tool' might also adopt this approach.

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[85] Communication from the Commission of 19 February 2020, Shaping Europe's digital future, COM (2020) 67.

[86] Inception Impact Assessment on Digital Services Act package: *Ex ante* regulatory instrument for large online platforms with significant network effects acting as gate-keepers , available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers

Competition authorities have tended, to date, to exhibit a preference for **'structural' remedies** which involve the one-time divestiture of assets to resolve competition concerns in mergers or outright prohibitions of particular arrangements whereas regulatory authorities have often implemented **behavioural remedies** which may either involve prohibiting certain forms of conduct or requiring that actions be taken, such as the provision of access to or sharing of assets. In practice, these distinctions are less clear than they first appear and 'access obligations' which address the source of market power are sometimes referred to as structural remedies.

A further distinction can be drawn between remedies which seek to ensure fair competition between firms on the **'supply side'** of the market, remedies which are intended to protect consumers from exploitative conduct on the **'demand side'** of the market, and remedies which are intended to empower consumers, and thereby promote competition, through interventions on the 'demand side'. The focus of competition authorities has generally been confined to the 'supply side' issues, either in relation to exclusionary practices by dominant firms or in relation to the accretion of unilateral or co-ordinated market power by firms as a result of a merger. Competition authorities have taken measures, but less frequently, to protect consumers from exploitative conduct, although a relevant example for our purposes is the recent Bundeskartellamt case against Facebook in relation to its 'excessive' accumulation of data[87] and the Competition and Market Authority's (CMA) proposals (using the UK equivalent of the New Competition Tool) for measures giving consumers choices over whether to receive personalised advertising with 'opt out' as the default[88].

In contrast, regulatory authorities pursue both supply side interventions to promote competition between firms and measures, including price controls and quality of service obligations, to prevent exploitation of consumers. Regulators in some countries have recently begun to focus increasingly on 'demand side' measures to improve the functioning of markets in which competition appears to be impeded despite promising supply side conditions[89]. A similar trend is observable in the application of the New Competition Tool by the Competition and Markets Authority, where 'demand side' remedies have featured quite significantly in many of the recent market investigations it has undertaken and feature prominently in its latest Digital Advertising Market Study[90].

2.2 Application of remedies by competition authorities

In cases where a number of potential remedies might remedy a particular competition concern, the European Commission may **leave it to the parties themselves to decide the steps to be taken in order to do so**. In the *Google Shopping* case, for example, the decision devoted just two of over 700 paragraphs to the question of how the abuse – a form of self-preferencing by Google - is to be brought to an end[91]. A heated debate has ensued as to whether the remedies which Google subsequently chose to adopt, and which included the introduction of an auction format to allow Google and its rivals to bid to be displayed in the Shopping Unit, represent an effective remedy[92]. Leaving aside the substantive aspects of the remedy that has been adopted by Google, this raises the questions, which participants in the seminar may wish to explore, about whether the Commission

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[87] 'Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, Case Summary B6-22/16, at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html

[88] CMA (2020), *Online platforms and digital Advertising Market study final report*, para 6.93-, available at https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

[89] Centre for Competition Policy, *The Role of Demand-Side Remedies in Driving Effective Competition A Review for Which?,* available at https://www.regulation.org.uk/library/2016-CCP-Demand_Side_Remedies.pdf

[90] For example, the CMA Retail Banking Review included demand side remedies (Open Banking to enable multi-homing and facilitate comparison and switching, provision and publication of service quality data, sending of prompts to customers and other measures to promote switching), as did the Energy Review (creation of a data base of 'inert customers' to be accessed by competing firms, provision of information to enable switching), although the latter also adopted a wide range of other remedies. The Investment Management Review also adopted remedies to improve decision-making by trustees, including mandatory wording for marketing materials, disclosure of fees and provision of information on past performance. The Digital Advertising Market study incudes proposals (to be implemented by a regulator) to alter the 'choice architecture' used by Facebook and Google to obtain customer consents, to require 'opt ins' for personalised advertising and to enable the porting of data between platforms.

[91] *Google Search (Shopping),* Case AT/39740, paras 699-700

[92] Concerns were first expressed in 2018, but Commissioner Vestager indicated in November 2019 that she remained concerned as to its effectiveness, see https://www.reuters.com/article/us-eu-alphabet-antitrust/eus-vestager-says-googles-antitrust-proposal-not-helping-shopping-rivals-idUSKBN1XH2I8

ought not to assume the responsibility for specifying the remedy to be adopted, even in cases where a number of competing options may be available to it.

The theory of harm in the *Google Shopping* case was self-preferencing by a vertically integrated firm. For reasons explained in other CERRE Reports, self-preferencing or 'intermediation bias' is a particularly difficult concern for public authorities to remedy and one we discuss in more detail in the next section[93]. An alternative remedy, advocated by some complainants, would have involved the removal of the Shopping Unit from the general search results page and a return to the position which prevailed prior to its introduction. However, rather than require the withdrawal of services or products, the Commission has **tended to adopt remedies which allow consumers to continue to access the benefits arising from innovation whilst at the same time seeking to create greater opportunities for rivalry**. As we explain below, in the *Microsoft I* case the Commission did not prohibit the bundling of Microsoft Windows and Media Player but instead required Microsoft to offer an unbundled version of Windows alongside its existing products.

In the *Google Shopping* case the Commission also imposed a fine on Google of €2.4 billion. **Financial penalties and damages** could be considered remedies as they are intended to deter firms from engaging in abusive conduct from which they might otherwise expect to gain before being required to cease, although they may also serve other purposes as well[94]. We do not consider the role of financial sanctions (or follow-on damages) in this paper. However, we note that it has been argued that the level of fines imposed by the European Commission to date (or indeed any level of fines which they may impose under Regulation 1/2003) would be insufficient to deter further abusive conduct by digital platforms if the potential gains from such conduct were to be the acquisition of a gatekeeper or otherwise dominant position in a global market for many years to come[95]. The conduct which is sanctioned with a fine may also be highly context specific and may not deter firms in other markets who may consider their circumstances to be very different[96]. In addition, fines may not be sufficient deter non-compliance with measures that are intended to stop previous abuses[97] and they are often appealed by parties to the General Court. The European Commission does not currently propose to revisit its fining powers, either for digital platforms or more generally but participants in the seminar may wish to discuss this further.

In other competition cases, the Commission will **specify in some detail what it requires firms to do**. This is straightforward if the remedy involves the withdrawal of contractual obligations that have been imposed on third parties. In the *Google Android* case, for example, the Commission found that Google's licensing arrangements for the use of the Android operating system included contractual provisions which required that device manufacturers pre-install the Google Search and Chrome apps in order to obtain a licence for the Google Play Store. The remedy was that these provisions be withdrawn and that Google refrain from other practices which might have the same effects[98]. Similar requirements related to licensing of arrangements which required manufacturers to enter into anti-fragmentation agreements[99] and arrangements with both manufacturers and mobile operators which excluded other general search services in return for revenue-sharing arrangements[100]. Implementation of these remedies appears to have been less controversial than in the *Google Shopping* case although Google's decision to implement a 'choice screen' (from March

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[93] CERRE (2019) *Implementing effective remedies for anti-competitive intermediation bias on vertically integrated platforms'*, available at https://www.cerre.eu/sites/cerre/files/cerre_intermediationbiasremedies_report.pdf
[94] Such as compensating victims.
[95] Bloomberg, 'Facebook's US fine may be great investment, EU economist warns', 26 April 2019, available at https://www.bloomberg.com/news/articles/2019-04-26/facebook-s-u-s-fine-may-be-great-investment-eu-economist-warns
[96] Furman Report (2019), *Unlocking Digital Competition: report of the digital competition expert panel*, para 2.20, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf
[97] Valletti's comments cited in footnote 11 were promoted by a $3 billion provision made by Facebook in respect of fines by the Federal Trade Commission for non-compliance with 2011 commitments to the regulator. Facebook settled with the FTC and paid $5 billion in July 2019 see https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions .
[98] https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, para 1394-6
[99] *Google Android*, case AT/40099, para 1393
[100] Ibid para 1401-3

2020) to allow users to select their default search provider whilst requiring rival search engine providers to bid for one of the three non-Google slots has attracted some criticism[101].

In other cases, such as *Microsoft I*, which concerned both tying and refusal to interoperate, the specification of remedies has been more complex. The remedy to concerns about **bundling** was straightforward to specify: Microsoft was required to offer a version of its Windows operating system for PCs without including Windows Media Player (whilst still being able to offer a bundled version of the product) and not to do anything to discourage its adoption or hinder the performance of rival media players[102]. It is less clear that it was effective[103].

The obligations to enable work group servers to **interoperate** with Windows PCs were **more complex** and included requirements that interoperability be provided on terms that were 'reasonable and non-discriminatory'[104]. Aspects of this remedy raised issues that have become familiar in debates about the regulation of digital platforms since then, including requirements that Microsoft not restrict the activities of these interoperating with its software, that any remuneration 'should not reflect the strategic value stemming from Microsoft's market power' and that terms of access should be predictable and stable so as to allow third parties to invest in complementary services[105]. Other aspects of the case may also provide a foretaste of things to come for regulators seeking to apply complex remedies to gatekeeper digital platforms.

The Commission required Microsoft to submit proposals for a monitoring trustee to oversee the implement of the remedies. Microsoft appealed the decision to the General Court on, amongst other things, the proportionality of remedies and that the Commission was not entitled to require a monitoring trustee (or require Microsoft to fund it)[106]. The Court found for the Commission in relation to proportionality of the remedies, but against the Commission in relation to the delegation of oversight to a monitoring trustee. Ensuring effective implementation of the remedies in *Microsoft I* proved very challenging for the European Commission (as it proved to be in the United States)[107], with protracted disputes about the nature of the technical documentation provided by Microsoft, as well as the level of royalties which Microsoft proposed to charge for licences for the source code. This involved subsequent Commissions and fines before Microsoft was deemed to be in compliance, at least 3 years after the original decision. The case page on the European Commission's website makes for sobering reading[108]: the Commission commenced its enquiries in 2000, and issued a decision in 2004. In late 2005 it issued a penalty decision for non-compliance, a statement of objections a month later, and imposed a fine of €280 million in mid-2006. In late 2007 the General Court ruled an appeal to the condemnation. The Commission issued a further penalty for non-compliance (of €899 million) in February 2008. In 2012 the General Court ruled an appeal to the penalties and reduced them slightly.

In *Microsoft II,* which again concerned tying of web browsers to the Windows Operating System, the Commission again engaged in extensive discussions of commitments, which it accepted. In addition to the (by now relatively standard) commitments not to restrict OEMs from pre-installing rival web browsers in PCs running the Windows OS or users from switching from Explorer to other browsers, Microsoft also proposed **'choice screens'** to enable the large installed base of existing Windows users to easily access and choose between a range of alternative browsers[109]. Many of the issues which we encounter today in terms of choice architectures (the ways in which choices are presented to users) featured in these debates and the resulting commitments involved detailed specifications

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[101] The winning bidders were announced in January, see 'Privacy focused search engine DuckduckGo is the big winner of Google's Europe Android Auction', at https://qz.com/1781609/google-shares-results-of-european-android-choice-screen-auction/
[102] *Microsoft (2004),* AT/37792, para 1011-13
[103] Economides and Lianos conclude 'The Commission's hope of widespread adoption of Windows XP N and the emergence of new powerful competitors did not materialize', 'Microsoft on trial', p.430, available at http://neconomides.stern.nyu.edu/networks/Economides_Lianos_Microsoft_Remedies.pdf
[104] *Microsoft,* para 1006-8
[105] Ibid para 1008
[106] CFI, case T-201/4, para 1194 et seq
[107] Economides and Lianos , p.416
[108] https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_37792
[109] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2550_8.pdf

as to how the user interface would work, the number of browsers to be displayed (12) and the format of the display (horizontal, with the 5 most popular browsers displayed in random order). The commitments were adopted in 2009 but Microsoft was again found to be non-compliant in 2013 for failing to display the choice screen on PCs using the Windows 7 OS for 14 months and fined €561 million[110]. As noted earlier, Google has also adopted choice screens as a remedy in the *Android* case

It is reasonable to conclude that remedies which involve the **imposition of obligations to supply 'essential inputs' or to address demand side concerns tend to be more difficult to specify than remedies which involve the straightforward prohibition of a particular mode of conduct or contractual arrangement**. **Remedies which are specified by the defendant themselves are likely to be easier to implement, but their effectiveness may be in greater doubt**. Whether such matters are weighed by the Commission when deciding which cases to pursue is unclear.

We would note that the Commission's current investigations into Amazon's use of seller data[111] and Apple's terms for the use and promotion of payment systems for apps in the Apple app store[112] would seem to be cases for which, if a finding of abuse were to be made, remedies might be easier to specify and implement than was the case in *Microsoft I*. In contrast, the CMA's current digital advertising findings include a range of remedies, some of which would be simple prohibitions (such a prohibition on Google paying for default positions on devices[113]) and others of which would require access to data sets (such as access to Google's click and query data)[114] or new interoperability arrangements (between Facebook and third parties)[115] which are likely to be much more challenging.

Another important feature of the application of remedies in antitrust cases is that **parties will often have and take the opportunity to seek a commitment decision of the Commission by volunteering remedies** during the enquiry. In the *Google Shopping* case, Google offered three sets of commitments between April 2013 and January 2014[116] which were intended to address the Commission's concerns without accepting a breach of the law, the last of which the Commission informed complainants that it was minded to adopt. In the light of the responses it then received, the Commission changed its mind and issued a Statement of Objections in April 2015 and a decision in June 2017. It is common for the Commission to 'market test' proposed measures with third parties in this way before deciding whether to accept them. The same procedure was adopted in *Microsoft II,* with the Commission deciding to accept the commitments in that case. Similarly, in merger cases, it is relatively common for parties to volunteer remedies during the proceedings (either towards the end of the Phase 1 inquiry or during Phase 2) in an effort to persuade the Commission that any SIEC arising from the merger will be effectively remedied by the commitments being proposed and that the merger should be approved on that basis.

Discussion of remedies could also extend beyond the measures that are adopted upon completion of a competition case. One of the recurring concerns in debates about the application of competition tools to digital platform markets is that abusive conduct may persist whilst the Commission conducts its investigation. This may be a concern in relation to exploitative abuses but is a particular concern in relation to exclusionary cases if the length of time taken to arrive at a remedy results in a further diminution of competition in the meantime. In such circumstances, the Commission may use **'interim measures'** when there is prima facie evidence of an infringement and a danger of serious and irreparable harm to competition. These powers have been used very sparingly in the past, although some regard their use in the *Broadcom* case in 2019 (to require the removal of certain exclusive purchasing rebates) as an indication that they may be employed more often by the

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[110] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_3162_3.pdf
[111] 'Commission opens investigation into possible anti-competitive conduct by Amazon', available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291
[112] 'Commission opens investigation into Apple's App Store rules' https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073
[113] CMA (2020), para 6.70
[114] CMA (2020) para 6.65
[115] CMA (2020) para 6.80
[116] *Google Shopping*, para 65

Commission in future[117]. Executive Vice-President Vestager has suggested in the past that the evidential hurdle which the Commission must meet to impose interim measures is higher than that adopted in some Member States and may require revision[118].

Any concerns about the inability to halt exclusionary conduct during the investigation will be compounded if the remedies that are adopted in the Commission's final decision were to take years to implement or to prove to be ineffective. The Commission's proposals for an ex ante regulatory regime, to the extent that it is targeted at exclusionary conduct, may be viewed as an attempt to address such concerns by another means. Participants in the seminar may wish to discuss the extent to which interim measures and some forms of ex ante regulation are seeking to address similar concerns, at least in relation to exclusionary practices, and which would prove the more effective.

2.3 Application of remedies by regulatory bodies

The Commission's proposal for an ex ante regulatory regime is presented in two forms, each of which involves a different approach to remedies. The first – **option 3a - involves requiring large platforms with a gatekeeping role to comply with a list of practices which would be prohibited or restricted**, such as certain forms of self-preferencing and tying of contractual obligations 'which have no connection with the underlying contractual relationship'[119]. The Commission indicates that some of these prohibitions would have general applicability regardless of the specific characteristics of the markets in which the platform performs a gatekeeper role, but others might apply only to certain firms, referring to operating systems, algorithmic transparency and issues relating to online advertising.

This approach echoes the proposal in the Furman Report[120] that platforms with 'strategic market status' that perform a gatekeeper role should be subject to a **code of conduct**. The details of the code were to be developed, but were expected to include obligations to ensure users could obtain both access to the platform and prominence, rankings and reviews on the platform on a 'fair, consistent and transparent' basis, and prohibitions on restrictions or penalties for using other channels to market. Specific provisions may be required for particular markets or for a sub-set of platforms. The CMA has taken up this proposal in its final report into digital advertising markets[121] with **principles of 'fair trading' intended to address exploitative abuses, 'open choices' to prevent exclusion (including requiring interoperability of core services), and 'trust and transparency'**. The CMA envisage that a regulator would enforce the code, with powers to issue interim measures in cases of suspected non-compliance and the power to appoint a monitoring trustee to oversee subsequent compliance if a breach has been found.

The **advantages of this approach** are considered to be several-fold: first, the rules that are envisaged would provide firms with **greater predictability** than is available under competition law (particularly in relation to matters on which there is little or no precedent) and may also prohibit practices which might otherwise be legal, absent the code. Participants may wish to discuss whether it is in fact possible to develop rules which would be both sufficiently broad to encompass the diversity of digital platforms whilst at the same time providing the predictability for market participants that is sought.

Second, it is argued that a regulatory body would be expected to **act much more quickly** to remedy breaches of the code than would be possible under existing competition law arrangements. This may include co-operative outcomes rather than requiring formal decisions. Again participants wish to consider how much weight to give to such claims. Enforcing principles rather than detailed rules is

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[117] 'Commission imposes interim measures on Broadcom in YV and modem chipset markets', https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109
[118] 'Brussels seeks stronger interim measures powers', available at https://eaccny.com/news/member-news/brussels-seeks-stronger-interim-measures-competition-powers/. The Furman Report makes a similar proposal, para 3.127
[119] Inception paper, p.4
[120] Furman report, paras 2.34-
[121] para 6.37-

still likely to give rise to arguments as to interpretation and application in a particular set of circumstances.

Third, it is envisaged that application of the Code would be **less concerned with establishing culpability or imposing fines**, and more concerned with ensuring pro-competitive conduct. The relationship between regulator and regulated firm would be more of an **ongoing dialogue,** with guidelines which would adapt to changes over time and perhaps the **trialling** of different actions or measures to assess their effectiveness before they were implemented.

The second approach – **option 3b** – is said to be 'inspired' by the existing regulatory regime for telecommunications services. The key difference between this approach and the first is that **remedies would be tailored to the competition concerns that had been identified in a particular market or in relation to a particular gatekeeper platform**, rather than being applied indiscriminately to all platforms performing a gatekeeper role. Such a regime, if modelled on telecommunications, would represent a **hybrid between the approach adopted by competition authorities, in which every case may involve a different set of remedies and the parties themselves may be left to decide which to adopt, and a code of conduct approach under which all designated firms are subject to the same prohibitions or requirements**.

In the telecommunications regime, national regulatory bodies are given a menu of remedies from which they can choose but the choice is limited in various ways. First, the menu of remedies available is itself defined in legislation to ensure consistency of approach across the European Union and fulfil harmonisation objectives. A complex set of institutional arrangements (which will be considered in the last seminar in this series) have been introduced to ensure that the remedy selected by the national regulatory body is subject to review by the Commission and by peers before it is implemented. The menu has been subject to periodic revision (and extension) when the legislative framework has been reviewed, and currently includes transparency and disclosure, accounting separation and non-discrimination obligations to address concerns about exclusionary conduct, obligations to provide access to a wide range of inputs, price control and cost accounting measures to address concerns about exploitative (or exclusionary, if wholesale inputs) conduct, and the 'functional' separation of activities. The framework does not accord telecommunications regulator powers to require the divestiture of assets or businesses.

Second, the remedies are conceived as a hierarchy, whereby regulators are required to prioritise interventions in upstream markets before they can consider the application of remedies downstream[122]. Third, and an important new feature of the latest revisions to the telecommunications regulatory regime in Europe, any consideration of remedies by the regulator has to take into account any commercial arrangements which may either be in place or in contemplation and provision is made for a commitment procedure in which firms can propose undertakings in lieu which a regulator will then market test[123]. This provides an opportunity for firms to offer commitments during the regulatory proceeding in a similar manner to parties in competition or merger proceedings, although its application remains largely untested at present.

Although the menu is limited, telecommunications regulators are still required to make and to justify their choice of remedies, which can be subject to appeal. This is generally undertaken as part of the overall review of the market and designation of firms with 'significant market power', although some national regulatory bodies have on occasion undertaken the designation of firms and the selection of remedies as distinct administrative processes.

The key point is that the tailored application of remedies, even if drawn from a limited menu that has been predefined, will **require a lengthy administrative process** and potentially raise concerns about the continuation of exclusionary conduct in the meantime. There would appear to be an **unavoidable trade-off between flexibility and the capacity to tailor remedies to individual**

[122] European Electronic Communications Code, 2018/1972, Article 73(2)
[123] Article 79

circumstances on the one hand, and the speed at which remedies might be applied on the other.

It is also important to note that the Commission does **not present Options 3a and 3b as being mutually exclusive**. The CMA, as noted earlier, has proposed that a future regulatory body be given powers both to apply a Code and to implement tailored remedies to promote competition on a case by case basis. The CMA envisages that application of the Code would be done quickly to ensure compliance with its underlying principles, whereas the development and application of more intrusive 'market opening' remedies, such as obligations to share essential inputs or to interoperate with other platforms, would likely require a more onerous and time consuming set of procedures.

3 Issues arising in digital platform markets

In this section, we make some observations about the application of remedies in digital platform markets. We noted earlier that dominant digital platforms may engage in practices, such as bundling services or imposing exclusive agreements, which are no different from those employed by firms in the non-digital arena. Conventional remedies, such as simple prohibition, are likely to be as appropriate in these cases as in others but participants may wish to consider whether they would be better pursued by competition authorities or by the application of a Code (of conduct) which would be overseen and enforced by a specialist regulator[124].

Digital platforms also present new challenges for public authorities when it comes to remedies in a number of areas. Some of these relate to exclusionary abuses, such as self-preferencing or refusal to provide access to data, and others to (arguably) exploitative abuses, such the use of inappropriate choice architectures or personalised pricing. Many have been or are currently the subject of other research at CERRE. Some of these remedies are highlighted in the Commission's Inception paper, although 'demand side' concerns about personalised pricing or choice architectures are not.

3.1 Self-preferencing

Accusations of unfair self-preferencing by digital platforms have been a recurring theme in recent years. Digital platforms often compete with each other for the attention of the user and, having done so, seeks to monetise it by serving content that enables transactions. This is done by ranking, rating or otherwise presenting content in an attempt to offer a good match to the needs of the user on the one side, and to require firms to pay for to obtain a better ranking or rating on the other. **Unfair self-preferencing could arise if the digital platform competes against those firms and is able to obtain a better ranking or rating by virtue of its affiliation, rather than on merit**. Such practices are likely to harm consumers by excluding rival content which may better fulfil their needs. This was the basis of the *Google Shopping* case, in which Google was found by the Commission to have introduced a new general search algorithm which penalised rival comparison shopping search services but which did not impact its own Shopping service. Google has been subject to similar accusations in relation to travel services[125] and Amazon has been accused of unfairly preferring its own brand products, including in the Best Buy box, when returning results to searches[126].

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[124] We do not discuss mergers involving digital platforms with a gatekeeper role in this section, since we would expect the main remedy in cases where a significant impediment to competition were to arise would be likely to involve prohibition of the transaction. Other potential merger remedies include commitments to share data, which are discussed below. However, the focus of the debate on mergers involving gatekeeper digital platforms is in relation to the thresholds for and evidential approach to the merger review, not to the remedies.

[125] 'Google under fire for allegedly promoting own travel service over others', available at https://www.pymnts.com/antitrust/2020/google-under-fire-allegedly-promoting-own-travel-service-over-others/

[126] The Capitol Forum (2016), 'Amazon: By Prioritizing its Own Fashion Label Brands in Product Placement on its Increasingly Dominant Platform, Amazon Risks Antitrust Enforcement by a Trump Administration', available at (2018) https://thecapitolforum.com/wp-content/uploads/2016/07/Amazon-2016.12.13.pdf ; and Creswell, 'How Amazon steers shoppers to its own products', New York Times, 23 June 2018.

Discriminatory conduct on the part of vertically integrated firms that provide essential inputs is not unfamiliar to either competition authorities or regulators. Much of the recent history of telecommunications regulation has been concerned with efforts on the part of the Commission and national regulatory bodies to police and prohibit discriminatory conduct as to both price and quality by firms, but there are good reasons to expect that remedying unfair self-preferencing by digital platforms will prove to be at least, and likely, even more challenging.

One effective remedy would involve removing the incentive to self-preference by **requiring the divestiture of the affiliated business and prohibiting further participation by the gatekeeper platform**. Full structural separation is not available to telecommunications regulators and Executive Vice President Vestager has repeatedly referred to it as being a 'last resort'[127]. The Commission's current proposal for an ex ante regulatory regime would appear consistent with the assumption that other approaches are to be pursued in the meantime. It is worth noting, however, that in at least one case the application of the British equivalent of the New Competition Tool did result in the break-up of the British Airports Authority[128] and we note that Option 3 of the NCT is presented in the Inception Impact Assessment as allowing the Commission to impose 'where appropriate, structural remedies'.

In the absence of a structural remedy of this kind, a public authority will be left with the task of determining whether the rankings and ratings that are served up by a digital platform reflect the results of competition on the merits and the best match to the users' enquiry, or whether they represent the exercise of 'biased intermediation' by the platform. The key point, discussed at greater length in a CERRE report[129], is that the preferencing or ranking of content in this way will often be an intrinsic function of the platform, without which it could not serve its core purpose of matching users to the content or services they seek. Generic rules or codes that prohibit 'discrimination', as might be applied by regulators in other circumstances, are of little utility when it comes to digital platforms that perform such intermediation functions. Instead, public authorities must seek **remedies which allow preferencing in order to produce 'good' matches on the platform but which prohibit 'bias'**. Since the distinction between the two may be very subtle, and arise from the cumulative effect of incremental changes to very complex algorithms, the task of detection can itself be very difficult (as regards the *Google Shopping* case, the impact of the introduction of the Panda algorithm during 2011 appears clear in retrospect[130], but it is less clear whether or how a regulator could have detected it at the time). Remedying such concerns is likely to involve changes to the algorithms, the consequences of which for competition will be difficult for any public authority to predict. It is unlikely to be possible to restore the market to the position that obtained prior to the abuse since the relative quality of content or services – and hence their predicted ranking - is also likely to have changed in the meantime. An intense, but potentially prolonged, period of interaction between the public authority and the digital platform is likely to be required in order for the former to satisfy itself that concerns about unfair self-preferencing have been adequately remedied. This might involve the **use of experiments to assess the impact of proposed changes on the results obtained by users**. Such tasks may be much better undertaken by a regulatory body, or by an appointed independent technical expert, than by a competition authority.

3.2 Data sharing

The other set of remedies commonly associated with digital platforms and explicitly referred to by the Commission in its proposals for an ex ante regulatory body, relate to obligations to share data which the digital platform has acquired. This is viewed as a remedy to concerns that digital platforms performing a gatekeeper role may have acquired an unassailable position within their core market by virtue of the scale and scope of the data which they hold, given network and feedback effects,

[127] 'Breaking up tech giants ins last resort, Vestager tells MEPs', available at https://euobserver.com/economic/146208
[128] Competition Commission (2009), 'BAA airports market investigation'. A market study with a view to structural separation was also allegedly threatened in negotiations between the UK telecoms regulator and BT which led to the 'legal separation' of its network and retail businesses.
[129] CERRE (2019), op cit
[130] *Google Shopping,* para 361-

and that they may also come to leverage that data into other markets and so dominate them. A significant body of literature has developed on 'data related' theories of harm in platform markets, to which a forthcoming report by CERRE will further contribute.[131]

The authors of the Furman Report were strong advocates of data sharing remedies to 'open up' competition in digital markets. They found it helpful to distinguish between 'personal data mobility', which would involve the ongoing transfer of data about a specific individual from one platform to another with that users' consent (as occurs with Open Banking), and 'data openness', which refers to the bulk transfer of non-personal data between entities[132]. The Commission's own advisers on digital competition also devoted considerable attention to data sharing remedies, distinguishing between (individual) data portability (which unlike Furman's mobility would not be continuous), protocol interoperability (which allows complementary services to interwork with the core services of the platform, as in the *Microsoft* case referred to earlier), data interoperability (involving the continuous transfer of data, but on an individual rather than bulk basis) and 'full protocol interoperability' (involving full interworking between platforms that are substitutes to each other, such as two messaging systems)[133]. Other topologies can also be proposed, but seminar participants may find it useful to distinguish between two broad categories of data sharing:

1. Data sharing remedies which are intended to address switching costs which a user otherwise faces in seeking to replicate data that has been accumulated by one platform when switching to another. Such remedies would generally involve the **transfer of data about a specific individual user at their request** and for their benefit,

Data sharing remedies which are intended to address leveraging concerns from one market to another (whether in a vertical relationship or otherwise). These remedies would generally involve the **bulk transfer of large volumes of data at the request of another firm** for the benefit of users in general.

Data sharing remedies have been adopted in only a small number of national competition cases to date, generally involving the sharing of customer lists to enable rivals to promote new services[134]. However, data sharing has also been a feature of the **remedies emerging from market investigations** conducted by the British competition authority (CMA), applying the equivalent of the 'new competition tool' being proposed by the Commission. This was most notable in the *Retail Banking* review, where the CMA established a new entity (the Open Banking Implementation Entity) to oversee the implementation of arrangements which required the nine largest UK retail banks to share current account information with third parties via approved APIs[135]. In the *Energy* review, the CMA required firms to disclose to the energy regulator details of all customers who had remained on a standard tariff for three or more years, with such information then being made available to rivals[136]. In both cases, ongoing oversight of these arrangements was undertaken by a regulatory body and not by the CMA. The CMA's latest Digital Advertising report also includes data sharing proposals in relation to Google search query data.

Data sharing has also been required by European law in some sectors, including the sharing of vehicle data with independent garages[137] and the sharing of smart meter data in the electricity

[131] REF
[132] Furman Report para 2.51-2.93
[133] Cremer et al (2019), *Competition Policy in the digital era*, p.84-5
[134] The cases involved a French energy company and the Belgian lottery, see XXX
[135] CMA (2016), *Retail banking market investigation*
[136] CMA (2016), *Energy Market investigation, Summary of AECs and remedies,* Para 20.24 (c)-(d)
[137] Regulation 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, OJ [2018] L 151/1, arts.61-66.

and gas sectors.[138] Telecommunications operators are required to share customer data with third parties for the purposes of providing telephone directory services[139].

It will be apparent from this that 'data sharing' describes a **large number of different potential interventions and requirements, each of which may be relevant to a particular set of circumstances** and a particular theory of harm. Such remedies may therefore be particularly suited to the Commission's proposal that an ex ante regulator adopted tailored remedies on a case by case basis. Recent research by CERRE has led us to the view that competition authorities, whilst being able to tailor remedies to the theory of harm, may adopt an overly restrictive view of data as an 'essential input' when a more expansive approach may be required if the aim is to ensure that a gatekeeper platform cannot leverage its data and envelope new markets[140].

Importantly, any European public authority will find their capacity to implement data sharing remedies **constrained by the requirements of the General Data Protection Regulation (GDPR)**.[141] The Regulation includes provisions, at Article 20, which allow individuals to require that personal data (being data which has been 'volunteered' by them to the platform and data which the platform has 'observed' through their interactions with the platform) be ported to another platform, without intermediation by the user themselves provided this is 'technically feasible'. This obligation applies to all firms, and not simply to digital platform or to platforms performing a gatekeeper role and is unlikely to address the competition concerns which the Commission's latest proposals are intended to address (although it may reduce switching costs for individual users). More expansive forms of data sharing, such as the sharing of large aggregated data sets containing personal data, may be inhibited by requirements under the Regulation to obtain individual user consents. Changes to the GDPR may be required to enable other approaches, such as the bulk transfer of personal data with users being allowed to 'opt out' rather than 'opt in', reflecting a tension between the European Union's objectives of preserving privacy on the one hand and promoting competition on the other. Other arrangements, such as requiring that access be given to data sets that remain under the control of the gatekeeper, perhaps via intermediaries or 'sandboxes', could also be considered.

Data sharing remedies – whether for the sharing of an individual's data under Furman's 'personal mobility' concept or the bulk transfer of large data sets such as Google's search query data, as suggested by the CMA - are all **likely to raise a significant number of issues**. For example, having determined that a particular gatekeeper platform is obliged to share data, the public authority must determine who can obtain access to the data and under what conditions. In view of the risks to privacy and other potential harms that might arise from the mismanagement of data, it is likely that potential recipients will themselves need to be subject to some form of supervisory regime to ensure that the integrity of the system and trust in the regime is retained. **Personal Information Management Systems** and other intermediaries which allow individual users to better control (and potentially monetise) their personal data may play an important role in future, but may need to be promoted and supported in order to do so, for example through the development of common technical standards which regulators may be required to develop or to oversee.

Demand for data is also likely to be very heterogeneous, in comparison to other assets which are shared under regulatory arrangements. The type, volume and other characteristics of the data will need to be specified, and common technical standards will be required to enable its transfer and manipulation. Many proposals for data sharing assume that sharing would be undertaken on a 'no charge' basis. There may be a case for this if sharing involves personal data on a user by user basis, but the bulk sharing of aggregated data for which acquisition the gatekeeper platform has made significant investments would seem likely to require the setting of charges in order to retain

[138] Directive 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity [2019] OJ L 158/125, art.23.
[139] EECC, art.112(1).
[140] Note, however, that Cremer et al consider that data sharing can be required under competition law to enable competition in either the core market or a complementary market, p.106
[141] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation), OJ [2016] L 199/1

appropriate incentives to invest and innovate. It is not clear requiring charges to be set on a 'FRAND basis' will provide sufficient clarity, given the history of the application of that concept in other fields such as essential patents. On the other hand, it is not clear to us that there currently exists a well-developed methodology for establishing charges for data sharing arrangements[142].That being so, it could represent a significant challenge to the implementation of such arrangements.

If data sharing proves challenging to implement, an alternative remedy may involve **restrictions on the internal sharing of data** by large platforms and the creation of **data silos**. This was the remedy adopted by the Bundeskartellamt in the Facebook case referred to earlier. That case concerned exploitative rather than exclusionary abuse but others have argued that data silos may be required to prevent large digital platforms leveraging data acquired from users in one market to another[143]. This might be the case, for example, if data protection regulation were to prevent the effective sharing of data with third parties, but to allow a large digital platform to do so amongst its own constituent businesses (an outcome which sometimes presented as being an unintended consequence of the GDPR). Given the potential economies of scope which large platforms might generate from using data for multiple purposes, such 'lines of business' restrictions might be considered to be remedies of last resort in the event that data sharing remedies prove to be incapable of being implemented effectively. Participants may wish to consider the relative merits of 'data sharing' and 'data silos'.

3.3 Interoperability

'Interoperability' can also refer to a number of different arrangements. For example, APIs may **enable complementary services** that have been developed by third parties to interwork with the core functions of the gatekeeper platform – what the Commission's advisers refer to as 'protocol interoperability'. Many digital platforms voluntarily expose some functionality in this way in order to support complementary innovation, as when mobile operating systems Android and Apple provide software developer kits and interfaces to support the creation of new applications. However, the gatekeeper platform may withdraw interoperability, or may alter the commercial or other terms on which it is granted. Such a case arose in the United States, where PeopleBrowsr analysed Twitter data to sell information about customer reactions to products or about Twitter influencers in certain communities. Twitter then decided that its data would no longer be accessible directly but should be purchased from certified data resellers. Following a complaint from PeopleBrowsr, a Californian Court ordered, with interim measures, that Twitter should continue to provide its data directly, although the parties subsequently settled the case.[144] Dominant firms may also refuse to provide interfaces to rivals or enable interoperability with their core services whilst at the same time ensuring interoperability between their own products, in a technical form of bundling or tying. We noted earlier, for example, that Microsoft was required by the European Commission to expose APIs so that third party work servers could interoperate with Windows. Although such remedies may not raise some of the issues associated with data sharing (for example, concerns about privacy and the constraints of the GDPR may not arise), they are likely to involve complex technical questions about the precise functionality to be exposed, how changes will be managed, security and other risks, and the terms under which access may be provided.

Another form of interoperability, and a long-standing feature of the telecommunications regulatory regime, involves the **interworking between platforms that are substitutes to each other**, or what the Commission's advisers refer to as 'full protocol interoperability'. A remedy of this kind might be considered appropriate in markets that exhibited strong direct network effects and in which users tended to subscribe to a single platform rather than multi-home, leading to concerns about 'tipping'. Social media and messaging markets are sometimes thought to have these characteristics, although

[142] We note , for example, that the CMA's recent proposals on the sharing of Google's search query data leave the issue of pricing as a matter for a future regulator to address, CMA (2020), para 8.43
[143] Condorelli, Daniele and Padilla, Jorge, Data-Driven Predatory Entry with Privacy-Policy Tying (May 13, 2020). Available at SSRN: https://ssrn.com/abstract=3600725
[144] http://blog.peoplebrowsr.com/2012/11/peoplebrowsr-wins-temporary-restraining-order-compelling-twitter-to-provide-firehose-access/

there is also evidence of multi-homing[145]. Again, the recent CMA report on Digital Advertising proposes what might be described as 'partial interoperability' under which Facebook would be required to allow access to certain functions, such as allowing users on rival platforms to invite their Facebook contacts to join them on the other platform or allowing users to post content to multiple platforms from Facebook (and vice versa). We understand that Facebook enables or has in the past enabled such functionality, which may suggest that incentives for platforms to interoperate can be quite dynamic and that ongoing regulatory engagement, rather than one-off intervention by a competition authority, may be more appropriate.

In 2018, provisions were introduced into the European Electronic Communications Code[146] which enable the European Commission to adopt implementing measures to require interoperability between 'interpersonal communications' or messaging services provided it has found an 'appreciable threat' to 'end to end connectivity' in at least three Member States. We interpret this as addressing a concern that the migration of users from conventional (interoperable) voice telephony services to (non-interoperable) messaging services such as WhatsApp might lead to a loss of interconnectivity in Europe. The remedy in the EECC does not, therefore, appear primarily intended to address concerns about competition between messaging platforms, although it may have this effect. It has yet to apply. The Inception report accompanying the latest Commission proposals for ex ante regulation make no reference to these provisions. The institutional arrangements for applying remedies are to be discussed in the fourth seminar in this series.

3.4 Exploitative conduct remedies

Digital platforms may also create new opportunities for different forms of exploitative conduct which would need to be remedied, some of which may be appropriate for consideration on the kind of Code envisaged by the Commission in Option 3a, other of which may require more tailored interventions.

One such concern is that large digital platforms may be well placed to engage in **personalised price discrimination**, as a result of which they would capture most or the entire economic surplus created by a transaction, rather than it being divided more equitably between consumers and producers. These concerns are long-standing (Amazon was accused of conducting trials in 2000[147]) but have not received much attention from competition authorities to date, perhaps because what research there is has tended to suggest that the practice is not currently widespread[148]. Popular attitudes to price discrimination are also complex: some forms are regarded as socially acceptable, but others not. Some regulators, including the Financial Conduct Authority and utilities regulators in the UK have been increasingly engaged with the consequences of price discrimination, particularly as it relates to outcomes for 'vulnerable customers'[149]. But these kinds of concerns have yet to extend to digital markets, so far as we are aware. Designing remedies which address concerns about price discrimination is likely to prove challenging when the welfare consequences of the conduct itself (personalised pricing can mean lower prices for some consumers as well as higher prices for others) are often ambiguous.

Another form of exploitative conduct highlighted by the CMA in its recent Digital Advertising Report concerns the use of **defaults and 'nudges'** to guide users into making decisions which may not in fact be in their best interests. In the context of the CMA study, this may involve the disclosure of more personal data than the user might otherwise wish, but it could involve the purchasing of products which do not best meet their needs or budget. The use of different 'choice architectures' to guide consumers is not restricted to large digital platforms, but their capacity to analyse user

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[145] See CMA Digital Market Interim Report, p. 94 for evidence of 'cross visiting' between social media sites,
[146] EECC, Art 61(2) (c)
[147] https://www.computerworld.com/article/2588337/amazon-apologizes-for-price-testing-program-that-angered-customers.html. See also Ezrachi and Stucke, *Virtual Competition: the promise perils of the algorthim-driven economy,* 2016; M. Bourreau and A. de Streel (2018), The regulation of personalised pricing in the digital era, Note for the OECD, DAF/COMP/WD(2018)150.
[148] UK authorities have undertaken various studies and the European Commission undertook a study in 2018, see 'Consumer market study on online market segmentation through personalised pricing/offers in the European Union', June 2018
[149] See FCA 'Price discrimination in financial services' at https://www.fca.org.uk/publication/research/price_discrimination_in_financial_services.pdf

interactions with the platform at scale allow them to undertake trials and continuously test the impact of small changes to user interfaces on consumer behaviour. This is another area (along with remedies for self-preferencing) where the specification of remedies is likely to require an ongoing period of interaction between a specialist regulator and the platform, including the use of experiments and trials.

DISCUSSION SUMMARY | Remedies

The purpose of this section is to list the questions and discussion points that arose from the overview presented in the Issue Paper on 'the remedies' and the exclusive workshop organised in July 2020. The non-attributable summary of the discussion was prepared by Claire-Marie Healy, project manager at CERRE.

Types of remedies
Have competition law remedies been effective in prohibiting abuses in European digital platform markets to date? If not, why not? Are Commission's fining powers adequate in relation to digital platform markets? If not, how should they change?
RESPONSES The mission of rules is actually to prohibit abuses. Remedies are just one of the means available to resolve abuses identified in the past in order to bring markets to a competitive state. The question that remains open is whether remedies used in the past to address competition issues in relation to digital platform markets (such as in the cases against Google, Expedia, Booking.com, Microsoft) have succeeded in creating a more competitive state or avoiding future anti-competitive conducts. One way to respond to this question would be to carry out a systematic research of all the interventions that took place in the digital platform markets in the last 10-15 years for instance, looking at 1) what did the authority try to address; and 2) did the remedies achieve the intended objective five years later? In the assumption that certain remedies did not lead to specific objectives and that change is required, another question arises of whether other remedies (structural remedies, behavioural remedies, fines) would have achieved better outcomes in the first place such as promoting innovation, privacy, equality, and more integration of the European Single Digital Market.
Which are the most effective remedies in the digital sector? Behavioural, structural, fines, restorative?
RESPONSES In general, five approaches for remedies are acknowledged: 1) structural separation that eliminates the common ownership incentives, and eliminates the incentives to engage in anti-competitive conduct in the first place; 2) functional separation within a company which maintains separate division of the businesses but no physical separation; 3) behavioural restriction, which relates to the future behaviour of the merged entity and tends to be applied in most of the cases so far; 4) procedural remedies within a company, which includes record keeping, document retention, board oversight requirements and incentives for individual executives, and which seem to be more effective than corporate fines; 5) substitutionary remedies including monetary fines, damages, restitutions or disgorgement.

Regarding monetary fines, the more personalised regime (already practiced in the finance industry), where companies decide to hit on executives' bonuses in response to an anti-trust fine, could be explored for online platforms with large margins where corporate fines might be less effective.

When looking back at the remedies imposed by the EU on Microsoft which required Microsoft to sell a version of Windows without Windows Media Player ("Windows-N") and to publish and license interoperability information, the remedies seem to have had no noticeable effect on the company or the marketplace. Indeed, Windows-N was a commercial failure, and there has been only limited cross-platform server entry as the emergence of new powerful competitors did not materialise.

What seems to have had an impact is the clear identification of the competition law problem that the antitrust remedy is attempting to address, the speed with which the issues and future conducts are addressed, and the setting of a precedent on what a company or market can and cannot do that the court decision established for the EU executive in ongoing and future anti-trust cases.

Are remedies likely to vary by Member State?

RESPONSES

Future market intervention must be grounded in clear, consistent governance that avoids fragmentation across member states. Unified remedies decided at EU level would be welcome and would provide more consistency for consumers and companies. The proposed ex ante instrument will require either an EU-wide regulator or a tightly coordinated approach across member states. For remedies, such as interoperability, that involve common agreements on standards and specification, however, setting up a global remedy would be preferable.

Remedy design and monitoring

Given the characteristics of the digital sector, is it better that the Digital Services Act prohibits a series of blacklisted conducts (option 3a) or provides for tailored-made remedies (option 3b)? Or should it do both?

RESPONSES

Blacklisted or principle-based prohibition conducts can take many forms (including general or specific issues) and should include robust and targeted definitions for platforms to distinguish the different forbidden practices. Given the very drastic nature of prohibiting commercial conduct, careful thought will need to be given to what practices merit prohibition.

For very specific cases, tailored made remedies would be more practical but will require time and resources to develop, which might hinder the development of innovation and competition. New means will also be required and developed to accelerate the resolution process.

Overall, a more flexible combination of Option 3a in parallel to Option 3b might be preferable to efficiently tackle the structural competition problems raised by large digital platforms and to impose tailor-made remedies where necessary and justified.

Another option would be to look at the market failures and the regulatory failures to allow adaptation and learning of regulatory bodies when dealing with the digital economy.

Can a Code of Conduct for gatekeeper digital platforms be specified with sufficient precision to be effective? How should this be done?

Should the content of Codes be platform-specific, be the same for all gatekeeper platforms, the same for all platforms, or a combination. Which parts?

RESPONSES

An enforceable code of conduct could be established to govern the behaviour of those large gatekeeper platforms whose conduct raises the most significant competition concerns.

Given the complex and rapidly changing nature of the markets, a CMA report recommends that the code of conduct would take the form of high-level principles rather than detailed and prescriptive rules which might fail to anticipate new market developments. The three high-level objectives are fair trading, open choices, trust and transparency, with principles within each objective providing specificity as to the behaviour required by the code. Each gatekeeper platform would then have its own tailored code.

Can competition concerns in digital platform markets, excluding mergers, be effectively addressed if the parties themselves are left to specify the remedy? How should this process work?

RESPONSES

Companies should be involved in the process and the discussion of the design and implementation of the remedy to facilitate its rapid and smooth implementation.

Should an ex ante regulatory regime allow parties to offer commitments in lieu of remedies?

RESPONSES

One of the recommendations of the Furman report suggests the notion of "participative regulation", where the industry proposes possible regulations and the regulatory bodies/authorities issue opinions. Some questions remain, however, on the practical implementation of this notion (who gets to participate, and how?) and how efficient this will be to manage markets. A more regular open discussion amongst regulators and companies might be useful to exchange guidance and ideas, and such discussions are happening in most cases already between regulators and companies, especially when discussing longer-term innovations, such as infrastructure developments. Such a participative approach might, however, not be necessary for all types of platforms depending on their products and services.

Following past experiences in the finance sector with some aspects of the participative model, there is a risk of regulatory capture that could emerge when regulators and companies spend too much time together, eliminating the adversarial process and limiting discussion with other stakeholders such as consumers and other competitors. A combination of both participative and adversarial models provides a more balanced approach for regulatory bodies or authorities.

Specific remedies in the digital economy
How should uncompetitive self-preferencing be policed and remedied?
RESPONSES Self-preferencing has been at the centre of several cases in the digital markets and is fundamental to the way gatekeepers maintain their position or exclude certain players or products. As stressed by the Platform Observatory in their preliminary findings released in July 2020, evidence of self-preferencing by a dominant vertically integrated platform is difficult to identify for authorities. The number of ongoing leveraging/self-preferencing investigations and the B2P Regulation that is entering into force across the EU mid-July 2020 should hopefully bring more information from incumbents that demonstrates the pro-competitiveness of their actions.
How would charges for access to data be determined? Are data silos a last resort?
RESPONSES Data silos are seen as a less efficient remedy, especially as a lot of the power of data comes from combining different data together. Data silos would therefore most likely limit the ability to innovate. Instead, 'data access' or 'data sharing' remedies could resolve potential data bottlenecks and barriers to entry created by data. These sets of remedies are also generally more desirable from an efficiency point of view, because they are aimed at increasing the efficiency of third-parties, rather than limiting the efficiency of the incumbent. There are, however, also caveats and limits to data sharing as a remedy in a competition context. Trade-offs occur particularly due to privacy concerns and conflict of laws with regard to privacy regulation. Economic trade-offs also occur, because data sharing can not only increase the potential to create value (through re-purposing and innovation), but also diminish the incentives to collect data in the first place, which would then deprive the potential for value creation from data. There is, hence, a broad consensus on the fact that data access and data sharing remedies in the digital economy, if they are pursued at all, should focus on raw user input data (volunteered and observed data). Moreover, only data that was created as a by-product of consumers' usage of a dominant service should be within the scope of mandated data sharing (e.g., search queries or location data); but not (volunteered) user data that represents the essence of the service itself (e.g., posts on a social media site). It is not obvious what the pricing of data should be and there is also some concerns around the liability issues for data sharing. Regarding data that has been acquired through anti-competitive means, such data might have to be considered free. If such data is acquired through an acceptable conduct, a price might then have to be defined by authorities. However, in practice, such data might not be relevant anymore to the competitors after the resolution of the case.

Is personalised pricing a concern?

RESPONSES

While some degree of personalised pricing is quite commonplace, personalised pricing does not seem to be a major concern for consumers or regulators. Also, the ability to price discriminate would increase the competitiveness of the market and might not be a good strategy for platforms to follow in the first place.

Regulatory authorities are mainly concerned about the risk of personalised pricing when higher prices are given for some customers, particularly if in vulnerable circumstances. These include the vulnerability of those whose circumstances appear to put them in need of special protection, the needs of people with disabilities, the needs of the elderly and the needs of those on low incomes.

Should regulators be involved in designing the choice architecture?

RESPONSES

Designing the choice architecture would involve thinking carefully about how consumers really behave.

The 'fairness by design' remedy could be a conceivable participatory approach for designing the choice architecture, involving both platform and regulator in the development, testing and monitoring of compliance. Such participatory remedies usually involve a trade-off for companies but they can also lead to more certainty and be potentially beneficial to companies and consumers.

Although a large amount of academic literature on fairness already exists, the concept of fairness under EU Law remains an ill-defined and would require more precisions.

A clear framework on how such a participatory approach work would also need to be defined to ensure a good dialogue between regulators and companies.

ISSUE PAPER + DISCUSSION SUMMARY

INSTITUTIONAL CONSIDERATIONS

GIORGIO MONTI

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ISSUE PAPER | Institutional considerations

1 Introduction

In its 2020 Digital Strategy Communication of February,[150] the Commission announced that the proposal of the **Digital Services Act package** would include one pillar aiming at achieving a fair and competitive economy through economic regulation. This pillar has now become known as the **Digital Markets Act** (DMA). In their Inception Impact Assessment of June 2020, the Commission services indicated that they were considering the following **three policy options**:

1. Revise the horizontal framework set in the Platform-to-Business Regulation;

2. Adopt a horizontal framework empowering regulators to collect information from large online platforms acting as gatekeepers;

3. Adopt a new and flexible *ex ante* regulatory framework for large online platforms acting as gatekeepers. This option is divided into the following sub-options:

    3a. Prohibition or restriction of certain unfair trading practices ("*blacklisted*" practices);

    3b. Adoption of tailor-made remedies addressed on a case-by-case basis where necessary and justified.[151]

The challenge in discussing institutional design is the vagueness of the proposal at this stage. For the purposes of this discussion we assume that the new ex ante Regulation will have the following features (it is not clear if all this will be presented so this outline is more for the purposes of facilitating discussion):

1. Objectives, which include stimulating innovation and competition as well as promoting fairness in P2B transactions (in other words, a list that includes competition and non-competition considerations).
2. Criteria to identify platforms with bottleneck power and the determination of which platforms hold such market power.
3. A list of prohibited conduct applicable to all such platforms and/or a case-by-case assessment of what forms of conduct should be prescribed.
4. Provisions affording the platform the opportunity to justify conduct which is prohibited.
5. Provisions imposing penalties for undertakings who infringe the Regulation and providing for remedies to implement the proscriptive obligations.

Assuming the proposed ex ante regulation has these attributes, then from a regulatory design perspective the questions are the following: (i) who should determine which platforms hold bottleneck power? (ii) who decides whether to carry out a case-by-case analysis and who is tasked with that analysis? (iii) who assesses the justifications proffered by platforms? (iv) who is in charge of imposing remedies and ensuring compliance and how are these tasks best discharged?

Taking this framework as a guide, this paper is structured as follows: After this introduction, Section 2 explains the institutional architecture found in the current Platform to Business Regulation and considers whether this would be sufficient if the proposed ex ante regulation being considered is implemented. As we show, the existing Regulation does not require the establishment of a regulatory authority. Section 3 considers the options available for the establishment of a regulatory authority,

[150] Communication from the Commission of 19 February 2020, Shaping Europe's digital future, COM(2020) 67.
[151] Inception Impact Assessment on Digital Services Act package: *Ex ante* regulatory instrument for large online platforms with significant network effects acting as gate-keepers , available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers

which appear necessary in light of the possible remedies which were discussed in the second issues paper. We consider different models found in other spheres of regulation in the EU. Section 4 discusses the relationship between EU competition law and the proposed ex ante regulation.

2 Enforcement of the P2B Regulation

In terms of enforcement, the current P2B Regulation provides a wide range of methods to secure compliance, but it does not require the establishment of a dedicated regulator.

Online intermediation service providers shall provide an internal system for handling complaints, and it is expected that the majority of cases are resolved with this procedure.[152] Failing this, the terms and conditions should specify a mediation procedure.[153] Enforcement may also be by representative organizations or public bodies which may take action in national courts.[154] More softly, the Regulation encourages the development of codes of conduct.[155]

In addition, the Regulation requires amendments or additions to national laws. Member States shall 'lay down the rules setting out the measures applicable to infringements of this Regulation and shall ensure that they are implemented.'[156] However, it seems that the obligation will vary across Member States: there is no expectation that new enforcement bodies are established, nor that states are required to provide for public enforcement and fines.[157] Some Member States may opt for public enforcement, but it suffices that courts are empowered to impose 'effective, proportionate and dissuasive' remedies.[158]

One of the longstanding enforcement problems in B2B relations is that the two contracting parties are often reluctant to use formal rules to enforce contracts.[159] In some instances businesses prefer informal methods to solve disputes to keep good relations between each other, while in others one of the two sides might have a weaker bargaining position and be concerned of reprisals if it complains. This has been observed in other contexts (e.g. farmers – supermarkets) and the Commission also notes that in the P2B context a large number of businesses are probably afraid of retaliation if they complain.[160] If this is so then reliance on internal procedures may be overly optimistic. In the Impact Assessment, it seems that the Commission favours monitoring over enforcement and here it remains to be seen if co-regulation works absent the risk of sanction but with the fairly explicit possibility that the results of co-regulation may inform subsequent legislative action by the Commission.[161] In other words, already at the time of preparing the current legislative initiative the Commission appeared to view it as a first step towards a more intrusive framework. It is of course puzzling that discussion about an upgraded ex ante regulation should take place before any experience has been obtained: the current Regulation began to apply only on 12 July 2020.[162]

If the legislator opts for option 3a (i.e. the prohibition or restriction of certain unfair trading practices ("blacklisted" practices)), then the above regulatory framework may suffice. Arguments in favour of relying on private enforcement are that the platforms are best placed to internalise the blacklist and adjust their commercial practices to secure compliance, while their clients are in the best position to see if there is non-compliance. Private law remedies would serve to deter such conduct (by the award of damages) and would also facilitate compliance (by the issuance of injunctive relief). In

[152] Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57, Article 11, recital 37
[153] Articles 12 and 13
[154] Article 14
[155] Article 17
[156] Article 15
[157] Recital 46
[158] Article 15(2).
[159] See CEPS (2014), *Legal framework covering business-to-business unfair trading practices in the retail supply chain*, Study for the European Commission
[160] Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, SWD(2018) 138 final (PART ½) p.26.
[161] Impact Assessment Annexes SWD(2018) 138 final, PART 2/2 page 21
[162] Article 19

many spheres of EU Law, enforcement is left to private actors who serve as private attorneys-general. The success of private enforcement depends on national private law procedures on access to justice, but even in the most favourable scenario this is likely to lead to less than optimal enforcement. On the one hand, the Court of Justice of the EU has issued numerous rulings supporting private enforcement: in cases where individuals sue Member States for infringements of EU Law the Court has said that 'the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.'[163] *Courage v Crehan* replicated this approach when the rights are infringed by undertakings: 'the existence of such a right [to damages] strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.'[164] Such reasoning supports the use of private enforcement: it serves to safeguard both the subjective rights of the victim and the general interest pursued by EU Law. However, as noted earlier, plaintiffs with a long-running commercial relationship with platforms may not be keen to enforce their rights.

Moreover, leaving it to private enforcement means that the ex ante regulatory framework would have to generate criteria about the material scope of application that are at a high level of generality, such that national courts can determine this. In other words, the legislator would need to provide a definition of dominance similar to that found in antitrust and electronic communications regulation. The disadvantage of this is that national courts may differ on whether a given platform has bottleneck power. Thus, it may be preferable to institute regulators who would have greater experience and afford the EU with better capacity to coordinate enforcement, as we discuss in section 3 below.

An alternative might be that the designation of large gatekeeper platforms that are subjected to ex ante regulation is carried out by a central agency (EU or national) and that enforcement is carried out by private parties. This would reduce somewhat the risk of divergence among national courts. On the other hand, it may lead to appeals against the finding of market power which may be time-consuming and erode the effectiveness of this initiative.

Reliance on private enforcement will be insufficient if option 3b is followed: the adoption of tailor-made remedies addressed on a case-by-case basis where necessary and justified. This can only be achieved by a regulator. This should be self-evident by the menu of remedies considered in the second issues paper. The regulator may well prefer to engage in a process of co-regulation whereby the parties themselves are asked to contribute to designing the regulatory framework, but it will require a regulatory authority to approve and supervise this. It follows that some institutional innovation is required.

While private enforcement appears insufficient, it may be worth discussing to what extent the ex ante regulatory framework should include both public and private enforcement. In competition law for example, we see that many cartel decisions are the used by claimants in follow-on actions. This can serve to increase the deterrent effect, since monetary fines are unlikely to really hurt major platforms.

3 DMA: Options for public enforcement

In this section we canvass a range of options for the creation of a dedicated regulator and consider advantages and disadvantages. The options draw on what existing models of enforcement we find in other fields of EU Law. At a high level, a variety of models may be found. These are summarised in the table and discussed further below.

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[163] *Francovich and others v Italy*, Joined cases C-6/90 and C-9/90, EU:C:1991:428 para 33.
[164] *Courage v Crehan*, Case C-453/99, EU:C:2001:465 para 27.

Table 1: Multi-level institutions

	EU Competition Law	General Data Protection Regulation GDPR	EU Consumer Law	Electronic Communications
1. EU level	Commission – full powers			Commission – in part
2. Networks	European Competition Network	European Data Protection Board	Consumer Protection Cooperation network	the Body of European Regulators for Electronic Communications ('BEREC')
3. National level	National Competition Authority (NCA)	National Data protection authority (DPA)	National Consumer Protection Authority (CPA)	National Regulatory Authority (NRA)
4. Effect of decision	Commission: EU-wide NCA: national[165]	EU-wide by 'lead' authority.[166]	Cross-border if collaborative decision	national

As we show below, EU agencies with enforcement powers exist, but are limited in number. National regulatory authorities are found in many fields and networks serve different functions (some are just information networks, while some facilitate policy-making).167 It is not always clear why a particular institutional architecture is chosen.168 Some suggest that an EU agency is chosen when there is a commitment problem at national level. This clearly explains Banking Union where the concern has been that weak national supervision led to the global financial crisis. On the other hand, networks can also serve to monitor weak national regulators. National regulators may work better than EU agencies when targeting local infringements as they are closer to the actors, while EU agencies would be preferable when addressing cross-country externalities: in competition law thus the Commission addresses EU-wide infringements, national competition authorities' local infringements. However, as we show below national data protection regulators can impose EU-wide remedies. Networks may be selected when information sharing is important. These functional rationales seem to offer little help in understanding why certain choices are made. At the political level, setting up national agencies is costly for Member States; on the other hand, imposing regulation by an outside agency might not be politically palatable. Member States may therefore prefer an independent EU agency for budget issues or to signal their commitment to the aims of the regulation but a national regulator which they can control for domestic policy reasons. The EU legislator might prefer more EU-level agencies but must also be wary about constitutional challenges and the risk of over-centralisation which may make the EU an unpopular actor. Thus, it seems futile to say that the institutional architecture selected is only a function of what makes for the most effective regulatory scheme: ultimately this will be a delicate political choice. However, the focus of our discussion here is to consider which institutional framework is optimal.

[165] Very exceptionally, an NCA has issued a decision about conduct overseas.
[166] Article 56 GDPR but a number of cooperative pathways are found see Articles 60 to 62
[167] On the evolution of transnational networks generally, see A-M Slaughter, *A New World Order* (2004), showing that these are dynamic and what may start as a network with modest aims becomes a major global actor.
[168] In this paragraph we summarise the main points made by L Van Kreij, Towards a Comprehensive Framework for Understanding EU Enforcement Regimes (2019) 10 European Journal of Risk Regulation 439.

3.1 Centralised enforcement

The simplest model would be to confer all these tasks to a single, **EU-wide regulator**. This is the model based on the **EU Merger Regulation and the Single Supervisory Mechanism for banking supervision**. The Commission has exclusive competence for concentrations having an EU dimension (subject to some exceptions).[169] The European Central Bank has exclusive competence to supervise systemically significant banks.[170] There are clear Treaty legal bases for these two domains.[171] The Code of Conduct on Computerised Reservation systems also operates in this way, with the Commission auditing compliance.[172]

From a legal perspective, the logic behind these systems is the same: the EU regulator should look after market actors when their conduct may affect the EU market in a significant manner, while national regulators are better placed to supervise conduct whose effects are largely national in scope. There is a certain economic logic to this as well, as the EU-wide regulator is better placed to carry out a holistic welfare assessment for the EU as a whole than a national regulator. Procedurally, provided the dividing line between EU and state regulation is clear, the system can allocate businesses and transactions in an effective way.

This obviously requires criteria to delimit competences. An option here could be the size of the digital platform based on the undertaking's turnover in the EU (like in merger control) or on the number of unique users in the EU.

From a political perspective, however, assigning the EU exclusive competence proved controversial. It is widely acknowledged for example that the thresholds to determine whether a concentration has an EU dimension are too high and that many more mergers should be assessed by the Commission. Likewise, the criteria for determining systemically significant banks is under-inclusive. However, Member States have resisted conferring more powers to the EU.

Centralising the enforcement of the ex ante tool under discussion here raises an additional challenge: the **extent to which EU agencies other than the Commission may regulate markets directly**. The European Securities and Markets Authority (ESMA) however provides a precedent.[173] ESMA is tasked with direct supervision and enforcement against specific financial entities.[174] In particular ESMA has powers to supervise and fine credit rating agencies.[175] This suggests that the EU legislator is relatively more free to create EU-wide agencies with robust regulatory powers than some of the early case-law suggested. At the same time, this is criticised because a lack of proper procedures in the creation of agencies undermines the legitimacy – basically, agencies tend to score high on output legitimacy (it's a good idea to regulate highly complex matters via experts), but low on input legitimacy (the procedures by which agencies are created and their accountability mechanisms).[176]

The leading judgment relates to ESMA and considered the legality of Regulation 236/2012 which regulates short selling and certain aspects of credit default swaps. Article 28 of that Regulation gives the ESMA the power to intervene through legally binding acts in the financial markets of Member States if there is a 'threat to the orderly functioning and integrity of financial markets or to the

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[169] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.
[170] Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.
[171] Articles 103 and 127(6) TFEU respectively.
[172] Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems OJ L 35, 4.2.2009, p. 47 Articles 13-16
[173] See also ACER in the energy sector. Regulation 2019/942 establishing a European Union Agency for the Cooperation of Energy Regulators OJ L 158, 14.6.2019, p. 22, Article 2(c).
[174] Regulation 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L331/84.
[175] Consolidated text: Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies ELI: http://data.europa.eu/eli/reg/2009/1060/2015-06-21. some recent decisions are summarized here: https://www.esma.europa.eu/sites/default/files/library/esma20-95-1264_2019_annual_report_0.pdf
[176] M. Scholten and M. van Rijbergen, The Limits of Agencification in the European Union [2014] 15(7) German Law Journal 1223

stability of the whole or part of the financial system in the Union'.[177] The Court explained that these powers were conferred lawfully because the EU rules establishing ESMA provide for this and the circumstances by which ESMA could issue generally binding norms were set out clearly in the EU legislation, and there were a series of procedural controls requiring it to consult widely before adopting any such measure.[178] Whether this judgment is enough to allow the creation of a regulator for platform remains to be debated.

It is submitted that to avoid legal challenge, the **Commission is the best-placed institution to enforce the ex ante tool under consideration**. It may be expedient to divide the work between DG COMP and DG CONNECT as one study has suggested: this would allow for the pooling of experience within the Commission.[179]

There are a **number of arguments in favour of opting for a centralised model**.

First, a number of the platforms that have gatekeeper power are likely to operate globally, making the EU the most effective level of governance. It is not easy to see how the principle of subsidiarity could lead to a different approach.

Second, the big platforms operate broadly the same systems across all Member States (and indeed globally), due to the huge economies of scale involved in designing and operating these systems. Therefore, if different National Regulatory Authorities (NRAs) were to require different tailor-made remedies, this risks leading to a big reduction in efficiency and may be impossible to justify on the basis of proportionality - even if any one of the remedies would be cost-justified if applied across the EU.

Third, monitoring compliance is likely to be costly and may require careful large-scale data analysis or direct review of algorithm design. It is highly unlikely that individual national regulators will be well set up to do this, and even if they were it would highly duplicative to do it more than once. This seems to be reflected in the weakness of some national authorities that apply the GDPR.[180]

Finally, the largest platforms have deep pockets and securing compliance is more likely if they face a single, well-resourced regulator than multitude of small agencies who might even disagree among each other on the appropriate course of action.

3.2 Full decentralisation

At the other extreme, national regulatory agencies would be tasked to apply the Regulation to undertakings whose place of business is their Member State. Two legal instruments may be compared to explore how this might be designed.

The most basic approach is found in the **General Data Protection Regulation. Here a 'lead authority' is designated by reference to the 'main establishment' of the firm** whose conduct is under review. The lead authority is required to cooperate with other data protection authorities and its decision then affects the firm's conduct across the EU.[181] This scheme assumes that each lead authority is as capable as any other. The lead authority is expected to work in close collaboration with other authorities and to consult them before taking decisions; in some instances the European Data Protection Board may arbitrate differences of opinion.[182] Considering this at a high level, it presents a paradox: on the one hand the Member States express mutual trust in each other's Data Protection Agencies (DPAs) by allowing one of them to have exclusive competence to regulate firms

[177] Regulation 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L86/1.
[178] Case C-270/12 *United Kingdom v. European Parliament and Council*, EU:C:2014:18 and Scholten and van Rijbergen (above).
[179] P. Marsden and R. Podszun, *Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement* (Konrad-Adenauer-Stiftung e. V. 2020) ch.4.
[180] Accessnow, *Two Years Under the EU GDPR: An Implementation Progress Report* (2020).
[181] Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L119/1, Articles 56 and 62 to 65.
[182] Ibid. Articles 60 and 63-65.

situated in its territory. On the other hand, each DPA retains the right to oversee how the competent DPA proposes to resolve the issue. At the time of writing this complex framework has not yet been applied and some have criticized it for being unnecessarily complex.[183] The Commission has called for more cooperation in cross-border cases.[184] There is also one instance where one DPA has taken action in a matter which at first blush appeared to be the competence of another DPA.[185]

An alternative framework is found in EU consumer law: if there is concern about a widespread infringement that affects consumers in more than one Member State or has an EU-wide dimension (i.e. it affects two thirds of the Member States), then the competent **consumer protection authorities have an obligation to coordinate enforcement by appointing a coordinator among them to ensure coherent investigation**. The firms whose practices are under review may offer commitments that resolve the consumer law concern in all relevant jurisdictions and absent this each authority is obliged to take enforcement action in case an infringement has been found. The coordinator and the Commission play a role in ensuring that the national authorities act consistently.[186] The upshot is that a firm operating across the EU is de facto afforded a single regulator and may propose EU-wide commitments. This procedure has developed incrementally since 2007 and a number of decisions have been taken.[187] For instance Booking.com made a number of commitments to modify the information consumers see so that it complies with consumer law, for instance offering explanations on how results are ranked and if hotels pay for higher ranking, as well as clarifying the total price of the rooms.[188]

Comparing the two, we can suggest that in data protection law case allocation is based on a criterion that is easy to apply but at the time of writing lead authorities seem to be under-resourced so that they are unable to address the majority of complaints they receive, leading to under-enforcement.[189] In consumer law there is no protocol for assigning cases to any coordinator, but coordination is expected and EU-wide remedies are imposed de facto. However, this only occurs in some cases without any systematic approach. In spite of it being the one with the thinnest legal framework, the **consumer protection cooperation system is the one that has worked the best to date** if one considers the number of instances where firms have made EU-wide commitments to comply with EU consumer law.[190] The concern remains nevertheless that the largest platforms are probably regulated more effectively by a well-resourced central authority than by a national regulator with assistance from its fellow regulators.

A further consideration worth noting in this model is whether the legislation requires **minimum or maximum harmonisation**. The latter prevents stricter national laws and is preferred as a means of guaranteeing legal certainty of cross-border business as well as avoiding over-regulation. Conversely it may be that in a fast-moving market minimum harmonisation allows Member States to develop innovative regulatory tools which may then be uploaded in a revision of the EU Law.

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[183] Accessnow, Two Years Under the EU GDPR: An Implementation Progress Report (May 2020) https://www.accessnow.org/cms/assets/uploads/2020/05/Two-Years-Under-GDPR.pdf.

[184] Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation COM/2020/264 final; Staff Working Document, SWD/2020/115 final

[185] The French DPA acted against Google when the competent regulator would have been the Irish DPA. However the Conseil d'Etat affirmed the French DPA's competence to atc finding that the conduct originated in the United States and not Ireland. Case N. N° 430810, Société Google (19 July 2020). A quick summary in English is at: https://www.cnil.fr/en/council-state-confirms-sanction-imposed-google-llc.

[186] Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2017] OJ L345/1, Articles 16 to 24.

[187] https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/coordinated-actions_en; https://ec.europa.eu/internal_market/scoreboard/_docs/2019/performance_by_governance_tool/cpc_en.pdf

[188] https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6812

[189] Accessnow (above), Brave, *Europe's governments are failing the GDPR* (April 2020), https://brave.com/wp-content/uploads/2020/04/Brave-2020-DPA-Report.pdf

[190] All coordinated actions taken to date are summarized here: https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/coordinated-actions_en.

3.3 A mixed model

For the application of EU competition law, we have both centralised enforcement (by the Commission) and decentralised enforcement (by National Competition Authorities). All enforcers are required to apply the same rules (Articles 101 and 102 TFEU): NCAs apply these in parallel with national competition law but the application of national competition law may not be stricter than what is provided for under Articles 101 and 102 save for a limited set of instances: where national competition law addresses unilateral conduct which may include abuse of economic dependency or when national law pursues non-competition objectives.[191]

Such a model requires criteria to assign cases to the best-placed authority. In the so-called European Competition Network Notice the Commission suggests that when the conduct of undertakings affects three or more Member States, then the Commission is likely to be the best-placed authority to assess the conduct in question. For cases with less extensive cross-border effects authorities are best-placed depending on the territory where the agreement is implemented, an NCA's capacity to remedy the infringement and the NCA's capacity to gather evidence.[192] A cartel of widgets by Italian manufacturers where they sell locally and export to France is best addressed by the Italian NCA. It is important to note that NCAs take the view that they are unable to impose remedies for effects that occur outside their borders. It follows that the Italian NCA's fines in the example here will only relate to the effects on the Italian market. In practice there has been little re-allocation of cases: normally the NCA that starts a case keeps it, so it is not easy to assess how well this framework performs.

In practice the system has led to NCAs taking cases which are largely national in scope. There are well-known examples of cross-border cases which would have merited better coordination. For example, a flour cartel affecting Germany, France, Belgium and the Netherlands was addressed by all four NCAs with some ex-post recalibration of fines. This approach follows directly from the territorial nature of the fines that these authorities can impose. As a result, cross-border cartel enforcement is normally best left to the Commission.

In digital markets, the Booking.com saga saw three NCAs cooperating on crafting a theory of harm for price party clauses and agreeing on an acceptable remedy. Many other NCAs then applied similar commitment decisions. This is the closest NCAs have come to issuing an EU-wide remedy, but it has required individual decisions by all NCAs. It is worth noting that the German NCA disagreed with the approach taken by the others. In other digital markets we are seeing some NCAs applying EU or national competition law to conduct which has EU-wide effects. A notable example is the German competition authority pursuing Facebook for excessive data collection using national law and the French NCA's recent actions against Google.[193] These developments may be assessed in two ways: a pessimistic reading is that they reveal a failure in the system of decentralised enforcement with the Commission unwilling or unable to regulate digital markets comprehensively. An optimistic reading is that competition authorities are experimenting different approaches and their individual enforcement actions may be expected to see the firm comply with a national decision by altering its practice EU-wide. This however, entails that the strictest authority could set the rules for the EU market as a whole. In markets which are evolving rapidly and where the best regulatory approach is not known there is merit in opting for experimentalist governance: the legislation can set high level objectives, leaving the national regulators the option to achieve this objective as they see fit. The quid pro quo is then that the regulators report back on the outcomes of their approaches and the superior regulatory approach can then be selected.

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[191] Regulation 1/2003, Article 3. For a comparative study, see CEPS (2012), *The impact of national rules on unilateral conduct that diverge from Article 102 TFUE*, Study for the European Commission.
[192] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJC101/43. The three countries rule is also used in Article 4(5) of the Merger Regulation for a concentration that does not have a Community dimension to be reviewed by the Commission.
[193] Bundeskartellamt prohibits Facebook from combining user data from different sources (Press Release 2 July 2019); https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-sanctionne-google-hauteur-de-150-meu-pour-abus-de-position.

An alternative use of the mixed model could also be explored. NRAs could not just be tasked to address gatekeeper platforms whose scope is purely national. In addition, NRAs could be the point of contact for complainants and would collect information about the platforms' relations with businesses. This information would then inform the Commission's regulatory response. In carrying out this information gathering function, Member States may choose to empower one or more existing regulator. For instance Data Protection, Consumer Protection, Telecom regulators or the NCA could all be tasked with identifying market failures for which the ex ante Regulation would be the best solution. After all, platform markets already fall under the regulatory scrutiny of each of these regulators.

3.4 Optimizing the operation of regulators

- *(a) Independence and resources*

One of the major challenges in establishing regulators in network industries has been to secure their **independence**. Only recently, the Body of European Regulators for Electronic Communications ('BEREC') has seen it necessary to issue a statement where it notes that certain Member States are taking steps that undermine the independence of the NRAs, calling for the Commission to monitor this and issue infringement proceedings if necessary.[194] The Commission also undertakes to monitor the independence of national authorities entrusted to apply the GDPR.[195] The concept of independence in EU Laws relating to network regulation has expanded over the years: when liberalisation began many utilities were regulated by national ministries and the legislation facilitated a gradual shift to independence. Today we have sufficient knowledge of the main attributes of independence and it would be helpful if the Commission established some sort of best-practice for the design of independent agencies. Independence means that the regulator is free from undue pressure from the firms it regulates and from the government. Attributes of independence include: (i) criteria about the appointment of the head and board members (terms of office, security of tenure, openness of the selection procedure); (ii) minimum regulatory capacity and autonomy in managing resources; (iii) independence from the political process.[196] Safeguarding this broad notion of independence is important for the Commission since it relies on NRAs as its national agents.

Independence is nothing without a **sizeable budget** (which should also not be allocated in ways that hamper the agency's independence) **and capable staff**. These matters however are more difficult for the Commission to oversee.[197]

One of the ways to counter the absence of independence is to establish networked governance: by subjecting NRAs to peer review one can try and control agencies that would be likely to issue decisions contrary to the EU interest.

It may be useful to discuss what other attributes platform regulators should have in order to ensure their capacity to discharge their tasks effectively, for example the power to carryout inspections or he power to impose interim measures.

- *(b) Due Process*

It is vital that the **regulator respects the fundamental rights of the undertakings**. These rights have been developed incrementally by the European Court of Justice and the European Court of Human Rights, and many are codified in the Charter of Fundamental Rights. These include the rights

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[194] BEREC statement on the independence of the national regulatory authorities BoR (20) 141

[195] Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation COM (2020) 264 final, section 3. This is based on a finding that some agencies are not independent, see SWD(2020) 115, p.15

[196] Directive 2018/1972 establishing the European Electronic Communications Code (Recast) [2018] OJ L321/36, Recitals 37-38, Articles 6-9 (hereinafter ECC).

[197] However in the ECN Plus Directive, designed to strengthen NCAs the legislator inserted requirements relating to independence and resources, Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3, Articles 4 and 5.

of defence, the right to be heard, the right to access the file, and the right to challenge a decision of a regulator in front of a court that will be empowered to review the decision thoroughly. Rather than just stating these principles in Recitals, the **legislation should elaborate on what these procedural rights are**.

- ***(c) Networks***

The EU normally supplements decentralised enforcement with the establishment of **agencies or networks to aid the work of national regulators** – a clear example is BEREC, which is expected to work in close cooperation with the Commission to adopt guidelines, issue opinions and gather information.[198] Its work does not in principle bind the national regulator, but provides a soft law framework that is generally applied by regulators and ensures uniformity.

Likewise, there is an expectation that national regulators cooperate – at times cooperation is institutionalised (e.g. the European Competition Network). The Network has facilitated the development of best practices and the sharing of ideas among agency officials.

In addition to such 'soft' coordination, we can also see an instance of **'hard' coordination** in the field of electronic communications. National Regulatory Authorities (NRAs) are empowered to regulate markets where the incumbent(s) hold significant market power. There are two stages to this: first the NRA identifies a relevant market and determines whether there is significant market power, second if this is so, the NRA picks among the remedies provided in the Directive. However, in carrying out these two steps it is closely monitored by the Commission, BEREC and other NRAs, as outlined below:

- Determining significant market power: the NRA is expected to analyse markets defined by the Commission in its Recommendation on Relevant Product and Service Markets.[199] Its draft findings on whether there is or is no market power are circulated to other NRAs, BEREC and the Commission who have a month to reply. If the NRA has defined a market outside those recommended by the Commission or identified undertakings holding SMP, but the Commission believes these measures may create a 'barrier to the internal market or if it has serious doubts as to its compatibility with Union law and in particular the objectives' of the EECC then a more extensive assessment is carried out: BEREC issues an opinion on the Commission's concerns and the Commission may then veto the decision of the NRA.[200]

- Imposing remedies: if the Commission agrees that there is a market in need of regulation then the NRA's draft measures (whether to impose a remedy or remove an existing remedy) are also reviewed by the Commission. BEREC, the Commission and the NRA are expected to collaborate if here are differences of opinion. However, this time the Commission may not veto the NRA decision, save in certain specific circumstances.[201] The focus here is more on securing an approach where the NRA takes into consideration the views of the EU bodies which may be better placed to evaluate the remedy given their knowledge of other regulatory efforts.

This approach raises the **following issues**: first, it appears that networks are a pervasive governance mode. Would they be useful in the framework of the ex ante Regulation under discussion here? In other fields the regulators are quite busy, it is not clear whether the workload of national regulators in platforms would be so onerous as to warrant the setting up of a network of comparable size and scope to BEREC, while a less formal grouping like the ECN might serve one well to facilitate sharing of good practices.

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[198] Regulation 2018/1971 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office) [2018] OJ L321/1.
[199] ECC, Article 64
[200] ECC Article 32
[201] ECC, Artcile 33

The second point for discussion is **whether any such network** (or the Commission, without a network structure) **should have powers to control the work of NRAs** like we have seen in the example of electronic communications above. One obvious disadvantage is that it would slow down the capacity of regulators to implement remedies if there is no strict timetable. A second oddity would be that if we operate a mixed system (i.e. local platforms are regulated by national authorities, global platforms by the Commission) then the Commission's own assessments would not be reviewed in the same way. This is a concern that has also been raised in competition law, where NCA draft decisions are checked by the Commission but no similar check is made of Commission decisions.[202]

A further discussion point might be **whether the two-phase approach applied in electronic communications could be replicated** here: (i) identification of gatekeeper power; (ii) specification of remedies. Arguably the Commission could issue soft-law notices on both points which could be reviewed regularly as experience accumulates about the attributes of market power and the workability of remedies. As in electronic communication, one might consider a stricter review of the first phase and a less strict, more cooperative approach to the second. Alternatively, the Commission could designate those platforms that hold gatekeeper powers, leaving regulators to just specify remedies (if a case-by-case assessment is required) or enforce the prohibitions (if black listed clauses are included). Regulators here might either be empowered to implement remedies for the EU as a whole (as in the GDPR) or each national regulator may have powers for its jurisdiction (as in competition law).

- ***(d) Remedies***

As discussed above, regulators must have sufficient powers to secure compliance. **When it comes to compliance with black-listed conduct, fines are a necessary remedy**. Fines can be imposed for procedural infringements (providing the regulator inaccurate information) or for substantive breaches of the obligations set out in the Regulation. Fines should be high enough to secure general deterrence.

However, reliance solely on fines is unhelpful. Generally, fines should be seen as a last resort remedy when firms reveal their unwillingness to comply. **A preferable approach is to persuade firms to comply**. More specifically, for some of the possible obligations to be imposed on platforms, the regulated firm will require guidance on how to comply. A helpful model that has emerged is **co-regulation**. Under this scheme the regulator and the firm cooperate in determining how to comply effectively with the obligations imposed. Suppose the remedy required by the regulator is to facilitate interoperability with the services of rivals. Such a remedy is not self-executing. The remedy requires an understanding of the technology used by the regulated firm which reveals the limits of what kind of interoperability regime is possible and how it can best be designed. On the other hand, the regulator is best placed to understand which technological fix proposed by the firm is best suited to resolve the market failure that has been identified.

A model where we see this co-creation is in **commitment decisions in antitrust law**.[203] The framework here is that the parties propose a course of conduct designed to ensure compliance which is then examined both by the Commission and by interested third parties who may comment via a so-called market testing procedure. In competition law this approach has been criticised for two reasons. The first is that the commitment procedure can be triggered on the basis of matters that are not real competition concerns. As a result, the Commission is able to secure a remedy it would not have managed to obtain under a formal procedure. This risk is absent in the setting under discussion because the obligations will be imposed following a formal procedure. The second criticism is that the Court of Justice has not played a sufficiently robust role in constraining the Commission's discretion when accepting commitments.[204] To a certain extent we can understand the Court's

[202] Regulation 1/2003, Article 11. This too contains a sort of veto power whereby the Commission can take over a case from an NCA.
[203] Regulation 1/2003, Article 9. G. Monti 'Commitment Decisions in Perspective' (2014) Fordham Competition Law Institute 461.
[204] F. Jenny 'Worst Decision of the European Court of Justice: Alrosa in context and the future of Commitment Decisions' (2014) Fordham Competition Law Institute 405.

attitude: if commitments are agreed as between market actors and the Commission, then so long as the procedures relating to design and consultation are not marred by procedural improprieties the Court may not wish to second-guess the agreement reached by the parties.

A further advantage of using an approach based on co-creation is its **flexibility**: one can build in review clauses: typically, commitment decisions have an expiry date; parties may also request that the commitment expires earlier if market conditions change. Nothing prevents the insertion of a clause that prolongs a commitment if more time is required to fix the market failure. This can serve to generate a model of compliance which is more fluid than merely issuing prohibitions. Given the fast-moving nature of digital markets, the capacity to adjust remedies in this manner makes for more effective enforcement. While monitoring and review raise costs, they serve to avoid over and under enforcement. They also build in a method to test the effectiveness of the regulator's intervention and can be used to review the regulatory framework in the long-term.

4 Relationship between competition law and regulation

4.1 Addressing overlaps

Conduct may be an infringement of competition law and of the ex ante tool – e.g. an exploitative term in a contract between a dominant platform and an advertiser. **Nothing prevents the parallel application of competition law and ex ante regulation**.

When the conduct of one undertaking may be the subject of two distinct criminal procedures (e.g. two national competition authorities pursuing the same undertaking for a cartel infringement for which fines are foreseen) then the **principle of *ne bis in idem* would apply**. This prevents the application of both competition rules. According to the Court, for the *ne bis in idem principle* to apply and forbid two actions, 'the facts must be the same, the offender the same and the legal interest protected the same.'[205] In competition law this allows the Commission to act against a cartel across the whole of the EU and forbids an NCA from pursuing that cartel. However, there are instances where some collusion by certain undertakings was analysed by the Commission and some by an NCA. Provided both cover different aspects of collusion, the facts of the two cases are not the same.[206]

If the regulator charged with applying the ex ante tool is empowered to impose fines that are deemed to be of a criminal nature for the purposes of EU Law as informed by the case law of the European Court of Human Rights, then a risk of *ne bis in idem* arises and the question at play would be whether the two rules protect the same legal interest. This would be a matter for the ECJ to explore. Arguably there is some similarity since both competition law and ex ante regulation would seek to promote competition, but at times the ex ante framework may be applied merely to ensure fairness between contracting parties. The answer may thus depend upon the activity being challenged. The Commission has taken the view that the application of national telecommunications law (which is based on the transposition of EU directives) by the NRA protect a different legal interest than the competition rules but has at the same time reduced the fine taking into account the penalties imposed by the NRA for infringements which partially overlapped with those in the decision.[207]

4.2 Addressing conflicts

Articles 101 and 102 TFEU are primary laws which cannot be rendered inapplicable by secondary legislation.[208] For instance, concentrations falling within the scope of the EU Merger Regulation may also be reviewed by the Commission in applying Articles 101 and 102. In practice this is most unlikely to ever occur since the Commission has been conferred sufficient powers to monitor such transactions under the EU Merger Regulation. It goes without saying that the merged

[205] *Toshiba*, para 97, discussed in Monti, Managing decentralized antitrust enforcement: Toshiba, Common Market Law Review 2014 p.261-279
[206] *DHL v AGCM*, C-428/14
[207] COMP/39.525 – *Telekomunikacja Polska*, paras 144-145. The point was not discussed on appeal.
[208] Primary law may do so, of course, see e.g. Article 106(2)

entity that results from the decision to clear the merger remains subject to competition law post-merger.

Conduct which a national regulator authorises may still be found to infringe EU competition law, as we have seen from the case-law in the telecommunications sector (e.g. *Deutsche Telekom*)[209]. In applying the ex ante tool, a regulator might choose not to impose a duty to share data on a dominant platform, but a competition authority might later consider that this remedy is necessary: may competition law apply notwithstanding regulatory clearance?

From a policy perspective, there are good arguments against the application of competition law: the regulator may be assumed to have a comparative institutional advantage (e.g. better knowledge of the sector, a more refined set of remedies) than the competition authority or a national judge. Moreover, the design of the competition law tool is likely to consider a wide range of interests, including keeping markets competitive. This leads to two arguments: first that it is likely that the regulator will have considered the importance of setting remedies to enhance competition, so from this perspective the application of competition law to consider the same interest is wasteful. Second, the regulator might have elected to sacrifice competition for another public policy goal that it is empowered to pursue. For instance, in electronic communications the regulator pursues the promotion of competition but also the facilitation of investment and might trade off a reduction of competition if this improves investment in better quality networks.[210]

From a legal perspective, the discussion depends on how the regulator is set up, and this takes us back to the options canvassed in section 3: whether the regulator is the Commission/an EU agency applying EU Law or a national regulatory authority applying EU Law (on the assumption that the ex ante tool is a Regulation). However, as we show the solution of the conflict between the ex ante Regulation and competition law is probably the same in both scenarios.

4.2.1 Conflicts between two EU laws applied by two EU bodies

If the ex ante tool is placed in the hands of an EU agency, it may be helpful to consider briefly the legal position in the United States to discern some organising principles. In the US a Federal statute may (a) preclude the application of antitrust law; (b) explicitly provide that antitrust law may apply in parallel; (c) remain silent on the parallel application of antitrust law. In the latter case it is for the courts to determine whether antitrust law may apply to the regulated sector or whether they are implicitly repealed. The following criteria have been considered by the Supreme court as relevant to address this question in its most recent judgment:

> (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC [Securities and Exchange Commission] authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes.[211]

In the EU context it is impossible to replicate this model because of a different constitutional setup: EU competition law cannot be repealed whether explicitly by secondary legislation, or implicitly by judicial interpretation. However, in this context the US case-law which is of more relevance is that which considers statutes which allow the parallel application of regulation and antitrust, as was the case in *Verizon v Trinko*. The case concerned an allegation of refusals to deal and one of the issues the Supreme Court was asked to consider is how far the existence of a dedicated access regime in telecommunications law affected the application of the Sherman Act. According to the court, in making this assessment:

> One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional

[209] Case C-280/08P *Deutsche Telekom v. Commission*, EU:C:2010:603.
[210] EECC article 3
[211] Credit Suisse v Billing, per Breyer J

benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.[212]

Conversely, if the regulatory scheme makes no reference to competition issues (e.g. it is an environmental statute) then the argument for applying competition law is stronger. This policy position appears valid even in the EU even if this particular issue has not to my knowledge been litigated.

The issue is this: **suppose that the regulator using the ex ante tool has decided that there is no need to share data, would it be possible for a claimant (or a competition authority) to raise an Article 102 TFEU claim for refusals to deal in data**? Arguably this is a legal question for the courts to assess, but it may be helpful to consider policy arguments one way and the other.

4.2.2 Conflict between EU competition law and national regulation

If, however, the Regulation tasks national regulatory authorities with the application of the ex ante tool, then nothing prevents the parallel application of EU competition law. This is the lesson from *Deutsche Telekom* and related case-law. In brief, the regulatory choice is seen as an act of the Member State, in which case:

- If the state merely authorises conduct which turns out to violate EU competition law (e.g. by stating that no ex ante rules are needed), then the undertaking may be found to have infringed competition law nevertheless. For example, the terms maybe fair for the purposes of the ex ante tool, but unfair for the purposes of Article 102 TFEU.

- If the state requires conduct by an undertaking which is anticompetitive then the Member State is in breach of EU Law. In this context a national court must disapply the regulatory choice, the Member State may well be found to be in breach of EU Law and sanctioned. Technically, this breach is found by a combined reading of Article 3(4) TEU (imposing a duty of loyalty on Member States) and Articles 101 and 102 TFEU: states must not require or facilitate the infringement of EU competition law when applying national law, even if this is derived from EU Law. For example, the regulator may require a platform to share information that facilitates collusion.

Critics take the view that this approach is overly restrictive and hampers the effective application of regulatory tools.[213] It appears that it would be for the Court of Justice to qualify its approach, however it may be possible to draft the ex ante tool in such a way to steer the court to give a more flexible interpretation. For example, the ex ante tool could empower the regulator to consider the possible conflict between its regulatory choice and competition law and to make an explicit trade-off. In this instance, the Court may be willing to accept an infringement of EU law if it is objectively justified. There is no case-law on this point, however it follows from the general case law on the internal market that a Member State may impose national laws that infringe internal market law if this is necessary to pursue a national public interest which is well articulated.[214] The point would become even more compelling if the regulator may show that its choice is designed to take into consideration two conflicting interests that may be traced to EU Law, for instance protecting consumers and promoting competition.

[212] Verizon v Trinko 540 U.S. 398 (2004)
[213] Geradin, Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom 41 Common Market L. Rev. 1519 (2004); G. Monti, Managing the Intersection of Utilities Regulation and EC Competition Law (2008) 4(2) Competition Law Review 123.
[214] E.g. Scotch Whisky Association and Others v The Lord Advocate and The Advocate General for Scotland EU:C:2015:845.

5 Conclusions

Having reviewed the institutional options that could be used to enforce the ex ante tool for systemically significant platforms, the following recommendations emerge from a comparative study of institutional models.

In terms of who the enforcer should be, it is **preferable if the Commission is in charge of applying the new ex ante tool, whether on its own or with the assistance of national regulators**. The need for Commission intervention is that the likely targets of the Regulation are firms operating across the EU with a single business model: unitary enforcement by a well-resourced actor with experience in the sector would optimise enforcement. National regulators can be entrusted with the application of the new ex ante tool to conduct that affects a national market and are also well-placed to identify market failures.

This recommendation is based on the following considerations: relying on businesses to complain to platforms and expecting that internal dispute resolution systems will suffice is too optimistic given the imbalance of power. Second, other models for enforcement based on entrusting a national regulator to address EU-wide concerns very much depend upon the capacity and resources of the regulator, which are likely to remain uneven. Third, while an EU agency could be created to enforce these rules, the case-law is still in flux and there may be legal challenges if this path is chosen. It is thus more prudent to entrust the Commission with enforcing the Regulation.

To ensure that enforcement is effective, the **Commission and the national regulators should have appropriate resources and independence** to discharge their duties. The **fundamental rights of the parties must be recognised** and inform the design of procedures, including due process and judicial review. Moreover, the **remedial powers** that the Commission and NRAs have should be **sufficiently strong** to deter and guide the firms that are regulated. The regulator should be empowered to facilitate the **co-creating of compliant practices by platforms**. Such an approach to remedy design secures input and output legitimacy: the former by including all affected stakeholders in commenting on proposed measures, the latter by allowing a fluid process of compliance by which remedies can be adjusted to ensure they remain relevant. In fast-moving markets this approach to securing compliance is particularly useful.

Finally, while the drive behind the DMA is a concern that EU competition law is not sufficiently flexible to address all market failures in digital markets, there **remains the possibility that competition law continues to apply even if the Commission or an NRA has applied the new ex ante tool or has chosen not to apply it considering that there is no infringement**. Arguably, if the Commission and NRAs are well resourced and active the risk of frictions with EU competition law is likely to be reduced because the Commission or an NCA will not feel compelled to act. Nevertheless, as seen in the field of telecommunications, sometimes competition law serves to fill in gaps in the application of the regulatory framework. This risk can be reduced but not eliminated.

DISCUSSION SUMMARY | Institutional considerations

The purpose of this section is to list the questions and discussion points that arose from the overview presented in the Issue Paper on 'institutional considerations' and the exclusive workshop organised in September 2020. The non-attributable summary of the discussion was prepared by Claire-Marie Healy, project manager at CERRE.

Institutional set-up
Can we rely on private enforcement exclusively? Should enforcement be both public and private? Should a platform regulator be established?

RESPONSES

The issue around institutional framework is highly political. It is interesting to note that in the platform to business (P2B) Regulation, there is no obligation to create a regulatory authority, although Member States may choose to. Some believe that this significantly weakens enforcement and thus the effectiveness of the Regulation. The dynamism of online platforms markets however is such that as much flexibility as possible would be desirable, for instance online platforms being part of determining the solution wherever possible and offering commitments where needed.

While there was some agreement that private law enforcement - such as in the form of a toolkit that national courts could use when requested – could work in certain situations and lead to swifter outcomes, self-regulation and co-regulation may not work in addressing the issue around balance of power when certain platforms play a dominant gatekeeper role. It is important that provisions are clear and that no 'fear' factors exist. Indeed, a number of studies show that where one company is dependent on another, they often fear lodging a legal complaint through fear of retaliation – something that can happen more rapidly than any judicial action. This implies that when there is a dependency issue, private enforcement can be ineffective, because it excludes the possibility of confidential complaints or ex-officio procedures. Such a form of assessment would have to fall under a regulator.

It was pointed out that such an obligation to mediate already exists in the B2B regulation. However, it does not address the issue of what happens if mediation fails, or if a customer is unwilling to complain because of their dependency on the platform. There need to be mechanisms in place to deal with this when mediation fails.

Another suggestion was to start from the perspective of practices where the remedy is prohibition. That provides a framework, with other items on a more case-by-case basis. However, enforcement of remedies for other issues have to be effective; for example, fines are often seen as simply one of the costs of doing business for platforms, and they do not prevent markets from being destroyed. Arguably, behavioural remedies are superior. The question of sections – in order to enforce remedies – also needs to be considered. Otherwise any code of conduct risks being invalidated. If the only effective sanction is financial, it should be big enough to act as a deterrent.

Should the DMA require the establishment of national platform regulators or an EU regulator?

Do we need both national and supra-national regulators, each with distinct competencies? For example, a global platform would be regulated by the EU platform regulator, while a national platform (e.g. price comparison website for car insurance) would be regulated locally.

RESPONSES

Some were not optimistic about the likely effectiveness of the 'Country of Origin' (CoO) principle. While it may work for illegal content hosting, for competition problems it can vary greatly between countries – both in approach and expertise. The example of GDPR and the Irish DPA – which was open about its limited resources and struggle to be effective – was mentioned.

Where dominance was purely national, there is, however, still a need for national authorities to look at these cases.

That said, there is a clear role for an EU level oversight. While most problems are pan-European in nature, having an EU level overarching perspective would be a clear advantage. A centralised European authority might provide greater harmonisation, and consistency in cross-border issues. Given the current fiscal circumstances, it may not be the best moment to create a new authority. A combination of national and EU level authorities is another option to be considered.

The European Commission could play a role as long as it is suitably empowered and resourced. The preferred location within the European Commission will however have to be relatively unusual as it will likely require taking two aspects – competition and regulation – together. What is likely to emerge is a complex interrelationship between a) competition that interacts rarely and episodically with industry and b) regulation that has a much closer, continuous relationship. In the case where the regulatory body ends up as part of DG Competition, given its inevitable focus and competence on competition issues, how can the regulatory ethos be ensured effectively? The full independence of the Commission in this role would also have to be questioned. Given the various – potentially conflicting – strands that this centralised approach will raise, a standalone body or a panel of independent experts taking decisions would be preferable.

What should the criteria to determine the competence of a national regulatory authority be?

Should the NRA or EU Regulator be tasked (a) only with the task of designating large gatekeeper power, leaving enforcement to private parties; or (b) with the task of designating large gatekeeper power and enforcement powers?

RESPONSES

Having a clear list of very specific dos and don'ts and relying on a regulator to monitor the impact on markets would be welcome. More intrusive remedies will always demand much more regulatory oversight. The need for criteria to define platforms, identify behaviours, build effective remedies and propose solutions is also crucial. It would also be advisable for the regulator to have a broad scope in interpreting fairness vs competition.

How should national regulatory agencies be coordinated?

Which existing models (competition law, data protection law, consumer protection, electronic communications, and banking) would fit the needs of the DMA?

Is an agency/network needed to coordinate and steer national regulators?

What should be the role of such a network? Would such an agency/network add value by providing information or setting out recommendations on best practices?

RESPONSES

The model of a network of independent national authorities to advise the European Commission and national regulatory authorities (NRAs) was discussed extensively. The body of European regulators for electronic communications (BEREC) that assists the European Commission and NRAs in implementing the EU regulatory framework for electronic communications could help in coordinating national authorities in charge of online platforms and advise the European Commission on digital issues. There seems to be no issue with such a pan-EU regulator being an existing body as long as the advisory body is made up of independent regulatory authorities.

Such cooperation, however, would require a lot of coordination, especially since several authorities will have to be engaged (the competition authority, the telecommunications authority, the consumer protection authority, and the data protection authority). Although the network approach was generally viewed as a good idea, there were concerns that – if the privacy, consumer and competition aspects were brought together – the experts on the panel would need to reflect the different demands, which may raise some political hackles.

Relationship with EU competition law
Should the regulator be empowered to prevent conduct which may harm competition while promoting another EU interest (e.g. a trade-off of less competition for greater investment, or perhaps allowing a dominant platform to discriminate against certain upstream providers in the name of making sure that the platform works more smoothly)?
RESPONSES Where the law is relatively flexible owing to a dynamic market, the procedural fairness of the regulatory authorities is even more important. Having a sunset clause or a review clause is also good practice in EU law and would be valuable too.
If a code of conduct is established (whether for all platforms or one type of platform) should there be a competition impact assessment? In other words, should the regulator test the extent to which the code of conduct might restrict competition?
RESPONSES When pursuing a code of conduct, some elements of self-regulation or co-regulation could be required; the risk being that self-regulation might be self-interested. Given this, it may prove more effective for the regulatory body to consult about the remedies and seek feedback from stakeholders and then decide. This in theory would discourage platforms from undermining other parties. One potential element could be a 'good faith' element – an obligation to mediate - in any code of conduct. This could cover advantages, but such an approach would need to be used at the discretion of the regulator. On the issue of continuous review, it was suggested that this should fall within a remedy package. For example, if the remedy included a code of conduct, then there has to be the facility to revisit that; either where it has proved ineffective or where it is no longer relevant or appropriate. A potential area of conflict could be where a code of conduct requires rules on issues such as privacy and illegal and harmful content; would this be seen as restricting competition. Should the regulator be responsible for both the societal versus economic effects? How could this be taken into consideration when defining remedies? This raised two broader topics. First, how far could a platform that was meeting its threshold justify its actions on a non-economic basis? Also, given that there are always trade-offs between specific objects, whose responsibility is it to determine that balance – is it a legal or regulatory question? The learnings from the telecommunications industry were to provide the independent regulatory authority with significant powers. Would the same thing work here, or is a legislative approach more appropriate?

RECOMMENDATIONS PAPER

RECOMMENDATIONS PAPER

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1 Introduction

In its Digital Strategy Communication of February 2020,[215] the European Commission announced that the proposal of the Digital Services Act package would include one pillar aiming at achieving a fair and competitive economy through economic regulation. This pillar has now been renamed the **Digital Markets Act (DMA)**.[216] In their Inception Impact Assessment of June 2020, the Commission services indicate that they are considering the following three policy options: (1) revising the horizontal framework set in the Platform-to-Business Regulation;[217] (2) adopting a horizontal framework empowering regulators to collect information from large online platforms acting as gatekeepers; (3) adopting a new and flexible *ex ante* regulatory framework for large online platforms acting as gatekeepers which could be (3a) prohibition or restriction of certain unfair trading practices ("*blacklisted*" practices) and/or (3b) adoption of tailor-made remedies addressed on a case-by-case basis where necessary and justified.[218] In October 2020, the European Parliament adopted one resolution on the forthcoming Digital Services Act package with important directions for the Digital Markets Act pillar.[219]

This recommendations paper aims to contribute to this policy debate and is structured as follows: after this introduction, section 2 deals with the problems to be addressed and the recommended objectives for the DMA. Then, section 3 deals with the scope of the DMA, the criteria to designate Large Gatekeeper Platforms (LGPs), and the prohibitions and the obligations which may be imposed on those LGP. Finally, section 4 deals with the institutional design and the enforcement methods for an effective DMA. For several recommendations, the footnotes indicate existing best practices in EU law.

2 Problems and objectives

2.1 Main characteristics of the digital economy and possible need for intervention[220]

Although digital intermediation platforms are diverse in their business models, they are united by some **key features**: (i) important economies of scale and scope on the supply side; (ii) massive direct and indirect network effects on the demand-side; (iii) massive use of personal and non-personal data, (iv) high rate of innovation and importance of some key innovation capabilities; (v) uncertainty in the evolution of technology and markets; and often (vi) conglomerates that orchestrate entire ecosystems.

Some of those digital platforms may have a **gatekeeper function** when their consumers mostly single-home and have no – or little - ability or incentive to multi-home because, for instance, of lack of information, high switching costs, biases, and heuristics or lack of viable, adequate and competitive alternatives and there is a low risk of disintermediation. In this case, such a platform is the main bottleneck to this customer base and is in a position to leverage this gatekeeper position to its advantage. This may raise competitive and exclusionary issues when, for example, the platform providing intermediation services (i.e. services connecting business users and consumers or end-users) also competes with business users in their respective markets. This may also raise exploitative

[215] Communication from the Commission of 19 February 2020, Shaping Europe's digital future, COM(2020) 67.
[216] There is now an understanding that the New Competition Tool may be integrated into the DMA and, therefore, could have a scope which is limited to the digital platforms. This paper is about the DMA and does not deal with the NCT as such.
[217] Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ [2019] L 186/55.
[218] Inception Impact Assessment on Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers , available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers
[219] European Parliament resolution of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL), in particular points 72-81 available at : https://www.europarl.europa.eu/doceo/document/TA-9-2020-10-20-TOC_EN.html
[220] See the first issue paper for more developments.

and fairness issues when the platform is using its bargaining powers to the detriment of the legitimate interests of its users.

However, the assessment of the economic effects of firms' conduct is particularly complex in the digital economy because specific **conduct often leads, at the same time, to pro and anti-competitive effects**.[221] For instance, the extension of a digital platform from one core market to another related market to offer a more complete suite of products and enlarge the ecosystem may benefit consumers, as such an extension increases the ecosystem's synergies. Such conglomerate diversification may also increase the economies of scope on the supply side. However, such an extension may lead to the exclusion of efficient niche competitors or discourage potential competitors from entering the market, thereby durably foreclosing the market or ecosystem. It may also lead to the exclusion of efficient providers of complementary products. Those examples show that assessing the competitive effects of conduct in digital markets often requires a difficult balancing of pro and anti-competitive effects. This is not specific to digital markets, but this is amplified in digital markets owing to the intensity of network effects and extreme returns on capital invested.

Therefore, assessing the economic effects of digital firms' conduct involves **several trade-offs** between different values, rights, and interests. Examples of those trade-offs are: (i) *short-term and long-term*: the conduct of a gatekeeper platform may increase consumer welfare in the short-term, for instance by increasing short-term competition or innovation, but at the expense of consumer welfare in the long-term, for instance by reducing competition and thus harming incentives for good value and innovation; the most difficult situation occurs where there are clear short-run efficiency benefits and long-term competitive harm that is more uncertain but potentially very serious; (ii) *competition and innovation*: the conduct of a gatekeeper platform such as the acquisition of a start-up, may increase the development and/or the diffusion of the innovation of such start-up but at the expense of the competition that could have been brought by the start-up. To complicate the matter even further, trade-offs are also possible between different types of competition or different types of innovation. Arbitrating trade-offs is one of the main roles of regulatory agencies and the judiciary but such arbitration is particularly difficult in the digital economy because the trade-offs are amplified and have to be decided in a highly uncertain environment.

Given those difficulties, the **risks of errors**, of type I and type II, may also be amplified in the digital economy. Those risks can be decreased by reducing the information asymmetry between the digital firms and the public authorities and by increasing the learning curve of the authorities. This can be achieved with a better understanding of the digital economy through studies, market monitoring sector enquiries and market investigation, individual cases, as well as with information disclosure through appropriate rules and presumptions. The establishment of specialised and dedicated authorities may also contribute to reducing information asymmetry. Errors risks can also be reduced by doing a careful assessment of the effects of digital platforms conducts which take into account the diversity of the business models as well as the risks of regulatory failures and unintended consequences of public intervention on the functioning of the markets. Also, the **costs of type I and type II errors** may be amplified in the digital economy. The costs of type II errors could be decreased, in particular through timely intervention and swifter procedures when necessary.

[221] Digital platforms may also generate several positive and negative non-economic effect which are not analysed in this paper, although we recognize that they are important and may interact with the economic effects.

2.2 Objectives of the Digital Markets Act

The DMA should have the following four main objectives:

1. Promoting **competition, market contestability and innovation**
2. **Empowering users**
3. Ensuring **fairness** in B2B relationships
4. Promoting the **Digital Single Market**

Based on the characteristics of the digital economy and the possible effects of the conducts of the Large Gatekeeper Platforms, we recommend the objectives of the DMA to be the following:

1. Promoting competition. The DMA should complement – and not substitute - competition law to promote competition, market contestability, and innovation when competition law is either ineffective or unable to intervene. Competition law may be ineffective because it is too slow or lacking the remedial measures necessary to preserve and restore the benefits of a competitive market to European consumers.[222] Competition law may also be unable to intervene in case of structural competition problems where the harm to competition is driven by underlying economic features of these markets more than by strategic firm conduct. Those structural problems include structural risks for competition when certain market features (such as network and scale effects, lack of multi-homing and lock-in effects) and the firms' conduct create a threat for competition. This applies to tipping markets, where the creation of powerful market players with an entrenched market and/or gatekeeper position needs to be prevented by early intervention or to unilateral strategies by non-dominant firms to monopolise a market through anti-competitive means.[223]

2. Empowering users. To foster competition, enhance innovation, and protect end-users' rights, the DMA should also provide users with relevant information and effective options to make informed choices. Reducing information asymmetries and giving users the tools and incentives to choose their preferred services could complement the ex ante regulatory intervention and steer the market in the right direction.

3. Ensuring fairness in a B2B relationship.[224] The DMA should also protect business users and partners against the unfair practices of the gatekeeper platforms on which they depend. As already explained in the P2B Regulation, the large gatekeeper platforms "have superior bargaining power, which enables them to, in effect, behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users and, indirectly, also of consumers in the EU. For instance, they might unilaterally impose on business users practices which grossly deviate from good commercial conduct, or are contrary to good faith and fair dealing".[225]

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[222] In the EECC, the insufficiency of competition law to adequately address market failures is one the three criteria justifying ex ante regulation: Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [hereinafter EECC], OJ [2018] L 321/36, art. 67(1). This third criterion has been clarified by the Commission in the following way: 'Competition law interventions are likely to be insufficient where for instance the compliance requirements of an intervention to redress persistent market failure(s) are extensive or where frequent and/or timely intervention is indispensable. Thus, *ex ante* regulation should be considered an appropriate complement to competition law when competition law alone would not adequately address persistent market failure(s) identified': Commission Recommendation 2014/710 of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation, OJ [2014] L 295/79, recital 16.

[223] See the Commission services' Inception Impact Assessment for the New Competition Tool: https://ec.europa.eu/info/law/better-rulation/have-your-say/initiatives/12416-New-competition-tool.

[224] In this sense, the DMA will complement the EU consumer protection law which ensures fairness in B2C relationship.

[225] P2B Regulation, recital 2.

4. Promoting the Digital Single Market. Finally, the DMA should ensure that the single market is not fragmented by a growing volume of national rules that regulate LGPs differently. Therefore, the DMA should promote the single market by imposing a common set of obligations on the LGPs and a common set of rights for the users of those platforms which should facilitate the scale-up of digital start-ups across the EU.

In achieving those objectives, enforcement action should comply with **good governance principles**, in particular the principles of proportionality, regulatory predictability and consistency, and respect for fundamental rights.

3 Scope, criteria for intervention and prohibitions/obligations

The scope of the DMA should **cover all online platforms** to be sufficiently flexible and future proof.

However, prohibitions and obligations should only be imposed on the online platforms which meet the following **four cumulative criteria**:

1) Be **large**, which could be measured by the number of unique users, time on site, or the proportion of interactions
2) Hold a **gatekeeper** position on which business users depend, which could be measured by the proportion of the large userbase with a low ability and/or incentive to multi-home or switch
3) This gatekeeper position is **enduring**, which can be measured by high entry barriers to both existing services and future services, because of the control of key innovation capabilities in the digital sector
4) Orchestrate an **ecosystem**, which implies a conglomerate presence

Those large digital gatekeeper platforms should be designated for a certain time by the EU body in charge of the DMA.

3.1 Scope of the Digital Markets Act

As the DMA intervention will be an asymmetric law, the scope of the DMA should be distinguished from the criteria to designate LGPs and which will trigger interventions. The scope determines the categories of digital platforms to which the designation criteria are applicable and not the platforms which will be regulated. In other words, the scope is necessarily broader than LGPs and not all platforms in scope should be regulated. The scope of the DMA should be broad enough to capture all types of digital platforms whose conducts *may* be harmful now and in the future.

Therefore, the scope of the P2B Regulation which covers certain types of online intermediation services[226] and online search engines[227] may be too narrow as it does not cover other digital platforms (such as operating systems or B2B marketplaces) whose conducts may potentially be harmful.[228] On that basis, we recommend that DMA **covers all types of digital intermediation platforms**. Following the OECD, this could be defined as "an information society service provider that facilitates interactions between two or more distinct sets of users (whether businesses or individuals) who interact through the service via the Internet".[229]

3.2 Four Criteria to designate Large Gatekeeper Platforms230

The criteria to trigger regulatory intervention and designate the digital platforms on which remedies may be imposed should follow from the four objectives mentioned above. Besides, those criteria should be sufficiently flexible to adapt to different business models as well as technology and market evolution which evolve rapidly and can be unpredictable in the digital economy. The criteria should also be sufficiently clear and easy to implement to ensure legal predictability and not be subject to long and complex procedures.

Therefore, we think that the intervention should be based on the following four cumulative criteria, each of which should be assessed with quantitative and qualitative indicators. Those criteria should be assessed on a case-by-case basis during the designation process which should be done at regular intervals to take into account the rapid evolution of digital markets. The first criterion relates to the size of the platforms as the larger the platform is, the bigger the harm may be.[231] The three other criteria relate to specific features of platforms that make harm possible.

1. Size of the digital platform: this criterion may be determined based on the following quantitative indicators: worldwide and EU turnover,[232] worldwide and EU number of transactions mediated by the platforms, number of unique users in the EU,[233] time on site of those users.[234] Those indicators could be calculated as in absolute value (for instance, the number of users) or a relative value (for instance, the market share of users for a specific service such as search, online

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[226] P2B Regulation, art.2(2) defining online intermediation services as services which (i) constitute information society services; (ii) allow business users to offer goods or services to consumers, to facilitate direct transactions between those business users and consumers; and (iii) provide services to business users based on contractual relationships. Information Society Service is defined as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient. The key elements in the definition are (i) the service must be provided for remuneration; (ii) at a distance; (iii) by electronic means; and (iv) at the individual request of the recipient of the service': Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1, art.1(1b).

[227] P2B Regulation, art 2(5) defining online search engine as a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found.

[228] The narrow scope of the P2B Regulation may be justified because it is a symmetric law whose obligations apply to all platforms in scope.

[229] https://www.oecd.org/innovation/an-introduction-to-online-platforms-and-their-role-in-the-digital-transformation-53e5f593-en.htm

[230] See the third issue paper for more developments.

[231] An alternative option would be to designate gatekeeper platforms only on the three last criterion and rely on the platform size as a jurisdictional criterion to trigger the intervention of EU law (as opposed to national law).

[232] The Commission proposal for a digital service tax also relies on such indicator as it applies to digital platforms with total annual worldwide revenues of €750 million and EU revenues of €50 million: Commission Proposal of 21 March 2018 for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148, art.4.

[233] The DSM Copyright Directive imposes additional stay-down obligations for content sharing platforms when the average number of *monthly unique visitors* exceeds 5 million, calculated on the basis of the previous calendar year: Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, OJ [2019] L 130/92, art.17(6). The EECC imposes on providers of number–independent interpersonal communications services the obligations to render their services interoperable if those providers reach a significant level of coverage and user up-take: EECC, art.61(2c). Some national laws on online content moderation also rely on users number as an intervention trigger.

[234] The EECC provides that Member States may impose reasonable 'must carry' obligations for the transmission of specified radio and television broadcast channels on the providers of electronic communications networks if a significant number of end–users of such networks and services use them as their principal means to receive radio and television broadcast channels: EECC, art.114(1).

marketplace …). The advantage of absolute indicators is that they are easy to calculate as they do not require the definition of a relevant market or a business area. However, the disadvantage of absolute indicators is that they may not indicate the true economic power of the platforms as they are calculated independently of the size of the market or the business area.[235]

2. Gatekeeper position implying that users are dependent on the platforms: this criterion may be assessed based on a set of quantitative and qualitative indicators related to ability and the incentive of both sides of the market intermediated by the platform (i.e. the business users and the consumers) to multi-home on several platforms or to switch between different platforms as well as the ability and the incentive of the platform to prevent both sides of the market from going around the platform to deal with each other directly. Those indicators include the numbers of users who multi-home and the churn rate between platforms. The lower the incentive and ability to multi-home are, the more probable the finding of a gatekeeper position will be.[236]

3. Enduring gatekeeper position. This criterion, which relates to the strength of potential competition, may be assessed by the determination of two types of entry barriers:[237]

- First, the **entry barriers to existing services** will vary according to the business models of the digital platforms: an important entry barrier consists of cross-groups externalities and network effects which tend to be amplified by big data and AI technologies and increase with the development and the maturation of the markets.

- Second, **entry barriers to future services** that are related to the control of innovation capabilities; in the digital economy, those are data, key platforms elements, risky and patient capital, specific data, and computer skills.

4. Ecosystem orchestrator: this criterion may be assessed with the following indicators: presence in multiple markets or business areas which could be 'tightly' connected in the same vertical value chain or more 'loosely' connected, control of ecosystems as a web of interconnected and to a large degree interdependent economic activities carried out by different undertakings to supply one or more products or services which impact the same set of users.[238] According to this criterion, only the gatekeepers who are active in several connected markets and orchestrate an ecosystem could be subject to the prohibitions and the obligations of the DMA.

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[235] The concept of business area is used in the BEREC Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool, BoR(20) 138.

[236] The EECC relies on a similar gatekeeper criteria to impose different types of obligations. It imposes on the providers of Conditional Access Systems (CAS) from which broadcasters depend to reach any group of potential viewers to offer to those broadcasters, on a FRAND basis, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers: EECC, art.62(1) and Annex II, Part I.

[237] The Commission gives the following examples of entry barriers: "economies of scale and scope, privileged access to essential inputs or natural resources, important technologies or an established distribution and sales network; other costs and other impediments, for instance resulting from network effects, faced by customers in switching to a new supplier.": Guidance of 3 December 2008 on the Commission's Enforcement Priorities in Applying Articles [102 TFUE] to Abusive Exclusionary Conduct by Dominant Undertakings, para.17.

[24] See the possible forthcoming reform of the Greek Competition law.

3.3 Prohibitions and obligations to be imposed on the Large Gatekeeper Platforms[239]

The following contractual terms and practices by large digital gatekeeper platforms should be **prohibited** to guarantee fair and competitive markets:

- Terms and practices which **dis-empower consumers to multi-home or switch**, such as default and nudges, anti-steering, limiting data portability.
- Terms and practices which **dis-empower business users to multi-home or switch**, such as Most Favoured National (MFN) or exclusivity clauses.
- Anticompetitive and **unfair leverage** of gatekeeper power across markets, such as specific types of self-preferencing and bundling.
- **Unfair contractual terms and practices**, such as retroactivity, termination/suspension.
- Given the multiple effects of terms and conducts in the digital economy, the large digital gatekeeper platform should have the **possibility to justify** its terms or practices with an efficient or objective defence. Thus, the prohibition amounts to a reversal of the burden of proof from the regulatory authority to the gatekeeper platforms.

Besides the large gatekeepers, platforms may be subject to the following **obligations** to guarantee market contestability:

- Provide **interoperability** to key services and access to key API.
- **Share** large volumes of **data** at the request of another firm for the benefit of users in general and which does not undermine good privacy practices.

Large Gatekeeper Platforms (LGPs) could be subject to two categories of intervention. The first category, which corresponds to option 3a of the Commission services Inception Impact Assessment, consists of prohibitions (negative obligations). Those prohibitions aim to ensure competitive and fair conduct on the markets for intermediation services. The second category, which corresponds to option 3b of the Inception Impact Assessment, consists of a variety of tailored remedies imposed on a case-by-case basis and enforced by a regulatory body. Those (positive) obligations aim to enable competition and stimulate contestability on the markets for the intermediation services. As explained in the following section, the prohibitions are easier to enforce than obligations that require a comprehensive governance framework. As the business models of the digital platforms are different,

[239] See the second issue paper for more developments.

each category of intervention will have to be adapted to the specific business model of the LGP at hand.

3.3.1 Prohibitions to guarantee competitive and fair conducts

The first category of intervention consists of prohibiting certain conducts for which there is enough experience and certainty that they are harmful to consumer welfare, innovation, and business users' legitimate interests.

The list of prohibited conducts could be based on the following four types, which would need to be adapted to the type and the business model of the LGP:

- Practices which **dis-empower consumers** (one side of the intermediated market) by limiting their ability to multi-home on several platforms or to switch between platforms. This is, for instance, the case of default and nudges in choice architecture guiding users into making decisions that may not be in their best interests, anti-steering practice, or conduct that limit data portability.[240]

- Practices which **dis-empower business users and partners** (the other side of the intermediated market) by limiting their ability to multi-home on several platforms or to switch between platforms. This is, for instance, the case of Most Favoured Nation (MFN), non-competing, or exclusivity clauses.

- Practices which allow **anti-competitive and unfair leverage of gatekeeper power** across markets. This covers specific forms of harmful self-preferencing conduct, such as the unjustified use of business users' data.[241] This covers also specific forms of bundling detachable and non-necessary services.

- **Unfair** Contractual terms. The list of such practices could be built upon the list already contained in the P2B Regulation and include unilateral or retroactive changes to the contract, unjustified termination/suspension.[242]

As uncertainty remains high and harmful conducts can often also have positive effects and the business models of LGPs are diverse, it is recommended to leave the LGP the **possibility to justify its conduct** based on efficiency or objective justifications.[243] In practice, the LGPs should have the possibility to prove that its conduct is necessary and proportionate to achieve efficiency or other non-efficiency objectives such as the protection of the security or the integrity of the platforms.

3.3.2 Obligations to guarantee market contestability

The second category of intervention consists of imposing certain obligations to increase market contestability and facilitate the entry of digital platforms developing new services that can be a substitute or complementary to the ones already offered by LGP. In effect, those obligations will **open the platforms of LGP** to new entrants.[244] Such obligations could revolve around the following two types:

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[240] Beyond the limited data portability right provided by Regulation 2016/679 of the European Parliament and of the Council of [27] April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation), OJ [2016] L 199/1, art.20.

[241] The prohibition of internal discrimination is also foreseen by several EU law: EECC, art.70 and Commission Recommendation 2013/466 of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment , O.J. [2013] L 251/13; Regulation 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation 2299/89, OJ [2009] L35/49, arts.5,7,10.

[242] Also Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ [2019] L111/59, art.3.

[243] As it is the case in the draft 10th amendment of German competition law: Section 19a(2).

[244] Similarly, when the telecommunications sector was liberalized in Europe in the nineties, the deal was to maintain the vertical integration of the incumbent while forcing them to open their networks to competition with the Open Network Provisions (ONP): Telecom Liberalisation Green Paper, COM(1987) 290.

- **Interoperability and access to API** to enable complementary services to interwork with the core functions of the LGP (protocol interoperability) or to enable interworking between platforms that are substitutes to each other (full protocol interoperability) while maintaining the security and the integrity of the LGP.

- **Data sharing** involving the bulk transfer of large volumes of data at the request of another firm for the benefit of users in general and which does not undermine good privacy practices and incentives for data minimisation. This obligation will apply asymmetrically to the LGPs only but horizontally to all sectors of the economy. Thus, this obligation is different from the existing data sharing obligation which tends to be imposed symmetrically but only in a sector-specific manner (such as payment services, automotive, or some network industries (energy, telecom, postal).[245]

Those obligations could be **very intrusive,** as they pose risks to incentives to invest and innovate and they are costly to implement by the LGPs. Therefore, they should be imposed:

- with great care, only when necessary to achieve market contestability;
- when they are proportionate to meet such objective;
- in a tailor-made manner, according to the business model of the LGP on which the obligations are imposed.

Enforcing those obligations will moreover be particularly complex. Enforcement will therefore require an effective and comprehensive governance framework, based on regulators having extensive expertise, information gathering and processing competence, and sanctioning power. It might be complemented by transparency or non-discriminatory obligations to ensure full effectiveness.

4 Institutions and enforcement

Given the multinational presence of the large gatekeeper platforms, the DMA should mostly be **enforced at the EU level** either by the Commission or an ad-hoc body. Member State should also designate independent **National Digital Agencies to support** the work of the Commission or the EU body. All enforcement authorities should comply with due process and their decisions should be subject to a meaningful judicial review.

Given the characteristics of the digital economy, regulatory authorities should develop **New Ways of Enforcement** based on the following four principles: enforcement should be more **participatory, experimental, data-based, and technological.**

4.1 Institutional design[246]

As the LGPs are most of the time global and their conduct tends to affect the users in more than one Member State as well as the digital single market as a whole, we recommend the DMA to be

[245] In addition, the Commission is examining the need to impose more data sharing obligation in a forthcoming Data Act, which may apply symmetrically.
[246] See the fourth issue paper for more developments.

enforced at the EU level, either by the Commission[247] or by an ad-hoc EU body.[248] The advantage of choosing the Commission is that a new authority would be costly and face a significant learning curve. Another advantage of choosing the Commission is that it will facilitate the coordination of DMA with competition law enforcement as the same authority will be in charge of both legal instruments at the EU level as well as with the other EU policies. The disadvantage is that the Commission is not an independent authority but plays an increasing political or geopolitical role. Another disadvantage is that the Commission may not have, at this stage, sufficient resources for this new role.

The tasks of the EU regulatory authority should be the following: (i) the designation of the LGPs based on the criteria and indicators mentioned above in section 3.2; (ii) the monitoring and the enforcement of prohibitions, possibly by giving more explanations of prohibitions to provide further guidance for LGP; (iii) the design, the monitoring and the enforcement of tailored-made obligations.

In enforcing the DMA, the EU authority should be supported and advised by national authorities which are closer to the consumers and the business users of the LGPs. Thus the DMA should also provide that each Member State designate a **National Digital Authority** with the standard features imposed by EU law on national regulatory authorities (in particular, expertise, independence, resources, information gathering, and sanctioning powers).[249] It will then be up to each Member State to designate such authority, which may be an existing one (for instance, the competition agency or the telecom regulator), a new one, or a national network between existing authorities. Such designation should build on (and respect) the recently introduced provision in the P2B Regulation to avoid inconsistent legislation

The tasks of the National Digital Authorities could be the following: hear complaints from business users or consumers of the platforms and, when justified, forward them to the EU authority; monitor the enforcement of the DMA prohibitions in their national territory; advise the EU authority on the necessity, the proportionality, and the design of DMA obligations and, when appropriate, monitor the enforcement of those obligations in their national territory. Moreover, national authorities could particularly focus on purely national cases, while providing leeway for EU level action in cross-border cases.

Given the intrinsic European dimension of the platforms and to ensure effective action and advice by the National Digital Authorities, these should be **coordinated within a new EU network**. The design of such a network could be inspired by one of the following existing models: the European Competition Network (ECN),[250] the Consumer Protection Cooperation Network (CPC),[251] the European Data Protection Board (EDPB)[252] or the Body of European Regulators for Electronic Communications (BEREC).[253]

Given the great complexity of enforcing the regulation in the digital economy, the multiple and amplified trade-offs to be decided, it is key that all the authorities in charge of the DMA are

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[247] As it is the case for the Code of Conduct for computerised reservation systems: CRS Regulation, arts.13-16.

[248] As it is the case for the systemic banks: Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63. The powers of the SSM are based on Article 127(6) TFEU. If the EU treaties do not provide for a specific legal basis, some claim, on the basis of the old *Meroni* doctrine, that the EU legislature cannot establish a new EU regulatory authority without a Treaty change as it would upset the institutional balance which gives executive powers to the Commission. However, the Court of Justice has recently validated the powers of the European Securities and Markets Authority (ESMA) which is tasked with direct supervision and enforcement against specific financial entities: Case C-270/12 *United Kingdom v. European Parliament and Council*, EU:C:2014:18.

[249] For instance, Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, O.J. [2019] L 11/3, arts.4-12 ; GDPR, arts. 51-59; EECC arts.6-9.

[250] Regulation 1/2003, arts.11-13.

[251] Regulation 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation 2006/2004, OJ [2017] L 345/1.

[252] GDPR, art.68-76.

[253] Regulation 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of the European Regulators for Electronic Communications, OJ [2018] L 321/1.

sufficiently **independent** of the market players as well as of the political power. Authorities should also enjoy sufficient sanctioning power and impose **sanctions** that are effective, proportionate, and dissuasive when the prohibitions or the obligations imposed on LGPs are violated.

It is also key that the investigations, the procedures, and the actions of those authorities respect the fundamental rights which are guaranteed by the **Charter of Fundamental Rights of the EU** and that the perceived need for speedy action does not reduce the guarantee of due process and procedural fairness protected by the Charter. Moreover, given the still limited understanding of the digital markets and the risks of errors, it is also key that the decisions of the regulatory authorities can be subject to **review by an independent Court** which has access to the relevant expertise to assess the very complex trade-offs which are to be arbitrated in the digital economy. To be meaningful, such a legal review should take the merits of the case into account.[254]

4.2 New Ways of Enforcement

Given the characteristics of the digital economy, in particular, the amplified trade-offs to be arbitrated, the rapid and often unpredictable innovation, and the large information asymmetry between the LGP and the regulatory authorities, new ways of enforcement need to be found for the DMA to be effective and not remain a piece of paper in the official journal of the EU. We think that those new ways of enforcement should be based on the four principles described below.

First, enforcement needs to be **participatory** while being mindful of the risks of regulatory capture. This means that all stakeholders (i.e., the LGPs, their actual and potential competitors, their business users, and the consumers) should be closely involved in the implementation of the new rules. This should be particularly the case for the design of positive obligations aimed at increasing market contestability. The participation of the LGPs may be achieved by relying more on commitments.[255] However, this should not necessarily rely on self-regulation - which is often self-serving - in the case of gatekeeper power.[256]

Second, enforcement needs to be **more experimental** while remaining predictable. Given the novelty of many issues, regulators are bound to make mistakes but should minimise those. One way to minimise errors is to learn from experience. Evaluation should be done ex ante by running A/B testing of different types and design of remedies as the LGPs are now used to do before launching new services. Evaluation should also be done ex post by assessing the relevance, effectiveness, and efficiency of the remedies after some time of implementation.[257]

Third, enforcement needs to be **data-based**. As the LGPs themselves, the regulatory authorities should seize the opportunities brought by big data analytics and AI to increase the efficiency of their regulatory operations. This implies that authorities need to have extensive power to collect information from the LGP but also from their business users and customers (which corresponds to option 2 on the Inception Impact Assessment). Authorities also need to have efficient means and technologies to process that information with AI tools (data-driven regulatory intervention, Suptech and Regtech).

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[254] See for instance, EECC, art.31.

[255] As used in competition law (Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. [2003] L 1/1, as amended, art.9) or in telecommunications regulation (EECC, art.79).

[256] This is why the concept of Code of conducts, which often refers to self-regulation, should be alleviated in the DMA.

[257] On ex post regulatory evaluation: Commission Staff Working Document of 7 July 2017, Better Regulation Guidelines, SWD(2017)350, Chapter VI.

Fourth, when appropriate and possible, enforcement needs to be **by design.** This implies that the legal prohibitions and obligations should be as much as possible integrated into the technological design used by the LGPs and that the technical architecture should include, as much as possible, the rules themselves.[258] As put by Lessig, the legislative code should move to the computer code.

[258] See the privacy by design rule imposed by GDPR, art.25(1): Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects.

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