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PART 2/2

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT REPORT

ANNEXES

Accompanying the document

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on contestable and fair markets in digital sector (Digital Markets Act)

{COM(2020) 842 final} - {SEC(2020) 437 final} - {SWD(2020) 364 final}

Annex 1: Procedural information

1. LEAD DG, D*e*CIDE PLANNING/CWP REFERENCES

Three Directorates-General are in the lead for this impact assessment. These are the Directorate-General for Competition (DG Competition), the Directorate-General for Communications Networks, Content and Technology (DG Connect) and the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG Grow).

The impact assessment compiles information on two projects:

- Initiative for a New Competition Tool, led by DG Competition and registered in D*e*cide as PLAN/2020/7913; and
- Initiative for a Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers, led by DG CNECT and DG GROW and registered in D*e*cide as PLAN/2020/7452.

2. ORGANISATION AND TIMING

The inception impact assessments for both initiatives were published on 2 June 2020. These inception impact assessments set out the background of the initiatives as well as their purpose and scope. The inception impact assessments also presented the consultation activities that would be conducted by the Commission (notably a public consultation, external support studies, exchanges with dedicated stakeholders and, for the New Competition Tool, a targeted consultation of the national competition authorities). The inception impact assessments also explained the data collection methodology that would be followed to gather relevant information for the purpose of the impact assessment.

The impact assessment was carried out in close cooperation with other interested Commission services. The inter-service steering group ('ISSG') set up for that purpose comprises representatives of the Directorates-General FPI, JRC, HOME, ENV, FISMA, AGRI, JUST, EAC, TRADE, RTD, TAXUD, ENER, MARE, SANTE, EMPL, MOVE, and ECFIN, the EEAS, as well as the Secretariat-General and the Legal Service, which are associated by default to any such initiative.

The impact assessment for the New Competition Tool, was carried out in close cooperation with the NCAs, which were consulted on the milestones for the evaluation study and the study on consumer purchasing behaviour. The different milestones of the evaluation phase are reflected in the table below:

Timing	Step
2 June 2020	Launch of the initiative in the Commission's Decide
2 June 2020	Publication of the Inception Impact Assessments (4-week comment period) and launch of the open public consultation (2 June until 8 September 2020)
3 July 2020	Upstream Meeting with the Regulatory Scrutiny Board on the Digital Services Act
10 September 2020	Upstream Meeting with the Regulatory Scrutiny Board on the New Competition Tool
6 October 2020	ISSG Meeting to consult on the draft Impact Assessment
8 October 2020	Publication of the following documents concerning the NCT pillar: - Summary report of the public consultation - Summary of the NCA consultation - External support studies
30 October 2020	Quality check-list
4 November 2020	Consultation of the Regulatory Scrutiny Board
6 November 2020	First (negative) Opinion by the Regulatory Scrutiny Board
10 December 2020	Second (positive) Opinion by the Regulatory Scrutiny Board

3. EXTERNAL SUPPORT STUDIES

3.1. EXTERNAL SUPPORT STUDIES CONDUCTED IN THE CONTEXT OF THE DIGITAL SERVICES ACT ('DSA') PACKAGE: EX ANTE REGULATORY INSTRUMENT OF VERY LARGE ONLINE PLATFORMS ACTING AS GATEKEEPERS ('GATEKEEPER INSTRUMENT')

3.1.1. Impact Assessment Support study

DG CNECT commissioned a support study for the an impact assessment, *Platforms with Significant Network Effects Acting as Gatekeeper*, run by Consortium composed of ICF (lead), WiK and CEPS, with a budget of EUR 597 850 [VIGIE 2020-00630]. The study had three objectives:

1. Providing a structured analysis of (i) the issues raised by digital platforms with strong data-driven network effects and (ii) analysis of the ability of current regulation (e.g. competition law; P2B regulation) to address these issues (regulatory failures).

2. Scoping the parameters of intervention which match the problem analysis (identify economic players in scope of the initiative, and criteria relevant to identify these players).

3. In agreement and cooperation with Commission services, help the identification of possible policy options, and provide evidence in analysing their impact.

3.1.2. Support study to the Observatory for the Online Platform Economy

DG CNNECT and DG GROW commissioned a support study to the Observatory for the Online Platform Economy run by a consortium composed of PPMI (lead) with Open Evidence, IW and Rand Europe (SMART 2018/0034), with a budget of EUR 830 000.

The contractor produced the following analytical papers (AP):

- AP1:Differentiated treatment (IW)
- AP2:Platform data access and secondary data sources (PPMI)
- AP3:Transparency in the business-to business commercial relations in the online advertising market (Open Evidence)
- AP4: Significant Market Status (RAND)
- AP5: Business user and third-party access to digital platform data (PPMI)
- AP6: The main obstacles and opportunities for multihoming (PPMI)
- AP7: The structure of the online platform economy post COVID-19 outbreak (Open Evidence)
- AP8: Developments concerning B2B platforms and emerging issues (RAND)

3.2. EXTERNAL SUPPORT STUDIES CONDUCTED IN THE CONTEXT OF THE NEW COMPETITION TOOL

DG COMP commissioned expert advice reports by renowned academics to inform the most appropriate set-up of the NCT, including:

a. A study by Massimo Motta and Martin Peitz on structural competition problems in digital and other markets, as well as a possible intervention trigger for the NCT based on the commonalities between the scenarios identified;[1]
b. A study by Alexandre De Streel and Pierre Larouche on the interplay of the NCTs and sector-specific regulation, as well as possible ways to ensure complementarity between both;[2]
c. A study by Heike Schweitzer on the institutional and procedural set-up of the NCT, with the aim of ensuring effective and timely intervention, while safeguarding the right to be heard and judicial review;[3] and
d. A comparative study by Richard Whish of existing market investigation tools, with a particular focus on the UK Competition and Markets Authority's market investigation reference tool.[4]

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[1] Massimo Motta is a professor at the Pompeu Fabra University in Barcelona and served as Chief Competition Economist of the European Commission from 2013 to 2016. Martin Peitz is a professor of economics at the University of Mannheim.

[2] Alexandre De Streel is professor of European law at the Universities of Namur and Louvain, Professor Larouche is professor in law and innovation at the Faculty of Law at the Université de Montréal.

[3] Heike Schweitzer is a professor in the Humboldt University of Berlin and was one of the special advisers authoring the *Competition policy for the digital era* report.

[4] Richard Whish is emeritus professor of Law at King's College London and one of the leading competition law scholars.

DG COMP also contacted three members of the Economic Advisory Group on Competition Policy (EAGCP), namely Gregory Crawford, Patrick Rey and Monika Schnitzer, who prepared an economic evaluation of the NCT.[5]

These reports are referenced in Annex 5.1.

4. CONSULTATION OF THE RSB

The meeting of the Regulatory Scrutiny Board ('RSB') took place on 4 November 2020. The outcome was a negative opinion, issued on 6 November. Following a substantial rethinking of the document in light of the comments of the RSB, the text was resubmitted for a second time. The RSB delivered its second positive opinion with reservations on 10 December 2020.

The following table provides information on how the comments made by the RSB in its first negative opinion were addressed in this Staff Working Document:

RSB comments	Actions taken
(1) The impact assessment is unfinished. Work on integrating the two pillars of the initiative is incomplete.	We acknowledge that the first submitted impact assessment was unfinished, and have since then fundamentally reworked the approach, notably on the basis of the feedback from the RSB. In particular, the original two-pillar structure of the impact assessment was abandoned and integrated into a 'single track' approach to the problem definition and options' assessment. The impact assessment further substantiates the *internal market* nature of the issues at stake and of the measures considered to address those. The entire Impact Assessment has been thoroughly overhauled, and no longer contains any distinctions between any pillars present in the previous version of the Impact Assessment. As a result of the substantial rethinking of the problem definition – no longer based on a distinction between pillars – genuinely unified policy options *ex novo* have been created for the impact assessment. This new structure has allowed an objective comparison of the three options presented, in line with the Better Regulation requirements.
(2) The report does not sufficiently justify the restriction of its scope to digital markets. It does not justify the selection of platform services	A new Section 1.2 has been included in the impact assessment in order to explain the focus of the initiative not only on digital markets, but more specifically on (i) selected core platform services of (ii) certain gatekeepers engaging in (iii) certain behaviour. Moreover, the evidence on the special incidence of market failures on digital markets has been further added in the

[5] Gregory S. Crawford is a professor of Applied Microeconomics at the University of Zurich, Patrick Rey is Professor of Economics at the Toulouse School of Economics, Monika Schnitzer is a member of the German Council of Economic Experts and a professor of comparative economics at the Ludwig-Maximilian-University Munich.

RSB comments	Actions taken
within the digital sector nor does it clarify the concept of gatekeeper platforms.	text. An entire new section 5 explains the main parameters that set out the options space, including explicitly a discussion of the different parameters that set the scope. This includes a clarification and a rationale of the notion of gatekeeper platforms, and provides an explicit overview of which services are in scope and which companies might qualify depending on the choice of criteria.
(3) The report does not provide an integrated problem definition for the initiative. It does not appropriately describe the shortcomings the initiative intends to address and does not provide a proper evidence base for them.	The problem definition has been redone from scratch in order to present an integrated problem definition for the initiative. In addition to doing away with the Pillar I and Pillar II classification, the distinction between problem drivers and problems as well as their interlinkage have been clarified. Moreover, for the purpose of clarity, the problem definition part no longer distinguishes between *existing* and *emerging* market failures. Following this new problem definition, the impact assessment now presents a single, more coherent intervention logic, reflecting problems, their underlying drivers and policy objectives pursued. The evidence base for the problems identified – in particular as regards the specific unfair practices – is now explicit, notably in the tables in Section 5, and in updated Annexes (notably 5.6); concrete examples of these problems and of their underlying drivers and evidence have been included.
(4) The report does not provide policymakers with real choices on the different policy options. It does not provide a full range of options and it does not develop these in sufficient detail. It therefore cannot assess their impacts on different stakeholders.	The new Impact Assessment provides a new structure for the Options design. It sets out upfront the main parameters that determine the options range, and their trade-offs. A completely new set of options (with sub-options as alternatives) is now presented that provide genuine alternatives within the parameters of the problem definition. The new Impact Assessment also explains in greater detail the discarded options and why they have been discarded. 1. **Option 1** is a non-dynamic option with a set of self-executing obligations addressing clearly defined unfair practices by gatekeepers designated solely on quantitative thresholds in specific core platform services. This option contains no dynamic elements, but is presented with distinct two sub-options on scope as distinct alternatives, on the basis of different thresholds.

RSB comments	Actions taken
	Sub-option 1-A is presented as a sub-option with a small perimeter of gatekeeper companies in scope (some 5-7 companies in scope) while sub-option 1-B contains a wider scope of gatekeeper companies (some 10-15 gatekeeper companies), based on a lower quantitative threshold. 2. **Option 2** is a semi-flexible option, combining a set of self-executing obligations with some degree of flexibility, notably through a dialogue on some of the obligations, through a mechanism for updating the practices and obligations, and a mechanism designating gatekeepers based on a combination of quantitative and qualitative thresholds and including the designation of emerging gatekeepers. Again, this semi-flexible option is presented with two sub-options that reflect alternatives on the scope platforms. Sub-options 2-A and 2-B are sub-options on this semi-flexible option, following the same distinction on the quantitative threshold as Option 1. 3. **Option 3** is a fully flexible option providing for a dynamic updating mechanism allowing for the inclusion of additional core platform services and of additional obligations where following a market investigation such an inclusion is considered appropriate and justified, and where the designation of gatekeepers is based only on qualitative (not quantitative) thresholds. The impact section is completely updated and revised, and now includes more detailed assessments and comparisons of each option against the baseline and against each other.
(5) The report fails to assess all risks and trade-offs of the policy options. It does not clarify the extent to which the preferred option, and in particular the interaction between the regulatory measures and the market investigation regime, is coherent and futureproof.	Section 5 now outlines the trade-offs upfront that motivate the choice and design of options. Section 7 now explicitly compares the new options against each other in terms of trade-offs, and motivates a preferred option. The substantial changes in the design of the Impact Assessment – including the disappearance of the pillars – has led to a unified set of measures no longer distinguishing between regulatory measures and market investigation. A fresh quantitative and qualitative assessment has been carried out for the preferred option. Annex 3 also includes a qualified and quantified overview of costs associated with each of the three options. Special attention has been given to the monitoring framework of the intervention under the preferred option.

The following table provides information on how the comments made by the RSB in its second positive opinion with reservations were addressed in this Staff Working Document:

RSB comments	Actions taken
(1) The report should make clearer how the problem drivers may lead to the identified negative outcomes. It should consider the negative consequences of curtailing the size advantages following from network economies and economies of scale for consumers. It should better distinguish problems relating to size advantages from the monopolisation of data and the imposition of market rules like exclusive dealings.	A conclusion was added on drivers' effects (Section 2.3.3) explaining in more detail how the problem drivers lead to negative outcomes. Section 6 has been updated, where relevant, to better reflect the link between problem drivers and identified impacts. Section 6.7 is now considering the point of curtailing gatekeepers' size advantages and is assessing the impact on consumers.
(2) The report should better justify the identification and selection of the core platform services. It should present evidence of what determines persistent misuse of gatekeepers' power vis-à-vis dependent business users and customers. It should more convincingly demonstrate for each of the selected core platform services that the identified weak contestability has negative effects in terms of higher mark-ups, lower quality of service, or reduced innovation. The report should better justify why other platform services, such as content streaming providers, would not meet the selection criteria.	Table 2 (in Section 5.2.2) illustrates all practices resulting from misuse of gatekeepers' power vis-à-vis dependent business users and customers. The Table specifies now under each example of unfair practice the type of behavior concerned (e.g. data-related, size-related, dependence-related, etc.). The evidence provided for each practice was also strengthened. Table 1 has been included in Section 5.2.1 explaining the main features of each of the eight core platform services in scope. Reference to several points of evidence describing the unfair practices and weak contestability in these services was also added, as well as a list of the most common practices for each services. As an introduction to Table 1 it is also explained the limitations as regards a granular assessment of mark-ups and innovation for each of these services. Nevertheless, some additional information was added in relation to these variables. Finally, some justifications are provided on the question why video streaming content services and industrial B2B platforms do not meet the criteria.
(3) The report should better define and justify the measures covered under the options. It should demonstrate why the proposed set of cumulative quantitative thresholds (under the 'non-dynamic' and 'semi-	In Section 5.2.1 more detail is now provided about the reliability of each quantitative proxy for the determination of the status of gatekeeper. Some additional data was collected and analysed during the period of review by the RSB. This resulted in a slight change in the value of the

RSB comments	Actions taken
flexible' options) can be considered as a robust and reliable trigger across all selected core platform services for the (quasi-automatic) designation of gatekeepers and the imposition of obligations. It should better explain why a market investigation is not deemed necessary or proportionate in these situations.	thresholds considered, without changing the number of gatekeepers under each sub-option. This also shows that small variations in the turnover and number of users do not have a significant impact in the designation of gatekeepers. The description of Option 2 in Section 5.3.2 (as well as in Section 8) now explains in more detail a flexible element that minimises the risks associated to the possible lack of robustness and reliability of the quantitative triggers. Also circumstances where a market investigation can take place when there is a doubt about the application of the quantitative thresholds are explained. This is also reflected in the comparison about effectiveness.
(4) From a future proofing perspective, the report should explain why the possibility of updating the list of core platform services following a market investigation was discarded for the 'semi-flexible'option, while maintained as a key element for the 'fully flexible' option. As regards the 'fully flexible' option, it is not clear why certain beneficial guidance elements (including indicative quantitative thresholds), which could have provided further legal clarity, have not been considered in the design of this option.	Section 5.3.2.5 now includes an explanation about the possibility under Option 2 to update the list of core platform services, namely in the context of the review of the Regulation. Any additional flexibility level would defeat the legal certainty created by a fixed scope of core platform services. Section 5.3.3.3 now includes an additional explanation as to why even guiding thresholds would defeat the purpose of Option 3 by undermining its inherent flexibility.
(5) The report should clarify the distinction between the 'semi-flexible' and 'fully flexible' options in terms of the obligations that can be added following a market investigation. It should also explain, where the market investigation powers and process deviate from the envisaged model and rules under Regulation 1/2003.	Section 5.3.3.4 now clarifies the distinction between Option 2 and Option 3 in terms of the obligations that can be added. Sections 5.3.2 and 5.3.3 now include several paragraphs comparing the enforcement powers and processes of Regulation 1/2003 with those of the instrument that is the object of this impact assessment.
(6) The report should improve the comparison of options in terms of effectiveness and benefits (including in summary table 5) given that the 'fully flexible' option seems to score	The relative importance of the tree parameters (speed, legal certainty and flexibility) has been specified in Section 7.1, and reflected throughout the options' comparison carried out in Section 7.

RSB comments	Actions taken
best in minimising false negatives/positives and future proofing. The report should clarify the relative weight given to the different assessment criteria (e.g. legal certainty vs. flexibility vs. speed). It should better substantiate the assumption that the 'fully flexible' option would lead to a higher number of large platforms being covered, and why the decisions taken under this option would be 'arbitrary' (given that they would be based on market investigation).	The narrative has been further specified and substantiates better the scoring in Table 5. The effectiveness and efficiency criteria have been reviewed, and adjusted whenever needed. The different assumptions made have been further explained in Sections 5.3 and 7.
(7) The report should better explain the limitations of the methodology used. When presenting evidence the report should differentiate more clearly between cases which are still being investigated or pending and the established case law. The Board notes the estimated costs and benefits of the preferred options in this initiative, as summarised in the attached quantification tables.	An explanation of the sources of evidence and their limitations was included before Table 2. Table 2 was updated making clear which evidence comes from established case law, which comes from cases being investigated and which one comes from public authorities' reports.

5. OTHER EVIDENCE, SOURCES AND QUALITY

Reports by the expert group for the Observatory on the Online Platform Economy[6]

- Measurement of the Online Platform Economy
- Differentiated treatment
- Data in the Online Platform Economy

Published for feedback on 9 July.[7]

[6] https://ec.europa.eu/digital-single-market/en/expert-group-eu-observatory-online-platform-economy
[7] https://ec.europa.eu/digital-single-market/en/news/commission-expert-group-publishes-progress-reports-online-platform-economy

Studies supporting the P2B initiative with relevant input for this proposal

- ECORYS, *Business-to-Business relations in the online platform environment FWC ENTR/300/PP/2013/FC-WIFO*, 2017 (commissioned by DG GROW & DG CNECT).
- ERNST&YOUNG, *Contractual Relationships between Online Platforms and Their Professional Users*, SMART 2017/0041 (commissioned by DG CNECT).
- VVA, *Data in platform-to-business relations*, November 2017 (commissioned by DG GROW).
- GfK et al., *Behavioural study on advertising and marketing practices in online social media*, June 2018 (commissioned by DG JUST).

Research conducted by the Joint Research Centre

- B. Martens (2020), *An economic perspective on data and platform market power,* JRC Digital Economy Working Paper 2020-09.[8]
- B. Martens, M. Sobolewski, & N. Duch-Brown (2020), *Market power in app stores*, JRC Digital Economy working paper 2020-10JRC.[9]
- B. Martens & N. Duch-Brown (2020), *From platforms to ecosystems: The role of data in linking seemingly separate markets*, JRC Digital Economy Working Paper 2020-11.[10]
- N. Duch-Brown (2020), *Entry and contestability in online platform markets*, JRC Digital Economy working paper 2020-12.[11]
- JRC, *Quality discrimination in online multi-sided markets*, 2017.[12]
- JRC, *Platform to business relations in online platform ecosystems*, 2017.[13]
- JRC, *The Competitive landscape of online platforms*, 2017.[14]
- JRC, *An Economic Policy Perspective on Online Platforms*, 2016.[15]

Other data sources

- Dealroom economic report, *Global platforms and marketplaces custom policy intelligence*, April 2020.
- Report on the *Monitoring Exercise Carried out in the Online Hotel Booking Sector* by EU Competition Authorities in 2016.

[8] https://publications.jrc.ec.europa.eu/repository/handle/JRC122896
[9] https://publications.jrc.ec.europa.eu/repository/handle/JRC122897
[10] https://publications.jrc.ec.europa.eu/repository/handle/JRC122898
[11] https://publications.jrc.ec.europa.eu/repository/handle/JRC122899
[12] https://ec.europa.eu/jrc/sites/jrcsh/files/jrc109185.pdf.
[13] https://ec.europa.eu/jrc/sites/jrcsh/files/jrc109186.pdf.
[14] https://ec.europa.eu/jrc/sites/jrcsh/files/jrc106299.pdf.
[15] https://ec.europa.eu/jrc/sites/jrcsh/files/JRC101501.pdf.

CERRE reports and events:

- *The role of data for digital markets contestability*, September 2020.[16]
- Seminar of 4 March 2020, *How should Europe address gatekeeping platforms*.[17]
- *Market Definition and Market Power in the Platform Economy*, May 2019.[18]
- *Implementing effective remedies for anti-competitive intermediation bias on vertically integrated platforms*, October 2019.[19]
- *Big data and competition policy*, February 2017.[20]
- *Internet Platforms and Non-Discrimination*, December 2017.[21]

Sources from the Member States

- Austrian position Paper, *Digitalisation and Competition Law*, June 2020.
- Dutch Competition Authority (ACM), *Market Study into mobile app stores*, April 2019.[22]
- *Digital gatekeepers - Assessing exclusionary conduct* – a study by e-Conomics commissioned by the Dutch government, October 2019.[23]
- Dutch position, *Future-proofing of competition policy in regard to online platforms*, May 2019.[24]
- Seminar on the regulatory challenges posed by 'structuring platforms' organised on 24 February 2020 in Paris by the French government.
- Non-paper by the French Ministry of Economy and Finance, *Regulating structuring digital platforms in favour of competition and innovation in the digital economy*.[25]
- French paper, *Regulation of structuring platforms: the case of operating systems and app stores, 'gatekeepers' of our devices*.
- Position of French Competition Authority.[26]
- ARCEP's working paper on the structuring platforms, December 2019.

16 https://cerre.eu/events/contestability-digital-markets-role-essential-data.
17 https://cerre.eu/events/designing-eu-intervention-standard-digital-gatekeepers.
18 https://cerre.eu/sites/cerre/files/2019_cerre_market_definition_market_power_platform_economy.pdf.
19 https://www.cerre.eu/sites/cerre/files/cerre_intermediationbiasremedies_report.pdf.
20 https://cerre.eu/publications/big-data-and-competition-policy.
21 https://cerre.net/publications/internet-platforms-non-discrimination/.
22 https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf.
23 https://www.government.nl/documents/reports/2019/10/07/digital-gatekeepers.
24 https://www.government.nl/documents/letters/2019/05/23/future-proofing-of-competition-policy-in-regard-to-online-platforms.
25 https://www.tresor.economie.gouv.fr/Articles/7690058a-00e4-44a7-8aed-9a2ee5a04d51/files/c888861f-5516-4e4e-b3ce-a96af66b3c34.
26 https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-publie-sa-contribution-au-debat-sur-la-politique-de-concurrence.

- The Report by the German Competition Commission, 2020.[27]
- German report, *A New Competition Framework for the Digital Economy*, 9 September 2019.[28]
- German Ministry for Economic Affairs and Energy Study, *Modernising the law on abuse of market power* (2018).[29]
- Position paper by German telecom and competition authorities on monitoring digital platforms, May 2020.[30]
- DE Monopolies Commission Policy Brief 4/2020, *10th amendment to the Competition Act – meeting challenges in digital and regional markets!*.
- Italian AGCM/AGCOM/DPA Report on big data and policy recommendations – 20 Feb 2020.[31]
- Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world (2 October 2019).
- Economic Affairs Ministries of DE, FR, PL: *Modernising EU Competition Policy*.
- Spanish National Commission on Markets and Competition (CNMC) contribution to conference *Shaping competition policy in the era of digitisation*.[32]

Sources from non-EU states and international organisations

- US House of Representatives Majority Staff report, Investigation of Competition in Digital Markets, October 2020.[33]
- Furman report, *Unlocking digital competition*, Report of the Digital Competition Expert Panel (the UK), March 2019.[34]
- OFCOM, *Online market failures and harms, An economic perspective on the challenges and opportunities in regulating online services*, October 2019.[35]

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27 https://monopolkommission.de/images/HG23/HGXXIII_Gesamt.pdf#page36.

28 https://www.bmwi.de/Redaktion/EN/Downloads/a/a-new-competition-framework.pdf?__blob=publicationFile&v=2.

29 https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3.

30 https://www.bwb.gv.at/news/detail/news/rtr_praesentiert_methodenpapier_in_enger_kooperation_mit_bwb_zu_monitoring_digitaler_plattformen/.

31 https://www.agcom.it/documents/10179/17633816/Allegato+10-2-2020+1581347457837/c4139504-3777-4674-ad6d-ac6b9d501608?version=1.0.

32 https://ec.europa.eu/competition/information/digitisation_2018/contributions/comision_nacional_de_los_mercados_y_la_competencia.pdf.

33 US House of Representatives Majority Staff Report, *Investigation of Competition in Digital Markets*, October 2020.

34 https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel.

35 https://www.ofcom.org.uk/__data/assets/pdf_file/0025/174634/online-market-failures-and-harms.pdf.

- CMA, *Online platforms and online advertising* – Market study final report, July 2020.[36]
- Stigler Center Report, George J. Stigler Center for the Study of the Economy and the State The University of Chicago Booth School of Business, July 2019.[37]
- ACCC Report, *Digital Platforms Inquiry*, June 2019,[38]and Interim Report of September 2020.[39]
- Japanese Fair Trade Commission Report regarding trading practices on digital platforms, October 2019,[40] and the Interim Report on the Evaluation of Competition in the Digital Advertising Market.[41]
- BEUC, *The role of competition policy in protecting consumers' well-being in the Digital Era*, October 2019.[42]
- OECD, *Rethinking antitrust tools in multisided markets*, 2018.[43]

External expertise

The European Commission sought external expertise before drafting this Impact Assessment. Views of the experts have contributed to the problem framing and evidence collection strategy. Consultation of experts listed here below does not imply automatic endorsement on their side of the Impact Assessment report.

- JRC expert panel

At the request of DG CNECT, the Joint Research Centre (JRC) of the European Commission established a high-level Panel of Economic Experts on Platform issues with a mandate to produce a report with an economic opinion on the proposed ex-ante regulatory tool, based on existing economic research and evidence. The members of the Panel are well-known economists with a strong track-record in economic research on digital platforms and competition policy. They include: Luis Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Marshall Van Alstyne and Tommaso Valletti. Panel members are independent and contribute pro bono to the report.[44]

- Philip Marsden, workshop of 29 January 2020.
- Paul Belleflamme, workshop of 29 January 2020.
- Stephen Adshead, workshop of 29 January 2020.

[36] https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report.
[37] https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C.
[38] https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf.
[39] https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2020-interim-report.
[40] https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Report.pdf.
[41] https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200616-1.pdf.
[42] https://www.beuc.eu/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf.
[43] http://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf.
[44] https://publications.jrc.ec.europa.eu/repository/handle/JRC122910

- Francesco Decarolis, workshop of 29 January 2020
- Daniel Knapp, workshop of 29 January 2020.
- Wolfgang Kerber, Updating Competition Policy for the Digital Economy? An Analysis of Recent Reports in Germany, UK, EU, and Australia, September 2019.[45]
- Alexandre de Streel and Peter Alexiadis, *Designing an EU Intervention Standard for Digital Platforms,* Robert Schuman Centre for Advanced Studies, Research Paper No. 2020/14.[46]
- Experts for the Observatory on the Online Platform Economy.[47]

[45] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469624.
[46] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544694.
[47] https://platformobservatory.eu/about-observatory/group-of-experts/.

Annex 2: Stakeholder consultation

1. THE STAKEHOLDERS ENGAGEMENT STRATEGY

This annex presents the results of the consultation activities performed in the context of the Inception Impact Assessments: (i) the *Digital Services Act ('DSA') package: ex ante regulatory instrument of very large online platforms acting as gatekeepers*;[48] and (ii) the *New Competition Tool ('NCT')*.[49]

Given the breadth of the questions asked, both consultations were conducted separately and the results are presented separately below. However, since the outset, both consultations were aimed at complementary solutions by "*ensur*[ing] *a joint analysis of the results*", "*with a view to exploring synergies and ensuring consistency on the policy options pursued, in particular as regards possible remedies and enforcement.*"[50]

As presented in the initiatives' Inception Impact Assessments, the objective of both consultations was to consult as widely as possible through various means in order to deliver an in-depth impact assessment of the different policy options and their perceived impact on the Commission's ability to improve effective competition in digital markets.

As will be presented below, this objective was largely met. To illustrate this, it is worth noting that a total of 3051 respondents participated in both open public consultations. These respondents represented all possible categories of stakeholders.

In developing the stakeholder engagement strategy for the both initiatives, the merged stakeholder mapping included:

1. Businesses and their associations, including digital players (online intermediaries, other digital players, third parties involved in the ecosystem around digital services);
2. Trade associations and labour unions;
3. Consumers, including users of digital services;
4. Civil society and consumer organisations;
5. National authorities including law enforcement, competition, data protection and consumer protection authorities, and other relevant regulatory bodies in Member States and, to the extent possible, in regions and municipalities;
6. Academics from the technical, legal and social science communities;
7. International organisations; and
8. General public, in particular through the open public consultations.

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48 Inception Impact Assessment for the Digital Services Act package.

49 Inception Impact Assessment of the New Competition Tool.

50 Inception Impact Assessment of the New Competition Tool, at page 3; and Inception Impact Assessment for the Digital Services Act package, at page 4.

2. CONSULTATION ACTIVITIES IN THE CONTEXT OF THE DIGITAL SERVICES ACT ('DSA') PACKAGE: EX ANTE REGULATORY INSTRUMENT OF VERY LARGE ONLINE PLATFORMS ACTING AS GATEKEEPERS ('GATEKEEPER INSTRUMENT')

2.1 Consultation on the Inception Impact Assessment

The Inception Impact Assessment was published on 2 June 2020 with the deadline for comments running until 30 June 2020. During this period, 85 formal submissions were received from a variety of stakeholders (e.g. online platforms; business associations; telecom operators; media publishers; civil society; consumers).

The largest group of respondents were from the private sector, amounting to more than half of all respondents. Among the private sector, online platforms constituted the largest group of respondents (one third of all respondents).

Overall, a two-third majority of stakeholders expressed its (general) support of Gatekeeper Instrument, with a one-fifth minority explicitly opposing its introduction. Although most replies were of a preliminary nature, many focused on 'option 3' with mixed support for and opposition to blacklisted practices and/or a case-by-case approach.

Online platforms are split on the issue, with the majority of large online platforms and/or their representative associations questioning the need for a Gatekeeper Instrument. On the other side, many small and medium sized platforms, in particular those that are business users of large online platforms, expressed their support for a Gatekeeper Instrument.

Market operators from some specific sectors (e.g. telecoms; financial services) have expressed equally strong support for a Gatekeeper Instruments and were specifically referring to the ineffectiveness of ex post competition rules in addressing some of the emerging issues. Having said that, some telecom operators referred to the relatively static nature of a blacklist/whitelist approach, which they therefore consider to not always be an appropriate and effective solution in a very dynamic online platform environment.

National Authorities expressed their support of a Gatekeeper Instrument and the need for an approach on an EU level to avoid regulatory fragmentation, whilst emphasizing the importance of involving the responsible national government representatives in the legislative project in advance.

Civil society and media publishers also strongly supported a Gatekeeper Instrument. Both called for an adequate degree of transparency in the market as well as the guarantee of a certain degree of media diversity and the respect of consumers' autonomy and choice.

2.2 Consultation on the Impact Assessment[51]

The open public consultation on the DSA, including the Gatekeeper Instrument was launched on 2 June 2020 and open for feedback until 8 September 2020. During this period, a total of 2863 contributions were received, of which 2128 citizens, 621 organisations and 59 administrations represented stakeholders from across all Member States.

In terms of geographical distribution of respondents, the majority of answers came from respondents from Germany (28%) followed by the United Kingdom (21%) and France (14%). Other Member States represented in higher proportions are Belgium (9%), Netherlands (4%) and Austria (3%). Member States contributed with response rates lower than 3%. Among respondents originating outside the EU, the highest share comes from respondents from the United States of America (3%).

Among respondents, the vast majority fully agree (71%) and agree to a certain extent (20%) that there is a need to consider dedicated regulatory rules to address negative societal and economic effects of gatekeeper power of large platforms. The majority of stakeholders considers that, while some of the issues connected to gatekeeper powers can potentially be addressed by improving the efficiency of competition law enforcement through procedural and/or organisational changes, there are restrictions that cannot be overcome with competition law enforcement.

The vast majority of respondents (85% of those who replied to the relevant question) considers that dedicated rules on platforms should include prohibitions and obligations for gatekeeper platforms. Most of the stakeholders suggest that, rather than having certain practices categorically prohibited, the Commission should scrutinise certain practices and prohibit them on a case-by-case basis in circumstances when they are most likely to have detrimental effects. It is also suggested that remedies could be more procedural in nature rather than prescribing a given course of conduct.

According to the vast majority of stakeholders, the proposed list of problematic practices, or 'blacklist', should be targeted to clearly unfair and harmful practices of gatekeeper platforms; specific enough to avoid confusion of what is and is not permitted; adaptable to a dynamic, fast moving sector; and specific to certain gatekeepers as they would otherwise risk hurting smaller players trying to compete with them.

The unfair practices listed by the respondents cover exclusionary conducts, exploitative conducts and transparency-related problems, such as: self-preferencing; lack of data sharing and accumulation of data; limited data portability and data access due to lack of interoperability; imbalance on how the revenues are split between platforms and right owners in relation to user generated content; imposition of unfair and unilateral terms and conditions; imposition of exclusionary terms and conditions for attaining and/or retaining

[51] See for a more elaborate synopsis report the OPC results on the Ex Ante Tool Annex 2.1 below.

access; cross-financing and cross-subsidising of otherwise unprofitable subsidiary companies; and default settings which adversely impact customer choice.

The respondents consider all the characteristics mentioned in the questionnaire (large user base, wide geographical coverage, large share of total market revenue, impact on a certain sector, exploitation of strong network effects, leverage of assets to enter new areas of activity, raising of barriers to entry, accumulation of valuable and diverse data and information, lack of alternative services, lock-in of users) are relevant in determining the gatekeeper role of large online platforms.

Respondents among platforms show diverse views on what would define a gatekeeping position. Some platforms argue that incorporating different services into a platform's offering says little about the strength of a platform, as it is also the case with the ability to leverage assets from one market to another. It is suggested that gatekeeper designations should be business model agnostic, gatekeeper assessments should be reviewed periodically, gatekeeper designations should apply to identified activities in specific markets, and some rules ought to apply on a sector-wide basis.

In general, stakeholders of all categories point out the need to ensure a high level of coherence and legal certainty, the criteria used should be transparent, objective and easily measurable. At the same time, stakeholders also state that a one-size-fits-all approach might be unfeasible, and that a merely cumulative approach might not be sufficient. Users mostly refer to a combination of both quantitative and qualitative criteria.

2.3 Summary of the targeted consultation of Member States

The e-Commerce Expert group was set up in 2005 to coordinate with Member States and exchange views on issues relating to electronic commerce and related services, facilitate the exchange of information, experiences and good practices in the area of electronic commerce in order to advise and assist the Commission in the preparation of legislative proposals and policy initiatives.

During the 21st meeting of the Expert group on 26 May 2020, the preparation of DSA package was presented in detail and discussed with the Member States. The Commission provided a presentation on the context and thinking behind the Gatekeeper Instrument, outlining possible options that might be elaborated in the Impact Assessment and emphasising that the final options will need to be looked at very carefully.

Throughout the impact assessment, the Commission also met bilaterally with stakeholders that requested this, primarily in the context of the public consultation and the feedback period for the inception impact assessment. These meetings were requested by the parties concerned and aimed primarily at discussing the submissions made by stakeholders, either in the context of the public consultation or outside of it

During the following Questions & Answers session, Member States welcomed the details provided by the Commission, mentioned ongoing national initiatives and discussions,

and asked complementary questions on the possible scope of the proposed tool and evidence base.

2.4 Summary of targeted stakeholder workshops

2.4.1. EU Observatory for the Online Platform Economy

Workshop, January 2020

On 29 January 2020, the Commission organised a closed Workshop to support its policy making in the area of online platform economy. The participants included the experts from the expert group for the Observatory on the Online Platform Economy, the Commission Observatory staff from DG CNECT, GROW, COMP and JUST and invited external experts: both from academia (Paul Belleflamme, Francesco Decarolis); industry (Daniel Knapp, Stephen Adshead) and regulatory authorities (Philip Marsden).

The Workshop was devoted to two main topics: market power and transparency in online advertising. The presentation and debate that followed fed into the reports prepared by the expert group and evidence supporting this Impact Assessment.

2.4.2. Expert Panel – Support Study for the IA

On 28 July 2020 and 10 September 2020 ICF, WIK-Consult GmbH, Cullen International, and CEPS organised a high-level academic expert panels to support the Commission in the preparation of the Impact Assessment of platforms with significant network effects acting as gatekeeper. The members of the academic panel were selected in consultation with the Commission by virtue of their in-depth experience in issues relevant to the governance of digital platforms and markets. The panel included the following experts: Martin Kenney, Jan Krämer, Marshall Van Alstyne, William E. Kovacic, Pierre Larouche, Giorgio Monti.

The expert discussed a wide range of issues concerning the platforms with significant network effects acting as gatekeepers, including among others objectives of the future regulatory framework, problems definition, thresholds for intervention, remedies and institutional design.

2.4.3. Stakeholder Consultation

The progress reports by the expert group on: (i) Measurement of the Online Platform Economy; (ii) Differentiated treatment; and (iii) Data in the Online Platform Economy, were published for feedback on 9 July. The Commission received nine contributions from citizens, industry associations, platforms and regulatory authorities.

2.5 Other consultation activities

In addition to the above-mentioned consultations and targeted stakeholder exchanges, the Commission received a number of spontaneous submissions from stakeholders. Some of these contributions were submitted by stakeholders that had participated in the public consultation and were therefore intended to supplement their views with additional

evidence. Other submissions were received from EU government bodies and business associations that had not participated in the public consultation. These submissions largely echoed the issues already raised in the different consultation activities.

Throughout the impact assessment, the Commission also met bilaterally with stakeholders that requested this, primarily in the context of the public consultation and the feedback period for the inception impact assessment. These meetings were requested by the parties concerned and aimed primarily at discussing the submissions made by stakeholders, either in the context of the public consultation or outside of it.

3. CONSULTATION ACTIVITIES IN THE CONTEXT OF THE NEW COMPETITION TOOL ('NCT')

3.1 Consultation on the Inception Impact Assessment

The Inception Impact Assessment was published on 2 June 2020 with the deadline for comments running until 30 June 2020. During this period, 73 formal submissions were received. The largest group of respondents were businesses and business associations, amounting to more than half of all respondents. Among businesses, technological companies constituted the largest group of respondents.

Respondents generally agreed that there are structural competition problems that cannot be addressed under the existing competition rules, with some expressing explicit support for an NCT proposal. Respondents expressed different opinions as to whether competition problems should be tackled with competition-based or regulatory tools. Consumer associations pointed out that there is a need for the NCT to complement the current EU toolbox.

Regarding possible problematic sectors, most views referred to issues relating to digital markets. Most respondents argued that it was less clear which were the structural competition problems outside the digital area that could not be addressed by Articles 101 and 102 Treaty on the Functioning of the European Union ('TFEU').

Given that most respondents did not appear familiar with the investigative processes of similar tools, they questioned how such a tool would work at EU level. Respondents expressing support emphasised that any new intervention tool would require a careful design to ensure legal certainty and procedural safeguards.

3.2 Consultation on the Impact Assessment

The open public consultation on the NCT was launched on 2 June 2020 and open for feedback until 8 September 2020. During this period, a total of 188 contributions were received, with 154 respondents representing stakeholders from 18 Member States.

Businesses (68) and their associations (54) represented more than 2/3 of respondents. Other respondents included NGOs, consumer organisations and academic/research institutions. Nineteen contributions were received outside the open public consultation, which largely echoed the issues raised in the contributions to the public consultation. The

figures in this summary are based only on contributions to the public consultation submitted through the online questionnaire.

Respondents generally agreed that there are structural competition problems that Articles 101/102 TFEU cannot tackle or address in the most effective manner. Respondents also generally agreed that an NCT could help address the limits of the existing competition rules.

More specifically, respondents confirmed that certain market features may lead to structural competition problems. Respondents also confirmed that the examples of structural competition problems set out in the questionnaire, in particular leveraging and monopolisation strategies, as well gatekeepers scenarios and tipping markets, may raise competition concerns that Articles 101/102 TFEU are not suitable or sufficiently effective to address, and that the Commission should be able to intervene in such scenarios. Respondents considered that such structural competition concerns commonly occur in digital markets, while pointing out that there are indications that they are not limited to digital markets.

As regards the intervention trigger for the NCT, the majority of respondents that expressed a view in this regard considered that such a tool should focus on structural competition problems, thus being applicable to all companies in a market, rather than only to dominant companies or gatekeepers or digital platforms. As regards the scope of application, the majority of respondents considered that such a tool should be applicable to all markets. A majority of respondents that expressed a view also indicated that the tool should not be limited to only markets/sectors affected by digitisation. However, a large number of those respondents who indicated that the tool should apply in all sectors and markets nevertheless provided explanations that mainly highlighted how the tool would be especially beneficial if applied to the problems found in digital markets.

As regards the interplay with other instruments and policy options, such as those included in the DSA package, there is general support for ex ante rules consisting of obligations and prohibitions for digital gatekeepers in order to address issues in digital markets raised by gatekeeper platforms. Most respondents emphasised that, in order to effectively address contestability issues in digital markets, there is a need for a combined approach, consisting of more than one policy solution. In those respondents' view, this should include ex ante rules and an enforcement tool applicable to digital markets.

A more detailed summary of the replies received in the context of the open public consultation on the NCT can be found on DG Competition's website.[52] A full list of supporting materials available on that website is also attached as Annex 5.1 to this document.

[52] https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html.

3.3 Summary of the targeted consultation of National Competition Authorities

In the context of the European Competition Network – a network bringing together the Commission, the EFTA Surveillance Authority and all the National Competition Authorities ('NCAs') of the EEA – the Commission submitted a questionnaire to gather the views on the NCT within the Network.

NCAs generally agreed that there exist certain features that may lead to structural competition problems that Articles 101 and 102 TFEU cannot tackle conceptually or cannot address in the most effective manner. The consultation showed a consensus among NCAs with relevant experience that there was a need for a new competition tool to deal with these structural competition problems. More specifically, NCAs pointed out that such a tool should enable the Commission to conduct investigations in markets with structural problems since a case-by-case enforcement against abuses of dominance is not sufficient in the increasingly fast-paced and interconnected economy.

NCAs with relevant experience were split as to the question in which sectors structural competition problems can occur. According to half of the respondents, structural competition problems may occur in all sectors/markets, whereas others argued that structural competition problems may occur in some specific sectors/markets, including but not limited to digital sectors/markets. NCAs, however, suggested that digital markets were more prominently affected by structural competition problems than other markets.

NCAs with relevant experience also indicated that a new competition tool to tackle such structural competition problems would only be effective if it were accompanied with adequate and proportionate investigative powers, but also by soft and hard powers to deal with structural competition problems, including possibly imposing structural remedies (e.g. divestitures or granting access to key infrastructure or inputs) where duly justified.

NCAs with relevant experience generally considered that not adapting existing competition law tools would be at most 'somewhat effective', meaning that an ex-ante regulation would in itself not be sufficient to address structural competition problems.

A more detailed summary of the replies received from NCAs in the context of their consultation on the NCT can be found on DG Competition's website.[53] A full list of supporting materials available on that website is also attached as Annex 5.1 to this document.

3.4 Summary of targeted stakeholder workshops

Consultation activities have also included the participation of the project team in a number of exchanges with stakeholders across various sectors. Given the particular circumstances of the Covid-19 crisis, all these exchanges took place in a virtual environment.

[53] See https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html.

First, as is the standard practice concerning pan-European competition policy matters, the Commission organised two meetings in the context of the European Competition Network ('ECN') in order to gather the views of NCAs as regards the NCT. These meetings were complemented by a series of questionnaires, whose replies are summarised in Section 2.3 above.

Second, bilateral calls were organised with a number of national government bodies and NCAs who requested additional information on the ongoing impact assessment. Upon their request, the Commission also introduced the impact assessment to working groups within the European Parliament and the Council of the European Union.

Third, the Commission also held extensive discussions with all EEA competition authorities (i.e. Greece, Romania) and non-EEA competition authorities (Mexico's COFECE, South Africa's Competition Commission and the United Kingdom's Competition and Markets Authority) having similar tools.

Fourth, a virtual meeting was also held with the Body of European Regulators for Electronic Communications.

Fifth, exchanges were also organised, at their request, with consumer organisations (through BEUC), as well as with a number of private sector stakeholders in the context of events organised by trade associations (e.g. European Round Table for Industry).

3.5 Other consultation activities

In addition to the above-mentioned consultations and targeted stakeholder exchanges, the Commission received a number of spontaneous submissions from stakeholders. Some of these contributions were submitted by stakeholders that had participated in the public consultation and were therefore intended to supplement their views with additional evidence. Other submissions were received from EU government bodies and business associations that had not participated in the public consultation. These submissions largely echoed the issues already raised in the different consultation activities.

All such submissions are published on the dedicated webpage on DG Competition's website,[54] except for a few submissions which stakeholders had asked the Commission not to publish for confidentiality reasons. The Commission used the latter to enhance its understanding of a particular stakeholder position and to complement its views on the issues subject to consultation.

Throughout the impact assessment, the Commission also met bilaterally with stakeholders that requested this, primarily in the context of the public consultation and the feedback period for the inception impact assessment. These meetings were requested by the parties concerned and aimed primarily at discussing the submissions made by stakeholders, either in the context of the public consultation or outside of it.

[54] See https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html.

Annex 2.1: Synopsis Report of the results of the open public consultation on the DSA package - Ex Ante Regulatory Instrument for large online platforms acting as gatekeepers

I. OUTLINE

The Commission has undertaken an Open Public Consultation ("OPC") on the Digital Services Act package ("DSA Package") following the Commission's Communication "Shaping Europe's Digital Future" of 19 February 2020.

The purpose of the OPC is to collect views and evidence from respondents as regards the experience with the application of the existing regulatory framework, in particular e-commerce Directive and collect input about the possible future digital services rulebook. To this end, an online questionnaire ran from 2 June 2020 to 8 September 2020, available in all official EU languages. Responses to the questionnaire were submitted online.

This synopsis report summarises and analyses the views of respondents on the scopes, the specific perceived problems and the implications, definitions and parameters for addressing possible issues deriving from the economic power of large, gatekeeper platforms.[55]

II. PARTICIPANTS AND METHODOLOGY

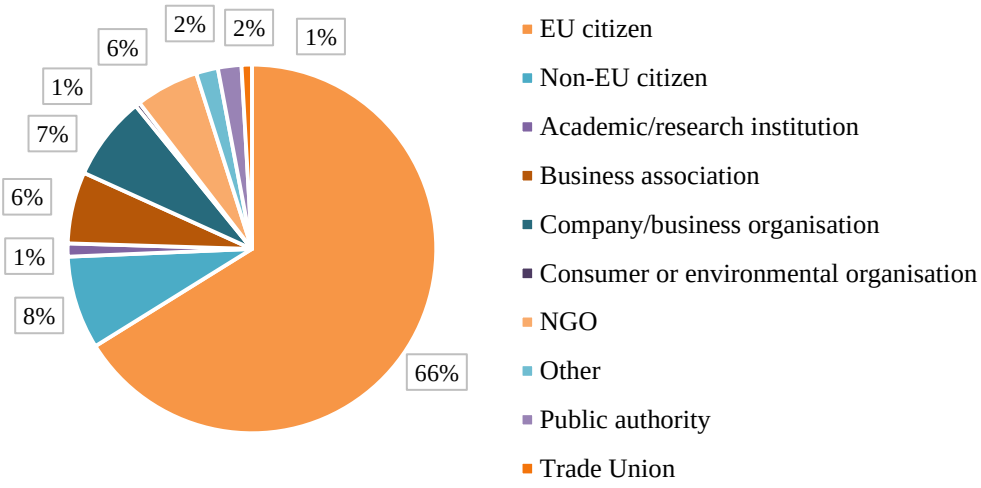
1. Participants - general

In total, 2863 responses to the OPC on the DSA Package have been received. Additionally, around 300 position papers were received in the context of the OPC. Respondents were asked to categorize themselves into different groups namely academic/research institutions, business associations, companies/business organisations, consumer organisations, environmental organisations, EU-citizens, non-EU-citizens, non-governmental organizations (NGOs), public authorities, trade unions and others.

By far most feedback was received from EU-citizens (66.2%) and non-EU-citizens (8.2%), companies/business organisations (7.4%), business associations (6.3%) and NGOs (5.6%). This was followed by public authorities (2.2%), others (1.9%), academic/research institutions (1.2%), trade unions (0.9%), as well as consumer and environmental organisations (0.4%) and several international organisations.

[55] This synopsis report of the open public consultation is based on the analysis of the replies performed by College of Europe contracted by the Commission to support in the qualitative and quantitative analysis.

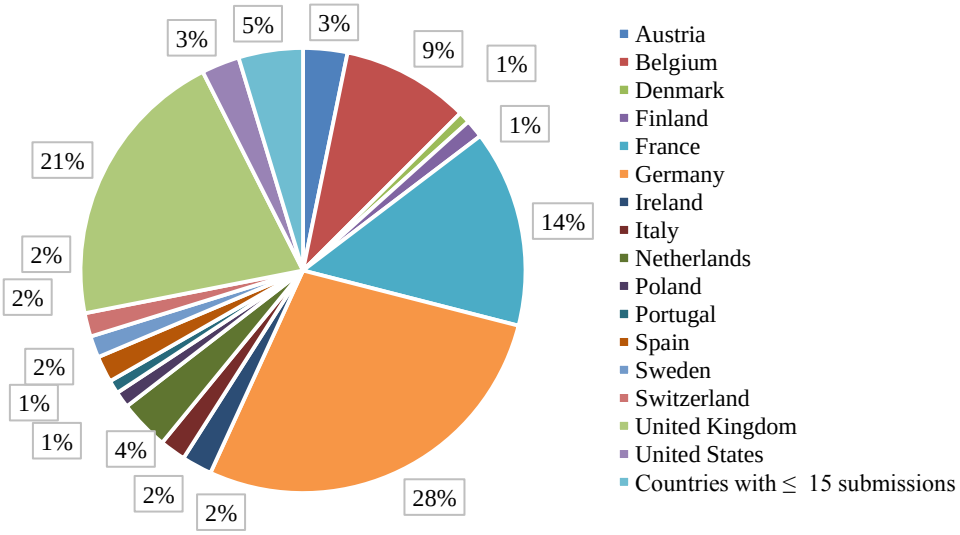
Figure 1: Type of respondent



In terms of geographical distribution of respondents (Figure 1), most of the respondents are located in the EU, the majority of respondents are from Germany (27.8%, i.e. 797 respondents) followed by the United Kingdom (20.6%, i.e. 591 respondents), France (14.3%, i.e. 410 respondents). Other Member States that are represented in a slightly higher proportion are Belgium (9.3%, i.e. 266 respondents), the Netherlands (4%, i.e. 104 respondents) and Austria (3%, i.e. 92 respondents).

The respondents from the remaining Member States contributed to a smaller extent, with responses rates lower than 3%. Among respondents originating outside the EU, the highest share comes from respondents from the United States of America (3%, i.e. 79 respondents).

Figure 2: Country of Origin of Respondents



2. Participants - Companies/Businesses organizations and business associations

Of the 211 participating companies/business organizations, 80.1% specified that they were established in the EU and 11.4% indicated that they were established outside of the

EU. 26.5% described themselves as a conglomerate, offering a wide range of services online. 21.3% identified as a scale-up and 6.6% as a start-up.

In terms of annual turnover, more than half of the participating companies/business organizations indicated a turnover of over EUR 50 million per year. 13.3% make an annual turnover of smaller than or equal to EUR 2 million, 3.8% of the respondent revealed an annual turnover of smaller than or equal to EUR 10 Mio, whereas 6.2% specified an annual turnover of smaller than or equal to EUR 50 Mio.

28.4% of the responding companies/business organizations were online intermediaries, 24.6% were other types of digital services. 12.3% indicated that they were an association, representing the interest of the types of businesses named prior. Of the 180 participating business associations, 15% indicated that they were representing online intermediaries, 19.4% specified that they are working on behalf of digital service providers other than online intermediaries, and 40% indicated that they represented the interests of other businesses.

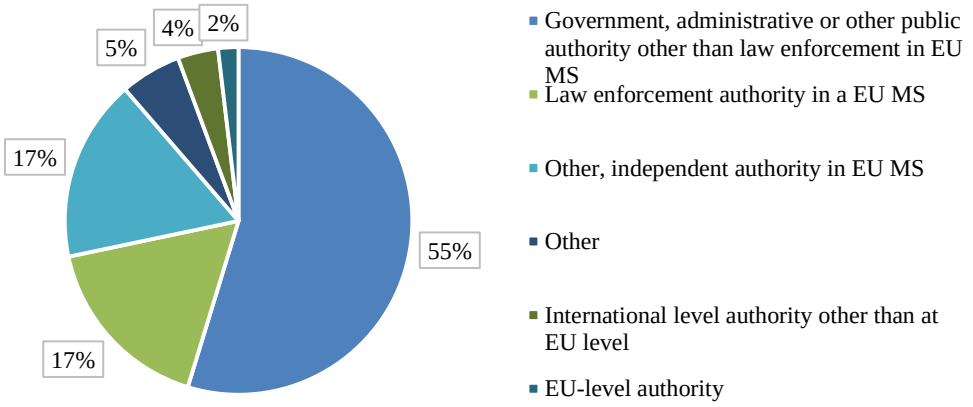
3. Participants - NGOs

Of the 159 participating NGOs, almost half (49.7%) stated, that they represented fundamental rights in the digital environment. 22.6% dealt with flagging illegal activities or information to online intermediaries for removal, and 22% represented consumer rights in the digital environment. Furthermore, 18.9% specified that they were fact checking and/or cooperating with online platforms for tackling harmful, (but not illegal) behaviours and 13.2% represented the rights of victims of illegal activities online. 10.7% represented interests of providers of services intermediated by online platforms, including trade unions, and 10.7% gave no answer. 30.8% of the responding NGOs indicated “other”.

4. Participants - Public authorities

59 public authorities participated in the open public consultation, of which 43 representing authorities at national level (72.9%), 8 at regional level (13.6%), 6 at international level (10.2%), and 2 at local level (3.4%). Among EU Member States, authorities replied from Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, and Poland. About half of the responding public authorities were governments, administrative or other public authorities other than law enforcement in a member state of the EU (49.2%). 15.3% indicated that they were a law enforcement authority in a Member State of the EU and 15.3% specified that they were another independent authority in a member state of the EU. These replies are complemented by a targeted consultation ran by the Commission with Member States.

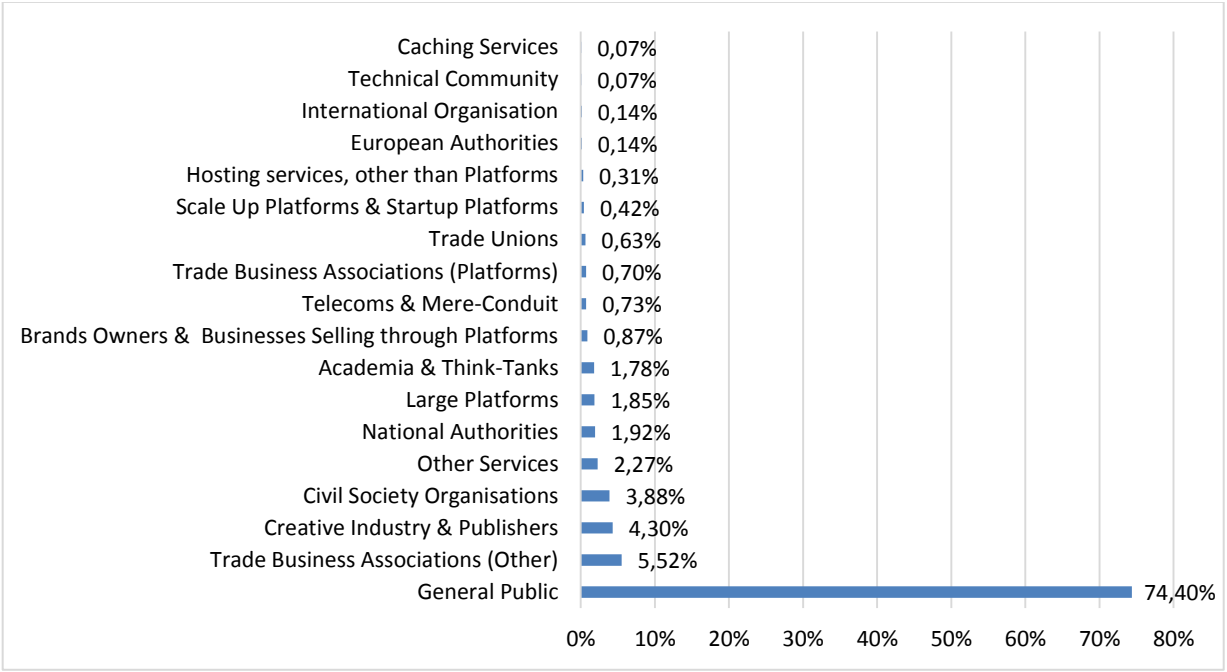
Figure 3: Type of responding public authority



5. Participants – Subcategories

For this report, respondents were categorized in 18 different categories to take into account different perspectives, as presented in Figure 4 below. These categories are: telecoms and mere-conduit; caching services; hosting services, other than platforms; large platforms; scale up and startup platforms; creative industry and publishers; brand owners and other businesses selling through platforms; other services; business associations representing the interests of platforms; business associations representing the interests of actors other than platforms; civil society organisations; trade unions; national authorities; European authorities; International Organisations; academia and think-tanks; technical community; and the general public.

Figure 4: Distribution of Respondents per Category[56]



[56] Sample size: 2863.

6. Methodology

The responses to the OPC were subjected to quantitative and qualitative analysis. In the quantitative analysis, the responses will be analysed in the following main steps:

- Ordering the respondents into the main categories considered relevant for the analysis;
- Analysis and mapping of respondents/stakeholders. In the mapping of stakeholders, the principles of Better regulation Toolbox were applied[57];
- Correlating main categories of respondents/stakeholders to their answers to identify patterns as regards "who thinks what?".

A methodological challenge of quantitative analysis is that the low numerical frequency of organisations makes it difficult to make statistical generalisations as to what type of organisation thinks what. In contrast, it is less challenging to make generalisations as regards the citizens because their number is much higher.

In the qualitative analysis the open, qualitative answers were analysed in the following main steps:

- The lists of open answers were grouped per type of issue they bring up. In other words, the answers are put in the same group if they bring up the same type of issues, although with different wording.
- The content of the group of answers was summarised in bullet points, condensing the main messages of the respondents. Where relevant, some examples of authentic responses are quoted.
- The bullet points, each condensing the issue and main messages, are listed. The most frequently mentioned issues are listed first, followed by the less frequently mentioned.
- In addition to the grouping of the most frequent issues and views, unique responses have been analysed and presented. Especially, if these were extensive, well-informed, and reflective.

In order to reach this thorough analysis, quantitative text analysis techniques have been used to group answers by the uniqueness of information and double-check if any relevant input was missing. We used:

- Deduplication methodology: the responses were duplicated by comparing their lexical similarity. For doing so, all the answers to each question were transformed into a document term matrix. Each response was processed by tokenizing and turning it into a vector of stemmed words weighted by their Term Frequency-Inverse Document Frequency (TF-IDF).[58] Next, for each question, the cosine

[57] https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox.pdf.

[58] *i.e.* we weighted the term frequency for term *i* and document *j* by the natural log of the number of documents over the number of other documents containing word *i.*

similarity of each pair of responses was computed. If a pair achieved a cosine similarity higher or equal than 0.85, only one would be kept for the analysis.

- Automatic summarization methodology: Some of the larger submitted reports were automatically summarized. Use was made of the python module "gensim.summarization" which implements the "TextRank" algorithm, a graph based sentence ranking methodology. For each document, a proportion of the sentences with the highest rank would be selected conditional on the length of the document.

III. SURVEY OUTCOME

1. *Unfair practices by gatekeeper platforms*

There is a wide-ranging majority across all stakeholder groups that there is a need for rules addressing the negative impact of gatekeepers' practices and conduct.[59] Among businesses and business users who replied to the relevant question, 88% encountered issues concerning allegedly unfair trading conditions on large platforms (Table 1).

Table 1: Business users of large platforms encountering issues with trading conditions on large online platforms

Categories	No. Answers	% Answers
Yes	136	87,74%
No	19	12,26%
Total Answered	**155**	**100%**

In general, the vast majority of respondents across stakeholder groups – in particular among businesses and business users, civil society organisations and telecom operators - report that the experienced issues are due to a perceived imbalance in bargaining power between large platforms and business users, which they consider hampers competition, fosters uncertainty in relation to contractual terms and also results in lock-in of consumers. These respondents also consider that unfair practices by gatekeeper platforms have a concerning impact on competition, innovation and consumer choice. On the other hand, a few platforms, academic institutions and representatives of startups emphasised the positive impact of gatekeeper platforms on innovation and consumer choice. Among national authorities, both points of view were expressed. Generally, respondents, in their replies, consider unfair practices to be the means, legal or illegal, by which digital platforms with a gatekeeper role limit market contestability and preserve their position of power.

Among the 1715 stakeholders who replied to the question, 58% somewhat disagree or fully disagree with the statement that consumers have sufficient choices and alternatives to the offering of online platforms, while 27% somewhat agree or fully agree with this statement (Table 2). The distribution of responses is homogeneous between each

[59] See section 5 below.

stakeholder group as well as within groups, with the majority of respondents somewhat disagreeing or fully disagreeing with this statement.[60] The only stakeholder group for which the majority of respondents consider that consumers have sufficient choices and alternatives are business associations representing the interests of platforms.

Table 2: View of the respondents on whether consumers have sufficient choices and alternatives to the offering from online platforms

Categories	No. Answers	% Answers
Fully agree	172	10,03%
Somewhat agree	297	17,32%
Neither agree not disagree	180	10,50%
Somewhat disagree	518	30,20%
Fully disagree	477	27,81%
I don't know/ No reply	71	4,14%
Total Answered	**1715**	**100%**

The unfair practices listed by respondents cover exclusionary conducts, exploitative conducts and transparency-related problems. Practices mentioned most often include:

1. Self-preferencing is considered to be very common by large platforms when services are vertically integrated, where they often favour their own services or products in detriment of third providers that rely on the large platform's infrastructure or to favour paid-for content by certain content providers or advertisers. It is for instance perceived that search and ranking algorithms give preference to the platform's own services or when the platform has an incentive to bias its recommendations toward the content provider charging a lower royalty.
2. Lack of data sharing and accumulation of data, also linked to the imposition of proprietary services and an authentication through the platform even when third party services/products are used to create a direct link with customers to the detriment of third-party providers. It is considered that gatekeeper platforms incentivize disintermediation as they preserve monopoly access to user data and attempt to remove the direct link between the client and third-party suppliers, creating therefore privileged relation with the client.
3. Limited data portability and data access due to lack of interoperability (e.g., APIs, limits to sharing customer data, restrictions to access key components, software or hardware), which creates obstacles for emerging competitors and also favours consumers lock-in. Several stakeholders refer to "walled-gardens", which allow

[60] See Annex B, Table B.1 for the overview of responses among different stakeholders' categories. E.g. about 73% of the 11 telecom operators, 67% of the 52 civil society organisations and 44% of the 9 scale up and startup platforms responding to the question, fully disagree that consumers have sufficient choices to the offering of the online platforms. Looking at large platforms, 33% of the 33 respondents somewhat disagree that consumers have sufficient choices.

to determine who can access the data uploaded by their end-users and on which terms and conditions.

4. Imbalance on how the revenues are split between platforms and right-owners in relation to User Generated Content (UGC).
5. The imposition of unfair and unilateral terms and conditions, which cover pricing, non-price terms, most favoured nation ("MFN") clauses, restrictions/abusive conditions on data sharing and use, exclusivity clauses, obligations regarding IPR, exclusivity or illegal restrictions, unfair access fees, among others.
6. The imposition of exclusionary terms and conditions for attaining and/or retaining access such as unfair delisting, and unreasonable performance targets.
7. Cross-financing and cross-subsidizing of otherwise unprofitable subsidiary companies as a strategy to gain market power in adjacent markets are considered to negatively impact competition.
8. Default settings which adversely impact customer choice. Similarly, the way privacy settings are presented to users by platforms are considered to potentially lead to manipulation of users into "consenting" to contractual terms of service.
9. Bundling of services with 'must have' services and apps, which makes the use of a certain service dependent on the use of further services of the company.
10. General lack of transparency on business practices on platforms (e.g. use of algorithms, content prioritization, lack of clarity in the terms of use, etc.).

Regarding app stores, the issues, raised by stakeholder groups that make use of app stores, include high commission fees, unreasonable transfers of liability to the app developer without mutual liability being accepted by the platform operator, and the lack of notice given for technical changes in the app stores, which then requires apps to be amended in some cases resulting in lack of functionality.

Regarding the travel sector, on one hand, it is reported by a business association that 56% of hoteliers feel pressured by online travel agents ("OTAs") to accept platforms terms and conditions (e.g. regarding cancellation policy, special discounts) that hotels would otherwise voluntarily not offer. On the other hand, OTAs report that a large platform acts as a gatekeeper and diverts traffic away from OTAs and metasearch search engines ("MSEs") to its own vertical search products, for accommodation, flights and vacation rentals.

Book publishers consider that the balance of power between gatekeeper platforms and book publishers is uneven and publishers often have to bear unfair terms and conditions, lacking sufficient bargaining power and/or the possibility to switch to another business partner. Unfair practices cited by book publishers relate to shortage claims, price-related claims, special agreement on freight costs, high number of returns, delivery rules, lack of

communication access, cancellations, tight delivery slots, hard rejects/wrong codes, among other issues.[61]

Among financial services providers there are concerns related to the fact that large digital platforms provide technical infrastructure and related functionalities that are increasingly relevant for the provision of digital financial services. This infrastructure includes devices and their associated functionalities, such as biometric authentication or communication protocols like Bluetooth and near field communication ("NFC") and app stores and pre-installed apps on devices. It is reported that this infrastructure is not always available on an equal basis to all market participants, with elements controlled by some market players and/or technical providers. Financial services providers also raise the issue that, under the Revised Payment Services Directive ("PSD II"), banks have to offer application programming interfaces ("APIs") for competitors as to certain payment services, while there is no such obligation for platform providers. This is considered to place financial service firms at a direct disadvantage, as financial data can be shared easily with platforms (who can then combine it with non-financial data in order to generate insights that may be relevant for the provision of financial services, other products or advertising), while data held in those platforms cannot be shared with financial services providers on the same terms.

In particular digital rights' associations pointed to the lack of data access and meaningful interoperability as important barriers to entry and called for measures that would address them. In addition, telecom operators recognised the right of data portability in Article 20 of the General Data Protection Regulation, but referred to the fact that its scope is limited to specific cases and subject to specific legal bases for processing. In particular, this right does not foresee continued and far-reaching access possibilities to different categories of data but is limited to receive the data 'provided' by the user, to avoid lock-in effects for individuals.

Regarding the use of gatekeeper platforms by minors, specific issues have been raised which include: overly complex terms and conditions; lack of transparency and redress; lack of standardised frameworks for age-appropriate terms and conditions; significant amount of data gathereing without the knowledge of minors; and behavioural advertising**.**

2. *Gatekeepers and media plurality*

Respondents representing the media sector and publishers consider in their replies that social media and search engines have a strong impact on the consumption, distribution and production of news. They impact the way in which information is accessed (demand side) as online platforms act as access points to information, as well as the way revenues are distributed (offer side).

Respondents consider that traditional business models, mostly based on revenues from advertisements and subscriptions to print media, are particularly challenged by

[61] Positions of publishers on media plurality are further assessed in the next section.

digitalisation. The respondents from the media and publishing sector consider that, on the one hand, gatekeeper platforms have left media without direct contact to their readers, losing access to full audience data and at the will of any changes in company policy and ranking algorithms, with consequent perceived threats on media plurality. On the other hand, it is perceived that the role and importance of online platforms in capturing the lion's share of online advertising spend has had a dramatic impact on newspapers and newswires that rely on advertising to finance their operations. In fact, press publishers consider that platforms exploit and monetise publishers' content and take advantage of their primary and direct access to users and users' data.

It is stated that, without access to sufficient advertising revenues, many media companies struggle to continue to offer valuable content. News publishers also consider that there is a lack of contractual transparency, especially with regards to the value created by leveraging on the content created by the publishers, which raises concerns that the current model is not sustainable and represents an existential threat to quality press media. Press publishers are worried that gatekeeper platforms not only can determine the success or failure of journalistic and editorial publications, but also ultimately have the power to steer political and cultural opinion as well as economic prosperity in the EU.

3. Platforms and startups

Generally, all categories of stakeholders consider that startups and small companies are more and more dependent on large platforms for reaching their customers, in particular, 3 of 4 scaleups and 4 of 5 startups answered this question accordingly. Their reliance on platforms is considered to vary heavily according to their fields and/or business models.

It is argued that startups often end up in a dependent relationship with these mega-platforms from the very beginning. In addition, all categories of stakeholders appear concerned with the practice of acquiring startups and scaleups, since it is considered detrimental for competition and can raise serious concerns related to the accumulation of data ('killer acquisitions'). It is also pointed out that, by acquiring startups while they are still a niche product, gatekeepers avoid the impression of impeding competition but in practice they prevent the emergence of competition in a targeted market.

However, some respondents, including several startups, research institutes and business associations, also point out the positive impact of platforms for startups: by lowering the barriers to entry and extending to companies of all sizes the advantages of cost and speed that can be gained from trading online.

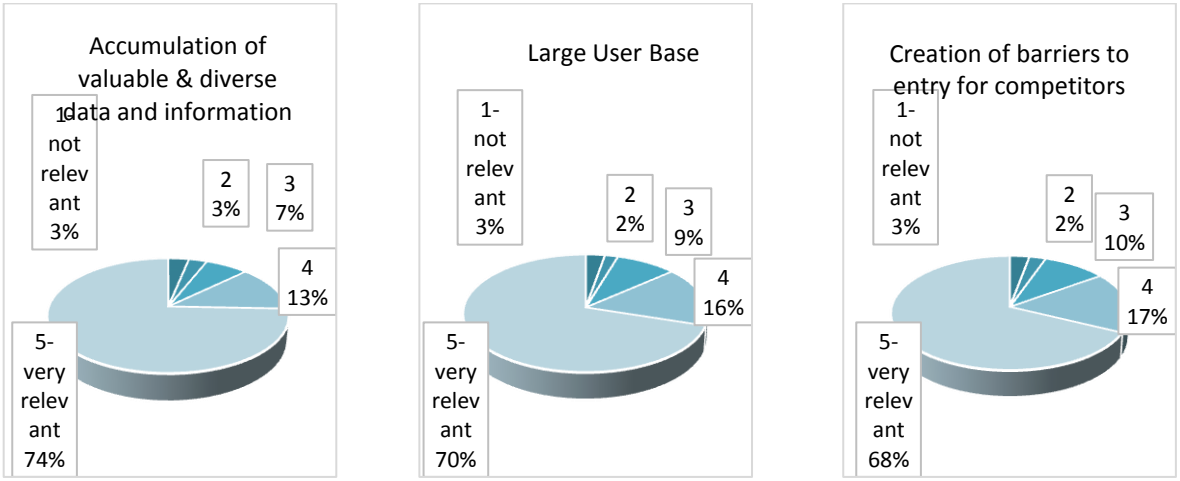
4. Scope and criteria for large gatekeepers

The respondents consider all the characteristics mentioned in the questionnaire[62] are relevant in determining the gatekeeper role of large online platforms. In particular, the

[62] I.e. large user base, wide geographical coverage, large share of total market revenue, impact on a certain sector, exploitation of strong network effects, leverage of assets to enter new areas of activity,

most relevant characteristics for respondents are: the accumulation of valuable and diverse data and information (74% of 1304 stakeholders who replied to the relevant question consider this characteristic very relevant), large user base (70% of the 1300 replies received), and the fact that large platforms raise barriers to entry for competition (68% of 1293 replies received) (Figure 5).

Figure 5: Most relevant characteristics in determining a gatekeeper platform[63]



For the definition of gatekeeper platforms, some stakeholders suggest to consider the criteria of 'economic dependence' on certain platforms which makes them unavoidable trading partners and make it more difficult for consumers to avoid dealing with them. Other relevant criteria to define gatekeeper platforms suggested by news publishing are the ability to utilise a platform which can direct consumer attention combined with the power to choose which information is displayed to consumers or otherwise set the terms on how information is displayed. The Body of European Regulators for Electronic Communications ("BEREC") proposes to identify digital platforms with significant intermediation power based on a combination of structural and specific criteria in different Areas of Business ("AoBs"). An AoB could be e.g. 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.

Respondents among platforms show diverse views on what would define a gatekeeping position. Some platforms argue that incorporating different services into a platform's offering says little about the strength of a platform, as it is also the case with the ability to leverage assets from one market to another. In addition, one platform stated that utilizing a company's own assets to enter new markets is actually welfare enhancing. It is

raising of barriers to entry, accumulation of valuable and diverse data and information, lack of alternative services, lock-in of users.

63 Figure 3. "Accumulation of valuable & diverse data and information", sample size 1304; "Large user base", sample size 1300; "Creation of barriers to entry for competitors", sample size 1293.

suggested that gatekeeper designations should be business model agnostic, gatekeeper assessments should be reviewed periodically, gatekeeper designations should apply to identified activities in specific markets, and some rules ought to apply on a sector-wide basis. Some large platforms, foreign business associations and a limited number of national authorities are worried that the regulatory proposal would focus on defining the companies it wants to regulate rather than focussing on determining the market and consider that using generic criteria would not be appropriate. Several platforms and foreign business associations highlight the need to ensure that any requirements to define 'gatekeepers' are non-discriminatory regarding the national origin of those companies and agnostic to different business models approaches.

In general, stakeholders of all categories point out the need to ensure a high level of coherence and legal certainty, the criteria used should be transparent, objective and easily measurable, and that a merely cumulative approach might not be sufficient. At the same time, some respondents from different stakeholder categories (including platforms, business associations and telecom operators) state that a one-size-fits-all approach might be unfeasible, while others (mainly from business associations) state that the new legislation should be general in nature, so that it may be applicable regardless of industry, sector, technology or business-model. Some respondents from the telecom sector argue that there should be dynamic methodology with a case-by-case assessment of the companies that should be subject to ex ante regulation. Respondents from the general public mostly refer to a combination of both quantitative or qualitative criteria.

Several respondents have referred to the operation of the EU telecoms ex ante regulatory regime, that provides valuable lessons as to how different criteria could be assessed to determine the extent of competition, consolidation of market power and the potential of consumer harm. This would ensure proportionality and legal certainty. In addition, several respondents, mainly telecom providers, argue that the new sectorial ex ante instrument for platforms should exclude from its scope those services that are already subject to sectorial ex ante rules that promote competition, as it is the case for electronic communication services and networks.

5. Need for a regulatory framework

Of the 1476 respondents who replied to the relevant question, the vast majority fully agree (70%) or agree to a certain extent (20%) that there is a need to consider dedicated regulatory rules to address negative societal and economic effects of gatekeeper power of large platforms (Table 3). This majority holds also within each group of stakeholders, including platforms, with 73% of the respondents agreeing or fully agreeing with the need for dedicated regulatory rules.[64]

[64] See Annex B, Table B.2 for the overview of responses among different stakeholders' categories. Among the respondents to this question, 25 out of 32 large platforms and 5 out of 9 scaleup/startup platforms replied that they agree or fully agree with the need to consider dedicated regulatory rules for gatekeeper platforms, that is 30 out of 41 platforms (73%).

Table 3: Respondents' view on the need to consider dedicated regulatory rules for gatekeeper platforms

Categories	No. Answers	% Answers
I fully agree	1038	70,33%
I agree to a certain extent	299	20,26%
I disagree to a certain extent	43	2,91%
I disagree	51	3,46%
I don't know	45	3,05%
Total Answered	**1476**	**100%**

In general, there is a shared understanding among stakeholders that there are structural competition issues that EU competition rules cannot address or cannot deal with effectively. The majority of stakeholders consider that, while some of the issues connected to gatekeeper powers can potentially be addressed by improving the efficiency of competition law enforcement through procedural and/or organisational changes, there are restrictions that cannot be overcome with competition law enforcement. These include the fact that ex post enforcement is not always best suited to tackle anti-competitive practices in fast-moving digital markets so that by the time an investigation has been concluded, the market may have irreversibly tipped in favour of the dominant firm and it may be very hard to restore competition. Moreover, competition investigations are ad hoc, limited to the narrow facts of the particular case, and may do little to address the same issues arising in different contexts, and the remedies imposed may do little to reinvigorate competition.

While telecom operators generally argue for the need to ex ante rules for gatekeepers, they also mention the need to carefully assess the results of the implementation of the Platform to Business Regulation ("P2B Regulation"), which only came into effect in July 2020 and the New Deal for Consumers, before suggesting any ex ante regulation. In fact, they consider that these policy instruments address the same market failures that the gatekeeper regulation seeks to address. Similarly, respondents from different stakeholders' categories consider the need to reassess the situation after the P2B Regulation has shown its effects.

A minority of respondents, mainly several large platforms and their business associations and some research institutes and academics, disagree with the proposal for new ex ante rules. These stakeholders consider that the risks posed by gatekeeper platforms can be sufficiently addressed with existing competition and antitrust law and tools (enforcement of Articles 101 and 102 TFEU) and other existing regulation. Some platforms, business associations and national authorities emphasized the need to focus the regulatory attention at specific actions and perceived market failures.

Regarding the form of the new ex ante rules, the majority agree that the rules should include prohibitions of certain practices considered particularly harmful for users and

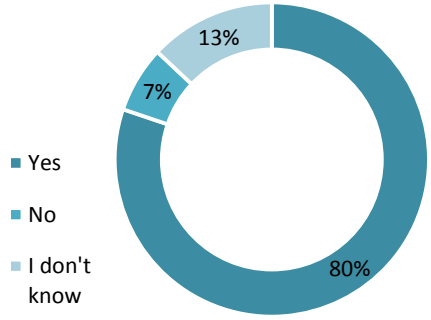
consumers (Table B.3)[65] as well as specific obligations (Table B.4)[66], as presented below in section 7. However, respondents have diverse views on what would be the best design for such prohibitions and obligations. Some stakeholders' groups, in particular among the general public, civil society organizations and the representatives of the creative and publishing industry, argue for strict prohibitions and obligations to all gatekeepers, while some respondents among business associations, academia and platforms caution against applying the same restrictions to all gatekeepers. Some respondents have highlighted the need to tailor the new rules to the different markets in which gatekeepers operate. As shown in the next section, the majority of respondents also argue that a case-by-case assessment and tailor-made development of remedies would be necessary to ensure proportionality and satisfactory policy outcome (Table B.5).[67]

It is argued by many stakeholders, especially among platforms, business associations, civil society organisations and academia, that new EU level rules would prevent further legal fragmentation across Member States, considering that several Member States have already started to introduce new regulation to address concerns arising from the presence of gatekeeper platforms. When considering the introduction of ex ante rules for online gatekeeper platforms, stakeholders across all categories have pointed out the need for these rules to be flexible enough to take into account the wide diversity of business models and future-proof against the evolution of these business models and technology.

6. Case-by-case regulation of gatekeeper platforms

80% of the 1216 respondents who replied to the relevant question, considers that there is the need for regulatory intervention on a case-by-case basis (Figure 6). This majority holds all stakeholder groups and, in particular, 100% of European authorities and International Organisations as well as hosting services other than platforms and telecom operators agree with the need for case-by-case remedies against specific large online platform companies with gatekeeper role (Table B.5).

Figure 6. Need for regulatory intervention against specific large online platform companies, with case by case remedies



It is argued that regulatory intervention should consider the high variety of online platforms' business models and digital markets they operate in, as well as the specific harms that should be addressed. Following the identification of large online platform companies with a gatekeeper role, competent authorities should be empowered to

[65] Sample Size: 1346. The only exception are business associations representing the interest of platforms among which 38% agree with the need to prohibit certain practices and 50% replied that they do not know.
[66] Sample Size: 1274.
[67] Sample Size: 1216.

monitor markets, select the remedies needed, attune them to the competition concerns of each particular case and enforce compliance.

In general, the majority of respondents consider that case-by-case remedies to respond to specific behaviours should go hand in hand with ex ante rules that apply horizontally to all gatekeepers. It is argued that the digital world is evolving rapidly, so a list of 'dos' and 'don'ts' might not capture all types of detrimental practices. Several stakeholders refer to the approach taken by the European Commission on Standards Essential Patents (SEPs) and on the Fair Reasonable and non-discriminatory (FRAND) commitment, as they consider that it might prove very instructive in the digital platforms' context.

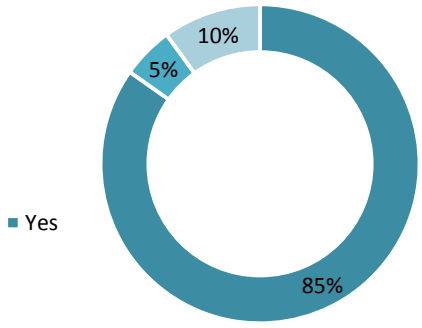
Among platforms, some argue that case-by-case intervention following a market assessment would be more effective and efficient than blanket prohibitions in targeting specific market failures. One consumer association instead argues that ex ante rules should focus on a list of obligations and prohibited practices, while case-by-case investigations are better left to competition law.

7. Practices by gatekeeper platforms that should be prohibited or obliged

The vast majority of respondents (85% of 1274 respondents to the relevant question) consider that dedicated rules on platforms should include prohibitions and obligations for gatekeeper platforms (Figure 7).[68]

According to the majority of respondents, the proposed list of problematic practices, or 'blacklist', should be targeted to clearly unfair and harmful practices of gatekeeper platforms; specific enough to avoid confusion of what is and is not permitted; adaptable to a dynamic, fast moving sector; and specific to certain gatekeepers as they would otherwise risk hurting smaller players trying to compete with them. It is also suggested that remedies could be more procedural in nature rather than prescribing a given course of conduct.

Figure 7. Rules & obligations on large online platform companies with gatekeeper role



Most of the respondents suggest that, rather than having certain practices categorically prohibited for all gatekeepers, the Commission should scrutinize certain practices and prohibit them for some gatekeepers in circumstances when they are most likely to have detrimental effects.

Some respondents from the telecom sector argue that a list of prohibited unfair practices and specific obligations should be introduced to prevent the most frequent and harmful abusive behaviours, while the case-by-case approach would allow to apply specific

[68] See Annex B, Tables B.3 and B.4 for the overview of responses among different stakeholders' categories.

remedies that reflect the gravity of specific threats to competition and to contestability in a targeted market.

Some respondents among business associations, research institutes and platforms consider that a 'blacklist' of prohibited practices should require careful consideration in relation to a dynamic industry that has multiple business models, types of users, and types of business partners, and it should result from an assessment of market failures to be resolved. In addition, several platforms are of the opinion that blanket banning of market behaviours risks being inefficient, negatively impacting consumers and actually risk worsening competition by limiting the ways in which entrants can innovatively challenge the incumbents.

The suggested obligations and prohibitions cover mainly issues of transparency, interoperability, portability, and non-discrimination. The suggestions are linked to the unfair practices which are reported by the respondents[69] and include, among a wide variety of others:

- the prohibition of discrimination through self-preferencing;
- elimination of certain clauses in the terms and conditions in contracts considered unfair, such as obligations to use platform's ancillary services, unilateral liability issues, contract modifications with retroactive effect;
- longer notification times for major changes on business-to-business contracts and market practices; the obligation of interoperability of datasets and APIs;
- transparency obligations in relation to interconnection, access, ranking of services and suspension of accounts, practices of micro-targeting;
- the prohibition of bundling when it results in restricting consumer choice;
- the prohibition of combination of data collected across different services when it results in unfair competitive advantage over rivals ('data unbundling');
- the prohibition of excessive intermediation fees;
- the obligation to connect businesses intermediated directly with their customers and to provide these businesses with more data of the transactions;
- a general prohibition on discrimination in access to infrastructure;
- restrictions on the use of pre-installation and default settings (in particular for browsers and search engines) and of 'nudging techniques';
- the provision of consumers control over data use, sharing and mobility, including additional obligations to facilitate the portability of both personal and non-personal data between service providers;
- algorithmic accountability and transparency audits (including to verify whether in practice the platforms are operating a preferential treatment for their own services);
- the provision of access to individualized data to businesses about their operations or customers/consumers;

[69] See Section 1 on 'unfair practices by gatekeeper platforms'.

- imposing accounting, structural or functional separation or firewalls between different businesses under common ownership of a gatekeeper platform.

Issues relating to data sharing are considered especially important by national authorities. Regarding the issue of 'killer acquisitions', it is proposed by national authorities to extend the time for the notification of mergers, so that the competent authorities can carry out in-depth investigations on the impact of a certain acquisition/merger on competition and innovation in the internal market. National authorities also consider highly urgent the issue of algorithmic transparency and accountability.

Some platforms have offered detailed responses on some of the potential obligations and prohibitions. In particular, they have pointed out that mandating interoperability should only be considered on the basis of a careful analysis on its effects on the market, especially when multi-sided. Similarly, it is considered that unconditional and misguided data access obligations would undermine the platforms' ability to innovate. More generally, they argue that the remedies should be proportional and that there should be a clear link between a specific conduct considered anticompetitive and consumer harm.

Regarding IP infringement, some respondents from telecom sector, brand owners and representatives of the creative industry have argued that gatekeeper platforms should be liable for facilitating infringements taking place on the platforms to the extent that the financial benefits have to be refunded to the IP owner.

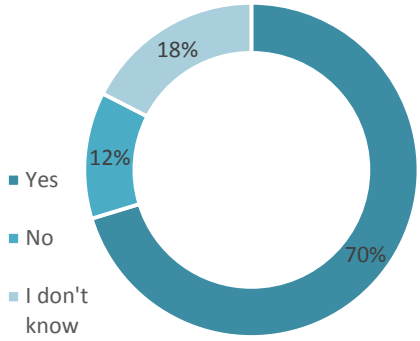
In relation to media pluralism, representatives of this sector as well as some civil society organizations is suggested to impose specific media requirements to ensure adequate remuneration of press publishers for their content used by or uploaded on large online platforms. Other suggestions specific to the media sector include: the requirement for platforms to share data with news media businesses about the interaction of users with the content of the publisher, early notification of changes to the ranking or display of news content, the obligation that the digital platform actions to not impede news media businesses' opportunities to monetise their content appropriately on the digital platform's sites or apps, and the requirement for the digital platforms to "fairly negotiate with" news media businesses as to how direct and indirect revenue should be shared. It is also pointed out that consumers must always have the choice to choose the relevance of content/media and never be left in the dark on why they see certain articles while not being served others. More generally regarding content diversity, some digital rights' associations consider that platforms should take steps to ensure that users are exposed to sufficiently diverse content and balanced coverage of issues of public interest by default. Yet, platforms and some civil society organisations consider that a regulatory intervention would not be the most appropriate way to ensure media pluralism.

One specific suggestion put forward by one digital rights' association to respond to excessive concentration in social media market is the decentralisation of content moderation. The association suggests a combination of data portability, interoperability and unbundling of hosting and content curation activities, consistent with data protection laws.

Specific suggestions have also been put forward in relation to the protection of minors, including the requirement to implement a privacy impact assessments to determine how products and services affect children's privacy, the minimization of the information being collected on children and applying enhanced security measures to protect any personal data that is collected, the provision and communication of child-friendly terms and conditions, making children's online profiles private by default, and offering simplified, accessible reporting and complaints mechanisms for minors.

8. Regulatory authority for gatekeeper platforms

Figure 8. Need for a specific regulatory authority to enforce dedicated rules to gatekeeper platforms



70% of the 1215 respondents who replied to the relevant question consider that there is the need for a specific regulatory authority to enforce the new prohibitions and obligations that might be imposed to gatekeeper platforms, while 80% of the respondents who replied to the relevant question consider that there is the need for a specific regulatory authority to enforce the case-by-case remedies that might be imposed to gatekeeper platforms.

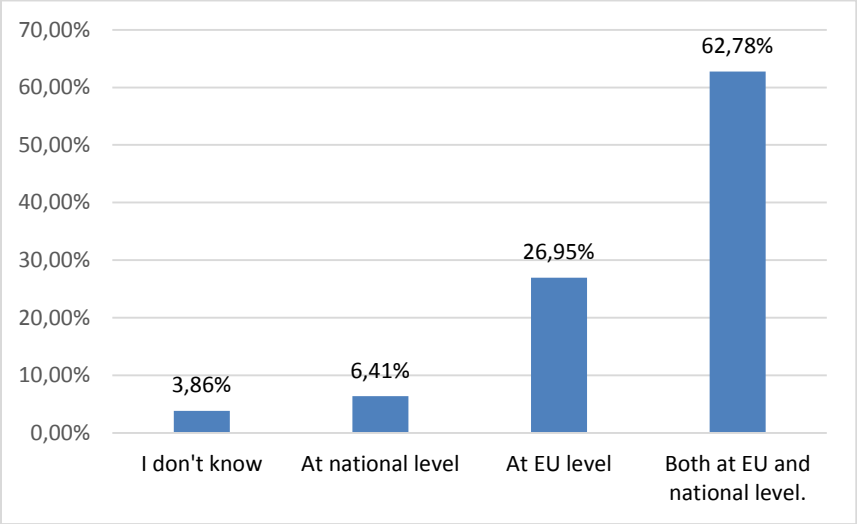
These stakeholders agree that there should be only one authority overseeing these issues and they point out the need to avoid overlapping with the competence of other authorities. Respondents from the media sector, consumers' associations and some business associations are among those who advocate for such a solution as they consider that only a specialised interdisciplinary regulatory authority can grasp the complexities of the digital ecosystem. Some national authorities and research institutes instead consider the need to build on existing structures in other to avoid creating parallel structures. These stakeholders suggest to rely on cooperation among Member States authorities as gatekeeper platforms are usually based in only one Member State.

In addition, several respondents, including some business associations and some national authorities, consider that only competition authorities should deal with potential harm to competition and point out the need to utilise as much as possible the current structure to enforce the rules. These stakeholders consider that there should be very special and weighty reasons for establishing a new regulatory authority for monitoring the online platform market.

The respondents generally consider that an effective coordination between EU bodies and the relevant national regulatory authorities is needed, especially in the light of the fact that issues related to gatekeepers are likely to have an important cross-border component. Platforms in particular point out the need to minimise fragmentation and allow for a pan-European approach. The majority of respondents consider that regulatory oversight should be both at the EU and national level (63%), while 27% consider that oversight

should be only at the EU level and 6% consider that oversight should be only at the national level (Figure 9).[70]

Figure 9. Platforms regulatory oversight level[71]



In particular, the majority of large platforms (70%) and of scale-up/startup platforms (57%) consider that the oversight should be at the EU level.[72] Among business associations representing the interest of platforms, 50% consider the oversight should be at the EU level and 50% consider that it should be done both at the EU and national level. On the other hand, the majority of national authorities (68%) consider that the oversight should be done both at the EU and national level and 7% of them consider that the oversight should be done at the national level only. Among business associations, 54% consider that the oversight should be done both at the EU and national level, while 40% consider that the oversight should be at the EU level. Among civil society organizations, 49% consider that the supervision should be done both at the EU and the national level, while 47% of consider that the supervision should be done at the EU level only.

In addition, respondents across stakeholder groups consider that the regulatory authority overseeing the gatekeeper platforms should: rely on an institutional cooperation with other authorities addressing related sectors; support swift and effective cross-border assistance across Member States; have a high level of technical capabilities, including data processing and auditing capacities; have a pan-European scope and cooperate with extra-EU jurisdictions. Several respondents have referred to National Regulatory Authorities ("NRAs", i.e. telecom regulatory bodies dealing with ex ante regulation for the telecoms sector) to be involved in the monitoring of gatekeeper platforms. Some also referred to the mechanism in place for the enforcement of EU competition law according to Regulation 1/2003, which creates a system of parallel competences between the European Commission and national authorities.

[70] See Annex B, Table B.6 for the overview of responses among different stakeholders' categories.
[71] Sample size: 1295.
[72] The only respondent categorized as 'caching services' also expressed the preference for oversight at EU level only.

There is a general agreement between all the stakeholders that the ex ante rules for gatekeeping platforms should complement the current sector-specific framework with a view to granting simplification, harmonization and consistency with the acquis.#

IV TABLES

Table B.1. Degree of agreement: Consumers have sufficient choices and alternatives to the offerings from online platforms (rating per category).[73]

Categories	Fully agree		Somewhat agree		Neither agree/disagree		Somewhat disagree		Fully disagree		I don't know/ No reply		Grand Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Academia & Think-Tanks	2	7,41%	5	18,52%	2	7,41%	7	25,93%	10	37,04%	1	3,70%	27	100,00%
Brands Owners & Businesses Selling through Platforms	0	0,00%	1	11,11%	1	11,11%	3	33,33%	3	33,33%	1	11,11%	9	100,00%
Caching Services	0	0,00%	0	0,00%	1	100,00%	0	0,00%	0	0,00%	0	0,00%	1	100,00%
Civil Society Organisations	0	0,00%	5	9,62%	4	7,69%	8	15,38%	35	67,31%	0	0,00%	52	100,00%
Creative Industry & Publishers	6	9,84%	4	6,56%	8	13,11%	19	31,15%	20	32,79%	4	6,56%	61	100,00%
European Authorities	0	0,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%
General Public	138	10,15%	254	18,68%	138	10,15%	413	30,37%	365	26,84%	52	3,82%	1360	100,00%
Hosting services, other than Platforms	0	0,00%	0	0,00%	0	0,00%	2	50,00%	1	25,00%	1	25,00%	4	100,00%
International Organisation	0	0,00%	1	100,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%	1	100,00%
Large Platforms	5	15,15%	5	15,15%	5	15,15%	10	30,30%	4	12,12%	4	12,12%	33	100,00%
National Authorities	3	10,71%	3	10,71%	4	14,29%	14	50,00%	3	10,71%	1	3,57%	28	100,00%
Other Services	1	3,57%	4	14,29%	2	7,14%	12	42,86%	8	28,57%	1	3,57%	28	100,00%
Scale Up Platforms & Startup Platforms	0	0,00%	3	33,33%	1	11,11%	1	11,11%	4	44,44%	0	0,00%	9	100,00%
Technical Community	0	0,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%
Telecoms & Mere-Conduit	0	0,00%	0	0,00%	1	9,09%	2	18,18%	8	72,73%	0	0,00%	11	100,00%
Trade Business Associations (Other)	13	18,06%	10	13,89%	10	13,89%	25	34,72%	8	11,11%	6	8,33%	72	100,00%
Trade Business Associations (Platforms)	4	50,00%	1	12,50%	3	37,50%	0	0,00%	0	0,00%	0	0,00%	8	100,00%
Trade Unions	0	0,00%	1	9,09%	0	0,00%	2	18,18%	8	72,73%	0	0,00%	11	100,00%
Total Answers	**172**	**10,03%**	**297**	**17,32%**	**180**	**10,50%**	**518**	**30,20%**	**477**	**27,81%**	**71**	**4,14%**	**1715**	**100,00%**

Table B.2. Need for dedicated regulatory rules to address any negative societal and economic effects of the gatekeeper role that large online platform companies exercise over whole platform ecosystems (rating per category).[74]

Categories	I fully agree		I agree to a certain extent		I disagree to a certain extent		I disagree		I don't know		Grand Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Academia & Think-Tanks	17	62,96%	4	14,81%	1	3,70%	4	14,81%	1	3,70%	27	100,00%
Brands Owners & other Businesses Selling through Platforms	6	66,67%	2	22,22%	0	0,00%	1	11,11%	0	0,00%	9	100,00%
Caching Services	0	0,00%	0	0,00%	0	0,00%	0	0,00%	1	100,00%	1	100,00%
Civil Society Organisations	43	82,69%	7	13,46%	2	3,85%	0	0,00%	0	0,00%	52	100,00%
Creative Industry & Publishers	57	93,44%	3	4,92%	1	1,64%	0	0,00%	0	0,00%	61	100,00%
European Authorities	1	100,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%	1	100,00%
General Public	801	71,52%	230	20,54%	27	2,41%	28	2,50%	34	3,04%	1120	100,00%
Hosting services, other than Platforms	3	100,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%	3	100,00%
International Organisation	1	100,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%	1	100,00%
Large Platforms	11	34,38%	14	43,75%	2	6,25%	3	9,38%	2	6,25%	32	100,00%
National Authorities	14	50,00%	10	35,71%	1	3,57%	0	0,00%	3	10,71%	28	100,00%
Other Services	21	75,00%	6	21,43%	0	0,00%	0	0,00%	1	3,57%	28	100,00%
Scale Up Platforms & Startup Platforms	3	33,33%	2	22,22%	2	22,22%	2	22,22%	0	0,00%	9	100,00%
Technical Community	0	0,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%
Telecoms & Mere-Conduit	9	69,23%	2	15,38%	0	0,00%	1	7,69%	1	7,69%	13	100,00%
Trade Business Associations (Other)	40	54,05%	16	21,62%	6	8,11%	11	14,86%	1	1,35%	74	100,00%
Trade Business Associations (Platforms)	2	25,00%	3	37,50%	1	12,50%	1	12,50%	1	12,50%	8	100,00%
Trade Unions	9	100,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%	9	100,00%
Total Answers	**1038**	**70,33%**	**299**	**20,26%**	**43**	**2,91%**	**51**	**3,46%**	**45**	**3,05%**	**1476**	**100,00%**

[73] Sample Size: 1715.
[74] Sample Size: 1476.

Table B.3. Need for dedicated rules that prohibit certain practices by large online platform companies with gatekeeper role that are considered particularly harmful for users and consumers of these large online platforms (rating per category).[75]

Categories	Yes		No		I don't know		Grand Total	
	No.	%	No.	%	No.	%	No.	%
Academia & Think-Tanks	19	86,36%	2	9,09%	1	4,55%	22	100,00%
Brands Owners & other Businesses Selling through Platforms	8	88,89%	1	11,11%	0	0,00%	9	100,00%
Caching Services	0	0,00%	0	0,00%	1	100,00%	1	100,00%
Civil Society Organisations	45	93,75%	2	4,17%	1	2,08%	48	100,00%
Creative Industry & Publishers	53	94,64%	1	1,79%	2	3,57%	56	100,00%
European Authorities	1	100,00%	0	0,00%	0	0,00%	1	100,00%
General Public	855	84,24%	42	4,14%	118	11,63%	1015	100,00%
Hosting services, other than Platforms	3	100,00%	0	0,00%	0	0,00%	3	100,00%
International Organisation	1	100,00%	0	0,00%	0	0,00%	1	100,00%
Large Platforms	21	67,74%	8	25,81%	2	6,45%	31	100,00%
National Authorities	19	76,00%	2	8,00%	4	16,00%	25	100,00%
Other Services	22	84,62%	1	3,85%	3	11,54%	26	100,00%
Scale Up Platforms & Startup Platforms	5	71,43%	0	0,00%	2	28,57%	7	100,00%
Technical Community	0	0,00%	0	0,00%	0	0,00%	0	0,00%
Telecoms & Mere-Conduit	10	100,00%	0	0,00%	0	0,00%	10	100,00%
Trade Business Associations (Other)	55	74,32%	13	17,57%	6	8,11%	74	100,00%
Trade Business Associations (Platforms)	3	37,50%	1	12,50%	4	50,00%	8	100,00%
Trade Unions	9	100,00%	0	0,00%	0	0,00%	9	100,00%
Total Answers	**1129**	**83,88%**	**73**	**5,42%**	**144**	**10,70%**	**1346**	**100,00%**

Table B.4. Need for dedicated rules that impose obligations on large online platform companies with gatekeeper role that are considered particularly harmful for users and consumers of these large online platforms (rating per category).[76]

Categories	Yes		No		I don't know		Grand Total	
	No.	%	No.	%	No.	%	No.	%
Academia & Think-Tanks	19	86,36%	2	9,09%	1	4,55%	22	100,00%
Brands Owners & other Businesses Selling through Platforms	7	77,78%	1	11,11%	1	11,11%	9	100,00%
Caching Services	0	0,00%	0	0,00%	1	100,00%	1	100,00%
Civil Society Organisations	44	97,78%	0	0,00%	1	2,22%	45	100,00%
Creative Industry & Publishers	53	94,64%	0	0,00%	3	5,36%	56	100,00%
European Authorities	1	100,00%	0	0,00%	0	0,00%	1	100,00%
General Public	812	85,29%	39	4,10%	101	10,61%	952	100,00%
Hosting services, other than Platforms	3	100,00%	0	0,00%	0	0,00%	3	100,00%
International Organisation	1	100,00%	0	0,00%	0	0,00%	1	100,00%
Large Platforms	20	68,97%	5	17,24%	4	13,79%	29	100,00%
National Authorities	20	80,00%	1	4,00%	4	16,00%	25	100,00%
Other Services	21	91,30%	0	0,00%	2	8,70%	23	100,00%
Scale Up Platforms & Startup Platforms	5	62,50%	1	12,50%	2	25,00%	8	100,00%
Technical Community	0	0,00%	0	0,00%	0	0,00%	0	0,00%
Telecoms & Mere-Conduit	6	66,67%	3	33,33%	0	0,00%	9	100,00%
Trade Business Associations (Other)	55	75,34%	13	17,81%	5	6,85%	73	100,00%
Trade Business Associations (Platforms)	4	50,00%	2	25,00%	2	25,00%	8	100,00%
Trade Unions	9	100,00%	0	0,00%	0	0,00%	9	100,00%
Total Answers	**1080**	**84,77%**	**67**	**5,26%**	**127**	**9,97%**	**1274**	**100,00%**

[75] Sample Size: 1346.
[76] Sample Size: 1274.

Table B.5. Need for case-by-case remedies against specific large online platform companies with gatekeeper role when necessary (rating per category).[77]

Categories	Yes		No		I don't know		Grand Total	
	No.	%	No.	%	No.	%	No.	%
Academia & Think-Tanks	15	75,00%	3	15,00%	2	10,00%	20	100,00%
Brands Owners & other Businesses Selling through Platforms	8	88,89%	1	11,11%	0	0,00%	9	100,00%
Caching Services	0	0,00%	0	0,00%	1	100,00%	1	100,00%
Civil Society Organisations	37	88,10%	0	0,00%	5	11,90%	42	100,00%
Creative Industry & Publishers	49	92,45%	1	1,89%	3	5,66%	53	100,00%
European Authorities	1	100,00%	0	0,00%	0	0,00%	1	100,00%
General Public	722	79,60%	58	6,39%	127	14,00%	907	100,00%
Hosting services, other than Platforms	3	100,00%	0	0,00%	0	0,00%	3	100,00%
International Organisation	1	100,00%	0	0,00%	0	0,00%	1	100,00%
Large Platforms	23	79,31%	3	10,34%	3	10,34%	29	100,00%
National Authorities	21	84,00%	3	12,00%	1	4,00%	25	100,00%
Other Services	19	82,61%	1	4,35%	3	13,04%	23	100,00%
Scale Up Platforms & Startup Platforms	6	75,00%	0	0,00%	2	25,00%	8	100,00%
Technical Community	0	0,00%	0	0,00%	0	0,00%	0	0,00%
Telecoms & Mere-Conduit	10	100,00%	0	0,00%	0	0,00%	10	100,00%
Trade Business Associations (Other)	46	68,66%	11	16,42%	10	14,93%	67	100,00%
Trade Business Associations (Platforms)	5	62,50%	2	25,00%	1	12,50%	8	100,00%
Trade Unions	9	100,00%		0,00%	0	0,00%	9	100,00%
Total Answers	**975**	**80,18%**	**83**	**6,83%**	**158**	**12,99%**	**1216**	**100,00%**

Table B.6. Platforms regulatory oversight level (rating per category).[78]

Categories	At EU level		At national level		Both at EU & national level		I don't know		Grand Total	
	No	%	No	%	No	%	No	%	No	%
Academia & Think-Tanks	8	38,10%	0	0,00%	13	61,90%	0	0,00%	21	100,00%
Brands Owners & other Businesses Selling through Platforms	3	37,50%	0	0,00%	5	62,50%	0	0,00%	8	100,00%
Caching Services	1	100,00%	0	0,00%	0	0,00%	0	0,00%	1	100,00%
Civil Society Organisations	22	46,81%	1	2,13%	23	48,94%	1	2,13%	47	100,00%
Creative Industry & Publishers	6	11,54%	2	3,85%	42	80,77%	2	3,85%	52	100,00%
European Authorities	0	0,00%	0	0,00%	1	100,00%	0	0,00%	1	100,00%
General Public	237	24,21%	74	7,56%	627	64,04%	41	4,19%	979	100,00%
Hosting services, other than Platforms	2	50,00%	0	0,00%	2	50,00%	0	0,00%	4	100,00%
International Organisation	0	0,00%	0	0,00%	1	100,00%	0	0,00%	1	100,00%
Large Platforms	21	70,00%	1	3,33%	6	20,00%	2	6,67%	30	100,00%
National Authorities	6	21,43%	2	7,14%	19	67,86%	1	3,57%	28	100,00%
Other Services	8	33,33%	0	0,00%	15	62,50%	1	4,17%	24	100,00%
Scale Up Platforms & Startup Platforms	4	57,14%	0	0,00%	2	28,57%	1	14,29%	7	100,00%
Technical Community	0	0,00%	0	0,00%	0	0,00%	0	0,00%	0	0,00%
Telecoms & Mere-Conduit	0	0,00%	0	0,00%	10	100,00%	0	0,00%	10	100,00%
Trade Business Associations (Other)	27	40,91%	3	4,55%	36	54,55%	0	0,00%	66	100,00%
Trade Business Associations (Platforms)	4	50,00%	0	0,00%	3	37,50%	1	12,50%	8	100,00%
Trade Unions	0	0,00%	0	0,00%	8	100,00%	0	0,00%	8	100,00%
Grand Total	**349**	**26,95%**	**83**	**6,41%**	**813**	**62,78%**	**50**	**3,86%**	**1295**	**100,00%**

[77] Sample Size: 1216.
[78] Sample Size: 1295.

Annex 3: Who is affected and how?

1. WHO IS AFFECTED BY THE DIGITAL MARKETS ACT?

The Digital Markets Act will have an impact on businesses, including gatekeeper platforms subject to the regulation, competing platforms, business users and SMEs, as well as on consumers and regulatory authorities.

1.1. BUSINESSES

The Digital Markets Act would benefit businesses in many different aspects. First, this initiate would allow the Commission to address gatekeepers' unfair conduct and weak contestability of, and competition in, platform markets, or risk thereof. More open and competitive markets where companies compete on their merits enable wealth and job creation.

Second, and in accordance with the results of numerous empirical studies,[79] an improvement of market competition would result in higher productivity, which would translate into higher economic growth. These effects are expected to be particular relevant in digital markets where structural market features may lead or contribute to market failures, preventing healthy competition between market players.

Third, more open and competitive markets would provide more incentives for companies to innovate and offer a better range of high quality products and services. The economic literature shows that firms facing more competition from rivals innovate more than monopolies.[80] Greater competition also drives efficiency in processes, technology and service and creates the conditions to make European's markets more attractive to investors.[81]

A set of measures that contribute to a more dynamic online platform ecosystem and more contestable market would particularly benefit SMEs who would face lower barriers when entering the market. It can therefore be expected that an increased contestability of the markets would, even with some changes to their business model due to the regulatory

[79] OECD, 2014, Fact-sheet on how competition policy affects macro-economic outcomes.

[80] See G. Federico, F. Scott Morton & C. Shapiro (2019), *Antitrust and Innovation: Welcoming and Protecting Disruption*, NBER Working Paper No. 26005 and P. Aghion, N. Bloom, R. Blundell, R. Griffith & P. Howitt (2005), *Competition and Innovation: an Inverted-U Relationship*, The Quarterly Journal of Economics, volume 120(2), pages 701-728. On empirical work, see P. Aghion, S. Bechtold, L. Cassar & H. Herz (2014), *The causal effects of competition on innovation: Experimental evidence*, Journal of Law, Economics, and Organization, volume 34 (2), pages 162-195 and C. Shapiro (2012), *Competition and innovation. Did Arrow hit the bull's eye?*, chapter 7 of Josh Lerner and Scott Stern (eds.), The Rate and Direction of Inventive Activity Revisited, pages 361-404.

[81] As evidenced by Gutmann & Voigt (2014), there is a significant relationship between the introduction of competition law and annual growth arising mainly from more investment. J. Gutmann & S. Voigt (2014), *Lending a Hand to the Invisible Hand? Assessing the Effects of Newly Enacted Competition Laws*.

intervention, continue to incentivise gatekeeper platforms to bring innovative products to the market and compete for consumers and business users.

Fourth, it is worth mentioning that the measures envisaged would limit the chilling effects unfair conduct has on sales. While gatekeepers are an important channel to reach markets and consumers, business users argue that unfair practices would lead to up to 15% loss in their sales. Businesses, especially smaller ones, would be more confident in engaging with gatekeepers if the latter (are obliged to) comply with clear fairness rules.

A detailed assessment of the way different categories of enterprises are affected is presented in Section 6 as well as in the following parts of this Annex.

1.2. CONSUMERS

A regime that protects EU consumers from business practices that keep the prices of goods and services artificially high would ensure that consumers have access to better quality, wider choice and innovative goods and services at affordable prices. Numerous studies confirm the benefits of competitive markets for consumers.[82]

A more competitive digital market will allow consumers to multi-home among alternative platforms offering differentiated commercial proposition. The fact that consumers can multi-home, altough resulting in possible search and switching costs, would generate a net benefit for consumers as they would only multi-home if the benefits of using alternative platforms compensate for those possible costs. In addition, some of the measures considered under the options aim at reducing those search and switching costs, for instance by allowing portability of data, creating conditions for interoperability, increasing transparency in the market, etc.

This initiative would indirectly contribute to safeguard value added for consumers and would contribute to ensuring greater respect of privacy and consumers' interests.[83] This would be achieved by contributing to (i) fairer competition on gatekeeper's platform (intra-platform competition) and among platforms (inter-platform competition), (ii) stronger contestability of the markets where gatekeepers are present and (iii) better

[82] See for instance S. Ahn (2002), *Competition, Innovation and Productivity Growth: A Review of Theory and Evidence*, OECD Economics Working Paper No. 317. See also for example, a study by the European Commission (2015) on *The Economic Impact of enforcement of competition policies in the functioning of EU energy markets*, which found that the Commission's decision finding an abuse of dominance by E.ON lead to a reduction in prices for both wholesalers and retailers to the benefit of consumers. See also the Note by the UNCTAD Secretariat (2014), *The benefits of competition policy for consumers*.

[83] Online platforms benefit from asymmetry of information (they dispose of large data sets compared to consumers). Platforms' analytical capacity gives them the possibility to use advanced algorithms and machine learning techniques to facilitate targeting, discriminatory practices and behavioural manipulation. BEUC considers that such practices can have an impact on demand and distribution of wealth – "*the most vulnerable consumers might end up paying higher prices than under a competitive price scenario (when personalisation is combined with commercial practices seeking to increase the individual consumer's willingness to pay). They may also be used to target biases and reinforce existing or desired viewpoints with the aim of keeping users engaged with the firm's platform so as to generate advertising revenues*." BEUC (2019), *The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era.*

functioning of the internal market through enhanced regulatory oversight at EU level.

It is also important to notice that although some interventions under this initiative may require changes to the existing business models, the evidence from the supra-normal profits that gatekeepers are accruing, their ability to obtain conditions that would not be possible under normal market circumstances as well as their ability to act independently from competitors, business users and consumer indicates that in the long term business users and consumers will not be harmed. This is especially the case since gatekeepers in particular will continue to depend on a large user base and since they will be subject to higher contestability and competition, their incentive to innovate and offer low prices will rather increase and not reduce due to the intervention.

It should be stressed that the foressen interventions will neither ban specific monetisation models (such as ad-based models) nor prevent the uptake of new services by gatekeepers - they prevent them from acting unfairly in their operations and reduce competition in the markets where they are present. Even in those cases where, due to the multi-sidedness of the market, there is a cross-subsidisation between the different sides and consumers already benefit from zero prices, more contestability and competition would not change the business model. On the contrary, more contestability and competition would increase the diversity of offers available to consumers and would reduce the prices to advertisers which would then indirectly reflect in lower prices charged by those advertisers when selling their products and services to consumers.[84,85] In addition, for many digital markets when consumers are offered 'free of charge' services, in practice they are receiving the service in exchange for their attention and their data, which can then be monetised through digital advertising. In a more contestable and competitive market, it would be clear to consumers what data is collected about them and how it is used and, crucially, the consumer would have more control of the data.[86]

Section 6 further assesses the impacts on consumers; the table of impacts per practice in this annex specifies expected impacts associated with each of the measures foreseen.

1.3. REGULATORY AUTHORITIES

This initiative will allow the Commission to tackle gatekeepers' unfair practices and existing and emerging market failures in digital markets. The burden that would ensue from giving the Commission this ability is low (mainly redeployment of existing job positions) compared to the benefits for the economy. Section 7 of the Impact Assessment and the sections below qualify and quantify these costs. National authorities would have to bear some administrative costs specified below.

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[84] In fact, higher advertising prices represent increased costs to the companies producing goods and services which are purchased by consumers. These costs are expected to be passed through to consumers in terms of higher prices for goods and services, even if the downstream market is highly competitive.

[85] See Section 6 of CMA report on *Online platforms and digital advertising*.

[86] See Section 6 of CMA report on *Online platforms and digital advertising*.

2. HOW WOULD THE EX ANTE RULES FORESEEN AFFECT STAKEHOLDERS?

The table below contains an assessment of impacts for individual practices that could be addressed by the various obligations included in the options considered in the Impact Assessment. It is important to note that the three options considered foresee a combination of obligations, which should resort an overall positive impact as set out in Sections 6, 7 and 8 of the Impact Assessment. Some of these individual practices would also act in concert, mutually reinforcing one another in the most proportionate way.

Table of impacts per considered obligation				
Unfair practice	**Impacts on gatekeepers**	**Impact on competitors and new entrants**	**Impact on business users**	**Impact on consumers**
Gatekeepers shall not be combining personal data originating from different core platform services with personal data from their other services or data from third party services or automatically signing in end users to other services of the gatekeeper in order to combine data without providing an effective possibility to opt-out Example: *provider of online social network site collecting data from its users obtained through several different services.*	Gatekeepers would be constrained in combining data collected from all their core platform services which would reduce their data advantage, thereby reducing barriers to entry. Gatekeepers would be required to compete on merits or face a risk of losing revenue. In view of increased choice, downward pressure on prices and therefore revenue.	Removal of barriers to entry and ability to enter/expand. Ability to compete on merits and higher incentives to innovate.	Consumers could possibly benefit from lower prices and/or higher quality/price ratio for online services offered on other platforms.	
Gatekeepers shall not prevent business users from offering the same products or services to customers through third party online intermediation services	Gatekeepers would be limited in disincetivising its business users from switching or multi-homing. Gatekeepers would be required to	Smaller and start-up platforms would have the possibility to offer better conditions to business users and thereby incentivise them to switch or multi-home.	Business users would have the ability and incentive to choose among different platforms where to offer	Consumers' choice would not be limited to offers provided through/on the gatekeeper platform.

Table of impacts per considered obligation				
Unfair practice	**Impacts on gatekeepers**	**Impact on competitors and new entrants**	**Impact on business users**	**Impact on consumers**
at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper. Example: *a provider of online intermediation services does not allow hotels/e-books publishers to offer better prices on different online travel agents/e-books platforms*	compete on merits or face a risk of losing revenue. In view of increased choice, downward pressure on prices and therefore revenue.	Increased choice likely to increase innovation incentive for all market players.	their service/product. Lower prices for intermediation services would lead to passing of the cost savings to consumers.	Consumers could possibly benefit from lower prices and/or higher quality/price ratio for online services offered on other platforms. Opportunity costs of comparing different options may increase.
Gatekeepers shall not prohibit their business users from promoting and subsequently concluding contracts with their customers acquired on gatekeeper's platform outside a gatekeeper's platform. Example: *a publisher cannot inform a new user through its newspaper app that the subscription is cheaper if concluded via the publisher´s website.* **Gatekeepers shall not prohibit consumers from accessing and consuming, on the gatekeeper's platform or services, services which have been acquired outside of the gatekeeper's platform or services.**	Gatekeepers facing increased choice from alternative sources. Such increased choice would put pressure on the level of prices and conditions of the service offered. Incentive to innovate in order to prevent outside-gatekeeper platform/service offers. Gatekeeper would likely face lower revenue in view of lower number of transactions.	Increased incentive to develop an alternative distribution channel.	Ability to reach customers directly and offer them targeted and tailored offers. Ability to reduce costs of distribution, which could be passed through to consumers in form of lower prices and investments in more innovative products/services.	Increased choice for consumers. Lower prices and higher quality.

Table of impacts per considered obligation				
Unfair practice	**Impacts on gatekeepers**	**Impact on competitors and new entrants**	**Impact on business users**	**Impact on consumers**
Example: *a music streaming subscription is concluded through a website, but cannot be subsequently used via the app*.				
Gatekeepers shall not prevent or restrict business users from raising issues with any relevant public authority relating to any behaviour of gatekeepers Example: *business users would like to complain about unfair practice by gatekeeper, but is effectively prevented doing so due to contractual constraints*.	Gatekeepers would not be able to exercise their imbalanced power preventing business users from complaining.	Business users competing with the gatekeeper would be able to obtain redress and thus compete with the gatekeeper on an equal footing.	Business users – especially smaller ones - would have a chance to find solution to the issue they face with the platform.	Consumers would ultimately benefit from an increased number of business users on the gatekeeper platform, since even smaller businesses would dare using the gatekeeper platform's services.
Gatekeepers shall not impose their own user ID services on business users when the latter offer service using the core platform service of the gatekeeper. Example: *an app store operator unilaterally requires all app developers to integrate the app store´s own user ID functionality in their apps and to show this ID functionality to the customers of their apps*.	Gatekeepers required to compete on merits. Incentive to innovate in order to compete. Gatekeeper would likely face lower revenue in view of lover use of their use ID services.	Enabling market entry by competitors offering alternative user ID services. Ensuring a level playing in the online platform economy. Incentives to innovate and compete.	Business users benefiting from more choice. Possible cost savings in use of alternative user ID services.	Increased choice for consumers. Benefiting from higher quality services.
Gatekeepers shall not require business users or customers of these business users to subscribe to or register with any	Gatekeepers would be limited in combining different services together. Gatekeepers would have to compete on	Removal of barriers to entry and ability to enter/expand. Ability to compete on merits and higher	Facing increased choice, which in turn could lead to lower prices and higher	Consumers facing more choice from different business users.

Table of impacts per considered obligation				
Unfair practice	**Impacts on gatekeepers**	**Impact on competitors and new entrants**	**Impact on business users**	**Impact on consumers**
core platform service other than the core platform service provided by the gatekeeper, as a condition to access, sign up or register to any of their core platform services Example: *consumer would like to subscribe to social networking service by a gatekeeper, but is effectively prevented from doing so without subscribing to other services of that gatekeeper*.	the merits of quality and characteristics of each individual service. Gatekeepers would be faced with lower demand for one or more of its services. Gatekeeper would face potential loss of revenue. Incentive to compete on merits and innovate.	incentives to innovate.	quality of service. Ability to combine services according to the actual needs and interests. Ability to multi-home and switch increased.	More choice enables also better choice to the actual needs of consumers (e.g. one service; combinations of services).
Gatekeepers shall provide advertisers and publishers with information concerning the price paid for the impression of a given ad, including for each of the relevant advertising services provided by the gatekeeper Example: *advertisers and publishers would like to obtain information about all the intermediation fees charged by the adtech services provider, but they are refused so*.	Gatekeepers would provide for increased transparency of its advertising system. Increased transparency is likely to put downward pressure on pricing, which is considered opaque. This may lead to some lost advertising revenue.	Increased transparency may facilitate entry or expansion of competing service providers. Success of competitors largely dependent on the actual switch in demand from business users, with at least part of their demand (reach of gatekeeper platform still being an important barrier to entry).	This would lead to improved transparency of the advertising value chain. Some demand may switch to alternative operators, but that will largely also depend on their reach to consumers.	Increased choice and competition likely to lead to lower prices paid for advertising, which should subsequently be passed on in final prices for consumers.
Gatekeepers should not use data provided by or generated through activities of business users of its core platform services in competition with those business users	Gatekeepers would be constrained in expanding their power to neighbouring markets through unfair practices since they would not be able to gain unfair commercial advantage.	Increased level playing field. Ability to compete on merits. Ability to bring innovative solutions to the market.	Business users would have more confidence in selling online, as they would be protected from practices that exploit their data for the benefits of the platforms	Consumers would continue benefitting from products/services provided through multiple channels (e.g. retailers) thus benefitting

Table of impacts per considered obligation				
Unfair practice	**Impacts on gatekeepers**	**Impact on competitors and new entrants**	**Impact on business users**	**Impact on consumers**
Example: *an e-commerce marketplace using commercially sensitive data collected from individual sellers to compete with these sellers on its own online marketplace*	Gatekeepers would need to establish market trends as any other market operator when determining supply and demand patterns. Gatekeepers would be further incentivised to innovate and compete on merits. Gatekeepers might grow at a lower pace as when engaging in unfair practices. If they can preserve their 'first mover advantage' in terms of number of business users and data accumulation but would need to compete on the basis of fair data- use practices.		alone.	from more choice, lower prices and innovative products.
Gatekeepers shall not prevent customers from un-installing any pre-installed software applications on its core platform services. Example: *app stores/operating systems preventing users from un-installing some of the pre-installed apps, in particular where these are not essential for running the hardware*.	Gatekeepers would be limited in practices preventing switching or multi-homing. Gatekeepers may be facing more competition concerning specific proprietary software applications and therefore limited growth. Gatekeepers may be losing some revenue in case of exclusivity arrangements with business users.	Ensuring a level playing field in the online platform economy. Ability to bring innovative products and services on the market in view of more open switching or multi-homing possibilities of consumers.	In case of pre-installation arrangements with gatekeeper, increased incentive to compete to remain relevant and competitive. Increased competition between different developers of software applications.	Increased consumer freedom of choice with a positive impact on prices and quality of service.
Gatekeeper shall allow the installation and effective use of	Gatekeepers would be effectively prevented from restricting switching or	Increased ability to switch shall serve as incentive to target consumers with high	Incentive to switch would lead to a more volatile	Increased choice for

Table of impacts per considered obligation				
Unfair practice	**Impacts on gatekeepers**	**Impact on competitors and new entrants**	**Impact on business users**	**Impact on consumers**
third party software applications or software application stores using, or interoperating with, operating systems of that gatekeeper Example: *consumer is prevented from installing an app store of the mobile game provider and the relevant applications directly from its app store*.	multi-homing. This may lead to decrease in demand in absence of innovative competing products in comparison to competitors. Increased switching and/or multihoming likely to lead to some loss in revenues.	quality products or services. Switching should incentivise increased innovation in a variety of markets. Increased overall competition and contestability of the markets.	markets due to competitive choice. This would in turn lead to more innovation, lower prices and higher quality products and services.	consumers. Lower prices and higher quality of service.
Gatekeepers shall not treat more favourably in ranking their own services and products compared to similar services or products of third-party business users and shall apply fair conditions to such ranking Example: *a search engine preferring its own vertically integrated services in its search engine results (e.g. shopping or travel services are featured on top of search results); a social network ranking its own dating service more prominently in users´ timelines than those of third-party dating services*.	Gatekeepers' power stemming from ability and incentive to engage in self-preferencing due to the vertical integration will be limited. Gatekeepers adjacent services growth may be limited or stalled absent change to compete on merits.	Competitors would have the ability to compete on equal footing and merits. Increased incentive to innovate and invest in view of level playing field.	Business users offering high quality and/or competitive product/services would benefit from greater visibility in view of the increased competitiveness of their service and therefore relevance in ranking.	Better informed and more impartial choice for consumers. Demand driven by the competitiveness of the offer and not by unfair practices.
Gatekeepers shall not technically restrict the ability of end users to switch between and subscribe to different software applications and services to be	Gatekeepers would be effectively prevented from restricting switching. This may lead to decrease in demand in absence of innovative competing	Increased ability to switch shall serve as incentive to target consumers with high quality products or services. Switching should incentivise increased	Incentive to switch would lead to a more volatile markets due to competitive choice.	Increased choice for consumers. Lower prices and higher

Table of impacts per considered obligation				
Unfair practice	**Impacts on gatekeepers**	**Impact on competitors and new entrants**	**Impact on business users**	**Impact on consumers**
accessed using the operating system of the gatekeeper Example: *an app store reserving for some providers with whom it has partnership agreements certain functionalities, thus preventing consumer switching to a different internet access provider.*	products in comparison to competitors. Increased switching likely to lead to some loss in revenues.	innovation in a variety of markets. Increased overall competition and contestability of the markets.	This would in turn lead to more innovation, lower prices and higher quality products and services.	quality of service.
Gatekeepers shall not prevent business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available to or used by any ancillary services provided by the gatekeeper. Example: *provider of financial services online would like to obtain access to certain features available to the payment services of the gatekeeper that are needed to perform certain operations, but is refused access to such features.*	Gatekeepers would not be able to discriminate against business users ancillary services providers in terms of access to their operating system, hardware or software features.	Increased level playing field	Business users would benefit from systems and features needed for their activity.	Consumers would benefit from higher quality and more diversified choice.
Gatekeepers shall not refuse to provide advertisers and publishers upon their request, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and	Gatekeepers would provide for increased transparency of its advertising system. Increased transparency is likely to put downward pressure on pricing, which	Increased transparency may facilitate entry or expansion of competing service providers. Success of competitors largely dependent on the actual switch in demand from	This would lead to improved transparency of the advertising value chain and better targeting of the service needed.	Increased choice and competition likely to lead to lower prices paid for advertising, which should subsequently be passed on in final prices for

Table of impacts per considered obligation				
Unfair practice	**Impacts on gatekeepers**	**Impact on competitors and new entrants**	**Impact on business users**	**Impact on consumers**
publishers to carry out their own independent verification of the ad inventory. Example: *advertisers would like to obtain access to performance measuring tools of gatekeepers to assess effectiveness of its advertising campaign, but is refused access to such tools.*	is considered opaque. This may lead to some lost advertising revenue.	business users, with at least part of their demand (reach of gatekeeper platform still being an important barrier to entry).	Some demand may switch to alternative operators, but that will largely also depend on their reach to consumers.	consumers.
Gatekeepers shall provide business users with effective data porting possibilities for data generated on core platform services, subject to GDPR consent requirements as applicable. Example: *third-party provider of online newspaper may need access to data of the potential user (i.e. subscriber) of its services in real time.*	Gatekeepers would be required to provide for effective means of data portability, practice which does not seem to function at the moment. Gatekeepers would not benefit from an important barrier to entry and expansion faced by existing competitors. Interoperability measures required would raise compliance costs for gatekeepers.	Competitors would benefit from incentive of business users who would have an effective mean for switching or multi-homing. Incentive and ability to switch would lead to incentive to enter or expand in the market and provide innovative services.	Increased ability of business users to switch or multi-homing. Incentive to switch or multi-home could lead to more innovative services and choice.	Increased choice for consumers. Lower prices and higher quality of service.
Gatekeepers shall not prevent free of charge, unhindered access to and use of non-aggregated and aggregated data that is provided for, generated in the context of, or inferred from, the use of the relevant core platform services by those business users and the customers acquiring the	Gatekeepers will not be able to prevent direct contacts between business users and consumers. Gatekeepers might lose some consumers who may switch to business users or competitors and thereby lose some revenue.	Level playing field among competitors in the online platform environment. Competitors would benefit from business users being able to obtain their customer data and possible use similar services from competitors of gatekeepers.	Business users would be able to better understand behaviour of their customers. Would enable better targeting of the offers as well as addressing possible shortcoming in the service	Consumers would benefit from a more direct contact with the business that is providing demanded service. More targeted supply could lead to more competitive offer in terms

Table of impacts per considered obligation				
Unfair practice	**Impacts on gatekeepers**	**Impact on competitors and new entrants**	**Impact on business users**	**Impact on consumers**
products or services provided by those business users. Example: *online newspaper asks the provider of online intermediation service for contacts of the customer who subscribed to its service through software application store of the gatekeeper, but is refused such data on privacy grounds, even if subscriber was never asked for consent, or lack of it, for such data sharing*.			(e.g. reasons for termination of a contract).	of lower price and higher quality.
Gatekeepers shall not prevent access, upon request of business users and any third party providers of online search engines, to query, click and view data in relation to free and paid search generated by consumers on the online search engines of the gatekeeper. Example: *provider of competing online search engine services asks the gatekeeper to provide access to its click-and-query data, which is refused without any consideration or explanation*.	Providing access to click-and-query data is likely to lead to increased competition in online intermediation services and online search engines. Increased competition expected to lead to incentive to innovate and provide higher quality product than competition.	By increasing level playing field the competitors obtain an opportunity to differentiate themselves from gatekeepers and show that quality of their product or service. Increased competition overall, likely to lead to more innovation and more tailored products.	Increased competition likely to lead to increased choice and thereby lower prices and higher quality products and services.	
Gatekeepers shall apply fair and non-discriminatory general conditions of access for business users to its software application	Gatekeepers would not be able to treat differently third parties on their respective platforms, they would not be	Business users directly competing would benefit from better level playing field vis-à-vis gatekeepers.	Business users could benefit from better quality of service, i.e. better access	Consumers would benefit from greater quality products/services by

Table of impacts per considered obligation				
Unfair practice	**Impacts on gatekeepers**	**Impact on competitors and new entrants**	**Impact on business users**	**Impact on consumers**
store. Example: *provider of an app store charges different commission rates to different business users without clear identification of reasons for such differentiation*.	allowed to prevent the latter from benefitting from the same access conditions. Gatekeepers would however not be prevented from determining the substance of the access conditions for their core platform services – these would merely be subjected to the fairness and non-discrimination check.		conditions, which would also allow them to offer increased quality of services to consumers.	business users.

3. SUMMARY OF COSTS AND BENEFITS

The costs and benefits associated to this initiative are specified below, comparing where possible the outcome of different options assessed.

3.1. OVERVIEW OF BENEFITS FOR THE PREFERRED OPTION

I. Overview of Benefits – Preferred Option 2		
Description	**Amount**	**Comments**
Internal market fragmentation (see also Annex 5.5 on cost of non-Europe)	EUR 92.8 billion	It is expected that here will be a substantial decrease in internal market fragmentation, as EU Member States will not need to introduce national legislations. The effect of market contestability on the internal single market is proxied by an increase in online cross-border trade and the indirect/spill-over effect in terms of employment, economic growth, innovation and consumer surplus (see below). If we assume that by preserving the internal market in the platform space cross-border trade projections by 2025 could be maintained, this would lead to EUR 92.8 billion.[87]
Impact on economic growth	EUR 12 billion - EUR 23 billion	**Input-output micro-econometric modelling**: Higher investment in R&D in the ICT sector in EU27 leads to an overall increase in the EU27 income between 0.09% to 0.17% of 2014 EU GDP, this is between EUR 12 billion and EUR 23 billion. Both impacts on growth and employment (below) are very conservative estimates because they result exclusively from an increase in R&D investment. However, market contestability and more fair competition are expected to produce important spillover effects that result in higher innovation, increase in market size, increase of entrepreneurship within and beyond the platform economy and growth in other traditional sectors. Online cross-border trade is expected to be highly impacted by this virtuous dynamic. Therefore, this

[87] Cross-border e-commerce in Europe was worth EUR 143 billion in 2019, with 59% of this market being generated by online marketplaces. This is projected to increase to 65% in 2025 (Ecommerce News Europe (2020)).

I. Overview of Benefits – Preferred Option 2		
Description	**Amount**	**Comments**
		estimation is not taking into account further rounds of direct and indirect effects with positive loops in the long-term.
Employment	600 000 jobs preserved (conservative scenario) – b/n 136,387 and 294,236 jobs created (optimistic scenario)	The preferred option would either preserve the current level of employment in the sector or lead to its increase[88] thanks to the increase in R&D spending (input-output microeconomic modelling)
Innovation	EUR 221 billion and EUR 323 billion over 10 years	Financial resources that could be invested in R&D are diverted to mergers and acquisitions (M&A), which results in higher market concentration instead of improvements in the quality and quantity of products and services for consumers. This pattern of innovation dedicated to competing 'for the market' has a detrimental effect on consumer choice and surplus. In addition, the positive impact on innovation stemming from higher market contestability is not limited only

[88] The data used in the input-output modelling come from three sources: (a) The 2014 world input-output table (WIOT) publicly available from the World Input-Output Database (WIOD, www.wiod.org), (b) Employment (number of persons engaged) and compensation of employees obtained from the Socio-Economic Accounts (SEAs) of WIOD, and (c) private R&D investments in information and communication (and its subitems represented by NACE Rev.2's Section J's divisions and/or groups), which were downloaded from Eurostat (rd_e_fundgerd).www.wiod.org), (b) Employment (number of persons engaged) and compensation of employees obtained from the Socio-Economic Accounts (SEAs) of WIOD, and (c) private R&D investments in information and communication (and its subitems represented by NACE Rev.2's Section J's divisions and/or groups), which were downloaded from Eurostat (rd_e_fundgerd).www.wiod.org), (b) Employment (number of persons engaged) and compensation of employees obtained from the Socio-Economic Accounts (SEAs) of WIOD, and (c) private R&D investments in information and communication (and its subitems represented by NACE Rev.2's Section J's divisions and/or groups), which were downloaded from Eurostat (rd_e_fundgerd).www.wiod.org), (b) Employment (number of persons engaged) and compensation of employees obtained from the Socio-Economic Accounts (SEAs) of WIOD, and (c) private R&D investments in information and communication (and its subitems represented by NACE Rev.2's Section J's divisions and/or groups), which were downloaded from Eurostat (rd_e_fundgerd).

I. Overview of Benefits – Preferred Option 2		
Description	**Amount**	**Comments**
		to diversion of money from M&A to R&D. Other expected indirect effects include an increase in entrepreneurship and creation of new products and solutions meeting consumers' needs rather than focused on exploiting a gatekeeping position. This may have a multiplicative effect increasing the size of the European single market, and hence, GDP and online cross-border trade (see other impacts in this table).
Investment in R&D	EUR 12 billion– EUR 23 billion	Higher investment in R&D in the ICT sector in EU27 leads to an overall increase in the EU27 income between 0.09% to 0.17% of 2014 EU GDP,[89] i.e. between EUR 12 billion and EUR 23 billion (input-output modelling).
Competition	Fall in HHI index 0.25 (user shares) and 0.11 (revenue shares)	It is expected that competition will improve substantially due among other to a substantial decrease in barriers to entry. Conservative estimate is no increase in the HHI Index, while upper bound means a fall in HHI index on for the user shares by 0.25 points and 0.11 for the revenue shares.
Online cross-border trade	EUR 450 billion to EUR 1.76 trillion after 10 years	Assuming the internal market fragmentation is fully addressed, the online cross-border trade would increase between EUR 450 billion to EUR 1.76 trillion after 10 years. Although it is hard to forecast with precision the increase in online cross-border trade, the impacts have been proxied by similar trends in offline cross-border trade resulting from market integration. The opportunity costs estimated here are very conservative as the assumed trends were linear and conservative growth rates. The fast change in the platform economy and interlinks with the rest of the economy suggests that online cross-border trade could see an important exponential growth if enhanced by market contestability, fair competition and virtuous patterns of innovation.
Consumer surplus	EUR 13 billion	The higher level of competition may result in lower prices as companies could decrease spending on

[89] The most recent available input-output matrix is for 2014, yet the matrix does not change significantly across time.

I. Overview of Benefits – Preferred Option 2		
Description	**Amount**	**Comments**
		advertising and lower costs; such savings could be passed onto consumers (especially where (price) competition increases). Consumer surplus of EUR 13 billion is based on the assumption that competitive asymmetry between gatekeepers and alternative platforms would be addressed (see Annex 4).

3.2. OVERVIEW OF COSTS

The Table below presents a cost comparison between Options 1, 2 and 3 (including underlying assumptions for cost estimates). In relation to the number of platforms captured by the qualitative criteria, it is very difficult to estimate upfront given that only after a market investigation it would be possible to determine whether a given provider of core platform services meets the criteria. The calculations are thus provided on the basis of illustrative numbers.

It is important to note that the costs for the EU Commission in terms of FTEs (full time equivalents) refer mostly to the internal redeployment of already existing job positions.

Cost comparison						
	Option 1		**Option 2**		**Option 3**	
Carrier	***Cost qualification***	***Cost quantification***	***Cost qualification***	***Cost quantification***	***Cost qualification***	***Cost quantification***
European Commission	Regulatory costs of implementation, supervision, information gathering. Associated burden is estimated based on experience from other sectors where regulation	Annual costs: between €6.4m (sub-option 1-A) and €10.5m (sub-option 1-B). This is based on 30 FTEs in case of sub-option 1-A (with a cost of €3.9m) and 50 FTEs	In addition to costs identified under Option 1, further data requests, implementation, assessment and enforcement/supervision costs are to be foreseen. Further implementation	Annual costs: €16.7m. This is based on 80 FTEs under both sub-options (€10.3m). Additional costs (i.e. around €6.4m) are necessary in relation to	In addition to costs identified under Option 2, further costs would be incurred in similar tasks in relation to other digital services, including implementation, assessment, enforcement/supervision	Annual costs: €18.2m This is based on 90 FTEs (€11.7m). Additional costs (i.e. around €6.5m) are necessary in relation to the support of experts,

Cost comparison						
	Option 1		Option 2		Option 3	
Carrier	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*
	requires the preparation of guidelines, designation of actors with market power and enforcement of conditions aimed at supporting contestability and avoiding foreclosure, i.e. telecoms regulation and competition law. It is assumed that the Commission would engage in preparing and processing information requests as well as the preparation of guidelines, designation of gatekeepers and enforcement of the obligations	in case of sub-option 1-B (with a cost of €6.5m). Additional costs (between €2.5m and €4m) are necessary in relation to the support of experts, provision of training, development of required IT systems, expenditure with missions and organisation of meetings.	costs would stem from the regulator specifying the obligations imposed to a given gatekeeper. Further assessment costs would stem from the need to conduct market investigations to designate gatekeepers and assess new practices.	the support of experts, provision of training, development of required IT systems, expenditure with missions and organisation of meetings.	costs, and assessments of fairness.	provision of training, development of required IT systems, expenditure with missions and organisation of meetings.
National authorities	Responses to consultations held by the EU regulator to integrate national expertise before taking a decision (e.g. on	Annual costs: €4.3m based on 2.5 FTE for 27 Member States	In addition to costs under Option 1, Option 2 would imply costs for national regulators to study Commission's proposed draft decisions on further	Annual costs: €6m based on 3.5 FTE for 27 Member States	In addition to Option 2, Option 3 would not imply any additional costs for national regulators.	Annual costs: €6m based on 3.5 FTE for 27 Member States

Cost comparison						
	Option 1		Option 2		Option 3	
Carrier	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*
	guidelines non-compliance, fines).		tailoring of obligations.			
Gatekeepers	Compliance costs incurred in order to prepare for compliance with rules, set compliance officers, and respond to requests for information. Number of information requests would depend on the complexity of the case. Estimate assumes that 20 FTEs are involved in data gathering, monitoring and enforcement activities per gatekeeper platform. This scenario does not consider possible synergies with already existing internal organisation/service for complying with other legislation, e.g. service	Annual costs: between €9.87m and €21.15m for a total number of gatekeepers in scope between 7 (under sub-option 1-A) and 15 (under sub-option 1-B)	Similar compliance costs per platform as per Option 1. On the one hand, the possibility of a dialogue would reduce the compliance costs. On the other hand, the need to reply to request for information in the context of market investigations would imply some extra costs.	Annual costs: between €21.15m and €28.2m for a total number of gatekeepers in scope between 15 (under sub-option 2-A) and 20 (under sub-option 2-B)	Similar compliance costs per platform as per Option 1. On the one hand, the possibility of a dialogue would reduce the compliance costs. On the other hand, the need to reply to request for information in the context of market investigations would imply some extra costs.	Annual costs: around €35.25m based on 25 gatekeepers.

Cost comparison						
	Option 1		Option 2		Option 3	
Carrier	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*
	ensuring COMP law compliance.					
Competitors, start-ups, business users	Monitoring of unfair conduct as well as new rules' implementation and supervision of compliance would imply some burden in the form of e.g. responses to information requests. However, in order to ensure proportionality information requests would take into consideration the size of the enterprise to which they are sent. The resources devoted to these requests might be counteracted by reductions in legal resource required to address unfair contractual conditions, with a substantial portion of the burden	Net additional resource requirements likely to be very limited	Monitoring new forms of unfair practices would create additional costs for market players as compared with Option 1. However, in order to ensure proportionality information requests would take into consideration the size of the enterprise to which they are sent. The resources devoted to these requests might be counteracted by reductions in legal resource required to address unfair contractual conditions, with a substantial portion of the burden previously taken by small firms in this area now addressed through tailored action at EU level.	Net additional resource requirements likely to be very limited	Monitoring new digital markets would create additional costs for market players as compared with Option 1. However, in order to ensure proportionality information requests would take into consideration the size of the enterprise to which they are sent. The resources devoted to these requests might be counteracted by reductions in legal resource required to address unfair contractual conditions, with a substantial portion of the burden previously taken by small firms in this area now addressed through tailored action at EU level.	Net additional resource requirements likely to be very limited

Cost comparison						
	Option 1		Option 2		Option 3	
Carrier	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*	*Cost qualification*	*Cost quantification*
	previously taken by small firms in this area now addressed through tailored action at EU level.					
Consumers	Responses to public consultations - questions targeting consumers would be less complex and shorter. Possibly higher search costs		Additional information gathering from consumers may be needed to inform specification/tailoring of remedies. Higher search costs		Additional information gathering from consumers may be needed to inform about other digital services. Higher search costs	
Total costs:		**EUR 20.57m – 35.95m**		**EUR 43.85m – 50.9m**		**EUR 59.45m**

Annex 4 – Analytical methods

The teams at DG CNECT, GROW and COMP, as well as the contractor of the study supporting the Impact Assessment and JRC conducted calculations to estimate the impact of the unfair practices employed by platform and market failures.

The quantitative assessments relied on estimates available in empirical studies quoted in the Impact Assessment, correlation analysis was based on data from Statista and an Input-Output macro-modelling. The assessment was guided by the EU Better Regulation Guidelines.

1. INPUT-OUTPUT MODEL

1.1 Introduction

The input-output (I-O) model is the name given to a modelling approach developed by Professor Wassily Leontief in the late 1930s[90]. As its name suggests, the I-O model assumes that there is a matrix that links transactions or flows recording payments **to and from** a sector within a year. Besides, the framework works on double-entry bookkeeping so that total gross output must equal gross input. 0 below illustrates the model.

The row total represents the total produced (supplied) by a sector while the total column represents the total used (demanded) by such sector. Hence, any element α_{ij} in each cell is what sector j use from sector i.

Input-output transaction matrix

		PRODUCERS AS CONSUMERS								FINAL DEMAND			
		Agric.	Mining	Const.	Manuf.	Trade	Transp.	Services	Other	Personal Consumption Expenditures	Gross Private Domestic Investment	Govt. Purchases of Goods & Services	Net Exports of Goods & Services
PRODUCERS	Agriculture												
	Mining												
	Construction												
	Manufacturing												
	Trade												
	Transportation												
	Services												
	Other Industry												
VALUE ADDED	Employees	Employee compensation								GROSS DOMESTIC PRODUCT			
	Business Owners and Capital	Profit-type income and capital consumption allowances											
	Government	Indirect business taxes											

Source: Miller and Blair (2009)[91]

[90] Leontief, W.W. (1986), Input-Output Economics, Second edition. Oxford: Oxford University Press.

[91] Miller, R.E. and Blair, P.D., 2009. Input-output analysis: foundations and extensions. Cambridge university press. Available at: http://digamo.free.fr/io2009.pdf.

The model is built using observed economic data from national account statistics to show the flows of products going from each industrial sector seen as a producer to sectors seen as consumers. The grey area in 0 above is the interindustry trade to which must be added the final demand columns and the value-added rows.

National account data will populate the matrix which will be used to estimate impacts out of exogenous shocks. For example, each Z_{ij} in the matrix below (0) will be constructed from official statistics. Such matrix will be used to find a matrix with the multiplier effects to estimate how exogenous changes in one specific sector of the economic impacts in the other sectors, value-added, final demand and lastly in GDP.

Example of a two-sector economy

		Processing Sectors		Final Demand				Total Output ($\mathbf{x}$)
		1	2					
Processing	1	z_{11}	z_{12}	c_1	i_1	g_1	e_1	x_1
Sectors	2	z_{21}	z_{22}	c_2	i_2	g_2	e_2	x_2
Payments	Value Added ($\mathbf{v}'$)	l_1	l_2	l_C	l_I	l_G	l_E	L
Sectors		n_1	n_2	n_C	n_I	n_G	n_E	N
	Imports	m_1	m_2	m_C	m_I	m_G	m_E	M
Total Outlays ($\mathbf{x}'$)		x_1	x_2	C	I	G	E	X

Source: Miller and Blair (2009)

The next section describes the implementation of the I-O model to this impact assessment.

1.2 Implementation of the I-O model for the impact assessment

In this Implementation of the I-O model for the impact assessment analysis, data was taken from the sources below:

- The 2014 world input-output table (WIOT) publicly available from the World Input-Output Database (WIOD, www.wiod.org),
- Employment (number of persons engaged) and compensation of employees obtained from the Socio-Economic Accounts (SEAs) of WIOD, and
- Private R&D investments in information and communication (and its subitems represented by NACE Rev.2's Section J's divisions and/or groups), obtained from Eurostat[92].

The most recent data were available for 2014 (WIOD Release 2016), which explains the choice of the year in our impact assessments. The WIOTs and SEAs cover 43 countries and the rest of the world region, each detailed by 56 industries according to the International Standard Industrial

[92] Business expenditure on R&D (BERD) by NACE Rev. 2 activity and source of funds [rd_e_berdfundr2], metadata accessible at: https://ec.europa.eu/eurostat/cache/metadata/en/rd_esms.html.

Classification Rev. 4. All tables adhere to the latest version (2008) of the System of National Accounts.

The incorporate **the impact of market contestability and fairer competition in GDP and employment into the I-O model**, we needed to assume that such market dynamic would result in **higher investment in R&D in the platform economy**, impacting in GDP and job creation. However, as the platform economy is still relatively new to the national account system there is not an exact code for such sector and we had to take some sub-sectors from the ICT sector as a proxy[93].

The results suggest that private investments in ICT sectors account only for roughly 0.10% of the EU GDP. The I-O modelling exercises show that these investments imply:

- An overall EU income increase from 0.09% to 0.17% (of 2014 EU GDP) and EU employment increase from 0.07% to 0.15% (of 2014 EU employment);
- At the EU level, most of the impacts are driven by one ICT subsector, consisting of Computer programming, consultancy and related activities and Data processing, hosting and related activities, web portal;
- The impacts are, however, heterogenous across the individual EU countries.

1.3 Limitations

One of the main limitations is the lack of exact code to identify the platform economy which may be underestimating the actual size of the sector and hence the contribution and links to the overall economy.

A second limitation is that it only incorporates the increase of R&D but there might be other exogenous shocks resulting from market contestability and fairer competition, including higher market size and higher online-cross-border trade. As it is difficult to know a priori the increase in market size and across which sector, incorporating this into the model proves challenging.

Other direct and indirect effects such as entrepreneurship, quantitative and qualitative changes in the patterns of innovation as well as lower prices to consumers resulting from market contestability are not included in the model for the same reasons as failing to incorporate change in market size. Therefore, the estimations must be taken as conservative and lower bound.

2. METHODOLOGY USED FOR CALCULATING CONSUMER BENEFITS STEMMING FROM A MORE COMPETITIVE PLATFORM ECONOMY IN THE EU

2.1 Presentation

This note summarises the method used to assess the economic impact of the DMA in the EU and the (preliminary) results obtained.

[93] The R&D expenditure data cover part of ICT services (but not ICT manufacturing), along with other subitems of Information and communication sector. These ICT services include Software publishing (NACE Group 58.2), Telecommunications (NACE Division 61), Computer programming, consultancy and related activities (NACE Division 62), and Data processing, hosting and related activities; web portals (NACE Group 63.1).

The quantitative methodology adopted can be conceptualised as a partial-equilibrium structural approach. The econometric model is grounded in a ***partial-equilibrium*** framework since it uses very detailed data to identify with high precision consumers' substitution patterns for a large set of digital services providers in 19 EU Member States and the UK. It is ***structural*** in the sense that economic theory is used to develop statements about how a set of observable endogenous variables are related to another set of observable explanatory variables, and sometimes also to a set of unobservable variables. However, economic theory alone cannot provide enough information for the estimation of the model. For this reason, there is a need to add statistical assumptions about its observed and unobserved variables. A key reason to use economic theory, beyond the specification of the relationship between the variables, is to clarify how institutional and economic conditions affect these relationships. This specificity is essential to make causal statements about the estimated relationships, or use them to perform counterfactuals, i.e., scenarios that have not been implemented but that can represent the likely outcomes of policy interventions.

The methodological approach is framed in the tradition of structural estimation in empirical industrial organisation in the economics profession. This approach uses discrete choice models for the estimation of demand and adds a simulated supply side to compute the industry equilibrium given by the observed data. Adding a simulated supply side to account for firms' strategic behaviour, the observed market equilibrium can be found. Moreover, by changing supply or demand conditions, the framework allows for the design of counterfactuals that simulate policy changes.

The model used here is a modified version of Duch-Brown et al. (2015), and was developed by researchers from the JRC. The model is a partial equilibrium approach using detailed data for usage of a large set of digital services, allowing estimating with a high level of accuracy demand substitutability and market equilibrium.

From a market analysis perspective, there are three potential competitive constraints: demand substitution, supply substitutability, and potential competition. Demand substitution constitutes the most immediate and effective disciplinary force on suppliers, and in particular to their strategic decisions. Supply substitutability and potential competition are relevant in the medium to long terms, since they imply the need of adjustments through tangible or intangible assets, additional investments or strategic decisions, all of which would imply significant changes in the markets under consideration[94]. Hence, a precise estimation of demand substitutability is essential to the analysis of the effects of changes in the institutional setting of a given sector, and this is the basis for the approach taken here.

We consider the demand for several categories of digital services. Consumers can choose among a large variety of websites that are differentiated in quality. Furthermore, consumers can also decide not to visit a website at all, in which case they can spend their time on other (offline) services goods. To model the substitution patterns, a two-level nested logit model is used which allows for market segmentation according to two discrete dimensions: i) category; and ii) sub-category. This model is useful since the nesting parameters enable one to assess to which extent consumers view the options in the same distribution channel and/or quality category as closer substitutes.

[94] Alternatively, one can see this as the difference between (comparative) static and dynamic approaches.

Assuming that consumers choose the product with the highest utility, one can obtain the choice probabilities for every product in every country, including the probability of selecting the outside good (McFadden, 1978). At the aggregate level, these choice probabilities can be equated to the market shares, relative to a hypothesised potential market, defined here as representing twice as much as the observed website visits.[95] The demand model can be used to compute consumer surplus (McFadden, 1978 or Anderson et al. 1992. If the model conforms to the basic principles of consumer theory, the model translates preference correlations into aggregate substitution patterns. Products in the same subgroup will have higher substitutability than products in a different subgroup.

An oligopolistic supply side is added to the model to infer marginal costs and current economic profits; as well as to define the observed market equilibrium. The model assumes that firms maximize profits, and that they compete in a differentiated products setting (Bertrand competition). As shown by Berry (1994) and Berry, Levinsohn and Pakes (1995), the profit maximising conditions can be used to compute the current marginal costs. Furthermore, this system can be used to perform policy counterfactuals, and in particular the effects of introducing more competition in this particular setting. The model also calculates consumer welfare (consumer surplus) changes, by computing the welfare measures in the different counterfactuals and in the observed market equilibrium.

The results with respect to the estimated consumer surplus are:

Country	Original	Counterfactual	Difference
AT	3.47	3.78	0.31
BE	4.77	5.54	0.77
BG	1.93	1.86	-0.06
CZ	6.00	5.93	-0.07
DE	34.11	37.17	3.06
ES	20.27	20.72	0.45
FI	3.43	3.86	0.43
FR	29.41	31.88	2.47
GB	36.85	40.08	3.23
GR	3.83	3.91	0.09
HR	1.62	1.61	-0.01
HU	4.01	3.95	-0.06
IE	2.65	2.95	0.30
IT	20.75	21.49	0.74
NL	10.31	11.59	1.28
PL	18.67	18.38	-0.29
PT	3.75	3.81	0.06
RO	3.74	3.63	-0.10
SE	5.15	5.71	0.56
SK	2.00	1.99	-0.01
Total	**216.72**	**229.87**	**13.15**

[95] Alternative definitions of the market size give similar results. See Duch-Brown and Martens (2016) for further details.

2.2 Limitations

The methodology suffers several limitations. First, the results come from a simulated counterfactual scenario, based on a series of assumptions, which may not necessarily be true. For instance, the assumption that digital service providers compete according to the Bertrand behaviour is questionable, but practical from an empirical point of view. Second, the data used covers just one month, and there may be singularities in that particular point in time that are different from a more wide perspective (ie, several months, or even years). Third, the results are based on a hypothesised consumer behaviour model, which may not correspond to real choices. Finally, the results refer to alternative platforms only (not considering business users). Consequently, the results account for consumer surplus which would stem from increased inter-platform competition but do not reflect positive effects on intra-platform competition (that can be legitimately expected as a result from the application of the preferred option).

3. REFERENCES

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Duch-Brown, N. and B. Martens (2016). The economic impact of removing GB restrictions in the EU Digital Single Market. JRC/IPTS Digital Economy Working Paper 2016-02.

Duch-Brown, N., L. Grzybowski and F. Verboven (2015). The Impact of Online Sales on Consumers and Firms: Evidence from Household Appliances. JRC/IPTS Digital Economy Working Paper 2015-15.

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Annex 5.1 – Overview of consultations and expert advice reports conducted in the context of the New Competition Tool

The following consultations and expert advice reports have been conducted in relation to the market investigation regime. All of these summaries and reports can also be found on DG Competition's dedicated website.[96]

Inception Impact Assessment of the New Competition Tool:

- Feedback received: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/feedback?p_id=7937377

Open Public Consultation on the New Competition Tool:

- Summary of contributions received in the context of the Open Public Consultation on the New Competition Tool: https://ec.europa.eu/competition/consultations/2020_new_comp_tool/summary_stakeholder_consultation.pdf
- Contributions outside EU Survey: https://ec.europa.eu/competition/consultations/2020_new_comp_tool/contributions_outside_eu_survey.zip

Consultation activities in the context of the European Competition Network (National Competition Authorities of the European Economic Area):

- Summary of the contributions of the responses: https://ec.europa.eu/competition/consultations/2020_new_comp_tool/summary_contributions_NCAs_responses.pdf

Expert advice reports commissioned in the context of the New Competition Tool:

- Prof. Massimo Motta and Prof. Dr. Martin Peitz (2020), *Intervention triggers and underlying theories of harm*, https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420575enn.pdf
- Prof. Pierre Larouche and Prof. Alexandre de Streel (2020), *Interplay between the New Competition Tool and Sector-Specific Regulation in the EU*, https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0120577enn.pdf
- Prof. Dr. Heike Schweitzer (2020), *The New Competition Tool: Its institutional set up and procedural design*, https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420574enn.pdf

[96] https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html.

- Prof. Richard Whish (2020), *Legal comparative study of existing competition tools aimed at addressing structural competition problems, with a particular focus on the UK's market investigation tool*: https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420573enn.pdf

Report by the Economic Advisory Group on Competition Policy (EAGCP) (Gregory Crawford, Patrick Rey and Monika Schnitzer) on an economic evaluation of the NCT:

- https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0320680enn.pdf

Annex 5.2: Summary of the EU Observatory work supporting the initiative

The Observatory for the Online Platform Economy supported by its expert group and the support study has produced a number of analytical papers and reports that confirm the international consensus on the need for new rules for digital platforms in order to complement the competition law enforcement.

1. THE REPORTS BY THE EXPERT GROUP FOR THE OBSERVATORY ON THE ONLINE PLATFORM ECONOMY

Firstly, the expert group for the Observatory on the Online Platform Economy has produced 3 preliminary reports published for feedback on 9 July:

- Measurement of the Online Platform Economy
- Differentiated treatment
- Data in the Online Platform Economy
- Market Power and Transparency Issues in Open Display Advertising – a case study (to be published in December)
- Market Power (to be published in December)

This feedback will form part of the Final Report to be published by the end of 2020. It will also include two further reports: on the transparency in the online advertising and market power.

1.1. REPORT ON MEASUREMENT AND ECONOMIC INDICATORS

The Report on Measurement and Economic Indicators identified the indicators that could be used to monitor the online platform economy for the purposes of policy making and further regulation, (e.g. in order to identify platforms in scope of the regulation). The report breaks down the problem of observation into three broad areas that cut across policy domains.

The first is economic significance of platforms in the context of the broader economy. The report identifies three measurement indicators: *volume of trade mediated by platforms; platform size and importance;* and *data on data*. It offers suggestions as regards new, more conceptual approaches to measuring platform size and 'data on data'.

The second area of observation is the platforms' power over their users. The report identifies three indicators for measurement: *business dependence on platforms*; *platform's share of consumer attention*; and *acquisitions as a competitive strategy*.

Regarding acquisitions as a competitive strategy, including so-called 'killer acquisitions' designed to pre-empt future competition, the report suggests automated market

intelligence data feeds and recommends to consider new obligations on major platforms to report M&A activities to the European Commission, for ex-post research and monitoring purposes.

The third area of observation covered in the Measurement report relates to **the alleged effects of platforms' power**: how to measure *platform volatility (e.g. continuous changes in terms and conditions or algorithms)*; *platform transparency*; and *other potentially problematic and thus policy-relevant practices*. The report stresses that platform transparency would benefit from further conceptual research to better understand the trade-offs between a public's need for transparency of powerful actors vs. the legitimate private business interests of a platform company.

As for other potentially problematic practices, the report recommends that the data generated by the internal complaint-handling procedures, as mandated by the P2B Regulation, should be analysed with a view to identifying and assessing any need for further public policy intervention.

1.2. REPORT ON DIFFERENTIATED TREATMENT

The Report on differentiated treatment focuses on differentiated treatment as a potential source of 'unfairness' in the relationship between platforms and their business users in the online platform economy. It distinguishes between practices of self-favouring, whereby a platform gives preferential treatment to its own vertically integrated activities over those of rivals, and more general practices of differentiated treatment where one or more business users are treated more favourably than others.

The report provides guidance on how to assess the impact of differentiated treatment by online platforms from a technical, economic and legal perspective. It also identifies areas requiring further scrutiny because of the particularly problematic nature of certain practices implemented by platforms. Given that instances of differentiated treatment are not necessarily limited to cases where a platform holds a 'dominant position' within the meaning of EU competition law, the report looks beyond the application and interpretation of competition law.

The report stresses that for assessing what practices can be considered 'unfair', more transparency and oversight are needed into the practices in which platforms engage. In this respect, the Platform-to-Business Regulation[97] provides a good starting point to facilitate the more concrete identification of forms of differentiated treatment that can be considered unfair and might, as such, need to be regulated.

The report concludes that it is desirable to keep monitoring the sector closely and conduct focused studies to scrutinise the impact of problematic practices.

[97] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services ('Platform-to-Business Regulation') [2019] OJ L 186/57.

1.3. REPORT ON DATA IN THE ONLINE PLATFORM ECOSYSTEM

The Report on Data in the Online platform ecosystem provides a structured overview of how data is generated, collected and used in the online platform economy. It maps out the diversity and heterogeneity of data-related practices and expands on what different types of data require a careful examination in order to better understand their importance for both the platforms and their users as well as the issues and challenges arising in their interactions. The report concludes with a range of issues, which deserve, in the view of the authors, further policy attention and analysis in the light of the limited evidence available and/or the importance and impact they entail.

2. SUPPORT STUDY FOR THE OBSERVATORY

The consortium supporting the work of the Observatory composed of PPMI (lead), Open Evidence, IW and Rand Europe[98] have produced the following analytical papers (AP):

AP1: Differentiated treatment (IW)

AP2: Platform data access and secondary data sources (PPMI)

AP3: Transparency in the business-to business commercial relations in the online advertising market (Open Evidence)

AP4: Significant Market Status (RAND)

AP5: Business user and third-party access to digital platform data (PPMI)

AP6: Structure of the online platform economy post COVID-19 outbreak (Open Evidence)

AP7: The main obstacles and opportunities for multihoming (PPMI)

AP8: Developments concerning B2B platforms and emerging issues (RAND)

1.4. ANALYTICAL PAPER #1: BUSINESS USER ACCESS TO PLATFORM DATA AND ALTERNATIVE DATA SOURCES

The paper argues that online platforms create value by using data to facilitate interactions (for example, commercial transactions) between users. This means that data is at the core of the platforms' business model and they use it to provide and improve their services.

Data in the possession of platforms allows them to understand the preferences of customers and their reactions to market signals, including changes in prices and product characteristics. This puts online platforms in a unique position as they are able to observe

[98] Support study to the Observatory for the Online Platform Economy, SMART 2018/0034.

the functioning of the market in real time[99]. Data is thus a key source of market power. In other words, platforms' decisions on what data to share, with whom, and under which conditions have far-reaching consequences to all the participants in the market.

Business users: data needs and access to data

In the paper the contractor identified three general dimensions of data relevant to platform business users:

- the type of data by object (customers, businesses, user behaviour, markets, transactions, etc.);
- whether the data is about an individual business which receives it, or other businesses on the platform (competition)/ whole marketplace.
- by the level of data processing and its value, from raw datasets to insights guiding business decision-making.

The paper shows that the kinds of data provided or not provided by the platforms (Amazon, eBay, Google Play and Booking.com) are rather similar. Access to data as well as advanced analytics are granted to the extent that it could generate more income for the platform as well as the business users. In such a case the key question is whether the business users can take full advantage of the data provided to them. Further, a significant share of businesses signal that they are experiencing data access problems. This was very visible in interviews where businesses, especially the bigger or stronger ones, felt strongly about the data access. Their key concern was getting access to data so that they could use it to innovate and keep up with the competition. A recurring issue was also the power of the vertically integrated platforms and especially the extent to which such platforms may use data to develop their own competing products.

The paper explored firstly, t**he findings concerning taking advantage of the available data** and, secondly, **the evidence concerning data that is not shared with the business users.**

The research showed that **a significant share of business users express dissatisfaction with regard to the level of data access provided to them by online platforms. The business user survey showed that access to data possessed by online platforms is of concern to around a third of surveyed business users who reported that they cannot access at least some data that is essential to their business.** Generally, although the platforms collect and analyse loads of data, only a fraction of this is provided to other players. The platforms do not share the raw big data on day-to-day activities, as well as detailed data on customers and competitors.

[99] Crémer, J., de Montjoye, Y.-A., & Schweitzer, H. (2019). Competition policy for the digital era. European Commission.

The paper identified three groups of concerns that business users express with regard to data sharing.

The first is related to lack of access to personal data, such as customers' e-mail address. Some business users, especially in the hospitality and e-commerce sectors consider such data of key importance to them so that they could establish a more direct client relationship. Other personal data collected by platforms, but usually not provided to business users include, for example: telephone, address, credit-card data. As confirmed by our desk research and interviews with the platforms themselves, this data is not provided for a number of reasons. Firstly, this is not considered compatible with the platform's business model as business users may use direct communication to bypass platforms in the future. Secondly, platforms consider that a consistent client relationship and data protection is part of the client experience. They are wary that direct access to the clients by business users may result in a surge of unwanted marketing messages (this argument was not supported by the interviewed business users). Finally, the personal data protection regulation (including GDPR) puts obligations on platforms in terms of data sharing and management, including the obligation of getting explicit consent from consumers to collect and share their data. According to the business user survey, legislative or regulatory restrictions is indeed acknowledged as the key reason for not getting access to data.

Secondly, business users need data that help them to stay competitive, innovate and develop their products and services. Partly this is related to data on, for example, search keywords, search volumes, consumer behaviour in reaction to different price signals. Platforms do share such data to a certain extent (e.g. three most important key words), however some interviewed business users felt that this does not give them sufficient level of detail. Partly, this is also related to data about competitors and their products and services. In this case however, both the interviewed platforms as well as business users expressed understanding that the level of detail is naturally limited as businesses would not want their individual business performance information to be made available to others.

The third concern is that **platforms are taking advantage of data to promote their own products that are very similar to those offered by their business users**. This is **primarily pertinent to vertically integrated platforms with significant market power.** So, in the business user survey, 58% of respondents reported that the platform itself offers the same (or very similar) goods or services to those that their businesses offer on the platform. Among these respondents, 55% argued that online platforms are favouring their own goods or services vis-à-vis the same (or very similar) goods or services offered by their businesses. Unique and comprehensive datasets on all the firms and their consumers operating in the marketplace can give a huge business advantage to the platform operators. The key ways of favouring include ranking, placement of advertisement, pricing and other – all of these are enabled by the data collected by platforms. Some interviewed business users argued that platforms (specifically –

Amazon) are using data to monitor which goods have the best margins in the market and then move into offering such goods themselves.

The paper also analysed the role of data companies. The businesses that need more data than they can get from platforms pursue two broad strategies: (1) collect and analyse data themselves, from sources available to them; (2) rely on third party providers (data brokers). Four-fifths of the business user survey respondents (81%) indicated that they collect some data themselves; the most prevalent data type is identification details of own customers (57% of respondents collect this data), followed by business performance data (55%) and analysis of market trends/ developments (55%). Further, a third of the surveyed companies (33%) reported that they use third-party sources (data brokers). Most of the interviewees - especially in the e-commerce sector - reported that they use the services of third-party data and analytics providers.

Companies specialising in data and insights fill important data gaps, especially with regard to data on competition and actionable business insights. According to PwC estimations, data companies earned USD 21 billion in 2018[100]. Some data brokers specialise to cover specific sectors, such as applications (App Annie, App figures, Apptopia, Mobile Action, Sensor Tower), e-commerce (Algopix, Jungle Scout, Sellics, Teikametrics, Terapeak) or hospitality (AirDNA, Beyond Pricing, Uplisting, Wheelhouse, Skift). Other data brokers, such as Similar Web and Zirra provide data on multiple sectors.

Data brokers use highly advanced technical methods to extract data, or they buy data from online and offline sources. A lot of data is scraped from the platforms. Another key source is crowdsourcing business user account data. Some third-party data providers ask online sellers to share their marketplace information, and then link the data of thousands of users to draw market insights. For example, Jungle Scout collects data from a large number of sellers (over 225,000) who have opted in to share their sales information[101]. When merged with the data gathered by scraping the platform's front-end (e.g., Best Seller rank on Amazon), this can yield quite precise estimations and extrapolations. Similarly, if AirDNA users wish to receive performance analytics, they will be asked to upload their Airbnb host IDs. After doing this, they can see their performance trends, comparative and financial analysis on all vacation rental listings.

The key value proposition of the data brokers lies in their ability to bring together a combination of sources as well as superior technical and analytical capacities, innovative tools and approaches. Data brokers allow their users to learn about their competitors, get a detailed market overview, obtain actionable insights. According to the analysis

[100] Gröne, F., Péladeau, P., & Samad, R. A. (2019). Tomorrow's data heroes. Strategy+business. Retrieved from https://www.strategy-business.com/article/Tomorrows-Data-Heroes?gko=5f270.

[101] Rohler, M. (2019). How are Estimated Sales and Revenue Calculated? What are AccuSales? Jungle Scout Help Center. Retrieved from https://support.junglescout.com/hc/en-us/articles/360008616814-How-are-Estimated-Sales-and-Revenue-Calculated-What-are-AccuSales-#:~:targetText=We%20gather%20it%20from%20a,their%20sales%20info%20with%20us.&targetText=This%20means%20that%20as%20we,analyze%20and%20test%20it%20daily.

presented in this paper, this is the kind of information that is most in demand by the business users and/or platforms do not provide to a sufficient extent. Further, business users themselves do not need to invest into any analytics or IT, but rather buy products tailored to their needs.

For instance, as explained by several interviewed Amazon sellers, Jungle Scout and other providers, such as Helium10, AMZScout and Unicorn Smasher, supply them with comprehensive market insights and competitor overviews. Obviously, these data brokers provide estimations based on what data they could gather rather than exact information. Nevertheless, the estimations are said to be 'spookily accurate'[102]. Similarly, data providers for app developers, such as AppAnnie and SensorTower, offer comprehensive app market data, including performance of specific apps and markets. Interviewed app developers mentioned that they use the sources together with the app store data extensively. In the accommodation/ hospitality sector, companies such as AirDNA provide insights based on data that the OTAs do not share. For example, in late 2015 Airbnb stopped providing the overall real-time reservation data. AirDNA, in turn, uses an algorithm based on 16 indicators picked up in historical data to determine the reservation status for each listing. They argue that their algorithm has an error margin of only 5%.

The data companies' market is very dynamic and fast-paced. This paper identified a number of issues, illustrating the key challenges and limitations of data brokers. Firstly, the data companies remain highly dependent on data sharing policies of platforms. For example, Amazon until recently provided exact and broad match search volume and product relevance data via one of its APIs. It was feeding several third-party software providers such as Viral Launch and Helium10 until late 2018, when the platform removed these metrics from the API. Another platform, Allegro made significant investment to develop new data products (Allegro Statistics) that are now provided to its sellers; this is endangering the business model of third-party analytics providers.

Secondly, the data needs of platform business users are often very specific and concern platforms that they use. Such data cannot be easily scraped or estimated by the third-party data providers[103]. It includes information on real-time of activities on the platform (e.g. X currently has product Y added to the shopping cart), which would allow to effectively address the customer; transaction-related data about the customers, sales activities and listings of specific business user.

Thirdly, the huge amounts of data that data brokers collect, store, possibly re-personalise and disseminate and are of interest from the regulatory perspective, first and foremost due to privacy concerns. Most individuals or companies are unaware of what information

[102] Gerber, S. (2018). Want to sell on Amazon? 15 strategies for success. The Next Web (TNV). Retrieved from https://thenextweb.com/contributors/2018/01/19/want-sell-amazon-15-strategies-success/.

[103] Graef, I. (2016). EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility. Kluwer Law International BV.

data brokers collect on them or even that they collect information at all[104]. Due to this asymmetry, the data broker industry has been often characterised as opaque, non-transparent, arbitrary, biased, unfair and unaccountable[105]. Interviewees from the data brokers argued that they are taking actions to make sure they are compliant with data protection and privacy laws, such as the GDPR. However, other sources show that such compliance has not always been properly ensured. For example, a few months after the GDPR came into force, Privacy International filed a complaint against seven data brokers: Acxiom, Oracle, Criteo, Quantcast, Tapad, Equifax, and Experian[106]. The main argument was their failure to comply with data protection principles (such as acquiring consent, providing detailed and transparent information for the data subject access requests) and exploitation of data in unknown ways.

As a final point, the analysis pointed out that some business users are exploring innovative approaches that would allow them to joint forces and be less dependent on big platform companies. One example includes cooperative marketplaces, such as Fairmondo.de, which belongs to its business users and employees. Through a cooperative structure, the users can share the platform as a resource for mutual benefit and decide on the rules for data sharing and access.

1.5. ANALYTICAL PAPER #2: DIFFERENTIATED TREATMENT OF BUSINESS USERS BY ONLINE PLATFORMS

Differentiated treatment of business users is one way in which online platforms can distort competition. It refers to the application of dissimilar conditions to (or preferencing of) similar business users, goods or services. Differentiated treatment can affect competition in two ways. First, if a platform's differentiated treatment disadvantages certain business users, it influences competition between business users. Second, competition can also be influenced by so-called 'self-preferencing' on the part of vertically integrated platforms. Such businesses not only operate the platform but are also business users of the platform – for instance, they sell their own products via the marketplace. Vertical integration is desirable for online platforms because it enables them to develop new revenue streams and exploit opportunities that arise from analysing data generated by the platform. The inherent danger of vertical integration lies in the opportunity it provides the platform to abuse its favourable position. Since the platform directly controls the ecosystem in which it competes alongside independent business users, it could employ the rules to its own advantage.

[104] Christl, W. (2017). How companies use personal data against people. Working paper by Cracked Labs, Institute for Critical Digital Culture.

[105] Christl, W. (2017). How companies use personal data against people. Working paper by Cracked Labs, Institute for Critical Digital Culture.

[106] Privacy International. (2018). Why we've filed complaints against companies that most people have never heard of – and what needs to happen next. Retrieved from https://privacyinternational.org/advocacy/2434/why-weve-filed-complaints-against-companies-most-people-have-never-heard-and-what.

This analytical paper on differentiated treatment **demonstrates that differentiated treatment by online platforms – defined as applying dissimilar conditions to similar business users – can occur for different reasons. On the one hand, the technical or regulatory framework can make such platform behaviour necessary. On the other hand, online platforms can use differentiated treatment to increase their revenues.** This mainly includes platform behaviour that aims at increasing the benefits for the consumers, e.g. by offering individualised services or ensuring a high quality of the facilitated transactions. However, differentiated treatment can also aim at increasing revenue for the platform without benefits for the consumers. In such cases, differentiated treatment obstructs competition between the business users of online platforms and – in case of vertically integrated platforms – between business users and the platform itself.

According to the data collected for this paper, **vertically integrated platforms seem to possess a stronger incentive to apply such behaviour than non-integrated platforms.** However, based on the available evidence, differentiated treatment of business users is not widespread in the EU.

Reasons for the differentiated treatment of business users by online platform can generally be grouped in two categories:

- Regulatory or technical necessities: the legal framework within which the platform operates, or the specific technical requirements of different business users (such as specific hardware or software) may give rise to differentiated treatment. In such cases, differentiated treatment may not constitute intentionally discriminatory behaviour on the part of the platform, but may instead be a response to these specific circumstances.

- Increasing revenue: a platform may engage in differentiated treatment in an attempt to increase its revenue via a rise in market share or sales, or by expanding into other markets, improving its gatekeeping position, lowering its own costs, increasing the fees paid by business users, as well as offering loyalty rewards or 'mainstreaming', i.e. adjusting content to match the preferences of the majority of users. These motivations can explain many types of differentiating behaviour, including: blocking listings or accounts; manipulating rankings or prices; restricting access to data or installing technical barriers to business users; and differentiated terms and conditions or customer support.

<u>Differentiated treatment of app developers</u>

Applications for mobile devices ('apps') are developed for a specific operating system and must be distributed to the users of mobile devices. The distribution of apps is to a large extent carried out via 'app stores'. App stores and operating systems can both be characterised as digital platforms. Apple produces both the hardware and software for its devices, and hence has a great influence on the distribution of apps for its devices. In fact, the Apple App Store is the only (and hence dominant) app store for iOS. Every app

that a consumer wishes to install must first be certified by Apple. Android, in contrast, has been developed through the cooperation of large manufacturers of mobile devices, among others. Accordingly, there exist multiple app stores for Android, e.g. independent app stores and app stores implemented by device manufacturers. Google Play Store, however, remains the dominant app store. The development of dominant platforms within the app store market is due to the reinforcing of positive indirect network effects. The more consumers use an app store, the more attractive it becomes for developers to distribute their apps through this store, and vice versa. High market shares, and the fact that the platforms offer their own apps, can make differentiated treatment a serious problem for individual app developers, as well as distorting competition and harming innovation.

Since Apple and Google offer their own apps in their app stores, both platforms are vertically integrated. Self-preferencing, as well as other forms of differentiated treatment, are therefore possible.

To gain qualitative insights into differentiated treatment for the analytical paper, 23 interviews were conducted. App developers and publishers accounted for 15 of these interviews[107]; their respective associations accounted for six. The remaining two interviews were conducted with Google and Apple, as the largest providers of app stores. Small app developers in particular acknowledged the opportunities platforms offered them to distributing their apps to consumers. However, 16 interviewees mentioned problems with differentiated treatment by platforms. Among these 16 interviewees, 13 were app store businesses users.[108] Furthermore, 12 interviewees claimed the platform favoured its own products or services. Ten of the interviewees that reported cases of platform self-preferencing were business users and two represented developer's associations.[109] Generally, app developers in the interviews feared being blocked by the platform and, hence, losing customers. They also feared that the platform could enter and dominate their market. Other forms of differentiated treatment mentioned by interviewees included impeding business users that offer substitutes to the platform's own products or services; denying access to data; or the mandatory use of platform services. Technical barriers, better customer support for large business users, and terms and conditions that favour the platform were also reported as issues. The interviewees generally claimed that larger businesses enjoyed greater opportunities to reach out to the platform in order to have their problems solved.

[107] Five of these 15 business users represented businesses with less than 10 employees. Two interviewees represented a business with between 10 and 49 employees and three from a business with between 50 and 249 employees. Large businesses with more than 249 employees accounted for five interviews.

[108] The two interviewed business users that did not experience differentiated treatment spoke for a company with less than 10 employees and one with between 50 and 249 employees, respectively.

[109] Among the business users that experienced self-preferencing were five businesses with more than 249 employees, two with between 50 and 249 employees, two with between 10 and 49 employees and one with between 1 and 9 employees.

Differentiated treatment of e-commerce business users

Generally, two types of business models used by online marketplaces can be distinguished. Platforms can be either vertically integrated or non-vertically integrated. The former includes a retail arm in addition to the platform. In contrast, non-vertically integrated online marketplaces are pure platform businesses. While market shares are difficult to determine, vertically integrated Amazon is the most important online marketplace in several European countries, as well as the United States.

In the online survey, nearly two-thirds of e-commerce respondents stated that they were completely or very dependent on online platforms. However, a clear majority of all respondents 68% strongly agreed or agreed that the online platform which was most important for their business treated its business users in a fair and unbiased manner. This is in line with the results for the entire sample (see above). The statement "*My business can easily access the data collected by the platform that is important for my business*", which focusses on data access as a specific type of differentiated treatment, yields a similar result. This result does not point to a widespread occurrence of differentiated treatment. Furthermore, around two-thirds of respondents strongly agreed or agreed that many other business users on the platform offered products similar to their own. Hence, competition among business users appears high.

Of those respondents who indicated that they had experienced differentiated treatment by a platform, the placement of advertising was the type most frequently cited (specified by around 62% of this group). The second most common type was the ranking of listings. The pricing of the platform's services came in third. The interviews conducted with e-commerce business users confirmed the relevance of differentiated treatment in the form of manipulated ranking results, as well as a lack of access to data.

Vertical integration of e-commerce platforms can have an influence on differentiated treatment. Nearly 53% of e-commerce respondents in our sample whose main platform offered the same or similar products reported self-preferencing by the platform. While there are limitations to this result given the survey sample, it provides a strong indication of it in markets with vertically integrated online marketplaces. The e-commerce business users interviewed did not provide unified views on differentiated treatment of vertically integrated platforms, however. While some said they had observed self-preferencing, others stated that they had not.

According to the survey, conflicts sometimes occur between e-commerce platforms and their business users: 57% of the surveyed e-commerce business users had experienced a disagreement with the platform they most frequently used at least once. These conflicts range from disputes over technical problems or a lack of transparency in the platform's data policy, to sudden price changes or discrimination through pricing. Many of the business users affected, namely 47%, had complained to the online platform in order to resolve the problem. Overall, the survey showed that 87% respondents had the conflicts, experienced with e-commerce marketplaces, completely resolved. Challenges mentioned

by the interviewees regarding the redress process generally centred on the standardised way in which platforms dealt with complaints or requests. Several interviewees mentioned that their complaints or requests were answered by automated systems instead of humans, the replies often not capturing the essence of the complaint or request completely.

1.6. ANALYTICAL PAPER #3: TRANSPARENCY IN THE BUSINESS-TO BUSINESS COMMERCIAL RELATIONS IN THE ONLINE ADVERTISING MARKET

The paper focused on the perceived lack of transparency and accountability in business-to-business (B2B) commercial relations in online advertising. Transparency issues have been observed especially for ad exchanges and ad placements in programmatic advertising, as well as concerns about the gatekeeping role of large online platforms towards business users in the market.

The analytical paper analysed the level and means of transparency in the online advertising value chain, through collection of evidence and facts about various business models, advertising practices and stakeholders.

It identified **three inter-related challenges** affecting business to business (B2B) commercial relations in online advertising:

- **Significant imbalances of market power in the ad ecosystem**, resulting from the dominance of a few platforms that occupy strategic positions across the ad value chain and have the ability to act as gatekeepers with business users.
- **The transparency issues in B2B relations**, some of which are linked to the market power of platforms while others result from the complexity of programmatic advertising.
- The issues of **ad fraud**, exacerbated by the ad ecosystem opacity.

The paper argued that the distribution of digital ad revenue shows that **the online market is increasingly dominated by a few large online platforms (Google, Facebook) that occupy strategic positions across the ad value chain and can take advantage of their vertical integration.**

It further points out that Google, Facebook, and to a lesser extent Amazon benefit from a vast ad inventory on their own websites and operated services, which they can monetise to generate most of their ad revenues. They have extensive proprietary user data from their consumer facing services, which they can use to improve targeting but to which they restrict access. Platforms such as Google and Facebook can also benefit from network effects and economies of scale from their vertical integration in the ad supply chain. As argued by the paper, **due to these advantages, platforms have the ability to engage in potentially anti-competitive practices such as self-preferencing, leveraging of their market power to other markets, and they can act as gatekeepers with the ability to charge higher fees and set their own terms for access to businesses.**

Secondly, the contractor analysed **the transparency of the online advertising environment**. The paper concluded that this environment **is characterised by opacity, partly linked to the practices of a few platforms, and to the complexity of programmatic advertising.** On the one hand within walled gardens, **online platforms can use their economic power to impose their terms and limit the disclosure of information on the costs, profits and effectiveness of placement of ads**. This undermines the decision making of advertisers and publishers regarding spending and their ability to refine targeting. Privacy legislation has been considered as an additional driver to reduce data disclosure to advertisers and publishers. The authors also argue that the removal of third-party cookies will also affect advertisers' ability to do audience targeting and may incentivise them to shift more to walled gardens where first-party cookies are still available, further decreasing publishers' revenues. On the other hand on the open web, the sharing of information depends on the positions and strategies of players along the supply chain, which results in fragmented information but also in user data leakage in RTB.

In addition, there is a **lack of transparency over the functioning and matching process of auctions**, due to the use of algorithms and potential influence of vertically integrated platforms. Stakeholders also reported an **opacity on the fees charged across the supply chain** due to the number of intermediaries. The lack of transparency on money flows leads advertisers and publishers to question the efficiency of the online ad supply chain. The opacity of the ad tech value chain, including the reliance on algorithms and the vast array of service firms, also makes open programmatic advertising rife with fraud, at the expense of advertisers.

Proposed solutions

The contractor also suggests possible solutions to address these different issues at policy, industry and individual level. Potential regulatory responses to address transparency issues include focused monitoring and enforcement of existing legislation by specific regulatory units, international cooperation, the development of codes of conduct with the main online platforms and regulatory reform based on evidence-based recommendations from the different inquiries and market studies commissioned by regulatory authorities, that can include requirements for information disclosure and interoperability and structural remedies.

In addition, several industry initiatives offer solutions for more trustworthy, transparent and verifiable ad trading. These include standards and practices for ad quality and measurement, charters or guides, innovative solutions to increase transparency on fees and bidding data, and programmes on user privacy and consent. They note though that effectiveness of self-regulatory initiatives depends on their adoption and implementation across the industry.

Finally, the paper points to the academic literature that provides a range of methods and models to help advertisers and publishers mitigate programmatic advertising opacity by enabling them to take more informed decisions and optimise their strategy and revenue.

Overall conclusion is that no single regulatory, industry or individual measure in isolation may sufficiently address the various issues identified but that better implementation of the existing initiatives and a combination of the proposed measures could be more effective in tackling these issues.

1.7. ANALYTICAL PAPER #4: ONLINE PLATFORMS WITH SIGNIFICANT/STRATEGIC MARKET STATUS

This analytical paper examined the evidence in relation to better understanding the various issues, and strengths and weaknesses of emerging approaches to identify online platforms with significant/strategic market status.

The potential for these platforms to act as barriers to a competitive market, has resulted in an increasing need for new policy approaches to assess whether online platforms have significant or strategic market status. A key part of this discussion has focussed on whether traditional approaches, based around assessing market shares, are adequate. Increasingly, it has been thought that current policy approaches should be extended or adapted to consider the dynamic, varied, and constantly changing nature of the online platform economy ecosystem.

The findings from the research run by the contractor suggests that emerging approaches to assessing online platforms with significant/strategic market status could be generally categorised as follows:

- Emerging approaches which draw on the traditional market share-based tests for application to online platforms; and

- Emerging approaches which appear to be devised specifically for online platforms.

Emerging approaches based on the traditional market share-based tests include: revenue share; user share; barriers to entry; mark-up index; and network effects.

Emerging approaches devised specifically for online platforms include: gatekeeper power; leveraging power; information/data exploitation power; prevalence of positive feedback loops; prevalence of indirect network effects; and the extent to which single- and multi-homing exists in the market.

The paper argues that the key challenges to the use of emerging approaches based on the traditional market share-based tests include factors such as: the fact that user share can be identified in several ways; barriers to entry may be hard to measure; and a zero-price market poses challenges for assessing market power of online platforms.

Amongst the emerging approaches devised specifically for online platforms, **the contractor examined two approaches in further detail: gatekeeper power and leveraging power.** Available evidence suggests that gatekeeper power - the level of power a platform can exert on its users through acting as a ‘gatekeeper’ – is a dynamic

phenomenon. **The main challenge with identifying gatekeeper power is likely to be in effectively establishing where the 'gates' are in relation to online platforms.** Additionally, **it may not be possible to assess gatekeeper power without considering it with other emerging approaches.** The evidence also highlights **leveraging power** – the ability of platforms to establish an advantageous position in a separate or ancillary market – **as potentially important**. However, experts suggest that leveraging is a common business practice and as a result leveraging power may not be a decisive indicator of market power on its own.

The main strengths of emerging approaches identified in the literature and suggested by the experts are that they seem to offer a more flexible instrument to market analysis and provide more dynamic indicators of market power suitable to the online platform ecosystem. The main challenges related to emerging approaches include a lack of reliable datasets to use some of the approaches and that due to their insufficient use in practice, the viability of these approaches is not yet clear. A comparison of traditional and emerging approaches suggests that traditional approaches appear to be more reliant on static indicators and stringent market definitions with a focus on single-sided market transactions. In contrast, **emerging approaches may be more effective at recognising transactions on all sides of the market and thus better suited to the online platform ecosystem**.

At present, the emerging approaches appear to be focussed on economic, regulatory, and competition aspects of the online platform economy. Experts suggest that **the emerging approaches also need to consider broader social and political impacts of the online platform ecosystem when identifying whether an online platform has strategic/significant market status.** When the systemic interdependencies within the online platforms are considered, a single emerging approach is unlikely to be effective in practice. Using the emerging approaches in conjunction with each other is likely to be more effective due to the complex, multi-sided interactions of the online platforms.

According to the paper, in order to identify whether an online platform has significant/strategic market status, policy makers would need to consider how the emerging approaches can be integrated into existing policy frameworks to adopt an open and flexible approach.

1.8. ANALYTICAL PAPER #5: BUSINESS USER AND THIRD-PARTY ACCESS TO ONLINE PLATFORM DATA

This analytical paper investigated the state of the art of data sharing by digital platforms with third parties. The analysis covered three sectors of the platform economy: e-commerce, online tourism services and app stores. It was based on a detailed research of secondary sources, 61 interview and 15 platform-specific case studies that included Amazon, AliExpress, eBay, Google Play, Apple App Store, Booking.com and others. Specifically, the paper strived to answer the following questions:

- What data, collected and held by platforms, is important for their business users and other businesses active in their respective sectors?

The analysis concludes that all data types collected by platforms are or could be important for business users for re-use. This includes data about transactions concerning own products and services, own clients/customers, and own business performance. Next, information concerning the broader market trends is also of key importance. It includes listings of other businesses, their customers, performance of different businesses in a specific market. Further, customer characteristics and customer profiles are of interest to all businesses, for example, behavioural data, such as browsing habits, search terms, purchasing decisions. The businesses using OTAs and e-commerce platforms underlined the importance of getting access to customer identification details e.g. for direct marketing. Finally, many companies, especially the smaller ones, expressed their preference for data analytics and insights as they do not have sufficient infrastructure and skills to take advantage of raw data.

Some businesses also use platform data as an input to develop or improve data-based products or services (upstream process). In particular, the datasets of online platforms are of interest to two types of companies: app developers and data brokers or marketplace/app store optimisation companies. All types of data are pertinent to them, however they have a preference for granular and raw data that could be combined with other data sources and could be used to train algorithms, develop insights and provide value to their customers. More specifically, datasets and real-time data feeding into software and mobile applications can cover various areas and technologies, such as images for image recognition, audio files for speech recognition, weather or traffic data, health data, geolocation data and so on.

- What kinds of data do platforms provide and what data they refuse to share?

Analysis carried out for this study shows that platforms provide data to their business users, which is sufficient to process transactions and manage their business. The businesses receive detailed data about their own listings, prices, sales, transactions and business performance. Platforms also provide some data about direct customers. Further, most major platforms share some data about the broader market, including overall market trends, best-selling products, customer profiles, although the type and granularity of such information differs from platform to platform. Overall, the major platforms compete for their business users and thus various metrics and dashboards are part of their value proposition. These metrics and dashboards are designed to help the business users to know their customers, monitor their own business performance, and understand the broader market trends.

However, some data usually is not provided by the platforms, despite demand from their business users. Firstly, this concerns customer nominal data and contact details (especially pertinent in e-commerce and for OTAs). Secondly, the granularity of data concerning the customer profiles is also often considered insufficient by businesses.

Businesses also demand more data about competing products and businesses on the platform. They also expressed a need for data about customer behaviour, such as search keywords, search volumes, buying patterns, responses to pricing signals. The platforms usually provide such data in a highly aggregated form and draw on it to develop analytics and insights that are offered or sold to business users. Nevertheless, many business users argue that such information is not sufficiently granular. Businesses that operate on the vertically integrated platforms (among online marketplaces, first and foremost, Amazon) also assume that the platform uses data from its marketplace to gain an unfair advantage over its own business users.

The analysis also revealed **power imbalances among platforms that are reflected in data sharing arrangements. Google and Facebook have the central position in online marketing and advertising, to the extent that they are unavoidable trading partners, including other platforms from the analysed sectors**. This puts them in a position to determine the terms and conditions of data access and data reuse. Whereas Google and Facebook receive data from platforms concerning their listings, customers and business users, they do not share detailed data gained through the advertising activities. Further, some platforms also signalled that data sharing arrangements put them at risk of being pushed out of the market by Google and Facebook that are developing their own business verticals in travel and e-commerce.

Finally, data brokers and online optimisation tool providers play an important role in data markets by offering data which is not accessible directly from the platforms. They usually pool platform data from multiple sources, including publicly available data, crowdsourced business user account data, data provided by platforms through APIs and data scraped from platform websites. The platforms that were analysed in this study argue that they do not have direct contractual relationship with the data brokers/online optimisation tool providers and thus are not responsible for quality or accuracy of the data. Nevertheless, the platforms see value in this market because it is useful for their business users; however, they may take action if, for example, they see that traffic from online optimisation tools providers start interfering with platforms' services. Platform-specific case studies also revealed several examples when decisions by online platforms (e.g. changing APIs, development of their own analytical services) undermined the business model of specific data brokers/ online optimisation tools providers.

Generally, all platforms claim that the only intended recipients for their data for re-use are their direct business users. Web-scraping is the main way to get access to platform data for all the other organisations interested in it. This is enabled by the fact that to generate transactions platforms must make a lot of information available for the customers on their websites.

- What are the incentives and constraints for platforms to share data?

The analysis shows that when taking decisions to share or not to share data, online platforms must reconcile several competing and potentially conflicting imperatives. On the one hand, the success of the business users is important because it generates revenues

for the platform. In this sense, online platforms have a strong incentive to provide access to data that could help businesses to understand their customers and to improve their product. On the other hand, online platforms must maintain trust of their clients (business users and customers of the business users), which means that they should avoid sharing data that these clients are unwilling to share, for example, personal information, sensitive business information.

Online platforms have also designed their terms and conditions to comply with the applicable regulatory frameworks, including P2B regulation, personal data protection, competition law, regulation forbidding trade in illegal and counterfeit products, and others. Generally, interviews with platforms revealed that they feel that they operate in an environment of legal uncertainty, which makes them reluctant to open more data. For example, they face different data protection regimes globally, as well as diverging interpretations of GDPR in EU member states. Further, whereas data sharing is usually considered as a measure to ameliorate power imbalances in the online platform economy, sharing seller-specific revenue information among sellers can be interpreted as providing a competitive advice under the national anti-trust law.

Several groups of players operate within the data ecosystem surrounding each online platform. These include other platforms, large and small businesses, customers of the business users, data brokers or companies providing online optimisation tools, regulatory and other public authorities. Sometimes these groups have diverging interests and competing demands concerning data access. As mentioned earlier, the platforms see personal data protection as part of their value proposition, however this claim is not always accepted by some businesses who argue that platforms use data protection as an excuse for not sharing important data. If platforms decide to open more raw data to business users, this could benefit large businesses at the expense of the smaller ones, because the big companies have the necessary infrastructure and know-how to take advantage of such information.

If a specific dataset is at the core of a platform's business model, it is unlikely to be shared. Due to this reason platforms will be reluctant to share datasets that could be used to undermine their role as leading intermediaries in two-sided markets. Vertically integrated platforms are not likely to share detailed market-level data, which could help the emergence of new competitors in their market. Yet these platforms also make internal decisions on what information from their marketplace/app store can or cannot be shared with the retail/app development division. Such decisions are of crucial importance to many businesses that compete with goods and services sold by the platform itself. Next, when taking decisions on data sharing, platforms consider the global competition. For example, several platform interviewees pointed out that they detect abusive bots originating from China, crawling their pages or trying to use their APIs. Platforms see Chinese marketplaces as serious competitors that are not competing on a level playing field as they are in the position to disregard many regulations that European companies must comply with.

Finally, the lack of technical interoperability between different platforms is also a constraint impeding data sharing and data portability. Introducing interoperability is costly, because it requires the development of common standards and revision of back-end code. From the perspective of platforms, investing into interoperability does not necessarily provide a clear commercial gain. Interoperability also has its downsides because it may make the system slower and limit the development of new or innovative products.

- What are the possible solutions to address platform refusals to share data important to other users?

The paper concludes that there is a clear public interest to encourage more data sharing, to the extent it could promote competition, offer more choices to businesses and their customers, foster innovation and help alleviate the market power of big online platforms. At the same time, the principles of personal data protection, business secrets' and intellectual property protection should also be taken into consideration.

Various solutions have been put forward by various stakeholders that could potentially facilitate data sharing. They include both public-sector led initiatives, as well as market-based ones, focusing specifically on the incentives and constraints for data sharing stemming from the analysis. Public sector led solutions include **mandated access; mandated interoperability and data portability; prohibition of certain business practices (for example, mandatory 'walls' prohibiting vertically integrated platforms from sharing data between their marketplaces and product development / retail departments); and reversal of the burden of proof (i.e. platforms may be required to demonstrate that their data practices are beneficial for their users)**. Market-based or self-regulatory solutions considered include offering access to data based on FRAND (Fair, Reasonable, And Non-Discriminatory terms) principles; data pools or data trusts; as well as company-led incentives for interoperability and data portability.

Annex 5.3: International consensus on the need to act

1. SUMMARY

At the international level, a number of countries have already started to discuss how to best address certain harmful behavior by gatekeepers. The problems they point to and conclusions they draw are to a big extent similar to the ones that are to be addressed in this initiative.

In the UK, the Furman Report reflects on the need to regulate platform companies "*in position to exercise market power or a gateway or bottleneck in the digital market, where they control others' market access*" (defined as companies with 'strategic market status'). [110] It points to persistent dominance of these platforms, exerting significant market power over their users and not being required to deliver the same level of positive outcomes as they would if facing normal competitive market conditions. In terms of solutions it suggests the use of ex-ante tools that should help to prevent negative outcomes before they occur. They should be based on three key pro-competition functions that can deliver benefits beyond core competition: (i) binding Digital Platforms Code of Conduct promoting fair, pro-competitive conduct by platform companies with strategic market status; (ii) personal data mobility and (iii) data openness. The monitoring and enforcement of the rules would be assigned to the new regulator - pro-competition digital markets unit. Its new powers should allow it to impose remedies and to monitor, investigate and penalise non-compliance. This call is further reinforced in the Competition and Markets Authority report [111] calling on the UK Government to establish a new pro-competition regulatory regime with strong and clear ex ante rules for those firms deemed to have 'Strategic Market Status' (SMS), overseen by a Digital Markets Unit.

In a similar vain, in the US, Stigler Centre Report points to insufficient entry (and therefore insufficient competition) in digital platforms caused by companies with 'bottleneck power' - meaning companies that have incentive and ability to develop and preserve a single-homing environment. It suggests setting up a new digital regulator -that the Digital Authority that would have the sole authority to define bottleneck power and update the definition regularly. The Digital Authority would enforce **two sets of rules**: (i) broadly applicable to all platforms, such as data portability, open standards to promote competition, interoperability and (ii) **rules applicable only to companies with bottleneck power,** such as non-discrimination and foreclosure or bundling.

[110] Furman report, *Unlocking digital competition, Report of the Digital Competition Expert Panel*, March 2019.
[111] CMA report on *Online platforms and digital advertising*.

In Australia, its competition authority (the ACCC) in its Digital Platforms Inquiry Report[112] set out its views on the market power of the two leading digital platforms – Google and Facebook- considering that both platforms have substantial market power thanks to their advertising businesses, that are extended well beyond their core owned and operated platforms. In terms of solutions, the ACCC considers that opening up the data, or the routes to data, held by the major digital platforms may reduce the barriers to competition in existing markets and assist competitive innovation in future markets. Increasing portability of data held by digital platforms may deliver significant benefits to current and potential future markets, including through innovation and the development of new service. The ACCC recommends to put in place frameworks that enable adverse consequences to be addressed and that reduce the likelihood of new issues arising. The report also proposes the creation of a branch within the ACCC to focus on digital platforms.

In China, its market regulator, published on November 2020 draft rules aimed at preventing monopolistic behavior by internet platforms, so as to increase scrutiny on the country's e-commerce marketplaces and payment services.[113] The draft rules would look to prevent e-commerce practices such as 'choose one between two', under which a marketplace restricts brands from selling on multiple platforms. The draft rules would also cover differentiate treatment based on big data, payment ability, consumption preferences, and usage habits.

As demonstrated above, a number of non-EU countries point to the same problems taking place in the digital markets and come up with similar solutions as the ones advocated by this initiative. The ex-ante rules targeting platforms with *market /bottleneck power* and ensuring fair and contestable digital markets, are perceived as the way to address these problems. Most of them also envisage setting up a specialised regulator responsible for monitoring and enforcement of the new rules in the digital markets. However, even if this initiatives in third countries will be further pursued and will lead to some form of (national) regulation of gatekeeper platforms in these countries, these regulations will most likely be tailored to the most salient needs and problems in the respective jurisdictions passing the regulation, and can therefore not be expected to effectively address the gatekeeper related problems as they manifest themselves in the EEA.

[112] ACCC report, *Digital Platforms Inquiry, Final Report*, June 2019.
[113] http://www.samr.gov.cn/hd/zjdc/202011/t20201109_323234.html.

2. THE FURMAN REPORT (UK)

The Furman report[114] reflects on the need to **regulate platform companies with 'strategic market status'**, defined as those "*in position to exercise market power or a gateway or bottleneck in the digital market, where they control others' market access*".

Problems:

The report points out to **the following problems** that should be addressed by new ex ante rules:

- A handful of powerful platform companies dominate a number of digital markets and this **dominance is persistent**. The position of the largest firms is getting stronger, and this strength and their positions are not imminently under threat. This means that they can exert significant market power over their users and are not required to deliver the same level of positive outcomes as they would if facing normal competitive market conditions.

- **Lack of contestability**: Due to the barriers to entry that exist in established digital platform markets they **cannot generally be considered freely contestable.** The significant amounts of data held by incumbent firms considered the single biggest barrier to entry in the digital economy.

- **Gatekeeper position fostering dependency**: The result is that one, or in some cases two firms in certain digital markets have a high degree of control and influence over the relationship between buyers and sellers, or over access by advertisers to potential buyers. As these markets are frequently important routes to market, or gateways for other firms, **such platforms are then able to act as a gatekeeper between businesses and their prospective customers.**

Impact on consumers

According to the report, in terms of impact on consumers, these market dynamics will lead to business users of platforms accepting worse terms than they would face if multiple platforms were competing with one another in each market. The consequences of these terms will ultimately feed through to consumers in the prices they pay, the quality they receive, and the range of innovative new products and services they are able to choose from.

Impact on innovation

The Report pointed to the stifling effect of the above practices on invitation. In particular it noted that to killer acquisitions by big platform companies "*at best, absorb innovation*

[114] Furman report, *Unlocking digital competition, Report of the Digital Competition Expert Panel*, March 2019.

to protect themselves from potential competition and, at worst, use acquisitions to kill off or distort innovation, creating a 'killzone' around their positions."

Who should be in scope

Platform companies with 'strategic market status', defined as those in position to exercise market power or a gateway or bottleneck in the digital market, where they control others' market access.

Designation of platform companies with 'strategic market status
According to the report, it would be up to the regulator (the Digital Markets Unit) to determine which markets have companies able to hold a strategic market status, where a high and enduring market share or other factors lead to market power. To do so the regulator **needs to develop a clear test for the characteristics of a company's market position above which regulatory powers are appropriate.**
Every 3 to 5 years the regulator would conduct a statutory review of both markets and the companies with strategic market status.
Aspects of market power particularly relevant to platforms and their potential to act as a bottleneck should also be considered for incorporation: **economic dependence, relative market power and access to markets.**

Solutions/Remedies

The report argues that the use of ex-ante monitoring and enforcement of a detailed set of pro-competition rules should help to prevent negative outcomes before they occur. P**ro-competition policy tools** will tackle the factors that lead to winner-takes-most outcomes and to that position becoming entrenched. Pro-competitive rules and frameworks should be based on **three key pro-competition functions** that can deliver benefits beyond core competition:

1. **a binding pro-competitive code of conduct** promoting fair, pro-competitive conduct by platform companies with strategic market status

Digital Platform Code of Conduct should be based around **a set of core principles** that would be required for of digital platforms deemed to have strategic market status. For the business side of platforms with a strategic market status, the principles should ensure that business users are:

• provided with access to designated platforms on a fair, consistent and transparent basis

• provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis

• not unfairly restricted from, or penalised for, utilising alternative platforms or routes to market

2. **personal data mobility** (giving consumers greater control of their personal data, e.g. their profile, purchase history or content) and **systems with open standards** and

3. **data openness**

These pro-competition tools **will be implemented by a digital markets unit,** with powers to regulate and enforce these functions.

Implementation and Enforcement

The pro-competition digital markets unit is to be responsible for monitoring and enforcing of the pro-competitive rules and frameworks. Its new powers should allow it to impose remedies and to monitor, investigate and penalise non-compliance.

To avoid burdens on smaller companies, **its enforcement powers should be focused on companies with 'strategic market status'**.

The unit's approach should combine participation and consultation (with a wide range of stakeholders) with the scope for regulatory enforcement, necessary to overcome incentives against compliance and make its solutions operate effectively and quickly. **It should only intervene where doing so is effective and proportionate to achieve competitive aims.**

The Code should be set up to achieve fast resolutions (in multiples of weeks or months). This approach would be supported by strong powers to formally request information from designated platforms within tight deadlines set by law when it suspects a breach of codes. It would also need power to enforce legally binding decisions and penalties for contraventions of the code where a participative approach is not effective.

The Digital Markets Unit should also have the powers to implement (ii) personal data mobility and systems with open standards as well as pursue data openness as a tool to increase competition.

3. CMA STUDY (UK)

The Competition and Markets Authority (CMA) Report[115] on online platforms and digital advertising focused in particular on whether rival providers of search and social media services can no longer compete effectively with Google and Facebook because of their size, and a range of concerns in the digital advertising market, including in particular a lack of transparency and conflict of interest (self-preferencing).

Problems:

[115] CMA report on *Online platforms and digital advertising.*

The report pointed to the following problems:

- **Conflict of interest**

The report points out that the extent of **vertical integration** by Google and Facebook that has taken place in the open display market raises numerous concerns as it may give result in the conflicts of interest and allow companies with market power at one stage of the value chain to use it to undermine competition at other stages. There are concerns whether Google can use its market power in inventory and data to advantage its DSP services and use its market power as an ad server to favour its SSP.

The extensive amount of data available to Google and Facebook provide these platforms with a competitive advantage and assist with entry into related markets. After entering the market, the role of Google or Facebook as a host or gateway then enables these platforms to advantage their own related businesses. **Google** and **Facebook** have the ability and incentive to favour a business with which they have an existing relationship (and through which additional revenue may be generated), such as websites that are members of their display or audience network or use their ad tech services. For example, when operating on behalf of the publisher, Google may have an incentive to favour bids coming through its own advertiser-side intermediaries, rather than those that are best for the publisher. When operating on the buy-side, it might have an incentive to channel advertiser's spend to its publisher clients, rather than to the publishers that are best for the advertiser. Given the substantial market power of each of Google and Facebook, their presence in a significant number of related markets and the opacity of their key algorithms, there is significant potential for self-preferencing by Google and Facebook to substantially lessen competition.

- **Lack of transparency and asymmetric information**

The findings of the report identify **a series of issues relating to lack of transparency** and the data advantages of the large platforms **which could limit competition in digital advertising**:

- ✓ the large platforms' processes for auctioning inventory are not transparent and there is limited ability to independently verify the effectiveness of advertising because of lack of access to data; and
- ✓ the data advantages of the large platforms in targeting advertising mean they can monetise their content much more effectively than other platforms/publishers, increasing their market power.

The lack of transparency exists mainly in the open display market where publishers and advertisers rely on intermediaries to manage the process of real-time bidding and ad serving. The CMA report points out that they cannot observe the actions of the intermediaries directly and do not see how the fees are charged along the supply chain. Hence, it undermines their ability to make optimal choices concerning buying and selling their inventory.

CMA believes that extensive data that is collected in the sector could address some of these concerns, but this data is held by a few parties, which leads to concerns on the **asymmetric information.** The report recalls the views of advertisers and publishers that Google and Facebook enjoy significant competitive advantages in both measuring effectiveness and targeting because of their extensive access to user data. Google offers in-depth targeting options, driven by its unique and vast sources of data while Facebook has the advantage of providing the ability to target specific audiences based on demographic characteristics, interests and location. However, the two platforms do not allow independent verification of their inventory.
Given the lack of transparency over fees and bids through the intermediation chain, there might be a legitimate concerns about any operator having positions on both the buy and sell side of the market, whether or not that operator is in fact acting in its clients' best interests.

Solutions:

In terms of potential interventions it supports ex- ante regulatory regime to regulate the activities of online platforms funded by digital advertising and recommends a number of solutions. It also reflects on the need to launch market investigation on the open display advertising market, with focus on the conflict of interest Google faces at several parts of its vertically integrated chain of intermediaries.

The final report recommends that the UK Government establishes a new pro-competition regulatory regime with strong and **clear ex ante rules for those firms deemed to have 'Strategic Market Status' (SMS)**, overseen by a Digital Markets Unit. CMA is now leading a Digital Markets Taskforce to consider the design and implementation of the procompetitive framework for digital markets.

The CMA's Digital Markets Taskforce is currently considering **the test which might be used to identify which firms may have SMS** and therefore would be subject to additional rules. A variety of factors could indicate that a firm has a strategic position including:

- evidence of the ability of the firm to leverage one market position into a variety of other markets

- the firm's size and scale; or

- its position as an access point to customers for businesses across a diverse range of markets.

It is when a firm has obtained such a position that the effects of its market power are likely to be particularly significant and existing tools are unlikely to be adequate in addressing this market power.

The new regime proposed in the market study would be comprised of two sets of tools:

- The first, an enforceable **code of conduct** to mitigate the effects of the market power of SMS firms by governing their behaviour.
- The second, a range of 'pro-competitive interventions' to tackle the sources of market power and promote competition.

The types of remedies that the market study outlines include data-related remedies, consumer choice and default remedies, and separation remedies.

4. THE STIGLER CENTER REPORT (US)

I. Problem definition

According to the report the general harm identified is **insufficient entry** (and therefore insufficient competition) in digital platforms.

Increased concentration levels, market power, network effects, and control over data and analytics have in many digital markets tipped the market in favour of the incumbents. Many digital markets feature **large barriers to entry**. Once the incumbent is established, entry into digital platform businesses is very difficult. The winner often has a large cost advantage from its scale of operations and a large benefit advantage from the scale of its data.

The role of data in digital sectors is particularly critical. The new entrant starved of data relative to a tech giant, is at a significant competitive disadvantage.

Problems arising in the digital markets:

- Harms to investment and innovation

By excluding competitors, dominant firms do not need to innovate as hard as they otherwise would be required to keep their customers. Likewise, when platforms do not face competition, they will be able to reduce quality, for example, by decreasing privacy protections, without losing customers or revenue.

- Harms to entry, including disintermediation

There is growing evidence that conglomerate digital platforms are in an advantaged position to stop or block entry by more focused rivals when compared to traditional businesses. A platform that has total control of demand can steer customers to content and complements it owns rather than to those provided by independent firms that might challenge its market power.

Platforms have bluntly moved to prevent disintermediation and have engaged in foreclosure to block potential rivals. For example, Facebook acted to suppress the growth video-capture-and-sharing app Vine when Vine attempted to link its users to their Facebook friends.

II. Who should be in scope

Companies with 'bottleneck power' - meaning companies that have incentive and ability to develop and preserve a single-homing environment.

The Digital Authority should have the sole authority to define bottleneck power and should update the definition regularly or on an 'as needed' basis.

Stigler report refers here to Furman report to explain the meaning of bottleneck power:

[O]ne, or in some cases two firms in certain digital markets have a high degree of control and influence over the relationship between buyers and sellers, or over access by advertisers to potential buyers. As these markets are frequently important routes to market, or gateways for other firms, such bottlenecks are then able to act as a gatekeeper between businesses and their prospective customers.

The finding of bottleneck power will employ consideration of the forces that tend to impede entry and lead to foreclosure. The Furman Report similarly explains that this single-homing foreclosure tends to happen when users experience high switching costs, such as loss of valued personal data or reputational indicators at the point of switching; contract terms that deter switching; technical barriers to switching, such as complex switching processes or a lack of interoperability between the old service and the new or second service; tying services, which can be by contract or technical; and the inertia of defaults.

III. Solutions/remedies

The reports proposes the following solutions:

- Improved antitrust enforcement:
    1) Reform of antitrust law to adequately deliver competition to consumers
    2) The establishment of a specialist competition court to hear all private and public antitrust cases
- Regulatory measures:
    3) A specialist regulator – **the Digital Authority** and
    4) **new broadly applicable rules** such as:
        a. data portability

b. open standards to promote competition (in particular in micro-payments and digital identities)

c. interoperability

5) new rules applicable to **companies with bottleneck power:**

a. **mergers** - DA could be given merger review authority over all transactions involving companies with bottleneck power

b. **non**-discrimination and foreclosure

as discrimination is an important tool in a foreclosure strategy by a digital bottleneck market power

Platform strategies to prevent multi-homing are an important category for DA to include in its analysis of foreclosure. The DA could **promulgate regulations prohibiting the foreclosure of a competing content provider on a platform that is vertically integrated**.

c. **bundling**

A digital platform with bottleneck power may have a contract with complementors (e.g., retailers on an ecommerce platform) that bundles together access to their transaction data along with logistics services. This could have harmful anticompetitive effects. The business may also compete against those sellers on its e-commerce site, using the retailer's data to learn about which products are selling well and expropriate the ideas and strategies of the seller.

The DA could establish **regulations that prohibit anticompetitive bundling by firms with bottleneck power.** Such a firm would be required to demonstrate that its bundle was on balance procompetitive if foreclosure was alleged. The DA could require unbundling and an offer to business customers of a choice of contracts in the case of anticompetitive bundling. The DA would need to enforce such contracts.

DA- Enforced Remedies for Antitrust violations:

When a company has been found liable for violating the antitrust laws, the regulator, in conjunction with the antitrust authority, could apply the following remedies in order to restore competition:

- data sharing,
- full protocol interoperability,
- non-discrimination requirements, and
- the unbundling of content from a platform.

5. THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC): DIGITAL PLATFORMS INQUIRY

The ACCC's Inquiry focussed on the three categories of digital platforms: online search engines, social media platforms and other digital content aggregation platforms. A large part of the Report focuses on Google and Facebook, reflecting their influence, size and significance as well as the fact that Google and Facebook are the two largest digital platforms in Australia. The Report focuses on the impact of the digital platforms on competition in the advertising and media markets and on advertisers, media content creators and consumers.

Chapter 2 of the Report sets out the ACCC's views on the market power of the two leading digital platforms, Google and Facebook, with a focus on the markets most relevant to the Inquiry.

Problem:

The report considers that both Google and Facebook have **substantial market power** thanks to their advertising businesses, that are extended **well beyond their core** owned and operated platforms.

Google[116] has **substantial market power** in the supply of general search services in Australia (95% of market) and in performing search advertising revenues in Australia (96%). It enjoys advantages of scope in accumulating data from consumers using its wide range of services (Google Search, Google Maps, YouTube, Gmail) and the Android OS, so it is able to track consumers on the more than two million websites that use Google advertising services. According to the report, **Google also benefits from its position as the default search engine on both the Chrome browser** (owned by Google), and the **Safari browser** (owned by Apple), which together account for more than 80 per cent of the Australian market for browsers. **The substantial amount paid by Google to Apple for default status on Safari (estimated at approximately US$12 billion in 2019) reflects the value of this default status**. Google Chrome is pre-installed on nearly all Android devices.

Due to the market dynamic – strategic acquisitions – Google has obtained further advantages of scope and reduced potential competition and his position on Australian market is very unlikely to change in the middle time. Report also recognises Google's importance to news media businesses, which is an unavoidable trading partner, and presumes significant loss of revenue if Google users could no longer click on links to

[116] The ACCC has not undertaken a detail assessment of non-dominant markets where Google offers services (markets for advertising technology services or programmatic display ads, but it recognises that EC has found Google to be dominant in both mobile operating system and app store markets.

their website in search result. The **ACCC therefore considers that Google has also significant bargaining power in its dealings with these media businesses**.

The report also concludes that Facebook has substantial market power in the supply of social media services and display advertising services. This is caused by a fact that Facebook has three time larger audience that Snapchat has (the closest competitor to Facebook) and similarly as in Google case creates a significant barrier to entry and expansion of its (possible) competitors. It benefits from the fact that its consumers are using another platforms owned by Facebook, mostly Instagram, Messenger and WhatsApp; other numerous strategic acquisitions are likely to even increase Facebook's advantage of scope and market power. Regarding **display advertising market, Facebook and Instagram's combined share of the market is estimated to be 51%** while the other suppliers don't hold more than 5%. Also similarly to Google, ACCC considers **Facebook to has substantial bargaining power over news media businesses;** Facebook's strength is in being a vital distribution channel for a number of media businesses targeting particular demographic groups.

Implications of substantial market power:

The Report concludes that a firm with substantial market power could damage the competitive process by preventing or deterring rivals, including potential rivals, from competing on their merits. That is, a firm with substantial market power could maintain or advance its position by restricting or undermining its rivals' ability to compete, rather than by offering a more attractive product.

ACCC also recognises that there is **a lack of transparency in the online advertising markets.** In particular, it is unclear how Google and Facebook rank and display advertisements and the extent to which each platform self preferences their own platforms or businesses in which they have interests.

Who should be in scope of the rules:

- online platform with **substantial market power** in the [observed] market;
- **market dynamic lowered** by acquisitions of potential competitors due to which
- **potential of new entry in the market is low**.

Rules/procedures to be applied:

- ACCC recommends the merger framework in Australia to be updated to make it clearer so that acquisition of potential competitors and economies of scope created via control of data sets are taken into consideration in assessing whether an acquisition has the effect or likely the effect of substantially lessening competition.

- Currently the notification of M&A to the ACCC is voluntary in Australia, **but ACCC considers it appropriate that the large digital companies would each agree to a protocol to notify the ACCC of proposed acquisitions that may impact competition in Australia**.

- As regards **addressing default bias,** ACCC considers that offering Australian consumers the choice that Google is forced to implement in Europe after the EC decision117 would have the effect of improving competition in the search services market and recommends that Google also implement these changes also in Australia.

- As regards the role of **data in market power**, the ACCC considers that opening up the data, or the routes to data, held by the major digital platforms may reduce the barriers to competition in existing markets and assist competitive innovation in future markets. This could be achieved by requiring leading digital platforms to share the data with potential rivals.

- One potential mechanism is the application of the Consumer Data Right, another is to require the platforms to provide interoperability with other services.

- Incentives for portability, privacy concerns and identification of the extent of data to be shared have to carefully considered.

- Particularly increasing portability of data held by digital platforms may deliver significant benefits to current and potential future markets, including through innovation and the development of new service. If data portability or interoperability would be identified to be beneficial in addressing the issues of market power and competitive entry or switching, the ACCC could recommend this to the Government.

- The creation of a branch within the ACCC to focus on digital platforms

- Proactive investigation, monitoring and enforcement of issues in markets in which digital platforms operate

- Inquiry into the supply of ad tech services and advertising agencies

6. CHINESE DRAFT COMPETITION RULES FOR ONLINE PLATFORMS

China's market regulator on published on 10 November 20220 draft rules aimed at preventing monopolistic behavior by internet platforms, so as to increase scrutiny on the

[117] European Commission, Google Android decision, 18 July 2018; European Commission, Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine, 18 July 2018, accessed 4 June 2019.

country's e-commerce marketplaces and payment services. The draft rules would look to prevent e-commerce practices such as ‘choose one between two’, under which a marketplace restricts brands from selling on multiple platforms. The draft rules would also consider whether a transaction treats different customers in different ways based on big data, payment ability, consumption preferences, and usage habits.

China's State Administration for Market Regulation (SAMR), which issued the draft, said[118] it wanted to prevent platforms from dominating the market or from adopting methods aimed at blocking fair competition. The definitions it provided for internet platforms mean the new rules could apply to e-commerce sites, such as Alibaba Group's Taobao and Tmall marketplaces or JD.com, as well as payment services like Ant Group's Alipay or Tencent Holding's WeChat Pay.

The draft comes after China's Financial Stability and Development Committee, a cabinet-level body headed by Vice Premier Liu He, flagged in October 2020 the need to improve mechanisms to ensure fair competition and called for the strengthening of anti-monopoly law enforcement.

[118] Reuters, 10 November 2020.

Annex 5.4: Overview of laws and proposed legislation in Member States related to the initiative

This annex summarises existing and forthcoming regulation by the Member States addressing economic power of digital platforms. It then compares those frameworks with the aim to evidence the already existing and the forthcoming fragmentation as specified under Article 114 TFEU.

1. NOTION OF FRAGMENTATION

Article 114 (1) TFEU forms the basis to act at EU level where the approximation of provisions in Member States have as their object the establishment and the functioning of the internal market. The internal market objective is met where the EU act aims at abolishing obstacles to the freedoms of the treaty and/or to remedy the disadvantages resulting from disparities and different conditions of competition.[119] This also covers the prevention of expected obstacles/prevent distortions to competition that may arise from expected action at MS level. Where reliance on Article 114 (1) TFEU is based on preventing forthcoming fragmentation it must be demonstrated that it is likely that the measures proposed at the level of MS will materialise.[120] The threshold for fragmentation to be relevant under Article 114 (2) TFEU regarding the first alternative under Article 114 (1) - i.e., on obstacles to freedoms of the treaty - is met by the sole fact that there are diverging rues in place or likely to be put in place. There is no minimum quantitative level to be demonstrated as to the importance of those differences. This is because the differences in law are indicative for demonstrating obstacles to the freedoms.[121] Regarding the second alternative under Article 114 (1) TFEU - i.e. on distortion of competition - the threshold to be met in order to justify intervention is that the distortion must be appreciable. The distortion is appreciable where the different national rules lead to different production costs or, where they affect the freedom of the treaties or systemic competition.[122] Where the conditions of Art. 114 are fulfilled and where other provision of the TFEU could also possibly cover the objectives of harmonisation, there is no need to take those other legal basis into consideration.[123]

[119] ECJ, Judgment of the Court of 13 May 1997, C-233/94, para 19; ECJ, Judgment of the Court of 5 October 2000, C-376/98, Federal Republic of Germany v European Parliament and Council of the European Union, paras 95, 96.

[120] ECJ, Judgment of the Court (Grand Chamber) of 10 February 2009, C301/06, Ireland v European Parliament and Council of the European Union, paras 62-72.

[121] ECJ, Judgment of 13 July 1995, C-350/92, paras 33-40.

[122] ECJ, Judgment of 5 October 2000, C-376/98, para 106-109;

[123] ECJ, Judgment of the Court of 9 October 2001, C-377/98, Kingdom of the Netherlands v European Parliament and Council of the European Union, para 28; ECJ, Judgment of the Court of 5 October 2000, C-376/98, Federal Republic of Germany v European Parliament and Council of the European

2. EXISTING FRAGMENTATION RESULTING FROM DIVERGENCES IN THE LAWS OF MEMBER STATES ADDRESSING ECONOMIC POWER OF DIGITAL PLATFORMS

Currently, MS already apply divergent frameworks to address the problems arising from the dependency of businesses on enterprises with relative market power and the resulting cases of unfairness. Those rules in most Member Stated of a horizontal nature, i.e., applicable also outside of digital platforms. For instance, in **Belgium,** the prohibition of abuse in dependency relationships was introduced by law of 4 April 2019 defining dependency by reference to absence of alternatives for the business and the possibility to impose conditions which could not be obtained under market conditions.[124] **Bulgaria** introduced regulation against abuse of economic dependence providing that undertakings with 'superior bargaining position' ('SBP'), are prohibited to act in a way which contradicts good faith business practices and harms or threatens the legitimate interests of the weaker contractual party and the consumers.[125] In **Cyprus,** the Competition Act addresses relationships of economic dependency by qualifying the imposition of unfair trading conditions, the application of discretionary treatment, or of sudden and inexcusable interruption of long-term trade relationships as unfair.[126] In **France**, currently the Commercial Code addresses unfairness in imbalanced B2B relationships.[127]

In **Germany,** currently the Competition Act rules out certain abuses of relative market power to impede smaller competitors in an unfair manner.[128] For instance, for enterprises with superior bargaining power in relation to an SME is prohibited to price below costs and placed under an internal non-discrimination obligation, i.e., it cannot offer services to

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Union, para 88; ECJ, Judgment of the Court of 10 December 2002, C-491/01, British American Tobacco, paras 62, 75.

[124] La loi du 4 avril 2019 modifiant le Code de droit économique en ce qui concerne les abus de dépendance économique, les clauses abusives et les pratiques du marché déloyales entre entreprise. Article I.6.4 Code de Droit Economique (CDE, Code of Economic Law) defines dependency ; Article IV.2/1 CDE describes the types of prohibited abuses. Following Royal Decree amending the Code of Economic Law regard g abuses of economic dependence published on 12 August 2020, this prohibition on abuse of economic dependence has entered into force on 22 August 2020.

[125] Article 37A Competition Act introduced by the amendment to the Protection of Competition Act of 9 July 2015.

[126] Competition Act 2008 and 2014 Part 2, Chapter 6, para 2: Competition Act II 6 (2).

[127] The key provision to regulate significant imbalance was introduced in 2008. It provides in Article 442-6 -2 Code de Commerce, that *any producer, trader, manufacturer or person recorded in the trade register who commits the following offences shall be held liable and obliged to make good the damage caused … 2° Subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties;* see also the description of the 'petit droit de la concurrence' on dealing with unfainess in dependency relationships and the cases dealt with by the DGCRF under Article 442-1 and Article 442-6 -2 Code de Commerce, in Rapport d'information par la Commission des Affaires Economiques sur les platformes numériques, présenté par MME Valeria Fauré-Muntian and M. Daniel Fasquelle, a l'Assembléé Nationale, 24 June 2020, Rapport No 3127, p. 42-44.

[128] Article 20 Competition Act.

itself at better conditions than to the SMEs, for example delivery.[129] Furthermore, Section 58a of the German Payment Services Supervisory Act[130] (introduces a right for payment service providers and e-money issuers to directly access technical infrastructure providing payment services, such as the near-field communication (NFC) interfaces. This provision has been described in doctrine as the 'Lex Apple Pay' and aims at regulating a gatekeeper position in the field of payment services.[131] In **Hungary** the Competition Act prohibits abuse of superior bargaining position, the abuse consisting in fixing purchase or sales prices unfairly in business relations, including where general contract terms and conditions are applied; stipulating unjustified advantages by any other means; or forcing the acceptance of detrimental terms and conditions on the other party. In addition, the rules prevent undertaking with superior bargaining position from influencing the other party's business decisions for the purpose of gaining unjustified advantages; creating a market environment that is unreasonably disadvantageous for the competitors; or influencing their business decisions for the purpose of gaining unjustified benefits.[132] In **Italy,** an asymmetric B2B law results from the extension of the protection under the unfair commercial practices law to cover also the protection of micro enterprises.[133]

Those dependency and relative market power rules are divergent as to the threshold for intervention. For instance, the superior market power is often defined by reference to superior bargaining power, but not in all cases. Furthermore, the dependency rules also diverge as to the protected enterprises; those are not in all cases SMEs but also in some cases microenterprises (Italy). Finally, those rules also differ as to the specific prohibited abuses.

As has already been set out in the Impact Assessment to the proposal for the P2B Regulation,[134] EU Competition law grants to a certain degree a basis for overcoming fragmentation, at least regarding the so called wide MFN clauses – i.e., the prohibition to

[129] Article 20 (3) of the Competition Act provides that "*Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market position to impede such competitors directly or indirectly in an unfair manner. An unfair impediment within the meaning of sentence 1 exists in particular if an undertaking 1 offers goods or commercial services not just occasionally below cost price, or 2. demands from small or medium-sized undertakings with which it competes on the downstream market in the distribution of goods or commercial services a price for the delivery of such goods and services which is higher than the price it itself offers on such market, unless there is, in each case, an objective justification*."

[130] PSSA Gesetz über die Beaufsichtigung von Zahlungsdiensten – ZAG, https://www.gesetze-im-internet.de/zag_2018/__58a.html.

[131] Franck/Linartardos, EPOS collaborative Research Center, discussion paper no 173, https://www.crctr224.de/en/research-output/discussion-papers/archive/2020/germanys-lex-apple-pay-payment-service-regulation-overtakes-competition-enforcement-jens-uwe-franck-dimitrios-linardatos.

[132] Hungarian Competition Acm Section 21 paragraphs b), c) and i).

[133] Decree Law no. 214 /2011 ('Salva Italia' Decree) of 22 December 2011 and Decree law no. 1/2012 ('Cresci Italia' Decree) 24 January 2012.

[134] Impact assessment - Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final –Part I/2, Chapter 1/2 2.1.1.6 Most-favoured nation (MFN) clauses.

sell at lower prices on other distribution channels. Those wide parity clauses were removed in a large part of Member States. However, the usage of so called narrow MFN clauses - i.e. the offering of better conditions via the sales channel of the hotel if compared to the conditions it offers on the platform - is still common and currently subject to monitoring by the competition authorities. However, in certain Member States also narrow MFN clauses were banned via legislative action. This is the case in France[135], Austria[136], Italy[137] and Belgium[138]. The laws of those MS prohibit all most favoured nation (MFN) clauses thereby allowing hotels to grant any discount or pricing advantages to their customers via other sales channels and via their own channel. In addition, France also prescribes that the room prices shall be specified in a 'mandate contract'. The national legislations in place bans narrow parity clauses beyond the level of harmonisation achieved under competition law. Consequently, costs of providing the service differ among Member States, either on the side of the platform or the side of the hotels.

In conclusion, the current rules in place already create a certain degree of distortion of competition between Member States insofar as the rules on tackling unfairness in dependency relationships diverge as to the preconditions to intervene and as to the depth of intervention. Regarding MFNs a dual type of fragmentation exists: on the one hand an obvious 'first level fragmentation' results from the fact that some MS have legislative bans in place and some MS do not. On the other hand there is also fragmentation observable due to differences in the MFN-legislations in place.

3. FORTHCOMING FRAGMENTATION LIKELY TO EMERGE DUE TO INITIATIVES AT MS'S LEVEL AIMING AT REDRESSING UNBALANCED SITUATIONS OF BUSINESSES IN RELATION TO DIGITAL GATEKEEPER

The divergences in regulation of economic power are likely to deepen due to the current initiatives at MS level to address specifically imbalanced relationships between digital

[135] Article L311-5-1 of the Tourisme Law (Code du Tourisme) as modified by the Law Macron provides that an hotel operator maintains his freedom to agree with the client any rebate of tariff advantage of any kind while any clause stipulating otherwise must be considered as unwritten and is void. The « LOI n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques » (so called 'Loi Macron')

[136] The ban of narrow MFN clauses was introduced by a modification to the Unfair Commercial Practices Law by adding those clauses to the blacklisted practes-Z32, modification to the UWG, östBGBl I 2016/99, for a complete picture of situation in Austria on MFN see Chapter 5.1 of the publication on MFN's in in Österreichische Zeitschrift für Kartellrecht 13, 127–140)

[137] In Italy, all parity clauses are banned by the Competition Act,, Legge annuale per il mercato e la concorrenza, adopted on 2 August 2017 prohibit any MFN clauses in agreements between OTAs and hotel operators (i.e. wide and narrow MFN clauses, and regardless of the size of the OTA).

[138] In Belgium, since August 2018 wide and narrow MFN clauses are banned by the law on freedom of hotels to set prices in their relationship with reservation platforms- Loi du 30 Juillet 2018 relative à la liberté tarifaire des exploitant d'hebergements touristiques dans les contrats conclus avec les operateurs des platformes de reservation en ligne, Moniteur Belge (M.B.) 10 Aout 2018.

platform and their business users. In a series of Member States legislative projects are under discussion and/or have been proposed within the legislative process.

In Germany, new rules, are likely to be imposed on **undertakings with paramount significance for competition across markets.** The proposed rules cover prohibitions/obligations in relation to discrimination, leverage, usage of data, portability, interoperability and information on quality and performance. The governmental draft bill for the 10th amendment to the Competition Act (GWB-Digitalisierungsgesetz) of 9 September 2020[139] contains profound changes to the Competition Act and introduce a set of rules specifically applicable to undertakings active to a significant extent on multi-sided markets or with networks. In order to extend the existing notion of abuse and to partly prevent competition problems on digital markets the ministerial draft bill contains two proposals: Firstly the proposed § 19a GWB introduces new forms of abuses for undertakings with paramount significance; and secondly the proposed § 20(3a) GWB makes it abusive for a company with superior market power to prevent the creation of network effects to the benefits of competitor.

Pursuant to §19a of the draft bill, the Competition Authority (Bundeskartellamt, BKartA, herein after: "NCA") would acquire the powers to issue a decision stating such status of a company. The criteria for paramount significance across markets are dominance in one or several markets, financial strength and access to other resources, vertical integration and activities in related markets, access to data relevant for competition, its importance for other companies in order to access sales and supply markets and its impact on their business activity. In the explanatory part to the governmental bill it is indicated "*that the determination of a paramount significance for competition across markets can only be made for a few companies and the rule will therefore have a narrowly limited circle of addressees*."[140]

As to the imposition of obligations, the draft bill §19a (2) GWB provides that the NCA can impose specific prohibitions on digital platforms found to have paramount significance unless the behaviour is shown to be objectively justified, while the burden of proof relies with the platform. The NCA may, for instance, impose (1) a non-discrimination obligation, (2) a prohibition of exclusionary conduct in adjacent competitive markets, (3) a prohibition to use data collected in the dominated or other markets for the purpose of creation of market entry barriers or other exclusionary conduct and the imposition of conditions allowing for such a use, (4) a prohibition to impede interoperability of portability, (5) a prohibition to insufficiently inform users about quality and success of their services or obstruct their the possibilities of assessment of

[139] Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (GWB-Digitalisierungsgesetz).

[140] Governmental draft bill for the 10th amendment to the Competition Act of 9 September 2020 Explanatory part, p. 84.

their performance by other means. Generally speaking, the new § 19a aims at preventing digital platforms to use their market position and the economic power in certain markets strategically to restrict competition in other markets. This is intended to address problems that may arise when certain companies establish anti-competitive structures, for example in new markets, without these companies necessarily being already dominant in all these markets.[141]

The second set of key provisions, § 20 (1) (2) (3a) GWB, are part of the framework abuses of relative market power to impede smaller competitors in an unfair manner under § 20 GWB. While currently only small and medium sized companies may benefit from the prohibitions in § 20, the draft proposes to remove the SME-condition, thereby extending the protection to all companies independent of their size. This is based on the findings that also large companies may now encounter situations of imbalanced bargaining power vis-à-vis gatekeeper platforms.[142] A further novelty would be that the source of superior relative market power could also result from intermediation power. Finally, where competitors of companies with relative or superior market power are prevented by the gatekeeper from achieving economies of scale themselves, these practices are to be pursued as unfair impediments. This new prohibition under § 20 (3a) aims to prevent tipping.[143]

In Germany, those proposed amendments of the Competition Act are likely to be adopted. It is currently discussed in Parliament and the Federal Council (Bundesrat).[144].

In **France**, a report has been submitted to the Parliament proposing to set the criteria to define platforms with structuring power ('platformes structurantes'), with a view of the establishment of a list covering those platforms and imposing on those platforms ex ante rules on transparency on algorithm for the purpose of audit, interoperability and portability, access to data with an essential facility feature, device neutrality for access to apps and a prohibition of self-preferencing.[13]

Although in **France,** a legislative proposal has not yet been tabled it seems likely that this will be the case in the near future. The political will to proceed in this direction is evidenced by the facts that

[141] Governmental draft bill for the 10th amendment to the Competition Act of 9 September 2020 Explanatory part, p. 83.

[142] Governmental draft bill for the 10th amendment to the Competition Act of 9 September 2020, Explanatory part, p. 89

[143] Governmental draft bill for the 10th amendment to the Competition Act of 9 September 2020 Explanatory part, p. 94.

[144] The governmental draft of 9 September 2020 is currently discussed in the German Parliament (Deutscher Bundestag Drucksache 19/23492 19. Wahlperiode 19.10.2020, https://dip21.bundestag.de/dip21/btd/19/234/1923492.pdf) and in the German Council of the regions Bundesrat, Drucksache 568/20 of 6 November 2020, https://www.bundesrat.de/SharedDocs/TO/995/erl/32.pdf?__blob=publicationFile&v=1).

- the French Ministry for the Economy and Finance has been calling[145] for **asymmetric regulation at EU level allowing for targeted and proportionate rules and obligations to complement competition law**.

    - According to the Ministry asymmetric regulation of structuring platforms should be enforced on a case-by-case basis, when competitive problems related to a platform appear to be structural and lasting, therefore requiring continuous intervention. Possible remedies could include obligations on data mobility and data portability to help reducing switching costs from one platform to another. The ultimate goal should be access to data potentially constituting barriers to entry (example: obligation to develop technical standards that facilitate interoperability of services and migration options for users).

    - Designation of the most structuring platforms, to whom the new regulatory framework should apply, should be based on a set of economic characteristics and conditions that justify regulation. Mechanism to identify companies and define obligations need to be sufficiently agile to react to the rapid development of tech companies and their practices.

    - As regards oversight and enforcement, a dedicated entity at the European level, to be coordinated with the Commission's existing series, could be created to implement this regulatory framework and establish supervision of structuring platforms.

- **The French competition authority[146] argues there is a** need for a solution to address the **behaviour of structuring platform** in markets where they are not dominant. They call for **a new legal regime for 'quasi-dominant' operators** to impose on them enforceable obligations in terms of interoperability, non-discrimination and access to data. Relevant competition authority could thus, on a case-by-case basis, either accept commitments and make them mandatory, or order the company to modify its behaviour in response to the identified competition concern.

- As regards 'killer acquisitions', the competition authority report proposes the introduction of mandatory information requirements for every merger carried out by a structuring platform. The Autorité further proposes to assess whether substantive merger control rules should be adapted to digital challenges, especially in terms of potential competition, conglomerate effects, the relevant

[146] Autorité de la concurrence: Contribution of the Autorité de la concurrence to the debate on competition policy and digital challenges (2020).

time scale of the analysis, and the impact of data and the creation of large user communities.

In **Italy,** the Competition Authority (AGCM), the Data Protection Authority (DPA) and the National Regulatory Authority AGCOM have issued a report on policy recommendations[147]:

- the data-driven approach in the analysis of the platform economy, and the analysis of data gathering, management and profiling from a multi-purpose angle encompassing consumer protection, privacy and competition objectives.

- IT authorities stresses the risk of competitive barriers in existing and adjacent but also possibly completely new markets due to network effects and economies of scale/scope in data gathering, as well as in particular zero-pricing policies.

- They also stress the importance, but also limits of privacy rules to achieve an optimal competitive amount of data protection granted by platforms (due to high information asymmetries between consumers/individuals and platforms, costs in switching and porting).

- They indicate privacy and consumer protection breaches, including in particular lack of transparency on purpose of data gathering, as well as conglomerate effects due to extent of data sources and analysis particularly relevant also for the analysis of antitrust breaches.

In the Netherlands, the **Dutch government**[148] is calling for ex ante intervention in addition to competition enforcement in order to prevent anti-competitive behaviour by **dominant companies acting as gatekeeper** to the relevant online ecosystem (to prevent that ex post enforcement comes too late to keep markets competitive and contestable). By adding an extra tool to Regulation 1/2003, both at EU and national levels respectively, the new instrument will preserve the single market and national enforcement (to reflect heterogeneity of platforms/markets). Platforms in scope are **platforms with gatekeeper role/bottleneck power**, **not necessarily dominant under competition rules but presenting risk of permanent dominance in the future due to ecosystem control** (identifying factors: network effects, data collection, scale and scope effects, platform-of-platforms/ecosystems). As regards remedies, they propose SMP-type remedies to keep them targeted, such as platform access, data portability/sharing, non-discriminatory ranking; by adding an extra tool to Regulation 1/2003; both at EU and national levels to respectively preserve the single market and national enforcement (to reflect heterogeneity of platforms/markets). They call for the notification thresholds to be amended to take account of the deal value.

[147] https://www.agcm.it/dotcmsdoc/allegati-news/Big_Data_Lineeguida_Raccomandazioni_di_policy.pdf.
[148] Dutch position on modernising competition policy in relation to digital platforms.

Regarding studies carried out in the Netherlands supportive for action to be taken the following should are to be mentioned:

- The Dutch competition authority market study on app stores[149] points in particular to bottleneck power over app providers and unilateral conduct of Google and Apple that can be used to expand their platform-ecosystems. As specific problems, they point to differentiated treatment, self-preferencing and lack of transparency.

- The report commissioned by the Dutch Ministry of Economic Affairs and Climate Policy on digital gatekeepers of October 2019.[150]

The **Belgian, Dutch and Luxembourg competition authorities** issued a position paper on the challenges faced by competition authorities in the digital world. Besides proposals to modernise the EU Merger Control Regulation and to (re-) introduce case-by-case guidance letters upon request, the three NCAs advocate for the introduction of an ex-ante instrument similar to the Dutch government proposal.

- As regards addressees, they argue that the concept and interpretation of 'dominance' under Art. 102 TFEU should be closely followed for reasons of legal certainty and predictability.

- COM Guidelines should be updated, clarifying e.g. the role of data, consumer behaviour and network effects.

- As regards the nature of remedies, the new tool could be modelled along (1) UK CMA power to impose remedies following market studies and/or (2) MS' telecom authorities to impose remedies on companies with significant market power.

- Only behavioural remedies should be used, e.g. platform access, data portability, data-sharing and on-discriminatory ranking.

- As regards procedural aspects, they argue for 'voluntary' commitments similar to Art. 9 of Regulation 1/2003, but without intention by the Commission to adopt a decision and no accusation of any wrongdoing. Rebuttable presumption that remedies are proportionate.

- With respect to competent authorities, Commission is best-placed to impose remedies on EU-wide dominant companies. MS should enforce at national level in cases where company is dominant only in one MS.

[149] https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf.
[150] https://www.government.nl/documents/reports/2019/10/07/digital-gatekeepers.

In **Romania** on 20 June 2020 a draft law on relative bargaining power has been published for public consultation. The dependency criteria are defined by reference to the existence of an imbalance of power due to elements such as the considerably larger dimension or market position, the importance of the commercial relationship for the dependent enterprise and the difficulty.[151]

To summarise, the current legislative projects differ as to the threshold for intervention and as to the concept of scoping the services to be covered. While some project stay within the competition logic of market power within relevant markets and adjacent markets, some other proposals go for a larger intervention logic (Germany, France, relying on cross-market significance). More importantly, the proposed set of obligations differ with respect to the proposed prohibitions and obligations. For instance, regarding the proposed ex ante regulation on data, the French proposal is to provide access to data while the German proposal is only to prohibit cross platform usage. Another example for likely forthcoming discrepancies of obligations is illustrated by the fact that the French proposal contains further reaching obligations regarding device neutrality, while the German proposal does not contain such an obligation.

Against those divergences in the legislative projects it is foreseeable that the existing divergences between MS described above are most likely to deepen even if not all proposed concepts are going to be maintained within the legislative processes. First of all it is very likely that the national rules will be scoped differently as to the types of power of digital platforms captured and that therefore the list of platforms covered will divergent. Finally, the legislative projects under way in MS will most likely result in the imposition of diverging ex ante obligations.

Finally it should be born in mind that although in some Member States (BE, NL, LUX) there is the political will and the supporting studies to address the issues covered by the present initiative those Member States prefer to support harmonisation at EU level rather than to proceed at national level. However, absent Community action Member States are likely to start a legislative process with the resulting likelihood of further fragmentation. Different national legislation within the EU may lead to increased fragmentation and compliance costs for large market players and the business users that rely on them. At the same time, start-ups and smaller businesses are also negatively impacted by this situation, as it impedes them from scaling-up and from cross-border expansion, in order to grow into challengers of established players in the digital sector.

Therefore, action at Community level is covered by Article 114 (1) TFEU also with the aim to prevent future fragmentation.

[151] See description of the public consultation: Romania: Draft law sanctioning the abuse of superior bargaining position published for public consultation at https://www.lexology.com/library/detail.aspx?g=5be9d7e5-8e41-4d38-b36c-17f7370e245f.

Annex 5.5: Cost of No-Europe

Gatekeepers may be legally established in one Member State and provide their services to almost the entire EU population. Given the intrinsic cross-border nature of platforms, measures at national level cannot be effective in addressing issues in the digital space. On the contrary, the proliferation of national laws would result in a range of different rules, which puts at risk the scale-up and competition capacity of smaller and start-up online platforms, thus further cementing gatekeepers' entrenched position. Lacking any EU-wide regulation, national solutions are likely to lead to conflicting outcomes where they are implemented by platforms operating at a pan-European scale. A multiplication of national rules and a lack of coordination only benefits the largest companies that are able to deal with 27 different legal systems. At the same time, larger platforms would also be negatively impacted by a fragmented legal landscape since it undermines legal certainty and regulatory predictability. For businesses using online platforms it would be even harder to apply different set of rules within the EU so fragmentation would discourage them to trade across the EU.

Not addressing issues raised by gatekeepers would thus lead to stronger legal fragmentation undermining the potential of the Digital Single Market. As further explained under Section 6 on impacts, the online platform economy contributes heavily to EU cross-border trade and the EU economy as a whole. The top 50 online platforms represent 60% of the traffic share[152] in Europe reaching revenues for about EUR 276 billion in 2018 and employing almost 600 000 people. In addition, the platform economy is expected to grow[153] and represents an opportunity for EU platforms and businesses using their services. It is therefore necessary to address obstacles to a properly functioning online platform economy in order to ensure its positive contribution to the Digital Single Market. This is well illustrated by the following figures: cross-border e-commerce in Europe was worth EUR 143 billion in 2019. 59% of this market, i.e. EUR 84 billion, is generated by online marketplaces. Consequently, in an extreme scenario, where barriers between Member States are established that inhibit all cross-border sales by marketplaces, 59% of total turnover in 2019 would have been lost. Given that this figure is projected to increase to 65% in 2025, the lost cross-border sales would increase over time. Marketplaces with European capital represent 11% of the market.

The size of online cross-border trade in Europe reached EUR 108.75 billion of turnover in 2019, representing 14.4% annual growth compared to 2018. However, if there is no EU intervention there is a risk of fragmentation in the Digital Single Market, which might reverse the positive trends in cross-border online trade.

[152] Traffic share is one of the most important proxies of the sector.

[153] ICF support study for the IA shows that the size of EU28 online cross-border trade in Europe for 2019 represents a 14.4% increase in comparison to 2018. Also, according to Cross-Border Commerce Europe 2019 study online marketplaces will represent 65% of cross-border online sales in Europe by 2025.

Assuming a 10% decrease per year in online cross-border trade, the opportunity cost of the digital market fragmentation would be EUR 1.76 trillion after 10 years.

Annex 5.6: List of antitrust decisions and investigations in core platforms services

1. OVERVIEW

This annex highlights examples of conduct by some of the largest platforms in the core platform services that are being, or have been, investigated in recent years. These conducts range from anti-competitive use of third party data, through to practices which limit the ability of application and service providers to advertise or offer subscriptions outside a given platform for a lower price (anti-steering and most favoured nation clauses), through to practices which artificially raise the profile of the platforms' own services and applications at the expensive of competitors.

1.1. MISUSE OF THIRD PARTY DATA FOR COMPETITIVE GAIN

Procedure, authority, date	Case reference	Description
Amazon		
European Commission Abuse of dominance or restrictive agreement Statement of objections on 10 November 2020	AT.40462 Amazon Marketplace	The Commission has informed Amazon of its preliminary view that very large quantities of non-public seller data are available to employees of Amazon's retail business and flow directly into the automated systems of that business, which aggregate these data and use them to calibrate Amazon's retail offers and strategic business decisions to the detriment of the other marketplace sellers. The Commission opened a second antitrust investigation into Amazon's business practices that might artificially favour its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services (the so-called "fulfilment by Amazon or FBA sellers").

1.2. OTHER DATA PRACTICES

Procedure, authority, date	Case reference	Description
Facebook		
German NCA Abuse of dominance Decision of 6 February 2019	Case B6-22/16	The German NCA found that Facebook abused its dominance by applying terms and conditions, which made the use of its social network conditional upon Facebook's possibility to collect and combine user data from multiple sources, including sources beyond the Facebook platform itself. In its decision, the competition authority prohibited Facebook and its other group companies from using those terms and conditions and from processing data accordingly insofar as private users in Germany are affected. The Bundeskartellamt's decision was suspended upon appeal by the Duesseldorf Regional Court but on appeal, the German Federal Supreme Court supported the Bundeskartellamt's case and found that each increase in the quantity and quality of the data and data analysis provided by Facebook, which is already very large in terms of the number of users, also reduces the chances of both actual and potential competitors to compete with this offer, with the risk that (potential) competitors will lose the competition for advertising contracts necessary to run the network.[154]
Italian NCA	CV154	The Italian NCA found that WhatsApp de facto forced the users of its service to accept in

[154] Decision by the Bundesgerichtshof of 23 June 2020, KVR 69/19, available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=109506.

Procedure, authority, date	Case reference	Description
Abuse of dominance 11 May 2017		full the new Terms of Use, and specifically the provision to share their personal data with Facebook, by inducing them to believe that without granting such consent they would not have been able to use the service anymore.

1.3. PREFERENTIAL DISPLAY, RESTRICTIONS IN INTEROPERABILITY

Authority, procedure, date	Case reference	Description
Amazon		
German and Austrian NCAs Abuse of dominance – settled 17 July 2019 (closed subject to commitments)	Case B2-88/18 Amazon (Germany) Case Amazon (Austria)	The German and Austrian competition authorities closed their investigations into several of Amazon's terms and conditions for third-party sellers – ranging from liability rules to the duration of the notice period for the termination of a seller – following Amazon's decision to amend them worldwide. In Germany, Amazon's behaviour could have qualified as one of the following abusive conduct under the GWB: (i) An exploitative abuse of dominance in the form of abnormal business terms and discrimination, (ii) An abuse in the form of unjustified advantages, because there seemed to be no objective justification to the advantages required by Amazon, and (iii) An exclusionary abuse in the form of unfair business terms that favour its own downstream business, Amazon Retail, to the detriment of third-party sellers.
Italian NCA	A528 Possible abuso di posizione dominante in	The NCA investigates whether Amazon abuses its dominance by discriminating on its e-commerce platform in favour of third-party merchants that use Amazon's logistics

Authority, procedure, date	Case reference	Description
Abuse of dominance 10 April 2019 (opening of investigation)	marketplace e-commerce e servizi di logistica	services. The NCA's theory of harm is that this practice may create barriers to expansion or entry for Amazon's competitors: (i) in the e-commerce logistics market (leveraging), and (ii) possibly in the e-commerce platform market as well.
Luxembourg NCA Abuse of dominance 21 June 2017 (non-infringement)	Case 2017-C-02 Amazon	Amazon allegedly used its dominant position in the upstream market for platform services to foreclose the unnamed complainant from the downstream online retail market, where it competed with Amazon. The NCA concluded that Amazon's platform service is not an essential facility for the complainant's business and that Amazon does not have the incentive to pursue the alleged foreclosure strategy.
Apple		
European Commission Restrictive agreement and/or abuse of dominance 16 June 2020 (opening of investigation)	AT.40452 Apple - Mobile payments	The Commission is investigating the possible impact of the following on competition in mobile payments solutions: (i) Apple's terms, conditions and other measures related to the integration of Apple Pay for mobile purchases (iPhones and iPads) on merchant apps and websites; (ii) Apple Pay is the only mobile payment solution that can access the NFC 'tap and go' technology that is embedded in iPhones for payments in stores; and (iii) Apple allegedly restricts access to Apple Pay for specific products of rivals on iPhones and iPads.
Dutch NCA	Apple alleged app store abuse	The NCA opened an investigation into whether Apple abused its dominance in the

Authority, procedure, date	Case reference	Description
Abuse of dominance 11 April 2019 (opening of investigation)		mobile app store market, *"for example, by giving preferential treatment to its own apps"*. The NCA opened the investigation after a market study into mobile app stores of Apple and Google, which identified self-favouring as one of the conduct that might warrant further investigation.
Google		
European Commission Abuse of dominance Decision of 27 June 2017	Case AT.39.740 Google Search (Shopping) Pending General Court judgment in Case T-612/17 Google and Alphabet	Google's appeal is pending before the EU General Court against the Commission's 2017 decision fining the company EUR 2.42bn. According to the Commission, Google leveraged its dominance in general internet search services to the separate comparison shopping service (CSS) market by favouring Google Shopping on its general web search results page. The Commission concluded that this had the potential to foreclose competing CSSs, which could lead to: (i) higher fees for merchants, (ii) higher prices and search costs for consumers, (iii) less innovation. To support this finding, the Commission among other things relied on statistics showing that: (i) Google Shopping significantly increased its traffic (45-fold in the UK, 35-fold in Germany, 29-fold in the Netherlands, 19-fold in France, 17-fold in Spain and 14-fold in Italy) and (ii) traffic to rival CSSs dropped significantly (by 92% for a rival in Germany and by 85% for a rival in the UK) without an alternative explanation than Google's behaviour.

Authority, procedure, date	Case reference	Description
Italian NCA Abuse of dominance 8 May 2019 (opening of investigation)	A529 Google/ compatibilità app Enel X Italia con sistema Android Auto	The NCA investigates whether Google abuses its dominance in the market for licensable smart mobile operating systems by refusing to integrate energy company Enel's X Charge app in its Android Auto app. According to the NCA, this conduct may hinder competition on the merits and limit consumer choice by: (i) excluding Enel's smartphone app for users of electric vehicles (EVs) which provides a location service that competes with Google Maps; and consequently, and (ii) *"considerably compromising*" several parameters of competition, including innovation, quality and diversity of services and diversity of business models.
Italian NCA Abuse of dominance 20 October 2020 (opening of investigation)	A542 Google online display advertising	The NCA is investigating an alleged exclusionary abuse of dominance by Google in the form of *"internal-external discrimination"*, which consists in: (i) its display advertising intermediation services relying on user data that Google collects from other, unrelated services or applications in which it is dominant; and (ii) not making this data available for competing providers of display ad intermediation services.

1.4. ANTI-STEERING AND MFN CLAUSES

Authority, procedure, date	Case reference	Description
Apple		
European Commission Restrictive agreement and/or	AT. 40437 Apple – App Store practices (music streaming)	As Apple charges third-party app developers a 30% commission on all subscription fees through its mandatory in-app purchase (IAP) system, *"Apple's competitors have either*

Authority, procedure, date	Case reference	Description
abuse of dominance 16 June 2020 (opening of investigations)	AT.40652 Apple – App Store practices (e-books/audiobooks) AT.40716 Apple – App Store practices (all other apps that compete with Apple)	*decided"* to disable the in-app subscription possibility or pass this fee on to consumers. The IAP obligation also appears to give Apple full control over the relationship with the subscribers of its competitors. Therefore, it is *"dis-intermediating its competitors from important customer data while Apple may obtain valuable data about the activities and offers of its competitors".* In addition, Apple's rules prevent third-party app developers from informing users of alternative options to purchase paid content.
European Commission Restrictive agreement and/or abuse of dominance 4 May 2017 (closed subject to commitments)	AT.40153 E-book MFNs and related matters (Amazon)	Commission decision that renders legally binding the commitments offered by Amazon. The Commisison had concerns about clauses included in Amazon's e-books distribution agreements that required publishers to offer Amazon similar (or better) terms and conditions as those offered to its competitors and/or to inform Amazon about more favourable or alternative terms given to Amazon's competitors. The clauses covered not only price but many aspects that a competitor can use to differentiate itself from Amazon, such as an alternative business (distribution) model, an innovative e-book or a promotion. The Commission considered that such clauses could make it more difficult for other e-book platforms to compete with Amazon by reducing publishers' and competitors' ability and incentives to develop new and innovative e-books and alternative distribution services.

1.5. TYING

Authority, procedure, date	Case reference	Description
Apple		
European Commission Restrictive agreement and/or abuse of dominance Decision of 18 July 2018	AT.40099 Google Android	Google's appeal is pending before the EU General Court against the Commission's 2017 decision fining the company EUR 4.34bn. According to the Commission, Google has ensured that its Google Search app is pre-installed on practically all Android devices sold in the EEA by tying it pre-installation with the pre-installation of the Google Play Store. The Commission found that pre-installation can create a status quo bias. Users who find search and browser apps pre-installed on their devices are likely to stick to these apps. Google's practice has reduced the incentives of manufacturers to pre-install competing search apps, as well as the incentives of users to download such apps. This reduced the ability of rivals to compete effectively with Google.