The digital sector: Challenges for Competition Law and Policy

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2022 Mannheim Center for Competition and innovation Annual Conference

Issues to be discussed

1) The economics of platforms and ecosystems
2) Competition law enforcement challenges
3) Recent cases the Google Android Decision and the Google Shopping General Court Judgment
4) A comparison of various regulatory proposals

The economics of platforms and ecosystems

1) Different types of platforms (Search engine, Social media, Marketplaces, Streaming platforms)
2) Economies of scale and economies of scope
3) Management of network effects
4) Building a user base/ Competition within ecosystems and competition between ecosystems
5) Closed and open architecture
6) Privacy as an element of performance
7) Targeting: quality enhancement and price discrimination
8) Data portability and Interoperability
9) The rise and fall of platforms

The economics of platforms and ecosystems

1) Different types of platforms (Search engine, Social media, Marketplaces, Streaming platforms)
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Competition law enforcement challenges

1) Relevant markets are not relevant
2) Business models matter for competition
3) Dynamic efficiencies must be taken into account
4) Access to data may be a barrier to entry but not always
5) Market shares are poor predictors of market power
6) The legal doctrine of potential competition is inadapted
7) Merger control: counterfactuals and the formulation of remedies in a dynamic environment

Google Shopping General Court Judgment

Issue: self preferencing

Structure of the reasoning

Self-preferencing anticompetitive if one assumes behavioural bias on the part of users

General principle of EU law: equal treatment

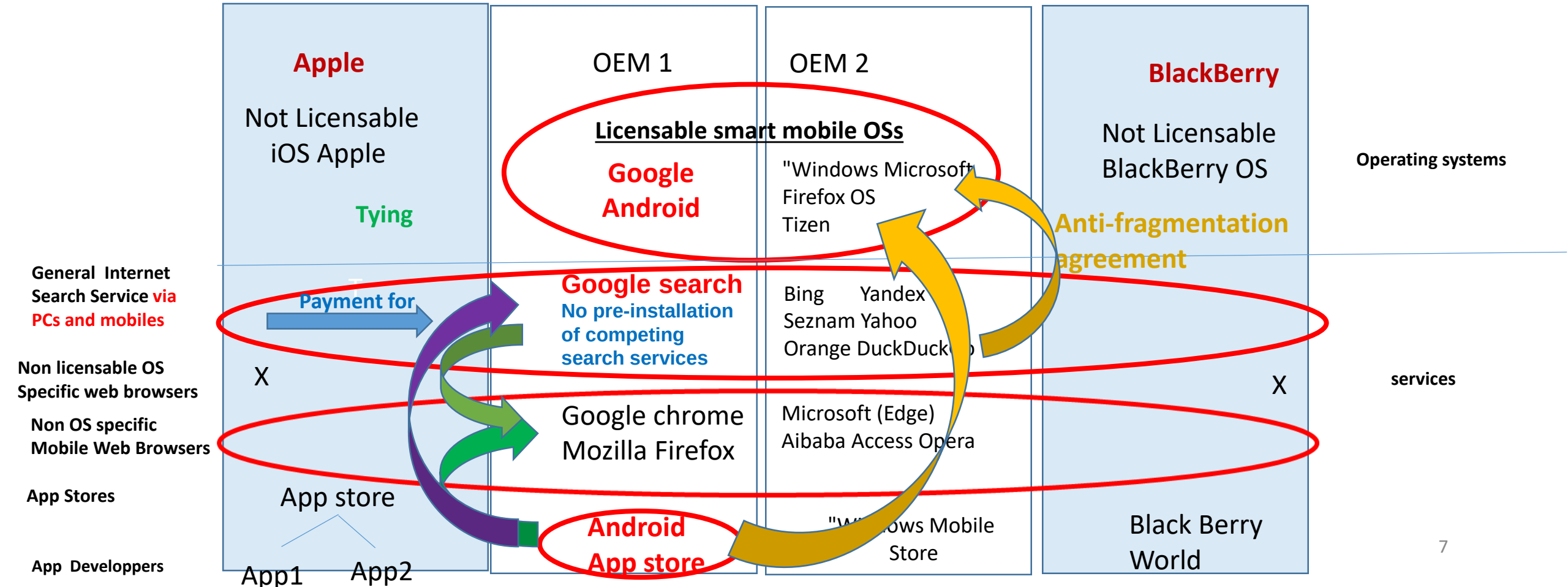
Self-preferencing is abnormal behavior for a search engine and hence not competition on merits

No assimilation with the Bronner case of refusal to deal because self-preferencing is an active anticompetitive practice hence no need to prove that it applies to an essential facility

Google Search is a quasi essential facility

A quality improvement can be a violation of competition law

Abuses of market power in the Google Android decision



Tying of Google Chrome with the Play Store and the Google Search app

EC Commission Decision: CASE AT.40099 Google Android , 18/07/2018

11.4. Tying of Google Chrome with the Play Store and the Google Search app

(877) The Commission concludes that **the tying of Google Chrome with the Play Store and the Google Search app constitutes an abuse of Google's dominant position in the worldwide market (excluding China) for Android app stores and in the national markets for general search services because**:

(i) Google Chrome is a distinct product from the Play Store and the Google Search app (Section 11.4.1);

(ii) **the Play Store and the Google Search app cannot be obtained without Google Chrome** (Section 11.4.2);

(iii) Google is dominant in the worldwide market (excluding China) for Android app stores and in the national markets for general search services (Section 11.4.3); and

(iv) the tying of Google Chrome with the Play Store and the Google Search app is capable of restricting competition (Section 11.4.4).

Google Android EU decision

Issue: tying of Google Chrome with Google Search and Play Store

Structure of the reasoning

No competition between Google and Apple (narrow market definition)

Pre- installation gives Google a competitive advantage because of behavioural bia of users

Tying has by nature a foreclosure effect (no need to demonstrate a real effect)

Competing general search services cannot offset the competitive advantage that Google ensures for itself through tying

Discussion of the Google Android decision

1) The crucial role of market definition

2) The role behavioural economics and the implications of the status quo bias

3) Tying abuse (from foreclosure to uneven playing field)

4) What next for Google ?

An excessively narrow market definition ?

(479) The Commission concludes that **non-licensable smart mobile OSs, such as iOS and BlackBerry OS, exercise an insufficient indirect constraint on Google's dominant position in the worldwide (excluding China) market for licensable smart mobile OSs**.

(480) First, **users obtain smart mobile OSs as part of a wider bundle** with a smart mobile device and **take into account a range of factors other than the smart mobile OS when purchasing a smart mobile device** (Section 9.3.4.1).

(481) Second, **iOS exercises an insufficient indirect constraint on Google's dominant position in the worldwide (excluding China) market for licensable smart mobile OSs** (Section 9.3.4.2).

(482) Third, BlackBerry OS exercises an insufficient indirect constraint on Google's dominant position in the worldwide (excluding China) market for licensable smart mobile OSs (Section 9.3.4.3).

An excessively narrow market definition ?

(497) **The Commission concludes that iOS exercizes an insufficient indirect constraint on Google ‘s dominant position in the worldwide (excluding China) market for licensable smart mobile Oss**.

(498)First, there are **significant price differences between Google Android and iOS devices**

(499) Second, **users of Google Android would face substantial costs when switching to iOSs devices**

(500) Third, users show a **significant degree of loyalty to their existing smart mobile OS**

(501) Fourth, **app developers are unlikely to stop developing for Google Android and develop exclusively for iOS.**

Restriction of choice and status quo bias

(863) Fourth, **Google's conduct is capable of harming, directly or indirectly, consumers who, as a result of Google's interference with the normal competitive process, may see less choice of general search services available.**

(971) Second, **Google's conduct is capable of harming, directly or indirectly, consumers who, as a result of Google's interference with the normal competitive process may see less choice of mobile web browsers**.

(1314) First, the portfolio-based revenue share payments prevented the launch of Google Android devices pre-installed with general search services other than Google Search. **Absent Google's conduct, users would, therefore, have had a wider choice, for example in terms of quality or range of products**. For instance, as explained in recital (862), as a consequence of Google's conduct some general search services with a more focused offering may not be able to achieve the scale and access to users that would allow them to invest in research and development with respect to their specific features. (

Pre installation and Status quo effect

(781) **The reason why pre-installation, like default setting or premium placement, can increase significantly on a lasting basis the usage of the service provided by an app is that users that find apps pre-installed and presented to them on their smart mobile devices are likely to "stick" to those apps**. HP described the creation of a **"status quo bias"** in the form of premium placement and default setting as follows: "Premium placement and default settings give applications and services located in those positions the advantage of being the first things users see when they start to interact with their device. Users are more likely to try these applications/services based on their prominent visibility and once they are using them, they usually continue to do so. It is an easy way to obtain new users and deliver almost automatic stickiness for an application or service."

(782**) Users are unlikely to look for, download, and use alternative apps, at least when the app that is pre-installed, premium placed and/or set as default already delivers the required functionality to a satisfactory level**. As Nokia indicated in relation to preinstallation: "Where a product is preloaded by default, consumers tend to stick to this product at the expense of competing products even if the default product is inferior to competing products." In order to overcome the status quo bias and see users looking for alternatives, service providers need to convince users that their service is significantly better than the alternative that is already pre-installed, premium placed or set as default.

Status quo bias and behavioural economics

WILLIAM SAMUELSON, RICHARD ZECKHAUSER “Status Quo Bias in Decision Making” Journal of Risk and Uncertainty, 1: 7-59 (1988')

A fundamental property of the rational choice model, under certainty or uncertainty, is that only preference-relevant features of the alternatives influence the in dividual's decision. Thus, neither the order in which the alternatives are presented nor any labels they carry should affect the individual's choice.

(I)n real world decision problems the alternatives often come with influential labels. Indeed, one alternative inevitably carries the label status quo-that is, doing nothing or maintaining one's current or previous decision is almost always a possibility. Faced with new options, decision makers often stick with the status quo alterna tive, for example, to follow customary company policy, to elect an incumbent to still another term in office, to purchase the same product brands, or to stay in the same job. Thus, with respect to the canonical model, a key question is whether the framing of an alternative-whether it is in the status quo position or not-will significantly affect the likelihood of its being chosen.‘

(D)ecision makers exhibit a significant status quo bias.

The Google Android decision and behavioural economics

Amelia Fletcher: THE EU GOOGLE DECISIONS: EXTREME ENFORCEMENT OR THE TIP OF THE BEHAVIORAL ICEBERG?, CPI Antitrust Chronicle , January 2019

Second, as discussed above, **the Google Shopping case essentially relies on saliency bias, such that consumers tend to make choices on the basis of what is most prominent to them, rather than assessing information more holistically.**

While that case involves a platform giving undue prominence to its own vertically integrated offering, and thereby leveraging its market position from one activity to another, the strong impact that rankings can have on sales by platform users could potentially have wider anti-competitive effects.

The Google Android decision and behavioural economics

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(….), behavioral biases have important implications for the **effectiveness of remedies**, where these are reliant on consumer behavior.
For example, **offering consumers a new option may have little impact on competition if they exhibit strong default or status quo bias.** In some cases, remedies will only work well if they change the choice architecture facing consumers, not just the choice options. A thoughtful example was the remedy in the Microsoft Browser case; a "boxchoice screen" which forced consumers to make an active and unbiased choice. Following the introduction of this remedy in the EU, Internet Explorer's market share in the browser market fell significantly more rapidly in the EU than it did in the U.S., which was not subject to the remedy.

Consumer reactions can, however, be hard to predict, and competition authorities can easily get this wrong. A key implication, therefore, is that **authorities should carry out consumer testing of any such remedies, ideally through the use of randomized controlled trials**. This is a relatively new technique for antitrust, but has become increasingly commonplace in sector regulation, at least in the UK, when putting in place new consumer-focused regulatory interventions. It has shown clear benefits in terms of helping to identify the most effective remedies.

Implications of status quo bias for competition

WILLIAM SAMUELSON, RICHARD ZECKHAUSER “Status Quo Bias in Decision Making” Journal of Risk and Uncertainty, 1: 7-59 (1988')

Finally, recognition of status quo bias suggests a novel conjecture about the measurement of market competition-one that runs contrary to the standard economic prediction.

If status quo effects are significant, it could well be that an increase in the number of competitors reduces the degree of market competition.

That is, with the entrance of new firms, dominant producers (those with disproportionate market shares) may become more dominant.

For instance, the enormous number of producers and products in the rapidly growing personal computer market undoubtedly contributed to the emergence of IBM as the industry standard.

Is equal treatment a general principle of EU law?

Google claims that the practices at issue are quality improvements that constitute competition on the merit and cannot be treated as abusive.

The abuse may take the form of an unjustified difference in treatment (see, to that effect, judgments of 17 July1997, GT-Link , C-242/95, EU:C:1997:376, paragraph 41; of 24 October 2002, Aéroports de Paris v Commission ,C-82/01 P, EU:C:2002:617, paragraph 114; and of 7 October 1999, Irish Sugar v Commission , T-228/97,EU:T:1999:246, paragraph 140). In that regard**, the general principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified** (see judgment of 16 December 2008 Arcelor Atlantique et Lorraine and Others , C-127/07, EU:C:2008:728, paragraph 23 and the case-law cited).

The Commission observed in that regard, in recital 344 of the contested decision, that while results from competing comparison shopping services could appear only as generic results, that is to say, simple blue links that were also prone to being demoted by adjustment algorithms, results from Google's own comparison shopping service were prominently positioned at the top of Google's general results pages, displayed in rich format and incapable of being demoted by those algorithms, resulting in a difference in treatment in the form of Google'sfavouring of its own comparison shopping service.

Was self-favouring a departure from competition on the merits?

178. (…) **for a search engine, limiting the scope of its results to its own entails an element of risk and is not necessarily rational, save in a situation, as in the present case, where the dominance and barriers to entry are such that no market entry within a sufficiently short period of time is possible in response to that limitation of internet users' choice**.

Consequently, the fact, assuming it to be established, that Google favours its own specialised results over third-party results, which seems to be the converse of the economic model underpinning the initial success of its search engine, cannot but involve a certain form of abnormality

Comment on paragraph 178

Paragraph 178 of the judgment will be discussed at length by commentators. **The General Court goes as far as to suggest that favouring the firm's own services is ' not necessarily rational ' for a search engine (or rather, that it is only rational for a dominant firm protected by barriers to entry).**
Alas, it is sufficient to take a look at the wider world to realise that the conduct at stake in the case is pervasive, even in industries where dominance is rare (such as supermarkets, which, one would assume, are also interested in offering the most attractive products to end-users but have long engaged in similar self-preferencing).

More generally, digital platforms (and search engines are not an exception) are partially open and partially closed. In this sense, the fact that some features in a platform are not open to third parties does not necessarily go against its interests (or is not necessarily irrational). In the same vein, business models evolve, and may become relatively more open (or relatively more closed) over time (think of Apple, which has followed the opposite path).

Chilling Competition, The General Court in Case T-612/17, Google Shopping:the rise of a doctrine of equal treatment in Article102 TFEU,12/12 2021

Is Google comparison shopping services an essential facility?

In essence, in the context of the second part of the fifth plea, **Google claims that the Commission treated the practices at issue as a 'refusal to supply' without verifying, in particular, that access to the elements concerned,namely, the general results pages and its own specialised results (Product Universals and Shopping Units), was 'indispensable' and that there was a risk of all competition being eliminated, as it ought to have done in the light of the judgment of 26 November 1998, Bronner** (C-7/97, EU:C:1998:569). According to Google, the Commission thuspenalised a refusal to supply while exempting itself from the conditions and evidential burden of establishing tha tinfringement.

224.**It must be noted that Google's general results page has characteristics akin to those of an essential facility** (see,to that effect, judgments of 15 September 1998, European Night Services and Others v Commission , T-374/94,T-375/94, T-384/94 and T-388/94, EU:T:1998:198, paragraphs 208 and 212 and the case-law cited, and of9 September 2009, Clearstream v Commission , T-301/04, EU:T:2009:317, paragraph 147 and the case-law cited),inasmuch as there is currently no actual or potential substitute available that would enable it to be replaced in aneconomically viable manner on the market (see, to that effect, judgment of 17 September 2007, Microsoft v Commission , T-201/04, EU:T:2007:289, paragraphs 208, 388, 390, 421 and 436).

The Commission (…) made clear, in Section 7.2.4.2 of the contested decision, that there was currently no viable alternative for traffic accounting for a large proportion of the activity of comparison shopping services

Is the Bronner jurisprudence applicable to Google behavior?

It must (…) be concluded that **the Commission was not required to establish that the conditions set out in the judgment of 26 November 1998, Bronner (C-7/97, EU:C:1998:569), were satisfied in order to make a finding of an infringement on the basis of the practices identified, since, as the Commission states in recital 649 of the contested decision, the practices at issue are an independent form of leveraging abuse which involve, as the Commission also indicates in recital 650 of that decision, 'active' behaviour in the form of positive acts of discrimination in the treatment of the results of Google's comparison shopping service, which are promoted within its general results pages, and the results of competing comparison shopping services, which are prone to being demoted.**

They can thus be distinguished from the conduct at issue in the judgment of 26 November 1998, Bronner (C-7/97, EU:C:1998:569**), which consisted in a simple refusal of access**, as the Court of Justice moreover pointed out in the judgment of 25 March 2021, Deutsche Telekom v Commission (C-152/19 P, EU:C:2021:238,paragraph 45), delivered after the hearing in the present case.

Isn’t quality improvement competition on the merits?

Accordingly,(…) , Google’s conduct cannot, as such, constitute competition on the merits.

Secondly, contrary to what is suggested by Google, **it does not follow from any of the judgments cited by the Commission in recital 334 of the contested decision that conduct leading to a product or service improvement cannot constitute, in itself, an autonomous form of abuse where that improvement results in the dominant undertaking favouring its own product or service through recourse to methods different from those governing competition on the merits and that conduct is capable of having anticompetitive effects**

Intel Judgment of the Court 2 September 2017

125 Second, the Court of Justice has held that, **where an undertaking in a dominant position 'submits,during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the … foreclosure effects [alleged against it]', the Commission must analyse the foreclosure capability of the scheme of rebates byapplying the five criteria set out in paragraph 139 of the judgment on the appeal (see paragraph 119above)**. Having regard to the wording of paragraph 139 of the judgment on the appeal, **the Commission is, as a minimum, required to examine those five criteria for the purposes of assessing the foreclosure capability of a system of rebates, such as that at issue in the present case.**

140 [As rectified by order of 24 October 2017] **The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer**. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.

Regulation of digital platforms

The EU Digital Market Act Proposal

Issues of contestability and unfair practices (…) appear to be particularly strong when the core platform service is operated by a gatekeeper. **Providers of core platform providers can be deemed to be gatekeepers if they:**

(i) have a significant impact on the internal market,

(ii) operate one or more important gateways to customers and

(iii) enjoy or are expected to enjoy an entrenched and durable position in their operations.

The identified gatekeeper-related problems are currently not (or not effectively) addressed by existing EU legislation or national laws of Member States. Although legislative initiatives have been taken or are under consideration in several Member States, these will not be sufficient to address the problems.

Which firm qualify as a gatekeeper in the DMA?

The **criteria** for the designation of a gatekeeper are **quantitative**:

- Annual EEA turnover above EUR 6.5 billion in the last three years;
- Average market capitalization or equivalent fair market value above EUR 65 billion in the last year, active in at least three Member States;
- Over 45 million monthly active end users in the Union and over 10 000 yearly active business users in the last year.

Back-of-envelope calculations suggest that these criteria will capture not only (obviously) the core businesses of the largest players (GAFAM), but perhaps also a few others: **Oracle and SAP for instance would appear to meet the thresholds, as would AWS and Microsoft Azure**.

Conversely, Twitter, Airbnb, Bing, Linkedin, Xbox Netflix, Zoom, and Expedia do not appear to meet the thresholds at present, **and Booking.com, Spotify, Uber, Bytedance/TikTok, Salesforce, Google Cloud, and IBM Cloud appear to meet some but not others at this point.**

Caffarra and Scott Morton

Where do the obligations come from ?

(…) the list of obligations outlined in the DMA seems to **be a catalog derived from past and current EU antitrust cases involving the usual set of Big Tech platforms, where the particular remedy has been generalized to apply to all gatekeepers, but without an explanation as to how and why that would work**.

Translating these dicta into actionable rules that people and companies can understand likely will require clearer organizing principles around business models.

Caffara and Scott Morton,January 11, 2021

A set of (questionable) rigid obligations

So how can these lists be made operational**? Some organizing principles around business models would have been more useful, even if one does not want to get too "close and personal" and name individual companies**.

A fixed set of rules—covering all kinds of business models—applying to any platform that is designated a gatekeeper is the contrary of "flexible."

What is more, **the separation between the designation of a gatekeeper first, and the application of the obligation second, is artificial because it is through the evaluation of conduct and its impact that an agency would identify a gatekeeper and understand what particular rules would ameliorate the problems that have been identified.**

As discussed further below, the UK seems to be taking this combined approach.

Caffara and Scott Morton

A system of rebuttable presumptions would be better

"Because of the innovative and dynamic nature of the digital world, and because its economics are not yet completely understood, it is extremely difficult to estimate consumer welfare effects of specific practices. … our insights into possible countervailing efficiencies are still evolving". Given the concentration tendencies of platforms, and the high barriers to entry in some of the markets they dominate, a finding that they restrict the ability of other firms to compete either on the platform or for the market in a way which is not clearly competition on the merits should trigger **a rebuttable presumption of anti-competitiveness**. **It should be the dominant platform's responsibility to show that the practice at stake brings sufficient compensatory efficiency gains.**

Given the breadth of the presumption, and the fact that our insights into possible countervailing efficiencies are still evolving, such efficiency defences should be fully explored by competition agencies and courts.

Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, Competition policy for the digital era, European Commission

Anti-competitive effects and efficiency gains

We consider that **one of the main challenges in the implementation of the DMA is how to separate the positive efficiency and welfare gains that platforms generate through (data-driven) network effects from negative anti-competitive and welfare-reducing platform behaviour.**

Pro-competitive remedies should not undermine the efficiency gains of platforms.

How can we preserve the wider societal benefits of network externalities while avoiding abuse of gatekeeper dominance?

A related challenge is how to narrow the information gap between regulators and gatekeepers, so that regulators can more accurately distinguish between pro- and anti-competitive gatekeeper behaviour.

Cabral, Haucap, Parker, Petropoulos, Valletti, Van Alstyne , "The EU Digital Markets Act: A Report from a Panel of Economic Experts », European Commission 2021

Anti-competitive effects and efficiency gains

For example, **Article 6 states that one should allow business users to bypass app stores**. While we agree that this often corresponds to an abuse of dominant position, **we can also envision efficiencies emanating from centralised control. As such, we would include these behaviours in our grey list that lets the platform make its case that efficiencies justify a closed system.**

Similarly, **Article 5 would bar platforms from requiring its users to employ the platform's own identification system**. Again, we would include these behaviours in our grey list, as **there are reasonable theories of value creation that justify this type of restrictions. Again, the regulated platforms would need to justify why those restrictions are necessary though.**

(…) Finally, we **suggest that the efficiency defence needs to fulfil the same standard of proof as in merger control and horizontal and vertical agreements that restrict competition**

Cabral, Haucap, Parker, Petropoulos, Valletti, Van Alstyne , "The EU Digital Markets Act: A Report from a Panel of Economic Experts », European Commission 2021

Tying and bundling can increase consumer surplus

Notwithstanding a long history of abuse of dominant position by means of tying and bundling, we also recognise **that in some cases consumers benefit when firms bundle key services**.

For example, **Google requires users of their location-based services to also use a Google approved version of Android.** Hardware manufacturers who wish to use Google apps are required to join the Open Handset Alliance which obligates members to use only Google approved Android versions.

In this way, even though Android is open source, Google's control prevents fragmentation of the code base. In this sense, **one may argue that Google provides a benefit that stems from some level of standardisation**.

The **downside** is that **potential operating system innovations are not interoperable with Google data services and Google may be able to charge higher prices for those services.**

The **offsetting benefit** is that **app developers and hardware manufacturers have to contend with fewer variants of the Android operating system than they otherwise would and are thus able to ensure interoperability**.

The challenge, of course, is to know whether the potential harm is larger than the benefits.

Cabral, Haucap, Parker, Petropoulos, Valletti, Van Alstyne , "The EU Digital Markets Act: A Report from a Panel of Economic Experts », European Commission 2021

Tying and bundling can increase consumer surplus

Bundling also occurs when platforms absorb functions that were previously provided by ecosystem partners into the core system. This can happen for numerous reasons.

Article 6 of the DMA includes tying and bundling in the list of prohibited gatekeeper practices "susceptible of being further specified." **Recognising the anticompetitive effects but also the possible efficiencies from bundling, we recommend that tying and related practices be presumed anti-competitive and grey-listed, and that the burden of proving pro-competitive effects be placed on the gatekeepers.** The presumption of anticompetitive effects, especially when the practice is initiated by a firm with market power, is important because of the fast pace at which digital markets evolve.

Cabral, Haucap, Parker, Petropoulos, Valletti, Van Alstyne , "The EU Digital Markets Act: A Report from a Panel of Economic Experts », European Commission 2021

Data aggregation restrictions may reduce consumer welfare

Aggregation restrictions will affect the ability and incentive for ad-funded platforms to create value for users in at least two ways.

First, ad-funded platforms, as also some fee-funded platforms, **use data to improve services to their participants in ways not related to advertising.** Insofar as they use aggregated data for direct service improvements, it is straightforward that **restrictions on data aggregation will harm the platforms' ability to create value for their stakeholders including advertisers, content providers, and consumers**. Platforms also will not be able to internalize
network effects as effectively as without restrictions, as the lower expected value of single interaction will be amplified by the lesser ability to orchestrate value from these interactions for the group of users as a whole.

Second, with restrictions**, the ad-funded platforms will not be able to create as much value for advertisers as without restrictions**. **The data that ad-funded platforms aggregate across various services help them to target ads to individual users, thereby increasing conversion rates**. Higher conversion rates translate into higher per-user revenues. This, in turn, means that the ad-funded platform has stronger incentives to attract additional users by offering them higher quality services.

Gregor Langus, Vilen Lipatov Value Creation by Ad-Funded Platforms, CESifo Working Paper No. 9525

Data aggregation restrictions may reduce concumer welfare

Data aggregation restrictions, therefore, will, in some circumstances, render an ad-funded business model not viable.

When the ad-funded model is a preferred one in the first place, a shift to a fee-funded mode will reduce consumer welfare by raising prices for platform service, compromising its quality by lowering the quality of many of its interactions, reducing the user coverage and the welfare-enhancing network effects with it, and relaxing competition.

or a recap, consumers enjoying ad-funded platforms' services may be harmed by data aggregation/collection restrictions in the following ways: (1) the price for each user may be increased and the quality of service decreased; (2) some users will not find it attractive to use the service at all; (3) transaction costs will be increased for each participating user; (4) some utility will be lost due to less scope for network effects, and (5) competition among platforms may be weakened.

Gregor Langus, Vilen Lipatov Value Creation by Ad-Funded Platforms, CESifo Working Paper No. 9525

The DMA establishes a preference for suppliers at the expense of consumers

But **under the DMA, the Commission must "ensure a fair balance" in the commercial relationship between the platform operator and its business users regardless of the effect on consumers (see Article 10). As proposed, the DMA will set in stone a policy preference for suppliers at the expense of consumers.**

Legislators will have to decide, **should the DMA put the consumer interest first, allowing companies to justify their product design decisions as pro-competitive or pro-consumer, or should the Commission's primary prerogative be protecting competitors interests, regardless of how that may harm consumers**?

KAY JEBELLI ,The EU Digital Markets Act: Five Questions of Principle, FEBRUARY 9, 2021

The DMA does not promote competition between platforms

Concentration of power is not sufficiently contested

(The DMA) **seems to focus on creating the condition for competition at the business users' level, rather than on creating the conditions for more platforms to enter the market**. In other words, the DMA proposal cares about protecting business users from, for example, self-preferencing behaviours of vertically integrated platforms; the imposition of most-favoured-nation clauses; and the mandatory use of certain platforms' services in their relationships with end-users. But **it does little to create the conditions for competition to be restored at the platforms' level.**

An extremely meaningful example is Article 6 (i)(f) of the DMA proposal, which requires gatekeepers to provide access and interoperability only with regards to business users or ancillary services. Rather than fostering the emergence of new platforms, this provision has the potential to increase the systemic dependence of business users and ancillary services' providers from the core platform, whose position remains uncontested and secured in the upper market.

EU: More ambitious DMA needs to shape digital markets of our future, Article 19, POSTED ON MARCH 11, 2021 DIGITAL 19 MIN READ

Regulatory projects comparison

	UK	US	Germany	EU
Name of proposed Regulation	A new pro-competition regime for digital Markets	1)American Innovation and Choice Online Act (S.2992) 2)The Merger Filing Fee Modernization Act of 2021	10thAmendt of the German Competition Act ARC-Digital Competition Act	Digital Market Act
Origin of the proposal	Ministerial Proposal	Parliamentary proposal	Governmental proposal Approved by Parliament	European Commission proposal
Amendemet to Competition law ?	Yes	No	Yes	No
Enforced by	Digital Markets Unit (DMU) established within the CMA	FTC / DOJ	Bundeskartellamt	Not Yet Clear

Regulatory comparisons

	UK	US	Germany	EU
Targets	Large tech firms considered to have "strategic market status" (SMS) Evidence-based economic assessment as to whether a firm has substantial, entrenched market power in at least one digital activity (meaning the effects of its market power are likely to be particularly widespread and/or significant) (…) The market power assessment should not require a formal market definition. 4.15 (…)we propose the assessment should be applied with respect to a specific activity Economic Analysis	A "website, online or mobile application, operating system, digital assistant, or online service" that: (A) enables a user to generate or interact with content on the platform, (B) facilitates e-commerce among consumers or third-party businesses, or (C) enables user searches that display a large volume of information Functional Approach	The Amendment introduces a completely new category of market power, namely Companies with 'paramount significance for competition across markets'. Rationale: While large digital players may not have significant market shares in all affected markets, they may nevertheless have significant influence on these markets due to their key position for competition and their conglomerate structures (also referred to as gatekeepers). Innovative definition of market power (Gatekeepers)	Providers of core platform providers can be deemed to be gatekeepers if they meet the three criteria test: (i)have a significant impact on the internal market, (ii) operate one or more important gateways to customers and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations. New concept (Gatekeepers)

Regulatory comparisons

	UK	US	Germany	EU
Thresholds For Targets and presumptions		"covered platforms" are those with (1) at least 50 million monthly active users (or 100,000 business users); (2)annual market capitalization or U.S. net sales exceeding $550 billion, (3) that serve as a "critical trading partner" for its business users.		Rebuttable presumption that "three criteria test" If the platform meets the following thresholds during three consecutive years: a) turnover equal or above €6.5bn ($7.9bn) or market capitalization of at least €65bn ($79bn); b) presence in at least three of the 27 Member States of the European Union; c) a reach of more than 45 million monthly active end users (which represent 10 percent of the EU population) as well more than 10,000 active business users on an annualized basis.

	UK bespoke	US Specific per se	Germany Rebuttable presumptions	EU Article 5 Obligations for gatekeepers
Prohibitions	Strategic Market Status firms subject to : 1)An enforceable code of conduct (ex to prevent consumers and businesses exploitation or exclusion of innovative competitors. 2)Pro-competitive interventions (ex personal data mobility, interoperability and data access) in a particular activity. 3) Enforcement mechanism to impose penalties for code breaches and failure to comply with code or PCI orders	Covered platforms Prohibited from 1)"Unfairly" preferencing their products, services, or lines of business; 2)"Unfairly limiting another's products to compete against them 3) Discriminating among similarly situated business users if it may harm competition 4) Restricting the capacity of business owners to operate with different platforms' operating systems, hardware, or software features 5) Conditioning access to the covered platform or preferred status or placement on the purchase or use of other products offered by the platform	Section 19a allows the Bundeskartellamt to prohibit as a preventive measures certain conducts by companies which are of paramount significance for competition across markets 1) Self preferencing own services, 2) impeding competition on markets where the company is not dominant, 3) creating entry barriers by the use of data collected on a dominated market, 4) Restricting the interoperability of products, services or data. 5)impeding other companies on procurement or salesmarkets (through pre-installation or integration of the dominant company's offers) 6) demanding disproportionate benefits for the treatment of offers from another (e.g transfer of data or rights not strictly necessary for this purpose).	Gatekeepers must refrain from 1)combining personal data sourced from the core platform services with personal data from any other services offered by them or with personal data from third-party services, unless consent 2) Imposing price parity clauses 3) preventing business users from promoting offers to end users acquired via the core platform service, 4) restricting business users from raising issues with relevant authority relating to their practices 5) requiring business users to use, offer or interoperate with an identification service of the gatekeeper; 6) Bundling their core platform services; 7) Refusing to let advertisers and publishers know the price and remuneration for the publishing of an ad and for each services provided.

	UK bespoke	US Specific per se	Germany Rebuttable presumptions	EU Article 6 Obligations for gatekeepers susceptible of being further specified
Self preferencing	Strategic Market Status firms subject to : 1)An enforceable code of conduct (ex to prevent consumers and businesses exploitation or exclusion of innovative competitors. 2)Pro-competitive interventions (ex personal data mobility, interoperability and data access) in a particular activity. 3) Enforcement mechanism to impose penalties for code breaches and failure to comply with code or PCI orders	Covered platforms Prohibited from 1)"Unfairly" preferencing their products, services, or lines of business;	Rebuttable presumption of violation for companies with 'paramount significance for competition across markets for, 1) Self preferencing own services,	d) refrain from treating more favourably in ranking services and products offered by the gatekeeper itself (…)compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking;

	UK bespoke	US Specific per se	Germany Rebuttable presumptions	EU Article 6 Obligations for gatekeepers susceptible of being further specified
interoperability	Strategic Market Status firms subject to : 1)An enforceable code of conduct (ex to prevent consumers and businesses exploitation or exclusion of innovative competitors. 2)Pro-competitive interventions (ex personal data mobility, interoperability and data access) in a particular activity. 3) Enforcement mechanism to impose penalties for code breaches and failure to	Covered platforms Prohibited from 4) Restricting the capacity of business owners to operate with different platforms' operating systems, hardware, or software features	Rebuttable presumption of violation for companies with 'paramount significance for competition across markets for, 4) Restricting the interoperability of products, services or data.	(f) allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services;

	UK bespoke	US Specific per se	Germany Rebuttable presumptions	EU Article 5 Obligations for gatekeepers
Tying Bundling	Strategic Market Status firms subject to : 1)An enforceable code of conduct (ex to prevent consumers and businesses exploitation or exclusion of innovative competitors. 2)Pro-competitive interventions (ex personal data mobility, interoperability and data access) in a particular activity. 3) Enforcement mechanism to impose penalties for code breaches and failure to	Covered platforms Prohibited from 5) Conditioning access to the covered platform or preferred status or placement on the purchase or use of other products offered by the platform	Rebuttable presumption of violation for companies with 'paramount significance for competition across markets for, No specific provision	(f) refrain from requiring business users or end users to subscribe to or register with any other core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3(2)(b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article;

	UK bespoke	US 1)American Innovation and Choice Online Act (S.2992) Specific per se	Germany Rebuttable presumptions	EU Article 5 Obligations for gatekeepers
Data	Strategic Market Status firms subject to : 1)An enforceable code of conduct (ex to prevent consumers and businesses exploitation or exclusion of innovative competitors. 2)Pro-competitive interventions (ex personal data mobility, interoperability and data access) in a particular activity. 3) Enforcement mechanism to impose penalties for code breaches and failure to comply with code or PCI orders	Covered platforms Prohibited from Use of non-public data that are obtained from or generated on the covered platform by the activities of a business user or by the interaction of a covered platform user with the products of a business user to offer or support the offering of the covered platform's own products	Rebuttable presumption of violation for companies with 'paramount significance for competition across markets for, 3) creating entry barriers by the use of data collected on a dominated market,	Gatekeepers must refrain from 1)combining personal data sourced from the core platform services with personal data from any other services offered by them or with personal data from third-party services, unless consent

	UK Bespoke Specific	US The Merger Filing Fee Modernization Act of 2021 General	Germany General	EU Article 12 Information obligation
Mergers and Resources	SMS firms to inform the CMA of all "mergers"; Broader jurisdiction for the CMA to review SMS firm mergers, via: (1) a transaction value threshold applicable to SMS firms (e.g., £100 or £200 million); alongside (2) a UK nexus test; Mandatory merger review prior to completion for a subset of the largest transactions by SMS firms; Changes to the probability threshold used in Phase 2 investigations of SMS firms from "more likely than not" to "realistic prospect" of an SLC.	Substantial increase in the Hart-Scott-Rodino Act (HSR) filing fees for large mergers, while also effectuating a slight decrease in HSR filing fees for smaller mergers. Section 3 of the bill authorizes the appropriation of increased funds for both the Department of Justice Antitrust Division (DOJ) ($252 million to the DOJ and $418 million to the FTC).	Turnover threshold increased from EUR 25 million to EUR 50million, and fromEUR 5million to EUR 17.5 million. Policy shift will result in a significant decrease of notifiable transactions,thereby freeing up capacities within the Bundeskartellamt for scrutiny of the digital space. The "GWB DigitalizationAct" provides the Bundeskartellamt with the authority to require companies,which are deemed to reduce competition through a series of small acquisitions in specific markets in which the Bundeskartellamt has conducted sector inquiries ,to notify every transaction provided that certain thresholds are met.	A gatekeeper shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 involving another provider of core platform services or of any other services provided in the digital sector irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules. A gatekeeper shall inform the Commission of such a concentration prior to its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest

	UK Bespoke Specific	US The Merger Filing Fee Modernization Act of 2021 General	Germany General	EU Article 12 Specific
Market Studies	The Digital Markets Unit will need to ensure that interventions remain effective in addressing persistent and evolving competition problems within firms with SMS. PCIs will need to be agile and flexible to keep pace with fast-moving and dynamic digital markets.6 We are consulting separately on reforms to the markets regime to encourage greater use of the CMA's market study and investigation powers.	No provision	No provision	The gatekeeper status can be determined either with reference to clearly circumscribed and appropriate quantitative metrics, which can serve as rebuttable presumptions to determine the status of specific providers as a gatekeeper, or based on a case-by-case qualitative assessment by means of a market investigation. Market investigations may also point to the need for an amendment of the list of core platform services. They allow to cover in a flexible way additional practices that are similarly unfair or that equally put fairness or contestability at risk after a thorough market investigation on the impact of those practices. Chapter IV provides rules for carrying out market investigations, notably procedural requirements for the opening of a market investigation (Article 14)

	UK bespoke	US Specific per se	Germany Rebuttable presumptions	EU Article 5 Obligations for gatekeepers
Defense	Strategic Market Status firms subject to : 1)An enforceable code of conduct (ex to prevent consumers and businesses exploitation or exclusion of innovative competitors. 2)Pro-competitive interventions (ex personal data mobility, interoperability and data access) in a particular activity. 3) Enforcement mechanism to impose penalties for code breaches and failure to comply with code or PCI orders	(b) Affirmative Defense for self preference, limiting competition, discrimination: If the defendant establishes by a preponderance of the evidence that the conduct was narrowly tailored, nonpretextual, and reasonably necessary to— (A) prevent a violation of, or comply with, Federal or State law; (B) protect safety, user privacy, the security of nonpublic data, or the security of the covered platform; or (C) maintain or substantially enhance the core functionality of the covered platform.	Rebuttable presumption of violation for companies with 'paramount significance for competition across markets the practices which can give rise to ex ante (interim) measures. The company bears the burden of proof to show that its conduct is objectively justified	

Conclusion

Competition authorities will just keep crashing if they never take their eyes off the rear view mirror