

Regulating digital gatekeepers

Background on the future digital markets act

SUMMARY

The EU has unveiled an ambitious plan to regulate online platforms, and the European Commission is proposing to introduce ex ante regulation to ensure that markets characterised by large platforms acting as digital gatekeepers remain fair and competitive for innovators, businesses, and new market entrants. The introduction of an ex ante regulatory framework that could limit online platforms' commercial freedom and give wide-ranging enforcement powers to regulators would be a far-reaching step. Against this background, this briefing explains the rationale for regulating digital gatekeepers in the EU and provides an overview of the key policy questions currently under discussion.

Recent reports and studies have shown how a few large platforms have the ability to apply a range of practices that raise significant competition issues. The limitation of competition law – essentially applied ex-post after the anti-competitive practices have been implemented – has sparked a debate on whether EU competition rules are still fit for purpose and whether such platforms should not instead be regulated ex ante so as to provide upfront clarity about what behaviour towards users and competitors is acceptable. In this respect, the policy discussion focuses on a number of issues, in particular, how to identify online gatekeepers that should be subject to ex ante regulation, what conduct should be outlawed for those gatekeepers, what obligations should be placed on them (such as data portability and interoperability), and how such innovative regulations should be enforced. Finally, the briefing highlights the initial views of a number of stakeholders.



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Background

[Online platforms](#) are driving the economy and social activity worldwide nowadays. They present an essential tool for engaging with customers, including across borders, and an important vector of innovation. There are **over 10 000 online platforms** operating in the EU and while most of them are small and medium-sized enterprises (SMEs), increasingly a few large online platforms determine the parameters for future innovations, consumer choice and competition.¹

A view widely shared today among academics and EU policymakers is that some of those large online platforms operate as **digital gatekeepers** between businesses and citizens. While there is no settled definition of what constitutes a digital gatekeeper,² this term commonly refers to platforms providing online services (e.g. online marketplaces) or controlling and influencing access to online services (e.g. operating systems, app stores and voice assistants)³ and thereby exercising control over entire [ecosystems](#), with a strong impact on competition and innovation in the digital field.⁴

In order to tackle certain competition issues raised by large online platforms, the EU recently launched a series of [antitrust proceedings](#) (e.g. the [Google Android](#) and [Amazon cases](#)) and began reflecting on the need to **adapt EU competition law tools** so as to level the playing field in the digital environment.⁵ In addition, the EU adopted a [Platform-to-Business Regulation](#), in force since July 2020. This text is a first step towards establishing a fair and transparent business environment for online platforms and has created horizontal standards for transparency, while also offering redress for SMEs using these platforms' services.

More recently, in the context of the forthcoming [digital services act package](#), the European Commission announced its intention to explore the need to regulate large online platforms acting as gatekeepers in order to ensure that the markets affected by these platforms remain fair and competitive and to improve regulatory oversight over them.⁶ The Commission is seeking to introduce an **ex ante regulatory instrument for large online platforms acting as gatekeepers** along with new competition measures in a forthcoming [digital markets act](#) (DMA) to address competition problems that the existing EU competition rules cannot tackle.⁷ These legislative proposals would complement existing competition rules and the upcoming [digital services act](#) (DSA) and [democracy action plan](#), which will address online liability, hate speech, disinformation and propaganda issues.⁸

The European Parliament, meanwhile, has already adopted several **legislative reports** setting out its position⁹ and has called on the Commission to propose a legal instrument imposing ex ante obligations on large platforms with a gatekeeper role, along with an effective institutional enforcement mechanism.

Rationale for regulation

Gatekeepers' impact on competition

Recent reports and studies have shown how a few large platforms have **become online gatekeepers**, controlling key channels of distribution because of a variety of factors, including strong **network effects** in the digital environment (i.e. users are more likely to value and choose platforms with a large user base), their **intermediary role** (i.e. between sellers and customers), and their ability to **access and accumulate large amounts of data** (e.g. users' personal and non-personal data and competitors' sales data).¹⁰

These characteristics may provide online gatekeepers with a dominant position and market power¹¹ detrimental to fair competition. In this regard, the Commission [stresses](#) three issues. First, traditional businesses are increasingly **dependent on a limited number of large online platforms**, which leads to imbalances in bargaining power between large online platforms on the one hand and their users and rivals on the other. Second, because those platforms largely **control the online ecosystems**, innovative digital firms and start-ups find it difficult to bring alternative products and

services to the market. Third, gatekeepers have the ability to use their dominant position on one market to extend that dominant position to adjacent markets, a practice commonly referred to as **'leveraging'**. As a result, large platforms increasingly have the ability to control access to services and products online, charge high fees, manipulate rankings and control business reputations. Additionally, these firms may quickly grow beyond a **tipping point**, after which they almost automatically gain more users and further strengthen their market power and dominant position.

A range of exploitative and exclusionary conduct¹² and transparency-related issues that might warrant ex ante regulation have been identified.¹³ These concern, inter alia, **self-preferencing**, i.e., unfairly favouring own products and services to the detriment of competing businesses (e.g. pre-installation and default settings exclusively of gatekeepers' own products/services); **preferencing of a third party**, i.e. unfairly favouring a third party's products or services to the detriment of competing businesses (e.g. discriminating between trade partners without reasonable cause); **unjustified denial of access to the platform or functionalities** necessary to conduct business (e.g. denial of access to the platform's payment services); **unjustified denial of access to collected data** (e.g. data that end users allow the platforms to share); imposition of **exclusionary terms and conditions for access** (e.g. unfair blocking of certain functionalities); **unjustified tying and bundling** practices, i.e. selling or offering together distinct goods/services without proper justification (e.g. adding applications to the primary service), imposing **unclear or unreasonable terms and conditions** on business users (e.g. excessive pricing for access to the platform) or on end-users (e.g. excessive gathering of end-user data), **unduly restricting or refusing data portability**, i.e. impeding individuals from obtaining and reusing their personal data for their own purposes across different services, effectively locking end-users into one platform; and also **unduly restricting or refusing interoperability** (i.e. the ability of a system, product or service to communicate and function with other systems, products or services) making it very difficult or impossible for businesses and end-users to switch platforms.

The implementation of such practices may discourage potential competitors and business-users from competing and could translate into **high barriers to entry** into the market for new players and reinforce **users' lock-in situations**. As a result, without intervention, negative effects on competition, on consumer choice and on innovation in alternative digital services may arise.¹⁴

Limits to antitrust enforcement

Antitrust tools are designed to address anti-competitive agreements and concerted practices between companies ([Article 101 of the Treaty on the Functioning of the European Union, TFEU](#)) and

Box 1 – Amazon case and data use. As a marketplace service provider, Amazon has access to non-public business data of third party sellers (e.g. sellers' revenues on the marketplace, number of visits to sellers' offers, data relating to shipping and sellers' past performance). The European Commission opened an [in-depth investigation](#) into Amazon's practices in July 2019 and reached the [preliminary conclusion](#) in November 2020 that Amazon has likely breached EU antitrust rules by distorting competition in online retail markets. The Commission takes issue with Amazon systematically relying on non-public business data of independent sellers who sell on its marketplace, to benefit its own retail business, which directly competes with those third party sellers. The Commission is now running a **formal investigation** to assess whether such practices are in breach of [Article 102](#) TFEU, prohibiting the abuse of a dominant market position.

abuse of dominant positions ([Article 102 TFEU](#)) arising in the online platform environment. However, there are limits to what EU competition law can achieve when addressing the digital gatekeepers' role.

Existing antitrust enforcement has been criticised as being too **slow**, cumbersome, and unpredictable for the fast-moving digital sector.¹⁵ Antitrust rules are **ex-post in nature** because they are designed to stop or penalise a specific behaviour, which is found to be anti-competitive, after a competition problem has emerged. Experts highlight that investigations carried out under Articles 101 and 102 TFEU have often proven **lengthy**, lasting sometimes more than five years, thereby creating a risk of irreversible harm to competition and

consumers before the abusive conduct by the dominant platform is addressed.¹⁶ Furthermore, competition law may also be unable to intervene in cases of **structural competition problems** where the harm to competition is caused by the economic features of these markets (e.g. network and scale effects, consumer lock-in) more than by the platform's anti-competitive conduct.¹⁷ A recent [report](#) from the European Court of Auditors confirms the current shortcomings of EU antitrust law, adding that the **deterrent effect** of the fines imposed in antitrust cases by the Commission is not proven and calling for ex ante guidance.

Shift towards **ex ante regulation**

The limitation of competition law – essentially applied ex-post after the anti-competitive practices have been implemented – has sparked a debate on whether competition rules are still fit for purpose and whether such platforms should not instead be regulated ex ante to provide upfront clarity about what behaviour towards users and competitors is acceptable.¹⁸ In this regard, the Commission services have [indicated](#) that they are considering three policy options: (1) revising the horizontal framework set in the Platform-to-Business (P2B) Regulation, (2) adopting a horizontal framework empowering regulators to collect information from large online platforms acting as gatekeepers and (3) adopting a new and flexible **ex ante regulatory framework** for large online platforms acting as gatekeepers.

Expected benefits

Moving from a purely ex-post approach towards ex ante monitoring and enforcement should help to **speed up public intervention**. This new approach should facilitate timely intervention, prevent negative outcomes before they occur and avoid irreparable harm to competition.¹⁹ One of the great advantages of monitoring the markets is that it provides **more transparency** and detailed and up-to-date knowledge of how the markets and platforms are functioning.²⁰ While the [P2B Regulation](#) has set common transparency obligations for platforms and search engines, it does not go far enough. It fails to address concerns relating to large gateway platforms and more prescriptive rules are [needed](#), not least to address unfair trading terms and practices.

Furthermore, ex ante regulation would allow **targeted intervention** against digital gatekeepers even if they are not considered dominant under competition law and could also address those practices capable of hampering competitiveness and innovation that are not sufficiently covered by current rules. For instance, the application of competition law tools to assess **data-related anti-competitive behaviour** is challenging, as most online platforms do not trade data as a stand-alone business and as a result no relevant market for data can be defined under current competition law standards.²¹ In this context, ex ante regulation could serve to ensure that competition is not distorted by the control of data, which is at the core of the digital economy. Finally, a pro-competition ex ante framework would give business users of platforms greater confidence to innovate and invest, and would provide more upfront clarity for platforms to know what conduct and behaviour are or are not acceptable.²²

Possible drawbacks

However, moving to an ex ante regulation also entails drawbacks. The complexity and variety of business models adopted by digital platforms and the high pace of innovation that characterises the digital sector make the establishment and implementation of ex ante rules a challenging task.²³ Also ex ante intervention may **lack the necessary flexibility and adaptability**. It is especially questionable whether a detailed list of obligations and prohibitions defined as ex ante would be beneficial, because the same type of conduct can have both pro and anti-competitive effects depending on the market and/or the specific gatekeepers in question.²⁴

Digital gatekeepers subject to regulation

Defining gatekeepers is a major challenge for EU policymakers because this notion spans companies that perform very different activities (e.g. marketplaces, software distribution) and pursue divergent business models (generating revenues through commission, advertisements, licensing fees or direct payments).²⁵ It is also essential to target the right entities, which are difficult to identify in complex digital ecosystems. Against this backdrop, it is paramount to determine criteria to clearly define the digital gatekeepers that should be subject to regulation.

Criteria to identify digital gatekeepers

The classification of platforms as online gatekeepers can be based on a combination of quantitative and qualitative criteria. **Quantitative criteria** refer to indicators such as market shares, number of users affected by platform operations, time users stay on a platform's site, and the platform's annual economic revenue. The EU regulation could exclusively target dominant online platforms with certain minimum revenues or user numbers and exclude from its scope of application small players (even if they hold monopoly power over a niche market).²⁶ However, traditional market share-based presumptions may not serve as a reliable indicator for the determination of market power given the importance of data in controlling access to customers.²⁷ **Qualitative criteria** are more difficult to identify but could point for instance at the platform's ability to control access to a large number of users (which competitors need to access in order to compete)²⁸ and its ability to leverage its gatekeeper position, i.e. access to its data (for analytics) is essential for competing on one or more neighbouring markets.²⁹

In this context, while some large platforms operating as app stores, search engines and marketplaces may qualify as digital gatekeepers, it is [disputed](#) whether other platforms, such as **travel booking platforms** or mobility platforms qualify as gatekeepers. Also, some argue that **collaborative economy actors** are competing in markets with low entry barriers (e.g. home-sharing platforms) and should not therefore qualify as digital gatekeepers in the same way as the actors mentioned above.³⁰

Test to identify digital gatekeepers subject to ex ante regulation

The mechanisms currently implemented to regulate electronic communications markets in the EU could serve as an inspiration for designing a special set of rules to regulate certain digital gatekeepers (**asymmetric regulation**). Several proposals have already been tabled in this respect.

The UK Competition Market Authority [recommends](#) setting up new ex ante rules for those firms deemed to have '**strategic market status**' (SMS), which is assessed based on:

- their size and scale,
- their proven ability to leverage their market powers into a variety of other markets, and
- their positions as an access point for businesses to customers.

A [report](#) by CERRE – the Centre on Regulation in Europe – offers a more detailed analysis. It recommends that ex ante intervention should only be exercised if the online platforms meet **four cumulative criteria**:

- a large size (measured by the number of unique users, time on site, etc.),
- a gatekeeper position on which other businesses depend (measured for instance by the ability for business users and consumers to switch between different platforms),
- gatekeeper positions that are lasting (notably because the entry barriers in the markets monopolised by the platforms are high), and
- gatekeeper control over entire ecosystems.

BEREC, the Body of European Regulators for Electronic Communications, [proposes](#) a granular assessment in two steps. First, a number of specific '**areas of business**' (AoB – e.g. app stores, online

search engines) would be identified. Then, digital platforms having '**significant intermediation power**' (SIP), i.e. presenting structural or specific characteristics in those specific 'areas of business', would be regulated. This approach, which is borrowed from the [EU telecom framework](#), would be used to identify platforms with:

- control over a digital bottleneck (i.e. over an infrastructure for which there is no relevant substitute) for a large number of end-users, and/or a position as an unavoidable trading partner for a large amount of business users,
- strong financial resources and access to capital markets, and
- an ecosystem structure giving them the ability to leverage their market power onto additional services/businesses, and/or privileged or exclusive access to key inputs/assets from their various businesses.

Such an approach would require a very detailed set of rules, to be laid down in EU legislation.

Designing a test for an ex ante regulation for digital gatekeepers would require lawmakers to define precisely a range of **new concepts** (e.g. gatekeeper position, relevant areas of business, relevant ecosystem) departing to a certain extent from traditional competition law concepts.

Ex ante prohibitions and obligations

Blacklist and case-by-case assessment

The second major challenge lies in defining what conduct should be outlawed and what obligations established for gatekeepers. The European Commission has explored a number of approaches.³¹ The first approach would be to enshrine in EU law a **set of clearly defined and predetermined obligations and prohibitions** of certain unfair trading practices (e.g. 'blacklisted practices'). Under this 'do and do not' approach, both general prohibitions that apply regardless of the online platform's sector of activity (e.g. 'self-preferencing') and more specific rules (e.g. relating to operating systems, algorithmic transparency, or issues relating to online advertising services) could be considered. The second approach would be to enshrine in EU law a range of tailor-made remedies (e.g. transparency, data portability, interoperability) that regulators could impose on digital gatekeepers where considered necessary and justified following a prior **case-by-case assessment**. A mixed approach is also possible with some practices prohibited from the outset and some remedies imposed on a case-by-case basis.

Many questions arise as to which is the best approach for setting ex ante rules for gatekeepers. It has been stressed that banning practices is not the best tool when it comes to solving competition problems raised by platforms and that a case-by-case analysis is better.³² For instance, while most experts agree that self-preferencing – whereby a platform gives preferential treatment to its own products and services – should be regulated, they also [stress](#) that self-preferencing may have pro-competitive effects (e.g. economies of joint production or scale).³³ In this regard, academics and experts are largely supportive of running a **balancing of interests test** to assess the anti-competitive effect of such a practice and its possible justifications.³⁴

Member States' views currently differ on the right approach to setting ex ante obligations and prohibitions for digital platforms. Germany [favours](#) a combination of introducing clearly defined obligations and prohibitions of certain unfair trading practices (i.e. a blacklist) and adopting tailor-made remedies on a case by case basis. France and the Netherlands [propose](#) making gatekeeper platforms subject to a set of general obligations and prohibitions and that intervention should include a flexible and proportionate case-by-case approach enabling the regulatory authority to impose tailor-made remedies. Ireland [warns](#) that an outright ban on certain behaviours could negatively affect incentives to invest. To justify ex ante intervention, it must be convincingly demonstrated that innovation is being stifled by the gatekeeper platforms and that competition on the digital markets is impeded by exclusionary behaviours. According to the Nordic competition

authorities it is [doubtful](#) that setting predetermined obligations and prohibitions would be beneficial because the same type of conduct can have both pro and anti-competitive effects.

Questions such as who bears the **burden of proof** and what is the **standard of proof**, and admissible **justifications** for assessing digital gatekeepers' behaviour will need to be clarified.

Remedies: focus on data portability and interoperability

Data portability

Control over personal and non-personal data is crucial in a data economy where the competitiveness of firms will depend increasingly on timely access to relevant data and the ability to use that data to develop new, innovative applications and products.³⁵ Empowering users to control their data is increasingly becoming a driver of EU policy on platforms. Data portability mechanisms are already implemented in a range of EU legislative acts such as the [General Data Protection Regulation](#) (GDPR), which allows individuals to ask for the transfer of their personal data from one organisation to another in order to switch service provider, the [Digital Content Directive](#), which grants a form of portability right for the non-personal data provided or created by consumers, and the [Free Flow of Data Regulation](#) which applies to the porting of non-personal data between businesses. In addition, many firms, offer portability services, i.e. data transfer between online services, on a commercial basis.³⁶

In this context, a range of ex ante remedies have been proposed to oblige digital gatekeepers to ensure access, sharing and portability of user data.³⁷ While data portability is seen as an effective remedy in preventing ex ante anti-competitive outcomes,³⁸ academics have raised a range of questions with respect to regulating ex ante portability of data. For instance, to what extent does imposing such a remedy require a strong **justification** and a **proportionality** test.³⁹ Furthermore, the EU legislation would need to clarify how the **GDPR principles** of [purpose limitation](#) and [data minimisation](#) that limit data sharing of personal data would align with a new ex ante right to data portability.

Interoperability

The imposition of an 'interoperability' requirement on digital gatekeepers has also been proposed. Broadly speaking, 'interoperability' refers to the ability of a system, product or service to communicate and function with other technically distinct systems, products or services.⁴⁰ Horizontal interoperability refers to interoperability of competing products, services or platforms (e.g. interconnection between communication networks) while vertical interoperability refers to interoperability of a product, service or platform with complementary products and services (e.g. an e-book readable on different platforms). In the EU, interoperability requirements have already been used to promote competition in telecommunications (e.g. the [Access Directive](#)), Fintech (e.g. the [Revised Payment Services Directive](#)) and the software industry (e.g. the [Microsoft case](#)).

Interoperability obligations are seen as **an important tool** to ensure that new companies can enter digital markets and provide competing services. However, some argue that mandating interoperability should remain a **measure of last resort** because such a remedy runs the risk of distorting competition and impeding technological progress.⁴¹ In the telecoms industry, interoperability is required of dominant operators to promote competition, but also of any operator (including non-dominant operators) to ensure other important policy objectives are fulfilled (e.g. to secure end-users' access to a given service).⁴² In a similar fashion, lawmakers will have to reflect on the trigger for imposing an ex ante interoperability remedy on platforms. Certain civil society organisations [advocate](#) imposing interoperability on digital gatekeepers not only at business level, to enable competing firms to provide their services, but also at the **level of user interfaces**, to ensure consumers and users can exercise their choice of platform freely.

Imposing on digital gatekeepers far-reaching obligations of data portability and interoperability would warrant a **case-by-case assessment** and would require law-makers to include a **proportionality test**.

Enforcement and cooperation

Institutional design

Clear rules for the intervention should be established and cooperation mechanisms set up between the various authorities at EU level (i.e. Commission departments) and between the Member States and the Commission to determine who is best equipped to intervene.⁴³ At national level, the monitoring and enforcement of complex behavioural remedies are seen as challenging and **sector-specific regulators** may be better equipped than competition authorities to undertake ex ante assessments in digital markets.⁴⁴ At EU level, there are also calls to create a **specific EU regulatory body** for the enforcement of ex ante regulation among platform gatekeepers.⁴⁵ Germany, for instance, [supports](#) establishing a pan-European regulator to oversee enforcement of the EU's new rules. Others, in contrast, have [proposed](#) the establishment of a European Commission **digital gatekeeper task force or unit** in charge of implementing and enforcing the ex ante rules as opposed to an EU agency, which would allegedly take too long to set up.

Furthermore, effective enforcement must keep pace with the fast market dynamics at play in the digital sector and the cross-border nature of the digital economy. This would require the adoption of ex ante rules **flexible enough** to be updated without heavy and lengthy legislative procedures (enshrined in delegated acts for instance) and securing effective **cooperation between the authorities** in charge of monitoring the market, conducting market investigations and issuing compliance orders.⁴⁶ In this respect, the EU should adopt rules on **competence allocation** (for instance based on the place of provision of intermediation services)⁴⁷ and allow new **participatory enforcement** mechanisms, i.e. involving all stakeholders in the implementation of the rules.⁴⁸

Consistency and interplay with competition law

The European Commission is proposing to introduce a [new competition tool](#) in parallel with ex ante regulation to address structural competition issues in markets and intervene in situations where a market is close to tipping, i.e. where large platforms almost automatically gain more users and further strengthen their dominant position. Competition experts have stressed that even with clearer ex ante rules, ex-post antitrust enforcement will remain an important backstop.⁴⁹ It is key to clarify how the proposed ex ante regulatory framework would operate alongside the planned new competition tools and the current competition rules⁵⁰ in order to avoid the risk of both under- and over-regulating digital gatekeepers.

Some stakeholders' initial views

NGOs and consumer protection associations

[BEUC](#), The European Consumer Organisation, supports the introduction of ex ante regulation for large online gatekeeper platforms with significant network effects, in conjunction with the introduction of a new competition tool dealing with structural lack of competition and structural risks to competition. UNI Global Union and the European trade-union federation UNI Europa ([UNI](#)) are calling on the European Commission to introduce an ex ante regulation on online platforms with significant market power, including a ban of certain practices such as bundling and self-preferencing and are calling for the structural separation of Amazon. A number of NGOs, including European Digital Rights (EDRi) and Electronic Frontier Foundation (EFF), have [asked](#) the Commission to set specific ex ante interoperability requirements for major actors in digital services markets characterised by significant network effects, in order to ensure real choice, fairness and contestability. [Access Now](#) stresses that policymakers should impose a gradual scaling of

responsibility, based on a platform's market share and other criteria of dominance, including their ability to shape and influence public discourse. Similarly, human rights organisation [Article 19](#) has called on the European Commission to consider the impact of gatekeepers not only on economic market dynamics, but also on consumers' fundamental rights. [The European Trade Union Institute](#) has called for the adoption of a broad regulation on gatekeepers, targeting not only unfair 'trading' practices, but also the unfair 'employment' practices.

Platforms

Platforms are highlighting the potentially negative effects of imposing ex ante regulation on them and calling for an in-depth analysis before imposing severe measures. [Google](#) does not support the introduction of new ex ante competition rules that might have unintended consequences on the user experience as well as cost risks for European businesses. The company asks that the process of designating firms as 'gatekeepers' be based on clear and future-proof definitions and supported by evidence. It also argues that the scrutiny of gatekeepers should be carried out without prejudice to business models and reviewed periodically. Furthermore, Google states that the ex ante regulatory framework should take proper account of existing measures (such as the P2B Regulation) and competition tools and stresses that imposing new measures on gatekeepers should be considered pragmatically and informed by evidence of actual harm. [Facebook](#) stresses that it will be imperative to base policy on solid evidence and a proper understanding of digital markets rather than broad assumptions about the economic dynamics prevailing in those markets.

Developers and platforms' business users

[SMEUnited](#), representing EU SMEs, supports the adoption of a new ex ante regulatory framework for large online platforms acting as gatekeepers and calls for the enactment of [data access](#) rights. The [Developers Alliance](#), however, does not favour the identification of blacklisted behaviours and fears this form of ex ante regulation could destabilise the existing ecosystem. [Microsoft](#) supports the development of new rules and new tools to control gatekeeper platforms and tackle structural competition problems, and is in favour of the creation of a specific EU regulatory body for the enforcement of ex ante regulation. The European Telecommunications Network Operators' Association and the GSM Association ([ETNO and GSMA](#)), representing the EU's largest fixed and mobile networks, the [European Broadcasting Union](#) and the [Association of Commercial Television in Europe](#) support an ex ante framework based on case-by-case assessment and tailored remedies.

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ENDNOTES

- ¹ See European Commission, [Inception impact assessment on the Ex ante regulatory instrument](#), 2020.
- ² For an overview of the notion of gatekeepers and its relationship with other concepts such as 'bottlenecks', 'unavoidable trading partners', and firms with 'special responsibility' see P. Alexiadis and A. de Stree, [Designing an EU intervention standard for digital platforms](#), EUI Working Paper RSCAS 2020/14.
- ³ See BEREC, [Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool](#), BoR (20) 138 at p 10.
- ⁴ See N. Duch-Brown, [The Competitive Landscape of Online Platforms; JRC Digital Economy Working Paper](#), 2017.
- ⁵ See J. Crémer, Y.-A. de Montjoye and H. Schweitzer, [Competition policy for the digital era](#), 2019.
- ⁶ See European Commission, [Inception impact assessment on the ex-ante regulatory instrument](#), 2020.
- ⁷ In this regard, the Commission has conducted three online public consultations in relation to: the [Digital Services Act – deepening the internal market and clarifying responsibilities for digital services](#), the [Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers](#) and the [Single market: New competition tool to strengthen competition enforcement](#) (2 June 2020 – 8 September 2020).
- ⁸ On the digital services act, see T. Madiaga, [Reform of the EU liability regime for online intermediaries: Background on the forthcoming digital services act](#), EPRS, 2020.
- ⁹ See European Parliament, [Resolution on improving the functioning of the Single Market](#) (2020/2018(INL)), European Parliament, [Resolution on adapting commercial and civil law rules for commercial entities operating online](#) (2020/2019(INL)).
- ¹⁰ See Stigler Centre, [Stigler Committee on Digital Platforms: Final Report](#), 2019; J. Crémer, Y.-A. De Montjoye and H. Schweitzer, [Competition policy for the digital era](#), 2019; UK, [Report of the Digital Competition Expert Panel, Unlocking digital competition](#), 2019; German Federal Ministry for Economic Affairs and Energy, [Report by the Commission 'Competition Law 4.0', A new competition framework for the digital economy](#), 2019.
- ¹¹ Under EU competition law, a dominant position refers to the ability of a firm to behave independently of its competitors, customers, suppliers and, ultimately, the final consumer. A dominant firm holding market power has the ability to set prices above the competitive level, to sell products of an inferior quality or to reduce its rate of innovation below the level that would exist in a competitive market.
- ¹² According to competition law, exploitative conducts are practices that harm business users and/or end-users directly, whereas exclusionary conducts are practices that remove or weaken actual and potential competition, while directly or indirectly harming business users and/or end-users.
- ¹³ For an overview see [BEREC Response to the Public Consultations](#), BoR (20) 138 at p 13. See also N. van Gorp and P. de Bijl, [Digital gatekeepers](#), 2019.
- ¹⁴ *Ibid* at p. 3.
- ¹⁵ *Ibid* at p. 9.
- ¹⁶ See the European Competition Lawyers Forum [submission](#) to the public consultation on DSA. A study for the European Parliament [highlighted](#) that it took the Commission seven years to decide on Google's illegal abuse of dominance in the search engine market to favour its own shopping comparison tool.
- ¹⁷ See European Commission, [Inception impact assessment for the new competition tool](#), 2020.
- ¹⁸ See K. Sabeel Rahman, ['Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities'](#), *Georgetown Law Technology Review*, Vol. 234, 2018. See also P. Alexiadis and A. de Stree, above.
- ¹⁹ See Report of the Digital Communications Expert Panel, above at pp. 62-63.
- ²⁰ *Ibid*.
- ²¹ See A. Strowel and W. Vergote, [Digital Platforms: To Regulate or Not To Regulate?](#), 2018.
- ²² See the UK Competition and Markets Authority's [submission](#) to the DSA consultation, September 2020.
- ²³ See Nordic competition authorities' [submission](#) to the DSA consultation, September 2020.
- ²⁴ *Ibid*.
- ²⁵ See D. Geradin, [The Digital Markets Act: How should ex ante rules look like?](#), October 2020.
- ²⁶ See Federal Ministry for Economic Affairs and Energy, [Report by the Commission 'Competition Law 4.0', A new competition framework for the digital economy](#), 2019 at p. 50.
- ²⁷ *Ibid* at 29.
- ²⁸ See Geradin above.
- ²⁹ In this sense, see J. Crémer, Y.-A. de Montjoye, H. Schweitzer above. See also Access Now, [Position on the Digital Services Act Package](#), 2020.
- ³⁰ CEPS, [Europe's Collaborative Economy](#), 2020.
- ³¹ See European Commission, [Inception impact assessment on the ex-ante regulatory instrument](#), 2020.

- ³² See the [submission](#) from the Spanish Comisión Nacional de los Mercados y la Competencia (CNMC), to the DSA consultation, stressing that sharing data is neither bad nor good per se.
- ³³ See J. Crémer, Y.-A. de Montjoye and H. Schweitzer, [Competition policy for the digital era](#), 2019. P. Caro de Sousa, [What Shall We Do About Self-Preferencing?](#), 2020.
- ³⁴ See European Commission, Expert group for the observatory on the Online Platform Economy, [Progress Report. Work stream on Differentiated treatment](#), 2020 at pp. 29-30. The report points at German Court cases holding that ad-blocking practices do not constitute a deliberate hindrance of competitors or aggressive commercial practice since they allow for a fair outcome and balancing of interests between end-users, publishers and software producers. See also Federal Ministry for Economic Affairs and Energy, [Report by the Commission 'Competition Law 4.0'. A new competition framework for the digital economy](#), 2019 at p.49; and OECD, [Business Restrictions – Background note](#), 2020.
- ³⁵ Ibid J. Crémer, Y.-A. de Montjoye and H. Schweitzer, at p. 32.
- ³⁶ See [Facebook submission](#) to the DSA consultation.
- ³⁷ For an overview see R. Fisey and A. de Stree, [Data sharing for digital markets contestability: towards a governance framework](#), CERRE, 2020. See also UK CMA, [Online platforms and digital advertising](#), 2020.
- ³⁸ See Federal Ministry for Economic Affairs and Energy report above.
- ³⁹ See CERRE report above at p. 15.
- ⁴⁰ See W. Kerber and H. Schweitzer, ['Interoperability in the Digital Economy'](#), *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 2017.
- ⁴¹ Ibid.
- ⁴² See Article 5 of [Directive 2002/19/EC](#).
- ⁴³ See CNMC's [submission](#) to the DSA consultation.
- ⁴⁴ See OECD, [Abuse of Dominance in Digital Markets](#), 2020 at 58.
- ⁴⁵ See Nordemann in Evas T. and Lomba N., [Digital services act, European added value assessment](#), EPRS, 2020.
- ⁴⁶ See P. Marsden, [Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement](#), 2020.
- ⁴⁷ See BEREC submission to the DSA consultation above.
- ⁴⁸ See CERRE report above at p. 18.
- ⁴⁹ See [Report of the Digital Competition Expert Panel, Unlocking digital competition](#), 2019 at p. 2.
- ⁵⁰ See Ireland's [submission](#) to the DSA consultation. See also the Chillin'Competition blog, [To Comment or not to Comment on the Ex Ante Rules for Gatekeeper](#), 2020.

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