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# Superstar firms

*A threat to competition and democracy?*

# Is there a problem with competition?

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**Superstars Firms: a threat for competition and democracy?**

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## Big Tech “superstars”: antitrust and beyond

- The **excessive power of “Big Techs” goes beyond economics**, requiring a strong political reaction. Market power, innovation, privacy, illegal content, political interferences, ..... The debate is multidimensional and affects a number of different public policies
- But I will only elaborate on the **limited role for competition law enforcement**
- Vestager: *“rules that put order into chaos”*
- There is a **need to complement “ex-post” enforcement** with “ex-ante” regulation, to compensate underenforcement

# EU Traditional competition enforcement paradigm

- **Four areas of Competition Policy enforcement:**
  - Fight against cartels (art. 101 TFEU)
  - Fight against other non-competitive agreements (art, 101 TFEU) and abuses of dominant position (art.102 TFEU)
  - Merger control (EU Regulation 139/2004)
  - State Aid control (arts. 107 and 108 TFEU)
- Enforcement of **arts. 101 and 102 is a case by case “*expost*” activity**, based on ex-officio investigations, third party complaints or leniency applicants
- Enforcement control of **Merger Regulation and State Aid is an “*exante*” activity**
- The European Commission, and when appropriate National Competition Authorities (except in State Aid) carry out investigations and adopt Decisions. The European Court of Justice can revise those Decisions

# Is competition enforcement working in the digital era?

- A real challenge both economic and political, in the EU and across the world
- **Underenforcement is a fact**, in particular due to the network effects characteristic of big technological platforms
- **Lengthy and complex investigations** are not adequate against fast changing markets. The timeframe for investigations and the standard of proof required are affected
- The digital economy accelerates existing trends towards **higher degree of market concentration**

## The trigger of the new approach: the Google Shopping case

- The first complaints about Google search abuses were tabled at the EU Commission in 2009
- The **formal investigation started in November 2010**, on “self-preferencing” in the search engine queries as well as on other possible abuses: scrapping, exclusivity dealings, ...
- Three rounds of analysis of Google’s proposals to erradicate those abuses did not provide satisfactory legally binding “commitments” (art. 9 Regulation 1/2003)
- Therefore, the Commission issued an Statement of Objections against parts of the infractions under investigation. **In June 2017 adopted a prohibition Decision on “Google Shopping”**, with a 2.4 bn € fine. In June 2017, the ECJ upheld the Commission Decision
- The Commission adopted Decisions against Big Tech’s abusive practices, including two other against Google: Android and AdSense cases. More investigations on course

## Merger control and Big Techs: the “Killer acquisitions”

- The **degree of concentration in some economic sectors augmented**, due to several factors including M&A
- **Big Techs have been very active** over the last years acquiring potential competitors at horizontal as well as vertical levels. Close to 500 acquisitions were recorded, almost all were cleared by competition authorities. In many cases, the acquired firms had turnover levels below the thresholds contemplated in Merger regulations.
- “*Ex-post*” analysis showed the existence of **underenforcement**, because competition authorities failed, under the present rules, to fully take into account the impact of those “*killer acquisitions*” to diminish effective competition or to reduce innovation incentives in the markets affected

# The 2019 EU Commission Report: a turning point

- There is a need to understand how digitization is transforming the way markets and companies operate
  - Do the present EU competition rules are still valid?
  - Is enough to adapt enforcement practices to cope with digital markets and big digital platforms?
- The 2019 EU Commission Report:
  - Digitization is the origin of new markets, new players and new business models
  - Digital services are often provided at zero-Price, building big data bases allowing strong market power
  - There are risks linked to the control of data
  - Competition enforcement needs to address the power of big online platforms, acting at the same time as “players” and “referees”
  - Some Mergers can have as a consequence to kill innovation



# Features of the digital economy (I)

- **Data as a vital tool**, adding to incumbents's advantage. Access to personalised information
- **Economies of scope**: barriers to entry, tying and exclusive dealing –among other abuses- easier due to huge data bases and big online platforms
- **High returns to scale**, with potential anti-competitive effect
- **Network externalities**. Costs less than proportionate to the number of customers served. *"Winner take all"* markets, because snow-ball effects
- **Switching** to other platform (*"ecosystem"*) is often difficult
- Large incumbents (*"Big Techs"*) are very **difficult to dislodge**

## Features of the digital economy (II)

- Markets do not always self-correct. Even if incumbents do not engage in any specific behaviour, there may be a tendency to persistent and growing market power
- Big Tech as “*natural monopolies*” or “*essential facilities*”?
- Platforms as their own regulators?
- Behavioural biases (*Motta*):
  - Default bias: users tend to use pre-installed apps
  - Prominence: users don't go beyond first search results
  - Impatience: we don't cancel automatic renewals or subscriptions, we agree to give away privacy rights...
  - All these biases affect choices, mostly in favour of incumbents

## EU legislative initiatives on digital

- In 2022 the EU adopted two relevant legislative pieces: the **Digital Services Act (DSA)** and the **Digital Markets Act (DMA)**. DMA will come into force in the coming months, whereas DSA will take full effect by 2024
- Other EU Regulations (or legislative proposals) on digital:
  - General Data Protection Regulation (**GDPR**), adopted in 2016, sets guidelines for the collection and processing of personal information
  - **Data Government Act**, adopted in May 2022, applicable from September 2023, aimed to create the processes and structures to facilitate data sharing by companies, individuals and public sector
  - **Data Act**, Commission proposal (February 2022) aimed to harmonise rules on the fair access to data
  - **Artificial Intelligence Act** (April 2021) Proposal for a Regulation laying down harmonised rules on Artificial Intelligence

# Digital Services Act

- DSA pretends to counter illegal products, services and content
- And to:
  - foster innovation, growth and competitiveness
  - facilitate scaling-up of smaller platforms, SMEs and start-ups
  - rebalance responsibilities of users, platforms and public authorities
  - protect consumer rights online
  - increase transparency and accountability of platforms
  - mitigate risks of manipulation and disinformation

# Benefits of DSA, according to the Commission

- For citizens:
  - More choice, lower prices
  - Less exposure to illegal content
  - Better protection of fundamental rights
- For providers of services:
  - Legal certainty, harmonisation of rules
  - Easier to start-ups and to scale-up
- For business users:
  - More choice, lower prices
  - Access to EU-wide markets through platforms
  - Level playing field against providers of illegal content
- For society at large
  - Greater democratic control and oversight over systemic platforms
  - Mitigation of risks of manipulation and misinformation

# DSA content(I)

- Who are covered?
  - Intermediary services offering network infrastructure: internet service providers, access providers, domain name registrars, hosting services
  - Online platforms: online marketplaces, app stores, collaborative economy platforms, social media platforms
- Obligations to online platforms: transparency, respect to fundamental rights, complaint and redress mechanisms, control of abusive notices, reporting criminal offences, ...
  - Measures to counter illegal goods, services or content online
  - New obligations on traceability of business users in online market places
  - Effective safeguards for users, including the possibility to challenge platforms' content moderation decisions
  - Transparency measures for online platforms on a variety of issues, including algorithms used for recommendations
  - Obligations for very large platforms to prevent the misuse of their systems
  - Access for researchers to key data of the largest platforms
  - Oversight structure to address the complexity of the online space

## DSA content (II)

- Specific obligations for very large online platforms (reaching more than 10% EU population)
  - Risk-management obligations and “Compliance Officer”
  - External risk auditing and public accountability
  - Transparency of “recommender systems” and user choice for access to information
  - Data sharing with authorities and researchers
  - Code of Conduct
  - Crisis response cooperation
- Sanctions: fines up to maximum 6% annual turnover or 5% of average daily turnover

# Digital Markets Act

- The purpose of DMA is to ensure a level playing field for all the digital companies, regardless of their size
- DMA establish criteria to qualify as “gatekeepers” (GKs)
  - Providers of “core platform services” (CPSs) with a significant impact in the single market
  - Operating CPSs which serves as an important gateway for users to reach other users, linking a large user base to a large number of businesses
  - Enjoying an entrenched and durable position in the market
  - With annual turnover of at least 7.5 bn € in each of the last three years
  - Or market capitalisation to at least 75 bn in the last financial year
  - And providing services with more than 45 M € monthly end users and more than 10.000 business users established in EEA during the last year



# Core platform services

- Online intermediation services
- Online search services
- Online social networking services
- Video-sharing platform services
- Number-independent interpersonal communication services
- Operating systems
- Cloud computing services
- Online advertising services provided by any of the platform services
- Web browsers
- Virtual assistants

## Obligations for Gatekeepers: “Do’s”

- Allow end users to easily un-install pre-installed apps, or change default settings
- Allow end users to install third party apps or app stores that use or interoperate with the operating system of the GK
- Allow interoperability in message services (Whatsapp, ...)
- Allow end users to unsubscribe from CPS’s of the GK
- Allow their business users to access and use the data they generate in their use of the platform (“portability of data”)
- Provide companies advertising in the platform with the necessary tools and information to carry out their own verifications
- Allow their business users to promote their offer and conclude contracts with their customers outside the platform

## Obligations to GKs: “Dont’s”

- Refrain from combining and cross-using personal data sourced from CPSs to any other service, unless the end user authorised to do so
- Treat their own services and products more favourably than the similar ones offered by third parties in the platform (“self-preferencing” and “tying”)
- Prevent customers from linking up to businesses outside the platform: “multi-homing” and “switching”
- Ban users from un-installing any pre-installed software or apps if they wished so
- Ban “price-parity” clauses
- Use targeted advertisement, unless the users agree on

## Advantages of DMA

- Business depending of GKs will be able to offer their services in a fairer environment
- Innovators and start-ups will have new opportunities to compete and innovate without having to comply with unfair terms and conditions
- Consumers will have more and better services to choose, more opportunities to switch their provider, direct access to services and fairer prices
- GKs will keep all opportunities to innovate and offer services, but will not be allowed to use unfair practices

# Compliance

- If the GK does not comply, the Commission shall specify the measures to be adopted
- GKs are obliged to inform the Commission about their intentions to merge, regardless the obligation to notify “ex ante” to the Commission or to the competent NCAs
- The Commission can add new obligations through a market investigation,
- GKs are obliged to submit an Audit six months after its designation
- The Commission can decide to impose interim measures, if there are serious risks of damaging business users and end users rights
- And may also decide to close its investigation with legally binding commitments

# Market investigations and non-compliance decisions

- EU Commission will carry out market investigations to:
  - Qualify companies as GKs, if can comply with the DMA conditions in the near future
  - Update the obligations of GKs
- Commission Decisions:
  - Design remedies to tackle systematic infringements
  - In this case, the Commission can impose behavioural or structural remedies proportionate to the infringement committed
  - Structural remedies (*e.g. Divestitures*) if there is no equally effective behavioural ones, or its implementation will be more cumbersome
    - Is possible to understand that a “break-up” would be possible as “*ultima ratio*” in *case of systematic non-compliance*
- Additional remedies may be imposed, after a market investigation

# Consequences of non compliance

- Fines up to 10% of total worldwide annual turnover last year, and up to 20% in case of recidivism
- Commission can impose fines not exceeding 1% were a GK, intentionally or negligently,
  - Fails to provide information or supply it in an incorrect, misleading or incomplete manner
  - Fails to provide access to data bases and algorithms
  - Refuse to allow inspections
- Periodic penalty payments up to 5% of the average daily turnover, if the GK fails,
  - To comply with a Decision
  - To supply correct information
  - To ensure access to data bases and algorithms
  - To submit to an on-site inspection
  - To comply with with interim measures
  - To comply with legally binding commitments

## Would it be possible to break-up of Gatekeepers?

- The debate was intense in the US (“New Brandeisians”, some Democrats)
- Historic precedents: Standard Oil, AT&T
- Some voices in the EP, before the debate around DMA
- The theory of “essential facilities”, to liberalise natural monopolies in the 80’s and 90s: transport, energy, water, ... appeared again
- Will “break-up” options solve the real problems?
  - There are easiest ways to achieve results
  - Without dealing with complex legal problems
  - And tackling smaller implantation obstacles
- Enforcement through arts. 101 and 102 provided solutions (Microsoft case, ...)





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