



Digital Markets Act Impact Assessment support study

Executive Summary and Synthesis Report

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Digital Markets Act - Impact Assessment support study

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Abstract

The digitisation of services has driven widespread innovation, increased competition and consumer benefits. However, digitisation has also been associated with the ability of certain players to act as gatekeepers, with the power to impose unfair terms on dependent businesses to limit the scope for dynamic new entry.

Available evidence suggests that existing measures are insufficient to address these problems, and that Europe would benefit from the introduction of EU-wide legislation to apply ex ante regulatory obligations on gatekeeper platforms. The impact of this measure could be maximised by combining clear requirements in the legislation with the ability to apply more tailored solutions in cases where it is not possible to make the designation of gatekeepers or design of associated obligations entirely self-executing. Such measures would best be applied by the European Commission with the support of a network of experts from national administrations.

Unlocking the full potential of the platform economy could increase EU27 GDP by between EUR 43.7 and EUR 174.5 billion from 2019 to 2029, while a more diverse pool of innovation could create between 136,387 and 294,236 new jobs. Action to tackle gatekeeper power could also increase consumer surplus by around EUR 13 billion per year.

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Executive summary

Digital platforms are playing an increasingly important role in the economy and society, and have made significant contributions to the growth of the European economy and to the strengthening of the internal market. The digital economy was estimated in 2019 to account for between 4.5-15.5% of global GDP,¹ and nearly one quarter of online trade is cross-border.²

The digitisation of services has been associated with widespread innovation, increased competition and consumer benefits. However, digitisation has also been associated with the ability of certain players to act as gatekeepers, controlling access to the information that end-users see and the services they receive and controlling the functionality, positioning, terms and conditions available to businesses depending on those platforms.

There is widespread and compelling evidence from competition cases, as well as from case studies conducted for this study and feedback from stakeholders, that certain platforms have become vital gateways for business users and end-users, and that platforms which act as gatekeepers can impose unfair conditions on the businesses and application providers which depend on them, as well as engaging in practices which could ultimately exclude potential competitors from the market.

The power wielded by large gatekeeper platforms in turn risks concentrating R&D expenditure and undermining innovation and disruptive entry, as well as limiting the choice and variety of services available to end-users, and potentially increasing prices. Moreover, in the absence of action at EU level, action may be taken in different ways by Member States, risking the fragmentation of the single market and increased costs and frictions for platforms business users seeking to do business cross-border.

Available evidence suggests that existing measures are insufficient to address these problems, and that Europe would benefit from the introduction of EU-wide legislation which would apply ex ante regulatory obligations on platforms which have the ability to act as gatekeepers. The impact of this measure could be maximised by combining clear requirements directly in the legislation with the ability to conduct a case by case analysis and apply more flexible and tailored measures in cases where it is not possible to make the designation of gatekeepers or design of associated obligations entirely self-executing. The European Commission is best-placed to act as the regulatory body in applying and enforcing these measures, supported by a network of experts from national administrations.

Evidence suggests that unlocking the full potential of the platform economy could increase EU27 GDP by between EUR 43.7 and EUR 174.5 billion from 2019 to 2029. Increased R&D resulting from a more diverse pool of innovation could create between 136,387 and 294,236 new jobs. Moreover, if prices reduce inter alia as a result of increased competition and lower commission charges, estimates based on JRC calculations suggest that consumers could gain around EUR 13 billion per year.

¹ Value depends on definition – see https://unctad.org/en/PublicationsLibrary/der2019_overview_en.pdf

² <https://ecommercenews.eu/cross-border-ecommerce-europe-worth-e143-billion/>

1. Introduction

a. Political and legal context

Digital platforms facilitate interactions by digital means between two or more distinct but interdependent sets of users. There are many types of digital platforms, with different business models.³ Examples include online marketplaces, app stores, search engines, social media and collaborative economy platforms. Some digital platforms are inherently online, while others, such as Operating Systems, and the devices and technical functionality which can support digital interactions between application and service providers and end-users, may not be.

Digital platforms are playing an increasingly important role in the economy and society, and have made significant contributions to the growth of the European economy and to the strengthening of the internal market. The digital economy was estimated in 2019 to account for between 4.5-15.5% of global GDP,⁴ and nearly one quarter of online trade is understood to be cross-border.

However, while these developments are positive, some platforms have become extremely large due to the significant economies of scale and scope, direct and indirect network effects and data feedback loops that underpin their business models. There has been increasing concern among policy makers, businesses, consumer associations and the academic community that some of the practices of some of those large digital platforms reduce market contestability and innovation as well as lead to unfairness in relationships amongst platforms or between platforms and their users.

Already back in its 2015 Digital Single Market Communication, the Commission noted that 'the market power of some online platforms potentially raises concerns, particularly in relation to the most powerful platforms whose importance for other market participants is becoming increasingly critical'.⁵ In its 2016 Communication on Online Platforms, the Commission identified a series of concerns relating to potentially harmful trading practices in relations between platforms and their professional users.⁶ The Commission made a legislative proposal which led to the adoption of the Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (the so-called P2B Regulation).⁷ The Commission also established an Observatory for the Online Platform Economy to monitor emerging issues and new developments in the online platform economy.⁸

Since then, many independent studies as well as reports adopted or commissioned by national and international authorities have pointed to the need, given the specific characteristics of the digital economy, to adapt enforcement mechanisms under competition

³ Commission Staff Working Document of 25 May 2016, Online Platforms, SWD(2016) 172.

⁴ Value depends on definition – see https://unctad.org/en/PublicationsLibrary/der2019_overview_en.pdf

⁵ Communication from the Commission of 6 May 2015, A Digital Single Market Strategy for Europe, COM(2015)192; p.9.

⁶ Communication from the Commission of 25 May 2016, Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe, COM(2016) 288. Also Ecorys (2017) *Business-to-Business relations in the online platform environment*, Study for the European Commission; EY (2018), *Contractual relationships between online platforms and their professional users*, Study for the European Commission.

⁷ Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ [2019] L 186/55.

⁸ Commission Decision of 26 April 2018 on setting up the group of experts for the Observatory on the Online Platform Economy, C(2018) 2393. The work of the Observatory has included aspects such as the measurement of the online platform economy, data access issues, and problems related to differentiated treatment in online platforms. In 2020 it will devote its work also to the topics of transparency in online advertising and market power of platforms, in particular as regards criteria to define the platforms of strategic economic power.

law and/or to adopt an *ex ante* regulatory framework to complement competition rules.⁹ In particular, some reports mention the need to alleviate anticompetitive leverage and self-preferencing, to stimulate data mobility and data sharing as well as interoperability and the need to strengthen merger review in the digital economy. On the basis of those different reports, several policymakers around the world are envisaging adopting specific asymmetric rules on large gatekeepers in order to ensure fair and effective competition in the digital economy. Investigations or initiatives are being pursued in major jurisdictions outside the EU such as the UK, Japan, Australia and the US. These include advice from the UK's Competition and Markets Authority (CMA) to the Government to establish a "new pro-competition regime for digital markets".¹⁰ Some initiatives have also been taken or are being explored by EU Member States including a proposed amendment to the German Competition Act,¹¹ and a proposed law to enhance consumer choice online in France.¹²

In its 2020 Digital Strategy Communication, the Commission announced that it will 'further explore, in the context of the Digital Services Act package, *ex ante* rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants.'¹³ The Council of the EU notes in its Conclusions of June 2020 that "certain very large online platform companies (...) draw extensive assets, including vast amounts of data, which may turn them into gate-keepers in the digital economy. This may risk restricting the ability of new innovators to successfully enter the market, and limiting the choice for consumers and supports 'the Commission's intention to collect evidence of the issue and further explore *ex ante* rules to ensure that markets characterised by large platforms with significant network effects, acting as gate-keepers, remain fair and contestable for innovators, businesses and new market entrants.'¹⁴ In its Resolution of October 2020, the European Parliament called for 'an internal market instrument imposing *ex ante* regulatory remedies on those systemic operators with significant market power has the potential to open up markets to new entrants, including SMEs, entrepreneurs, and start-ups, thereby promoting consumer choice and driving innovation beyond what can be achieved by competition law enforcement alone'¹⁵.

Against this backdrop, the European Commission has put forward a "Digital Markets Act", which would address problems arising as a result of gatekeeper power in certain digital platforms on a pan-EU level.

b. Objectives and scope of the Impact Assessment

This study seeks to contribute to the Commission's reflection on the need for *ex ante* regulation of gatekeeper platforms and to assist in the development of the Impact Assessment for the Digital Markets Act. Key aspects of the analysis are to:

⁹ Some of those reports are very well summarised in W. Kerber (2019), *Updating Competition Policy for the Digital Economy? An Analysis of Recent Reports in Germany, UK, EU, and Australia*, available at SSRN and S.E. Ennis and A. Fletcher (2020), *Developing international perspectives on digital competition policy*, available at SSRN.

¹⁰ CMA December 2020 "A new pro-competition regime for digital markets" https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice_-.pdf

¹¹ GWB-Digitalisierungsgesetz, government bill of 9 September 2020 www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf?__blob=publicationFile&v=6. On 30 November 2020, the bill was before the Bundestag's Committee on Economic Affairs and Energy.

¹² http://www.assemblee-nationale.fr/dyn/15/textes/l15b2701_proposition-loi

¹³ Communication from the Commission of 19 February 2020, Shaping Europe's digital future, COM(2020) 67, p.10.

¹⁴ Conclusions of the Council of 9 June 2020 on Shaping Europe's Digital Future, point 50 available at <https://www.consilium.europa.eu/en/press/press-releases/2020/06/09/shaping-europe-s-digital-future-council-adopts-conclusions/>

¹⁵ European Parliament resolution of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL), in particular point 73, available at : https://www.europarl.europa.eu/doceo/document/TA-9-2020-10-20-TOC_EN.html

- identify the main issues stemming from gatekeeper power within online platform ecosystems;
- analyse the extent to which those issues can be addressed through the existing competition and regulatory framework at the EU and national level;
- identify potential regulatory gaps;
- assist in identifying policy options regarding parameters and types of intervention;
- provide evidence to enable the comparison of those options; and
- analyse the impact of the options on the economy and society, compared with maintaining the status quo.

c. Methodology and approach to the Impact Assessment

In conducting the study, we have followed the steps established in the Better Regulation Guidelines, as illustrated in the following figure.

Figure 1. Impact assessment workflow specified in the Better Regulation Guidelines



As part of the evidence gathering process we:

- conducted 10 case studies illustrating challenges associated with major gatekeeper platforms;
- carried out 27 interviews with stakeholders and 7 interviews with national authorities involved in the investigation and/or regulation of online platforms;
- invited feedback from national regulatory authorities operating in the electronic communication sector, as well as authorities engaged in data protection;
- conducted 3 focus groups involving consumers, business users, and service and software developers;
- convened a panel of distinguished academics in the fields of computer sciences, law, economics and management, which provided insights for our analysis at two stages of the process;
- identified key indicators of the power exercised by large platforms and gathered data for a selection of platforms in different fields and varying sizes to conduct sensitivity tests on the threshold for intervention;
- reviewed ex ante regulatory practices in other sectors as well as national initiatives aimed at addressing perceived challenges associated with bottleneck platforms in Europe and internationally in order to identify potential thresholds and remedies which could be relevant to online platforms;
- compared different options to assess their effectiveness and efficiency in achieving the desired outcomes, as well as the degree to which they would add value beyond the nationally specific approach that prevails today; and

- identified the economic, social and environmental impact of the different options with reference to relevant literature and input output analysis.

The findings from our research as well as the supporting evidence are included within the Annexes prepared in conjunction with this synopsis report. The contents are listed in the following table.

Reference	Title
Annex 1	Detailed Impact Assessment concerning the planned Digital Markets Act (supporting analysis)
Annex 2	Analysis of options
Annex 3	Analytical methods
Annex 4	Case studies
Annex 5	Benchmarking of solutions
Annex 6	Expert panel minutes
Annex 7	Stakeholder feedback

2. Analysis of the issues

a. What is the problem and why is it a problem?

i. Challenges today

Online trading and communications is becoming central to the European economy

Digital services and applications are rapidly becoming central to the lives and livelihoods of Europeans. The COVID pandemic has further accelerated and enhanced the role of online platforms in relation to the off-line world. Following the lockdowns introduced in the Spring of 2020, one global survey found that consumers made greater use of video and music streaming (cited by 57% and 39% respectively), and spent more time on social media and mobile applications (cited by 47% and 36% respectively).¹⁶ Online collaboration tools have also seen substantial take-up, and these trends are expected to persist as the economy recovers from the pandemic.¹⁷

Cross-border trade has also been boosted by the digital revolution. **Almost 24% of total online trade in Europe is cross-border**, and in turn, increased online trade has increased the importance of online intermediaries. **It is estimated that by 2025 online marketplaces will represent 65% of cross-border online sales in Europe.**¹⁸

Certain players have been able to establish themselves as gatekeepers

¹⁶ Hootsuite Digital 2020 global statshot report <https://thenextweb.com/growth-quarters/2020/04/24/report-most-important-data-on-digital-audiences-during-coronavirus/>

¹⁷ A survey of global decisions makers by DMEXCO found that 78% of respondents considered that working from home would be much more accepted than before, while 59% considered that communication and collaboration tools such as Slack, Asana and Microsoft Teams would become more important.

¹⁸ See Detailed Impact Assessment – Annex 1 to this report

The digitisation of services has been associated with widespread innovation. However, **digitisation has also been associated with the ability of certain players to act as gatekeepers, controlling access to the information that end-users see and the services they receive and controlling the functionality, positioning, terms and conditions available to businesses and application providers depending on those platforms.**

For example, **nearly half of companies** responding to a Statista/ UPS survey in July 2020 concerning e-Commerce in Europe said they **sold goods and services through online marketplaces**.¹⁹ Amazon and eBay were clear leaders in this space. A major travel portal interviewed for this study observed that nearly half of its traffic was referred from Google. **The average Italian spent more than 45 hours using Facebook in the course of December 2019 and 24 hours using Google – far outstripping the time spent on other sites.**²⁰ In countries such as the Netherlands, use of Microsoft's Office 365 suite (coupling productivity software with cloud services) grew from just 12% of companies in 2015 to 56% in 2019.²¹ **58% of Germans booking accommodation between 2019-2020 had done so through Booking.com.**²²

Gatekeepers can undermine the trading conditions for dependent business users and/or control the conditions for innovation and entry by independent firms

The gatekeeper role played by certain platforms can in turn result in **business users becoming dependent on those platforms to access customers**, and enable platforms to **control the terms and conditions of access.**

By virtue of their control over customers in markets with strong network effects, alongside access to data and financial power, gatekeeper platforms may also be able to **maintain their position and leverage their power from one market into another.**

The resulting concentration of control over certain aspects of the value chain can result in **unfair terms for dependent firms**, while **potential competitors, which might otherwise offer an alternative route to market, may find it challenging to gain a foothold in the market.**

Large gatekeeper platforms which have a strategy to extend their business to provide a wider “ecosystem” of services or which form part of digital conglomerates can also engage in **self-preferencing and bundling practices** which could undermine the position of rivals.

Exclusionary or discriminatory conduct by large digital platforms could lead to the exit of otherwise efficient innovative players, or a failure of potential entrants to launch new services in competition with or over digital platforms. In turn, limitations on the potential for competitors to expand and control over prices for intermediation or advertising, could result in **reduced choice for consumers or higher prices over time.**

Another important effect of the exercise of control by large digital platforms is that they can **inhibit innovation** by potential alternative platforms or by applications providers operating on their platform.

While gatekeeper platforms may themselves be significant drivers and sponsors of innovation, there may be **unequal opportunities for innovation**, for example if alternative application or platform providers lack access to the same range of market data or lack access to the full functionality of the platform concerned, or if large digital platforms use their position of control to impede the entry or expansion of potential challengers. As noted in

¹⁹ Idem.

²⁰ Statista

²¹ Statistic office productivity software market share worldwide

²² Statista

2018 research on the relationship between platforms, innovation and entrepreneurship by Nambisan, Siegel and Kenney.²³

“Never before has so much of entrepreneurs’ decision-making, strategies and success been at the mercy of an external entity as is evident in the case of the platform economy. Platform firms can “tax” the entrepreneur’s income, decide on the appropriateness of the entrepreneur’s creation, and make a wide variety of other unilateral decisions that could critically shape the survival and continued success of the new venture.”

Ultimately, if there is no realistic prospect to create an effective competing platform or application to rival those belonging to existing large digital platforms, alternative platform and application developers may focus their business strategy and innovation goals solely on aspects that would be attractive for the leading platform i.e. complementary innovation with a view to acquisition, rather than pursuing strategies aimed at substituting or disrupting the business models of existing online platforms, which may generate greater consumer welfare in the long run.

Competition cases, case studies and interviews suggest that the problem is widespread

The prevalence of unfair practices by large gatekeeper platforms is evidenced not only in the number of cases that have been investigated by EU and national competition authorities (**Cullen International’s database lists around 30 competition investigations in the EU since 2015**), but also from common themes raised by interviewees and in case studies prepared for this report.

Examples of conduct or alleged conduct which have caused concern include:

- The **misuse of third party data** for the competitive benefit of the platform’s own retail services²⁴.
- Contract terms which seek to **limit third parties’ ability to compete on price or develop direct relationships with customers**.²⁵
- **Linking access to the platform to unrelated conditions**, such as “investment” or a requirement to make use of the platform’s “single sign-on” services²⁶.
- **Refusal to supply or late supply of data** concerning a business users’ own customers,²⁷ and lack of standardisation of data to facilitate data portability.

²³ Nambisan, Siegel and Kenney (2018) On Open Innovation, platforms and entrepreneurship https://brie.berkeley.edu/sites/default/files/brie_wp_20185.pdf

²⁴ In July 2019, the European Commission opened an investigation into alleged anti-competitive use of third party seller data by Amazon, with a focus on how this use of data impacts competition. During 2020 testimony before the US Congress, Amazon CEO Jeff Bezos noted that he could guarantee that the policy [not to access and use seller data when making business decisions] had not been violated. Branded manufacturers interviewed for the support study have also expressed concerns about the ability of Amazon to use data on third party transactions to launch their own brands. The Italian NCA is also investigating an alleged exclusionary abuse of dominance by Google in the form of “internal-external discrimination”, which consists in its display advertising intermediation services relying on user data that Google collects from other, unrelated services or applications in which it is dominant; and not making this data available for competing providers of display ad intermediation services. The German NCA has also found that Facebook engaged in exploitative abuse of consumers’ data. Data sources included both subsidiaries and third party websites which made use of Facebook APIs, including the Facebook login option.

²⁵ These practices include so-called “anti-steering” clauses and “Most Favoured Nation” clauses, whereby business users making use of a platform are prevented from advertising their own subscription services or from charging a lower price on other channels to market. Exclusivity clauses can also impede competition from emerging

²⁶ These issues were raised in the context of interviews conducted for the study.

²⁷ This issue was raised by several stakeholders in the context of interviews

- Alleged **manipulation of listings and rankings** to favour the platform's own retail services.²⁸
- **Other forms of self-preferencing, tying and bundling** including pre-installation and preferential marketing, which seek to give an advantage to the platform's own retail services, compared with third parties.²⁹
- **Excessive commissions** for sales via app stores or e-commerce sites. These fees can reach up to 30% of the service value.³⁰
- **Lack of access to key functionality embedded in the device, which enables innovation by third parties**, such as NFC chips used for digital payment solutions³¹.
- **Denial of access to key services and barriers to interoperability between key services and ancillary applications.**³²

The depth and extensive nature of data gathered by large gatekeeper platforms, also enables better targeting of advertising and tailoring of search results, and a **failure to engage in data sharing**, has been cited as a key barrier to the development of alternative platforms and innovative services which could draw on the data concerned.³³

Problems such as these are further elaborated in Annex 1.

²⁸ The Google shopping case, which resulted in a €2.42bn fine provides a clear example whereby Google gave its own comparison shopping service an illegal advantage by promoting it in search results, and demoting those of competitors. Ms Vestager has also indicated that the Commission is looking into Google's job search feature, which was recently launched in parts of the EU. In this context, it should be noted that the Italian NCA is conducting an ongoing investigation on whether Amazon is penalising third parties which do not use its fulfilment services through worse search rankings. This issue was also raised by multiple parties interviewed for the study.

²⁹ There are multiple examples of these practices, including Amazon's bundling of premium shipping with on-demand video, pre-installation of general search applications and web browser as addressed in the 2018 Google Android case, pre-installation and marketing of Apple's music service, and multiple cases and allegations concerning tying and bundling of OS or office suite with other applications by Microsoft. Stakeholders interviewed for the study cited concerns over the bundling of Office with cloud-computing services, and the potential impact this may have on the competitive cloud services market segment

³⁰ Complaints or allegations have been made in particular in relation to the commissions charged by Apple on the app store, as well as the commissions charged by Amazon and Booking.com

³¹ In contrast to smartphone manufacturers relying on Android, Apple retains exclusive access to the NFC chip in every iPhone, which enable contactless payments.

³² This is the subject of a recent complaint by the FTC against Facebook. The complaint alleges that Facebook, over many years, has imposed anticompetitive conditions on third-party software developers' access to valuable interconnections to its platform, such as the application programming interfaces ("APIs") that allow the developers' apps to interface with Facebook. In particular, Facebook allegedly has made key APIs available to third-party applications only on the condition that they refrain from developing competing functionalities, and from connecting with or promoting other social networking services. The Italian NCA is investigating whether Google has abused its dominance in the market for licensable smart mobile operating systems by refusing to integrate energy company Enel's X Charge app in its Android Auto app. According to the NCA, this conduct may hinder competition on the merits and limit consumer choice by excluding Enel's smartphone app for users of electric vehicles (EVs) which provides a location service that competes with Google Map. A complaint has also been filed against Apple by tracking app provider Tile. Tile reportedly argues that Apple has made it more difficult for users to operate its product on their smartphones compared to Apple's own rival application, FindMy (pre-installed in the iOS operating system), by selectively disabling features that allow for a seamless user experience. In the course of investigating Amazon's conduct towards marketplace sellers, the German and Austrian competition authorities identified concerns over exclusive access of the rating service Vine, which was reserved for suppliers of Amazon Retail.

³³ Members of the expert panel convened for this study considered that data was an important source of innovation and that while data access should not be granted in all cases, access to non-critical data could enable innovation in other market segments

Fragmented efforts to tackle the problems leads to legal uncertainty and barriers to the single market

The well-documented and extensive nature of problems associated with gatekeepers in digital platforms has led various countries within and outside the EU to take or consider their own measures to address gatekeeper power.

These include advice from the UK's Competition and Markets Authority (CMA) to the Government to establish a "new pro-competition regime for digital markets",³⁴ while initiatives within the EU include a proposed amendment to the German Competition Act,³⁵ and a proposed law to enhance consumer choice online in France.³⁶

However, fragmented approaches to addressing a problem which concerns cross-border platforms and is pan-European in scope, risks creating its own problems by increasing legal uncertainty and creating a plethora of different rules which impact the ability of platforms (and especially entrants or small scale platforms) to operate cross border, and impede business users including SME from providing services across the EU.

ii. What are the causes of the problem?

Digital platforms have been able to build a strong position in different business areas for a range of reasons.

A key challenge concerns **switching barriers**. Even though in theory, customers could switch to a different device and associated OS when they make a new purchase, few do so. For example, A study by research firm GfK in 2011 said that 84% of iPhone owners planned to purchase another Apple handset when they replace their cellphone.³⁷ Other factors which contribute to sustaining switching barriers and impeding multi-homing by consumers, even in cases where alternatives are readily accessible via the Internet include consumer inertia,³⁸ while contractual practices such as anti-steering or "most favoured nation" clauses, further limit the incentives for consumers to multi-home.³⁹

Moreover, for certain types of platforms, **strong network effects** can have a self-reinforcing effect on the leading position of the main player and make it difficult for users to switch, as noted in comments made in the consumer focus group for this study which highlighted the advantages of using platforms which were used by many others "to connect".⁴⁰ The depth of stored user-generated content on social media sites and cloud computing services or data lockers can also present a barrier to switching or multi-homing for both consumers and corporate users of these services.⁴¹

³⁴ CMA December 2020 "A new pro-competition regime for digital markets"
https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice_-.pdf

³⁵ GWB-Digitalisierungsgesetz, government bill of 9 September 2020
www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf?__blob=publicationFile&v=6. On 30 November 2020, the bill was before the Bundestag's Committee on Economic Affairs and Energy.

³⁶ http://www.assemblee-nationale.fr/dyn/15/textes/l15b2701_proposition-loi

³⁷ <https://marketrealist.com/2014/02/ecosystem/>

³⁸ Consumer inertia, coupled with a perception that existing services are "good enough" (see feedback from consumer focus group), can deter consumers from exploring other options. Although not a new phenomenon, consumer inertia can play an important role in the digital economy where services are mostly provided (and new services added) for "free". See https://www.researchgate.net/publication/336663190_Consumer_Inertia_the_New_Economy_and_EU_Competition_Law

³⁹ Idem.

⁴⁰ ICF/WIK consumer focus group group 2020

⁴¹ For example, transferring music purchased on iTunes to the Android system can be complex, requiring various manual interventions. <https://www.androidauthority.com/how-to-transfer-music-itunes-android-230232/> Similar drivers underlie challenges with vendor lock-in for corporations relying on cloud-based productivity applications. <https://journalofcloudcomputing.springeropen.com/articles/10.1186/s13677-016-0054->

The scale of the impact of being locked out of these distribution channels can be seen through the example of Epic Games, which suffered a reduction in revenues of USD38m between June and August 2020 after Apple cancelled its developer account due to a dispute over commission fees.⁴⁸

Potentially excessive commission fees may also result in higher charges to consumers than would otherwise be the case. As an illustration, if Apple's commission fee were halved from 30% to 15%, and cost savings were passed onto consumers, this could result in an increase of consumer surplus of around 490 Mio € in the EU.⁴⁹ Alternatively, part or all of these savings could be reinvested in innovative features by the companies affected.

iv. How will the problem evolve?

The scale of the problem is expected to grow, as the traditional economy increasingly moves online, and as sectors which previously focused on physical sales exploit digital channels – a move that has been accelerated during the COVID crisis.

A segment by segment analysis by the study team suggests that, in most areas, large platforms are expected to maintain an equal or even higher share of users in the core market segments in which they operate, a trend which is likely to perpetuate dependency by small businesses and application providers.⁵⁰

There are a number of measures which apply to the platform economy at EU level. These include the Platform to Business (P2B) Regulation.⁵¹ Anti-trust provisions associated with competition law also can and has been used to address some of the problems identified. However, there is evidence that these measures are likely to be insufficient in addressing core challenges identified in section i. The P2B Regulation has a limited scope of application,⁵² addresses a limited number of potentially harmful practices, and enforcement is in many cases limited to imposing “transparency” requirements. Meanwhile, competition law is not always an ideal solution due to challenges in applying the market definition concept in multi-sided markets, lengthy timeframes,⁵³ high legal thresholds to prove abuse, and the backward-looking nature of intervention, which may fail to address problems on an ongoing basis.

The fact that problems keep recurring over time⁵⁴ or in similar situations,⁵⁵ provides an indication that existing measures such as competition law have not been effective in addressing the issues in a systematic and long-term manner.

⁴⁸ , Epic Games circumvented Apples guidelines by giving customers (players of the popular online game Fortnite) direct discounts on their website. In reaction to Epic Games attempt to bypass Apple's AppStore commission fees (30%), Apple cancelled the developer account of Epic Games.

⁴⁹ Estimations by the study team based on Statista data

⁵⁰ For example, Google's Chrome web-browser is a clear market leader and has gained market share. Google also dominates search, with around 95% market share in the EU27, while Facebook (with Instagram) controls over 90% of the social media revenues, a figure which is expected to remain stable. Mobile operating systems are expected for the most part to be provided by only two companies with limited switching, and Amazon is expected to expand its position in e-commerce at the expense of smaller players. Concerns have also been raised about the conduct of platforms which have a strong position in specific market segments, which are used by a significant proportion of users. Cloud services are in general competitively provided, but bundling with key productivity software and challenges with switching present a risk to the future contestability of this sector. Although this segment is also competitively served today, similar concerns (relating to leverage) have been raised in the context of video sharing platform services.

⁵¹ [Regulation \(EU\) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services](#)

⁵² The P2B Regulation applies to online intermediation services (e.g. online marketplaces, app stores, social media for businesses, price comparison tools) and, only for certain provisions, to online search engines

⁵³ For example, the European Commission opened its formal investigation into Google on 30 November 2010 and issued first of its (so far) three decisions on 27 June 2017 (and the appeal is still pending).

⁵⁴ One example is the bundling practices of Microsoft, respectively concerning Windows Media, Internet Explorer, bundling of Office with cloud services and recently the filing of a complaint into bundling of Teams

The insufficiency of existing measures at EU level to address the identified problems is also evidenced by the fact that a number of Member States have taken steps towards action at national level to address problems associated with large gatekeeper platforms. This is for example the case in France, through the draft law to enhance consumer choice online,⁵⁶ and Germany, through the Government bill for the 10th amendment to the German Competition Act (GWB-Digitalisierungsgesetz).⁵⁷ Action for the Government to establish a “new pro-competition regime for digital markets” has also been proposed by the UK CMA.⁵⁸

b. Why should the EU Act?

The intrinsic and systemic cross-border nature of the services provided by the large online platforms implies that no Member State alone can reach the objectives effectively. Moreover, large online platforms benefiting from significant economies of scale and acting as gatekeepers may be legally established in one Member State, but provide their services to almost the entire EU population.

Stakeholders interviewed for this study⁵⁹ were of a common view that an EU-wide solution was needed, as was the electronic communications regulators’ group BEREC, and the expert group convened for this study.⁶⁰

Although some national administrations such as those in France and Germany, have taken steps to implement national measures, these may be seen as supportive of and potentially complementary to EU solutions. Indeed, the report prepared by the French Economic Affairs Commission in the context of the draft legislation under preparation in France recommends that France should fully support the European Commission’s efforts to create ex ante regulation of large digital platforms via the Digital Services Act.

EU-level action in this field would create additional clarity not only for business users of platforms, but also large gatekeepers and other platforms themselves. This is because a proliferation of different measures at national level could raise compliance costs and complexity, hampering the ability of platforms, large and small, as well as dependent users (and especially SMEs) to operate cross-border.

Harmonised rule-sets are also important for European consumers and businesses, to ensure that they benefit from a similar freedom of choice across the EU as well as harmonised application of any rules that may directly affect them.

c. What should be achieved?

In view of the threats to the internal market as well as the challenges to competition created by the conduct of large gatekeeper platforms in an increasingly digital economy, the aim of a potential ex ante measure should be to ensure the proper functioning of the internal market by promoting a fair and contestable online platform environment.

More specifically, as we have identified problems as regards unfair conduct towards business users as well as barriers to competition and threats to the integrity of the single market, the ex ante measure should seek to:

⁵⁵ In a similar fashion to the previous cases which involved exploitation of Microsoft’s position in PC operating systems to leverage into downstream markets, similar complaints have been made (and abuse found in certain cases) around the potential exploitation of operating systems developed by Apple and Google, which power a large portion of handheld devices.

⁵⁶ PROPOSITION DE LOI *visant à garantir le libre choix du consommateur dans le cyberspace*

⁵⁷ GWB-Digitalisierungsgesetz, government bill of 9 September 2020 www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf?__blob=publicationFile&v=6. On 30 November 2020, the bill was before the Bundestag’s Committee on Economic Affairs and Energy.

⁵⁸ https://assets.publishing.service.gov.uk/media/5f9e7567e90e07562f98286c/Digital_Taskforce_-_Advice_-.pdf

⁵⁹ See Annex 7

⁶⁰ See Annex 6

- address gatekeepers' unfair conduct;
- address market failures to ensure contestable and competitive digital markets for increased innovation and consumer choice; and
- enhance coherence and legal certainty to preserve the internal market.

d. Who should fall within the scope of the measures?

The identified problems encompass a range of online services and digital platforms. It is therefore recommended that the **DMA should have a wide scope**.

From the problem definition as well as the case studies, we note that the types of services in which challenges have been identified or could emerge include:

- online intermediation services including, in particular, marketplaces and app stores;
- online search engines;
- operating systems;
- cloud computing services;
- video sharing platform services;
- number independent interpersonal electronic communication services;
- social networking services; and
- advertising services associated with the above platforms.

Reference to such services could be made directly within the legislation, or services such as these could be referenced as examples in the wider context of a scope covering "digital platforms".⁶¹

However, although it is important for the sake of completeness and the legislation to be able to cover a wide set of platforms, the analysis of problems suggests that **requirements under the ex ante measure should be restricted to those large platforms which have the capability to act as gatekeepers**, and thereby can adversely affect businesses relying on them and ultimately damage the interests of end-users.

Defining a wide scope for the legislation itself, but a targeted approach to regulation, was also identified as the optimal approach by the expert panel, in order to ensure that the legislation is future-proof.⁶²

e. What are the options to achieve the objectives?

As the problems identified are linked to the conduct of a subset of platforms (a narrower scope than the P2B Regulation) and have proven not to be effectively addressed via competition law, the only realistic solution would be to tackle the problematic conduct through ex ante regulation. The need for ex ante regulation in the sector was also broadly supported by the expert panel convened for this study, and the majority of interviewees.

However, within the scope of ex ante regulation, it is possible to envisage different degrees of intervention, both as regards the threshold for intervention (which affects the number of platforms that would be subject to regulation), and as regards the strength and depth of intervention itself. In addition, differing approaches could be taken towards the nature of the

⁶¹ Various definitions have been proposed for this concept. See for example proposed definition in https://ec.europa.eu/information_society/newsroom/image/document/2016-7/nikolai_van_gorp_-_response_economics_to_the_uk_house_of_lords_call_for_evidence_14020.pdf

⁶² See notes from the Expert Panel in the Annex

rules applied, ranging from full specification of the rules within the legislation, towards full flexibility of intervention by the regulatory authority applying them.

Against this background, we have identified three broad sets of solutions that could realistically address the identified options.

Under **option 1 – non-dynamic regulation**, all aspects of the legislative measure would be self-executing, to the fullest extent possible. This would imply that the threshold used to determine which platforms have gatekeeper status consists of quantitative criteria only and that platforms meeting these criteria would be subject to clearly defined prohibitions and obligations, which do not require any further specification. No designation by a regulator would be required under this option, and gatekeepers would take responsibility for ensuring compliance with requirements of the law without any intervention from a regulatory body. Different sub-options could be envisaged under this heading, whereby, under option 1a, a high bar for intervention would be set (by setting high quantitative metrics for the threshold), while under option 1b, a lower bar would be set, thereby capturing more platforms within the scope of the obligations. Enforcement action under this option could be carried out by a regulatory authority on its own initiative or on the basis of a dispute. An approach such as this could also or alternatively provide scope for private enforcement.

Under **option 2 – semi-dynamic regulation**, there would be a mix between self-executing measures and measures which require further specification or elaboration. A distinction would be made between (i) prohibitions and/or obligations which can be specified to a high degree, thereby enabling them to be self-executing; and (ii) prohibitions and/or obligations which would require further elaboration by a regulatory body, in order to allow them to be tailored to the specific platform in question. Similarly, as regards the threshold to define large gatekeeper platforms, a mix between quantitative and qualitative criteria could be envisaged, whereby quantitative criteria in the legislation would indicate the presence of a gatekeeper platform, but qualitative criteria could also be used to confirm that the platform concerned could exploit a gatekeeper position, especially in situations where not all of the quantitative criteria are met. Again, suboptions could be considered based on the level of the quantitative criteria that would need to be met in order to define a platform as meeting the large gatekeeper criterion. This option would require the intervention of regulatory authority in the designation of gatekeeper platforms, as well as in the specification of obligations and/or prohibitions which require further elaboration. Given the role played by the regulatory authority in defining the regulatory regime, a system of public enforcement by the regulatory authority would be most coherent in this case.

Under **option 3 – fully dynamic regulation**, all regulatory requirements would be subject to case by case specification, and the threshold would likewise be composed only of qualitative criteria, which would provide for a wide degree of optimisation by a regulatory authority, relying on available evidence. Under this option, obligations and prohibitions could be outlined within the legislation but made subject to further specification either directly by the regulatory authority, or via a co-regulatory process involving review and approval by the regulatory authority of propositions put forward by the designated operators (similar to a commitment process). Alternatively, the legislation could contain a toolbox of measures from which the regulatory authority could impose obligations, similar to the toolbox provided to national regulatory authorities in the context of the EU electronic communications Code.

In addition, it is necessary to consider the status quo, as an “option 0”, against which these potential solutions could be compared.

The fact that intervention is needed for enforcement purposes and, in the case of options 2 and 3 to designate gatekeeper platforms, and to elaborate the application of certain obligations, means that a regulatory authority should be tasked with the application of the DMA. The European Commission was identified by stakeholders in the course of interviews, as well as the expert groups is likely to be the best-placed authority to act as a regulator in the context of the DMA. The cross-border nature of most gatekeeper platforms (and for

online transactions in general) justifies an EU-wide approach to designation and the application of obligations, and therefore it is appropriate for an EU body to undertake these tasks. Moreover, the European Commission has relevant experience e.g. in the context of competition law, as well as in reviewing and monitoring the implementation of ex ante measures e.g. in the context of ex ante regulation applied to the electronic communications sector.⁶³

At the same time, the conduct of gatekeeper platforms may have specific effects on business users including SMEs and start-up companies active at a national level and national administrations also have valuable experience in the application of competition law and ex ante enforcement across a range of sectors. Thus, the experience of national administrations could usefully be harnessed through the establishment of a network, which is engaged in the development of guidelines and contribution to decisions under the DMA (e.g. in relation to designation or the elaboration of obligations) as well as playing an active role in the enforcement process. Other examples where networks of national administrations have played a valuable role include BEREC,⁶⁴ in the context of the electronic communications sector, and the European Competition Network.⁶⁵

f. How do the options compare?

i. Effectiveness

As regards the status quo, as noted in section a.iv, if action is not taken at EU level to establish a ruleset for the ex ante regulation of large gatekeeper platforms, there is a high risk that national rules will be introduced that result in the fragmentation of the internal market, negatively impacting the ability of platforms and business users to operate cross-border and thereby limiting consumer choice. Moreover, in cases and regions where no regulatory action is taken, large gatekeeper platforms could act in a manner which excludes or discriminates against business users or application providers, limiting the potential for innovation and entry, and – in certain cases – limiting choice and/or increasing prices for consumers. Thus, the status quo is not a viable option to address the problems identified.

Option 1 (non-dynamic regulation) follows an approach to designation that is fixed through thresholds set in the Directive. As such it follows a similar approach to the thresholds established in the UTP Food Supply Directive which judges dependency on the basis of the gap between the annual turnover of the supplier and buyer,⁶⁶ and the approach used in the EU's Financial Supervision Regulation, which refers to the **quantitative absolute level of assets**, economic importance and the size of cross-border activities.⁶⁷ The obligations under this option are also designed to be self-executing, and in this context, are similar to “blacklists” used in Directives which aim to ensure fairness in business relationships such as those set out in the Food Supply Directive.⁶⁸ An advantage of this approach is that it allows for swift application of the rules, without any intermediate step by a regulatory authority. It also should provide clarity for stakeholders on whether or not they would be captured within the scope of the measure, and places the onus on the designated platforms to comply rather than requiring detailed elaboration of the rules.

⁶³ Ex ante regulation applying in the electronic communications sector is set out in the context of the EU Electronic Communications Code EECC <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972&from=EN>

⁶⁴ <https://berec.europa.eu/>

⁶⁵ https://ec.europa.eu/competition/ecn/index_en.html

⁶⁶ Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ [2019] L111/59, art.1(2).

⁶⁷ Council Regulation 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. [2013] L 287/63, art.6.

⁶⁸ For example, the Food Supply Directive prohibits practices such as late payment, unilateral changes to terms of a supply agreement

However, our analysis suggests⁶⁹ that while certain quantitative criteria can be good predictors of gatekeeper power amongst digital platforms, concerns have nonetheless been found (and enforcement action taken) with respect to platforms which would not meet all of the quantitative criteria that are associated with the largest gatekeeper platforms that have been the subject of most complaints thus far. Such platforms could be captured within the threshold if the quantitative criteria were lowered (option 1b). However, lowering the threshold would risk capturing additional players, whose conduct has not given rise to concern. Thus, use of quantitative criteria alone to identify large gatekeeper platforms risks either under or over-regulation.

A similar problem exists when only “self-executing” obligations are provided for in the legislation. Our analysis suggests⁷⁰ that some practices can be defined sufficiently clearly that they could be subject to “blacklists” in the legislation. These include for example, a prohibition on the misuse of third party data to benefit the retail arm of the platform, or the prohibition on “anti-steering” clauses, which prevent application or service providers from advertising the existence of alternative subscription and billing mechanisms. However, there are other problematic practices, for which it is not possible to define a prohibition or obligation in the legislation sufficiently clearly that it could be applied without further interpretation. Self-preferencing (in a broad sense) is one such case, while access to data or interoperability, also require a further interpretation and/or operational step in order to render them effective. Thus, the use of a pure blacklist approach based on self-executing prohibitions would either result in a limited list of prohibitions (and thus fail to tackle some of the serious problems raised by gatekeeper platforms) or if broadened, could result in measures which are difficult to interpret and create legal uncertainty, creating considerable pressure on the enforcement and appeals process to define the scope of the obligations. This would entirely negate the time benefits that should arise from a self-executing measure.

Option 3 (dynamic regulation) provides scope for full flexibility both in the designation process and in the specification of obligations. As such, it is closer in nature to the regulatory process pursued in the context of electronic communications regulation, where national regulatory authorities define relevant markets and designate operators on the basis of competition law principles (subject to guidance at EU level), and then select from a toolbox of measures such as access, non-discrimination, price control etc, which must often be elaborated in detail in order to ensure effective application. Such an approach should ensure that designation takes account of a range of factors and remedies are tailored to each situation and platform. However, experience from the electronic communications sector, as well as certain aspects of competition law, such as merger control, where remedies are also considered, suggest that this approach is likely to be lengthy, and the extensive reliance on the qualitative judgement of the regulatory authority may also result in appeals, creating further uncertainty and delay.⁷¹ This is likely to make such an approach less effective in a fast-moving sector such as digital platforms, and limits the benefits of an ex ante regulatory approach in comparison with competition law in addressing damaging practices.

Effectiveness of the ex ante measure could on the other hand be maximised by making use of a mix between pure quantitative and qualitative indicators as regards thresholds, and a mix between self-executing measures (wherever it is possible to specify the measures in this

⁶⁹ See Annex 2

⁷⁰ See detailed analysis in the Annex 2

⁷¹ For example, the European Commission opened its formal investigation into Google on 30 November 2010 and issued first of its (so far) three decisions on 27 June 2017. Google’s appeal against this *Shopping* decision is still pending. In relation to remedies, Google’s rivals alleged in November 2020 that “as of today, the decision did not lead to Google changing anything meaningful”. Open letter of 12 November 2020 to EU competition commissioner Margrethe Vestager, signed by 135 companies and 30 industry associations https://www.enpa.eu/sites/default/files/inline-files/Final_ENG_Joint%20Letter%20of%20Online%20Intermediaries%20to%20M.Vestager_ENG%20-%202011.11.2020.pdf

way) and those requiring elaboration, which could be done by the European Commission alone or, where appropriate, in conjunction with the regulated party. This is the solution proposed in the context of Option 2 (semi-dynamic regulation). The advantage of this option is that the use of quantitative criteria could allow clarity and speed in the designation of the largest gatekeeper platforms which have been identified with the majority of problems identified by stakeholders (and in anti-trust investigations), while enabling action to be taken on a case by case basis amongst those platforms which may not meet all the quantitative criteria, but may nonetheless have been identified as having the potential to exercise gatekeeper power to the detriment of business users and consumers. Meanwhile pursuing a mix of self-executing measures and those requiring elaboration, should enable swift and clear action to be taken in relation to measures which can be proscribed in detail, while providing scope for more tailored measures in cases where elaboration is required to make clear how the obligation should be interpreted in a particular case and/or to specify the type of solution needed to render the obligation operational. An analysis of the distinction between the two types of measures is provided in Annex 2.

As regards the choice between option 2a (with high quantitative thresholds) or option 2b (with low quantitative thresholds), the key trade-off lies between the risk of over or under-regulation. Setting a high threshold is likely to capture only the largest gatekeeper platforms within the automatic designation system and require case by case assessment to potentially designate other platforms which do not meet all of the quantitative criteria. This approach would minimise the risk of over-regulation, but subject those falling short of the quantitative criteria to a longer process, with greater risk of uncertainty and challenge. Conversely, using low thresholds may result in the automatic designation of a larger number of platforms, but increase the risk of over-regulation, which might result constrain the commercial options for platforms which do not have the power to create a negative impact on business users and consumers. On balance, the principle of precaution and better regulation, limiting the scope of regulatory intervention to the minimum necessary, suggests that a **high threshold for designation of gatekeepers would be more suitable in this case.**

We conclude that **option 2a is most likely to be effective in addressing the problems identified.**

ii. Efficiency

Efficiency is assessed by comparing administrative costs as well as other unintended costs with the benefits of a measure.

Administrative costs

Regarding the administrative costs, it is assumed that option 1 (non-dynamic designation and obligations) would entail only costs associated with information gathering, alongside monitoring and enforcement exercises. These would be conducted by the European Commission with support from the network of national experts. **The total estimated cost for option 1 would be around €4.6m, with a cost of €3.7m for the European Commission** (including resource to co-ordinate the network of national experts) and the remainder associated with national experts. Under option 2 (semi-dynamic designation and obligations), additional resource would be required to undertake supplemental designation (of gatekeepers not meeting all quantitative criteria) and to implement certain measures which are not subject to self-executing requirements. **The total estimated cost of option 2 is around €11.6m, of which an estimated €8.2m would be associated with the activities of the European Commission (including co-ordination of the network).** Finally, under option 3, as all designation and remedies would be applied on a case by case basis, further resource would be required within the Commission and amongst member states. It is assumed that **option 3 would account for costs of around €16.6m of which €10.6m would be attributed to the Commission.**

Setting a higher threshold for designation (under option 2a) would be associated with relatively higher resource for designation, due to the need to conduct case by case analyses

in more situations. However, it is possible that under this scenario, fewer platforms would be designated as gatekeepers overall, which would reduce costs associated with case by case remedies and enforcement. Thus, overall costs for 2a and 2b might be similar. On the other hand, a higher threshold under option 1a (non-dynamic regulation) would likely be associated with fewer designations than option 1b. Thus, option 1a can be assumed to represent the lowest cost of the relevant options.

These cost estimations do not include overheads associated with IT, training, meetings and missions. Such costs might in particular be associated with gathering representatives from the 27 Member States for meetings associated with the Network. On an assumption that option 1 would entail 4 physical meetings of the Network each year, each involving 2 representatives and that the average cost for travel and subsistence per representative is €500 for each occasion, then the travel cost associated with the Network under option 1 would be around €108,000 per year. This might double in the event of option 2 (due to increased need for involvement in relation to specific Decisions), and double again for option 3, to reach around €432,000 per year in that scenario.

The scale of costs to stakeholders would likely mirror those associated with the costs for the European Commission and national administrations, with the lowest cost being associated with option 1a (non-dynamic regulation with high thresholds), and the highest being associated with a very tailored and case specific approach (option 3). If 10 FTEs are required to address regulatory compliance per regulated gatekeeper platform (equivalent to 2.5 “markets” in electronic communications) and if 10 major platforms are subject to ex ante regulation via self-executing clauses only (option 1), the total cost associated with addressing ex ante regulatory obligations could be around €6.4m in total (€635,000 per platform)⁷². If an additional 4 FTEs were required to additionally address some detailed case by case obligations, additional costs of around €250,000 would apply per platform and the total cost for 10 platforms would increase to around €8.9m. If all obligations were case by case and this required an additional 4 FTEs per platform, the total cost for 10 regulated platforms would increase to €11.4m.

These estimates do not however include the cost of external legal advice and appeals. Costs for both the European Commission and stakeholders are likely to be proportionately higher for options which entail greater degrees of flexibility (and therefore scope for legal challenge). Thus, the total costs for options 2 and 3 could be higher in the order of several million euros in the event of legal challenge. At the upper bound, a large platform interviewed for the support study considered that the enforcement costs for implementing tailored ex ante regulation could vary widely, ranging from a minimum of €15m with centralised enforcement and limited intervention scope, up to €30m or more if the interventions were distributed across multiple markets, and the scope was wide. If these estimates are correct, then a maximum of around €300m in compliance and regulatory expenses for stakeholders might be associated with obligations applying to 10 platforms.

A detailed discussion of the methodology used to estimate the administrative costs is shown in Annex 1. The estimates draw on resource used within the Commission to undertake investigations under competition law as well as resources deployed by national regulatory authorities and stakeholders in connection with designation and the application of ex ante regulation under the EU Electronic Communications Framework.

Costs in comparison with benefits

As discussed in section g the benefits of ex ante regulation on gatekeeper platforms could include price reductions and associated increases in consumer welfare, as well as greater innovation potential amongst smaller businesses. In its study of the digital advertising market,⁷³ the UK Consumers and Markets Authority observed that in 2019, total expenditure

⁷² This assumes an FTE cost based on 50% ISCO1 and 50% ISCO2

⁷³ https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

on digital advertising was around £500 per household in the UK. Reductions in any excessive advertising charges could flow through to reduced prices across a wide range of goods and services to customers. We have also calculated that, if the commission charged by the Apple App Store is excessive and those charges were reduced by half (from 30% to 15%), this could increase EU consumer surplus by €490m if the benefits are passed onto consumers through lower prices, or create the potential for additional investment and innovation by app developers. Measures which limit the ability of gatekeepers to maintain their market position and/or facilitate switching by business users could also potentially support increases in venture capital funding in Europe, which far exceed the enforcement costs associated with ex ante regulation.⁷⁴

There is a risk that inappropriate ex ante regulation of gatekeeper platforms could fail to reduce prices to consumers, in the event that lower commission charges are for example recovered in other ways (e.g. increased advertising charges, higher delivery charges or higher charges for devices in the case of app stores). In telecoms, this potential effect (e.g. in the context of reductions in mobile termination rates and roaming charges) has been referred to as the “waterbed” effect. Valletti and Genakos tested the effects of reductions in termination rates on other charges levied to mobile customers in a 2007 study.⁷⁵ They found that reductions in termination rates due to regulation were in fact associated with increases in retail prices for telephony and reduced profits for the regulated firms. However, the effect was not complete, as prior to the introduction of regulation, mobile operators had not fully passed on “excess” rents from termination to their customers through lower prices elsewhere. Valletti and Genakos concluded that the “more incomplete the waterbed effect, the easier it is to justify regulatory interventions”. The lack of a complete waterbed effect in the context of telecoms, is confirmed in the European Commission’s evaluation report⁷⁶ on the 2009 Commission Recommendation concerning fixed and mobile termination rates, which concluded that the measure had led to a social welfare benefit of €1.7bIn in the worst case scenario, compared with the situation in the absence of termination rate regulation.

In the context of digital platforms, there is a risk of a waterbed effect, especially where conglomerate platforms are able to raise prices in other business areas or revenue-generating services. Examples of such conduct might involve a gatekeeper platform compensating for reduced app store commissions by increasing the price of hardware, or an e-commerce platform compensating for reduced commissions through increasing delivery charges. However, high cashflows and profit margins associated with the largest platforms (and the substantial gap they maintain in this regard compared with smaller players) suggest that if a transfer of “excessive” charges occurs from one area to another, this may be an indication of wider competitive challenges elsewhere in the platform ecosystem, rather than indicating that ex ante regulation in the target area is ineffective or unnecessary. In practice, in the two examples mentioned, competition between device manufacturers and measures which facilitate competition from alternative fulfilment services (e.g. by prohibiting self-preferencing favouring the listing of own fulfilment services) should in principle limit the potential for gatekeeper firms to recover excess profits from a regulated area by increasing charges in another.

It is also possible that ex ante regulation of gatekeeper platforms could also fail to increase (or even reduce) investment in R&D and improve service quality, if the benefits of integration and conglomeration and concentration of cashflows and R&D by a limited group of companies, outweigh the benefits that can be achieved through innovation from a more diverse group of companies. There is limited empirical evidence on this point in the field of

⁷⁴ See further analysis in Annex 1

⁷⁵ See for example <https://voxeu.org/article/mobile-regulation-and-waterbed-effect#:~:text=As%20a%20result%2C%20regulators%20are,as%20the%20%E2%80%9Cwaterbed%20effect%E2%80%9D>.

⁷⁶ <https://ec.europa.eu/digital-single-market/en/news/evaluation-report-commissions-2009-recommendation-termination-rates>

digital platforms. However, as noted in Annex 1, there is evidence to suggest that open systems enabling investment and innovation by a more diverse group of companies improved quality in electronic communications (in the field of copper and fibre-based broadband provision).⁷⁷ Similar effects are noted in research by Boudreau on open technology platforms.⁷⁸

Furthermore, aside from benefits associated with increased choice, quality and innovation, a key aim of the proposed Regulation is to address unfair practices, which result in unequal distribution of revenues and profits amongst different firms. An ex ante measure which explicitly seeks to address unfair contract terms and prevent foreclosure, should provide benefits to a multitude of small businesses and start-up companies, and in turn to their employees and customers.

We conclude that the benefits to SMEs, start-ups and consumers from measures which are particularly effective in achieving the aims of increasing contestability, boosting innovation and addressing barriers to the single market are likely to substantially exceed the costs of the measure. On the expectation that option 1 would not be entirely effective in achieving these goals for the reasons explained above, while option 3 would be effective, but more costly, time-consuming and less legally certain than option 2, we conclude that **option 2 would be the most efficient solution in addressing the identified problems.**

iii. Coherence

As long as it complements and does not contradict existing measures, ex ante regulatory intervention under all three of the options considered should be coherent with existing provisions. Importantly, ex ante regulation serves to complement rather than contradict competition law, because the proposed objectives for ex ante regulation under the DMA are wider than those applying to competition law, the threshold for intervention is distinct and specific to platforms (in similar vein to the specific approach taken to identify systemic banks), and the primary intention is to change conduct on an ongoing basis rather than sanction past abuses. Moreover, ex ante regulation would serve to complement and complete provisions concerning data portability in the GDPR⁷⁹ as well as data access in the P2B Regulation,⁸⁰ by providing the means for detailed obligations, implementation and enforcement. Care will be needed however to ensure consistency and coherence between the data measures envisaged for the DMA, and any measures taken to support a European data strategy.⁸¹

iv. EU value add

Stakeholders interviewed for this study as well as organisations such as BEREC, the Dutch competition authority, and French administration have generally highlighted the need for action at EU level to address issues concerning platforms which are pan-European and often global in scale.

⁷⁷ See Nardotto, Valletti, Verboven (2015) Unbundling the incumbent: evidence from UK broadband <https://onlinelibrary.wiley.com/doi/full/10.1111/jeea.12127>. The effects of unbundled access to fibre on quality and innovation are also explored in the WIK (2020) study for the Commission: The role of State Aid for the rapid deployment of broadband networks in the UK <https://ec.europa.eu/competition/publications/reports/kd0420461enn.pdf>

⁷⁸ Boudreau (2010) Open platform strategies and innovation: granting access vs devolving control <http://kevinboudreau.com/PAPER%20Open%20Platform%20Complement%20Draft.pdf>

⁷⁹ Article 20 of the GDPR provides a right to data portability. Specifically “The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided” However, the GDPR does not set standards or specify the detailed processes through which data will be provided.

⁸⁰ Article 9 of the P2B Regulation requires transparency regarding the availability of and access to customer data, but does not require the online intermediary to make this data available to business users

⁸¹ https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_en

Option 1 (non-dynamic regulation) provides only a partial solution to the identified problems, as it would not enable problems which require tailored or elaborated remedies to be effectively addressed. Thus, in addition to limiting the added value of the measure overall, there is a risk that national administrations may feel the need to adopt national measures to fill the gap, which could undermine the coherence of the single market.

Options 2 and 3 (semi-dynamic and dynamic regulation) are most likely to provide the tools that are needed to address problems associated with EU-wide gatekeeper platforms, and ensure a harmonised approach to regulation benefiting both platforms and their users, limiting the need for additional intervention at national level. Due to its core of clear designation criteria and specific directly applicable measures and thus reduced scope for uncertainty and legal challenge, option 2 is likely to result in greater added value at EU level than option 3, which would rely entirely on case by case designation and implementation.

v. Conclusions

The conclusions of our analysis are shown in the following table. The preferred option is option 2a (semi-dynamic regulation), because it strikes an appropriate balance between legal certainty and flexibility, which should result in the most targeted and effective interventions, while limiting the degree of costs incurred for both the regulatory authority and stakeholders. Specifically, it provides clarity concerning the regulatory treatment of the most significant gatekeeper platforms and addresses a core set of problems through self-executing provisions – while leaving sufficient flexibility for other gatekeepers to be identified and for certain more nuanced provisions to be elaborated by the regulatory authority. Applying option 2b – semi-dynamic regulation - but with a low designation threshold may offer a similar degree of effectiveness and even greater legal certainty than option 2a. However, this comes at the expense of higher administrative costs for certain stakeholders and potential unintended negative consequences, if platforms which do not pose problems are captured within the lower threshold.

Option 1 (non-dynamic regulation) is the most legally certain of the options considered, and may come with the lowest administrative costs. However, the measure may be poorly targeted, due to the lack of any flexibility in the designation and design of obligations. The risk of unintended negative effects (either under or over-regulation) is highest under this option.

Option 3 (fully dynamic regulation) provides the least legal certainty from the options considered (due to the degree of flexibility granted to the regulatory authority and risk of delay and appeal), while being costly to administer.

Options	Suboptions	Effectiveness			Efficiency			Coherence	EU Value add
		Address unfair conduct	Ensure contestable markets for innovation and consumer choice	Enhance coherence and legal certainty	Administrative costs to EU / MS and stakeholders	Unintended costs / mistargeted regulation	Benefits		
Option 1: Non-dynamic regulation	1a: high designation threshold	+	+/-	+++	Lowest	Medium	+	+++	+
	1b: low designation threshold	++	+/-	+++	Low	High	+	+++	+
Option 2: Semi-dynamic regulation	2a: high designation threshold	+++	+++	+	Medium	Low	+++	+++	+++
	2b: low designation threshold	+++	+++	++	Medium	Medium	++	+++	++
Option 3: Fully dynamic regulation		++	++	-	High	Low	++	+	++

g. What are the socioeconomic and environmental impacts of the preferred option compared with the status quo?

This section discusses the main conclusions of the socio-economic impact assessment which is presented in detail in Annex 1 to this report.

i. Economic impacts

The most relevant economic impacts of increasing the market contestability of the platform economy and unlocking its full potential are GDP growth, consumer surplus and online cross-border trade.

Other economic impacts include the better functioning of the internal market and the contribution of the platform economy to (offline) cross-border trade. However, impacts have been quantified and monetised to the possible extent depending on data availability.

Economic growth

A more dynamic platform economy has a direct impact on economic growth but also an indirect impact by benefiting other traditional sectors in the economy through spillover benefits, such as the synergies between online and offline cross-border trade. Evidence suggests that unlocking the full potential of the platform economy is expected to increase the GDP of the EU27 by between EUR 43.7 and EUR 174.5 billion from 2019 to 2029.

For this study, an input-output econometric model was applied suggesting that higher investment in R&D in the ICT sector in the EU27 would lead to an overall increase in EU27 income of an amount equivalent to 0.09-0.17% of 2014 EU GDP, namely, between EUR 12 billion and EUR 23 billion.

Employment

The econometric modelling estimated an increase in employment in the EU27 of an amount equivalent to 0.07-0.15% of 2014 EU employment, that is, between 136,387 and 294,236 new jobs created.

Both the impacts on growth and employment are very conservative estimates because they result from an increase in R&D investment. However, market contestability and fairer competition are expected to produce important spillover effects that result in higher innovation, increase in market size, increase of entrepreneurship within and beyond the platform economy and growth in other traditional sectors.

Compliance costs

The compliance costs for the preferred option are described for the European Commission, national authorities and 10 gatekeepers below:

- European Commission (EUR 8.2 million);
- national authorities across EU27 (EUR 93 million); and
- ten gatekeepers (EUR 8.9 million)

Therefore, the overall annual cost would reach approximately EUR 100 million.

Consumer surplus

There are important qualitative aspects contributing to higher consumer surplus such as higher freedom of choice due to market contestability, competition and new patterns of innovation. Consumer surplus, innovation and fairer competition are strongly related and positively feed each other. Consumers' welfare is also enhanced by lower online harm (e.g. use of data, fraud) led by lower market concentration. Hence, consumers end up with more and better-quality products/services. Prices are also expected to decrease.

The quantitative estimate of the improvement in consumer surplus is about EUR 13 billion per year, according to the latest JRC estimation. This effect could be enhanced if considering that prices are lower due to lower fees. For example, if Apple's commission fee were halved from 30% to 15%, the average prices of apps in the AppStore could fall. The effect of lower fees on consumer surplus could be around EUR 490 million per year in the EU.

Online cross-border

Although it is hard to forecast with certainty the increase in online cross-border trade, the impacts have been proxied by similar trends in offline cross-border trade resulting from market integration. The opportunity costs estimated here are very conservative as the assumed trends were linear and the growth rates conservative. The fast change in the platform economy and interlinks with the rest of the economy suggests that online cross-border trade could see important exponential growth if enhanced by market contestability, fair competition and virtuous patterns of innovation. Unlocking the potential of the platform economy could increase the value of online cross-border trade between EUR 45 billion and EUR 175 billion per year.

ii. Social impacts

The most relevant and tangible impacts are those within the platform market and how market contestability is likely to enhance innovation and competition.

Innovation

Financial resources that could be invested in R&D are diverted to mergers and acquisitions (M&A), which results in higher market concentration instead of improvements in the quality and quantity of products and services for consumers. This pattern of innovation dedicated to competing 'for the market' has a detrimental effect on consumer choice and surplus.

In addition, the positive impact on innovation stemming from higher market contestability is not limited only to the diversion of money from M&A to R&D. Other expected indirect effects include an increase in entrepreneurship and the creation of new products and solutions to meet consumers' needs rather than focused on exploiting a gatekeeping position. This may have a multiplicative effect in increasing the size of the European single market and, hence, GDP and online cross-border trade (see other impacts in this table).

Competition

An increase in market contestability is expected to contribute to fairer competition. Market concentration indexes are good proxies of competition. More competition reinforced by lower entry/exit barriers is expected to result in a more even distribution of market shares, users share, cash-flow and profits. The change in the pattern of competition from 'for the market' to 'in the market' should contribute to innovations that are favourable to consumers and smaller platforms. Consumers would enjoy more and better products/services and lower online harm, considering that online harm and market concentration are correlated.

The impact on competition is measured by the Herfindahl-Hirschman Index (HHI) which is an index of concentration. Lower concentration means higher competition. A conservative estimate is no increase in the HHI Index, while upper bound means a fall in HHI index for the user shares by 0.25 points and 0.11 for the revenue shares.

Environmental impacts did not emerge, in the context of this intervention, as relevant during desk research nor in the primary data collection.

3. Conclusions

Digital platforms are expected to become increasingly vital in supporting European service industries and cross-border trade in the years to come. The digitisation of services has been associated with widespread innovation, increased competition and consumer benefits. However, digitisation has also been associated with the ability of certain players to act as gatekeepers, controlling access to the information that end-users see and the services they receive and controlling the functionality, positioning, terms and conditions available to businesses depending on those platforms.

There is widespread and compelling evidence from competition cases, as well as from case studies conducted for this study and feedback from stakeholders, that certain platforms have become essential channels to market, and that platforms which act as gatekeepers can impose unfair conditions on the businesses and application providers which depend on them, as well as engaging in practices which could ultimately exclude potential competitors from the market.

The power wielded by large gatekeeper platforms in turn risks concentrating R&D expenditure and undermining innovation and disruptive entry, as well as limiting the choice and variety of services available to end-users, and potentially increasing prices.

Available evidence suggests that existing measures are insufficient to address these problems, and that Europe would benefit from the introduction of EU-wide legislation which would apply ex ante regulatory obligations on platforms which have the ability to act as gatekeepers. The impact of this measure could be maximised by combining clear requirements directly in the legislation with the ability to apply more flexible and tailored measures in cases where it is not possible to make obligations entirely self-executing. The European Commission is best-placed to act as the regulatory body in applying and enforcing these measures, supported by a network of experts from national administrations.

Evidence suggests that unlocking the full potential of the platform economy could increase EU27 GDP by between EUR 43.7 and EUR 174.5 billion from 2019 to 2029. Increased R&D resulting from a more diverse pool of innovation could create between 136,387 and 294,236 new jobs. Moreover, if prices reduce inter alia as a result of increased competition and lower commission charges, estimates based on JRC calculations suggest that consumers could gain around EUR 13 billion per year.

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