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Regulation of large online platform companies acting as gatekeepers

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1 and 2. Do you believe that in order to address any negative societal and economic effects of the gatekeeper role that large online platform companies exercise over whole platform ecosystems, there is a need to consider dedicated regulatory rules? Please explain.

I fully agree. Negative societal and economic effects of the gatekeeper role that large online platform companies exercise over whole platform ecosystems are complex and cannot be properly addressed, in particular, by current competition law, at least for the following two reasons:

- Competition law prohibits certain conducts – such as imposing unfair trading conditions, applying discriminatory conditions or refusing to enter into a commercial relationship – in broad terms. These rules, which were adopted decades ago, were meant to be applicable to a wide range of practices affecting negatively competition across all possible sectors (sector neutrality). The experience of cases such as *Microsoft* and *Google* has shown that competition rules could be used to tackle some complex conducts in the IT sector but that they are not sufficient and fully appropriate. Indeed, it remains difficult to determine under current competition law which practices are really unlawful (problem of legal uncertainty), notably because of the requirement in abuse of dominance cases to demonstrate negative economic effects prevailing over efficiency gains. For the avoidance of doubt, these considerations do not mean that the fundamentals of competition law should be changed; on the contrary, competition law should essentially remain as it is in order to address all possible competition law issues across all industrial sectors.

- Enforcement of competition law – in particular in case of abuses of a dominant position – requires lengthy procedures (to tackle only some very specific conducts), both before

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competition authorities and courts. Such procedures take years and require significant (financial) means, and are therefore not appropriate to address all issues raised by large online platforms as gatekeepers. The duration of these procedures actually tips in favor of the large platforms which have the time and the resources to keep reinforcing their position on the market while the procedures are pending.

Dedicated regulatory rules would help solving, at least partly, the above-mentioned issues under the current system of competition law characterized by ex-post enforcement, provided *a minima* that (i) the rules would prohibit specific conducts (see answers to questions 3 and 4 below), and (ii) (large) platforms would be under regular supervision of specialized agencies (see answers to questions 7 and 8 below).

3 and 4. Do you believe that such dedicated rules should prohibit certain practices by large online platform companies with gatekeeper role that are considered particularly harmful for users and consumers of these large online platforms? Please explain your reply and, if possible, detail the types of prohibitions that should in your view be part of the regulatory toolbox.

As indicated above, I believe that certain practices should be prohibited. The most important component of dedicated rules would rely precisely in prohibiting certain specific practices in order to prevent the market from being further controlled and abused by a few large platforms. Indeed, under current competition law, some of these practices may be prohibited but only on a case by case basis and at the end of a lengthy procedure. However, the experience shows that some practices implemented by large undertakings in the digital sector are generally negative for competition and prevent the emergence of smaller service providers. These practices would be better addressed in the event they would be prohibited in dedicated rules, regardless of the demonstration of dominance within the meaning of competition law and actual negative effects on the market.

In my view, the following group of practices in particular should be hardly justified and would therefore have to be prohibited, it being specified that specific practices within these groups should be defined and explicitly incorporated in dedicated rules:

- The access to data and use of data by platforms of third-party undertakings using these platforms should be prohibited. Should such access be necessary or unavoidable for technical reasons and in order to provide contractual services, the access within the platform should be limited on a need to know basis and Chinese walls should prevent other teams within the large platforms to access and use these data.

- Discrimination between trading partners (e.g. developers or news companies) should be prohibited. In particular, more favorable financial terms and discounts should not be available for large players (to the detriment of smaller companies).

- Technical requirements which would not be necessary in order for apps developed by third-parties to be working on the platforms should be prohibited. In this connection, platforms should be obliged to explain and justify technical requirements. Such explanation and justification should enable third-parties to challenge any alleged technical requirement imposed by the platform on the ground that they would not be justified by valid technical grounds.

- Excessive pricing should be prohibited. Indeed, it seems that prices to publish apps in certain appstores or to provide certain services in apps published in these stores have reached certain levels preventing developers from being adequately compensated for their activities. It is true that defining the right level of prices is complicated and may be subject to debate. As a matter of principle, pricing should be subject to FRAND terms. In this respect, the experience made in standardization cases (or similar cases such as AKKA/LAA) would be useful. To be further noted that a parallel may be drawn with other

industries in which the level of prices is controlled or even set by agencies for public interest reasons, for instance in the pharmaceutical industry.

5 and 6. Do you believe that such dedicated rules should include obligations on large online platform companies with gatekeeper role? Please explain.

Yes, large online platform companies should be subject to obligations similar to the obligations existing under the current open banking regulatory framework, i.e. large online platform companies should be subject to the obligation to disclose application interfaces and to share their data (sometimes referred to as compulsory licensing on datasets).

With respect to data sharing more specifically, it is widely accepted that access to large datasets can be key for companies to keep improving their algorithms and be competitive on the market in certain circumstances. At this juncture, markets have tipped to some large platforms and, because of strong network effects, new entrants (even holding robust technologies) can no longer catch up. This type of reasoning has justified cases like *Microsoft* and the experience made further to these cases has shown that the mechanism of compulsory licensing in these specific circumstances has helped open markets without reducing the incentive to innovate of the companies on which such obligation has been imposed.

Not every dataset held by large platform companies should be subject to mandatory data sharing. The datasets concerned should be those which cannot be collected by other companies because the service based on which the collection was possible in the first place can no longer be viably developed. Typically, datasets based on general search engines (Google) or general social media (Facebook) should be made available to third parties.

Discussions on compulsory data sharing often focus on issues relating to the protection of personal data. First, it should be noted that, in many instances, access to personal data is not of interest for smaller businesses, which are rather looking for large sets containing anonymized data. In other instances, personal data are not even involved in the first place, for example when sets contain data relating to industrial activities (such data would typically be collected in the context of smart building or smart city projects). Second, even when personal data are at stake, the discussion should not be limited by considerations relating to the consent of the persons concerned. Other public interests are present, such as the need to restore competitive markets, which may justify dedicated rules prevailing over data protection considerations.

In terms of pricing, I share the view commonly expressed that datasets should be made available on FRAND terms. While such principle is straight forward in theory, determining FRAND terms may be difficult in practice, in particular when it comes to taking into consideration the cost of collecting data. An option may be to force large companies to set up procedures similar to those applicable to “willing licenses” in the context of standard-setting organizations. Eventually, prices should be supervised by a specific regulatory authority. Such system would not significantly differ from the control of prices in the pharmaceutical industry.

7 and 8. If you consider that there is a need for such dedicated rules setting prohibitions and obligations, as those referred to in your replies to questions 3 and 5 above, do you think there is a need for a specific regulatory authority to enforce these rules?

Yes, like in any other regulated sector, I believe that a specific regulatory authority with deep understanding of the technical and business specificities of IT markets is needed.

Competition authorities have to deal with too many sectors in order to reach such level of specialization. In addition, their role, which consists of intervening on the basis of general rules and ex post, as well as assessing all specificities of a given case, differs from the role of specific regulatory authorities, which should have the power to supervise large platforms and to intervene in case of violation of more defined prohibitions and obligations contained in dedicated rules. Also,

specific regulatory authority should have the power to deliver rulings to the supervised companies, should they so require. Indeed, the adoption of dedicated rules cannot be contemplated without a system providing more legal certainty to the supervised companies.

9 and 10. Do you believe that such dedicated rules should enable regulatory intervention against specific large online platform companies, when necessary, with a case by case adapted remedies? If yes, please explain your reply and, if possible, detail the types of case by case remedies.

As a matter of principle, in light notably of the principle of legal certainty referred to above which is key in the context of specific dedicated rules, specific remedies should be determined in the regulation itself in relation to the violation of each specific prohibition or obligation. However, this does not mean that several remedies should not be available in relation to the violation of each specific prohibition or obligation; in such instance, a list of remedies available should be defined. If the determination of specific remedies in relation to the violation of each specific prohibition or obligation is not possible, this is likely to mean that the issue cannot be properly addressed via dedicated rules and remedies and would have to be left to general competition law.

The types of remedies have been addressed in my reply to Questions 3 to 6 above. Furthermore, it would be interesting to contemplate remedies which are currently unknown to competition law but which exist under other regulatory frameworks (such as in financial market regulations). For instance, an option that may deserve to be investigated is the prohibition for certain natural persons, which have been held liable of violating specific prohibitions or obligations, to be employed or provide services in the sector concerned (so-called blacklisting).

For the avoidance of doubt, remedies should not be considered only ex post. In relation to dedicated rules, it may be justified to require from large platforms to inform the supervisory authority on certain defined practices prior to implementing them, or even to submit certain defined practices to prior approval of the supervisory authority. This might for instance be the case in relation to the change in pricing of services.

Two last observations:

- Particular attention should be given to the fact that terms and conditions made available by large platforms do not have a sufficient level of clarity, whereby transparency and clarity may be improved by existing regulations (specifically Regulation 2019/1150 which applies since July 12, 2020).

- “Structural” prohibitions, such as the prohibition to acquire companies in neighboring sectors, should not be incorporated in dedicated rules. Such prohibitions should still be addressed under competition law based on a full assessment of the economic impact of the transaction, and not on more formal prohibitions which would be characterizing dedicated rules. Regarding the commonly used argument that current merger control is not equipped to deal with all issues raised by transactions in the IT sector, it should lead in my view to a revision of current merger control systems and rules.

11 and 12. If you consider that there is a need for such dedicated rules, as referred to in question 9 above, do you think there is a need for a specific regulatory authority to enforce these rules?

Please refer to reply to Questions 7 and 8 by analogy.

13. If you consider that there is a need for a specific regulatory authority to enforce dedicated rules referred to questions 3, 5 and 9 respectively, would in your view these rules need to be enforced by the same regulatory authority or could they be enforced by different regulatory authorities? Please explain your reply.

Yes, these rules would need to be enforced by the same regulatory authority. Having different authorities is likely to lead to inefficiencies and a lack of consistency between issues which form a whole.

14. At what level should the regulatory oversight of platforms be organised?

At national level or at the regional (EU) level for platforms exercising their activities over multiple territories (which should be the majority of platforms).

15 If you consider such dedicated rules necessary, what should in your view be the relationship of such rules with the existing sector specific rules and/or any future sector specific rules?

To the extent possible, the relationship between dedicated rules and existing or future sector specific rules should be clarified *ex ante* and not left to traditional legal interpretation. That said and as a matter of principle, sector specific rules, such as rules governing open banking, should prevail since they were adopted to address very specific issues relating not only to the IT sector but more precisely to IT in the banking and financial sector.

16. Should such rules have an objective to tackle both negative societal and negative economic effects deriving from the gatekeeper role of these very large online platforms? Please explain your reply.

As a preliminary note, I believe that tackling negative economic effects deriving from the gatekeeper role of large online platforms (i.e. restoring more competitive markets) should allow to address indirectly negative societal effects as well. That said, I acknowledge that some negative societal effects may be disconnected from economic effects or may be solved only in the long term as a consequence of negative effects addressed in the short term.

In my view, adopting a single set of rules having the objective to tackle both negative societal and negative economic effects should be more efficient and would lead to a consistent piece of regulation. From this perspective, the two distinct purposes should be clearly mentioned in the regulation and it should be clear which rules aim at which purpose, it being specified that certain rules may aim at reaching both purposes at once.

17. Specifically, what could be effective measures related to data held by very large online platform companies with a gatekeeper role beyond those laid down in the General Data Protection Regulation in order to promote competition and innovation as well as a high standard of personal data protection and consumer welfare?

As a preliminary note, the GDPR aims only at protecting the personal data of natural persons. On another hand, competition and innovation issues characterizing current digital markets derive not only from access to personal data, but more generally to other sets of data. Such other sets of data include for instance data relating to industrial activities (e.g. the level of pollution in a specific area) or personal data in an anonymized form. Hence, personal data and the GDPR are only part of the challenge relating to the appropriation of data by some market players.

When personal data are at stake, there is tradeoff between protecting competition on the one hand and data protection on another hand. In my view and as already indicated above, the current standard of data protection cannot be fully maintained if the purpose is to improve competition, because personal data will have to be shared in order to support the activities of companies willing to compete with large gatekeepers. That said, I believe that, in the long term, more competition on the market would force companies to adopt and implement higher standards of data protection because such standards will become a competitive factor. Also, more competition on the market would prevent strong positions, such as the current position of the main gatekeepers, which in turn

will reduce the risk of major data protection issues, since the risk will be spread among more market players.

18. What could be effective measures concerning large online platform companies with a gatekeeper role in order to promote media pluralism, while respecting the subsidiarity principle?

I do not believe that specific measures can be imposed directly on large platforms in order to efficiently promote media pluralism.

Taxes should be imposed on these platforms and the revenues generated through these taxes should be used by Member States in order to implement their own strategy aiming at promoting diverse media companies, depending on the specific needs of each State. To be noted that safeguards should be put in place in order to prevent large platforms from passing on, directly or indirectly, these taxes to other market players.

19. Which, if any, of the following characteristics are relevant when considering the requirements for a potential regulatory authority overseeing the large online platform companies with the gatekeeper role:

- [x] Institutional cooperation with other authorities addressing related sectors – e.g. competition authorities, data protection authorities, financial services authorities, consumer protection authorities, cyber security, etc.
- [ ] Pan-EU scope
- [x] Swift and effective cross-border cooperation and assistance across Member States
- [ ] Capacity building within Member States
- [x] High level of technical capabilities including data processing, auditing capacities
- [ ] Cooperation with extra-EU jurisdictions
- [ ] Other

21. Please explain if these characteristics would need to be different depending on the type of ex ante rules (see questions 3, 5, 9 above) that the regulatory authority would be enforcing?

No difference.

22. Which, if any, of the following requirements and tools could facilitate regulatory oversight over very large online platform companies (multiple answers possible):

- [x] Reporting obligation on gatekeeping platforms to send a notification to a public authority announcing its intention to expand activities
- [x] Monitoring powers for the public authority (such as regular reporting)
- [x] Investigative powers for the public authority
- [ ] Other

24. Please explain if these requirements would need to be different depending on the type of ex ante rules (see questions 3, 5, 9 above) that the regulatory authority would be enforcing?

No difference.

25. Taking into consideration the parallel consultation on a proposal for a New Competition Tool focusing on addressing structural competition problems that prevent markets from functioning properly and tilt the level playing field in favour of only a few market players. Please rate the suitability of each option below to address market issues arising in online platforms ecosystems. Please rate the policy options below from 1 (not effective) to 5 (most effective).

1. Current competition rules are enough to address issues raised in digital markets: 2=somewhat effective.
2. There is a need for an additional regulatory framework imposing obligations and prohibitions that are generally applicable to all large online platforms with gatekeeper power: 5=most effective.
3. There is a need for an additional regulatory framework allowing for the possibility to impose tailored remedies on individual large online platforms with gatekeeper power, on a case-by-case basis: 5=most effective.
4. There is a need for a New Competition Tool allowing to address structural risks and lack of competition in (digital) markets on a case-by-case basis: 1=not effective.
5. There is a need for combination of two or more of the options 2 to 4: 5=most effective.

26. Please explain which of the options, or combination of these, would be, in your view, suitable and sufficient to address the market issues arising in the online platform ecosystems.

The options 2 and 3 would be suitable and sufficient to address the market issues arising in the online platform ecosystems. Clear prohibitions and obligations in dedicated rules along with national specialized and active supervisory authorities is in my view the best option. This should lead to a regulatory and supervisory system similar to the systems in place in the financial and pharmaceutical industries.

At this juncture, the NTC seems to rely on rather broad and vague concepts. It seems in particular difficult to justify structural remedies in the absence of clear violations by large platforms.

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