



Università
Europea di
Roma



Co-funded by the
European Union

JEAN MONNET CHAIR IN DIGITAL TRANSFORMATION AND AI POLICY

DIGITAL ECONOMY AND DATA STRATEGY

Course Market Law and Regulation a.y. 2022-2023

Course convenor: Professor Valeria Falce (Valeria.Falce@unier.it)

Module 1.



The rise of digital economy

1. What is Competition Law?

- Broadly, involves the use of legal tools to control the exercise of **market power**, in order to **protect competition** in the market.

Market power refers to the ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition... The exercise of market power leads to reduced output and loss of economic welfare. (OECD, 1993)

- **Competition** between economic actors is the **best** way to organise any market (at least in *most* instances);
- Market power held by one or more firms is not problematic in itself, but may be liable to **abuse**, which should be **prohibited**; *and*
- Competition law provides the state with a **public counterbalance to control private power**, without prohibiting private power entirely.

- **Competition** between economic actors is the **best** way to organise any market (at least in *most* instances);
- Market power held by one or more firms is not problematic in itself, but may be liable to **abuse**, which should be **prohibited**; *and*
- Competition law provides the state with a **public counterbalance to control private power**, without prohibiting private power entirely.

“Antitrust law was, as we know, invented neither by the technicians of commercial law (though they became its first specialists) nor by economists themselves (though they supplied its most solid cultural background). It was instead desired by politicians and (in Europe) by scholars attentive to the pillars of the democratic systems, who saw it as an answer (if not indeed ‘the’ answer) to a crucial problem for democracy: the emergence from the company or firm, as an expression of the fundamental freedom of individuals, of the opposite **phenomenon of private power**; a power devoid of legitimation and dangerously capable of infringing not just economic freedom of other private individuals, but also the balance of public decisions exposed to its domineering strength.”

Amato, Antitrust and the Bounds of Power (1997)

- **Article 101 TFEU** (ex Art. 81 EC, Art. 85 of the EEC Treaty):
 - Prohibits anticompetitive agreements and other forms of coordination between undertakings; provides an express exemption for forms of coordination that satisfy four cumulative conditions for exemption
- **Article 102 TFEU** (ex Art. 82 EC, Art. 86 of the EEC Treaty)
 - Prohibits abusive conduct by one or more undertakings holding a dominant market position
- **Regulation 139/2004**: merger control

Objectives of EU Competition Law

- **Ordoliberalism**
 - emphasis on importance of economic freedom as value in itself – protection of right to participate in economy
- **Market integration**
 - Facilitating market interpenetration
- **Efficiency (consumer welfare)**
 - “more economic approach” to EU competition law

Objectives of EU Competition Law: *GlaxoSmithKline*

“the objective assigned to Article [101 TFEU], which constitutes a fundamental provision indispensable for the achievement of the missions entrusted to the Community, in particular for the functioning of the internal market...is to prevent undertakings, by restricting competition between themselves or with third parties, from **reducing the welfare of the final consumer** of the products in question...”

Case T-168/01 *GSK*, para.118

“...like other competition rules laid down in the Treaty, Article [101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the **structure of the market** and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price...”

Case C-501/06 P *GSK*, para.63

Enforcing EU Competition Law

- Centralised **public** enforcement by the European Commission
- Decentralised public enforcement by the National Competition Authorities
- Notable push to increase levels of **private** enforcement at Member State-level

- *Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*
- *Such abuse may, in particular, consist in:*
 - (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*
 - (b) limiting production, markets or technical development to the prejudice of consumers;*
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*
 - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*

Art. 102 TFEU

- *Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*
- *Such abuse may, in particular, consist in:*
 - (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*
 - (b) limiting production, markets or technical development to the prejudice of consumers;*
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*
 - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*

Goal of the provision

What are the goal of this provision:

- *consumers?*
- *competitors?*
- *competition itself?*

*“Article 82 EC [...] is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the **structure of the market and thus competition as such (as an institution)** which has already been weakened by the presence of the dominant undertaking on the market.”*

(Avv. Gen. Kokott, British Airways v. Commission, Case C 95/04 P, §68)

On goals and tools



Protection of competition as means to other ends.

Trust in competitive markets leading to scenario where society as a whole is better off thanks to lower prices, products available to all consumers, better quality of products and services, more innovation.

How does Art. 102 tries to achieve such goal?

1. Distinction between dominance and abuse;

- Mere creation of dominance is not punished.*
- Difference with US antitrust.*

*2. Punishment of abuse of dominant position when such conduct **may** affect trade between Member State in the internal market or a relevant sub-portion of it.*

Art. 102 TFEU



- To be subject to EU Competition Law, an entity must be an **'undertaking'**.
- The concept of an undertaking includes **every entity engaged in an economic activity**, regardless of the legal status of the entity and the way in which it is financed.

Art. 102 TFEU

- If two or more connected businesses (businesses within the same corporate group, multi-national companies with subsidiaries) influence the structure of a market through their conduct or through concerted strategic decisions, we might have **collective dominance**.
- In practice, a relationship between entities has been found on the basis the presence of identical conducts on the market.
- Collective dominance, as demonstrated through case law, is often associated with an **oligopoly**.

Art. 102 TFEU



- The EU case law sets out a legal test that must be satisfied for collective dominance to be established (conditions are cumulative).
- each member of the group must have the capability of being aware of how the other members are behaving;
 - tacit coordination must be sustained over a period of time;
 - it must be proven that the potential reaction of consumers and competitors will not affect the competition against the dominant entities.

How does the assessment proceed?



1. *Definition of the relevant market;*
2. *Assessment of dominance;*
3. *Assessment of abuse:*
 - *Presumptively abusive conduct listed in art. 102*
 - *Presumptively abusive conduct theorized by the case law (ex. Loyalty rebates);*
 - *Assessment on a case by case analysis of abusive conduct not expressly listed.*

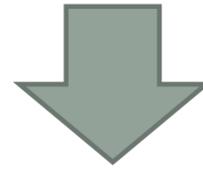
How does the assessment proceed?



- Before assessing dominance it is necessary to define a relevant market.
 - It comprises of both a:
 - **Product Market** (a market that comprises all products and/or services which are regarded as **interchangeable or substitutable** by the consumer, by reason of the products' characteristics, their prices and their intended use).
- and a**
- **Geographical Market** (which comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently **homogeneous** and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those area).

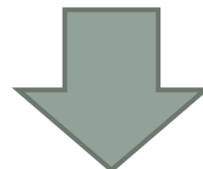
Again: on the difference between dominance and abuse

Dominance = situation where the competitive structure of the market is already weakened because of the very same presence of the dominant undertaking.



allowed

Abuse = subsequent moment where the dominant undertaking takes advantage of its position of strength in the market and put into practice a conduct to further increase it, to the detriment of competitors and consumers.



prohibited

How does the assessment proceed?

- A finding of dominance derives from the analysis of a combination of factors, the most relevant of which are:
- constraints imposed by the existing suppliers from, and the position on the market of, **actual competitors**.
 - constraints imposed by the credible threat of future expansion by actual competitors or entry by **potential competitors**.
 - constraints imposed by the bargaining strength of the **customers** (**countervailing buyer power**).

How does the assessment proceed?



Market share %	Assessment
100%	Monopoly or de facto monopoly
85-90%	Usually conclusive of market dominance
75%	Indicative of dominance
50%	Strong evidence of dominance
40% or more	Evidence of dominance, to be considered with other factors
25-40%	Single dominance is unlikely unless there is a fragmented market. Other factors might come into play
20%	Possibility of dominance left open but unlikely.
10%	No dominance

How does the assessment proceed?



- Under a factual point of view, the “abuse” can be defined as a conduct by one or more undertakings that are not competing on the merits (on prices, quality etc.) and is likely to impair effective competition.
- There is **no legal definition of abuse** provided by the Treaty or any legislation. Article 102 was interpreted as to supervise the dominant undertaking’s ‘**special responsibility**’ not to allow its conduct to impair undistorted competition.
- There are **three forms of abuses** that could occur from anti-competitive practices: **exclusionary, exploitative; and single market abuse.**
- Exclusionary and exploitative abuses may be considered separately, this does not mean there is a rigid category that abuse falls into. **An overlap** of different abuses is a common occurrence.
- An effect-based analysis will normally be required for finding an abuse. However, the Commission retains the right to conclude the existence of consumer harm without carrying a detailed assessment.

Exclusionary abuses



These are conducts engaged in by a dominant undertaking which are capable of **preventing competitors from entering or remaining active in a given market** .

- **Limiting production:** under Article 102(b), "limiting production, markets or technical development to the prejudice of consumers" is considered an abuse by a dominant undertaking.
- **Price discrimination:** under Article 102(c), an abuse is "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".
- **Tying:** under Article 102(d) "tying" is defined as "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Exclusionary abuses



- **Bundling:** arises in a situation where two products are sold together in a single package at a single price.
- **Predatory pricing:** this is the practice of dropping prices of a product below costs so that one's smaller competitors cannot cover their costs and leave the market.
- **Margin squeeze:** spread between the dominant undertaking's prices for wholesale access and its retail prices and the fact that the undertaking's wholesale products are indispensable to competition on the downstream market.
- **Granting rebates:** not an abuse in themselves, but need to analyze the effects on competition.

Exclusionary abuses



- **Exclusive dealing:** an agreement whereby a customer is required to purchase all or most of a particular type of goods or services from a dominant supplier and is prevented from buying from any supplier other than the dominant firm.
- **Refusal to Supply:** happens when an undertaking which has a dominant position in the upstream market refuses to supply a new or existing customer on a downstream market on which it is also present
- **Refusal to supply intellectual property rights:** refusing to license intellectual property rights or providing interoperability information, regarded as improper exercise of intellectual property rights by a dominant firm.
- **Miscellaneous other non-pricing abuses:** conduct that does not fit within the scope of the aforementioned categories, such as sham litigation and regulatory gaming.

Exploitative abuses



This type of abuse occurs when a dominant undertaking uses its position to **exploit consumers without losing them through conduct like price increase and production limitation**. Assumes barriers to entry.

- **Unfair trading conditions:** Imposition of conditions on its customers that directly harm them.
- **Excessive pricing:** price set significantly above the competitive level. The charged price must be excessive and unfair to be abusive. That is, the charged price has no reasonable relation to the economic value of the product supplied and exceeds what the dominant undertaking would have obtained in a normal and sufficiently competitive market.
- **Collecting societies:** organizations empowered with the authority to license copyrights and collects royalties from users of the copyright and distributes them to copyright owners for a fee. Abusive behavior when they discriminate undertakings from other MS.

The theory of the Special Responsibility of the dominant firm



- “[...] a dominant undertaking is subject to certain limitations that do not apply to other undertakings in the same form. Because of the presence of the dominant undertaking, competition on the market in question is weakened. Therefore [...] that undertaking has a **particular responsibility** to ensure that its conduct does not undermine effective and undistorted competition in the common market.

(Avv. Gen. Kokott, *British Airways v. Commission*, Case C 95/04 P, §23)

Caveat of the theory



- “[...] *A practice which would be unobjectionable under normal circumstances can be an abuse if applied by an undertaking in a dominant position*”.

(Avv. Gen. Kokott, British Airways v. Commission, Case C 95 04 P, §23)

- *This caveat has historically found confirmation in the lack, within the text of the provision, of a legal mechanism to save the allegedly dominant firm.*
 - *No balancing mechanism such as Art. 101, 3 TFUE;*
 - *Only the recourse to objective justification in some cases.*

Objective justification



- Dominant firms may justify their behavior either by demonstrating that their conducts are **objectively necessary** or by demonstrating that the concerned conducts **produce substantial efficiencies** which outweigh any anti-competitive effects on consumers.
- For objective justification to be applicable the conduct must be proportionate and founded on external factors (e.g. safety measures).
- To defend the conduct on efficiency grounds, **four cumulative conditions** must be satisfied:
 1. the efficiencies would have to be realized, or be likely to be realized, as a result of the conduct in question;
 2. the conduct would have to be indispensable to the realization of those efficiencies;
 3. the efficiencies would have to outweigh any negative effects on competition and consumer welfare in the affected markets; and
 4. the conduct must not eliminate all effective competition.

Further details on the doctrine of abuse



- ***Abuse as objective concept: no prove of intent to restrict competition;***
- ***Abuse and capability to restrict competition:***
 - *The restriction of competition may be simply potential;*
 - *Goal of the provision: stop a conduct before it could irrevocably damage the competitive structure of the market (i.e. before actual effects have been produced).*

The Discussion Paper of the EU Commission



Main goals:

- *Replacing the concept of dominance with the concept of substantial market power;*
- *Elimination of prima facie case of abuse for conduct listed in Art. 102, 2 prong;*
- *Methodology based on the effects of the conduct on the market (no presumptions);*
- *Efficiency defence for the allegedly dominant firm violating art. 102*

Guidance Paper of the EU Commission (2008)



Discussion Paper

1. Replacing the concept of dominance with the concept of substantial market power;
2. Elimination of presumption of abuse for conducts listed in art. 102, 2 prong and those theorized by the case law.

Guidance Paper

1. Failed
2. Failed

Guidance Paper of the EU Commission (2008)



Discussion Paper

3. Introduction of a methodology based on the effects of the conduct on the market (no presumptions);
4. Efficiency defence for the allegedly dominant firm violating art. 102

Guidance Paper

3. Introduction of the concept of anticompetitive foreclosure
 - 3.1. AEC test;
 - 3.2. Specific methodologies with economic tools for specific conduct
4. Possibility to rebut a *prima facie* presumption of abuse with recourse to objective justifications or efficiency gains.

The notion of anti-competitive foreclosure



What is anti-competitive foreclosure?

- *“a situation where **effective access of actual or potential** competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers”*

Guidance Paper, §19

The notion of anti-competitive foreclosure



*The Commission will normally intervene under Art. 102 where “[...] on the basis of cogent and convincing evidence, the **allegedly abusive conduct is likely to lead to anti competitive foreclosure**” §20.*

- *Duty to provide cogent evidence, but*
- *On the likelihood to lead to anti competitive foreclose (no proof of actual foreclosure).*

Factors to be taken into account



- *The position of the dominant undertaking;*
- *The conditions on the relevant market;*
- *The position of the dominant undertaking's competitors;*
- *The position of the customers or input suppliers;*
- *The extent of the allegedly abusive conduct;*
- *Possible evidence of actual foreclosure*
- *Direct evidence of any exclusionary strategy.*

AS EFFICIENT-COMPETITOR benchmark.



Always a duty to investigate on the existence of anticompetitive foreclosure



- *There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment [...]*
- *If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti competitive effect may be inferred. §21*



Prima facie case of abuse still safe!

Defenses available for the dominant firm to rebut a finding of abuse



- *Objective justification;*
 - *existence of sound reasons (normative, technical, economic) justifying the conduct.*
 - *Often exogenous to the undertaking (normative prescriptions), sometimes proper to the firm (defense of IPR);*
- *Efficiency gains.*

Real novelty: Efficiency gains



The Guidance Paper seems to introduce a four factor balancing exercise (echoes art. 101, 3):

- the efficiencies have been, or are likely to be, realized as a result of the conduct;*
- the conduct is indispensable to the realization of those efficiencies;*
- the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare;*
- the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.*

Prohibiting Anticompetitive Coordination (Generally)

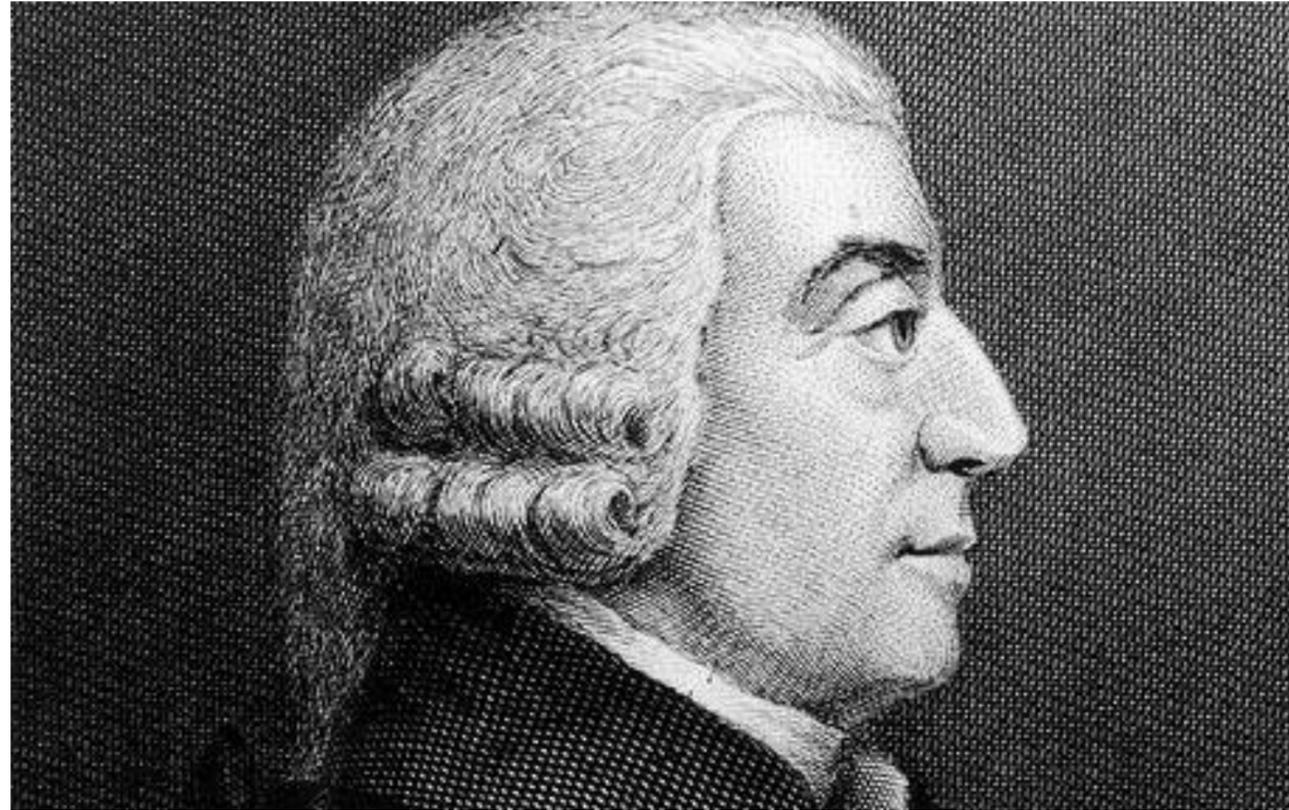


- Anti-competitive agreements (and other forms of coordination) are prohibited by both EU and US competition law.
 - **Article 101 TFEU** (EU)
 - **§1, Sherman Act** (US)
- Whilst the format of these two prohibitions varies a little, in essence both require the antitrust enforcer to establish:
 1. The existence of some form of **coordination** between two or more distinct enterprises [focus of Seminar 2], *with*
 2. Either an **anticompetitive** objective or an anticompetitive impact on the market in practice [focus of Seminars 3 & 4].

Why Do We Scrutinise Agreements under Competition Law?



- **Market power** rationale: by combining, firms increase their market power and thus *influence the functioning of the market* in concert in a way that they cannot do singly
- **Conspiracy** rationale: combination of firms viewed as akin to a *morally reprehensible* group enterprise or conspiracy



“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”

Smith, *Wealth of Nations*, 1776

Prohibiting Anticompetitive Coordination (Generally)



➤ *Article 101 TFEU reads:*

“1. The following shall be prohibited as incompatible with the internal market: all **agreements** between **undertakings**, decisions by associations of undertakings and concerted practices which **may affect trade between Member States** and which have as their **object** or **effect** the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

EU Law: Article 101 TFEU



Article 101(1) – Prohibition

“The following shall be prohibited as incompatible with the internal market: all **agreements between undertakings, decisions** by associations of undertakings and **concerted practices** which may affect trade between Member States and which have as their **object** or **effect** the **prevention, restriction or distortion of competition** within the internal market...”

Article 101(3) – Exception Rule

The provisions of paragraph 1 may, however, be declared inapplicable in the case of...[coordination]...which contributes to improving the production or distribution of goods or to **promoting technical or economic progress**, while **allowing consumers a fair share of the resulting benefit**, and which does not:

- (a) impose on the undertakings concerned restrictions which are not **indispensable** to the attainment of these objectives;
- (b) afford such undertakings the possibility of **eliminating competition** in respect of a substantial part of the products in question.

Establishing Anticompetitive Agreements



Article 101 TFEU

1. **Agreement** between undertakings, **decision** by associations of undertakings or **concerted practices**;
2. Which has the **object** or **effect** of restricting competition (para.1), without sufficient countervailing **efficiency justifications** (para.3)

§1, Sherman Act

1. **Contract, combination or conspiracy**;
2. Which amounts to a **restraint of trade** (either because it is *per se* illegal, or is found to be so after a '**rule of reason**' analysis)

Coordination within the Competition Rules



- Application of Article 101(1) is premised upon some form of coordination between two or more separate undertakings: either **agreement, concerted practice, or decision of an association of undertakings**
 - cf. Article 102 TFEU, which applies to the unilateral conduct of single undertakings
- Similarly, application of §1, Sherman Act, requires the identification of some “**contract, combination** in the form of trust or otherwise, or **conspiracy**” involving two distinct enterprises
 - cf. §2, Sherman Act, which requires only the identification of a single legal “person” engaging in monopolisation

What is a cartel?



“A “hard core cartel” is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce...”

OECD, *Recommendation of the Council concerning Effective Action against Hard Core Cartels* (1998)

The ‘Supreme Evil’ of Antitrust?



“...CONSIDERING that hard core cartels are the most **egregious** violations of competition law and that they injure consumers in many countries by **raising prices** and **restricting supply**, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others...

...effective action against hard core cartels is particularly important from an international perspective, because their distortion of world trade **creates market power, waste, and inefficiency** in countries whose markets would otherwise be competitive...”

OECD (1998)

“The **primary target** of the antitrust rules is to make certain that companies compete rather than collude. Cartels and other similar restrictive agreements distort resource allocation and encourage inefficiency.”

European Commission, COM(2004) 293 final, p.6

The 'Supreme Evil' of Antitrust?



Article 101 TFEU

- Hard core cartel offences (secret price-fixing, market-sharing, customer allocation etc.) are **object** restrictions of competition, contrary to Art.101(1)...
- ...and such arrangements can, in practice, **never be justified** under Art.101(3).

§1, Sherman Act

- Hard core cartel offences are ***per se*** illegal under §1 – meaning that such arrangements are always prohibited by antitrust, regardless of any potential pro-competitive justifications for the behaviour.

Enforcement Challenges of Cartels



- Since the prohibition on hard core cartels is clear and unequivocal, most cartel behaviour these days takes place in **secret**, and cartelists often go to considerable lengths to conceal their anticompetitive arrangements
- This creates a particular challenge for anti-cartel enforcement: how can competition agencies (a) uncover the **existence** of secret cartels; and (b) gather sufficient **evidence** to mount a prosecution against such arrangements?

- Does competition law prove to be effective when it comes to digital markets?
- The answer relies on the analysis of the Digital Service Act Package and the Digital Single Market...

Peculiarities of digital markets

- Competition ‘for’ the market, rather than competition ‘in’ the market ➤ **winner takes all.**
- **Extreme returns of scale:** marginal cost to produce digital service is close to zero
➤ entry barrier.
- **Direct and indirect network effects** ➤ entry barriers.
- Role of data:
 - 1) **‘Free’ digital services:** consumers ‘pay’ the majority of digital services with personal data.
 - 2) Data are non-rivalrous, BUT network effects limit data portability and multi-homing.
 - 3) Data accumulation improves the services personalization ➤ competitive advantage.
- **Digital markets tend to ‘tip’** ➤ **dominant online platforms subject to competition law investigations.**

Common features antitrust investigations in digital markets

- Companies subject to investigations: Google, Facebook, Apple, Amazon ➤ **GAFAM – Microsoft**
- **Parallel investigations by:**
 - 1) EU Commission.
 - 2) NCAs of the ‘big’ EU MS (i.e. Germany, France, Italy) + UK.
- **Categories of sanctioned conducts:**
 - 1) ‘Traditional’ exclusionary abuses: tying.
 - 2) ‘New’ exclusionary abuses: self-preferencing; preferential access to customers data; platform envelopment.
 - 3) Revival of exploitative abuses: unfair trading conditions; exploitative use of personal data.
- **Limited judicial review... so far:**
 - 1) Google Shopping: ruling EU General Court on 9th November 2021.
 - 2) Google Android: ruling of the EU General Court on 14th September 2022.
 - 3) Facebook (DE): preliminary ruling by EU Court of Justice (C-252/21) – ruling of the CJEU on 4th July 2023.

Shift from competition policy to sector regulation

- **Antitrust enforcement is NOT effective:**

- 1) NO deterrent effect: € 6 billion fine imposed by EU Commission on Google ➤ small fraction of Alphabet worldwide turnover.
- 2) Lengthy antitrust investigations and judicial proceedings (e.g. Intel, Microsoft).

- **Political reasons**

- 1) DMA: preventing legislative initiatives by EU MS.
- 2) Europe lags behind China and the USA in digital innovation ➤ asymmetric regulation on 'big' platforms favours the entry of 'small' European platforms.

Sector regulation

- **Determines ex-ante the behaviour of firms** (e.g. price regulation, universal access obligation...) ➤ **obligations rather than prohibitions.**
- It is common in **network industries** (e.g. electricity, gas, railways, posts...):
 - 1) Markets liberalized since 1980s, BUT still characterized by imperfect competition
 - 2) Former State owned company remains incumbent in the market
 - 3) Sector regulation incentivizes competition in the market (e.g. incumbent has to grant access to its network to its competitors)
- Legislation: EU Directives implemented at the national level.
- Enforcer: National Regulatory Authority (NRA) supervizes a specific network industry.
- **Sector regulation for digital platforms** ➤ **ex-ante obligations for digital platforms.**

Emergence of sector regulation of digital platforms in Europe

- **EU Digital Markets Act (DMA):**

- a) 15.12.2020: proposal by EU Commission.
- b) March 2021: political agreement between EU Parliament and Council.
- c) 12.10.2022: final version DMA published on EU Official Journal.
- d) 2.5.2023: DMA enters into force.**

- **UK Digital Market Unit (DMU):**

- a) April 2021: DMU established within CMA ➤ advisory body, NO enforcement power.
- b) UK Government has not submitted DMU bill to the House of Commons.

- **Sec. 19(a) GWB:**

- a) 14.01.2021: German Parliament adopts 10th amendment to the GWB ➤ new sec. 19(a).
- b) Section 19(a) GWB: the Bundeskartellamt can prohibit conducts by **companies of 'paramount significance for competition across markets' (i.e. digital conglomerates)** without the need of proving a competition law infringement.

- c) Companies subject to Sec. 19(a) GWB ➤ NO remedies adopted yet:**

- Ø28.01.2021: Facebook.
- Ø18.05.2021: Amazon.
- Ø25.07.2021: Google.
- Ø25.4.2023: Apple



Co-funded by the
European Union

Digital Markets

Relevant Markets



Co-funded by the
European Union

Fast moving markets (Dow, Monsanto: 'Innovation Spaces');

- On-line and Off-line (are they competing?), & hybrids;
- For free: how do you use the SSNIP test? (Google Shopping: it's a market, you pay with your data)
- Multi-sided (e.g., consumers, advertisers, app developers, suppliers/content providers): one market (USSup.Ct., or several markets?)



Market Definition: First Reactions



Co-funded by the
European Union

- German Parliament 2017, amendment to GWB: that a product is provided for free does not signify that a relevant market does not exist
- Commission 2019: «in digital markets, less emphasis should be put on the market definition part of the analysis.»
- Commission Experts' Report: revise 1997 Market Definition Guidelines (see also Commissioner Vestager's 2019 speech confirming this)



Market Power

- Tipping (dir. & indir. network externalities)
- Winner takes all
- Big Data (BKartA on FB): data-opolies (Stucke)
- Emphasis on Personal Data & 'Attention' (how do you measure market shares?)
- Lock-in effects (multi-homing de facto impossible, data portability highly imperfect)
- Buyer power
- 'Ecosystems'
- Tendency to conglomeration (and related issue of killer acquisitions): should we stop them sooner rather than later (e.g., Google/FitBit)?

Market Power (II)

Commission in Apple/Shazam: «market shares may not be a perfect proxy for measuring market power in recent and fast-growing sectors characterised by frequent market entry and short innovation cycles.»

- Is the 'platform' a bottle-neck? (E.g.: Fortnite/Apple)
- Commission Experts' Report 2019: need to work on market power in digital markets, need to focus on its measurement and on cross-market foreclosure strategies in the digital economy.



Two Recent Examples: (I) Google Shopping; (A) Market Definition (1)



(156) The Commission concludes that the provision of general search services constitutes a distinct product market. First, the provision of general search services constitutes an economic activity. Second, there is limited demand side substitutability (section 5.2.1.2) and limited supply side substitutability between general search services and other online services. Fourth, this conclusion does not change if general search services on static devices versus mobile devices are considered.

The provision of general search services constitutes an economic activity. (158) First, even though users do not pay a monetary consideration for the use of general search services, they contribute to the monetisation of the service by providing data with each query. (159) Second, offering a service free of charge can be an advantageous commercial strategy, in particular for two-sided platforms such as a general search engine platform that connect distinct but interdependent demands. (160) Third, even though general search services do not compete on price, there are other parameters of competition between general search services. These include the relevance of results, the speed with which results are provided, the attractiveness of the user interface and the depth of indexing of the web.

Two Recent Examples: (I) Google Shopping;

(A)

Market Definition (2)

(192) The Commission concludes that the provision of comparison shopping services constitutes a distinct relevant product market. This is because comparison shopping services are not interchangeable with the services offered by: (i) search services specialised in different subject matters (such as flights, hotels, restaurants, or news); (ii) online search advertising platforms; (iii) online retailers; (iv) merchant platforms; and (v) offline comparison shopping tools.



Two Recent Examples: (I) Google Shopping; (B) Market Power

(271) The Commission concludes that Google holds a dominant position in each national market for general search services [...].

(272) This conclusion is based on Google's market shares, the existence of barriers to expansion and entry, the infrequency of user multi-homing and the existence of brand effects and the lack of countervailing buyer power.

The conclusion holds notwithstanding the fact that general search services are offered free of charge, and regardless of whether general search on static mobile devices constitutes a distinct market from general search on mobile devices.

Two recent examples: (2) Facebook (BGH Interim Judgment); (A)

Market Definition

[§§ 24 seq.] Based on the determination of the BKartA, devoid of any legal error, from the perspective of the (potential) user [a social network] is not interchangeable with regard to its function with the provision of services of a professional network or a job stock exchange (Xing, LinkedIn, Indeed, Stepstone), a messaging service such as Snapchat, WhatsApp und Skype or other social media as YouTube, Twitter und Pinterest.

Their subject matter or main focus is either professional communication or the processing of contacts (as in Xing and LinkedIn), the bilateral or group communication within small groups (as in a way in messaging services such as WhatsApp and Snapchat), the diffusion of pictures or films (as in Instagram or YouTube) or the publication of one's opinion (as in e.g. Twitter).

[Absence consideration not an issue] Here multi-sided markets are involved, where the side which is provided for no consideration is a business aimed at obtaining an income. Facebook in fact puts the social network at the disposal of its users for free but at the same time allows third-party intermediaries to reach the platform users with their advertising and in such a way finances also the users' platform.

Two recent examples: (2) Facebook (BGH Interim Judgment); (B) Market Power

[FB's Market share over 96 % of the daily active social network users in the latest years] (§44) [...] according to the user survey promoted by the BKartA, 46% of Facebook users see "less data disclosed " as a reason to increasingly use another service instead of Facebook. Due to the existing direct network effects, however, this does not affect Facebook's market position. [...] The benefit of the Facebook network for users increases with the total number of people connected to the network, because the greater the number of users, the greater the communication options for each individual user. The fact that it is not just about the available people, but about the identity of the accessible users, that is, "identity-based" network effects exist, is confirmed by the result of the user survey. According to this, it is important for 85.8% of those surveyed that friends are users. 47.2% consider the total number of users to be important. These direct network effects lead to a high retention effect (lock-in effect) and ultimately to the fact that users are more willing to accept the disadvantages associated with using the social network - in particular those that are advantageous for the advertising market. This binding effect is very pronounced due to the size of the Facebook social network [...].

Two recent examples: (2) Facebook (BGH Interim Judgment);

(§52) According to the findings of the Federal Cartel Office in the contested decision, Facebook has so far been able to successfully fend off the pressure emanating from companies in neighboring markets via innovating and expanding its own social media. In the opinion of the office, Facebook's own innovations referred to in detail in its presentation as well as the examples of influential innovations by competitors did not show that any competitive pressure could attack Facebook's market position so far. This is shown by the fact that, despite the innovative force of the Internet, there have been no signs of any tendency to liquidation or any loss of relevant market share by Facebook over the past seven years. In such a situation there is only a vague, abstract vulnerability of its market position, which at least at the moment as well as at the time the office's resolution was passed has not all made Facebook's dominant market position more relative in any significant way.

Market Definition

Market definition helps identify customer demand and relevant competitors, allows identifying the actual competitors of the undertakings involved and makes it possible, among other things, to calculate market shares.

However, market definition is not an end in itself, but rather a step that helps in accessing competitive constraints and market power. An intermediate step for structuring the analysis, followed by a full analysis of competition among the companies active in the relevant market or potentially entering it.

The economic and societal impact of digital platforms raises a number of questions for policymakers, including whether existing regulatory approaches and instruments sufficient to promote and safeguard public interests.

In accordance with the EU Guidelines on market definition, the (relevant) market is defined as follows:

“Market definition is a tool to identify and define the boundaries of competition between firms. [...] The main purpose of market definition is to identify in a systematic way the competitive constraints that the 3 undertakings involved face”

In competition law, a relevant market is a market in which a particular product or service is sold. It is the **intersection of a relevant product market and a relevant geographic market**. The European Commission defines a relevant market and its product and geographic components as follows:

- a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;
- a relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous

European Commission explored the possibility for defining relevant market by function, by equipment, by operating system.

Traditional market definition tools or revised market definition among new market surroundings?

The definition of relevant market is the most **critical step in the enforcement of competition law** and it is also clearly one of the most fundamental building blocks of the economics of competition law itself, because enables competition authorities and courts to “*discern market power by examining concentration in a defined market.*”

The relevant market is required to be established by **defining the proper product, geographic and temporal markets.**

In other words, a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

Ultimately **there is no right or wrong market definition but only more or less appropriate delineation of the relevant market.** Only the assessment can be wrong in terms of the incumbent or expected intensity of competition to which the undertakings concerned are exposed in their area of activity.

“The UE Market Definition Notice”



The Commission Notice on the definition of relevant market for the purposes of Community competition law - also known as “**the Market Definition Notice**” - was published in **1997** to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its enforcement of EU competition law.

- By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expected to increase the transparency of its policy and decision-making in the area of competition policy.
- This is because the concept of relevant product and geographic market is a technical term used to identify and define the boundaries of competition between firms.
- Nowadays **disruption** makes it necessary to question the Effectiveness Efficiency Relevance Coherence of those positions set above.

In particular, the dynamic forces at play in the digital economy mean that market processes do not merely rein in substantial market power by product substitution, but also by the creation and reconfiguration of new channels of competition.

- The review processes' main goals should be to improve market definition – and the evaluation of market power – to reflect the empirical realities of an increasingly digital economy.
- **Market definition remains a relevant and valuable analytical tool for the application of EU competition law.**
- **While the basic principles set out in the Market Definition Notice remain sound, their practical application merits evaluation.**
- For those reasons and the reasons European Commission launched an initiative to **evaluate its 1997 Notice on the definition of the relevant market** for the purposes of EU competition law, through a **public consultation** of at least 12 weeks that will be carried out in Q2 2020 and then a **conference or workshop** with technical experts in Q4/2020

In order to do so the evaluation requires

- **an analysis of the jurisprudence** of the EU courts as well as of the main Commission decisions since the Notice was adopted in 1997. This would be with a view to **identifying pertinent methodologies and approaches to market definition that may not be reflected in the current Market Definition Notice**;
- **a review of latest economic thinking on market definition principles and practice**;
- **a targeted comparative review of international practices in market definition**;
- **a review of other academic research on the topic**, while consulting other agencies (within and outside the EU) and international experts on the topic of market definition;
- **an analysis of new technical and market developments** – mainly deriving from **the digitisation and globalisation of the economy** – that could have an influence on the competitive constraints;
- an assessment of the internal coherence of the different components of the Market Definition Notice, but also an assessment of coherence with EU jurisprudence and law as well as with the overall EU competition policy and practice.

The evaluation of the Market Definition Notice offers **an opportunity to assess the practical application of market definition principles and further develop best practice guidance** for a rigorous, sophisticated, and transparent approach to market definition.

- We will see a number of areas on which the evaluation exercise could focus.
- We'll also see some of the feedback already given by players and scholars to the cause.
- But first it is necessary to set out the main path along which understand the **European Commission's initiative to evaluate its 1997 Notice on the definition of the relevant market for the purposes of EU competition law.**

Concept in Transaction



DIGITAL
ECONOMY
AND NEW
MARKET
PERSPECTIVE
S



MULTI-SIDED
MARKETS
AND MULTI-SIDED
PLATFORMS
RETHINKING OF A MARKET
DEFINITION



NEW
MARKE
T
POWER

Market definition can be used as a tool to assess market power. Thus, it is required to define relevant market and to delimit the company's market position to ascertain its compliance with the competition law.

- Defining relevant market is an essential precondition for assessment of market dominating power and determination of abuse of dominant position from the phase of requirements of conduct, while in the case of other type of conduct such as cartel case, relevant market definition is just an instrument for determination of unfairness.
- Despite market definition is just a tool not a requirement, the evaluator should consider realistically what competition exists and what competition is possible.
- Defining an appropriate relevant market is an important analytical step, both for evaluating market power and assessing competitive effects. This is so regardless of the industry or products involved.
- Market definition is an integral part of the competitive assessment undertaken under EU competition law.

DIGITAL ECONOMY AND NEW MARKET

PERSPECTIVES

The spread and extent of growth in the digital economy has been driven by the appearance and expansion of globalised platforms that disintermediate standard markets and directly connect users.

- The advent of the Internet has led the opportunity to strike down search costs and information asymmetries in retailing markets, transforming them into more complex multisided realities and challenging the role of competition regulators.

- Those changes have given birth to the **multi-sided economy**.

As more and more physical products and services become largely digital in nature, the scale of this change becomes ever more important.

ONLINE
INTERME
DIARIES

MEDIA
COMPA
NIES

PAYMEN
T CARDS
COMPA
NIES

Digitalisation of the economy has arrived in waves:

internet allowed people to buy directly digital copies and physical products and services from online stores, rather than physical ones;

online platforms assemble, search, review and match users with sets of products and sellers. To do so platforms recruit at least two, but often three or more sets of users, many of which value the platform not for its own qualities, but for the presence of others upon it;

the direct transfer of not just information, and hence digital copies, but also of value, in the form of unique digital products and services over the internet.

In this scenario, **market's development is enhanced by technological innovation and increasing integrations of produce and supply chains on a global scale.**

It is necessary, then, to **re-define the concepts of market** and above all of relevant market, because of the disruptive and innovative changes that high-tech markets has led

MULTI-SIDED MARKETS AND MULTI-SIDED PLATFORMS

The definition of relevant market and the determination of dominant position need to be considered reflecting new area of market developments.

- With the advent of internet, chances of mediating transactions among customer groups are significantly increasing.
- This leads to magnify the importance of online platforms. Recently, platform operators working in multi-sided market also are increasing thanks to popularization of smartphones and development of big-data cloud computing technology.
- A large part of the debate on this type of markets has been focused on internet platforms and the digital economy. However, multi-sidedness is not only an “online” phenomenon. Several traditional “offline” markets (e.g. newspapers, magazines, payment card) have been identified to be multisided.
- Currently, multi-sided platform operators are threatening incumbent with their’s own ecosystem based on platforms without network.

PLATFORM ECONOMY



Co-funded by the
European Union

Platforms not only can gather, process and filter information as a gatekeeper but also qualitatively alter the informational contents.

- The phenomenon is also described as **platform economy**, that means that all information is measured and accumulated as data via Internet of Things (IoT).
- In this area the analysis of the data can maximise production efficiencies and lower the marginal cost of production and distribution for physical products to predict zero level of marginal cost. For example, an electronic car can be manufactured like computer parts as manufacturing process is simplified and standardized which means the marginal cost drops hugely.
- Platforms are, indeed, different in nature from traditional markets, and particularly there are important demand externalities from one side of the platform to the other ('cross-platform network effects') which, if ignored, could lead to bad decision-making.
- It is important, then, to examine the disruptive effects from the point of view that are mainly affected.

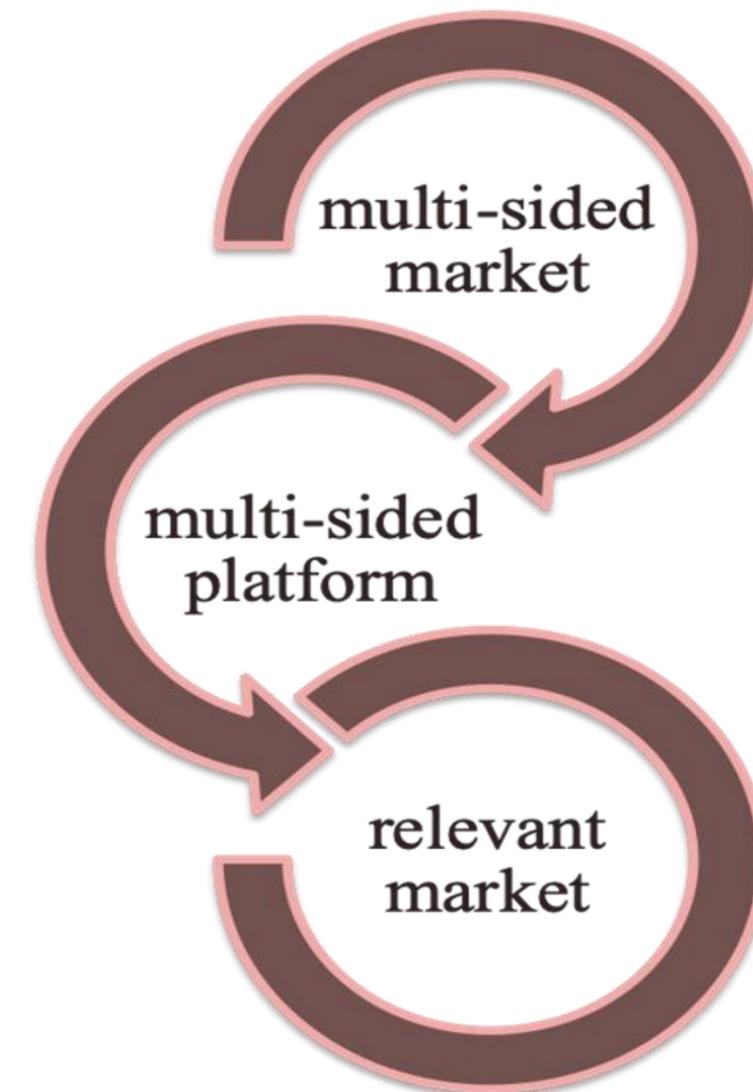
Multi-sided market is increasing where platform operators minimise transaction cost only by matching surplus side users with surplus asset and demand side users.

- The 'marginal cost' and 'price' are not same and under the asymmetric price structure from manipulation by platform operator. The price level is the total prices charged by the platform to the each-side, while the price structure is the decomposition or allocation of the total prices between the buyer and the seller.

In a word, transaction cost can be minimised between both sides by platform operator and marginal cost decreases by itself. And price level and price structure are closely connected to indirect network effect in multi-sided market.

- **The theoretical research concerning multi-sided market and multi-sided platform is synonymous with 'zero marginal cost society'.**

- Since it is not easy to determine whether specific market structure is one-sided or multi-sided and what kind of role platforms do play, it would be necessary to clear up some focal topic



RETHINKING MARKET

DEFINITION

Market definition is a less valuable tool in Multi-sided markets.

- Nevertheless, the concept of relevant product and geographic market is a technical term used to identify and define the boundaries of competition between firms.
- Market definition is used both in the Commission's antitrust enforcement pursuant to **Articles 101 and 102** of the Treaty on the Functioning of the European Union and in the Commission's merger control enforcement pursuant to Council Regulation (EC) No 139/2004.
- Market definition allows identifying the actual competitors of the undertakings involved and makes it possible, among other things, to calculate market shares.
- Where there is a plausible cross-platform network externality, the most important takeaway is for competition agencies to **consider the value of adopting a multi-sided approach, and to explain the rationale when deciding not to do so.**
- The research will start from **defining the new concepts of market, multi-sided economy and relevant market.**

MSMs

The digital growth has been driven by the appearance and expansion of globalised platforms that disintermediate standard markets and directly connect users, transforming them into more complex multi-sided markets. While economists often abstract from market definition within their theoretical models, practitioners need to get at least some notion about the definition of the relevant market.

- The concept of Multi-sided platform (MSPs) is often confused or interchanged with the term Multisided market (MSMs). Indeed **multi-sided platforms should be distinguished from multi-sided markets in terms of mediating plural customer groups as its service.**
- The distinction is useful for two reasons:
 - it helpfully distinguishes between the product of the firm (the platform), and the relevant market, or markets, in which the platform operates;
 - it accounts for the fact that while the multi-dimensionality begins with two-sidedness (in which consumers and sellers meet on a platform), this is only the beginning, 'cause many of these markets have three sides (consumers, content suppliers and advertisers) and some even have four (for example in payment cards) or more.

There are various definitions of the multi-sided markets in which multi-sided platforms compete, however, most share the same basic elements, and can be captured as follows:

a market in which a firm acts as a platform and sells different products to different groups of consumers, while recognising that the demand from one group of customer depends on the demand from the other group(s).

- Furthermore, the demands of the two or plus sides of the market are linked by indirect network effects and the firm recognise the existence (i.e. internalises) these effects.
- The buyers of the various products, however, do not internalise those effects, which are therefore called externalities.
- The fact that buyers do not internalise these externalities makes a multi-sided reality different from the case of complementary products.

With market power definition the more sophisticated tools need to be adjusted to estimate the impact that a price can rise both sides.

- It might be argued that multi-sided markets require less scrutiny from antitrust authorities and should be treated more leniently.
- Actually the very opposite is true. Indeed, the markets in which the multi-sided platforms operate may provide particularly fertile ground for exclusionary conducts and market abuses.

Let's take **some examples** in order to investigate whether the tools traditionally used to define markets, to assess market power and efficiencies, and to assess the effects of exclusionary conduct and vertical restraints, remain sufficient to address those questions in the context of these multi-sided platform markets.

- Exclusionary conduct
- Vertical restraints

Exclusionary conduct

- platform markets' behaviour deserves greater scrutiny and should be a greater priority for agencies to supervise;
- the framework for assessing the exclusionary effects of exclusivity clauses remains robust, price-cost tests as a whole are not fit-for-purpose as a tool for identifying predatory pricing in these markets. A proposed replacement is to consider whether the price would have made sense if it did not weaken its rival. This could be tested by estimating elasticities and then removing any substitution effects from the platform's optimal price setting problem

Vertical restraints

- Vertical restraints in multi-sided markets can be imposed either by platforms on user or by users on platforms;
- the analytical framework and tools will be used to analyse efficiencies and the effects of vertical restraints on a case-by-case basis;
- where cross-platform network effects are strong there may be a real risk that if they have the opportunity, users on either side might free-ride and bypass the platform.

As a result there may be significant scope for vertical restraints imposed by the platform to generate efficiencies by protecting its viability.

Multi-sided markets definition and functions are different from standard markets.

- Due to indirect network effects, the antitrust assessment is typically more complex in multi-sided markets.
- This is also true for market definition. In particular, due to **interdependencies between markets, the (stand-alone) value of market definition may even be more limited than in one-sided markets.**
- Modelling these markets, the way they work and identifying the mistakes, can be made by
 - > treating them as traditional markets or
 - > treating them as an unicum.
- The path that'd been chosen has consequences for the way in which competition agencies analyse these markets, and hence on whether, and if so how, they decide to intervene in these markets.

Why it is important to determine the market

A traditional starting point for framing an analysis of the competitive effects of a merger, an action or an agreement is to define the relevant market(s) that might be affected. This can help to identify demand and a set of relevant competitors.

- However, when a merger, action or agreement involves either a multi-sided reality, or a firm that trades with a multi-sided platform, there is a preliminary question of «**how many markets to define?**».
- For multi-product or multi-location firms, acting in one-sided market, the answer is the result of the market definition exercise, which identifies the scope of the market, and hence whether those different products and locations fall within the same or different markets.
- In contrast, for multi-sided platforms, the product that a platform provides to one side of the market does not compete with the product it provides to another side

NEW MARKET

POWER

Now will be set out some key features of multi-sided markets that are important to an assessment of market power



Indirect Network Externalities



Co-funded by the
European Union

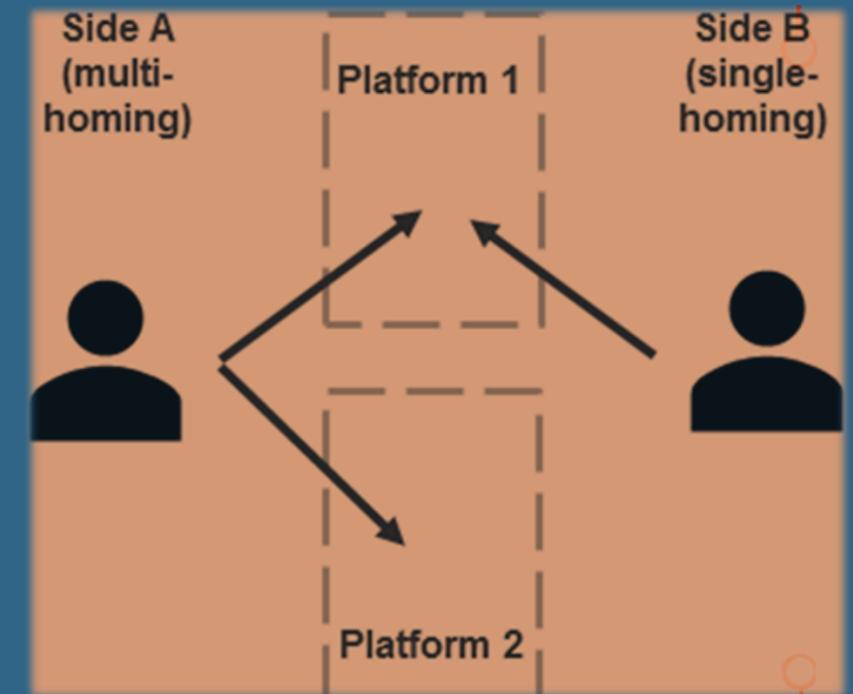
Indirect network externalities (INE) are an important feature of multi-sided markets.

- Network externalities arise when the utility (or profit) obtained by a consumer (or firm) of one type depends on the number of consumers (or firms) of the other types in the market and the different consumer groups cannot internalise these externalities.
- The benefits on one side of the market derive from being on the platform and depend on the number of customers on the other side of the market, and vice versa. As a result, the demands of each group of customers are interlinked and this generates feedback loops between them.
- The presence of network externalities between the different consumer groups in multi-sided markets changes the strategic nature of the market game.
- This has been well-documented by the large economic literature that has emerged on multi-sided markets.
- A main reason is that network externalities affect demand from the different consumer groups, which in turn influence the firms' strategic behavior, including pricing decisions

Single-homing and Multi-homing

As seen, the extent of single-homing and multi-homing by customers on each side of the market is a key competitive aspect of multi-sided platforms.

- If customers on one side only join one platform, then customers on the other side can only access those customers by joining the same platform.
- This creates “**competitive bottlenecks**” - with single-homing customers on one side and multi-homing customers on the other, the platform competes aggressively for the singlehoming customers and once they are on board it earns profits from customers on the other side who multi-home.
- There are some practical ways to identify the extent of single and multi-homing and thereby assess market power.



Price Structure

In a multi-sided market, the price structure reflects the interlinked demands of the two groups of consumers and the need to get both sides on board.

This often results in complex pricing where the price to each group of consumers does not reflect the marginal cost of supplying them.

- Platforms must be able to use the price structure to internalise the externalities arising from the INE.
- This means that Businesses on one side of the market may pass-through the fees they are charged by the platform to the consumers on the other side of the market when transacting with those consumers through the platform.

This may undermine the platform's price structure and limit its ability to internalise the externalities by facilitating value creating transactions between the two sides.

In addition to the complex pricing that can be a feature of multi-sided markets, it will also be important to consider the degree of pass-through when considering the extent to which multi-sidedness affects the behaviour of the platform.

Tipping

Network externalities can lead to markets tipping to one, or a few, providers.

- The feedback loops that can arise when there are strong INE means that multi-sided markets tend to be relatively concentrated.
- A multi-sided market may be less likely to tip the more differentiated the offering from competing platforms and the more that customers on one or more sides multi-home. Scale economies and having a critical mass of consumers may also be important in determining the concentration of a market with platforms because they influence their financial viability.
- Once a market tips, the joint behaviour of consumers and businesses may mean that the market power of the platform becomes well-established. It may take considerable coordination by both consumers and businesses to switch to another platform to restore competition. Such co-ordination may be unlikely in the absence of major technological changes in the sector. For these reasons, establishing whether there is a 'first-mover advantage' may be important in identifying current market power and the potential longevity and sustainability of this market power.

**WHEN THE MULTI-SIDED NATURE OF THE MARKET
IS
RELEVANT TO ASSESSING MARKET POWER**

Any assessment of market power in multi-sided markets should take account of these features.

- This is due to the fact that the **multi-sided nature of the market is relevant to assessing market power**
- The standard results from one-sided markets do not apply directly to multi-sided markets and any assessment of market power needs to take this into account explicitly (as we show below).
- Many of our standard tools for assessing market power are more complex to apply in multisided markets and may need to be adapted. At a minimum, this may involve simply taking into account the impact multi-sidedness has on the platforms' business strategy and decisions.
- It could be useful to suggest some **practical approaches which authorities should consider when measuring market power in multi-sided markets.**
- In this section we explore how competition authorities can operationalise the market power tools and obtain reliable estimates of key parameters in multi- sided markets.

Market power in multi-sided markets

Exploring measures of market power in multi-sided markets that can be employed by competition agencies, a key question is **how the measures developed for one-sided markets can be adjusted to analyse merger effects in multi-sided markets.**

- As pointed out, multi-sided markets differ from traditional one-sided markets in that
 - (i) firms serve more than one consumer group; and
 - (ii) there exists indirect network effects across the consumer groups.
- The vast economic literature that has emerged on multi-sided markets clearly demonstrates that **the presence of network effects changes firms' strategic behavior and thus the nature of competition.** However, in absence of network externalities across consumer groups, there is really no difference between one-sided and multi-sided markets.
- In this case, the competition authorities can assess the effects of the merger on the different sides of the market separately, using the standard tools for one-sided markets, as presented above.

Indeed, using the standard tools for one-sided markets is what has been done by competition authorities in many cases until recently.

- **Standard tools can be misleading in the presence of network effects, and present new tools for analysing mergers in multi-sided markets.**
- While the literature on multi-sided markets is vast, there are only a few recent studies developing operational tools for competition authorities' assessment of mergers in such markets.
- Due to the two-sidedness, those measures depend on four sets of diversion ratios that can either be estimated using market-level demand data or elicited in surveys. In an application, they evaluate a hypothetical merger in a daily newspaper market.
- **The results demonstrate that it is important to take the two-sidedness of the market into account when evaluating measures.**



MEASURES OF MARKET POWER

This section will focus on identifying different measures of market power and explain how these relate to the conduct considered.

- These measures of market power are not exclusive to multi-sided markets. However, it can be explained how they may need to be adapted when used in multi-sided markets and we identify some additional challenges that may arise in this context and where care will need to be taken when interpreting the results of standard measures.



These sources of information are unlikely to provide all the evidence required to assess the strength and impact of any position in the market.

- The pragmatic approach of assessing market power in each side of the market and then taking into account feedback loops will capture the multi-sided nature of the market and its relevance to the conduct under investigation, provided that it is possible to assess accurately the feedback loops.
- We've seen in practice several practical ways of measuring market power in the different sides of the market, taking account of the added complexity and potential biases that arise in using these measures in multi-sided markets and ways of directly measuring the feedback loops.
- Nevertheless, it is not always be possible to measure the feedback loops directly. Where this is not possible, thinking through how these loops are likely to work in practice will provide a good qualitative way of capturing the impact indirect network effects will have on market power.

The authority will need to make an assessment in the round and using multiple sources of evidence, including internal business documents.

Digital Single Market

What is the Digital Single Market?

- The Digital Single Market designates the 2014-2019 strategy of the European Commission for the best possible access to the online world for individuals and businesses.
- A Digital Single Market (DSM) is one in which the free movement of persons, services and capital is ensured and where the individuals and businesses can seamlessly access and engage in online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.
- The 2014-2019 Commission had identified the completion of the DSM as one of its 10 political priorities.

The Pillars

- The DSM Strategy was built on three pillars:
- Access: better access for consumers and businesses to digital goods and services across Europe;
- Environment: creating the right conditions and a level playing field for digital networks and innovative services to flourish;
- Economy & Society: maximising the growth potential of the digital economy.

EU Digital Agenda

List of Actions on the Digital Agenda (launched in 2010 under the Europe 2020 strategy) include:

- Simplifying pan-European licensing for online works
- Stakeholder debate on measures to stimulate a European online content market
- Simplifying the distribution of creative content
- Protecting intellectual property rights online

Creating a connected Digital Single Market is one of the ten priorities of the Juncker Commission.

The Digital Single Market



Co-funded by the
European Union



President Juncker
Head of European
Commission

"My **first priority** will be to put policies that create growth and jobs at the centre of the policy agenda. Key to this **is creating a digital single market for consumers and businesses** – making use of the great opportunities of digital technologies which know no borders. **To do so, we will need to have the courage to break down national silos** in telecoms regulation, **in copyright** and data protection legislation, and in competition law."



Vice-President Ansip
Digital Single Market

"Take copyright, for example. Today's rules are a mess, so we need to act with some urgency. They date back to 2001. They are not suited to the digital age, for responding to new technologies, consumer behaviour and market conditions."



Commissioner Vestager
Competition

"Geo-blocking is a technical hurdle that e-commerce companies erect to make cross-border trade difficult or impossible. I have a subscription to a streamed TV package. When I am abroad I get a message saying 'Sorry, the content can only be watched from within Denmark'. Messages like this are not easy to comprehend, are they?"



Commissioner Oettinger
Digital Economy &
Society

"I am quite convinced that portability on the one hand and maintaining a degree of territoriality on the other are necessary if we want to preserve cultural diversity in cinema in Europe."

EU Digital Single Market



- Communication “A Single Market for IP Rights” (24.5.2011)
- Green Paper on online distribution of audiovisual works (13.7.2011)
- Communication on content in the Digital Single Market (18.12.2012)
- Licences for Europe (5.11.2013)
- EU Copyright Review (5.12.2013)
- Digital Single Market Strategy (6.5.2015)
- Consultation of the review of the Satellite and Cable Directive (24.8.2015) and Proposed Regulation (14.9.2016)
- Communication towards a modern, more European copyright framework (9.12.2015)
- Regulation 2017/1128 on ensuring cross-border portability of online content services in the internal market (14.6.2017)
- Directive 2019/790 on Copyright in the Digital Single Market (17.4.2019)
- Directive 2019/789 on broadcasters’ online transmissions and retransmissions of television and radio programmes (17.4.2019)

Digital Single Market Strategy (6.5.2015)

- Preventing unjustified geo-blocking:
 - legislative proposals in the first half of 2016
- Competition sector inquiry on the application of competition laws to e-commerce (June 2015)
- Better access to digital content:
 - Legislative proposals before the end of 2015 to reduce differences between national copyright regimes and allow for wider online access
 - Portability of legally acquired content
 - Ensuring cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector
 - Harmonised exceptions for greater legal certainty for cross-border use of content for research and education
 - Clarifying rules on the activities of intermediaries in relation to copyright-protected content

E-commerce Sector Inquiry



The main findings of the Final Report (10 May 2017)

The report confirms that the growth of e-commerce over the last decade and, in particular, increased online price transparency and price competition, had a significant impact on companies' distribution strategies and consumer behaviour.

The final results of the sector inquiry highlight the following major market trends:

- a large proportion of manufacturers decided over the last ten years to sell their products directly to consumer through their own online retail shops, thereby competing increasingly with their distributors;
- increased use of selective distribution systems, where the products can only be sold by pre-selected authorised sellers, allows manufacturers to better control their distribution networks, in particular in terms of the quality of distribution but also price;
- increased use of contractual restrictions to better control product distribution - depending on the business model and strategy, such restrictions may take various forms, such as pricing restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools and exclusion of pure online players from distribution networks.

http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

E-commerce Sector Inquiry

The main findings of the Final Report (10 May 2017)

Some of these practices may be justified, for example in order to improve the quality of product distribution, others may unduly prevent consumers from benefiting from greater product choice and lower prices in e-commerce and therefore warrant Commission action to ensure compliance with EU competition rules.

Digital content

- The results of the sector inquiry confirm that the availability of licences from content copyright holders is essential for digital content providers and a key factor that determines the level of competition in the market.
- The report points to certain licensing practices which may make it more difficult for new online business models and services to emerge. Any assessment of such licensing practices under the EU competition rules has however to consider the characteristics of the content industry.
- One of the key findings of the sector inquiry is that almost 60% of digital content providers who participated in the inquiry have contractually agreed with right holders to "geo-block". Geo-blocking prevents consumers from purchasing consumer goods and accessing digital content online from other EU Member States.

http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

Communication Towards a Modern, more European Copyright Framework (9.12.2015)

- Ensuring wider access to content across the EU:
 - EU draft regulation on cross-border portability
 - Legislative proposals in 2016 to enhance cross-border distribution of content in light of the SatCab review
 - Supporting rights holders and distributors to reach agreement on cross-border access to content including through mediation
 - Facilitating digitisation of out-of-commerce works and making them available online
 - Development of licensing hubs
- Adapting exceptions to digital and cross-border environments
 - Text and data mining, illustration for teaching, preservation by cultural heritage, “panorama”
- Achieving a well-functioning marketplace for copyright:
 - Definition of the rights of “communication to the public” and of “making available”
 - Remuneration of authors
- Providing an effective and balanced enforcement system: “follow the money”

Portability Regulation 2017/1128

Obligation on online content service providers to offer cross-border portability to the subscribers who are temporarily outside their home country

- Scope: services that are already portable in the home country; both Free and Pay services;
- *Legal fiction that the subscriber is accessing his/her subscription from Member State of residence*
- Platform mandate
- Authentication of Member State of residence
- Temporariness
- Transition period

Entry into effect 1 April 2018

http://europa.eu/rapid/press-release_IP-15-6261_en.htm

http://europa.eu/rapid/press-release_IP-17-225_en.htm

<https://ec.europa.eu/digital-single-market/en/news/regulation-cross-border-portability-online-content-services-internal-market>

EU Copyright Reform Package (14.9.2016)

- Proposed regulation on online transmissions of broadcasting organisations and retransmissions of TV and radio programmes
 - Sat Cab Review
- Proposed Directive on Copyright in the Digital Single Market
 - Mandatory exceptions/out of commerce works
 - Voluntary scheme for licensing AV works on VOD platforms
 - Related right for press publishers
 - Levies for publishers
 - New duty on platforms (value gap)
 - Transparency and remuneration for authors and performers
- Proposed regulation and Directive on Marrakech Treaty

http://europa.eu/rapid/press-release_IP-16-3010_en.htm

EU Satellite and Cable Directive Review (24.8.2015)

- The SatCab Directive facilitates clearing of copyright and related rights for satellite broadcasting and cable retransmission to improve cross-border transmission and reception of broadcasting services
- Country of origin principle: rights are acquired for the EU country where the uplink takes place
- Rights cleared in one country allow broadcasters to broadcast to the whole of the EU, subject to contractual freedom
- For cable retransmission rights have to be cleared through collective management organisations

EU Satellite and Cable Directive Review (24.8.2015)

Questions for consultation:

- Are the EU rules up to date in the digital age?
- What would be the impact of extending the SatCab Directive to cover broadcasters' services over the internet (catch-up, simulcast)?
- <https://ec.europa.eu/digital-single-market/en/news/eu-seeks-views-satellite-and-cable-directive>

Report on the responses to the consultation:

- <https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive>

EU Directive 2019/789



- Vice-President for the Digital Single Market Andrus **Ansip** said: *"I am very pleased we reached yet another agreement that brings us closer to a functioning Digital Single Market. The updated broadcasting rules are a big part of the puzzle. This regulation has the potential to unlock a large amount of broadcast content across borders, benefitting the 41% of Europeans who watch TV online but also the 20 million EU citizens who were born in a different EU country from the one they live in"*.

What will the directive change for the distribution of TV and radio programmes?

- **The Principle of the country of Origin (COO):** the Directive introduces the country of origin (COO) principle to facilitate the licensing of rights for certain programmes that broadcasters may wish to offer on their online services (simulcasting, catch-up services and other services that complement the main broadcast, such as previewing). Thanks to this mechanism, broadcasters will be able to make radio programmes, TV news and current affairs programmes as well as their fully financed own productions, available online in all EU countries.
- **Retransmission:** the Directive provides a mechanism to facilitate the licensing of rights in the case of retransmission of radio and TV programmes, which includes retransmission services provided over the internet under certain conditions. This measure is expected to contribute to a wider distribution of radio and TV channels.
- **Direct injection:** Direct injection is a process increasingly used by broadcasters to transmit their programmes to the public. The new rules will make sure that right holders are adequately remunerated when their works are used in programmes transmitted through direct injection. They will provide legal certainty to broadcasters and distributors involved in the process.

EU Geo-Blocking Regulation

The final text of Article 4(1)(b) of the Geo-Blocking Regulation, approved by the European Parliament on 6 February 2018 and adopted by the Council on 27 February 2018, specifically carves out from its scope the provision of access to copyright protected works:

Article 4

Access to goods or services

1. A trader shall not apply different general conditions of access to goods or services, for reasons related to a customer's nationality, place of residence or place of establishment, where the customer seeks to:

(a) ...

(b) receive electronically supplied services from the trader, *other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form*

REVIEW OF THE GEO-BLOCKING REGULATION?

Directive on Copyright in the Digital Single Market (8.4.2019)

- In September 2016 the European Commission proposed changes to copyright law including introducing a Directive on Copyright in the Digital Single Market with the intention “to create a comprehensive framework where copyrighted material, copyright holders, publishers, providers and users can all benefit from clearer rules, adapted to the digital era”.
- To this end, on 13 February 2019, the European Parliament, the Council of the EU and the European Commission reached an agreement on this Directive. The Directive was subsequently passed by the European Parliament on 26 March 2019 and came into force from 2021.
- The Directive includes new copyright exceptions and limitations, rights for press publishers (and content creators) as well as regulating the position between content platforms and the respective rights holders.

Directive on Copyright in the Digital Single Market (8.4.2019)

- The Directive has caused considerable controversy with critics believing that its permissions introduce legal uncertainty and will ultimately harm the creative and digital economies.
- Some users are also concerned that content will not be as readily accessible.
- Some concessions have been made, for example, with news aggregators able to include very short pieces of news reports, although exactly what that means still must be agreed upon.
- The Directive is not enforcing upload filters on user generated content platforms and it appears that memes and gifs will be able to be shared on these platforms.
- On the other hand, the Directive's supporters believe that it will increase revenues to publishers and creators of content, which will protect and promote the publishing and creative industries.
- There is considerable uncertainty as to how the Directive will work in practice and what the commercial consequences will be for platforms, publishers/creators and users.

Directive on Copyright in the Digital Single Market (8.4.2019)

Right for publishers of press publications

- In the Directive, the new press publishers right (Article 15) gives the publishers of 'press publications', which are defined as a 'collection composed mainly of literary works,' rights to reproduce and make their works available online, for the use of their press publications by information society service providers (ISSPs). These rights will expire 2 years after the press publication is published.
- This will be relevant to online press articles by ISSPs, as Member States must provide that authors of the works, which are used in press publications, obtain an appropriate proportion of the amount that press publishers receive from the ISSPs.
- Provisionally, the use of individual words, short phrases and hyperlinks of publications will still be allowed without authorisation from press publishers.

Directive on Copyright in the Digital Single Market (8.4.2019)

Hosting user generated content

- The Directive seeks to regulate the payment received by writers and performers and the revenues enjoyed by the online platforms when they share their output. Article 17 considers that an “online content sharing provider” is communicating with the public when it allows them access to works that are protected by copyright. Sites which host user generated works will need to apply for a licence in order to present copyright protected content uploaded by users unless it complies with conditions set out in the Directive. Where no licensing agreements exist with rights holders, the platforms, under Article 17(4) will have to:
 - make all efforts to obtain an agreement
 - ensure the unavailability of unauthorised content where rights holders have provided the appropriate information and
 - act quickly to remove any unauthorised content once notified and stop future activity.

Directive on Copyright in the Digital Single Market (8.4.2019)



Hosting user generated content

- Whether the platform has observed these obligations above is determined by the principle of proportionality, the audience and types of work that users upload and the methods and costs for the platforms. At the right holder's request, platforms are obliged to provide the right holders with information regarding how they comply with their obligations set out under Article 17(4).
- For less well-established platforms, that have not been available to the public for three years and that have a turnover of less than €10 million and 5 million monthly users, they will only have to adhere to the conditions that they have made best efforts to receive authorisation and that if notified they act as quickly as possible to remove the content. If the users increase to above 5 million they will also have to make certain that notified content does not re-emerge later.
- The Directive has also set out that platforms must set out an effective complaints process that all users can access in the event that there is a dispute over removal or suspension of access to works that are uploaded. All complaints must be examined expeditiously and by human review. To further the relationship between the user and the platform, the Commission, with the help of consultations with platforms and rights holders, will discuss best practice for the parties' cooperation.

Directive on Copyright in the Digital Single Market (8.4.2019)

Remuneration for authors/performers

- The new Directive gives authors and performers rights to proportionate payment on the licensing of their rights. Under the Transparency obligation in Article 19, authors have the right to detailed information about the exploitation of their work. This article sets out that Member States should ensure that the licensee to the author's work provides to the author up to-date information on the exploitation of their work at least once a year. However, the licensee can limit the burden in 'duly justified cases' where the time or administration spent on the information would be disproportionate to the amount of remuneration for the author.
- If a piece of work becomes hugely successful and the fee originally paid was too low, the Directive provides for a contract adjustment correction.
- The Directive also includes a mechanism for writers/performers to reclaim their rights when their work is not being used, although this mechanism does not apply where the lack of exploitation can be remedied easily by the author or performer.

Directive on Copyright in the Digital Single Market (8.4.2019)

Exceptions and limitations

- Text and Data mining exceptions - Articles 3 and 4
- Teaching and Cultural Heritage exception - Article 5 (an online education exception for the use of online teaching), and Article 6 (a conservation and dissemination of cultural heritage exception)

Use of Out-of-commerce works (that, through a presumption of good faith, are not available through the usual channels of commerce after a "reasonable" search has been undertaken to identify whether it is publically available)

- Article 8(1) provides for Collective Management Organisations (CMOs) to be able to grant to non-CMO members, for non-commercial reasons, licences to institutions with regards to out of commerce works which reside in the collection of the institution on a permanent basis.

Appointing parties for negotiations for audio-visual works on video-on-demand (VOD)

- Where there are disputes between those who are attempting to grant licences for audio-visual works for VOD, member states are now obligated to appoint a mediator, official or impartial body to facilitate the conclusion of the licences.

Digital Single Market achievements



- Under the Juncker Commission, 30 legislative proposals on the Digital Single Market were made.
- At the end of the mandate, 28 of these legislative proposals have been agreed upon by the co-legislature.