

Considerations of France and the Netherlands regarding intervention on platforms with a gatekeeper position

This discussion document elaborates on the issue of intervention on “large digital platforms with significant network effects acting as gatekeepers” (also referred to as “structuring platforms”), namely why, when, how a new framework of regulation could be used. Its purpose is to bring further input to both consultations launched by the European Commission regarding first ex ante intervention for platforms acting as gatekeepers as part of the DSA Package and second the New Competition Tool (NCT) insofar as it applies to digital markets. We naturally welcome further in-depth discussions with experts, the European Commission, and other Member States about this issue.

Why is intervention needed?

Admittedly, platforms continue to provide entrepreneurs and consumers with a large number of benefits. However, such benefits may be diminished if the market position of some platforms becomes entrenched up to the point where competitors cannot challenge their market power anymore (see below). The terms ‘structuring platforms’ is used hereafter to designate the gatekeeping position of such platforms. As a result, small, innovative platforms may be impeded from entering the market or compelled to withdraw from it. Also, consumers and business users may become dependent on a platform and subject to unfair terms or behaviour. This may ultimately lead to a significant lack of competition as well as broader market failures stemming from users’ inability to shop around on the market and pick the terms and conditions which they favour. Let alone this negative impact on freedom of choice, these outcomes may cause major harm regarding innovation, price and quality.

Dynamics

The aforementioned risk arises primarily as a result of the dynamics of digital platform markets.

This is the case on markets where:

- Direct and positive indirect network effects play an important role, making it easier for a platform with a large number of established users to attract more users.
- Network effects are strengthened when increased by data-driven feedback loops.
- A platform enjoys significant economies of scale (more likely when the product is digital).
- Economies of scope arise in cases where the combination of data sets can be used to gain new insights.

Whether or not these dynamics actually lead to a winner-takes-all or winner-takes-most outcome hinges upon a number of factors, inter alia the level of switching costs and whether or not the users are likely to multi-home.

In some cases, these dynamics will create a situation where a platform is able to control almost the whole market. As a result of exclusive access to inputs (data, online infrastructure) and/or users, consumers and businesses, as emphasized above, may have no alternative but to use the platform, thereby having to accept its terms and conditions, even when this means undergoing potentially significant drawbacks, on quality, price, or privacy-wise.

Strategies

A further consequence of the dynamics described above is that structuring platforms may get the opportunity to apply a number of strategies aimed at maintaining and strengthening their gatekeeper position.

- If a platform has access to key inputs (such as data or access to essential online infrastructure), capital and a large, stable number of users as a result of the dynamics referred to above, it can leverage such market power on other markets.
- Such strategy can be carried out throughout the acquisition of other companies, for example in order to obtain a crucial data set or to eliminate a potential competitor.

Effects

If combined, these dynamics and strategies can lead to a number of effects that may in turn contribute to strengthening established market positions.

- The leveraging of market power means that gatekeeper platforms are able to create an ecosystem of services, in which users may become locked-in by high switching costs that may be raised by each new service added to the ecosystem.
- In some cases, damage to competition may be difficult to reverse.
- The impact on the market and the negotiating position vis-a-vis users can reach a point where a gatekeeper platform amounts to a sort of private regulator, which is able to set rules on the market whilst being subject neither to accountability through democratic checks and balances (like public regulators) nor to market discipline. These rules can be used to strengthen the platform's own position, for example by deterring users from multi-homing or switching to another service provider.

When is intervention required?

Pre-emptive action should intervene prior to the stage where damage becomes irreversible. Intervention is justified when the asymmetric bargaining power of structuring platforms leads to negative consequences. For example, intervention may be necessary when users are locked in a platform or competition is or will soon be hampered by a lack of access to inputs, capital and users. It should thus apply to situations where, without any intervention, it is unlikely that smaller actors and new entrants who otherwise may grow out into a new disruptive innovator are able to compete with the structuring platform.

A platform subject to intervention should at least have considerable market power in at least one market. This is a basic prerequisite for such platform to be a gatekeeper and thus be seen as a structuring platform.

On the other hand, designing a regulation that does not exceed what is necessary to address the aforementioned concerns – i.e. which does not impose unnecessary obligations to the platforms without any gatekeeper position – is also important.

Operationalising the scope of intervention

One way to try and seek both legal certainty and an adequate enforcement timeframe would be to define the scope of intervention against a number of simple and objective criteria, typically relating to the size of the platforms (as the number of users, business contracts, market share or turnover).

Nevertheless, the simpler the criteria, the less accurate they are in order to single out the platforms calling for specific rules. Conversely, the more accurate these criteria, the more numerous and unwieldy they would likely need to be to approximate the right scope for intervention.

Without ruling out the use of some simple criteria to define the scope of structuring platforms, more qualitative criteria seem to be indispensable as far as many of the aforementioned provisions are concerned.

It is important to stress that classical methods of market definition cannot always be used effectively in digital markets. In its analysis to determine whether a structural position exists, the regulatory authority should review the characteristics of the service or ecosystem in question together with the behaviour of the platform and its users.

This means that in any event, the definition of the scope of intervention calls for a platform-by-platform approach carried out by the regulatory authority. However a right balance ought to be struck between this and the need for a reasonable level a legal certainty.

What should be intervened on and how?

Besides a principle-based set of obligations and prohibited practices, intervention should also include a flexible and proportionate case-by-case approach by enabling the regulatory authority to impose tailor-made remedies to a structuring platform. Proportionate intervention is needed to preserve the benefits of platforms whilst enhancing competition. Too heavy-handed an intervention would hamper innovation. This approach is a possible way to implement options 3a and 3b or the NCT set out in the Inception Impact Assessments issued by the European Commission .

1. List with principle based obligations and prohibited practices

In order to increase users' ability to freely make efficient choices, a gatekeeper platform would be subject to a set of principle-based obligations and prohibited practices. This would be how option 3a would be implemented.

The full set of behavioural obligations could be widened to the whole ecosystem of the platform to tackle the risks stemming from its gatekeeper position on a number of neighbouring markets (leveraging). Also, it could be adjusted over time, in light of the evolution of the business environment. The measures could be either eased or tightened depending on the actual evolution of these conditions.

Possible behavioural measures:

- An extension of the right to data portability for business users.
- Rules regarding fair contracts.
- Rules prohibiting disruptive self-preferencing.
- Rules prohibiting halting access for third party providers of services or goods, including for instance APIs and data without objective justification.

2. Case-by-case remedies

Access obligations might be imposed to ensure market openness. This would be the implementation of option 3b or the NCT. The purpose of these measures would be enhancing competition by regulating access to relevant inputs, users, and online infrastructure. Therefore, prior to their enforcement, a particularly careful assessment of their pros and cons should be carried out throughout an in-depth investigation (case-by-case approach) by a regulatory authority.

Possible access obligations:

- An obligation to proactively offer alternatives to users.
- Safeguarding interoperability.
- Data sharing obligations.

Sanctions of infringements

The forthcoming framework should allow the regulator to charge the platforms with proper sanctions in case of infringement. The level of these fines or other sanctions should be significant enough to ensure the effectiveness of the rules at stake by deterring the platform from breaking them. The requirement of an efficient and deterrent mechanism of sanctions is all the more important here since any breach of the rules would be likely to induce serious and irreversible harm.

Institutional embedding

The European body entrusted with the enforcement of the new regulation should be fitted up with proper tools, such as broad investigation, audit and monitoring powers, including the ability to audit algorithms.

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