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The Evolving Concept of Market Power in the Digital Economy – Note by the European Union

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1. Introduction

1. The European Commission ("Commission") agrees with the introductory statement by the OECD Competition Division that market power is a fundamental concept for competition law and policy.[1]

2. In EU competition law, the concept of market power plays a central role in the application of both the Merger Regulation[2] and the antitrust rules on restrictive agreements and abuse of dominant position.[3] Its relevance is evident in the Merger Regulation, whose objective is to prevent concentrations which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.[4] In antitrust enforcement, the application of Article 102 TFEU on abuses of dominant position is premised on the finding of a degree of market power. Absent a finding of market power or dominance, a unilateral behaviour cannot constitute an abuse under Article 102 TFEU. Market power is qualified as a position of economic strength, which enables an undertaking to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.[5] Furthermore, the assessment of undertakings' market power can also be relevant in the application of Article 101 TFEU, in particular in cases where the Commission has to examine the anticompetitive effects of the agreements under scrutiny.

3. In essence, the assessment of market power enables the Commission to identify the competitive constraints that may limit the economic behaviour of investigated undertakings. In this respect, it should be recalled that the prerequisite to this assessment is the delineation of the relevant market, which is a combination of a product and a geographic market.[6] That is because establishing the precise product and geographic market and its characteristics affects the finding of market power.

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[1] The evolving concept of market power in the digital economy – Background note by the Secretariat - 22 June 2022, page 5.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, in OJ L 24, 29.1.2004, p. 1–22 (the "Merger Regulation").

[3] Respectively Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"), in OJ C 326, 26.10.2012, p. 47–390.

[4] Merger Regulation, Article 2(2). Article 2(1)b further specifies that in making its appraisal, the Commission shall take into account "*the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition*".

[5] Case 27/76 United Brands Company and United Brands Continentaal v Commission [1978] ECR 207, paragraph 65; Case 85/76 Hoffmann-La Roche & Co. v Commission [1979] ECR 461, paragraph 38.

[6] Commission Notice on the definition of relevant market for the purposes of Community competition law, in OJ C 372, 9.12.1997, p. 5–13 (the "Market Definition Notice"), paragraph 9. In

4. In this note, Section 2 will illustrate the Commission's practice in assessing market power in digital markets, in both merger and antitrust cases. It will focus on the main factors that have been relevant in a series of different cases analysed so far and on how the Commission has adapted its assessment–. Section 3 will then discuss the concerns that are emerging in connection with market power in digital markets and whether this requires broadening or adapting the concept of market power or the introduction of new concepts in this respect. Section 4 offers a conclusion.

2. The Commission's assessment of market power in digital markets

5. Digital markets present a series of distinctive and sometimes unique features that could affect the competitive assessment, for example in terms of market share analysis and the evaluation of barriers to entry and expansion. Sometimes these features are not exclusive to digital markets, but are much more prominent and relevant in the digital sector. These include the following.

6. **Two sidedness and zero-pricing.** Many digital services are offered via platforms linking two or more groups of users ("sides") together. One critical aspect of two-sidedness is that a supplier can offer digital products, in particular consumer-facing products, for free (or on a freemium basis) on one side, while generating revenues on the other side of the market (e.g. via advertising revenues or the provision of other B2B services). This is the case, for instance for search engines and social networks.

7. **Single- and multi-homing.** Multi-homing refers to the same customer using the same type of products (or services), from more than one supplier. In digital markets, multi-homing generally entails that one user may have access to different software or applications from competing providers. For instance, smartphone owners may rely on multiple consumer communication services in parallel, depending on the use cases or the identity of the person they want to communicate with.

8. **Network effects.** Digital markets are also often subject to network effects, which is a phenomenon whereby the higher the number of users or participants using a good or service the higher the value of that good or service. In turn, network effects can give rise to specific and complex pricing dynamics, including providing free services to one or more user groups.

9. **Ecosystems**. While there is no generally accepted terminology, digital ecosystems can be defined as multiple products linked through technology that increases complementarities among them, and defined by reference to the platform that provides that technology.[7] Examples are ecosystems built around mobile operating systems, which

particular, "*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*" (paragraph 7), and "[t]*he relevant geographic market 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 neighbouring areas because the conditions of competition are appreciably different in those area*" (paragraph 8). This note will not deal directly with all aspects of market definition in the digital sector. However, considering the clear and strict interrelation between the different concepts (market power has to be identified in one or more defined markets), this note will discuss certain specific market features present in the digital sector, that are relevant not only for the assessment of market power but also for market definition.

[7] See AdlC and CMA (2014), Bourreau & De Streel (2019), Bourreau (2020).

consist of software and/or hardware components (including a smartphone, the operating system, an app store and apps) linked together through the operating system interface.

10. **Data.** The collection, combination and analysis of data for the purposes of developing and/or improving products or services is a particularly prominent characteristic of digital markets and business models. When using digital products, users may generate data that can be informative including in relation to their identity, usage patterns, and/or preferences. The ability to collect or analyse data may be a condition for successful entry in a given digital market. That is particularly the case if data is an important input for the development, performance or improvement of a digital product or service. In this sense, data is similar to the need to have assets, technologies or other important inputs in more traditional markets.

11. **Tipping**. Certain digital markets can easily reach a tipping point; Where network effects are particularly relevant, users are naturally attracted by the largest network so that the market ultimately tips in its favour. This usually implies that once a market has "tipped", it becomes difficult to overcome the entrenched incumbent. On the other hand, digital markets generally can change and evolve extremely fast, due to new products/services and new consumers' trends which could offset the effects of tipping, depending on specific cases.

12. These factors should not be analysed in isolation, as they are sometimes interrelated and affect each other. For instance, the presence of strong network effects may limit multi-homing by consumers. Conversely, the tendency of consumers to multi-home may limit the strength of network effects.

13. As mentioned, not all the above listed features are novel or unique to digital markets. However, their relevance is certainly more critical for digital markets than for traditional ones.

14. Therefore, the question arises whether the traditional antitrust tools used for the assessment of market power are still relevant and appropriate in digital markets. In other terms, the challenge for the antitrust enforcer in digital markets is how to incorporate these concepts into the analysis of market definition and market power and whether this requires adjustments of methodology or different legal standards.

15. The following sections will outline the Commission's experience in the assessment of market power in the digital sector in relation to the above features, for both antitrust and merger control. The Commission's conceptual and methodological approach in the assessment of these characteristics of digital markets is consistent between the two instruments.

2.1. Market shares

16. Market shares are the standard starting point to assess market power as part of the Commission's competitive assessment, including in digital markets, both in merger and in antitrust cases. EU guidance and practice state indeed that market shares (and related concentration levels) "*provide useful first indications*" of the structure of the markets at stake and of the competitive importance of the relevant market players.[8]

[8] See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004 (the "Horizontal Merger Guidelines"), para.14; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008 (the "Non-

17. To obtain market shares, the Commission first defines the relevant plausible (product and geographic) market(s), which in turn allows the identification of suppliers and customers present on the market(s). The Commission then typically derives a total market size and computes the respective share of suppliers, based on their sales of the relevant product in the relevant geographic area.[9] The Commission usually relies on market shares based on sales, both in value and volume.[10] However depending on the specific product(s) under investigation, other metrics can offer useful information.[11] The Commission has regularly resorted to such alternative indicators to assess market power in digital markets.

18. While market shares are relevant for the assessment of market power in digital markets, the fact that digital markets are often two-sided justify a tailored approach. As mentioned above, two-sidedness often implies that one side of the platform/service is offered to consumers "for free", while monetisation occurs on the other side, towards another set of customers (for instance, advertisers). As a result, market shares based on sales may not always be available or informative to capture dynamics on those market(s) on which little to no revenues are generated.

19. Where access to products is provided mainly or entirely for free, as in some digital markets, usage metrics in particular may be relied on to assess and measure market shares. Their aim is to assess how much customers (actually) use the relevant digital products. These metrics may include for instance the number of (active) users over a specific period of time (typically daily or monthly).[12] The number of active users may be particularly relevant to assess market power in relation to products for which customers may multi-home but where user engagement may differ widely between each specific platform. As a result, such metrics have for instance been used in relation to social networks and consumer communication services.[13] Shares based on the time spent by users of the product or audience numbers can also be relevant, by example for content-driven markets.[14] The recorded number of visits can also be used as a metric to calculate shares, in particular for web-based products (such as e.g. search engine services or professional social networks).[15] Relatedly, the number of downloads and/or pre-installations of digital products can be used to estimate shares for specific software/apps that require installation.[16] More than one such metric may be relevant to assess the market power of the undertaking(s) under investigation and of competitors.

20. These alternative metrics need to be adapted to the specific market(s) under investigation. The Commission may thus disregard the relevance of some specific metrics

Horizontal Merger Guidelines"), para. 24; also see https://ec.europa.eu/competition-policy/antitrust/procedures/article-102-investigations_fr.

[9] See Market Definition Notice, para. 53.

[10] Market Definition Notice, para. 55.

[11] Market Definition Notice, para. 54.

[12] See for instance case M.7217 *Facebook / WhatsApp*, paras 95-98.

[13] See case M.6281 *Microsoft / Skype*, paras. 79-80.

[14] See, by analogy, case M.9064 *Telia Company / Bonnier Broadcasting Holding* in relation to the market for the wholesale supply of Free To Air and basic pay TV channels, paras. 323-326, 338-339, 350-351 and 356-357.

[15] See case AT.39740 *Google Search (Shopping)*, paras. 273-284, and case M.8124 *Microsoft / LinkedIn*, paras. 283-286.

[16] See case AT.40099 *Google Android*, paras. 591-593.

in its assessment, where appropriate. For instance, the Commission found in *Facebook/WhatsApp* that time spent would not be a particularly relevant metric to assess market power in consumer communications apps on smartphones. Indeed, the time spent on such apps could depend on exogenous factors such as the personal relationship between the users (e.g. close family members) rather than the attractiveness of the product for users, and thus competitive dynamics. As a result, user engagement, and consequently market shares were found to be more illustrative when based on e.g. active daily or monthly users.[17]

21. Therefore, market shares remain a relevant factor of assessment for market power. However, given the specificities of digital products and services, the Commission has used different methodologies and metrics to calculate shares, adapted to the specificities of the relevant market(s).

22. Ultimately, other market-specific features may also relativise the importance of shares to assess the market power of the undertaking(s) under investigation in the digital sector, besides the zero-price nature of certain markets.

23. One such factor is the highly dynamic nature of some digital markets, which may lead to volatility of market shares of the relevant suppliers. In markets characterized by regular entry as well as short innovation cycles, market shares might only provide a limited first indication of competitive strength of suppliers, as they are prone to change. The Commission can take this factor into account, where relevant. This was the case for instance in relation to consumer communication services, in the early 2010s.[18] Another consequence is that the Commission may also rely on market shares forecasts, based for instance on internal documents, to assess market power.

24. In addition, digital markets may present a significant degree of product differentiation (in terms of functionalities, user interface, design etc. of the relevant product). In this context, market shares may be less informative to indicate market power and other factors such as the degree of substitution between relevant products may be more relevant.

2.2. Network effects

25. Network effects can be (i) direct (i.e., the value of a product/service increases as the number of its users increases – same-side effects) and indirect (i.e., the value of the product/service increases for one user group when a new user of another user group joins the network – cross-side effects). In digital platforms, indirect effects are particularly relevant, although in specific cases direct effects can be important as well.[19]

26. The Commission has dealt with network effects in digital markets in both antitrust and merger cases.

27. As regards antitrust, network effects have been a particular focus of Commission investigations in tying practices. Already in the 2000s with the *Microsoft* cases, the Commission assessed the relevance of indirect network effects in the assessment of Microsoft's dominance. In fact, the Commission found that those effects constituted the main barrier to entry in the market for client PC operating systems: the more popular an

[17] See case M.7217 *Facebook / WhatsApp*, footnote 45.

[18] See case M.7217 *Facebook / WhatsApp*, para 99, and M.6281 *Microsoft / Skype*, para. 78.

[19] For example in social networks and dating platforms.

operating system is, the more applications will be written for it and the more applications are written for an operating system, the more popular it will be among users.[20]

28. The relevance of network effects was confirmed in the *Google Android* case for the market for the licensing of smart mobile device operating systems (or "OS"). The Commission found that network effects arise because, when deciding which licensable smart mobile OS to develop for, app developers consider the revenue potential of that OS. Since app developers earn their profits mainly by app downloads, mobile OSs with a large user base are considered more attractive.[21]

29. Similarly, the Commission considered network effects (together with scale) as a decisive element for the finding of Google's dominance in the markets for online search advertising in the *Google AdSense* case. First, the Commission considered that the success of an online search advertising service depends on the number of advertisers that a potential entrant can attract. This increases the relevance of the online search ads that it can serve in response to a given query and the likelihood that users will click on online search ads served to them. Second, the Commission found that the success of online search advertising services also depends on the reach and performance of the underlying general search service: the higher the number of users of a general search service, the greater the likelihood that a given online search ad is matched to an interested user and eventually converted into a click.[22]

30. The Commission also focused on the concept of network effects as barriers to entry and expansion in the market for general internet search in the *Google Shopping* case. Among others, the Commission noted the positive feedback effects between the two sides of the general search services-online search advertising platform, including direct and indirect network effects on the general search side.[23] In its judgment, the General Court has fully confirmed the Commission's decision on the point of the relevance of network effects, referring to a "virtuous circle" initiated by traffic, improving the relevance of results and thus attracting more users and ultimately more revenue from advertising partners or online sellers, which in turn meant that Google could invest more in improving its competitive position in the digital sector, where innovation is key.[24] The General Court considered that the barrier to entry created precisely by the network effects in that case was so high as to allow Google a behaviour that would have otherwise been irrational and risky.[25]

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[20] Case AT.39530 – *Microsoft (tying)*, 16.12.2009, paragraphs 25-26. See also case AT.37792 – *Microsoft*, 24.03.2004, where the Commission individuated direct and indirect network effects in the client PC operating systems market, the work group server operating systems market and the media player market, see in particular paragraph 980: "*A position of market strength achieved in a market characterised by network effects – such as the media player market – is sustainable, as once the network effects work in favour of a company which has gained a decisive momentum, they will amount to entry barriers for potential competitors*". The decision was confirmed on this point by the General Court in Case T-201/04 of 17.09.2007.

[21] AT.40099 – *Google Android*, 18.07.2018, paragraph 464.

[22] Case AT.40411 – *Google Search (AdSense)*, 20.03.2019, paragraphs 249-251.

[23] Case AT.39740 – *Google Search (Shopping)*, 27.06.2017, in particular at recitals 285-305. Network effects are explicitly mentioned at recitals 294 to 296 and at recital 314.

[24] Case T-612/17, *Google Shopping*, 10.11.2021, paragraph 171

[25] "[…] *for a search engine, limiting the scope of its results to its own entails an element of risk and is not necessarily rational, save in a situation, as in the present case, where the dominance and*

31. As regards mergers, in *Facebook/WhatsApp*, the Commission considered whether network effects existed in the market for consumer communications apps. First, the Commission clarified that the existence of network effects as such does not a priori indicate a competition problem in the market affected by a merger. Such effects may however raise competition concerns in particular if they allow the merged entity to foreclose competitors and make more difficult for competing providers to expand their customer base. Network effects have therefore to be assessed on a case-by-case basis. In that case, the Commission considered that there were a number of factors which mitigated the role of network effects in impeding entry or expansion, including that: (i) consumer communications apps are a fast-moving sector, where customers' switching costs and barriers to entry/expansion are low; (ii) the possibility of multi-homing; and (iii) the parties did not control any essential parts of the network or any mobile operating system.[26]

32. In *Microsoft/LinkedIn*, possible network effects in the market for Professional Social Networking ("PSN") services were identified. Professionals tend to benefit as more professionals join the network and use it actively, as this is likely to translate into a higher number of professional contacts, of profile views and of recruitment opportunities. In that case it appeared likely that network effects could potentially strengthen the foreclosure of actual or potential competing providers of PSN services. It was also doubtful that the impact of network effects could be sufficiently mitigated by multi-homing or by the entry of potential new PSN service providers. The concentration was then cleared following the submission by Microsoft of a series of commitments.[27]

33. The presence of relevant network effects was also an element considered in the *Google/Fitbit* case, in the markets for online search advertising services. The decision referred to the previous decision in the antitrust case *Google Adsense* and observed that no elements in the file justified a different conclusion. Moreover, the transaction would be likely to increase the barriers to entry and expansion of competitors, in particular because of reduced availability of user data. The concentration was then cleared following a series of commitments offered by Google.[28]

2.3. Multi-homing

34. Multi-homing is relevant to assess market power, including in digital markets, as it conceptually limits the market power of providers, when sufficiently effective. A material level of multi-homing implies that the competing products from different suppliers are used similarly, and is less likely to be relevant in case users rely on one "primary" product, while other products would be secondary.[29]

35. Multi-homing mitigates market power in a variety of ways. For instance, multi-homing implies that customers use at least two competing products, which indicates that

barriers to entry are such that no market entry within a sufficiently short period of time is possible in response to that limitation of internet users' choice" (Ibidem, paragraph 178).

[26] Case M.7217 – *Facebook/ WhatsApp*, paragraphs 127-140.

[27] Case M.8124 – *Microsoft / LinkedIn*, 06.12.2016, paragraphs 340-344.

[28] Case M.9660 – *Google/Fitbit*, 17.12.2020, in particular paragraphs 459-461.

[29] See case M.8124 *Microsoft / LinkedIn*, the Commission found that "*although many users have accounts on two [professional social networks], they actively use only one of them or, in any event, they view one of them as their "main network"*. ", see para. 345.

switching between different providers is relatively easy and actually takes place, as users regularly switch from one product to the other.[30]

36. In addition, as mentioned above, multi-homing may reduce the importance of network effects. For instance, in *Microsoft/Github*, the Commission found that the "*possibility of switching also mitigates any potential network effects from which GitHub may benefit*". Conversely, in *Microsoft/LinkedIn*, the Commission found that "*it is doubtful whether the impact of network effects could be sufficiently mitigated by multi-homing*" due to the significant time required from users to update their profiles on PSNs. Similarly, in its decision in *Google Shopping*, the Commission found that despite the technical ability of users to switch between different general search services, only a minority of users in the EEA that used Google as a main general search engine used other ones.[31]

37. In the Commission's decisional practice relating to digital markets, multi-homing has been a key criterion assessed for instance in relation to consumer communication services accessible via smartphones, computers and/or other smart devices.[32] In *Facebook / WhatsApp*, for instance, the Commission took into account the level of multi-homing to assess the closeness of competition between Facebook Messenger and WhatsApp. In that case, multi-homing indicated that the two applications are to some extent complementary, rather than being in direct competition.[33]

38. Customers' multi-homing may also be relevant in relation to the underlying hardware. In *Microsoft / Zenimax*, for instance the Commission found that a material proportion of gamers own multiple consoles or play games on both consoles and personal computers. This situation, among other factors, limited the market power of the merged entity, as it constrained the ability of Microsoft to engage in customer foreclosure by foreclosing access to its Xbox console to competing video game publishers.[34]

2.4. Ecosystems

39. When analysing market power in the context of ecosystems, an important question is whether market power should be assessed at the level of the ecosystem or at the level of individual markets that together form the ecosystem. In this regard, ecosystems share features with aftermarkets in more traditional industries.[35] In such markets, market power might be assessed on a "system market" comprising both the primary and the secondary

[30] In case M.8994 Microsoft / Github, para. 100 the Commission found that "*The ease of switching is facilitated by multi-homing of users between GitHub and competing Git-based version control services. […] This indicates that most users of GitHub are familiar with the user interface and other features of competing service providers which reduces any learning cots involved in switching*" (emphasis added).

[31] Case M.8994 Microsoft / Github, para. 102; case M.8124 *Microsoft / LinkedIn*, paras. 344-345; case AT.39740 – *Google Search (Shopping)*, 27.06.2017, paragraphs 306 and following. While the Commission in *Google Shopping* did not explicitly assess multi-homing as opposed to network effects, the section on multi-homing follows that on barriers to enter, which discussed the presence of network effects.

[32] Key cases include case M.6281 *Microsoft / Skype* and case M.7217 *Facebook / WhatsApp*.

[33] See case M.7217 *Facebook / WhatsApp*, para. 105.

[34] See case M.10001 *Microsoft / Zenimax*, para. 75.

[35] Aftermarkets arise when the consumption of certain durable products, such as cars or printers (primary products), leads to the subsequent purchase of other products, such as car parts or ink cartridges (secondary products).

product, on "multiple markets", that is a market for the primary product and separate markets for the secondary products associated with each version of the primary product, or on "dual markets" consisting on one market for the primary product and one overall market for all secondary products.

40. An important factor in determining whether market power of a digital ecosystem host should be assessed on the level of a "system market" can be the switching costs that consumers face. The higher the switching costs, the less likely that it is reasonable to assess market power on a "system market". For device-centric ecosystems, the price of the device can constitute a significant switching cost. The higher the weight of the primary product in total lifetime expenditure, the less likely customers are to switch to another primary product in case of an increase in the price of the secondary product. For ecosystems involving primary products that do not have a monetary price, switching costs may relate to the direct and indirect network effects characterising the primary product. For instance, for an ecosystem built around a social network, switching would involve losing access to one's contacts, and to developers of content available through that network.

41. In the *Google Android* case,[36] the Commission investigated a series of anticompetitive practices by Google relating to the Android mobile ecosystem – all forming part of a strategy by Google to cement its dominance in general internet search. In this case, the Commission found that Android app stores constituted an ecosystem-specific market, rejecting Google's arguments that app stores and mobile operating systems compete together as a system against other "mobile platforms". The Commission assessed whether customers (device manufacturers, as well as users and app developers) would switch to another primary product (i.e. another licensable OS) in the event of a deterioration of the conditions of supply of Android app stores, and found this unlikely, amongst others because switching to another OS would also entail switching mobile device, which would entail high costs because the price of a device is high compared to users' expenditure on apps. Moreover, users would need to learn to use a different interface, there would be costs of transferring data, costs of downloading and purchasing apps again, losing access to apps that are not available on other.

42. Unlike traditional bundles, digital ecosystems typically include numerous products, with different degrees of complementarity between them, and different degrees of interoperability with products outside the ecosystem. In the context of ecosystems, market power could therefore be manifested in the host's ability to prevent or degrade interoperability with products of third parties. In several recent cases, the Commission investigated the ability and incentive of ecosystem hosts to harm competition by limiting the interoperability of third-parties' products with its ecosystem and to thereby strengthen its core market and raise barriers to entry and/or to leverage its market power to neighbouring markets. These cases are illustrated in Section 3.1, outlining the specific concerns that may arise from market power in digital.

43. Furthermore, when investigating acquisitions by ecosystem hosts, the Commission also takes into account that an acquisition might lead to a strengthening of dominance in the ecosystem's core market. For example, in the context of Amazon's acquisition of MGM, a company which is active in the production and distribution of audio-visual (AV) content, the Commission investigated links regarding MGM's content and Amazon's existing bundle of AV retail and marketplace service products.[37] In this case, the Commission concluded that the addition of MGM's content into Amazon's Prime Video

[36] See case AT.40099 *Google Android*.

[37] See case M.10349 *Amazon / MGM*.

offer was not significant enough to have a significant impact on Amazon's position as provider of marketplace services and the transaction was unconditionally cleared.

2.5. Data

44. As mentioned above, the importance of data has exponentially increased with the growth of the digital economy. With the emergence of data as a key input into many products and services, the ability to access and use data has become an important competitive parameter, which is relevant for the assessment of market power.

45. In particular, if the ability to collect or analyse data is a condition for successful entry in a given digital market, data may operate as a barrier to enter a certain market. Where an incumbent has a significant "data advantage", that new entrants are unable to match (in terms of ownership, possession or ability to gather and process data), this may contribute to strengthening or entrenching the market power of that incumbent.

46. In antitrust, in the *Google Shopping* case, when assessing Google's dominance in the national markets for general search services, the Commission found that general search services use "search data" to refine the relevance of general search results pages. Search services therefore need to receive a significant volume of search queries in order to compete viably. These queries must include both common and uncommon search queries. The more queries a search engine receives, the better it performs, attracting more users. Therefore, the Commission found that the need to gather this data constituted a barrier to enter for competitors.[38] Similarly, in the *Google Android* case, when finding that Google's conduct increased barriers to entry, the Commission noted that user data related to search queries were a valuable input that constituted a barrier to entry.[39]

47. In the case of merger control, the Commission may analyse whether the horizontal combination of the two merging parties' datasets could lead to the creation or strengthening of a dominant position. This can in particular be the case if data is the relevant product (e.g., music charts). Moreover, a data combination could also entail higher barriers to entry and expansion for competitors that would be unable to match the scale necessary to operate or compete effectively with the merged entity on data collection. The Commission analysed this type of horizontal concerns for instance in *Microsoft/LinkedIn* and *Verizon/Yahoo*. In both cases, the Commission analysed whether the combination of the parties' data in relation to online advertising could give rise to concerns by increasing the merged entity's market power in a hypothetical market for such data or barriers to entry to actual or potential competitors. The Commission dismissed such concerns by finding, among others

[38] Commission decision of 27 June 2017 in case AT.39740 *Google Search (Shopping)*, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf. This was also recognized in Google's internal documents, *ibid*, recitals 287 – 288.

[39] See Commission Decision of 18 July 2018 in case AT.40099 – *Google Android*, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, see recital 860(3) and footnote 943. The Commission referred to a statement made in 2008 by Jonathan Rosenberg, formerly Google's Senior Vice President of Product Management and Marketing, that described the "positive feedback loop" of obtaining more data: "*[...] So more users more information, more information more users, more advertisers more users, more users more advertisers, it's a beautiful thing, lather, rinse repeat, that's what I do for a living. So that's... 'the engine that can't be stopped'*".

that large datasets would remain available after the merger, the merging parties were small market players and the data they collected could not be characterised as unique.[40]

48. More recently, in the *Google/Fitbit* case, the Commission found that Google's acquisition of Fitbit, by combining Google's already vast data collection with Fitbit's health and location data, could enable Google to hinder expansion by competitors in online advertising markets where Google already had very substantial market power pre-transaction. This notwithstanding the fact that the Commission found that the Fitbit data, although being valuable, in particular for online advertising services, was not "unique" when compared to the databases of other players.[41]

49. Beyond the specifics of individual cases, certain general considerations can be made on the assessment of data as a barrier to enter and for assessing market power.

50. First, the analysis should be carried out on a case–by-case basis, depending on the specific market, products, services and data at stake. That is because different digital services require and use different datasets, and market dynamics (including on replicability and availability of the data) may differ. Furthermore, any competitive analysis should start by assessing the importance and usefulness of the specific data for the purpose of the products or services on the relevant market – the more important the data are as an input, the more significant they would be as a requirement for competing or entering in the market.

51. Furthermore, when evaluating the importance of data in relation to market power, it is key to properly understand data ownership. For instance, when assessing Meta's acquisition of Kustomer,[42] the Commission investigated what data Meta would obtain from Kustomer's customers and whether this data would strengthen Meta's position in the market for the supply of online display advertising services. However, the Commission concluded that Kustomer offers a business-to-business product and does not own the data of its business customers. Access to data would be dependent on agreements with its business customers who need consent from their end customers.

52. Finally, when considering the (incremental) value of data and implications for market power or barriers to entry, it is important to take into account that data is subject to various types of regulations. This includes in particular privacy laws, but also intellectual property and consumer protection laws that contain provisions relevant to the application of competition rules. For example, in *Google/Fitbit* the Commission noted that the acquisition would not reduce competitive pressure on Google to compete on privacy aspects because it was unlikely that privacy could be an important parameter of competition in wearable devices, in particular in the EEA, since *"any decision or initiative that the Parties might adopt, in relation to privacy and data protection, will have to be in compliance with the data protection rules set forth by the GDPR, which provides a high*

[40] Commission decision of 6 December 2016, Case M.8124 – *Microsoft/LinkedIn*, paras. 179-180; Commission decision of 21 December 2016, Case M.8180 – *Verizon/Yahoo*, paras. 81–83 and 89-93.

[41] This theory of harm in Google/Fitbit does not constitute a classical 'vertical' concern, since Fitbit's data was not traded and could therefore not be regarded as an input for a firm active in online advertising. Moreover, Fitbit was not active on any online advertising market, and thus the transaction did not present a traditional 'horizontal' concern either. The Commission nevertheless concluded that the transaction would allow Google to combine its already very prominent datasets with those of Fitbit, thus strengthening its ability to supply services in online advertising markets and foreclose competitors' entry and ability to expand in such markets.

[42] See case M.10262 *Meta (formerly Facebook) / Kustomer*.

standard of privacy and data protection for the industry and leaves little room for differentiation".[43]

3. Emerging concerns and new approaches in the digital industry

53. Section 3.1 will illustrate, based on the Commission's enforcement experience, some of the most relevant types of concerns identified to date in digital markets. Section 3.2 will discuss the question of introducing new concepts for enforcement in the digital sector going beyond the traditional "market power" of antitrust and merger control, including regulatory solutions, and the relation of competition enforcement with these "new" tools. It will focus in particular on the Digital Markets Act ("DMA"), as the prime example at the EU level of these new initiatives.

3.1. Specific concerns

54. Because of their specific characteristics, digital markets can present challenges for regulators as regards the framing of the theory of harm. These stem from the specific market dynamics, as well as the business models of the digital sector. Nevertheless, it is important to recall that the core principles and framework of competition enforcement are flexible and adaptive, and can apply to all industries, including digital.[44]

55. Against this background, the Commission, considers that the following lessons can be drawn from its enforcement experience, as regards the particular concerns that may arise in the digital sector.

56. First, the Commission has run competition cases both by applying "traditional" competition law theories of harm as well as "adapting" theories of harm to the digital sector, while maintaining the general ideas of competition law underpinning those theories. Examples of the former include investigations into most favoured nation clauses,[45] exclusivity clauses, including rebates,[46] and tying practices.[47] Examples of the latter include the *Google Shopping* case, as well as the *Android* case, as regards Google's so called "anti-fragmentation agreements". These investigations focused on specific practices in the digital sector, which, despite their peculiarities, where caught by Article 102 TFEU. This approach has been upheld by the General Court in the *Google Shopping* judgment, as the Court confirmed the Commission's analytical framework for identifying an abuse by Google in relation to general search services and comparison shopping services, notwithstanding the alleged novelty of the abuse.[48]

[43] See case M.9660 *Google / Fitbit.*

[44] See in that regard Special Advisers' Report, "Competition Policy fit for the Digital Age", page 3, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

[45] Case AT.40153 E-book MFNs and related matters (Amazon), decision of 04.05.2017.

[46] Case AT.40220 *Qualcomm (exclusivity payments)*, Commission decision of 24.01.2018, case AT.40411 *Google Search (AdSense)*, Commission decision of 20.03.2019, case AT.40608 *Broadcom*, Commission decision of 07.10.2020.

[47] Case **AT.40099 *Google Android*, Commission decision of 08.07.2018.**

[48] Case T-612/17, *Google Shopping*, 10.11.2021, paragraph 154, noting that "the list of abusive practices contained in Article 102 TFEU is not exhaustive", and paragraphs 166 and following,

57. Second, in the aforementioned investigations, the starting point of the Commission's investigation was the fact that a dominant undertaking used its market power in a certain market to maintain its position, or expand it in an adjacent or neighbouring market. Therefore, while the assessment of the notion of market power has to be adapted to the specificities of the digital sector, it remains a central element of the Commission's assessment. In the digital sector, the situation where a dominant undertaking uses it market power in one market to expand in another is often referred to as "leveraging" or "self-preferencing".[49] The General Court's ruling in the *Google Shopping* case has established an analytical framework for one instance of such conduct. In particular, the General Court found that Google's conduct of favouring its own comparison shopping service on its general search engine, to the detriment of its competitors, was an abuse of dominance. This derived from: the importance of Google's general search traffic for rivals; users' behaviour, as users typically concentrate on the first few search results displayed; and the large proportion of 'diverted' traffic in the traffic of comparison shopping services and the fact that that traffic could not be effectively replaced.

58. Third, a common element of competition in digital markets is the tendency of markets to "tip". As mentioned above, once a market has "tipped", it may be very difficult to remove the harm caused by the abuse. This implies that timeliness of intervention is important. For that reason, the use of early intervention tools such as interim measures may be warranted.

59. Fourth, the role and use of data has become increasingly important for the assessment of specific competition concerns in both antitrust and merger cases in digital.

60. In merger cases in particular, over the years the Commission has assessed different categories of data-related concerns. In the first place, in addition to horizontal concerns, assessing whether the combination of the merging parties would create or strengthen a dominant position, the Commission has investigated "non-horizontal" concerns, in particular of a vertical or conglomerate nature. Examples in this respect include the *Microsoft/LinkedIn* and *Apple/Shazam* mergers.[50] In the second place, the Commission has refined its assessment and methodology to assess the importance of data, in particular when analysing non-horizontal concerns. For instance, in *Apple/Shazam*, the Commission assessed the increment of data brought by the transaction to Apple using four relevant

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where the General Court noted that the Commission did not simply qualify Google's conduct as "leveraging", but framed it under a specific assessment of relevant factors.

[49] Special Advisers' Report, "Competition Policy fit for the Digital Age", page 7.

[50] In *Microsoft/LinkedIn*, the Commission investigated whether post-transaction Microsoft would have the ability and incentive to offer LinkedIn's sales intelligence solutions in a bundle with the Microsoft CRM software (conglomerate concerns), and whether Microsoft could restrict access to LinkedIn's "full data" (consisting of more than LinkedIn's sales intelligence solutions offering), depriving competitors of an important input to develop machine learning functionalities for CRM software (vertical concerns of input foreclosure). In *Apple/Shazam*, the Commission investigated whether Shazam's data could be considered as an important input to improve existing functionalities, or offer additional functionalities, on music streaming apps, and thus whether denial of access to such data to Apple Music's competitors in the supply of digital music streaming services could have had anticompetitive effects. In addition, pursuant to paragraph 78 of the Non -Horizontal Merger Guidelines, the Commission investigated whether through the acquisition of Shazam, Apple could have gained insights into users of competing music streaming apps. In particular, the Commission assessed whether, thanks to the data acquired through Shazam, post–transaction Apple could have improved the performance of Apple Music's customer acquisition channel, by performing more targeted advertising or marketing campaigns aimed at customers of rival providers of music streaming services (in particular Spotify's freemium customers).

metrics, the so-called "four V" approach: the type of data composing the dataset (variety); the speed at which the data is collected (velocity); the size of the data set (volume); and the economic relevance (value). Based on this methodology, the Commission benchmarked different databases available in the market and found that, even if the merged entity were to deny access to Shazam's data to competitors of Apple Music, the impact on the ability to compete of those rivals would have likely been negligible and therefore a potential foreclosure strategy would not have led to a significant impediment of competition. The Commission also carried out a similar analysis of a data set in the case of Google's acquisition of Fitbit, and on that basis, found that the Fitbit data, although being valuable, in particular for online advertising services, is not "unique" when compared to the databases of other players.[51]

61. In antitrust, the Commission has opened investigations into practices where data represent a key aspect of the conduct and theory of harm under Article 102 TFEU. In the *Amazon Marketplace* case, the Commission's investigation focusses on the data that Amazon collects when merchants sell their products to consumers by means of the Amazon marketplace and the use that Amazon makes of such data.[52] The Commission's concerns in this case depend on the fact that Amazon has a dual role as an online marketplace and online retailer. Amazon thus has access to sensitive data generated by the merchants' transactions on its marketplace, and uses such data in the downstream market for online retail, where Amazon as a retailer is in competition with such merchants. This could raise competition concerns, as Amazon's use of those competitor data to inform business decisions may foreclose rival online retailers.[53]

62. In *Google/Fitbit*, the Commission had two concerns in this regard.[54] First, a number of players in the market for digital healthcare currently access health and fitness data provided by Fitbit through an Application Programming Interface ("API"), in order to provide services to Fitbit users and obtain their data in return. The Commission found that, while, in general terms user health data are available from a number of data sources, the user data of Fitbit's users are only available through Fitbit's API and that post-transaction Google might restrict competitors' access to the API. Second, the Commission was

[51] See case M.9660 *Google / Fitbit*

[52] In the context of this investigation, the Commission adopted a Statement of Objections against Amazon on 10 November 2020, see IP/20/2077 of 10 November 2020, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

[53] According to the Commission's statement of objections, through its online marketplace, Amazon collects large amounts of non-public business data about the activity of independent retailers on its platform, their products and the transactions on the marketplace. Based on its preliminary findings, the Commission found that the marketplace-related data of third party retailers are available to Amazon's retail business and flow directly into the automated systems of that business, which then aggregate these data and use them to calibrate Amazon's retail offers and strategic business decisions. For example, by means of those data, Amazon can focus its offers in the best-selling products across product categories and adjust its offers. Therefore, Amazon uses the data gathered from its third party retailers active on its marketplace to benefit its own retail arm, which competes with those same marketplace sellers. The Commission's preliminary view, outlined in its Statement of Objections, is that Amazon leverages its dominance in the market for the provision of marketplace services in France and Germany to gather data from third party retailers, and that the use of such data by Amazon's retail arm allows Amazon to avoid the normal risks of retail competition. This would be in breach of Article 102 TFEU. *Ibid.*

[54] See case M.9660 *Google / Fitbit*.

concerned that, since Google controls the Android mobile operating system, following the transaction, as the host of the ecosystem built around the Android mobile operating system, Google could put competitors of Fitbit at a disadvantage by degrading their interoperability with Android smartphones. The Commission ultimately cleared the transaction, following commitments by Google to ensure the openness of its APIs in both directions.

63. In Meta's acquisition of Kustomer, the Commission found that Meta would have the ability, as well as an economic incentive, to engage in foreclosure strategies vis-à-vis Kustomer's close rivals and new entrants, such as denying or degrading access to the APIs for Meta's messaging channels.[55]

64. In conclusion, the Commission's enforcement experience in the digital sector highlights that, notwithstanding the specific features of digital, the competition tools of antitrust and mergers are adaptive, and can be used to identify and address concerns stemming from market power in digital. The Commission has in several instances tackled specific substantive concerns that arise from the peculiarities of digital markets, business models and practices, by assessing them under the conceptual framework of Article 102 and merger control.

3.2. New and broadened concepts in the digital industry

65. Notwithstanding competition law's adaptability and suitability, in recent years there have been numerous discussions to introduce new regulatory concepts and tools to qualify and tackle issues arising from marker power in digital markets. There have been several proposals in this respect, in various jurisdictions. These include the notion of "significant and durable market power" (US House of Representatives Majority Staff report), "substantial market power" (Australian ACCC report), "strategic market status" (UK Furman report) "bottleneck power" (Stigler Center report), "significant market status" (UK proposal for a Digital Markets Unit), and "paramount significance for competition across markets" (Article 19a in the German competition act). These proposals usually also include new regulatory powers, bestowed on the competition authority or a new regulator, for enforcement in the digital sector.

66. In the EU, the main legislative initiative in this respect is the DMA, for which the Commission adopted its proposal on 15 December 2020.[56] The DMA is the outcome of a broad policy reflection within the EU on the need to tackle systemic issues of fairness and contestability in digital markets. The DMA does so by introducing rules applicable to certain "core platform services" ("CPSs") in the digital sector, including search engines, operating systems, social networks, online intermediation (i.e., app stores and marketplaces). Undertakings that provide these core services and that are designated as "gatekeepers" need to comply with a set of obligations and prohibitions established in the DMA.

67. Under the DMA, the Commission shall designate an undertaking as gatekeeper if it meets three cumulative requirements, enshrined in Article 3(1) of the DMA. First, the provider of a core platform has a significant impact on the internal market. Second, the relevant core platform service is an "important gateway" for end users and business users in the EU. Third, that provider and its CPS have an entrenched and durable market position.

[55] See case M.10262 *Meta (formerly Facebook) / Kustomer*.

[56] Commission Proposal for a Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector ("DMA"), COM(2020) 842 final.

68. An undertaking shall be presumed[57] to satisfy these requirements if it meets the quantitative thresholds enunciated in Article 3(2) of the DMA, namely:

- for the significant impact on the internal market, the provider of the CPS must have an annual turnover of at least **EUR 7.5 billion** within the EU in the past three financial years or a market valuation of at least **EUR 75 billion, and provide a core platform service in at least three Member States**;
- for the important gateway element, the relevant CPS must have at least **45 million monthly end users** and at least **10 000 business users** established in the EU; and
- for the entrenched and durable position, the relevant CPS must have met the thresholds of **45 million monthly end users** and at least **10 000 business for the last three financial years.**

69. Undertakings providing CPS have an obligation to notify the Commission when they meet these thresholds.

70. When the quantitative thresholds are not met, the Commission can still designate a CPS provider as gatekeeper, following a qualitative assessment. The Commission can carry out an investigation to assess whether a provider of CPS, although it does not meet all the quantitative thresholds of the DMA, still fulfils the relevant criteria that qualify it as a gatekeeper mentioned above. For that purpose the Commission will assess, in its investigation, some or all of the following elements, listed in Article 3(8) of the DMA: the size, including turnover and market capitalisation, operations and position of that undertaking; the number of business users using the core platform service to reach end users and the number of end users; network effects and data driven advantages, in particular in relation to that undertaking's access to, and collection of, personal data and non-personal data or analytics capabilities; any scale and scope effects from which the undertaking benefits, including with regard to data, and, where relevant, to its activities outside the Union; business user or end user lock-in, including switching costs and behavioural bias reducing the ability of business users and end users to switch or multi-home; a conglomerate corporate structure or vertical integration of that undertaking, for instance enabling that undertaking to cross subsidise, to combine data from different sources or to leverage its position; or other structural business or services characteristics.

71. The aforementioned elements are all characteristic of digital markets. Their presence and relevance is therefore indicative of the presence of a gatekeeper for the CPSs in scope of the DMA. These factors are also among those that the Commission has analysed when establishing the market power of an undertaking under antitrust and merger control, as outlined in the previous sections. Therefore, to a certain extent, the status of gatekeeper and the notion of market power share

[57] An undertaking that meets the thresholds can argue that, although it meets all the thresholds, it still does not fulfil the requirements for designation as gatekeeper due to the circumstances in which the CPS operates. However, the possibility to rebut the presumption is narrowly construed. The gatekeeper has to provide "sufficiently substantiated arguments" that "exceptionally" it is not a gatekeeper. Any justification on economic grounds seeking to engage into market definition or to demonstrate efficiencies deriving from a specific type of behaviour is to be discarded as it is not relevant for the designation as gatekeeper.

some conceptual and methodological similarities. However, it should be emphasised that the notions of gatekeeper under the DMA and dominance under competition law are different. Moreover, in the DMA the EU legislator has made use of presumptions by resorting to quantitative thresholds to provide certainty and alleviate the administrative burden as regards the designation of gatekeepers.

72. The notions of gatekeeper under the DMA and dominance under competition law overlap partly. A company designated as gatekeeper may be a company that the Commission has previously found to hold a dominant position on certain markets where it offers certain services falling in scope of the DMA, or might be found to be dominant in a future dominance assessment under Article 102. However, the dominance assessment is not identical nor a precondition for finding of a gatekeeper position. One important difference in this respect is that the prerequisite for a finding of dominance is the definition of a relevant market. Conversely, the DMA's gatekeeper designation, and the obligations that come with it, are rather centred on the concept of "core platform service". These are predefined and listed in the DMA. Accordingly, finding whether a provider of a core platform service is a gatekeeper does not require a market definition exercise like antitrust investigations.

73. More generally, as regards the relation between the DMA and competition enforcement (in particular, abuses of dominance under Article 102 TFEU), the following considerations should be kept in mind.

74. First, the DMA is an internal market tool, based on the legal basis of Article 114 TFEU, aimed at the harmonisation of rules throughout the EU. Therefore, similarly to other sector-specific regulation, the DMA introduces ex-ante rules that complement competition law and are, in part, inspired by previous competition law enforcement experience. This approach of using regulation and competition in a complementary manner to tackle systemic issues is not new in the EU. It has been done before in industries such as telecommunications, energy or financial services.

75. Second, the application of the DMA does not exclude nor replace competition enforcement. Rather, in regulatory spirit, the DMA complements EU and national competition law, which will remain applicable. This is explicitly recognized by the DMA's Article 1(6). In particular, competition law will remain applicable as regards digital products or services that are not CPSs, or to conducts that are not subject to the DMA's obligations. More generally, also in regulated sectors, competition enforcement has a role to play, to complement regulation, and address possible shortcomings. The continued possibility of intervention for the Commission under Article 102 TFEU in regulated sectors was confirmed by the case law of the EU courts.[58]

76. Third, the DMA has yet to enter into force, but a first illustration of its symbiotic dynamic with competition law is offered by the Commission's *Apple Pay* case. The case concerns Apple's refusal to give access to mobile wallets app developers to the hardware and software functionalities ("NFC input") on Apple devices, reserving such access to its payment own solution, Apple Pay. If Apple were to be designated as a gatekeeper for the iOS operating system, the DMA's interoperability obligations would oblige Apple to give access to its hardware and software features, including NFC. In her remarks following the

[58] Court of Justice, 14 October 2010, case C-280/08 *Deutsche Telecom*, paras. 90-91. See in this respect also General Court, 29 March 201s, case T-336/07 *Telefonica*, paras. 296-305, Court of Justice, 10 July 2014, case C-295/12 *Telefonica*, para. 133, and Court of Justice, 9 September 2003, case C-198/01, CIF, ECLI:EU:C:2003:430, in particular para. 58.

adoption of the Commission's statement of objections in the case, EVP Vestager noted that the case "*addresses a conduct by Apple that has been ongoing since Apple Pay was first rolled out in 2015. This conduct may have distorted competition on the mobile wallets market in Europe. […] The Apple Pay investigation will inform the future application of the Digital Markets Act. It will set a precedent with regard to the analysis of the security concerns, and a recipe for effective and proportionate access to NFC for mobile payments*".[59] Therefore, in the interim of the DMA's application, competition law remains relevant and applicable also for ongoing or past conducts by dominant undertakings in the digital sector that will in the future be covered by the DMA.

77. Finally, as regards the concrete interplay of the DMA with EU and national competition law, coordination of enforcement actions between the Commission and the national authorities, where the latter apply their national competition rules or other regulatory tools applicable to digital gatekeepers, under their own "market power" instruments, will remain crucial. To that end, the DMA includes a specific coordination mechanism between the Commission and Member State national competition authorities, under which the latter will notify their national draft decisions addressed at gatekeepers to the Commission, to ensure consistency and avoid conflicting outcomes.

78. In the EU, such coordination of regulatory intervention under the DMA and EU and national competition rules is appropriate to ensure consistency of outcomes and efficient allocation of resources, in situations where several regulators potentially apply similar notions of market power. Moreover, it is also necessary, in light of the *ne bis in idem* principle, as elaborated by the European Court of Justice in *Bpost.* In its preliminary ruling, the Court of Justice held that a legal person that has already been the subject of a final decision in proceedings relating to an infringement of sectoral rules can be the subject of a finding of an infringement of the EU competition rules, the same facts, provided that: "*there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; that the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and that the overall penalties imposed correspond to the seriousness of the offences committed*".[60]

79. In conclusion, while the DMA introduces the notion of "gatekeeper", which shares some similarities with the dominance standard, based on market power, this remains a distinct, regulatory concept, separate from dominance under Article 102 TFEU. Going forward, in the EU the digital sector will be subject to the DMA's rules applicable to digital gatekeepers, national rules that address similar concepts of "market power", Article 102 TFEU and similar national competition rules. To ensure effective enforcement and consistency of intervention and outcomes, the Commission and the Member States will have to coordinate their actions.

4. Conclusion

80. The Commission considers that the concept of market power remains central for the competitive assessment in digital markets, both under antitrust and merger control. Digital markets present certain characteristics that raise challenges for both market

See https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2773 .

[60] Court of Justice, 22 March 2022, case C-117/20 *Bpost*, ECLI:EU:C:2022:202.

definition and the competitive assessment. Nevertheless, the EU competition rules' principles and basic concepts are sufficiently flexible and adaptable: this has enabled the Commission to assess market power and theories of harm in the digital sector, factoring in its analysis all the specific features of digital markets, dynamics and business models.

81. At the same time, while the Commission can intervene in relation to market power in digital markets under the current antitrust and merger framework, it has also proposed the introduction of a new regulatory instrument, the DMA, to tackle systemic issues arising in digital markets from the presence of so-called gatekeepers. The purpose of the DMA is to address upfront the most problematic conducts by means of ex-ante rules. However, while the DMA and its obligations draws inspiration from competition law experience, including as regards the notion of gatekeeper, it remains a separate instrument, which complements but does not replace competition law.

82. In addition, the Commission is reviewing its toolbox to ensure it remains fully up to date and reflects current market dynamics and business models, including in particular digital. For that reason, the Commission has revised the Vertical Block exemption regulation and is carrying out a revision of the Horizontal Block exemption regulations and of the Market Definition Notice. It has also launched an evaluation process for Regulation 1/2003 to ensure that the Commission's procedural tools are fit for the digital age.