Organisation for Economic Co-operation and Development

Unclassified English - Or. English

30 June 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 24 June 2022

Gatekeeper Power in the Digital Economy: An Emerging Concept in EU Law - Note by Alexandre de Streel

Roundtable on the Evolving Concept of Market Power in the Digital Economy

22 June 2022

This paper by Alexandre de Streel was submitted by the author as part of the background material in support of their presentation at Item 5 of the 138th meeting of the Competition Committee on 22-24 June 2022.

This paper was not commissioned nor vetted by the OECD Secretariat; the opinions expressed and arguments employed herein are exclusively those of the author and do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

More documents related to this discussion can be found at:
https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm

If you have questions about this document, please contact
Mr Antonio CAPOBIANCO [Email: Antonio.CAPOBIANCO@oecd.org]

JT03498706

Gatekeeper Power in the digital economy: An emerging concept in EU law

Note by Alexandre de Streel*

"Behold, the way for man is narrow, but it lieth in a straight course before him, and the keeper of the gate is the Holy One of Israel; and he employeth no servant there; and there is none other way save it be by the gate; for he cannot be deceived, for the Lord God is his name"

Gatekeeper power is an emerging concept in EU law and has become the trigger for the new Digital Markets Act which imposes a series of obligations on the gatekeeper platforms in order to make the EU digital markets more contestable and fairer. This short note aims to clarify the different definitions of gatekeeper power and its relationship with associated concepts such as bottleneck or B2B economic dependency. Then the note shows that gatekeeper power is not totally novel in EU economic law. Finally, the paper reviews the gatekeeper definition of the DMA and its interplay with dominant position under competition law.

1. Fifty shades of gatekeeper

There are probably not as many shades of gatekeeper than shades of grey but the **concept of gatekeeper has several meanings, some being broader than others** as explained in OECD (2022b, p.24). Beyond the biblical definition highlighted above, the simplest definition of gatekeeper is an undertaking which determines who can pass through a gate or, more specifically, an undertaking which controls access by a group of users to some products, information or another group of users.

1.1. An economic definition of gatekeeper power

Caffara and Scott Morton (2021) proposes an economic definition of gatekeeper as "an **intermediary who essentially controls access to critical constituencies on either side of a platform that cannot be reached otherwise**, and as a result can engage in conduct and impose rules that counterparties cannot avoid." In this sense, gatekeeper power provides a particular type of market power. The level of control and market power depend on the incentives and ability of those constituencies to multi-home and to switch and increase with the proportion of single homers.

In the context of digital platforms, we can distinguish two types of gatekeeper power. In the first type, the gatekeeper **controls access to its users by third-party firms**. For example, an online social network such as Facebook has, to some extent, control over access to its users by online advertisers, in particular for the consumers who spend most of their time on the social network. When there is a potential bottleneck for access to users (for advertisers, sellers, etc.), a digital platform may have an incentive to expand into new markets to broaden the engagement of its customers with a larger line of products and

* Professor, University of Namur and CERRE.

services. By providing a wide array of products and services, the firm can lock in its customers into a whole product ecosystem. To the extent that the firm monetizes its customers to third parties in some way (e.g., their attention to advertisers, their data to data brokers, etc.), the firm can become a gatekeeper for access to its customers.

In the second type, the gatekeeper **controls access to content, products and/or services**. For example, Google Search controls access of users to Web content via its ranking algorithm or Spotify controls access to its large catalogue of music titles through its personalized recommendations. To the extent that customers do not have any other viable alternative, gatekeepers may have the ability to steer customers towards products or services that are not the best match for them. One incentive to do so would be, for example, to steer consumers towards offers that generate higher profits for the platform. Another incentive would be to favour in-house offers (e.g., in-house content for a content platform).

Thus, by expanding its range of products and services, a digital firm can achieve the position of gatekeeper, for access to its customer base by third parties, such as advertisers or sellers, or for access to its portfolio of products or services. If consumers mainly use the gatekeeper's ecosystem of products and services (i.e., single-home), the gatekeeping position provides market power to the firm, for example for setting the conditions of access to third parties.

1.2. Gatekeeper power, bottleneck control and economic dependency

This conception of gatekeeper power is related to the economic concept of bottleneck and the legal doctrine of economic dependency as explained in OECD (2022b, p. 24-29).[1]

The **concept of bottleneck** has been developed in the context of tangible network industries such as telecommunications.[2] In the context of multi-sided markets, Armstrong (2006) defines as *competitive bottleneck* a market configuration where there is single homing on end users side of the market and multi-homing on the business users side. In this case, business users need to be on the platform controlling the competitive bottleneck if they want to reach the customers who single home on that platform.

[1] A link can also be made to the legal concept of 'unavoidable trading partner' as explained in Alexiadis and de Streel (2020, p.6) and OECD (2022b, p.28).

[2] See for instance Larouche (2000) for a elaboration of the bottleneck concept in the telecommunications sector.

The longstanding doctrine of "**economic dependency**" under German antitrust law,[3] which has also been embraced by several Member States[4] such as France[5] is relied upon to prevent undertakings from exercising unfettered commercial freedom in those situations where their customers do not have realistic solutions in selling or purchasing other products or services in the market. One the most comprehensive legal definition of dependency is found in the recent Belgian legislation, which specifies that economic dependency is characterised by:

> *"the absence of reasonably equivalent alternatives available within a reasonable period of time, on reasonable terms and at reasonable costs, allowing it for each of them to impose services or conditions that could not be obtained under normal market conditions."*[6]

Alexiadis and de Streel (2020, p.8) explain that the concept of economic dependency applies in one of two circumstances, namely: (i) a high level of concentration in the market (*i.e.*, market dominance); or (ii) the special features of a bilateral relationship between the undertaking in question and its individual customers. The concept of dependency identifies a range of relationships which can trigger public intervention, including relationships based on product ranges or strong brands (*e.g.*, "must have" products or product ranges), large volumes of business, product shortages, the strength of the buyer, and technical standards or specifications set by undertaking in question (*e.g.*, for spare parts).[7] The overriding principle behind the application of the doctrine is the view that the dependent customer or competitor has "insufficient and unacceptable means of switching to other providers."[8]

Thus the **bottleneck concept seems the narrowest while economic dependency seems to be the broadest**, as illustrated in Figure 1 below. In addition, a causal relationship may be established between the three concepts. The control of a bottleneck leads to gatekeeper

[3] See Section 20(1) of the German Act against Restraints of Competition, available at: http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf, this section applies "*to undertakings and associations of undertakings to the extent that other undertakings as suppliers or purchasers of a certain type of goods or commercial services are dependent on them in such a way that sufficient and reasonable possibilities for switching to third parties do not exist and there is a significant imbalance between the power of such undertakings or associations of undertakings and the countervailing power of other undertakings (relative market power). Section 19(1) in conjunction with subsection (2) no 1 shall also apply to undertakings acting as intermediaries on multi-sided markets to the extent that other undertakings are dependent on their intermediary services for accessing supply and sales markets in such a way that sufficient and reasonable alternatives do not exist. A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other compensation, special benefits which are not granted to similar purchasers*".

[4] For a comparative analysis of the legislations in the Member States, see Renda et al. (2012).

[5] Article L 420-2 of the French Commercial Code, available at: http://www.autoritedelaconcurrence.fr/doc/code_commerce_gb.pdf. The state of economic dependence requires that it is impossible for the plaintiff to resort to another undertaking for the supply, or the sale, of a given product or service, due to technical or economic reasons. In essence, four types of economic dependence have been addressed by the French Competition Authority, namely: (i) scarcity-based dependence; (ii) dependence associated with long-lasting business relationships; (iii) assortment-based dependence; and (iv) demand-based buyer power dependence.

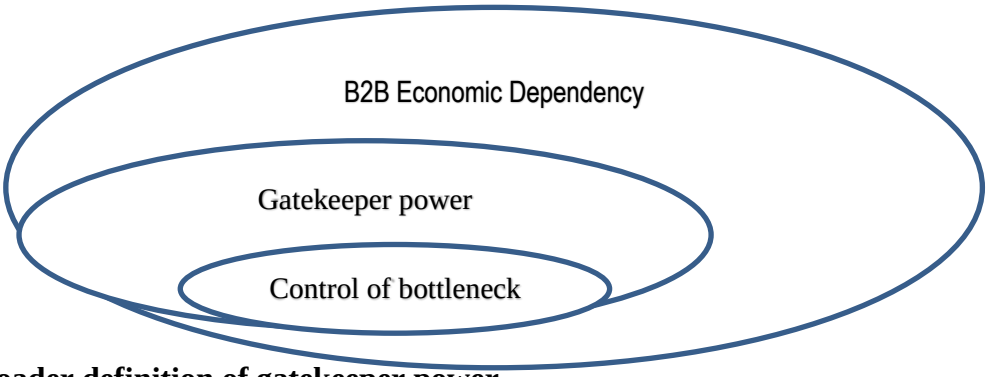
[6] Art.I.6.12a of the Belgian Code of Economic Law.

[7] Section 20(2) of the German Act against Restraints of Competition.

[8] German Federal Court, *Rossignol* (1976) WuW/E 1391, 1393 et *seq)*, para. A.I.2.

power which, in turn, creates an economic dependence vis-à-vis the undertaking having gatekeeper power. As the concepts do not have the same scope, the causality goes in one direction, but not in the other. Indeed, B2B dependency may be caused by gatekeeper power, but also by other reasons.

Figure 1. Interplay between bottleneck, gatekeeper and B2B dependency



1.3. A broader definition of gatekeeper power

Some commentators find the economic definition of gatekeeper too narrow and unable to capture all the potential harms that could be caused by digital platforms with gatekeeper power. To address such concern, Lynskey (2017) proposes a broader definition of gatekeeper as an undertaking which **controls the flow and accessibility of information and structures the digital environment**. With this perspective, she explains that gatekeeper power is distinct from market power in terms of how it is measured and in terms of its potential impact on the rights and interests of individuals. She also claims that not all harms to individuals are captured by the ex post application of competition rules or even visible from a purely economic perspective.

In the same vein, Laidlaw (2010) differentiates between two types of gatekeeper: 'Internet gatekeepers' who control information flows and 'Internet information gatekeepers' which as a result of this function of controlling information flows can have an impact on 'participation and deliberation in democratic culture'. Helberger et al (2015) argue that much of the concern regarding the influence of gatekeepers lies in their control over access to individuals and the way in which the relationship between gatekeepers and users is shaped.

2. History of the use of the gatekeeper power in EU law

While gatekeeper is used for the first time explicitly and extensively in the 2022 Digital Markets Act, the concept has been mentioned previously in EU competition law and regulatory contexts.

2.1. Competition law

The European Commission has used the gatekeeper concept in **several pay TV merger decisions regarding the access to technical services**. For instance in *NewsCorp/Telepiu*, the Commission considered the merging parties would have been "the *gatekeeper* of a tool (i.e., Videoguard conditional access system) that may facilitate entry for any alternative pay DTH operator and of an infrastructure (i.e., the platform) that may ease the conditions

for the broadcasting of pay and free TV satellite channels."[9] Some Commission decisions have imposed compulsory access to those technical services as a condition to clear the merger.[10]

The critical infrastructure whose control leads to the gatekeeper power may vary depending of the segment of the digital economy. While for pay-TV distribution, the gatekeeper position could be due to the control of technical services (conditional access system or set up boxes), for the traditional TV broadcasters, it can be due to the control of premium content (films and sport). For the more recent digital platforms, gatekeeper position may be due to the control of essential data allowing better recommendation and personalisation or a conglomerate footprint allowing valuable synergies for the users, as explained by many recent policy and economic reports on digital platforms.[11]

Interestingly, a **gatekeeper power may lead to a narrow relevant market definition** in where each undertaking having such power constitutes a relevant market on its own. In telecommunications sector, the Commission relied on a bottleneck analysis to define narrow per network markets for wholesale fixed and mobile termination. The Commission did so because the called parties single-home (as they do not directly pay the wholesale termination fee in a Calling Party-Pays system) while the operators of the calling party have to multi-home on the different operators.[12]

Similarly, in the digital sector, the Commission defined in its *Google Android* decision a market for app stores for the Android mobile operating system.[13] As explained by Franck and Peitz (2019, p.55), such market definition by mobile OS is based on the assumption that consumers are single-homers as they make a discrete choice of either using a device based on Apple's or Android's mobile operating system while app developers tend to be multi-homers.

However, Franck and Peitz also recall that the relationship between the different sides of the market need to be taken into account and that the monopoly power on one side of the market (such as the side of app stores for the Android/iOS mobile operating system) may be mitigated through interaction with the other user group, in particular if large parts of the revenues that are generated on the monopolised side are passed to the users on the other

[9] Decision of the Commission of 2 April 2003, Case M.2876 *NewsCorp/Telepiu*, para.198.

[10] Case M.2876 *NewsCorp/Telepiu*, para 225. When those access commitments could not have been obtained, mergers have been prohibited: Decisions of the Commission of 27 May 1998, Case M.993 *Beterlsmann/Krich/Premiere* and Case M.1027 *Deutsche Telekom/BetaResearch*. The merger was prohibited because it would have resulted in BetaDigital and BetaResearch having a dominant position on the German market for the supply of technical services for pay-TV, besides Premiere strengthening its dominance on the pay-TV market and Deutsche Telekom strengthening its dominance on the cable networks.

[11] Such as Cremer et al. (2019), Furman et al (2019), Scott Morton et al (2019). Many of those reports are summarised in Lancieri et Morita Sakowski (2021).

[12] For instance, Decision of the Commission of 20 September 2013, Case M.6990 *Vodafone/Kabel Deutschland*. The same rationale was followed in ex ante regulation: Commission Recommendation 2014/710 of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante, OJ [2014] L 295/79, Annex: markets 1 and 2. Currently, the termination rates are directly regulated by the legislation without passing through a market definition step: Article 75 of the Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ [2018] L 321/36.

[13] Commission Decision of 18 July 2018, Case AT.40 099, *Google Android*, paras. 268-322.

side.[14] The same debate took place several years ago when regulatory authorities were about to regulate the mobile termination tariffs and were warned to take into account the effects of their decisions on the other side of the market (the so-called waterbed effects).[15]

2.2. Regulation

Several EU laws regulate the control of a bottleneck facility which leads to gatekeeper control. This is the case of many access regulations in the network industries. One of the most comprehensive and sophisticated access regime designed at the EU level can be found in the European Electronic Communications Code.[16] The Code imposes a series of access obligation to telecommunications operators which control bottleneck facilities in order to support entry and promote competition.[17] In some case, the control of bottleneck -and the resulting gatekeeper power – is directly presumed in the law and the regulator does not have to prove such power (or any market power). This is the case for:

- an operator controlling the access to network elements whose duplication would be economically inefficient or physically impracticable, such as wiring, cables and associated facilities inside buildings or up to the first concentration or distribution point;[18]
- a provider of TV Conditional Access Systems from which broadcasters depend to reach any group of potential viewers,[19] thereby complementing on access obligations which have been imposed under merger control as mentioned above.[20]

In other cases, the regulator should prove the presence of Significant Market Power to impose access obligation.[21] Such position corresponds to the control of (i) a dominant position on (ii) electronic communications markets which have been selected for ex ante regulatory intervention because the ex post competition law would not be effective enough to police the market power, hence abuse of dominant position need to be prevented instead of cured.[22] Thus, in this case, the regulator should prove the existence of market power with competition law methodologies.

[14] On multi-sided markets, see OECD (2018).

[15] For instance, Valletti and Houpis (2005).

[16] Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ [2018] L 321/36, hereinafter EECC.

[17] EECC, Recital 28 mentions explicitly the presence of bottleneck at the infrastructural level to justify pro-competitive regulation.

[18] EECC, Art.61(3) and BEREC Guidelines of 10 December 2020 on the Criteria for a Consistent Application of Article 61(3) EECC, BoR (20) 225.

[19] EECC, art.62(1) and Annex II, Part I.

[20] Such access obligation to CAS was originally imposed by Directive 95/47 of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals OJ [1995] L281/51, art.4(c).

[21] EECC, Arts.72-73.

[22] EECC, Arts.63-67. The number of markets susceptible to ex ante regulation has been reduced over time as competition increases in the European telecommunications sector. Since 2020, the Commission has only identified two wholesale markets: fixed local access and fixed dedicated capacity: Commission Recommendation 2020/2245 of 18 December 2020 on relevant product and

Regarding digital platforms, a **quasi-gatekeeper concept was explicitly mentioned in the motivation for the Platform-to-Business (P2B) Regulation**.[23] The Explanatory Memorandum of the Commission proposal states that:

> *"This growing intermediation of transactions through online platforms, combined with strong indirect network effects that can be fuelled by data-driven advantages by the online platforms, lead to an increased dependency of businesses on online platforms as quasi gatekeepers to markets and consumers."*[24]

3. Gatekeeper power in the Digital Markets Act

The obligations of Digital Markets Act (DMA) are triggered by the presence of gatekeeper power.[25]

3.1. The definition of gatekeeper power

3.1.1. Determination of gatekeeper power

The gatekeeper power determination under the DMA is made is two steps. First, the digital platform should provide one or several **core platform digital services**. Those are ten types of digital services which are defined in the DMA: online B2C intermediation services which include marketplaces and app stores, online search engines, online social networks, video-sharing platform services, number-independent interpersonal communication services, web browsers, virtual assistants, cloud computing services, operating systems and online advertising services.[26] They have been selected for regulation because they economic features are such that their provision of the leads to gatekeeper power.[27]

Second, the platform should have **gatekeeper power** in providing those core platforms services. This power is determined on the basis of a cumulative three criteria test, namely:

- "*it has a **significant impact** on the internal market;*

service markets within the electronic communications sector susceptible to ex ante regulation, OJ [2020] L 439/23.

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

[24] Explanatory Memorandum of the Commission Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238.

[25] Regulation 2022/XXX of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act).

[26] DMA, Art.2(2).

[27] DMA, recital 2 DMA explains that those digital services: '*feature a number of characteristics that can be exploited by the undertakings providing them. An example of such characteristics of core platform services is extreme scale economies, which often result from nearly zero marginal costs to add business users or end users. Other such characteristics of core platform services are very strong network effects, an ability to connect many business users with many end users through the multisidedness of these services, a significant degree of dependence of both business users and end users, lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, and data driven-advantages*.'

- *it provides a core platform service which is an important **gateway** for business users to reach end users; and*
- *it enjoys an **entrenched and durable** position, in its operations, or it is foreseeable that it will enjoy such a position in the near future".*[28]

The gatekeeper designation is made on an individual firm and individual core platform service basis: it only concerns the core platform service(s) for which the firm meets the three criteria test. It does not apply to the other core platform services offered by the same firm which do not meet the three criteria test neither to other digital services outside the core platform service list.[29] For instance, if Meta holds a gatekeeper position for social network service, that does not mean that Meta will also be designated as gatekeeper for its marketplace service.

3.1.2. Structural presumptions for gatekeeper power

In order to ease the gatekeeper designation process, the DMA introduces structural presumptions, for each of the three criteria, in the form of size thresholds.[30]

- The first criterion (*significant impact*) is deemed fulfilled if the provider of core platform service achieves an annual EU turnover of at least €7.5bn or a market capitalization of at least €75bn *and* that provider is currently active in at least three Member States;
- The second criterion (*important gateway*) is deemed met if the core platform service provided reaches more than 45 million monthly active end-users in the EU (around 10% of the EU population) as well as more than 10,000 active business users on an annualised basis;
- The third criterion (*entrenched and durable position*) is deemed fulfilled if the end and business users thresholds have been met during the previous three financial years.

However, the presumption is rebuttable. A provider of core platform service which meets the size thresholds has the possibility to rebut the presumption and demonstrate with sufficiently substantiated arguments that the three-criteria test is not fulfilled.[31]

Conversely, if a provider of core platform service does fulfil the three-criteria test despite falling under the presumptive thresholds, the Commission may designate that provider as a gatekeeper on the basis of an open list of quantitative and qualitative indicators which are:

---

[28] DMA, Art.3(1).

[29] DMA, Art.3(9).

[30] DMA, art.3(2). The Annex to the DMA clarifies the methodology to measure the size thresholds. The Commission DMA Impact Assessment indicates that the use of those thresholds could result in 10 to 15 CPS providers being designated as gatekeepers: Commission DMA Impact Assessment, SWD(2020) 363, para.148.

[31] DMA, Art.3(4) and Art.17(3). Recital 23 clarifies that the economic criteria which may be used by the platform to rebut the gatekeeper presumption are: '*(i) the impact of the undertaking providing core platform services on the internal market beyond revenue or market cap, such as its size in absolute terms, and the number of Member States in which it is present; (ii) by how much the actual business user and end user numbers exceed the thresholds and the importance of the core platform service provided, considering its overall scale of activities; and (iii) the number of years for which the thresholds have been met.'*

- '*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'.* [32]

Table 1 below summarises the three-criteria test to determine the gatekeeper power, the size thresholds for the gatekeeper power presumption and the qualitative indicators that can be used to rebut the presumption or to designate gatekeepers which are below the thresholds.

Table 1. Criteria, thresholds and indicators to designate gatekeeper

Three criteria	Size thresholds	Quantitative and qualitative indicators
1. Significant impact on internal market	***Financial and geographical size (at firm level)*** •Annual EU Turnover (last 3 years) > € 7.5bn or Market cap (last year) > € 75 bn •and provides one CPS in at least 3 Member States	***Size*** •Turnover •Market cap
2. Important gateway to reach end-users	***Users size (at CPS level)*** •Monthly EU active end-users > 45m •and yearly EU active business users > 10 000	***Number and type users*** •Number of business users and end-users •Business users and end-users lock-in, lack of multi-homing

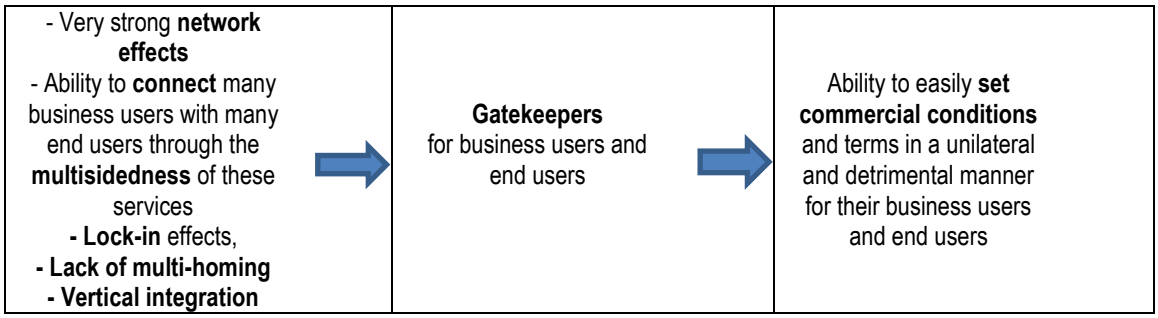
[32] DMA, Art.3(8) and rec 25.

3. Entrenched and durable	CPS user size is durable over the last 3 years	***Entry barriers*** • Network effects, data driven, analytics capabilities •Economies of scale and scope (incl. from data) •Conglomerate corporate structure or vertical integration
		Other structural market characteristics

3.1.3. Interpreting the gatekeeper power

To correctly apply and interpret the concept of gatekeeper power used in the DMA, it is important to understand what it is and what it is not. Gatekeeper power corresponds to the narrow economic definition explained above and aims to **identify a particular type of market power** (Schweitzer, 2021, p.523). The logic of the DMA intervention and the underlying conception of the gatekeeper power in the DMA is as follows:[33] a number of market characteristics lead to gatekeeper power which, in turn, leads to B2B economic dependency as illustrated in Figure 2 below.

Figure 2. Gatekeeper power under the DMA



Therefore, gatekeeper power is **not a mere measure of bigness**. While the presumption is based on size thresholds, it may be rebutted with economic indicators showing that the platform is not an indispensable intermediary for business users to reach end users. Geradin (2021) explains that those economic criteria – in particular the multi-homing – should be seriously taken into account in the implementation of the DMA, and that the gatekeeper power test should not end to be a mere bigness test. Indeed, the DMA is a pro-competition regulation aimed at controlling market power in a more effective manner than competition law; it is not a law aimed at controlling the impact of size as other EU platforms laws such as content moderation rules.[34]

Also, the DMA does **not adopt the broad conception of gatekeeper** mentioned above. Therefore the DMA could only address the economic harms that could be created by an

[33] This logic is explained in recital 13 DMA.

[34] See in particular the Digital Services Act (DSA) which imposes additional content moderation obligations on the Very Large Online Platforms which have more than 45 million active users: Regulation 2022/XXX of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31.

abuse of gatekeeper power, and not the other harms identified by the commentators advocating for a broader conception of gatekeeper power. However, some of those non economic harms are addressed by other laws, such as the content moderation rules or data protection rules. To have a comprehensive and consistent approach in regulating digital platforms, it is key that all the authorities in charge of those different instruments cooperate closely together as explained in de Streel and Monti (2022). The establishment of the DMA High-Level group which is composed of authorities in charge of competition, consumer protection, data protection as well as the telecommunications and the media sector could greatly contribute to this cooperation across legal fields.[35]

3.2. Interplay with competition law

The DMA Gatekeeper power aims to **identify a specific type of market power in intermediation without relying on competition law methodologies**. Indeed, in an DMA assessement, the definition of relevant markets which is based on an economic analysis of demand and supply substitutability is replaced by the delineation of core platform services which is based on the interpretation of legal definitions found in Article 2 of the DMA.[36] The dominance assessment is replaced by the assessment of the three criteria test for gatekeeper power.

Some commentators regret that the gatekeeper designation under DMA is not based on competition law methodologies as this is the case for the SMP designation under the electronic communications regulation. Ibanez Colomo (2021) fears that the absence of market definition and dominance assessment leave too much discretion to the Commission.

However, it is not uncommon that a new economic law starts with less sophisticated methodologies than competition law and then, as the regulator gains more expertise and experience, evolves towards more sophisticated methodologies. This journey has been pursued by the EU electronic communications law as explained by Hancher and Larouche (2011). The first-generation EU Directives followed a formalistic approach as regulated markets were directly defined in legislation and the threshold for intervention was set at 25% market share on those pre-defined markets.[37] Then, regulation moved towards more sophisticated approach, aligned on contemporary competition law methodologies.[38]

More fundamentally, **the use competition law methodologies in the DMA may not be appropriate** for at least two reasons. First, the traditional tools to define relevant markets need some adaptations to take into account the characteristics of the digital economy as explained in OECD (2022a). Second, the reliance of relevant market, which tends to be narrow and build around on a specific anti-competition conduct, may not be appropriate to determine the scope application of ex ante regulation which tend to adopt a more holistic approach as explained by Hellwig (2009). Larouche and de Streel (2022, p.181) underlines

[35] DMA, Art.40.

[36] DMA, rec. 23 notes explicitly that : '*(…) Any justification on economic grounds seeking to enter into market definition (…) should be discarded, as it is not relevant to the designation as a gatekeeper (…).'*

[37] Directive 97/33 of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) [1997] OJ L199/32, esp. art. 4.

[38] This shift was made with the 2002 reform: Directive 2002/21 of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33.

that it is the use of economic methodologies which is important for good economic regulation and to place useful limit to the discretion of the regulator, but economic methodologies are broader – and should not be equated with - competition law methodologies.

This explains why the DMA relies on different concepts and methodologies than the ones used in competition law. OECD (2022b, p.33) proposes three main reasons for such divergence: (i) need to translate broad economic concepts in legislation that requires greater clarity, specificity and certainty than economic literature can currently provide, (ii) attempt to address some of the practical challenges associated with market power-based competition enforcement in digital markets or (iii) because market power and dominance are too narrow to address the concerns that new regulation seeks to address. The first and third reasons could be excluded as the DMA gatekeeper power does not rely on new economic concepts nor proposes a broader definition than market power. The second reason seems more convincing in the European context.

If the gatekeeper power is interpreted as a particular type of market power, the next question raised by OECD (2022b, p.34) is **whether a gatekeeper designation will have a bearing on market power assessments in a competition enforcement context**. A similar issue has been raised in the EU electronic communications regulation on the consequences of a Significant Market Power designation. This Commission explains that such designation does not automatically imply that the operator is also dominant for the purpose of competition law[39] because

> *"when assessing ex ante whether one or more undertakings have SMP in the relevant identified market, national regulatory authorities are, in principle, relying on different sets of assumptions and expectations than those relied upon by a competition authority applying Article 102 TFEU, ex post, within a context of an alleged committed abuse."*[40]

While this position is true in theory, a designated SMP operator is often in practice considered as having a dominant position because regulation and competition law target market power and use similar methodologies and criteria.

The same reasoning is followed for the DMA, all the more so that the gatekeeper designation is not based on competition law methodologies contrary to the SMP designation. Thus a **gatekeeper designation does not automatically imply a dominant position**.[41] However, the three criteria test and the economic indicators which can be used by the Commission to designate platforms which are below the size thresholds or by the platforms which are above those thresholds to escape designation have similarities with factors determining dominance. Thus in practice, it can be expected that a gatekeeper designation is also an indication of a dominant position.

[39] Commission Guidelines of 27 April 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, OJ [2018] C 159/1, para.11.

[40] Explanatory Note of the Commission Guidelines of on market analysis and the assessment of significant market, SWD(2018) 124, p.22 citing Case T-336/07, *Telefónica v Commission* EU:T:2012:172, paras 303 and 341 – 349.

[41] DMA, recital 5 *in fine* explicitly notes that '*gatekeepers (...) are not necessarily dominant in competition-law terms*.'

References

Alexiadis P. and A. de Streel (2020), *Designing an EU Intervention Standard for Digital Platforms*, EUI Working Paper-RSCAS 2020/14.

Armstrong M. (2006), 'Competition in two-sided markets', 37(3) *Rand Journal of Economics*, 668-691.

Caffara C. and F. Scott-Morton (2021), The European Commission Digital Markets Act: A translation, Vox.eu.

Crémer, J., Y-A. de Montjoye and H. Schweitzer (2019), *Competition policy for the digital era*, Report to the European Commission.

de Streel A. and G. Monti (2022), *Improving institutional design to better supervise digital platforms*, CERRE Report.

Franck J.U. and M. Peitz (2021), *Market definition and market power in the platform economy*, CERRE Report.

Geradin D. (2021), What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?, available at SSRN.

Hancher L. and P. Larouche (2011), "The coming of age of EU regulation of network industries and services of general economic interest" in P. Craig and G. de Búrca, eds., *The Evolution of EU Law*, 2nd ed, Oxford University Press, 743-781.

Helberger N., K. Kleinen-von Königslöw and R. van der Noll (2015), "Regulating the new information intermediaries as gatekeepers of information diversity", *Info* 17(6), 50.

Hellwig M. (2009), Competition Policy and Sector-specific regulation in network industries, in Vives, *Competition Policy: Fifty Years on from the Treaty of Rome*, OUP.

Ibáñez Colomo P (2021), The Draft Digital Markets Act: a legal and institutional analysis, Journal of European Competition Law & Practice 7(12), 561–575.

Laidlaw E. (2010), "A framework for identifying Internet information gatekeepers", *International Review of Law, Computers & Technology* 24(3), 263.

Lancieri F. and P. Morita Sakowski (2021), Competition in Digital Markets: A Review of Expert Reports, *Stanford Journal of Law, Business & Finance* 26(1), 65-170.

Larouche P. (2000), *Competition Law and Regulation in European Telecommunications*, Hart.

Larouche P. and A. de Streel (2022) The integration of wide and narrow market investigations in EU economic law (with P. Larouche) in M. Motta, M. Peitz and H. Schweitzer (eds) *Market Investigations: A New Competition Tool for Europe?* Cambridge University Press, 164-215.

Lynskey O. (2017). "Regulating 'Platform Power'," LSE Law, Society and Economy Working Papers 1/2017.

OECD (2018) Rethinking Antitrust Tools for Multi-Sided Platforms *www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm*

OECD (2022a) Handbook on Competition Policy in the Digital Age, https://www.oecd.org/daf/competition-policy-in-the-digital-age/

OECD (2022b), *The Evolving Concept of Market Power in the Digital Economy*, OECD Competition Policy Roundtable Background Note.

Renda A. et al. (2012), *The impact of national rules on unilateral conduct that diverge from Article 102 TFEU*, Study for the European Commission, 2012.

Schweitzer H (2021) 'The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Market Act Proposal', ZEuP 3, 503-544.

Valletti T. and G. Houpis (2005), Mobile Termination: What is the "Right" Charge?, *Jour. of Regulatory Economics* 28(3), 235–258.