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Monopolisation, Moat Building and Entrenchment Strategies – Note by the European Union

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More documents related to this discussion can be found at www.oecd.org/competition/monopolisation-moat-building-and-entrenchment-strategies.htm

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1. Introduction

1. With the emergence of large digital platforms forming part of powerful ecosystems as well as increased concentration levels[1], the concepts of "moats" and "moat building" and "entrenchment strategies" have garnered significant attention in discussions around competition policy and enforcement[2].

2. These terms have primarily been developed and utilised in the US. They have neither been defined nor commonly used (at least as a stand-alone concept) in the context of the application of competition law by competition agencies or courts in the European Union ("EU")[3]. Nevertheless, the main elements that these terms aim at capturing have played a considerable role in the context of the application of EU competition law in many cases, whether in the assessment of market power, as an element of the theory of harm in unilateral cases or in the assessment of the potential anti-competitive effects of mergers. Even without specifically using these notions, past enforcement actions have successfully tackled some anti-competitive business practices or mergers which could be captured by these notions[4]. However, these notions may also depart to some extent from traditional concepts in that they point towards a possible benefit of or the need to engage in a more comprehensive and dynamic assessment of market power and strategies of companies to maintain or strengthen this market power.

3. While it is important to adapt the analytical framework applied in the different competition instruments to reflect market realities, the introduction of new concepts should be done with caution to avoid increasing the threshold for effective enforcement of the competition rules.

4. This submission is structured as follows. Section 2 explains the notions of economic moats, moat building and entrenchment strategies as well as their use in EU competition law enforcement. Section 3 describes the experience of DG Competition in

[1] See Koltay, Gabor and Lorincz, Szabolcs and Valletti, Tommaso M., Concentration and Competition: Evidence from Europe and Implications for Policy (2022). CESifo Working Paper No. 9640, accessible at https://ssrn.com/abstract=4069206 and Joseph E. Stiglitz, Market Concentration is threatening the US Economy, accessible at https://www.project-syndicate.org/commentary/united-states-economy-rising-market-power-by-joseph-e-stiglitz-2019-03..

[2] See for example keynote speech by Assistant Attorney General Jonathan Kanther at the CRA conference in Brussels on 31 March 2023, accessible at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference; Digital markets and "trends towards concentration", Jonathan Kanter, Journal of Antitrust Enforcement, Volume 11, Issue 2, July 2023, pages 143-148; Sullivan, Sean, Anticompetitive Entrenchment (2020). Kansas Law Review, Vol. 86, 2020 accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3505033. See also Guideline 6 of the 2023 US Merger Guidelines.

[3] The same is valid for new regulatory tools like the Digital Markets Act ("DMA"), see Section **Error! Reference source not found.**.

[4] Necessarily, differences between regulatory frameworks in the EU and other jurisdictions, notably the US, have implications for how these phenomena can be addressed within each jurisdiction.

dealing with economic moats, moat building and entrenchment strategies in its antitrust enforcement practices, making references to several recent cases. Section 4 does the same for the EU Commission's merger practice and Section 5 explains how the Commission's enforcement of the Digitals Market Act ("DMA") addresses moat building and entrenchment practices by certain gatekeepers in the digital sector. Section 6 concludes.

2. The notions of economic moats, moat building and entrenchment strategies and the use of these notions in EU competition law enforcement and jurisprudence

5. As the notions of moats and moat building as well as entrenchment strategies have not been defined in legislation or jurisprudence in the EU, there are no commonly accepted definitions or descriptions of these notions. The EU Commission has traditionally not used these terms in its decisional practice when enforcing EU antitrust and merger control rules. If the notions were used in antitrust decisions of the EU Commission, they were mainly used when quoting third parties from the investigation or articles from industry analysts[5].

6. The term "moat" initially comes from the investment industry and was often attributed to investor Warren Buffet. It refers to a key competitive advantage that a company establishes to protect its market share from rivals on a long-term basis. Mr Buffet said he wants to invest in companies that are like a castle with a large moat around it that protects the castle from competitors[6]. Economic moats therefore describe some unique resources or capabilities of a company that protect its market position. This advantage can stem from various factors ranging from brand reputation, technological innovation, economies of scale to exclusive access to certain input. In the context of digital markets direct and indirect network effects and access to data can constitute powerful moats.

7. Moat building refers to practices creating such competitive advantages that protect a company's market position. Entrenchment strategies, on the other hand are understood to be strategic actions fortifying a company's position within a market by protecting and maintaining its economic moats and by making it difficult for competitors to challenge its market position.

3. DG COMP's experience with economic moats, moat building and entrenchment strategies in antitrust enforcement

8. While the terms moats, moat building and entrenchment strategies have not been expressly used in the Commission's antitrust enforcement practice, the underlying considerations and concepts have played a role, notably in decisions concerning the application of Article 102 TFEU to conducts constituting abuses of a dominant position.

9. Article 102 TFEU does not prohibit a dominant market position in itself. It only prohibits the abuse of such a position. For Article 102 TFEU to be applicable, the

[5] See for example reference to observations by industry analysts to Google's Android strategy as the "building of moats" in footnote 1041 of the Commission decision of 18 July 2018 in case AT.40099 - *Google Android* or reference by a third party in case M.10108 – *S&P Global / HIS Markit*, paragraph 463. See however also Commission decision of 4 March 2024 in case AT.40437, *Apple – App Store Practices (music streaming)*, paragraph 345.

[6] See for example article by Gary Conolly in The Sunday Times, Putting faith in moats risks ending up in mire, accessible at https://www.thetimes.co.uk/article/gary-connolly-putting-faith-in-moats-risks-ending-up-in-mire-khrgmwdnlbm.

Commission must establish that the undertaking concerned holds a dominant market position in the relevant product and geographic market. A dominant company has a special responsibility not to engage in conduct which impairs effective competition. Article 102 TFEU in particular prohibits exclusionary abuses, consisting of conduct which departs from competition on the merits and which is capable of producing exclusionary effects.

10. The existence of moats as defined in Section 2 above will typically be relevant for the finding of dominance as they will often not only be a key competitive advantage, but their existence may also constitute a barrier to entry to the market for new competitors or a barrier to expansion for existing competitors. Barriers to entry and expansion are one of the key factors for the finding of dominance. Examples of barriers to entry which could also be considered as moats in the specific circumstances of the case are, for example, intellectual property rights, economies of scale, exclusive or preferential access to input or brand image. In digital markets, network effects and data can constitute a considerable barrier to entry. As such, the presence of moats may facilitate the finding of dominance of an undertaking.

11. Moat building or entrenchment strategies do not expressly form part of the categories of abuses listed in Article 102 TFEU or established in the European Union case-law (such as tying, exclusive dealing or refusal to supply). However, moat building and entrenchment strategies may still be caught by the prohibition of Article 102 TFEU. On the one hand, conduct which falls within the categories of established abuses like tying, refusal to supply or exclusive dealing can have characteristics that may qualify it as moat building or entrenchment. For example, exclusive dealing in the digital sector may have the effect of preventing competitors from reaching the minimum scale to reach a critical level of customers that would allow the development of network effects. Furthermore, refusing to supply an input which is indispensable for the development of a product competing with the one of the dominant undertaking can reinforce the "moat" by blocking the entry or growth of possible contestants, thereby protecting the market position of the dominant undertaking. On the other hand, also conduct not falling in the categories of established abuses can be caught by Article 102 TFEU provided it departs from competition on the merits and it is capable of producing exclusionary effects. Such conduct may include practices that could be considered as moat building or an entrenchment strategy. This may for example be the case for conduct which builds or increases barriers to entry or expansion or that otherwise solidifies or strengthens the market position of the dominant undertaking.

12. Moat building strategies may be particularly effective if they take place within an ecosystem of products and services which are all built around, support or form part of the castle protected by the moats. In digital markets, there are often several complementary products related to one or more core products (which constitute "the castle"). Dominant undertakings often "branch out" to control a larger and larger portfolio of integrated products and services, often leveraging their market power from one market to another. This makes it harder for single-product undertakings to enter and challenge the castle. The existence of an ecosystem of interdependent products and services may – while providing also certain efficiencies – reduce contestability in the affected markets by protecting the dominant undertaking's market position in its core market or markets.

13. The most instructive case of the European Commission dealing with practices which can be considered as entrenchment strategies is the Google Android case[7]. It concerned several types of abuses forming part of an overall strategy by Google to cement

[7] Commission decision of 18 July 2018 in case AT.40099 - *Google Android*, confirmed in the judgment of 14 September 2022, *Google Android*, case T-604/18, EU:T:2022:541.

its dominance in its "economic castle", Google Search. Google's strategy was to create and maintain moats around its castle, allowing it to maintain its dominance in general search during a broad shift in the market from PCs to smart mobile devices.

14. In this case, Google imposed the following restrictions on Android device manufacturers and mobile network operators:

- •Google required manufacturers to pre-install the Google Search app and Chrome browser app, as a condition for licensing Google's Play Store (tying);
- •Google made payments to certain large manufacturers and mobile network operators on the condition that they exclusively pre-installed the Google Search app on their devices (exclusivity rebates);
- •and Google prevented manufacturers wishing to pre-install Google apps from selling even a single smart mobile device running on alternative versions of Android that were not approved by Google (so-called "Android forks") (imposition of far-reaching anti-fragmentation conditions).

15. The European Commission concluded that the tying of Google´s search and browser apps with the Play Store reduced the incentives of manufacturers to pre-install competing search and browser apps, as well as the incentives of users to download such apps. This reduced the ability of rivals to compete effectively with Google.

16. The Commission also concluded that making payments conditional on exclusive pre-installation of Google Search harmed competition by significantly reducing incentives to pre-install competing search apps[8].

17. Finally, the Commission found that Google had obstructed the development and distribution of competing Android operating systems. In doing so, Google closed off an important channel for competitors to introduce apps and services, in particular general search services, which could be pre-installed on Android forks.

18. In this case, the moat building and entrenchment behaviour consisted in depriving competitors of the possibility to effectively contest Google Search's dominance. By pre-installing these apps and relying on users' behaviour (the so-called status quo bias[9]), Google ensured that users would rely on the default search provider, thereby depriving competitors of the chance to grow their customers' base. The ubiquity of the Android operating system, together with the preinstallation of the Search app and of the Chrome browser (which featured an embedded Google Search function) closed off channels for competitors to reach users. As a consequence, Google kept on acquiring the data necessary to optimise its Search service and consumer profiles, which allowed it to increase the related search advertising revenue, its economic castle. The exclusivity payments ensured that OEMs and mobile network operators were incentivised to strengthen the moat around the Search app on mobile devices. The anti-fragmentation agreements limiting the development and distribution of Android forks ensured that only Google could control the types of apps that could be pre-installed on any given Android mobile device. As an observer from the venture capital industry observed, Google's strategy in Android was not

[8] The part of the decision related to this abuse was annulled by judgment of the General Court of the European Union of 14 September 2022, *Google and Alphabet* v *Commission (Google Android)*, case T-604/18, EU:T:2022:541. The judgment is currently under appeal before the European Court of Justice.

[9] See Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, recitals 812 and 861.

just building a moat but "scorching the earth for 250 miles around the outside of the castle to ensure no one can approach it"[10].

19. Overall, the strategy aimed at ensuring the pervasiveness of Google's products in the mobile devices market was crucial for the protection of the castle, as in the online search services market the quality and attractiveness of the service is strictly interlinked with the number of users it is able to rely on: the more users' queries, the more accurate the results are, the more users decide to use the service. The higher the number of users relying on Google's search services (and the better the consumer profiles for targeted advertising), the higher the number of advertisers willing to pay for ads to be placed next to the search results.

20. More in general, in digital ecosystems moat building and entrenchment strategies are significantly concerning from a competition enforcement perspective, since these markets are characterised by particularly significant scale economies, network effects and complementarities. These characteristics provide ample opportunity not only for beneficial product and service integration, but also for erecting entry barriers, for example by limiting compatibility with rivals.

21. Another interesting example of practices that could be considered to amount to moat building or an entrenchment strategy is the recent commitment decision vis-à-vis Amazon.[11] In this case, the European Commission was preliminarily concerned that Amazon could access and use non-public data relating to third-party seller listings and transactions for the purposes of Amazon's retail activities in competition with those third-party sellers. This would have allowed Amazon to maintain a competitive advantage vis-a-vis third party sellers on its platform allowing it to protect its own retail business. In particular, Amazon Retail's ability to use such data for decisions relating to entry, pricing, inventory management and the selection of suppliers constituted a structural advantage to Amazon Retail. The Commission was also concerned that Amazon Retail could adjust its own offers on the basis of non-public seller data, enabling it to control the outcome of competition on the Amazon marketplace and restrict sellers from selling the highest demand products on which Amazon Retail would typically compete.

22. In this case, Amazon's retail activities can be considered as the economic castle supporting its business model and the third-party transactions data obtained by Amazon from its intermediation platform Amazon marketplace would constitute the moat. Amazon could benefit from the insights obtained at platform level to optimise commercial decisions at the retail level. Such advantage was a barrier for retail competitors, who could not overcome it, given the structural nature of such moat, and could therefore be marginalised. Amazon's strategy was not to eliminate competitors at the retail level, as this would cannibalise its profits at the platform level. It used the competitive advantage derived from its platform role to ensure that its retail commercial decisions were optimised to the expenses of its retail competitors.

23. In addition, the European Commission was preliminarily concerned that Amazon favoured its own products and services in the ranking on Amazon marketplace. For each product listed on the Amazon marketplace, a specific offer is presented to consumers on the product display page in a prominent box known as the "BuyBox". The offer is selected by Amazon's algorithms on the basis of criteria determined by Amazon. Both Amazon

[10] See Bill Gurley, The Freight Train That Is Android, accessible at https://abovethecrowd.com/2011/03/24/freight-train-that-is-android/.

[11] Commission decision of 20 December 2022 in case AT.40462 - *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*.

Retail and third-party sellers can provide offers for each listed product on the Amazon marketplace, and the Commission was concerned that Amazon's selection mechanism for the Buy Box favoured offers of Amazon Retail over those of third-party sellers.

24. As for this behaviour, the protection of the economic castle was achieved through the reliance on the structural competitive advantage derived from being able to control the functioning of the "Buy Box" algorithms at platform level.

25. Moat building and entrenchment strategies can also significantly stifle innovation, even if dominant undertakings are investing significantly into the innovation of their products. This is because dominant incumbents with entrenched positions protected by moats have far lower incentives to engage in the type of innovation that would cannibalise their existing core product. This can explain why it took OpenAI to bring user-facing AI services to the market, even though Google had far greater AI capabilities. Given search advertising as its economic castle, Google had incentives to be cautious with directing innovation towards product releases that would undermine the revenue stream from its search product.

26. Another example of an entrenchment strategy that stifles innovation can be found in the pharma sector. In the Astra Zeneca case[12], the dominant company held a patent on a drug to treat stomach diseases. Astra Zeneca made misleading representations to patent offices in order to extend its intellectual property rights on the drug. As a consequence, innovation and entry by generics drugs was disincentivised. Astra Zeneca's behaviour could be considered a strategy by the company to protect its revenue source from the block-buster drug (the castle) through an unlawful extension of its intellectual property rights (the moat)[13].

4. DG COMP's experience with economic moats, moat building and entrenchment strategies in merger enforcement

27. The concept of market power plays a central role in the application of the Merger Regulation. Its relevance is evident in the objective of the regulation which is to prevent mergers 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. Where mergers may lead to the creation or strengthening of a dominant position such anticompetitive transactions may allow the merged entity to widen or deepen its 'economic moats' and to entrench its market power. As a result, such mergers may not only weaken the existing degree of competition but also undermine the future contestability of the market.

28. However, not every increase in market power resulting from a merger is necessarily unlawful. A merger can increase market power either by impeding competition *or* by improving the offering of the merging firms. As noted in the Commission's Non-horizontal

[12] See Commission decision of 15 June 2005 in case COMP/A. 37.507/F3 – *AstraZeneca* and judgment of 6 December 2012, *AstraZeneca v Commission*, case C-457/10P, EU:C.2012:770, upholding the General Court judgment in case T-321/05, EU:T:2010:266.

[13] See also the announcement of the sending of a Statement of Objections to Teva in relation to practices that included artificially extending the protection of the patented drug Copaxone (and by systematically spreading misleading information about a competing product) with a view to hinder a competing product's market entry and uptake, accessible at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6062.

Merger Guidelines, a merger is unlawful only in the former case (i.e., if it leads to significant consumer harm through higher prices, lower quality, or other parameters of competition)[14]. Conversely, mergers that benefit the merging firms' position by improving their products or lowering their costs usually enhance competition even as they make it harder for rivals to win sales.

29. Generally, entrenchment is more likely in markets with significant barriers to entry, e.g., in industries characterised by economies of scale, scope or network effects. Or in markets where intellectual property or interoperability plays a significant role. Similarly, complementarities between related products may allow entrenching a dominant position by raising barriers to entry. Such complementarities may exist within a vertical chain of inputs, among related products within a digital ecosystem, or in multi-sided markets.

30. There are different ways in which a merger may harm the competitive process by creating or entrenching a dominant position. *First*, a merger may create or strengthen a dominant position by eliminating horizontal competition between current competitors. For example, in *Adobe/Figma*, the Commission was preliminarily concerned that the transaction would allow the merging parties to strengthen a dominant position in the market for interactive product design tools, where Figma was the market leader and Adobe its most significant competitor[15].

31. *Second*, a merger may create or entrench a dominant position by eliminating future competition – e.g., by eliminating potential competition or by limiting innovation competition. For example, in *Adobe/Figma*, the Commission was preliminarily concerned that the transaction would lead to the elimination of Adobe's most significant potential competitor in vector and raster editing, resulting in the strengthening of Adobe's dominance in these markets[16].

32. *Third*, a merger may create or entrench a dominant position by leveraging market power through unilateral conduct such as tying, bundling, or refusal to supply. Or where the merged entity gains such a degree of control over an asset that expansion or entry by rival firms may be more difficult[17]. For example, the combination of data sets in *Google/Fitbit*, was found by the Commission to lead to Google strengthening its position in online search advertising, given its significant competitive advantage in data over rivals[18]. In *Illumina/Grail*, the Commission was concerned that the transaction would allow Illumina to foreclose Grail's rivals as these firms heavily depended on Illumina's gene

[14] See 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-horizontal merger guidelines"), paragraph 10.

[15] Case M.11033 *Adobe/Figma* (abandoned). The press release following the Statement of Objections is accessible at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5778.

[16] Id.

[17] 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"), paragraph 36.

[18] See Commission decision of 17 December 2020 in case M.9660 - *Google/Fitbit*, paragraphs 414-468.

sequencing technology. This might have allowed the merged entity to gain control over the emerging market of early cancer detection tests[19].

33. In Booking/eTraveli, the Commission found that that transaction would have strengthened Booking's dominant position in the hotel OTA market. The merger would have allowed Booking to acquire a main customer acquisition channel and expand its travel services ecosystem. By increasing traffic to and sales by Booking's platforms, the transaction would have reinforced network effects and increased barriers to entry and expansion: hindering further the ability of competitors to enter or expand in the hotel OTA market and entrenching Booking's travel ecosystem[20]. In *Microsoft/Activision Blizzard*, the Commission had concerns that post-merger Microsoft would be able to strengthen its dominant position in PC operating systems and its surrounding ecosystem, as it could have the incentives to make Activision Blizzard's games exclusive to its own cloud game streaming market – potentially leading to Microsoft gaining a foothold in this nascent segment of the market[21].

34. Especially in digital ecosystems, entrenchment is often characterised not by a single distinct mechanism, but by a combination of mutually reinforcing effects that weaken competition and harm contestability. For example, suppose two producers of complementary products with appreciable market power merge. The joint impact of such a transaction may consist of the following mutually reinforcing effects that widen or deepen the merged entity's 'economic moat' and that may ultimately strengthen a dominant position to the detriment of competition:

- **Eliminating potential competition**: Producers of complements with market power have a strong interest that the respective other product is supplied competitively. This allows them to extract rents on their own side of the system. As a result, complementors are often the most credible potential entrants into each other's markets and the most credible rivals in innovation competition. A merger may eliminate such dynamic competition between complementors.
- **Foreclosing entry points**: For similar reasons, each complementor has a strong incentive to support potential entry by third parties into the respective other market (e.g., by granting favorable commercial terms, investing into interoperability, or by sponsoring entry)[22]. As a result, a merger between complementors may foreclose critical entry points for third parties.
- **Offensive and defensive leverage**: Moreover, the merged entity may tie or bundle the merging products (e.g., by selling them in an integrated bundle or by denying interoperability). This not only weakens current rivals in the tied good market but may also eliminate their ability to expand into the tying good market. An incentive for such conduct may exist because potential entrants often first need to build their

[19] Case M. 10188 *Illumina/GRAIL*. The press release following the decision prohibiting the merger is accessible at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5364.

[20] Case M.10615 *Booking/eTraveli* – the press release following the decision prohibiting the merger is accessible at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5364.

[21] Commission decision of 15 May 2023 in case M.10646 *Microsoft/Activision Blizzard*, paragraphs 735-747.

[22] E.g., Eurotunnel is offering to subsidise new cross-Channel rail operators to limit the market power of its customer Eurostar. See Financial Times "Eurotunnel operator offers to subsidise new cross-Channel rail services", accessible at https://www.ft.com/content/b481ef33-bbe6-4397-9b67-e860e46c5090.

own scale and network effects to be ready to enter and innovate against an incumbent's core product that is protected by scale and network effects[23].

- **"Soft" entry deterrence**: Even if the merged entity's post-merger conduct is not willfully exclusionary, a merger of complements may undermine entry incentives of third parties. Specifically, bundled rebates, product integration, and lack of investment in interoperability are likely to limit the expected profitability of otherwise efficient entrants. For example, after facing entry in one of the two markets, the merged entity may have an incentive to lower its prices in this market below cost even absent any exclusionary motive[24]. This is because (overly) aggressive conduct in the competitive market forces the entrant to charge low prices as well. This, in turn, allows the incumbent to instantaneously recoup losses by increasing its prices in the monopoly market[25].
- In sum, mergers of complements in an ecosystem of applications may allow the merging firms to entrench market power and create a protective moat that exploits the complementarity of the merging products. As a result, it may become more and more difficult to challenge the integrated portfolio of services offered by the incumbent as entry points for efficient rivals are closed.
- Since the potential anticompetitive effects of such mergers are often dynamic in nature, it is important that a solid theory of harm is outlined and supported by facts. This is particularly relevant in digital markets, where complementary mergers may also generate appreciable efficiencies. To this end, internal documents often play a critical role in evaluating the likely future evolution of the market and the expected impact of the proposed transaction. It is upon the Commission, by means of a sufficiently cogent and consistent body of evidence, to demonstrate that a transaction is more likely than not to lead or to not lead to a significant impediment to effective competition[26].

5. New Enforcement tools – DMA

35. In a nutshell, the Digital Markets Act ("DMA") is a regulation that imposes directly applicable obligations – "dos and don'ts" – on companies that are designated as gatekeepers for specific core platform services.

36. As EU competition and merger law, the DMA does not use the terms "moats" or "entrenchment". However, the economic principles underlying these concepts can also be found in the DMA, in particular its objectives, the criteria for designating gatekeepers under the DMA and the obligations that apply to them.

[23] Note that this is the theory of harm advanced in the seminal antitrust cases against Microsoft in the US and EU.

[24] E.g., see Markus Reisinger, Jens Schmidt and Niels Stielitz (2021), How Complementors Benefit from Taking Competition to the System Level, Management Science 67(8), 5106-5123.

[25] Note that this strategy does not involve a profit sacrifice for the dominant firm. Note that this is likely one of the reasons why digital monopolists tend to offer free products in a plethora of adjacent markets. These complementary services increase the value of their core product, limit the pricing power of rival complementors, and create a protective moat around their offering.

[26] Judgment of 13 July 2023 in case C-376/20 P, *Commission v CK Telecoms UK Investments Ltd*, paragraph 87.

5.1. Overview of the DMA

37. Apart from its objectives (5.1.1), three concepts are key for the understanding of the working of the DMA: (5.1.2) core platform services, (5.1.3) gatekeeper designation and (5.1.4) obligations.

5.1.1. Objectives

38. The main underlying objectives of the DMA, leaving aside the harmonisation of the rules in the internal market of the EU, are contestability and fairness[27]. Both can be linked to principles that also underlie the concepts of moats and entrenchment.

39. *Contestability* relates to the ability of rival to effectively overcome barriers to entry or expansion and challenge the gatekeeper on the merits of their products and services[28]. Most if not all of these barriers could be qualified as "moats". The DMA legislator provided several examples for such moats as structural reasons for reduced contestability in some markets, such as network effects, strong economies of scale, benefits from data, high investment costs, and vertical integration[29].

40. In addition, the European legislator acknowledged the role that ecosystems play in reducing contestability[30]. Often, the economic castle of a gatekeeper is surrounded by several moats that reinforce themselves, and a successful challenge of the castle requires overcoming if not all but most of these moats.

41. *Fairness* relates to the (im-)balance between the rights and obligations of business users and the gatekeeper. The latter should not be allowed to obtain a disproportionate advantage of its position. Rather, business users should be able to adequately capture the benefits resulting from their innovative efforts.

42. Fairness, as a motivating principle for obligations in the DMA, targets behaviour that allows a gatekeeper to exploit its position vis-à-vis business users. This includes scenarios in which a gatekeeper discriminates against or otherwise hampers a competing service, which can qualify as "entrenchment".

43. As recital 34 DMA states, contestability and fairness are intertwined. Accordingly, a position protected by a moat empowers a gatekeeper to act unfairly. In the same vein, unfair entrenchment strategies can reduce the possibility to challenge the gatekeeper's position.

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[27] See Article 1(1) DMA. As recital 4 DMA makes clear, the underlying concerns is that a lack of contestability and fairness will lead to negative effects on prices, quality, fair competition, choice and innovation in the digital sector. More detail on the concepts contestability and fairness can be found in recitals 31-34 DMA. For underlying economic considerations, including on innovation incentives, see, e.g. J. Crémer, G.S. Crawford, D. Dinielli, A. Fletcher, P. Heidhues, M. Schnitzer, F. Scott Morton, K. Seim, Fairness and Contestability in the Digital Markets Act, 40 Yale J. Reg. 973 (2023), accessible at https://www.yalejreg.com/wp-content/uploads/DRAFT_Fairness-and-Contestability.pdf.

[28] See recital 32 DMA.

[29] See recitals 3 and 32 DMA, and also the criteria in Article 3(8) DMA.

[30] See recital 3 DMA: "Some undertakings exercise control over whole platform ecosystems in the digital economy and are structurally extremely difficult to challenge or contest by existing or new market operators, irrespective of how innovative and efficient those market operators may be."

5.1.2. Core platform services

44. The DMA only applies to an enumerated list of core platform services ("CPSs") offered by gatekeepers. CPSs include for instance search engines, social networks, online intermediation services (app stores, marketplaces), and messaging services. As lies in the nature of digital ecosystems, some of these CPSs will be a gatekeeper's economic castle, while others could rather be considered as performing the function of "moats"[31].

5.1.3. Gatekeeper designation

45. The Commission can designate providers of CPSs as gatekeepers in two ways: (1) based on quantitative criteria and a (rebuttable) presumption, or (2) based on a qualitative assessment following a market investigation.

46. When it comes to the *quantitative* gatekeeper designation, the three (cumulative) quantitative criteria for designation are proxies for the general characteristics of a gatekeeper pursuant to Article 3(1) DMA, namely (i) significant impact on the internal market, (ii) the CPS is an important gateway for business users to reach end users, (iii) the gatekeeper has an entrenched and durable position (or is foreseeable that it will enjoy such a position in the near future)[32].

47. The DMA links the term "durable and entrenched position" with the contestability of the position. A limited contestability can be assumed to exist if the quantitative criteria have been fulfilled for a period of at least 3 years[33]. Arguably, such a position presupposes, that the gatekeeper has some form of advantage, a moat, that prevents its position from being challenged by rivals. The DMA's gatekeeper concept was built on the widely shared realisation that the position of a small number of large digital platforms were entrenched in their position[34].

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[31] This can evidently vary from gatekeeper to gatekeeper and will depend on the underlying business model. For instance, for Alphabet the main economic castle is arguably search advertising. Many of its other service, such as Chrome or the Android operating system, function primarily as moats. See, e.g., Bill Gurley, The Freight Train That Is Android, accessible at https://abovethecrowd.com/2011/03/24/freight-train-that-is-android/, or the Commission's assessment of the four antitrust infringements in the Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraphs 1339 et seq., from the perspective of their objective to protect and strengthen Google's dominant position in general search and ultimately its revenues via search advertisement.

[32] The presumption is rebuttable: a player can argue it is not a gatekeeper even if it meets the quantitative criteria. In its decision practice, the Commission has accepted such rebuttal arguments outright in some instances, in others it rejected them outright, or it opened market investigations for a fuller assessment.

[33] See recital 21 DMA. Recital 25 further explains that high relative growth rates are an example for dynamic criteria that could indicate when a position becomes entrenched and durable.

[34] See the problem definition in the Commission's Impact Assessment on the DMA Proposal, SWD(2020) 363 final, paragraphs 25 et seq. and also J. Crémer, Y.-A. de Montjoye & H. Schweitzer, Competition policy for the digital era, accessible at https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en; Furman report, Unlocking digital competition, accessible at https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel; Report of the Digital Competition Expert Panel, ACCC report, Digital Platforms Inquiry Final Report, accessible at https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf; Stigler Center report, Stigler Committee on Digital Platforms, Subcommittee on Market Structure and Antitrust, accessible at https://www.chicagobooth.edu/-

48. For providers of core platform services that do not fulfil the presumptions, the Commission will have to undertake a market investigation with a *qualitative* assessment to assess whether an undertaking holds a gatekeeper position. As the criteria in Article 3(8) DMA make clear, the existence of moats, for instance in the form of network effects, economies of scale/scope or the possibility to cross-subsidise, is a crucial point in such an assessment.

5.1.4. Obligations

49. The DMA imposes obligations on gatekeepers to addresses practices that, based on experience from competition law and other fields, have been considered to be the most damaging for business users and consumers.

50. As recital 32 DMA makes explicit, the legislator in particular intended to ban certain practices by gatekeepers that are liable to increase barriers to entry or expansion, and to impose certain obligations on gatekeepers that tend to lower those barriers – in other words, moats[35].

51. Importantly, the obligations apply *ex ante*, i.e. gatekeepers need to comply with the obligations once designated (the more informational/transparency obligations in Articles 11, 14, 15 and 28) or six months later (the substantive obligations in Articles 5-7). Moreover, they regularly also apply *per se*, or with only very narrow, mainly technical, justifications[36].

The DMA obligations under the prisms of "moats" and "entrenchment"

52. When looking at the substantive DMA obligations in Articles 5-7 under the prisms of moats and entrenchments, most of them can be seen as either attempting to (a) overcome moats or (b) prevent entrenchment.

53. This distinction is not always straight forward, not only because the distinction between moat and entrenchment might not always be clear. Some obligations could also do both, overcome a moat or prevent entrenchment. For instance, Article 6(7) obliges a gatekeeper for an operating system to allow business users effective interoperability with the same hardware and software features available to the gatekeeper. On the one hand, this obligation helps overcoming the gatekeeper's advantage of controlling the operating system by giving business users equal access to the operating system's functions. On the

/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf; US House of Representatives Majority Staff Report, Investigation of Competition in Digital Markets, accessible at https://www.documentcloud.org/documents/7222836-Investigation-of-Competition-in-Digital-Markets.html.

[35] Recital 32 DMA further makes clear that "[t]he obligations should also address situations where the position of the gatekeeper may be entrenched to such an extent that inter-platform competition is not effective in the short term, meaning that intra- platform competition needs to be created or increased."

[36] See, e.g. Monopolkommission, Recommendations for an effective and efficient Digital Markets Act, paragraphs 43 et seq. accessible at https://www.monopolkommission.de/images/PDF/SG/sr_dma_fulltext.pdf.

other hand, the obligation can also make a gatekeeper's entrenchment strategy via leveraging more difficult[37].

54. Moreover, some obligations do not overcome the moat or prevent entrenchment but rather try to prevent the building of a moat or to make it more difficult for the moat to become so deep that it cannot be overcome, such as the prohibition of data collection without explicit consent in Article 5(2) DMA. And some obligations fall entirely out of this categorisation or only have a very weak link, such as the prohibition to prevent business users from raising issues of non-compliance with public authorities in Article 5(6) DMA.

Moat-overcoming obligations

55. Several obligations in the DMA attempt to overcome existing moats by requiring designated gatekeepers to do something that levels the playing field for rivals.

56. To provide an example, Article 6(11) DMA requires a designated gatekeeper for the online search engine CPS, at the request of a rival online search engine, to provide access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on its online search engine. The intention of this obligation is to bridge the large data moat that the incumbent online search service has built and to foster competition on the merits of the search algorithm.

57. The DMA also tackles other moats related to online search[38]. The main access points for online search services are web browsers, even before search apps. The providers of operating systems often indirectly determine the use of browsers as well search services by pre-installing apps and setting search services as default. Accordingly, Article 6(3) and (4) try to counter the effects of such pre-installation and default-setting. They mandate that gatekeepers of operating systems must allow deinstallation, side-loading and changing of defaults. Moreover, where the operating system gatekeeper is also a gatekeeper for web browsing or online search, it must show a choice screen. The same applies where the gatekeeper for web browsers is also a gatekeeper for online search.

58. Other examples of moat-overcoming obligations include in particular other data obligations, in particular (i) the obligation to enable end users (or authorised third parties) to port user data (Article 6(9)), (ii) the obligation to provide business users with data that the latter generate on the CPS (Article 6(10)), (iii) but also the obligation to provide access to app stores, search engines and social networks on fair, reasonable and non-discriminatory terms (Article 6(12), or (iv) the obligation to provide interoperability to rival messaging services (Article 7).

Entrenchment-preventing obligations

59. Some of the DMA obligations try to prevent that a gatekeeper strengthens its position by maintaining or strengthening its moats, or by otherwise making it difficult for competitors to challenge its market position.

60. For instance, Article 5(7) and (8) prohibit certain forms of tying, such as requiring the use of identification services, web browser engines or (in-app) payment services of that

[37] For instance, it could prevent leveraging scenarios like those in the Commission's Microsoft work group server operating system interoperability case, upheld in judgment of 17 December 2007 in case T-201/04 *Microsoft v Commission*, ECLI:EU:T:2007:289.

[38] For a depiction of the moats that Google created around its search service, see Footnote 5 above.

gatekeeper as well as subscribing to or registering with another CPSs as a condition for using the gatekeeper's CPS.

61. Another example for this group of obligation is the prohibition to leverage a gatekeeper position by way of self-preferencing in ranking, indexing and crawling in Article 6(5). Such a self-preferencing cannot only help to leverage into another market but also defensively against a possible entry into the gateway market[39].

62. When it comes to emerging gatekeepers, i.e. companies that do not yet enjoy an entrenched and durable position in their operations but will foreseeably enjoy such a position in the near future, the DMA lists in Article 17(4) a number of obligations that the Commission may declare applicable if it designates this company as gatekeeper[40]. From Recital 27 follows that the legislator considers these obligations as capable of preventing the company from enjoying an entrenched and durable position in its operations because they target leveraging and facilitate switching and multi-homing[41]. Pursuant to Article 17(4), the Commission will only declare applicable those obligations that are appropriate and necessary to prevent the gatekeeper concerned from achieving, by unfair means, an entrenched and durable position in its operations.

6. Conclusion

63. While neither the notion of moats or moat building nor that of entrenchment strategies have been defined in legislation in the EU nor used by the Commission in its enforcement of EU antitrust and merger rules, the underlying concepts and considerations have played a role in its decisional practice. A clear example is the Google Android case which concerned Google's strategy to cement the dominance in the "economic castle" Google Search by creating and maintaining moats around it.

64. These concepts also play a role in merger control, where mergers may weaken the existing degree of competition and undermine the future contestability of the market. Generally, entrenchment is more likely in markets with significant barriers to entry. Also complementarities between related products may entrench a dominant position by raising barriers to entry. Merger cases where the entrenchment of dominance was assessed by the Commission include Booking/eTraveli, Adobe/Figma and Microsoft/Activision Blizzard.

[39] For an example from antitrust, see Commission decision of 27 June 2017 in case AT. 39740 - *Google Shopping*, confirmed in the judgment of 10 November 2021, *Google Shopping*, case T-612/17, EU:T:2021:763, in which the Commission assessed not only the potential effects in the national markets for comparison shopping services, but also in the national markets for general search services (paragraphs 641-643). On 25 March 2024, the Commission took investigative steps to clarify whether Amazon may be preferencing its own brand products on the Amazon Store in contravention of Article 6(5) of the DMA, see press release IP/24/1689, accessible at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689.

[40] These are the Articles 5(3): ban of most-favoured-nation clauses, 5(4): anti-steering, 5(5): reader rule, 5(6): ban of gag clauses, 6(4): side-loading, 6(7): hardware/software interoperability, 6(9): end-user data portability, 6(10): business user data access, and 6(13): no disproportionate termination rules.

[41] Another situation in which the Commission will assess the entrenchment of a gatekeeper's position is when it is considering the imposition of additional measures in a case of systematic non-compliance, see recital 75 DMA.

65. In the same vein, key concepts of the DMA, including many of the obligations, can be linked to economic concepts underlying moats and entrenchment.