

The European Union Digital Single Market

Europe's Digital Transformation

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and Magdalena Suska**

First published 2022

ISBN: 978-1-032-20159-7 (hbk)

ISBN: 978-1-032-20164-1 (pbk)

ISBN: 978-1-003-26253-4 (ebk)

1 EU's perspective on the functioning of giant online platforms in the digital economy

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DOI: 10.4324/9781003262534-2

 **Routledge**
Taylor & Francis Group
LONDON AND NEW YORK

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Introduction

The digital market has already become a reality in the world. Internet platforms, including so-called gatekeepers, are becoming the primary managers of both the social, scientific, and political content they deliver and the places where providers of goods and services connect with consumers (including other economic operators). Gatekeepers are big tech companies which within an online platform model develop and manage platforms, as well as rules for business partners and consumers, and acquire data, the most valuable component of the digital market. Due to their size, they have an enormous market advantage over their competitors. Weak contestability and unfair practices in the digital sector are a problem that is more common and more pronounced for some digital services than for others. This applies in particular to widespread and widely used digital services and digital infrastructures, which mostly directly mediate between business users and end users.

Many countries struggle with the answer to the question how to approach new reality, where a small number of big companies govern new markets. Some countries apply their present law to digital giant tech companies, while others develop new rules for new digital market competitors. The first option can fail, as the old-fashioned regulations in force are often not sufficient, as they do not take into account new activities and behaviours of economic actors of the digital market, especially as they establish new fast-developing online products. The second option leads to different rules applied in various countries, while the digital activities do not recognise traditional borders. As regards the European Union, the latter approach, taken individually by EU member states, could result in the fragmentation of the EU internal market.

The aforementioned problems are present in the European Union, as well. On the one hand, although the legal framework that harmonises and unifies the way entrepreneurs operate in the EU covers a wide scope and is often very detailed, certain aspects of digital economy seem to escape it. That is because it was developed before the digital market emerged, which is why it does not cover some types of behaviour of its actors. On the other hand, some EU member states launched their work on national regulations in that field, while

others called the Commission to act (Cédric et al., 2020; Amaro, 2020; Rosemain and Busvine, 2020; Fletcher, 2021).

After months of discussions and announcements of new regulations, the European Commission issued a digital package in December 2020. It covers two new regulations: the Digital Service Act (European Commission, 2020a) and the Digital Market Act (DMA) (European Commission, 2020b). They should regulate a significant part of the EU Digital Single Market to the extent comparable to the creation of the traditional internal market in the early 1990s. According to the European Commission, the aim of the Digital Market Act is to enable platforms to use their full potential by tackling the most serious cases of unfair practices. In consequence, both end users and businesses, which reach customers through the platforms, can reap the full benefits of the platform economy. At the same time, new rules should not hamper rapid growth of new tech companies and development of innovative services.

Taking into consideration recent changes observed in the digital market, an enormous increase in and the strengthening of the market position of the biggest companies, as well as recent problems emerging in the field of competition, the aim of this chapter is to grasp the change in the approach of the EU competition policy to entities offering online platforms compared to the existing solutions functioning in traditional economic transactions in the European Single Market. We put forward a hypothesis that competition rules targeting digital platforms, especially gatekeepers, will regulate the behaviour of online market actors to a greater extent than the rules designed for offline operations.

In order to examine the hypothesis, we will analyse Digital Market Act (DMA) draft from the viewpoint of the identification of actors that it covers and responsibilities imposed on them. Currently (October 2021), discussions on the DMA are pending in the Council and in the European Parliament; however, one should not expect any major changes within the scope covered by the study. A separate issue is the strength and strictness of the DMA in the final version (Wiggers and Struijlaart, 2021), adopted by the Council and the European Parliament. It seems that both co-legislators look in the same direction to hardly regulate the presence of the gatekeepers and their behaviours (Altmaier et al., 2021; European Parliament, 2021; Fletcher, 2021).

The first section of this chapter presents the specific position of online platforms in the global digital market. Then, we discuss how new regulations and the existing approach to competition rules relate to each other, especially with regard to the behaviour of operators holding a dominant market position. It should be noted that the DMA also covers procedures concerning cooperation between the European Commission and the EU member states; however, this issue remains outside the scope of this study. Further, legal solutions in the field of identification of gatekeepers and responsibilities entrusted to them are outlined in the light of previous experiences with the application of EU competition rules. The chapter finishes with conclusions that specify the scope of future studies.

1 Position of online platforms in the EU digital market

According to Śledziewska and Włoch (2020, p. 96), a genuine revolution for digital transformation was not so much in the implementation of network systems in enterprises or e-commerce but online platforms which have worked out operating models based on the advancing use of the internet, proliferation of mobile devices, and massively growing possibilities to collect and process data. The heart of these platforms lies in intermediation in interactions between different types of users: business partners, as well as consumers and buyers of products on offer.

Online platforms are thus another trade and communication channel, parallel to the traditional one, a new type of market where demand and supply meet. In the offline world, a marketplace is often specified by an administrator who ensures the provision of connecting roads, parking lot, space where products can be displayed for sale (in an open-air market, a shopping centre, or service facilities), and recently also engages in advertising activities (e.g., advertising a shopping centre). The administrator is very rarely involved in attracting customers, although recently big shopping centres increasingly inform about joint promotional campaigns or special offers. An attempt to win a bigger number of consumers turns into a kind of competition between administrators of traditional markets (shopping centres). Yet these operations have a limited geographical scope as they develop only locally and, in most instances, the administrators do not collect and store consumer data, with the exception of, for example, loyalty cards or special financial schemes (credit cards) or vehicle registration numbers for parked cars. As observed by Kenney and Zysman (2016), digital platforms can be viewed as a complex mix of software, hardware, operations, and network. The fact that they ensure access to a combination of techniques, technologies, and interfaces to a wide group of users who may build what they want on solid foundations is crucial. It seems, however, that Śledziewska and Włoch (2020, pp. 99–100) propose a definition that is more precise from economic point of view and states that online platforms represent a new business model and operate as internet intermediaries between at least two separate but interdependent (networked) groups of users who are in fact two sides of the market within multipartite markets. In other words, platforms decide on rules of the game and standards binding within them, as a result of which transaction costs can be reduced; they provide appropriate tools (e.g., a browser) and services (e.g., payment schemes) and using data they have at their disposal, they can match sides to the transaction based on specific criteria. Thus, online platforms rely on a complete business model that integrates demand and supply, that is, market creation, establishing, or facilitation using new technologies (Śledziewska et al., 2017).

The aforementioned business model concept merits our attention as, due to its innovative nature, it is often used as an excuse for certain types of behaviour of big online platforms which are sometimes considered uncompetitive. Some researchers openly suggest that it is not a business model but rather a complete

business ecosystem, the most advanced form of business network today, or a highly connected network of organisations, stakeholders, and consumers involved in exchange, production, innovation, trade, cooperation, and competition that co-evolve with regard to a specific goal or central organisation (Moss et al., 2021). Online platforms are also seen as digital infrastructure that provides the core functionality for third-party providers to interface and interoperate in order to offer complementary products, including services, as well as serves different functions, often bringing together interdependent groups in multisided markets (Moss et al., 2021).

In principle, online platforms offer services identical to those available in the analogue world, they match business partners with consumers. Nevertheless, attention should be paid to two issues: the nature of services and data. Pursuant to the currently binding EU regulations (Directive, 2015), the previously mentioned services rendered by online platforms are the so-called information society services, that is, services provided (a) for remuneration as the fundamental requirement of the identification of a service covered by the freedom to provide services and internal market regulations; (b) at a distance, that is, without the service provider and recipient being simultaneously present in the same place; (c) via electronic means (using electronic equipment) and at the individual request of the recipient of services (which excludes acting on the initiative of service providers) (Directive, 2015). One needs to note that platforms offer multiple services of a scope wider than currently stipulated in the regulations, including the part without remuneration from the consumers, which is designed to attract their attention. This is how they subsidise, for example, access to them to maximise profit in other fields of activity.

When it comes to data, online platforms have full data of the vendor, like in the analogue world, but, above all, they have buyer's data. In the latter case, these are data that inform about consumer's movements before the purchase, his previous experience, how he finds desired products, how he pays for them, possibly his opinions about the product and the seller, as well as his use of other services, not necessarily related to the transaction. One could argue that similar information is gathered by small retail local shops, whose owners know "everything" about customers from their neighbourhood; however, those data are less detailed and not so comprehensive as the ones used by tech companies. At this point, it is worth highlighting that data are sources of very important value to all companies, especially to platforms. Nowadays, data are considered a novel source of revenue, and the process of creating wealth from it is called "data monetization" (Johnson et al., 2017; Faroukhi et al., 2020; Hanafizadeh and Harati Nik, 2020). The aforementioned value of data is difficult to measure due to diverse ways in which they are used. Such mechanisms are absent or at least significantly limited in offline business models. On the other hand, while in the brick and mortar retail model the consumer has a limited opportunity to compare products, on online platforms the range of information is much more

complete and easier to compare. This is one of the conditions to ensure perfect competition in the general equilibrium theory.

There are many types of platforms, from a simple transmission of traditional trade from the physical market to the internet through platforms providing specific services (e.g., payment, access to media), markers platform, which can be developed as systems and available content, up to platforms that contain at least several of enumerated services (the so-called hybrid platforms). In particular, the latter ones which collect data from diverse activity categories ensure the use of business partners and consumer data in a wide array of offered services. Thus, user data acquired in relation with one service can be used for offering another one (Kenney and Zysman, 2016; Moss et al., 2021). Such cross-exploitation of data enables, *inter alia*, continuous adjustment of advertising content shown to the consumers not only while they are looking for a specific product but also when they use another service of the same service-provider. There are some reasons why it is important. Firstly, online platforms build their position on a rapid increase of the number of internet users (both business partners and consumers). Secondly, they offer user-friendly services that fit into the trend of fast and intuitive communication and use of equipment. Thirdly, platforms benefit from the economies of scale: growing number of users is accompanied by the scalability of intermediary services, that is, increased revenue from sales without increasing basic operational costs. Bigger number of both final users and business partners increases the potential to adjust offers, number of opinions, and, as a result, the value of transactions and the value of platforms. Fourthly, they generate revenues mainly from advertisements based on collected and processed data and content adjusted to a potential consumer. User attention is at least as important as user data in monetising services. Fifthly, platforms offer data which help to generate extra value from network effects. In this case, we mean mechanisms that work for increasing the population of network users which increase the benefit involved in being a part of the network to consumers and business partners (ACCC, 2019; OECD, 2019; Śledziwska and Włoch, 2020).

As we have already mentioned, online platforms develop dynamically. One may identify single-sector platforms and enterprises which offer multiple diverse platforms linked with one another. Recent years witnessed their concentration (Moss et al., 2021) through mergers and acquisitions of smaller actors, including start-ups, by bigger operators and the expansion of existing players into new areas promising for the future. As a result, a holding emerged composed of five technological global giants referred to as GAFAM: Google (Alphabet Inc. is a holding established in 2015 by Google), Amazon, Facebook, Apple, and Microsoft. Further positions are occupied not by American or European champions but by Baidu, Alibaba, and Tencet from China, apparently the main competitors of GAFAM, although today much smaller. The aforementioned companies are clear leaders of the digital market understood broadly as a market where demand for services meets supply (including contents) via electronic means (Table 1.1).

Table 1.1 Selected services offered by GAFAM

	<i>Google</i>	<i>Apple</i>	<i>Facebook</i>	<i>Amazon</i>	<i>Microsoft</i>
Browser	Google			Search engine	Bing
Electronic mail	Gmail	iCloud mail			Outlook
Communicator	Hangouts	iMessage	Messenger, WhatsApp		MSN Messenger, Yammer
Maps	Google Maps; Google Earth, Waze	Apple Maps			Bing Maps, StreetSide
Social media	Google+		Facebook, Instagram	Twitch/ Goodreads	LinkedIn
Cloud	Drive, Google Cloud Platform	iCloud		AWS, Amazon Drive	Azure, OneDrive, SkyDrive
Voice assistant	Google Home	Siri	Boty	Echo/Alexa	Cortana
Advertising	AdWords, AsSense, Double Click, Tag Manager		In News Feed Audience Network	Amazon Advertising	Bing Ads

Source: D. Coyle (2018); Statista (2020).

Growth dynamics of online platforms can be evidenced by a clear increase in their market capitalisation, that is, the total market value of a publicly traded company's outstanding shares. Although the discussed companies were established in different periods, obvious increases in their value have been observed in the recent five years (Figure 1.1). According to the latest data available for September 2021, Apple was a clear leader followed by Microsoft, Google, Amazon, and Facebook, leaving Chinese enterprises far behind.

Notably, the biggest increases among the discussed companies were reported in 2014–2021 by Amazon, which has massively expanded its service offer and was followed by Alphabet (Google) and Microsoft. According to CNBC (2021), the seven biggest tech companies (Amazon, Apple, Alphabet, Microsoft, Facebook, Tesla, and Netflix) achieved revenue between US\$837,000 (Amazon) and US\$55,000 (Netflix) for every minute of the first three months of 2021. (Figure 1.2) (CNBC, 2021).

As already stated, digital market, especially the operations of digital platforms, is characterised not by its product but by the seller's and, above all, buyer's data. In the offline realm, both the administrator of shopping space and the seller do not learn a lot about the buyer. In fact, the latter in principle remains anonymous until the transaction takes place or is totally anonymous in cash

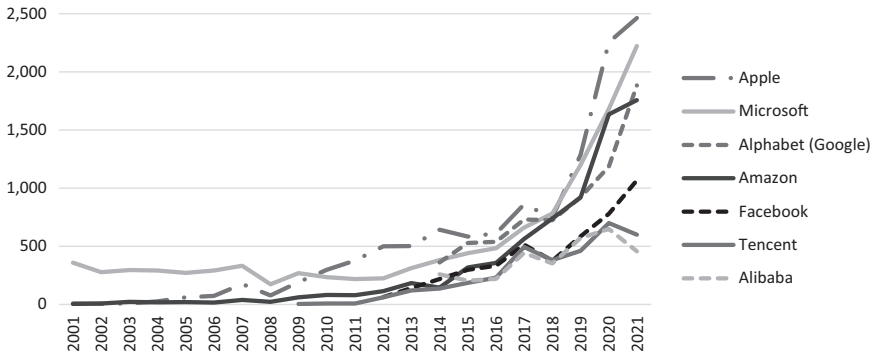


Figure 1.1 Market capitalisation of big tech companies (in billion US\$)

Source: <https://companiesmarketcap.com/tech/largest-tech-companies-by-market-cap/> (accessed 20 September 2021)

transactions. Buyer's habits remain unknown together with places that s/he visited previously; usually also nothing is known about his earlier market research and information collected with regard to offerings of competing operators. In the digital market, the main products that sellers would like to use are data about consumer behaviour. Some of the data may be really useful, some are useless; however, having them and using them in a skilful way may contribute to the success of the platform and its business partners. Data have become a particularly relevant product, which is evidenced by a substantial increase in worldwide amount of data created per year (Figure 1.3).

Data at the disposal of technological companies can be used, first of all, to optimise product offerings, adjust ads and multimedia communication, as well as predict consumer behaviour and adjust products to the expectations or (sometimes artificially generated) consumer needs. Another way to profit from data that has been discovered in recent years consists in using them in the development of services based on artificial intelligence. Once suitably adapted, these services are offered to other companies. Consequently, the ability to derive value from data increasingly determines the competitive position on the market (Śledziwska and Włoch, 2020, pp. 68–71). We are therefore dealing here with value created in online commerce by online platforms not only in the form of tangible goods and services, but also Big Data—large, variable, and diverse data sets.

However, the aforementioned data concern not only consumers but also business and production processes. In order to ensure the compatibility of production processes within both a single plant and an entire conglomerate, as well as cooperation with component suppliers and recipients of processed or finished products, it has become necessary to exchange data, including generating, acquiring, reading, and using data. In order to ensure that huge amounts of data (predefined, of course) can be used simultaneously by many actors, the

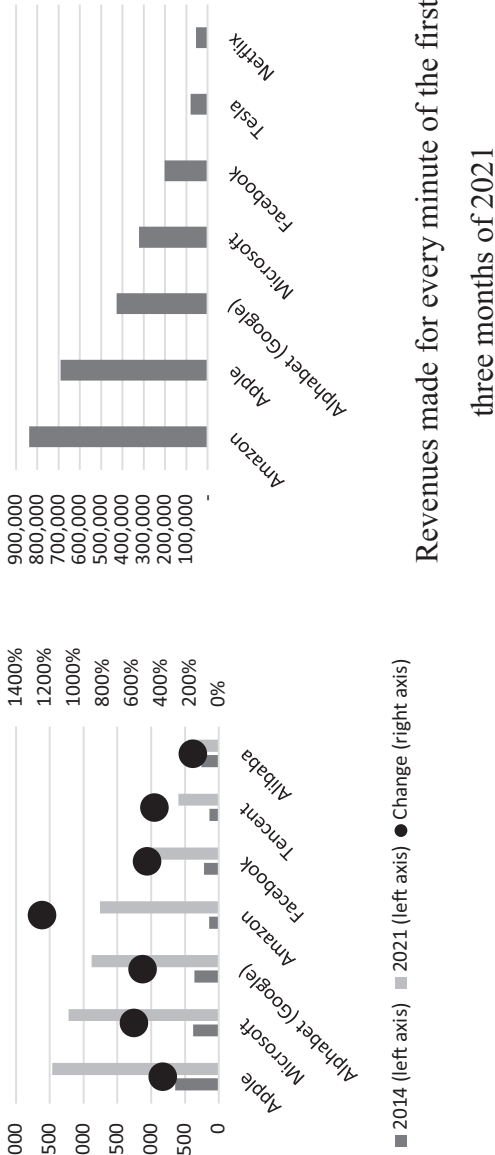


Figure 1.2 Market capitalisation of top tech companies (in billion US\$)

Source: Own calculations based on <https://companiesmarketcap.com/tech/largest-tech-companies-by-market-cap/> and CNBC (2021) (accessed 20 September 2021)

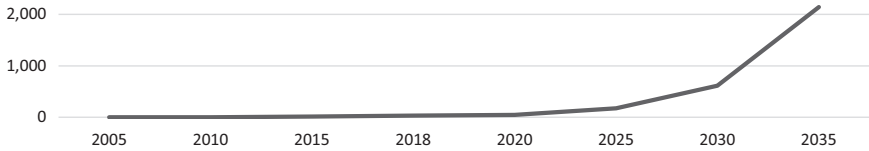


Figure 1.3 Worldwide amount of data created per year in zettabytes

Source: Statista (2019)

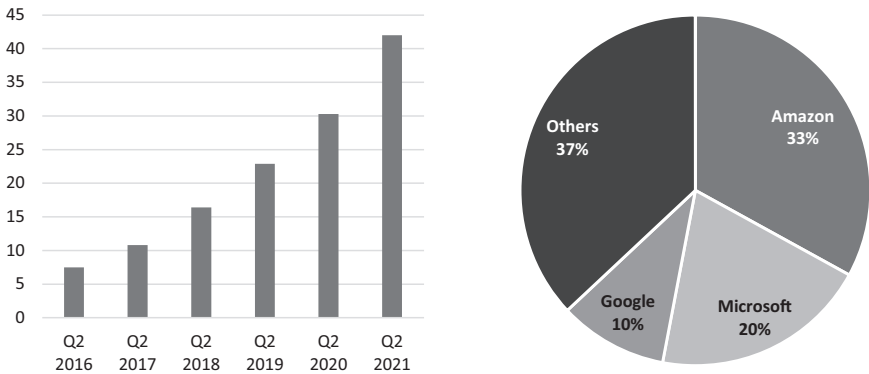


Figure 1.4 Cloud infrastructure service market (in billion US\$)

Source: Statista (2020); Synergy (2021)

data cloud segment is developing. Available financial data indicate a significant increase in the value of investments in cloud infrastructure (Figure 1.4).

Access to and management of user, producer, and service provider data create the potential for “platformisation” of further sectors. The fact is that different sectors have different potential to operate through platforms. The specific nature of the digital market in this sphere is confirmed by the fact that the main investor in future stores of knowledge about production, producers and consumers, and therefore the entire market is Amazon, followed by Microsoft and Google.

Linked to data collection and processing is the issue of data protection. This is a particularly important issue from the point of view of both business partners and consumers. As already mentioned, in physical markets, neither the collection nor the exchange of such detailed data about the production process or the purchase transaction takes place. In the digital marketplace, this data is generated, and in order to ensure the trust of consumers and business partners, which is essential for business development, it is necessary to ensure data security. The big tech companies in question are investing heavily in data security, from the leader in operating systems (Microsoft) to companies providing search engines (Google) and sales platforms (Amazon) (Figure 1.5).

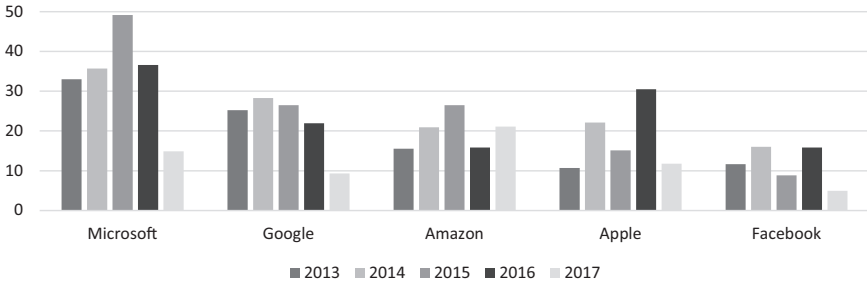


Figure 1.5 Selected companies' patent applications for data security

Source: Statista (2019)

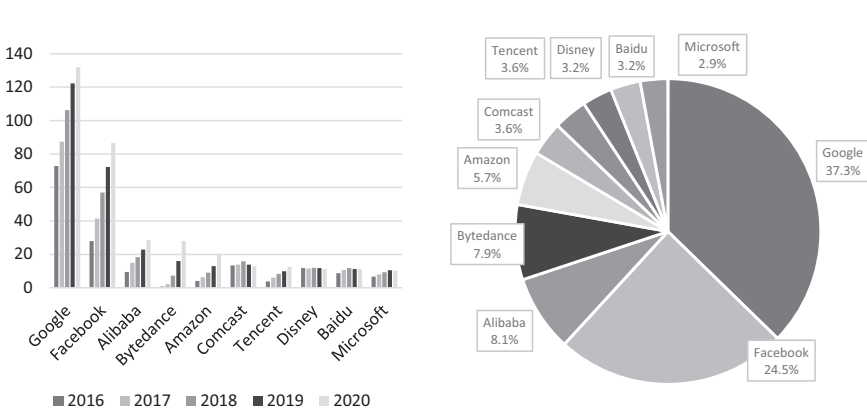


Figure 1.6 Advertising revenue in billion US\$ and shares in top ten global media owners

Source: www.groupm.com/this-year-next-year-global-2021-mid-year-forecast/

The data held by big tech companies are used by them both to attract new consumers and to offer their services to business partners through advertising services. The possibility of profiling the recipient of the message, adapting content to the real or potential expectations, and capabilities of consumers mean that specific content, including advertising, should only reach selected recipients. An important indicator of the position of companies on the digital market is therefore the revenue generated from advertising. The group of largest global tech companies has evolved quite significantly over the past five years, through both the strengthening of the position of their largest providers, the emergence and rapid growth of new operators, and mergers and acquisitions (Figure 1.6). In 2020, the 25 largest media companies accounted for 67% of all industry advertising revenues, while five years earlier the same companies accounted for only 42%. As far as the biggest players are concerned, in 2020 the share of the top ten global media owners in advertising revenues reached 55.2%, of which

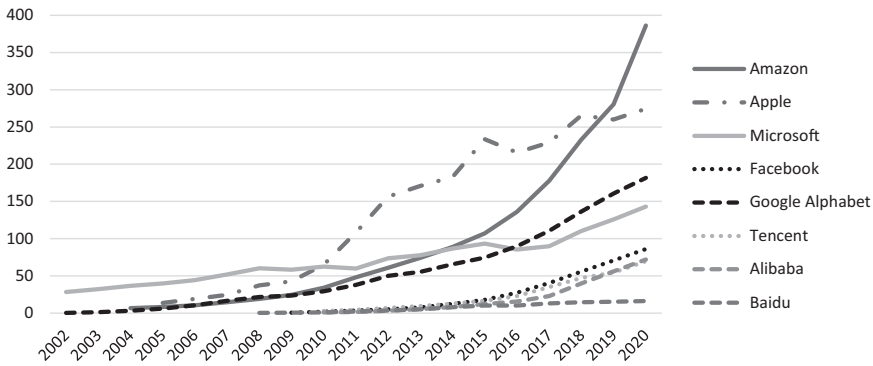


Figure 1.7 Annual revenues (in billion US\$)

Source: www.statista.com/statistics/266282/annual-net-revenue-of-amazoncom/, www.statista.com/statistics/267728/apples-net-income-since-2005/, www.statista.com/statistics/267805/microsofts-global-revenue-since-2002/, www.statista.com/statistics/268604/annual-revenue-of-facebook/, www.statista.com/statistics/266206/googles-annual-global-revenue/, www.macrotrends.net/stocks/charts/TCEHY/tencent-holding/revenue, www.macrotrends.net/stocks/charts/BABA/alibaba/revenue, www.macrotrends.net/stocks/charts/BIDU/baidu/revenue.

almost 62% belonged to Google and Facebook. Noteworthy is the very rapid growth of the position of new players in the advertising market from both the United States (Amazon) and China (Alibaba, Bytedance—Tiktok) and the much lower dynamics recorded by, for example, Microsoft.

Ultimately, the solid position of global players in the digital market can be seen in their annual revenues and the number of active users. According to the preliminary data, the clear growth leader with the highest annual revenues in 2020 was Amazon, which almost quadrupled its revenues over the past five years to US\$386 billion (Figure 1.7). Other big tech companies also registered an increase in their revenue; however, the clear leaders were Alibaba (almost six times growth to US\$72 billion) and Facebook (almost four times growth to US\$85 billion). Both Microsoft and Apple saw their annual revenues increase to US\$275 billion and US\$143 billion, respectively. The aforementioned indicates a definite strengthening of these companies in the digital market through the development of their respective sub-markets. Given the digitalisation evident in socio-economic life, especially accelerated by the COVID-19 pandemic, significant increases in the aforementioned metrics can be expected for these companies.

Related to the aforementioned revenues is a second indicator that determines both market position, value and, consequently, the market power reflected in the number of active users. Due to the sensitivity of data treated as commercial information, companies usually share it only on the occasion of significant increases. The greater the number of active users, the greater and more diverse the potential demand, the greater the likelihood of finding customers for products offered by business partners. Of course, due to the specificity and scope of the services offered, and thus practically operating in different markets, a

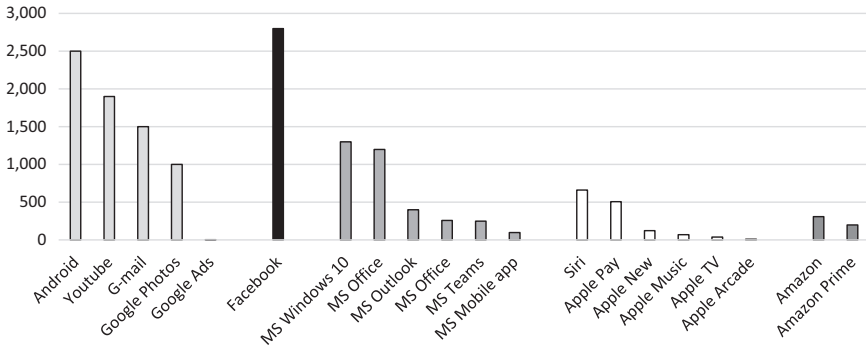


Figure 1.8 Active users (in million)

Source: <https://review42.com/resources/google-statistics-and-facts/>; www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/; <https://expandedramblings.com/index.php/microsoft-office-statistics-facts/>; <https://news.microsoft.com/bythenumbers/en/windowsdevices>; www.thexyz.com/blog/microsoft-office-365-usage-statistics/; www.windowscentral.com/microsoft-teams-has-scored-250-million-monthly-active-users; www.businessofapps.com/data/apple-statistics/; <https://9to5mac.com/2021/04/06/poll-has-your-opinion-of-apple-arcade-improved-with-the-arrival-of-classic-ios-games/>; <https://techjury.net/blog/amazon-statistics/#gref>.

comparison of the positions of individual companies must take their specifics into account. However, taking into account the broad definition of the digital market, the clear leader in recent years has been Facebook with almost 3 billion active users, although it should be noted that so far it has only offered a social medium with sales space emerging only recently (Figure 1.8). The remaining big tech companies offered consumers a wide range of services, from operating systems and applications through search engines, email, online shops, to entertainment (games, music, and books). Assuming that the total number of internet users is 4.3 billion people, the performance of companies in relation to individual market segments at the level of 1.5–2 billion active users must be considered particularly high. This also applies to Amazon, which has reached over 310 million users, but at the same time has become a major player in the online shop market.

2 Internal market policy and competition policy of the EU

The European Single Market was launched on 1 January 1993. It introduced four freedoms, including the free movement of services. Although the foundations of the market were present already in the Treaty establishing the European Economic Community of 1957, many barriers are still faced in cross-border business operations. Many legal solutions have been adopted over this period mainly to harmonise the legislation of the EU member states, that is, to reduce differences between them. It boiled down to the elimination of national restrictions and to putting in place common, usually minimum, requirements that would ensure, inter alia, consumer safety or the protection

of consumer rights. These actions were mostly taken on the basis of shared competences between the EU and the member states. The result was directives which have to be transposed into the legislation of all member states and then implemented. Parallel to legislation strictly concerning the four freedoms of the internal market, EU competition law was being developed, including the regulation of corporate behaviour. Due to the exclusive competence of the European Union in this area, the European Commission became the body responsible for the implementation of both treaty provisions and secondary legislation—mainly regulations directly applicable in the member states.

The aforementioned regulations were drafted long before the digital transformation (Ambroziak, 2020). Some areas clearly necessitate new legal solutions that would take account of the specificity of the digital market. Sometimes it is just a matter of adapting regulations existing in the analogue world to online requirements. More often, however, completely new regulations must be adopted that address new phenomena that previously did not exist in the EU internal market. An example of such a case was the emergence of geo-blocking, which was unknown to traditional offline trade. Geo-blocking consists in limiting access to or differentiating prices of products (goods and services) depending on the place of origin of the customer in relation to the seller. The solutions adopted in this regard, although based on Article 114 TFEU, which implies only harmonisation of laws of the member states, provide for uniform rules being introduced by virtue of a Regulation, that is, an act directly and uniformly applicable in all member states (Regulation, 2018). This rather restrictive approach stems from the critical assessment for more than a decade of the quality, manner, and correctness of the implementation of directives by member states, which resulted in the fragmentation of the EU internal market (Ambroziak, 2012).

The problem is also that laws created sometimes many years ago, even before the digital age, still apply to both the offline and the online marketplace. Where there are no digital laws, the application of existing offline laws is extended to the digital reality. This applies, for example, to the application of the Charter of Fundamental Rights on privacy, which is often difficult to fulfil in view of data collection in the digital marketplace (by online platforms, including gatekeepers and, to a lesser extent, business partners).

It is worth noting that experts point to a wide range of areas where competition rules are infringed by online platforms. This is often due to their business model and a tendency of online platforms to transform themselves from transaction enablers to participation gatekeepers, tying one service to the need to subscribe to another, discriminatory algorithms deciding the nature and reach of advertisements, but also influencing the manipulation of the content offered (Srniczek, 2016; Nooren et al., 2018; Śledziwska and Włoch, 2020). A particularly important issue is the use of the data held by tech giants for their commercial benefit and inflicting the threats to the privacy of users (Mushtaq et al., 2020).

In the absence of specific antitrust rules for the digital market, it is worth quoting the existing selected EU rules applicable to undertakings that have been most abused in recent times in trading via online platforms. This primarily

concerns the prohibition of “any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it” (Article 102 TFEU). This article enumerates, in fact, cases of abuse of a dominant position in the form of

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

According to the concept contained in Article 102 of the TFEU, the link between dominance and abuse is not necessary, while the European Court of Justice required the compulsory nexus between the aforementioned two (Mush-taq et al., 2020). This approach is particularly relevant in the context of provisions expected to regulate operations of online platforms which have a dominant position and are currently accused of engaging into abusive behaviour.

Lengthy explanatory proceedings carried out by the European Commission are a separate issue. As observed by the European Court of Auditors, as antitrust enforcement pursuant to the Council Regulation 1/2003 only takes place after a competition problem has arisen, the duration of the proceedings might negatively affect the effectiveness of the decisions (ECA, 2020). In the Commission’s practice to date, proceedings have taken a relatively long time and possible remedial action has necessarily been immediate. However, the digital market is developing very dynamically and any actions of large online platforms have an immediate impact on consumers’ access to goods and services. At the same time, both their business partners and consumers, for various reasons, are highly dependent on them. In market economies, large players with large data sets often trade them for the various products they offer (goods and services) so that their position becomes monopolistic. Moreover, using various technological tools such as machine learning, artificial intelligence, and algorithms, big tech companies deliberately try to strengthen their monopolistic position. In addition, market concentration and the acquisition of innovative start-ups by big tech companies are an observed phenomenon (Kerber, 2019; Caffara and Morton, 2021; Crémer et al., 2019; Cabral, 2021; Bendiek, 2021).

Consequently, it seems that the Commission’s actions should be fast and effective, although many experts point to the need for cautious and experimental action. In view of the rapidly changing situation in the digital market and the equally rapid adaptations of the major players, experimentation with

different (also innovative) legal and regulatory solutions (and learning from these experiences) is advocated.

Moreover, and this seems most important, EU antitrust law has so far been based on actions undertaken by supervisory authorities, that is, the European Commission, *ex post* in nature. This is because it has been about stopping and punishing specific behaviours identified and investigated after competition problems became apparent in the EU internal market. In addition, the very procedures before the European Commission, requiring multiple explanations, which allowed multiple stakeholders to speak, ensured, on the one hand, transparency of actions, and, on the other hand, as already mentioned earlier, dramatically prolonged the legal response to non-competitive behaviour of actors operating in the EU (EPRS, 2020; ECS, 2020). An example of a change in the European Commission's approach towards *ex ante* action is the introduction of preventive merger control due to the gravity of potentially negative consequences for competition (Council Regulation, 2004).

It is worth noting that an additional problem that the EU antitrust legislation in force on the basis of the Treaties fails to successfully cope with concerns the occurrence of structural problems with ensuring workable competition in the market. This concerns situations where the harm to competition is caused by specific features of the digital market (e.g., network and scale effects, consumer lock-in). European Court of Auditors assessed that the classic concepts of competition policy rules are not sufficient to define market power and evaluate competition in digital markets. These markets are often “multi-partite”, that is, a platform serves as an intermediary between other business partners and consumers (ECA, 2020).

A separate issue is the relationship between the new competition rules and data protection and consumer protection law. In the latter case, one may encounter a serious problem of confronting legislation created for the needs of the offline economy with the concept of data, which, in principle, does not exist in the analogue economy. It is now accepted that data today is in fact exclusively digital. On the one hand, data protection rules should foster trust in the digital marketplace. Ensuring anonymity both when browsing available content and when using it, including purchases, should be an important element of this sphere of regulation. This is why it will be so important to resolve the debate on the KYBC (Know Your Business and Customers) problem. The question arises as to whether a platform that *de facto* acts as a market, that is, a place where supply and demand meet, must know the data of the business partner and the consumer. In an offline situation, a shopping mall knows the data of a business partner but definitely does not know the consumer, that is, his preferences, previous behaviour, and even less personal data. The reverse is true for many platforms, where personal authentication is needed to search the available resources, contact business partners, and finally complete the transaction.

The fact that platforms ensure consumer trust with regard to their personal data, the extent of their use and impact, for example, through the presentation of search results, should lead to an improved position of consumers in the

market. On the other hand, from the consumers' point of view, the traditional offline market does not provide them with full information on the products on offer, whereas it is the digital market, with a high degree of trust, that can increase the level of knowledge of the consumers concerned. The consequence of this may be the improvement of their position on the market in relation to usually stronger partners—entrepreneurs.

Consequently, the law regulating the activities of consumers on the digital market should take into account the rights of consumers, their weaker position vis-à-vis both business partners and platforms. It seems that the latter should not only be an intermediary, but a possible mediator to protect consumers, as weaker actors. It is therefore about protecting the position of the consumer from the point of view of both his trust in the platform and business partners, the security of the products offered, and the use of personal data (OECD, 2019). The result of such an action should be increased competition, including between digital platforms, for both better data protection and use in a more transparent way and traditionally at the level of quality, price, and delivery time (ACCC, 2019). Thus, we would need to ensure the interplay between different policies and laws and the need for developing integrated policy solutions that encompass competition policy, consumer policy, data protection policy, and others (Kerber, 2019; Kira et al., 2021; Miskolczi-Bodnár, 2020).

A separate issue is the anticompetitive practices of online platforms consisting in the manipulation of search results, bundling of applications (requirements to pre-install certain apps), the use of pricing algorithms disputing the actions of actors to monopolists, and the use of business partners' data to introduce their own brands (OECD, 2019).

Taking the aforementioned into account, it is pointed out that the antimonopoly rules existing in the EU are difficult to interpret in the new, multidimensional, digital reality. Therefore, a systematic analysis and assessment of entrepreneurs' behaviour from the point of view of potential abuse of their market position is needed. However, this is not a static analysis as in the traditional marketplace, but an innovative approach to the behaviour of entrepreneurs operating in the new digital market (Coyle, 2018).

Given both the significant impact and the speed of change in both business and consumer behaviour in the digital marketplace, the European Commission considered three options for new legislation: (1) reviewing only the existing horizontal framework (Regulation, 2019), (2) adopting a horizontal framework empowering regulators to only collect information from large online platforms acting as gatekeepers, and (3) adopting a new and flexible *ex ante* regulatory framework for large online platforms acting as gatekeepers (European Commission, 2020f; EPRS, 2020).

Finally, in December 2020, the European Commission presented the so-called Digital Package, one of the key elements of which is the aforementioned Digital Market Act (European Commission, 2020b), already announced earlier in the Communication on the Digital Future (European Commission, 2020e). It is worth noting that the Commission proposed a directly applicable

regulation (which stems from the exclusive competence of the EU in the field of competition policy), however, based on Article 114 TFEU (which is a reference to shared competence in the functioning of the internal market). It ensures the implementation of uniform rules, which eliminates the potential need for national regulations that could fragment the EU market.

The main objective of this legislation is to establish harmonised rules to ensure a fair and contestable market throughout the EU, thus ensuring that oligopolistic sellers behave as they would in a competitive environment. This means that the regulations it contains apply only to a specific group of traders and not to the entire digital market. For this purpose, quantitative and qualitative indicators have been adopted to define gatekeepers and the obligations they have to comply with. These obligations are *de facto* restrictions on the behaviour of big tech companies intended to empower consumers and ensure fairness in B2B relationships (de Streel, 2020; Caffara and Morton, 2021; Portuese, 2021).

3 Definition of gatekeepers in the European Union

The aspect that is crucial for gatekeepers' identification and definition is the designation of the framework for the notion of "core platform services", which is to be covered by new legal provisions. In the DMA, the Commission proposed eight categories of services that would be covered by the term: (a) online intermediation services¹; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services (Directive, 2018); (f) operating systems; (g) cloud computing services that enable access to a pool of shareable computing resources (Directive, 2016); (h) advertising services, including any advertising networks, advertising exchanges, and any other advertising intermediation services provided by a provider of any of the aforementioned core platform services.

The core platform services defined previously cover a very wide range of services used by both business operators and consumers in the digital market. At the same time, due to their nature and the specificities of the market, they are provided, as previously stated, by a huge number of players in the EU market. However, this is not a highly diversified market, as most services are offered by a few large companies that will be considered gatekeepers by the EU legislation. For the designation of such gatekeepers, in addition to the requirement to provide core internet services, conditions have been set regarding their market position.

Firstly, the gatekeepers should have a significant impact on the internal market, which is to be validated by both the extent of its geographical activities and financial standing. In the first case, it is assumed that out of 27 member states, it is sufficient that it provides its services in at least three of them. In the second case, it is a question of achieving a turnover of €6.5 billion in each of the last three years, or an average market capitalisation (or the equivalent fair market value of the undertaking to which it belongs) of €65 billion in the last financial year. The European Parliament proposes to increase the

aforementioned numbers to respectively €10 billion and €100 billion, as the DMA should clearly target those platforms that play an unquestionable role as gatekeepers due to their size and their impact on the internal market (European Parliament, 2021).

Secondly, it was assumed that gatekeeper provides a core internet service acting as an important access point through which at least 10,000 active business users can reach more than 45 million end users per year. Meeting this criterion in each of the last three years means, from the point of view of the new legislation, that gatekeeper has achieved or is highly likely to achieve an established and sustainable position. The adoption of such clear criteria ensures that companies offering core platform services should not be able to avoid being correctly identified as gatekeepers.

However, if the available data were questionable or unreliable or access to them were difficult, as may be the case for global companies registered, for example, in China, an additional competence is attributed to the Commission and a procedure is introduced related to the possibility of considering a company as gatekeeper also if the aforementioned quantitative criteria are not fulfilled. In such a case, the Commission should take into account, in addition to the aforementioned quantitative factors, including turnover and market capitalisation and the number of business and end users, network effects and benefits based on data collection and processing, effects of scale and scope of activities, dependency of the business or end user, as well as other structural market or service characteristics, including conglomerate or vertical links.

The aforementioned criteria are very imprecise. However, it means that much smaller companies than those recognised as gatekeepers by the quantitative indicators, which nevertheless offer core platform services and are well established on the market, can be recognised as gatekeepers. However, the Commission has to carry out a market investigation beforehand, including presenting its findings to a potential gatekeeper. There is a time limit of 12 months for this procedure, which is significantly shorter than the standard action under Article 102 TFEU on abuse of a dominant market position.

The presented approach to identify gatekeepers based on both quantitative and somewhat more qualitative criteria seems to be correct, as new ventures of big players may be calibrated in such a way that the quantitative criteria mentioned earlier would not be met by other business models. Furthermore, the European Commission, in the course of the market investigation, may show that a gatekeeper systematically fails to fulfil the obligations imposed on it, which may result in the imposition of behavioural or structural remedies proportionate to the gravity of the infringement committed.

The aforementioned definition does not take into account the differences between gatekeepers in different digital markets. This means that the same treatment is given to Facebook in the area of social media as to Google in the area of search engine. This may be due to the nature and operating models of digital giants that change their roles or start offering products in a formula offered by their business users. This makes it much more difficult to separate

the activities in individual markets and, more importantly, distorts the overall picture of their activities. As a consequence, a closed list of internet services defining core platform services may raise doubts. In view of the very rapid development of individual digital sub-markets, it can be expected that new services and gatekeepers will emerge, requiring a response from the Commission. An answer to this shortcoming is the possibility for the Commission to present an amended draft of the regulation based on a prior market analysis focused on new services. However, this procedure is bound to be lengthy. Yet this mechanism may discourage companies from overdeveloping certain new digital areas and sub-markets for fear of being classified as gatekeepers.

From a procedural point of view, it is important to note that it is the responsibility of the provider to monitor the quantitative indicators in relation to the individual core internet services and, if exceeded, to notify the European Commission within three months, according to the European Commission proposal, and one month according to the European Parliament amendment, as the designation of a company as a gatekeeper should be a fast procedure (European Commission, 2020b; European Parliament, 2021). The Commission should, within 45 days, designate the provider concerned as a gatekeeper and the list of core internet services offered. These decisions can be amended following a review procedure at least once every two years due to a significant change in the market (except when the decision is based on incomplete or incorrect data).

4 Obligations of gatekeepers

Many obligations have been imposed on gatekeepers as entrepreneurs who have access to huge amounts of data of both business partners and, above all, consumers. These have been introduced as a response, so to speak, to the problems and uncertainties that have arisen to date with regard to the legality of these companies' actions. The Commission's proposal is based on past experience in competition law enforcement and the effects of *ex post* actions (Caffara and Morton, 2021; Anderson and Mariniello, 2021; Braeken et al., 2021; Bendiek, 2021). Thus, we are dealing, on the one hand, with some regulation of firms' activities and, on the other hand, with business models built on behaviour currently denied.

At the same time, the Commission has reserved itself the right to extend and modify the list of these obligations by means of a delegated act adopted as a follow-up of a market analysis. Firstly, gatekeepers have been ordered not to combine consumers' personal data obtained in any way in connection with the conduct of their business activities. This does not just mean the aggregation of data collected in the course of providing core internet services, but any other data, including data outside this catalogue. This separation is also to apply to the registration of end users as users of other services provided, unless the end user has been given the opportunity to make a choice and has given his or her consent.

An example of such a challenged action in the EU was Facebook's notification in relation to the collection and use of data obtained in connection with a

merger with WhatsApp. Facebook, when notifying the European Commission of its merger with WhatsApp in 2014, indicated that it would not be able to create automated connections between users of both platforms (Case M.7217). However, two years later, WhatsApp announced an update to its terms of service and privacy policy, which included, among other things, the ability to automatically link WhatsApp users' phone numbers and Facebook accounts. At the time, the European Commission discovered that such a possibility already existed in 2014, hence it concluded that Facebook had provided misleading information in its WhatsApp acquisition notification and it imposed a fine of €110 million (European Commission, 2017a). It is worth noting, however, that this was not so much a penalty for automatically linking accounts as for failing to provide precise information during the notification process. As far as the linking of data from two independent accounts is concerned, this is a kind of linking of data obtained from two independent digital markets: the social medium and a mobile messaging service. Both accounts can be used by the consumer for completely different purposes, and linking them, from Facebook's point of view, gave access to data such as private interests and business contacts. For consumers, on the other hand, it meant tying content posted on the Facebook platform to contacts not necessarily related to that content.

Secondly, business users should be able to offer the same products using intermediation services at prices different to those applied on gatekeepers' platforms. The point is that large online platforms have prevented their business partners from offering the same products at different, sometimes more competitive, lower prices on other websites because of their regional or sectoral profile.

An example of this is certainly the case of Amazon's application of the most-favoured-nation or parity clauses to e-book suppliers. The latter had to inform Amazon if they offered more favourable direct or indirect sales conditions outside this platform. This concerned prices as well as alternative advertising activities and sales channels different from those required by Amazon. This amounted to a restriction of the economic freedom of those doing business with Amazon. The Commission found that the company's conduct amounted to an abuse of a dominant market position within the meaning of Article 102 TFEU (Case AT.40153). Ultimately, two years after the investigation was opened, Amazon committed itself in 2017 not to enforce the said clauses obliging publishers to offer similar non-price and price terms as those offered to Amazon's competitors, as well as linking discount opportunities for e-books to the retail price on a competing platform (the so-called Discount Pool Provision) (European Commission, 2017b). The provision introduced in the new DMA a priori prohibits such actions, as they limit the possibility of attracting consumers to other platforms. It is worth noting at this point that similar actions, that is, restricting competition, were also undertaken by smaller online platforms, which argued that they had to incur advertising costs and maintain the offer on the site, while transactions took place on other platforms with lower prices.

The third obligation of gatekeepers is to ensure that business users and consumers acquired via the core platform service can carry out transactions and

use the acquired services regardless of whether core internet services are used or not. The idea here is, on the one hand, to ensure that business users can promote offers and conclude contracts with end users, especially consumers, regardless of whether they use the core internet services for this purpose or not, that is, regardless of the platform. The design of the DSM comes down not so much to classifying individual services, although these are enumerated in the definition as core internet services, but to businesses having specific platforms on which multiple services may be offered (e.g., new sales services on Facebook social media platform).

On the other hand, the idea is to provide end users with the possibility to access and use content, subscriptions, features, or other elements using the business user's application without being closely linked to the gatekeeper's platform. In this way, the gatekeeper can only become a place where transactions and digital services are performed without the gatekeeper's involvement and therefore without potential earnings. The European Commission introduced this requirement based on its experience with the case of Apple restricting iPhone and iPad users to download apps only via the App Store. Apple introduced provisions in its contracts with business users regarding the mandatory use of Apple's own proprietary in-app purchase system "IAP" for the distribution of paid digital content (with 30% commission imposed on all subscription fees) and restrictions on the ability of developers to inform users of alternative purchasing possibilities outside of apps. The complainant of Apple's discriminatory actions was first its competitor Spotify (Case AT.40437) and then an e-book/audiobook distributor (Case AT.40652). It is worth noting here that iPhone and iPad users are specific consumers due to the limited range of compatible and dedicated applications. This means that they can only demand in a very specific market of applications available for their devices. Consequently, the app shop provider is the only entity that can either ensure supply or allow competition to emerge. Ultimately, the European Commission has reservations about such an abuse of market dominance by an online platform (European Commission, 2020c, 2021a).

The next three orders introduced by the new rules are to address the market position of business users and gatekeepers. These are (a) refraining from the requirement to use a platform identification service—it refers to the operations of, among others, advertising companies that must use a platform's identification service when offering their services, which enables gatekeepers the collection of data and restricts service providers in using their own identification; (b) refraining from requiring business users or end users to subscribe to or register as a condition to get access to any of their core internet services; (c) providing information to advertisers on the price and remuneration to the publisher for the publication of an advertisement and other services provided by gatekeepers. In addition, the need to provide advertisers and publishers with access to performance measurement tools and self-verification of advertising inventory was identified among the obligations to be further specified.

As an example of the aforementioned restrictions on the freedom of business users on online platforms, Caffara and Morton S. (2021) point to Google's

practices in the case of online advertising (Google adtech) covered by a new European Commission investigation. This involves preferring its own advertising technology services and restricting business partners' access to consumer data that Google itself uses. By adopting the Google platform as one of several digital marketplaces, Google both collects consumer data that can be used for advertising purposes, offers advertising space, and services as an advertising intermediary. As Google's operations cover all levels of the supply chain for online display advertising, the Commission intends to review, in addition to the previously indicated practices, Google's requirements for both the use by business users of Google's services Display & Video 360 and/or Google Ads and third party "cookies" on Chrome (European Commission, 2021b). From the Commission's point of view, Google may hold a dominant position in that particular market and abuse it through the aforementioned indicated practices. For business users, such behaviour by Google significantly deteriorates their position not only on the advertising market but also in reaching out to consumers in general. In such a situation, it is Google which is in a better position to tailor and position advertisements on the basis of data collected on end users, as compared to business partners.

Another, apparently obvious, obligation imposed on gatekeepers by the Digital Market Act is the requirement to refrain from preventing or hindering business users from making comments to the relevant public authority on the behaviour of these traders. Operating in a free market economy, supervisory bodies are expected to monitor the market and therefore the behaviour of consumers and producers, in this case digital service providers. Such companies independently collect market data, but they also acquire data from their participants; hence, the introduced obligation seems to be obvious, as business users, by their economic presence on the gatekeeper's platform, do not become dependent on them.

In addition to the aforementioned obligations, obligations susceptible of being further specified have been introduced. These are requirements that need to be further specified in discussions between the European Commission and gatekeepers. Undoubtedly, regulatory dialogue with gatekeepers is essential, as this should ensure that "regulations are tailor-made". At the same time, this must not lead to avoiding responsibility for practices that breach competition and consumer protection rules. Failure to ensure transparency in discussions between the Commission and gatekeepers could lead to the impression that rules are being worked out for the benefit of large internet platforms only.

The obligations susceptible of being further specified primarily concern the prohibition of gatekeepers from using publicly unavailable data generated in the course of the business users' activities. This includes all data, whether generated by businesses or consumers, regardless of the scope of services. Most often such data are used in competition with business partners. After a certain product is placed on an online platform (which, for example, sells certain goods), it faces competition from gatekeepers who have much more information about other business operators and consumer preferences.

An example of the conduct condemned by the European Commission is the case of Amazon, which used data acquired through its marketplace, where

business partners sold their products under their own brand (European Commission, 2020d). The problem was that in the different segments of sales made on Amazon's platform, in addition to the business users who developed their position, brand, and products offered, there were more competitive or more visible Amazon retail offers. In addition, the Commission intends to investigate whether the criteria that Amazon sets to select a "Buy Box" winner and to allow sellers to offer products to prime users under the Amazon loyalty programme lead to preferential treatment of Amazon's retail business or a seller using Amazon's logistics and delivery services. Failure to qualify for the loyalty programme puts the trader at a competitive disadvantage vis-à-vis Amazon's platform, on which he is fully dependent and whose success or failure is not determined solely by the product and consumer service but by the decision of the owner of the online platform.

Another requirement for gatekeepers is to provide end users with the possibility to uninstall any applications to the core internet service. At the same time, gatekeepers should be able to restrict this behaviour for applications that are crucial for the functioning of the operating system.

The example on the basis of which the Commission introduced this restriction was the decision on Google's practices relating to the pre-installation of the Android system and default restrictions. Firstly, Google required manufacturers of mobile devices to pre-install certain proprietary products in order to obtain licences for others (the search engine in question). In some cases, this involved financial benefits for these manufacturers. Secondly, as part of the "Anti-Fragmentation Agreement", Google prevented phone manufacturers from selling them with other Android systems (European Commission, 2018). The Commission's concern here was therefore that, in the specific digital market generated by Google, manufacturers of other devices or applications should be able to compete with Google's products.

New regulations also require gatekeepers to allow access, installation, and effective use of applications offered by a third party, including those obtained outside of core platform services. However, at the same time, it is ensured that the gatekeeper should be able to take proportionate measures to ensure that applications or app shops offered by third parties do not compromise the integrity of the hardware or operating system provided by the gatekeeper. This should ensure that the core platform service offered, and therefore the digital submarket in question, works correctly. Related to this requirement is another obligation that also needs to be clarified between the Commission and gatekeepers: to refrain from technically restricting end users from using the various applications and services that can be accessed using the gatekeeper's operating system. This also applies to the possibility of subscribing to such applications and services, including internet providers to end users. Furthermore, clarification of the obligation to apply fair and non-discriminatory general conditions for business users to access their app shop is provided for.

In the aforementioned cases, the European Commission most probably had in mind anticompetitive—in its opinion—practices of gatekeepers, who

required obtaining applications only from App Store or Google Play, respectively, which meant limiting access to other software dedicated to a given operating system. On the one hand, it seems obvious to guarantee the integrity of the digital market as a core platform service, but the obligation to use applications available in one shop only drastically limits the opportunities for independent app providers to enter the market. This is especially true for small companies that sometimes operate in a local market and the cost of entering a single gatekeeper-managed shop platform may be too high. In such a situation, large corporations enter this niche and are able to bear these costs and pass the fees on to the cooperating entrepreneurs (e.g., a small restaurant versus a food delivery company which delivers meals from many restaurants to consumers).

Mandatory obligations already include the prohibition to use non-public data obtained by gatekeepers in connection with the relationship between business users and consumers that was previously used for competitive advantage. On the other hand, among the obligations requiring further discussion, there is one considering the placing of consumer products on a fair and non-preferential basis compared to other business operators. It was also stressed that any search engine provider must be provided with access, on fair, reasonable, and non-discriminatory terms, to placement, query, click, and impression data relating to free and paid searches made by end users (subject to the anonymisation of personal data).

In these cases, reference can be made to the Commission's decision on the more favourable positioning and display by Google, in its general search results, of pages of its own comparison shopping service compared to competing comparison shopping services (European Commission, 2017c). The idea is therefore that gatekeepers should not place their products on more favourable terms than similar services or products offered by another third party. This requirement is difficult to meet for some gatekeepers who cannot easily separate their individual activities from the core platform service and ensure, for example, non-discriminatory billing.

A separate issue covered by this regulation (to be further specified) is the possibility for business users and ancillary service providers to gain access to interoperable operating system, hardware or software functions that remain at gatekeepers' disposal. It is therefore about the collection and monetisation of data held that cannot be accessed by business partners operating on an online platform. This is also the subject of the proceedings recently opened by the European Commission, which intends to investigate whether this data gives Facebook an undue competitive advantage in particular on the online classified ads sector. The Commission has concerns that Facebook, by using data obtained from social media activities, competes unfairly with players in neighbouring markets where it is also an active player (European Commission, 2021c).

It is also worth noting that two principles have been adopted in the EU as part of the overall digital market policy objective: general data portability and data access interoperability. Firstly, gatekeepers should ensure the portability of data generated in the course of a business user's or end user's activities.

Secondly, gatekeepers should ensure that business users are able to benefit from free, real-time, continuous, high-quality access and use of data generated by their activities on the online platform (this includes end user data). However, both obligations have been categorised as requiring further specification.

Conclusions

The digitalisation of the economy has given rise to a digital marketplace that differs significantly in many elements from the traditional marketplace and offline business models. This relatively new phenomenon escapes the scope of hitherto applicable regulations. Neither has it been reflected in the adaptation of the European Single Market regulations in force to date. As a consequence, one can observe increasing violations of competition rules in the EU digital market.

Under such circumstances, the Commission, which is responsible, among other things, for enforcing compliance with the EU law, including preventing the abuse of a dominant market position leading to the distortion of competition, initiated works on a new piece of EU law. The official aim of the proposed Digital Market Act is to ensure competitive conditions in the European Single Market for all companies. Digitisation and appropriate regulations in this area became especially relevant during the COVID-19 pandemic as digitisation emerged as a perfect solution to the pandemic situation (remote learning, working from home, online shopping, etc.) and at the same time became one of the pillars of post-pandemic transformation in the EU (post-pandemic EU economies are to be more competitive, thanks to digitisation).

When adopting new solutions in this area, decision-makers should act with a lot of caution. Both the market, its participants, and their behaviour are new to everyone. On the one hand, leaders are emerging who undoubtedly dominate the market and are forerunners of digitalisation of social and economic life. These companies develop online platforms, which are new markets connecting business partners and consumers. On the other hand, changes in the behaviour of market players are occurring very quickly. This is definitely different from the offline economy, where all changes occur much more slowly and the existing legislation seems to be optimal. Internet platforms and, above all, gatekeepers, using access to the greatest value, that is, data of both consumers and business partners, can steer a given market at will. Undoubtedly, this is the effect produced by their business models, but this does not mean that they should not be regulated with a view to ensuring competition and consumer protection. Such a situation and such behaviour are not observed in the offline reality.

Given the situation, it should come as no surprise that the European Commission's new approach is not so much to amend or adapt the existing legislation as to introduce a new one based on recent experience, as is the case with the Digital Market Act. Moreover, this solution is ahead of the potential future behaviour of big tech companies. The identification of gatekeepers should ensure that new antitrust solutions do not affect the entire market, but only precisely selected unfair behaviour of companies.

On the one hand, the approach proposed by the European Commission seems to be optimal. EU legislation is not aimed at interfering in the digital infrastructure built by technology giants. Consequently, it should not define the markets for their functioning, leaving both the scope and the directions of development to independent business decisions. What the Digital Market Act should achieve is only the *ex ante* elimination, compared to *ex post* effects, of situations where the dominant position of entrepreneurs is abused. Furthermore, criteria should be introduced to determine which behaviours of dominant companies in digital markets are uncompetitive and consequently unacceptable in the EU and ultimately prohibited. The proposed criteria have been developed on the basis of the experience of recent years and the antitrust cases of the European Court of Justice. Thus, it seems that the EU approach is not so much to ban activities in the EU as to discourage certain behaviour deemed to be uncompetitive. In this way, legal space has been created, on the one hand, for the further development of gatekeepers and, on the other hand, for business partners, including small- and medium-sized enterprises (SMEs) from the EU, to cooperate with them. Consequently, gatekeepers can develop new technologies, platforms, and digital markets, while SMEs, also those from the EU, can use the infrastructure thus built. This approach also provides some protection for consumers in the digital market by, among other things, protecting their data from being used by gatekeepers in unfair competition with other business users.

On the other hand, it is worth noting that amendments proposed by the European Parliament and the Council make the rules more stringent. Political acceptance and will to support such approach can be pretty easy to reach in the EU, as all of the big five giant tech companies are not European (they do not originate from the EU) and their main competitors are from China. Nonetheless, identification of selected companies as gatekeepers in the digital market is not extraordinary compared to offline reality. We can point out to some examples of sectoral regulation based on the EU law, which introduced special obligations on the big quasi-monopolistic and monopolistic companies.

As noted earlier, the obligations imposed on gatekeepers by the regulation rely on the past practices of individual platforms offering selected services. It means that the European Commission procedures were introduced against one set of two elements: a given behaviour of a given company. Separate identification of giant individual platforms as gatekeepers and then their problematic behaviour, as proposed in the DMA, can be difficult to implement.

However, it is worth noting that the new rules can be recognised as a warning to preventively deter online platforms from uncompetitive behaviour. Indeed, it seems that this regulation can be read as a roadmap for technology giants offering selected core platform services not to engage in certain activities. It is true that often the specific behaviours listed in the regulation can with high probability be attributed to the behaviours of specific companies, but this makes the Digital Market Act all the more of a document setting out a descriptive framework of acceptable behaviour from an antitrust perspective than a legal act to punish unfair behaviour of giant techs. Therefore, further research will

definitely be needed into the economic and social consequences of the new regulations, both the here discussed Digital Market Act and the Digital Service Market, including the availability of new services, the degree of consumer protection, and the provision of fair B2B relationships on online platforms.

Note

- 1 Pursuant to the EU legislation (Regulation, 2019), to be considered online intermediation services, services should:
 - constitute information society services (Directive, 2015);
 - allow business users to offer goods or services to consumers with a view to facilitating the initiating of direct transactions, irrespective of where those transactions are ultimately concluded;
 - be provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers.

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