

Preserving Dynamic Competition with the Digital Markets Act

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The digital era has generated dramatic consumer benefits. Consumers benefit from an abundance of choice on digital shelves. Prices are driven down by vigorous competition between suppliers on digital intermediaries that make it easier than ever for consumers to learn about the products, services, and sellers they choose to deal with. Digital intermediaries pass on the benefits of their scale, network and learning effects, and dramatically lower transaction costs. Growing and evolving demand combined with the versatility and diversity of software makes it ever easier for new entrants to successfully target a niche audience with innovative and differentiated offers, disrupting bigger players, and maintaining a dynamically competitive environment.

In the digital era, size alone is no moat. Microsoft entered a niche of the computing ecosystem, disrupting the then industry defining IBM. As the personal computer market grew, much smaller Apple and Google competed dynamically with Microsoft, through mobile devices, browsers and mobile operating systems. Amazon entered a niche of the retail market; Netflix, a niche of film distribution; Facebook, a niche of digital media and advertising. The same is true of Spotify with streaming, Shopify with retail, Zoom with communications, TikTok and Snap with social media, DeliveryHero with logistics, and Zalando with fashion. Their success is not in copying what has been done before, but meeting previously underserved customer demand where incumbents were slow or unwilling to react. Their success shows that innovation drives dynamic competition in digitally enabled markets.

Digital technology leaders are a product of digital globalisation. There are over 10,000 European digital platforms, and currently 112 billion-dollar European tech companies combining for \$416 billion market valuation; this number has almost quadrupled since 2014, with 32 new companies joining the European unicorn club in the last year alone.¹ These companies all rely on robust technological ecosystems. Some are complementors, adding value to existing ecosystems. Others use the tools and infrastructure of existing incumbents to serve a particular niche, aspiring to grow their own ecosystems. They will succeed by attracting investment capital, acquiring the best human talent, minimising costs, and dynamically adapting in the evolving global environment.

The next generation of innovative disruptors will benefit from thriving ecosystems they can trust. Complementary innovators need confidence to invest in platform specific ecosystems. Platform operators have market incentives to keep that trust, because of network effects. But, platform operators can also become so large and indispensable that their incentives shift. Anticompetitive conduct should be prohibited, particularly where there is a relation of

¹ GP Bullhound "Titans of Tech" (June 2020), available [here](#).

dependence. For example, an indispensable platform that attracts developers with the promise of continued software interface access should not be allowed to unduly remove that access.

But what may be “undue” in the eyes of an upset customer may not be undue from the ecosystem perspective. Changes that harm the interests of some subset of users may benefit the wider interest; balancing these multi-dimensional concerns is difficult in practice and requires repeated readjustment.² But platform operators have the greatest ability and incentive to meet evolving preferences and grow overall demand for the benefit of all platform users. This is what led to their success. It is unlikely that legislators can find that future-proof balance, *ex-ante*, and divorced from market circumstances. To prohibit or oblige, *ex-ante* and inflexibly, a wide range of practices, in a wide range of industries, without even the possibility of refinement or readjustment, risks eroding the value-generating ecosystems upon which future innovations depend. The Treaty grants even the most anticompetitive of agreements the possibility of pro-competitive justification. **A case-by-case assessment of potential justifications is warranted here as well.**

Ex-ante prohibitions on large players are likely to reduce competitive constraints between them. Even where entry is uncertain, the threat keeps incumbents responsive to demand. But regulatory suspicion of pro-competitive product design choices will chill future demand driven technological development and product differentiation. **Unrebuttable *ex-ante* prohibitions would thereby create new regulatory barriers to dynamic competition that would otherwise benefit all users.**

Ex-ante obligations to supply previously uncommercialised services (such as data access or interoperability) also risk reinforcing existing dependencies by turning large intermediaries into legislatively created infrastructure suppliers divorced from evolving consumer demands. Meanwhile, potential rivals will choose the “easy” option of a remedy-taker business model. **Unappealable *ex-ante* obligations would hence distort and dampen competitive incentives.**

There is no question that Europe is sovereign and does create and enforce rules to address its concerns about the growing size and influence of leading technology companies. CCIA supports the European Union in its efforts to preserve the very structures that have enabled the creation of the many beneficial technologies we enjoy today. In dynamically competitive markets, we submit that **“the balance between over- and under-enforcement does not lead us away from a thorough effects analysis.”**³ Competition enforcement shows that the best remedies are adapted to market circumstances, with the insight and participation of industry, and an eye towards future innovation and market growth. A case-by-case assessment is needed to ensure the best outcomes can be achieved here as well.

² P. Evans & A. Gawer, “The Rise of the Platform Enterprise: A Global Survey” (CGE, January 2016), available [here](#) (“A more integrated understanding of technology and business will be fundamental to the success of platform firms, or the success of platform business units within traditional firms. Where and how to design technological interfaces, how open or closed should they be, how to price them, who will the complementors be, how to govern the ecosystems, will become as fundamental and as routine to business strategy and management as the well-honed traditional questions of product segmentation, pricing of products, management of the supply chain, and how to design distribution channels.”)

³ J. Laitenberger “The Antitrust Journey” (29 June 2019), available [here](#) (Director-General of the Directorate-General for Competition, 2015-2019; Judge at the General Court since 26 September 2019).