COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT REPORT

Accompanying the document

[...]

Digital Markets Act
<table>
<thead>
<tr>
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<td>B2B</td>
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<tr>
<td>CMA</td>
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<td>Full-time equivalent</td>
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1. INTRODUCTION: POLITICAL AND LEGAL CONTEXT

1. The digital transformation has profoundly changed the functioning of the global economy and society. The Covid-19 crisis and the increased importance and use of digital services has only further evidenced the importance of ensuring a borderless, fair, and contestable Single Market for digital services where companies can thrive and where citizens have genuine choices and control.

2. This Impact Assessment examines the possible policy options to ensure a competitive Single Market for digital services and in particular fair and contestable platform markets. It combines the assessment of two initiatives previously presented in separate Inception Impact Assessments: (i) the Digital Services Act (‘DSA’) package: ex ante regulatory instrument of very large online platforms acting as gatekeepers;¹ and (ii) the New Competition Tool.²

3. Given the breadth of the topics covered, both inception impact assessments – including their respective consultations – were initially published separately. However, since the outset, both consultations were aimed at complementary solutions by “ensur[ing] a joint analysis of the results”, “with a view to exploring synergies and ensuring consistency on the policy options pursued, in particular as regards possible remedies and enforcement.”³

4. As presented in both initiatives’ Inception Impact Assessments, the objective of both consultations was to consult as widely as possible through various means in order to deliver an in-depth impact assessment of the different policy options and their perceived impact on the Commission’s ability to improve effective competition in digital markets. By means of this holistic approach, this combined approach will allow the Commission to ensure the proper functioning of the internal market by promoting effective competition in digital markets, in particular a fair and contestable online platform environment. This objective feeds into strategic course set out in the Communication “Shaping Europe's digital future”, to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations.

5. There is a broad consensus on the benefits of digital services. However, recent years have seen a mounting global concern due to the concentration tendencies that characterise digital markets. These concentration tendencies and the underlying market dynamics, as well as other characteristics of digital markets can contribute to market failures and lead to inefficient market outcomes in terms of higher prices, lower quality, less choice and innovation to the detriment of European consumers. Over the last two decades, a small number of online platforms have emerged as large ecosystems, playing a crucial role. Such platforms intermediate a significant portion of transactions between consumers and businesses, and have emerged as a key structuring element of today’s digital economy.

6. A wide-range of recent studies by international as well as by National Competition Authorities (‘NCAs’) confirm these trends. The Commission has carried out a reflection process about the role of competition policy in a fast-changing world, which included commissioning a report a group of the independent Special Advisers to Commissioner Vestager published in April 2019.⁴ These findings are further confirmed by the evidence
gathered by the ‘EU Observatory on the Online Platform Economy’ and its expert group, set up to support the Commission in monitoring and analysing the developments in the online platform economy.

7. Similar reflections are taking place in some of the EU’s major trading partners, including the US, Japan, the UK, and Australia, including calls for a new regulatory framework for platforms with “significant and durable market power” (US House of Representatives Majority Staff report), “substantial market power” (ACCC report), “strategic market status” (Furman report) and “bottleneck power” (Stigler Center). The US report notably concludes that each investigated platform now serves as gatekeeper; that each platform uses its gatekeeper position to maintain its market power; and that the firms have abused their role as intermediaries to further entrench and expand their dominance.

8. The need to address these concerns in digital markets was expressed in Commission President von der Leyen’s mission letter for Executive Vice-President Vestager, where she stated that in “striving for digital leadership, we must focus on making markets work better for consumers, business and society”. The letter tasked Executive Vice-President with ensuring “that competition policy and rules are fit for the modern economy”.

9. This objective was reiterated in the Commission’s Communication ‘Shaping Europe's digital future’, as “it is important that the competition rules remain fit for a world that is changing fast, is increasingly digital and must become greener”. In the same Communication, the Commission further stated that “competition policy alone cannot address all the systemic problems that may arise in the platform economy.” Against this background, the Commission also announced that it “will further explore, in the context of the DSA package, ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gate-keepers, remain fair and contestable for innovators, businesses, and new market entrants”.

10. In the European Parliament, the Committee on the Internal Market and Consumer Protection (IMCO), the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Legal Affairs Committee (JURI) published draft reports in April and in May 2020, as legislative own-initiative reports. The final IMCO and LIBE Committees reports were adopted in September and draft JURI report in October 2020. In parallel to these reports, the European Parliament also adopted a resolution on competition policy on 18 June 2020, where it “calls on the Commission to assess the possibility of imposing ex ante regulatory obligations where competition law is not enough to ensure contestability in these markets”.

11. The European Council confirmed this need to act in its New Strategic Agenda 2019-2024, by stating that “[w]e will continue to update our European competition framework to new technological and global market developments”. The Council of the European Union (‘Council’) also “supports the Commission’s intention to collect evidence of the issue and further explore ex ante rules to ensure that markets characterised by large platforms with significant network effects, acting as gate-keepers, remain fair and contestable for innovators, businesses and new market entrants”.
Furthermore, the Council welcomed the public consultation on a ‘New Competition Tool to address structural competition problems across markets’ and expressed its willingness to discussing the Commission’s proposal for a DSA Package. The Council underlined “that new policy approaches for the Single Market have to be fit for the digital age [and] able to cope with new and agile business models, especially in the digital economy.” Finally, the Council reiterated the importance of swift action on the DSA package in its most recent conclusions, in which it “looks forward to the Commission’s proposal for a Digital Services Act by the end of this year”.

2. PROBLEM DEFINITION

The core problems addressed in this Impact Assessment are all linked to certain market features of digital markets.

2.1. Market features of digital markets

Digital markets for the purpose of this Impact Assessment cover both traditional information technology markets and other markets where products or services are offered by use of digital technologies, including products connected to the internet. This includes notably markets where gatekeeper platforms operate, in particular B2C markets.

Digital markets exhibit particular features, described in the following sections, namely: scale (or scope) economies, and a high degree of vertical integration (Section 2.1.1); direct or indirect network effects (Section 2.1.2); data dependency (Section 2.1.3); switching costs (Section 2.1.4); asymmetric and limited information, and relatedly, behavioural biases by consumers (Section 2.1.5); and high market concentration (Section 2.1.6). These features, while not unique to digital markets, often fundamentally change the competitive process in digital markets in particular, leading to sudden and radical decreases in competition which may prevent markets from self-correcting.

2.1.1. Scale (or scope) economies, and high degree of vertical integration

Whenever the fixed costs of entering an industry or operating a business are particularly high compared to the variable costs of producing a particular good or service, e.g. a smartphone operating system, or a search engine for internet searches, firms that operate at a large scale always have a material cost (or quality) advantage over smaller rivals. Similarly, there may be strong synergies between different but related business activities (such as a search engine and a comparison shopping site) which make it difficult for rivals offering only one such product to compete against multi-product firms covering a whole range of different products, or even offering entire ecosystems. This problem is exacerbated where the multi-product firm is also vertically integrated, i.e. it operates activities at both upstream and downstream levels of the supply chain. In this case, the integrated firm may not have sufficient incentives to grant its downstream rivals access to the inputs (such as intellectual property, or data) produced by its own upstream affiliate. Where such inputs are crucial for success on the downstream market, smaller, non-integrated rivals may be put at a competitive disadvantage.
Extreme returns to scale, along with network effects and the role of data (see Sections 2.1.2 and 2.1.3), have been identified as the three key characteristics of the digital economy.\(^\text{25}\)

17. There has been broad consensus among the NCAs with relevant experience\(^\text{26}\), as well as among the respondents to the Open Public Consultation (‘OPC’)\(^\text{27}\) that “extreme economies of scale and scope”, “high start-up costs”, “high fixed operating costs” and “high degree of vertical integration” are an important or very important source or part of the reasons for emerging and existing market failures. Moreover, according to the International Competition Network ‘Report on results of the ICN survey dominance/substantial market power in digital markets’ (‘ICN Report on digital markets’\(^\text{28}\)), 51% of the respondents indicated that economies of scale played an important role in the assessment of market power in digital markets in the cases that they have investigated.

18. In its enforcement practice under Article 102 of the Treaty on the Functioning of the European Union (‘TFEU’), the Commission has found the aforementioned market features to constitute, to varying degrees, barriers to entry in the digital sector. For instance, in Google Shopping, the Commission based its dominance assessment for the market for general search services among other things on the existence of barriers to expansion and entry, notably the significant investments in terms of time and resources required to establish a fully-fledged general search engine.\(^\text{29}\) Likewise, in its Google Android decision, the Commission found that “developing a smart mobile OS [operating system] is a costly and time-consuming process”.\(^\text{30}\) As regards economies of scope, the Commission made particular reference in its Preliminary Assessment in the Amazon e-book MFNs case to “[t]he ability of e-book readers to drive sales and lock-in customers: that with its Kindle e-book reader, Amazon operates a closed "ecosystem" (or "walled garden"). Customers who own a Kindle can use that e-book reader only for ebooks purchased in Amazon's Kindle store.”\(^\text{31}\) In the same case, the Commission also found substantial economies of scale for e-book retailing, in particular because of the need to construct a sufficiently large catalogue of available titles (which requires agreements with a large number of E-book Suppliers), and because of the scale and scope of investments needed to set up a viable e-book distribution platform.

\subsection*{2.1.2. Network effects}

19. Where network effects are present, the value of a service increases with the number of users. For instance in case of a social network, a greater number of users increases the value of the network for each user. Such network effects, which arise among users of the same user group, are called direct network effects. Indirect network effects, also known as cross-side effects, typically occur in case of platforms which link at least two user groups and where the value of a good or service for a user of one group increases according to the number of users of the other group. For instance, the more users join a particular mobile operating system, the more apps will be developed for this particular operating system, which in turn makes the operating system more attractive for its users.

20. Network effects tend to favour large providers over smaller rivals, and provide them with market power, in a similar way as scale and scope economies. Both the NCAs with relevant
experience\textsuperscript{32}, as well as the respondents to the OPC\textsuperscript{33} broadly agreed that ‘strong direct/indirect network effects’ are an important or very important source or part of the reasons for emerging and existing market failures.

21. One reason why network effects tend to favour large incumbents is that even aggressive initial price offers will not necessarily allow smaller rivals to challenge incumbents and steal market shares from them. This is so because in many industries characterised by network effects, prices are often zero for consumers, with firms monetising their services through advertising and/or access to consumer data (e.g. Google, Facebook).\textsuperscript{34} Therefore, there is no room for entrants to undercut incumbents when the going price for a particular service is already zero. There was some consensus among the NCAs with relevant experience\textsuperscript{35}, and strong support among the respondents to the OPC\textsuperscript{36}, that ‘zero-pricing markets’ are an important or very important source or part of the reasons for emerging and existing market failures. Moreover, according to an ICN Report on digital markets, 77% of the respondents indicated that network effects played an important role in the assessment of market power in digital markets in the cases that they have investigated.

22. In its enforcement practice under Article 102 TFEU, the Commission has found network effects to constitute, to varying degrees, a barrier to entry in the digital sector. For instance, in the Microsoft case, the Commission found that network effects represented a relevant barrier to entry because “[a] media player would not meet with significant consumer demand if there was no or no significant amount of corresponding digital content which this player could play back”.\textsuperscript{37} In Google Android, the Commission found that “network effects arise because, when deciding which licensable smart mobile OS to develop for, app developers consider the revenue potential of that OS and since they ‘earn their profits mainly by app downloads, mobile OSs with a large user base are considered more attractive by app developers’”.\textsuperscript{38}

2.1.3. Data dependency

23. Data dependency refers to scenarios where the operations of companies are largely based on big datasets. As the Special Advisors to Commissioner Vestager stated, “[d]ata is a core input factor for production processes, logistics, targeted marketing, smart products and services, as well as Artificial Intelligence (AI). It drives interoperability in interconnected environments and will revolutionise sectors such as mobility and healthcare. The competitive relevance of data is consequently very important. The competitiveness of firms will increasingly depend on timely access to relevant data and the ability to use that data to develop new, innovative applications and products. Against this background, an important debate has emerged on whether, and if so under which conditions and on which legal basis, public intervention is needed to ensure sufficient and timely access.”\textsuperscript{39} Data is particularly relevant as an input for digital services and products.

24. There has been broad consensus among the NCAs with relevant experience\textsuperscript{40}, as well as among the respondents to the OPC\textsuperscript{41} that “lack of access to a given input/asset which is necessary to compete on the market (e.g. access to data)” and “data dependency”, possibly in conjunction with data protection issues, are an important or very important source or part of
the reasons for emerging and existing market failures. Moreover, according to an ICN Report on digital markets, 49% of the respondents indicated that dependency on data played an important role in the assessment of market power in digital markets in the cases that they have investigated.

In the Commission’s enforcement practice, data dependency has been of relevance in a number of cases in the digital sector. For instance, in Apple/Shazam, the Commission found that the merger would give Apple access to Shazam’s consumer data, which would give it the “[a]bility to use the Customer Information to put competitors at a competitive disadvantage”, while the evidence on Apple’s incentives to do so was mixed.\textsuperscript{42} In the Google Shopping case, the Commission identified the availability of data in the form of user search queries, paired with users’ tendency to single-home on Google for their general searches, as an important barrier to entry: “[B]ecause a general search service uses search data to refine the relevance of its general search results pages, it needs to receive a certain volume of queries in order to compete viably. The greater the number of queries a general search service receives, the quicker it is able to detect a change in user behaviour patterns and update and improve its relevance.”\textsuperscript{43}

### 2.1.4. Switching costs

Switching costs are onetime expenses a consumer or business incurs or the inconvenience it experiences when switching between products or service providers. Examples include the cost of learning how to use a different mobile operating system, or the cost of exporting digital libraries (such as images, music files, book files etc.) into another operating system (or else, where such transfer is not possible, the cost of losing one’s libraries). Switching costs allow firms to have market power over those consumers who were successfully attracted to a given product in the past. Like for network effects, the presence of switching costs makes it more difficult for entrants to contest the market position of firms which have already acquired a large customer base. The NCAs with relevant experience\textsuperscript{44}, as well as the respondents to the OPC\textsuperscript{45}, generally showed that ‘high customer switching costs’ are an important or very important source or part of the reasons for emerging and existing market failures.

One implication of switching costs in a platform context is that either one (or both sides) of the platform tend to single-home for specific purposes, i.e. users only use one platform, rather than using several platforms simultaneously.\textsuperscript{46} For instance, the vast majority of smartphone users owns either an iPhone or an Android phone, but not both at the same time, and they tend to be very loyal to their operating system. The fact that “customers typically use one platform (i.e. they predominantly single-home) and cannot easily switch” has been recognised by NCAs with relevant experience\textsuperscript{47}, as well as by the respondents to the OPC\textsuperscript{48}, as an important or very important source or part of the reasons for emerging and existing market failures. Moreover, according to the ICN Report on digital markets, 41% of the respondents indicated that switching costs played an important role in the assessment of market power in digital markets in the cases that they have investigated.
28. Research on the basis of ‘agent-based simulations’ also found evidence of biases that reinforce consumer lock in, such as “escalation of commitment”, and “availability bias”. In ‘escalation of commitment’, users commit themselves to one platform, even when switching may provide higher user utility. Hence, those users never switch platforms. For instance, a consumer purchasing on a large e-commerce marketplace offering a range of products, would not switch to one or several other platforms even if the latter are specialised in the specific type of goods the consumer is interested in. Convenience and user habits would prevail over the benefit (e.g. higher quality) potentially resulting from the use of a more specialised platform. Users subject to an ‘availability bias’ may make platform choice decisions using a heuristic that relies on vivid or recent data. For example, users may easily recall a platform that has many users, as media and social media will be mentioning such a platform. Social norming (e.g. follow friends’ behaviour) may play an additional role as a driver when it comes to high coordinated switching costs.

29. In its enforcement practice under Article 102 TFEU, the Commission has found switching costs to constitute, to varying degrees, a barrier to entry in the digital sector. For instance, in the Amazon e-book MFNs case, the Commission found that “customers that have already purchased Kindle e-books may face costs in switching to another e-book platform, due to the need to acquire an additional e-book reader and the inability to transfer the library of e-books purchased in Amazon's Kindle store to a different e-book reader.” In an internal document, Microsoft itself stated that “The Windows API [...] is so deeply embedded in the source code of many Windows apps that there is a huge switching cost to using a different operating system instead.” Switching costs are also relevant where customers are businesses, not final consumers. This is demonstrated by the Google Android case, where the Commission found that “OEMs wishing to switch to other licensable smart mobile OSs face switching costs. [...] For example, Sony has estimated that the initial development cost ‘to implement the Android OS on our devices was approximately 50 million Euro, with lead time of 1.5-2 years’.”

2.1.5. Asymmetric information and consumers’ behavioural biases

30. Information asymmetry on the customer side occurs when customers (consumers or businesses) in an economic transaction possess substantially less knowledge than the other party does, so that they cannot make informed decisions. For instance, a lack of information on alternative price offers in the market for a particular good or service may prevent consumers from ‘shopping around’ to find better offers. This in turn shields incumbents from direct price competition with their rivals, allowing firms to charge higher prices than they otherwise could. Similarly, a lack of meaningful transparency about all relevant product characteristics in view of the complexity of the terms and conditions of the service for an average user, e.g. the data usage of different social networks, prevents users from comparing different offers against each other, which in turn reduces the incentives of suppliers to improve their offerings along those dimensions that are not observable to users.

31. At times, consumers’ limited knowledge about alternative offers or product features is caused or exacerbated by so-called behavioural biases. For instance, consumers may systematically
misjudge their own preferences, or the prices or attributes of products, leading to suboptimal consumption choices, such as buying excessive amounts of add-on warranties, insurance products, or gym memberships. Another example is ‘default bias’, i.e. the tendency to favour the default option when given a choice between several options; this bias discourages switching to different alternatives (such as a different browser, different search engine, etc.) whenever certain software products come pre-installed on consumers’ devices, and therefore has similar adverse effects on competition as would limited information about the existence of these alternatives.

32. The feature of ‘information asymmetry on the customer side’ has been recognised as important or somewhat important source or part of the reasons for emerging and existing market failures by the NCAs with relevant experience, as well as among the respondents to the OPC. Moreover, according to the ICN Report on digital markets, 44% of the respondents indicated that consumer bias played an important role in the assessment of market power in digital markets in the cases that they have investigated.

33. In its enforcement practice under Article 102 TFEU, the Commission has found behavioural biases to constitute, to varying degrees, a barrier to entry in the digital sector. For instance, in the Google Android case, the Commission found that “users that find apps pre-installed and presented to them on their smart mobile devices are likely to 'stick' to those apps” In other words, users suffer from “default bias” or “status quo bias”, which in turn makes pre-installation of operating systems, app stores, search engines, etc, a powerful tool to lock in users to these specific services: “In 2016, approximately 260 million smartphones were sold in Europe, of which approximately 197 million smartphones or 76% were Google Android devices. Practically all of these Google Android smartphones had the Google Search app pre-installed with the rest of the GMS bundle.”

2.1.6. High market concentration

34. A market is considered highly concentrated if one or at most two firms hold a market share of close to 100%. The structural market features discussed above all favour the emergence of few large firms, or even just one ‘super-dominant’ firm. There is evidence for a trend of growing concentration (and, relatedly, growing mark-ups) at the industry level, which has been documented both for the US and for the EU, although there is an ongoing debate whether growth in concentration may have been slower in the EU than in the US.

35. NCAs with relevant experience, as well as the respondents to the OPC, broadly agreed that “one or few large players on the market (i.e. concentrated market)” constitutes a very important or important source or part of the reasons for market failures. From a competition perspective, it may be very difficult to maintain ‘competition in the market’, and even if possible, it may not be desirable, in a situation in which having only one network is the most beneficial outcome for consumers. However, in such a situation it is essential to keep ‘competition for the market’ open. Any successful attempt by a firm to lock-in a group of consumers, so that the market is no longer contestable for a new entrant, will prevent such
‘competition for the market’, with possible adverse consequences for prices, product variety, and innovation.\textsuperscript{60}

36. In light of the above, ensuring contestability is of utmost importance, as “[i]n these markets, the issues frequently arise from a combination of complex interleaving of firm conduct, consumer behaviour, economic characteristics, technological factors, and various aspects of regulation. Promoting competition in this sector will therefore not be purely about limiting anti-competitive conduct, important as that is. It will also require more proactive market-opening measures.”\textsuperscript{61}

\textbf{2.2. What are the problems?}

37. The market features explained in Section 2.1 lead to two main problem groups:

38. First, in many of these digital markets, in particular B2C markets, large online platforms have emerged as gatekeepers (‘gatekeeper platforms’). Some of these gatekeeper platforms exercise control over whole platform ecosystems that are essentially impossible to contest by existing or new market operators, irrespective of how innovative and efficient they may be.\textsuperscript{62} As a consequence contestability of these digital markets is limited even beyond the limitations resulting from their features (‘weak contestability of platform markets’). In addition, many businesses are increasingly dependent on these gatekeeper platforms, which in many cases leads to gross imbalances in bargaining power and, consequently, identified unfair practices resulting in unfair business conditions for business users\textsuperscript{63} (‘unfair business conditions for business users’).

39. Second, the above market features can lead to ‘emerging and existing market failures’ which undermine effective competition and contestability in digital markets beyond the weak contestability of and unfair business practices on platform markets. In the first place, business models and market structures can change rapidly in markets with these features. The market features set out in in Section 2.1 and the resulting market failures can also occur in markets without gatekeeper platforms. In the second place, even within markets with gatekeeper platforms, market dynamics can lead to the emergence of new business practices whose effects will need to be examined in a thorough market investigation before deciding whether, on balance, they are harmful or beneficial to competition on these markets. In the third place, some market failures related to entrenched market positions might need to be remedied by more comprehensive means than only addressing business practices.

\textbf{2.2.1. Problems stemming from conduct by large gatekeeper platforms}

40. Many of the digital markets are characterised by a single player, and a few large platforms that have become gatekeepers for many digital and non-digital products and services. These gatekeeper platforms represent a key segment of the digital economy and have an important role in providing third parties with online access to a large number of EEA consumers. For example, more than 4 million businesses trade significantly via platforms,\textsuperscript{64} for whom these platforms serve as important intermediaries to reach consumers.
41. These gatekeeper platforms raise important concerns. First, their gatekeeper position and economic power cannot be efficiently contested by actual or potential competitors due to the importance of the market features presented above. Second, due to their economic power and imbalances in their commercial relationship, gatekeepers can undermine fair trading conditions for their business users.65

2.2.1.1. Weak contestability of platform markets

42. As mentioned above, there is an unprecedented concentration of economic power in digital markets: seven of the large platforms account for 69% of the total EUR 6 trillion platform economy, through vertical and horizontal integration. Large online platforms intermediating between businesses and consumers are growing at an exponential pace. They have several hundreds of millions of users (both businesses and citizens/consumers).66 Total net revenues of some of these platforms (of billions of euros) double and triple over a few years.

43. Large gatekeeper platforms benefit significantly from the main features of digital markets (described in Section 2.1). In this context, new entrants that may want to enter or expand in platform markets characterised by a gatekeeper platform may find it extremely difficult to overcome some of the inherent market features without operating a sufficiently large user base.67 For instance, a new entrant must convince sufficient number of users (due to the importance of network externalities) to coordinate their migration to a new service, taking e.g. part of the social network along, or other associated data assets such as purchase or preference histories, or ratings. This lack of contestability is extensively echoed in the academic literature,68 pointing out that control over data by specific platforms (or a lack of venture capital funding for businesses aiming to compete with incumbent digital platforms), are significant barriers to entry.69

44. These large gatekeeper platforms therefore have an entrenched market position, which is hard to contest, and which they further expand through ecosystems. The largest platform companies are active across many different markets, creating extended data-driven ecosystems around their core activities, often cross-subsidising one service with data or revenues from another. In this regard, a large numbers of respondents identified online intermediation services, search engines, operating systems for smart devices, consumer reviews, network and/or data infrastructure/cloud services, digital identity services, online advertising intermediation services, payment services, fulfilment services and data management platforms as activities that can strengthen the role of gatekeeper platforms when any or all of these are integrated within a single corporate structure.70

45. The (structurally) entrenched position of gatekeepers has shown to be lasting and essentially unchallenged by competing platforms, thus leading to weak inter-platform competition. It is sometimes argued that incumbent’s services are often free and that competition is ‘just one click away’ or that it is vigorous in some segments. This is a too narrow and selective view of the overall dynamics of the digital platform economy and market features described above (see in particular Section 2.1).
2.2.1.2. Unfair business conditions for business users

46. The relative bottleneck or economic power of gatekeeper platforms means that entrants or business users are essentially dependent on the gatekeepers’ service and gatekeeper platforms represent an important trading partner for them to be able to reach large numbers of consumers in the EEA.

47. As a result, there are stark imbalances of bargaining power between gatekeeper platforms and business users, which allow large gatekeeper platforms to engage in unfair practices vis-a-vis business users resulting in unfair business practices, as evidenced by competition enforcement practice, the OPC[71], including targeted submissions by stakeholders, and various studies (for more details on the different forms of unfair practices, see Section 2.5.2).

48. The identified unfair practices do not represent one-off problem. They are systemic and recurrent features of the conduct by gatekeeper platforms, which are very often facilitated by the features of the markets in which these gatekeeper platforms operate.[72]

2.2.2. Market failures that undermine competition and contestability in digital markets

49. Going beyond the identified problems of gatekeeper platforms, the market features explained in Section 2.1 also contribute to more general, structural competition problems, in particular in digital markets. The Commission’s enforcement experience in both antitrust and merger cases in various industries points to the emergence and existence of market failures that cannot be tackled or that cannot be addressed in the most effective manner under the existing EU competition rules. This is supported by numerous international studies (see Section 1).

50. The term ‘market failure’ indicates a situation in which a market does not allow consumers to benefit from the results of effective competition in terms of low prices, better quality, as well as more choice and innovation, while firms are able to earn supra-normal profits which are not competed away over time.[73] The following graph illustrates the stock price development for five major big tech companies from 2014-2018.[74] To the extent that stock prices reflect market expectations of future profitability, this graph can be interpreted as measuring (future) profits of the respective companies. When comparing these figures to the S&P 500 index,[75], which grew by about 60-70% over the same period, this graph shows how the five companies – Alphabet (Google’s parent company), Apple, Facebook, Amazon, and Netflix – have consistently outperformed the market average.
To get a sense of the absolute levels of profitability (rather than their development over time), the following graph shows the revenue per employee of selected tech companies in 2019. Given that labour costs are the relatively most important cost factor for tech companies, these figures can be interpreted as a rough indicator for profitability levels. It is interesting to note that the ranking of companies in this figure does not fully correspond to the ranking in Figure 1. While Netflix ranks highest in both stock price growth and revenue per employee, Amazon’s realised profits have been below the expectations reflected in the stock price evolution.
While markets typically feature self-correcting mechanisms, there can be obstacles that prevent these mechanisms from operating, leading to non-transitory losses of economic value. For instance, abnormally high profits in a market should not be sustainable in the long run because they would attract new entry into this market. As the new competitors start offering the same or very similar products as the incumbent(s), they will steal market share, and hence profits, from them, until the abnormally high profits will gradually be competed away. However, this self-correcting mechanism may be impaired when there are, for instance, barriers to entry that make it very difficult or even impossible for potential competitors to enter the market and challenge the incumbents. The first five market features described in Section 2.1 all have in common that they may represent such a barrier to entry, because they do not allow entrants to be cost effective (because of scale and scope economies), to replicate the incumbent’s products or services (because of data dependency or vertical integration), or to induce consumers to switch away from the incumbent(s) (because of network effects, switching costs, or asymmetric information). Such barriers of entry therefore allow incumbents to sustain market power, which in turn leads to longer-term societal losses in terms of higher prices and less product variety for consumers, and less dynamic innovation.

It is important to stress that the features of a market include both structural and behavioural ones and that demand-side considerations, in particular the behaviour of customers, play an equally important role in this regard. Therefore, in many cases, there is a combination of those elements leading to or constituting a market failure.

Depending on whether harm is about to affect or has already affected the market, market failures can be grouped into two main categories: (i) scenarios where there is an emerging market failure (e.g. driven by anti-competitive monopolisation strategies or gatekeeper scenarios; see Section 2.6.1) and (ii) existing market failures (e.g. driven by repeated parallel leveraging strategies or tacit collusion; see Section 2.6.2).

2.3. Why can the existing EU toolbox not deal with emerging and existing market failures and with unfair business practices by large gatekeeper platforms?

2.3.1. Why can existing EU competition law not tackle the problems?

Broadly speaking, the EU competition policy toolbox includes rules on antitrust, merger control, state aid, and public undertakings and services. Generally, a distinction is made between competition rules allowing for an intervention ex post or ex ante. Antitrust enforcement under Articles 101 and 102 TFEU (and the accompanying implementing regulations) belongs to the first category, as it aims at detecting anti-competitive behaviour by companies that has the actual or likely effect of causing distortions of competition. They therefore qualify as quasi-criminal proceedings. Sector inquiries are investigations that the Commission carries out when it suspects possible breaches of the competition rules in specific sectors of the economy. There is no possibility to impose remedies following a sector inquiry. Merger control and state aid rules aim at preventing anti-competitive outcomes by assessing ex ante whether a merger between undertakings or state aid would negatively affect competition. Merger control and state aid are purely administrative proceedings.
In light of the above, intervention under the existing EU competition rules can only occur if one of the following preconditions are fulfilled: 1) a company is dominant and abuses its dominant position, 2) there is an anticompetitive agreement, 3) there is a merger/acquisition with EU dimension or 4) a Member State grants an aid. This means that the existing EU competition rules cannot conceptually deal with existing market failures in the absence of these preconditions (e.g. anti-competitive monopolisation by a non-dominant company with market power below the dominance threshold).

Given that the market features of digital markets are not caused by the companies operating on a particular market, even though their distortive effects can sometimes be exacerbated through their conduct, emerging market failures cannot be tackled on the basis of the existing competition rules. The same applies to existing market failures, which refer to markets that are not functioning well and delivering competitive outcomes, notably due to their structure.

In addition, in some instances, the existing EU competition rules may be able to prevent or address a market failure, but not in the most effective manner (e.g. repeated parallel leveraging into related markets by a dominant company). This is because the existing competition rules do not allow for a holistic assessment of and a more principle-based approach with regard to remedies for all markets concerned. For example, individual instances of leveraging of market power by a dominant company into related markets can be dealt with under Article 102 TFEU. However, if such conduct were to be carried out in a repeated manner, the Commission would need to run several parallel investigations, without necessarily being able to tackle the core problem effectively (see Section 2.6.2).

In antitrust cases the Commission cannot aim at going beyond the infringement at stake to address an underlying structural problem. Remedies must be limited to what is necessary, not more than that, to achieve its goal. Thus, the remedies in antitrust cases must go as far as necessary to bring the infringement to an end and should be the least restrictive possible. If there are several appropriate measures that can address the infringement, the least onerous one must be imposed.

In light of the above, there is an enforcement gap which prevents effective and timely intervention based on the existing EU competition rules against emerging and existing market failures.

In addition, the existing EU competition rules do not necessarily capture all unfair business practices by large digital gatekeepers. This is because these practices do not necessarily have an anticompetitive object or effect under Article 101 TFEU, or may not be captured by Article 102 TFEU, if the platform is not found to be dominant, or if there is no effect on competition.

**2.3.2. Why is other EU legislation not sufficient to tackle the problems?**

Regulation (EU) 2019/1150 on fairness and transparency for business users of online intermediation services (the ‘P2B Regulation’) started to apply on 12 July 2020. It is the first
EU-level legislation specifically targeted at commercial issues engaged in by online platforms, or ‘online intermediation services', as well as by online search engines. It applies to more than 10,000 platforms in Europe and reflects the fact that a certain dependency of professionals, or ‘business users', is inherent in any successful online platform and means that the fairness, transparency and redress rights and obligations that the P2B Regulation provides are necessarily high-level and principles-based. Since this legal framework establishes a general ‘safety net’ for all professionals active in the online platform economy it does not address issues deriving from the concentration of economic power and unfair business practices of a limited number of very large, gatekeeper platforms, nor does it address emerging and existing market failures in digital markets more broadly.

63. **EU data protection legislation**\(^{82}\) specifies the fundamental right to the protection of personal data. It therefore covers business-to-citizen and government-to-citizen interactions, rather than commercial and competition related issues. Article 20 of the General Data protection regulation (‘GDPR’) provides a limited right to data portability\(^{83}\), though it is broadly considered that there are still many implementation challenges and that this right is at present insufficient to significantly lower entry barriers and to facilitate the contestability of markets\(^{84}\).

64. **EU consumer law** does address a range of potentially harmful practices, at EU level notably through the Unfair Commercial Practices Directive (UCPD)\(^{85}\) and the Unfair Contract Terms Directive (UCTD)\(^{86}\). While these directives define a number of relevant concepts, such as 'professional diligence' and 'good faith', their scope is explicitly limited to business-to-consumer transactions. Conversely, the Misleading and Comparative Advertising Directive (MCAD)\(^{87}\) covers certain B2B relations. However, the provisions set forth in the MCAD are limited to a narrow subset of advertising practices, which are not specific to online platforms or digital markets, and do not deal with the unfair business practices carried out by large gatekeeper platforms.

2.4. What is the size of the problem?

65. Reports have estimated that the **digital economy** accounts for between 4.5% to 15.5% of global GDP in 2019, depending on the definition.\(^{88}\) The amount of data created by year in the digital economy is growing at an exponential rate. In 2020, it is estimated to reach 47 zettabytes compared to 12 zettabytes in 2015. Forecasts point to 2 142 zettabytes in 2035.\(^{89}\) A report from the CMA describes the growing importance of pricing algorithms, not only adopted by large retailers such as Amazon, but also smaller online retailers.\(^{90}\)

66. The important role of **large platforms** for businesses to reach markets and consumers is constantly strengthened due to the e-commerce growth in Europe. The B2C e-commerce turnover was growing at an average pace of 13% between 2014 and 2019 with turnover forecasted to hit EUR 621 billion in 2019 and is set to be worth EUR 717 billion in 2020.\(^{91}\) On average, 16.2% of retail trade in 2020 in Europe takes place online, almost double in comparison to 2018.\(^{92}\) The share of online shoppers in Europe making cross-border online purchase has also increased significantly over the past decade, nearing 50% in 2019. Cross-
border B2C e-commerce sales in Europe are projected to grow at a double-digit rate at least through 2022. Online platforms’ role has strengthened with the widely introduced lockdowns due to the COVID-19 outbreak in 2020; consumers have shifted their habits towards more search engines, social media and online entertaining media.

67. As explained in more detail in Section 2.1, the characteristics of digital markets often favor the emergence of strong concentration, which tends to be accompanied by rising mark-ups and weaker competition. The trend of increasing industry concentration has been documented for both digital and non-digital industries alike. For instance, in 2014 the mean European high ‘digital intensity’ industry had 4 percentage point higher sales concentration than in 2000.

68. As regards trends in mark-ups, empirical studies suggest that company mark-ups have increased by 4% to 6% for the period 2001-14, on average across country, and that the result is mainly driven by the top of the mark-up distribution in the digital sector. For the top 10% of the firms in the sample, the growth in mark-ups over the period 2001-14 amounted to 20%, while the remaining firms in the sample exhibit a flat trend, i.e. mark-ups stayed roughly the same. To the extent that this observed trend of increasing market power of this top 10% of firms is a sign of insufficient competitive constraints faced by these firms, increasing competition in these markets could contribute to slowing down the growth trend in mark-ups, decrease prices and increase choice, quality and innovation. For example, a recent study shows that more concentrated industries also feature a more negative relation between markups and investment and innovation.

69. As to the platform economy, according to the Online Platform Economy Observatory, traffic share is the most revealing indicator of the economic significance of online platforms. The 50 top online platforms, representing an average of over 60% of traffic share across the Member States, achieved worldwide revenues of almost USD 340 billion (EUR 276 billion) in 2018, and employed almost 600,000 people.

70. The degree to which businesses of all kinds have integrated into and may depend on the platform economy is illustrated by the fact that in some cases more than 50% of goods sold on a market place can be from third-party sellers. In relation to software, there are over 26.4 million software developers in the world who depend entirely on large platforms providing the infrastructure and setting the rules for the distribution of their apps.

71. The problems identified above are affecting a large and expanding number of merchants and small businesses across Europe, which form a significant part of the EU economy. The number of enterprises depending on online platforms varies depending on the sector, but can be estimated to reach at least 1 million merchants in the EU (underestimate), combining sectors such as online retail, hotels and restaurant businesses, app developers, etc. The increasing importance of digital channels and the dependence, especially of small businesses, on such channels, means that the implications of unfair business practices by gatekeeper platforms could be far-reaching.
The reduced contestability of digital markets in which gatekeeper platforms operate moreover seems to result in suboptimal innovation levels, with notably implications for societal welfare. Relevant data, although of a general nature, supports the view that many markets are becoming more concentrated and display less competition. Profit margins are widening, with a few firms reaping a significant share. Innovation levels are also sub-optimal.

2.5. Drivers of problems stemming from conduct by large gatekeeper platforms

2.5.1. Identified factors and practices limiting platform market contestability

Gatekeeper platforms benefit from data dependency, strong (in)direct network effects, variety and volume of data, information asymmetry, lack of multi-homing and consumer lock-in, which reinforce entry barriers. In addition, other factors, including unfair practices by gatekeeper platforms contribute to the weakened contestability of platform markets where a gatekeeper platform is present.

Furthermore, considering the market features that gatekeeper platforms benefit from, business users in a data driven economy face important barriers to entry, such as limited or no access to vast amount of data as well as lack of any or meaningful interoperability to access such data that may be collected by gatekeeper platforms.

For example, the Impact Assessment study and input to the OPC point to practices that prevent both consumers and business users to switch. In the digital sphere data, being able to port both historical and real-time data are an important precondition for both multi-homing and switching. Business users and consumers alike repeatedly raise the issue of not being able to use any other platform or service because the incumbent refuses to provide an enhanced and continuous real-time ability to port personal and non-personal data in interoperable format. These practices affect contestability, and limit business users’ possibilities to move to or rely on alternative platforms or services.

As mentioned above, behavioral biases reinforce switching costs and keep users locked into the gatekeeper platform. Platform companies routinely design their services to optimise their users’ experience, often using advanced behavioural profiling and testing techniques, such as A/B testing, or finely targeted personalisation of their service offering. Some usage patterns design choices that ‘nudge’ users into certain decisions. In addition to biases towards default settings/options and high information costs, researchers recently identified seven categories of behavioral patterns.

In addition to behavioral biases, certain practices by large gatekeeper platforms contribute to consumer lock-in, including through strengthening these biases through such unfair practices. For instance, gatekeeper platforms are often requiring a user to sign up/register with an email service of the gatekeeper’s platform when using another of its products. The US House of Representatives Judiciary Committee also describes lock-in strategies including free tier offerings for cloud services.
Gatekeepers often also limit their business users ability and incentives to switch. One example of such behavior is imposing on business users ‘anti-steering’ provisions, by which they prevent business users from ‘steering’ consumers to other offers than those provided on the platform, even though these alternative offers may be cheaper or otherwise potentially attractive alternatives. For instance, a big app store, which represents a very important trading partner for many business users, may not allow its business users to advertise alternative subscription options to consumers. Also, so-called wide Most Favoured Nation Clauses (MFNs) – i.e. clauses that oblige third party business users to apply the same retail prices or offer the same conditions on other platforms essentially freeze competition among platforms and do not allow competing platforms to have lower priced/better offers.

Finally, gatekeeper platforms may limit the access to or the interoperability of certain of their platform services/functionalities with the services offered by business users, reserving those functionalities to their own services.

2.5.2. Identified unfair practices vis-a-vis business users

Online platforms intermediate an increasing number of transactions and are increasingly the main vehicle for businesses for market access. A few gatekeeper platforms have become the entry points to numerous markets - they link millions of enterprises with billions of consumers. Businesses are increasingly dependent on limited number of these gatekeeper platforms, which together with the strong data-driven network effects results in an imbalance in bargaining power between business users and gatekeeper platforms. They have thus become an important trading partner for these businesses to reach millions of consumers in the EEA and serve as market-gateway, on which SMEs depend to be visible online and to reach consumers both on national and cross-border markets.

A good indicator of businesses’ dependence on platforms is turnover from sales and share of revenue via online platforms as a proportion of the company’s total revenue from e-commerce. According to the Observatory’s estimates, around half of enterprises derived more than 25% of their revenues from online platforms. For almost 10% of companies, online platform sales exceed 75% of all revenues; while according to Statista estimates, in 2017, 18% of company revenues across the EU-28 came from e-commerce, with the highest proportion in Ireland (33%) and Czech Republic (31%).

Another indicator of businesses’ dependence on platforms is the use of platforms to publish online advertising. Of SMEs in the EU that sell online, more than 8 in 10 rely on search engines to promote their products and services as a mean of marketing their products or services. In 2018, an average of 26.2% of enterprises across the EU paid to advertise online. In northern European countries, such as Sweden and Denmark, this figure was over 44%.

Gatekeepers’ market position, their economic power together with their successful business models have enabled them to create ecosystems for which they set the rules by which other economic players should act. If set in an unfair manner, these rules can be detrimental to business users, and limit SMEs’ online visibility and associated sales.
84. The enforcement experience and input to the OPC shows that unfair practices can have different forms and shape. They can be grouped into broader categories – the most prominent examples are unfair business practices related to self-preferencing, data and access conditions.

85. The broad category of ‘self-preferencing’ or ‘self-favouring’ refers to practices in which a usually vertically integrated platform applies dissimilar conditions to business users in equivalent situations – in this case favouring its own services directly or indirectly in situations when it has a dual role of providing core platform services to business users and at the same time competing with them when providing ancillary services.

86. Self-preferencing occurs in many situations in the online and offline world (e.g. in supermarkets with own brands). Such behaviour may not be considered generally anti-competitive under EU competition rules or as unfair in all business relationships. However, certain forms of self-preferencing may amount to an unfair business practice. An important concern here is fair balancing of interests, in this case those of the gatekeeper platforms versus that of their business users. In particular, the special position of gatekeeper platforms who are playing a dual role and may engage in favouring their own services may lead to the exclusion of alternatives by business users who are largely dependent on these gatekeeper platforms to reach consumers, reducing choice for them, potentially undermining the quality of service and increasing prices. For example, a big app store, which markets a number of its own popular apps and at the same time maintains the same marketplace, access to which is very important for its competitors to reach consumers, for competitors is self-preferencing through applying more favourable policies for its own products and selective drafting rules favouring its own products.

87. Feedback to the OPC shows that business users consider self-preferencing to be a very common practice deployed by large, vertically integrated platforms. Responses by business users suggest that search and ranking algorithms often give preference to the platform’s own services, but also that a platform often has an incentive to bias its recommendations toward the content provider charging a lower royalty.

88. Certain forms of data related practices by a gatekeeper platform can also be considered unfair.

89. An example of a data related practice that could be considered unfair, and has been raised by many stakeholders in the context of the OPC, is the situation where a gatekeeper platform restricts business users from accessing and using the data that they provide, receive from their customers or generate in the course of their use of the gatekeeper’s platform or service. Data related practices which could also be considered as harmful relate to unfair restriction to interoperability and/or interconnection.

90. Feedback to the OPC shows that business users are confronted with the imposition by large platforms of proprietary services and an authentication through the platform even when third party services/products are used to create a direct link with customers to the detriment of third-party providers. Respondents suggest that gatekeeper platforms exclude business users
from access to user data and attempt to remove the direct link between the client and third party suppliers (so-called disintermediation).

91. Other examples include (i) gatekeeper platforms that use certain data that they received from business users for a particular use, for instance advertising services, for other, unrelated purposes, or (ii) a gatekeeper operating a marketplace benefits from its dual role and ability to evaluate product, sales and customer data generated from the sales of goods provided by third party merchant business users on its marketplace.

92. Finally, with regard to access conditions, gatekeeper platforms, thanks to their position, can often impose unfair terms of access to business users, for instance in relation to price for the services they offer.

2.5.3. Fragmented regulation and oversight

93. Various different national rules in the EU are emerging in partial response to the problems identified, including significant initiatives in Belgium, France, Germany, and the Netherlands. In addition, there is no necessarily coordination among different national authorities setting laws vis-à-vis platforms, leading to potentially heterogeneous responses across the EU. Fragmentation already exists with regard to platform-specific regulation, as for example in the cases of transparency obligations and MFN clauses.

94. Fragmentation of the EU legal landscape creates a degree of legal uncertainty and heterogeneous compliance costs that are generally easier to absorb for incumbents, but generate significant burden for potential entrants and smaller business users, thus limiting the ease of scaling-up across the internal market. Disparate laws may also endanger the benefits stemming from large platforms’ activity since they would imply regulatory shopping ultimately resulting in unequal impacts on EU consumers. Fragmented regulation and oversight put at risk the effective functioning of the Digital Single Market.

2.6. Problem drivers for market failures in digital markets

95. As outlined in Section 2.2.2, there are two categories of market failures that undermine competition and contestability: emerging market failures (see Section 2.6.1) and existing market failures (see Section 2.6.2). There are different scenarios that can give rise to emerging and existing market failures which cannot be tackled or addressed in the most effective manner under the existing EU competition rules. Examples illustrating the most important cases of emerging or existing market failures are set out in Section 2.6.3.

2.6.1. Emerging market failures

96. Emerging market failures arise where certain market characteristics as those set out in see Section 2.1, in isolation or combined with conduct of the companies operating on the market concerned, fundamentally change the competitive process, leading to sudden and radical decreases in competition preventing markets from self-correcting. Such emerging market failures cannot be tackled on the basis of the existing EU competition rules, because the market features underlying the emergence of such market failures are not caused by the
companies operating on the market concerned, even though their distortive effects can be exacerbated by the companies’ conduct.

2.6.2. Existing market failures

97. Existing market failures refer to markets that, notably due to their structure, are not functioning well and delivering competitive outcomes in terms of low prices, better quality, as well as more choice and innovation. As explained in paragraph 50 above, while markets typically feature self-correcting mechanisms, there can be obstacles that prevent these mechanisms from operating, leading to non-transitory losses of economic value. 114

2.6.3. Examples of emerging and existing market failures

98. This section discusses examples for the scenarios that give rise to emerging and existing market failures. As illustrated in Figure 3 below, there are some scenarios, namely leveraging strategies (either standard or repeated parallel), and gatekeeper (or ‘bottleneck’) scenarios, which are relevant for both emerging and existing market failures. Other scenarios only affect one or the other type of market failure. For instance, anti-competitive monopolisation only concerns emerging market failures, while tacit collusion (possibly facilitated by pricing algorithms) and common shareholding are examples of existing market failures. Each scenario will be discussed in more detail below.

99. The scenarios identified below do not represent an exhaustive list of such situations, but are meant to illustrate the most important cases of emerging or existing market failures, which cannot be tackled under the existing EU competition rules or which cannot be addressed in the most effective manner.

**Figure 3: Examples of emerging and existing market failures**
2.6.3.1. Anti-competitive monopolisation as example of emerging market failures

100. Anti-competitive monopolisation refers to scenarios where one market player may rapidly acquire market shares due to its capacity to put competitors at a disadvantage in the market unfairly, for instance, by imposing unfair business practices or by limiting access to key inputs, such as data. These markets will not yet have generated a dominant firm, but show clear signs of increasing market power in the hands of one firm. As the industry matures and becomes more concentrated, certain business practices - which are unobjectionable when used in the infant stages of the industry (such as exclusive contracts, fidelity rebates, tying) - may allow a firm to drive its competitors out of the industry or relegate them to unprofitable market niches. In combination with other factors (such as scale economies or network effects) they may lead to anti-competitive monopolisation.

101. One implication of the presence of network effects is that even markets where initially multiple competitors are active become prone to ‘tipping’: once a firm has obtained a certain advantage over rivals in terms of market share, its position may become unassailable and the market may gravitate towards a situation of dominance or (quasi)-monopoly. An example would be the market for comparison shopping websites, where the Commission found that, as a result of Google’s dominance in providing search engine services, Google was able to take traffic away from competitors, allowing Google Shopping to grow from a very marginal position to a very strong dominant position.

While the Google Shopping case shows that Art. 102 TFEU allows for competition policy to intervene and impose corrective measures in such markets after tipping has occurred, such an ex-post intervention may not always be able to fully restore the market conditions that existed before the market tipped, in particular in fast moving markets where competitors may quickly leave markets and may not want to reenter again. Both the NCAs with relevant experience, as well as the respondents to the OPC, generally consider that tipping is common or to some extent common in digital markets. According to these respondents, the important or very important competition concerns that arise in tipping markets are the following: 1) there will not be sufficient competition on the market in the long run; 2) customers will not have enough choice; 3) customers will face insufficient innovation; 4) efficient or innovative market players will disappear and 5) customers may face higher prices.

102. Both the NCAs with relevant experience, as well as the respondents to the OPC, agree that anti-competitive monopolisation is a market scenario qualifying as important or very important emerging market failure. In terms of sectors or markets where this scenario might arise, respondents mentioned notably digital sectors/markets (including app stores, online advertising, search services, social networks and online marketplaces), transport, automotive, pharmaceuticals and telecoms. Most respondents who expressed a view considered that this scenario is common or at least somewhat common in digital markets, including because of the particular features of such markets. Those respondents who signaled relevant knowledge or experience with tipping markets identified the following as fields where such tipping has occurred: social networks, search services, e-commerce platforms, online advertising, online...
messaging, app stores, operating systems, regulated markets like telecoms, energy and rail, as well as online food delivery and accommodation bookings.

103. Respondents generally considered that important or very important market features of a tipping market are the following: 1) direct network effects; 2) indirect network effects; 3) users predominantly single-home (i.e. they use typically one platform only) and 4) economies of scale. Respondents generally considered that tipping is common or to some extent common in digital markets.

2.6.3.2. Leveraging strategies as example of emerging and existing market failures

104. Leveraging strategies refer to practices whereby a firm with market power exerts such power with a view to extending such power to a related market. Such strategies may give rise to both emerging and existing market failures. Where a (possibly dominant) company with market power in a core market applies such leveraging on multiple related markets simultaneously, for instance by relying on large amounts of data, the term ‘repeated parallel leveraging strategies’ applies. The latter are more likely to give rise to existing market failures, rather than emerging market failures.

105. Repeated parallel leveraging strategies are a market scenario that could fall under Article 102 TFEU, if the leveraging is carried out by a market player with a dominant position. However, if that player does not have a dominant position, Article 102 TFEU does not apply. Provided there is a finding of dominance, the Commission could address single instances of this conduct on the basis of the existing EU competition rules. However, if the market player concerned engages in multiple leveraging strategies into different related markets, this would require running several competition cases for each individual market onto which the leveraging takes place. This may lead to diverging outcomes depending on the circumstances of each case, without addressing the underlying problem at the heart of the leveraging strategy, as explained in the Motta/Peitz study: “In such circumstances, a market investigation into these practices in the digital industry may allow to achieve a uniform approach that avoids the vagaries of the case-law, and might hence be superior to the attempt of setting a policy through the precedential values of article 102 cases.”

106. Both the NCAs with relevant experience, as well as the respondents to the OPC, broadly agreed that “[a] (not necessarily dominant) company with market power in a core market extending that market power to related markets” is a market scenario qualifying as important or very important structural competition problem. In terms of sectors or markets where these situations manifest themselves, respondents mentioned digital sectors/markets (including app stores, operating systems, online advertising, search services, social networks, messaging apps, e-commerce and online marketplaces), transport, automotive, and telecoms. As examples and manifestations of the leveraging of market power, respondents pointed to various types of behaviour, including tying and bundling, discrimination, ‘self-preferencing’, ‘enveloping strategies’, refusal to share or provide access to information, and cross-subsidisation.
2.6.3.3. Gatekeeper/bottleneck scenarios as example of emerging and existing market failures

107. As pointed out in the OPC\textsuperscript{127} by many stakeholders, as well as recently documented by the US House of Representatives Majority Staff report (see Section 1), so-called ‘gatekeepers’ control access to a number of customers (and/or to a given input /service such as data) that – at least in the medium term – cannot be reached (and/or replicated) otherwise. Gatekeeper scenarios refer to situations where customers typically predominantly use one service provider/platform for a specific purpose (single home). These gatekeepers may engage in strategies that limit the ability of their business users to grow and multi-home, thereby weakening competition on the whole market.

108. There was consensus both among the NCAs with relevant experience\textsuperscript{128}, as well as among the respondents to the OPC\textsuperscript{129}, that ‘Gatekeeper Scenarios’ qualify as important or very important structural competition problem, pointing in particular to e-commerce, search services, social networks, online advertising, app stores, operating systems, online messaging, accommodation bookings, entertainment services (e.g. video distribution and broadcasting), financial markets, energy and telecommunication markets, or transport, as sectors where such gatekeeper scenarios have manifested themselves.

2.6.3.4. Tacit collusion as example of existing market failures

109. Tacit collusion refers to a situation where competitors in an industry manage to behave in a coordinated manner (i.e. jointly raise prices, or partition the market among each other) based on a mutual understanding of each other’s best interest, yet without explicitly coordinating their actions. Given that in a tacit collusion scenario undertakings do not reach an agreement nor engage in a concerted practice, this type of scenario falls outside Article 101 TFEU and cannot be tackled by the Commission under the existing EU competition rules.

110. NCAs\textsuperscript{130} and stakeholders responding to the OPC\textsuperscript{131} generally agree that “[h]ighly concentrated markets where only one or few players are present, which allows to align their market behaviour” is an important or very important market scenario qualifying as a structural competition problem. They consider that important or very important features of an oligopolistic market with a high or substantial risk of tacit collusion are the following: 1) high concentration levels; 2) competitors can monitor each other’s behaviour; 3) high barriers to enter and 4) the homogeneity of products. Those respondents also generally agreed that Article 101 TFEU is not suitable for tackling tacit collusion.\textsuperscript{132}

111. More recently, there have been concerns expressed in particular in academia\textsuperscript{133} that new technologies, in particular \textit{pricing algorithms}, may facilitate collusive behaviour among firms without the need to coordinate their actions explicitly.\textsuperscript{134} Pricing algorithms are automated tools that allow very frequent changes to prices and other terms taking into account all or most competing offers on the market. It appears at least possible that such algorithms, if deployed by several competitors in the same industry, will learn to set supra-competitive prices without ever communicating with each other.\textsuperscript{135} NCAs with relevant experience submit that pricing algorithms are widely used for the distribution of mass-market products (such as
electronic goods, or household appliances) and services (such as plane tickets and accommodation). They are used especially to set flexible prices for products or services in several industries including tourism, transport, hospitality and entertainment, and can be an important or very important source or part of the reasons for a structural competition problem.\(^\text{136}\)

112. For instance, in its E-commerce sector inquiry, the Commission established that more than half of the respondent retailers tracked the online prices of competitors and more than three quarters of these retailers subsequently adjusted their own prices to those of their competitors.\(^\text{137}\) Such automatic price adjustments are not per se problematic. However, automatic tracking of competitors’ prices generates a level of price transparency in the industry that would be difficult to achieve if this data had to be hand-collected. Price transparency has been recognised as a factor facilitating collusion in past competition cases\(^\text{138}\), and in at least one case, namely that of Computerised Reservation Systems, necessitated regulatory measures to prevent the emergence of tacit collusion.\(^\text{139}\) The potential of algorithms to facilitate collusion by creating more transparency could be amplified where such algorithms are either programmed to, or learn by themselves to pursue collusive strategies, i.e. to set prices above the competitive level, which are sustained by a complex punishment code by which firms trying to undercut the collusive price to steal market share from their rivals trigger a price war in the market which makes the original price reduction unprofitable.

113. The OECD found that “[c]ompetition law covers instances where algorithms amplify explicit collusion, but could be more difficult to apply in relation to pure forms of tacit collusion, which is generally not covered by antitrust rules. Given the concern that algorithms make tacit collusion more frequent, there is an ongoing debate about the need to rethink some fundamental antitrust concepts.”\(^\text{140}\) A similar concern has been expressed by an expert panel (drawn from the ‘Economic Advisory Group on Competition Policy’) consulted by the Commission on the UK experience with Market Investigations and possible lessons to draw for the EU.\(^\text{141}\)

114. Among the stakeholders responding to the OPC, only a part had come across pricing algorithms before, but those who did consider that they are an important or very important source or part of the reasons for a structural competition problem.\(^\text{142}\) NCAs do not have extensive experience with such market situations. Some of them therefore conducted studies in order to explore different theories of harm when using pricing algorithms. They explain that pricing algorithms are widely used for the distribution of mass-market products and services especially to set flexible prices for products or services in several industries including tourism, transport, hospitality and entertainment and generally consider that using pricing algorithms can lead to the alignment of prices/less competition between market players.

2.6.3.5. Common shareholding as example of existing market failures

115. Some markets are characterised by a high degree of common shareholdings (when one person or institution owns shares of two or more firms) or cross-shareholdings (when two firms own each other’s shares).\(^\text{143}\) This may lead to ambiguous incentives for the owners of these shares,
and the managers who run the respective companies on behalf of their shareholders. In fact, when a firm’s value depends not only on its own profits, but also on the profits made by some (or all) of its rivals, then this may soften competition between these firms, leading to higher prices and lower quality for consumers. Common shareholder may induce such a softening of competition for instance by making managers of companies in the same industry compete less aggressively against each other by designing their compensation schemes in a way that discourages such competition.

116. While common shareholding was not explicitly mentioned in the questionnaire submitted to the NCAs and the OPC, one NCA\(^1\) and several respondents to the OPC\(^2\) suggested common shareholding as an additional market feature that can be a source or part of the reasons for a market failure, notably as it may facilitate tacit collusion.

117. Due to its structural nature, common shareholding itself is, like tacit collusion, not covered by Article 101 and Article 102 TFEU. It cannot therefore be addressed under the existing EU competition rules absent additional elements amounting to an anti-competitive agreement pursuant to Article 101 TFEU or a breach of a collective dominant position pursuant to Article 102 TFEU.

### 2.7. How will the problem evolve?

118. As explained in Section 2.1.6, concentration and mark-ups in most digital markets have been increasing over the last years, and there is no indication that this trend will be inverted during the next years. In some cases, markets have already stabilised at a high concentration level structure and do not show any evidence of possible increase in competitiveness in the future. Data is also becoming more and more important, exacerbating the market failures associated to the control of data.

119. The COVID-19 crises has dramatically increased the importance of e-commerce and trading via digital platforms in the EU’s economy.\(^3\) This has only accelerated the dependency of users and businesses on the services provided by the larger gatekeeper platforms – as evidenced indirectly in the increase in stock market valuation of some of the largest platform companies.

120. Absent any EU intervention, the economic drivers are likely to increase, exacerbating the observed problems. As an illustration, further development and use of voice assistants can also be expected to reinforce gatekeeper platforms’ position. Voice-activated services may create concerns in relation to search for online products/services/information. The provision of a single answer to a search request limits the possibility to access alternative results, thus reducing choice and limiting competition.\(^4\)

121. Innovation would remain concentrated within a small number of gatekeepers, ultimately limiting consumers’ possibility to access innovation- and data-friendly services\(^5\) provided by a larger number of platforms than gatekeepers.
122. The regulatory gap will be filled at national and non-EU level, increasing further the coordination costs, fragmenting the internal market, and leading to greater legal uncertainty.

2.8. Problem tree

![Figure 4: Problem tree](image)

3. WHY SHOULD THE EU ACT?

3.1. Legal basis

123. Given the intrinsic cross-border nature of the services provided by gatekeeper platforms and the risk of further regulatory fragmentation regarding functioning of the Single Market for digital services, in particular in relation to gatekeeper platforms as well as functioning of digital markets, Article 114 TFEU is the relevant legal basis for this initiative. One of the objectives of the intervention is to identify harmonised set of rules relating to measures tackling unfair behaviour by gatekeeper platforms, safeguarding contestability of digital markets and ensure harmonised set of market investigation powers in case of existing or emerging market failures.

124. It is appropriate to combine Article 114 TFEU with Article 103 TFEU because certain unfair behaviour by gatekeeper platforms and certain types of existing market failures could also be addressed under Articles 101 or 102 TFEU but not in the most effective manner, as explained in Section 2.3.1. Given that Article 114 TFEU is subject to stricter procedural requirements than Article 103 TFEU, the former will have to be followed (see Article 294 TFEU).

125. As set out above, the current regulatory approaches at Member States level are a patchwork of existing or proposed regulatory solutions (see detailed description in Annex 5). This creates
legal uncertainty for companies operating in the internal market, whether at national or on a pan-European basis. Moreover, the fact that emerging or existing market failures can be addressed in some Member States but not in others and that the remedies imposed may differ across Member States risks creating an appreciable distortion of competition in the internal market and undermine fundamental freedoms protected by the Treaty. This distortion could be prevented in the most effective manner by empowering the Commission and the Member States’ competition authorities to apply the instrument required to address emerging or existing market failures in a harmonised system of parallel competences, similar to the application of Articles 101 and 102 TFEU.149

3.2. Subsidiarity: necessity and added value of EU action

126. The objectives of the intervention cannot be achieved by Member States acting alone, as the problems are of a cross-border nature, and not limited to single Member States or to a subset of Member States. The digital markets at stake (including those featuring gatekeeper platforms) are often of a cross-border nature, as is evidenced by the volume of cross-border trade, and the still untapped potential for future growth, as illustrated by the pattern and volume of cross-border trade intermediated by digital platforms. Almost 24% of total online trade in Europe is cross-border. It is estimated that by 2025 online marketplaces will represent 65% of cross-border online sales in Europe.150

127. Even where these digital markets may be geographically defined as national in scope, the problems at stake nevertheless remain of a cross-EU nature for three main reasons. First, the goods and services offered by the market players concerned are typically of a cross-border nature. Second, digital players typically operate across several Member States, if not on an EU/EEA-wide basis, which is particularly the case for markets such as online advertising, social media, online retail, cloud services, e-commerce or online search. This is not to say that services such as online advertising and search do not have to be tailored to Member States’ languages - however, the overall business strategy will normally be EU/EEA-wide.

128. Accordingly, emerging and existing market failures in digital markets and unfair business practices by large digital gatekeepers both have Union relevance, as they can arise across borders and affect several Member States, thus not being limited to a specific national market of a Member State.151

129. As regards unfair business practices, in the absence of an EU measure, there is a high risk that with national approaches, business users or application developers seeking to serve the internal market will need to understand a range of diverse rule-sets and pursue actions in multiple countries across the EU, which is likely to fragment the Single Market for digital services, create barriers to expansion and compliance costs, especially for start-ups and SMEs. A lack of harmonised rules in this space risks complicating the regulatory landscape faced by platforms operating on a pan-European or indeed global basis. An intervention at the EU level is therefore more efficient, insofar as it introduces a common set of rules across Member States to address in a consistent manner the same unfair business practices carried out by large digital gatekeepers across the Union.
130. Similarly, intervention by individual Member States or NCAs would be ineffective in tackling emerging and existing market failures across the Union. Each Member State can only address structural competition problems in its own territory,\textsuperscript{152}, imposing its own remedies, whereas emerging and existing market failures may affect the territory of several Member States because of the wider geographic scope of the relevant market concerned or the cross-border business activities of the market players concerned. Addressing emerging and existing market failures with a cross-border dimension at national level could also lead to inconsistencies in the remedies imposed, with the ensuing risk of fragmenting the Digital Single Market.

131. Therefore, by addressing emerging and existing market failures in digital markets and unfair business practices by digital gatekeeper platforms at the EU level, the functioning of the internal market will be improved through clear and harmonised rules that give all stakeholders legal clarity and through an EU-wide intervention framework allowing to address emerging and existing market failures in a timely and effective manner.

4. OBJECTIVES: WHAT SHOULD BE ACHIEVED?

4.1. General objectives

132. The general objective of this initiative is to ensure the proper functioning of the internal market by promoting effective competition in digital markets, in particular a fair and contestable online platform environment. This objective feeds into the strategic course set out in the Communication ‘Shaping Europe’s digital future’ as shown in Section 1.

4.2. Overview of specific objectives

133. The specific objectives are outlined in the figure below, and explained in the following sections.

\textbf{Figure 5: Specific objectives}

Ensure the proper functioning of the internal market by promoting effective competition in digital markets, in particular a fair and contestable online platform environment

- Address identified unfair conducts by large gatekeeper platforms
- Promote contestability of platform markets
- Enhance coherence and legal certainty in the online platform environment to preserve the internal market
- Ensure contestable and competitive markets by preventing the emergence of market failures on a case-by-case basis in digital markets
- Ensure contestable and competitive markets by addressing existing market failures on a case-by-case basis in digital markets
4.2.1. Objectives related to problems stemming from the gatekeeper position of large platforms

4.2.1.1. Address identified unfair conducts by large gatekeeper platforms

134. The market dynamics surrounding gatekeeper platforms provide them with a position in which their behaviour vis-à-vis business users remains unchecked, resulting in unfair conducts. Therefore, the specific policy objective is to lay out a clearly-defined set of rules addressing identified unfair behavior by digital gatekeeper platforms. This objective is measurable in principle through careful monitoring and information-gathering provisions. It is both achievable and realistic, as industry pressure and Member State action, as well as some voluntary measures have already led to some pockets of change. A timeframe and indicators for reaching this objective should be devised following a dedicated monitoring approach based on the work of the Expert Group for the Observatory on the Online Platform Economy and its supporting study.

4.2.1.2. Promote contestability of platform markets

135. Weak inter-platform competition is one of the problems identified in Section 2.2.1.1. This specific policy objective is therefore to promote platform markets contestability and benefits associated with it, i.e. innovation, increased consumer choice.

136. While gatekeeper platforms themselves significantly contribute to innovation (as witnessed by their large R&D budgets, for example), the innovation objective here refers to innovative entry in areas that challenge the incumbent to innovate even further in view of market entry that brings innovation.

Closely related to innovation, the consumer aspect of this objective aims for more privacy-friendly and innovative services.

4.2.1.3. Enhance coherence and legal certainty in the online platform environment to preserve the internal market

137. There is an emerging fragmentation of the regulatory landscape and oversight in the Union, as Member States address platform related problems currently not (effectively) covered by existing regulation. This is suboptimal in light of the cross border nature of the platform economy and the systemic importance of gatekeeper platforms for the internal market. Divergent fragmentation would create legal uncertainty and higher regulatory burdens for participants in the platform economy. Therefore a specific policy objective is to improve coherent and effective oversight and enforcement of measures against platforms.

4.2.2. Objectives to prevent and address market failures in digital markets

4.2.2.1. Ensure contestable and competitive markets by preventing the emergence of market failures in digital markets on a case-by-case basis

138. As explained in Section 2.1 and Section 2.6.1, digital markets may display certain characteristics which, in isolation or in combination with conduct of the companies operating on the market concerned, fundamentally change the competitive process, leading to sudden
and radical decreases in competition preventing markets from self-correcting. Such emerging market failures cannot be tackled on the basis of the existing EU competition rules. Therefore, the specific policy objective is to allow identifying and addressing such emerging market failures in digital markets on a case-by-case basis in a timely and effective manner to ensure that these markets remain contestable and competitive. This will contribute to digital markets delivering low prices, better quality, as well as more choice and innovation to the benefit of European consumers.

4.2.2.2. Ensure contestable and competitive markets by addressing existing market failures in digital markets on a case-by-case basis

139. As explained in Section 2.6.2, certain markets may not be functioning well and delivering competitive outcomes due to their structure. Such existing market failures cannot be tackled or addressed in the most effective manner on the basis of the existing EU competition rules. Therefore, the specific policy objective is to allow identifying and addressing such existing market failures in digital markets on a case-by-case basis in a timely and effective manner to ensure that these markets remain contestable and competitive. This will contribute to digital markets delivering low prices, better quality, as well as more choice and innovation to the benefit of European consumers.

4.3. How do the objectives link to the problems identified?

140. The figure below shows how different objectives are linked with the problems and the underlying problem drivers identified in Section 2. It also shows that all five specific objectives contribute to achieving the general objective of ensuring the proper functioning of the internal market by promoting effective competition in digital markets and in particular a fair and contestable online platform environment.
5. WHAT ARE THE AVAILABLE POLICY OPTIONS?

5.1. High-level options

5.1.1. High-level option 1: No change to the current regulatory framework

141. Under this policy option the current regulatory framework would not change.

142. This means that the Commission continues vigorous competition enforcement in digital markets under the existing EU competition law framework, and the existing EU rules (outlined in Section 2.3) continue to apply. Competition enforcement by the Commission includes making full use of the existing tools within this framework, such as sector inquiries, interim measures and adopting more prescriptive or restorative remedies compared to past cases, when appropriate. In this scenario, the ongoing reviews of existing legislation (horizontal and vertical agreements), as well as the evaluation of the Market Definition Notice will continue as planned. However, as explained in Section 2.3.1, the existing EU competition rules cannot tackle or address the problem drivers for market failures in digital markets in the most effective manner.

143. The other applicable EU rules include the P2B regulation, the GDPR and EU consumer law. As described in Section 2.3.2, the P2B regulation does not address issues deriving from the concentration of economic power and unfair business practices of a limited number of very large gatekeeper platforms, nor does it address emerging and existing market failures in digital markets more broadly. The GDPR covers business-to-citizen and government-to-
citizen interactions, rather than commercial and competition related issues. The provisions of EU consumer law are not specific to online platforms or digital markets, and do not deal with the unfair business practices of gatekeeper platforms nor with emerging and existing market failures in digital markets.

144. It follows that this option cannot tackle or address in the most effective manner the problem divers identified and thus cannot achieve the related specific objectives.

5.1.2. High-level option 2: Separate legislative instruments

145. Under this policy option, the Commission would establish two separate legislative instruments to address the problems outlined in Section 2.2, which are routed in the inherent features of digital markets, as described in Section 2.1, namely (i) the weak contestability and identified unfair business practices of gatekeeper platforms, and (ii) emerging and existing market failures in digital markets.

146. Under this policy option, one legislative instrument would focus on large gatekeeper platforms. It would impose on them a clearly defined set of prohibitions and obligations with two aims: 1) to enhance the contestability of the markets on which these large gatekeepers operate (through provisions such as mandating data-portability); and 2) to ban identified unfair business practices (such as self-preferential display, ranking and rating) of these gatekeepers.

147. A separate legislative instrument would enact a competition-based market investigation regime for digital markets that complements the existing competition law toolbox by preventing and addressing market failures through suitable and proportionate market-specific remedies with a view to ensuring contestable and competitive markets. This would allow the Commission to identify and remedy market failures that cannot be tackled or addressed in the most effective manner under the existing EU competition rules.

148. While this policy option could tackle the two sets of problems identified, it would not do so in the most effective manner. In fact, one of the repeated requests of stakeholders during the two parallel public consultations was to ensure a coherent EU-level intervention where \textit{ex ante} rules for gatekeeper platforms and competition-based market investigation powers would complement each other.\textsuperscript{155}

149. This option could not fully guarantee this coherence between the two legal instruments and could not effectively ensure the synergies and complementarity between them. In particular, this option would not allow establishing an effective feedback mechanism between the two instruments which would ensure establishing a coherent enforcement practice. Enacting two instruments could even lead to inconsistencies in how to achieve the most effective outcome to ensure the proper functioning of the internal market.

5.1.3. High-level option 3: A single legislative instrument

150. Under this policy option, one single legal act would combine the measures addressing the issues identified in Sections 2.2.1.1 and 2.2.1.2 with regard to gatekeeper platforms (as
described in Section 5.2) and the establishment of a competition-based market investigation regime (as described in Section 5.3) aimed at preventing and addressing market failures in digital markets that are not or not fully addressed by the aforementioned measures.

151. This option would overcome the inefficiencies identified in the high-level option 2 and would ensure a holistic approach with two complementary and mutually reinforcing pillars.

152. **Pillar I** of the single legislative act would consist of two parts. The first part would contain prohibitions and obligations aimed at protecting dependent business users whose services are intermediated by large gatekeeper platforms against already identified and clearly defined unfair practices and mitigate commercial imbalances. These prohibitions and obligations would provide an immediate and cross-market solution to tackle the identified unfair practices.

153. The second part would contain prohibitions and obligations aimed at enhancing the contestability of markets characterised by large gatekeeper platforms through measures focusing on promoting consumer switching, as well as mitigating network effects in order to promote choice and innovation. These general obligations are targeting certain already identifiable key elements that affect the contestability of markets on which large gatekeepers operate and will reduce the risk of emerging market failures, while mitigating the existing ones. The measures promoting contestability would reduce the risk of market failures and mitigate the existing ones in markets characterised by large gatekeeper platforms.

154. **Pillar II** of the single legislative act would establish a competition-based market investigation regime with appropriate remedy powers for digital markets, which, in combination with continued vigorous enforcement under the existing EU competition rules, will allow addressing emerging and existing market failures in the dynamically changing digital environment beyond the already identified issues in markets characterised by large gatekeeper platforms. It will also ensure keeping the gatekeeper rules future-proof through an appropriate feedback mechanism by which the competition-based market investigation regime would contribute to enhancing Pillar I. Inversely, experience in the implementation of the specific pre-identified obligations for gatekeepers could point to areas meriting a competition-based market investigation.
155. In conclusion, high-level option 3 ensures the most efficient and effective way to achieve the objective.

5.2. Policy options under Pillar I

5.2.1. Link to related initiatives

156. In parallel to this initiative, the Commission is also proposing rules on platform responsibility under the DSA, when it comes to the issue of illegal third-party content, goods, or services intermediated by platforms. Those issues relate to the supply of digital services across borders in the internal market and are not directly related to notions of bottleneck power or unfair business practices, nor to contestability objectives under the present initiative. While the preferred option under that initiative also defines an asymmetric regime with a ‘large platform’ regime, the intervention logic is not based on economic gatekeeper power, but rather on the ‘public square’ nature of intermediation platforms.

5.2.2. Description of the retained policy options

5.2.2.1. Option I.A: Ex ante rules on self-executing prohibitions (‘blacklist’) and obligations (‘whitelist’) concerning clearly defined unfair practices by gatekeeper platforms

157. This option would provide a new ex ante regulatory framework, which would apply to the ‘core platform services’ of gatekeeper platforms. Based on the characteristics of these services as well as of the concentrated nature of the markets in which they intervene, the core platform services in scope would be: (i) online intermediation services (incl. esp. market places, app stores and social networks and their advertising services), (ii) online search engines (and their advertising services), (iii) operating systems and (iv) cloud services.
158. The new framework would not replace, but rather complement the horizontally applicable provisions of the P2B Regulation, which would continue to apply to all online intermediation services and online search engines, not merely those with a gatekeeper role.

159. To enable an accurate identification of the gatekeeper platforms and provide legal certainty for market operators, the new framework would lay down criteria based on which a large online platform provider and its services would be designated as a gatekeeper platform by the competent EU regulatory body. Such criteria would reflect the problem drivers. First, the market position and bargaining power held by certain core platform services would be captured by size and dependency criteria. Second, the weak inter-platform competition that results from such core platform services having become entrenched would be captured by a durability criterion. These criteria would translate into mainly quantitative and some qualitative parameters to be applied under two thresholds.

160. A primary threshold would set a high bar of exclusively quantitative parameters above which companies and their services would automatically be designated gatekeeper platforms. The use of quantitative parameters only will provide legal certainty and expedite the designation process. These parameters could include EEA turnover (at the group-level of the companies controlling the platform), number of monthly active EU users (separately for each of the relevant platform services in scope), number of EU business users using the platform service, as well as additional parameters reflecting the durability criterion (e.g. average time spent by consumers and EEA turnover derived from digital advertising, stability and growth of the global and EU user bases). A platform meeting the criteria under the first threshold would automatically be considered as gatekeeper and the designation by the regulatory body as gatekeeper would be declaratory, given that the parameters are quantitative.

161. A secondary threshold would allow the competent regulatory body to designate additional, large online platforms and their services that fall short of the very high bar set by the primary threshold but that nonetheless operate large core platform services that exhibit significant dependencies, which are moreover entrenched. This designation would rely on some qualitative parameters (e.g. data advantage; vertical integration; level of innovative entry) in addition to quantitative ones. Importantly, online platforms falling below the secondary threshold would be automatically excluded from the scope of the new regulatory framework. This automatic exclusion will further add to providing legal certainty to market operators. This system would be complemented by a requirement for large online platforms to notify a limited set of data corresponding to the scoping parameters.

162. Once designated as gatekeeper platforms, platforms (and their services in scope) would have to comply with clearly defined self-executing prohibitions (‘blacklist’) and positive obligations (‘whitelist’) relating to identified unfair practices as further explained below. These rules would apply irrespective of the technology used to provide the services (e.g., desktop, mobile or voice assistant technology). These prohibitions and obligations would apply to unfair business practices identified through law enforcement experience, feedback to the OPC, input from the Impact Assessment study and targeted submissions by the stakeholders.
In relation to such self-executing prohibitions and obligations, the task of the competent regulatory body would be to ensure compliance with the rules without any substantive assessment of the practice in question.

These self-executing prohibitions and obligations under the new framework would address the factors and practices concerning market contestability (Section 2.51) and would address identified unfair practices towards business users (Section 2.5.2).

As regards the objective of facilitating contestability, possible rules could include prohibitions on gatekeeper platforms from (i) restricting business users to offer the same goods and services to consumers under different conditions through other platforms than through the gatekeeper’s own platform or services; (ii) restricting business users from promoting on the gatekeeper’s platform their offers for goods or services and from concluding contracts with consumers for the provision of these goods or services outside of the gatekeeper’s platform or services (‘anti-steering’); (iii) restricting the installation of third party applications or application stores through channels that are different from the gatekeeper’s platform or service (‘side-loading’); (iv) requiring users to subscribe to one of its services as a condition to access, sign up or register to the platform; or (v) automatically signing users in to more than one of a gatekeeper’s service other than by an opt-in option for each of these individual services. The aforementioned practices restrict the ability of their business users to use equally valid alternatives when accessing gatekeeper platforms’ services or platform, to offer products or services to consumers or. In addition, some of these practices are unfair as they require users to accept services they do not really want or prevent them from refusing conditions of access to services that are not necessary for the provision of these services.

As regards the objective of tackling identified unfair practices, a list of such self-executing prohibitions and obligations addressed to gatekeeper platforms would include different types of unfair practices, such as unfair data related practices, unfair self-preferencing practices and unfair practices concerning conditions of access to gatekeeper platforms’ services (see also Section 2.5.2).

As regards unfair data related practices, the new rules would for example ban gatekeeper platforms from (i) using non-publicly available, aggregated or non-aggregated data generated, inferred from or collected through the commercial activities of business users of the gatekeeper platform for the platform’s own consumer-facing commercial activities; or (ii) using data received from business users through the provision of advertising services for any other purpose than these advertising service. Another rule could be (iii) an obligation on a gatekeeper platform to provide users access to their own data that is generated by using the platform and allow them to transfer that data. These practices are considered particularly unfair, since they allow gatekeeper platforms to unfairly benefit, vis-à-vis dependent business users, from data they obtain due to their dual role, and to undermine the level playing field and ability of business users to operate on the markets concerned.

As regards unfair self-preferencing practices, the new rules would for example ban gatekeeper platforms from applying preferential display/ranking in online search engines or online
intermediation services. These practices by gatekeeper platforms are considered particularly unfair in an imbalanced commercial relationship, since they unfairly favour gatekeeper platforms’ own platform or services and restrict the ability of their business users to directly engage with their consumers in view of more targeted and commercially more attractive offers.

169. The objective of these self-executing prohibitions and obligations is to address unfair practices and enhance contestability, by ensuring a more level playing field between gatekeeper platforms and protecting the weaker business partner in commercial relationships with a gatekeeper platform.

170. For all self-executing prohibitions and obligations covered by the new framework, gatekeeper platforms would be allowed to provide limited justifications, on general, non-economic considerations (e.g. public morality, public policy or public security). Such justifications would not cover, or seek to replicate, economic justifications for a specific type of conduct as known and applied under EU competition rules.

171. Finally, this option would involve implementation, supervision and enforcement at the EU level by the Commission as the competent regulatory body. Given the pan-European reach of the targeted companies, a decentralised enforcement model does not seem to be a conceivable option. However, to integrate the national expertise in the platform economy, the initiative would envisage that the Commission consults a ‘network of regulators’ before taking decisions (e.g. on non-compliance; fines).

172. To facilitate implementation, supervision and enforcement by the Commission as the competent regulatory body, the new rules will also envisage that gatekeeper platforms would provide to the Commission any information that is necessary to ensure compliance with the rules and enable it to continuously monitor market developments. Furthermore, the rules would also envisage that gatekeeper platforms appoint ‘platform compliance officers’, which would serve as gatekeepers’ internal and external contact point for the implementation of the new rules and obligations.

5.2.2.2. Option I.B: Ex ante rules on prohibitions and obligations concerning clearly defined unfair practices by gatekeeper platforms (‘greylist’)

173. This option would build on the previous option I.A of laying down clearly defined self-executing prohibitions and obligations applicable to designated gatekeeper platforms.

174. Beyond the aforementioned self-executing prohibitions and obligations, this option would in addition define a closed list of obligations and prohibitions for a further set of identified unfair practices, which would however require an intervention by the competent regulatory body in their concrete application (‘greylist’). This closed list of prohibitions and obligations under the new framework would equally address the factors and practices that limit market contestability (Section 2.5.1) and would address identified unfair practices towards business users (Section 2.5.2). As regards the former, a greylist would include obligations concerning
conditions of data access, portability and interoperability. As regards the latter, the grey list would aim at ensuring fair and non-discriminatory access to gatekeeper platforms’ services and platforms.

175. In relation to the objective of facilitating contestability, the new rules would include data-related obligations on gatekeeper platforms to (i) take appropriate and reasonable measures to enable the business users and consumers of their services to use any other service by means of providing continuous portability of personal and non-personal data and appropriate forms of interoperability or (ii) interoperate with or allow access to third-party ancillary services at the request of its business users or third party service providers where the gatekeeper provides ancillary services to its online intermediation services (e.g. data analysis services, payment). These obligations are considered particularly important to enable users to use equally valid alternatives when accessing the gatekeeper platforms’ services. In the absence of tackling such practices, users would be significantly limited in their ability to multi-home and/or use alternative platforms or services. This could consequently lead to the unfair exploitation of users and undermine the contestability of the platform markets concerned.

176. As regards the objective of tackling unfair practices by gatekeeper platforms, the new rules would include obligations to ensure conditions of fair and non-discriminatory access to gatekeeper platforms’ services and platforms. Such obligations would include a prohibition of, for example, unfair or discriminatory pricing, or other conditions, for the access to gatekeepers’ platform or services. Such unfair practices concerning the access to gatekeeper platforms’ services are considered particularly unfair since they would allow gatekeeper platforms to extract excessive value from their commercial relationship with dependent users, which would not be possible in a more balanced commercial relationship.

177. The required intervention by the competent regulator for applying the grey list would take two different forms:

178. First, some of the clearly defined obligations would still require an implementation-step, whereby the regulatory body would explain how one or more of the obligations apply to the specific gatekeeper platform. For example, it would be for the competent regulatory body to define appropriate and reasonable technical and contractual measures that the gatekeeper platform would need to take to enable the business users and consumers of their platform or services to use any other platform or service (i.e. to multi-home). Another example is an obligation on gatekeeper platforms to provide non-discriminatory interconnection and interoperability between their service and other related services. In this case, it would again be for the competent regulatory body to define appropriate and reasonable technical and contractual measures to ensure that interoperation.

179. Second, some of the clearly defined obligations contain an explicit requirement to act fairly/not to act unfairly and therefore will require a fairness assessment in their application to the specific case. For example, it would be for the competent regulatory authority to assess and establish the facts of a concrete case when gatekeeper platforms’ pricing behaviour could be considered unfair and determine how such unfairness should be addressed. In another
example, it would be for the competent regulatory body to assess and establish in a concrete
case whether gatekeeper platforms give access to the platform on fair terms. The fairness
assessment pursues different objectives from competition law and as such will not be carried
out pursuant to the EU competition rules. If such unfairness would be confirmed in the
specific case, it would be for the competent regulatory body to determine measures for
addressing it.

180. Similarly to option I.A, also under this option it would be the Commission who would be
responsible for the implementation, supervision and enforcement of the new framework.
Equally, to integrate national expertise in the platform economy, this option would also
envisage that the Commission consults a ‘network of regulators’ before taking decisions (e.g.
non-compliance; tailoring of obligations; fines).

5.2.3. Policy options discarded at an earlier stage.

181. As indicated in the IIA, an option of amending the P2B Regulation was considered. Further
horizontal rules could be established for all 10 000 online intermediation services and search
engines that are currently falling within the scope of the P2B Regulation. This could cover
prescriptive rules on different specific practices that are currently addressed by transparency
obligations and beyond.

182. However, such an option would target all platforms. It is therefore in mismatch to the
problems and its drivers, which relate to the subset of very large gatekeepers. Imposing
stringent measures horizontally would be disproportionate and have a negative impact on
innovation and competition in the online platform space. Changing the scope of P2B
Regulation so that only large gatekeepers are subject to regulation is not a conceivable way
forward since it would eliminate the beneficial impact of its fairness and transparency rules
addressed to non-gatekeeper platforms.

183. Furthermore, at the IIA stage, an option was considered which would empower a regulatory
body to collect information from large online platforms acting as gatekeepers, supported by
enforcement powers in case of refusal to supply this information. The purpose would be to
better inform the implementation of the existing legal framework by gaining, for example,
进一步 insights into gatekeepers their business practices and their impact on these platforms’
users and consumers, scope of data gathering, treatment of their own downstream operations
compared with those of third parties and indicators of the outcomes resulting from these
practices. However, this option would only improve the understanding of the issues at stake. It
may be expected to have some reputational lever, but that would be insufficient to address the
problems or affect their drivers, which are already well identified and circumscribed.

5.3. Policy options under Pillar II

184. In order to prevent emerging and address existing market failures in digital markets (described
in Section 2.6), the Commission has considered two main policy options to frame an
appropriate competition-based market investigation regime. The two market investigation
regimes considered have a fundamentally different underlying rationale as described below.
5.3.1. Option II.A: A conduct-focused dominance-based market investigation regime

185. This option would allow the Commission to address competition concerns arising from unilateral conduct by dominant companies without any prior finding of an infringement pursuant to Article 102 TFEU.\(^6\) This regime would require the Commission to establish dominance of a company in a relevant market before assessing whether there is an emerging or existing market failure on a market characterised by the presence of a dominant company. Following a thorough market investigation, and subject to a clear legal test to identify an emerging or existing market failure, it would allow the Commission to impose appropriate and proportionate remedies addressing the conduct of the dominant company without any finding of an infringement of the existing EU competition rules. It follows that it would not involve any fines or rights to launch damage claims. The Commission could also recommend legislative action to improve the functioning of the market concerned.

5.3.2. Option II.B: A market structure-based market investigation regime

186. This option would allow the Commission to identify and remedy market failures that cannot be tackled or addressed in the most effective manner under the existing EU competition rules. Thus, unlike Option II.A, this regime would not focus on any specific company, but rather on any market suffering from emerging or existing market failures. This option would therefore consist in establishing a competition-based market investigation regime similar to already existing and tested market investigation instruments of this kind in other jurisdictions such as the United Kingdom, Iceland, Greece, South Africa and Mexico. This market investigation regime would be based on a clear and predictable legal test allowing the Commission to intervene with appropriate and proportionate remedies after having established on the basis of a thorough market investigation that emerging or existing market failures prevent a given market from functioning properly, irrespective of the conduct of the undertakings operating on that market.

187. Under this option, the Commission would be competent not only to remedy the conduct of specific companies, but also to impose appropriate and proportionate market-wide remedies, after having mapped all features of a market in order to establish whether there is an emerging or existing market failure on the market or the markets concerned (where the relevant features exist in more than one relevant market).

188. As under the previous option, there would be no finding of an infringement, no fines and no damage claims. The Commission could also recommend legislative action to improve the functioning of the market concerned.

5.3.3. Sub-options II.C and II.D – Scope of the market investigation regime

189. Irrespective of whether the market investigation regime is conduct-focused and dominance-based or rather market-structure based, the question of its scope can result in two further sub-options.
**a) Sub-option II.C: Market investigation regime with a digital scope**

190. Under this sub-option, the market investigation regime would allow preventing emerging and addressing existing market failures in digital markets. Digital markets would be identified on the basis of relevant criteria, such as the fact that products or services are offered over the internet, including products connected to the internet.

**b) Sub-option II.D: Market investigation regime with a horizontal scope**

191. Under this sub-option, similarly to the existing EU competition rules, the market investigation regime would apply beyond digital markets, and allow preventing emerging and addressing existing market failures in all markets of the economy. This option would therefore result in a market investigation regime with horizontal scope.

6. **WHAT ARE THE IMPACTS OF THE POLICY OPTIONS?**

6.1. **What are the impacts of the policy options under Pillar I?**

192. This section presents the main impacts of the policy options as compared to the baseline with the aim of identifying proportionate measures.

193. The categories of stakeholders which would be affected, directly or indirectly, by the retained policy options are: platforms (in scope and out of scope), business users depending on platforms (e.g. hotels), business users competing with platforms (e.g. another platform), competitors (e.g. innovative entrants), consumers, regulatory authorities. Impacts for these stakeholder categories have been assessed as completely as possible in the following subsections covering the internal market, growth, innovation, competition, platforms, business users, SMEs, consumers and regulatory authorities.

194. To set the background, among respondents who replied to the relevant question in the OPC, 91% agree that there is a need to consider dedicated regulatory rules to address negative societal and economic effects of gatekeeper power of gatekeeper platforms. This view is supported by many targeted submissions by different groups of stakeholders, such as SME platforms and their associations, telecom operators and their associations as well by national regulatory authorities in different sectors (e.g. electronic communication services).

195. For the impacts developed in this section see also Annex 3, which specifies in detail who will be affected by the preferred option and how.

6.1.1. **Internal market**

196. Preventing fragmentation of the internal market is one of the most important policy objectives enshrined in the Treaties of the EU and preserving the cross-border nature of the platform economy contributes to this objective. A 2016 European Commission Communication on the opportunities and challenges of online platforms for the Digital Single Market stresses the pivotal role of online platforms in the European single market. Services and products such as search engines, price comparison websites, online marketplaces and creative content outlets
offer strong links to the rest of the economy. One million EU companies in Europe use online platforms to trade goods and services, and more than 50% of these are SMEs. The report estimates a turnover of about EUR 602 billion for the European B2C e-commerce sector, growing at almost 14% per year.  

Christensen et al (2018) estimate, using the RHOMOLO model, that implementing the third pillar of the Investment Plan for Europe, including efficiency gains from the Digital Single Market, would contribute to a 1.5% increase in GDP per year until 2030 and create between 1.0 and 1.4 million jobs. In particular, the impact of a more efficient Digital Single Market ranges from 0.44 to 0.82% changes in GDP and between 307 and 561 additional FTEs.

Option I.A would already allow some aligning of platform-related rules across the EU through horizontal measures. Option I.A leaves scope however, for a quite a number of unfair business practices to remain unaddressed or left to treatment at national level, which raises a risk of fragmentation. Option I.B would capture a complete scope of identified unfair practices by gatekeeper platforms that would be treated in a harmonised way across the EU. Due to enforcement at EU level foreseen under both options, also the implementation and enforcement would be coherent across all Member States, thus fostering the Single Market for digital services.

6.1.2. Growth and trade

The platform economy contributes heavily to the European economy as revealed by its size and is expected to continue to grow steadily. Traffic share is one of the most important proxies of the sector. The top 50 online platforms represent 60% of the traffic share in Europe reaching revenues for about EUR 276 billion in 2018 and employing almost 600 000 people.

The European market of online platforms makes a significant contribution to GDP and the European economy as a whole. Revenues of the sector in Germany for instance reached EUR 33 billion in 2015, compared to EUR 320 billion worldwide. Similarly, the top 13 vloggers of one of the largest platforms earned together about USD 54 million which is assumed to end up as consumption or investment in the national GDP. This shows the relative size of the sector in the economy.

As explained in the problem definition (Section 2) gatekeepers’ position is difficult to contest due to the features of digital markets as well as due to unfair business practices by gatekeeper platforms. In terms of the total potential scale of the macroeconomic impacts associated with policy options to reduce entry barriers, as mentioned in Section 6.2.1, one can observe that the B2C e-commerce turnover was growing at an average pace of 13% between 2014 and 2019 with turnover forecasted to hit EUR 621 billion in 2019 and is set to be worth EUR 717 billion in 2020. This sector is expected to increase in value by around 14% per year.

Addressing gatekeepers’ unfair business practices limits their chilling effect on sales. Business users argue that such unfair practices (e.g. pretended privacy considerations, limitation to data access, etc.) would lead to up to 15% loss in their sales. Both options and B in particular would reinforce trust in the platform business environment since it foresees an
adaptable framework, based both on a clear set of obligations/prohibitions and a flexible greylist which might require an assessment of the applicability of the conducts to the specific case.

203. Importantly, competitive entrants contribute to growth in the digital sphere; prohibitions and/or obligations under Option I.B in particular – e.g. data access or interoperability - can allow entrants to grow and compete effectively. Given that consumer trust in gatekeepers is essential, no prohibition and/or obligation under Options A or B should lower standards of security or privacy. Option I.A rules (clearly defined self-executing obligations and prohibitions) for gatekeepers would improve business environment but would not address in depth issues related to some clearly defined unfair business practices which might require competent regulatory body to tailor implementation of a clearly defined obligation or establish by means of a fairness assessment how a given prohibition and/or obligation should be tailored to a specific gatekeeper platform. Option I.B would allow for continuous monitoring and gradual/timely redress of unfair business practices and weak market contestability, thus contributing to a more competitive platform ecosystem.

204. Building on a clear set of self-executing prohibitions and obligations and tackling clearly defined unfair practices through prohibitions and/or obligations that would require tailoring of these measures to a given gatekeeper platform, Option I.B would provide an adequate solution to the problems identified in the platform economy and would free its growth potential.

205. As already explained in the recent P2B impact assessment, trade intermediated through online platforms is expected to follow an upward trend as most consumers opt for platforms when purchasing goods and services online\(^\text{170}\). In addition, the COVID-19 crisis accelerated the shift to online retail at an unprecedented pace pointing to the importance of the online platform economy. Usage of digital devices has increased significantly during the COVID pandemic, which is likely to increase the relative importance of online platforms compared with the off-line world. Specifically, following the lockdown, one global survey found that consumers spent more time on social media and mobile applications (cited by 47% and 36% respectively).\(^\text{171}\)

206. Cross-border ecommerce in Europe was worth EUR 143 billion in 2019 (without travel). And 59% of this market, EUR 84 billion, is generated by online marketplaces. Marketplaces with European capital represent 11% of the market, an increase of 17% compared to one year before.\(^\text{172}\)

6.1.3. SMEs

207. The above figures show the growth potential for EU SMEs to reach consumers through platforms across the globe. SMEs in the context of the initiative under assessment could be both platforms and business users. Options A and B would have a positive impact on business users and SME platforms. Business users would benefit from a more balanced relationship with gatekeepers while SME platforms will have enhanced opportunities to scale up and compete with these gatekeepers. Options A and B foreseeing a comprehensive form of regulatory oversight would allow both categories of SMEs to benefit from a more innovative
and competitive business environment incentivising them to seize the digital single market opportunities and grow.

6.1.4. Competition and Innovation

208. There are strong links between patterns of competition and innovation. Preventing patents or pre-emptive activities, for instance, is one way to gain monopoly power and to increase barriers to entry. If this pattern is dominant, the pace of innovation in the long-run slows down.\textsuperscript{173} Although the sector of online platform invests heavily in innovation, smaller companies that depend on gatekeepers are discouraged to innovate so as not to compete with the gatekeeper. Hence, innovation that contributes to such dependency is incentivised.\textsuperscript{174}

209. The evidence shows the concentration of R&D investment among few dominant firms, and with a sustained trend. The trends in the investment in R&D depicted in our Impact Assessment study suggest a cluster of high volumes of investment among big five companies; and a widening gap across time between large and small companies. The Impact Assessment study shows that financial resources that could be invested in R&D are diverted to mergers and acquisitions, which results in higher market concentration instead of improvements in the quality and quantity of products and services for consumers. The pattern of innovation dedicated to competing 'for the market' has a detrimental effect on consumer choice and surplus.\textsuperscript{175}

210. Moreover, market concentration results in accumulation of cash-flow that is available for R&D investment and innovation or mergers & acquisitions. The Impact Assessment study illustrates the concentration of liquidity among the top five companies, each of them ranging between 10\% up to 30\%, while the remaining 17 companies are on average below 1\%. i Five companies accumulate 90\% of total free cash-flow (USD 90 612 million) that could be distributed among all 22 companies if competition were lower. This suggest that smaller companies may face some financial constraints, failing to attract venture capital to finance R&D projects, while large firms have enough own funds to embark on innovation.

211. \textbf{Option I.A} is expected to have a positive impact on innovation since it would create a fairer and more balanced business environment for business users and platforms; gatekeepers’ compliance costs may decrease to certain extent gatekeepers’ innovation ability but given gatekeepers’ financing capabilities, the regulation would not substantially affect their innovation capacity.

212. \textbf{Option I.B} would affect gatekeepers’ focus on innovation while addressing at the same issues encountered by gatekeepers’ business users, thus also creating a healthier business environment for other platforms contributing to restoring and/or installing competitive dynamics in the platform economy. Alternative platforms are currently facing a number of challenges e.g. for developing compelling offers (lack of data and consumers (due to strong network effects)), for accessing venture capital for competing services, portability, risk of leverage, etc. Also, business users (e.g. e-commerce merchants, service providers and application developers) face issues such as dependency, unfair contractual relations, unequal distribution of revenues/profits, exclusion. In light of this, the expectations for Option I.B are
to spur overall technological innovation in the platform markets (concentrated so far within a limited number of gatekeepers) to other market players, thus creating more competition and innovation to the ultimate benefit of consumers. Option I.B is in this respect estimated to yield direct benefits of many billions of Euros annually, in addition to improved innovation levels and entrepreneurship, which are complex to quantify in precise terms but likely equally if not more important in size and impact.

6.1.5. Competitiveness

213. As stressed in the EU Better Regulation Guidelines, the three components of competitiveness are cost/price, innovation and international competitiveness.\textsuperscript{176} The competitiveness of the online platform market is enhanced if the sector can produce good quality or original products/services, is undistorted and competitive, and is capable of innovation. This is pivotal when considering introducing remedies (policy options) that do not affect the competitiveness of the online platforms and incentivise competitive behaviours.

214. Carayannis et al (2014) shows that innovation and productivity are important drivers for competitiveness. It was shown above that dynamic markets with the right incentives to innovate foster total factor productivity and growth.\textsuperscript{177} A more efficient Digital Single Market with the right incentives to innovate should contribute to a more competitive EU digital economy. Yet, a 2019 BEUC report stresses that regulatory policy is pivotal to ensure regulatory costs and administrative burden are kept to a minimum while minimising data harvesting and handling, ensuring rights to privacy, encouraging fair behaviour between the most powerful platforms and ensuring consumer protection.\textsuperscript{178}

215. \textbf{Option I.A} would address a range of clearly identified harmful practices. \textbf{Option I.B} sets a clear regulatory framework imposing requirements on gatekeepers in relation to further clearly identified harmful practices and is able to assess specific unfair conducts and further target remedies (if needed) to the unfair conduct identified. Both therefore contributing to the overall competitiveness of enterprises depending on platforms

6.1.6. Platforms

216. First and foremost, it should be stressed that there is a wide ranging consensus across various operators with different sizes and business models in the tech community that there is a need for rules addressing the detrimental impact of gatekeepers’ practices and conduct.\textsuperscript{179}

217. Second, the targeted scope of both options imposing rules only on the largest gatekeeper platforms strongly contributes to the proportionality of any potentially resulting compliance costs.

218. Compliance costs under both options would largely substitute for the already high costs large platforms incur for complying with divergent regulatory measures gradually put in place in different Member States. It could be objectively argued that compliance costs under all options considered would be reasonable. Such costs would imply some additional legal compliance officers to check company policies against the new rules; some employees to
interface with the regulator and respond to requests for information. Given that compliance costs are expected to be limited, platforms under scope would have little incentive to pass on costs to consumers or to small business users (e.g. by limiting their access to a platform).

219. However, indirect (other than non-compliance) costs may be higher, as proposed measures are expected to have impact on gatekeeper platforms business models and potentially reduce their supra-normal profits. The impact of such changes on gatekeeper platforms is difficult to quantify. While some loss of revenue for gatekeeper platforms is expected, there are no indications that this would result in significantly higher fees and/or reduced quality for businesses and/or consumers. Consumers are at the core of platforms’ business strategy and platforms need, due to the market features discussed in Section 2.1, an important number of consumers in order to be able to (i) attract businesses (and vice versa) thus allowing online matching of offer and demand, and (ii) benefit from the virtual growth cycle characterising the platform economy.

220. The Options would moreover not be geared towards eliminating legitimate monetisation opportunities for gatekeeper platforms. They would aim to eliminate unfair behavior towards business users, thus rather enhancing trust in the platform business model. A set of measures that contribute to a more dynamic online platform ecosystem and more contestable market will particularly benefit SME online platforms who would face lower barriers when entering the market. It can therefore be expected that an increased contestability of the markets will, even with some changes to their business model due to the regulatory intervention, continue to incentivise gatekeeper platforms to bring innovative products to the market and compete for consumers and business users.

221. Moreover, the Impact Assessment study for this initiative estimates that gatekeeper platforms’ financial resources that could be invested in R&D are currently diverted to mergers and acquisitions (M&A), which results in higher market concentration instead of improvements in the quality and quantity of products and services for consumers. This pattern of innovation dedicated to competing 'for the market' has a detrimental effect on consumer choice and surplus. In addition, the positive impact on innovation stemming from higher market contestability is not limited only to diversion of money from M&A to R&D. Other expected indirect effects include an increase in entrepreneurship and creation of new products and solutions meeting consumers' needs rather than focused on exploiting a gatekeeping position. This may have a multiplicative effect increasing the size of the European single market, and hence, GDP and online cross-border trade. The Options are estimated to allow to recover to a large extent this opportunity cost. The present options would thus have a clearly positive effect on overall welfare.

6.1.7. Business users

222. Both third party business users (non-competing with the gatekeeper) and business users competing with the gatekeeper (e.g. a retailer selling on an e-commerce platform) are expected to significantly benefit from both options, as these are geared at preventing unfair practices that go to the detriment of gatekeepers’ business users and (potential) competitors,
while Option I.B would address a larger number of such practices. Given that the rules only aim to prevent unfair and harmful conduct, they should not hamper entry even by gatekeepers based on fair means of competition.

6.1.8. Employment

223. The impact of a more contestable online platform market on employment directly in the sector is ambiguous. On the one hand, if the ecosystem becomes more dynamic and grows further in size, in theory it could absorb additional FTEs. However, if companies decide to use the additional profits on R&D or labour-saving production processes, then the effect is negative. Hence, the direct effect on employment depends on how many new firms enter the market and challenge the gatekeepers, their ability to create new jobs, and the corresponding behaviour across the dominant platforms.

224. However, there is an indirect positive effect on other sectors of the economy, considering the links between the digital economy and growth. Above all, even under the assumption that no additional jobs would be created, given the millions of people employed in the sector and the millions of SMEs depending on online platforms to reach their consumers, taking adequate measures to ensure the proper functioning of the platform economy would safeguard these millions of jobs.

6.1.9. Consumers

225. This impact assessment supports the wide consensus on gatekeepers’ benefits for consumers in terms of choice, convenience and price of online products and services. However, due to the distorted intra-platform competition and the limited inter-platform competition, consumers have a reduced choice in terms of number of competitive platforms, informed choice decisions, and data/privacy-friendly services.

226. In addition, increased market concentration is detrimental for the consumer surplus as it results mainly in lower choice and higher prices/costs.

227. Although data to estimate the loss in consumer surplus is limited, there is some illustrative evidence. For example, if commission fee in large app store were halved from 30% to 15%, the average prices of apps in this app store could fall, which would increase consumer surplus up to EUR 490 million in the EU per year based on Statista data.

228. Moreover, if it is assumed that current expenditures on advertising per users are excessive and driven by high market concentration, such amounts could be a proxy for the consumer detriment. For example, in 2019 EUR 546 was spent in the UK on advertising per user. Given the total number of users in the platform economy is about 3.3 billion, the consumer surplus would reach EUR 1,803 billion, assuming the number of consumers does not change with the level of competition in the market.

229. The choices for consumers are limited by lock-in effects and lack of innovative alternatives that are restricted by the gatekeeper platform(s) unfair business practices. In the longer run, they risk experiencing lower quality and/or less innovative services and/or higher prices.
The initiative assessed under the present analysis aims at addressing these concerns with a view to ensuring optimal and secure consumers’ experience online.

230. **Options I.A and I.B** - Both options would indirectly contribute to safeguard value added for consumers and would contribute to ensuring greater respect of privacy and consumers’ interests. This would be achieved by contributing to (a) fairer competition on gatekeeper’s platform (intra-platform competition) and among platforms (inter-platform competition), (b) stronger contestability of the markets where gatekeepers are present and (c) better functioning of the internal market through enhanced regulatory oversight at EU level.

231. The question has arisen whether additional regulatory costs for gatekeeper platforms would not translate into higher prices for consumers. As explained above under 6.1.6., consumers are at the core of platforms’ business strategy of indirect network effects and feedback loops. Hence, gatekeepers would not risk changing their successful business model and losing consumers by setting prices for currently free services. Where gatekeepers’ services are zero-priced, consumers expect them to remain so. Therefore, setting a price for free gatekeepers’ services would be perceived by consumers differently as compared to increases in already existing (i.e. not zero) prices. Any attempt from gatekeepers to make users pay would imply the risk for them of reducing the attractiveness of their services and of encouraging users to switch to other platforms continuing to offer their services free of charge.

6.1.10. Regulatory Authorities

232. **Both Options** imply enforcement costs to be essentially incurred by the EU Commission. It may also imply costs for national regulatory authorities if they were to be consulted on the Commission’s enforcement decisions, but these costs would be limited due to the purely consultative, non-operational nature.

233. **Option I.B** would imply additional resources and costs for the Commission for acquiring information/data, monitoring, analysis and decision-taking under the greylist. They are estimated in the order of one Commission unit. However it is considered that these costs will largely outbalance the benefits of reducing the impact of practices which severely undermine the trading conditions for millions of business users and further entrench gatekeepers’ incontestable positions.

6.1.11. International trade

234. The vast majority of gatekeeper platforms are active globally and have their corporate headquarters outside the EU. Both Options can therefore have trade implications. However, such implications would be, if anything, political in nature, as both Options are consistent with the EU’s international obligations.

235. The Options are designed in such a way as to target any gatekeeper platform in an objective and non-discriminatory manner, therefore potentially also platforms headquartered in the EU, as long as they fulfil the objective criteria (see Section 5.2.2.1) for being designated a gatekeeper platform, as defined in the law. Importantly, the global gatekeeper platforms have
an important EU presence, including legal representation, large numbers of personnel and physical infrastructure including cloud, fulfilment or retail outlets. The objective scoping criteria applicable to both options target this EU presence and do not take into account the location of the corporate headquarters of the company in question. In doing so, the options will be future-proof and consistent with the EU’s international obligations, including non-discrimination under the General Agreement on Tariffs and Trade. The regulator will also be required to keep the designation of gatekeeper platforms up to date by identifying new players or by removing existing ones, including any that may have their corporate headquarters inside the EU.

236. It is also important to add that in the US, where many gatekeeper platforms have their headquarters, an intense debate is on-going about the need to regulate gatekeeper platforms\textsuperscript{188}, including antitrust hearings of Amazon, Apple, Facebook, and Google in the US Congress House of Representatives.\textsuperscript{189} In October 2020, the House of Representatives’ Committee on the Judiciary issued a Majority Staff Report in which a broad range of significant remedies are proposed, following a detailed assessment of the effects of number of unfair and anticompetitive practices by these platforms, in order to restore competition in digital markets.\textsuperscript{190} These remedies notably include structural separation, line of business restrictions as well as non-discrimination rules for dominant platforms including on access and pricing.

237. Similar calls for ex ante regulation of platforms are also voiced in other non-EU countries, such as Japan or Australia.\textsuperscript{191} These developments point to the global consensus that has been building on the need to complement competition policy with additional ex ante measures, limiting the risk of negative impacts of the new EU regime on international trade. What is more, the present initiative would establish a proportionate regulatory framework that should promote a fair and contestable online platform environment in the EU, one in which new platforms can emerge and scale-up, to the benefit of users around the globe, not just in the EU.

6.2. What are the impacts of the policy options under Pillar II?

238. This section summarises the main impacts of Options II.A and II.B described in Sections 5.3.1 and 5.3.2 as compared to the baseline scenario. Given that the impacts described below are valid for both a conduct-focused dominance-based market investigation regime (Option II.A) and a market structure-based the market investigation regime (Option II.B), the following sections refer simply to the impact of the market investigation regime. However, the magnitude of the impact of each option differs as explained in Section 6.2.10.

239. The assessment of the impact of these options is to a large extent qualitative as a quantification of the effects is only partially feasible. In fact, the assessment of the options depends on the number of cases investigated and the markets concerned. Given that these elements are very difficult to predict any quantification of the impacts would at any rate be subject to a large error margin. Nevertheless, whenever feasible some quantification is provided.
6.2.1. Internal market and competition

240. The adoption of a market investigation regime would complement the existing competition rules, thus leading to a more comprehensive competition-based enforcement toolkit that is able to address emerging and existing market failures in digital markets in a timely and effective manner. This would result in more open and competitive markets, where companies compete more fairly on their merits, and enable them to generate wealth and create jobs.

241. Several studies illustrate the importance of an efficient enforcement of competition law for ensuring competition on markets.\textsuperscript{192} Hylton and Deng (2007) examined how different antitrust systems affect the level of competition in individual countries and found that increasing the range of instruments available to competition authorities has a significant impact on the intensity of competition in the country's economy.\textsuperscript{193} One of the key objectives of the market investigation regime is to remove the features that give rise to barriers to entry and expansion for businesses. Boosting effective competition enforcement would mean that the internal market would be reinforced and be fairer for businesses and consumers.

242. A study requested by the IMCO committee of the European Parliament estimated the size of the EU electronic communications and services sector in 2019 at EUR 86.1 billion, data and AI at EUR 51.6 billion and e-commerce sector at EUR 14.6 billion.\textsuperscript{194} According to this study, interventions aiming at increasing the contestability of the digital sector, resulting in lower prices and greater consumer choice, productivity gains and innovation, would have a significant positive and growing contribution to achieve all of the potential benefits of a Digital Single Market.

6.2.2. Growth and productivity

243. The adoption of a market investigation regime would lead to a more comprehensive competition-based enforcement toolkit. More effective competition enforcement would ultimately increase productivity, which is a key driver for economic growth.

244. Several empirical studies confirm that the enforcement of competition law leads to more competition on markets, which in turn results in higher productivity in affected industries, which translates into economic growth\textsuperscript{195}, and that industries where there is a high level of competition experience statistically significant faster productivity and economic growth\textsuperscript{196}. Other studies also confirm the positive effects of competition on the productive efficiency of companies due to (i) ‘between-firms’ effect, by which better companies succeed while the worst ones fail and leave the market, and (ii) a within-firm effect by which companies in competitive environments are better managed.\textsuperscript{197}

245. It is difficult to estimate the impact on economic growth and productivity of the adoption of the market investigation regime since the proposed changes are of a nature that is not easily quantifiable. This is because a more comprehensive competition-based enforcement toolkit is likely to give rise to general benefits to the economy as a whole rather than to specific and quantifiable savings or benefits. In addition, the economic literature trying to measure those benefits is scarce.
Despite these obstacles, Buccirossi et al. (2011, 2013) developed a methodology to measure the impact that competition policy enforcement has on the economy. These authors estimated the impact of the level of competition enforcement, measured by the Competition Policy Indicators (‘CPIs’), on growth in Total Factor Productivity (‘TFP’). TFP growth has had an important impact on GDP in the EU. Comprehensive competition policy enforcement is expected to influence TFP growth because it helps keeping markets open, thereby ensuring that new, innovative and more productive firms are not foreclosed from markets, and at the same time putting pressure on incumbents to either improve or lose market share. Given that TFP growth in the EU as a whole has been below 1% for the last ten years, even if one assumes that the introduction of additional powers to the Commission results in a relatively small increase in the effectiveness of competition policy enforcement, that impact on TFP would be significant, translating into a significant boost to productivity. For instance, a 10% increase in CPI would lead to an increase of more than 40% in TFP growth.

Dutz and Hayri (1999) found a strong correlation between long-run GDP growth, and effective enforcement of competition rules, on the basis of a cross-section of 52 countries. Moreover, the positive effects on productivity growth are not only felt in the sectors where such increased competition takes place, but they also spread to downstream markets and throughout the economy. A JRC study from 2017 find that a 1% reduction in the fixed cost of entry in the overall market for product and services would result in an increase in GDP of 0.1%. Such effects are expected to increase further in the long-run fostered by the positive effect on TFP and employment.

The impact of the market investigation regime on economic growth and productivity is expected to be particularly relevant when addressing emerging and existing market failures in digital markets where, as explained in Section 2, market features can lead or contribute to preventing healthy competition between market players. This is even more the case today given the increasing weight of the digital economy (see Sections 2.4 and 2.7).

6.2.3. Innovation

The adoption of a market investigation regime would lead to a more comprehensive competition-based enforcement toolkit allowing businesses to compete more fairly on their merits. This incentivises them to innovate and offer a better range of higher quality products and services that meet consumers' expectations. Firms facing more competition from rivals innovate more than monopolies. Greater competition also drives efficiency in processes, technology and service.

According to Federico et al. (2019), a significant amount of innovation is driven by disruptive firms. By making its offer to customers attractive in a new way, a disruptive firm can destroy a great deal of incumbent profit while creating a large amount of consumer surplus. Competition enforcement precisely seeks to protect the competitive process by which disruptive firms challenge the status quo. Several empirical studies confirm that an increase in competition leads to a significant increase in research and development investment by neck-and-neck firms. Conversely, the view according to which market concentration or
large firm size is associated with a higher level of innovation is not supported by empirical evidence.\textsuperscript{207} Shapiro (2012) highlights the considerable empirical evidence that greater competition spurs innovation.\textsuperscript{208}

251. As explained in an UNCTAD report (2020),\textsuperscript{209} because digital markets show a particularly high speed of evolution, the ability to innovate, including through the adoption and innovative use of technologies, is likely to become a particularly important capability for firms and economies in the digital era.\textsuperscript{210} Adressing the market features impeding a more competitive environment in the digital markets is thus of particular relevance.

6.2.4. International trade

252. The adoption of a market investigation regime would lead to a more comprehensive competition-based enforcement toolkit and make EU markets more open, competitive and attractive to investors. Greater competition also enhances the ability of businesses to compete, both on their home markets and internationally. Borrell and Tolosa (2008) assessed the combined effect of competition and other policies, particularly open trade policies, concluding that competition law and policies aimed at opening trade reinforce each other and should be considered as complementary.\textsuperscript{211}

253. The promotion of a higher competitiveness of digital markets is of particular importance in increasing trade and investment flows. According to an UNCTAD report,\textsuperscript{212} digitalisation contributes significantly to increasing the scale, scope and speed of trade. ICT products are already a significant part of the global trade (in 2017 they are estimated to have reached USD 530 billion, representing 10% of total global trade in services).

254. Similarly to Pillar I, the market investigation regime, and in particular Option II.B which focus on market structure and not on particular businesses, would be designed in such a way that it would target any company active in a given digital market in an objective and non-discriminatory manner. In doing so, the market investigation regime would be future-proof and consistent with the EU’s international obligations, including the non-discrimination principle under the General Agreement on Tariffs and Trade.

6.2.5. Employment and inequality

255. The adoption of a market investigation regime would lead to a more comprehensive competition-based enforcement toolkit and would lead to greater competition on EU markets. An overview by the OECD of the main literature covering the links between competition and employment confirms that competition stimulates employment growth in the long term.\textsuperscript{213} The aggregate effect mainly results from a positive impact on TFP growth, which increases labour demand, and through aggregate demand, given that more competition lowers prices and therefore tends to increase real wages. This generates a virtuous circle of output and demand growth in the long run.\textsuperscript{214} Greater competition by stimulating economic growth, has also a beneficial effect on income equality.
256. In the short run, the response to increased competition can lead to an increase in unemployment, e.g. through process innovation that replaces labour intensive machinery with new machines to increase productivity at the cost of labour. However, econometric simulations of the effect of increased competition leading to redundancies in an industry demonstrate a return to a steady growth path with rising employment after 2 to 3 years. Benetatou et al (2020) found that CPI has a positive and statistically significant effect on labour productivity growth.

257. In relation to income, Ennis et al. (2017) attempted to calculate a rough measure of the short-run money transfer from poor to rich due to market power for 12 OECD economies and showed that, on average, for each dollar of monopoly profits, a total of USD 0.37 is transferred from the 90% poorest to the 10% richest. Ennis et al (2017) suggest that, in an average country, market power would increase by 17% the wealth of the best-off 10%. The results were similar to the results found by Ennis and Kim (2017), suggesting that 10% to 24% of the wealth of the best-off decile may be attributed to market power.

258. One important aspect to consider as regards the impact of the market investigation regime on employment is the growing importance of digital markets in job creation. According to an UNCTAD report, digital transformation has strongly contributed to job creation across the G20. Between 2006 and 2016, total employment in the G20 grew by 13%, a net gain of almost 127 million jobs with highly digital-intensive sectors contributing with 43% of these net job gains. Jobs in the ICT sector comprised 11.8% of total employment of the G20 countries, in 2017.

259. The Covid-19 crisis called for the adoption of new labour regulations favouring teleworking regimes. Digital services are of extreme importance as tools enabling teleworking regimes. Therefore, making these services more accessible is even more important today for a functional labour market.

6.2.6. Consumers

260. The adoption of a market investigation regime would lead to a more comprehensive competition-based enforcement toolkit and thus protect EU consumers from business practices that keep the prices of goods and services artificially high. This in turn would ensure that consumers have access to better quality, wider choice and innovative goods and services at affordable prices. Numerous studies confirm the benefits of competitive markets for consumers.

261. The CMA estimates the average direct financial benefit to UK consumers of its whole activity (which includes antitrust, merger control, consumer protection enforcement, as well as market studies and market investigations) and associated costs. For the period 2017 to 2019, the total estimated annual consumer benefit of its activities was GBP 1109 million against an average cost of GBP 76 million, yielding a ratio of direct benefits to costs of 14.6. A significant share of these consumer benefits relate to the CMA’s market investigations (i.e. GBP 820 million).
262. During the last 10 years of enforcement by the UK competition authority, the annual consumer benefits resulting from its market investigations ranged between GDP 345 million and GDP 887 million, corresponding to 0.02% to 0.05% of UK GDP. If one sizes this to the EU GDP level and converts it to current prices, annual EU consumer benefits would have the potential to range between EUR 2.7 and 6.3 billion (see Annex 3). However, it is not expected, at least during the first years of application, that the application of the market investigation regime would result in similar annual consumer benefits, given that the Commission would still have to build the expertise in applying this competition instrument. It is thus more relevant to use as a reference the average consumer benefit per market investigation, which sized to the EU GDP could be as high as EUR 2 - 2.5 billion.

263. One important aspect to consider as regards the potential consumer benefits of the market investigation regime is the growing importance of digital markets for consumers. According to the ‘Digital Economy and Society Index (DESI) 2020’, internet use has continued to increase year-on-year with 85% of Europeans surfing the internet at least once per week. Using the internet for listening to music, playing games or watching videos is still the most common activity (81% of individuals). Reading news online is the second most popular activity (72% of individuals), followed by e-commerce (71%), bank online (66%) and social networks (65%). According to Eurostat figures, more than 6 out of 10 consumers from the EU28 made online purchases in 2019, the highest proportion made purchases three to five times in a period of three months and bought goods or services for a total of between EUR 100 to EUR 499. Improving competition enforcement in digital markets is thus particularly relevant for the protection of European consumers.

6.2.7. Regulatory Authorities

264. The adoption of a market investigation regime would lead to a more comprehensive competition-based enforcement toolkit, which would make it better ‘value for money’. Removing gaps and limitations in the Commission’s means and instruments would enable a more effective competition enforcement, leading to more competition on markets.

265. The burden that would result for the Commission from the use of the market investigation regime in digital markets is low compared to the scale of the benefits in terms of a more effective competition enforcement and overall benefits for the economy, as set out notably in Section 6.2.2. The introduction of a market investigation regime would not bring about significant structural changes implying high costs, given that it would be implemented in the context of the existing competition law enforcement structures.

266. The main cost involved for the Commission would consist in the staff required for running the market investigations. Depending on the number of markets concerned and the complexity of the issues under investigation, under Option II.B, per investigation a total of approximately 10 to 15 full-time equivalents (‘FTEs’) would be required, while under Option II.B this number should be between 15 and 20 FTEs. These estimates are based on the staff requirements for more complex Commission antitrust investigations, which generally require between 10 and
15 FTEs. A market investigation regime, which focuses not only on the conduct of a dominant company but on market structure, would likely require a higher number of FTEs.

267. For the purpose of remedy design and monitoring, additional resources would be required. Per investigation, a minimum of 2 to 3 FTEs would be required during a period of approximately 5 years, depending on the complexity of the issues identified and the remedies required. Other additional costs of monitoring could be incurred, namely for external experts, but any estimate of those costs would be highly speculative without regard to the markets and market failures at stake. In this regard, it should be noted that a market investigation regime aimed at addressing emerging and existing market failures would generate expertise that would also create positive spill-over effects for remedy design in antitrust and merger cases. This would result in an increase in the ability of the Commission to enforce EU competition law more effectively in those fields, leading to more competition on the markets concerned. The gathered expertise could also be deployed to initiate or inform ongoing legislative proposals.

6.2.8. Businesses

268. The adoption of the market investigation regime would lead to a more comprehensive competition-based enforcement toolkit, which would result in more open and competitive markets where companies compete on their merits. As explained in the previous sections, this would allow businesses to benefit from higher productivity growth, and more incentives to innovate and to offer a broader range of high-quality products and services. This would also create the conditions to make European's markets more attractive to investors.

269. Businesses subject to a market investigation would face administrative costs when undertaking administrative activities needed to comply with obligations to provide information. They may also face compliance costs if remedies are imposed at the end of a market investigation.

270. There is scarce evidence available about the amount of administrative costs incurred in the context of competition enforcement. Baker (2003) indicates the average cost with an antitrust case to be around USD 2.5 million (covering filing fees, lawyers and economic consultants). This would be equivalent to around EUR 2.5 million at current prices. Neven (2006) discusses the relative importance of economic and legal fees gathered from the records of the Airtours case (1999). This case was litigated in court after the Commission prohibited the acquisition by Airtours of First Choice. Airtours succeeded in its appeal in the Court of First Instance (CFI) and the Commission was ordered to pay the cost that Airtours had incurred in the procedure. The fees claimed by Airtours added up to more than EUR 2.2 million, corresponding in the current value to EUR 2.7 million.

271. There are no reasons to believe that the administrative costs associated to an investigation under the market investigation regime would be higher than the ones estimated by the above studies in relation to antitrust investigations. Expected administrative costs to businesses would be at most of a magnitude of EUR 2.5 to 3 million per investigation. In case of smaller players the costs would be significantly lower as the information required would be proportional to the size of their businesses.
As concerns compliance costs, the Commission for each of the market investigations would assess the proportionality of the possible remedies. These costs are however not possible to quantify upfront as the requirements associated to any future intervention are now very speculative. It stands to reason that “these costs [would] be significantly lower than those that may arise to disadvantaged firms and, ultimately, consumers [if, in the absence of early intervention, the factors that favor concentration, partnered with consumer and/or firm conducts that merit investigation, indeed cause this concentration]”.\textsuperscript{232} A guiding example regarding the estimation of compliance costs may be provided by the UK’s Competition Commission, which “normally collect information from parties about the potential cost of implementing and complying with its remedies. In evaluating such information, the CC will bear in mind that it has less information than the parties have about how such potential costs have been estimated and that there might be incentives for parties to overstate the cost of those remedies that they do not support. The CC is likely to place most weight on estimates of implementation and compliance costs where parties have provided a clear explanation of how the estimate was reached, together with supporting evidence as to the assumptions used to derive those estimates.”\textsuperscript{233}

6.2.9. SMEs

In the particular case of SMEs, the adoption of a market investigation regime would lead to the creation of a more level playing field allowing SMEs to compete more fairly and grow throughout the internal market. In fact, by targeting the features of a market that give rise or contribute to market failures, an intervention under the market investigation regime would decrease barriers to entry and expansion for smaller innovative players.

In addition, access to digital markets allow SMEs to increase their productivity and reduce their costs. According to a study from OECD countries, in 2015 only 20% of SMEs engaged in sales through e-commerce, against 40% of large firms. This digital gap slows productivity growth and widens inequalities. More competitive digital markets resulting in more affordable services would allow SMEs an easier access to the digital technologies. Ultimately, given that SMEs are the bulk of many national economies, a massive adoption of digital technologies by them will generate a shift of aggregate productivity and welfare.\textsuperscript{234}

6.2.10. Summary of impacts

The two main options described in Sections 5.3.1 and 5.3.2 would lead to a more effective and coherent competition enforcement regime and thus to an increase in competition in the markets where the Commission decides to intervene. The main differences between the two main options in relation to the impact on the above-described parameters reside in the markets on which the Commission would be able to intervene. In particular, as explained in Section 7.2 below, the Commission would not be able to address under Option II.A most of the market failure scenarios identified, such as anticompetitive monopolisation, tacit collusion and common shareholdings. This implies that the impact on the parameters discussed in this section is expected to be significantly higher under Option II.B.
In relation to administrative and compliance costs for businesses, Option II.A would impose lower costs as it would imply an enforcement in less markets and remedies would only be enforced against dominant companies. Costs for the Commission would also be lower under Option II.A, but Option II.B would compensate this by allowing for more effective competition enforcement.

The magnitude of the impact would not differ significantly between Option II.C and Option II.D. As explained for each parameter in Sections 6.2.1 to 6.2.8, the digital economy is becoming more and more important as a driver of productivity and growth, trade and investment, innovation, employment and income distribution. It is also becoming increasingly relevant for consumers and SMEs. Moreover, although the emerging and existing market failures that the market investigation regime aims to address occur in all sectors, digital markets are particularly prone to the emergence of quasi-monopolistic market structures, as explained in Section 2.6. Therefore, also a market investigation regime with a horizontal scope is likely to focus on emerging and existing market failures in those markets.

7. HOW DO THE OPTIONS COMPARE?

This section assesses the effectiveness, efficiency, coherence and proportionality of the different policy options as compared to the baseline scenario. It does so first within each pillar discussed in Section 5 and then across the preferred options within each pillar.

7.1. How do the options under Pillar I compare?

This section assesses the effectiveness, efficiency and coherence of the different policy options as compared to the baseline scenario as explained above.

7.1.1. Effectiveness

Option I.A would tackle unfair practices on the basis of a well-defined self-executing prohibitions and obligations addressed to large gatekeepers with significant bottleneck power. This option would be partially effective in as much as such unfair practices can be clearly identified for the companies in scope and do not need specification in their implementation. Self-executing rules would be immediately applicable and thus have direct effects.

However, the effectiveness of this blacklist approach would also be limited by three factors: a series of unfair practices (‘grey list’) would not be captured, even though they too would constitute equally harmful unfair practices; the list established would essentially be ‘backward looking’ and be less future proof, as it would be based on past behaviours, while regular updating of the blacklist would be legally cumbersome.

This option would partially contribute to innovative entry, because a series of egregious blacklist practices that harm such entry would be prohibited, such as specific harmful forms of self-preferencing, or data related unfair practices. Consumer choice could also increase directly, notably requiring consumer portability provisions for gatekeepers, making it easier for companies to switch. Indirectly, consumer benefits would also derive from lower prices
for gatekeepers, although rules would need to be designed to avoid adverse effects on security and privacy, for instance.

283. **Option I.B** would be effective in curtaining a wider range of unfair practices than in the self-executing blacklist under Option I.A, since a ‘grey list’ would be added, which would lay down clearly defined and closed list of unfair practices that however require limited intervention by the competent regulatory body. This option would therefore capture wider range of unfair practices, be more flexible and therefore more future-proof than the one under the previous option. It would still provide a high degree of legal certainty through a clear signaling effect to the market. The need for intervention of the regulatory body does not significantly affect effectiveness, as it would be limited contextualisation in the clearly circumscribed frame of a specific provision.

284. The impact of Option I.B on innovation and consumer choices would be very similar than under the previous option. Option I.B also meets the objective of effective and coherent EU-wide oversight through the establishment of a single regulator at the EU level, in cooperation with a network of national authorities. This regulatory set-up would have information gathering powers that would help provide regulators with early information on potentially unfair practices.

### 7.1.2. Efficiency

285. The efficiency comparison is based on a cost-benefit estimate developed below, which compares the administrative costs associated with the different options and comparing the costs with the direct and indirect benefits in each case.

286. **Option I.A**: In addition to regulatory enforcement costs, the costs under this option should consider regulatory burden for gatekeepers while the main benefit would be a healthier and fairer business environment in terms of competition and innovation. As explained under Section 5.2.2.1, this option would require resources to enforce this measure as well as national regulators to respond to eventual consultations from the Commission.

287. **Option I.B**: As explained under Section 5.2.2.2, this option would equally require resources to enforce this measure as well as national regulators to respond to eventual consultations from the Commission. Given that the platform economy is related to a number of policy areas, enforcement costs would include coordination costs of national authorities and EU regulators (e.g. in case of data related practices that may require assistance by the data protection authorities when tailoring appropriate obligations). In terms of profits, while a quantitative estimate of profits under different options proves impossible to draw, it is an objective qualitative assessment to consider that the impact of putting in place an effective and proportionate regulation addressing dysfunctions in the platform economy would lead to a different profit distribution. Current excessive gatekeeper profits that could be extracted based on their grossly imbalanced bargaining power would be distributed to business users and consumers; hence, the more appropriate (effective but also proportionate) the regulatory measures, the more optimal the re-distribution of profit.
Based on benchmarks of similar practices within the Commission, networks and national authorities, the administrative costs for the Commission are estimated by an external study at EUR 8 million, while the compliance costs for market operators are expected to be between EUR 11.25 million and 12.5 million. The benefits of option I.A and I.B could include price reductions and associated increases in consumer welfare, as well as greater innovation potential amongst smaller businesses. Assuming that price reductions are passed onto consumers, the consumer surplus is estimated to increase by EUR 18-44 billion. In total, when the full potential of the platform economy is unlocked, it is expected that between EUR 43.7 billion and EUR 174.5 billion in opportunity cost over 10 years in comparison to the baseline scenario would be recovered.\(^{236}\)

### 7.1.3. Coherence

An assessment was carried out of the various policy options’ coherence with (a) the Commission’s digital strategy, (b) the DSA package and (c) other regulatory instruments.

#### 7.1.3.1. Coherence with the Digital Strategy

Both options are coherent with the Commission’s digital strategy in their contribution to ensuring a fair and competitive digital economy, one of the three main pillars of the policy orientation and objectives announced in the Communication ‘Shaping Europe's digital future’. Both would a coherent, effective and proportionate ex ante toolbox to address problems in the digital economy that currently cannot be tackled.

#### 7.1.3.2. Coherence with the DSA-package

Both options are coherent with and complementary to the proposal for the update of the e-Commerce Directive under the DSA-package. While the ECD review is a horizontal initiative focusing on the issues such as free provision of information society services in the Single Market, liability of online intermediaries for third party content or safety of users online, the present options are concerned with economic imbalances, unfair business practices by gatekeeper platforms and their negative consequences. To the extent that the other initiative contemplates an asymmetric approach which may impose stronger due diligence obligations on large online platforms, consistency will be ensured in defining the relevant criteria, while taking into account the different objectives of the initiatives.

#### 7.1.4. Coherence with other instruments

Both options align with other EU instruments, including with the Charter of Fundamental Rights, the General Data Protection Regulation, Consumer Law acquis and upcoming legislative proposals like the Data Act. The definitions to be used under both options are coherent with definitions used in EU existing legislation, in particular the P2B Regulation. With their scope targeted to gatekeeper platforms, they complement well the horizontal obligations for all platforms under that Regulation. Both complement competition law by addressing practices that either fall outside the existing EU competition rules, or cannot be effectively addressed by these rules. Both options would minimise the harmful structural
effects of these behaviours \textit{ex ante}, without limiting the EU’s ability to address the same behaviours \textit{ex post}. \textbf{Option I.B} would - while recognising the differences – align with the experiences from the targeted and tailor-made \textit{ex ante} regulation of specific sectors, including the rules applicable to electronic communication services.

\textbf{7.1.5. Proportionality and Subsidiarity}

293. \textbf{Option I.A} is proportionate since it allows achieving the objectives in a targeted manner imposing limited burden both on gatekeepers and national authorities. It would however leave uncovered some unfair practices that are equally harmful as the ones identified under the blacklist but may require a more tailored approach. It may hence underperform in terms of meeting the objectives effectively. This would call for potential Member States’ intervention to tackle those. Option I.A would thus leave greater room for action at national level but at the same time raise a risk of a regulatory fragmentation.

294. \textbf{Option I.B} allows achieving the objectives effectively since it sets a comprehensive \textit{ex ante} framework providing both for a list of self-executing obligations and prohibitions and a tailor-made approach through the greylist. At the same time, compliance cost for gatekeepers is reasonable thus allowing to safeguard the benefits they create for the internal market. Also, Option I.B is proportionate since it would also address the wider possible range of practices at EU-wide level while at the same time providing for the possibility of a tailored and contextualised application of the rules. Option I.B foresees cooperation with NCAs and with sectorial bodies.

\textbf{7.1.6. Conclusion}

\textbf{Table 1: Pillar I policy options comparison}

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295. \textbf{Option I.A} would be partially effective in curtail unfair gatekeepers’ practices, increasing innovation, consumer choice and better oversight. This option is efficient to the extent that irrespective of the compliance and enforcement costs it entails, it also allows creating rules for gatekeepers incentivizing them to put in place fairer trading practices. This option is coherent with other EU instruments.

296. \textbf{Option I.B} appears as the most apt to address not only current, but also future issues arising gradually in the quickly changing platform environment; it is hence fully effective in fulfilling the initiative’s objectives. It is also efficient since while entailing important regulatory and enforcement costs it allows achieving substantial benefits for businesses and consumers by redistributing incumbents’ supra-normal profits and creating healthier business environment.
Both options respect the subsidiarity principle. Proportionality of both options is ensured by targeting gatekeepers and the selection of clearly harmful practices only. Option I.B which achieves the objectives more effectively, and allows for proportionality considerations in the contextualisation and implementation of the greylist practices, and is therefore considered more proportionate than Option I.A.

Option I.B therefore emerges as the preferred option.

7.2. How do the options under Pillar II compare?

7.2.1. Effectiveness

Under Option II.A (i.e. the conduct and dominance-focused approach) the condition for intervention under the instrument, similarly to the existing Article 102 TFEU, is establishing dominance. In order to carry out such analysis, the competition authority in charge of enforcing the instrument has to, first, investigate and define the relevant markets and, second, establish who the players are on the market and identify their market position. Once dominance is established, the competition authority would focus its analyses on the conduct of the dominant company that may result in or contribute to emerging and existing market failures. Following the investigation the authority may take different measures, in particular imposing remedy on the target company.

Under Option II.B (i.e. market-structure-focused approach) the authority would first conduct a market investigation to map all relevant features of the market including (i) the structure of the market concerned or any aspect thereof; (ii) the conduct of persons supplying or acquiring goods or services who operate on that market, whether that conduct occurs in the same market or not; (iii) and the conduct relating to the market concerned of customers of any person who supplies or acquires goods or services. The features of a market that may be investigated include both structural and behavioural ones, including demand and supply-side considerations and consumer behaviour.

The market structure-based approach includes an investigation of markets where dominant companies are present to analyse whether there are market features leading or contributing to emerging and existing market failures. In many cases, anti-competitive conduct by a single firm may be associated with structural features of the market, for example barriers to entry or regulation and government policies, or conduct by customers.

Under the market-structure-based approach, the Commission would seek to achieve a ‘comprehensive solution’ designed to bring about a well-functioning market in the future. The market investigation regime would allow the Commission to take an appropriate course of action that may imply a complex package of different measures, such as (i) make non-binding recommendations to companies (e.g. proposing codes of conducts and best practices); (ii) inform and make recommendations/proposals to sectorial regulators; (iii) inform and make legislative recommendations; and (iv) impose appropriate and proportionate remedies on companies to deal with identified and demonstrated scenarios of emerging and existing market failures.
In order to achieve Specific Objective (1), i.e. preventing market failures, Option II.A would not be effective. In cases of an unlawful monopolisation, the dominance by nature cannot be demonstrated as it has not yet materialised. Under the conduct-focused dominance-based approach, parallel leveraging could also only be addressed when the company is dominant. In turn, under Option II.B, the Commission would be able to assess all scenarios of risk of market failures, by assessing whether the features of the market may lead to a risk of market failure, irrespective of the fact that there is not yet a dominant undertaking.

Achieving the Specific Objective (2), i.e. addressing market failures, Option II.A would not be as effective as Option II.B. This is because market failures are not always solely linked to a single dominant company. For example, several market scenarios identified as market failures, such as tacit collusion, the use of pricing algorithms, common shareholding commonly involve a multiplicity of non-dominant companies and could only be addressed under the structure-based approach. Similarly, some gatekeepers will often not yet reach the dominance threshold but their conduct might very well risk to cause market failures. Conversely, with the market-structure-focused approach the Commission could address all market failures, as it would investigate the features of a market, to identify whether they lead to any possible situation of lack of competition, not limited to those where there is a dominant player.

Among respondents to the OPC with a relevant knowledge there is a strong view that the market investigation regime should focus market failures, being applicable to all undertakings in a market, including non-dominant companies. The general view among NCAs with relevant experience is that the market investigation regime should depart from the traditional dominance concept and thus be applicable to all undertakings in a market, including dominant but also non-dominant companies. This is because a conduct-focused approach would fail to cover many important emerging and existing market failures that are not caused by dominant companies including gatekeeper scenarios where dominance cannot necessarily be established. Motta and Peitz (2020) “identify a wide set of theories of harm which may also include narrow oligopolies or markets that will likely move towards dominance if unchecked. Thus, a dominance-based competition tool would not address several forms of consumer harm that are due to competition problems. Therefore, [a conduct-focused, dominance-based] would in our opinion be inferior to a market structure-based competition tool”.

In relation to the sub-options on the scope, both Option II.C and Option II.D would be equally effective in addressing Specific Objective (1), i.e. preventing market failures and Specific Objective (2), i.e. addressing market failures, in digital markets.

Option D would also be applicable to non-digital markets, which are not directly part of the objectives of this initiative. In fact, respondents to the OPC indicated that emerging and existing market failures occur in all sectors and markets and highlighted that no sector is immune to (potential) market failures. At the same time, a high number of respondents who indicated that market failures can occur in all sectors and markets mainly pointed to digital examples. Respondents indicating that emerging or existing market failures mainly or solely occur in digital sectors/markets argued that the characteristics of the digital sector (e.g.
economies of scale and scope, data accumulation and dependency, network effects, lock-in, zero pricing) make digital markets particularly prone to the emergence of quasi-monopolistic market structures. Similarly, according to half of the responding NCAs, emerging and existing market failures may occur in all sectors/markets, whereas others argued that emerging and existing market failures may occur in some specific sectors/markets, including but not limited to digital sectors/markets. At the same time, NCAs suggested that digital markets are more prominently affected by emerging and existing market failures than other markets.

308. The European Consumer Organisation pointed out that competition law enforcement in digital markets, though important, has not been effective enough in dealing with all problems in these markets and consequently not able to remedy, let alone prevent, harm to consumers in a timely manner. Indeed, there is an extensive economic literature and numerous reports as explained in Section 2 describing the growth of digital markets and their particular characteristics that makes them prone to market failures, and where resources would be better focused at least at the initial stage of the launch of any new investigation regime. This emerging and shared view speaks for introducing the market investigation regime first in digital markets ensuring however via a review clause or other means that once the evaluation process described in Section 9 allows, the Commission may propose extending the scope of the investigation regime beyond digital markets.

7.2.2. Efficiency

309. **Option II.A** would have some, but limited value added in terms of efficiency as compared to the current competition law instrument under Article 102 TFEU. The main advantage of a dominance-based approach would be that the intervention would be based on a well-established competition law concept, i.e. dominance. At the same time, it has the disadvantage that the market investigation regime would not bring substantial value-added compared to the investigations under Article 102 TFEU. It would turn on establishing the dominance, which, apart from being subject to a burdensome and lengthy assessment, would not be able to tackle fully the specific objectives identified. More specifically, the Commission under the dominance-based approach would need to define the relevant markets in order to establish dominance before it can focus on the actual conducts. The regime by its non-incriminating nature could however potentially solicit a more cooperative attitude by the undertaking targeted by the investigation.

310. **Option II.B** would, however, ensure more efficiency. The Commission would have to investigate thoroughly the relevant markets, without however having to establish dominance. The focus would be on the market features as such and the identification and remediation of the emerging or existing market failures. Option II.B would thus allow the Commission to address market failure scenarios such as anticompetitive monopolisation, tacit collusion, the use of pricing algorithms, common shareholdings, and tipping markets in the absence of dominance. This implies that the impact of Option II.B on the parameters discussed in Section 6.2 is expected to be significantly higher and the potential to generate consumer benefits of the order of EUR 2-2.5 billion per market investigation would also be higher (see Section 6.2.6). This would more than compensate the possible higher administrative costs to
businesses associated to Option II.B, as these are more than off-set by the gains of a market investigation intervention focused on the market structure.

311. In relation to the sub-options on the scope, both Option II.C and Option II.D, the later would require more resources and could, in the short term, risk diverting the focus of the available resources to market investigations on non-digital markets where the emerging and existing market failures are less prone to emerge. In the long term, after acquiring the expertise of conducting market investigations in digital markets and benefiting from the design and monitoring of the remedies adopted after those investigation, resources could also be applied to non-digital market investigations without any losses of efficiency. In that case, Commission may propose extending the scope of the investigation regime beyond digital markets.

7.2.3. Coherence

312. In terms of coherence, Option II.A and Option II.B would complement the current EU policies in the digital sector and would lead to a more comprehensive EU competition law regime. A market investigation regime could potentially detect new uncharted practices that might at a later stage could become subject of further regulatory measures provided they can be well-defined and occur systematically. Focusing specifically on the positive and negative obligations on large gatekeeper platforms, those rules can efficiently be complemented by a market-structure based investigatory regime that would be able to capture situations not already covered by the list of obligations.

313. In relation to Option II.C and Option II.D both would be coherent with the current EU policies. Option II.C would be coherent with the recent policy initiatives focusing on the creation of borderless, fair, and contestable Single Market for digital services (see Section 1), while Option II.D is coherent with the EU competition rules (such as mergers and antitrust, see Section 2.3.1) which apply indifferently to all sectors.

314. The introduction of the market investigation regime, under any of the options considered would be subject to full respect of the fundamental rights to fair proceedings and good administration as enshrined in the EU Charter of Fundamental Rights and the European Convention of Human Rights (‘ECHR’), which are binding on the EU institutions. Given that proceedings under the market investigation regime are administrative in nature and not criminal or quasi-criminal, the fundamental rights of the Charter enjoyed in the case of criminal proceedings would not apply. However, when acting under the market investigation regime, the Commission’s investigation and powers would be counterbalanced by ensuring that undertakings involved enjoy effective fair process rights such as the right to be heard, the right to a reasoned decision and access to judicial review, including the possibility to challenge enforcement measures. These rights apply in case of administrative proceedings.

This design to preserve fundamental rights is also consistent with – if not superior to – the safeguards applicable similar investigation regimes elsewhere in the world.
7.2.4. Proportionality

315. **Option II.A** is proportionate since it allows achieving the objective in a targeted manner imposing limited burden on undertakings in digital markets. Option II.A does not contain any additional prescriptive general obligations for companies. It would however require the cooperation of those companies that are subject to the investigation and/or the remedies. Overall given the dominance requirement to apply the tool, the circle of companies potentially subject to the remedies would be narrower.

316. **Option II.B** allows achieving the objectives whilst remaining proportionate. Similarly to Option II.A, it does not contain any additional prescriptive general obligations for companies and require the cooperation of those companies that are subject to the investigation and/or the remedies.

317. **Option II.C** is proportionate to the objective, as it limits the scope of the market investigation regime to digital markets where as Section 2 shows the market failures are more prevalent.

318. **Option II.D**, corresponds to the evidence that shows that market failures are not limited to digital markets. At the same time, extending the scope of the initiative beyond digital markets would go beyond the objectives.

7.2.5. Conclusion

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<th>Effectiveness</th>
<th>Efficiency</th>
<th>Coherence</th>
<th>Proportionality</th>
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<td>Preventing</td>
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<td>market failures</td>
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<td>Option II.A</td>
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<td>Option II.B</td>
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<td>Sub-option II.C</td>
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<td>Sub-option II.D</td>
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319. **Option II.A** is not effective and efficient in preventing emerging market failures and would not be effective is addressing all existing market failures, as many of the examples of market failures described in Section 2.6.3 would not be dealt with this option. This option is coherent with other EU instruments and proportionate since it allows achieving the objective in a targeted manner imposing limited burden on undertakings in digital markets.

320. **Option II.B** is highly effective and efficient in both preventing emerging market failures and addressing existing market failures. This option is coherent with other EU instruments and proportionate since it allows achieving the objective in a targeted manner imposing limited burden on undertakings in digital markets.
321. **Option II.C** is highly effective in both preventing emerging market failures and addressing existing market failures. This option would be highly efficient by focusing on the markets which are more prone to market failures. This option is coherent with other EU instruments. This option is also proportionate since it allows achieving the objective in a targeted manner imposing limited burden on undertakings in digital markets.

322. **Option II.D** is highly effective in both preventing emerging market failures and addressing existing market failures. This option would be risk the loss of efficiency by diverting resources to less prominent problems in non-digital markets. This option is coherent with other EU instruments. This option is only partially proportionate as it goes beyond the objectives.

323. Based on the above, the most effective, efficient and coherent policy option is a market-structure focused investigatory regime (**Option II.B**) that in its initial phase focuses on digital markets where emerging and existing market failures are the most prominently present (**sub-Option II.C**). The market investigation regime, at least in its initial phase shall focus on the markets where emerging and existing market failures are the most pronounced.

### 8. PREFERRED OPTION

324. Based on the preceding analysis in Sections 6 and 7, the preferred policy option is a single legal instrument consisting of combination of Option I.B under Pillar I to comprehensively address the issues identified in relation to large gatekeeper platforms, and Option II.BC, under Pillar II, i.e. a competition-based market investigation regime to address emerging and existing market failures in digital markets that the existing EU competition rules cannot tackle, or cannot address in the most effective manner.

#### 8.1. Description of Pillar I

325. The core substantive elements of this option are explained in Section 5.2. It provides for a new *ex ante* regulatory framework applicable to designated gatekeeper platforms, based on two building blocks: (1) self-executing prohibitions and obligations (*blacklist/whitelist*) and (2) a closed list of unfair practices, in form of prohibitions or obligations that would require limited intervention by the competent regulatory body (*greylist*). Such regulatory intervention would be twofold: First, some obligations would require concretisation as to its implementation by the gatekeeper platform concerned. Second, some unfair practices would require contextualisation and fairness assessment as to their applicability in the case at hand.

326. The option would provide for a procedural framework ensuring effective implementation and enforcement while respecting due diligence and rights of defence. The Commission would enjoy appropriate and effective implementation, enforcement as well as sanctioning powers in case of non-compliance. The designation decision addressed to gatekeepers would be subject to judicial review and would foresee reassessment at the request of the affected operator in case of material changes concerning the designation criteria. Case specific intervention under the greylist could be subject to prior market testing and allow gatekeeper platform to propose measures on how to comply with their obligations in the greylist. Finally, the Commission
could adopt sanctions in case of a non-compliance by the gatekeeper platform(s) with the blacklist and greylist as further concretised by the Commission.

8.2. Description of Pillar II

327. The market investigation regime, inspired by similar and tested existing competition instruments, in particular by that of the UK, is described in detail in Annex 5.1.3. In a nutshell, the main procedural milestones of the proceedings, such as the opening decision, the preliminary report and the final decision imposing appropriate and punitive remedies will be set out in the main legislative act and while detailed rules will be set out in an implementing regulation. During the investigation, the Commission will investigate the market(s) at stake to identify emerging and existing market failures under appropriate and effective investigative powers.

328. Under the Market Investigation Regime, the Commission would not find infringements by individual undertakings nor impose fines, therefore the proceedings would be of an administrative rather than quasi-criminal nature. To ensure compliance with the EU Charter of fundamental rights in particular the proceeding will ensure appropriate procedural safeguards, checks and balances, transparency, stakeholder engagement and judicial review.

8.3. Functioning of the feedback loop between Pillars I and II

329. As explained in Section 5.1.3 the combination of these two sections in one instrument would lead to substantial and mutual synergies between the two pillars. The practical modalities to formalise the feedback mechanism between the two pillars will be developed in either the legislative proposal or the guidance documents related thereto.

330. The implementation, monitoring and enforcement practice of the regulatory body (who, for the greylist practices, would have to confirm the applicability of certain obligations to specific gatekeeper platforms and/or to establish how one or more of the obligations apply in a specific case) will result in information gathering that could point towards the need for a market investigation in certain areas (for instance, where numerous complaints flag new issues which emerge or existent issues which persist despite the application of the ex-ante measures).

331. In turn, the market investigation regime will serve to keep the gatekeeper rules future-proof, where its applications results in the identification of systemic issues in the markets where large gatekeepers subject to the gatekeeper rules operate. In particular, unfair practices by the large gatekeepers which are not currently identified in the blacklist or greylist could be detected through the market investigation regime. In that scenario, the conclusions of a market investigation could, together with other evidence sources, indicate a need for revising the practices included in the blacklist and greylist.
9. HOW WILL ACTUAL IMPACTS BE MONITORED AND EVALUATED?

9.1. How will the impact of Pillar I be monitored and evaluated?

332. Given the dynamic nature of online platforms, monitoring and evaluation of impacts needs to constitute an important part of the proposal. It also responds to explicit demands by stakeholders, including Member States (e.g. France), for a dedicated monitoring function, and reflects the self-standing monitoring option considered in the IIA. The monitoring therefore will be divided into two parts: (1) continuous monitoring which will report on the latest developments in the market every second year potentially involving the EU Observatory of the Online Platform Economy and (2) operational objectives and specific indicators to measure them.

333. Regular and continuous monitoring will focus cover the following main aspects:

a) Monitoring on scope related issues (e.g. indicators for the designation of gatekeepers, range of designated gatekeepers and its evolution, use of the margin of appreciation in the designation)

b) Monitoring on unfair practices (compliance, enforcement patterns, evolution)

c) Monitoring as a trigger for launch of a market investigation

d) Interplay between the two pillars of the instrument

334. The following specific indicators will used concerning the specific objectives.

<table>
<thead>
<tr>
<th>Specific objective</th>
<th>Operational objectives</th>
<th>Measuring indicators</th>
</tr>
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<tbody>
<tr>
<td>Address identified unfair conducts by large gatekeeper platforms</td>
<td>Preventing unfair data related practices and ensuring the compliance with obligations</td>
<td>Number of compliance interventions by the Commission per gatekeeper platform/per year</td>
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<tr>
<td></td>
<td>Preventing identified unfair self-preferencing practices</td>
<td>Number of sanction decisions per gatekeeper platform/per year</td>
</tr>
<tr>
<td></td>
<td>Preventing unfair practices concerning access to gatekeeper platforms’ services and platform</td>
<td>Share of users multi-homing with different platforms or services</td>
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<tr>
<td></td>
<td>Limit the diverging national regulatory interventions</td>
<td>Number of regulatory interventions at the national level</td>
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<tr>
<td></td>
<td>Ensure coherent interpretation of prohibitions and obligations</td>
<td>Number of clarification requests per year</td>
</tr>
<tr>
<td>Enhance legal certainty in the online platform environment to preserve the internal market</td>
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</table>

335. The monitoring will also take due account of the conceptual work of the Expert Group of the Online Platform economy under its work stream on Measurement and Economic Indicators.
9.2. How will the impact of Pillar II be monitored and evaluated?

336. This section describes the monitoring and evaluation that could be applied to assess the impact of the market investigation regime, in particular concerning the objectives of preventing and addressing market failures resulting in inefficient market outcomes in terms of higher prices, less choice, lower quality and lower innovation to the detriment of European consumers.

337. By way of background, it should be noticed that the benefits of the market investigation regime – similarly to the traditional instruments of competition policy – would materialise through specific investigations initiated under the regime. These investigations will affect precisely defined markets (an analytical concept widely used in EU competition law), which tend to be much smaller than an ‘industry’ or a ‘sector’ as defined by the commonly used NACE codes. At this point in time, it is impossible to foresee which markets will be investigated, what combination of market features and conduct may give rise to emerging and existing market failures, and which remedies may be found suitable and proportionate to solve these emerging and existing market failures.

338. Therefore, the monitoring of the actual impact of the market investigation regime will occur at two levels:

a) on a general and more qualitative level, documenting the application of the regime; and

b) on a specific and quantitative level, by performing ex-post studies on selected investigations run under the regime.

339. Regarding the first level of monitoring, the market investigation regime will be monitored from the start of its implementation on an annual basis following the methodology of the annual Report on Competition Policy. This report lists the ongoing merger, antitrust and state aid investigations, sector inquiries and decisions adopted during the respective year and provides a brief description of the relevance of the main decisions. In the future, this report will also list and describe the investigations opened under the market investigation regime and the final decisions taken, including an overview of the importance of those decisions for the internal market. Another element that can be monitored relates to the Commission’s human resources deployed for those investigations, in particular as regards the number of officials who were involved in each investigation.

340. This will allow an evaluation of the frequency with which the market investigation regime is being used, the number of decisions taken under the regime and the Commission’s resources used in its application.

341. As regards the second level of monitoring, the Commission will evaluate a selection of decisions taken under the market investigation regime. The ex post evaluation of a given decision under the market investigation regime would be carried out after 2 to 3 years from the date of the respective remedy implementation. This would also allow sufficient time for the remedies to produce effects in the markets under consideration. Similar to the case of the
application of Articles 101 and 102 TFEU and the Merger Regulation, the Commission cannot regularly monitor the impact of all its interventions by collecting data on a continuous basis. This is because of the administrative burden that such a process would impose on companies and also the lack of resources available to the Commission. Nevertheless, a selection of the most important decisions under the market investigation regime (i.e. those targeting larger markets and those likely to generate higher benefits) will be subject to the process of ex post evaluation.

342. The core part of the ex post evaluation of a given decision under the market investigation regime will be the identification of the effects of the decision on the market and their comparison with the situation in the counterfactual scenario. The results of the ex post evaluation reports will also include a discussion on the similarities and/or discrepancies in comparison to the relevant (peer-reviewed) literature and will provide useful conclusions for any future remedy selection and implementation. Relevant examples of this type of ex post evaluations are those produced by the CMA regarding their market investigation decisions. From the 19 market investigations conducted so far, the UK Competition Authority has evaluated three decisions, each time on the basis of different elements of evidence and methodologies.

343. The monitoring methodology of the results achieved under the market investigation regime will depend on the specific decision. Contrary to other legislative proposals, this initiative does not aim at implementing pre-determined measures in a given market/sector that the Commission could consequently start monitoring shortly after implementation. Instead, this initiative will allow the Commission to intervene in markets whenever a emerging and existing market failure is detected. The outcome of such investigation cannot be foreseen upfront. A market investigation may result in no intervention if the Commission concludes based on the results of the market investigation that an intervention is not justified. Alternatively, it can result in an intervention that will be tailor-made to the structural competition problems identified and demonstrated in the course of the investigation. This implies that the monitoring indicators and arrangements will be determined on a case-by-case basis, which means that, at this stage, only general considerations can be made about the possible methodologies and data sources to be used (see Annex 5.1.4 for a presentation of these general considerations).

344. The ex post evaluation of an intervention under the market investigation regime is likely to omit elements that can result in both an improvement of competition or additional costs for companies. In the former case, this leads to an under-estimation of the benefits and in the latter case, this leads to an over-estimation of the net benefits. For instance, a decision under the market investigation regime is likely to generate deterrent effects. As explained in a report by the CMA (2017), a common thread in all the literature about deterrence effects of competition enforcement is that there are significant practical difficulties involved in estimating deterrence. Another example is the cost incurred by businesses as a result of the implementation of remedies. These are very difficult to estimate, in particular because it is not possible to impose on companies the burden of providing information about the costs and benefits of each intervention.
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These features are present in digital markets as regards both business-to-consumer (‘B2C’) and business-to-business (‘B2B’) relations, although they may differ, in terms of intensity and dynamics, in the two contexts. For instance, scale economies may translate in a quality advantage (rather than a pure cost advantage) for a search engine: the more queries a search engine receives, the better the results it can provide since its algorithm will be improved by learning.


See Summary of the contributions of the NCAs to the impact assessment of the new competition tool, https://ec.europa.eu/competition/consultations/2020_new_comp_tool/summary_contributions_NCA responses.pdf. Some NCAs indicated that some of the questions in the questionnaire did not apply to them, because they did not have come across this particular feature or scenario in their recent case work. When reporting on the views expressed by NCAs on particular issues, this IA only reflects the views of those NCAs that did in fact express such a view, i.e. those ‘with relevant experience’.


Case AT.39740 *Google Search (Shopping)*, Commission Decision of 27 June 2017, paragraph 272.


Case AT.40153 *E-book MFNs and related matters (Amazon)*, Article 9 Decision of 4 May 2017, paragraph 65.

See Summary of the contributions of the NCAs to the impact assessment of the new competition tool.

See Summary of the Stakeholder Consultation on the New Competition Tool.


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See Case AT.39740 *Google Search (Shopping)*, Commission Decision of 27 June 2017, paragraph 287.

See Summary of the contributions of the NCAs to the impact assessment of the new competition tool.

See Summary of the Stakeholder Consultation on the New Competition Tool.

See Support study to the Observatory for the Online Platform Economy, report on the main obstacles and opportunities for multihoming.

See Summary of the contributions of the NCAs to the impact assessment of the new competition tool.

See Summary of the Stakeholder Consultation on the New Competition Tool.

Case AT.40153 E-book MFNs and related matters (Amazon), Article 9 Decision of 4 May 2017, paragraph 65.


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Fletcher, Amelia, Market Investigations for Digital Platforms: Panacea or Complement? (August 6, 2020). Available at SSRN: https://ssrn.com/abstract=3668289. Amelia Fletcher is a Professor of Competition Policy at University of East Anglia (Norwich, UK) and Deputy Director at the Centre for Competition Policy. She is also a Non-Executive Director of the CMA, and a member of the Enforcement Decision Panel at Ofgem. She was recently a member of the HM Treasury-commissioned Digital Competition Expert Panel, which reported in March 2019. She has been a Non-Executive Director of the Financial Conduct Authority (2013-20) and Payment Systems Regulator (2014-20) and Chief Economist at the Office of Fair Trading (2001-2013).

In the OPC on Ex Ante Rules a majority of stakeholders note that “certain platforms and their ecosystems have become unavoidable to access a large variety of contents and services on the internet. Those structuring platforms have become gatekeepers not only within their services, but for the internet at large.”

In this Impact Assessment the notion of unfair business practices refers to both terms and conditions as well as the actual business practices of gatekeeper platforms.


In the OPC on Ex Ante Rules, the vast majority of respondents fully agree (71%) or agree to a certain extent (20%) that there is a need to consider dedicated regulatory rules to address negative societal and economic effects of gatekeeper power of large platforms. See Synopsis Report Open Public Consultation Ex Ante Rules.

Observatory expert group Progress report on the Measurement of the Online Platform Economy.

In the OPC on Ex Ante Rules, respondents in general consider that unfair practices by gatekeeper platforms have a concerning impact on competition, innovation and consumer choice. Competition is hampered when gatekeeper platforms create barriers for new entrants to enter the market, thereby resulting in reduction of investments and innovation and consumer choice stifling. Unfair practices are considered to be the means by which digital platforms increase the cost of switching or multi-homing for users, thereby limiting market contestability and preserving their market power. See Synopsis Report Open Public Consultation Ex Ante Rules.
In the OPC on Ex Ante Rules, all categories of stakeholders consider that startups and small companies are more and more dependent on large platforms to be able to reach their customers. Their reliance on platforms is considered to vary heavily according to their fields and/or business models. It is argued that start-ups often end up in a dependent relationship with these mega-platforms from the very beginning. See Synopsis Report Open Public Consultation Ex Ante Rules.

In the OPC on Ex Ante Rules, several hundreds of respondents identified each of these activities.

In the OPC on Ex Ante Rules, different stakeholders groups refer to number of unfair practices by gatekeeper platforms. Some examples (by stakeholder group): (i) telecom operators: unfair and abusive commission fees, lack of data sharing, unilateral imposition of unfair terms and conditions, imposition of proprietary services, unfair self-preferencing; (ii) content creators or publishers: unfair self-preferencing, unfair data pooling, lack of transparency on news feed, inability to offer services to consumers outside gatekeeper platform or services, inability to obtain customers data or (iii) other business users: arbitrary de-ranking of the service, excessive extraction of data or limitation on access to consumers data. See Synopsis Report Open Public Consultation Ex Ante Rules.

In the OPC on Ex Ante Rules, 88% of the businesses and business users who replied (155 in total), encountered issues concerning trading conditions on large platforms. In general, most of the issues presented by the users are due to a perceived imbalance in bargaining power between platforms and business users, which hampers competition, fosters uncertainty in relation to contractual terms and also results in lock-in of consumers. Tensions also arise from the fact that a platform can (1) provide online intermediation or online search services for business users, and, at the same time, (2) competes with some of its business users on certain products or services. Another major issue raised has to do with access to data and risk of disintermediation. See Synopsis Report Open Public Consultation Ex Ante Rules.


Stock prices of each company are normalised to 100 in 2014, i.e. they are expressed relative to their respective value in 2014. This graph therefore allows to compare the development of stock prices across different companies, but not their absolute level.

The S&P 500 is a stock market index that measures the stock performance of 500 large companies listed on stock exchanges in the United States. It is one of the most commonly followed equity indices.


The existence of emerging and existing market failures has been further confirmed by NCA stakeholders responding to the OPC and further research. See Summary of the contributions of the NCAs to the impact assessment of the new competition tool. These results of this public consultation will be discussed in more detail in the following sections, notably Section 2.6.3.

A merger or acquisition will be of an ‘EU dimension’ where the aggregate turnover of the undertakings concerned exceeds given thresholds; irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the EU, provided they have substantial

While certain forms of unfair business practices can be abusive under Article 102(a) TFEU, this not only requires a dominant undertaking but generally also an effect on competition. If an undertaking imposes on its trading partners or obtains from them terms and conditions that are unjustified, disproportionate or without consideration but without affecting competition on the market, competition law generally does not apply (See recital 9 of Regulation (EC) No 1/2003. Some national competition laws also prohibit the abuse of economic dependence. Such behaviour resulting from imbalances in bargaining power that do not affect competition is usually the domain of unfair trading laws.

Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1 (2016).

While some voluntary efforts for data portability by some platforms have been underway since 2017 in the ‘Data Transfer Project’, the project described itself still as ‘early stage’ and activity peaked in 2018 on the project. It should not be underestimated that this ‘Data Transfer Project’ is at present limited to only several large online platforms, which means that actual or potential competitors do not (yet) benefit from this project.

See for example on challenges of the implementation: https://www.researchgate.net/publication/321198844_The_right_to_data_portability_in_the_GDPR_Towards_user-centric_interoperability_of_digital_services.

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0114


CMA (2017), Pricing algorithms.

Ecommerce report 2019.


This notion of ‘digital intensity’ is rather broad and encompasses all firms with relatively high exposure to “Information and Communication Technologies” (in terms of their investments, or input purchases), as well as firms reporting online sales. For the definition of ‘digital intensity’, see F Calvino, C Criscuolo, L Marcolin, M Squicciarini (2018). A taxonomy of digital intensive sectors, OECD Science, Technology and Industry Working Papers 2018/14.


The study used firm-level data sourced from the commercial dataset Orbis® by Bureau van Dijk (BVD). It provides information on firms' localisation, annual balance sheet and income statements, although the number of observations per country can vary significantly. It covers the period 2001-14 for 26 countries: Australia, Austria, Belgium, Bulgaria, Denmark, Estonia, France, Finland, Hungary, Germany, Indonesia, India, Ireland, Italy, Japan, Republic of Korea, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Spain, Sweden, Turkey, the United Kingdom, United States. See also Federico J. Diez, Daniel Leigh & Suchanan Tambulertchai, Global Market Power and its Macroeconomic Implications, IMF Working Paper WP/18/137 (June 2018). https://www.imf.org/en/Publications/WP/Issues/2018/06/15/Global-Market-Power-and-its-Macroeconomic-Implications-45975.


The economic significance of platforms can be assessed quantitatively, taking in several major areas of interest: revenues/traffic share, trade flows. https://platformobservatory.eu/state-of-play/economic-significance/


Ibid., p. 22.

In the OPC on Ex Ante Rules, in particular digital user’s associations pointed to the lack of data access and meaningful interoperability as important barriers to entry and called for measures that would address them. In addition, telecom operators recognised the right of data portability in Article 20 GDPR, but referred to the fact that its scope is limited to specific cases and subject to specific legal bases for processing. In particular, this right does not foresee continued and far-reaching access possibilities to different categories of data but is limited to receive the data ‘provided’ by the user, to avoid lock-in effects for individuals.

As explained earlier, lock-in refers to situations where users of platforms find it difficult to switch to another service.

They have been described in a recent Joint Research Centre report as “benefit an online service by coercing, steering, or deceiving users into making unintended and potentially harmful decisions” S Lewandowsky and I. Smillie, “Technology and Democracy”, Joint Research Centre (to be published).


Several stakeholders, such as media publishers or game developers, raised concerns about this specific issue in the OPC on Ex Ante Rules as well as through different legal actions taken both in the Europe and the US (see for example: https://www.theverge.com/2020/8/13/21367963/epic-fortnite-legal-complaint-apple-ios-app-store-removal-injunctive-relief).


Observatory expert group report on differentiated treatment.

Most favoured nation or MFN clauses refer to a potentially harmful practice by online platforms which consist of restricting the business users’ ability to offer their goods/services at different conditions (including lower prices) through other means.


There may of course be instances where it is instead desirable to limit access to data, for instance out of a concern for privacy. However, the tensions between contestability of a market on the one hand, and data protection on the other, can be eased where, for instance, anonymised data are sufficient for a competitor to compete effectively, or where consumers have given their express consent to port their data to a new service provider.


See Summary of the contributions of the NCAs to the impact assessment of the new competition tool.

See Summary of the Stakeholder Consultation on the New Competition Tool.
See Summary of the contributions of the NCAs to the impact assessment of the new competition tool.

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See Summary of the Stakeholder Consultation on the New Competition Tool.

Envelopment is a strategy by which a gatekeeper platform (the enveloper) operating in a multi-sided market (the origin market) enters a second multi-sided market (the target market) by leveraging the data obtained from its shared user relationships.


See Summary of the contributions of the NCAs to the impact assessment of the new competition tool.

See Summary of the contributions of the NCAs to the impact assessment of the new competition tool. See Summary of the Stakeholder Consultation on the New Competition Tool.

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See Summary of the contributions of the NCAs to the impact assessment of the new competition tool. See Summary of the Stakeholder Consultation on the New Competition Tool.


Case AT. 39850 - Container Shipping, see press release available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2446


OECD, Executive Summary of the Roundtable on Algorithms and Collusion, 26 September 2018.


See Summary of the Stakeholder Consultation on the New Competition Tool.

Competition in the voice-assistant markets will become more and more difficult as the algorithms underpinning the assistants benefit from the concentration of access to customers’ and users’ accumulated data. Incumbent platforms benefitting from large volume and variety of datasets will be able to provide more refined search results through their own assistants. This is an important competitive advantage vis-à-vis smaller and/or start-up platforms.

A number of NCAs expressed an interest in either adopting national market investigation instruments or in being empowered to apply or to participate in a market investigation regime set up at EU level, see Summary of the contributions of the NCAs to the impact assessment of the new competition tool. In that case, the European Competition Network could serve as a mechanism for the necessary discussion and coordination in the application and enforcement of the instrument.

In addition, Member States may not have the means to adopt appropriate measures to tackle emerging and existing market failures. Only some NCAs of Member States have instruments that enable them to tackle, to a certain extent, emerging and existing market failures, such as Greece and Romania. It can be expected that further Member States will adopt such national tools. Eight NCAs signalled that the competition rules applicable in their respective Member States have been amended in order to deal with emerging and existing market failures or that there are plans for doing so, namely Belgium, Bulgaria, Austria, Romania, Lithuania, Iceland, Germany and Greece. See Summary of the Questionnaire to the NCAs on the New Competition Tool.

In the OPC on the Ex Ante Rules, when asked to rate the suitability of the options considered in the parallel consultations on the New Competition Tool and Ex Ante Rules, the largest group of correspondents rated a combination of obligations and prohibitions for gatekeeper platforms with a tool to address structural risks and lack of competition in (digital) markets as most effective (52%) or very effective (15%).

The draft Impact Assessment Support Study contains an analysis of business areas including mobile operating systems, app stores, desktop operating systems, search, social media, advertising (incl. search, display & video), e-commerce and cloud services.

In the feedback to the OPC and the ICF IA study on Ex Ante Rules, several respondents referred to an arbitrary restrictions by gatekeeper platforms of their ability to freely communicate with their users on
different operating systems, in particular restrictions on their ability to inform customers about special offers and promotions as well as alternative purchasing possibilities outside of the gatekeeper’s platform.

In the feedback to the OPC and ICF IA study on Ex Ante Rules different stakeholders groups raised concerns about all these practices and their unfairness. As mentioned above, concerns about several of these practices have also been raised in the context of initiation of the formal proceedings and also in the recent US Report House of Representatives Majority Staff report.

During the OPC on Ex Ante Rules, several stakeholders raised a concern that limited data portability and data access due to lack of interoperability (e.g., APIs, limits to sharing customer data) creates obstacle for emerging competitors and also favours consumers lock-in.

For example, the replies to the OPC on Ex Ante Rules point to concerns expressed by several stakeholders about the capacity for gatekeeper platforms to shape the entire ecosystem, acting as quasi private regulators. This allows them to impose in a non-transparent manner and at their discretion their own technical standards, trading conditions, and contractual terms. Stakeholders point to the fact that refusing them is not an option as, due to the lack of competitive offerings, there is no alternative for reaching consumers.

As mentioned in footnote 149 above, several NCAs expressed an interest in either adopting national market investigation instruments or in being empowered to apply or to participate in a market investigation regime set up at EU level (see Summary of the contributions of the NCAs to the impact assessment of the new competition tool). While the policy options outlined in the following consider the Commission as being in charge of a market investigation, a cooperation mechanism could be introduced, based on the model of the European Competition Network, to enable NCAs to participate and coordinate in the application and enforcement of the instrument. This would be possible under all policy options and would enable a coordinated enforcement of the market investigation regime, similar to the mechanism for the enforcement of Articles 101 and 102 under the European Competition Network.

71% of respondents fully agree and 21% agree to a certain extent. See Synopsis Report Open Public Consultation Ex Ante Rules.

For more information see: https://ec.europa.eu/jrc/en/rhomolo


People making short films (recording thoughts, ideas or opinions on a subject) and posts them on internet.

Please note that the impact for platforms is understood as the monetary effect (spillover) on the economy, while the impact for you tubers is measured by their earnings/revenues.


European Ecommerce Report 2017 While the causal link between GDP growth and the economy of online platforms is difficult to demonstrate, considering these figures, it is reasonable to expect a relatively significant positive and growing contribution of the platform economy to the digital internal market and economic growth.

P.130 Impact Assessment Annexes, SWD(2018) 138 final: 71% of consumers would have preferred platforms for their purchases. This figure is an underestimate given the COVID epidemics but provides already an idea of the important use of platforms by consumers.
Cross-border Europe, annual analysis of the best global cross-border platforms operating in Europe, EU 28


IA study, Draft Final Report

https://ec.europa.eu/info/files/better-regulation-toolbox-20_en


OPC, direct submissions.


The Online Observatory report on differentiated treatment shows that they may be subject to search diversion, i.e. platforms may have incentives to a biased order of products/services presentation, which would divert consumers from products/services they initially intended to buy, pushing them to purchase more and/or more expensive products/services.

Gatekeepers’ extraction of information leads to serious privacy concerns. Facebook analytics is a well-known example.

IA study, Draft Final Report

https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

Statista, total number of users in 2019

IA study, Draft Final Report

Online platforms benefit from asymmetry of information (they dispose of large data sets compared to consumers). Platforms’ analytical capacity gives them the possibility to use advanced algorithms and machine learning techniques to facilitate targeting, discriminatory practices and behavioural manipulation. BEUC considers that such practices can have an impact on demand and distribution of wealth – “the most vulnerable consumers might end up paying higher prices than under a competitive price scenario (when personalisation is combined with commercial practices seeking to increase the individual consumer’s willingness to pay). They may also be used to target biases and reinforce existing or desired viewpoints with the aim of keeping users engaged with the firm’s platform so as to generate advertising revenues.”

Stigler Center Report, George J. Stigler Center for the Study of the Economy and the State The University of Chicago Booth School of Business, July 2019.


Competition authorities and academics have published a large number of ex-post studies of the results of enforcement actions, which were surveyed by the OECD in 2013: "Evaluation of competition enforcement and advocacy activities: The results of an OECD survey”. See also “Ex Post Economic Evaluation of Competition Policy: The EU Experience” (2020) edited by Ilzkovitz, F. & Dierx, A. for a compilation of ex post evaluations of specific policy interventions and an assessment of the broader impact of competition policy. There are also studies measuring the effectiveness of competition enforcement across a large number of cases. For example, Dutz, M. & Vagliasindi, M. (2000), "Competition policy implementation in transition economies: An empirical assessment", European Economic Review 44 (4-6), 762-772, used data on a number of transition economies to show that better implementation of competition law leads to better competition.


CPI ranges between 0 and 1 and is intended to measure the quality of competition policy enforcement. The CPIs covered seven features resulting in seven individual indicators that were used to calculate an aggregate CPI incorporating all the information on the competition policy regime of each country.

TFP is a widely used measure of productivity in an economy which basically describes how efficient the economy is in the use of all relevant inputs.

It is not possible to replicate the study of Buccirossi et al. (2011, 2013) in order to estimate the quantitative impact that the market investigation regime would have on the CPI, and hence on TFP growth. This is because the CPI was built on the basis of the current legislative tools available to the Commission as regards its antitrust enforcement. However, it is fair to expect a significant impact. According to the calculations by Buccirossi et al. (2011, 2013) the estimated coefficient of the CPI index is around 0.09. This means that an increase of 0.1 in the CPI index leads to an increase in TFP growth of 0.009 percentage points. For example, at the average values in the study of TFP (~1%) and CPI (0.4976), a 10% increase in CPI (e.g. an increase of 0.04976) would lead to an increase in the growth rate of TFP of 0.448 percentage points (i.e. an increase of more than 40% in TFP growth, from 1% to 1.448%).

See Dutz, M. & Hayri, A. (1999), "Does more intense competition lead to higher growth?", Policy Research Working Paper No. 2320, World Bank, found a strong correlation between long-run GDP growth, and effective enforcement of competition rules, on the basis of a cross-section of 52 countries.


208 Borrell, J. R., & Tolosa, M. (2008). "Endogenous antitrust: cross-country evidence on the impact of competition-enhancing policies on productivity". Applied Economics Letters, 15(11), 827-831. The authors found that the impact of antitrust enforcement on total factor productivity is positive and statistically significant, implying that competition policy effectiveness raises productivity. The estimates suggest that increasing the average antitrust effectiveness in one standard deviation would increase average total factor productivity by 28%. The study assesses the combined effect of both competition and trade policy, as examining competition law alone over-estimates its effect on productivity growth.


210 See also Dierx A., Heikonen J., Ilzkovitz F., Pataracchia B., Ratto M., Thum-Thysen A. & Varga J. (2015), "Distributional macroeconomic effects of EU competition policy – A general equilibrium analysis", paper to be published in a World Bank-OECD publication on Competition Policy, Shared Prosperity and Inclusive Growth, who estimate that enforcement of the EU competition rules by the European Commission has a sizeable impact on the creation of new jobs (they estimate around 650 000 after 10 years).

211 "Does competition kill or create jobs?”, OECD Global Forum on Competition, DAF/COMP/GF(2015)9, paragraph 78.


216 For a comprehensive description of the UK market investigation instrument see R. Whish (2020), The New Competition Tool: Legal comparative study of existing competition tools aimed at addressing structural competition problems, with a particular focus on the UK’s market investigation tool.

217 See for instance Ahn, S. (2002), op. cit. See also for example, a study by the Directorate-General for Competition of the European Commission on "The Economic Impact of enforcement of competition policies in the functioning of EU energy markets" (2015), which found that the Commission's decision finding an abuse of dominance by E.ON lead to a reduction in prices for both wholesalers and retailers to the benefit of consumers. See also the Note by the UNCTAD Secretariat (2014) "The benefits of competition policy for consumers".
See the Impact Assessment 2018/2019 of the UK Competition and Markets Authority, which estimated the benefits of the Competition and Markets Authority’s work averaged over a 3-year period and the ratio of these benefits to costs.


PriceWaterhouseCoopers (2003) investigated whether time and costs of business devoted to multi-jurisdictional merger reviews. The study finds that on average the costs per jurisdiction correspond to EUR 3.3 million in external merger review costs, 65% of these costs are legal fees, 19% are filing fees and 14% are fees for other advisers. Updating these costs to current values, they would correspond to EUR 4.3 million. These are however be less representative of the costs of market investigation.


A robust quantitative cost-benefit analysis proves difficult for the initiative under consideration. We therefore refer to ‘an estimate’ of costs and benefits.

A study (draft final report)


See Summary of the Stakeholder Consultation on the New Competition Tool.

See Summary of the contributions of the NCAs to the impact assessment of the new competition tool.

See M. Motta and Martin Peitz (2020): Intervention trigger and underlying theories of harm - Expert advice for the Impact Assessment of a New Competition Tool. See also G. S. Crawford, P. Rey, and M. Schnitzer (2020), An Economic Evaluation of the EC’s Proposed “New Competition Tool”: “one of the benefits of the New Competition Tool lies in its ability to address the conduct and practices of non-dominant firms; hence, we see no benefit to limiting its applicability to dominant firms”, not yet published, see Annex 4.b.

See Summary of the Stakeholder Consultation on the New Competition Tool.

See Summary of the contributions of the NCAs to the impact assessment of the new competition tool.

See workshop with BEUC members on the ongoing Impact Assessment for a possible New Competition Tool, 1 October 2020.

See H. Schweitzer (2020): The New Competition Tool: Its institutional set up and procedural design, Chapter II, section 2, “Administrative nature of the NCT, a more participative process and procedural guarantees”.
For instance, in the case of its BAA market investigation, the CMA made an evaluation on the basis of qualitative elements, namely based on stakeholders interviews and site visits resulting in several case studies, as well as quantitative elements, including a descriptive and econometric analysis by independent consultants. One of the models run aimed at testing whether positive changes in overall airport transport movements and passenger numbers at the divested airports were above that which would have been expected in the counterfactual scenario. For this the external consultants compared trends in time for three divested airports and a set of comparable UK airports using a fixed-effects panel regression and test for breaks in time series. In the evaluation of the home credit market investigation, the UK competition authority interviewed those involved in the design and implementation of the remedies and undertook some descriptive analysis, examining monthly data from the LendersCompared website and market-level and firm-specific annual data.

Several studies suggest that the deterrent effect of antitrust enforcement may be substantial. See Baarsma B., Kemp R., van der Nol, R., & Seldeslachts J. (2012), "Let's not stick together: anticipation of cartel and merger control in the Netherlands", De Economist, which estimated on the basis of a survey of lawyers and other advisors that for every sanction decision taken by the Dutch competition authority there are almost five other cases in which a prohibited act has been terminated or modified in response to advice on competition law. A study commissioned by the former UK competition authority, the Office of Fair Trading (OFT): London Economics (2011), "The impact of competition interventions on compliance and deterrence", OFT Report no 1391, found, based on a survey of more than 800 companies and a small number of law firms, that for each abuse of dominance case, 12 potential infringements are deterred.

In case companies would consider that the costs of intervention would outweigh the benefits, they could voluntarily submit information supporting their view.