

**EMMA-ENPA comments on
The inception impact assessment and the public consultation on a
New Competition Tool**

(08.09.2020)

I. For years, magazine and newspaper publishers have been exposed to increasing competitive pressure from market-dominant platform companies.

As mega-platforms, by means of their gatekeeper position, decide if and how media offerings or commercial services have access to consumers through their platforms, they decide which media offering or service has a chance on the respective reader and advertising markets.

Press publishers are particularly affected by the ever-increasing market power of these mega-platforms. In fact, these platforms do not limit themselves to their (monopoly) intermediary role. They constantly broaden the scope of their activities by invading adjacent niche markets – which allows them to collect further data and information to be fed back into the primary (monopoly) intermediary market. In many cases they also enter into unfair competition with press publishers, particularly on downstream markets. Routinely, such mega-platforms commercially offer, supply and provide access to content for which they did not bear any of the production costs or original investment and use it to substitute content producers and distributors, while at the same time securing an increasing share of digital advertising budgets.

The concerning developments outlined above are the reason why already in 2009, German press publishers' associations filed a complaint against the abuse of the internet search monopoly - which has only continued to grow since then. With the European Commission's Decision in the case AT.39740 - Google Search (Shopping) dated 27 June 2017, for the first time, a digital platform monopolist was prohibited from giving preference to its own offerings over offerings from competitors on its monopoly platform.

While the European Commission's decision in the Google Shopping case has been seminal, it has also further highlighted the limitations of the current legal regime:

- It took almost eight years from the first complaints to the Prohibition Decision;

- The outcome verdict is not yet final, as an application for annulment is pending at the General Court;
- The Compliance Mechanism was designed by the infringing party, Google, and is unanimously seen as failing to reinstate equal treatment between its own and rival comparison-shopping services in the various markets¹;
- The decision is strictly limited to the infringement in “comparison-shopping”; and
- Therefore, its legal consequences are strictly limited to the comparison-shopping market and not directly applicable to other markets; not least since the European Commission emphasised a necessary case-by-case approach;
- The many complaints from other verticals over the years are still unaddressed (e.g. jobs, hotel, travel, local, images).

This case also illustrates the need for comprehensive improvements to the legal and administrative instruments for ensuring fair competition on dominant platforms, if we want to maintain economic (and editorial) competition in Europe. The Commission's prohibition of self-preferencing against the search monopoly is an important and possibly historic step in adapting the general prohibition of abusive practices to the realities of the platform economy in a networked world.

However, the decision alone is not yet sufficient. It is not yet legally binding, its implementation is substantively deficient, and its limitation to the "comparison-shopping" market as well as its limited legal consequences are far from sufficient to ensure fair competition between those companies that rely on neutral search.

Given the current enforcement deficits vis-à-vis the large gatekeeper mega-platforms, it must be possible to sanction the delay of legal proceedings adequately. Therefore, deterring sanctions should be applied when regulating these market players.

II. We therefore welcome the European Commission's intention to take action against the specific market power of gatekeeper platforms and to restore and ensure non-discriminatory and fair competition in the internal market.

To this end, the European Commission has announced an instrument for the ex-ante regulation of very large online platforms acting as gatekeepers ("ex ante regulation") as part of the Digital Services Act. In addition, a new supplementary instrument to

¹ Compare Storåkers, CEO of PriceRunner, “No one in the industry thinks that these remedies have made a difference.”, quoted in Politico's Pro Morning Tech, 25 August 2020.

improve the enforcement of competition law ("New Competition Tool") will aim to address structural competition problems, which prevent markets from functioning properly.

The European Commission's intention to ensure that competition policy and competition rules are up-to-date is in principle to be welcomed for the reasons outlined above. However, the specific design of an additional instrument to improve the enforcement of competition law in detail will be crucial in order to ensure the effectiveness of the new measures. In order to address the key challenges of restoring and ensuring fair competition in digital markets characterised by large gate-keeper platforms, and in order not to go beyond the set target, it may be appropriate to limit the scope of the new measures to the problematic digital platform markets. In any event, a wide application of the envisaged measures, which would pose significant risks to those markets that are not characterised by unequal competition and the same enforcement problems, should be avoided. It goes without saying that it is difficult to assess the content of such measures before their scope and conditions for intervention are further specified.

In order to restore and secure fair competition in the (digital) internal market in the long term, it must be ensured that both initiatives, the ex ante regulation and the New Competition Tool, do not overlap or undermine each other. Accordingly, the New Competition Tool cannot be an alternative to the necessary ex ante regulation of digital gatekeeper mega-platforms. We therefore particularly welcome the clarification in the inception impact assessment that the New Competition Tool should be complementary to the ex ante regulation. For this reason, we would in principle consider it appropriate to restrict the planned measure's scope of application to the area of the digital markets, which are characterised by the gatekeeper mega-platforms, in order to prevent an overreaching scope. The public consultations and impact assessments on both initiatives should inter alia ensure that consistency is ensured and overlap between the two initiatives is avoided.

EMMA-ENPA have taken note of the four regulatory options presented in the European Commission's inception impact assessment. Options 3 or 4 of the inception impact assessment would not require any market dominance, nor an abuse for intervention. Options 1 and 2, on the other hand, would require a finding of market dominance with the companies concerned, but would not require the existence of an abuse under Article 102 TFEU. In both cases, the conditions for intervention would be significantly reduced compared to the standard of general competition law. However, a proportionate design of the envisaged additional rules appears to be essential in order

to avoid unwanted negative effects on other competitive markets. We therefore consider that the New Competition Tool should complement ex ante regulation of gatekeeper platforms and, in any case, should only be applied in cases where sector-specific regulation such as ex ante regulation is not applicable. This would require that the New Competition Tool be limited to the very area of gatekeeper mega-platforms.

Against this background, we must express concerns about all the options presented in the inception impact assessment. As no concrete conditions for intervention or constitutive elements of a "structural competition problems" are known for options 3 and 4, we consider these approaches to be too broad at this stage. To avoid low hurdles for intervention by the competition authority, it is essential that the criteria for intervention, in particular for "structural competition problems", be specified in more detail. Taken individually, all the elements of definition present a risk of intervention in markets which are not characterised by the same challenges as the platform markets, characterised by digital gatekeeper platforms.
