eu travel tech

**Eu travel tech position paper on *ex ante* regulation to complement competition law in the digital era**

## I. Introduction

This paper[1] presents eu travel tech's position on the debate over whether *ex ante* regulation needs to be adopted by the European Union to complement competition law in the digital era. Its purpose is to share with the European Commission the experience of its members in dealing with large consumer-facing digital platforms active in several markets (which we refer to as "Systemic Digital Platforms") and, in particular, Google on which they and other business users depend for material volumes of user traffic. eu travel tech will show that *ex ante* regulation is needed to prevent "Systemic Digital Platforms" from leveraging their market power at the expense of their business users and consumers.

eu travel tech represents the interests of travel technology companies. eu travel tech uses its position at the centre of the travel and tourism sector to promote a consumer-driven, innovative and competitive industry that is transparent and sustainable. Our membership spans Global Distribution Systems (GDSs), Online Travel Agencies (OTAs), Travel Management Companies in business travel (TMCs) and Metasearch Search Engines (MSEs).[2]

This paper is divided in nine Parts. Part II contains an executive summary. Part III provides an overview of the various issues posed by Systemic Digital Platforms in the EU travel tech sector. Part IV makes a case for adopting *ex ante* rules aimed at controlling the market power of Systemic Digital Platforms, explaining why competition law alone is inadequate for that task. Part V examines the appropriate legal basis for adopting such *ex ante* rules. Part VI identifies objective criteria to identify companies that it would be appropriate to subject to such *ex ante* rules, while Part VII lays down the principles that should form the content of regulation. Part VIII includes our suggestions with regard to institutions and enforcement. Finally, Part IX concludes.

## II. Executive summary

*Core problem and focus.* While several digital platforms can be characterized as "systemic", the present paper focuses on the behavior of one such Systemic Digital Platform, namely Google. Like most online businesses, many OTAs and MSEs are reliant on Google for a material portion of user traffic, be it organic or paid. In many cases,

[1] The paper was produced by the EU competition law firm Geradin Partners, on behalf of eu travel tech.

[2] eu travel tech's members include Amadeus, Booking.com, eDreams ODIGEO, Expedia Group, Travelport, and Skyscanner. Associate members include American Express GBT. Strategic Partners include Lastminute.com, etraveli, Trainline, Travix, Travelgenio, OAG and CWT.

customers begin their journey with Google Search. This control of the top of the customer purchase funnel enables Google to act as a bottleneck, by e.g., diverting traffic from OTAs and MSEs into its *own* competing vertical travel search products, to the detriment of OTAs and MSEs. Google's conduct harms innovation as by directing users to its vertical products (Hotel Finder, Google Flights, etc.), Google prevents OTAs or MSEs from differentiating themselves, other than on price, or even from earning revenue. This reduces competition and innovation, and harms consumer choice.

***There is a need for ex ante regulation*** . eu travel tech supports the work done by DG Competition. However, intervention based on competition law alone many not be sufficient to address and deter anticompetitive conduct by Systemic Digital Platforms. Rather, we believe that existing *ex post* enforcement should be complemented by *ex ante* rules, which could address certain limitations of antitrust enforcement, ensuring EU markets remain fair and contestable to the benefit of consumers.

***Which online platforms should be ex ante regulation?*** The Commission should produce a definition of Systemic Digital Platforms that is neither under- nor over-inclusive, i.e. that captures those (but *only* those) platforms whose systemic role in the digital economy is such that their conduct threatens the fairness and openness of EU markets, without imposing unnecessary regulatory burdens on other market participants. We think a workable definition would be that a digital platform is systemic if the following cumulative conditions are met:

(a) Its activities span over a significant part of the EU internal market and are protected by high barriers to entry, such as economies of scale, and direct and indirect network effects;
(b) It acts as a private gatekeeper to critical online services for an exceptionally large population of consumers, which single home; hence allowing it to act without constraint when it sets the rules of the game for the services it controls.
(c) It is able to leverage its unique assets (data, customer base, technological assets, etc.) into new markets and exclude rivals.

***Content of ex ante regulation*.** Instead of laying down highly detailed and prescriptive rules, the *ex ante* regulation should set out core principles, which are fleshed out in an accompanying guidance paper and further developed through the enforcement process. More specifically, we believe that these principles should address several practices that are particularly detrimental to the travel industry and which may also affect other industries, including the ability of Systemic Digital Platforms to: (i) engage in self-preferencing, e.g. when Google discounts organic search results in favor of its own products or advertising; (ii) internal combine and use data across products and services; (iii) impede multi-homing to entrench the Systemic Digital Platform's position by "locking in" users and erecting barriers to entry.

***Designation of a platform as "systemic".*** The Commission should have *exclusive* jurisdiction to designate a digital platform as "systemic". The effect of such a

designation should be that the Systemic Digital Platform is *automatically* subject to the *ex ante* rules, which may then be adapted on a case by case basis to the particular characteristics of the platform in question. The geographic scope of the designation should reflect the EU-wide jurisdiction of the Commission and the cross-border nature of the relevant Systemic Digital Platforms, i.e. it should cover all of the Member States in which the Systemic Digital Platform is active.

***Enforcement of the ex ante rules***. Enforcement could be based on a system of *parallel* competences between the Commission and national authorities, drawing inspiration from the mechanism in place for the enforcement of EU competition law according to Regulation 1/2003. Were similar principles to govern the enforcement of *ex ante* rules, we would typically expect the Commission to be the authority "well placed to act", as the practices of large digital platforms are usually cross-border in nature and affect several Member States at once. The competent authority should be vested with the power to take all necessary measures to ensure the *effet utile* of the *ex ante* rules, lest we end up with toothless regulation.

## III. The problems faced by the travel sector

Digitization has changed profoundly the way people live, communicate with each other and travel. For instance, digitization has seen the rise of certain large digital platforms that intermediate between a variety of businesses and consumers. This has given rise to new dynamics and in some cases new competitive challenges. Protected by significant barriers to entry (strong network effects and economies of scale and scope, marginal costs often close to zero, primarily single-homing customers, wide access to competitively relevant data, etc.),[3] a small subset of platforms have become "digital gatekeepers" to markets, customers and information, thus putting in danger the fairness and openness of EU markets.[4] There is already evidence of how Systemic Digital Platforms can use their systemic role to cement their market power and leverage it into new markets, as well as to impose unfair conditions on their business customers (e.g., excessive data extraction). Once a market has tipped in their favor, it becomes extremely difficult for both existing rivals and new entrants to compete. This stifles innovation and harms consumers.

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[3] Stigler Committee on Digital Platforms, Final Report, September 2019, available at https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en, (the "Stigler Report"), pages 34-41. See also Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, "Competition Policy for the digital era", Final Report (2019), available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf (the "Crémer Report"), pages 20-21.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, Shaping Europe's digital future, COM(2020) 67 final, page 8.

The travel sector is no exception, as it has grown heavily dependent on – and exposed to the problematic conduct of – one of these gatekeepers, namely Google, on which this paper will focus. Yet, our concerns are far from being specific to the travel industry. Indeed, similar concerns about Google's conduct have been voiced by companies operating in many other sectors (e.g., comparison shopping services, news publishing, etc.). This serves to illustrate how the issues posed by Google's conduct are at their core *systemic* and *structural*: they stem from Google's abuse of its quasi-monopoly in general search (and related advertising), which act as a gateway for user traffic to online businesses.

At the same time, our concerns are not necessarily limited to Google. Rather, Google's practices should be regarded as *examples* of how a large tech firm may use its gatekeeping role to gain anticompetitive advantage in new markets and/or entrench its position on existing markets. Indeed, companies in similar gatekeeping positions engage in similar practices. For this reason, *ex ante* regulation should not refer to named undertakings, but should focus on the conduct of gatekeepers that threaten the openness and fairness of EU markets.

The Commission is well aware of Google's quasi-monopoly over general search: at least since 2008, Google has consistently held remarkably high market shares across all 27 EU Member States, in most cases exceeding 90%, while no effective entry has taken place.[5] Coupled with strong barriers to entry such as network effects, economies of scale, access to click-and-query data, and the need for significant investments,[6] this means that Google's position is virtually incontestable. That has enabled Google to become the gatekeeper of user traffic flowing through its search engine.

Naturally, that has not left the travel sector unaffected. Like most online businesses, many OTAs and MSEs – even those with a highly recognizable brand and a strong direct relationship with consumers – are reliant on Google for a material portion of user traffic, be it organic or paid. In many cases, customers begin their journey with Google Search. This control of the top of the customer purchase funnel enables Google to act as a bottleneck, by e.g., diverting traffic from OTAs and MSEs into its *own* vertical search products, to the detriment of OTAs and MSEs. Indeed, Google has systematically engaged in such practices in order to promote its own vertical travel products, namely Hotel Finder (accommodation), Google Flights (flights) and VR finder (vacation rentals).

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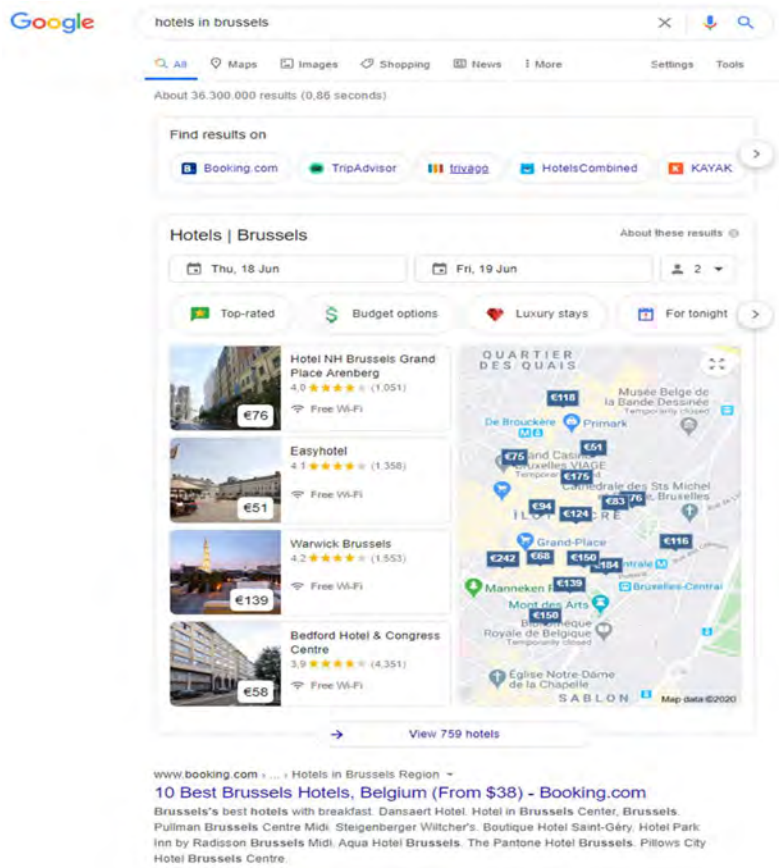
5 Commission Decision of 27.6.2017 in case AT.39740 - Google Search (Shopping), C(2017) 4444 final, paragraphs 274-284.

6 Commission Decision of 27.6.2017 in case AT.39740 - Google Search (Shopping), C(2017) 4444 final, paragraphs 286-296.

For instance, when a user searches for a hotel in Brussels, Google automatically displays the "Hotel search unit", a box with hotel listings that when clicked on leads the user to Google's hotel vertical,[7] see Figure 1. The Hotel search unit is prominently featured on Google's SERP with a rich and attractive display format, setting it apart from rival verticals displayed significantly further down the page, below "the fold", despite the fact that these rivals are highly ranked organic results. Over the years, the Hotel search unit has captured an increasingly large portion of the SERP, pushing organic results ever further down the page (and below the fold). If the search is conducted on a mobile device – as is increasingly the case – where screen size is limited, the Hotel search unit will typically push organic results down so far that the user will have to scroll down to find them. Yet the average user rarely scrolls down the SERP.

**Figure 1**



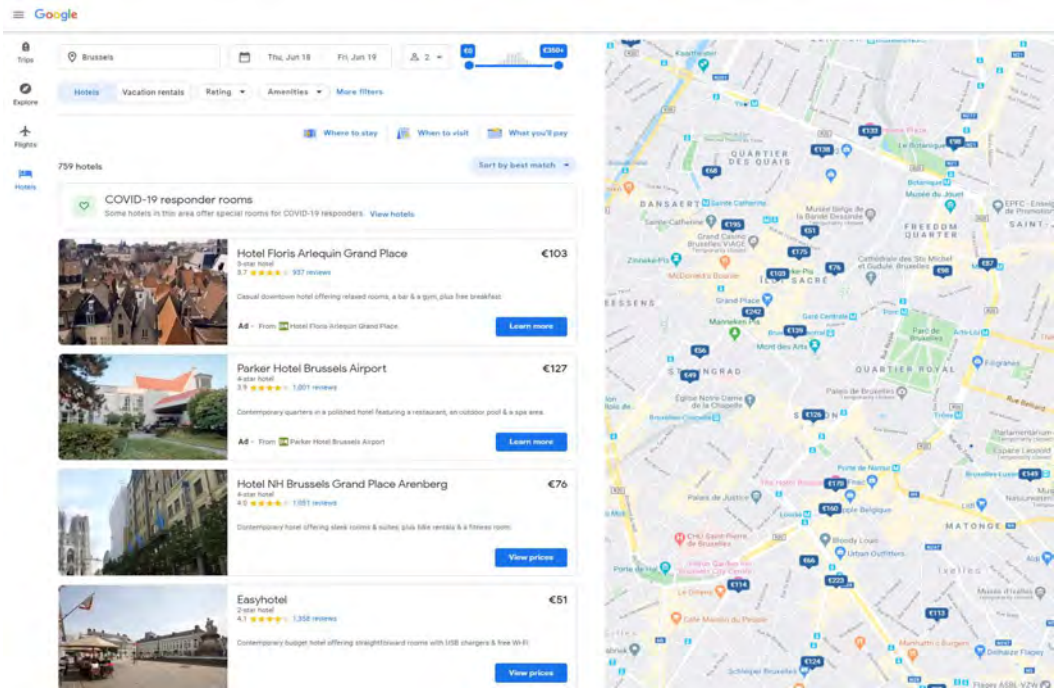

The result is that OTAs and MSEs receive increasingly less traffic from organic results. In order to make up for the loss of organic traffic, they have increased their ad spend

[7] As far as eu travel tech is aware, Google monetizes its Hotel search unit by displaying ads within its vertical.

with Google (either in the form of traditional Search Engine Marketing or in the form of Hotel Ads), which in turn increases their cost of customer acquisition, increases distribution costs and squeezes their margins.[8]

Even when a user clicks on a listing displayed within the Hotel search unit, Google interposes itself between the OTA or MSE whose listing is clicked on and its customers. When a user clicks on a listing in the Hotel search unit display (see Figure 1), he is referred to Google's Hotel Finder vertical, not to the OTA or MSE whose listing he selected, see Figure 2. The user then inputs her search details into Google's Hotel Finder (*e.g.*, dates, star rating, budget, services such as Wi-Fi). In effect, the Hotel search unit that is displayed on the SERP (Figure 1) is a "bait and switch" – the user thinks that he will be taken to the listing he clicks on, but in fact, regardless of the listing on which he clicks, he is taken to the Hotel Finder page (Figure 2).

**Figure 2**




Google then displays the offers made by OTAs, MSEs and hotels that have participated in the auction run by Google to populate its Hotel Finder results page, see Figure 3 (which shows the screen the user sees when it clicks on one of the hotels listed). Only then will the customer be able to choose an OTA or MSE to complete her booking.

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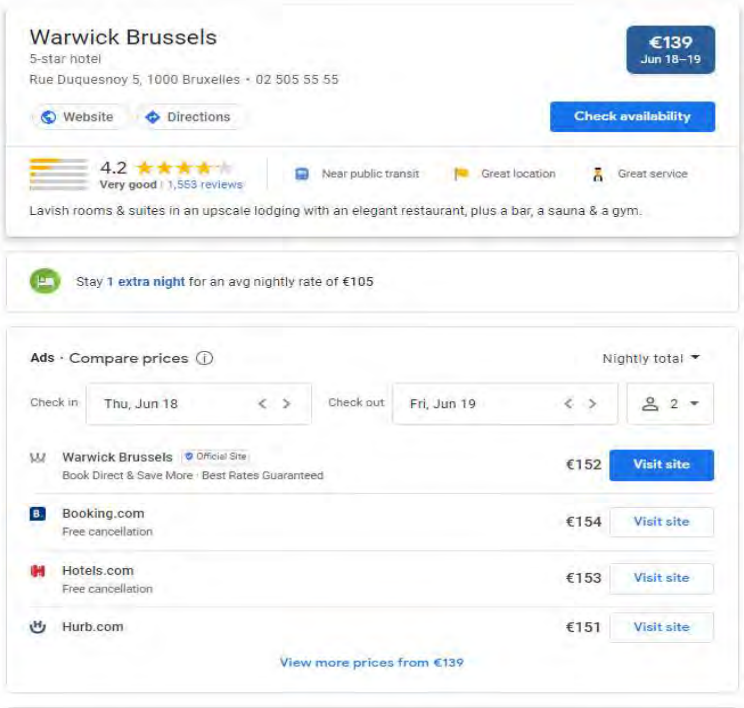
[8] See also "A Deep Dive Into Google's Impact on Travel 2020", *Skift*, February 2020, available at https://research.skift.com/report/a-deep-dive-into-googles-impact-on-travel-2020/, pages 37-38.

Figure 3




Consumers are thus pushed further down Google's purchasing funnel before they interact with the OTA or MSE that they initially chose back on the SERP. This reduces, if not eliminates, the ability of OTAs or MSEs to differentiate themselves other than on price (as only their logo appears next to a price), stifling innovation, disincentivizing investments in quality enhancements and harming consumers.[9] At the same time, OTAs and MSEs have to pay significant amounts to be displayed in Google's Hotel Finder results. In addition, to be able to participate in the Hotel Finder auction, OTAs and MSEs, hand over valuable data to Google, through a live feed, which Google uses to populate its Hotel Finder results.[10] Google has not entered into contracts with tens of thousands of hotels and hotel chains in the way that OTAs have.

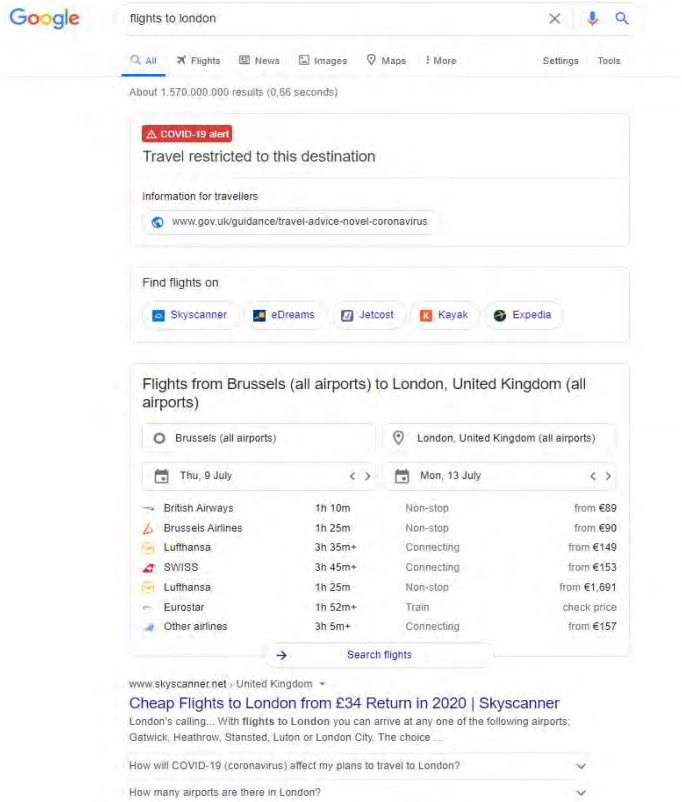
As one might expect, Google has engaged in similar practices to promote its travel search products in other verticals, such as flights. Each time a user searches for flights on Google Search, Google will by default display its own "Flights unit", which when

9 Worse, in the case of the recently launched flights carousel that appears above the Flights unit, OTAs and MSEs may differentiate *only* on the basis of their logos, as no prices are shown.

10 This is a broader concern about Google, i.e. that it may collect through its various business-user services (e.g., advertising or analytics services) data not strictly necessary for the provision of its services, which it may then use to develop competing products. Businesses are in the dark as to what Google may do with the collected data and its standard terms and conditions shed little light.

clicked on leads the user to Google's dedicated flights vertical. As is the case with the Hotel search unit, the Flights unit occupies an increasingly large portion of the SERP and pushes organic results further down the page (below the fold), while its rich display format makes it visually more attractive to users.[11] See Figure 4, which shows the results a Google user based in Brussels sees when she searches for flights to London.

**Figure 4**




Importantly, in the case of flights search Google announced in January 2020 that it will no longer charge airlines / OTAs referral fees.[12] It is hard to see how an

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11 This is in stark contrast with the "neutral display" obligations imposed on vendors of computerized reservation systems (CRS). See Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89, OJ L 35, 4.2.2009, pages 47–55.

12 G. Sterling, "Google removes 'ads' and 'sponsored' labels from flight search results", *Search Engine Land*, 23 January 2017, available at https://searchengineland.com/google-removes-ads-and-sponsored-labels-from-flight-search-results-327975. Flight search engines typically offer their services to consumers free of charge. They fund their operations by charging participating airlines / OTAs each time a user clicks on one of their offers (on a Cost-Per-Click basis) or completes a transaction (on a Cost-Per-Acquisition basis).

independent flights search engine could compete against a product offered virtually for free to *all* sides of the market. eu travel tech suspects that Google most likely cross-subsidizes Google Flights through its other products, and in particular Google Search and related advertising. Google may use the data it collects through Google Flights (e.g., people's travel plans, their destination, the dates on which they travel, the airports they will use, etc.) in order to sell high-value targeted ads on Google Search.

As described in the academic literature, the ability to internally combine and use data across products and services may enable a platform like Google to engage in "envelopment" strategies aimed at conquering new markets through cross-subsidization. This strategy further entrenches Google's position in its core market (general search), while also preventing rivals in the flights search market from gaining data parity, let alone superiority.[13] This strategy is simply impossible to match even for more efficient rivals in the flights search market, as it would require them at the same time to enter the general search market, where Google's position is incontestable.

In summary, Google's conduct harms innovation as we have seen that by directing users to its vertical products (Hotel Finder, Google Flights, etc.), Google prevents OTAs or MSEs from differentiating themselves, other than on price, or even from earning revenue. This reduces competition and innovation, and harms consumer choice.

## IV. Why *ex ante* regulation?

One might of course argue that the issues presented above should be addressed through recourse to EU competition law. However, while undoubtedly an important tool in preserving the contestability of markets, relying on competition law alone is no longer a sustainable solution.

In the first place, *ex post* enforcement is not always sufficient to tackle anti-competitive practices by Systemic Digital Platforms.[14] Competition investigations are resource-intensive and lengthy, spanning several years. As a result, by the time an investigation has concluded, the market may have tipped in favor of the investigated undertaking as a result of its conduct, such that competition may be extremely hard to restore.[15]

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[13] D. Condorelli and J. Padilla, "Harnessing Platform Envelopment Through Privacy Policy Tying", 14 December 2019, available at SSRN: https://ssrn.com/abstract=3504025.

[14] See Competition and Markets Authority, "Online platforms and digital advertising", Market study interim report, 18 December 2019, available at https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf (the "CMA Interim Report"), page 234.

[15] See also Report of the Digital Competition Expert Panel, "Unlocking digital competition", March 2019, available at

In the second place, competition investigations are *ad hoc*, limited to the facts of the particular case, and may do little to prevent similar conduct that has similar effects in other markets.[16] eu travel tech members learned this the hard way: even though certain members filed complaints with the Commission over Google's conduct as early as 2012, Google's conduct worsened and continues unchecked today. While initially the Commission took issue with Google using its dominance in search to favor a number of its verticals, including travel, it eventually only addressed one of the affected verticals, namely comparison shopping services in the case AT.39740 – *Google Search (Shopping)*. In the meantime, Google has been free to engage in abusive practices that are comparable to, and have created consumer harm of the order of, the conduct condemned in *Google Shopping* in order to favor its travel verticals.[17]

In the third place, even when lengthy investigations conclude, the remedies imposed may do little to facilitate the restoration of competition. For example, rival comparison shopping services have long complained that the remedy implemented in *Google Shopping* has had little to no impact.[18] In November 2019, more than two years after the decision was adopted, Commissioner Vestager observed in an interview that the remedy generates "*very little*" traffic to rivals.[19] In the case of *Google Android*,[20] rival search engine DuckDuckGo recently criticized the proposed auction-based remedy for both favoring Google[21] and being "*rigged in favor of big companies and search engines with intentionally ad-heavy search results.*"[22]

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, (the "Furman Report") paragraph 2.8 et seq; Stigler Report, page 99.

16 See also Furman Report, paragraph 2.20.

17 For instance, in the case of Google Flights or Google Hotel Finder, there is a valid argument that Google has engaged in an unlawful tie of its travel vertical to its general search services. Once the user enters a travel-related query on Google Search, Google will *automatically* display its OneBox (e.g., Hotel search unit or Flights unit). There is no way for the user to access Google Search and avoid Google's verticals.

18 See e.g., R. Toplensky and M. Acton, "Google antitrust remedy delivers few changes for rivals", *Financial Times*, 27 October 2017, available at https://www.ft.com/content/b3779ef6-b974-11e7-8c12-5661783e5589.

19 N. Hirst and L. Croft, "Google's shopping remedy providing 'very little' traffic to rivals, EU's Vestager says", MLex, 27 November 2019.

20 Commission Decision of 18.7.2018 in Case AT.40099 – *Google Android*, C(2018) 4761 final.

21 A. White, "Google's App Choice Screen Still Favors Google, Rival Says", *Bloomberg*, 28 January 2020, available at https://www.bloomberg.com/news/articles/2020-01-28/google-rival-attacks-search-giant-s-bid-to-stoke-android-choice.

22 "Google's Android choice screen 'rigged' against some search engines, DuckDuckGo says", *MLex*, 10 March 2020.

Finally, there are circumstances where competitive entry may not be possible in the short- to medium-term as a result of the existence of insurmountable barriers to entry, in which case *ex ante* regulation may be the only available tool to prevent Systemic Digital Platforms from non-exploitative abuses of their market power.

In light of the above, while eu travel tech supports the work done by DG Competition, intervention based on competition law alone many not be sufficient to address and deter anticompetitive conduct by Systemic Digital Platforms. Rather, we believe that existing *ex post* enforcement should be complemented by *ex ante* rules. *Ex ante* rules could address certain limitations of antitrust enforcement, ensuring EU markets remain fair and contestable to the benefit of consumers. This view is shared by various Member States, including Germany and France, which are considering revising their competition law frameworks for the digital economy.

Germany has been perhaps the most aggressive Member State to date. In January 2020, the Ministry of Economic Affairs and Energy published a draft bill proposing to amend the German Act against Restrictions of Competition (Gezetz gegen Wettbewerbsbeschränkungen or "GWB").[23] Among other things, the draft bill introduces the concept of "*undertakings with paramount significance for competition across markets*", and provides for the Bundeskartellamt to impose additional obligations on such undertakings.

More recently, the French Autorité de la Concurrence suggested introducing the concept of "*structuring digital platforms*", i.e. those with significant market dominance.[24] Last year, the competition authorities of Belgium, the Netherlands and Luxembourg also called for the introduction of *ex ante* instruments to enable them to remedy potential anti-competitive conduct in digital markets without conducting full-scale investigations.[25]

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[23] Referentenentwurf des Bundesministeriums für Wirtschaft und Energie, Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), 24 January 2020 The draft bill is available (in German) at https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf. An English translation of the key proposals can be found at https://www.d-kart.de/wp-content/uploads/2020/02/GWB10-Engl-Translation-2020-02-21.pdf.

[24] "The Autorité de la concurrence's contribution to the debate on competition policy and digital challenges", 19 February 2020, available at https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf (the "Autorité de la concurrence position paper").

[25] Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world, 2 October 2019, available at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf.

Given these developments, and the resulting risk of fragmentation of the internal market linked with the multiplicity of initiatives taken at the national level, the EU should proactively step in and adopt EU *ex ante* rules ensuring uniformity and consistency in creating a true (regulatory) level playing field across the Union.

## V. The legal basis for *ex ante* regulation under EU law

The EU could adopt *ex ante* regulation to ensure the fairness and contestability of digital markets relying on either Article 114 TFEU or Article 103 TFEU.

First, the EU should be able to rely on the general internal market legal basis of Article 114 TFEU, as the proposed rules would have as their object "*the establishment and functioning of the internal market*." However, this would require that the (lengthy) ordinary legislative procedure be followed, with legislation being adopted jointly and on an equal footing by the Parliament and the Council on a proposal from the Commission (Article 289(1) TFEU).

Alternatively, the Commission may choose to rely on Article 103 TFEU,[26] which provides for the adoption of a Regulation or Directive "*to give effect to the principles set out in Articles 101 and 102 […] laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.*" This path would be open if the proposed rules are designed to give effect to the "*principles*" laid down in Article 102 TFEU: the rules would elaborate on the long-recognized "special responsibility" of a dominant undertaking under Article 102 TFEU.[27]

The benefit of Article 103 TFEU is that it enables legislation to be adopted on the basis of a faster special legislative procedure (see Article 289(2) TFEU), with the Council of the European Union as the *sole* legislator. The European Parliament would only take part in a *consultation* procedure.[28] Given the obvious benefits of such a shorter

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26 Of the same view the Report "A new competition framework for the digital" prepared by the Commission 'Competition Law 4.0', set up by the German Ministry of Economic Affairs and Energy, available at https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3 (the "Competition Law 4.0 Report"), page 49.

27 Judgment of the Court of 9 November 1983 in case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECLI identifier: ECLI:EU:C:1983:313.

28 This means that the Commission will submit the proposal to the Council and the European Parliament. The Parliament may accept, reject or propose amendments to the legislative proposal. However, the Council is *not* required to take into account the Parliament's opinion – but it must not take a decision without having received it. If the Council substantially amends the Commission's proposal after the Parliament has given its opinion, the Parliament must be reconsulted (see paragraph 40(iii) of the Framework Agreement on relations between the European Parliament and the European Commission).

legislative procedure, eu travel tech encourages the Commission to base its legislative proposal on Article 103 TFEU.

## VI. Identifying the scope of the *ex ante* regulation

The most challenging issue is to delineate the scope of the proposed rules, i.e. identify the characteristics of the undertakings that should be subject to the *ex ante* rules. The goal should be to produce a workable definition that is neither under- nor over-inclusive, i.e. that captures those (but *only* those) undertakings whose systemic role in the digital economy is such that their conduct threatens the fairness and openness of EU markets, without imposing unnecessary regulatory burdens on other market participants. The Commission should rely on abstract and objective criteria to define the scope of the regulation, as naming particular companies (e.g., the GAFAs) would not be realistic.

In general, it seems there are two approaches that could be followed, each with its own pros and cons. One approach would be to lay down a "hard" definition, whereby certain exhaustive criteria would have to be cumulatively met in order for an undertaking to be subject to the *ex ante* rules. While theoretically providing certainty, this approach faces the challenge of correctly formulating the various criteria *in abstracto*. A second approach would be to set out *indicative* criteria, which the authority responsible for enforcing the rules would use to determine whether a given undertaking is subject to one or more of the rules. This approach provides flexibility but might create legal uncertainty.

The terms of reference ("ToRs) of the "Platforms with Significant Network effects acting as Gatekeeper Impact Assessment Study" (the "Impact Assessment Study") provides some indication of the types of platform that could fall within the scope of *ex ante* regulation. We agree that the regulation should cover "*online platforms, i.e. digital services that facilitate interactions via the Internet between two or more distinct but interdependent sets of users*",[29] including "*online marketplaces, app stores, search engines, social media and platforms for the collaborative economy*."[30]

We also note that the ToRs identifies a series of features that could be used to identify the online platforms that would be subject to *ex ante* regulation, including the fact that:

[29] "Platforms with Significant Network effects acting as Gatekeeper Impact Assessment Study", p. 1.

[30] Id.

- They are "*driven by strong economies of scale, and direct and indirect network effects [and] increasingly act as private gatekeepers to critical online activities for an exceptionally large population of private and business users*."[31]

- Their "*gatekeeper role is enabled inter alia by their hold over vast amounts of data and in some cases very large customer bases*."[32]

- They enjoy a "*systemic ability to cement and even expand their critical gatekeeping roles, including in other ecosystems, to raise barriers to entry and expansion for rivals and to increase their hold and leverage over their users*."[33]

- Their "*large competitive advantage due to the economies of scale and of scope, reinforced by data-driven network effects*" allows them "*to act as private regulators setting the rules of the game on the markets they control*."[34]

- The ability to leverage their core abilities (data, customer base, technological assets, etc.) to enter and potentially conquer new markets with relative ease "*may lead to unusually large commercial imbalances and bargaining power between platforms on the one hand and their users and rivals on the other*."[35]

eu travel tech agrees that these features are what sets "Systemic Digital Platforms" apart from many other platforms that should not be subject to *ex ante* regulation, as problematic conduct by such other platforms can be dealt with using competition law.

On the basis of the above, we think a workable definition would be that a digital platform is systemic if the following cumulative conditions are met:

(a) Its activities span over a significant part of the EU internal market and are protected by high barriers to entry, such as economies of scale, and direct and indirect network effects;

(b) It acts as a private gatekeeper to critical online services for an exceptionally large population of consumers, which single home; hence allowing it to act without constraint when it sets the rules of the game for the services it controls.

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31 Id., p. 3.

32 Id.

33 Id.

34 Id., p. 2.

35 Id., p. 4.

(c) It is able to leverage its unique assets (data, customer base, technological assets, etc.) into new markets and exclude rivals.

The first condition requires that *ex ante* regulation should only capture digital platforms whose activities extends "across a significant part of the internal market", hence avoiding local actors from being caught by *ex ante* regulation. It also requires that these online platforms be protected by high barriers to entry, enabling them to enjoy significant and enduring market power over their business customers and individual users.

The second condition requires that the digital platform should act as a private gatekeepers, so that one user group depends on the platform in order to reach a significant portion of another user group. That is the case when one user group (typically consumers) single-homes, to the effect that the other user group (typically businesses) relies on each platform with single-homing consumers to reach those single-homers.[36]

Third, this position can also enable the platform to control access to users in an adjacent market ("gatekeeper" role), enabling it to charge a premium for such access (e.g., in the form of high fees or other onerous terms).[37] They are also able to dictate their rules to competitors in such adjacent markets, which are dependent on their platforms to reach consumers, hence acting as private regulators. This reflects the "horizontal" or "conglomerate" nature of the digital platforms in question. Indeed, there is a valid argument that the digital platforms posing most risk to competition are those that, by virtue of their systemic position, access to resources or competitively relevant data are able to swiftly and effectively expand into adjacent or related markets. This enables the digital platform to rapidly become dominant in new markets, while at the same time entrenching its position on its core(s) market(s), reinforcing its gatekeeper role.[38]

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[36] See also Autoriteit & Consument Market, "Market study into mobile app stores", Report, 11 April 2019, available at https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf, page 56, describing how single-homing of one user group enables the platform to become a bottleneck for the multi-homing side: "*[s]ingle-homing and a lack of switching opportunities mean consumers cannot effectively be reached by the multi-homing side in any other way, and the platform becomes a bottleneck for reaching the single-homers. According to economic theory, this means that the platform can charge the multi-homing side a premium fee for accessing the single-homing side, once it has attracted a large single-homing group. If the single-homing users cannot be effectively reached by the multi-homing side in any other way, the platform will become a bottleneck for reaching the single-homers."*

[37] See also Autorité de la concurrence position paper, page 7; Crémer Report, pages 61-63.

[38] See also German draft bill to amend GWB, page 76: "*such undertaking have in particular the ability to use their power and resources from other markets to restrict competition in additional markets, thereby strengthening their market position there and thus ultimately further deepening their paramount significance for competition across markets*." (free translation from the original German).

A second approach would be to, instead of proposing a "hard" definition of what constitutes a Systemic Digital Platform, list criteria on which the authority responsible for enforcing the rules would rely in order to classify the digital platform as systemic. The indicative criteria could be similar to the conditions put forward above as part of a definition. The authority enforcing the rules could thus have regard to the fact that the platform is a digital gatekeeper, which can act as a private regulator, and leverage its market position into adjacent or other related markets, as well as other factors (such as the digital platforms' access to competitively relevant data, its financial strength, etc.).[39]

We note in this respect that the ToR of the Impact Assessment Study mentions that the authors of the study should elaborate a set of "*mainly quantitative indicators (and underlying methodology for setting those) on the basis of platforms' characteristics such as number of unique users, number of visits, the amount of gathered data, time spent on the platform, network effects and drivers of growth, main source of income, multi-platform integration, third parties' turn-over realised on a platform or geographic coverage, number of transactions, etc.*" While we believe that these quantitative criteria may play a role in identifying the platforms that should be subject to *ex ante* regulation, they should be combined with the qualitative criteria suggested above. We do not think, for instance, that the time users spent on a platform or the number of visits it receives are, in and of themselves, particularly good indicators of the systemic nature of a platform.

Regardless of the approach followed, it would be necessary to safeguard legal certainty for market participants. For this reason, we think the *ex ante* rules should apply to a digital platform's conduct only once the competent regulatory authority has issued a formal decision designating such platform to be "systemic". That is in line with the proposals in the Furman Report (whereby the proposed Digital Markets Unit would have to first designate the companies holding "*strategic market status*"), and the German draft bill (whereby the Bundeskartellamt would have to first issue a decision declaring that an undertaking is of "*paramount significance for competition across markets*").[40]

If the Commission were to take this approach, it would have to consider (1) which *authority* would have competence to issue a decision declaring a digital platform to

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[39] See also the German draft bill to amend GWB, which provides that "*[i]n determining the paramount significance of an undertaking for competition across markets, particular account shall be taken of: 1. its dominant position on one or more markets, 2. its financial strength or its access to other resources, 3. its vertical integration and its activities on otherwise related markets, 4. its access to data relevant for competition, 5. the importance of its activities for third parties' access to supply and sales markets and its related influence on third parties' business activities*."

[40] See proposed Section 19a of the German draft bill to amend GWB.

be "systemic", (2) the *effect* of such a decision, (3) the *geographical* and (4) *temporal scope* of such a decision. As these issues are closely related to enforcement considerations, we address them in **Part VIII** below.

## VII. The content of *ex ante* regulation

In this Part, we propose the principles that should apply to Systemic Digital Platforms in order to ensure the fairness and contestability of EU digital markets. Instead of laying down highly detailed and prescriptive rules, the *ex ante* regulation should set out core principles, which are fleshed out in an accompanying guidance paper and further developed through the enforcement process.[41]

The principles would limit or prohibit Systemic Digital Platforms from engaging in conduct considered to be particularly harmful, such as self-preferencing or reducing interoperability with competing products or services. Of course, such practices may well be prohibited under Article 102 TFEU. However, given the potential for harm when such Systemic Digital Platforms engage in such conduct, *ex ante* regulation would introduce a *reversal* in the burden of proof, whereby such practices would be presumed unlawful.[42] It would then be for the Systemic Digital Platform to prove that its conduct does not have adverse effects on competition. The Systemic Digital Platform should also have the right to provide an objective justification for its conduct or point to demonstrable efficiencies that are passed on to consumers that outweigh anti-competitive effects. That would ensure that *ex ante* regulation does not discourage pro-competitive practices. We now turn to particular practices that could be addressed with the *ex ante* rules.

### 1. Leveraging / Self-preferencing

Many Systemic Digital Platforms seek to leverage their market power from one market into an adjacent or other related market.

A particular type of vertical leveraging that should be regulated is self-preferencing by Systemic Digital Platforms, namely using market power in one market to favor their position in an adjacent or related market at the expense of their rivals, e.g., by giving preferential treatment to their own products and services.[43] There is growing

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41 Of the same view the CMA with regard to a code of conduct for digital platforms. See CMA Interim Report, page 237.

42 Of the same view the Crémer Report with regard to self-preferencing. See also ADLC position paper, page 8.

43 According to the context, self-preference tactics may come in different shapes and forms, e.g., a systemic platform operating a search engine or an online marketplace may modify its ranking algorithm to give an advantage to its own products or services (e.g., in the form of a more prominent position in the results or a visually richer and more attractive format).

consensus that self-preferencing by systemic digital platforms may be harmful for competition and should be circumscribed.[44]

As observed above, one clear example of harmful self-preferencing is when Google places its "Hotel search" or "Flights search" units above all higher ranked organic search results, hence discounting organic search results in favor of its own travel products. Users will be drawn to these Google travel products not because they provide superior services, but because they are guaranteed a privileged position by Google on top of the SERP. These products are prominently featured on the SERP because Google determine where its page placement algorithm displays its own vertical product relative to the organic results produced by its search engine, which it can do because of the lack of competition. In this case, self-preferencing hurts competition, innovation and consumer choice.

This self-preferencing problem is further aggravated when organic search results are also discounted by advertising as organic search almost entirely disappears from the screen. This forces travel tech operators to buy expensive advertising, which – while being extremely profitable to Google – increases their cost of customer acquisition and distribution, and squeezes their margins.

In addition to pushing organic search results from the screen, Google is able to funnel traffic to its own vertical search product through a "*bait and switch*" mechanism, When a user clicks on a listing in the Hotel search unit display, the user thinks that he will be taken to the listing he clicks on, but in fact, regardless of the listing on which he clicks, he is taken to the Hotel Finder page, not to the listing he selected –The user then separately inputs her search details into Google's Hotel Finder on this separate page (e.g., dates, star rating, budget, services such as Wi-Fi) for a new search.
As long as Google is allowed to give preferential treatment to its own products on the SERP, as well as to load the top of the SERP with ads discounting organic traffic, market players such as the members of EU travel tech will have to spend more while getting less traffic and conversion on its ad spend. This hurts growth, innovation and consumer choice.

2. Limiting data cross-usage

As explained above, the ability to internally combine and use data across products and services may enable a platform like Google to engage in "envelopment" strategies aimed at conquering new markets through cross-subsidization. This is, for instance, illustrated by the Google Flights service, which Google does not monetize by charging a fee, but by collecting data that it will monetize through search or display ads. An appropriate response would be to place strict limitations on the Systemic

[44] Crémer Report, pages 66-67; Furman Report, pages 60-61; CMA Interim Report, page 238; Competition Law 4.0 Report, pages 50-51; German draft bill to amend GWB, page 78; ADLC position paper, page 8.

Digital Platforms' ability to combine and use data across products and services ("data unbundling").

In the alternative, and in order to preserve efficiencies stemming from data cross-usage, the Systemic Digital Platforms could be prohibited from using data collected from one product or service in order to improve advertising for another product.[45] That would be especially the case where the data is provided by business users for the sole purpose of servicing the business user's advertising, but where the business user has no option to limit the ability of the Systemic Digital Platforms to use this data for other purposes.

3. Impeding multi-homing

Multi-homing has the potential to enable new entrants to build a sufficiently large user base and eventually challenge the Systemic Digital Platform, introducing much-needed competition "for" the market. As a result, measures impeding multi-homing entrench the Systemic Digital Platform's position by "locking in" users and erecting barriers to entry. For this reason, it is important that Systemic Digital Platforms be prohibited from taking measures that impede multi-homing, such as reducing user data portability.[46]

Depending on the case, it might be appropriate to require Systemic Digital Platforms to provide "*real-time, potentially standardised, access*" to data,[47] in order to enable "*personal data mobility*".[48]

## VIII. Enforcement considerations

A final, but equally important question, is which regulatory authority should be responsible for enforcing the *ex ante* rules. This is addressed in this Part, alongside related enforcement considerations.

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45 Advertising would be construed broadly to include all fundamental advertising functions, namely targeting, frequency capping, conversion measurement and attribution.

46 Of the same view the authors of the Crémer Report, page 57 ("*it is important to ensure that multi-homing is possible and that dominant platforms do not impede its practice*") and page 58 ("*we feel that a measure by which a dominant firm impedes multi-homing is suspect and an efficiency defence would be needed*"). See also German draft bill to amend GWB, according to which undertakings with paramount significance for competition across markets should be prohibited from making the interoperability of products or services or data portability more difficult and thereby impending competition.

47 Crémer Report, page 84. As the authors of the Crémer Report observe, data interoperability allows for complementary services to platforms to be developed and may also help multi-homing.

48 Furman Report, pages 65-71.

There seem in principle to be three options, namely (a) enforcement at the EU level, (b) enforcement at the national level and (c) a combination of both. Considering the need to ensure consistency among EU Member States while avoiding overburdening the Commission, a workable enforcement mechanism could differentiate between (1) the process of designating a digital platform as "systemic" and (2) enforcing the principles analyzed above in **Part VI**.

1. Designating a digital platform as "systemic"

We strongly recommend that the Commission should have *exclusive* jurisdiction to designate a digital platform as "systemic". Empowering national authorities to declare digital platforms to be "systemic" would lead to considerable fragmentation across the EU. One could easily imagine a scenario in which one national authority declares a given pan-European platform to be systemic while other national authorities do not. In order to achieve consistency and legal certainty, the power to issue such decisions should lie exclusively with the Commission.

The effect of such a designation should be that the Systemic Digital Platform is *automatically* subject to the *ex ante* rules.[49] When issuing the decision qualifying a platform as "systemic", the Commission should have the power to limit the scope of its obligations specifying that the platform should comply only with some of the *ex ante* rules, in order to better take into account the particular characteristics of the platform in question. The addressee of the decision should have of course the right to challenge the decision before the EU courts, but such relief should not have suspensory effect.

The geographic scope of the decision should reflect the EU-wide jurisdiction of the Commission and the cross-border nature of the relevant Systemic Digital Platforms, i.e. it should cover all of the Member States in which the Systemic Digital Platform is active. In other words, the designation of a digital platform as systemic would be "pan-European", unless a narrower geographic scope is explicitly identified. The Commission's decision should bind national authorities – including national courts, which when entertaining doubts about the legality of the Commission's decision would have the power to refer the matter to the Court of Justice for a preliminary ruling under Article 267 TFEU.

Moreover, given that the Commission's decision would be effective *ex nunc* (and not retroactively), it should be in force for an indefinite period of time ("once systemic always systemic"), with the caveat that (a) the Commission would monitor market developments and revisit (and if need be update) its decision periodically (e.g., every three years) and (b) the addressee would have the right to ask the Commission to

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repeal its decision for the future pointing to exceptional changes in market circumstances.

2. Enforcement of the *ex ante* rules

Enforcement of the *ex ante* rules could be based on a system of *parallel* competences between the Commission and national authorities, drawing inspiration from the mechanism in place for the enforcement of EU competition law according to Regulation 1/2003.[50] Under this mechanism, competence lies with the authority "well placed to act".[51] A Member State's authority is typically "well placed to act" when there is "*a material link between the infringement and the territory of [that] Member State*".[52] On the other hand, the Commission is particularly "well placed to act" if: (a) the practice has effects on competition in more than three Member States,[53] (b) the case is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission,[54] or (c) the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.[55]

Were similar principles to govern the enforcement of *ex ante* rules, we would typically expect the Commission to be the authority "well placed to act", as the practices of large digital platforms are usually cross-border in nature and affect several Member States at once. However, it cannot be excluded that in certain cases national

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50 According to Article 11(1) of Regulation 1/2003, "*[t]he Commission and the competition authorities of the Member State shall apply the Community competition rules in close cooperation*". Further details on the division of work between the Commission and national competition authorities (together, the "European Competition Network" or "ECN") are laid down in Commission Notice on cooperation within the Network of Competition Authorities (Text with EEA relevance), OJ C 101, 27.4.2004, pages 43–53 (the "Cooperation Notice").

51 According to paragraph 6 of the Cooperation Notice, a case may be re-allocated where the authority that receives a complaint or initiates *ex officio* proceedings considers that is not "well placed to act" or where other authorities also consider themselves "well placed to act". Re-allocation may also be decided if necessary "*for an effective protection of competition and of the Community interest*" (paragraph 7 of the Cooperation Notice).

52 Paragraph 9 of the Cooperation Notice. Paragraph 8 lays down three cumulative conditions indicating the existence of such material link: (a) the agreement or practice has substantial direct actual or foreseeable effects on competition within the territory of an authority, is implemented within or originates from its territory, (b) the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately and (c) the authority can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

53 Paragraph 14 of the Cooperation Notice.

54 Paragraph 15 of the Cooperation Notice. [expedia: para 14]

55 Ibid.

authorities would be "well placed to act", e.g., because the practice in question is implemented only in one Member State – or simply because the Commission's resources are limited. In that case, enforcement by the national authorities could work as follows: once a Systemic Digital Platform has been the subject of a decision by the Commission, national authorities could rely on the Commission's decision and initiate proceedings against the Systemic Digital Platform for breach of the *ex ante* rules. Considering the proposed reversal of the burden of proof, we would expect the workload of the national authority to be manageable and thus decisions to be adopted swiftly.

In any case, the competent authority – be it the Commission or national authorities – should be vested with the power to take all necessary measures to ensure the *effet utile* of the *ex ante* rules, lest we end up with toothless regulation. That would involve, in particular, (a) broad information-gathering powers, (b) the power to accept commitments proposed by the platform as well as (c) the power to order the platform to either refrain from a particular action or engage in specific affirmative conduct to ensure compliance with the rules, on pain of periodic penalty, and appoint a monitoring trustee. The power to impose *restorative* remedies, i.e. remedies aimed at restoring competition in the *status quo ante* should also be considered.[56]

In addition, considering the fast-moving nature of digital markets and their tendency to (irreversibly) tip, the competent authority should have the power to issue interim measures aimed at preserving the status of competition, pending full examination of the systemic platform's compliance with the *ex ante* rules.[57] The Commission should also have the power to order interim measures. To this end, the Commission should adopt a threshold for interim measures that is lower than the one currently contained at Article 8(1) of Regulation 1/2003, which requires a "*prima facie*" finding of infringement and an urgent need for interim measures to avert the risk of "*serious and irreparable*" damage to competition. Such lower threshold could, for instance, require that the conduct in question is "*likely*" to infringe ex ante rules and may lead to "*serious and immediate*" damage to competition in a related market.[58]

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[56] In favor of restorative remedies (remedies with a "restitutive" element) the authors of the Crémer Report, page 68.

[57] On the need to make greater use of interim measures and / or suggestions to lower the required threshold, see Furman Report, pages 104-105; ADLC position paper; Competition Law 4.0 Report, pages 71-73.

[58] This is the threshold under French law. See French Commercial Code, article L464-1; French Supreme Court, case No. 04-16.857 *Neuf Telecom c/ France Telecom*, 8 November 2005, Bulletin 2005 IV No 220. Note that the ADLC has made frequent use of interim measures.