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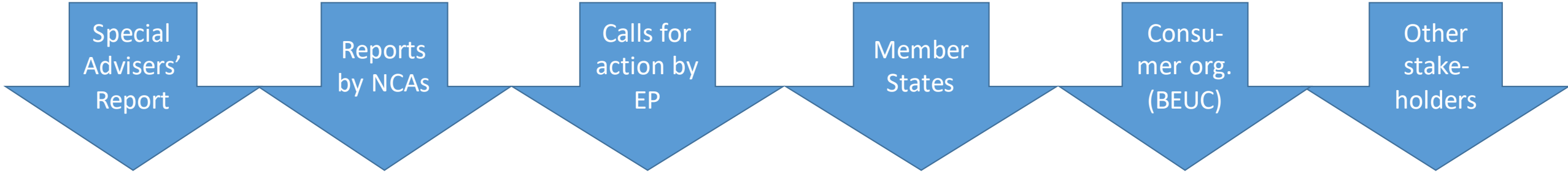
DIGITAL MARKETS ACT

Salzburger Telekom Forum
8 September 2021

Background

- **Worldwide reflection process** (EU, US, AUS, JP) about need for changes to current legal framework to allow for **enforcement action preserving the competitiveness of markets**
- Factors triggering this debate include **digitalisation** & **market concentration**



- Two related **impact assessments launched in June 2020**: (i) ***ex ante*** rules for large gatekeeper platforms and (ii) New Competition Tool
- Public consultations and other evidence gathered pointed to **most pressing issues in digital markets** and **need for holistic approach** avoiding possible overlaps
- Both **initiatives merged to feed into Digital Markets Act**
- Digital Markets Act **does not replace consumer protection legislation** and **complements existing competition law**

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Robust evidence base and engagement

- Long-standing and on-going policy and regulatory work in the area of platform economy:
  - Communication on platforms and the Digital Single Market (**2016**)
  - Special Advisers Report to Commissioner Vestager on "*competition policy in the digital era*" (**2019**)
  - Platform to Business Regulation (on promoting fairness and transparency for business users of online intermediation services (**2019**)
  - International work: Stigler Center, UK CMA, US House Majority Report, ACCC inquiry, JP P2B bill/advertising study
  - Proposal of the Digital Markets Act (following Open Public Consultation and supported by the Impact Assessment study) (**2020**)

- Antitrust enforcement experience by the Commission and other competition authorities

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Rationale for intervention

- **Digital sector**: market concentration tendencies and underlying market dynamics in the digital sector, as well as other characteristics of digital markets, have contributed to several **market failures** and **high risk of market tipping**
  - **Extreme scale and scope economies**, often resulting from nearly zero marginal costs to add customers and business users
  - **Strong network effects** associated to the multi-sidedness of online platforms
  - **Data driven-advantages**
  - **Asymmetric** power in commercial relations raising a risk/enabling unfair behavior and behavior undermining contestability of markets in the digital sector
  - **Presence of large platforms**, often integrated in large ecosystems, exacerbates negative effects triggered by these features, thus making it impossible for markets to self-correct.

DMA: identified problems and objectives

Identified problems:

- **Unfair gatekeeper practices** vis-à-vis business users/end users
- **Weak contestability** (or risk thereof) of platform markets
- **Regulatory fragmentation** and **fragmentation of internal market**

driven by features of digital markets

Objectives:

- **Address market failures** to ensure contestable and competitive digital markets for increased innovation and consumer choice
- **Address gatekeepers' unfair conduct**
- **Enhance coherence and legal certainty** to preserve **the functioning internal market** by means of harmonized rules

single *ex ante* regulatory instruments

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DMA: harmonization instrument

- **BASELINE = Platform to Business (P2B) Regulation**

- **DMA proposal = Harmonization* instrument to ensure effective functioning of internal market** in markets in the digital sector where gatekeepers are present = Article 114 TFEU

- **HARMONIZATION = no further obligations on gatekeepers** for the purpose of ensuring contestable and fair markets

- **DMA not replacing but complementary to:**
  - ✓ Rules pursuing other legitimate interests (e.g. consumer protection, unfair trading practices)
  - ✓ EU competition rules and national competition rules

- **EXAMPLES OF FRAGMENTATION:**
  - National laws on parity clauses
  - National rules concerning digital payment services

***Harmonization refers to the determination of EU-wide legally binding standards to be met in all Member States.**

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DMA: core principles on material scope

- Gatekeepers are platforms:
  - with a **significant impact** on the internal market,
  - serve as an **important gateway** for business users to reach their customers, and e
  - enjoy, or will foreseeably enjoy, an **entrenched and durable position**.

- Scope = **core platform services** offered by gatekeepers – wherever in the Union and no matter where gatekeepers are established.

- Gatekeepers designated based on a **rebuttable presumption** (quantitative criteria) or based on **market investigation** (qualitative assessment).

Core platform services

Criteria considered:

- highly concentrated platform services;
- one or very few large digital platforms set the commercial conditions irrespective of their competitors, customers or consumers;
- few large digital platforms act as gateways for business users to reach their consumers and vice-versa;
- gatekeeper power often misused by means of unfair behaviour

- **online intermediation services** (incl. esp. marketplaces, app stores),
- **online search engines**,
- **operating systems,**
- **cloud computing services;**
- **video sharing platform services**,
- **number-independent interpersonal electronic communication services,**
- **social networking services** and
- **advertising services,** including advertising networks, advertising exchanges and any other advertising intermediation services, related to one or more of the above services

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Gatekeeper designation process (Article 3)

A provider of a core platform service can be designated as a gatekeeper when:

Requirements

a) it has a **significant impact on the internal market**;

b) it operates a core platform service which serves as an **important gateway** for business users to reach end users;

c) it enjoys an **entrenched and durable position** in its operations or it is foreseeable that it will enjoy such a position in the near future (“**emerging gatekeeper**”)

Rebuttable presumption

a) Annual **EEA turnover** of 6.5 bn (last 3 FYs) OR average **market capitalisation/equivalent fair market value** of 65 bn (last FY) AND **one CPS in at least 3 Member States**

b) 45 million **monthly active end users** and 10,000 **yearly active business users** established in the Union in last FY

c) Where (b) is satisfied in each of the **last 3 FY**

- **Notification obligation** within 3 months after meeting the quantitative thresholds
- **Designation** within 60 days after receiving complete information, **unless rebuttal** based on substantiated arguments in relation to operation of CPS
- **Market investigation** (target: 5 months as of opening)

Qualitative designation following market investigation

- Target: 12 months as of opening
- Emerging gatekeepers: subset of obligations aimed at fostering contestability
- Investigation powers & due process

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Obligations

- **Directly applicable** (Articles 5 and 6)
- Obligations apply to **core platform services** that meet the conditions (Article 3(7))
- Narrow **exemptions**: public interest, viability of operations (Art. 8, 9)

Directly implementable obligations (Article 5)

If need for further specification → Commission Decision (Article 6 → Article 7)

Information obligation of acquisitions of core platform service providers (Article 12)

Independent audit of techniques for profiling consumers across core platform services (Article 13)

Gatekeepers expected to enjoy a durable and entrenched position

Only obligations that are necessary and appropriate for contestability

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Examples of obligations under Article 5 by type of practice

- Data related practices
  - Ban on **combination of personal without consent**
  - *EXAMPLE: provider of online social network site collecting and combining data for deep consumer profiling from its users obtained through several different services without consent*
- Favourable treatment
  - Obligation to allow business users from **promoting offers to their customers**, and from concluding contracts with these customers **outside of the gatekeeper's platform or service**
  - *EXAMPLE: enabling news publisher to inform a new user through its newspaper app that the subscription is cheaper if concluded via the publisher´s website as oppose to gatekeeper's core platform service*
- Advertising related practices
  - Provide advertisers and publishers with information concerning **the price paid by the advertiser** and **the price paid to the publisher** for the impression of the given ad
  - *EXAMPLE: ad tech service provider could not refuse to provide advertisers and publishers with information about all the intermediation fees charged by it*

Examples of obligations under Article 6 by type of practice

- Data related practices
  - Ban on the use **non-publicly available commercially sensitive data** of business users
  - *EXAMPLE: an e-commerce marketplace using commercially sensitive data collected from individual sellers to compete with these sellers on its own online marketplace (i.e. dual role)*
- Favourable treatment
  - Obligation **not to treat more favourably** in raking gatekeeper's own services and products
  - *EXAMPLE: a search engine preferring its own vertically integrated services in its search engine results (e.g. shopping or travel services are featured on top of search results)*
- Access conditions
  - Obligation to ensure **fair and non-discriminatory conditions** of access to business users to app stores
  - *EXAMPLE: provider of an app store charging different commission rates to different business users without clear identification of reasons for such differentiation*

Market investigation

- Always subject to **opening of proceedings**

- Three scenarios:
  - **Designation of gatekeepers** based on qualitative criteria or rebuttal of presumption based on quantitative criteria
  - Investigation of possible **systematic non-compliance**
  - Investigation into **new core platform services** and **new (unfair) practices** (***future proofing***)

- Requirements on opening of proceedings
  - **Date of opening** of investigation
  - **Description of the issue**
  - **Purpose of the investigation**

Governance structure

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Commission is competent to ensure effective implementation and enforcement of the DMA

- ✓ Designation of gatekeepers (quantitative thresholds or market investigation)
- ✓ "Implementation dialogue" on Art. 6 obligations
- ✓ Suspension and exemption requests by gatekeeper
- ✓ Monitoring of compliance (fines, interim measures, additional remedies)
- ✓ Market investigations - systemic non-compliance and new services/practices

Member States (Advisory Committee)

Advice of the **Advisory Committee** on number of **decisions** - advisory procedure under Regulation (EU) No 182/2011

- ✓ Suspension of obligations (Art. 8)
- ✓ Exemption from obligations due to overriding reasons of public interest (Art. 9)
- ✓ Designation of gatekeepers following market investigation (Art. 15)
- ✓ Decision on systematic non-compliance (Art. 16)
- ✓ Decision on interim or voluntary measures (Art. 22 and 23)
- ✓ Non-compliance decision (Art. 25)
- ✓ Adoption of implementing acts (Art. 36)

Request for a market investigation **to designate** (Art. 33)