Digital Platforms – Opportunities, Risks and the Case for Regulation

Florence, 20 June
Werner Stengg
European Commission
2019: This Is What Happens In An Internet Minute

- Facebook: 1 Million Logs In
- YouTube: 18.1 Million Texts Sent
- Netflix: 3.8 Million Search Queries
- Google: 694,444 Hours Watched
- Instagram: 347,222 Scrolling Instagram
- Snapchat: 2.1 Million Snaps Created
- WhatsApp: 41.6 Million Messages Sent
- Giphy: 4.8 Million Gifs Served
- Amazon Echo: 180 Smart Speakers Shipped
- Tinder: 1.4 Million Swipes
- Twitch: 1 Million Views
- Spotify: 1 Million Emails Sent

Created By:
@LoriLewis
@OfficiallyChadd

European Commission
Online Platform Time = YouTube + Instagram Gaining Most

% Internet Users Using Select Platforms > 1x per Day, Global*

Source: Mary Meeker's Internet Trends 2019
## Global Market Capitalization Leaders

USA Stable @ 23 of 30... Technology Stable @ 9 of 30

<table>
<thead>
<tr>
<th>Rank</th>
<th>Company</th>
<th>Sector</th>
<th>Region</th>
<th>Market Cap Value ($B)</th>
<th>% Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Microsoft</td>
<td>Technology</td>
<td>USA</td>
<td>$1,007B</td>
<td>+146%</td>
</tr>
<tr>
<td>2</td>
<td>Amazon</td>
<td>Technology</td>
<td>USA</td>
<td>888</td>
<td>+159%</td>
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<tr>
<td>3</td>
<td>Apple</td>
<td>Technology</td>
<td>USA</td>
<td>875</td>
<td>+62%</td>
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<tr>
<td>4</td>
<td>Alphabet</td>
<td>Technology</td>
<td>USA</td>
<td>741</td>
<td>+49%</td>
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<tr>
<td>5</td>
<td>Berkshire Hathaway</td>
<td>Financial Services</td>
<td>USA</td>
<td>505</td>
<td>+44%</td>
</tr>
<tr>
<td>6</td>
<td>Facebook</td>
<td>Technology</td>
<td>USA</td>
<td>495</td>
<td>+46%</td>
</tr>
<tr>
<td>7</td>
<td>Alibaba</td>
<td>Technology</td>
<td>China</td>
<td>402</td>
<td>+106%</td>
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<tr>
<td>8</td>
<td>Tencent</td>
<td>Technology</td>
<td>China</td>
<td>398</td>
<td>+93%</td>
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<tr>
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<td>Visa</td>
<td>Financial Services</td>
<td>USA</td>
<td>372</td>
<td>+94%</td>
</tr>
<tr>
<td>10</td>
<td>Johnson &amp; Johnson</td>
<td>Healthcare</td>
<td>USA</td>
<td>368</td>
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<tr>
<td>11</td>
<td>JPMorgan</td>
<td>Financial Services</td>
<td>USA</td>
<td>354</td>
<td>+48%</td>
</tr>
<tr>
<td>12</td>
<td>Exxon Mobil</td>
<td>Energy</td>
<td>USA</td>
<td>316</td>
<td>(15%)</td>
</tr>
<tr>
<td>13</td>
<td>Nestlé</td>
<td>Food / Beverages</td>
<td>Switzerland</td>
<td>306</td>
<td>+33%</td>
</tr>
<tr>
<td>14</td>
<td>Walmart</td>
<td>Retail</td>
<td>USA</td>
<td>303</td>
<td>+37%</td>
</tr>
<tr>
<td>15</td>
<td>ICBC</td>
<td>Financial Services</td>
<td>China</td>
<td>285</td>
<td>+27%</td>
</tr>
<tr>
<td>16</td>
<td>Procter &amp; Gamble</td>
<td>Home Goods</td>
<td>USA</td>
<td>273</td>
<td>+24%</td>
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<tr>
<td>17</td>
<td>Mastercard</td>
<td>Financial Services</td>
<td>USA</td>
<td>271</td>
<td>+156%</td>
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<td>18</td>
<td>Bank of America</td>
<td>Financial Services</td>
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<td>262</td>
<td>+76%</td>
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<tr>
<td>19</td>
<td>Royal Dutch Shell</td>
<td>Energy</td>
<td>Netherlands</td>
<td>259</td>
<td>+31%</td>
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<tr>
<td>20</td>
<td>Samsung</td>
<td>Technology</td>
<td>South Korea</td>
<td>249</td>
<td>+50%</td>
</tr>
</tbody>
</table>

Source: Mary Meeker's Internet Trends 2019
Duopoly vs. Amazon Share of Total US Digital Ad Spending, 2018 & 2020

<table>
<thead>
<tr>
<th></th>
<th>2018</th>
<th>2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amazon</td>
<td>4.1%</td>
<td>7.0%</td>
</tr>
<tr>
<td>Duopoly (Facebook &amp; Google)</td>
<td>57.7%</td>
<td>55.9%</td>
</tr>
<tr>
<td>Other*</td>
<td>38.1%</td>
<td>37.1%</td>
</tr>
</tbody>
</table>

Note: includes advertising that appears on desktop and laptop computers as well as mobile phones, tablets and other internet-connected devices, and includes all the various formats of advertising on those platforms; net ad revenues after paying traffic acquisition costs (TAC) to partner sites; numbers may not add up to 100% due to rounding; *includes US digital ad spending outside Amazon, Facebook and Google

Source: eMarketer, Sep 2018
Cloud Deployment = Revenue +58% Y/Y...

Cloud Service Revenue – Amazon + Microsoft + Google

Source: Mary Meeker's Internet Trends 2019
Global Streaming Music Subscription Market H1 2018

Global Streaming Music Subscription Market, H1 2018 (All Revenues Are Label Trade Values)

**MUSIC SUBSCRIPTION REVENUE BY SERVICE**

<table>
<thead>
<tr>
<th>Quarter</th>
<th>Revenues in millions USD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1 16</td>
<td>91</td>
</tr>
<tr>
<td>Q2 16</td>
<td>106</td>
</tr>
<tr>
<td>Q3 16</td>
<td>119</td>
</tr>
<tr>
<td>Q4 16</td>
<td>136</td>
</tr>
<tr>
<td>Q1 17</td>
<td>150</td>
</tr>
<tr>
<td>Q2 17</td>
<td>167</td>
</tr>
<tr>
<td>Q3 17</td>
<td>179</td>
</tr>
<tr>
<td>Q4 17</td>
<td>199</td>
</tr>
<tr>
<td>Q1 18</td>
<td>213</td>
</tr>
<tr>
<td>Q2 18</td>
<td>230</td>
</tr>
</tbody>
</table>

**MUSIC SUBSCRIPTION MARKET METRICS**

- **229.56m** Music Subscribers H1 2018
- **$3,498m** Music Subscription Revenue H1 2018

Source: MIDiA Research Music Subscriber Market Share Model 09/18
Netflix Rules the Connected Living Room

Penetration of U.S. OTT households*

- Netflix: 74%
- YouTube: 54%
- Amazon Video: 33%
- Hulu: 23%

Share of total OTT viewing hours

- Netflix: 40%
- Amazon Video: 14%
- Hulu: 18%
- Others: 21%

* OTT (over-the-top) is defined as using apps to stream video content via the internet to a television set; wi-fi households only; April 2017

Source: comScore
Search engine market share in the United States, Europe and China in July 2018*

- **United States**: 86.4%
  - Google: 7.5%
  - Bing: 5.1%
  - Yahoo!: 1.0%
- **Europe**: 91.4%
  - Google: 3.7%
  - Bing: 2.4%
- **China**: 73.8%
  - Baidu: 4.1%
  - Others: 7.1%

* Market share across all platforms (desktop, mobile, tablet, game consoles)

Source: StatCounter
Globally marketplaces own 56% of cross border ecommerce

- Amazon is the most popular cross border webshop in Luxembourg (72%) and Austria (64%).
- eBay leads in Cyprus (63%).
- AliExpress was most popular in Russia (69%) and the Netherlands (35%).
Internet users who bought or ordered goods or services for private use in the previous 12 months by age group, EU-28, 2008-2018

Source: Eurostat (online data code: isoc_ec_i buy)
GOOD, BAD, OR BOTH?
<table>
<thead>
<tr>
<th>Platforms:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>make markets</strong> (opportunities)</td>
</tr>
<tr>
<td>business opportunities: access to global/new markets</td>
</tr>
<tr>
<td>consumer choice (<strong>wide</strong> access)</td>
</tr>
<tr>
<td>consumer empowerment (algorithms = access to <strong>relevant</strong> information)</td>
</tr>
<tr>
<td>consumers (and business) have <strong>easy</strong> access to information, goods and services</td>
</tr>
<tr>
<td>consumers (and business) have access to <strong>new</strong> (and cool) types of services and technologies</td>
</tr>
<tr>
<td><strong>make matches</strong> (efficiency)</td>
</tr>
<tr>
<td>&quot;regulation of markets&quot; (rules of the game; access) is entrusted to private parties (including all data)</td>
</tr>
<tr>
<td>control over data and algorithms (ranking) opens door to anti-competitive behaviour (e.g. self preferencing)</td>
</tr>
<tr>
<td>increases risk of lock-in into closed eco-systems (e.g. default settings, self preferencing, etc.)</td>
</tr>
<tr>
<td><strong>make lives easy</strong> (convenience)</td>
</tr>
<tr>
<td>first, fast and strongest uptake of new technologies, further cements competitive edge of digital champions</td>
</tr>
<tr>
<td><strong>make new things</strong> (innovation)</td>
</tr>
</tbody>
</table>
unsafe products
terrorist propaganda
counterfeit products
hate speech
value gap
unfair business practices
illegal and harmful content
taxation
consumer protection
"Online Platforms"

- create and shape new markets
- operate in multisided markets
- benefit from network effects
- rely on information and communications technologies to reach their users
- play a key role in digital value creation, notably by capturing significant value (including through data accumulation)

‘Online marketplace’ means a service provider which allows consumers to **conclude online contracts** with traders and consumers **on the online marketplace’s online interface**.

Clearly inform consumers about: the main parameters determining ranking of the different offers, and whether the contract is concluded with a trader or an individual.

*Proposal for Directive on better enforcement and modernisation of EU consumer protection rules ("New Deal")*
"Online interface"

‘Online interface’ means any software, including a website, part of a website or an application, that is operated by or on behalf of an economic operator, and which serves to **give end-users access to the economic operator’s products**.

"To require the removal of content from an online interface referring to the related products or to order the explicit display of a warning to end-users when they access the online interface".

*Regulation on Market Surveillance and Compliance of Products ("Goods Package")*
"Internet Platform"

An "Internet Platform" means any information society service provider whose service is used by third parties to initiate online the trading of physical goods.

"The primary responsibility for the protection and enforcement of IPR remains with the respective Rights Owners and that it is the primary responsibility of Internet Platforms to enable a safe online environment for consumers. Hence, it is the parties' goal to collaborate in the fight against the sale of Counterfeit Goods"

Memorandum of Understanding on the sale of counterfeit goods via the internet
"IT companies"

Facebook, Microsoft*, Twitter and YouTube (hereinafter "the IT Companies")

The IT Companies share, together with other platforms and social media companies, a collective responsibility and pride in promoting and facilitating freedom of expression throughout the online world; they also share the European Commission's and EU Member States' commitment to tackle illegal hate speech online.

Code of Conduct on Countering Illegal Hate Speech Online (2016)
"Hosting service provider"

"'hosting service provider' means a provider of information society services consisting of the storage of information provided by the recipient of the service at his or her request"

"Hosting service providers, in respect of content provided by content providers which they store at the request of those content providers, are encouraged to take effective, appropriate and proportionate measures to tackle illegal content online"

*Commission Recommendation on measures to effectively tackle illegal content online (2018)*
"Hosting service provider"

'Hosting service provider' means a provider of information society services consisting in the storage of information provided by and at the request of the content provider and in making the information stored available to third parties.

Hosting service providers shall take appropriate, reasonable and proportionate actions in accordance with this Regulation, against the dissemination of terrorist content and to protect users from terrorist content.

Proposal for Regulation on preventing the dissemination of terrorist content online (2018)
"Online content-sharing service provider"

‘Online content-sharing service provider’ means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

"shall obtain an authorisation from the rightholders" ... or "ensure the unavailability of specific works and other subject matter"

"Video sharing platform service"

"Video-sharing platform service” means a service ... where the principal purpose of the service ... is providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility"

"Take appropriate measures to protect minors; [and] the general public from (...) incitement to violence or hatred, ... public provocation to commit a terrorist offence, ... child pornography ... and offences concerning racism and xenophobia."

Directive on the provision of audiovisual media services (AVMSD)
"Digital interface"

'Digital interface' means any software, including a website or a part thereof and applications, including mobile applications, accessible by users.

"A 'significant digital presence' shall be considered to exist ... if the business ... consists wholly or partly of the supply of digital services through a digital interface"

This Directive lays down rules extending the concept of a permanent establishment, as it applies for the purposes of corporate tax in each Member State, so as to include a significant digital presence

"Online intermediation service"

‘Online intermediation services’ means:
(a) they constitute information society services;
(b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;
(c) they are provided to business users on the basis of contractual relationships.

Transparency and redress.

Regulation on promoting fairness and transparency for business users of online intermediation services (2019)
The B2P Regulation

on "promoting fairness and transparency for business users of online intermediation services" (2019)
Online platforms offer **unparalleled opportunities** and their **potential should be maintained**

**Innovation and growth in the digital economy**

More than 1 million EU businesses already selling goods and services via online platforms

**Cross-border market opportunities**

More than 50% of SMEs selling though online marketplaces sell cross-border

**Enhanced consumer welfare**

Increased choice of competitive goods and services online
Market dynamics and problems

1) Online platforms as main vehicle for market access (and as "regulators" of markets)

2) Unprecedented, strong network effects

3) Data-driven advantages of platforms

4) Imbalanced bargaining power and dependency of businesses on online platforms: unfair practices

5) Business users’ fear of retaliation
Data network effects

• Raw material to feed algorithms and AI

• Quality of service provided to consumers

• Competitive advantages vis-à-vis other sellers (offline, online, third party on own platform)

• Advantages in targeted advertising

• Facilitated entry into neighbouring markets; possibility to detect promising start-ups
Harmful trading practices

Possible motivations:

• Interests with business users are aligned (e.g. fee per transaction), but:
  • Focus on consumer side, who might otherwise multi-home
  • (Over-)reliance on automation (e.g. algo takes wrong decision to delist)

• Interests with (all) business users are not (fully) aligned:
  • Platform competes with 3rd party sellers (self preferencing)
  • Transactions of some sellers are more profitable than those of other sellers (e.g. higher commission rates, in-app purchases)
Terms and conditions:

- "imposed" (unfair?)
- unclear (about rights or practices)
- changed without prior notice
- unpredictable (e.g. about reasons for delisting)
- offer no redress possibilities
- forum clauses
- MFN clauses
Delisting:

- no clarity in terms and conditions
- no advance warning, nor information at time of delisting
- no redress possibilities (complaint handling)
- no liability in case of wrongful delisting
- loss of data/history
Ranking:

- No transparency about main ranking criteria
- No clarity about impact of extra payment options
Self preferencing:
No transparency about possible differentiated treatment (e.g., data, ranking, operating systems)

Data:
No transparency about:
• Data use by platform
• Data sharing with business users
• Data sharing with third parties
P2B initiative – design

Problem – based approach
- Unfair P2B trading practices
- Lack of effective redress
- Legal fragmentation

Two-stage approach
- Focused light-touch measures
- Observatory to inform future policy making

Three Pillars
- Transparency
- Redress
- Monitoring
Scope of the Regulation

**Definitional elements:**

a. Information society services
b. B2P2C relationship
c. Contractual relationships
d. Initiating transactions
e. Geographical scope: intermediation service in the EU irrespective of whether EU platform or not
 Included in the scope

Marketplaces on which a commercial transaction between a customer and a business user takes place

Characteristics: The transaction and payment take place on the platform

Common business model: The platform charges a commission

E-COMMERCE

APP STORES
**Included in the scope**

Online platforms bringing together users with the aim to facilitate a commercial transaction

**Characteristics:**
- The transaction does not take place on the platform itself
- The actual payment takes place outside the platform
- The business user may be charged by the platform in different ways (e.g. commissions, charges per click, listing fees)
NEW RULES

- **Terms and conditions** in plain and intelligible language.
- Business users will be informed of any changes to the T&C.
- Platforms will have to respect a notice period of 15 days, unless the business user concerned explicitly agrees on a shorter period.
- Providers of online intermediation services to state which additional channels and affiliate programmes they might distribute goods and services through, what ancillary goods and services they may offer alongside the business users’ offer and include the general effects on the ownership and control of IPR.
- Requirement for business users’ identity to be visible.

**T&Cs to include possible reasons for restricting, suspending or terminating.**

- No notice requirement for suspension of individual goods or services but 30 days’ notice for closure of an account.
- Providers on online intermediation services to provide a statement of reasons for its decision.

Delisting
NEW RULES

• Providers of online intermediation services as well as online search engines will be required to clearly inform about the general criteria determining how goods and services are ranked.

• Online intermediation services providers and search engines should be transparent on how they treat their own goods or services compared to those offered by business users.

The providers of online intermediation services have to formulate and publish general policies on what data generated through their services can be accessed, by whom and under what conditions.
Providers of online intermediation services will be required to explain the use of contract clauses demanding the most favourable range or price of goods and services offered by their professional users.

**NEW RULES**

Providers of online intermediation services shall include specific contractual terms:

- **Not imposing retroactive changes** to T&Cs (exceptions for regulatory obligations or if beneficial).
- **Transparency on use of information** after termination of a relationship and on how to terminate that relationship.

**MFN clauses**

**Good faith and fair dealing**
1. Online platforms will have to set up or have in place **internal complaint handling systems** (exemption for small enterprises)

2. Business users will have access to out-of-court dispute settlement through easily accessible **external mediators** (exemption for small enterprises)

3. Representative organisations or associations will be able to enforce the Regulation in court on behalf of businesses – **injunctive relief**

4. **Member States** to put in place measures to ensure adequate and effective enforcement of the Regulation.
Ex-ante Regulation or ex-post application of competition rules?

Or both?
Competition policy for the digital era

A report by
Jacques Crémer
Yves-Alexandre de Montjoye
Heike Schweitzer
The consumer welfare standard

- "Consumer" should encompass also (business) users
- Because of stickiness of market power...
- ...strategies by dominant platforms to reduce competitive pressure they face should be forbidden...
- ... in the absence of clearly documented consumer welfare gains
Market definition

- Market (boundaries) may change very quickly
- Interdependence of all sides of multi-sided platforms are essential in analysis
- Less emphasis on market definition, more emphasis on theories of harm and identification of anti-competitive strategies
- Consideration of "lock-in" strategies
- [Mind importance of clear market definition for SMP-type regulation!]
Other considerations

- Assessment of "market power" needs to consider:
  - the strength of consumers' biases towards default options and short-term gratification (behavioural economics)
  - The access to data available to the presumed dominant firm but not to competitors
- Err on the side of disallowing potentially anti-competitive conducts: impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct (e.g. when expanding into neighboring markets)
Platforms

• Essential to protect competition "for" the market
  • MFN clauses (wide or narrow bans, depending on competition between platforms)
  • Multihoming, switching and complementary services (data portability; interoperability)

• Equally important to protect competition "in" the market (i.e. competition on a dominant platform) – given that platforms play a form of "regulatory role"
Platforms as regulators

- Dominant platforms setting up a marketplace must ensure a level playing field (= not engage in abusive self preferencing)
  - Self-preferencing is not abusive per se, but subject to an effects test (Art 102 TFEU)
  - However, abusive also where it results in "leveraging" of market power, and not justified by pro-competitive rationale
- For non-dominant platforms, conduct including self-preferencing may have pro-competitive effects
Questions

• If we have/had new transparency rules for "all" platforms (B2P Regulation), and modernised competition rules for "dominant" platforms, do we still need additional ex-ante legislation for platforms having "significant market power" or "strategic market power" (see UK Online Harms White Paper)

• If yes, how would we define (a) such power and (b) adequate rules?