Dominance in data as a competitive advantage

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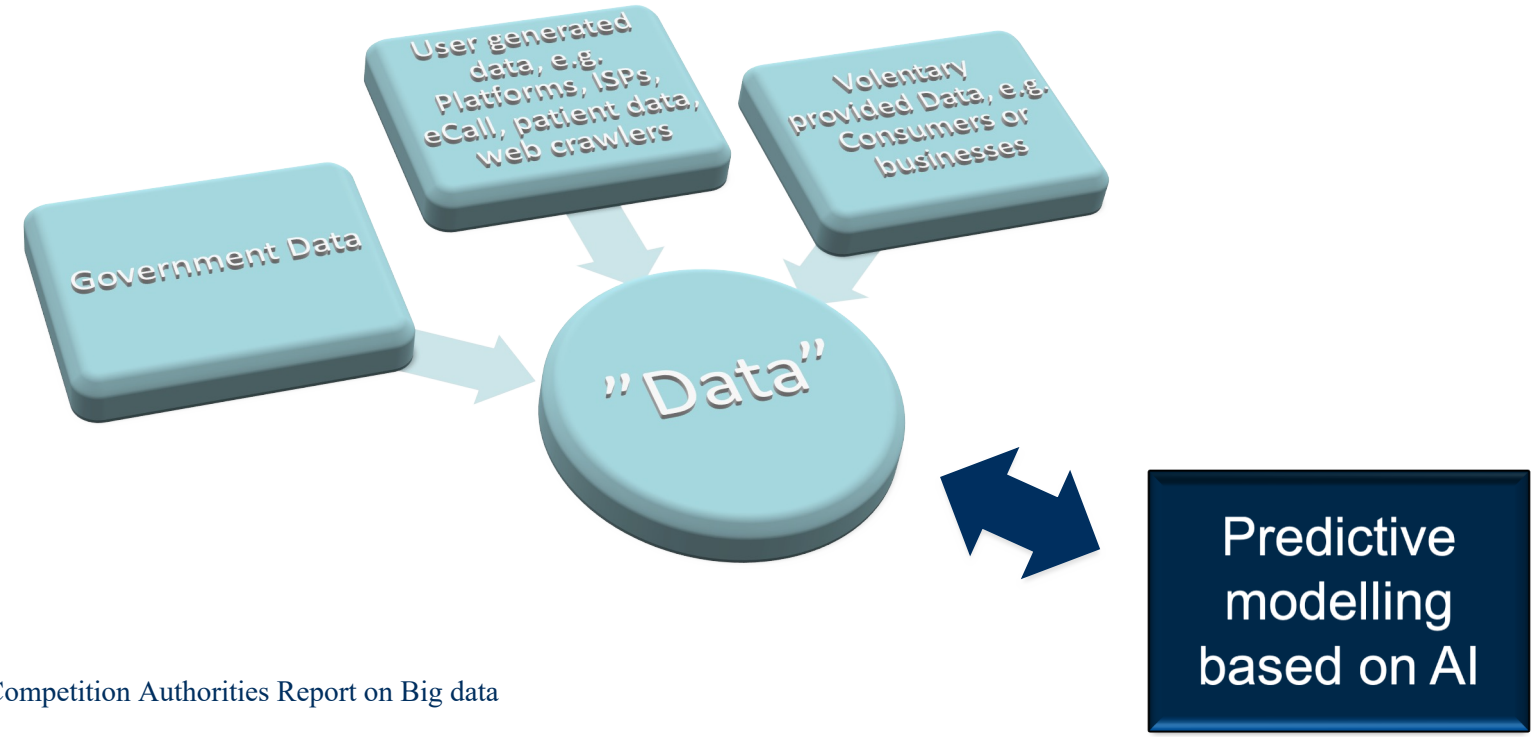
The data, the information (as such), irrespectively how private and how valuable, is not currently covered by property right. However, the infrastructure or ecosystem is covered



Source: French/German Competition Authorities Report on Big data 2016; and OECD 2015
Stanley Greenstein, Our Humanity Exposed, Doctoral Thesis, 2017

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The new paradigm

- The revolutionary step for mankind, having major and sudden impact on society and human endeavour as we know it, in reference to the new infrastructure made up by 1G-5G telecom technology, Internet, Server interface, Internet of Things and Industrial Internet, is the possibility to monitor, collect, analyse and store huge amount of information
- Soon, much of our society will be connected to the Internet including devices such as our clothes, kitchens, vehicles, bathrooms, vehicles, houses, ships and cities. The new paradigm may make it possible, in theory and practice, to transform all that internet connected activities to collectable data.
- The consequences of the changes are difficult to predict, yet we seem to see that the data collected will mainly be under the control of platforms.

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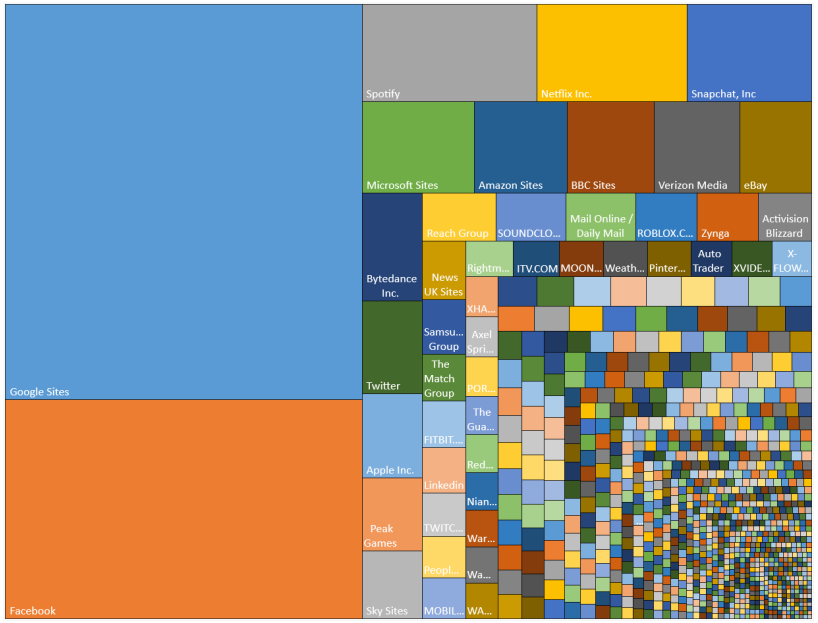
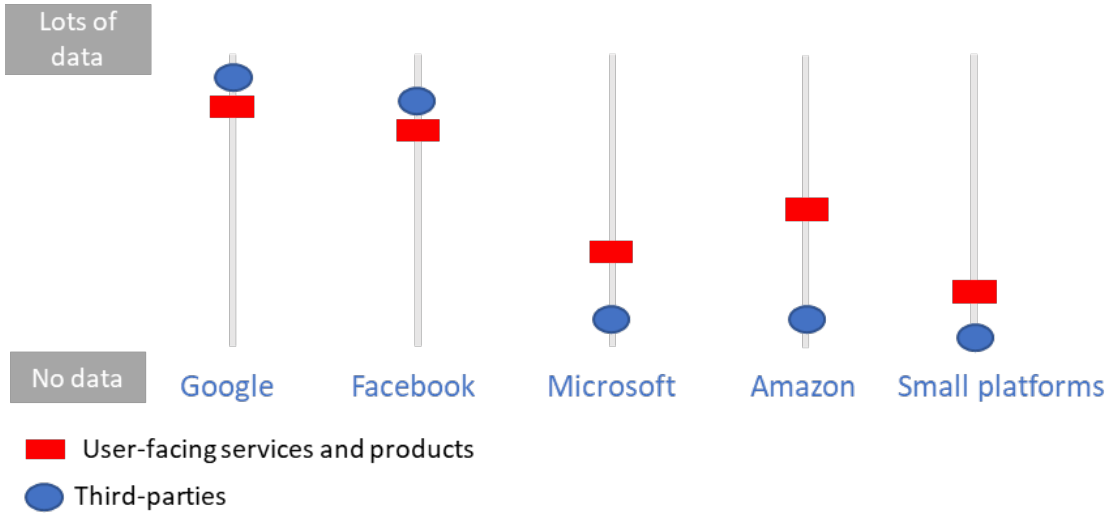
Market failures in the data-driven market

- Leading internet intermediates, collect vast amounts of data, and have access and the right to use to other firms' data. Access and the right to use that data would under certain situations give these firms much leverage in knowledge.





Source: CMA, Comscore MMX Multi-Platform, Total Digital Population, Desktop aged 6+, Mobile aged 13+, February 2020, UK.
Notes: Top 1000 properties account for 83% of total user time spent online.

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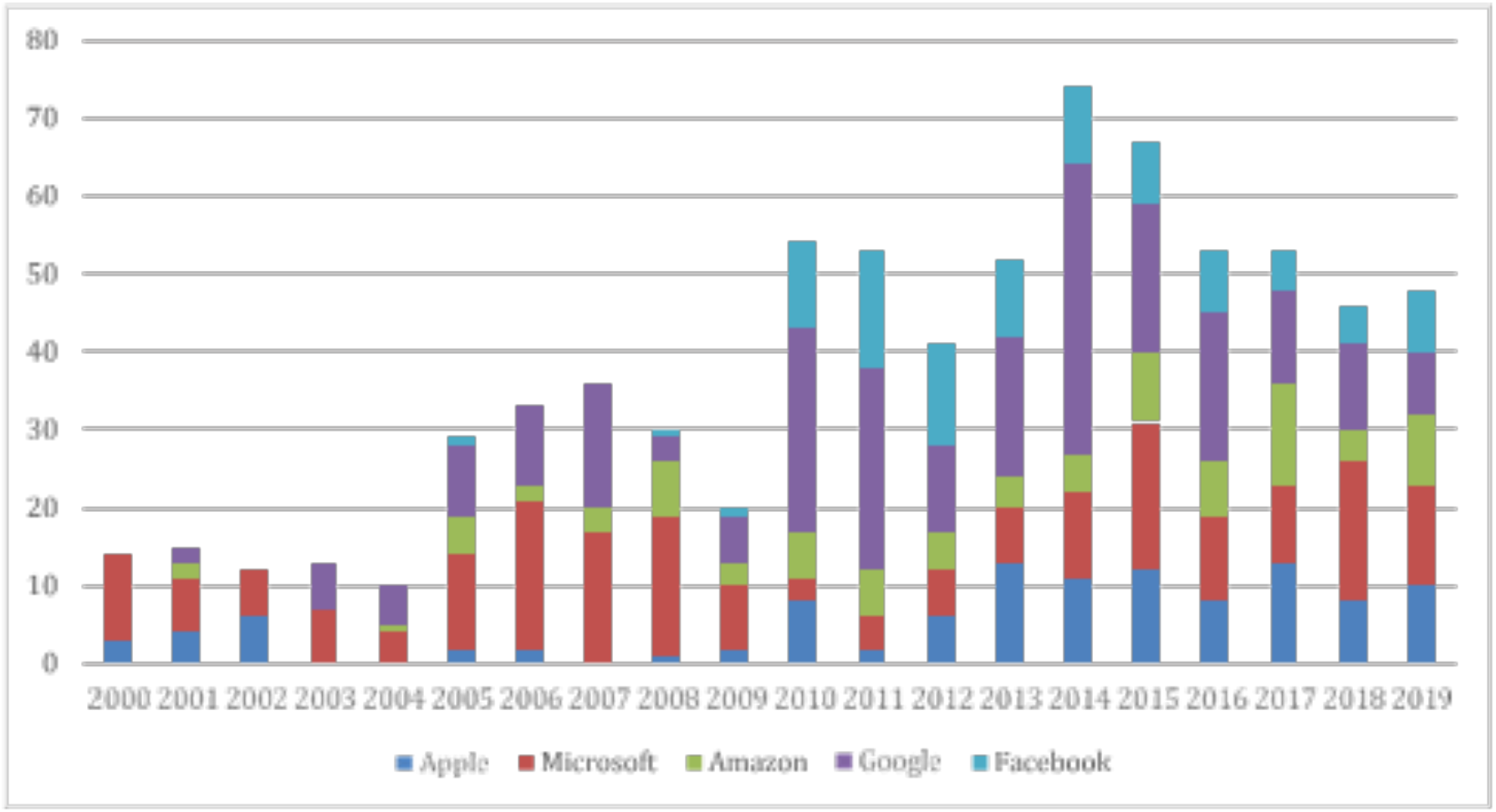
Mergers by the GAFA:s

- Based on an empirical study conducted by Parker et al (2021) on big tech's M&A strategies, they found that from 1987 to 2020, the total number of public M&As made by GAFAM is a staggering 825 transactions. Out of this number, Google has the most transactions with 249 (30%), Microsoft following closely with 239 (29%), Apple coming in third with 128 (13%), Amazon fourth with 107 (13%) and Facebook as the youngest of the giants coming last with 102 (12%). More importantly, the study shows that the rate of GAFAM's M&A activities is exponentially increasing, where in 2000 it was less than 10 in total, then in 2010 it increased to over 200, and within another 10 years it increased into over 800.

Mergers by the GAFA:s



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Mergers by the GAFA:s

- In the 20-year time span that GAFAM has made 825 digital mergers globally, only a very small percentage have been scrutinized and not a single transaction has been blocked by any competition authority in world. This worrying fact has led many experts to conclude that statistically it is very likely there were some false negatives among those myriad mergers (Furman Reporty).

- *String tendencies towards monopolization* (Stigler report)

Mergers by the GAFA:s

- Digital markets are especially prone to monopolization because they exhibit distinct features which change the nature of competition in these markets. As confirmed by the various expert reports, markets dominated by digital platforms present a confluence of the following features:
  - 1) strong network effects;
  - 2) very strong economies of scale and scope due to data advantages;
  - 3) near-zero marginal cost; and
  - 4) increasing returns to the use of data. The more users a platform has, the more valuable that platform becomes to other users

- The more data a platform controls, the better product they can make, allowing them to extract even more data and perpetuating a virtuous cycle

Facebook/WhatsApp

- Before WhatsApp was acquired, it was the largest mobile messaging app with over 450 million active users and one of the fastest growing apps with a rate of one million new users per day. There were two features which distinguished WhatsApp from its rivals.

- First, WhatsApp was built on the founders' commitment to fully protect its users' data privacy

- Second, no advertisement

Facebook/WhatsApp

- The merger was approved by both the EC and FTC in 2014.
- Facebook had assured during the merger review that WhatsApp and Facebook will remain to operate as standalone applications with separate user databases, and that the merger will not change WhatsApp's data privacy policies.
- Two years after the merger was cleared, they instituted privacy policy changes in WhatsApp allowing the app to share users' personal data with Facebook and allowing Facebook to combine user data from WhatsApp into an integrated database.
- This ultimately led the EC to impose a €110 million fine to Facebook for providing misleading information regarding its ability to combine user data from WhatsApp.

Facebook/WhatsApp

- Moreover, in the *Facebook/Whatsapp* merger case, the Commission state, "Any privacy related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules." European Commission, „Facebook/Whatsapp",

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Google/Fitbit 2020

- Following an in-depth investigation of the proposed transaction, which combines Google's and Fitbit's complementary activities. Fitbit has a limited market share in Europe in the fast-growing smartwatch segment where many larger competitors are present, such as Apple, Garmin and Samsung. The proposed transaction leads to very limited horizontal overlaps between the activities of Google and Fitbit. The Commission's investigation focused on the data collected via Fitbit's wearable devices and the interoperability of wearable devices with Google's Android operating system for smartphones.

Google/Fitbit 2020

- Following its investigation, the Commission had concerns that the transaction, as initially notified, would have harmed competition in several markets. In particular:
- **Advertising:** By acquiring Fitbit, Google would acquire (i) the database maintained by Fitbit about its users' health and fitness; and (ii) the technology to develop a database similar to that of Fitbit. By increasing the already vast amount of data that Google could use for the personalisation of ads, it would be more difficult for rivals to match Google's services in the markets for online search advertising, online display advertising, and the entire “ad tech” ecosystem.

Google/Fitbit 2020

- **Access to Web Application Programming Interface (‘API') in the market for digital healthcare:** A number of players in this market currently access health and fitness data provided by Fitbit through a Web API, in order to provide services to Fitbit users and obtain their data in return. The Commission found that following the transaction, Google might restrict competitors' access to the Fitbit Web API.
- **Web API Access Commitment:**
- Google will maintain access to users' health and fitness data to software applications through the Fitbit Web API, without charging for access and subject to user consent.
- **Android APIs Commitment:**
- Google will continue to license for free to Android original equipment manufacturers (OEMs) those public APIs covering all current core functionalities that wrist-worn devices need to interoperate with an Android smartphone.

The German Facebook case and the interface between GDPR and Competition Law

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EU Commission investigation into Amazon Markets

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The Proposal for a Digtal Markets Act

- EC proposes a sector specific regulation for large platforms, so-called gatekeepers
- A gatekeepers is a platform with at least 45 million users a month spread across several EU MS, or which has an annual turnover in the European Economic Area (EEA) of at least 6.5 billion euros in the last three financial years, or an average market capitalization or equivalent of at least 65 billion, and provides so-called central platform service. ***Obs!*** Can be rebutted.
- They are covered by specific ex ante rules Arts 5 (so-called black) and 6 (so-called [hard] grey), see infra.
- The potential fines for violating the rules are high and can amount to 10 percent of the undertaking's global turn over. In the event of systematic infringements, the Commission may require further (structural) actions.
- No efficiency defence, and general a limited list of grounds for exceptions

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Art. 5

- Prohibition to combine personal data from the gatekeeper's platform services with personal data from other services (art. 5a.)
- MFN / price parity clauses (art. 5b.)
- Prohibition of steering clauses, exclusivity or steering, req. of open platforms (art. 5c.)
- Prohibition of bundling and combination offers (art. 5f.)
- Price transparency regarding online advertising (publishers and platforms) (art. 5g.)

- The German and Italian Facebook decisions (appealed)
- EC: Amazon (e-books) 2017; investigation and decision of national competition authorities in bookingdotcom (Sweden, France, Germany and Italy) 2015
- EC: Apple (App store - Spotify) and Google Adsense, but also (to some extent) the Swedish decisions Bruce and online pizza
- Google Android (2018)
- Google Adsense, DMA Final Report, Australian Competition Authority (ACCC)

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Art. 6

- Prohibition for gatekeepers to use business users' data in competition with said business users in downstream markets (art 6a.)
- End users should be able to uninstall apps and software on platforms (Article 6b.)
- Side-loading - end customers must be able to access, download and use apps
  from business users, req. open OS, on but also outside the platform (interoperability, art 6c.)
- Prohibition of self-favouring or discrimination in rankings. (art 6d.)
- Obligation to allow third parties to offer support services (software on platforms (interoperability, Article 6f.)
- Access to the gatekeeper's performance measurement tools (art 6g.)
- Obligation to facilitate data portability for end users as well as to give business users continuous access to data. (art 6h.)
- Access for business users to data generated on the platform (art 6i)
- Share search data with competitors (art 6j)
- Access to app stores and the like on FRAND terms (art 6k)

- EC: Amazon Marketplace (investigation)
- EC: Google Android 2018
- EC: Apple (App store – Spotify) och Google Adsense, *Swedish case Nasdaq.*
- Google shopping (2017), Amazon Buy Box (investigation)
- Apple Store/Mobile Payment (investigation)
- DMA Final Report, Australian CA (ACCC)
- EC: Amazon Marketplace (investigation)
- EC: Amazon Marketplace (investigation)
- EC: Google shopping (2017)
- EC: Apple store

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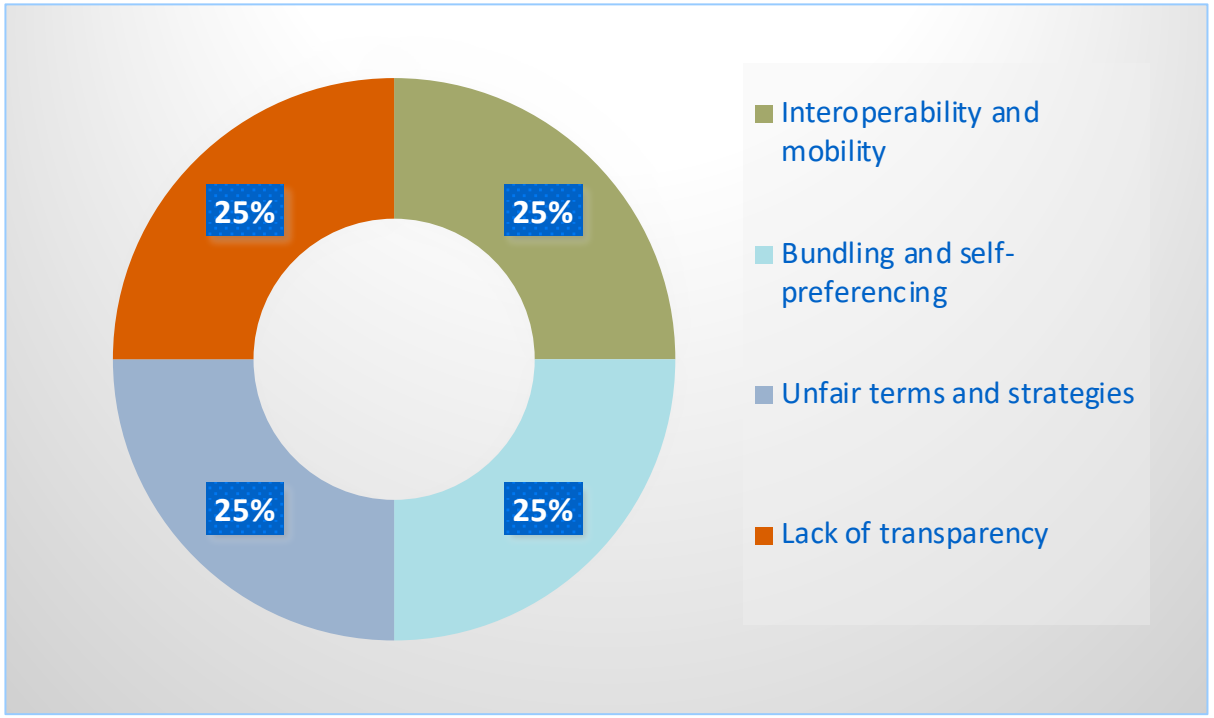
The DMA



- MFN / price parity clauses (art. 5b.)
- Steering clauses - prohibition of exclusivity or control (Article 5c.)
- Obligation to allow third parties to offer support services on the platform including interoperability (Article 6f.)
- Obligation to facilitate data portability for end users as well as to give business users continuous access to data. (art 6h.)
- Access for business users to data generated on the platform (art 6i)
- Bundling and combination offers (arts. 5e and f.)
- End users should be able to uninstall apps and software on platforms (Article 6b.)
- Side-loading - end customers must be able to view, download and interact (interoperability) with apps from business users, even outside the platform (art. 6c.)
- Prohibition of self-favoritism or discrimination in rankings. (art 6d.)
- Prohibition to combine personal data from the gatekeeper's platform services with personal data from other services offered by the gatekeeper or with personal data from third-party services. (Art. 5a.)
- FRAND access to certain platform services (Article 6k)
- Price transparency regarding online advertising (publishers and platforms) (art. 5g.)
- Access to the gatekeeper's performance measurement tool (art. 6g.)

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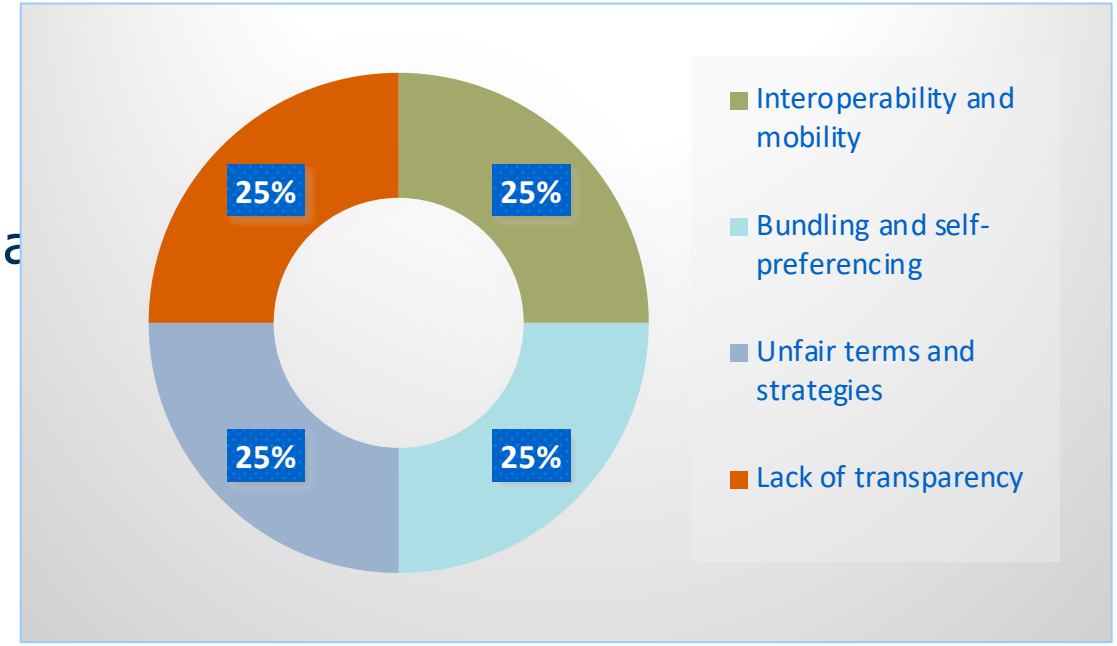
Similarities between the proposal for the DAMA and other sector specific regulations

- The applicability of DMA - or additional obligations - does not require that a gatekeeper's strategy or action has been identified as restricting competition, by object or effect
- No efficiency defense
- Limited exceptions
- Competition law is [always] availa



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Differences between the proposal for the DAMA and other sector specific regulations

- DMA: Gatekeepers are not necessarily dominant in reference to competition law
- The burden is on the companies, they must:
  - Notify when the thresholds are reached
  - Presumptions must be refuted
  - Make suggestions on how the obligations should be complied with
- Centralized to EC
- DMA notified acquisitions - could possibly trigger Article 22 MR - new Article 22 Guidance paper (Hemnet)

- EU Telecom regime: Significant Market Power (SMP)
- The burden is on the relevant authority:
  - Define market for ex ante regulation
  - Show SMP
  - Identify what measures the company should take
- Decentralized to MS

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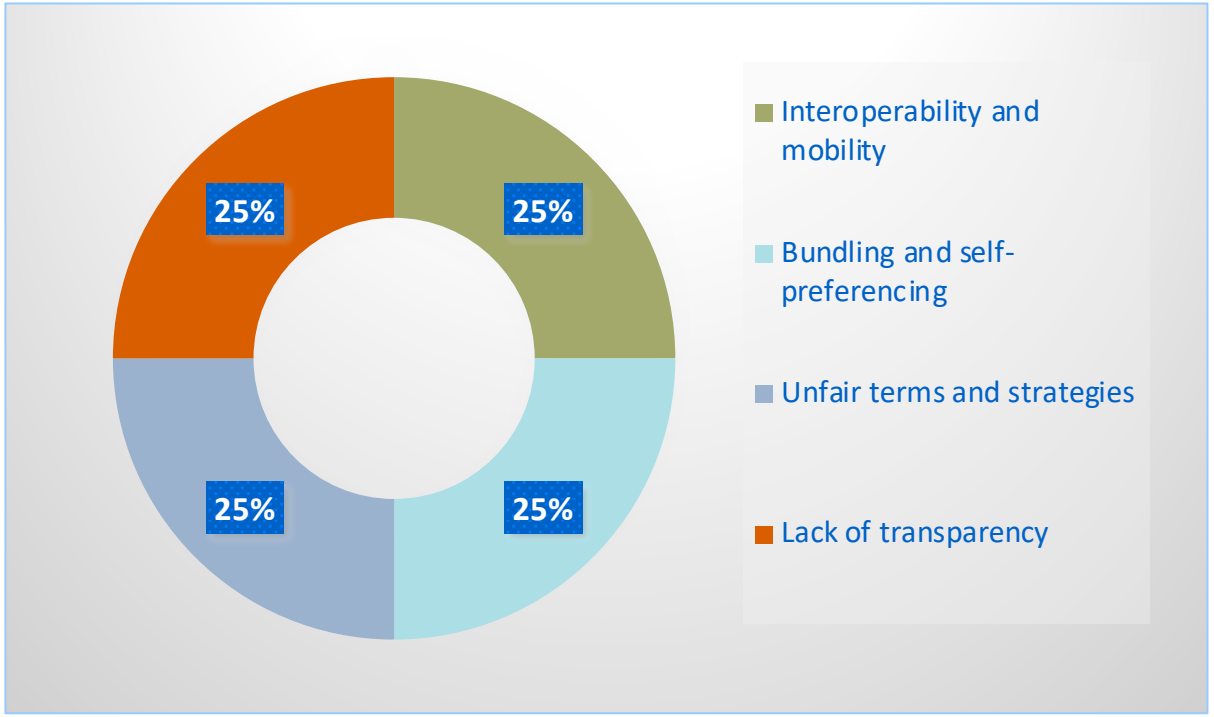
Proposal for the DMA



Art. 6(a) refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users

Art. 6(h) provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, …. including by the provision of continuous and real-time access;

Art. 6(i) provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users…

Proposal for the Data Act – Regulation for the Internet of Things

- Consumers and businesses right to access data generated by the products or related services they own, rent or lease.
  - FRAND terms (also relevant when access is based on other Union or MS laws)
- Fairness in reference to terms and conditions for data sharing
- BtoG data access under exceptional circumstances
- Minimum regulatory requirements of contractual, commercial and technical nature, imposed on providers of cloud, edge and other data processing services, to enable switching between such services.
- The sui generis database right is not applicable
  - What about other forms of IPRs and trade secrets – should be honored? But, what about exhaustion?
  - GDPR

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Perhaps something akin to a Property Right is developing - an Access and Portability Right

- The development reflected in *inter alia* DMA, Data Act and the DSA
- An access and portability right (APR) to be created for users of all forms of platforms current and IoT based.
- Should imply equal access under GDPR and under intellectual property rights held by the platform provider, and be apt for Internet of Things.
- The APR system provide does not imply exclusive right to data, it only provides a mandatory access and portability right to datasets containing ex post (observed) data in the control of the business providers, while the aggravated data (inferred data) originating from the platform are still the prerogative of the platform providers.
  - When non-exclusive several problems diminish
  - Could, in my proposal, be traded and exhausted
- Lessen the market failures discussed earlier
- Moreover, possibly some of the initiatives for sector specific regulations could be held back

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