Recent Developments in Competition Law and Consumer Law in the EU – With a Specific Focus on the Digital Markets Act and E-commerce Platforms

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Preliminary remarks

- I will not cover all slides and aspects in the presentation.
- Legal provisions (e.g. Art. 5; recital 32) refer to provisions in the Digital Markets Act (DMA), unless mentioned otherwise.
- Abbreviations:
  - DMA = Digital Markets Act = Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)
  - DSA = Digital Services Act = Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)
  - P2B Regulation = Platform-to-Business Regulation = Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services

Today’s presentation

1) The big picture: making sense of the DMA, DSA, etc.
2) Why the DMA?
3) The DMA explained
4) Zooming in on rules specifically relevant for e-commerce platforms
   - ban on self-favouring / self-preferencing
   - ban on parity clauses
   - ban on gatekeeper platforms using data generated by business users to compete with those business users

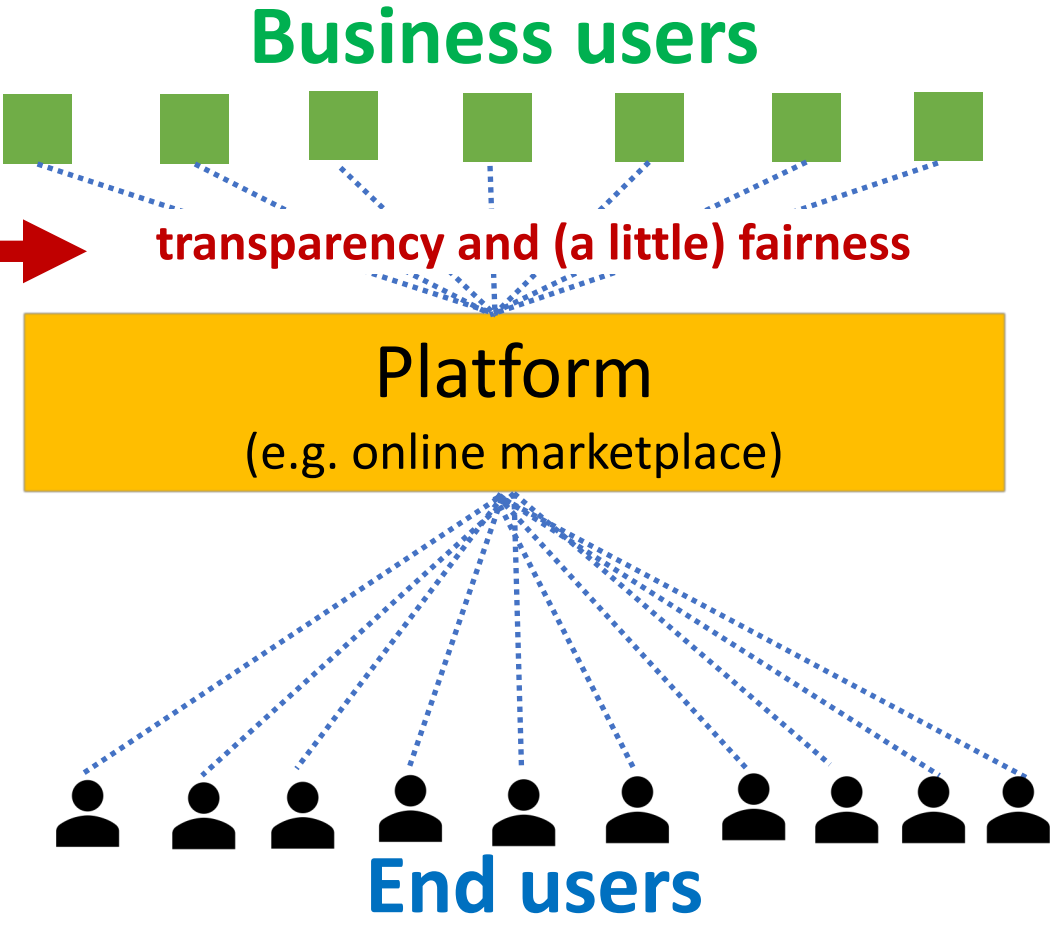
1) The big picture

Role of the P2B Regulation

Japanese equivalent: 特定デジタルプラットフォームの透明性及び公正性の向上に関する法律

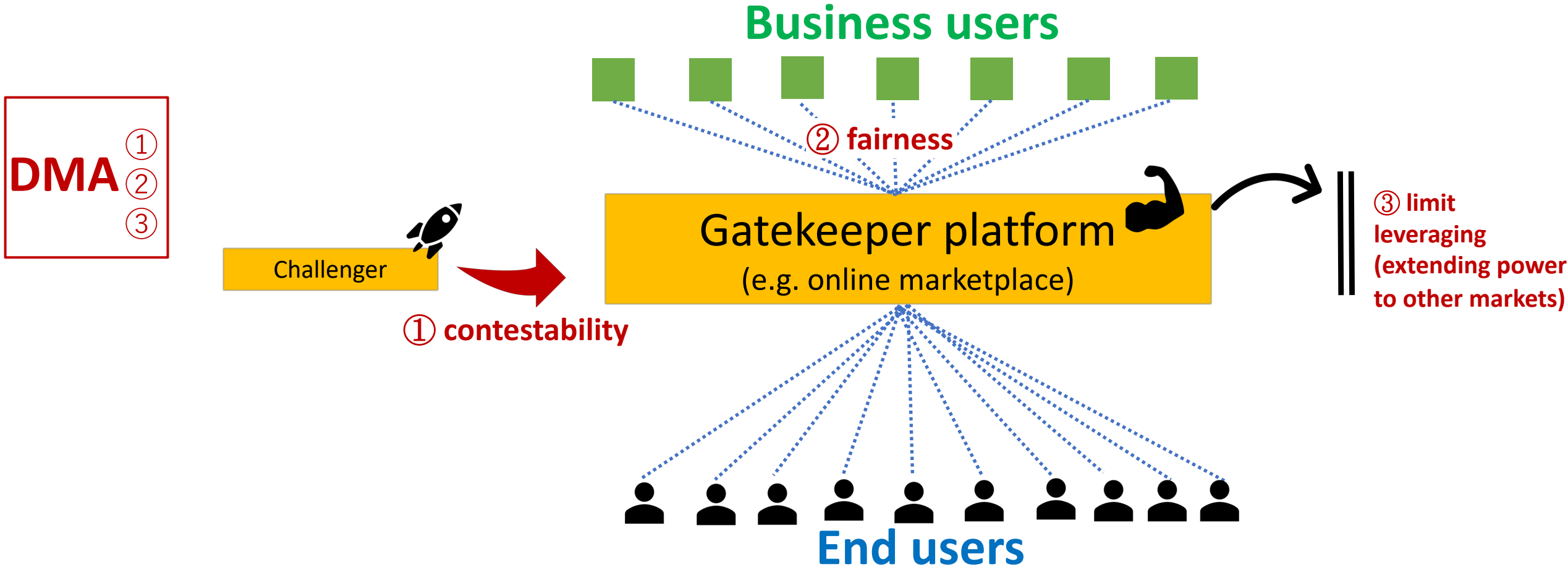
P2B Regulation

- Transparency of terms and conditions
- Explain ranking
- Set up complaints system
- Give reasons for termination of account, etc.



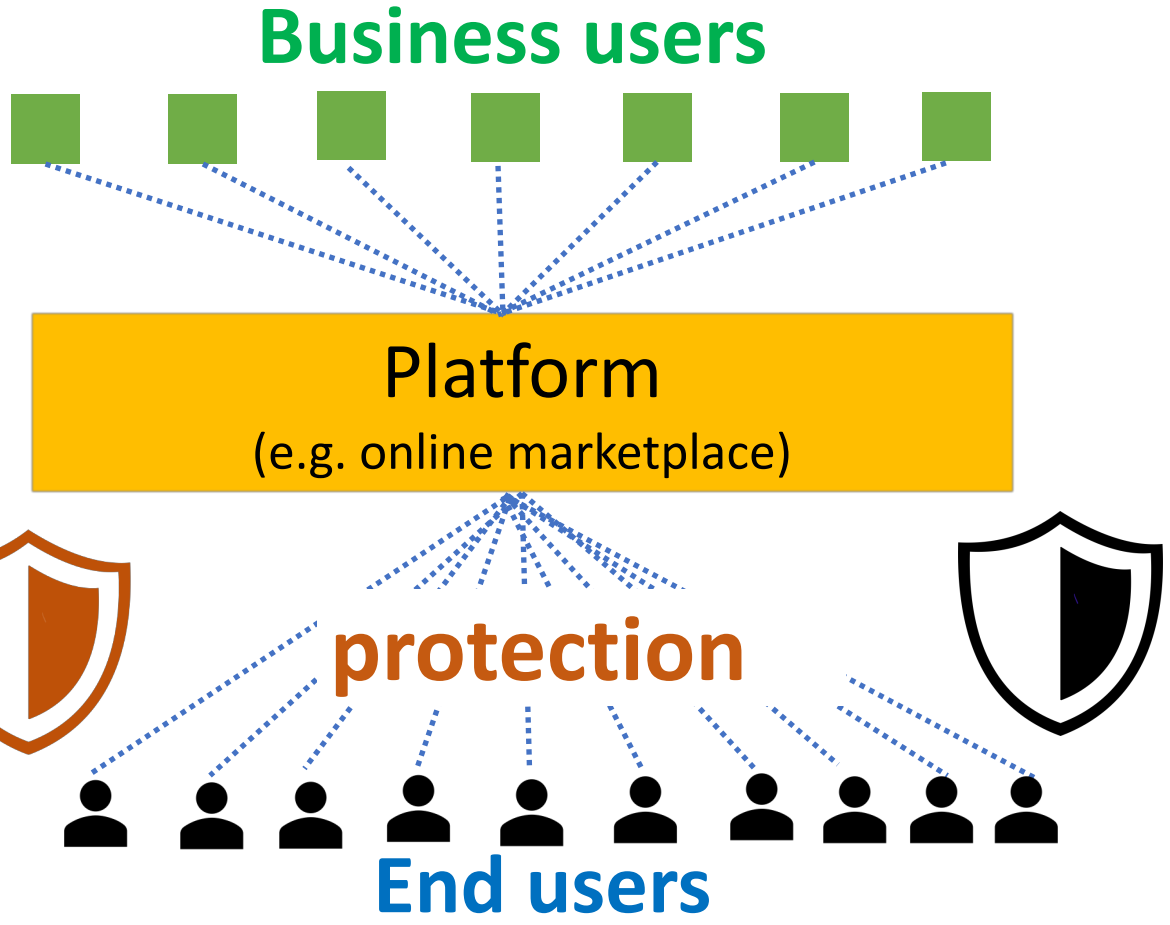
Role of the DMA

No Japanese equivalent



Role of the DSA and EU consumer law

(Japanese equivalent: some aspects covered in 取引デジタルプラットフォームを利用する消費者の利益の保護に関する法律 and various consumer protection statutes such as 景品表示法 and 消費者契約法)



DSA: protecting end users

- **from illegal products, disinformation, dark patterns, etc.**
- **requires transparency of recommendation algorithms**
- **additional obligations for very large platforms**
- **will apply from Feb. 2024**

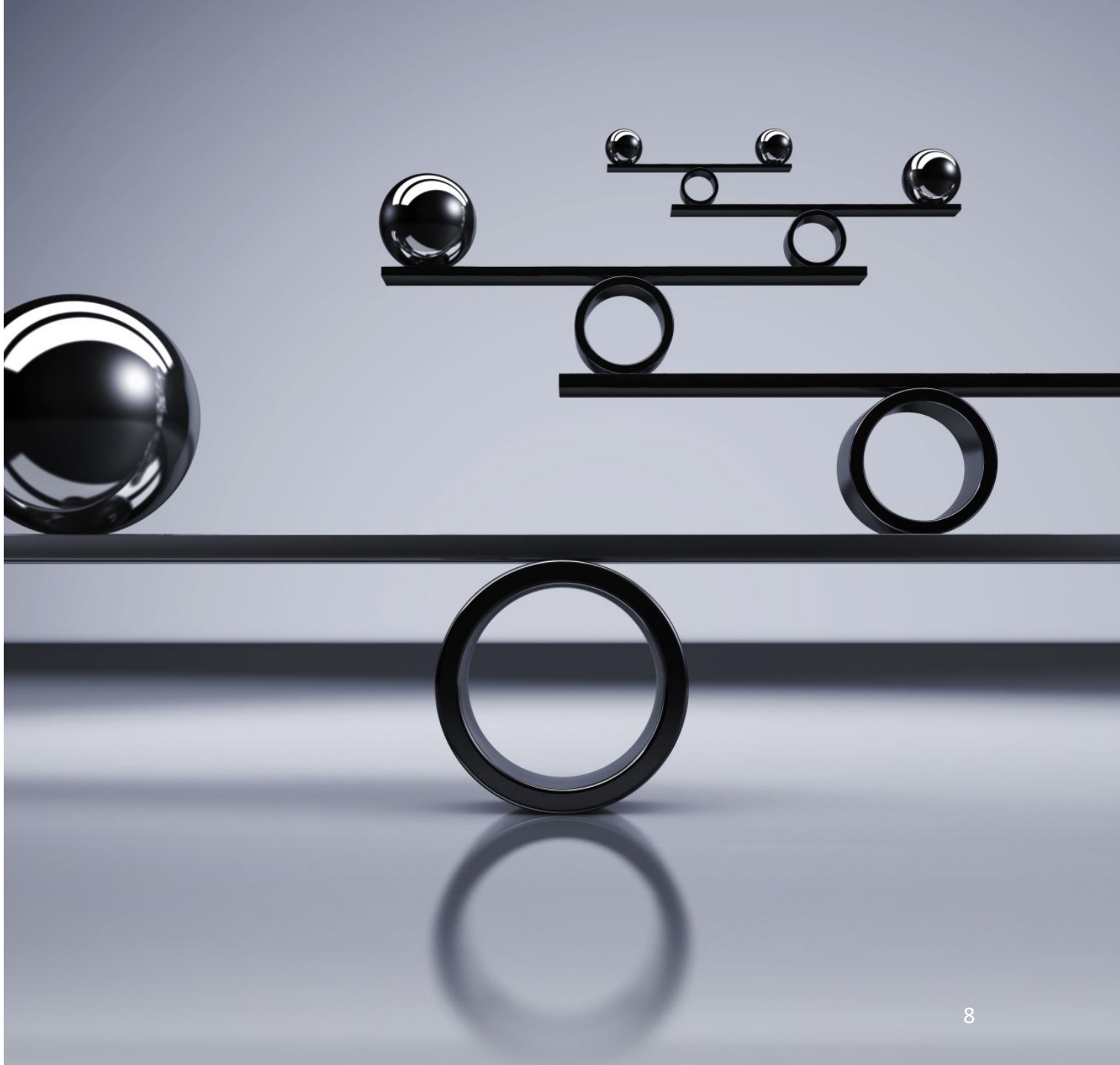
+ EU consumer law

(applicable to all sectors)

- Unfair Commercial Practices Directive
- Consumer Rights Directive
- Unfair Contract Terms Directive

Boosted by Enforcement and Modernization Directive (specific provisions for digital sector (ranking transparency, rules on online consumer reviews, etc.))

Question of balance?



Fragmented enforcement

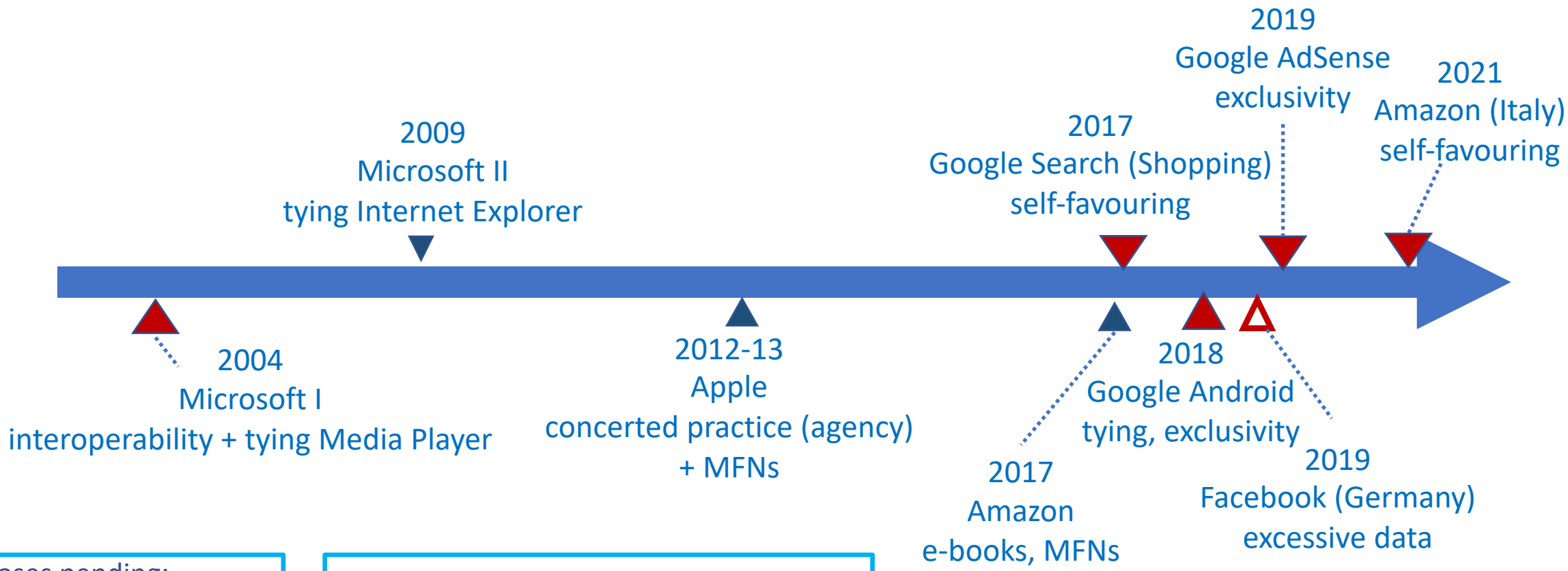
- EU competition law: European Commission + national competition authorities + private enforcement
- P2B regulation: country-by-country + private enforcement
- DMA: European Commission (see later, slide 26)
- DSA: EU Member States and, for very large platforms, the European Commission
- EU consumer law: national consumer protection authorities + private enforcement

2) Why the DMA?

Competition law's response to the rise of Big Tech

- Growth of Big Tech → growth of market power
  - In part based on competition on the merits, but also based on anti-competitive practices, raising entry barriers
  - Markets prone to "tipping" → entrenched position
- Wave of cases: EU was forerunner in bringing cases. Major awakening in U.S. recently.
- Each case essentially zooms in on *one specific company + one specific type of conduct*
- Cases brought as abuse of dominance (Art. 102 Treaty on the Functioning of the European Union)
  - Requires analysis of effects
  - Sophisticated, thorough analysis
  - Case by case

Major Big Tech antitrust cases in the EU



+ several cases pending:

- Amazon (use of data from merchants (AT.40462) + self-favouring in BuyBox (AT.40703)
- Apple (AppStore rules – mandatory use of IAP, anti-steering (AT.40437, AT.40652 and AT.40716)
- Apple – mobile wallets (AT. 40452)
- Facebook (use of data from advertisers for online classified ads) (AT.40684)
- Google (Adtech practices) (AT.40670)

▼ = decision finding infringement + fine

▽ = decision finding infringement but no fine

▼ = "settlement"
(decision making commitments binding)

The limits of competition law

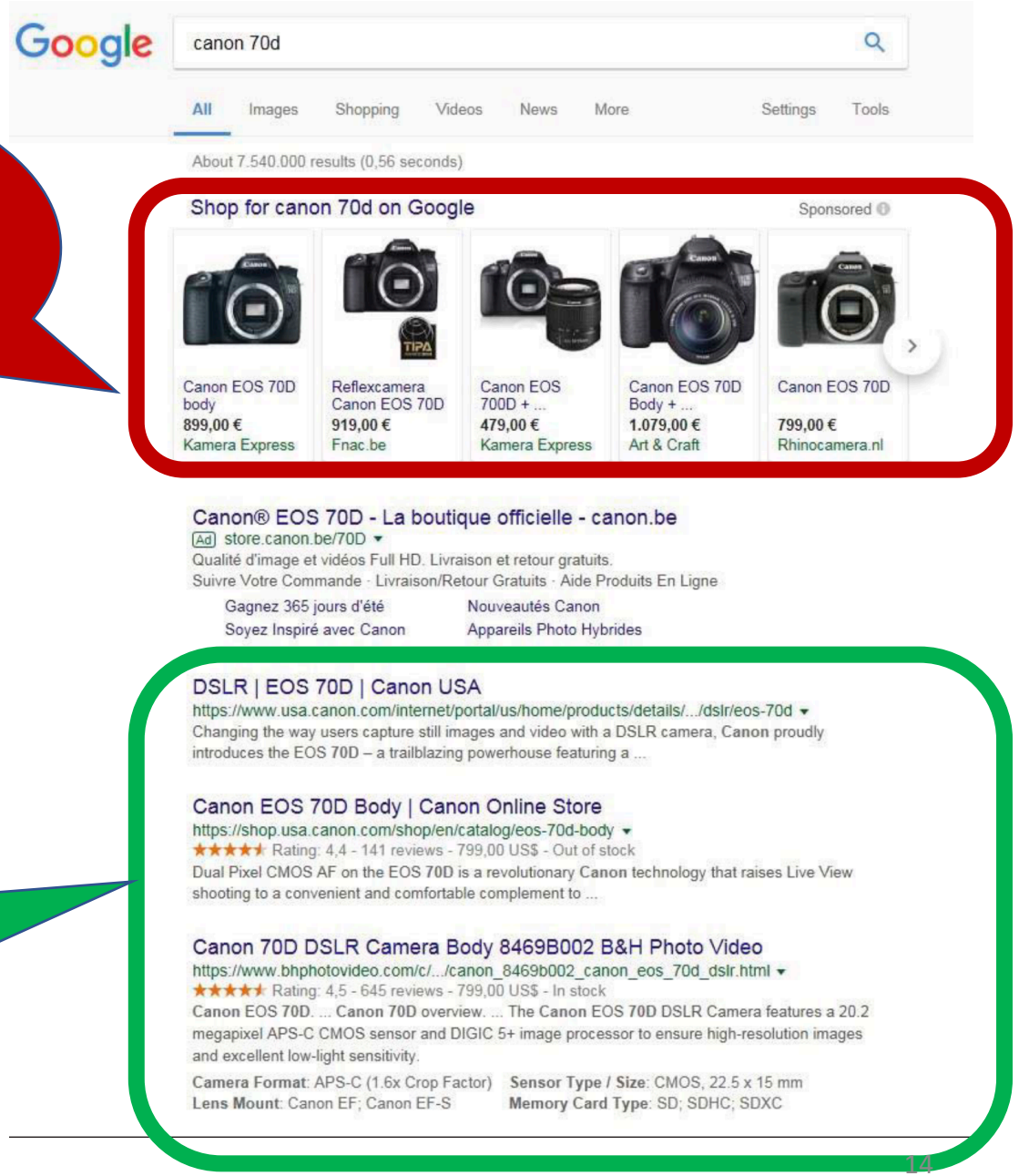
- Perception that competition law cases:
  - took too long
  - came too late
  - remedies struggled to get impact → no effective change
  - dealt with a very small part of the market each time → no wide-ranging change of conduct by Big Tech

→Push for different approach

EU - Google Search (Shopping) case

(Case AT.39740, Commission decision of 27 June 2017)

Google shopping (only Google is allowed in the box, even when other links are more relevant)



Generic search results (where competitors are demoted)

3) The DMA explained

Timeline DMA

- 15 December 2020: European Commission proposes DMA
- 25 March 2022: compromise between Council and European Parliament
- 5 and 18 July 2022: formal approval by Council and European Parliament
- 12 October 2022: published in Official Journal
- 1 November 2022: entry into force
- 2 May 2023: rules become applicable
- By 3 July 2023: gatekeepers need to notify (inform the Commission of the platform services that meet the thresholds)
- By 6 September 2023: designation of gatekeepers by Commission → triggers six months compliance deadline
  - OR possibly: opening of market investigation (max. 5 months) if counter-arguments of gatekeeper manifestly (very clearly) call into question gatekeeper presumptions (Art. 3(5) and Art. 17(3))
  - No six months grace period for obligation to inform Commission about M&A by gatekeepers (Art. 14(1)
- By 6 March 2024: compliance = rules actually start to have an impact

Overwhelming support for the DMA

- European Parliament vote: 588 votes to 11, with 31 abstentions
- Council of the EU: all Member States unanimously agreed
- European Consumer Organisation: “This legislation will rebalance digital markets, increase consumer choice and put an end to many of the worst practices that Big Tech has engaged in over the years.” (BEUC, Press release of 25 March 2022*, Digital Markets Act: landmark Big Tech regulation agreed in boost to consumer choice*)
- Also in favour: majority of businesses and business associations (in public consultations leading up to DMA proposal), national competition authorities
- Against: Big Tech (but with exceptions, e.g. Microsoft supports)

Goals

- Primary goal: harmonization = consistent rules throughout EU
- But what do the harmonized rules try to achieve?
  - contestable markets: new players should be able to enter the market and challenge the dominant platform (cf. recital 32)
  - fair markets: prevent exploitation of weaker parties (businesses, and, to some extent, also end users) that depend on the platform (cf. recital 33)

Target

- “Gatekeepers”:
  - Companies that operate a “core platform service” (search engines, social networks, online intermediation services (this includes online marketplaces and app stores)), etc.)
  - + core platform service acts as important gateway for business users to reach end users
  - + company with “significant impact on the [EU] internal market”
  - + entrenched and durable position (or foreseeable that such position in near future)
- Will be designated by Commission
  - Based on objective, quantitative criteria (number of users, turnover, etc.)
    - if company meets criteria → presumption that company is gatekeeper
    - but company can rebut (”we meet the quantitative criteria but we are not a gatekeeper”) (Art. 3(5))
  - Designation also possible based on qualitative criteria (Art. 3(8) (e.g. entrenched and durable position, or foreseeable that it will enjoy such a position in the near future)

Target: which companies?

- Expectation: between 10 and 15 companies

- Hard to guess which ones, because no public data about number of business users and end users. Probably (based on quantitative criteria and estimates about user numbers):
  - GAFAM (various core platform services)
  - Oracle, SAP, Salesforce (cloud computing)
  - Paypal? , Zalando? (online intermediation services)
  - Booking.com? (online intermediation services)

- Important: rules do not cover gatekeeper as such, but specific core platform services of that gatekeeper: Commission will designate company + specific core platform service (Art. 3(9))
- So, for instance, if Meta is a gatekeeper
  →NOT: “everything Meta does is covered by DMA”,
  →BUT: “the specific platform services of Facebook which have been designated (e.g. Facebook social network, Instagram, WhatsApp) will be subject to the DMA”

Content

- Specific rules (different from competition law, which largely functions based on open standards)
- Do’s and don’ts
- No analysis of effects, no need to define relevant markets, no need to establish a dominant position, no efficiency defence (different from competition law)

→ Major shift in approach, after decades of increasingly effects-based, case-by-case, economics-based analysis

Do’s and don’ts

- In total: around 20 do’s and don’ts
- Some do’s and don’ts can be further specified through a “regulatory dialogue” (Art. 6 and 8(3))

Many do’s and don’ts inspired by competition law cases

- To some extent “codification” and generalization of competition law cases (both decided and pending cases)
  - No self-favouring (Art.6(5)) ← Google Search (Shopping) case
  - No combining personal data from different services without user consent (Art. 5(2)) ← German Facebook case
  - Obligation to enable interoperability (Art. 6(7)) ← Microsoft I case
  - Prohibition for gatekeeper to use data generated by business users on the platform to compete with those business users (Art. 6(2)) ← EU Amazon case (pending)
- But also new rules
  - Interoperability for messaging services (Art. 7)
  - Gatekeeper search engine must give FRAND access to search query data (Art. 6(11))
  - Online advertising transparency towards advertisers and publishers (Art. 5(9) and 5(10))

What the DMA is NOT

- NOT: breaking up Big Tech
  - “structural remedies” (e.g. forced sale of a business) mentioned as last resort in case of systematic non-compliance (Art. 18(1)) but with many safeguards and conditions → highly implausible outcome
- NOT: competition law. Competition law remains applicable and is said to be “complementary” (recitals 10-11)

Relationship with competition law

- DMA ”pursues a different legal interest” (recital 11) → complementary but different
- Expectation:
  - Commission unlikely to bring new competition law cases against gatekeepers for practices dealt with in the DMA
  - But still room for competition law enforcement against designated gatekeepers for
    - Anticompetitive practices not covered by the DMA
    - New types of anticompetitive practices
- Can same conduct by same company be punished under both DMA and competition law? Would this not infringe prohibition on double jeopardy (*ne bis in idem; Charter of Fundamental Rights of the EU,* Art. 50)?
  - Answer: would limit fundamental right, and is therefore only allowed under certain conditions. Among others, the two proceedings (DMA and competition law) must be “sufficiently coordinated” and penalty in first case must be taken into account in second case (conditions specified in: Case C-117/20, *bpost SA v. Autorité belge de la concurrence*).
  - Coordination mechanism is included in DMA (Art. 38).

Enforcement

- European Commission as sole enforcer (Art. 38(7), *in fine*; recital 91)
  - Cease-and-desist order
  - Fines of up to 10% of global turnover; 20% in case of repeat offense
  - In case of systematic infringements (three violations within eight years): behavioural or structural remedies
    - E.g. divestiture, ban on acquisitions
- Nudge from Member States: Member States may investigate possible infringements and transmit findings to Commission (Art. 38(7))
- Private enforcement (e.g. damages actions)
  - Commission Q&A: DMA contains precise obligations and prohibitions; those harmed can seek damages.
  - DMA explicitly mentions possibility for representative actions by consumer associations (Art. 42). Those actions can seek redress (e.g. compensation) or injunctive relief (Directive 2020/1828)
  - Open question: should a distinction be made between the obligations that do not require further specification (Art. 5) and those that are "susceptible of being further specified" (Art. 6) ? → do the latter require a Commission specification decision first, before victims have "a right derived from EU law"? (probably: no)
  - Germany: to facilitate private enforcement of the DMA, an amendment to the GWB will make the provisions of the Damages Directive applicable where appropriate → will there be a new "race to attract litigation" between different EU jurisdictions (cf. what we are witnessing in the case of damages actions; Vande Walle, *Private Enforcement of Antitrust Law in Belgium and the Netherlands – Is There a Race to Attract Antitrust Damages Actions?* (2018))

How future-proof is the DMA?

- Commission has power to "update" existing obligations (Art. 12(1)), after having done a market investigation (max. 18 months; Art. 19(1))
- But Commission cannot
  - add new obligations
  - expand the DMA to cover a new type of "core platform service"

  → This would require an amendment to the DMA via full legislative process

Some reflections 

- Many rules are based on issues identified in *specific* competition cases → now generally applicable, not just to *specific* company but to all gatekeepers, often with different business models → will require some interpretation, discussion (→ hence the regulatory dialogue)
- Enforcement effective this time?
  - Tools remain the same: fines, cease-and-desist orders, commitments,…
  - Information assymetry between Commission and companies remains
  - Procedure does not appear particularly swift. For instance, to issue non-compliance decision: market investigation, communication of preliminary findings, access to file (Art. 34(4), right to be heard (Art. 34(1), possible consultation of third parties (Art. 29(4))
- DMA can be thought of as a "reset"
  - effectiveness of antitrust interventions has been blunted by years of increasingly sophisticated requirements, stricter judicial review, expansive due process rights
  - Legislature has intervened and enacted "per se" rules.
  - But will still need to be interpreted, and will still be subject to EU principle of proportionality.
  - Will the rules be effective this time or will history repeat itself? Extensive litigation over every step, circumvention of remedies, etc.? If so, what would be the next step in five or ten years? Structural remedies?

4) Zooming in on rules specifically relevant for e-commerce platforms

Ban on self-favouring / self-preferencing

Competition law cases against self-favouring(1)

- EU Google Search (Shopping) case
  - Commission decision (AT.39740 – *Google Search (Shopping)*)
    - Seemingly based on leveraging (=the use of a dominant position on one market to extend that dominant position to one or more adjacent markets (Commission decision, para. 649))
    - Remedy: Google must treat competing comparison shopping services no less favourably than its own within the general search results page
  - General Court (Case T-612/17 – *Google Shopping;* further appeal by Google pending)
    - confirms Commission's analysis but:
      - Rejects "leveraging" label (self-favouring is a type of leveraging, but not all leveraging is a violation of competition law) (judgment, para. 163-164)
      - Commission's legal classification is "favouring" (para. 123) or "discrimination" (judgment, para. 279) → self-favouring now established as independent type of abuse of dominance
      - Rejects long-time counter-argument of Google and some commentators (Bo Vesterdorf, Ibáñez Colomo: Commission must use legal test for "refusal to deal / essential facility" (→ indispensability); if entitled to refuse to deal, then also entitled to favour your own services + innovation and long-term competition will suffer)
      - Potential anti-competitive effects are sufficient

Competition law cases against self-favouring (2)

- Italian Amazon case (Case A528, 30 November 2021; appeal pending but suspended over issue raised by Amazon in EU Amazon case relating to jurisdiction)
  - Italian competition authority fined Amazon for abuse of dominance – self-favouring
  - Found that Amazon discriminates in favour of merchants who use Amazon's logistics services (Fulfillment by Amazon), by giving them access to the Prime label, and better access to the Buy Box = self-favouring to benefit Amazon's logistics services
- EU's pending case against Amazon (AT.40703 – Amazon – Buy Box)
  - Alleges that, for Buy Box and access to Prime, Amazon favours products sold by Amazon itself or by sellers using Amazon's logistics and delivery service

DMA prohibits self-favouring

- DMA text:
  - The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third-party. The gatekeeper shall apply transparent, fair and nondiscriminatory conditions to such ranking.

    (Art. 6(5); words in blue were added by Parliament to the Commission proposal)

- Some background:
  - Ranking defined as "relative prominence" given to goods or services, as presented, organised or communicated by gatekeeper, irrespective of the technological means used (Art. 2(22)) (similar to definition of "ranking" in EU consumer law (Unfair Commercial Practices Directive, Art. 2(m), which requires transparency of ranking parameters to consumers (Art. 7(4)a))
  - Rule also applies if only one result is presented (Art. 2(22), *in fine*; recital 52)
  - European Parliament added "indexing and crawling" because self-favouring can take place even before ranking. For example, already during crawling, as a discovery process by which new and updated content is being found, as well as indexing, which entails storing and organising of the content found during the crawling process, the gatekeeper can favour its own content over that of third parties (recital 51).

Expected impact of the rule

- On gatekeepers: growth in adjacent services (ecosystem expansion) will become more difficult; only through competition on the merits
- On competitors and new entrants: competitors can compete on equal footing; increased incentive to innovate and invest in view of level playing field
- On business users: those offering high quality and competitive products will get greater visibility
- On consumers: better informed and more impartial choice

(Commission Staff Working Document – Impact assessment report, Annex 3, 15 December 2020, p. 54)

- More pessimistic view:
  - cat and mouse game on compliance (“we comply”, complaints, adjustments, more complaints, “implementing act” specifying measures that must be taken, etc.)
  - but probably blatant cases will trigger enforcement action

Implementing the ban on self-favouring

- Ban on self-favouring is in the list of “obligations susceptible of being further specified” → regulatory dialogue is possible
- Commission is starting discussions with stakeholders on how to implement this rule

DMA stakeholder workshop - "Applying the DMA’s ban on self-preferencing: how to do it in practice?"
Date: 5 December 2022

Panel session 1 – How to identify self-preferencing practices based on concrete examples. Examples of questions to be discussed:

- What is self-preferencing?
- What type of practices may constitute self-preferencing in the sense of the DMA?
- How to monitor whether self-preferencing occurs?
- How to determine whether ranking conditions are transparent, fair and non-discriminatory?

Introduction by Inge Graef and interventions by three panellists followed by discussion with audience
Panellists: BEUC, EU Travel Tech and Google
Moderator: European Commission

European Commission, Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force, 31 October 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423

Ban on parity clauses

Cases and legislation against (wide) parity clauses

- Case AT.40153 E-book MFNs and related matters (Amazon), Commission Decision of 4 May 2017:
  - The Commission considered that parity clauses included in Amazon's e-books distribution agreements could make it more difficult for other e-book platforms to compete with Amazon by reducing publishers' and competitors' ability and incentives to develop new and innovative e-books and alternative distribution services
  - Ended with commitment by Amazon not to use such clauses for a five year period
- Several Member States already had a national ban on wide and narrow parity clauses (Belgium, France, Austria, etc.)

Ban on parity clauses

- DMA Text:
  - The gatekeeper shall not prevent business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper. (Art. 5(3)).
- Bans both wide and narrow parity clauses; ban non narrow parity clauses added by Parliament
- Why ban on wide clauses? They limit inter-platform contestability (recital 39)
- Why ban on narrow clauses? They unfairly limit the freedom of business users (recital 39)

Ban on gatekeeper platforms using data generated by business users to compete with those business users

(in the context of e-commerce: an online marketplace uses data collected from sellers to compete with those sellers on its own online marketplace)

Using data from business users to compete with them

- EU's pending case against Amazon (AT.40462 – *Amazon Marketplace*)
  - Use of data: Amazon's access to third-party seller data gives Amazon an unfair advantage in its own retail offerings

- DMA Text:
  - The gatekeeper shall not use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the customers of those business users
    (Art. 6(2)).

Questions and comments welcome

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