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

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, 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 may 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 regulated? 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.

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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.