

ECOSYSTEMS IN COMPETITION LAW

BACKGROUND BEHIND AND DETAILS AROUND ARTICLE 2A

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Views do not (yet) represent policy or law

Presentation to the ECN, Virtually, May 27, 2021

ECN Presentation – M.G. Jacobides, LBS (& HCC)

- *Background*
- *Tackling the issue, through existing or new lenses; ex ante and ex post*
- *The new Greek Article 2A provision for regulating ecosystems*
- *Additional material*

What is the issue with ecosystems? Multi-product, multi-actor, and lock-ins

Google (& Google Mobile Services)

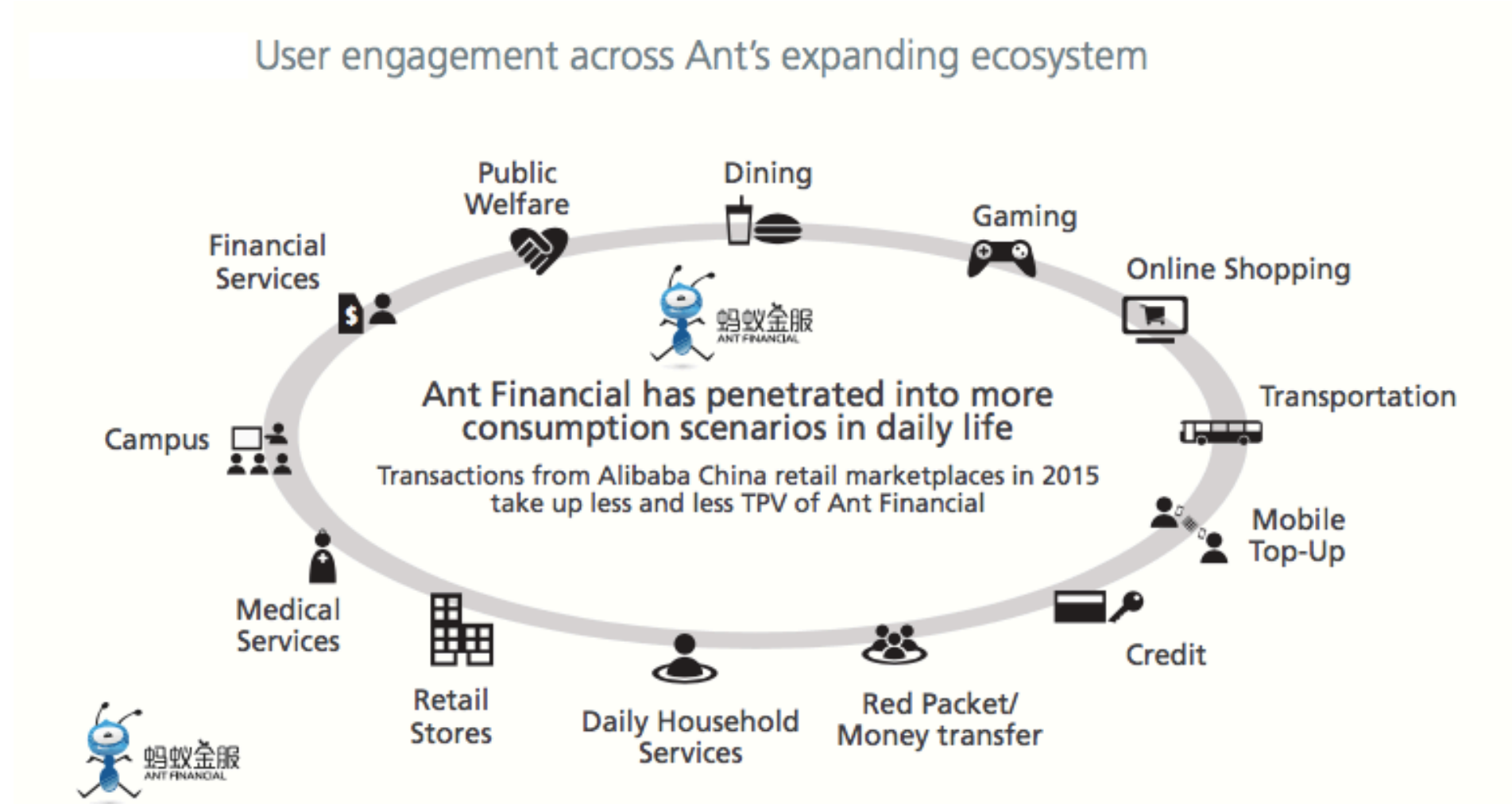
Multi-actor ecosystem		X	X	X		X	X	X	X
Integration	X	X	X	X		X	X	X	
Supply chain					X				
	Search	Music	Videos / movies	Internet browsing	Camera / pictures	Messaging / social	Health tracking	Maps / locations	Gaming
	Google Search	Third Party Apps (e.g. Spotify) + YouTube Music	Third Party Apps (e.g. Netflix) + YouTube	Third Party Apps + Chrome	Built-in camera in the smartphone	Third Party Apps (e.g. WhatsApp) + Google Chat	Third Party Apps	Third Party Apps + Google Maps	Third Party Apps, Google Stadia

What is the issue with ecosystems? Multi-product, multi-actor, and lock-ins

Apple / iOS

	Search	Music	Videos / movies	Internet browsing	Camera / pictures	Messaging / social	Health tracking	Maps / locations	Gaming
Multi-actor ecosystem	X	X	X	X		X	X	X	X
Integration		X	X	X		X	X	X	
Supply chain					X				X
	Third Party Apps	Third Party Apps (e.g. Spotify) + Apple Music	Third Party Apps (e.g. Netflix) + Apple TV+	Third Party Apps + Safari	Built-in camera in the smartphone	Third Party Apps (e.g. WhatsApp) + iMessage	Third Party Apps + Health	Third Party Apps + Apple Maps	Third Party Apps + Apple Arcade

Mega-ecosystem creators want to envelop the final customer's every move

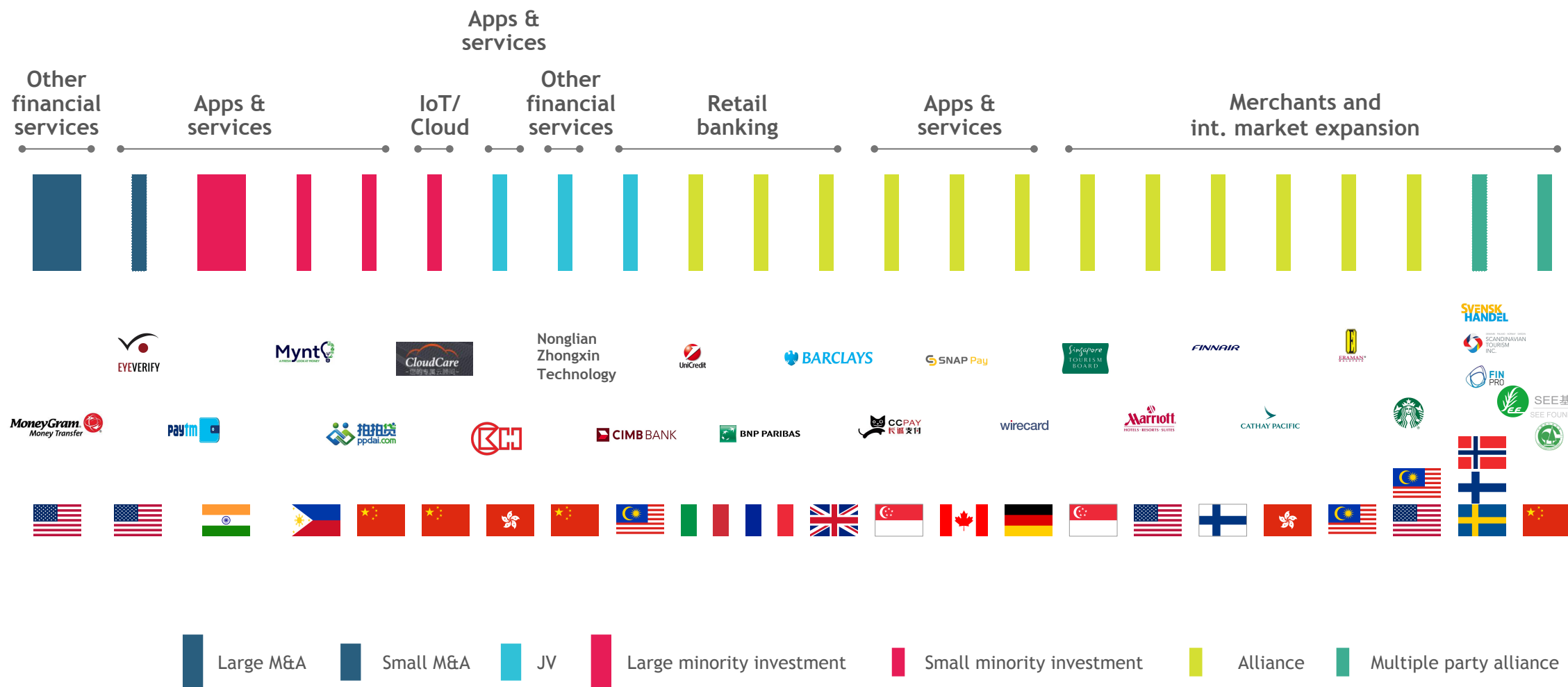


Source: Alibaba Group Investor Day, June 2016

Jacobides, M.G. 2019, In the ecosystem economy, what's your strategy?, *Harvard Business Review*, Sept/Oct

Jacobides, M.G. 2019, The Delicate Balance of Making an Ecosystem Strategy Work, *Harvard Business Review*, online

Ant Financial: Combining partnerships & investments into an ecosystem



Source: Factiva, VC database, Pitchbook, company website, BCG analysis

Leading to tremendous power over complementors

The problem of **scope** (are we ok with it?)

The problem of **AI as a GPT** (are we ok with it?)

The problem of **data and its use** (are we ok with it?)

The problem of **M&A cementing / killing ecosystems**

The problem of ecosystems as **means to grow** (quickly)



Ant Financial to Evolve Into A Global Leading Fintech Company

PAYMENT



451mn

Annual Active Users⁽¹⁾

153mn

No. of Daily Avg. Transactions⁽²⁾

PayPal

180mn active users⁽¹⁾
16mn daily average transactions⁽²⁾

MasterCard

1.4bn accounts⁽¹⁾
180mn daily average transactions⁽²⁾

Visa

2.2bn accounts⁽¹⁾
260mn daily average transactions⁽²⁾

WEALTH MANAGEMENT

152mn

Annual Active Users



AUM RMB 760bn⁽⁴⁾

3-Yr Operation

Charles Schwab
9.9mn active users

CITIC Securities
7mn active users

Lufax
3.6mn active users

FINANCING



ANT FLOWER LOAN



ANT MICRO LOAN

SME Loans

3mn⁽⁴⁾

Cumulative Users

China Merchants Bank
38mn cards in circulation

China Minsheng Bank
4.5mn cumulative borrowers

INSURANCE



380mn

Cumulative Users

China Life
400mn cumulative users

Ping An
110mn cumulative users

CREDIT REFERENCE



SESAMe CREDIT

130mn⁽⁴⁾

Cumulative Users

People in credit reference system in the US
~250mn



1: Number of users of Alipay and PayPal with one or more successful transactions in 2015. Number of accounts of Visa and MasterCard as of the fourth quarter of 2015 2: Daily average transactions of the first quarter of 2016
3: Daily average transactions of the fourth quarter of 2015 4: As of March 31, 2016 All data without footnote above refer to the year of 2015 or as of 2015 Source: annual reports, IR websites, research reports, public news

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How should we address the problem? Beyond DMA/DSA

PROMARKET

THE PUBLICATION OF THE STIGLER CENTER AT
THE UNIVERSITY OF CHICAGO BOOTH SCHOOL OF BUSINESS

ANTITRUST AND COMPETITION DIGITAL PLATFORMS NEWS

Rethinking Competition: From Market Failures to Ecosystem Failures

BY MICHAEL G JACOBIDES, IOANNIS LIANOS April 12, 2021



M.G. Jacobides & I. Lianos, 2021, Ecosystems and competition law in theory and practice, forthcoming, *Special Issue on Regulating Platforms & Ecosystems, Industrial and Corporate Change*



Market vs. Ecosystem: Different competitive scenarios

Table 2 in M.G. Jacobides & I. Lianos, Ecosystems and competition law in theory and practice (January 24, 2021). Available at SSRN: <https://ssrn.com/abstract=3772366>

Scenario	Example	Affected parties	Dominant Effects	Potential (future) competition issues	Nature of interaction	Main Competitive focus	Appropriate competition law tool
Standard	Distribution network (e.g. Walmart)	Final users	Substitutability	Standard barriers to entry analysis	Market Competition	Interbrand Intrabrand	Relevant market
Aftermarkets or Two-sided Platforms	Primary product with replacement parts (e.g. Kodak) Spotify	Final users	Specific Complementarities (supply side synergies) Demand side synergies	Standard barriers to entry analysis Network effects	Systems Competition	Interbrand Intrabrand	Narrow or Broad Relevant market depending on users' path dependency Ecosystem
Operating Systems (Production) Platforms	Microsoft, Apple	Users each side Complementors	Cross-side network externalities	Standard barriers to entry analysis Network effects	Multi-sided platforms	Inter-ecosystem Intra-ecosystem (vertical)	Narrow Relevant market Ecosystem

Scenario	Example	Affected parties	Dominant Effects	Potential (future) competition issues	Nature of interaction	Main Competitive focus	Appropriate competition law tool
Transaction platforms	Payment system (Visa, Amex) and match-making platforms in general	Users each side	Reciprocal cross-side demand-side externalities (consumption synergies)	Standard barriers to entry analysis Network effects	Multi-sided Platforms	Inter-ecosystem	Narrow Relevant market with consideration of out-of-market efficiencies (EU) or Broad Relevant market (US) Ecosystem analysis; abuse wrt complementors
Digital Ecosystems	Search engine-based, multi-product scope (Google) Social network-based, multi-product scope (Facebook) Device and S/W based, multi-product scope (Apple) eCommerce-based, multi-product scope (Amazon) ?Future 5G IoT Platform-based (e.g. connected cars)	Final users (locked in both for each product / service and for the overall bundle) Complementors in each of the multi-actor ecosystems operated Future users and complementors	Non-generic complementarities leading to current/future lock ins One-directional direct, indirect and Cross-side demand / network externalities Economies of scale and learning leading to power imbalances / predation Information generated incidentally, asymmetrically used Feedback Loops entrenching incumbents	Network effects Portfolio effects Data asymmetry => learning effect issues Trajectories of innovation => de facto entrant discrimination	Multi-product and multi-actor ecosystems, supported by (potentially connected) Multi-Side Platforms and Attention markets	Inter-ecosystem Intra-ecosystem (vertical and horizontal) Innovation competition	Ecosystem analysis (architecture, governance, business models); identification of potential areas of abuse wrt final customers and complementors Analysis of impact of action/inaction on competition and innovation Consideration of governance / ecosystem architecture as substitute / complement to regulation ex ante / post

Options I

- *Employing the conventional competition law framework: Stretching the limits of our tools*
 - ❑ “firms compete to draw consumers into more or less comprehensive ecosystems, markets for specific products or services will persist from a consumer’s perspective, and should continue to be analysed separately, alongside competition on (possible) markets for digital ecosystems” but “ecosystem-specific aftermarkets” are possible (Cremer et al., 2019)
- Revision of the Commission’s 1997 Market Definition Notice – no focus on ecosystems so far

Options II

➤ *Regulating ecosystem competition directly with ex ante laws*

- ☐ A utility-like approach to regulation- dominant digital platforms as natural monopolies? (comp. Ducci, 2020 with Petit, 2020)
 - ☐ Impractical
 - ☐ Contested
- ☐ Regulation 2019/1150
 - ☐ Transparency focused
 - ☐ Doesn't cover the “uncontract” type of situation
- ☐ “New” or Old Competition Tools
 - ☐ UK Market Investigation Reference
 - ☐ Greek Competition Law, Article 11
- ☐ The Digital Markets Act (2020)
 - ☐ Only for Gatekeepers
 - ☐ DMA (Article 3), gatekeepers are entities that (i) have a significant and durable position in the EU internal market, (ii) operate one or more important gateways to customers, and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations. The DMA definition is intended to apply to a particular dominant actor, where economic significance, scope, or size provide pragmatic grounds for concern about control over a significant part of the economy, and where the ecosystem in question is global rather than local or regional
 - ☐ Some flexibility...: Art. 3(6), Art.15



Options III

➤ *Non-conventional ex post competition law framework*

- ☐ *The German Facebook Case (2019)*
- ☐ Loi modifiant le Code de droit économique en ce qui concerne les abus de dépendance économique, les clauses abusives et les pratiques du marché déloyales entre entreprises, Art. 4
- ☐ French abuse of economic dependence law: Case 20-D-04 16 March 2020 «relative à des pratiques mises en œuvre dans le secteur de la distribution de produits de marque Apple»
- ☐ New Article 19a GWB (Germany)

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New Greek provision: Article 2a on Abuse of central position in an ecosystem of structural importance

1. Any abuse by an undertaking of its central position in an ecosystem of structural importance to competition in the Greek territory is prohibited. In the event that the requirements for the application both of the present article, and of Articles 2 of the present Law and 102 TFEU are met, only the latter articles shall apply, excluding application of the present.
2. For the purposes of the application of para. 1, the Hellenic Competition Commission shall take into account in particular the business model of the ecosystem and the rules that govern the relations of the parties involved. The Hellenic Competition Commission shall also take into account any sufficiently justified objective justifications put forward and which concern the practices at issue.
3. An ecosystem is defined as (i) a nexus of interconnected and, to a great extent, interdependent economic activities of different undertakings aiming at the provision of products or services which impact on the same group of users; or (ii) a platform connecting the economic activities of different undertakings with the purpose of providing one or more products or services which impact either on the same users or on different groups of business users or end users. A platform is defined as an entity that operates either as an intermediary for transactions between interdependent groups of end users and business users or between interdependent groups of business users, or as infrastructure for the development and provision of different, yet interconnected, products or services.
4. An ecosystem is presumed to be of structural importance to competition where failure to participate in it substantially affects the effective exercise by third parties of their economic activities. When determining an ecosystem's structural importance to competition, account shall be taken particularly of the following elements: (i) the economic power of the ecosystem or its significant share in the turnover or the revenue of one or more sectors of the Greek economy, (ii) its access to substantial resources, in particular to a significant number of business users that depend on the ecosystem in order to connect with end users or to sensitive data and information about the competition, (iii) the significance of its activities with regard to the access of third parties to procurement and sales markets in the Greek territory. Notwithstanding the fulfilment of the requirements set out in the previous sentence, an ecosystem shall be presumed to lack structural importance to competition where at least four other independent ecosystems operate in parallel and these ecosystems constitute a credible alternative for users.

New Greek provision: Article 2a on Abuse of central position in an ecosystem of structural importance

5. A central position in an ecosystem is defined as the position of economic strength enjoyed by an undertaking which provides it with the power to behave to an appreciable extent independently of its competitors, its customers and the users of the ecosystem in general. When determining the possession by an undertaking of a central position in an ecosystem, account shall be taken, inter alia, of the following elements: (i) the control by that undertaking of necessary resources and infrastructures for the economic activity of other undertakings, (ii) the undertaking's ability to set out rules governing the operation of the ecosystem and the access of third parties to it, (iii) the undertaking's increased bargaining power vis-à-vis business users and end users of the ecosystem, (iv) the dependency of ecosystem users on the undertaking for the provision of intermediation services essential for their access to markets for products and services, and the absence of a credible alternative.

6. The Hellenic Competition Commission may initiate ex officio investigations in order to establish whether there has been an infringement of para. 1. Where an infringement is established, the Hellenic Competition Commission issues a decision which is notified to the undertaking concerned, whereby the latter is required to cease the infringement and refrain from it in the future. By the same decision the Hellenic Competition Commission may invite the undertaking to propose, within 60 days from the notification, any remedies that it intends to implement in order for the undertaking to comply effectively with the Commission's decision.





















7. The remedies proposed by the undertaking pursuant to the previous paragraph shall be made binding by decision issued by the Hellenic Competition Commission within 120 days following notification of a previous decision of the Hellenic Competition Commission finding an infringement. In case the proposed remedies are deemed inadequate, the Hellenic Competition Commission, following a hearing of the undertaking, may impose any behavioural remedies necessary and appropriate in order for the infringement to be brought to an end, depending on the nature and the gravity of the infringement and to the business model of the ecosystem concerned.

8. The General Directorate for Competition of the Hellenic Competition Commission may initiate proceedings to monitor compliance with a decision adopted pursuant to the previous paragraph, and the Commission may issue a decision with respect to an undertaking's compliance. Where an undertaking's failure to comply has been established, the Hellenic Competition Commission may by decision require the undertaking concerned to bring the non-compliance to an end and refrain from it in the future, as well as impose a fine pursuant to Article 25B para. 2.

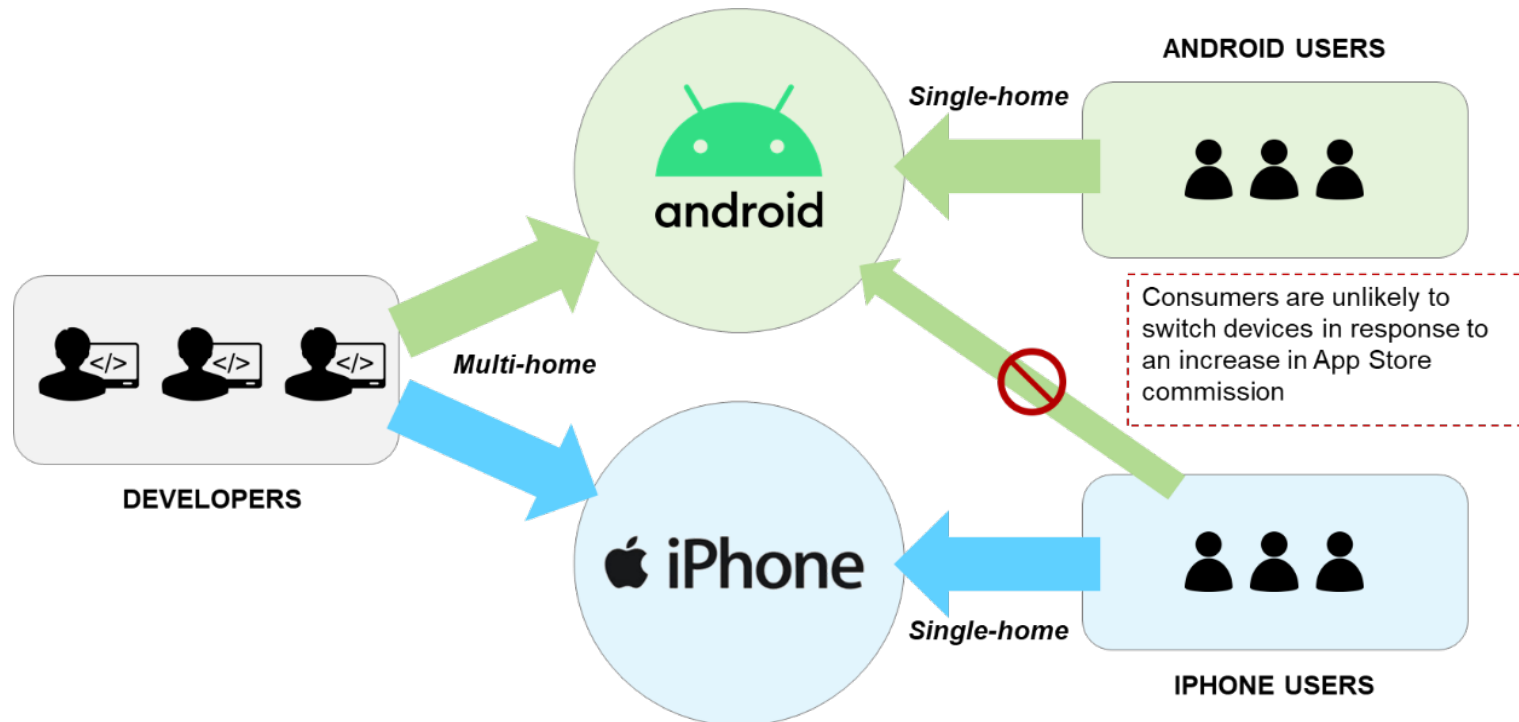
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In a similar vein: Criteria for who is a Gatekeeper, beyond size? Structure, again

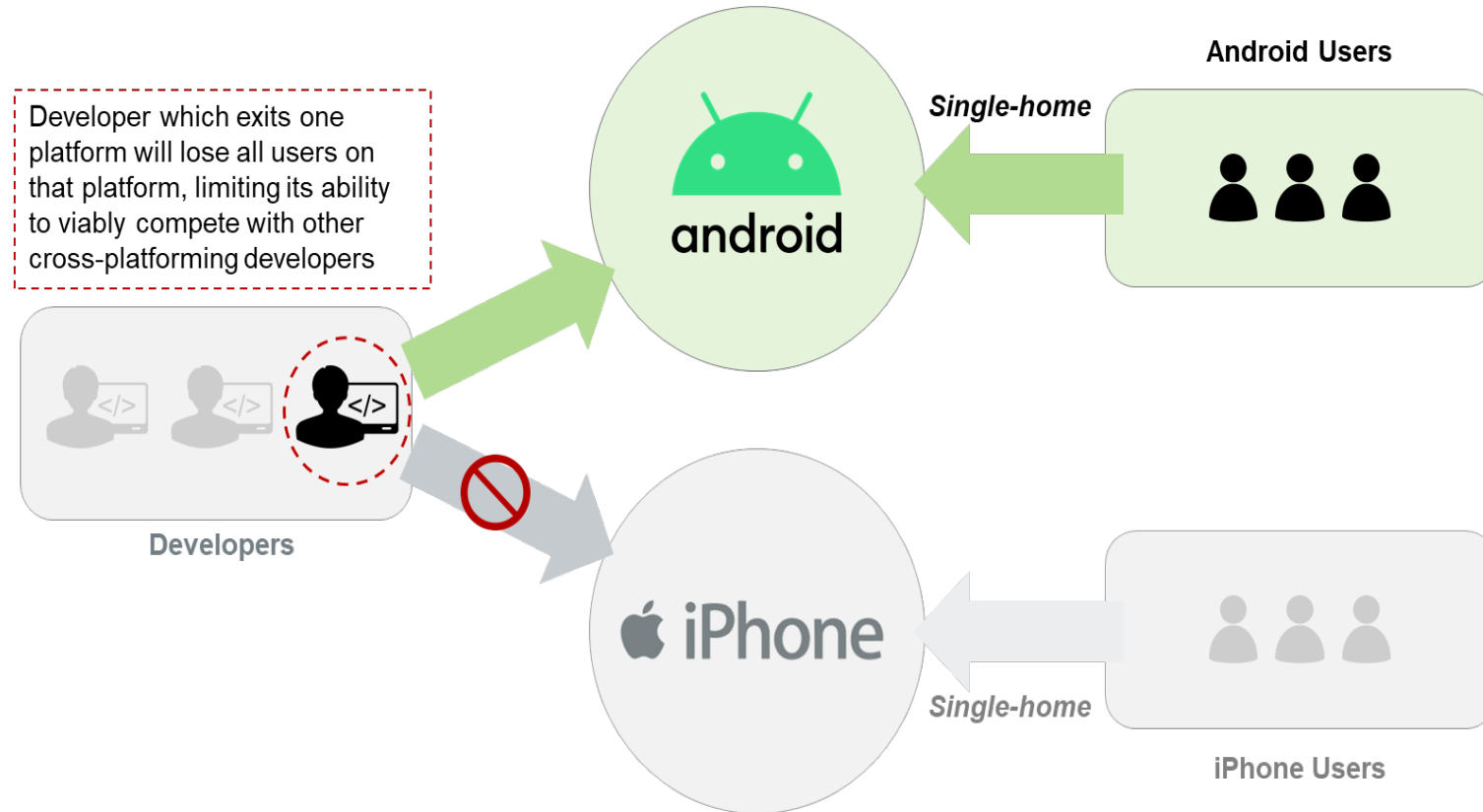
Factor	Digital Marketplaces Assessed		
1  Exclusive consumer access	 iPhone Apps <i>Distribute apps to iPhone users and provide ancillary services (e.g., dev support) to developers</i>		
2  Consumer lock-in	 PC Gaming <i>Platforms connect consumers with PC video games</i>	  	
3  Limited seller bargaining power	 Livestreaming <i>Covers a range of content, led by gaming</i>	  	
4  Required seller multihoming	 Ridesharing <i>Match riders to drivers in real time, provider quality control, safety and other ancillary services</i>	   	
5  Barriers to entry			

Gatekeeper power illustration: Apple iOS



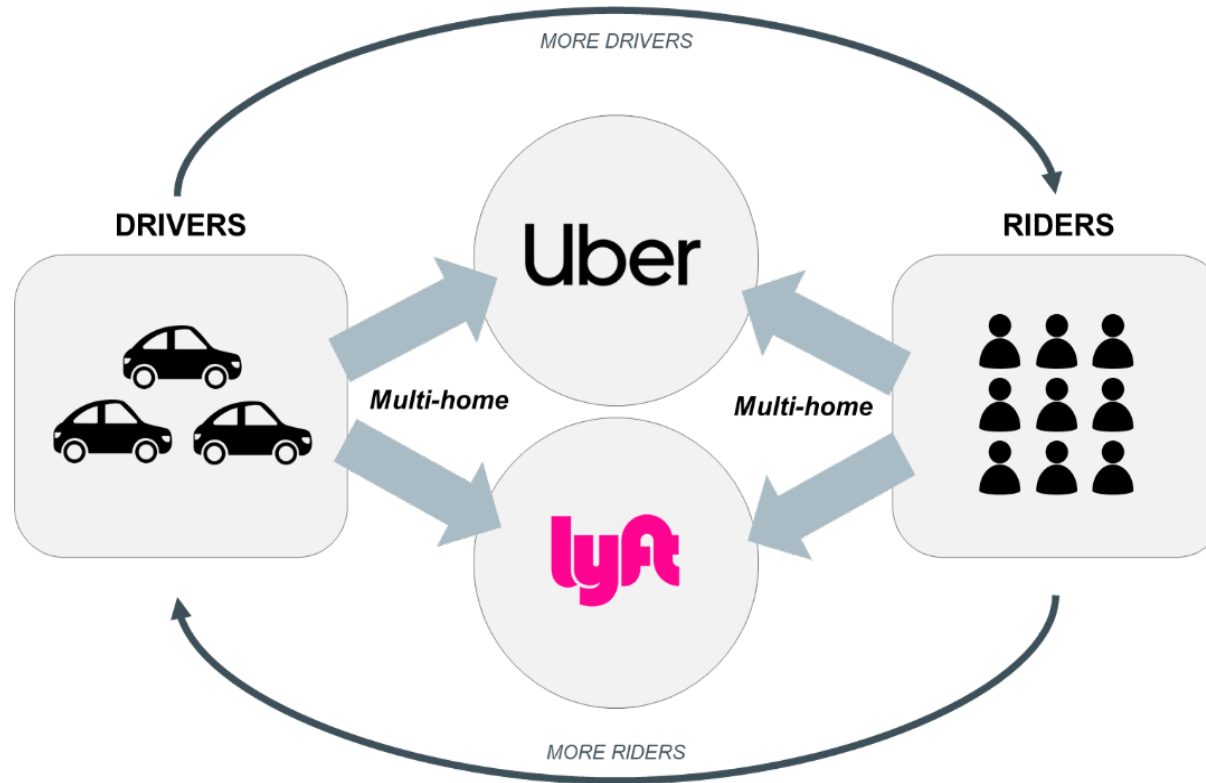
JJacobides, M.G., 2021, *What drives and defines digital platform (gatekeeper) power? A framework, with an application to the Apple / Tinder relationship*. EvolutionLtd Working Paper, www.evolutionltd.net

Gatekeeper power illustration: Apple iOS



Jacobides, M.G., 2021, *What drives and defines digital platform (gatekeeper) power? A framework, with an application to the Apple / Tinder relationship*. EvolutionLtd Working Paper, www.evolutionltd.net

In other ecosystems, orchestrators don't have gatekeeper power



Jacobides, M.G., 2021, *What drives and defines digital platform (gatekeeper) power? A framework, with an application to the Apple / Tinder relationship*. EvolutionLtd Working Paper, www.evolutionltd.net