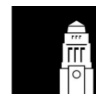

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Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act

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Abstract

The European Union's Digital Markets Act (DMA) initiative, which is set to introduce ex ante regulatory rules for "gatekeepers" in online platform markets, is one of the most important pieces of legislation to emanate from Brussels in recent decades. It not only has the potential to influence jurisdictions around the world in regulating digital markets, it also has the potential to change the business models of the wealthiest corporations on the planet and how they offer their products and services to their customers. Against that backdrop, this article provides an analysis of the aims of and principles underlying the DMA, the essential components of the DMA, and the core substantive framework, including the scope and structure of the main obligations and the implementation mechanisms envisaged by the DMA. Following this analysis, the article offers a critique of the central components of the DMA, such as its objectives, positioning in comparison to competition law rules, and substantive obligations. The article then provides recommendations and proposes ways in which the DMA – and other legislative initiatives around the world, which may take the DMA as an example – can be significantly improved by, *inter alia*, adopting a platform-driven substantive framework built upon self-executing, prescriptive obligations.

Introduction

As the search for the optimal European digital landscape continues, the contours of that landscape are beginning to emerge. In particular, as demonstrated succinctly by the European Parliament's "legislative train", the train for *regulating* the European Union digital markets has left the station.[1] This article concerns what is on that train (and what could or should have been thereon) by providing an assessment and analysis of the main features and provisions of the draft Digital Markets Act (DMA).[2] As the train for regulation has already left the station, this

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[1] See the illustration at https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-digital-markets-act.

[2] European Commission, "Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)", COM(2020) 842 final, 15 December 2020 (hereafter "DMA"), available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN. At the time of writing, European Parliament, Internal Market and Consumer Protection Committee (IMCO) Compromise Amendments, Version 18 November 2021, adopted on 23 November 2021, available at https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2021/11-22/DMA_Comrpomise_AMs_EN.pdf are due to be voted on at a plenary of the European Parliament, and the Council (Competitiveness) General Approach on the Proposal for a Digital Markets Act, 16 November 2021, has

article does not discuss the question of whether ex ante regulation of certain digital markets is the most suitable approach in the first place. Given that at the time of writing the legislative train is in transit and, subsequently, the contents of the DMA are still subject to change, the current article focuses on the aims of and principles underlying the DMA, the essential components of the DMA, and the core substantive framework, including the scope and structure of the main obligations and the implementation mechanisms envisaged by the DMA.

The DMA is intended to complement the EU and Member State competition rules.[3] The legal basis for the legislative proposal is Article 114 TFEU, which facilitates the harmonisation of rules at the EU level in order to avoid fragmentation that could otherwise undermine the functioning of the Internal Market.[4] The DMA purportedly complements competition rules by addressing "unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules" because antitrust enforcement concerns the situation in specific markets, "inevitably" intervenes after the restrictive or abusive practice takes place, and involves investigative procedures that take time.[5] In contrast, the DMA arguably "minimises the detrimental structural effects of unfair practices ex ante" whilst leaving open the possibility of further ex post intervention by EU or national competition law enforcement.[6]

Irrespective of its stated positioning as a "complement" to competition law, the substance and scope of the DMA *intersect* with the substance and scope of EU competition law. This overlap warrants consideration in order to explore the dynamics of how the DMA and EU competition rules will co-exist. This is because conceptual issues arise at the intersection between the DMA and EU competition law to the extent that the DMA attempts to improve upon competition rules by transforming certain extant competition law obligations that are enforced ex post into ex ante regulatory rules that are automatically applicable. This substantive framework of the DMA codifying *general* ex ante rules inspired, to a large extent, by *specific* competition enforcement proceedings and competition law provisions merits discussion. That is so because the chosen framework raises questions as to the potential effectiveness of the legislative proposal as it stands, not least because one of the main intended advantages of the DMA over competition law enforcement is *speed*.[7] In principle, an ex ante regulatory framework such as

been unanimously agreed upon on 25 November 2021; available at https://data.consilium.europa.eu/doc/document/ST-13801-2021-INIT/en/pdf. It is anticipated that the trialogue and the negotiations between co-legislators will start in 2022; see Council of the EU, "Regulating 'big tech': Council agrees on enhancing competition in the digital sphere", Press Release, 25 November 2021, available at https://www.consilium.europa.eu/en/press/press-releases/2021/11/25/regulating-big-tech-council-agrees-on-enhancing-competition-in-the-digital-sphere/.

[3] DMA (n 2) Explanatory Memorandum, p.3.

[4] On the relevance and importance of the legal basis's being Article 114 TFEU and not Article 352 TFEU, including the possibility that the reliance on Article 114 TFEU "could eventually lead to the DMA's annulment", see A. Lamadrid de Pablo and N. Bayón Fernández, "Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It" (2021) 12 (7) Journal of European Competition Law & Practice 576, 577. Notably, the Compromise Amendment on the DMA adopted by the European Parliament, Internal Market and Consumer Protection Committee (IMCO) explicitly incorporates the into the text of Article 1(1), DMA that the "purpose" of the Regulation is "to contribute to the proper functioning of the internal market" so as to "foster innovation and increase consumer welfare"; European Parliament, IMCO, Compromise Amendments (n 2). Other than the emphasis on the internal market objective, this amendment is also notable for the reference to "consumer welfare", which does not exist in the Commission's proposed text; see DMA (n 2).

[5] DMA (n 2) Explanatory Memorandum, p.3-4.

[6] DMA (n 2) Explanatory Memorandum, p.4.

[7] For the position that a "key motivation for the DMA policy initiative is to speed up the implementation of remedies for anticompetitive behaviour by gatekeeper platforms", see Luís Cabral et al, "The EU Digital Markets Act: A Report from a Panel of Economic Experts", European Commission, Joint Research Centre (JRC122910) (2021), p.10.

the DMA should be able to engender speedier changes in business conduct than competition law enforcement proceedings by avoiding the numerous lengthy stages of such interventions.[8] Yet, there is a balance to be struck between the speed and accuracy of an intervention.[9] Likewise, as acknowledged in the DMA Impact Assessment itself, ex ante rules also present a trade-off between flexibility and certainty.[10] As a set of automatically applicable ex ante rules, the obligations in the DMA must provide sufficient *legal certainty* to the parties subject to the rules.[11] Whereas ex ante regulation is expected to provide more certainty to the subjects of regulation than ex post intervention,[12] it lacks flexibility in comparison to competition law enforcement which is conducted on a case-by-case basis.[13] Particularly given that the markets within the scope of the DMA are dynamic markets where practices and market features are subject to rapid change, a flexible and future-proof approach is needed to ensure agility of the applicable legal framework, whilst simultaneously providing sufficient legal certainty to the regulated entities.[14] The effectiveness of the DMA will, thus, depend on how well it strikes these necessary balances in principle and in practice, which to a degree depends on how much the DMA can improve upon competition law enforcement in digital markets.

Against this backdrop, the current article pursues two aims. First, it aims to shed light on the main provisions of what is perhaps one of the most important pieces of legislation emanating from Brussels in terms of the number of people and the value of commerce that will be impacted by the proposed legal instrument. Second, this article aims to provide a critique of the main components of the proposed Regulation with a view to proposing ways in which the DMA – and other legislative initiatives elsewhere in the world which may take the DMA as an example – can be significantly improved.

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[8] Typically, in the most likely type of competition law investigation into the conduct of large platforms, namely those carried out under Article 102 TFEU into the possible abuse of a dominant position, these stages include defining the relevant market, establishing dominance, establishing abuse, assessing the validity of any objective justifications, etc which typically take several years from the opening of proceedings to the adoption of a decision.

[9] See Cabral et al (n 7) p.10.

[10] European Commission, Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), 15 December 2018, SWD(2020) 363 final, [159]-[164].

[11] Another issue that arises in the intersection of the DMA and competition law rules relates to parallel application of competition law rules and the DMA and the legal issues that this may lead to in practice, such as that of a potential violation of the principle ne bis in idem. This will not be discussed in the current article due to the focus on the substantive aspects of the DMA. For a discussion of ne bis in idem in the context of the DMA and EU competition law rules, see e.g. G. Monti, "The Digital Markets Act – Institutional Design and Suggestions for Improvement", TILEC Discussion Paper DP 2021-004, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730 pp.14-15. A related, further issue arises in cases where a gatekeeper cannot simultaneously comply with an obligation imposed by the DMA and a remedy imposed by a National Competition Authority under national competition law. For a discussion of this potential problem and its possible resolution, see Alexandre de Streel and Pierre Larouche, "The European Digital Markets Act Proposal: How to Improve a Regulatory Revolution" Concurrences No. 2-2021, 46, 55-56.

[12] C. Decker, *Modern Economic Regulation: An Introduction to Theory and Practice* (2015 Cambridge University Press) p.48.

[13] P. Larouche, *Competition Law and Regulation in European Telecommunications* (2000 Hart Publishing) pp.123-124; OECD, *Competition Enforcement and Regulatory Alternatives*, OECD Competition Committee Discussion Paper (2021), https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives-2021.pdf, p.8.

[14] For an explicit acknowledgement of the need to balance these different interests, see e.g. Federal Ministry for Economic Affairs and Energy (Germany), Ministere de L'Economie, des Finances et de la Relance (France), Ministry of Economic Affairs and Climate Policy (The Netherlands) ("The Friends of an Effective DMA"), *Letter and Proposal: Strengthening the Digital Markets Act and Its Enforcement* (9 September 2021), available at https://www.permanentrepresentations.nl/permanent-representations/pr-eu-brussels/documents/publications/2021/09/9/strengthening-the-digital-markets-act-and-its-enforcement p.1.

This article is structured as follows. In the next section, the article provides some context and background to the proposed Regulation in other to explore the rationale behind the legislative proposal. After that, the article presents an overview of the main components of the DMA by exploring the central concepts underlying the proposal. This is followed by a discussion of the obligations found in the DMA and the proposed implementation, compliance and enforcement modes of the Regulation. The remainder of the article provides a critique of the DMA as is, alongside a set of recommendations that can improve the legislative proposal in this or future iterations and that can contribute to improving other legislative proposals modelled on or similar to the DMA.

Exploring the rationale behind the DMA

Online platform markets, the providers of digital services and the practices of digital service providers have been under intense scrutiny globally for various concerns over the last few years. A clear international trend can be observed towards adopting new (ex ante) rules and/or revising existing legal frameworks, most notably competition law frameworks, with a view to tackling a range issues observed on digital markets comprising the products and services of large online platforms.[15] The DMA is a core component of the European Union's single digital market strategy and accompanies and complements the Digital Services Act (DSA).[16] Action at EU level was considered necessary as regulatory initiatives at Member State level "cannot fully address these effects" regarding contestability and unfair behaviour, lest they "lead to a fragmentation of the Internal Market".[17] Being an EU-level instrument is, indeed, one of the main strengths of the DMA. Such EU-level harmonisation can avoid fragmentation and reduce costs of compliance and can ensure that the European digital single market is achieved and preserved, which is potentially endangered by divergent national rules applicable to identical businesses with cross-border operations.[18] Given that each of the large online platforms operates cross-border and does so typically with the same business model, action at EU level – rather than at Member State level – indeed, appears preferable in terms of costs of compliance, legal certainty, and effectiveness of the rules.

The DMA is drafted against a backdrop of "important innovative benefits for users", and "new business opportunities" and facilitation of "cross-border trading" as identified contributions to

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[15] The jurisdictions adapting existing rules and/or adopting new rules include the UK, Japan, Germany, Australia, United States, etc. For examples of legislative initiatives, see e.g. For notable examples, see e.g., American Choice and Innovation Online Act, 117th Congress, H.R. 3816, 24 June 2021 (US); Ending Platform Monopolies Act, 117th Congress, H.R. 3825, 11 June 2021 (US); Competition and Antitrust Law Enforcement Reform Act of 2021, 116th Congress, SIL21191 6C1, 4 Feb. 2021 (US); Gesetz zur Aenderung des Gesetzes gegen Wettbewerbsbeschraenkungen fuer ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB-Digitalisierungsgesetz), 18 January 2021 ("Act Amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions") (GWB-Digitalisation Act) (Germany); Act on Improving Transparency and Fairness of Digital Platforms, 27 May 2020 (Japan); Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020, 15 Feb. 2021 (Australia).

[16] See Commission Communication "Shaping Europe's Digital Future", 19 February 2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0067 p.5. The Digital Services Act (DSA) is a horizontal legislative initiative focusing on issues such as the liability of online intermediaries for third party content, online safety of users, etc.; see European Commission, "Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC", COM/2020/825 final, 15 December 2020, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN.

[17] DMA (n 2) Explanatory Memorandum, p.1.

[18] Certain Member States have already amended their rules specifically to tackle issues on digital markets, so the risk of fragmentation is real; see e.g. Germany, GWB-Digitalisation Act (n 15).

the internal market generated by digital services.[19] However, alongside all the benefits engendered by digital services, such as increased consumer choice, improved efficiency and competitiveness of industry and enhanced civil participation in society, the DMA Explanatory Memorandum notes that "a small number of large online platforms capture the biggest share of the overall value generated" and that these platforms intermediate "the majority of transactions between end users and business users".[20] The Explanatory Memorandum does not provide any figures as to either the value generated by digital services or the said share of that value that is captured by the said large online platforms or the number/value of the transactions the majority of which are arguably intermediated by the few large platforms. The entire DMA is, nevertheless, built upon the premise that "[a] few large platforms increasingly act as gateways or gatekeepers between business users and end users and enjoy an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers".[21]

The so-called "core platform services" that the DMA focuses on and the services to which the DMA rules apply to – as proposed by the Commission – are: online intermediation services; online search engines; social networking; video sharing platform services; number-independent interpersonal electronic communication services; operating systems; cloud services; and advertising services.[22] To this list, the European Parliament IMCO has added three further core platform services: web browsers; virtual assistants; and connected TV.[23] The DMA focuses on these platform types because these are noted to be the services "where the identified problems are most evident and prominent and where the presence of a limited number of large online platforms that serve as gateways for business users and end users has led or is likely to lead to weak contestability of these services and of the markets in which these intervene".[24] The DMA lists as common characteristics of these "core platform services", extreme economies of scale, very strong network effects, "an ability to connect many business users with many end users through the multi-sidedness of these services", significant dependence of both business users and end users, lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, and data-driven advantages.[25] It should be noted that some of the listed features of core platform services, such as an ability to connect

[19] DMA (n 2) Explanatory Memorandum, p.1.
[20] DMA (n 2) Explanatory Memorandum, p.1. The figures provided elsewhere in the Explanatory Memorandum relate to the size of the "digital economy", which according to the Memorandum is estimated "at between 4.5% to 15.5% of global GDP in 2019); ibid p.1. It is well established in the literature that the "value" of digital services that are widely used by consumers is not captured by GDP because they are provided at a price of zero (i.e. for "free"); see e.g. E. Brynjolfsson et al, "GDP-B: Accounting for the Value of New and Free Goods in the Digital Economy", NBER Working Paper 25695 (2019), available at https://www.nber.org/system/files/working_papers/w25695/w25695.pdf.
[21] DMA (n 2) Explanatory Memorandum, p.1.
[22] DMA (n 2) Article 2(2).
[23] See European Parliament, IMCO, Compromise Amendments (n 2) Article 2(fa) (fb) (fc).
[24] DMA (n 2) Explanatory Memorandum, p.2.
[25] DMA (n 2) Recital 2. The DMA (or the Impact Assessment) does not provide any specific empirical or other evidence to support the position that end users do not multi-home and do not switch between platforms (i.e. are locked in); DMA (n 2) Recital 2. The support study for the Impact Assessment appears to have carried out a study with 9 consumers; see European Commission, "Digital Markets Act Impact Assessment Support Study: Annexes", December 2020, available at https://op.europa.eu/en/publication-detail/-/publication/2a69fd2a-3e8a-11eb-b27b-01aa75ed71a1/language-en/format-PDF/source-search p. 480 et seq. Cf P. Akman, "A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets" (2022) Virginia Law & Business Review (forthcoming) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835280 providing the results of an empirical survey of over 11,000 online platform users from 10 countries, which found that multi-homing exists, on average, in every survey country studied for every platform that users were asked about and that non-trivial proportions of users report to have made a decision to switch platforms in the last 2 years; see pp. 11-12, 20-21.

many users due to being multi-sided, are, clearly, not unique to core platforms and are a feature of all multi-sided platforms, large and small.

According to the DMA, the characteristics of core platform service markets, as mentioned above, combined with "unfair conduct" by the relevant service providers can have the effect of "substantially undermining the contestability of the core platform services", as well as the "fairness" of the relationship between service providers and their business users and end users, leading to less choice for those users and conferring on the service providers "the position of a so-called gatekeeper".[26]

The motivation behind the DMA is the establishment of a "targeted set of harmonised rules … at Union level to ensure contestable and fair digital markets featuring the presence of gatekeepers within the internal market".[27] Thus, the "objective" of the DMA is "to ensure a contestable and fair digital sector in general and core platform services in particular, with a view to promoting innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector".[28] The two concerns that drive the DMA are, therefore, contestability and fairness on digital markets, both of which are discussed separately below.[29]

An overview of the main components of the DMA

The general objective of the DMA initiative is "to ensure the proper functioning of the internal market by promoting effective competition in digital markets and in particular a contestable and fair online platform environment".[30] Amongst three possible policy options regarding how the legislative initiative could be shaped, the draft DMA opts for the so-called "semi-flexible" option which involves: a closed list of "core platform services"; a combination of quantitative and qualitative criteria to designate providers of core platform services as "gatekeepers"; "directly applicable obligations" including some "where a regulatory dialogue may facilitate their effective implementation"; and a possibility for the European Commission (hereafter, "Commission") to update both the obligations and the core platform services through a so-called "market investigation" mechanism.[31]

In brief, the DMA adopts a framework that establishes the criteria whereby a provider of a core platform service will be designated a "gatekeeper" by the Commission either as a result of i- the operation of a (rebuttable) presumption based upon quantitative metrics, or, ii- following a separate procedure (i.e. a "market investigation") in cases of the quantitative criteria's not being met or the presumption's being challenged by the platform in question.[32] In the latter case, the gatekeeper designation is built upon the "overall objective requirements" which essentially define a "gatekeeper" for the purposes of the DMA.[33] Accordingly, a provider of core platform

[26] DMA (n 2) Recital 2.
[27] DMA (n 2) Recital 8.
[28] DMA (n 2) Recital 79. European Parliament, IMCO, Compromise Amendments (n 2) Article 1(1) inserts a "purpose" statement into the DMA text itself by proposing an amended provision that reads: "The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring contestable and fair markets for all businesses to the benefit of both business users and end users in the digital sector across the Union where gatekeepers are present so as to foster innovation and increase consumer welfare". Neither the reference to the internal market, nor the references to fostering innovation and increasing consumer welfare, nor any statement of purpose was found in the Articles of the original text proposed by the Commission.
[29] See text around n 122.
[30] DMA (n 2) Explanatory Memorandum, p.9.
[31] See DMA (n 2) Explanatory Memorandum, p.10.
[32] DMA (n 2) Article 3(2), 3(4), 3(6); Article 15.
[33] See DMA (n 2) Recital 24.

services shall be designated as a gatekeeper if: "(a) it has a significant impact on the internal market; (b) it operates a core platform service which serves as an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future".[34] Although this is the base definition of a gatekeeper for the purposes of the DMA, there are at least three core concepts in the definition that are arguably not "objective" despite the stipulation of the legislative initiative to the contrary. The concepts of "significant impact on the internal market", "(important) gateway", a current or "foreseeable" "entrenched and durable position" all beg for interpretation and clarification, which are absent from the DMA.[35] What the DMA does provide is quantitative metrics that the legislator assumes (or decides) satisfy the three "objective requirements" at the current time based on the turnover/market capitalisation/market value *and* the provision of a core platform service in at least three Member States; number of active users; and, the length of time during which the platform satisfied these metrics.[36]

Where the gatekeeper designation follows a "market investigation", far more useful than the base definition of a gatekeeper is the list of elements in Article 3(6) DMA which the Commission is to take into account in its designation decision. Namely, elements such as the size of the core platform service provider, the number of dependent business users and end users, entry barriers derived from network effects and data-driven advantages, efficiencies of scale and scope, user lock-in, and other structural market characteristics.[37] Indeed, the list of elements that the Commission must take into account in designating a gatekeeper through a market investigation is more in tune with the economics and empirics of multi-sided platforms, and is likely to generate more accurate and future-proof assessments of a gatekeeper position than the somewhat crude[38] quantitative metrics used for the presumption mentioned above for gatekeeper designation.

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[34] DMA (n 2) Article 3(1). The European Parliament, IMCO, Compromise Amendments (n 2) Article 3(1) revise the Commission's text to substitute the word "undertaking" for "provider of core platform services" in the provision.

[35] See in the same vein, Fernández noting that these conditions are "quite loose" and thus, give ample discretion in practice to the Commission to designate gatekeepers, which is a kind of flexibility that is more typical of ex post assessment than of ex ante rules, and should not undermine legal certainty; C. Fernández, "A New Kid on the Block: How Will Competition Law Get Along with the DMA?" (2021) 12 (4) Journal of European Competition Law and Practice 271, 271. See also Lamadrid de Pablo and Bayón Fernández (n 4) 582.

[36] See DMA (n 2) Article 3(1) and 3(2). European Parliament, IMCO, Compromise Amendments (n 2) Article 3 upwardly adjusted the turnover and market capitalisation thresholds proposed by the Commission (from EUR 6.5 billion to EUR 8 billion and from EUR 65 billion to EUR 80 billion, respectively), thus potentially reducing the scope of platforms that will be caught in the net due to the increase in the thresholds that need to be satisfied. However, European Parliament, IMCO, Compromise Amendments (n 2) Article 3 also removed the requirement that the quantitative threshold regarding the user base is calculated using the number of *active* end users, which may have the effect of enlarging the scope of platforms that will be "gatekeepers".

[37] DMA (n 2) Article 3(6). European Parliament, IMCO, Compromise Amendments (n 2) Article 3(b)(ea) notably adds multi-homing to this list of factors, too, but limits this to "multi-homing among business" which is unclear in terms of whether it refers to multi-homing amongst business users or multi-homing among businesses (e.g. by end users). For the position that such a concept of multi-homing should include both business users and end users, see e.g. A. de Streel et al, "Making the Digital Markets Act More Resilient and Effective: Recommendations Paper", CERRE, May 2021, available at https://cerre.eu/wp-content/uploads/2021/05/CERRE_-DMA_European-Parliament-Council-recommendations_FULL-PAPER_May-2021.pdf p.87. Council (Competitiveness) General Approach (n 2) Compromise Text Article 3(e), indeed, introduces the concept of multi-homing by business users and end users as a factor that suggests "lock-in".

[38] In the same vein, see Monopolkommission, *Recommendations for an Effective and Efficient Digital Markets Act*, Special Report 82, 2021, available at https://www.monopolkommission.de/en/reports/special-reports/special-reports-on-own-initiative/372-sr-82-dma.html K3 that the approach of the DMA to the designation of gatekeepers "risks covering too few or too many businesses, and possibly the wrong ones, as it focuses on sheer size and reach, and not on gatekeeper power". See also Geradin noting that quantitative metrics on their own cannot suffice to

Establishing the gatekeeper position through a market investigation relying on economic and empirical elements does, however, mean that adopting a designation decision (and thus, the gatekeeper's becoming subject to the obligations in the DMA) will take longer, be more burdensome and resource-intensive for the Commission and provide less legal certainty for the relevant service provider ex ante.[39] Having said that, given that the possibility exists for a platform's seeking to rebut the presumption triggered by satisfying the quantitative criteria, there does not appear to be anything in the DMA that would currently prevent the delaying of such gatekeeper designation in any case. So long as there exists the possibility to rebut the presumption – which must, indeed, exist to preserve defence rights – the possibility of delaying the designation decision will also exist. The only limiting principle currently appears to be that the platform has to present "sufficiently substantiated arguments"[40] to rebut the presumption, for the Commission to have to conduct a market investigation for the designation decision. However, it is currently unclear what will (not) be deemed "sufficiently substantiated arguments" in this context.[41] A Commission decision finding that the arguments put forward by the platform were not "sufficiently substantiated" and/or failed to rebut the presumption would be subject to review by the Court of Justice, triggering a potentially lengthy procedure.[42] All in all, whether the standard gatekeeper designation through a rebuttable presumption based on quantitative criteria will achieve more speed over the alternative designation through a more economically and empirically grounded assessment is a question that can be assessed only after the DMA enters into force as the answer relies partly on how often the rebuttable presumption will be sought to be rebutted and legally challenged by the relevant platforms.

The obligations

Once a provider of a core platform service is designated as a "gatekeeper", it becomes subject to the "directly applicable" obligations stipulated in Articles 5 and 6 in respect of each of its core platform services listed in the relevant designation decision.[43] According to the DMA,

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establish *dependency* of business/end users on the platform in question, which is what the gatekeeper designation should focus on; see D. Geradin, "What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Markets Act?" (2021) available at https://ssrn.com/abstract=3788152, pp.14-15.

[39] The Commission is to conclude such a market investigation within 12 months from the opening of the proceedings in cases of a platform's not satisfying the quantitative criteria in Article 3(2) and within 5 months from the opening of the proceedings in cases of a platform's seeking to rebut the presumption (despite satisfying all of the quantitative criteria in Article 3(2)); DMA (n 2) Article 15(1) and (3).

[40] European Parliament, IMCO, Compromise Amendments (n 2) Article 3 (4) substitutes the word "compelling" with "sufficiently substantiated" in this provision.

[41] DMA (n 2) Recital 23 notes that in assessing the arguments evidenced by the platform to rebut the presumption, the Commission "should take into account only the elements which directly relate to the requirements for constituting a gatekeeper, namely whether it is an important gateway which is operated by a provider with a significant impact in the internal market with an entrenched and durable position, either actual or foreseeable". Yet, besides clarifying that efficiencies cannot be taken into account in the assessment, the Recital offers little help to establish what sort of evidence would constitute "sufficiently substantiated arguments" that can rebut the presumption since it simply reiterates the definition of a "gatekeeper" provided in DMA (n 2) Article 3(1). European Parliament, IMCO, Compromise Amendments (n 2) amends Recital 23 to stipulate that the gatekeeper can only put forward such arguments where there are "exceptional circumstances in which the relevant core platform service operates".

[42] The DMA (n 2) Article 35 explicitly notes that the decisions involving a fine or penalty are subject to review. However, if the Commission rejects the platform's arguments that it is not a gatekeeper, this may be subject to judicial review, too, because the Commission's rejection of those arguments would "produce legal effect vis-a-vis third parties", namely for the platform in question by making them subject to the rules in the DMA, thus subjecting such decisions to the review of their legality by the Court of Justice under Article 263 TFEU.

[43] For both sets of obligations' being "directly applicable", see DMA (n 2) Explanatory Memorandum, p.10. The gatekeeper "shall comply" with the obligations in Articles 5 and 6 within six months after the Commission designates it as a gatekeeper and lists the relevant services provided by that gatekeeper as "core platform services"

"[t]he list of obligations foreseen by the proposal has been limited to those practices (i) that are particularly unfair or harmful, (ii) which can be identified in a clear and unambiguous manner to provide the necessary legal certainty for gatekeepers and other interested parties, and (iii) for which there is sufficient experience".[44] It should be noted in this context that the "sufficient experience" that the DMA refers to must relate to the experience of the Commission and some national authorities because none of the relevant Commission infringement decisions concerning large online platforms, all of which have been appealed, has yet been confirmed by both of the European Courts.[45] Whether all of the stipulated obligations are unambiguous enough to provide legal certainty, as purported by the DMA, is also open to debate and discussed below.[46]

The substantive obligations in the DMA are all automatically applicable rules that every gatekeeper "shall" ensure full and effective compliance with.[47] Broadly speaking, there appear to be three types of obligations in the DMA in terms of what they seek to achieve. Some of the obligations across Articles 5 and 6 can be said to pursue an objective of "fairness" to apply to the relationship between the gatekeeper and its business users and/or competitors.[48] Some of these and other obligations appear to target certain "conflicts of interest" that arise in the relationship between gatekeepers and their business users, particularly where the gatekeeper is vertically integrated, and it both facilitates transactions for its business users and also competes with these users in offering products/services to end users.[49] Finally, some of the obligations in the DMA appear to pursue more directly the objective of ensuring and preserving "contestability" on the relevant markets through encouraging multi-homing, switching, lowering barriers to entry, increasing transparency, etc.

A distinction is made between the obligations under Article 5, which are "self-executing", and those under Article 6, which are "susceptible of being further specified".[50] As proposed by the Commission, Article 5 contains seven obligations, four of which are expressed as prohibitions, and three of which are expressed as prescriptions, whereas Article 6 contains eleven obligations, three of which are expressed as prohibitions, and eight of which are expressed as

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under Article 3(7) DMA; DMA (n 2) Article 3(8). European Parliament, IMCO, Compromise Amendments (n 2) Article 3(8) proposes the said six-month period to be reduced to four months.

[44] DMA (n 2) Explanatory Memorandum, p.6.

[45] This is also evidenced by the Impact Assessment; see Impact Assessment (n 10) [155]. There are several pending appeals and ongoing EU Commission investigations at the time of writing. See e.g. Case COMP/AT.40411 - *Google Search (AdSense)*, 20 March 2019, currently on appeal in Case T-334/19, *Google and Alphabet v Commission* [2019] OJ C255/46; Case COMP/AT.40099 – *Google Android*, 18 July 2018, currently on appeal in Case T-604/18, *Google and Alphabet v Commission* [2018] OJ C445/21. After the publication of the DMA, the General Court largely dismissed Google's appeal against the Commission decision in Case COMP/AT.39740 - *Google Search (Shopping)*, 27 June 2017 in Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* ECLI:EU:T:2021:763. At the time of writing, an announcement on whether Google/Alphabet will appeal the decision has not yet been made.

[46] See text around n 132.

[47] DMA (n 2) Article 11; European Parliament, IMCO, Compromise Amendments (n 2) Article 6a. European Parliament, IMCO, Compromise Amendments (n 2) Article 6a(1a) also prohibits a gatekeeper from engaging "in any behaviour regardless of whether is of a contractual, commercial, technical or any other nature, that, while formally, conceptually or technically distinct to a behaviour prohibited pursuant to Articles 5 and 6, is capable in practice of having an equivalent object or effect".

[48] Incidentally, the Platform to Business Regulation also aims at and regulates this; see European Commission, "Regulation (EU) 2019/1150 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services", [2019] OJ L186/57.

[49] European Parliament, IMCO, Compromise Amendments (n 2) Recitals 48 and 49 explicitly acknowledge the conflict-of-interest rationale behind some of the obligations.

[50] See DMA (n 2) Explanatory Memorandum, p.13 and Article 6.

prescriptions.[51] As mentioned above, the obligations in Article 6 are "susceptible of being further specified" albeit being directly applicable, a peculiar set up, the complexity and implications of which are discussed below.[52]

The list in Article 5 contains obligations ranging from a prohibition of combining personal data across the gatekeeper's services (arguably inspired by the Bundeskartellamt action in *Facebook*) to an obligation to allow business users to offer their products/services at prices and conditions that differ from those adopted on the gatekeeper's platform (arguably inspired by numerous European proceedings against most-favoured-customer clauses and *Amazon*).[53] Another important self-executing obligation is to allow business users to promote offers to and conclude contracts with end users whom they acquire on the platform via channels outside of the platform (arguably inspired by *Apple App Store*).[54] Article 5 also contains obligations that appear more directly to target contestability issues. An important such obligation is that of the gatekeeper's providing advertisers and publishers with information concerning the price paid by the advertiser and remuneration paid to the publisher in the context of gatekeepers which provide advertising services (arguably inspired by *Google AdTech*).[55] Another obligation, aimed at preventing restrictions on free choice of users is that of refraining from requiring users to subscribe to or register with another core platform service of the gatekeeper as a condition of access to another core platform service operated by the same gatekeeper (arguably inspired by *Google Android*).[56]

Notable obligations on the Article 6 list include a prohibition of a gatekeeper's "treating more favourably in ranking services and products offered by the gatekeeper itself" compared to similar services or products of third parties.[57] This prohibition, which became – grammatically

[51] European Parliament, IMCO, Compromise Amendments (n 2) have moved the obligations founds in Article 6(1)(a) and (b) to Article 5, and introduced four new obligations in Article 6. The new obligations introduced in Article 6 comprise a prohibition of combining personal data for delivering targeted or micro-targeted advertising without explicit consent (except for data of minors, in which case such advertising is completely banned); a prohibition of practices that obstruct the possibility for end users to unsubscribe from a core platform service; obligations to allow interconnection between gatekeepers' number independent interpersonal communication services and social network services and those of others. Council (Competitiveness) General Approach (n 2) Compromise Text also introduces a new obligation, namely Article 6(l), prohibiting the "making conditions of termination from a core platform service disproportionate" and an obligation to ensure that such conditions of termination can be exercised without undue difficulty. In essence, it is the same obligation as the one introduced by European Parliament, IMCO to enhance the right of end users to unsubscribe from core platform services; see Council (Competitiveness) General Approach (n 2) p.3.

[52] See text to n 68 and around n 135.

[53] DMA (n 2) Article 5(a) and 5(b). Bundeskartellamt, *Facebook*, 6th Div. Dec., B6-22/16, 6 February 2019, currently on appeal, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5; Case COMP/AT.40153 *E-book MFNs and Related Matters (Amazon)*, 4 May 2017.

[54] DMA (n 2) Article 5(c). Case COMP/AT.40437 *Apple - App Store Practices (Music Streaming)*, 16 June 2020 (Opening of Proceedings), 20 April 2021 (Statement of Objections); see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40437.

[55] DMA (n 2) Article 5(g). Cases COMP/AT. 40670 *Google - AdTech and Data Related Practices*, 22 June 2021 (Opening of Proceedings); see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40670.

[56] DMA (n 2) Article 5(f). *Google Android* (n 45). There appears to be some mismatch between DMA (n 2) Article 5 (f) which stipulates this ban on bundling of core platform services and Recital 41 which appears to set out the rationale behind the ban (e.g. the Recital only mentions end users whereas Article 5(f) mentions both end users and business users).

[57] DMA (n 2) Article 6(d). European Parliament, IMCO, Compromise Amendments (n 2) Article 6(d) expands this ban on self-favouring to "other settings" beyond rankings to be applicable to "third party services or products". This amendment also introduces the requirement that such conditions should be "transparent", in addition to fair

incorrectly – to be known as "self-preferencing" has been at the core of some of the current competition law enforcement proceedings in digital markets, most notably *Google Search (Shopping)*.[58] The DMA not only prohibits self-favouring, but also imposes a duty to "apply fair and non-discriminatory conditions to such ranking" by gatekeepers.[59] The DMA imposes a further duty on search engine gatekeepers to provide third party search engine providers access to ranking, query, click and view data on "fair, reasonable and non-discriminatory terms".[60] Likewise, the DMA separately imposes an obligation to apply "fair and non-discriminatory general conditions" of access for business users to the software application store of a gatekeeper (presumably inspired by *Apple – App Store*).[61] Other notable obligations include the prohibition of a gatekeeper from using, in competition with its business users, any data generated by the business users (or their end users) and that is not publicly available (presumably inspired by *Amazon*).[62] Similarly to Article 5, Article 6 also includes obligations that appear more directly to address contestability issues by targeting multi-homing, switching, barriers to entry, etc. Important obligations in this context include that of allowing end users to uninstall any pre-installed software on the core platform service, as well as that of refraining from technically restricting the ability of end users to switch between and subscribe to different apps and services to be accessed via the operating system of the gatekeeper.[63] Another such obligation relates to allowing business users and ancillary service providers access to and interoperability with the same operating system, hardware/software features available to/used by the gatekeeper of any ancillary services (arguably inspired by *Apple Mobile Payments*).[64]

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and non-discriminatory. The European Parliament, IMCO, Compromise Amendments (n 2) Recital 49 further provides an obligation that vertically integrated gatekeepers should be required to treat their own vertically integrated products/services, as a separate commercial entity that is commercially viable as a stand-alone service, in order to avoid conflicts of interest between themselves and their customer-competitors. However, there is no legal provision providing for this in the DMA Articles.

[58] *Google Search (Shopping)* (n 45). The fact that a phrase that is grammatically incorrect in English is now used in official documents by authorities in English-speaking jurisdictions such as the US, UK and Australia is possibly one of the most notable examples of the so-called Brussels effect. On the Brussels effect, see A. Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP, 2020). For the use by authorities from English-speaking jurisdictions such as the US, UK, and Australia of the grammatically-incorrect phrase in official documents and publications, see e.g. Department for Digital, Culture, Media & Sport and Department for Business, Energy & Industrial Strategy (UK) "A new pro-competition regime for digital markets", Consultation Document, July 2021, [106], [178]; Competition and Markets Authority (CMA) (UK), "A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce", December 2020, p.31 n 40; Australian Competition and Consumer Commission (ACCC), "Digital Platform Services Inquiry: Interim report No. 3 – Search defaults and choice screens", September 2021, Appendix B, B1, B2; US House of Representatives, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Majority Staff Report and Recommendations, *Investigation of Competition in Digital Markets*, 2020, pp.6, 16, 21, 382 et seq.

[59] DMA (n 2) Article 6(d).

[60] DMA (n 2) Article 6(j).

[61] DMA (n 2) Article 6(k). Case COMP/AT.40716 *Apple - App Store Practices*, 16 June 2020 (Opening of Proceedings); see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40716.

[62] DMA (n 2) Article 6(a). Case COMP/At.40462 *Amazon Marketplace*, 17 July 2019 (Opening of Proceedings), 10 November 2020 (Statement of Objections); see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40462.

[63] DMA (n 2) Article 6(b) and (e). Interestingly, Recital 50 – incidentally, an extended version of Recital 41 – does not read as limiting the prohibition of technical restrictions of users' ability to switch and multi-home to the providers of operating systems alone. However, the text of DMA (n 2) Article 6(e) explicitly refers to the "operating system of the gatekeeper" and thus, limits the prohibition to those gatekeepers that provide operating systems.

[64] DMA (n 2) Article 6(f). See Recital 52 suggesting that this provision has in mind technology such a near-field-communication technology, regarding which the Commission is currently pursuing an investigation in Case COMP/AT.40452 *Apple – Mobile Payments*, 16 June 2020 (Opening of Proceedings); see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40452. "Ancillary services" are

Finally, a further notable obligation is that of allowing the installation and use of third-party apps and app stores using and interoperating with the operating systems of the gatekeeper and allowing these apps and app stores to be accessed via other means than the core platform service of the gatekeeper (i.e. "side loading") (arguably inspired by *Apple App Store*).[65] It is unclear why these three important contestability-driven obligations prohibiting limitations on users' ability to switch and multi-home and "side load", and requiring interoperability, are limited to providers of operating systems and ancillary services, respectively.[66] Both technical restrictions on end users' ability to switch and multi-home and limitations on interoperability can be concerns in a wide range of circumstances beyond operating systems and ancillary services. It is possible that the DMA has limited the application of these obligations based on current experience with the said practices and inspired by ongoing investigations, rather than adopting forward-looking obligations regarding these practices more generally.[67]

The obligations in Article 6 are "susceptible of being further specified", a phrase whose meaning is not immediately clear, because these obligations, similar to those in Article 5, are also automatically applicable. The DMA puts forward the possibility of a so-called "regulatory dialogue" under Article 7 in the context of the Article 6 obligations' being further specified.[68] However, that "regulatory dialogue" is not a *conditio sine qua non* of Article 6 obligations' being enforceable. Rather, as proposed by the Commission, the regulatory dialogue involves either the Commission's opening proceedings and by a decision "specif[ying] the measures that the gatekeeper concerned shall implement" (where the measures intended to be implemented, or, has been implemented by the gatekeeper do not ensure effective compliance with the obligations in Article 6), or the gatekeeper's requesting the Commission to open proceedings to determine whether the measures that it intends to implement or has implemented under Article 6 are effective in achieving the objective of the relevant obligation.[69] Thus, there is not really a regulatory "dialogue", in comparison to, for example, that envisaged in the UK, but merely the possibility of requesting the Commission to provide assurances and a mechanism for the Commission to specify – where it suspects non-compliance with Article 6 – the measures that the gatekeeper must implement to ensure compliance with Article 6.[70] In other words, the fact that the obligations are "susceptible of being further specified" does not

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defined as "services provided in the context of or together with core platform services, including payment services as defined in point 3 of Article 4 and technical services which support the provision of payment services as defined in Article 3(j) of Directive (EU) 2015/2366, fulfilment, identification or advertising services"; DMA (n 2) Article 2(14).

[65] DMA (n) Article 6(c). *Apple - App Store Practices* (n 61).

[66] European Parliament, IMCO, Compromise Amendments (n 2) Article 6(c) and (f) have made changes to the wording of the relevant provisions without expanding the scope of the obligations beyond app stores, operating systems and ancillary services. European Parliament, IMCO, Compromise Amendments (n 2) Article 6(fa) and (fb) introduce new obligations for providers of number independent personal communications services and providers of social network series to allow any providers of the same services to interconnect with the gatekeepers' said services free of charge and upon the request of any such providers.

[67] For a detailed "matching" of the DMA obligations to ongoing/previous competition law investigations, see OECD (n 13) pp.31-32. A similar matching of obligations to cases and policy documents and reports is also found in the DMA Impact Assessment (n 10) pp.53-60.

[68] For "regulatory dialogue", see e.g. DMA (n 2) Recitals 33 and 58.

[69] DMA (n 2) Article 7(2) and (7). European Parliament, IMCO, Compromise Amendments (n 2) Article 7(1b) provides for a more meaningful regulatory dialogue between the gatekeeper and the Commission in the context of which the gatekeeper may "request that the Commission engage in a process" to clarify and further specify relevant measures that the gatekeeper shall adopt to ensure compliance. This process can be used where the gatekeeper "holds reasonable doubt as to the appropriate method or methods of compliance" but is at the discretion of the Commission. Council (Competitiveness) General Approach (n 2) Compromise Text Article 7(3) also provides for more scope for "dialogue" between the gatekeeper and the Commission.

[70] For the UK regulatory dialogue, namely the "participative approach" to regulation, see Consultation Document (n 58) [86]; [118]; [124]; [125].

mean that it is necessary for the Commission to "further specify" how a given obligation in Article 6 should be implemented by a gatekeeper before the obligation becomes applicable and legally enforceable.

Article 10 of the DMA makes provision for the Commission to update by a delegated act the obligations for gatekeepers, following a "market investigation" through which the Commission may identify the need for new obligations to address practices that limit contestability or are unfair in the same way as the practices addressed by the obligations in Articles 5 and 6.[71] According to the DMA, a practice "shall be considered to be unfair or limit the contestability of core platform services" in this sense where: "(a) there is an imbalance of rights and obligations on business users and the gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the gatekeeper to business users; or (b) the contestability of markets is weakened as a consequence of such a practice engaged in by gatekeepers".[72] Although it is welcome that the DMA includes a general provision regarding which practices may be deemed unfair or as limiting contestability in the future, whether this provision can ensure sufficient certainty and engender a "sufficiently predictable" standard ex ante is debatable; it is thus discussed below.[73] Notably, there is no reference to "consumers" or "competition" as such in these principles expressing the prohibited practices under the DMA.

Finally, two further important obligations in the DMA include that of notifying concentrations in the digital sector to the Commission, and an obligation on the designated gatekeeper to submit any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services to an independent audit.[74] Notably, unlike the case with the other obligations in the DMA, there is no Recital in the DMA explaining the rationale behind the obligation to notify concentrations, which suggests that this may have been a last minute addition to the proposal. This is striking since the scrutiny – or the absence of thereof – of acquisitions and mergers by big tech platforms has been one of the most contentious and criticised aspects of the application of extant competition law frameworks in platform markets.[75] The rationale provided for the independent audit requirement for profiling of

[71] European Parliament, IMCO, Compromise Amendments (n 4) Article 10(1a) also provides the Commission with the ability to adopt delegated acts to clarify the extent to which an obligation applies to certain core platform services; the extent to which an obligation applies only to a subset of business users or end users; or how the obligations shall be performed in order to ensure the effectiveness of those obligations.

[72] DMA (n 2) Article 10[2].

[73] See DMA (n 2) Recital 66 and see text to n 132.

[74] DMA (n 2) Articles 12 and 13. Under Article 12 DMA, the notification requirement regarding concentrations applies to "any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 involving another provider of core platform services or of any other services provided in the digital sector irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules".

[75] For a discussion of "killer" and "reverse killer" acquisitions in this context, see e.g. C. Caffarra, G. Crawford and T. Valletti, "'How tech rolls': Potential competition and 'reverse' killer acquisitions", VoxEU, 11 November 2020, available at https://voxeu.org/content/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions. Indeed, according to some commentators, the notification obligation in the DMA does not go far enough; see e.g. C. Caffarra and F. Scott Morton, "The European Commission Digital Markets Act: A translation", VoxEU, 5 January 2021, available at https://voxeu.org/article/european-commission-digital-markets-act-translation. European Parliament, IMCO, Compromise Amendments (n 2) Recital (64) introduces a new provision (Article 16(1a) and Recital 64) targeting so-called "killer acquisitions" that provides the Commission with the ability to restrict gatekeepers from making acquisitions in cases of systematic non-compliance with the DMA. It is questionable whether such a provision which effectively bans, albeit temporarily, certain types of mergers can be included in the DMA given its legal basis (Article 114 TFEU). For the importance of the legal basis, see Lamadrid de Pablo and Bayón Fernández (n 4). Cf J.-U. Franck, G Monti and A. de Streel, "Article 114 TFEU as a Legal Basis for Strengthened Control of Acquisitions by Digital Gatekeepers", Legal Opinion Commissioned by the Federal Ministry for Economic Affairs and Energy, 20 September 2021, available at

consumers is that ensuring a degree of transparency regarding such profiling facilitates contestability "by putting external pressure on gatekeepers to prevent making deep consumer profiling the industry standard".[76] Arguably, such enhanced transparency "should allow other providers of core platform services to differentiate themselves better through use of superior privacy guaranteeing facilities".[77] Interestingly, this position seemingly differs from the Commission's position in *Google/Fitbit*, where the Commission noted that the GDPR leaves no space for such differentiation on privacy.[78] The debate on the interplay between privacy and competition law in digital markets is, thus, poised to continue in the aftermath of the DMA.[79]

Implementation, compliance, and enforcement

The DMA provides the Commission with strong investigative and enforcement powers – similar to those available for competition law enforcement – in order to ensure effective implementation and compliance with the rules.[80] The Commission's powers range from requests for information (including access to data, algorithms, etc.) to onsite inspections, interviews, appointment of external experts, and so on.[81] Besides the ability to order interim measures, the DMA also provides the Commission with the power to impose fines and periodic penalty payments, in similar scale to those available for violations of EU competition rules.[82] The DMA specifically – and somewhat superfluously – stipulates that all decisions in which the Commission imposes fines or penalties are subject to review by the Court of Justice of the European Union.[83] Why this stipulation in the DMA is provided and why it is stipulated in more restrictive terms (i.e. limited to fines and penalties) than is provided for under EU law are both unclear.[84]

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https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/article-114-tfeu-as-a-legal-basis-for-strengthened-control-of-acquisitions-by-digital-gatekeepers.pdf?__blob=publicationFile&v=5 arguing that Article 114 TFEU can provide sufficient legal basis for potential changes to merger law.

[76] DMA (n 2) Recital 61.

[77] DMA (n 2) Recital 61.

[78] See Case COMP/M.9660 *Google/Fitbit*, 17 December 2020, available at https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf.

[79] For the current debate, see e.g. K. Kemp, "Concealed Data Practices and Competition Law: Why It Matters", (2020) 16 (2) European Competition Journal 628; D. D. Sokol and R. Comerford, "Antitrust and Regulating Big Data", (2016) 23 (5) George Mason Law Review 1129.

[80] DMA (n 2) Recital 68.

[81] DMA (n 2) Articles 19, 20, 21.

[82] DMA (n 2) Articles 22 and 26. In case of non-compliance with the DMA (to be established under Article 25), under the original text, the Commission could impose on a gatekeeper fines not exceeding 10% of its total turnover where non-compliance is intentional or negligent; Article 26(1) DMA. European Parliament, IMCO, Compromise Amendments (n 2) Article 26(1) stipulates that in case of non-compliance the fines that the Commission may impose need to be no less than 4% and not exceeding **20%** of total worldwide turnover of the gatekeeper. Thus, the ceiling of the maximum fine is twice as high as that for violations of competition law; see "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty" [2003] OJ L1/1, Article 23(2). With this scale of fines, and given the treatment of the fines under competition law by European Courts as quasi-criminal, the DMA also essentially becomes quasi-criminal law. For the "quasi-criminal" nature of EU competition law, see e.g. B. Vesterdorf and K. Fountoukakos, "A New Competition Tool into Old Bottles? Considerations on the Legal Design of the European Commission's Proposed NCT" (2021) 12 (4) Journal of European Competition Law & Practice 284, 295, 296. See also e.g. Case T-67/11, *Martinair Holland NV v Commission*, ECLI:EU:T:2015:984, [29]; Case T-9/11, *Air Canada v Commission*, ECLI:EU:T:2015:994, [33]. See further R. Wesseling and M. van der Woude, "The Lawfulness and Acceptability of Enforcement of European Cartel Law" (2012) 35(4) World Competition 573, 577.

[83] For which explicit provision is made in DMA (n 2) Article 35.

[84] Under Article 263 TFEU, the CJEU has a much wider scope of review in the context of Commission acts. Council (Competitiveness) General Approach (n 2) Compromise Text, indeed, recognises this and inserts a new Recital to this effect (Recital 75a), but fails to amend Article 35 DMA to reflect this and makes no other change to the text to acknowledge the correct scope of review by the CJEU.

Where the Commission finds that a gatekeeper does not comply with the obligations laid down in Articles 5 or 6 or with other measures adopted under the DMA or with binding commitments, it can adopt a "non-compliance decision".[85] In a non-compliance decision under the DMA, the Commission "shall" not only order the gatekeeper to "cease and desist", but also to provide "explanations on how it plans to comply with the decision".[86]

The DMA introduces a "market investigation" mechanism which can be used by the Commission for three different purposes. First, a market investigation can be used to designate as a gatekeeper a platform which meets the qualitative criteria for being a gatekeeper but does not satisfy all of the quantitative criteria or which meets all of the quantitative criteria but presents "sufficiently substantiated arguments" with a view to proving that it does not meet the qualitative criteria.[87] Second, the Commission can conduct a market investigation to establish systematic non-compliance with the obligations in the DMA, after which the Commission may impose behavioural or structural remedies on the gatekeeper.[88] In similar fashion to competition law enforcement proceedings, the Commission's proposal stipulates that structural remedies can only be imposed if "there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the gatekeeper concerned than the structural remedy".[89] This requirement has been removed by the European Parliament IMCO, with the implication that structural remedies such as break-ups and divestitures can be imposed even if there are equally effective behavioural remedies.[90] Again, similarly to competition law proceedings, the Commission's proposal allows for accepting commitments offered by the gatekeeper to bring such a market investigation into systematic compliance to an end.[91] This possibility has also been removed by the European Parliament IMCO.[92] Third, a market investigation can be conducted to examine whether new services should be added to the DMA as "core platform services" or to detect "types of practices that may limit the contestability of core platform services or may be unfair and which are not effectively addressed by this Regulation".[93] The Commission has to publish a public report comprising its findings after such a market investigation and where appropriate, the report "shall" put forward a proposal to amend the DMA to include further digital services as "core platform services" in the DMA and be accompanied by a delegated act to amend Articles 5 and 6 where it is the obligations that are to be revised as a result of the market investigation.[94] Thus,

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[85] DMA (n 2) Article 25. Interestingly, the language of "cease and desist" is much closer to that used in the US than that used in EU (competition) law, namely "terminate" the infringement; see e.g. Regulation 1/2003 (n 82) Article 7.

[86] DMA (n 2) Article 25.

[87] DMA (n 2) Article 15.

[88] DMA (n 2) Article 16. "Systematic non-compliance" means that the Commission has issued at least three non-compliance or fining decisions under the DMA against a gatekeeper in relation to any of its core platform services within a period of five years prior to the commencement of the market investigation; DMA (n 2) Article 16(3). European Parliament, IMCO, Compromise Amendments (n 2) Article 16(3) amend this to *two* non-compliance or fining decisions in *ten* years.

[89] DMA (n 2) Article 16(2).

[90] European Parliament, IMCO, Compromise Amendments (n 2) Article 15 deleting Article 15(3).

[91] Article 16(6) DMA.

[92] European Parliament, IMCO, Compromise Amendments (n 2) completely remove the possibility of commitments under the DMA. Despite removing the possibility of accepting commitments, a new Article 24b, proposed in the Compromise Amendments, instituting a "compliance function" for the gatekeepers require the compliance officers to "monitor compliance with commitments"; European Parliament, IMCO, Compromise Amendments (n 2) Article 24b (5)(c).

[93] DMA (n 2) Article 17.

[94] The current draft of the provision is not entirely clear in this regard as it separates the provision regarding the proposal to change the list of core platform services and the provision regarding the delegated act to amend the obligations with a semicolon, meaning that it is unclear whether the core platform services and obligations must

this third type of use of a market investigation procedure is the essential means through which the DMA will be made "future proof". The DMA provides for the possibility of Member States' making a request to the Commission to open a market investigation where they have reasonable grounds to suspect that a provider of a core platform service should be designated as a gatekeeper by the Commission.[95] Notably, the DMA text as proposed by the Commission does *not* provide an ability to the Member States to request the opening of a market investigation with a view to adding more obligations or more core platform services to the scope of the DMA, but these additional capabilities have been introduced by the European Parliament.[96]

Critique and Recommendations

Pros and cons of ex ante regulation compared to ex post competition law enforcement

The interplay between ex ante regulation of business conduct and ex post application of competition law to the same conduct in the context of ensuring that the markets in question function effectively presents many complexities.[97] Although both ex ante regulation and competition law address concerns such as market failures or market power, they respectively involve distinct forms of intervention in markets.[98] Whilst economic regulation involves "a State-directed, positive, coercive alteration of or derogation from the operation of the free market in a particular sector" usually undertaken to address a market failure, competition law seeks to strengthen the operation of the market mechanism by prohibiting certain forms of anticompetitive conduct by firms.[99] Thus, whereas ex ante economic regulation is *prescriptive* and imposes positive obligations on market actors (i.e. a requirement to perform certain actions), competition law *proscribes* certain conduct and imposes negative obligations (i.e. a prohibition on certain actions).[100] Ex ante regulation is normally viewed as a prospective and sectoral intervention mechanism that "creates a structural framework intended to prevent market failures from occurring".[101] Such regulation typically involves restrictions on a range of firm decisions, and the three main decision variables controlled by such regulation are price, quantity, and the number of firms (i.e. entry and exit).[102] In contrast, competition law is normally applicable across markets and ex post, meaning that it applies on a case-by-case basis once competition problems or anticompetitive conduct arise.[103]

In the context of digital markets such as those that will be subject to the DMA, the merits of ex ante intervention, in comparison to ex post intervention by competition law, include the ability to tackle structural problems that cannot be addressed by existing competition law rules which

always be amended concurrently; see DMA (n 2) Article 17 (2) (a) and (b). European Parliament, IMCO, Compromise Amendments (n 2) Article 17 stipulates these to be alternatives by inserting the conjunction "or" in the text.

[95] DMA (n 2) Article 33. Whereas the Commission's original DMA text requires three or more Member States to request the Commission to open a market investigation, the European Parliament's Compromise Amendments require two or more Member States to do so; see European Parliament, IMCO, Compromise Amendments (n 2) Article 33.

[96] See European Parliament, IMCO, Compromise Amendments (n 2) Article 33. In the same vein, see Council (Competitiveness) General Approach (n 2) Compromise Text Article 33.

[97] For an in-depth discussion and analysis of the interface between ex ante regulation and competition law, see N. Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (CUP, 2015).

[98] Dunne (n 97) p.3; OECD (n 13) p.4.

[99] Dunne (n 97) p.3. See also W. Kip Viscusi, J.E. Harrington, Jr and J.M. Vernon, *Economics of Regulation and Antitrust* (4th ed MIT Press, 2005) p.357.

[100] Dunne (n 97) p.45; OECD (n 13) p.8.

[101] Dunne (n 97) p.43.

[102] Kip Viscusi, Harrington and Vernon (n 99) p.358.

[103] See Dunne (n 97) pp.43-44.

(outside of merger control) apply ex post.[104] Particularly in markets with strong network effects that have inherent "winner takes all" or "winner takes most" tendencies, it is important to ensure that markets are contestable.[105] This means that market contestability issues such as barriers to entry and expansion, and multi-homing, switching, etc. are important for the purpose of keeping the markets open to entry and expansion. Such market contestability issues can be better dealt with by carefully designed ex ante rules than by ex post rules, because they relate to the operation and features of the markets, and not necessarily to the conduct of particular undertakings.[106] The disadvantages of intervention by ex ante rules, such as those contained in the DMA, include at least two risks, both of which are recognised in the Legislative Financial Statement Accompanying the DMA. The first is the risk that rules may be ineffective due to legal uncertainties relating to the obligations, and the second is the risk that the rules may be ineffective due to material changes in fact.[107] Both of these are, indeed, real risks in the case of the DMA which, as discussed further below, contains several obligations that may not provide sufficient legal certainty, and is set to apply in markets that are by their nature dynamic and fast-moving. Finally, another possible risk in the context of ex ante regulation is "regulatory capture", which is a potential concern that may arise in all ex ante regulatory frameworks and is thus not specific to the DMA.[108] In that context, the set-up of the DMA may, indeed, provide less scope for regulatory capture than an alternative framework such as that being considered, for example, in the UK, which involves a "participative" regulatory approach.[109]

The advantages of ex post intervention by competition law include the ability to analyse fully the economic effects of a given practice on a case-by-case basis in view of the actual markets, market actors, relevant practices, and the law involved. Notably, such an assessment also provides the ability to take into account any efficiencies engendered by the conduct in question before making a decision on whether such conduct is ultimately harmful to competition on the facts.[110] The case-by-case analysis would be expected to lead to more accurate assessments of certain practices than ex ante regulations, which do not involve an actual assessment of a particular conduct and its effects on competition, customers, etc. Similarly, competition law rules are generally broad and flexible in terms of their scope and, thus, can be interpreted to apply to a wide range of practices, including novel practices in novel markets, which may not be possible in the case of specific regulatory obligations. As for the cons of ex post intervention, particularly in dynamic markets, competition law enforcement necessarily takes a long time,[111]

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[104] For the limited effectiveness of competition law against structural issues, see eg OECD, *Ex Ante Regulation in Digital Markets – Background Note*, DAF/COMP(2021)15, available at https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2021)15&docLanguage=En p.13.

[105] See e.g. DMA (n 2) Recital 3. For a discussion of "contestability" as one of the objectives of DMA, see text around n 122 below.

[106] See e.g. the discussion in OECD (n 13) pp.24-25.

[107] See DMA (n 2) "Legislative Financial Statement", p 64.

[108] "Regulatory capture" refers to a type of "regulatory failure", whereby the regulator fails to achieve the public interest goals that it was set up to achieve due to its being "captured", influenced, etc. to protect the interests of the subjects of regulation; see A. Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing, 2004) pp.57-58.

[109] In the UK, the regulatory set-up is to include a combination of "a participative approach with the use of formal powers"; Consultation Document (n 58) Part 6, e.g. [124]-[125]. The participative approach will involve engaging "constructively with all affected parties, resolving issues through advice and informal engagement"; ibid [125].

[110] In EU competition law, efficiencies can be taken into account both under Article 101 and Article 102 TFEU. See e.g. Communication from the Commission, "Notice — Guidelines on the application of Article 81(3) of the Treaty", [2004] OJ C101/97 and Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority* ECLI:EU:C:2020:52, [165], respectively.

[111] A common, albeit not representative, example used to demonstrate the issue with the length of time competition law investigations take is *Google Search (Shopping)* (n 45) which took nearly seven years from the opening of

whilst dynamic markets change quickly. Further, standard competition law rules do not deal with market contestability or structural issues such as barriers to entry, expansion, exit, etc. Thus, competition law enforcement may come too late in these markets, and even when it comes, it may not lead to structural changes, meaning that the contestability issues may persist even after an intervention in a given case.

The main challenge for an ex ante regulation such as the DMA, thus, appears to be that of balancing the trade-offs between speed and accuracy, and flexibility and legal certainty. The remainder of this section explores in further detail pertinent features of the DMA in seeking to examine the extent to which the DMA strikes the balance correctly and how it may be improved.

What type of regulation is the DMA and why does it matter?

Bearing in mind the features of traditional ex ante regulation and the pros and cons of ex ante regulation in comparison to ex post competition law intervention, as discussed above, and considering the features of the DMA as explained, this subsection explores what type of regulation the DMA can be considered to be, as well as the implications of the nature of the DMA and the obligations therein for the potential effectiveness of the legislative instrument.

The DMA differs substantially from traditional modes of ex ante regulation, for the following reasons. First, the DMA does not apply to a particular "sector" of the economy despite the suggestions in the legislative proposal to the contrary.[112] Rather, the DMA applies to a particular group of *entities* whose commonality that brings them within the scope of the regulation is found not in the "sector" in which they operate, but in their size and economic importance (i.e. the characteristics that qualify them as "gatekeepers"). Although the "core platform service" providers that fall within the scope of the DMA are all providers of digital services, it is not possible to think of them as operating in the same "sector" of the economy: "digital" is not a distinct sector of the economy.[113] Businesses from across the sectors of the economy ranging from agriculture to transport to health utilise digital technologies. Thinking of a distinct "digital sector" can lead to comparisons with, for example, utilities where sector regulation is common. Yet, such comparisons overlook the dynamic and heterogeneous nature

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the investigation to the adoption of an infringement decision. It is, however, not necessarily representative of the average duration of enforcement proceedings because the proceedings in that case involved negotiations over numerous rounds of commitments and two statements of objections, etc. Having said that, abuse of dominance proceedings do take a long time to conclude with one study estimating the average to be five years, starting from the first procedural action mentioned in the Commission's decision to the adoption of the decision by the Commission; see F. Dethmers and J. Blondeel, "EU Enforcement Policy on Abuse of Dominance: Some Statistics and Facts" (2017) 38 (4) ECLR 147, 161-162.

[112] See e.g. DMA (n 2) Explanatory Memorandum, p.1 and Recital 12 referring to the "digital sector" without specifying it.

[113] Cf Consultation Document (n 58) p.7 n 6 noting that the term "digital markets" is "difficult to define given the increasing rate of adoption of digital technologies by businesses in all sectors of the economy". This is notwithstanding the fact that the "digital sector" has been categorised as a distinct sector by the OECD using the UN Standard Industrial Classifications (SICs); ibid p. 7 n 5. Notably, that definition of the "digital sector" includes several sub-sectors such as "repair of computers and communication equipment", "telecoms", and "wholesale of computer and electronics", none of which are relevant to the regulatory scope of the DMA; see DCMS, "Sectors Economic Estimates 2018 (2020)", available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959053/DCMS_Sectors_Economic_Estimates_GVA_2018_V2.pdf. Notably, the CMA explicitly recognises that "digital" is not a distinct sector; see CMA, "A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce", 2020, available at https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf [6.2].

of the digital services that are to be subjected to the same ex ante regulation (i.e. the DMA) and, thus, may be prone to oversimplifying and underestimating the task at hand through an expectation that the sector-specific approach that works for utilities may also work for digital services. This is arguably not the case where the heterogeneous activities of a select group of heterogeneous entities providing dynamic heterogeneous services are the subject of regulation. Indeed, the "core platform services" as perceived by the DMA and the providers offering these services significantly differ from one another both from a business model and a technological viewpoint (e.g. online marketplaces versus operating systems or online search engines).

Unlike traditional ex ante economic regulation, where a given set of rules applies to, for example, all the operators on a given level of supply of electricity to achieve more competitive outcomes on that production level,[114] the DMA is to apply to a mix of entities some of which have no competitive or commercial relation with one another, and to cut across a range of markets and supply chains. This particular feature of the DMA implies that the DMA is *not* sectoral regulation, as traditionally understood, and given that its net is being cast based on the relative importance of certain entities for certain markets, it can be deemed closer to asymmetric, *entity regulation*.[115] However, the DMA differs from traditional entity-based regulation, too, because it does not seek to regulate a given type or line of business for the purposes of, for example, ensuring the stability of certain markets, as is the case with the regulation of banks and other financial institutions. There is no such line of business as that of "gatekeeping". Thus, the DMA can be considered *sui generis* in its regulatory approach in that it involves entity-based regulation of entities in different markets where only certain *activities* of some entities are regulated, arguably, in order to make those market segments in which the activities are regulated more competitive. This particular regulatory approach of choice is important and relevant because, with this mix of entity regulation and activity regulation through the establishment of rules of conduct, the DMA comes close to establishing a separate competition law framework applicable to certain entities.[116] Indeed, when one considers the substance of some obligations proposed in the DMA and discussed above, they appear closer

[114] The DMA can, indeed, also be distinguished from sector regulation in that sector regulation ultimately aims to achieve effective competition and establish competitive conditions in the relevant market, after which it is rolled back. For a detailed discussion of EU telecoms regulatory regime and the DMA, see P. Ibanez Colomo, "The Draft Digital Markets Act: A Legal and Institutional Analysis" (2021) 12 (7) Journal of European Competition Law & Practice 561, 570. See also Ogus (n 108) p.5 noting that "[t]he principal function of economic regulation is … to provide a substitute for competition in relation to natural monopolies".

[115] "Entity regulation" can be contrasted to "activity regulation" whereby the former applies to an entity (e.g. after a registration, issue of licence, etc) and the latter applies to the activity (i.e. irrespective of the status of the entity). The distinction is particularly pertinent in certain sectors such as financial services where a licence is required to be able to offer certain services. For a characterisation of the DMA and similar legislative initiatives around the world as "[e]merging entity-based regulatory initiatives" in the context of entity vs activity regulation in fintech, see Speech by F. Restoy, Chairman, Financial Stability Institute, Bank for International Settlements, to the Fintech Working Group at the European Parliament, 16 June 2021, available at https://www.bis.org/speeches/sp210616.htm. For a more detailed discussion, see also F. Restoy, "Fintech regulation: how to achieve a level playing field", Financial Stability Institute, Occasional Paper No 17, February 2021, available at https://www.bis.org/fsi/fsipapers17.pdf.

[116] On the "closeness of the DMA to competition policy", see also Statement by France, Germany and the Netherlands "Friends of an effective Digital Markets Act, Non-Paper: Strengthening the Digital Markets Act and Its Enforcement", 27 May 2021, available at https://www.permanentrepresentations.nl/documents/publications/2021/05/27/strengthening-the-digital-markets-act-and-its-enforcement. See also European Competition Network, "Joint Paper of the Heads of the National Competition Authorities of the European Union: How National Competition Agencies Can Strengthen the DMA", 2021, [15] noting that "… the DMA proposal is built on the evidence provided by competition law cases and sector inquiries of various European Competition Authorities including the Commission…". See also N. Petit, "The Proposed Digital Markets Act (DMA): A Legal and Policy Review" (2021) 12 (7) Journal of European Competition Law & Practice 529, 529 noting that the DMA is "essentially sector-specific competition law".

to competition law rules than ex ante (sector) regulation, with the important feature of by-passing the investigative and enforcement stages and codifying as a rule *an* outcome that could – but may not – be achieved through a potential competition enforcement proceeding (e.g. a duty to deal on fair-reasonable-and-non-discriminatory terms).[117] One important implication of incorporating what are essentially specific examples of competition law enforcement outcomes into the DMA is that the same practice can be the subject matter of infringement proceedings under both the DMA and EU competition law (e.g. enforced by national competition authorities). Indeed, the DMA explicitly leaves open the possibility of applying competition law on top of the DMA, but currently lacks any rules to clarify the implementation and coordination processes, a situation that should be remedied "in the interests of legal certainty and efficiency".[118]

Second, the DMA is not only prescriptive, but also *proscriptive* in its substance, which is precisely where it overlaps with EU competition law rules. For this reason as well, it is not possible to characterise the DMA as a traditional piece of ex ante regulation because such regulations involve prescriptive rules (i.e. a to-do list for its subjects), rather than prohibitions (i.e. a not-to-do list), meaning that one would expect to have a list of *do's* rather than *do not's* in a traditional ex ante regulation. Yet, of the eighteen specific obligations for gatekeepers stipulated in Articles 5 and 6 of the DMA, seven obligations directly contain proscriptive obligations (i.e. prohibitions rather than orders to do something).[119]

Codifying ex ante rules that are built upon extant competition law prohibitions and past or ongoing enforcement proceedings, as the DMA currently does, is not optimal for two reasons. First, where the obligations are stipulated in the form of orders to not do something (e.g. not to engage in a certain practice), ensuring compliance will be much more challenging than would

[117] Some provisions in the DMA introduce essentially a "duty to deal" for gatekeepers providing certain core platform services (e.g. search engines, software application stores) in the context of access to business resources, inputs, etc. of the gatekeeper to which the gatekeeper could refuse third parties access; see e.g. DMA (n 2) Article 6(j) and (k). In EU competition law, refusal to provide access to such inputs, resources, facilities, infrastructure, etc. would fall under a "refusal to deal" which can be an "abuse of a dominant position" under Article 102 TFEU. The Court of Justice case law on refusal to deal sets the bar high for establishing an abuse of this type; see e.g. Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, and others*, ECLI:EU:C:1998:569, [41]-[47]. Notably, almost all of the enforcement actions that have inspired the rules in the DMA are either currently under appeal or relate to ongoing investigations; see text around nn 53 to 65. On a characterisation of the DMA as *ad hoc* regulation for reasons discussed similar to those in the current article, see also Petit (n 116) 532. Sharing this characterisation of the DMA, see also Ibanez Colomo (n 114) 561.

[118] As put by the European Economic and Social Committee, "Opinion on the Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)", INT/928, 27/04/2021. The DMA also leaves open the possibility of applying alongside the DMA "national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations of gatekeepers"'; DMA (n 2) Article 1(6). This is part of the reasoning which leads some commentators to suggest that if the DMA is adopted under Article 114 TFEU, as currently planned, it may violate EU law, due to the DMA's failure to harmonise regulatory fragmentation; see Lamadrid de Pablo and Bayón Fernández (n 4) p.580. European Parliament, IMCO, Compromise Amendments (n 2) proposes amending the Commission's DMA text by providing a new provision on cooperation and coordination with Member States; see ibid Article 31d.

[119] These are all the stipulations that begin with "refrain" in the list of obligations. This linguistic determination is, undoubtedly, a crude way of establishing whether an obligation is positive (i.e. prescriptive) or negative (i.e. proscriptive). Thus, the decisive factor in the categorisation should be whether the rule imposes a positive obligation for the gatekeeper which must take certain action in order to comply with the rule or whether the rule imposes a negative obligation on the gatekeeper to *not* engage in a certain practice, etc. in order to comply with the rule. For a proposal that Articles 5 and 6 in the DMA should online include "positive" obligations rather than "negative" obligations in order to limit the overlap with abusive conduct prohibited under Article 102 TFEU, see M. Botta, "Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila" (2021) 12 (7) Journal of European Competition Law & Practice 500, 500, 512.

be the case with prescriptive rules and such proscriptive obligations will likely lead to litigation. This is because where the ex ante rule is a prohibition of a given conduct, rather than a prescriptive obligation to do something, the entity subject to the rule will *not* have to ensure that it performs a certain act – which it would be liable for if it fails to perform – but will have to *refrain from* engaging in certain conduct. When the regulatory obligation is to refrain from engaging in a particular conduct (e.g. a type of conduct currently prohibited under competition law), monitoring of compliance by the regulator will need to involve investigating whether the undertaking, as a matter of fact, engaged in a type of conduct that it was supposed not to engage in. This contrasts to a prescriptive obligation, regarding which compliance can be monitored much more easily by, for example, requiring the undertaking to report on the actions that it has taken to comply with the rule. Ex ante prohibitions of the types envisaged in the DMA would, instead, require the undertaking to report on the practices that it has *not* engaged in and practices that it has *not* adopted in compliance with the rule, which makes little business or legal sense. Indeed, whilst there is no such reporting obligation in the DMA as proposed by the Commission, the European Parliament IMCO has inserted such an obligation into the Regulation.[120] In any case, in order to monitor and ensure compliance with such proscriptive obligations, in essence, the Commission will need to instigate non-compliance proceedings and undertake a factual investigation to establish whether the gatekeeper, as a matter of fact, did engage in the type of conduct that was, as a matter of law, prohibited by the DMA. Such an investigation would come close to a competition law investigation, which is exactly what the DMA is intended to avoid. Thus, for full effectiveness and self-execution of the substantive rules in the DMA, the obligations stipulated by the DMA – and other similar legislative initiatives – should involve *orders* obliging gatekeepers to *do* certain things (i.e. undertake positive actions) rather than prohibitions of conduct, the compliance with which requires undertaking a factual and legal investigation into business practices and market conduct.

Second, irrespective of the proscriptive or prescriptive nature of the obligations, where the rules are based on previous competition enforcement cases, the fact that these have led to substantial investigations to establish an infringement, and indeed that these have been subject to appeal on the facts and the law, suggests that the *substance* of these rules necessitate a case-by-case analysis and are prone to generating litigation. Codifying such prohibitions in the form of ex ante rules in the DMA does not do away with the complexity of the relevant facts and law, the analysis of which requires a case-by-case assessment. Given that the obligations in the DMA are to be automatically applicable and that one of the objectives of ex ante regulation is to avoid a case-by-case analysis as it happens in competition law cases, legislating potential competition law enforcement action outcomes into ex ante rules appears hard to justify where this implies the imposition of complex obligations the contents of which can be subject to interpretation and require case-by-case analyses. Thus, it is clear that the substantive framework of the DMA can be improved. Such a proposal to improve upon the obligations is presented after the next

[120] European Parliament, IMCO, Compromise Amendments (n 2) Article 7(1) stipulates that the gatekeeper shall demonstrate compliance with the obligations laid down in Articles 5 and 6 "when called upon to do so" and Article 7(1a) imposes a specific reporting requirement that within six months after being designated a gatekeeper, the gatekeeper shall provide the Commission with a report "describing in a detailed and transparent manner the measures implemented to ensure compliance with the obligations laid down in Articles 5 and 6". Further, "[t]his report shall be updated at least annually". A similar mandatory reporting requirement is also introduced in the Council (Competitiveness) General Approach (n 2) Compromise Text Recital 58a and Article 9a. Thus, under these amendments, the gatekeepers are, indeed, obliged to report on how they have *not* engaged in a long list of practices which comprise the *prohibitions* in Article 5 and 6. As noted above, such a requirement makes neither commercial nor legal sense, and should be dropped in so far as the prohibitions in Article 5 and 6 are concerned.

subsection on the stated objectives of the DMA, which completes the evaluation of the DMA.[121]

The stated objectives of the DMA – a chimera in the making?

As currently drafted, the DMA presents a conceptual problem regarding its stated objectives. As it stands, the DMA is trying to achieve two distinct objectives (viz., contestability and fairness) with one legal instrument, an approach which raises the question of the extent to which different objectives can be (equally) effectively achieved with a single instrument. Whereas the former (contestability) relates mostly to the structure and inherent features of the relevant markets, the latter ((un)fairness) relates largely to conduct of large incumbent operators on these markets. This two-headed nature of the draft legislation prevents a clear understanding of its underlying rationale and logic: is the DMA an instrument aimed at regulating the conduct of incumbents, or is it an instrument aimed at ensuring digital markets remain contestable and do not "tip", thereby, *inter alia*, preventing the emergence of "gatekeepers" in the first place? Currently, the DMA appears to be aspiring to be both, but its aspirations and contents do not fully match, and it is, in particular, unclear whether the DMA can deliver on its "contestability" objective.

The DMA does not provide a definition of "contestability", even though this concept lies at the heart of the legislative proposal.[122] The objective of *preserving* contestability arguably requires focusing on markets that are important for the development and progress of innovation, but that have *not* yet tipped (i.e. are still contestable).[123] For those markets, one would need to adopt forward-looking measures – market-wide measures – so that these markets do not tip and gatekeepers do not arise in the first place. These are measures that directly aim at reducing barriers to entry, encouraging multi-homing, increasing transparency, avoiding conflicts of interest between vertically-integrated platforms and their customer-competitors, which can lead to the latter's exclusion from the market, etc. A legislative framework aiming at preserving

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[121] See text after n 134 below.

[122] One definition of "contestability" that has been proposed to be the relevant concept of contestability for the purposes of the DMA is that of "ability for non-dominant firms to overcome barriers to entry and to expansion to the benefit of users"; see Jacques Crémer et al, "Fairness and Contestability in the Digital Markets Act", Yale Tobin Center for Economic Policy Discussion Paper No. 3, 6 July 2021, at pp. 14, 16. Notably, this definition specifies as relevant the ability of "non-dominant" firms to enter or expand in the market. However, the DMA does not appear to distinguish between non-dominant or dominant firms in referencing contestability; see eg Explanatory Memorandum pp.3, 10; Recitals 21, 37. The distinction is important, for example, regarding the question whether a gatekeeper platform's being challenged by another gatekeeper from a different market in the former's core platform service market would count as contesting the market for the purposes of the DMA. An alternative interpretation of "contestability" in the relevant context is that of preserving "opportunities for platforms to differentiate themselves" because the disruptor that will "successfully challenge the incumbents will not be providing more of the same but something different"; see C. Cennamo and D. Daniel Sokol, "Can the EU Regulate Platforms Without Stifling Innovation?" Harvard Business Review, 1 March 2021, available at https://hbr.org/2021/03/can-the-eu-regulate-platforms-without-stifling-innovation. Yet another concept of relevant contestability for the DMA is proposed to be that of undertakings' which are not gatekeepers being able to overcome barriers to entry and expansion in digital markets; see Monopolkommission (n 38) K2. Council (Competitiveness) General Approach (n 2) Compromise Text Article 10(2)(b) does provide a definition of "contestability" in the sense of describing which other practices may be found limit contestability for the purposes of the DMA. According to that description, such limitation occurs where a practice is "engaged in by gatekeepers and is capable of impeding innovation and limiting choice for business users and end users because it" either affects or risks affecting the contestability of a core platform service or other services in the digital sector on a lasting basis due to the creation or strengthening of barriers for other undertakings to enter or expand as suppliers of a core platform service or other services in the digital sector" or it "prevents other operators from having the same access to a key input as the gatekeeper".

[123] For the theory of "contestable markets", see W. Baumol, J. Panzar and R. Willig, *Contestable Markets and the Theory of Industrial Structure* (Sounders College Publishing, 1982).

contestability would need to *anticipate* where the future bottlenecks are likely to arise based on current market conditions and introduce measures that can tackle the emergence of such bottlenecks before they arise. Such a legislative framework would arguably focus on specific markets with tendencies to tip and impose market-wide, symmetric rules.

Where there are already gatekeepers on the so-called "core platform services" – and the DMA is only concerned with the markets where there are extant gatekeepers – then the presence of such gatekeepers suggests that these markets may have already tipped or at least become incontestable.[124] In that case, namely for markets that have already tipped, an instrument similar to a code of conduct as envisaged in the UK, for example, that would apply to the *specifi*c "gatekeepers" on *specific* markets that have tipped and stipulate *specific* rules for *specific* gatekeepers in terms of what they can and cannot do may be more effective.[125] This is because where the market has already tipped, preserving any residual competition or introducing new competition to such a market will require tailor-made solutions bearing in mind and in relation to the existing practices of the incumbent and market conditions. In contrast, if the market has not tipped, then the particular practices and position of the incumbent may be less important than market-wide conditions, for example, entry barriers, to preserve competition. Whereas the former approach can be thought of as attacking the "symptoms", the latter can be thought of as attacking the "cause" of the problem. The current draft of the DMA aiming to tackle "unfair" *conduct* in markets where there are already "gatekeepers" whilst at the same time aiming to ensure "contestability" of these markets raises questions over whether the DMA is attempting to cure the "cause" or the "symptoms" of any competition issues in the relevant markets. It further raises the question whether these distinct objectives can be effectively achieved with a single instrument and if so, to what extent.

The absence of clarity regarding what the underlying rationale and logic of the legislative proposal are also demonstrated by the considerable circularity in the way the DMA explains its fundamental concepts: "core platform services" are those where there are a limited number of large platforms "that serve as gateways", but not every provider operating a "core platform service" is a gatekeeper; only those that "operate one or more important gateways".[126] Namely, it is the existence of a platform that acts as a "gateway" to customers that, *inter alia*, makes a digital service a "core platform service" and it is the operation of a "gateway" that makes a "core platform service" operator a "gatekeeper" as well. Although the amendments to the text by the European Parliament IMCO somewhat reduce the level of circularity,[127] it is still

[124] See also eg Monopolkommission (n 38) [19] noting that safeguarding of contestability is important "in order to *prevent* markets from tipping in favour of one platform operator (emphasis added)".

[125] The proposed pro-competition regime in the UK involves a "code of conduct" and a "procompetitive intervention" element, whereby a mandatory, enforceable code of conduct tailored to each regulated actor (a firm with a "strategic market status") is accompanied by the possibility of implementing measures that address the "root causes" of the relevant firm's entrenched market power; see Consultation Document (n 58) [23]; [80]; [85]; [90]; [102]; [105]-[106].

[126] See DMA (n 2) Explanatory Memorandum, p.2 and Recital 15 noting that concerns arise "… only when a core platform service constitutes an important gateway and is operated by a provider with a significant impact in the internal market and an entrenched and durable position…". See also DMA (n 2) Recital 6 stipulating that "[g]atekeepers have a significant impact on the internal market, providing gateways for a large numbers of business users, to reach end users, …" which suggests that it is the *gatekeepers* that provide gateways rather than the *core platform services* that provide gateways, unlike what DMA (n 2) Article 3(1)(b) indicates. DMA (n 2) Article 3(1)(b) stipulates that to be designated as a gatekeeper, the platform has to "… operat[e] a *core platform service* which *serves as an important gateway* for business users …" (emphasis added).

[127] European Parliament, IMCO, Compromise Amendments (n 2) Article 3(1) and 3(2) have substituted the word "undertaking" with "provider of core platform services", thereby reducing the circularity to a degree. The amendment, however, does not remove the circularity because Article 3(1)(b) in both the Commission's original

difficult – if not impossible – to distinguish conceptually the "gatekeepers" from the "core platform services", even though the DMA supposedly applies not to all providers but only the "gatekeepers" providing "core platform services". This conceptual circularity matters because as currently drafted, it is unclear whether the presence of large platforms with entrenched positions that are gateways to customers is the motivating factor and rationale behind the proposed legislation and, hence, it is the large platforms acting as gateways that leads to the identification of particular services as "core platform services", or, whether it is the other way around. Namely, whether it is certain features of certain markets that make them inherently important for the digital economy and of these markets, the proposed legislation is only aimed at a select group ("core platform services") where there happen to be large platforms acting as gateways. This uncertainty in the DMA contrasts to, for example, the approach followed in the UK in the context of the Digital Markets Unit which is to operate within a legal framework that is explicitly and specifically targeted at a group of platforms and that has particular *entities* (i.e. firms with a "strategic market status") as its motivating factor, which it will subject to certain conduct rules.[128] This distinction between the "core platform service" and the "gatekeeper" as the main target and subject matter of the legislation is particularly relevant to rationalising *why* certain services or providers are – and/or may be in the future – included in the DMA and why some are not and/or may not be in the future.[129] As such, the current DMA begs the question whether its objective and rationale are grounded in the desire to regulate certain digital *markets* or whether these are grounded in the desire to regulate certain digital *actors*. In this respect, the DMA fails short of the clarity that is needed in terms of the motivation, rationale, and target, with regard to its subjects and objectives.

For an EU-wide ex ante regulation such as the DMA, which is to add an additional layer of intervention over conduct-based competition law rules, a focus on contestability is where it can generate most added value in terms of engendering more effective competition in digital markets. Ultimately, in the long run, the objective must be to try and *prevent* market conditions that when combined with certain inherent futures of platform markets (network effects, economies of scale, etc.) make these markets incontestable and impossible to enter, as under those circumstances effective competition can take place and competition law can suffice, rendering ex ante regulation unnecessary.[130] Thus, contestability-driven ex ante rules such as those aiming to ensure that the free choice of end users to switch or to multi-home across different platforms is facilitated, as well as those focusing on increasing the transparency of advertising markets and interoperability can contribute towards the lowering of barriers to entry and opening up of the relevant markets to new entry/expansion. Such contestability-driven rules, which ultimately aim to generate more effective competition on the relevant markets by encouraging entry and expansion or preventing exclusion, are also likely to be more future-proof and impact less negatively on incentives to invest or innovate than fairness-driven rules.[131] This is because fairness-driven conduct rules inherently introduce a level of

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text and IMCO's Amendments still require the platform to be operating a core platform service which serves an important gateway for the platform to be designated as a "gatekeeper".

[128] See Consultation Document (n 58) [6]; [7]; [50]; [80].

[129] For example, voice assisted technology, Internet of Things, etc. are not included in the Commission's text, but European Parliament, IMCO, Compromise Amendments (n 2) Article 2 have added web browsers, virtual assistants, and connected TV to the list of "core platform services". The rationale for adding these three to the list of core platform services is not provided in the Amendments.

[130] Having said that, see Ibanez Colomo (n 114) 569-571 noting that the DMA differs from ex ante sector regulation because it does not appear to be built on the premise that competition is the better means and ultimately, the aim is to have market competition and no regulation in the long run.

[131] For a similar discussion of contestability and the importance of the DMA focusing on "specific anticompetitive practices that create structural barriers to competition between ecosystems" and "fostering market contestability in adjacent segments", see Cennamo and Sokol (n 122).

uncertainty and subjectivity into the assessment of what is lawful and what is unlawful. Such rules are also more likely to lead to litigation, as they ultimately concern *inter partes* fairness,[132] increasing the costs of doing business and compliance, as well as losing any speed advantage that ex ante rules may provide over competition rules in terms of the intervention. This is because it is unlikely that fairness-based rules can provide sufficient legal certainty to be self-enforcing or self-executing. Existing EU competition law rules already involve prohibitions that explicitly or implicitly incorporate "fairness", and case law on these prohibitions demonstrates the practical and conceptual challenges involved in operationalising such rules.[133] The description of "(un)fairness" as provided for in the DMA cannot be said to improve upon the position of the concept in competition law, as it, too, relies on an assessment that is ultimately subjective and involves a value judgement.[134] Thus, it is unlikely that fairness-based ex ante rules can be sufficiently unambiguous in order for them to be self-executing or automatically applicable, and ultimately improve upon existing competition law rules. With this in mind, the next subsection offers recommendations for improvement by taking a closer look at the specific obligations included in the DMA and how the substantive framework may be bettered in the interests of increasing its effectiveness.

Improving on the obligations – a platform-driven framework

The first point of improvement in the context of the substantive obligations in the DMA results from the fact that it is unclear on what *conceptual* basis or rationale the distinction between obligations falling under Article 5 and obligations falling under Article 6 has been made. It is similarly unclear what "susceptible of being further specified" means in the context of the obligations listed in Article 6, since, as noted previously, these obligations are all automatically applicable similar to those obligations in Article 5. That being the case, it is also unclear what the legal distinction between the obligations in Article 5 and Article 6 is. If the DMA is to preserve this two-legged framework of obligations, then the lawmaker must articulate the specific rationale which led to the extant categorisation of obligations and the legal relevance of this distinction, in particular in the context of those obligations that are automatically applicable but also "susceptible of being further specified". Without a clear rationale and a substantive justification, the distinction between Article 5 and Article 6 obligations appears arbitrary and, thus, unprincipled.

The second point of improvement regarding the obligations is that arguably, the DMA should only and exclusively contain obligations that are "self-executing". This is because one of the main reasons to opt for ex ante regulation is the *speed* with which a resolution can be reached in terms of market outcomes and conditions in comparison to competition law enforcement in digital markets.[135] Codifying practices currently prohibited by competition law (e.g. discrimination or fair-reasonable-and-non-discriminatory access conditions), and which take years of litigation to establish their exact scope and extent in the form of ex ante obligations

[132] See the definition of "unfair" for the purposes of the DMA as stipulated in Article 10 and noted above text to n 72.
[133] For a discussion and analysis of the case law and different "(un)fairness" concepts, see e.g. P. Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing, 2012) pp.146-184.
[134] This is because it involves establishing what counts as an "imbalance of rights and obligations" on the business users of a gatekeeper and what counts as an "advantage" obtained by the gatekeeper from its business users that is "disproportionate" to the service provided by the gatekeeper to its business users; see DMA (n 2) Article 10(2)(a) DMA. On the vagueness of the "fairness" concept embodied in the DMA from an economics perspective, see also Monopolkommission (n 38) [23].
[135] For a comparison of the pros and cons of ex ante regulation and law enforcement, see e.g. R.A. Posner, "Regulation (Agencies) versus Litigation (Courts): An Analytical Framework" in D.P. Kessler (ed) *Regulation vs. Litigation: Perspectives from Economics and Law* (University of Chicago Press, 2011) pp.20, 23 in particular.

does not do away with the nature of such practices that calls for case-by-case analyses and generates such litigation.[136] Subsequently, it is unlikely that the DMA – and any other such legislative initiative – can improve upon speed if it includes obligations that are not self-executing and do not provide sufficient ex ante certainty and clarity. Obligations that require commercial judgements or factual assessments to be made by those regulated can potentially lead to extensive litigation over their precise meaning and scope and application. Some of the obligations in the current lists in the draft DMA would, indeed, require such an assessment of the market conditions, the potential effects of the practice on third parties (e.g. customers), etc. before the platform or the Commission could ensure or assess compliance with the relevant obligations.[137] Although they are intended to be automatically applicable, the contents of some DMA obligations cannot be so, as they require detailed assessments of practices and/or determinations to be made on what is fair, non-discriminatory, etc., all of which are context-dependent.

In the framework proposed here regarding the obligations that the DMA should be limited to, "self-executing" should mean that the gatekeeper can comply with the obligation without needing to have recourse to the regulator (e.g. for further specifications) or to the interests/circumstances of third parties, and without needing to use discretion/judgement. The gatekeeper should be capable of implementing such self-executing obligations *unilaterally*, either through technical design solutions or commercial decisions. The DMA already includes examples of such genuinely "self-executing" obligations such as: the obligations to allow end users to uninstall preinstalled software; provide end users with the tools to port their data; provide advertisers and publishers with the tools to measure the performance of their ads; and more. Surprisingly, these examples are all found in Article 6 rather than Article 5, which raises further questions about the substantive accuracy of the distinctions made between the two sets of obligations.

A related, third point of improvement is related to the fact that, currently, the DMA includes certain obligations regarding conduct that may have both positive and negative effects on competition and welfare. Ideally, the list of self-executing obligations should target conduct that is devoid of non-trivial efficiencies that may benefit consumers because – understandably – there is no possibility of using an efficiency justification in the DMA.[138] The lists of prohibited conduct do not appear to take into account any of the efficiencies that will be lost when certain types of practices are categorically prohibited without the possibility of putting forward a justification (e.g. leading to free riding by business users of platform services to conclude contracts off the platform and bypass the platform fee).[139] Failing a revision of the lists of conduct to limit the obligations to those where the practice is devoid of non-trivial

[136] Interestingly, the DMA Impact Assessment itself recognises that "broadly formulated or generic practices (such as self-preferencing in general) that would require an in-depth competition like analysis to be carried out" should not be included as obligations in the DMA and have arguably been rejected; Impact Assessment (n 10) [157]. Yet, how, for example, the type of self-favouring that is prohibited in DMA (n 2) Article 6(d) differs from such a general prohibition of the said conduct that "would require an in-depth competition like analysis", is unclear.

[137] The Impact Assessment, in fact, notes that the Article 6 obligations require "a degree of appreciation" in view of their implementation; Impact Assessment (n 10) [384].

[138] Some commentators have proposed that the DMA should, indeed, include an efficiency defence which would operate as an exemption for conduct that can be provided by the Commission; see Monopolkommission (n 38) K9, [130]-[138]. However, given that the DMA contains only automatically applicable obligations and aims to achieve speedier changes to market practices and conditions, the inclusion of an efficiency assessment either before the obligations are applicable or as a defence would run counter to its essential framework and objective of achieving speed.

[139] For a discussion of some of the efficiencies in the context of DMA obligations, see eg Cabral et al (n 7) pp.10-11. See also Crémer at al (n 122) p.24.

efficiencies, the lawmaker should conduct a cost-benefit analysis and rationalise the choice made towards a categorical ban by demonstrating that the lost benefits are less important than the gains in the relevant context. Such a cost-benefit analysis incorporating the costs of potentially lost efficiencies, including through potentially dampened incentives to invest and innovate,[140] does not appear to have entered the calculus in the legislative proposal which appears to be driven by the premise that all of the practices in the list of obligations are "unfair".[141]

A fourth point of improvement results from the framework of the DMA's treating all the providers of core platform services in the same way by subjecting them all to the same set of obligations. A corollary of this is that it is unclear which obligations in Articles 5 and 6 are to apply to which core platform services and whether the platforms can correctly self-select the right ones, in practice. In turn, it is also unclear whether a gatekeeper could be held liable for non-compliance if it puts forward a defence that it was not sufficiently certain or clear that a particular obligation in Article 5 or 6 applied to their core platform service on the facts. More importantly for the coherence of the substantive framework of the Regulation, the gatekeepers in question operate significantly different platforms with different business models, technologies, users, products/services, etc.[142] A gatekeeper online travel agent remunerated by commission on bookings made on the platform is a very different business to a gatekeeper search engine remunerated by advertising on the platform.[143] A single set of rules that applies

[140] See eg Cennamo and Sokol (n 122) noting how the prohibition of "self-preferencing" by the DMA may have the "unintended consequence" of hindering business model innovation and digital transformation of incumbents in traditional sectors which increasingly adopt platform-based business models and build their own ecosystems to remain competitive.

[141] See e.g. the Impact Assessment which proceeds, in its analysis of the costs and benefits, on the basis that the DMA will lead to an increase innovation because currently the "[f]inancial resources that could be invested in R&D are diverted to mergers and acquisitions (M&A), which results in higher market concentration instead of improvements in the quality and quantity of products and services for consumers. This pattern of innovation dedicated to competing 'for the market' has a detrimental effect on consumer choice and surplus"; Impact Assessment (n 10) Annexes p.60; Impact Assessment (n 10) [282]. Not only does this approach ignore the fact that some mergers and acquisitions, including by the "big tech" may be welfare-enhancing and that in multi-sided markets, competition may be *for* the market due to network effects inherent in the relevant markets, it is also unsupported by the DMA itself which does *not* provide any particular new review provisions for such M&A activity. Thus, the benefits envisaged by the Impact Assessment (circa EUR 220-320 billion over 10 years) as the potential benefits of the DMA are not borne out by the DMA as the legislative instrument stands. Further, elsewhere in the Impact Assessment, it is noted that "[t]here is … not much research developed about the impact of concentration in (sic) the innovation efforts in relation to [core platform] services"; Impact Assessment (n 10) [130]. The costs envisaged in the Impact Assessment are limited to the costs of compliance, monitoring, enforcement, etc; Impact Assessment Annexes (n 10) p.62-66. On merger control and innovation in platform markets, see D. Daniel Sokol, "Vertical Mergers and Entrepreneurial Exit" (2018) 70 Florida Law Review 1357. On the importance and relevance of protecting competition *for* the market in digital markets, see e.g. J. Cremer, Y.-A. de Montjoye, H. Schweitzer, "Competition Policy for the Digital Era", Report for DG Competition, European Commission, 2019, pp.5-6; 55-60 noting, inter alia, that "to provide incentives to supply goods and services on reasonable conditions and to innovate, **it is essential to protect competition 'for' the market**" (original emphasis) at p.5.

[142] On the "problem" of the DMA's failing to take account of the different nature of the core platform services that it regulates, see also Cennamo and Sokol (n 122). In same vein, see also Caffarra and Scott Morton (n 75).

[143] Likewise, whereas an online travel agent enters contracts with hotels for the purposes of listings on the platform, there is normally no such contractual relation between a search engine and the owners of the websites the links to which appear in the results of the search engine. The nature of any legal relation between an online travel agent and hotels, and a search engine and owners of websites is also fundamentally different. For a discussion of the legal nature of "platforms" and their relations with their business users, see P. Akman, "Online Platforms, Agency, and Competition Law: Mind the Gap" (2019) 43 (2) Fordham International Law Journal 209, 275-295; P. Akman, "The Theory of Abuse in *Google Search*: A Positive and Normative Assessment under EU Competition Law" [2017] (2) Journal of Law, Technology & Policy 301, 330-332. European Parliament, IMCO, Compromise Amendments (n 2) Recital 33 now includes a statement to the effect that the obligations laid down

indiscriminately to all types of core platform services and gatekeepers does not make commercial or legal sense and is unlikely to be equally effective across all services and gatekeepers.

A better approach for the DMA and any similar initiative would be to adopt a platform service-driven substantive framework with a single, separate list of obligations for each core platform service (e.g. a list for search engines, another list for marketplaces, etc.). Such an approach would facilitate a framework that is tailored to the specific business and technological model of the relevant platform services. These platform service-specific obligations can benefit from the inclusion of a "holding obligation" or an explicit general clause that stipulates the precise principle/objective(s) of the obligations imposed on the particular core platform service (e.g. to avoid conflicts of interest, or to increase multi-homing, or to encourage entry, etc.). Although a core platform service-driven or gatekeeper-driven list of obligations could be feared to lead to a straitjacketing effect in cases where a gatekeeper platform evolves in the services that it offers (e.g. a social network starts offering a marketplace),[144] a separate clause can be included in the DMA to stipulate that gatekeepers will be subjected to the obligations under all service categories for which they are designated as gatekeepers. Thus, if a social platform network is designated by the Commission as a gatekeeper in both social networks and online marketplaces, then it would become subject to the obligations listed for both social networks and online marketplaces in the DMA.[145]

Ideally, a platform-driven framework should be accompanied in the legislation by the ability, for example, to impose other/further obligations through the mechanism of a legally binding code of conduct with individual gatekeepers. This can be used for those obligations that are currently in the DMA but are not – in essence – capable of being self-executing. Such an approach would create the possibility of having a set of further obligations imposed on relevant platforms that is genuinely "susceptible of being further specified". In that sense, it would be in the code of conduct that such obligations would be further specified.[146]

Bringing all of the recommendations above together, it is proposed that the DMA's substantive framework be revised and restructured to include a single list of self-executing prescriptive obligations per core platform service. Each list should include an overarching principle where the list of self-executing obligations are prescriptions expressing how that principle translates into actionable points for a provider of that particular core platform service.[147] Ideally,

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in the DMA should take into account the nature of the core platform services and the presence of different business models, but that statement does not really resolve the issue because the obligations in the Compromise Amendments are still listed in similar fashion to the Commission's proposed obligations in DMA (n 2) Articles 5 and 6.

[144] The author would like to thank Director-General Guersent for this point. Expressing a similar concern, see also Monopolkommission (n 38) [60].

[145] This is not different in substance to the current approach of the DMA which, in any case, requires a designation by the Commission the "core platform services" for which a "gatekeeper" is to be subjected to the obligations in the DMA.

[146] Notably, European Parliament, IMCO, Compromise Amendments (n 2) Article 36a provides the Commission with the possibility to issue guidelines to accompany the obligations set out in Articles 5, 6, 12 and 13 to facilitate compliance. Although this is certainly welcome, it only provides for the provision of guidance on obligations already in the DMA, so is a different mechanism to a code of conduct as discussed above Council (Competitiveness) General Approach (n 2) provides a similar provision to the European Parliament's that allows the Commission to issue guidelines on any aspects of the DMA.

[147] Other authors have also proposed the inclusion of principle-driven obligations in the DMA, albeit in different ways to the approach proposed in this article. For example, see de Streel and Larouche (n 11) 57 proposing more generic, principle-based general prohibition in the DMA alongside the specific obligations in Articles 5 and 6; The Friends of an Effective DMA (n 116) proposing "tailor-made remedies" that can imposed by the Commission on the basis of four overarching principles, in addition to the specific obligations in Articles 5 and 6; and, Podzsun,

additional provision should be made for instituting further obligations (e.g. those that cannot be self-executing and need to be further specified to be directly enforceable) through a legally binding code of conduct or such similar provision. Under such a framework, whereas the general clause ensures future relevance, the list would provide sufficient certainty to the regulated. Overall, such an approach would not only provide more certainty and clarity regarding the objectives of the obligations and the rationale for targeting these at particular platform services, it can also substantially improve upon the existing DMA framework by minimising the litigation opportunities, thereby improving upon the speed with which competition law rules are applied in digital markets. Finally, the possibility of introducing further obligations tailored to specific platforms through a code of conduct or such provision ensures that the rules can adopt quickly as the markets change.

Conclusion

In any legislative proposal such as the DMA, one challenge will be how to balance the trade-off between certainty against flexibility, and the trade-off between speed against accuracy of the intervention and resolution. In principle, a degree of vagueness in the obligations may be hoped to provide some flexibility to the relevant regulator. In practice, if the obligations are detailed (rather than expressed as general principles), yet not sufficiently clear or certain, this will lead to litigation because their implementation will require interpretation, assessment and analysis of conduct. Under such circumstances, flexibility may be better achieved through other approaches or other means (e.g. codes of conduct, principle-based rules as opposed to specific obligations etc.). Many of these options appear to have been discarded as options for the DMA as currently conceived. They remain as valuable options, however, for future iterations of the DMA, as well as for other jurisdictions seeking to adopt similar ex ante rules for digital markets.

A further challenge for any initiative such as the DMA which will apply in dynamic markets is that of future-proofing. Whereas some of the obligations in the DMA may not provide sufficient legal certainty, some other obligations are highly detailed and specific. These latter obligations pose a risk that by the time the DMA comes into force, some of the obligations may not be relevant because the specific practices that they address will no longer be the practices of concern. Rather, there will possibly be other practices that are of concern, but not on the DMA list – given the dynamic nature of the relevant markets, obligations that make sense today may not be so meaningful in a couple of years.

The challenges faced by legislative initiatives such as the DMA may be tackled by adopting a platform-driven framework, as proposed in this article. With such a platform-driven framework, policymakers can make the best out of ex ante regulation and avoid some of the pitfalls of the same.

Bongartz and Langenstein proposing the introduction of three principles, explicitly, in the DMA, as guiding principles to inform the detailed obligations; see R. Podzsun, P. Bongartz, S. Langenstein, "Proposals on How to Improve the Digital Markets Act", February 2021, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788571.