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THE DIGITAL MARKETS ACT:

A CONCEPTUAL ANALYSIS OF THE NATURE OF THE REGULATION AND THE APPROPRIATENESS OF ITS NEW COMPETITION TOOLS

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Daniel Pérez Montufo
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ABSTRACT

In 2022, the European Parliament and the Council of the European Union enacted the Digital Markets Act, a Regulation that aims to control the great power that top technology undertakings have gathered in the European Digital Market through the widespread use of their platforms.

The belief among policymakers and economic experts worldwide was that digital markets present several undesirable characteristics that render existing competition tools inadequate to tackle anticompetitive practices. Aiming to solve these deficiencies, the resulting DMA presents a radically different structure than that of current competition law in a set of rules presented as an instrument of regulatory nature.

It is quite unclear whether this is the true nature of the Regulation, as its objectives and main traits are those of competition law, even if adapted to deal with digital markets. The main aspect it shares with instruments of economic regulation is the nature of its obligations, which are to be applied *ex ante*. It is essential to ascertain the true nature of the Regulation, as it can have relevant consequences regarding its application. Furthermore, it is also worth analysing how these conceptual changes have been applied, because most of its presumed gains depend on whether the DMA actually backs up the economic evidence and reasoning behind it.

Keywords: digital markets act, fairness, contestability, platform competition, gatekeepers, *ex ante* regulation

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1. INTRODUCTION

Over the last two decades, the rise of digital markets has profoundly transformed the dynamics between consumers and businesses, presenting policymakers with unprecedented challenges affecting almost every legal domain. Particularly, competition law has been for some time a focus of discussion, for the structural particularities that digital markets present with respect to typical ones are so relevant that even modern regulation is not believed to be enough to tackle contemporary anticompetitive practices.

Following those concerns, in the late 2010s several jurisdictions resolved to recalibrate their current policies, committing to a radically different approach. This shift can be observed at an international level through initiatives like the proposal for the *Digital Markets, Consumer and Competition (DMCC) Bill* in the UK[1], and on several U.S.[2] legislative bills. On an infra-communitarian level, we can find examples in the 10th or 11th [3] amendments of the German Competition Act.

As for the European Union, the Proposal for Regulation 2020/0374, known as the Digital Markets Act (DMA), was approved by the European Commission ("EC") on December 15, 2020, with the main objective of achieving "*contestable and fair markets in the digital sector*"[4]. Nearly two years after the Proposal, on 14 September 2022, the European Parliament and the Council of the European Union ultimately signed and enacted it.

This Regulation aims to give an effective response to the growing concerns that a few digital platforms have gained an excessive amount of power in the European Digital Single Market, which any of its 38 previous regulatory instruments has been able to effectively address.

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[1] *Digital Markets, Competition and Consumers Bill* (Last updated 12 May 2023) *Parliament.uk*. Available at: https://bills.parliament.uk/bills/3453

[2] Among others, H.R.3816—*American Choice and Innovation Online* 2021, 117th Congress (2021–2022); H.R.3825—*Ending Platform Monopolies Act 2021*, 117th Congress (2021–2022); H.R.3826— *Platform Competition and Opportunity Act 2021*, 117th Congress (2021–2022); *H.R.3849— ACCESS Act 2021*, 117th Congress (2021–2022).

[3] *GWB-Digitalisierungsgesetz*, 18 January 2021, Bundesgesetzblatt Jahrgang 2021. Available at https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s0002.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s0002.pdf%27%5D__1683978940201; Gast (2023) *The 11th Amendment to the ARC and Germany's New Competition Tool - D'Kart, D'Kart*. Unofficial translation available at: https://www.d-kart.de/blog/2023/05/03/the-11th-amendment-to-the-arc-and-germanys-new-competition-tool/.

[4] *Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector* (2022), OJ L265/1 (hereafter: DMA). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925&qid=1673893249474

In order to achieve these objectives, the Regulation defines a set of digital platforms that fall under its scope due to their relevance as a point of connection between businesses and consumers, naming them as *Core Platform Services* ("CPS"). On the other hand, it establishes legal presumptions to determine whether an undertaking in charge of those CPS has an excessive amount of power, naming these as *Gatekeepers*.

Gatekeepers thus must comply with the provisions of the DMA, facing fines of up to 20% of their global turnover in case of non-compliance.

Conceptually, the Regulation has two points that arguably stand out among the rest: on the one hand, the fact that it is allegedly not conceived as a competition law instrument, but as one of economic regulation. On the other hand, the fact that it establishes a set of *ex ante* rules to address anticompetitive behaviour, instead of the *ex post* analysis that characterizes modern competition law.

Whether or not these new traits will improve current the current tools is yet to be seen, as it only started being applicable on the 2nd of May 2023, but a preliminary analysis on the appropriateness and nature of these characteristics could help shed some light to the matter and correctly place the point at which the Regulation stands.

2. DIGITAL MARKETS IN THE EUROPEAN UNION

2.1 EUROPEAN UNION POLICY EVOLUTION ON DIGITAL MARKETS

The European Union has been concerned about regulating the digital market for a long time now. The founding basis for the European Digital Market was set with the E-commerce Directive 2000/31/EC[5], that constituted the framework for the digital market and tried to exhaustively regulate digital services[6]. Another important landmark came with the 2011 Single Market Act[7], which improved integration in the Digital Single Market.

[5] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031

[6] 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) (hereafter: DMA Proposal), legislative financial statement. 1.5.3

[7] Communication from the commission to the european parliament, the council, the economic and social committee and the committee of the regions. Single Market Act: Twelve levers to boost growth and strengthen confidence (/* COM/2011/0206 final */)

Perhaps the most important commitment of the EU in this field was made almost a decade ago, when in 2015 the Commission led by Jean-Claud Juncker engaged in its Digital Single Market strategy[8] aiming to achieve "*the best possible access to the online world for individuals and businesses*"[9]. Until the end of the Juncker Commission, 28 legislative proposals were approved and are into force, affecting several areas of the DSM.

So far, it seems that these DSM strategies have been focused on two aspects[10]. The first one is removing digital barriers between countries in order to attain an effective single market, an objective on which the Commission seems to be faring well, even if there is still room for improvement[11]. The other one is to grant the weak operators of digital markets (that is, end users[12] and – to a lower extent – business users[13]) reinforced rights, trying to avoid harms that result of the current digital market structures and business models. Regarding this second aspect, it should be noted that no effort was being made to solve structural problems that lead to anticompetitive and harming practices.

Ultimately, this conservative policy trend started changing in 2019. In that year took place the adoption of several legislative pieces that started targeting unfair practices by digital platforms. We can highlight Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services (P2B Regulation), whose main target is making relations between platforms and businesses

[8] Communication from the commission to the european parliament, the council, the european economic and social committee and the committee of the regions - A Digital Single Market Strategy for Europe (COM/2015/0192 final)
[9] European Commission (2015) Shaping the Digital Single Market, Shaping Europe's digital future - European Commission. Available at: https://web.archive.org/web/20201030161819/https://ec.europa.eu/digital-single-market/en/shaping-digital-single-market (Accessed: 14 May 2023).
[10] Conclusions drawn based on the factsheet European Commission, Directorate-General for Communication, (2018) *A Digital Single Market for the benefit of all Europeans – Towards a more united, stronger and more democratic union*. Publications Office. https://data.europa.eu/doi/10.2775/085894. Among others, the EC marks as the most notable advances in the DSM, as for the first set of objectives, the increase in infrastructure to access the internet, or the reduction of cross-border costs with measures such as free roaming or the prohibition of unjustified geographical blockade. As for the second set of objectives, the EC remarks the benefits from Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation, GDPR) or Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 (Cybersecurity Act), to which we could also include Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market or the mentioned P2B regulation.
[11] Pinto, R. et al. (2022) *Single Market barriers continue limiting the EU's potential for the twin transition: examples in key sectors*, DIGITALEUROPE. Available at: https://www.digitaleurope.org/resources/single-market-barriers-continue-limiting-the-eus-potential-for-the-twin-transition/
[12] An end user refers to individuals or consumers who access and utilize digital platforms or services for personal purposes. End users are the final beneficiaries of digital products and services, such as social media users, online shoppers, or app users.
[13] Business user is a concept that refers to entities that utilize digital platforms or services for commercial purposes. These can include other businesses, online retailers, app developers, service providers, or any organization that engages in economic activities within the digital market.

users more transparent; or the 2019 amendment of the Unfair Commercial Practices Directive[14], that partially shares the subsequent DMA's focus on fairness and contains a set of ex ante prohibited conducts. Even so, these legislative bodies include only a "*subset of issues*"[15] with respect to the problem that the DMA came to address one year after their publication, when proposed in 2020.

Parallel to the approval of the DMA came the Digital Services Act[16], whose objective is to make digital platforms accountable for their illegal and harmful content. They both share the aim of covering the shortcomings of the 2000 e-Commerce directive, that had caused different Member States to approve their own different set of regulations on digital platforms, leading to legal uncertainty and high resolutory burdens for agents operating in digital markets[17]. Still, each of the new regulations addresses different parts of the problem. To my understanding, the DSA establishes obligations relating to the private rights of agents operating on digital markets and their private relationships – those that do not generate negative spillovers to third parties. On the other hand, the DMA focuses on the public side of those relationships. It deals with conducts that (presumedly) harm other agents in the market, but at the same time harm competition and values of public relevance, which are to be analysed below.

Even after all of these advances, it is clear that the DSM strategy still has a long way to go: if one looks at the conditions that the ideal Digital Single Market should meet ("*individuals and businesses can seamlessly access and engage in online activities under conditions of fair competition, and a high level of consumer and personal data protection*"), we see they are almost identical to the underlying objectives of the DMA, even if completing the DSM has been one of the 10 political priorities of the Commission since 2014.

This may serve as an indication that sectoral regulations that have been approved under the DSM and the orthodox approach to competition law that has been so far applied to digital markets may not be enough to ensure such a legislative desideratum. But before being able to draw these conclusions, we need to understand what the source of these problems is. That is,

[14] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules
[15] Commission Staff Working Document Impact Assessment Report 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); part 1 (2020) (Hereafter: DMA Impact Assessment Report), para. 6.
[16] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)
[17] DMA proposal, legislative financial statements 1.5.3 and 1.5.4.

what do digital markets have with respect to conventional ones that has required policy makers to take a step further and reconsider fundamental aspects competition law.

2.2 DIGITAL MARKET FAILURES

Digital Markets per se have become key elements of modern economy, bringing efficiencies and innovation while allowing for new business models to develop. They also increase consumer choice and convenience, while allowing for small businesses to use bigger platforms to reach their target audience in ways that would otherwise be impossible[18].

Nevertheless, they have a set of structural and behavioural traits that make them particularly prone to anticompetitive practices that have deemed this step further in competition law essential to preserve the markets as such. Notably, they are highly concentrated (with price mark-ups growing every year) and characterized by a "*winner takes it all"* configuration, which means that whenever a platform takes the lead on its market, it usually ends up dominating almost the whole market. These properties have led to a small number of platforms being in control of millions of consumers and small businesses who depend on them[19]. In addition to that, the lack of common regulation in this aspect in the EU has led to a problem of legal fragmentation across Member States, which increases overall costs for all agents involved in the market[20].

These consequences derive from the sum of small market failures[21] that, by themselves, could be relatively well managed; but that together have effects that can be persistent and irreversible under competition law's conventional tools. We are going to analyse some of the most relevant of these digital markets' traits, and why are they so important that they require a particular Regulation to be tackled[22].

[18] Brochure (2021) Shaping Europe's digital future – *How do online platforms shape our lives and businesses?* Available at: https://digital-strategy.ec.europa.eu/en/library/how-do-online-platforms-shape-our-lives-and-businesses-brochure

[19] DMA Impact Assessment Report, paras. 58-60, 85-88

[20] DMA Impact Assessment Report, paras. 52-54

[21] Which can be defined as a "*situation in which a market does not allow consumers to benefit from the results of effective competition in terms of low prices, better quality, as well as more choice and innovation, while firms are able to earn supra-normal profits which are not competed away over time*"

[22] Deutscher, Elias (2022) '*Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust*', The Antitrust Bulletin, 67(2), pp. 311-313. doi: 10.1177/0003603X221082742. (Hereafter: "Deutscher, 2022").

A first defining aspect of digital markets is the key role played by multi-sided intermediary platforms (MSPs)[23] in bringing supply and demand together, thus reducing transaction costs for both business and end users.

Based on these MSPs, we can find two different types of problems: those related to the weak contestability that such platforms face, and the lack of competition between different platforms; and those related to the unfair practices that certain types of platforms conduct with respect to their business users.

The problems of the first type are of different natures, but they all have in common that they serve to build entry barriers in the markets where platforms operate, that can ultimately set the viable number of agents in the market too low with respect to a socially optimal level.

The business model of MSPs implies that they can benefit from both direct and indirect network effects[24], which are reinforced by the role that data plays in these markets: the more users a platform has, the more data it can collect to further optimize their services, thus intrinsically amplifying these network effects. These effects combined result in three *a priori* undesirable characteristics.

Firstly, they lead to economies of scale and scope[25] playing a key role on the business model of MSPs, that lead to possible entrants to the market having to initially invest too much for their business to have short-term profitability.

[23] A multi-sided (intermediary) platform can be defined as an "*organization that creates value primarily by enabling direct interactions between two (or more) distinct types of affiliated customers* (…) *they provide an infrastructure which significantly eases transactions between buyers and sellers by eliminating the need for barter.*" (Yablonsky, S. (2016) '*Intermediaries in E-Commerce'*, in Lee, I. (ed.) Encyclopedia of E-Commerce Development, Implementation, and Management. Business Science Reference).

[24] As for the direct (or same-side) effect, whenever a new user enters the platform, the value of that platform increases for the other users of his same group (think about an additional user of a social network). On the other hand, indirect or cross-side network effects imply that the opposite group benefits from the entrance of that user to the market (think of a transportation company, where a driver benefits from the entrance of a new customer and vice versa) (Katz, Michael L. & Shapiro, Carl, *Network Externalities, Competition, and Compatibility*, 75 Am. Econ. Rev. 424 (1985)).

[25] Crémer, J. et al., *Competition Policy for the Digital Era* (2019), pp. 19–24, available at: https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en (hereafter: "Cremer et. al"); Furman, J. et al., *Unlocking Digital Competition* (2019) (hereafter: "Furman et. al"), paras. 1.68–1.70, available at: https://www.hks.harvard.edu/centers/mrcbg/programs/growthpolicy/unlocking-digital-competition-report-digital-competition-expert.

Furthermore, these network effects generate switching costs that can lock-in users to a single platform, even to the point of limiting or preventing multi-homing[26]: as market platforms are two-sided, once demand and supply have met, convincing both to simultaneously switch to another platform is difficult. This may ultimately lead to the tipping[27] of the entire demand towards a single platform, that by having enough users makes business inviable for other competitors[28].

Besides network and data effects, user behavioural bias[29] designed and induced by platforms and social norming also increase switching costs and lead to user lock-in.

The other type of problem that digital markets have are unfair practices from platforms towards their business users. Online platforms are now keys for businesses users to access demand; up to a point where a situation of dependence has been established[30]: without these platforms it is almost impossible to reach a significant number of consumers[31]. This dependence, combined with the gigantic size of the main platforms, has led to imbalances and abuses in these relationships.

This issue is enlarged by the fact that digital markets are characterized by being the perfect scenario for vertical integration[32]: platforms do not only act as intermediaries between business and end users, but they also expand to complementary sectors. The result is that the biggest undertakings in the market having consolidated over the years a set of conglomerate ecosystems[33].

[26] *Google Android* (Case AT.40099), Commission Decision of 18 July 2018, paragraph 600
[27] This is, once a platform obtains sufficient market share advantage with respect to its rivals, the market naturally moves to a dominance or almost monopolistic situation, instead of moving towards a competitive equilibrium.
[28] Furman et al., para. 2.5
[29] DMA Impact Assessment Report, paras. 80-82
[30] This type of situation is defined as strategic market status; its further consequences are analyzed at Furman et. al. p. 41–42.
[31] Iqbal, Mansoor, *Facebook Revenue and Usage Statistics* (2023) Business of Apps. Available at: https://www.businessofapps.com/data/facebook-statistics/
[32] Vertical (or "diagonal") integration takes place whenever a platform "*starts providing up-stream, down-stream, or complementary services and expanding their presence into neighboring markets*" (Deutscher, 2022 *supra*, p. 313).
[33] Which we can define as a complex and interconnected network of digital platforms, technologies, products, services, and participants that interact and collaborate with each other within a particular digital domain or industry. Based on Jacobides, M. et al. (2018) *Toward a Theory of Ecosystems*, 39(8) Strategic Management Journal 2255. Available at: https://www.researchgate.net/publication/323916602_Towards_a_Theory_of_Ecosystems

This has enabled digital platforms to conduct on a hybrid business model, as those ecosystems often act as a marketplace to reach end users. Their earnings come both rents from transactions between businesses and end users, thus controlling a "bottleneck"; and from selling their own products competing with business users. Platforms that follow this type of business model receive the name of dual role platforms.

These major traits of digital platforms shape the way in which platforms interact with the rest of the users of digital markets, both with other platforms and with business users.

On the one hand, interactions with other platforms (horizontal relationships) are clearly shaped by network, scale and scope effects, increasing incentives to tip the markets and thus extract the maximum possible amount of rents from their platforms. This results in incentives to eradicate horizontal competition, either with abusive practices or by simply acquiring them[34].

On the other hand, interactions with business users (vertical relationships) lead to a conflict of interests between leaving more space to business users in their marketplaces so as to extract more rents from them, or cannibalizing their sales in order to be able to sell more products themselves. The equilibrium that is optimal for online platforms may not be the one that is socially optimal to maximize overall welfare.

We will see that the *ex ante* rules contained by the DMA are aimed at solving structural problems in both types of relationships, from which the two main goals of the Regulation arise: contestability is promoted by preserving or enhancing inter-platform competition (in horizontal relationships); whereas fairness is pursued by ensuring intra-platform competition (in vertical relationships), protecting both businesses and (in a minor way) end users from the sub-optimal allocation of resources that platforms may want to give them. We will treat this in more detail below, when analysing *ex ante* rules in the DMA.

[34] Which is very likely to be anticompetitive. In case that the possible benefits of developing the projects or ideas of the acquired competition are not higher than the benefits of not developing them and continue with the current dominant product or service, will result in a huge loss of innovation. This is known as a "*killer acquisition*" in the economic doctrine. But there is another anticompetitive scenario, the "*upgrade with suppressed competition*", which implies that even if the acquiring party was to develop the idea of the entrant, this will still result in a market with less competitors, strengthening the dominant position of the incumbent. See Motta, M. and Peitz, M. (2021) *'Big tech mergers'*, Information Economics and Policy, 54. doi: 10.1016/j.infoecopol.2020.100868.

2.3 NECESSITY OF THE REGULATION

Until now, the EC has been using general EU competition law in their attempts to address the problems posed by digital markets. These tools are regulated in arts. 101 and 102 TFUE. The first aims to deter anti-competitive agreements and concerted practices that may affect trade between Member States (MS) or harm competition in the Common Market, while art. 102's objective is to impede abusive exploitation of dominant positions.

Even if the CJEU has tried to adapt these provisions to face anticompetitive behaviour in the digital markets, there are insurmountable problems that have rendered it necessary to adopt a new regulation.

The first and most important change needed to restore contestability and fairness in digital markets was stated in the big majority of the reports the EC asked for: upon detecting a problem, intervention needs to be as fast as possible[35]. As of right now, current legislation faces a procedural problem, for EC enforcement procedures are excessively time intensive. They follow an inductive method, requiring a detailed economic and legal analysis that consumes a lot of time (the mean time the EC takes to adopt an infringement decision is three years; 2 years for adopting a commitment one[36]).

This need for speed is mainly due to two reasons, related to both inter and intra-platform competition[37]. First, the aforementioned stickiness of market power (once the market is tipped, it is extremely difficult for new entrants to grow), which means that a slow intervention will probably result in remedies that come after competitors have been forced out of the market. At that point, little can the EC do to restore competition in the market. Moreover, in digital markets there are other types of power besides market power (e.g., see *supra,* intermediation power, bottleneck power, or strategic market status), whose consequences for business users dependant on the platforms get worse over time.

[35] Among others, Crémer et. al p. 45 and 52-53; Furman et al. p. 104-105; Stigler Committee (2019) *Digital Platforms* (Final Report), p. 119. Available at: https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report

[36] Bostoen, F. (2023) '*Understanding the Digital Markets Act*', The Antitrust Bulletin, 68(2), p. 6. doi: 10.1177/0003603X231162998 (hereafter: "Bostoen, 2023").

[37] Bostoen, 2023, p. 6.

Besides that, there is an equally important substantive problem with current competition law[38]. The EC is not able to respond to market failures when they are either the result of the structure of the market (e.g., tipping or lock-in), or of the behaviour of digital platforms in absence of TFUE prerequisites (e.g., anti-competitive agreements or a dominant position). There are also cases where even unfair business practices may not have an impact on competition itself, such as an abuse of strategic market status that does not affect competition among business users.

Furthermore, the EC in most cases can only intervene after the harm has been done, and we have seen that digital markets are prone to irreversible damages, thus rendering this intervention at least very inefficient.

As a result, it can possibly be the case that the EC has inhibited itself from opening cases against online platforms on the grounds that its conduct may not fall under the substantive scope of competition law. Moreover, the main cases against the main digital platforms operating in Europe concern exclusionary – and not exploitative – conduct[39], for under current competition one the latter is more difficult to address. This case leaves even more room for the legal fragmentation problem, as only some Member States have regulated this exploitation problem beyond the EU[40].

Still, even when the EC does intervene, current legal remedies have not proved to solve the underlying problem in most cases. There are even extreme situations in which business users of platforms are allegedly worse off after an intervention than prior to it[41]. Even if not to that extent, a worrying number of cases have not ended with an efficient remedy[42], or it has come too late to have a significant impact (as recurrent practices by a digital platform end up generating behavioural biases in their end users).

[38] DMA Impact Assessment Report, paras. 118-121
[39] Bostoen, 2023, p.8. Even so, in EC, *Commission Sends Statement of Objections to Meta Over Abusive Practices Benefiting Facebook Marketplace* (press release, Dec. 19, 2022), IP/22/7728, the EC preliminarily concluded that Meta conducted exploitative behaviour towards competitors under the pre-DMA regime. Still, no cases of exploitative behaviour towards business users (not competitors) have been investigated.
[40] E.g., Tribunal de commerce de Paris, Case 2018017655, ministère de l'Économie et des finances v Google, Mar 28, 2022
[41] Marsden, Philip (2020), *Google Shopping for the Empress's New Clothes—When a Remedy Isn't a Remedy (and How to Fix it)*, 11 Eur. Compet. Law. Pract. J 553
[42] 2023 Bostoen, pp. 9-10

Finally, as most relevant platforms operate in the whole EU, legal fragmentation has increasingly been a problem, raising costs of compliance for all agents in digital markets. A harmonization of regulations was deemed necessary by most part of the doctrine[43], and the DMA does so by centring its enforcement at an EU level, even if allowing Member States to act under certain circumstances.

3. THE DMA: IMPACT ON EUROPEAN COMPETITION LAW

To preserve inter and intra platform competition, the DMA thus had to overcome a wide range of limitations, some of which were conceptually inherent to EU competition law. Moreover, considering further problems (both procedures and remedies were too slow to be effective), the gates were opened to the possibility of a major rethinking of the way the EU addressed competition, even departing from its deepest-rooted assumptions.

3.1 CONCEPTUAL ANALYSIS: THE NATURE OF THE REGULATION

The DMA that resulted from this process has overcome some of these limitations by partially departing from pure EU competition law. It can therefore be argued that it has a mixed nature, adding to that base many aspects of the rules that the EU has been using to address sector-specific competition issues or general economic regulation beyond competition law[44]. Ascertaining its true nature is not a minor issue, given that relevant aspects such as the application of the *ne bis in idem* principle with respect to competition law, or the interpretive principles, expertise, and precedent to apply depend on this matter.

Furthermore, we will see that if we consider the Regulation as a whole, most competition law traits have been completely reshaped with respect to prior regulation, based on new underlying assumptions intended to fit better for digital market structure. This is not something exclusive to the EU, but rather a trend that other legal orders, such as the US or the UK, are also following.

[43] See for instance, Akman, P. (2021) *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act* 47 European Law Review 85, Available at: https://ssrn.com/abstract=3978625 (hereafter: "Akman, 2021")

[44] Larouche, P. et de Streel, A. (2021) '*The European Digital Markets Act: A Revolution Grounded on Traditions*', Journal of European Competition Law & Practice, 12(7), pp. 542–560. doi: 10.1093/jeclap/lpab066. (Hereafter: "Larouche, 2021")

Both elements together result in a set of presumptions and ex ante rules, whose appropriateness will be discussed below.

3.1.1 An instrument of economic regulation

When designing the DMA, a clear statement of intents with regards to its nature was made when deciding to base it on art. 114 TFEU[45] (i.e., as an instrument of economic regulation) and not as a competition law rule (which could have been done for instance under arts. 352 or 103(c) TFEU). The DMA also offers a hint in art. 1(6) and recital 10, which declares that this new tool is complementary (applied "*without prejudice*") to current competition law, both at an EU and national level. The fact that both legal bodies could be simultaneously appliable is an implicit recognition of the different nature this new competition tool is intended to have. Still, upon taking a closer look at the regulation, one can rapidly see that its true nature is not as clear as it was intended, which may rise concerns with respect to whether other competition law instruments are indeed applicable or not.

If we look at the regulatory trend, we can find that for some time now the European legislator has been complementing existing competition law tools with regulations for specific sectors of economic activity, particularly in areas where competition law has proven to be ineffective in dealing with structural competition problems[46]. These sectoral regulations pursue the same goals than competition law using a different type of tools, usually classified as *ex ante* (by contrast to the *ex post* methods of competition law). Even if this distinction is somewhat inaccurate[47], it serves to show how the methods used by the DMA are much more similar to those used by sectoral regulation than standard competition law.

Still, it is hard to qualify the Regulation as being sector-specific, for it has no sectorial focus (it concerns gatekeepers and CPS, which exist across digital markets – and "digital" is not a sector by itself) and it is enforced at an EU level, something uncommon for that type of regulation. Furthermore, as we will see, this type of regulation is characterised by prescriptive rules

[45] DMA, preface.
[46] Larouche, 2021, p. 543.
[47] There are competition law tools that operate prior to the conduct taking place (e.g., merger control; tools such as guidelines, block exemptions or notices; precedents such as EC decisions and court judgements). At the same time, economic regulation usually comes after a market failure has been observed, and even after approved they may require *ex post* enforcement. Coates K. (2020) *Ex-Post and Ex-Ante Rules*, 21st Century Competition.

(conducts imposed to agents subject to the regulation), but the DMA also contains proscriptive obligations (prohibited conducts), which are more typical of competition law rather than sectorial regulations.

It also has traits of general economic regulatory frameworks (such as the GDPR, the P2B regulation or the DSA), less related to competition law; which apply to all market agents and aim to accomplish certain policy objectives. Yet, the DMA applies only to gatekeepers, and its objectives are (more or less) in line with competition law goals (*discussed below*), so it is also unclear whether it can be classified as such. On this regard, it is noticeable that the Committee on the Internal Market and Consumer Protection tried to introduce an absolute ban with respect to targeted advertising to minors in the Regulation[48], but it was finally discarded, upon the belief that the targeting of minors was beyond the boundaries of the DMA (it instead was introduced in the DSA)[49]. Thinking of the Regulation as a regulatory instrument makes it hard to see why should this policy be out of scope; but if the DMA is considered as competition law it does make sense to not to include it.

3.1.2 Competition law traits

Despite the efforts put to depart from competition law, it is not clear that it has been the case. Given that the core rules of the european legislation are general and flexible norms with multiple possible interpretations[50], the pretension made to escape from it seems slightly bold, even there may be reasons to do so. To judge the extent to which it departs from current competition law, we will consider two of the main aspects that define the current european legislation: its objectives and procedures.

a) Goals

i. Contestability, fairness, and extra-economic goals

On its recital 11, the DMA states that its objective, even if complementary, is different from "*protecting undistorted competition on markets*", which is one of the main goals of competition

[48] Amendments adopted by the European Parliament on 15 December 2021 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) (COM(2020)842 – C9-0419/2020 – 2020/0374(COD)).

[49] Schwab, A., O, C., Vestager, M. and Breton, T. (25 March 2022) "*Press Conference on Digital Markets Act: Outcome of Negotiations*" (Press conference at the European Parliament, Brussels).

[50] See Larouche, 2021, p. 546 for a brief summary of the different competition policies applied by Commissioners in the 1994-2021 period, all under the same core regulation.

law. As its own name evidences, the ultimate aim of the Regulation is to preserve (and promote) contestability and fairness in the digital markets. Even if the DMA tries to explain those goals respectively in its recitals 31 and 32, the definitions given are too wide, and the doctrine is yet to reach an agreement on the borders of each concept. Perhaps this issue will be solved by the EC when it starts applying the Regulation, but as for right now I will use as baseline the following definitions, constructed upon the description of the market failures stated in section 2.2 and the mentioned recitals.

As it has already been hinted, fairness refers to the goal of avoiding abusive and exploitative behaviour from gatekeepers to business users that arises from the conflict of interests resulting from their hybrid business model, thus preserving intra-platform competition.

As for contestability, it refers to the goal of reducing structural and behavioural barriers to entry that lead to the tipping of the market and the entrenchment of the gatekeeper's market power, shifting their incentives from innovation to the deterrence of inter-platform competition.

However, taking a step further we can see that these notions are (at least, partially) already embodied in wider concepts[51]. Fairness directly addresses certain types of exploitative and exclusive conduct, which are two conventional competition law concerns[52], even if the latter is not usually pursued by the EC – it is perhaps more common to find addressed under regulatory instruments. This latter aspect can suppose a good reason supporting the need for the DMA, as it solves one of the substantive problems of current regulation. Still, in my opinion it is not enough to support the pretended deviation from competition law.

Contestability on the other hand can fit under the general purpose of art. 102 TFEU to keep markets as competitive as possible, but that only captures part of the concept. What does clearly deviate from competition law is the fact that under this goal, the DMA seeks not only to defend competition, but also actively promote it by lowering structural and behavioural barriers to entry when deemed necessary. Current competition law only may impact this area when barriers are

[51] See e.g., Laitenberger, Johannes. *Fairness in Unilateral Practice Cases* (GCLC Conference, Brussels, Jan. 26, 2018). Available at: https://ec.europa.eu/competition/speeches/text/sp2018_02_en.pdf. Here the EC Director-General for Competition (2015-2019) states that fairness is "*a way to describe the rationale that underpins EU competition enforcement* [and] *to express the overall goals and benefits of EU competition policy* […]".
[52] Moreno Belloso, N. and Petit, N. (2023) '*The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*', European Law Review, forthcoming (pre-copyedited version), p. 1.

artificially created by gatekeepers. This is a clear disruption of the premise held until now that stated that competition law protects competition, and not competitors[53].

Besides those, the DMA also has some complementary objectives. For instance, there are several obligations concerning transparency (in line with the P2B regulation mentioned in the section above) and privacy which, however, could be understood to fall under the fairness goal.

Additionally, a comprehensive understanding of the DMA considering its recitals shows that the classic competition law parameters (price, quality, choice, and innovation) are also to be kept in mind by the EC. Given the type of the market failures that shape the DMA, here the Regulation changes the traditional focus (placed on prices) and puts more emphasis on the innovation[54] and choice[55] parameters.

To what extent these classical parameters will shape the decisions of the Commission will define how much the Regulation deviates from standard competition law, which is yet to be seen. However, I believe that they should serve as mere abstract orientating parameters rather than actual goals to be pursued, given that the DMA pursues fostering inter and intra-platform competition mainly because digital markets are believed to be structurally inefficient. Therefore, ensuring contestability and fairness will have the effect increase welfare for society overall (which is the main goal that in my opinion the EC should pursue), besides its redistributive effects from gatekeepers towards business and end users, which may only indirectly take the form of price decreases and increases in quality, choice, and innovation in the long run[56]. In other words, the ultimate objective is to change the structure of the market so that it becomes closer to an efficient equilibrium, instead of the classical goal of competition law of increasing consumer surplus. The fact that some recitals encourage the EC to keep these parameters in mind does not imply that they are the ones defining their actions.

[53] CK Telecoms UK Investments v Commission (Case T-399/16) ECLI:EU:T:2020:217 para. 362.

[54] As two of the main fundamentals behind the DMA are the beliefs that big online platforms that are now the sole leaders of their markets have not delivered over time the innovation outcomes that they deemed optimal, and profits from this innovation in the digital sector have not been distributed fairly across companies. *DMA Impact Assessment Report*, paras. 65, 322; section 6.3

[55] As it has been exposed, intra-platform harming practices tend to naturally restrict choice for the users (due to exploitation of business users), so this may be the most direct of the effects, as assessed by the Regulation in recitals 2 and 70.

[56] Furthermore, it is not that clear that the benefits that business users get from the defence and increase of intra-platform competition will ultimately be passed to final consumers. Perhaps it is more easy to imagine that this will happen in aspects such as innovation or choice (range of products available), but when it comes to prices it will eventually depend on the amount of bargaining power that consumers and business users have, as depending on the degree of competitiveness of the given retail markets it may be that there are no benefits for consumers at all, as business users could keep to themselves the benefits from applying the DMA.

ii. Departure from the maximization of consumer welfare

Perhaps this departure from the law of increasing consumer welfare is one of the most significant changes with respect to current competition law. Proof of this objective change is that the EC can intervene without carrying out an *as-efficient competitor test*[57] to determine whether a conduct harms consumer welfare (even if the test has recently been limited to price conducts by the CJEU[58]).

One of the main implications this goal shift can have is that now the EC has to pursue multiple objectives when enforcing the DMA (contestability, fairness and other extra-economic values); while until now the only rule was to act whenever by doing so consumer welfare could be improved. A problem may surge if those multiple goals are not aligned, as perhaps conflicts can surge among them.

As of today, this is just speculation, but after the Regulation starts being applied some empirical research will be required to know under what circumstances these different goals can either be complementary or suggest different courses of action[59]. Still, given that any given goal is just a legislative policy choice, being able to take different courses of action can ultimately be positive for the EC. For this to happen, the Commission needs to be transparent when enforcing the DMA, stating the goals they are they pursuing and justifying the trade-offs they are willing to take. With this, final results can be better (or, at least, equal) than just applying one same rule blindly to all cases.

b) Enforcement

The most noticeable aspect in which the DMA departs from the actual techniques of competition law is in its enforcement methods and legal commands, as a brief look at articles 5-7 shows, moving from the use of standards to rules. The trade-off between rules (detailed prescriptions set directly in the law) and standards (statements of objectives that are intended

[57] Theory that states that unilateral conduct by dominant firms is only objectionable if it forecloses an "as-efficient" or equally efficient competitor. AKZO v Commission (Case C-62/86) ECLI:EU:C:1991:286 para. 71; Post Danmark A/S v Konkurrencerådet (Case C-209/10) ECLI:EU:C:2012:172 paras. 22, 25.
[58] *Google and Alphabet v Commission (Google Shopping)* (Case T-612/17) ECLI:EU:T:2021:763.
[59] Deutscher, 2022, p. 317

to inspire and direct the actions of their enforcers) is not exclusive to competition law, but here it plays a role of utmost importance.

Modern EU competition law is characterized by the use of standards, under the so-called "more economics approach"[60], that requires the EC to carry out exhaustive economic analysis whenever assessing a competition case. This is, as stated, one of the main problems that motivated the DMA, as these fact-intensive assessments are particularly complex in digital markets, which led to excessively slow procedures, with the consequences seen before.

As a response, the DMA departs from this model by introducing a list of *ex ante* rules and obligations which are directly applicable and compulsory for the designated gatekeepers. Nonetheless, a distinction between the provisions of articles 5 and 6-7 should be made. As for the first, it contains a set of self-executing obligations, that we may consider of a pure rule-based design. But article 8 (2) states that those obligations from articles 6 (and 7) are susceptible of being further specified, following a market investigation procedure in which concerned gatekeepers can be heard. Furthermore, more flexibility is added by article 12, which allows the Commission by means of a delegated act to add more obligations to these lists, again after conducting a market investigation. These last provisions clearly fall in an area between rules and standards, trying to get the best of both words (and, at least, trying to have some room to manoeuvre in case *ex ante* rules turn out to be too rigid, as is the fear of part of the doctrine).

Even so, the approach that the Commission will have to take when solving concrete cases has completely changed, departing from the inductive case-to-case method that was followed under art. 102 TFEU to a deductive one, based on this set of presumptions of harm. These rely on strong priors that serve to infer that the conduct concerned is harmful[61], this is, the EC will act upon the presumption that the conduct outlawed by the DMA has a higher probability of being anticompetitive than unharmful.

This is the key point of this method, and the EC has taken a safe approach to make sure that the presumptions will most likely hold (or, at least, to have an excuse in case they do not): most of

[60] Wils, W., *The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance* (2014). World Competition: Law and Economics Review, Vol. 37, No. 4, 2014, pp.405-434

[61] Which contrasts with the weak priors of the "more economic approach", which only allows to determine whether the conduct is harmful after conducting detailed economic analysis.

the concerned conducts are directly taken from recent investigations and cases addressed by the Commission, and they are used to codify some theories of harm that the own EC has developed.

This has a direct implication that helps to deal with the problem of the irreversibility of damages in digital markets, that comes from the more certain and predictable[62] character of legal rules: instead of sanctioning firms for the harm they have caused, they proactively help to stop the damage from even occurring.

Some other effects are directly related to the goals of hasting enforcement processes. For instance, as the burden of proof needed to declare that a conduct is anticompetitive is lowered to authorities, we could expect procedures to speed up. Even if this lowering implies that it is symmetrically increased for concerned gatekeepers as to defend their actions, as it will be analysed below (section 3.2.2), the cases in which undertakings can offer defences are limited. Moreover, having to apply less complex rules will accelerate procedures; an aspect further reinforced by the fact that the amount of data and information that the EC needs to review in order to make a decision is vastly reduced.

This last point has also been the rationale for the setting of another important presumption: to avoid dealing with the problems of defining the boundaries of digital markets and analysing dominance (as it has been discussed, there are more concepts different from market power that define dominant positions in these markets), some qualitative and quantitative presumptions for undertakings have been established, which automatically classify them as *gatekeepers* and makes these provisions applicable to them. The appropriateness of this practice is discussed below (section 3.2.1).

Despite all of the above, it should not be forgotten that the sacrifice of economic case-to-case deep analysis entails some risks: the same complexity of digital markets that leads to slow analysis can also serve as a counterargument, for ignoring it may lead to making decisions under excessive uncertainty. We should also consider the rapidly changing nature of such markets,

[62] United Kingdom Competition & Markets Authority (2020) A new pro-competition regime for digital markets—Advice of the Digital Markets Taskforce, p. 34; DMA Proposal, Explanatory Memorandum 5–6.

which altogether with the wide range of platforms and services that operate in digital markets do not really recommend deviating too much from standard-like provisions.

But the rationale behind the DMA already has considered some of these problems, as it has been assumed that type II errors of enforcement (that is, identifying a conduct as harmful and prohibiting it when in fact it was not harmful at all) are preferable to type I errors (falsely believing that a conduct is innocuous when it actually is causing harm)[63]. And perhaps the EC has accepted this new framework because the established rules are based on recent cases they enforced against the undertakings that will be designated as gatekeepers, so the probability of these conducts being anticompetitive is relatively high. Furthermore, the features of digital markets[64] lead to believe that the harm that these conducts can cause to all agents of economy is much greater than the resulting in non-digital markets, arguments that altogether mitigate the excessive uncertainty critic.

The fact that magnitude of the harm now plays a role (when deciding to include the conduct in the list of prohibitions, something that, as noted, can be done by the EC) is in particular a relevant improvement when compared with current methods. These rely on a purely probabilistic "balance of probabilities" standard of proof, which only accounts for the probability of the given conduct resulting in harm, without accounting for the actual size of the harm itself[65]. This contributes to making type I errors excessively costly[66].

All in all, we can conclude that as for its enforcement methods and legal commands, the DMA even if adopting methods of economic regulation instruments, is not as separated from competition law as in could seem, as article 8 and the market investigations allowed under article 30 allow for some degree of flexibility to keep in line with current competition law methods. In my opinion, it can be thus seen more as an attempt of evolution rather than a deviation.

[63] As a contraposition to the orthodox belief of type 1 being preferrable that competition law has long followed, which was based the assumptions that (i) probability of business conducts being anticompetitive was low and (ii) markets tend to correct themselves if there is harm being caused (Deutscher, 2022, p.317-318). The analysis held in section 2.2 leads to believe neither of these assumptions are reasonable in digital markets.

[64] Some of the mentioned market failures supporting this are the scale and scope economies, that lead to anticompetitive conduct affecting a vast number of agents; or the propensity of markets to tipping, that render damages irreversible.

[65] Deutscher, 2022, p. 332

[66] Even so, part of the doctrine believes the exact opposite; this is, that current standard of proof is already too low. See for instance Larouche, 2021, p.546.

If the question is whether this change of policy is adequate or not, I think that it is open to debate. In my opinion, the need for speedy intervention justifies taking the risks of type 2 errors, as otherwise irreversible damage to competition could take place. Furthermore, I believe that the presumptions behind the rules make economic sense and are indeed backed with solid economic reasoning, which also justify the choice of rules beyond reasons of procedural nature. Still, I deem necessary a more concrete analysis on the obligations to draw solid conclusions, which I conduct on section 3.2.2.

3.2 POLICY ANALYSIS

Knowing where the DMA conceptually stands and how does that specific nature shape its objectives, it can be advisable to go a step further and look into the concrete way in which they are pursued. In particular, this section will scrutinize the two flagships of the Regulation, the designation of *gatekeepers* and the particular *ex ante* obligations to which they are subject (and the set of remedies that come alongside them). As we have seen, the motivation behind those aspects relies on the assumption that the trade-offs it makes are positive and will bring more welfare to society than the previous regulation (which also faced a different set of trade-offs, as actually any kind of policy does).

3.2.1 Evaluation of the *Gatekeeper* concept

a) Designation of Gatekeepers and Core Platform Services

Thus, having seen that the DMA prescinds of defining the boundaries of a market and analysing market power to determine its scope, it is worth analysing more in detail the concrete methods employed. These are built upon two pillars: Core Platform Services and Gatekeepers.

Article 1(2) clearly states that the DMA only applies to a given set of services, which receive the name of Core Platform Services. This denomination comes from the fact that these types of digital platforms are considered essential and foundational for digital platforms operating in the EU for their relevance in the structure in digital markets and the fact that these platforms often have a significant impact on competition and market dynamics.

Rather than formulating a general definition, article 2 introduces an *a priori numerus clausus* list of platforms, outside of which any given platform will not be subject to its obligations. Still,

as already introduced, this rigidity is compensated by art. 19(1), which allows the Commission to add more services to the CPS list after conducting a market investigation, in which any type of third party can be consulted (art. 19(2)).

As recital 14 states, the mere existence of a CPS does not rise concerns on contestability and fairness by itself; and therefore, a second condition is needed for the regulation to be applicable. As art. 1(2) indicates, the given CPS needs to be provided or offered by a *gatekeeper*. In economic terms, a gatekeeper can be defined as an undertaking with significant and entrenched power[67] which controls access to important digital platforms, thus having the ability to bottleneck the access to many other businesses or end users to the market.

The DMA in article 3(1) perfectly captures this definition by establishing three cumulative qualitative criteria that an undertaking needs to accomplish in order to be considered to be a gatekeeper: (a) having a significant impact on the internal market, the substantiality requirement; (ii) provide a CPS which serves as a gateway to connect business and end users, the criticality requirement; and (iii) enjoying an entrenched and durable position in its operations (or having the possibility of doing so in the future), the durability requirement. These requisites are fairly accurate in capturing some of the widest market failures that led to the making of the DMA, but this precision is somehow distorted by the following paragraph of the article.

The latter establishes three quantitative criteria that serve as *iuris tantum* presumptions for respectively each of the three qualitative criteria defined in art. 3(1). The first one is based on annual EU turnover or market capitalization and presence in EU Member States; the second one, in the number of businesses and end users; and the last requires for both previous criteria to be met in the last three financial years.

To soften the rigidity that rule-based norms and presumptions present, arts. 3(5)-(6) allow for gatekeepers that meet the quantitative criteria present a rebuttal submission arguing that due to the circumstances in which the relevant CPS operates, the qualitative criteria are not met. It should be noted that this seems to be a very limited possibility, as the burden for the undertaking to demonstrate that the presumptions are wrong is heavy: arguments must be *"sufficiently substantiated"* and *"manifestly call into question the presumption"*. The Commission has plenty of discretion to decide whether a rebuttal submission should be looked into, but if it finds

[67] Not limited to the *market* power or dominance concepts, as it has already been expressed.

it necessary, it should open a market investigation (detailed *below*) following art. 17(3), in which the disregard of market definition is once again patent, as recital 23 of the Regulation clearly states that "*any justification on economic grounds seeking to enter into market definition […] should be discarded, as it is not relevant to the designation as a gatekeeper*".

On the other hand, art. 3(8) considers the case in which an undertaking may met the qualitative criteria but not the quantitative presumptions. In this situation, the EC needs to conduct another market investigation to be able to qualify the undertaking as a gatekeeper. In this case, there is a *numerus apertus* list of economic aspects that the Commission may consider for these purposes. Coherently with the problems addressed by the DMA, most of these aspects are related to either bargaining power of business/end users or structural market aspects that may lead to entry barriers and the tipping of the market.

Another way of increasing flexibility and leave more room for gatekeepers to defend their interests is introduced by art. 4, which allows the EC (*motu proprio* or upon request) to "*reconsider, amend or repeal*" its designation decision, upon either a "*substantial*" change in the facts upon which the designation decision was based; or if the designation decision was based on incomplete, incorrect, or misleading information. This second point is relatively straightforward; but the practical relevance of the first will depend on both what the EC considers to be a *substantial* fact, and the degree of relevance that the questioned fact needs to have on having determined the designation decision.

On a similar line, art. 4(2) establishes that the Commission should *at least* every three years review that gatekeepers still accomplish the qualitative requirements, and whether the list of important CPS for each gatekeeper needs to be amended. Even if some authors, as already mentioned, stated after the release of the DMA proposal that the regulation needed higher to be more flexible with respect to gatekeepers, the time lapse has actually increased, from 2 years in the proposal to 3 years in the final version.

We can see this same line of reducing the duration of procedures and releasing the EC of some workload in the gatekeeper designation procedure. Art. 3 (3) DMA puts the burden of initiating the process on the potential gatekeepers, making undertakings that meet those thresholds notify the EC within 2 months. Then, by art. 3(4) the EC has 45 days to designate the undertaking as a gatekeeper, even if art. 3(5) offers limited possibilities to rebut the presumptions (EC must

resolve in 45 days as well). If the undertaking's arguments are considered, art. 17(3) DMA compels the commission to do a market investigation in a maximum of 5 months to examine whether it should be designated as a gatekeeper (art. 17(1)). The preliminary findings of the investigation must be communicated within 3 months from the date of opening of the investigation. According to the text of the law, this procedure can last up to eight and a half months.

On the other hand, the aforementioned procedure of designation based on qualitative criteria (art. 3(8) DMA) may last only up to 12 months, and preliminary findings may be notified within the first six months. These deadlines, combined with the fact the procedures only have to be carried out once (barring triennial renewals), result in an actual improvement in the speed of intervention for the EC.

These are more proofs that the main objective of the DMA is to solve the procedural problem of current competition law, the slowness of its procedures. The less time the EC spends reviewing basic aspects, the more time it can devote to the crucial aspects of its cases. But for this method to adequately hold, it needs to be that this gatekeeper concepts are actually accurate, and work most of the times in capturing undertakings with potential harm to the economy. Next section analyses whether this is the case.

b) Pertinence of the concept

In order to ascertain the appropriateness of gatekeepers, we could ask ourselves the question of whether they serve as a good proxy for dominance and market power. Given that our analysis in the previous section led us to conclude that the DMA can be considered more as a development of competition rather than a different economic instrument, it seems reasonable to contrast their scopes.

As for qualitative criteria, it should be noted that they contain relevant subjective concepts ("*Significant impact on the internal market*", "*important gateway*", a current or "*foreseeable*" "*entrenched and durable position*") that will need to be interpreted and clarified, as they lack further definitions. This may give some discretion to the EC when having to use these parameters to determine gatekeepers, resulting in a method even more similar to that used under *ex post* rules; even if at the expense of sacrificing procedural efficiency.

On the other hand, a noticeable aspect of quantitative thresholds is that they are directly related to the economic power of the undertaking. Some economic experts argued that perhaps it would have been better to use other types of proxies as objectively measurable criteria, such as (a) dependence on referral traffic from major search engines, social media and advertising, and (b) the extent of multi-homing by users on each side of the market[68]. Whether the choice finally made is pertinent or not will depend on the ability of the final size-related criteria to capture power and dominance.

Economic power of the undertaking is not considered to be harmful *per se*, even if the bigger magnitude of a CPS has the potential to multiply the harmful effects of anticompetitive behaviour, given the increase in the data-driven network effects and in economies of scope and scale. Even so, the abstract potential to cause greater harm is a good starting point for subjecting undertakings to the DMA obligations, but it is far from enough without at least proving that this potential can be more concrete, which is what the EC currently does when looking for a position of dominance under art 102 TFEU.

If we take a closer look at the undertakings that are most likely going to fall under those quantitative criteria, it turns out that this concrete potential could be *de facto* present in those requisites, as it is mainly Google (Alphabet), Apple, Microsoft, Amazon and Facebook (Meta)[69] (the "GAFAM"), who have already been considered as dominant by the EC in their most relevant CPSs[70] in decisions generally confirmed by the General Court. Therefore, either by chance – as the number of gatekeepers is not big enough to infer general results – or as a result of an accurate design for this proxy (or even of a design bespoke for the GAFAM), gatekeeper status seems to be a good proxy for market power when it comes to GAFAM's core markets.

[68] Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T. and Van Alstyne, M. (2021) The EU Digital Markets Act (A Report from a Panel of Economic Experts). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783436

[69] Other predictions point that Booking, AirBnB (online intermediation services), SAP, Oracle or Salesforce (cloud computing services) could also be included, even if it is uncertain whether they accomplish the qualitative thresholds in the near future. Mariniello, Mario & Martins, Catarina (2021) *Which platforms will be caught by the Digital Markets Act? The 'gatekeeper' dilemma*. Bruegel | The Brussels-based economic think tank. Available at: https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma (Accessed: 21 May 2023).

[70] See for instance Bostoen, 2023, p. 7

Still, as the DMA provisions apply to all the CPS of the undertaking that are individually an important bottleneck in terms of art. 3(1.b)[71] and not only the core markets, there could be still concerns about the adjacent CPSs of these undertakings. A general overview of those shows that most of the times the GAFAM cannot be qualified as dominant in such markets[72], but this would still not be a relevant issue. Firstly, because even competition law can intervene in adjacent markets whenever a firm leverages its dominant position from their core market. But also, the objective of the DMA is to complement competition law, and given the trend of digital markets to form digital ecosystems around given undertakings, it seems appropriate to try to tackle those ecosystems as a whole.

For instance, the objective of the DMA would be impossible to achieve if Microsoft (dominant in the PC Operating Systems ("OS") market[73]) had to follow DMA provisions with respect to the OS market, but not with other CPSs such as Microsoft Edge (browser), Outlook or Teams (both number-independent interpersonal communications service ("NIICS")). This could lead to practices forbidden under the DMA such as self-preferencing, benefiting from the bottleneck position that its dominant OS grants them.

Thus, even if heterogeneous, the CPS chosen may serve the final target of regulating whole digital ecosystems, which as seen are home to exploitative conducts by gatekeepers that otherwise would most likely not be tackled by competition law.

Still, this does not retract from the fact that the gatekeeper concept could be more precise: for instance, given that included CPS are so heterogeneous –and, as will be seen below, some of them have particular obligations that other CPS do not face–, we could also have had different nuances that adapt for each particular case. Perhaps, some partial exemptions for platforms whose business and end users both multi-home[74], even if this would delay designating procedures – to the detriment of the legislative desideratum of speed.

[71] DMA art. 3(9); these CPS for which the gatekeeper has been designated have to be expressly listed in the designating decision issued by the EC and are the only ones to which the DMA obligations will apply.
[72] For instance, Microsoft or Meta's app stores, Microsoft's LinkedIn for social networks, the browser market or even the NIICS market, qualified as being competitive by the own EC.
[73] *Microsoft* (Case AT.37792) Commission Decision of Mar. 24, 2004.
[74] Still, even this most straight-forward case would be problematic to implement. For instance, NIICS services are a clear example of platforms with multihoming in both sides – even if in this both sides are end users –, but switching costs are so high due to the gigantic role that network externalities play in such services that exempting them would have made little sense. There is even an article (art. 7 DMA) dedicated solely to introducing obligations to such services, mainly interoperability.

It should be noted that comparing different regulations (US, UK; Germany), there is one clear common factor: all of the new competition instruments are based upon a designation process that makes them applicable only to some selected powerful enterprises. As this approach to big undertakings or ecosystems is not exclusive to the EU, it could be advisable in future years to benchmark performances of the different regulations, to test the outcome of the DMA system and whether the trade-offs it makes are worth. In this case, a comparative analysis shows that the designating methods intended under the new U.K. and Germany regulations are based only in qualitative criteria, where competition authorities call in different platforms for designation after case-specific analysis. When all the new approaches are into force, they may serve as a benchmark to compare the amount of the efficiency gains that the DMA brings (or not).

3.2.2 *Ex ante* regulation: Mechanics and shortcomings

We have already seen the rationale behind the *ex ante* mechanics of the DMA obligations, but a closer look at the way they have been implemented can give us a better understanding of the system and to what extent the EC has left behind economic analysis and attention to detail. Furthermore, considering that competition law remedies were one of the main flaws that led to the designing of the DMA, it should also be advisable to review whether the problems have been solved.

a) Obligations

i. Structure

Besides the discussed distinction that the own Regulation does between the self-executing obligations of art. 5 and those susceptible of being further specified of arts. 6-7, another classification that offers the possibility to analyse the obligations in more detail could be done with regards to (i) proscriptive rules (referring to conducts that the gatekeepers should refrain from doing), and (ii) prescriptive rules (referring to obligations that gatekeepers should respect, or conducts actively imposed to them)[75].

[75] This is the classification I have found the most useful for the purposes of this work, following Akman, 2021 (p.16) and Bostoen 2023; but it is not the only possible one. For instance, De Streel, A., Liebhaberg, B., Fletcher, A., Feasey, R,, Krämer, J. and Monti, G. (2021) *The European proposal for a Digital Markets Act: A first*

We find most of the proscriptive rules in article 5 (e.g., obligations relating to manipulation and reuse of personal data (art. 5(2)), or rights of the business users of CPS (arts. 5(3)-(8))); but also in art. 6 (see art. 6(2), which prevents gatekeepers from using data from its business users that is not publicly available; and art. 6(6), which prohibits gatekeepers restricting the ability of end users to multi-home in their CPS).

As we can see, these prohibitions are not alien to conventional competition law, as most of them are based on previous cases already faced by the EC. Therefore, they should in theory be less prone to type II errors, but at the same time this raises a question: where they really that necessary? Given that the EC has already defined the markets and ascertained the dominance of the relevant gatekeepers in their core markets, one could think that procedural efficiency gains from these cases would be smaller. Still, they could be useful to avoid such practices to extend to other gatekeepers in case they entered into new or adjacent markets (a practice that we have seen is common in digital environments), when doing so with conventional tools would imply forcing too much the limits of competition law. One could think that in these cases the confidence in minimizing type II errors would perhaps be smaller, but given that what is relevant for the risk of anticompetitive conduct to appear is the own structure of markets and platforms and not the particular characteristics of undertakings, this increase in risk of type II errors would not be so relevant.

Another conclusion we can draw from the list of proscriptive rules is that generally they tend to aim for the goal of protecting intra-platform competition (i.e., fairness), which we have seen has a component of exploitation of business users, something hard to tackle under current competition law. Still, it should be noted that both types of rules can (and do) address both types of objectives, as it will be developed below.

As for the prescriptive rules, as opposed to the previous type, they are mainly concentrated in art. 6 (which makes sense, given that demanding a specific conduct has better results if there is an option of specifically designing them, as the EC can do with this article) and 7 (NIICS-related obligations, mainly mandating interoperability). The exceptions would be arts 5(9) and

assessment. Available at: https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/ classify them according to four possible theories of harm.

(10), regarding information rights on advertising outcomes with both advertisers and publishers of the advertising, respectively. As for the art. 6 obligations, they refer to artificially self-preferencing (paras. 3-6), prevention of multi-homing or interoperability (paras. 7, 9-10), transparency (paras. 8, 11) and general protection of business users (paras. 12-13).

When examining the obligations, it becomes evident that they surpass the boundaries of competition law, being more in line with the tools used by economic regulation instruments. This is so because they not only seek to preserve the level of competition that would result in absence of market failures, but also to foster it (hence why they are not that much based in previous competition law cases, as we have seen that the EC cannot target most of these issues). Thus, the goals of prescriptive rules are more in line with contestability and the fostering of inter-platform competition, giving more resources (and thus, bargaining power) to business users (access to more information, better competition conditions with respect to the gatekeeper's adjacent products in his platform) and lowering structural barriers to entry. Yet again, this does not imply that a given prescriptive rule aims for fairness, which does happen (see e.g., arts 6(11) and (12)).

It should be noted that these obligations mostly aim to facilitate entry and expansion of new CPS suppliers, instead of already existing gatekeepers. This could be due to the fact that, according to some economic theories, the instauration of multimarket contact between different undertakings (in this case, multiplatform) can help collusive practices to develop[76]. It thus would make sense to aim for the entrance of new platform providers rather than help the existing core of gatekeepers to expand. On the other hand, some of the obligations also directly promote de-platforming, removing the need to use the CPS at all for business and end user interaction after it has been first established through the platform; thus removing any possibility of abusive behaviour by gatekeepers.

As for the relation that each type of obligations has with the ultimate goals of the Regulation, as it was introduced some paragraphs above, it should be noted that both goals of fairness and contestability are intertwined (as stated in recital 34 DMA), so any given obligation may target both objectives irrespective of its nature. This is further enhanced by the fact that inter and intra-platform competition present strong interplays, feeding back on each other. Fostering intra-

[76] See for instance Bernheim, B. D., and Whinston, M. D. (1990). *Multimarket Contact and Collusive Behavior*. The RAND Journal of Economics, 21(1), 1–26. https://doi.org/10.2307/2555490

platform competition gives more power to businesses users, which in the end can grow up to the point of creating a new platform to challenge their original CPS (see for instance, even if out of the scope of the DMA, the case of the Epic Games Store entering a market with high entry barriers such as the PC videogame marketplaces[77]). On the other hand, promoting inter-platform competition will also improve conditions for businesses users, as more competition among CPS grants them more options to switch platform if conditions offered are exploitative.

If we were to be more precise, we could divide the obligations pursuing inter-platform competition into three groups, according to the concrete form of abusive behaviour they tackle[78]: first, obligations forbidding the strengthening and entrenchment of market power in CPS, such as arts. 6(3, 9, 11), which try to lower barriers to entry that, even if structural, gatekeepers are able to remove. Secondly, obligations addressing the leveraging of market power from the CPS to adjacent platforms, such as arts. 6(2, 4, 5, 7), an effective way of targeting possible ecosystems. A third set of obligations target the exploitation of market power, this is, gatekeepers directly abusing their business users. An example of this could be art. 6(12).

Finally, it should be noted that some of the obligations present some concern for extra-platform competition, which refers to those "ancillary" (using terminology of the DMA draft, even if the concept was deleted in the final version) services that gatekeepers offer in relation to, but outside of their CPS. Also targeting this objective along with the main two competition concerns, we can find obligations addressing tying practices (e.g., arts. 5(7) and (8)) or data processing practices such as art. 5(2).

ii. Adaptability

As introduced before, the regulatory and market powers that the DMA grants to the EC play an important role in the configuration of the obligations provided by the Regulation, as they allow for both higher flexibility and adaptability of the obligations, depending on the provision

[77] Following its release in December 2018, the number of active users of the Epic Games Store has increased year after year. Epic Games. (2023). *Number of active users of Epic Games Store worldwide from 2019 to 2022 (in millions)*. Statista. Statista Inc. Accessed: May 23, 2023. https://www-statista-com.sare.upf.edu/statistics/1234012/number-epic-games-store-users/

[78] Ibáñez Colomo, P. (2021) *The Draft Digital Markets Act: A Legal and Institutional Analysis*. Available at: https://ssrn.com/abstract=3790276 classifies them according to the use of market power that each obligation seeks to prevent (strengthening, leveraging or exploitation of market power).

considered. This configuration, referred to as "*semi-flexible*" in the DMA Impact Assessment[79], was the chosen one for the final version among two other extremes, a non-dynamic and a fully flexible one.

All of these procedures shall come after conducting either a market investigation (chapter IV DMA, arts. 16-19), which has three variants depending on the situation that leads to it; or an inquiry procedure (chapter V DMA, arts. 20 *et seq.*). The latter is defined in general terms for the three situations in which it applies (implement obligations subject to further development, inquire non-compliance with the Regulation and imposing fines), and grants the EC a set of tools to increase precision and reduce risk of errors in their duties. It comprises the power to request information and data from undertakings, to carry out interviews and take statements from both natural and legal persons, and to conduct unannounced inspections in undertakings.

For the purposes of this work, the first relevant procedure is introduced in article 8(2) DMA. It allows the Commission to adopt implementing acts, as to specify "*the measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations laid down in Articles 6 and 7*" (which we have seen are mainly prescriptive), following an inquiry procedure. This helps to reduce the impact of the trade-off suffered by moving from standard-based to rule-like obligations, given that the inquiry is meant to serve as a way of finding the optimal level of intervention needed and the best ways to induce compliance. In contrast, the pace of the procedure is still likely to improve with respect to current competition law, as art. 8(2) DMA indicates that the implementation decision should come within 6 months from the opening of the procedures; and art. 20(2) allows the Commission to use its investigative powers even before opening the procedures.

Another important procedure is the one contained in art. 12 DMA, which allows for updating obligations for gatekeepers. It is worth mentioning that this possibility applies also to the self-executing obligations of art. 5. These updates must be agreed after conducting a market investigation (art. 19 DMA) and are to be done through the means of delegated acts (art. 49 DMA), which are subject to control of experts, Member States, the Council and the Parliament. It is to be seen whether this trade-off between speed and control has been unbalanced in favour of the later, with the aim of avoiding misconducts of the EC that could lead to overinclusion of

[79] DMA Impact Assessment, para. 181

gatekeeper conducts. More elements pointing in this direction are the fact that definitions of unfair or contestability-limiting practices are restrictively defined (art. 12(5)); and that there is only a *numerus clausus* list of possible updates (art. 12(2)). Nonetheless, this list is relatively wide: it includes (i) extending targeted obligations to other CPS, business and end users or different types of data; (ii) specifying the way in which obligations of arts. 5 and 6 are to be performed, (iii) increasing the conditions required in imposed behaviours to gatekeepers; and (iv), to regulate relationships between CPS and other services of gatekeepers. In a separate way, arts. 12(4-5) allow for updating the NIICS-related obligations of art. 7. On the other hand, a beneficial aspect of having this closed list is the fact that it brings legal certainty to gatekeepers and other operators, which reduces the adverse effects that legal uncertainty could have on basic goals of the DMA, such as innovation[80].

As a last note, it should be remarked that art. 1(5) DMA states that no more obligations shall be imposed by Member States to ensure contestable and fair markets, which is in line with the centralization at the EU-level of digital markets enforcement sought by the EC. This could in theory lead to under-enforcement of practices that gatekeepers may make only at a state-level in some member states due to their own market characteristics. Nonetheless, the DMA does leave the gate open for member states, as if they justify that they are looking after objectives other than those of fairness and contestability, they may be allowed to impose further obligations to gatekeepers. Their ability to do so will once again depend on what is the exclusive scope and margins that the Commission gives to the objectives of the DMA.

iii. Shortcomings

The change in paradigm that *ex ante* rules suppose has naturally led to some criticism, not only because of the abstract revolution, but also due to the concrete way of implementing them.

The main critique posed by a sector of the doctrine is the perceived excessive rigidity of the rules[81]. They contend that the provisions outlined in the preceding section are not enough to avoid the degree of possible overinclusion of conducts that they find optimal.

[80] Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T. and Van Alstyne, M. (2021) *The EU Digital Markets Act (A Report from a Panel of Economic Experts*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783436

[81] See for instance Larouche, 2021, pp. 545-6 or Bostoen, 2023, pp. 24-26.

The foremost argument behind this view is that the DMA does not grant gatekeepers the possibility of offering an *efficiency defence*. This concept refers to the possibility of a gatekeeper to argue that a conduct which a priori violates an obligation is in fact bringing efficiencies to the market (and, in the best-case scenario, that the conduct is non-harming and beneficial to the subjects that that very own obligation is intending to protect).

The rationale behind this decision of the Commission is that most of the times that gatekeepers bring these arguments they are one-sided and present conclusions that do not match the evidence that the DMA Impact Assessment Report gathers through its numerous reports and studies. Besides that, these arguments have been rejected by the Courts as being unfounded[82]. Moreover, what an efficiency defence *de facto* does is reversing the burden of proof, which leads to gatekeepers bringing – as happens now – tons of information for the EC to review, significantly harming the procedural haste gains.

A proposed solution could be to work with a grey list (areas where efficiencies can appear and thus an efficiency defence could be justified) and a blacklist (unjustifiable under no grounds) of practices[83]; but this leaves unsolved the problem of the reduced efficiency gains. Yet again, the viability of this solution will depend on the accuracy of each greylisted obligation to accurately capture *only* harmful behaviour: the worse the rule, the more needed this defence would be. In this line, many supporters of this theory note that the current distinction between self-executing obligations and those susceptible of further development partially does the same job as some black and grey lists would do. The main point is the interpretation and final use that the EC gives to the tools granted by art. 8(2). The other main critique regards the concrete obligations that should fall under each list (for instance, it can be argued that identification decentralisation set by art. 5(7) may actually entail some risks); but as the doctrine is divided to this extent, it may be that the final solution has opted to accept some trade-offs whose pertinence is difficult to measure until they are finally applied[84].

Furthermore, it should be considered that art. 8(7) modulates the process of specifying obligations (the DMA equivalent of the grey list), stating that measures approved should be proportional and ensuring that they help to achieve the objectives of both the Regulation and

[82] DMA Impact Assessment Report, para. 158.
[83] Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T. and Van Alstyne, M. (2021) The EU Digital Markets Act (A Report from a Panel of Economic Experts); De Streel, A., Liebhaberg, B., Fletcher, A., Feasey, R,, Krämer, J. and Monti, G. (2021) *The European proposal for a Digital Markets Act: A first assessment*. Available at: https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/.
[84] Even if there is criticism concerning the actual choice that dees it arbitrary. See, for instance, Akman 2021.

the obligation concerned. Thus, if a conduct by a gatekeeper abstractly prohibited (only by arts. 6 and 7) in the concrete case helps fostering fairness and contestability, the EC may have a gate to adapt to it under this article. In any case, we should wait to see what is the use that the Commission makes of this possibility before drawing definitive conclusions, but it is significant that recital 23 states that alleged efficiencies are irrelevant for the designation of gatekeepers, but nothing is said about the role of efficiencies in interpreting and applying obligations. It should be noted that art. 102 TFEU does not include an express reference to an efficiency defence, yet it has been included by jurisprudence.

Tangent to this point, it should be noted that some of the obligations expressly provide for the possibility of end users to consent to the activity of the gatekeeper (art. 5(1)), or to justify the conduct on the basis of the integrity, security and privacy of the gatekeeper, the platform or the end user (arts. 6(4) and (7)).

Still, this lack of efficiency defence does not mean that gatekeepers are left unarmed, as they have safety valves for critical cases. Art. 9(1) DMA provides an exemption in the case that compliance with a specific obligation "*would endanger, due to exceptional circumstances beyond the gatekeeper's control, the economic viability of its operation in the Union*". This exemption only allows for a temporal suspension in very restricted cases, but even if it cannot be comparable to an efficiency clause, it allows for covering the most crucial cases. Alongside that, art. 10 allows for an exemption of similar scope to the previous one, but in the grounds of "*public health and public security"*[85], which for instance may be of use for the mentioned art. 5(7), as cybersecurity could be regarded as a matter of public security.

All in all, doing an integral interpretation of the DMA, it seems that depending on the interpretation of the open provisions that the EC does, the lack of efficiency defence can be well covered, without incurring in the procedural efficiency losses to which it would have led. As a final note, it is worth mentioning that neither the U.S. legislative bill proposals[86] nor the 10th amendment to the German Competition Law act provide an efficiency defence, which may suggest that the belief that its costs outweigh the benefits is believed to be true beyond the EU

[85] It should be noted that the restricted character of this provision is further reinforced by the fact that the DMA proposal also considered *"public morality"*, an element that has not made the final cut.

[86] Instead of an efficiency defence, platforms can only use an "*affirmative defence*" to refute presumptions of illegality. H.R.3816—*American Choice and Innovation Online* 2021, 117th Congress (2021–2022), s. 2 (c): "*the defendant establishes by clear and convincing evidence* […]".

(even if the UK DMCC does, which could be used in a future to compare the outcomes of the regulations).

Besides the lack of efficiency defence, there have been other issues pointed out by part of the doctrine. For instance, it can be argued that the fact that most obligations derive from current competition law cases has led to them being solely aimed at current practices, lacking capacity to adapt to future anticompetitive conducts. As the extent of the commented delegated acts is limited by a considerable number of factors, new practices that sufficiently diverge from those included in the law will have to be faced with conventional competition law – or with a complementary legislative body.

Besides that, we have seen that when considering the classic competition law parameters (price, quality, choice, and innovation), the DMA particularly focused on the last three, disregarding common anticompetitive practices related to prices, such as loyalty rebates[87] or exclusivity payments[88] by dominant platforms, which can also artificially rise entry barriers to markets and lead to market tipping. Perhaps the reasoning behind this exclusion is that it is more complex to infer an *ex ante* rule that is not too much overinclusive given the nature of the conducts themselves, but perhaps it would have been advisable to tackle them with a transparency or communication obligation, or to state a very generic rule subject to great development under art. 8(2). Still, these conducts could be tackled using art. 102 TFEU[89], but it is at least a surprising incoherence to not find them regulated.

Finally, a part of the doctrine[90] has argued that the DMA has missed a big opportunity when relegating the obligation to impose interoperability only for operative systems, virtual assistants (art. 6(7)) and NIICS (art. 7 DMA). If the target was to foster inter-platform competition among gatekeepers, this is surely a big miss for the regulation, as for instance search engines or social networks could also benefit from this practice. And if instead, as hinted, the DMA aims for allowing new entrants to bring platforms to compete with gatekeepers, the restriction of this

[87] Loyalty rebates are financial incentives offered by dominant platforms to customers or business partners who consistently choose their products or services, aiming to encourage loyalty and discourage customers from switching to competitors.
[88] Exclusivity payments refer to financial arrangements made by dominant platforms with suppliers or business partners, wherein they receive payments or incentives in exchange for exclusive or preferential access to their goods or services. These payments can be in the form of discounts, upfront payments, or other financial incentives.
[89] *Intel v Commission* (Case C-413/14 P) ECLI:EU:C:2017:632 paras. 137–141.
[90] Larouche, 2021, p. 554

obligation to NIICS is an incomprehensible mistake, as it would have allowed for a huge decrease in structural barriers to entry coming from data-driven networks effects and economies of scale and scope. Still, this problem could be solved by the EC by means of the art. 12 DMA procedure.

b) Remedies

Any analysis of the *ex ante* rules contained on the DMA would be incomplete without considering the other side of the coin, the remedies provided in the Regulation.

To this extent, it seems that the EC was well aware that one of the main problems that competition law faced when dealing with digital markets was the uncertainty with respect to the outcome of the remedies applied. This, altogether with the self-enforcing nature of a substantial part of the obligations, has led to the DMA attributing a great importance to the control and supervision of its obligations and remedies.

This nature can already be seen in arts. 8(1) and 11 DMA. The first introduces the general principle that gatekeepers "*shall ensure and demonstrate compliance with the obligations*", which is further developed by art. 11, which states that 6 months after the designation of gatekeepers they shall provide the EC a report describing measures taken to comply with the obligations of arts. 5-7; a report which is to be updated annually.

Furthermore, to check compliance, the EC should make use of the inquiry procedure described in the previous section and, all of its described tools. For this particular case, art. 26 further gives the Commission the power to "*take all the necessary actions*" to monitor the implementation and compliance with DMA obligations and the decisions resulting from the procedures explained below (arts. 8, 18, 24, 25 and 29). These actions may include (but are not limited to) appointing external experts and auditors and appoint officials from Member States' competition authorities to help the Commission. Finally, another measure aimed at tackling the competition law problem of ineffective (even prejudicial) remedies comes with art. 8(9), which allows the EC to review its obligation specifications of art. 8(2) if they are found to be ineffective.

Inversely, art. 8(3) allows gatekeepers to require the EC's assistance in ascertaining whether an intended remedy will suffice to ensure compliance with a particular obligation. This participation of the gatekeepers is further enhanced by art. 34 DMA, which grants gatekeepers

the right to be heard before the Commission adopts any decision pursuant to all the main articles covered in this section.

Having all these control mechanisms, whenever the EC finds out that there has been a case of non-compliance (which may be of an obligation, of specifying measures of art. 8(2), or other remedies, interim measures or commitments), it should adopt a "*non-compliance decision*", following art. 29 DMA, which should be adopted within 12 months of opening the inquiry procedure of art. 20. A first remedy tool is introduced here, as art. 29(5) states that in the non-compliance decision it can issue cease-and-desist orders to gatekeepers (a *prima facie* behavioural remedy which is not alien to competition law). Otherwise, it should adopt a decision closing the procedure.

Interim measures are another remedy tool can be found in art. 24 DMA. These are only available in cases of "*urgency due to the risk of serious and irreparable damage for business users or end users*", after proceedings of art. 29 have started. They have only a temporal (and renewable) time scope, and should help to deal with one of the main problems of digital markets, which is the combination of the extremely rapid changing nature of most platforms and the irreversible nature of most market failures. These remedies again are not new, but their implementation is expected to be faster than under competition law procedures, which may be enough to be an improvement. Still, given their temporary nature these are also behavioural and not structural remedies. Considering that most problems of digital markets are something structural, there are justified concerns on whether these two first tools will be enough.

Whenever the EC has concerns about a gatekeeper conducting systematic non-compliance with its obligations, they can open a market investigation following art. 18 DMA, which should conclude in 12 months. This is at least three times faster than the mean time it takes under competition law procedures[91], so once again the procedural efficiency goal seems on principle well accomplished.

According to arts. 18(1) and (3), systematic non-compliance implies receiving three or more art. 29 non-compliance decisions (concerning any CPS) within an 8-year period, but only with

[91] Bostoen, 2023, p. 27

respect to one or more of the obligations provided in arts. 5-7. The remedy provided for this case consists in adopting "*an implementing act imposing on such gatekeeper any behavioural or structural remedies which are proportionate and necessary to ensure effective compliance with this Regulation*" (art. 18(1)).

Therefore, we finally find the option to implement a structural remedy, something that was supposed to be one of the main objectives of the DMA. Still, this leaves room for some concerns, given that they require three strikes to be applied. Therefore, if the problem posed by a gatekeeper is indeed of a structural nature, it may fail to comply with the obligations and the specifying measures of art. 8(2) repeatedly and the EC will not be able to properly address the issue until the third time, significantly delaying the process. Even so, this problem may be mitigated if the EC decides to use art. 8(2) to force gatekeepers to apply structural changes to their platforms and business models, but this is yet to be seen.

Even if the room for structural remedies is this limited, we should be thankful, as in the original DMA proposal those structural remedies were limited to "*either where 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*"[92]. After criticism of a relevant section of the doctrine, these provisions have been relaxed up to the point where they stand now, with art. 18(2) DMA even allowing to block possible mergers, when proportionate and under certain conditions.

Another concern with this respect is the fact that the Commission can still choose to apply only behavioural remedies, which in some cases may be the most suitable option, but that may lead to possible suboptimal solutions in case they decide to not to apply a structural change where it was necessary, perhaps due to fear of going too far. Still, as all procedures involve constant communication with gatekeepers, and third parties are allowed to intervene (*see* e.g., art. 27 DMA), in theory the possibilities of adopting a wrong decision should be reduced. The fact that these remedies can be tailor-made by the EC also points in this direction.

Finally, there is an underlying issue with these structural remedies. To achieve the objectives of solving structural market failures, many gatekeepers will need to change the way they monetize their platforms, thus altering their business models or the design and essence of their products. This has a moral implication that should be considered, relating to the freedom of

[92] DMA proposal, art. 16(2).

undertakings to rule their own businesses: up to what point are those forced structural changes admissible? The limits with the freedom to conduct a business (recognised in art. 16 of the Charter of Fundamental Rights of the European Union) need be clearly defined in order to avoid excessive intrusion. Nonetheless, this aspect should be mitigated by the fact that the DMA ensures that remedies should be applied by the gatekeepers in coordination with the EC during the whole process, so they can have constant dialogue to find the best solutions for both parties – ultimately, for gatekeepers and its business and end users.

At this point, it is worth making a parallelism with the classification made with obligations. We can divide the remedies according to the type of obligation they result from. On the one hand, proscriptive rules are to be enforced using injunctions or cease-and-desist orders, which can be categorized as reactive remedies. Given the nature of such obligations, little to no structural remedies seem to be *a priori* needed to enforce them. Therefore, they are up to a certain point exempt of this debate that structural remedies pose.

On the other hand, when it comes to prescriptive rules, injunctions alone are not enough. They demand from the enforcing party to provide more explicit guidance on the desired course of action, which leads them to be categorized as "proactive" remedies, which are the ones subject to this dilemma.

Finally, the last set of available remedies are fines, described in arts. 30-33. Again, these remedies are not something new, but they can result in really significant amounts that serve to dissuade firms from non-compliance. Briefly, fines in art. 19 proceedings can be of up to 10% of worldwide revenue in the first non-compliance in a period of 8 years. For following breaches of the same or similar obligations, this amount is raised to 20% of global turnover. This concept of scaling fines in case of recidivism may also serve to increase deterrence. Besides those, minor breaches of other obligations can also imply fines of 1% of worldwide turnover.

4. CONCLUSIONS

The objective of this work has been to analyse and ascertain the systematic nature of the Digital Markets Act, and to explain and determine whether some of its main defining traits are suitable for accomplishing its objectives. In order to do so, after exposing the regulatory context and

analysing the key features of digital markets, a first analysis of the main abstract characteristics of the Regulation has been conducted, for then comparing it with the traits of different areas of law and see which one fits better with the DMA. The second part of the work has focused on analysing the concrete implementation of the elements that define the subjective and objective scope of the regulation and the set of obligations and remedies it imposes to concerned gatekeepers.

The starting point for the first part of the job was the self-definition that the own DMA does, classifying itself as an instrument of economic regulation different from competition law. When it comes to the objectives it pursues, fairness and contestability, there are clear influences from both areas of law. Fairness relates to preserve intra-platform competition, aiming to avoid exploitative and exclusive conducts. These two types of conducts are already pursued by competition law, even if the later is difficult to pursue. Contestability on the other hand refers to the competition law goal of keeping markets competitive, but goes further when trying to foster that inter-platform competition, lowering structural barriers to entry even when they are not directly caused by gatekeepers.

Furthermore, the four classical parameters of competition law need to be also considered by the EC, but from a different perspective. First, there is a shift of the focus, moving from mainly price targets to innovation and choice objectives. Moreover, they are not directly pursued goals, but rather targets to keep in mind and attain in the long term when designing policies. This is so because the goal is no more to maximise consumer surplus, but to make markets efficient, which due to the type of market failures is believed to implicitly bring a redistribution towards business and end users.

The other section of the first part of the work was an abstract analysis of the enforcement methods of the Regulation. The main difference with respect to competition law is the move from using standards (under the "*more economic approach*") to *ex ante* rules, induced by the long duration of enforcement procedures and the underenforcement of anticompetitive conducts that took place under the current system. As with objectives, this conversion comes motivated by a change in the assumptions that led to the previous system. This means that, as happens with objectives, the special characteristics of digital markets have recommended that the starting point for designing the DMA tools is that of the rules of typical instruments of economic regulation. But stopping the analysis there would leave behind part of the picture, as the DMA

goes on to grant the EC a big number of tools to help increasing flexibility of these rules, so that the case-by-case analysis that characterizes the current EU system is not totally lost. Furthermore, we have seen that a detailed analysis of the types of rules used by competition law and economic regulations leads us to find *ex ante* and *ex post* rules in both types of instruments.

Considering all these traits, we can see that the pretended departure from competition law is far from total. All the main and secondary objectives are either directly taken from competition law, taken a step further by broadening its scope or policy redefinitions by changing the underlying assumptions of old goals. Therefore, if anything, the DMA supposes an evolution of current competition law, at least teleologically, which adapts instruments typical from economic regulations to fit its very own objectives. But these tools, that are not even alien to competition law, are chosen because are the ones that fit best the purposes of the regulation. Consequently, classifying it as an instrument of economic regulation solely on this basis implies assuming that laws are classified only according to their most common enforcement methods, which misses a substantial part of the analysis.

Nonetheless, there are viable reasons for classifying the DMA outside competition law (without considering advantages in legal procedures of basing the Regulation in art. 114 TFEU instead of art. 354 TFEU). For instance, given that the market structure and failures that led to the rethinking of the underlying assumptions of the regulation are exclusive to digital markets, perhaps the EC did not want this regulation to lay in the same optic than current competition law because of these differences in the very own starting point, which could lead to undesirable outcomes if the whole legislative body was to be interpreted altogether. Another relevant reason is the fact that EU competition law in a strict sense cannot be applied without dominance or an anti-competitive agreement. Even if we have seen that there are concepts that, although different, have the same effects than dominance in digital markets; a very strict interpretation would render the option of considering it competition law unviable.

Still, I think these last reasonings are not strong enough to overcome the prior reasoning. Even if taking elements from economic regulations, the vast majority of traits of the DMA shape it as an evolution of competition law.

The second part of the work analyses the concrete implementation of two of the most distinctive traits of the Regulation, starting with an evaluation of the concept of gatekeepers.

The DMA implements qualitative criteria to design gatekeepers, with quantitative thresholds acting as presumptions for the qualitative requirements. Despite having other alternatives, the final text links these quantitative criteria to the size of the undertaking, which could rise concerns as size *prima facie* is not a problem. But when applied to european platforms, we find that the companies that will be designated (mainly the GAFAM) have already been considered dominant in their core CPS, so in this case the size criteria seem to be a good proxy for market power.

Outside their core markets, they have not been found dominant, but this should not pose much of a problem: first, because competition law can intervene in an adjacent market in the case that an undertaking leverages to it its dominant position from another market. And second, because given the trend in digital markets of gatekeepers to create ecosystems around their core markets that further enhance market failures, it seems advisable – and it is the objective of the DMA – to tackle these ecosystems even before dominance arises in the adjacent markets, due to the irreversibility of problems such as the tipping of the market or the behavioural biases that gatekeepers induce in their end users. Given that further modulations or partial exemptions would be problematic to apply – even to the extent of rendering the DMA unapplicable to whole CPSs –, and the fact that most obligations are to be specified and adapted by the EC in constant talks with the gatekeeper, the solution adopted in the final DMA seems *a priori* a good one.

Finally, the last section of the work deals with the concrete implementation of the *ex ante* obligations and their remedies.

As for the structure of the obligations, the first thing to note is that they are divided into proscriptive and prescriptive rules, mainly pursuing the fairness and contestability goals respectively. Against the view that proscriptive rules may be redundant with respect to competition law as it stands, it can be argued that they serve to rapidly extend enforcement of already anticompetitive behaviour in a CPS to other gatekeepers entering into it in a more efficient manner than competition law would do, and without forcing its limits. Furthermore, as both fairness and contestability objectives are intertwined, having these obligations also indirectly helps with objectives out of the scope of the DMA.

Another concern has already been mentioned, regarding the possible rigidness of having rule-type obligations. This is more of a problem in the self-enforcing obligations, who cannot benefit from the specification process of art. 8(2) DMA. This article has the potential to allow for applying tailor-made obligations to gatekeepers, even if the true strengths of the method will depend on the final use that the EC makes of it.

As for the possibility of adaptation of the obligations to future practices, in my opinion the DMA has found a very strong balance: even if the updating procedure has strong formal requirements (it is an EC delegated act after all), the list of possible expansions is sufficiently wide (even if sufficiently disruptive practices will be left out), and the fact that it is *numerus clausus* helps bringing legal certainty to market agents, avoiding unnecessary harm to innovation. This concern is in line with the focus that the DMA puts on innovation and choice over price conducts, which is actually incoherent considering that all of them have the same potential capability of harming contestability and fairness, but the last ones have been totally omitted.

A final concern comes with respect to the lack of an efficiency defence. Yet, most critiques proposed an alternative solution (black and grey lists) which in practice serves almost the same function that the distinction of arts 5 and 6-7 DMA, even if as said the extent of these similarities will depend on the use that the EC does of art. 8(2). Still, the view that this will be a valid alternative is supported by the exigence of proportionality of art. 8(7) and the fact that some provisions expressly provide for the possibility of justifying the conduct of the gatekeeper. Furthermore, there are other safety valves for critical cases, so the worst-case scenarios for gatekeepers are already covered.

As for which obligation should belong to each list, the fact that each author offers their own different solution based on reasonable arguments leads to thinking that the final list that was approved could be considered as a political decision that accepts the trade-offs that considers to be the most efficient, and whose appropriateness can only be judged after an analysis of its application.

All in all, considering the DMA as a whole, it appears that the interpretation of some of the open provisions by the EC will play a crucial role, as it can potentially replace an efficiency defence while avoiding any procedural inefficiencies that would have otherwise arisen.

Finally, regarding the remedies, the central role given to control and supervision of remedies is a key choice considering the shortcomings that classical competition law remedies had in digital markets. Both inquiry procedures and market investigations serve well to this ends, and the fact that gatekeepers can *motu proprio* seek assistance is a tool that – if used – will surely help enforcement. Furthermore, the concept of scaling fines can serve well as an element of deterrence.

Nonetheless, it should be noted that after making use of art 8(2), available remedies are only behavioural (and not structural) until the systematic non-compliance procedure of art. 19, which takes three non-compliance decisions to apply. This may slow definitive remedies from taking place. Besides that, the structural remedies in the DMA pose underlying issues related to the potential impact on gatekeepers' business models and the freedom to conduct business, which in many cases will need to change to comply with the Regulation. Clear limits must be defined to avoid excessive intrusion, but the DMA promotes constant dialogue between gatekeepers and the European Commission for mutually beneficial solutions.

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