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## SHIFTING FROM SANCTIONS TO PREVENTIVE REGULATION IN DIGITAL FRAMEWORK: A CRITICAL PERSPECTIVE

### **Abstract**

The historical period we are living through is characterised by the vivacity and opposing thrusts: on the one hand, in fact, it emerges clearly that the intention of the European Union regulation is *inter alia* to modernise the traditional system, making it more sustainable, resilient, and efficient.

On the other hand, it is evident that the current war events bring attention to more concrete and current needs.

In this complex framework, it is useful to proceed step by step and to pay attention to the different segments that are thus characterising the path of European legislation.

Among others, it is interesting to focus on the theme of digital platforms, highlighting positive elements and possible criticalities.

Digital platforms and the digitalisation of commerce, and thus, more generally, of our habits, are, in fact, profiles characterised by a multiplicity of issues that need an accurate examination.

In addition to the existing relationship between technology and sustainability (still to be explored), we consider it useful to focus here on the issues of controls and responsibilities, to verify their efficiency and system compatibility.

It is increasingly necessary to understand whether the usual "sanctioning" and ex-post "control" tools are adequate or far from a regulation that, instead, proves to be more efficient if proactive and intended not to allow unsuitable players to enter the market.

The question addressed in this paper is whether the new rules set out in the Digital Markets Act could be the most adequate and efficient way to ensure access to the digital market by other (smaller) players.

To answer this question, we will first give a brief overview of the current legal framework based on ex-post remedies. Then, we will analyse the main innovative provisions as well as the main criticisms.

**JEL CLASSIFICATION:** K22

### **SUMMARY**

1. Legal framework – 2. The Digital Markets Act: Gatekeepers and Consumers – 3. Gatekeepers' obligations – 4. Main criticisms – 5. Conclusions.

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## 1 The legal framework

Digital platforms, as is well known, are increasingly shaping economic, political, social, and cultural life. Over the past decades, tech giants increased their power in an uncontrolled way and legislators around the world are currently struggling to adequately respond to the new risks that accompany them<sup>1</sup>. It seems that traditional antitrust law, based on *ex-post* remedies, is no longer able to address market failure and gatekeepers' behaviour.

Even though lately national authorities have been very proactive in the enforcement of antitrust law, pursuing to limit the digital platform growing powers, nonetheless such authorities did not manage to improve competitive conditions in platform-controlled settings.<sup>2</sup> That inefficiency is mostly due to the length of the antitrust process and to the difficulties of the courts to deeply understand the complexity of digital economy.<sup>3</sup> The competition rules are currently provided in national regulations and, within the EU framework, in articles 101 and 102 of the Treaty on the functioning of the European Union (corresponding to Articles 81-89, in the previous version of the Treaty), which concern national regulations on business activities. In particular, the above-mentioned provisions prohibit anti-competitive agreements and concerted practices, as well as abuses of dominant positions.

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<sup>1</sup> Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, 'Competition Policy for the Digital Era', Publications Office of the European Union, [2019]; J. Furman, D. Coyle, A. Fletcher, D. McAuley, and P. Marsden 'Unlocking Digital Competition, Report of the Digital Competition Expert Panel' [2019].

<sup>2</sup> Among others, it is worth noting that the Italian Antitrust Authority ("*Autorità Garante per la Concorrenza e per il Mercato*" or "*AGCM*") issued over the past few months very significant sanctions against big tech companies such as Amazon and Google, for instance: (i) in *Google Ireland Ltd vs U.di.Con* [2021], Italian Antitrust Authority "*Autorità Garante per la Concorrenza e per il Mercato*", PS11147, and in *Apple Distribution International Ltd. vs U.di.Con* [2021], Italian Antitrust Authority "*Autorità Garante per la Concorrenza e per il Mercato*", PS11150, AGCM accused both Google and Apple to deploy aggressive commercial practices, provided that such companies omitted relevant information and pre-selected user acceptance to the transfer and use of data for specific purposes. Moreover, in 2021 AGCM fined Amazon Europe Core S.r.l., Amazon Services Europe S.à r.l., Amazon EU S.à r.l., Amazon Italia Services S.r.l. and Amazon Italia Logistica S.r.l. with the huge sanction of about Euro 1 billion. Specifically, the Authority accused Amazon to hold a position of absolute dominance in Italy within the intermediation services on marketplace which leveraged the company to favour its own logistic services – Fulfilment by Amazon (FBA), harming competitors and strengthening its own position. Indeed, AGCM considered that Amazon tied to the use of FBA the access to a set of exclusive benefits essential for gaining visibility and increasing sales. One of the most relevant benefits is the Prime label, which makes it easier and quicker to sell products to the consumers who are members of Amazon Prime programme; Amazon prevented sellers from associating the Prime label with offers not managed with FBA logistic service. In so doing, Amazon harmed competing e-commerce logistics operators by "preventing them from presenting themselves to online sellers as providers of services of comparable quality to Amazon's FBA and thus capable of ensuring high visibility on Amazon.it" [A528-FBA Amazon].

<sup>3</sup> See, for example, Luís Cabral et al, 'The EU Digital Markets Act: A Report from a Panel of Economic Experts', [2021], 6, 10 and 28; Rupperecht Podszun, Philipp Bongartz, Sarah Langenstein, 'The Digital Markets Act: Moving from Competition Law to Regulation for Gatekeepers' (2021) 10 EuCML, 60; Damien Geradin, 'What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Markets Act?' (2021), <<https://ssrn.com/abstract=3788152>> accessed 19 May 2021; Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (2021), TILEC Discussion Paper No. 2021-04, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3797730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730)>, accessed 20 May 2021.

The current competition legal framework provides “ex-post” remedies, that apply after the restrictive or abusive practice takes place; and it involves investigative procedures that are very costly and time-consuming.

In response to such difficulties, the EU Commission recently proposed two legislative initiatives, the Digital Services Act and the Digital Markets Act<sup>4</sup> (together also referred to as “Digital Services Package”). Such proposals may lead to a real transformation within the competition law framework.

The goal of the Digital Services Act<sup>5</sup> is to regulate online “intermediary services” (such as social media and marketplaces) that connect consumers to goods, services, or contents, by setting, among other things, standards on transparency, proposing limits on content removal, and allowing users to challenge censorship decisions (such issues are currently regulated by laws that came into force back in 2000).<sup>6</sup>

Whilst the Digital Services Act may have serious consequences regarding the freedom of speech, this paper intends to primarily focus on the Digital Markets Act (hereinafter also “DMA”), which has been approved by the EU Parliament Committee on the Internal Market and Consumer Protection and that is therefore making progress towards finalisation.<sup>7</sup>

## 2 The Digital Markets Act: between gatekeepers and consumers

The Digital Markets Act’s goal is to make the digital sector fairer. The impact assessment document of the proposal,<sup>8</sup> in addition to this general objective of the regulation, highlights three specific objectives, namely: (i) “Address market failures to ensure contestable and competitive digital markets for increased innovation and consumer choice”; (ii) “Address gatekeepers’ unfair conduct”; and (iii) “Enhance coherence and legal certainty to preserve the internal market”.<sup>9</sup>

To pursue the above-mentioned goals, the DMA is intended to complement the EU and Member State competition rules, which facilitates the harmonisation of rules at the

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<sup>4</sup> At the date of writing this text is not yet in effect.

<sup>5</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market for digital services (Digital Services Act) and amending Directive 2000/31/EC [2020].

<sup>6</sup> 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”) [2020].

<sup>7</sup> The Digital Markets Act was proposed in the first place by the European Commission in December 2020 with the scope to radically change how digital platform act in the EU. Numerous amendments have been applied to the proposal and the final version has been recently - and finally - approved by the Committee on the Internal Market and Consumer Protection (IMCO) within the European Parliament.

<sup>8</sup> See: European Commission, “Impact assessments” <[https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en)> accessed 29 May 2021.

<sup>9</sup> 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) [4.2], 30.

EU level in order to avoid fragmentation that could otherwise undermine the functioning of the internal market. As stated in the explanatory memorandum to the DMA, the DMA's goal is to complement competition rules by addressing "unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules".<sup>10</sup> The DMA arguably "minimises the detrimental structural effects of unfair practices ex-ante" and, at the same time, it leaves open the possibility of further ex-post intervention by EU or national competition law enforcement.

The DMA has been very criticised, as pointed out *infra* at paragraph 4 above, since its proposal due to its potential impact on competition and, in particular, on some of the largest firms in the digital sector. The DMA appears to embrace two objectives: one is to ensure that the digital markets in which gatekeepers operate are and remain contestable.<sup>11</sup> A second objective is the promotion of fairness within these markets.<sup>12</sup> It is worth noting that the Digital Markets Act is not aimed at replacing the traditional antitrust system, but it intends to act as a complementary tool by means of a new set of *ex-ante* obligations that platforms identified as gatekeepers should abide by.

In this regard, the DMA shall be read as a simplified version of competition law, which strives to address perceived gaps in EU competition law as applied to digital markets controlled by gatekeepers.

Gatekeepers are providers of "gateways for a large number of business users to reach end users". Article 3 of the DMA provides a definition of gatekeeper based on both quantitative and qualitative criteria. With regards to the first one, gatekeepers are companies that play a significant role in the internal market because of their size and their importance as gateways for business users to reach their consumers.

More specifically, pursuant to article 3, gatekeepers are digital platforms with (i) over 45 million active users each month, (ii) a turnover of Euro 6.5 billion or more in the last three financial years, (iii) operations in at least 3 of the 27 EU Member States.

The DMA further defines qualitative criteria that should be considered when identifying a gatekeeper. Indeed, a gatekeeper shall (i) have a significant impact on the internal market, (ii) operate a core platform service that serves as an important gateway for business users to reach end users, and (iii) enjoy an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position soon.

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<sup>10</sup> See Regulation of the European Parliament and of the Council on contestable and fair market in the digital sector (Digital Markets Act), [2020], <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0842&rid=8>> accessed 26 May 2021.

<sup>11</sup> For an economic perspective on fairness and contestability see: Jacques Crémer, Gregory S. Crawford, David Dinielli, Amelia Fletcher, Paul Heidhues, Monica Schnitzer, Scott Morton, and Katja Seim 'Fairness and contestability in the Digital Markets Act', Policy Discussion Paper No. 3, Digital Regulation Project, *Yale Tobin Center for Economic Policy* [2021].

<sup>12</sup> Recitals 4 and 5 of the Digital Markets Act.

Some of the main criticisms concern first the criteria used to define gatekeepers. Schweitzer assumed that the quantitative criteria seem overly focused on size rather than on actual gatekeeping power and it does not take into proper consideration other companies that actually create a significant distortion of competition. In particular, the above quantitative threshold would be used to determine whether a specific platform shall be compliant with the obligations irrespective of *evidence of harm* in the marketplace.

### 3 Gatekeepers' obligations

After defining gatekeepers, the DMA lists under articles 5 and 6 numerous preventive obligations that gatekeepers shall comply with on a daily basis; for example, gatekeepers must:

- (i) refrain from combining personal data sourced from core platform services with personal data from any other services.
- (ii) allow the installation and effective use of third-party software applications or software application stores in the gatekeeper's own operating system;
- (iii) refrain from treating more favourably their own ranking services and products compared to similar third-party services or products;
- (iv) provide advertisers and publishers with information concerning the price paid by the advertiser and remuneration paid to the publisher in the context of gatekeepers that provide advertising services.

Furthermore, article 6 deals with self-preferencing, discriminatory ranking, and data-sharing obligations and it provides a so-called "blacklist". Operators included in such blacklist are subject to many obligations that will apply automatically across all business models and core platform services, but they are "susceptible of being further specified" due to the transformative potential they have.<sup>13</sup>

Without aiming to provide in this paper an exhaustive list, it is worth noting that the above obligations can be split into two categories: some of the obligations pursue to preserve fairness and contestability, whereas others' aim is to limit potential conflicts of interest.

### 4 Main Criticisms

After having very briefly discussed the main features of the Digital Markets Act, we would like now to focus on some of the main criticism regarding the new regulation.

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<sup>13</sup> Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' [2021] 12(7) Journal of European Competition Law & Practice 561.

Firstly, it must be underlined that DMA is supposed to overcome the current regulatory fragmentation in the EU if there are no common rules at the EU level concerning the digital markets. Nonetheless, many States are now in the process of adopting national regulations and, therefore, one of the main risks that may arise concerns the potential increase of legal fragmentation and uncertainty; the Commission shall therefore carefully prevent this fragmentation by issuing precise guidelines regarding the adoption and the implementation of the new regulation.<sup>14</sup>

Moreover, with reference to the potential impact of the new regulation (based on *ex-ante* remedies) on competition within digital markets, we find it useful to take a step back to the economic notions of competition and regulation. Walras's law is an economic theory that suggests that all markets work towards market equilibrium, where supply and demand find balance. Within this framework, competition shall, if embraced in a productive manner, naturally lead to innovation, adaptation, and growth and it shall therefore be protected by the State. In the event competition is at risk, the State is entitled to intervene and to limit the private economic sphere to facilitate potential competitors in entering the market.

Regulation is defined by Selznick as “*the sustained and focused control exercised by a public authority over activities valued by the community*”.<sup>15</sup>

If, therefore, *regulation* intervenes *ex-ante* to define a framework of rules inspired by the principle of competition and compatible with the market, the antitrust intervention (competition) is aimed at verifying - *ex-post* - the possible illegality of anti-competitive behaviours, where the 'rules' leave operators margins of discretion in their application.

Competition law and regulation are often presented as alternative approaches to govern competition and address market failures, commonly understood as the inability of the market to be as efficient as it could.<sup>16</sup>

R. Chopra and L. Khan argue that competition law, based on *ex-post* remedies, cannot be preferred to *ex-ante* regulation in all instances. First, regulation can pursue goals other than pure market efficiency and can tackle challenges other than market power, such as health concerns and safety standards. On the other hand, a lack of competition can enable dominant firms to exercise their market power in harmful ways.<sup>17</sup>

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<sup>14</sup> Aina Turilazzi and Carlo Stagnaro, “Noting lasts forever (even the gatekeeper's market share); The implications of the Digital Markets Act for businesses, consumers and innovation” IBL Special Report [2022].

<sup>15</sup> Philip Selznick 'Focusing organisational research on regulation', in Noll Roger (ed) *Regulatory policy and the social sciences* (Berkeley: University of California Press 1985).

<sup>16</sup> Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' [1970] 25(2) *The Journal of Finance* 383; Howard Shelanski, 'Antitrust and Deregulation' (2018) 127 *YALE L. J.* 1922, 1943; see also Don Boudreaux and Robert B Ekelund, 'Regulation as an Exogenous Response to Market Failure: A Neo-Schumpeterian Response' [1987] 143(4) *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift Für Die Gesamte Staatswissenschaft* 537.

<sup>17</sup> Rohit Chopra, Lina M. Khan, 'The Case for “Unfair Methods of Competition Rulemaking” [2020] *The University of Chicago Law Review*, 358.

With reference to digital platforms, one of the main goals of the DMA is to ensure (contestability and) fairness, which represents an important pillar of the market economy. In this regard, the new set of rules is aimed at ensuring a basic level of fairness in a framework – grounded on art. 101 and 102 TFUE - where the market is no longer able to find its own balance without State intervention.

The intervention through *ex-ante* rules, such as those contained in the DMA, include at least two risks, both of which are recognised in the Legislative Financial Statement Accompanying the DMA. The first is the risk that rules may be ineffective due to legal uncertainties related to the obligations, and the second is the risk that the rules may be ineffective due to material changes in fact.<sup>18</sup>

Furthermore, DMA may not take into proper consideration certain aspects regarding the need to protect competition. First of all, even though the new legislative tool imposes restrictions on gatekeepers in terms of openness to new players, digital platforms are so valuable to users that they would likely to still choose their services even if the DMA makes it easier for users to abandon it, the so-called "value-driven lock-in". A feasible strategy for companies to obtain a strong advantage over their competitors, in fact, is of "to spin a web of software applications that competitors can't match and customers won't ever abandon!".<sup>19</sup> In the case of the value-driven lock-in, the user who leaves the platform will not have to incur any costs, however, he will renounce the value he previously derived from it.

P. Bergkamp argues that DMA may have a broader effect than only preventing competition distortion. Indeed, provided that, so far, the violations of the EU competition law have been sanctioned only through *ex-post* economic fines, companies were still able to behave anti-competitively accepting the risk of subsequent investigation and fines.<sup>20</sup> In this regard, Bergkamp argues that "*the expected benefits accruing from the anti-competitive behaviour could outweigh the expected costs of the investigation and fine. In the DMA's ex-ante regime, the obligations imposed on big tech apply irrespective of any actual effects on competition*".<sup>21</sup>

Furthermore, the adoption of DMA may slow the digital technology industry in Europe because of the increase in regulatory costs, and it may reduce opportunities for a partnership between the European less digitised firms and very big US companies that are essential in order to speed up digitisation efforts.<sup>22</sup> In this regard, the new

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<sup>18</sup> Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' [2022] 47 *European Law Review* 85.

<sup>19</sup> Eric K. Clemons, *New Patterns of Power and Profit. A Strategist's Guide to Competitive Advantage in the Age of Digital Transformation* (1st edn, Springer 2019).

<sup>20</sup> Penelope Bergkamp, 'The proposed EU Digital Markets Act: A New Era for the Digital Economy in Europe' [2021] 18(5) *European Company Law* 152-161.

<sup>21</sup> *ibid*

<sup>22</sup> Meredith Broadbent, 'Implications of the Digital Markets Act for Transatlantic Cooperation', Center for Strategic and International Studies (CSIS) [2021].

regulation, aimed at ensuring open access to the digital market by smaller players seems to ignore the competition dynamics that gatekeepers currently bring to the market in terms of innovation and investment incentives. As a consequence, the DMA, if not carefully implemented, may weaken some of the functionalities of digital platform services that create value for users.<sup>23</sup>

Moreover, analysts point out that the restrictions imposed by DMA may also reduce the investment related to future technology innovations and it would suppress their ability to develop the already existing products.<sup>24</sup>

## 5 Conclusions

In conclusion, the current legal framework is clearly no longer adequate to deal with most of the main anti-competitive concerns raised by online platforms and current competition policies, based on *ex-post* remedies, have not delivered the desired results in order to ensure that markets remain competitive and contestable.

As a result, it is surely time to assert control over the ways in which platforms and other digital actors operate. Despite the numerous doubts about some of the provisions of the new regulation, some form of the regulatory response to the challenges raised within the digital economy is necessary, provided that it cannot be resolved by continuing to rely on antitrust or hoping that the market will find an acceptable balance without any intervention.

In this sense, the Digital Markets Act represents without a doubt the first step towards a more fair and contestable market if designed in an adequate manner to target specific problems. Lawmakers, within the approval and implementation process, shall ensure the DMA, once approved in its final version, does not reduce competitiveness and productivity due to the regulatory costs and the restrictions it imposes.

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<sup>23</sup> Copenhagen Economics, "The implications of the DMA for external trade and EU firms. Exploring the potential impact of the DMA in EU" [2021] <<https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/8/568/1623318729/copenhagen-economics-study-of-dma-implications-on-eu-external-trade.pdf>> accessed 23 May 2021.

<sup>24</sup> *ibid.*