

SciencesPo

CHAIR DIGITAL, GOVERNANCE AND
SOVEREIGNTY

**GATEKEEPERS AND
PLATFORM
REGULATION**

***Is the EU Moving in the
Right Direction ?***

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Executive Summary

- Digital platform markets are characterized by various forms of scale economies, network externalities, and increase returns to data, which create natural tendencies toward concentrated market structures. In such winner-takes-all environments, the standard competition law toolkit faces a set of critical challenges vis-à-vis dominance by large digital platforms. First, lengthy cases may not be able to effectively prevent distortions of competition and may as a consequence be unable to preserve forms of dynamic rivalry fueled by the entry of nascent potential competitors threatening established market positions. Second, competition problems may find their root in the structural features of an industry beyond anticompetitive conduct, requiring a broader set of remedies than those available in competition law cases. This paper suggests that these considerations justify, in principle, the general premise of the recent proposal to introduce, at the EU level, novel forms of ex ante regulation for selected platforms through the Digital Markets Act. It concludes, nonetheless, that the potential of the new framework to enhance competition will critically depend on the scope of future necessary refinements, which are discussed in the paper.
- This paper argues that the ex ante framework proposed in the Digital Markets Act should not attempt to lay out at the start a comprehensive and all-encompassing framework applicable in the same way to all the platforms classified as gatekeepers. Rather, it should be conceived as a place of 'regulatory convergence', where general principles can gradually be tailored to the heterogeneous features of different platform services based on a more precise sector-by-sector approach.
- The policy objective of creating more effective forms of intervention to complement identified gaps of competition policy in digital markets requires both timely intervention and more incisive remedies. While an ex ante framework has the potential to move faster than competition law enforcement, improving the routes that may lead to the identification of obligations and remedies may not be sufficient without an effective framework for their actual implementation and application. Therefore, the success of the Digital Markets Act will depend on whether it can operationalize the design and implementation of obligations and remedies better than ex post competition law enforcement.

- The power to initiate market investigations envisioned in the Digital Markets Act represents a scaled-back version of the New Competition Tool originally proposed by the European Commission as a stand-alone new instrument. While significant uncertainty about their role in practice remains, market investigations may positively serve as experimentation to potentially reconsider in the future the desirability of an independent broader tool that could be applied beyond digital markets and issues of dominance.

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1. Introduction

The emergence and growth of large digital firms has raised a number of public policy concerns, including privacy, labor, consumer protection, data governance and fake news, but among them the issue of competition and market power has gained particular prominence in recent years, due to the high levels of market concentration that characterize digital industries¹. Social networks, e-commerce marketplaces, sharing economy platforms, and search engines are, among others, well-known examples of digital sectors displaying very concentrated structures, where market leaders are often perceived as entrenched firms undisciplined by competitive forces². As a consequence, a number of antitrust investigations into digital firms have been initiated both in Europe and other jurisdictions, and a number of competition authorities have commissioned reports³ on the state of competition in the digital economy (for an overview, see Lancieri and Sakowski, 2020). In part, the resulting academic and policy debates on big tech reflect re-emerging normative tensions about the overarching goals of antitrust, attitudes toward bigness, and innovation policy (Khan, 2017; Wu, 2018; Shapiro, 2018, 2019; Carlton and Heyer, 2020; Malamed and Petit, 2018). More recently, nonetheless, there has also been a growing appetite to reconsider more surgically some of the substantive mechanisms of the standard competition toolkit, often perceived as ill-equipped to adequately address issues of market power in big tech sectors; attributable, for instance, to the length of antitrust cases and the lack of suitable remedies for structurally concentrated sectors. In response to these growing concerns, the European Commission has recently proposed the creation of new instruments aimed at

¹ Various studies also report possible trends of increasing concentration and reduced competition across industries. See for example: Autor, D., D. Dorn, L. F. Katz, C. Patterson, and J. V. Reenen (2020). The fall of the labor share and the rise of superstar firms. *Quarterly Journal of Economics*; Aghion, P., A. Bergeaud, T. Boppart, P. J. Klenow, and H. Li (2018). A theory of falling growth and rising rents; De Loecker, J., Eeckhout, J., and Unger, G. (2020). The rise of market power and the macroeconomic implications. *The Quarterly Journal of Economics*, 135(2):561–644. Barkai, S. (2020). Declining labor and capital shares. *Journal of Finance*, Forthcoming. Gutiérrez, Germán, and Thomas Philippon. *Some Facts about Dominant Firms*. No. 27985. National Bureau of Economic Research, Inc, 2020.

² See for example, the Economist, Big tech: How to make sense of the latest tech surge, February 20, 2020, available at <https://www.economist.com/leaders/2020/02/20/how-to-make-sense-of-the-latest-tech-surge>; Competition in the digital age: How to tame the tech titans, January 18, 2018, available at: <https://www.economist.com/leaders/2018/01/18/how-to-tame-the-tech-titans>

³ Major reports on digital markets include: “Unlocking Digital Competition,” Expert Panel for the UK Government (2019); “Competition Policy for the Digital Era,” Directorate-General of Competition of the European Commission (2019); “Digital Platforms Inquiry – Final Report,” Australian Consumer and Competition Commission (2019); “Competition Law and Data,” French Autorité de la Concurrence (“AdC”) and the German Bundeskartellamt (2016); “Big Data and Innovation: Key themes for competition policy,” Canadian Competition Bureau (2018); “Stigler Committee on Digital Platforms Report” Sub-committee on Market Structure and Antitrust, University of Chicago Booth School of Business (2019); “Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations” US Subcommittee on Antitrust, Commercial and Administrative Law (2020).

intervening more effectively in digital sectors, including through a more ex ante, quasi-regulatory approach.

In particular:

- The Digital Markets Act (DMA) introduces new rules for so-called ‘gatekeeper’ platforms.⁴ Its objective is to ensure market contestability and fairness by complementing and filling identified gaps in existing competition law provisions, particularly on abuse of dominance. At the core, the DMA does not fit within traditional forms of ex ante regulation generally applied in network industries to directly control market power; rather, it is predominantly conceived as a pro-competitive set of rules premised on the idea that digital platform markets have the potential to be and remain competitive, but achieving such potential requires broader rules than competition law enforcement to keep markets contestable and promote new entry. This objective is operationalized by identifying, based on both qualitative and quantitative criteria, certain ‘core platform services’ as gatekeepers, which must then adhere to ex ante obligations set out in the DMA⁵. In addition, the DMA gives the Commission power to conduct market investigations to identify additional gatekeepers that do not meet quantitative thresholds, as well as new sets of obligations⁶.

- The Digital Services Act (DSA) updates some of the principles contained in the e-commerce Directive⁷ and introduces harmonized rules at the European level

⁴European Commission, The Digital Markets Act: Ensuring Fair and Open Digital Markets: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

⁵ Core platform services include online intermediation services, search engine providers, social networks, operating systems, cloud providers, video-sharing intermediaries, advertising services, etc. Article 3 of the Digital Markets Act proposes three main criteria that must be satisfied to identify a gatekeeper: (1) The service must have a significant impact on the EU internal market; (2) the service must be an important gateway for business users to reach end users; (3) There must be an entrenched and durable position, including cases where such position can be expected to materialize in the near future. These criteria are presumed if the following quantitative thresholds are met: (a) The service is provided in at least three Member States and there is an annual revenue of at least 6.5 billion euros or an average market capitalization or equivalent fair market value of at least 65 billion euros; (b) the platform service has more than 45 million monthly active end users and more than 10,000 yearly active business users in the EU; (c) the thresholds on end/business users in condition (b) were met in the last three financial years, demonstrating an entrenched and durable position. Examples of the proposed obligations for gatekeepers include, among others, restrictions on self-preferencing, separation of datasets, prohibitions on Most Favorite Nation Clauses, rules on pre-installation, portability measures, etc.

⁶ For an overview of additional details included in the proposal, see Florence G’sell, The Digital Markets Act Represents a Change in Europe’s Approach to Digital Gatekeepers, Promarket, January 25, 2021.

⁷ European Commission, e-commerce directive, available at: <https://ec.europa.eu/digital-single-market/en/e-commerce-directive>;

on the use of content by platforms⁸. This includes regulation of illegal content (for example, hate speech and fake news) and increased transparency reporting, with additional due diligence requirements applicable to very large online platforms.

This paper evaluates the impact of these legislative proposals on the development of European competition policy in digital markets. As such, it does not directly address the broad set of issues beyond competition underpinning these legislative initiatives, which in combination are part of the European Digital Strategy, *Shaping Europe's Digital Future*⁹. Rather, the report focuses on the Digital Markets Act and narrows its scope to one of the central motivations animating its introduction: the issue of dominance in digital platform markets and the relationship between DMA's gatekeeper regulation and the treatment of abuses of a dominant position in EU competition law under Article 102 of the Treaty on the Functioning of the European Union (TFEU). In so doing, this paper addresses the following questions: what are the theoretical justifications for the development of new regulatory approaches through the Digital Markets Act, and how do they fill identified gaps in competition policy enforcement against dominance by digital platforms, in particular those identified as so-called gatekeepers?

This paper finds support for the general premise underlying the development of new regulatory tools through the introduction of the Digital Markets Act. The structural features of many digital sectors limit the institutional ability of competition law enforcement to intervene effectively, and this justifies the need for complementary, pro-competitive instruments that may fill current gaps. However, this support must be qualified in light of the concrete design and future development of these new tools, which raise a set of questions that remain unaddressed and that are discussed throughout the paper. Three general areas of focus demand particular attention. First, the relationship between the criteria to identify gatekeepers and the content of the obligations associated with such status (as well as their interplay with competition law enforcement) will require further refinement and tailoring. The shift from general principles to the development of more refined and more sector-specific frameworks attuned to the heterogeneity of different platforms represents an important future challenge for the DMA. Second, greater emphasis will need to be placed on the design and development of adequate obligations and remedies and in particular, the institutional dimension of remedies' implementation in specific markets. While more timely intervention is crucial for more effective action in digital sectors, the question of remedies demands equal attention if effectiveness is to be realistically improved

⁸ European Commission, The Digital Services Act: Ensuring a Safe and Accountable Online Environment: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en

⁹ European Commission, Shaping Europe's Digital Future: <https://ec.europa.eu/digital-single-market>

through the introduction of the DMA framework. Finally, the role that will be played by market investigations in practice remains an open question. Going forward, their application may serve as experimentation to potentially consider the expansion of market investigations into a broader, stand-alone instrument. As discussed in the following sections, these and other questions are likely to raise legitimate criticisms and concerns about the proposed framework. Arguably, the ability of the DMA to persuade its critics is likely to be maximized if the proposed ex ante paradigm can operate as a place of 'regulatory convergence'; namely, a venue where learning from various areas of digital regulation and enforcement can be synthesized and developed into market or service-specific rules for a narrow subset of particularly problematic sectors.

This paper is structured as follows. Sections 2 and 3 respectively take an overview of the key features of digital platform markets and the challenges they raise for the standard competition law framework. On that basis, Section 4 explains why the identified enforcement gaps may require hybrid forms of ex ante and ex post tools, but also points to a set of shortcomings and ambiguities in the current proposals. Section 5 concludes by highlighting some of the central issues that will need to be addressed going forward.

2. Economic and technological features of big tech platforms

It is useful to take a step back from big tech sectors and start from the basic economics of platforms in general, including both digital and non-digital intermediaries. Platforms connect and coordinate the interaction between different groups of agents (Rochet and Tirole, 2006; Caillaud and Jullien, 2003; Armstrong, 2006). Traditional examples include payment cards connecting cardholders with merchants, physical shopping malls providing a meeting place for buyers with sellers, and ad-based printed newspapers creating an audience of readers for advertisers. A distinguishing feature of platforms is that these different groups are linked by so-called indirect network effects (Evans and Schmalensee, 2014). Generally, network effects refer to the fact the value of a network increases with the size of that network. These effects are direct when they occur within the same group of users, for example joining a telephone network (Rohlfs, 1974; Katz and Shapiro, 1985). In the context of platform intermediation, network effects are usually indirect (Evans and Schmalensee, 2016), because the value of joining or using a platform depends on the presence of a different group of users also joining the same intermediary, for example drivers on one side benefiting from the presence of riders on the other side of a ride-hailing network.

Platform network effects represent a form of economies of scale on the demand-side; namely, the value and efficiency of an intermediary platform for one group of users typically increase with the number of different users also joining the intermediary. Returning to the ride-hailing example, drivers benefit from the presence of more passengers, and vice-versa, passengers benefit from the presence of more drivers, for example, because the thickness of the network reduces waiting times. As such, and like other forms of scale economies, indirect network effects typical of platforms can lead to some degrees of market concentration and influence various aspects of platform competition (OECD, 2009; OECD, 2018; Rochet and Tirole, 2003; Jullien, 2011; Evans, 2003).

Digital platforms reflect this traditional economic model of platform intermediation based on indirect network effects, but in a different technological form that follows from digitalization, data and AI technologies, and a variety of different business models. These technological differences become critical in understanding digital markets, because they create additional forms of economies of scale that, arguably, enhance the concentration tendencies already characterizing more traditional platform markets in a significant way. From this perspective, while the difference between big tech and the older generation of physical platforms can, in a way, be interpreted as merely quantitative in nature, it has become so pronounced that it could be said it amounts to an important qualitative shift.

In particular, the following combination of economic and technological features conceivably make digital industries structurally concentrated, in a way that at the extreme resemble natural monopolies (Ducci, 2020).¹⁰ First, digitalization expands the reach of digital intermediaries, which reinforces and in some cases enhances the importance of demand-side economies of scale, both in the form of indirect and direct network effects (respectively, buyers and sellers on e-commerce platforms, and users on a social network). Second, the digital nature of services can give rise to cost structures characterized by large fixed costs and marginal costs that are negligible or zero, creating large scale economies on the supply side.¹¹ Third, there are increasing returns to data collection and analysis, which represents an additional scale effect, whereby access to larger datasets can create an advantage in terms of

¹⁰ In fact, more generally, the presence of various forms of scale economies in digital industries make the natural monopoly framework a better theoretical benchmark and starting point than competitive markets. In other words, rather than starting from the question of why a given digital sector departs from the expectation of a competitive market, it may often be more fruitful to ask whether and why the strength of scale economies and counterforces militating against concentration create a departure from natural monopoly.

¹¹ See also Ridder, M. D. (2019). Market power and innovation in the intangible economy; Aghion, P., A. Bergeaud, T. Boppart, P. J. Klenow, and H. Li (2018). A theory of falling growth and rising rents.

quality-adjusted costs for providing a service.

It must be noted that the respective importance of each of these factors, an empirical question, is obviously not infinite, and it is likely to vary substantially across different markets. Moreover, scale economies can often be counterbalanced by important forces that militate toward fragmentation; in particular, product differentiation in the market, diseconomies of scale, problems of congestion, multi-homing (users affiliating with more than one platform), etc. However, while the combination of these forces and counterforces calls for a case-by-case analysis, their interplay has, on balance, tended to create highly concentrated market structures, leading to winner-takes-all dynamics in big tech sectors.

KEY DRIVERS OF CONCENTRATION

Supply-side economies of scale
Positive (direct and indirect) network effects
Increasing returns to data
Low product differentiation, multi-homing, and congestion

These economic and technological features create important implications for competition policy and the regulation of so-called digital ‘gatekeepers.’ Concentration can be associated with efficiency properties, and competition for the market likely takes a more dynamic form that materializes as recurring cycles of dominant firms rather than static competition. Often, this also entails complex interplays across adjacent markets (Petit, 2020). Yet, the identified structural features may represent entry barriers for novel entrants and small firms, whose potential to threaten an established firm often depends on the ability to enter niche, adjacent segments of a market and then grow as potential substitutes to established market leaders. Incumbents, on their part, may have an incentive to leverage on these structural features to protect their established position (Federico, Scott Morton, and Shapiro, 2019). These features raise a central question for competition law enforcement: can current tools dealing with single-firm conduct be used as an effective instrument to address market power concerns resulting from dominance, and are these instruments ultimately capable of promoting market contestability and dynamic competition? These issues are discussed in the next section.

3. Gatekeepers and dominance gaps in competition policy

EU competition law addresses abuses of a dominant position pursuant to Article 102 TFEU. This provision contains a prohibition of anticompetitive behavior by a dominant firm with market power, whose scope and content have, over time, been delineated and further specified through case law. The EU competition law framework on dominance has shown a willingness to address a number of critical and unconventional issues at play in digital industries (including tying, exclusivity, MFNs clauses, pre-installations, self-preferencing, data abuses, and so on). As such, from a substantive perspective, it has manifested a lot of flexibility when dealing with unilateral conduct and is a broad enough instrument that can, in theory, reach various forms of exclusionary concerns raised by big tech firms.

However, despite its broad substantive scope, the effectiveness of Article 102 faces a number of challenges when evaluated against a competition policy framework tailored toward the promotion of market contestability and dynamic pressure, which relies not only on existing competitors but also on entry by small disruptive firms. These limitations lie mainly in the institutional underpinnings of ex post enforcement against single-firm conduct: namely, its reliance on lengthy proceedings focused on the anti-competitive nature and effects of various forms of conduct by a dominant firm, which in digital markets risk arriving too late, with little to do for the restoration of competition, and without necessarily addressing structural issues undermining dynamic rivalry. As a consequence, the following gaps have been identified in the current debates:

- (a) *Timely intervention.* This gap includes both the excessive length of abuse of dominance cases, as well as the inability to intervene on a more proactive, precautionary basis in industries where there may be a risk of future harm (associated with either conduct of a dominant firm, but also non-dominant firms and structural market failures). These concerns are particularly important in dynamic industries where timely intervention against possible harms may not be achieved through ex post enforcement.
- (b) *Effective remedies.* The types of remedies needed either to restore competition or to address concerns over market power in sectors with low contestability may include tools that likely possess a regulatory or quasi-regulatory component, which in turn requires the institutional ability to monitor and enforce them (for example, portability and data sharing remedies). Moreover, some industries may benefit from

remedies that address structural problems affecting competition in a market independently from anti-competitive conduct by a dominant firm, and that apply at the market level rather than to a specific firm.

The DMA proposals for ex ante regulation of certain digital platforms must then be evaluated against these identified gaps in the current treatment of abuse of dominant position, and against the potential of such ex ante and more regulatory approaches to offer improvement to the existing standard competition law regime.

4. Between ex ante and ex post intervention

The previous section identified a set of issues that may not be addressed effectively through ex post competition law enforcement. Yet, the nature of a potential alternative or complementary ex ante framework remains to be identified. In theory, one option would be to regulate the market power of an incumbent in a way similar to price and entry regulation in utilities sectors. While it cannot be excluded a priori that some sectors where no competition appears feasible may in the future require this kind of approach, standard regulation works well in sectors with a long-term stable technology, an issue that clashes with the technological dynamism and complexity currently occurring in many digital industries (Hovenkamp, 2020). Moreover, regulating directly the market power of a specific platform would require a more comprehensive sector specific regime beyond what is being currently proposed at the EU level. Hence, the new tools are better interpreted as hybrid instruments between ex ante and ex post intervention: on the one hand, they depart from traditional models of regulating market power in network industries, in so far as they augment the standard competition law toolkit to better facilitate new entry, contestability, and displacement of established market positions. On the other hand, they differ from competition law and gravitate toward a more regulatory paradigm in that they also identify a set of behaviors that should not be permitted ex ante in light of the established position of some digital intermediaries identified as ‘gatekeepers’ (on the basis of concerns over competition and market power but also considerations of fairness).¹²

There are compelling reasons to justify the general premise of these initiatives at the EU level. As discussed, the structural features of digital industries and the resulting policy shift toward dynamic rather than static considerations raise a set of issues related to market power and competition that in theory call for complementary, ex

¹² Moreover, while the proposals do not exclude structural solutions as potential remedies of last resort, the essence of the Digital Markets Act departs from approaches that favor break up policies, both in terms of horizontal break ups as a way to fragment and deconcentrate digital markets and in terms of vertical separation.

ante forms of intervention to fill the current gaps in competition law intervention. For example, there may be concerns related to access to bottlenecks and exercises of market power by firms in sectors with low contestability that would ideally require more regulatory approaches. In addition, there may be problems associated with dominant platforms leveraging market power in adjacent industries for anticompetitive purposes; for example, to pre-emptively exclude and block the growth of smaller nascent firms that may have the potential to become substitutes for the dominant platform in the future, a strategy that mirrors the debates on so-called killer acquisitions (the pre-emptive acquisition of potential competitors, usually smaller firms that threaten to become substitutes of the acquiring platform).¹³ Ex post competition law interventions, in such cases, may occur too late and without adequate remedial power. More generally, competition concerns may in some instances be associated with the structural features of a market beyond the conduct of a specific firm and, thus, may justify market wide remedies.

These and other considerations provide legitimate theoretical justifications for the impetus toward more regulatory or quasi-regulatory approaches in conjunction with ex post enforcement. Nonetheless, a novel ex ante regime entails additional costs and complexities that may create counterproductive effects. These should not be taken for granted and must be justified by substantial and tangible improvements to the status quo achievable through practical implementation. In this regard, a more detailed analysis of the content and scope of the new framework raises a number of important questions that remain to be adequately addressed. Ambiguities related to the need for faster outcomes, effective remedies/obligations tailored to the specificities of each sector, possible overlaps with competition law enforcement, and the future role of market investigations are discussed in turn.

4.1 Timely intervention

The gatekeeper classification introduces a set of ex ante obligations through which the DMA can effectively implement more timely and proactive intervention going forward, bypassing the traditional requirements and length of competition law enforcement. There are a few caveats to these benefits. First, the content of these obligations and associated remedies is likely to be evident in cases where there is

¹³ Concerns over these mergers have emerged in the pharmaceutical sector but they have broadened to cover big tech sectors. See, for example, Colleen Cunningham, Florian Ederer, and Song Ma, *Killer Acquisitions* (2020) *Journal of Political Economy*, forthcoming; Competition Policy International, *Killer Acquisitions*, *Antitrust Chronicle* (2020); Scott Hemphill and Tim Wu, *Nascent Competitors* (2020), *University of Pennsylvania Law Review*, forthcoming; Paul Gompers, William Gornall, Steven N. Kaplan, and Ilya A. Strebulaev, *How Do Venture Capitalists Make Decisions?* (2016) NBER Working Paper Series, No. 22587.

already sufficient information (including from past cases) about the kind of market failures and anticompetitive concerns that need to be addressed ex ante in a specific market or in relation to a specific platform. In contrast, the benefits of imposing ex ante obligations in terms of timely intervention are less straightforward in sectors that are still undergoing significant market changes and that are less known, in that they are going to depend on a need to carry out well-developed market investigations based on a solid and adequate evidentiary basis. The major benefit for industries that have not yet tipped toward a dominant player may in fact come indirectly from a stronger emphasis on so-called 'defensive' leveraging behavior by an already identified gatekeeper, namely a platform active in another market that leverages market power in adjacent sectors to protect its core position in the primary market¹⁴ (which may benefit a subset of industries that have not yet tipped but where the gatekeeper platform firm is operating).

4.2 Effective remedies for heterogeneous platforms

Another critical feature of effective intervention beyond speed relates to the availability of adequate and tailored obligations and remedies, on which many open questions remain. For instance, it would be useful to evaluate how the DMA would improve on existing remedies already imposed in antitrust proceedings. The *Google Shopping* case may provide an example. Upon finding an infringement of Article 102 TFEU, the European Commission imposed on Google an obligation to provide 'equal treatment' between rival comparison-shopping services and its own service.¹⁵ This remedy, in essence, already gravitates toward forms of regulatory intervention against self-preferencing (a concern explicitly included in the current proposals) but it has been deemed ineffective beyond issues related to the length of the proceeding (Caffarra, 2019; Geradin, 2019). How would the DMA improve the effectiveness of remedial power and the administration of remedies that already exist? Moreover, the nature and objective of remedies are likely to differ substantially across markets on a case-by-case basis, depending on the specific features of a platform service, the identified theory of harm and market failure, and desired policy objectives. For example, the role and relative importance of data, network externalities, or scale in physical infrastructure are likely to vary substantially across markets, and the nature of various platform services (from matchmaking to audience building for advertising)

¹⁴ The issue of defensive leveraging was at the heart of the well-known antitrust case *United States v. Microsoft Corp.* 253 F 3d 34 (Dist. Of Columbia Circuit, 2001). The investigation centered on Microsoft's leveraging from the market for operating systems into the new emerging browser market, which was an attempt to marginalize the browser Netscape, seen as a potential competitive threat to its Windows operating system.

¹⁵ European Commission Press Release, Antitrust: Commission fines Google €2.42 billion for abusing dominance as a search engine by giving illegal advantage to its own comparison-shopping service: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784

is likely to raise different sets of competition concerns. Likewise, the variety of policy objectives may include, among others, making a market more contestable to promote competition *for* the market; limiting exercises of market power in sectors where contestability is low; fostering fragmentation, switching and multi-homing to promote competition *in* the market; dealing with access issues and intra-platform and vertical concerns; imposing market-wide remedies in some instances, and firm-specific remedies in others, etc. At present, the set of proposed obligations is closer to a general aggregation of different concerns, many of which are likely to be pertinent in some markets but not in others. The important heterogeneity across digital platform markets, however, calls for more specific rules and remedies, designed on the basis of sector-specific features and concerns that are consistent with the rationale for the gatekeeper classification in the first place. The shift from general principles to more tailored sector-specific frameworks is likely to be a major factor determining the future success of the Digital Markets Act.

4.3 Overlaps with competition law

Given the complementary nature of the DMA proposal, it is often rightly emphasized that the role of competition law enforcement in digital sectors should not be marginalized but rather reinforced by the introduction of *ex ante* instruments. In other words, the DMA framework should in principle remain a confined complement available in specific contexts where competition law enforcement may be deemed insufficient, rather than an expansionary substitute to standard competition law procedures, thresholds, and burdens of proof. The interplay between the two instruments, however, does not always appear as straightforward. For instance, the role of the DMA's market investigations and competition law cases with respect to future, novel concerns related to an identified gatekeeper remains unclear. Moreover, there are important open questions that revolve around the notion of fairness and its overlaps with competition law, in particular exploitative abuses of market power.¹⁶ In theory, markets with very high barriers to entry (in the extreme case, a natural monopoly) may justify greater emphasis on price and non-price exploitative exercises of market power, bringing notions of fairness and efficiency into

¹⁶ Exercises of market power can be distinguished between exclusionary and exploitative: the use of market power is exclusionary when it intends to exclude rivals; it is exploitative when it represents a mere exercise of market power without exclusionary effects, for example charging a monopoly price. While antitrust provisions against dominance vary across jurisdictions and can cover both issues, abuse of a dominant position is predominantly focused on exclusionary forms of market power exercises. For a discussion, see Robert O'Donoghue QC, Jorge Padilla, *Law and Economics of Article 102 TFEU* (Hart Publishing 2020)

closer alignment.¹⁷ While this suggests that the DMA could play an important role in this area, the exact meaning of fairness and its intended overlaps with competition law remain to be determined. Overall, the coherence of the interplay between competition law enforcement and the Digital Markets Act will likely depend, among other things, on: how robust and uncontroversial the selected gatekeeper criteria will prove to be in practice;¹⁸ how accurately the cumulative sets of obligations will balance the need to control mere exercises of market power in some cases (excessive prices and non-price exploitation) and the promotion of market contestability in others; and how effective DMA remedies will prove to be compared to those already available in standard competition law cases.

4.4 Market investigations and the new competition tool

One final issue that is worth discussing concerns the future role of market investigations. In this regard, it must be noted that the original legislative proposals initially envisioned two different and distinct measures, differing from the present ones: first, a New Competition Tool (NCT), a stand-alone new instrument to study and address structural competition problems in specific markets in a timely and effective manner in order to address gaps in EU competition rules (for example, monopolization by non-dominant firms with market power, structural problems independent from a firm's conduct, and tacit collusion in oligopolistic market structures);¹⁹ second, a Digital Services Act package, which, among other things, proposed an ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers, with equal emphasis on issues of fairness and competition.²⁰ Now, ex ante regulation of gatekeepers has become the core proposal of the current Digital Markets Act with a closer relation to issues of

¹⁷ Standard arguments against the use of competition law to address exploitative exercises of market power include the role of market forces, in the absence of significant barriers to entry, as a constraint to market power exercises, as well as institutional issues when intervention involves a degree of direct regulatory oversight beyond the expertise of competition agencies. The premises underlying the proposed framework challenge both considerations, and thus it would appear necessary to better clarify the adopted policy position with regard to non-exclusionary exercises of market power.

¹⁸ See for example the approach advanced in the UK Report for a Code of Conduct for platforms with 'Strategic Market Status.' See Unlocking Digital Competition," Expert Panel for the UK Government (2019).

¹⁹ European Commission, Single Market – new complementary tool to strengthen competition enforcement: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool>. The following options were originally considered: 1. A dominance-based competition tool with a horizontal scope; 2. A dominance-based competition tool with a limited scope in digital markets; 3. A market structure competition tool (applicable to non-dominant firms) with a horizontal scope; 4. A market structure competition tool (applicable to non-dominant firms) with a limited scope in digital markets.

²⁰ European Commission, Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers>

competition, while the present Digital Services Act is, as discussed, primarily focused on content regulation. The New Competition Tool, in contrast, has been abandoned as a stand-alone new tool, and only a scaled back version has been retained within the DMA in the form of market investigation powers. A number of compelling reasons would have supported the adoption of a stand-alone NCT²¹ which could have been an important instrument to develop ex ante obligations and remedies tied to identified market features and anti-competitive concerns in specific sectors, but could also have been used as a tool to tackle broader structural issues beyond dominance in digital markets. The DMA market investigation powers appear more the result of a compromise than a tool with a clearly identified role. However, the use of market investigations could serve as a form of small-scale experimentation with the potential to reconsider the desirability of a stand-alone market structure competition tool with general application to digital and non-digital markets.

5. Looking ahead : The DMA as a place of regulatory convergence

The recent regulatory proposals are premised on the idea the European Commission suffers from an enforcement gap in digital markets, which does not permit moving faster and more proactively and imposing more effective remedies and obligations on dominant digital firms. As discussed in this policy paper, there are compelling reasons in support of new hybrid forms of intervention against distortions of competition that blur the standard dichotomy between ex ante and ex post paradigms of interventions against market power. A balanced mix of different instruments may be more effective at promoting dynamic competition, contestability, and the threat of displacement of current incumbents, while possibly also being more suited to address concerns about market power in sectors displaying lower levels of contestability or durable market power. Nonetheless, introducing different, parallel frameworks increases the need to ensure that the relationship between them is developed in a consistent and justifiable way (Monti, 2020).

At the heart, the Digital Markets Act should arguably be seen as a place of 'regulatory convergence' for particularly problematic markets, where general rules and principles can, over time, be tailored and enforced effectively. Under this perspective, a number of important issues require further thought and scrutiny. First, rather than trying to specify in advance comprehensive rules applicable to all gatekeepers, the DMA should aim to specify clear principles through which better

²¹ For a discussion see Massimo Motta and Martin Peitz, Intervention triggers and underlying theories of harm (2020) Expert Report.

tailored sets of obligations and remedies may be developed gradually on a market-by-market basis and consistently with the heterogeneity of platform services. In this regard, competition law cases can and should inform the proposed framework; market investigations may refine its outer boundaries; and learning from other related areas of digital regulation may offer additional lessons whose relevance to competition can be synthesized in the Digital Markets Act. To the extent possible, however, this learning should strive to operate based on a sector-specific approach. Second, the DMA should be seen as a remedial destination, where enforcement and administration of various remedies and obligations can occur effectively. Such effectiveness does not only depend on more timely intervention, but also on how the new framework may be able to increase remedial power, both in terms of more effective remedy design and institutional capabilities. In other words, the DMA's potential to complement competition law enforcement depends on whether it can successfully enable an institutional framework superior to the status quo that operationalizes more effective application and monitoring of remedies. Finally, the concrete analysis required to, first, classify a firm as a gatekeeper and, second, identify specific obligations that would follow from such a classification should not be seen as a separate and excessively formalistic two-stage assessment; rather, it should be based on a cohesive analysis where each step must inform and reinforce the other in order to develop a coherent framework that is sufficiently flexible to adapt to future market developments. It must be kept in mind that one of the central goals of the new initiatives discussed here is the promotion of contestability and dynamic competition through the entry of novel competitors. In its development, application, and overall interplay with competition law enforcement, the proposed ex ante framework should facilitate, rather than undermine, forms of disruptive entry much needed in big tech sectors.

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