

# Shifting the Digital Paradigm: Towards a *Sui Generis* Competition Policy

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## I. Introduction

The purpose of this article is twofold. *First*, it analyses the provisions of the Digital Markets Act as introduced by the European Commission to the European Parliament in December 2020 with amendments proposed by the European Parliament Committee on the Internal Market and Consumer Protection Draft Report in June 2021 and adopted in the first reading in December 2021. *Second*, it offers a conceptualisation of the broader EU competition law processes, which predetermine and necessitate the proposal. The article shows how and why the evolution of the digital economy is leading to the re-interpretation of the established objectives of competition law and the recalibration of the available instruments of competition enforcement, thereby modifying the very nature of competition law, economics and policy.

Our understanding of the phenomenon of economic competition (and its regulation) is becoming much less axiomatic and much more contextual, communicative, participatory, interpretative and flexible. The proposed rules reflect this new *modus vivendi*. The theoretical analysis explains how the normative and procedural substance of the proposal embodies and exemplifies this emerging competition policy. The new *sui generis* competition rules are a necessary complement to the current *ex-post* provisions of competition law.

The article begins with the second objective, offering a basic theoretical framework to the socio-economic processes, compelling such a proactive DMA proposal with potentially such far-reaching implications. This allows to explain the narrative, the matrix within which the proposed rules are emerging, and as such helps to understand better the essence of the rules. It discusses briefly the central features of the old (current) and the new (emerging) paradigms of competition policy. The focus of the article is on the digital economy, but the trends characterising the new paradigm are universal.

The methodological and normative novelties of the proposal do not compromise the doctrinal and theoretical foundations of competition law.<sup>1</sup> The rules complement and enrich the apparatus of competition policy.

The phenomenon of economic competition cannot be limited, monopolised and exhausted by the traditional conceptions of *ex-post rules*.<sup>2</sup> It is broader and not as rigid and monovalent

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<sup>1</sup> Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal', Vol. 28, No. 3, 2021, pp. 1–35 (forthcoming).

<sup>2</sup> This article agrees with Alfonso Lamadrid that '[c]ompetition law [...] has never been a tool for the optimization/fine-tuning of market outcomes in light of more or less idealized benchmarks (one would need a lot of confidence to do that). That is why [...] a NCT could have an impact on the nature of the discipline'

as the dominant economic and juristic axioms claim it to be. The reduction of the theory of competition chiefly to the neoclassical microeconomic metrics and/or to the unreflective dogmatism of case law is a tendency, underpinning and in many respects constraining the current competition policy paradigm.

## II. The central elements of the new competition law paradigm

This part of the article offers a theoretical background through which the new proposal could be addressed. It consists of six sections. It *firstly* explains the macroeconomic context, which impels the EU and other jurisdictions to revise the foundational principles on which their competition laws function, as well as the very rationale for the existence of their competition laws and policies. This section offers a perspective through which the essence of the proposed rules becomes more logical and reasonable.

Section 2 addresses the normative question of the goals of the DMA, arguing that its impact on competition may differ depending on which goal should be seen as the central one. It does not engage in the discussion on the substantive analysis of the literature on the goals of competition. Such a question goes beyond the scope and the focus of this article. The main criterion addressed in the section is the distinction between intra- and inter-platform competition.

The *third* section shifts the attention from the macroeconomic context of the proposal to the more technical characteristics of competition rules, by looking at their current *ex-post* and *ex-ante* mechanisms, and by hypothesising why and how the proposal in building a conceptual bridge between these two methodologically autonomous (if not fundamentally different) avenues of the enforcement of competition rules. The emergence of these pioneering *sui generis* competition rules epitomises a more universal, global trend in the area of regulating competition, and the *Brussels effect* of these rules is likely to be pervasive.

The *fourth* section looks at the central element of the *sui generis* competition law – Art 6 DMA, covering the provisions, euphemistically called in the proposal ‘obligations for gatekeepers susceptible of being further specified’. It explains why and how the rationale of Art 6 DMA shapes a new proactive side of competition policy.<sup>3</sup> The analysis of the substantive and procedural aspects of these obligations is offered in the relevant section of Part III.

Section 5 discusses opportunities and difficulties related to the binary mechanism of designating gatekeepers. It explains why a proper calibration of the mechanism is of a fundamental importance for the entire functionality of the DMA and analyses the available options for such calibration.

Finally, section 6 addresses the most problematic implications of the DMA – real and potential, – looking at the issues, which could have a negative impact either on competition on the digital markets or on the enforceability of the new provisions.

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(Alfonso Lamadrid, ‘The Proposed New Competition Tool: A Follow-Up’, *Chillin’Competition Blog*, 29 June 2020). But contrary to the critical rationale developed by Alfonso Lamadrid, this article is strongly supportive of the new expansive development of the discipline.

<sup>3</sup> The idea of the dialectical interdependence of two wings of competition policy: proactive and preventative is elaborated in Oles Andriychuk, ‘Dialectical Antitrust: An Alternative Insight into the Methodology of the EC Competition Law Analysis’, *European Competition Law Review*, Vol. 31, No. 4, 2010, pp. 155–165.

## 1. The need for a more diversified regulatory toolkit

The intensity of the current discussions on the nature of competition policy is very high. After a relatively long period of the reign of the Law & Economics paradigm, epitomising the tendency towards a homogenisation of competition standards and a gradual convergence of the legal and the economic arms of the profession into a normative and methodological neoclassical consensus, a range of the independent but mutually reinforcing challenges – both internal and external – have triggered a shift of the paradigm. The process of emergence of the new competition policy – ‘a Copernican transformation of the field’<sup>4</sup> – is long and non-linear.

The new paradigm of the EU competition law is either characterised or predetermined – but not exhausted – by the following seven factors: (i) methodological; (ii) substantive; (iii) strategic; (iv) normative; (v) tactical; (vi) procedural; and (vii) functional.

1) *Methodological*: de-axiomatisation (de-mathematisation, de-scientification, de-dogmatisation) of competition policy. Various economic theories and approaches, which were – and in many respects still are – dominant in competition policy, are inherently susceptible to mathematisation and axiomatisation of the market processes. The underlining assumption of these approaches is that competition is measurable in its entirety and the societal interests on which it has an impact are ultimately commensurable. The first assumption implies the rapid development of sophisticated econometric modelling aiming to explain the past, present and future market processes. The second, that all the variety and diversity of these processes can and should be reduced to the common normative denominator: price theory and its impact on consumers. Such a reductionist perception would always have its critics, but the main focus of the criticism was either placed on improving the parameters of the modelling or expanding its criteria and variables rather than contesting the validity of the modelling as such or was unrealistically heterodox both from the normative as well as the methodological perspectives.

This tendency towards an absolute rationalisation of competition policy is part of a broader movement of bringing the apparatus of natural sciences to various social disciplines. Evidently, such calculability allows to provide a *prima facie* unbiased, neutral and accurate explanation to each choice in each instance of complex decision-making processes. Politically, this can be seen as a reliable legitimacy shield, the situation where each decision and each choice must be underpinned by complex mathematical justification. The emerging paradigm does not oppose mathematisation of competition policy *per se*. It derives from the assumption that the societal processes influenced by competition policy are much broader and diverse, and much less measurable and predictable, than the dominant vision presupposes. It is not a criticism of the rationality and calculability as such, but a criticism of their absolutisation and axiomatisation. Under the old (current) paradigm the economic truth is holistic and singular. Under the new (emerging) one it is plural. It implies that in each complex case with high societal stakes, several reasonable interpretations of economic, legal and factual truth could be offered by the parties to the decision-maker. Selecting between different competing (and sometimes even opposing) interpretations, with both of them meeting the standards of economic, legal and factual truth, is not a pathology of the system but a recognition of the complexity of economic life and the

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<sup>4</sup> Pablo Ibáñez Colomo, ‘Protecting the ‘Law’ in Competition Law’, *Journal of European Competition Law & Practice*, Vol. 11, No. 7, 2021, p. 333.

language of law.<sup>5</sup> The shortcomings of the methodological reductionism of the axiomatic enforcement of competition rules becomes most evident in the area of the digital economy, but its elements are present in all sectors. If the existence of the absolute axiomatic economic truth, which competition policy should discover and protect in its entirety is a myopic illusion and if the complex cases allow several conflicting but equally meritorious and valid interpretations, then the role of the enforcers is expected to be much more proactive. The role goes far beyond the mechanistic fact-checking, box-ticking and truth-legitimising assigned to it by the neoclassical Law & Economics approach, moving towards a more flexible, interpretative, strategic planning model. Such a shift carries with it a number of potential pitfalls. Some of the most problematic are addressed in the last section of this part of the article.

2) *Substantive*: the second condition necessitating the shift of the paradigm concerns ubiquitously discussed specificity of the digital economy. Its inner nature is characterised by network effects, zero-price markets, winner-takes-all and market tipping, economies of scale and scope, disintermediation, data synergy and competition for the markets, global digital race and other unique elements making the regulation of the digital economy a *sui generis* process.<sup>6</sup> Such an autonomous enforcement implies neither conceptual nor institutional separation, but alongside the other six features of the new paradigm it contributes to the argument about the need for a more proactive and flexible competition policy. In this context, the proactive approach is necessitated by the very nature of economic relations taking place in the digital economy, requiring a revision of the traditional competition tools in this sector.

3) *Strategic*: this factor concerns the processes of global transformation, epitomised under the umbrella term '4<sup>th</sup> industrial revolution'. The idea is that the accumulation of the digital power (big data, access, infrastructure, agenda-, trend- and attention-setting) has a decisive impact on the role and place of a polity in the global economic (as well as cultural, social, political) landscape for the succeeding decades. This implies the rapid growth of discussions on digital sovereignty. Both UK and EU are net contributors in this equilibrium as their end- and business users feed the non-domestic algorithms; their discoveries feed non-domestic innovative growth and their talents feed non-domestic businesses, thereby contributing to the increase of the digital wealth, influence and revenues for other polities. Evidently, for many reasons the current place of both jurisdictions in the global digital race is – and will remain for a long time – important, but it is incomparably lower than the place of the locomotives of the digital economy, and the gap between the top and second tiers of digital pioneers appears to be increasing. This strategic race explains the antagonistic, rivalrous elements in the digital competition. Such factors are not – and will never be – articulated or problematised openly in

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<sup>5</sup> This line of reasoning is much more developed in constitutional jurisprudence – the area dealing with conflicting rights and interests for much longer and in a much more intensive way. See e.g., Alec Stone Sweet, Jud Matthews, 'Proportionality Balancing and Global Constitutionalism', *Columbia Journal of Transnational Law*, Vol. 47, No. 1, 2008, p. 88: 'A court that explicitly acknowledges that balancing inheres in rights adjudication is a more honest court than one that claims that it only enforces a constitutional code, but neither balances nor makes law. It also makes itself better off strategically, relative to alternatives. The move to balancing makes it clear: (a) that each party is pleading a constitutionally-legitimate norm or value; (b) that, a priori, the court holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts'.

<sup>6</sup> The literature on this is wide and well-elaborated. For a summary see e.g. Laurine Signoret, 'Code of Competitive Conduct: a New Way to Supplement EU Competition Law in Addressing Abuses of Market Power by Digital Giants', *European Competition Journal*, Vol. 16, No. 2–3, 2020, pp. 221–231.

the competition policy internal narrative, as the issues go beyond competition policy apparatus, but implicitly they play an important role as well. They are not the main drivers of the new paradigm, but they contribute to the gradual replacement of the older one.

4) *Normative*: another factor concerns the internal values and goals of competition policy itself. Etymologically, competition policy is about protection and promotion of competition. But in reality, for a long time its main purpose was embedded in consumer welfare, measured primarily by neoclassical price theory. We currently see the rapid revival of a more structural approach, emphasising the size and quantity of the competitors as well as the ideas of fairness and opportunities for smaller competitors. There are legitimate reasons to regulate competitive process even in instances when consumer welfare is increasing and innovation is growing, particularly when welfare is measured in terms of prices and the main benefits of the innovation are distributed between the gatekeepers themselves. The history of competition policy has already the periods with the dominance of the Harvard and Ordoliberal schools, and critics note the elements of a vicious circle. However, if perceived in conjunction with the de-axiomatisation, de-scientification and fragmentation of competition policy, its more interpretative, contextual nature, the references to contestability and fairness as the central objectives of competition policy, go far beyond the rationale of the replacement of the current competition orthodoxy by the old ones.<sup>7</sup>

5) *Tactical*: in the globalised digital world – and in the globalised digital race – the instances of regulatory competition are pervasive. National authorities interpret and apply the provisions of competition law differently, depending on their vision and interests. While most use the same or comparable lexical constructions, declare the same or comparable normative objectives, and prohibit the same or comparable practices, the semantics of the enforcing competition law differs significantly, as it is predetermined or circumscribed by factors external to competition analysis. In some instances, we see a very unusual interpretation of the provisions of competition law; in others the tactic is in not enforcing it at all, aiming to race to the bottom. With over a hundred jurisdictions having some competition provisions in their domestic legislation, it is impossible to expect uniformity and consensus. In addition, the local interpretations of competition law are often combined with the need to take into account other economic and non-economic factors.<sup>8</sup> This again is done in various proportions and combinations often based on an *ad hoc* constellation of societal interests, previous practices, enforcement priorities and the like. The textbook-style application of the principles of competition could work in a static system with no or very little exogenous impact. The situation is very different these days, with such dynamism of the processes in the digital markets, diverse approaches and interests of various countries, and so many proactive incentives introduced locally and regionally. Some studies, for example demonstrate that the developing economies have legitimate grounds for an explicit application of competition law instrumentally,<sup>9</sup> in order to achieve broader societal objectives. The situation where some jurisdictions holistically apply the rules and principles while others neglect them, eventually impels the former into also being

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<sup>7</sup> Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement', TILEC Discussion Paper, 2021-004, 2021, p. 1: 'It would be a mistake to see the DMA as a regression back to the form-based approach for which the Commission was so criticised in the 1980s'.

<sup>8</sup> For an example of such appealing, well-structured and meticulously elaborated counter-narrative see Alexey Ivanov, Ioannis Lianos (eds.), 'Digital Era Competition: A BRICS View. Report by the BRICS Competition Law and Policy Centre', September 2019, 1295 p..

<sup>9</sup> Thomas Cheng, 'Competition Law in Developing Countries', Oxford University Press, 2020, 580 p..

less orthodox. Competition is dynamic, polyvalent, contextual and in some sense instrumental, and the theory of competition should inherently reflect these re-emerging features.

6) *Functional*: regulating gatekeepers requires a more pragmatic, better-targeted approach; the approach, which reflects enforcers' understanding of the economic processes and commercial practices, taking place in this rapidly developing segment of the digital economy. The transitioning from the period of the Internet optimism/naivety with the ideology of the libertarian *laissez faire* being the regulatory default to the period of the Internet pragmatism/nationalism with a more nuanced, proactive approach to the digital economy, utilising much broader range of the instruments and principles. Essentially, the DMA implemented the rationale of smart, targeted, asymmetric, differentiated regulation, the idea that one size does not fit all, and that undertakings, which establish their prominent market position using targeted and differentiated practices in data collection and use, should be expected to have a similar targeted and differentiated regulatory treatment. The emerging paradigm is more proactive because it is the only way to catch up with the rapidly changing and intrinsically complex digital relationships; it is more tailored and individualised because these relationships are becoming more context-dependent and law-independent.

7) *Procedural*: the emerging new approach is not designed as an alternative to the established narratives of competition law, economics and policy, but as an effective complement to them. The main purpose is to establish a harmonious combination of the *ex-ante* and *ex-post* instruments of competition policy, synchronising them where possible, using one where the other is too time- or resource-consuming or is less suitable for other reasons. In spite of a very active enforcement of *ex-post* competition law in EU over the last decade, the implication for digital competition is rather limited. Not least because the anticompetitive practices – mainly unilateral – of which the gatekeepers were accused, and the remedies imposed on the infringers are neither representative of the systemic processes of the digital transformation nor effective enough in terms of restoring the functioning of competition in the Internal Market. Regulating undertakings' conduct for the purposes of protecting and promoting competition goes far beyond the rationale of the traditional *ex-post* competition law, requiring also more flexible and more nuanced targeted interventions. Enforcement of *ex-post* competition rules is only possible after an active instance of infringement: it takes a very long time between illegal conduct occurring, being identified and comprehended, the remedies being imposed and confirmed, and then damages being awarded. In most of the cases – even those succeeding in this long and turbulent process – the solution is still embedded in individual conduct and seldom has meaningful systemic implications for the markets concerned.<sup>10</sup> In addition, the de-axiomatisation of competition implies that there could be more than one position on the market which meets the legitimacy threshold, and each polity aims to fine-tune its markets in accordance with the vision and interests they prefer most. Such a practice goes far beyond the rationale of remedying *ex-post* infringement.

## 2. Plurality of goals of competition policy

Protecting, maintaining and promoting economic competition is an important public policy. For the purposes of expediency and manageability, as well the inherent characteristics of the

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<sup>10</sup> Philip Marsden, 'Google Shopping for the Empress's New Clothes –When a Remedy Isn't a Remedy (and How to Fix it)', *Journal of European Competition Law & Practice*, Vol. 11, No. 10, 2020, pp. 553–560.

phenomenon, such a policy has a tendency of being reduced to a single metric of the Law & Economics instruments. In reality, however, competition in the same market can have various legitimate forms, and prioritising one over the other is to a large extent a matter of political choice of the polity. An instance of such a plurality of goals in the context of the digital economy is the co-existence of intra- and inter-platform competition. The former envisages the regulatory attention to shaping competition taking place inside a platform,<sup>11</sup> implying thereby the dominant status of the platform as a *quasi*-legitimate or at least unavoidable precondition of economic affairs. The focus is placed on preventing the platform from the practices which harm competition in the downstream markets. These markets often have several layers and protecting competition *within* such a dominant platform is indeed in many respects more important and more realistic than aiming to challenge or replace the *de-facto* utility status of the platform.

The situation of inter-platform competition in the digital markets is fundamentally different. It envisages a meaningful coexistence of real competitors in the markets, which are inherently susceptible to being mono- or oligopolised. It is thus inherently rare. This is explained by the inner systemic features of the digital economy. Its political regulation requires some strategic enforcement planning and very skilful and targeted intervention. We can see the existence of a meaningful alternative to the services offered by the global gatekeepers mainly in jurisdictions, applying competition policy in a much more flexible, opportunistic way, as a part of their broader strategy of nurturing domestic competitors. Usually, such a nurturing is done by way of constraining the global gatekeepers. The issue may easily become toxic, and the legislators have to strike a delicate balance between the effectiveness of the DMA on one hand and the compliance with the overarching principles of liberal democracy on the other. The danger of overshooting the mark is real. Its presence however does not negate the importance of the discussions about the new vision of the relationship between competition and industrial policies. On the contrary, the discussions about the most effective and the most acceptable formats of such a dialogue between the policies is important as never before.

The non-systemic, nurtured pedigree of the inter-platform competition implies that the regulatory instruments in this context are often focused not on the mere *protection* but also on the *promotion* of such competition. Achieving an effective inter-platform competition could be possible *inter alia* with the implementation of such complex features of the digital economy as interoperability and data portability as well as other forms of encouragement and support of the new inter-platform entries. Clearly, the idea of interoperability of core services is very difficult to maintain effectively,<sup>12</sup> and despite some rumours, the final version of the DMA proposal does not put forward such a proactive instrument as the interoperability *between* the core platform services. Furthermore, often interoperability may backfire, as the incumbent may

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<sup>11</sup> Niamh Dunne, 'Platforms as Regulators', Draft, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3665007](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665007)

<sup>12</sup> For a detailed elaboration of the role of interoperability in the EU digital markets see e.g. Wolfgang Kerber, Heike Schweitzer, 'Interoperability in the Digital Economy', *Journal of Intellectual Property, Information Technology and E-Commerce Law*, Vol. 8, No. 1, 2017, pp. 39–68.; Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, 'Competition Policy for the Digital Era', European Commission Report, 2019. See also Jason Furman, Diane Coyle, Amelia Fletcher, Derek McAuley, Philip Marsden, 'Unlocking Digital Competition', Report of the Digital Competition Expert Panel, 2019; Ian Brown, 'Interoperability as a Tool for Competition Regulation', Open Forum Academy Report, 2020. Christoph Busch, Inge Graef, Jeanette Hofmann, Annabelle Gawer, 'Uncovering Blindspots In the Policy Debate on Platform Power', Final Report by the Expert Group for the Observatory on the Online Platform Economy, 2021.

remain the main home for the business- or end users, discouraging potential switching by making it useless.

This leads to the question about the type of new entries which could be encouraged by the regulators: (i) should they be limited to the entrants not being gatekeepers in other core platform services or extended to all undertakings, including current gatekeepers?; (ii) should – and if yes, to what extent – local entrants get regulatory priority?

If the former model is opted for, the discussion about *ecosystem competition* would become very relevant. This format of competition is based on a trivial observation that while being monopolists in some markets, all the biggest digital players do usually compete strategically with each other for a higher share in other markets, entrenched by other gatekeepers. The ultimate aim of this competition is to lock the users in their platform-ecosystem by offering the widest spectrum of digital services, needed for such users, discouraging thereby not only any switching or multihoming as such, but even any need for existing the platform-ecosystem. The structure of this model is similar to the North American professional sports leagues. The clubs compete fiercely between each other with no or very rare option for new entry. Arguably, the competitive process within such a format may flourish and all the parameters of a healthy intra-platform competition would be likely to be met. Even in such circumstances, however, the format remains problematic as the barriers for new entries would be unrealistically high. It would also be unacceptable for those jurisdictions disagreeing with the *status quo*, aiming to promote in one way or another a more fair and representative structure of the markets and/or a greater role of some (usually, domestic) new entrants.

Even after clarifying such problematic and potentially toxic normative criteria, the questions of the intensity of the selected intervention, enforceability of the selected methods and consistency of the selected priorities remain very difficult to agree upon. The cascade of complexities explains the reason why inter-platform competition is seldom declared as an explicit goal of regulating EU digital society. However, from the perspective of the strategic development of the European digital economy, and in the context of the increasing discussions on the European digital sovereignty, having a meaningful alternative to all, most or some gatekeepers in all, most or some digital markets would create a range of positive systemic implications. This explains why the issue of inter-platform competition should never be neglected in DMA discussions.

### 3. Addressing the *ex-ante/ex-post* deadlock dilemma

The traditional methodological distinction between competition law *sensu stricto* (usually, preventative and *ex-post*) and competition regulation *sensu lato* (usually, proactive and *ex-ante*) is being portrayed as almost dichotomic. While both instruments address the same phenomenon, their very rationale, normative and methodological postulates differ substantially. The purpose of this section is to analyse the role of the proposal as a procedural *sui generis* bridge between the traditional *ex-post/ex-ante* functioning of competition instruments.

The stylised assumption underpinning the *ex-post/ex-ante* dichotomy is that markets function competitively until and unless instances of anticompetitive conduct occur. These instances should be remedied by the effective enforcement of *ex-post* rules. Some of these instances cannot be remedied by the *ex-post* rules alone. In such situations more proactive



regulatory interventions are needed. These interventions have a form of *ex-ante* regulations. They are adopted for remedying or avoiding more systemic market failures. The most proactive instances of *ex-ante* regulation go beyond a *preventative* remedy and envisage a *proactive* establishment and promotion of competition, a ‘procompetitive intervention’ in the previously mono-/oligopolistic markets. Usually, market failures necessitating the *ex-ante* regulation are explained by the sectoral specificities of the industry, its historical, geographic and cultural pedigree, which prevents an effective functioning of the *ex-post* rules.

As the rationale of *ex-post* competition rules is universal and applicable to all industries, the core of competition discussions take place exclusively or mainly within the *ex-post* instruments. As the rationale of *ex-ante* rules is often sector-specific and as such *ad hoc*, it is much harder to internalise it within the established *ex-post* competition narratives and conventions. In such a constellation, *ex-ante* rules are usually perceived as an extraordinary, sector-specific measure, going beyond the typical competition equations, modelling and metrics. Both approaches are mindful of each other and of their mutual interdependence, but conceptually the current paradigm of competition policy tends to perceive them separately (competition vs. regulation), as not having much to do with each other except the subject matter itself.

Such a polarity is being bridged by the new more dialogical, interpretative, participatory and individualised DMA rules. The core difference between the two paradigms is that the new one is based on the conceptual idea of the plurality of goals of competition policy, abandoning the neoclassical presupposition that markets can be comprehended and then regulated in their totality. More than one conceptual and normative answer is possible, and thus competition policy becomes more pragmatic and less dogmatic, more targeted and less axiomatic.<sup>13</sup>

The normative pluralism of the digital competition allows for a strong targeted interventionist policy. The DMA proposal is a representative example thereof. The main systemic idea of the DMA proposal is in combining the interpretative flexibility and the very regulatory philosophy of the *ex-post* competition rules with the expediency of the targeted *ex-ante* regulation, thereby realising the benefits and abandoning the shortcomings of the two regulatory wings of competition policy. This explains a *prima facie* lack of what Rupprecht Podszun, Philipp Bongartz and Sarah Langenstein called a ‘principled approach’, with the list of the DMA obligations appearing to ‘look more like a random selection of past and ongoing cases’.<sup>14</sup> It is hard to disagree with the observation that a competent mind could find a specific practice or an emblematic case under the provisions of essentially all recitals of Arts 5 and 6 DMA,<sup>15</sup> and that such a selection may well appear to be an eclectic hotchpotch of all-inclusive self-conflicting expectations rather than a set of well-calibrated, mutually supportive harmonious obligations.

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<sup>13</sup> In this sense the functional pluralistic approach developed in this article differs from those developing their support of the new competition tool from the perspective of normative fairness and justice: Ceara Tonna-Barthet, Louis O’Carroll, ‘Procedural Justice in the Age of Tech Giants – Justifying the EU Commission’s Approach to Competition Law Enforcement’, *European Competition Journal*, Vol. 16, No. 2–3, 2020, pp. 264–280.

<sup>14</sup> Rupprecht Podszun, Philipp Bongartz, Sarah Langenstein, ‘Proposals on How to Improve the Digital Markets Act’, Policy paper in preparation of the information session on the Digital Markets Act in the European Parliament’s Committee on Internal Market and Consumer Protection (IMCO) on 19 February 2021, p. 3.

<sup>15</sup> Giorgio Monti, ‘The Digital Markets Act – Institutional Design and Suggestions for Improvement’, TILEC Discussion Paper, 2021-004, 2021, p. 1: ‘Nearly all of the 18 obligations are based on prohibiting conduct that has been found to infringe Articles 101 or 102 TFEU or which is currently under investigation by the Commission’.

It is necessary however to make an important hypothesis in this respect. The hypothesis is that the all-inclusiveness – and thus the vagueness – of Arts 5 and 6 DMA is introduced intentionally. Such an *opacity by design* is characterised by three interdependent elements. By identifying these elements, we can explain such an approach and demonstrate why the provisions of DMA indeed a *sui generis* competition law.

The *first* concerns the fact that while formally the provisions of Art 6 DMA do have a direct effect, practically they can be interpreted by the Commission in relation to, and in communication with, each gatekeeper individually, so the proposal essentially hedges all possible effective remedies, enabling the Commission to use those that suit best in each specific case.<sup>16</sup>

*Second*, such an *open-texture*, interpretative approach to the legislation is one of the central features of the *sui generis* competition law – the law, which is much more flexible, adaptable to the rapidly changing digital reality, easy-to-impose and monitor, selective, communicative, participatory and future-proof. Clearly, having a more uniform and coherent catalogue of obligations would allow better predictability, certainty and transparency of this legal instrument, and it would also be more protected against rule-of-law polemical arguments. Yet this would equally disarm the tool's effectiveness. The all-inclusiveness of the provisions of Arts 5 & 6 DMA, their *opacity by design*, implies a much higher level of regulatory engagement by the Commission. This is a second layer of the asymmetric nature of the DMA: not only it is asymmetric in terms of regulating only the undertakings with the assigned gatekeeping status (the first layer of the asymmetry). It also allows for an asymmetry in terms of calibrating the scope of the obligations of each of the gatekeepers (the second layer of the asymmetry). Such an option allows the enforcer a greater flexibility, but also envisages its greater regulatory engagement into the micro-management of the market processes. Such a redesign of the role and the function of the Commission is a paradigmatic shift in competition law. The *opacity by design* feature of the Commission's proposal appear to be strengthened even further in the Draft European Parliament Report, proposing in Amendment 71 a transfer of the open-ended language of Arts 5 & 6 DMA from the *letter* of law to its very *spirit*.<sup>17</sup>

The tool indeed remains competition law<sup>18</sup> – and, in some sense, even more so than the *ex-post* competition provisions. This is because it does not reduce the phenomenon of economic competition to the single metric of consumer welfare and does not operate within a myopic and misleading rationale “if welfare is increasing, there is no reason for regulatory

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<sup>16</sup> The procedural mechanics of the enforcement of Art 6 DMA is discussed in the relevant section of the paper.

<sup>17</sup> Amendment 71 of the European Parliament Draft Report proposes extending this period to three years. European Parliament, Committee on the Internal Market and Consumer Protection Draft Report on the proposal for a regulation of the European Parliament and of the Council Contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9 0419/2020 – 2020/0374(COD)), Rapporteur: Andreas Schwab, 01.06.2021, p. 50: ‘While the obligations of Articles 5 and 6 apply in respect of core platform services designated pursuant to Article 3, a gatekeeper, including any undertaking to which the gatekeeper belongs, shall not engage in any behaviour regardless of whether this behaviour is of a contractual, commercial, technical or any other nature which, while formally, conceptually or technically distinct to a behaviour prohibited pursuant to Articles 5 and 6, is able in practice to have an equivalent object or effect.’

<sup>18</sup> Heike Schweitzer offers a different lexicology to the same semantical point: ‘[W]hile no longer being competition *law* proper, and therefore correctly not being based on Art. 103 TFEU, it remains competition *policy*’ (Heike Schweitzer, ‘The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal’, Vol. 28, No. 3, 2021, p. 5 (forthcoming), emphases in the original).

intervention". In the zero-price digital markets welfare is much harder to measure, but even where measured, it cannot exhaust the reasons for regulatory intervention and steering the competition. There are broader and much more diverse elements in the competitive process than price-theoretical considerations,<sup>19</sup> and not all the aspects of this process are necessarily always self-correcting.

Remarkably, the DMA – is quite scarce in terms of protecting and satisfying the interests of end users (i.e. consumers). And even those obligations aiming to increase data portability, interoperability, and access transparency are designed primarily to protect and promote intra- or inter-platform competition. Reducing the polyvalence of competition to the single utilitarian calculus of consumer harm or benefit would be susceptible to making the EU digital markets even less competitive. First, because, consumers are quite satisfied with the existing *modus vivendi* of the gatekeepers and very large online platforms. Second, because these remedies applied universally, as the ends in themselves, would be likely to backfire both from the perspective of the competitive process as well as from the perspective of end user interests. Finally, because the benchmark of innovation and efficiency is not designed to take into account the specific EU interests in the global digital race, and in the multisided markets the strategic beneficiaries of the innovations and efficiencies may well allow consumers a 'fair' share of the resulting benefits (in line with Art 101(3) TFEU), while further entrenching their gatekeeping position and preventing any meaningful new entry.

The *third* element is functional. It would respond to those supporting the rationale of Art 6 DMA in general and in terms of having a broad catalogue of obligations with the need of their following individualisation but arguing that making such untailed list of obligations binding before the regulatory dialogue takes place is problematic from the perspective of certainty. The argument goes to the point that making the provisions of Art 6 DMA binding after rather than before the dialogue would not have a negative impact on the enforceability of such provisions. The response to this assumption is that under such circumstances the gatekeeper-defendant could (vexatiously) argue in the judicial proceedings both about the nature of what precisely has been agreed between the gatekeeper and the Commission, and how – and from which moment – the discussed practices are or are not in compliance with the outcomes of the dialogue. Such disputes would have the potential to become a new litigation routine, distracting the limited sources of the Commission from the substance to the form.

On the other hand, establishing the moment of non-compliance with the obligations of Art 6 DMA *ex-tunc*, but having an option of imposing liability only *ex-nunc* increases significantly the bargaining power of the Commission in the regulatory dialogue, allowing to use the carrot and stick approach depending on individual circumstances,

#### 4. Towards a *sui generis* competition law

*Ex-post* competition laws allow flexibility in interpreting the conduct but are slower in terms of the resolute part. *Ex-ante* rules allow speedy enforcement but the rules themselves become too soft and vague, making compliance with the *letter* of law a not very demanding exercise – particularly for the major market players whose compliance with the law's and policy's *spirit* matters most. It is often these undertakings that prefer being regulated explicitly

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<sup>19</sup> Oles Andriychuk, 'Competition Overdose: Curing Markets from Themselves: Ten Points for Discussion', *Legal Studies*, Vol. 44, 2021, forthcoming.

and *ex-ante*, as such a format decreases – if not eliminates altogether – the regulatory discretion of the enforcers. Also, the horizontal nature of the *ex-ante* rules usually leads to the compliance burden being disproportionately heavier for those who are supposed to enter the markets than those holding the incumbent position.

The provisions of the proposal aim to bridge this conceptual gap. From a procedural point of view, the rationale of Art 6 DMA is not the most juristically elegant formula. It establishes a range of *de jure* binding obligations without *de-facto* intending to enforce them prior to the mechanism of Art 7(2) DMA being triggered. This mechanism *allows* but never *requires* the Commission to ‘specify the measures that the gatekeeper concerned shall implement’.<sup>20</sup> The mechanism of the regulatory dialogue is established in Art 7(4) DMA: ‘the Commission shall communicate its preliminary findings [... explaining] the measures it considers to take or it considers that the provider of core platform services concerned should take in order to effectively address the preliminary findings’.<sup>21</sup>

While not assuming *de-facto* this stage as a non-compliance (every gatekeeper can reasonably expect a clarification of such broad catalogue of obligations before complying with them), Art 7 DMA *de jure* implies precisely that, by using *inter alia* the disposition ‘[i]n respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall’. This qualifying statement is identical to the one used in Art 5 DMA, which in the case of Art 5 DMA refers to directly effective (or in the DMA terminology ‘self-executing’) obligations.

Furthermore, Art 7(3) DMA states explicitly that ‘[p]aragraph 2 of this Article is without prejudice to the powers of the Commission under Articles 25, 26 and 27’.<sup>22</sup> The provisions of these Articles concern the issues of non-compliance and fines. In other words, the legal apparatus defining and calibrating the regulatory dialogue is far from being perfect from the perspective of the traditional paradigm: it appears to be more of a vicious circle in which the gatekeepers are simultaneously binding and not. A possible explanation for such unnecessary juristic equilibristics could be an attempt to put the gatekeepers under the pressure of an *a priori* non-compliance. This could be done both for purposes of expediency as well as to strengthen the bargaining power of the Commission in the regulatory dialogue. Both objectives are reasonable and legitimate, but both could be probably achieved indeed via a legally less extravagant means.

The spirit of the proposal implies that the provisions of Art 6 DMA become *de-facto* directly effective only after they are individually calibrated in the regulatory dialogue between the Commission and the gatekeeper. The mechanism of the individual calibration is established in the DMA. This is what makes the formula not very elegant juristically. Yet it does not compromise its overall legal validity. Aside from the legal structure, the very substance of Arts 6 & 7 DMA appears to be the most suitable toolkit for breaking the *ex-ante/ex-post* digital deadlock. It essentially establishes a regulatory forum at which the Commission and the relevant gatekeeper agree upon the specific provisions of Art 6 DMA, which would become directly effective in respect to the gatekeeper.

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<sup>20</sup> Proposal for Regulation of the European Parliament and of the Council On Contestable and Fair Markets in the Digital Sector (Digital Markets Act), Brussels, 15.12.2020 COM(2020) 842 final 2020/0374 (COD), Art 7(2).

<sup>21</sup> Proposal for Regulation of the European Parliament and of the Council On Contestable and Fair Markets in the Digital Sector (Digital Markets Act), Brussels, 15.12.2020 COM(2020) 842 final 2020/0374 (COD), Art 7(4).

<sup>22</sup> Proposal for Regulation of the European Parliament and of the Council On Contestable and Fair Markets in the Digital Sector (Digital Markets Act), Brussels, 15.12.2020 COM(2020) 842 final 2020/0374 (COD), Art 7(3).

The mechanism of the regulatory dialogue envisaged in the DMA goes beyond the format of the preventative *ex-post* competition rationale. Under the provisions of the DMA, not only does the Commission get a proactive right to assign (by interpreting) a specific provision of Art 6 DMA for the specific gatekeeper, it also receives an opportunity to impose these provisions even without its ultimate consent *ex-nunc* and most importantly *ex-tunc*. Even more so, formally giving the ‘internal market’ pedigree of the DMA, the Commission does not have to constrain its reasoning and justification to the very well-elaborated matrix of *ex-post* competition law, economics and policy but rather to much broader and context-dependent objectives of fairness and contestability.

Such an extensive catalogue of obligations, which essentially can be assigned by the Commission separately on each gatekeeper *ad hoc* depending on the broader context and interests, is the central feature of the *sui generis* competition policy. The new asymmetric challenges posed to traditional theories of competition policy by the digital economy can finally receive an adequate regulatory remedy. The remedy could be invoked by the Commission in different proportions to different gatekeepers and then quickly adjusted if required.

#### 5. Binary or pyramidal structure of defining the gatekeepers

Under the DMA, the definition of the gatekeepers is binary. The undertaking either meets cumulatively all the qualifying features – and then the entire body of the DMA obligations becomes applicable; or it does not meet some of them – with a consequence of applicability of none of these obligations to such an undertaking. The qualifying binary mechanism in this respect is similar to defining the dominance under Art 102 TFEU. Such categorical ‘either/or’ format can be problematised as the undertakings, which ‘barely’ meet the qualifying features become *de-facto* worse off than those, which ‘barely’ escape them.

In the context of *ex-post* competition law, the problem is seldom discussed as the scope for defining the markets and establishing the dominance is relatively flexible and open-textured and the situation on each market is specific, allowing an effect- rather than form-based evaluation of each specific case. Furthermore, any ‘unintended’ beneficiary of the situation would be very likely to be defined as a dominant undertaking in a new market investigation if the situation on the market changes significantly following the previous investigation.

The scenario becomes fundamentally different under the DMA. The status of the gatekeeper is assigned *ex-ante* and is defined in quite clear terms via a set of quantitative (i.e. formal) criteria. Formally, the qualitative criteria are still indicative, but they still manifest quite strong indicators. It is enough for the undertaking to pass below the radar of at least one of the criteria to escape the application of the entire body of the DMA. This may lead to a strategic decision by some or all of the potential gatekeepers to attempt to reduce their operation in the least important parameter of the definition. Whether effective or not, such an attempt would depend on a number of factors. Chiefly, on the quantitative requirements of the thresholds.

This is why the criteria for defining the gatekeepers should be designed in a way, which allows capturing the most important and systemic undertakings (we can call them super-gatekeepers or gatekeepers-monopolists) without going lower than necessary. Such a calibration would enable all the potential competitors to each of the super-gatekeepers to stay below the threshold for the longest possible time, allowing them to scale up and strengthen their presence in the markets, and thus to enable a regulatory environment for a meaningful

inter-platform competition. At the same time, the threshold should remain sufficiently low to avoid a tactical move of a gatekeeper-monopolist aiming to decrease figures in one of its qualifying parameters, which is the least important for maintaining the entrenched position. These two objectives are directly antithetical to each other: the higher the thresholds, the easier it is for the gatekeepers-monopolists to attempt to go under the radar – but also the more friendly the environment for the inter-platform competition becomes (as the DMA would capture only super-gatekeepers). The lower the thresholds, the more unrealistic the escape from the DMA by the super-gatekeepers would be – but also simultaneously the less friendly the environment for the inter-platform competition (as the DMA would capture not only super-gatekeepers, but also many of its strongest real or potential competitors). Calibrating these thresholds therefore is of fundamental importance for the effectiveness of the DMA, at least as far as inter-platform competition concerns.

The Draft Report of the European Parliament goes further than the qualifying thresholds for defining the gatekeepers proposed by the Commission. It aims to increase these thresholds to capture only a handful of gatekeepers-monopolists (the undertakings most commonly associated with the Big Tech label).<sup>23</sup> Such an increase – alongside with the tightening the obligations of those captured by the new thresholds and the new proposed requirement to cover only undertakings operating at least two core services with 45 million active monthly users each – makes the regulatory binarity of the DMA even more categorical and polar.

Technically, such an amendment goes in line with the idea of promoting inter-platform competition in the EU digital markets, as it allows the potential newcomers-‘heavyweights’ to escape the DMA in its entirety for a longer period. Assuming that a meaningful inter-platform competition can come only from undertakings with established recognition, such competition would be more likely to emerge if these undertakings remain below the qualifying radar of the DMA as long as possible. However, such a raising of the qualifying thresholds also expands symmetrically an opportunity for the gatekeepers-monopolists to attempt to decrease any of their qualifying parameters to escape the application of the DMA as well.

This is a reason why the instrument of finetuning the criteria for qualifying an undertaking as a gatekeeper is of a systemic, strategic importance. From this perspective, it would be reasonable to make the procedure either *ad hoc* or more flexible, making it similar to market definition and establishing the dominance in *ex-post* competition law. The Commission as the main enforcer of the DMA is the most organic candidate for assigning it with the competence of such a fine-tuning. The golden line between keeping the thresholds sufficiently high for capturing only the most systemic gatekeepers-monopolists on one hand, and sufficiently low for avoiding an attempt of a tactical decrease of any of the qualifying parameters by such gatekeepers-monopolists is a moving target, requiring both the strategic vision as well as the

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<sup>23</sup> The Draft Report proposes to increase the threshold for defining an undertaking as a gatekeeper from €65 billion to €100 billion as far as market capitalisation concerns, as well as from €6.5 billion to €10 billion for the turnover in the last three financial years. Additionally, the document proposes to add as an additional condition for undertakings to be designated as gatekeepers under Article 3 (2) of the proposal – that they are providers of not only one but, at least, two core platform services with 45 million active monthly users each – European Parliament, Committee on the Internal Market and Consumer Protection Draft Report on the proposal for a regulation of the European Parliament and of the Council Contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9 0419/2020 – 2020/0374(COD)), Rapporteur: Andreas Schwab, 01.06.2021, p. 32).

routine technical expertise. This appears to be not a legislative, but rather an enforcement competence.

Clearly, granting such an administrative discretion for designating the gatekeepers to the Commission may work in both ways. The right way would allow decreasing the thresholds for the gatekeepers-monopolists to discourage their tactical reduction of any of the parameters, increasing simultaneously the thresholds for their potential inter-platform competitors – to make the regulatory environment for their scaling up friendlier. The wrong way would be an exemption of the gatekeepers-monopolists and/or capturing too early their potential inter-platform competitors. The latter scenario appears to be rather implausible – or it would be a sign of the inability/unwillingness of the Commission to pursue the entire initiative of the *sui generis* competition law in the area of the digital economy altogether: a systemic failure, which could not then be remedied by the ‘homeopathic’ measures of decreasing its flexibility in designating the gatekeepers.

A separate issue with regard to the thresholds for designating the gatekeepers modified by the Draft Report concerns the additional requirement for the potential gatekeeper to operate at least two core platform services with 45 million active monthly users each. On one hand, introducing such a second qualifying layer grants to most of the potential inter-platform competitors a regulatory immunity from the DMA. Particularly, if such eventual newcomers do not operate two or more entrenched core platform services with 45 million active monthly users each already (assuming of course that the drafters of the DMA envisage an encouragement of genuinely new entries rather than a mere inter-platform competition between gatekeepers-ecosystems trying to expand into each other’s entrenched markets). From this perspective, the new criterion is indeed beneficial for designing a fairer format of inter-platform competition. It may however potentially backfire as it puts potentially below the DMA radar all the gatekeepers-monopolists, operating mainly one core platform service with 45 million active monthly users. Clearly, the entrenched power in one segment of the digital economy has various spillover effects across other sectors, and usually an entrenched position in one market allows an expansion to and successful anchoring into other core platform services. In this sense, meeting this additional requirement may indeed be a reliable test of the real economic power of the potential gatekeeper. It is possible however to have scenarios where the undertaking is entrenched only into one core platform service, particularly, if such a service is distant enough from others and/or allows a strategic growth without a need of a horizontal expansion into other markets. If such a business strategy is indeed possible, the proposed second layer may in fact cement the *status quo* as it would put an important group of undertakings, which would otherwise qualify as the gatekeepers under the proposal of the Commission below the qualifying filters of the DMA, limiting rather than promoting inter- (as well as intra-)platform competition. The version of the DMA, adopted by the European Parliament in the first reading, does not support a proposed change.

At first glance, the negative implications of the categorical binarity of the designating the gatekeeping status could be mitigated differently. A mechanism of such an alternative designation is offered in the DSA. Unlike the DMA, the structure of the DSA envisages a pyramidal rather than a binary designation format. It is more symmetrical than categorical. The stronger the power of the undertaking, the higher the obligations. The proposal offers at least six levels of such undertakings – starting with micro- and medium-sized undertakings, which are not subject to the DSA even when they offer intermediation services and ending with the very large online platforms, which are subject to the strictest DSA obligations.

In spite of its *prima facie* attractiveness and the evident proportionality of the formula ‘the stronger the power – the higher the responsibility’, such a pyramidal approach may work very well for *protecting* the *intra*-platform competition. The *promotion* of the *inter*-platform competition in the digital markets requires a more radical format. The entrenched gatekeepers are subject to the *sui generis* competition law as envisaged by the DMA as well as Art 102 TFEU. The potential new entrants are only subject to Art 102 TFEU. The greater the flexibility is assigned to the enforcer in terms of calibrating the thresholds for establishing the gatekeeping status, the longer the potential new entrants would remain below the radar of the DMA (making thereby the emergence of inter-platform competition more likely). Clearly, such a discretion of the enforcer should be paired with its great strategic vision and high technical competence.

The Rapporteur of the Draft Report, EMP Andreas Schwab has suggested that EU should focus on top 5 tech companies (implying that under the format, proposed by the Commission, about 20 undertakings would be designated with the status of gatekeeper).<sup>24</sup> A format very similar to the one proposed by the Draft Report is envisaged by the UK CMA. A dedicated Digital Markets Unit will be enforcing a mandatory code of conduct, governing the behaviour of the gatekeepers-monopolists.<sup>25</sup> It is very likely that each of the biggest gatekeepers, defined in the context of the Online platforms and digital advertising market study (evidently, the gatekeeping status is held by a digital advertising duopoly)<sup>26</sup> would be assigned with the specific obligations, calibrated specifically for such an undertaking.

It is not unlikely that such a narrow, almost individualised, scope of the DMA’s addressees could provoke comments about the targeted nature of the legislation, aiming to impose *de-facto* trade restrictions. This could lead to litigation and/or direct ‘symmetrical’ tariff sanctions either against the EU itself or (some of) its digital undertakings. While acknowledging that the scope of these considerations goes beyond competition law (both *sensu stricto* and *sui generis*), it would be helpful for the discussion to have some assurance that the probability of such scenario is being evaluated and would be taken into consideration either during the final stages of the legislative process.

## 6. Potential challenges and shortcomings

Clearly, introducing such an omnipotent tool brings with it a number of previously unknown challenges. The list is non-exhaustive and addresses only potential shortcomings. Some of them will remain problematic only hypothetically. Among the most challenging are the following: amorphous scope; coherence; arbitrariness; regulatory capture; insufficient regulatory dialogue, rule of law; international context and excessive transparency.

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<sup>24</sup> Javier Espinoza, Interview with Andreas Schwab, ‘Financial Times’, 31 August, 2021.

<sup>25</sup> UK Competition and Markets Authority Press release ‘A Digital Markets Unit has been established within the CMA to begin work to operationalise the future pro-competition regime for digital markets’, 7 April, 2021. UK Competition and Markets Authority, ‘The Competition and Markets Authority has delivered the advice of its Digital Markets Taskforce to government on the potential design and implementation of pro-competitive measures for unlocking competition in digital markets’, 3 April 2020. UK Government Press release, ‘New competition regime for tech giants to give consumers more choice and control over their data, and ensure businesses are fairly treated’, 27 November, 2020.

<sup>26</sup> UK Competition and Market Authority, ‘Online platforms and digital advertising Market study’ Final report, 1 July 2020.



Amorphous scope: As evident from the provisions – as well as the full title – of the DMA proposal, its main objectives are contestability and fairness in the digital sector. Both objectives are relevant but go far beyond the ambit of DG Comp. Furthermore, they may mean different – occasionally even mutually exclusive – things in different contexts; they are inherently broad and indeterminate. Thus, the obvious question emerges who and how defines the supreme EU interest, navigating and steering the enforcers in the bilateral regulatory dialogue, and how explicitly such an objective should be communicated to all the relevant stakeholders: other parts of the Commission, other EU authorities, Member States, their relevant NCAs, gatekeepers, their competitors, customers and consumers as well as the broader community. Arguably, such an overarching EU interest should be embedded into the rationale of EU digital sovereignty. Global competition in the digital area (and era) is fierce as it defines the role and place of the polity in the future constellation of the world economy (and politics) for many decades ahead. In terms of the Fourth Industrial Revolution, data is the new oil and platforms the new infrastructure. Those controlling data and infrastructure are becoming trendsetters in economic, cultural, political, social and various other senses. However appealing and categorical the argument of the non-rivalrous nature of data is, data are rivalrous, as only processed, ‘smart’ data are decisive in shaping the choices and predicting behaviour – and thus only processed ‘smart’ (and as such non-sharable) data matters most, and chiefly in conjunction with the digital infrastructure and expertise. Furthermore, the real essence of the digital competition is not in the data as such but in users’ attention – which is obviously rivalrous and scarce. The EU’s interests can be pursued in various ways, and the emergence of the *sui generis* competition rules indicate the Commission’s understanding of and planning for shaping the policy accordingly. It is difficult however to assume that these issues will be communicated clearly and fulfilled consistently as a long-term strategy.

Coherence: The former shortcoming may trigger another one: if the overarching objective is strategic, undefinable in clear terms, flexible, changes its shape, consists of various components and open to reinterpretation, it would be difficult to ensure the uniformity and institutional consistency of its long-term objectives.

Arbitrariness: However understandable the purpose of maintaining EU digital sovereignty is, the scope of Art 6 DMA enables potentially unlimited control over the gatekeeper. Imposing of most or all obligations together with the strict monitoring of the compliance may downgrade even the leading players in the industry, particularly if such a formally valid but substantively preconceived approach is applied in conjunction with liberal enforcement vis-à-vis the gatekeeper’s real and potential competitors. In the words of Pablo Ibáñez Colomo, the reform ‘would afford authorities a virtually unconstrained margin of appreciation to decide when to intervene and how’.<sup>27</sup> While Pablo Ibáñez Colomo warns categorically against this transformation, this article sees it as a necessary and timely shift. Wider discretion is an indispensable part of the *sui generis* competition law. It is likely, however, to lead to some or many of the shortcomings identified by critics. This is a hard choice. For the critics, the negative consequences of the wider discretion are an avoidable harm (avoidable in the sense of abandoning the asymmetric all-inclusiveness of the DMA). For the proponents, they are undesirable but hardly avoidable side effects. In other words, effective regulation of competition in the digital markets is only possible with the much wider discretion of the enforcers, but such unprecedented scope of discretion is a very delicate and potentially harmful

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<sup>27</sup> Pablo Ibáñez Colomo, ‘Protecting the ‘Law’ in Competition Law’, *Journal of European Competition Law & Practice*, Vol. 11, No. 7, p. 333.

instrument which has never before been available for a market regulator, and this novelty itself is a challenge which cannot be ignored.

Regulatory capture: Also, the flexibility and opacity of the enforcement of Art 6 DMA allows significant room for various instances of regulatory capture. This could obviously take the form of direct positive biases with regard to some gatekeepers aiming either to soften the rule for a gatekeeper A or to impose too strict rules on the gatekeeper A's competitor – gatekeeper B. In addition, and less controversially, some sympathy in conjunction with incompetence may lead to the situation when the least problematic obligations would be discussed most, and their imposition on the gatekeeper would be portrayed as an important regulatory achievement in constraining the power of the relevant undertaking.

Insufficient regulatory dialogue: the idea of the regulatory dialogue is one of the prominent features of the proposal. The format of the dialogue, however, is not ideal. If the idea of having the expansive, flexible and hard-to-comply-with catalogue of obligations of Art 6 DMA implies their almost inevitable refinement via the regulatory dialogue envisaged in Art 7(2) DMA, it would be reasonable to expect to allow the gatekeepers the room for efficiency defence and/or objective justification. Semantically, this format would be more dialogical. Evidently, the format of commitments as envisaged in Art 23 DMA could mitigate this shortcoming. If Art 7(2) DMA and Art 23 DMA are applied in conjunction with each other, it would imply the interrelation between the scope of interpreting a specific obligation of Art 6 DMA by the Commission, and the scope of the commitments a gatekeeper is prepared to take for ensuring its compliance with Art 6 DMA. This is something conceptually similar to a partial objective justification. However, unlike the latter, both Art 7(2) DMA and Art 23 (DMA) presuppose the instance of non-compliance, violation of the rules and the following duty of compliance with the rules, whereas the instrument of objective justification *de-facto* exempts the gatekeeper from the obligation. The question remains whether it is really necessary to place the relevant gatekeepers in such *a priori* legally uncomfortable situation, and what explains such rigidity.

Rule of law: The scope of Arts 5 & 6 DMA is broad and open to interpretation. This is an important element of the tailored regulation. However, it raises systemic questions about compliance with the principles of procedural justice, establishing clear separation of powers with *ex-post* competition rules, the relevance of the concepts, definitions, and principles developed in case law.

International context: These proactive rules risk being portrayed as protectionist and dirigistic, particularly in those parts of the global digital economy with a higher number of undertakings susceptible of being regulated by the DMA. In other jurisdictions the new approach could be used as a proxy for blame-shifting, legitimising much broader interventionist protectionist or authoritarian policies.

Excessive transparency: gatekeepers have the remarkable ability to adapt to any regulatory requirements, turning many of those designed originally to limit their economic power to their own benefits. This becomes especially easy when the rules are imposed horizontally or on a specific group of undertakings. This is the reason why we see more instances of narrowly tailored or even individualised regulation. The DMA proposal offers a possibility for such individualised tailoring via the avenue of its Arts 6 and 7(2). Such an approach helps to mitigate the imbalances. From this perspective, however, the rationale of the DSA is different. While using a differentiated approach and gradually imposing stricter obligations depending on the size of the platform, it allows for the realistic option of categorising into the same group both

incumbent and its main real and potential competitors, thereby cementing the *status quo*. Furthermore, even requirements imposed on all online platforms (i.e., on the undertakings from the lower layer of the pyramid) are quite demanding in terms of transparency obligations. This carries the risk that the incumbents could access and then integrate more publicly available data into their algorithms and know more about the performance of their potential competitors. In addition, the stricter rules make it less plausible to mitigate the competitive gap, developed in the previous more liberal regulatory period. The asymmetric, *ad hoc* dialogical approach is needed because, however selective the category of gatekeeper in the DMA or very large online platform in the DSA might be, it is very likely to include not only the incumbent but also its real or potential competitor with a high probability that the incumbent adapts quicker and the higher probability of misuse.

The overarching problem with the identified shortcomings is in their systemic nature, as well as their apparent reverse correlation with the effectiveness of the rationale of Art 6 DMA: the more clarity is brought to these questions, the less room for regulatory manoeuvre in the regulatory dialogue is left for the Commission. Overall, the benefits and improvements introduced by the proposal outweigh the possible shortcomings. All of these systemic challenges are exacerbated by the evident understaffing. It is hard to pursue all the catalogue of the ambitious and new policies with only 80 people working on these problems.

### **III. Conclusion: towards a genetically modified competition policy**

The main contribution of the DMA is paradigmatic. It cannot be boiled down solely to incremental improvements and refinements of the established principles and the current regulatory mechanisms. Nor does it only lie in bringing up to date the rules for the digital markets. The proposal introduces a qualitative shift towards a more targeted, individualised, personalised enforcement. It manifests a new vector and a new essence of competition policy: an essence which better reflects the needs of the contemporary digital society. The real contribution of these new *sui generis* competition rules is in their capturing, encapsulating and reflecting upon the new economic reality, which primarily underpins the digital sector of the economy but has a spillover effect on all aspects of social life. The new rules offer a more comprehensive, expedient, pragmatic and holistic instruments for dealing with the newly emerging challenges to economic competition as well as – more broadly – helping to discover, shape and better calibrate the very notion of economic competition and its regulation in the new circumstances.

Methodologically, one of the challenges for the DMA is its aim to achieve a major synergetic goal of the revision of the whole spectrum of the digital markets-related rules by covering the whole spectrum of diverse digital services, each of which has its own specificity. For this reason, it is difficult to define a single centre of gravity of the regulations in the wording of the proposal. Different articles appear to address very different problems which originate in very different factors, with very different rationales and requiring different remedies. It is very likely that the DMA will contain or at least allow for several concurrent normative narratives and regulatory philosophies. This article is based on the narrative of a proactive, individualised, dialogical, participatory competition policy, embracing and complementing all central features of the previous axiomatic paradigm but going in some cases beyond – though never against – its postulates.

The main conclusion of the article is that the emerging *sui generis* competition law, epitomised in the DMA proposal, is an objective trend. The EU is in the vanguard of this global competition law re-emergence. Other most prominent (and structurally closest) examples of the regulatory reconceptualisation of the role of competition policy in shaping the digital economy can be seen in the UK<sup>28</sup> and Germany.<sup>29</sup> Tactically, the approach to regulating economic competition in the digital society may – and does – differ from jurisdiction to jurisdiction. The specific tools are designed taking into consideration various national specificities. Strategically, however, all these examples are part of the same trend.

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<sup>28</sup> 'A New Pro-Competition Regime for Digital Markets', Advice of the CMA's Digital Markets Taskforce, December 2020.

<sup>29</sup> The 10th amendment to the German Act against Restraints of Competition - the 'ARC Digitalization Act', January 2021.