SIMONETTA VEZZOSO

TACKLING DIGITAL GATEKEEPER POWER: A MORE EFFECTIVE, PARTICIPATORY WAY

A report commissioned by Martin Schirdewan MEP

GUE/NGL
THE LEFT
IN THE EUROPEAN PARLIAMENT

DIE LINKE.
IM EUROPAPARLAMENT

TABLE OF CONTENTS

EXECUTIVE SUMMARY

On 15 December 2020, the European Commission submitted to the European Parliament and to the Council the Digital Markets Act (DMA), namely a proposal for a Regulation on contestable and fair markets in the digital sector. The essence of the DMA proposal consists in the provision of directly applicable legal obligations (dos and don'ts) directed at a number of key digital firms (designated gatekeepers). This new regulatory tool should complement existing competition law enforcement. As some key firms' entrenched market power in digital markets with specific, well analyzed characteristics is such that competition problems are expected to persist over time, there is the need for an ongoing and specific oversight of these firms that traditional competition law is unsuitable to provide.

The Commission's idea of a new regulatory tool is highly welcome. It comes at a pivotal moment for redirecting the EU digital economy's trajectory, whose importance has substantially grown also due to the pandemic. However, while a complementary ex-ante approach to tackle gatekeeper power is unavoidable at this stage, the DMA as currently proposed by the Commission in lacking in many important respects that, if left unremedied, could seriously compromise the effectiveness of the envisaged regulatory tool. The Study therefore puts forth several specific suggestions on how to substantially improve the proposed DMA. First, some of the obligations proposed by the Commission should be fine-tuned and expanded, for instance the currently foreseen interoperability mandate. Second, gatekeepers' effective compliance with the DMA's obligations needs to be more forcefully ensured. Third, much more should be done in order to future-proof this new regulatory tool because of the highly dynamic nature of digital markets. Finally, the important need of a more participatory approach involving the "gated" users, namely business as well as end-users, should be suitably addressed. As tackling gatekeeper power is at the core of this new regulatory framework, this should be done comprehensively, including promoting more and better involvement of platform's users in the DMA's overall implementation.

1. INTRODUCTION

In November 2014, the European Parliament voted a Resolution[1] whose content was broadcast around the world.[2] The Resolution was focusing in particular on online search services in the shadow of the EU Google Shopping case, still ongoing at that time since 2010.[3] The Members of the European Parliament (MEPs) called on the Commission to enforce EU competition rules decisively "in view of the potential development of search engines into gatekeepers". Particularly noted was MEPs plead „to consider proposals aimed at unbundling search engines from other commercial services". As is well known, despite a proliferation of antitrust proceedings and infringement decisions against Google since Margrethe Vestager became EU Competition Commissioner,[4] unbundling remedies were never ordered to this day. More generally, there have been increasing and nonpartisan concerns that competition law enforcement, in the EU and beyond, has been ineffective in tackling the rise and consolidation of large amounts of power in just a few digital hands.[5] By now there is a large consensus in the EU that even enforcing current competition law „decisively" would not suffice to tackle the very much unassailable gatekeeper power enjo-

1 European Parliament resolution of 27 November 2014 on supporting consumer rights in the digital single market (2014/2973(RSP)).

2 See Financial Times, Google break-up plan emerges from Brussels, 21 November 2014; New York Times, In Europe, a Resolution to Break Up Google, 21 November 2014.

3 See European Commission, Press Release, Antitrust: Commission probes allegations of antitrust violations by Google, 30 November 2010, https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1624 (last accessed 14 July 2021). After protracted and inconclusive commitment negotiations with the Commission, in 2017 Google was eventually fined €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 (last accessed 14 July 2021).

4 The most recent proceeding concerns Google's adtech business, see European Commission, Press Release, Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector, Press Release, 22 June 2021.

5 J. Furman, D. Coyle, A. Fletcher, D. McAuley, D. and P. Marsden, Unlocking Digital Competition. Report of the Digital Competition Expert Panel, HM Treasury Publications, London, 2019; US House of Representatives Sub-Committee on Antitrust, Investigation of Competition in Digital Markets, Washington, 2020.

yed by some digital platforms, which were able to act conspicuously under the regulatory radar so far. Seven years on from the 2014 resolution, the European Parliament is now co-legislating on a new regulatory instrument aimed to tackle gatekeeper power. Together with the necessity to substantially strengthen and reshape competition policy, the Commission's choice of an ex-ante approach comes at a pivotal moment for redirecting the digital economy's trajectory, whose importance has grown because of the pandemic.[6] While the largely unbridled market forces which have been at play so far have led to certain types of innovations, the regulatory framework currently in place has been woefully inadequate to check the legitimacy and exercise of the unbounded economic power gained by certain key digital firms. Abuses of dominant position by Big Tech, even when episodically detected and fined, have not been sufficiently remedied. Potential competitors have been acquired without proper assessment under a fatally ineffective merger regime in dealing especially with innovation dynamics. Platform orchestrators have been able to shape competition and innovation processes in their exclusive interest within well-guarded closed ecosystems, depriving the economy as a whole of new and potentially more beneficial trajectories of digital innovation, as well as of alternative business models, providing more and effective choice. Consumers have been exploited and manipulated in new and worrying ways. Democracies have been negatively affected.

Against this well-known and largely undisputed factual background, as represented by almost countless Reports produced in the last three years,[7] the Com-

6 M. Mazzucato, R. Kattel, T. O'Reilly, J. Entsminger, Reimagining the Platform Economy, Project Syndicate, 5 February 2021, https://www.project-syndicate.org/onpoint/platform-economy-data-generation-and-value-extraction-by-mariana-mazzucato-et-al-2021-02?barrier=accesspaylog (last accessed 14 July 2021)

7 See for instance Heike Schweitzer, Justus Haucap, Wolfgang Kerber and Robert Welker, Modernising the law on abuse of market power, 4 September 2018; J. Crémer, J., Y.A. de Montjoye, and H. Schweitzer, Competition Policy for the Digital Era, Publications Office of the European Union, Luxembourg, 2019; Furman/Coyle/Fletcher/McAuley/Marsden (n 5); M. Schallbruch, H. Schweitzer and A. Wambach, A new competition framework for the digital economy: Report by the Commission 'Competition Law 4.0', September 2019; Stigler

mission on 15 December 2020 submitted to the European Parliament and to the Council the much-awaited Digital Markets Act (DMA), namely a proposal for a Regulation on contestable and fair markets in the digital sector.[8] The core of the DMA proposal is a package of directly applicable (self-executing) obligations (dos and don'ts) directed at a number of digital players (designated gatekeepers). This new regulatory tool should complement existing competition law enforcement. While a complementary ex-ante approach to tackle gatekeeper power is unavoidable at this stage, the DMA as currently proposed by the Commission is lacking in many important respects that, if left unremedied, could seriously compromise the effectiveness of the envisaged regulatory tool.

After providing a brief summary of the main reasons that have led the Commission to put forth a new regulatory regime for digital gatekeepers, as well as an overview of its structure (Section 2), the Study will advance several suggestions on how to refine and expand the obligations contained in the DMA (Section 3), how to better ensure gatekeepers' effective compliance (Section 4), and how to future-proof this new regulatory tool (Section 5). The final part of the Study addresses the important need, largely disregarded by the current Commission's Proposal, to make this unprecedented form of economic regulation tailored at digital gatekeepers more by meaningfully involving the "gated" users, namely business as well as end-users (Section 6).

Committee on Digital Platforms, Final Report, George Stigler Center for the study of the Economy and the State, University of Chicago Booth School of Business, Chicago, 2019; US House of Representatives Sub-Committee on Antitrust, Investigation of Competition in Digital Markets, Washington, 2020.

8 European Commission proposal for a Digital Markets Act, see https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fitdigital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (last accessed 14 July 2021).

2. THE UNAVOIDABILITY OF A COMPLEMENTARY EX-ANTE APPROACH TO TACKLE GATEKEEPER POWER

The Digital Markets Act proposed at the end of 2020 is the Commission's response to the need to comprehensively and effectively tackle the largely unassailable power of a number of large digital players with tools which go beyond traditional competition law. The gatekeepers specifically targeted by the new Regulation not only have come to firmly dominate their respective markets (e.g., Google dominates search, Facebook social media, Apple and Google mobile phones and app stores, Amazon business-to-consumer e-commerce), but tend to expand into new economic sectors creating major digital ecosystems. Their respective market power is such that it is unlikely to be competed away in the short or medium term ("entrenched").

Several reports[9] and inquiries[10] have offered in-depth analyses of the assorted causes behind the high levels of concentration and the entrenchment of dominant positions experienced in these digital markets. First, they point to relevant structural features, such as huge economies of scale and scope, significant network effects, as well as the critical role of data accumulation. Second, competition law enforcement has been largely ineffective in preventing and/or limiting digital platforms' entrenchment in their respective markets, checking their expansion in adjacent markets, as well as in addressing the economic harms that result from the exercise of their strategic market power (exploitative and exclusionary conducts). While an increasing number of practices by large digital companies raising competition concerns have been investigated by the Commission and national competition authorities in the last years (see Box 1), concrete results have been limited so far. Moreover, platforms have engaged in substantial merger activity that has remained unchallenged to a great extent. Suffice it to recall in this respect that of the hundreds of acquisitions made by Google even in recent years, not a single one has been forbidden by competition authorities.[11] Finally, substantial market failures have to do in particular

9 See the references as of n 7 above.

10 CMA Competition and Markets Authority, Online platforms and digital advertising: Market study final report, July 2020; ACCC Australian Competition and Consumer Commission, Digital Platforms Inquiry: Final report, July 2019.

11 Not yet covered by the Reports and Inquiries mentioned in n 7 and 10 respectively is Google's acquisition of Fitbit, recently allowed in the EU, see European Commission, Press Release,

Box 1. Overview of recent issues raised by digital ecosystems and the substantial market power held by digital platforms (in the EU only)

- Self-preferencing behaviors: Google Search (Shopping) ; Amazon's logistic services.
- Tying-oriented practices : Google Android.
- Combination of personal data : Facebook.
- Data advantage over competitors and business user : Google Search (Shopping) ; Amazon Marketplace
- Implementation of MFN clauses : e-book Amazon ; Booking.com.

with ever widening information asymmetries among market participants (e.g., through the use of opaque algorithms). In sum, these reports and inquiries come to the largely shared conclusion that the entrenched market power enjoyed by major platforms is very likely to have a negative impact both on prices and innovation and that this power should not be left unchecked any longer.

The DMA has been presented by the Commission as a new ex-ante approach which should complement competition law enforcement with the aim to discipline the behaviour of a number of large digital platforms so as to safeguard the openness and fairness of digital markets. A key concept in order to understand how the DMA is supposed to work in practice is that of a "core platform service."[12] Those in scope of the proposed regulation are "digital services that are most broadly used by business users and end users and where, based on current market conditions, concerns about weak contestability and unfair practices by gatekeepers are more apparent and pressing from an internal market perspective."[13] Art. 2 (2) identifies eight types of core platform services: "(a) online intermediation services; (b) online search engines; (c) on-

Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions, 17 December 2020.

12 It should be further considered, however, whether the reference to "platform" services is potentially too restrictive.

13 DMA Proposal, Recital 12.

line social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; (h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g)". While advertising services are in the DMA's scope only when provided together with another core platform service, with regard to the other digital services this is not required. Issues of contestability and unfair practices that the DMA aims to tackle arise when the core platform services are operated by gatekeepers, namely providers that "(i) have a significant impact on the internal market, (ii) operate one or more important gateways to customers and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations".[14] Gatekeepers covered by the Regulation are identified on the basis of quantitative thresholds, giving rise to rebuttable presumptions, complemented by the use of qualitative criteria. For each gatekeeper identified on the basis of quantitative (Article 3(4)) or qualitative (Article 3(6)) criteria, the Commission has to "identify the relevant undertaking to which it belongs and list the relevant core platform services that are provided within that same undertaking and which individually serve as an important gateway for business users to reach end users" (Article 3(7)). In respect of each of its core platform services, the gatekeeper has to abide by the obligations listed in Articles 5 and 6 of the proposed Regulation.

While the gatekeeper designation and the scope of the applicable rules should be the central elements of the DMA Proposal, the Commission has realized that detailed regulatory provisions are needed in particular (i) to ensure effective compliance with the obligations and avoid their circumvention, (ii) to update those obligations, (iii) to deal with their non-compliance, (iv) to add more services to the list of core platform services, and, finally, to ensure that the Commission has (v) adequate investigative, enforcement and monitoring powers as well as (vi) the power to adopt delegated acts. The result is a fairly long and articulated Proposal which contains 39 articles divided into 6 chapters, as well as 79 Recitals.

14 DMA Proposal, Explanatory Memorandum, p. 2 (bold in original).

This regulatory complexity is to a large extent unavoidable, especially due to the novelty of the proposed instrument and the limitations and constraints posed by the overarching EU normative framework. In the more than six months since its publication, the DMA Proposal has been discussed on almost countless occasions and in quite varied academic, policy and industry fora. All of this has helped to better assess the scope of the Commission's proposal, drawing attention to its positive aspects, but also to its shortcomings. Naturally, it is to be hoped that the European Parliament and the Council under the Slovenian and then French Presidencies will work to further strengthen the DMA. For the same purpose, this Study will in the following suggest several amendments to the Commission's DMA Proposal which seem necessary to make this new tool more effective and participatory, albeit without disrupting the Proposal's underlying conceptual framework at this already advanced stage of the legislative process.

3. REFINING AND EXPANDING THE DESIGNATED GATEKEEPERS' OBLIGATIONS

It is appropriate and overdue for the EU legislator to clearly set the rules of the game for digital gatekeepers, also given the current limitations and shortcomings of other regulatory frameworks. The DMA's obligations only apply to few very large digital players, leaving smaller platforms unaffected by the tabled Regulation. Proposals recently put forth in the US[15] are moving in the similar direction of identifying the targets of new obligations based on quantitative criteria.[16]

The entirety of the obligations contained in Articles 5 and 6 of the DMA Proposal are rule-based and it is for the gatekeepers to ensure that compliance is effective "in achieving the objective of the relevant obligation" (Article 7). The Commission's chosen approach is potentially providing the greatest upfront clarity to firms which could be designated as gatekeepers. While the obligations as of Article 5 are directly applicable without a Commission decision, Article 6 identifies those obligations "susceptible of being further specified". This would allow for more tailoring of the obligations, in particular taking into consideration the different gatekeepers' business models.

Recital 58 explains that the gatekeepers "should ensure the compliance with this Regulation by design. The necessary measures should therefore be as much as possible and where relevant integrated into the technological design used by the gatekeepers". The "by design" element calls to mind Article 25 of the General Data Protection Regulation.[17] There is no reference in the DMA Proposal, however, to the need for the gatekeeper to explain how it complied with these obligations, i.e. to describe the measures that it concretely took in order to integrate them "as much as possible and where relevant" into the

15 House Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice", 11 June 2021, https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-stronger-online-economy-opportunity (last accessed 14 July 2021).

16 See A. Fletcher, Big Tech: how can we promote competition in digital platform markets?, Economics Observatory, 16 June 2021.

17 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (27 April 2016) OJ L 119/1 (4 May 2016).

technological design that it uses. This is however very important in order to promote effective compliance by design, and the DMA should be amended as to make clear gatekeepers' obligation in this respect.

The Commission seems to have deliberately abstained from clustering the roughly 18 obligations in any meaningful way, such as for instance making a distinction between those aimed to prevent the harms caused by the exercise of entrenched market power versus those designed to address the root causes of such market power in digital markets. While this is not a problem per se, the "objective of [each] relevant obligation" (Article 7) should be spelt out clearly so as to facilitate compliance and bolster enforcement, both public and private. Some of the obligations imposed on gatekeepers clearly aim at increasing contestability with regard to the gatekeeper's core platform services (e.g., Article 6(1)(h)). Others are aimed at enabling business users to compete fairly with the gatekeeper's ancillary[18] services (e.g., Article 6(1)(f)). Promoting fairness in the sense of directly limiting and/or preventing users' exploitation underlies some obligations (e.g., Article 5(a)), while other provisions aiming at increasing transparency should also help reducing information asymmetry between the gatekeeper and platform users (e.g., Article 5(g)). The truly remarkable approach here regards the cumulative and possibly mutually reinforcing effects that these obligations can have on openness and fairness with regard to each designated gatekeeper, granting breathing and guarded space (leeway) to use the platform services, compete and innovate. Put differently, taken away from the gatekeepers are opportunities to engage in a repertoire of rather well-known practices that are seen as unfair and/or considered to produce negative effects on the contestability of the platform services concerned. This is obviously very different from the traditional antitrust approach that tends to focus on the positive and negative effects of business practices taken singularly. But it is also quite different from a regulatory approach that would directly dictate market outcomes to the regulated entity.

18 Ancillary services are defined by the proposed Regulation as "services provided in the context of or together with core platform services, including payment services...and technical services which support the provision of payment services...fulfilment, identification or advertising services" (Art. 2(14)).

It is already apparent from the tone of the discussions that have surrounded the DMA Proposal since its publication in December 2020 that the eighteen listed obligations could be almost endlessly adjusted to allow for more or less contestability of core and ancillary platform services (i.e., openness), as well as for more or less fairness in the relationship between platform users and the gatekeeper itself. Conversely, the concrete possibility for gatekeepers to continue profiting from economies of scale and scope, network effects and data-driven advantages can be tuned up or down based on the unavoidable amount of market engineering the DMA is premised on based on its ex-ante perspective. How fair and contestable do we want the competitive spaces to be in which gatekeepers already operate and are entering into? These are policy choices that the EU legislator is now expected to make, setting also the path for the further development of the DMA in the years to come.

A purely technocratic approach trying as much as possible to avoid difficult policy choices that cannot, however, be left to the chimerical wisdom of an invisible hand would miss the point. Put differently, the regulatory framework chosen by the Commission for the DMA requires a fairly clear ex-ante vision of how fair and open competitive processes in the digital economy should indeed function, as properly distilled into the rules of the game imposed on the gatekeepers.[19] While the principles informing the obligations can be spelt out rather clearly, carefully achieved trade-offs between them will often be necessary.

Let's consider for instance Art. 5 (a) DMA Proposal. Any antitrust practitioner analysing it will immediately recognise the Facebook's proceeding before the German competition authority as likely inspiration.[20] Many bright suggestions could be put forth in order to make this provision more effective in promoting contestability.[21] The Commission's offered choice with regard to this obligation

19 In other words, what seems unavoidable is a policy framework based on principles, as discussed in particular by P. Marsden and R. Podszun, Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement, 2020, p. 36 ff.

20 Bundeskartellamt, 6.2.2019, Case B6-22/16.

21 Cfr. R. Podszun, Should gatekeepers be allowed to combine data? Ideas for Art. 5(a) of the draft Digital Markets Act, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860030.

has been expanding on, but remains much in line with, the remedy ordered by the German Competition Authority, the Bundeskartellamt, which foresees the end user's possibility to opt into the data combination, despite the well documented issues with regard to consent regimes more generally. But the question remains, for instance, why the Proposal has not gone even further than the German solution, for instance prohibiting the combination of personal data sourced from any of the gatekeeper's core platform services with personal data from any other core platform service or other services offered by the gatekeeper or with personal data from third-party services. There is no explanation in the Proposal of the trade-offs involved in framing the proposed obligation, which could however be very useful in interpreting it. While the example of Article 5 (a) shows that it certainly makes sense to draw the inspiration for the list of dos and don'ts from past experiences in enforcing competition law, efforts should be made already at this stage to tailor the "tried and tested" outcomes to the new regulatory context, expanding the obligations beyond what has been learned from past competition cases if this seems suitable, and/or suitably explaining the different path taken.[22]

Moreover, it seems obvious that the obligations foreseen in the DMA should not be derived exclusively from past experiences.[23] The lack of effective competition enforcement against digital platforms in the past is an undisputed fact[24] and therefore this would be a highly inadequate compass for a successful ex-ante approach. A good example of a missing obligation, possibly for lack of previous competition enforcement experience, despite being generally considered key in terms of its potential for unlocking competition in the age of digital platforms,[25] relates to the interoperability of core platform services. A well-conceived interoperability provision, possibly involving at this stage only those features of core platform services that are already standardized at the industry level, while

22 With regard again to Art.5 (a), at a minimum, the provision should make it clear that the alternative, less personalised service offered to the end user must be of the same quality, see also BEUC, Digital Markets Act Proposal, 1 April 2021.

23 Marsden/Podszun (n 19), p. 57.

24 See references as to n 7.

25 Cfr. CMA (n 10), Annex W in particular.

pushing for more standardization, is indispensable in order to enable consumers to choose alternative service providers and therefore create competition in core platform services. Therefore, it is suggested that Article 6(1)(f) should be expanded accordingly.

Strengthening business users' independence from the gatekeeper is another important objective of the DMA. In the case of Article 5 (b), it seems therefore necessary that business users should be allowed to offer better prices, conditions and availabilities to end users via their own website. Moreover, they should not be forced to provide the gatekeeper information concerning the conditions and prices they apply when using other distribution channels. The same applies to allowing business users to communicate with end users without being subject to arbitrary restrictions by the gatekeeper (Article 5 (c)).

Traditional tie-ins between core platform services and their ancillary services and other related practices such as default or pre-installed apps have been an area of concern for competition authorities in the digital sector at least since the EU Microsoft cases.[26] Article 5 (e) prohibits tying the gatekeeper's core platform services with its identification service. Path dependency from previous antitrust activity and thinking might have limited the scope of this obligation. Again, this approach might already be myopic and backward-looking, especially considering market developments such as the massive penetration of Big Tech into finance in particular via their offerings of payment services. A proper extension of the tie-in ban should be considered already at this stage. As to setting defaults, their strategic importance due in particular to consumer inertia is well known from past competition cases, and therefore it would be advisable for the obligations as of Article 6 (1) (b) and Article 6 (1) (d) to be framed so as to clearly restrict their use.

Another worrying sign of the negative effects of the backward-looking orientation of the DMA Proposal is the still too limited attention devoted to virtual assistants and the manifold possibilities they already offer for gatekeepers to act unfairly and further leverage their power. Particularly important is preserving

26 See European Commission, Microsoft, https://ec.europa.eu/competition/sectors/ICT/microsoft/index.html (last accessed 14 July, 2021).

end users' ability to use the virtual assistant of their choice. Due to their critical importance, virtual assistants should already be listed among core platform services. Preserving users' possibility to switch between virtual assistants, as well as imposing purposeful interoperability mandates are already critical obligations at this stage of digital evolution.

Additional efforts seem necessary also in order to prevent gatekeepers from unfairly profiting from their huge data advantage. Thus, for instance, they should refrain from using, in competition with business users, any of the data not publicly available that business users have generated.[27] Moreover, access to data mandates, carefully crafted in collaboration with data protection authorities,[28] could already at this stage extend beyond search engine's data as foreseen pursuant to Art. 6(1)(j), in particular with regard to markets where restoring and/or promoting competition depends on the deployment of algorithms trained on comprehensive data sets.[29]

As exemplified above, the fine-tuning and also expansion of the obligations currently listed in Articles 5 and 6 is a very important exercise[30] which should be led by a clear understanding of the best way to achieve fair and contestable competition markets and spaces in the digital economy. From the trialogue phase, tough and important policy choices in this respect are bound to emerge, which will have a decisive impact on the overall usefulness of the envisaged new regulatory instrument. It is already abundantly clear, as the brief discussion in this Section has shown, that past or even ongoing competition enforcement cases already at this stage should not be the main compass guiding the choice of the obligations to be imposed on the gatekeepers.

27 Art. 6(1)(a) instead is currently limited to data generated by the use of core platform services.

28 See also Section 4 below.

29 See the original « data openness » proposal by Furman et al. (n 5), p. 74 ff.

30 See Marsden/Podszun (n 19).

4. ENSURING EFFECTIVE COMPLIANCE WITH THE OBLIGATIONS

Once well-conceived, thoughtful obligations are in place, ensuring their effective compliance by the designated gatekeepers is essential. It is fair to say that competition authorities have learned a lot in this respect from their recent (and less recent, e.g. the EU Microsoft case) experiences in dealing with powerful digital platforms. The main issues in this respect have regarded unsustainable enforcement procrastinations, especially in highly dynamic markets prone to tipping, and ineffective remedies.[31]

The DMA Proposal seems to take stock of this experience, but additional efforts should be made in order to think strategically and carefully remove all the remaining, accidental stumbling blocks that could be wilfully exploited by gatekeepers.[32] Moreover, the whole process needs to be streamlined form beginning to end, namely starting from the designation process down to the imposition of effective and even structural remedies in case of systematic non-compliance by gatekeepers with this new regulatory framework. An example of an impactful solution in this sense could be to automatically qualify providers of core platform services as gatekeepers, i.e. without the need for a cumbersome designation procedure, if said providers meet the qualitative and quantitative requirements laid down in the Regulation and are not able to demonstrate that, due to the specific circumstances in which they operate, they do not fulfil them. It should also be made absolutely clear that failings by the gatekeepers to abide by the already (sometimes too) generous legal deadlines set by the DMA Proposal cannot be exploited to their advantage and that from assessing a DMA breach to its effective remedy, action will be swift and resolute (e.g., that it should normally be a matter of months and not years).

While the regulatory dialogue between the Commission and the respective gatekeeper in order to further specify the Article 6 obligations is certainly adequate, it is also advisable that the measures required to ensure effective compliance with the Regulation are market tested before their implementation. Importantly, the Commission should also be able to request the respective gatekeepers to A/B test those measures to make them truly effective, taking into account in particular end users' behavioural biases, which could be much more significant

31 See references as to n 8.

32 See for some examples of such concrete risks in particular BEUC (n 22).

or 'tailored' than theory or past experience can teach.

Extremely important would also be to boost the anti-circumvention prohibition as of Article 11, in particular by unequivocally banning all flavours of insidious 'dark patterns' which gatekeepers could engage in with a view to manipulating end user choices and thereby undermine the effectiveness of many of the foreseen obligations (e.g., Article 5 (a), Article 5 (f), Article 6(h)).

Additionally, in order to ensure effective implementation and compliance with the obligations laid down by the proposed Regulation, the Commission should not only have the power to appoint external experts and auditors,[33] but an independent officer responsible for monitoring compliance should mandatorily need to be directly embedded within the gatekeeper.[34] Adequate measures will be necessary in order to ensure the compliance officer's independence from the gatekeepers, while ensuring that he or she can perform the delegated tasks in an effective manner.

The area of private enforcement is also clearly underdeveloped in the DMA at the moment and would need to be carefully built up as to maximize the potential for gatekeepers' compliance with the obligations. BEUC has for instance suggested in this regard to include into the DMA an external dispute resolution mechanism to quickly solve grievances by business and end-users.[35]

While the consistent application of the DMA throughout the EU is key to its legal basis, as it derives from Article 114 TFEU (harmonised obligations with regard to the fairness and contestability of core platform services provided by gatekeepers), the currently foreseen involvement of national competition authorities (NCAs) in supporting DMA's enforcement is hardly efficient, in so far as it makes little use of the NCAs knowledge and resources. There should be no objection from the harmonization point of view to the national competition authorities acting under the supervision of the European Commission, for instance carrying out investigative actions at its specific request. Allowing the

33 As already foreseen by Article 24 (2). Those external experts and auditors should be tasked also with accessing gatekeepers' algorithms.

34 See CERRE, Making the Digital Markets Act More Resilient and Effective, May 2021.

35 BEUC (n 22), p. 6.

national competition authorities to ask the Commission to initiate proceedings against gatekeepers, or to initiate these proceedings themselves, could also promote swift DMA enforcement, which is key to this new tool's success in disciplining gatekeepers' behaviour in order to ensure contestability and fairness.

Finally, a whole new type of coordination framework at the EU level involving the different competent authorities in the digital sector is long overdue, starting from traditional competition law enforcement and now, at least equally important, with regard to the DMA. Suggestions[36] put forth by the European Data Protection Supervisor already a few years ago to create a coordination structure under the umbrella of what has been called a Digital Clearinghouse have not been influential in the EU so far. With regard specifically to the DMA, this coordination framework should include regulators both at the EU and the national level, in particular data protection authorities. This new body would have clear competences and the possibility to help the Commission to fill the interdisciplinary expertise gaps likely to emerge in dealing with gatekeepers with almost limitless resources and knowledge.

36 See EDPS, Big Data & Digital Clearinghouse, https://edps.europa.eu/data-protection/our-work/subjects/big-data-digital-clearinghouse_en (last accessed 14 July 2021).

5. FUTURE-PROOFING THE DMA

Conceptually, as seen above especially with regard to the wording of the obligations contained in Articles 5 and 6, the DMA is "free-riding" on the Commission and the national competition authorities' expertise and experiences in enforcing competition law in the digital sector over a period of at least twenty years. This is not a bug but a specific and enduring feature of the proposed ex-ante regulatory framework, as some of the "portable" lessons learned in enforcing competition law should at some point sensibly flow into the substantive parts of the DMA, namely gatekeepers' designation and obligations. At the same time, the DMA, as noticed above, should not be bound exclusively to past experiences. Already at this point it is apparent that more is needed than what enforcement-based lessons can provide as inspiration, such as for instance an obligation imposing interoperability with regard to core platform services, and not only ancillary ones as currently foreseen by Article 6(1)(f).

Admittedly, abuse of dominance proceedings against likely candidates for gatekeeper designation have recently increased in number and scope, both at the national and EU level (see Box 1 above), at a time when the insights flowing into the conceptual work underpinning the DMA were already being gathered.[37]

It is of course crucial for the future-proofing of the DMA that new learnings are incorporated into this new tool on an ongoing basis. Recital 33 of the DMA already covers "experience gained, for example in the enforcement of the EU competition rules", obviously also at the national level.[38] Importantly, the proposed Regulation foresees in Article 17 that the Commission may "conduct a market investigation with the purpose of examining whether one or more services within the digital sector should be added to the list of core platform services or to detect types of practices that may limit the contestability of core

37 See for instance the Android Auto case by the Italian Competition Authority involving an issue of interoperability refusal, started in Summer 2019 and decided after the publication of the DMA Proposal, see ICA (2021), A529, GOOGLE/COMPATIBILITÀ APP ENEL X ITALIA CON SISTEMA ANDROID AUTO, Decision No. 29645 (ICA Google Maps/Enel) available in Italian at https://www.agcm.it/dotcmsdoc/allegati-news/A529_chiusura.pdf. (last accessed 14 July 2021). For a first comment see Simonetta Vezzoso, Interoperability between competition law and the proposed Digital Markets Act, forthcoming in Wirtschaft und Wettbewerb 2021.

38 Such as in the case of the newly decided Italian Android Auto decision,

platform services or may be unfair and which are not effectively addressed by this Regulation." However, while it is essential that market investigations produce accurate results, the current 24-month deadline should be drastically shortened in the interest of adequately future-proofing the regulation in the context of highly dynamic markets. Sufficient resources should be made available to perform the crucial task of updating the DMA as frequently as it is required.

Additionally, pending the results of the above market investigation expanding the scope of the Regulation, a mechanism should be envisaged whereby new practices implemented by gatekeepers can be provisionally prohibited if there is the looming risk of serious damage for business users and/or end users. The practices in question should be capable of undermining contestability or be unfair. The interim measures should be temporary and replaced by the final decision pursuant to Article 17.[39]

39 See, for more details of a proposal along similar lines, European Parliament, Draft Opinion of the Committee on Economic and Monetary Affairs for the Committee on the Internal Market and Consumer Protection on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD)) 7 July 2021- Rapporteur for opinion: Stéphanie Yon-Courtin.

6. MAKING THE DMA MORE PARTICIPATORY

The DMA mirrors traditional competition policy enforcement in many respects. We have noted above how the scope of gatekeepers' obligations is closely linked to competition law enforcement. Moreover, competition authorities' considerable experience in the area of commitment proceedings has also shaped the DMA in its current form. These proceedings involve negotiations with the investigated companies that tend to take place behind closed doors; the company's undertakings reached during these negotiations are then made binding by Commission's decisions and market tested. Consumer representatives and other stakeholders are left to wonder about the concrete progress of negotiations between the competition authority and the company in scope, to which they are excluded and that can extend over periods of time, as happened for instance in the Google Shopping case.[40]

With regard to the DMA, the same "closed doors" mentality is also apparent. Consumer associations have already pointed out in this respect that consumers or their representatives, and not only "gatekeepers, or undertakings, or associations of undertakings concerned", should have the right to be heard before the Commission adopts a decision in multiple types of proceedings, such as designation of gatekeepers, the specification of Article 6 obligations, suspensions/exemptions from obligations, market investigations, etc.[41] While this 'asymmetrically participatory' attitude during commitment negotiations was already questionable, this is even less convincing with respect to the DMA. In fact, the gatekeeping role held by a number of digital players and as conceptualized by the DMA points very strongly to their quasi-infrastructural nature.[42] The total number of users on the different sides of the gate already plays an important role in designating the digital platform as a gatekeeper. Most importantly, users contribute to the value and importance of the platform itself, business users as well as end-users. If some of the obligations foreseen in Article 5 and 6 of the DMA Proposal aim to make the platform environment fairer, there

40 See n. 3.

41 BEUC (n 22), p. 6.

42 As the UK Government puts it, "[W]ith digital technologies increasingly underpinning business activity, the quality of the technology has broader implications for growth and productivity", see UK Government, A new pro-competition regime for digital markets, July 2021, p. 8.

is no active role for users in actively contributing to shaping this environment.

The Study suggests that the DMA should be made more participatory and in the following advances a concrete DMA amendment proposal in this respect. It should be made clear, however, that the type of participation proposed here is rather different from what suggested in particular by the Nobel-winning economist Jean Tirole, namely a "participative antitrust" in which "the industry or other parties propose possible regulations and the antitrust authorities issue some opinion, creating some legal certainty without casting the rules in stone". This was the core of Tirole's proposal of a "fourth way" to taming tech monopolies, namely as alternative to self-regulation, competition policy and public utility regulation.[43] This idea of a participate approach has been conveniently advocated by some of the likely designated gatekeepers that in the past have profited substantially from endless antitrust commitment proceedings.[44] The idea was further explored by the Digital Markets Force, which was asked by the UK Competition Authority to provide advice to the government on the design and implementation of a pro-competition regime for digital markets.[45] In the just announced consultation on the UK Government proposals' for its own ex-ante approach, emphasis is indeed put on "resolving concerns through constructive engagement with firms". Nevertheless, the competent regulator, the Digital Markets Unit, should have "robust powers to deter and tackle non-compliance."[46]

Admittedly, the DMA itself is already more like a "fifth way," which seems rather distant from Jean Tirole's original idea. Designated gatekeepers covered by the Commission Proposal are not actively co-designing the obligations they will have to comply with. Based on the DMA, the designated gatekeepers will have

43 See Quartz, A Nobel-winning economist's guide to taming tech monopolies, 27 June 2018, https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies/ (last accessed on 14 July).

44 O. Bethell, G. Baird, A. Waksman, Ensuring innovation through participative antitrust, Journal of Antitrust Enforcement, Volume 8, Issue 1, 2020, 30 ff.

45 A new pro-competition regime for digital markets, Advice of the Digital Markets Taskforce, December 2020.

46 See UK Government, A new pro-competition regime for digital markets, July 2021, p. 8.

to change and adapt their behaviour, while the Commission is given substantial and formal powers to monitor and enforce gatekeepers' compliance with the new rules. The modicum of regulatory dialogue pursuant to Article 7 is limited to specifying the concrete measures necessary to fully and effectively comply with the obligations as of Article 6. The gatekeeper can secure this dialogue by requesting "the opening of proceedings pursuant to Article 18 for the Commission to determine whether the measures that the gatekeeper intends to implement or has implemented under Article 6 are effective in achieving the objective of the relevant obligation in the specific circumstances."

At any rate, the participative approach suggested by Jean Tirole has the merit to raise the important question of "Who gets to participate?"[47] A new understanding of the concept of "participative antitrust" could possibly emerge from further reflections along these lines. Thus, for instance, the holding of open meetings called by the new Chair of the Federal Trade Commission Lina Khan could be seen as an interesting step in this direction. In these meetings, after the Commission has conducted its business, members of the public are invited "to share feedback on the Commission's work generally and bring relevant matters to the Commission's attention."[48]

Arguably, a more participatory approach with regard specifically to the DMA should be shaped carefully. As noted by Philip Marsden and Rupprecht Podszun, "[t]his is not to permit a tea-party discussion to delay real implementation, but instead to inform and make better targeted the obligations".[49] With this objective, as well as duly considering the Authors' compelling warning, this Study suggests that a new form of 'user dialogue' should be enshrined into the institutional fabric of the DMA.

47 Cfr. Michelle Meagher, Who Gets to Participate in « Participative Antitrust » ? Medium, 17 January 2019.

48 FTC Announces Agenda for July 21 Open Commission Meeting, 12 July 2021, https://www.ftc.gov/news-events/press-releases/2021/07/ftc-announces-agenda-july-21-open-commission-meeting (last accessed 14 July 2021).

49 Marsden/Podszun (n 19), p. 56. At the time their Study was published (September 2020), the Authors had in mind the obligations they recommended, but this arguably applies mutatis mutandis to the obligations put forth by the Commission in the DMA Proposal.

Large digital platforms and ecosystems, which are the declared target of the DMA, are basically networks of people (end-users) and businesses, connected by digital technology. While the economic analysis of digital platforms that has come to inform competition economics, as well as competitive strategies studies, both tend to focus on the platform owner's perspective, the user perspective is notoriously much less investigated.[50] While arguing in favor of more platform user participation might sound alienated from competition policy as we know it, the idea that the digital age may require the implementation of new forms of broad civic involvement has already been thoroughly explored among others by the OECD.[51] This organization has "collected evidence and data that support the idea that citizen participation in public decision making can deliver better policies, strengthen democracy, and build trust".[52] In particular, it is argued that "[t]here is a need for new ways to find common ground and take action" and that "[t]his is particularly true for issues that are values-based, require trade-offs, and demand long-term solutions".[53] Moreover, platform user involvement in DMA governance could be useful in adverting the risk of regulatory capture. Most importantly, due to the quasi-infrastructural[54] role of gatekeepers in our economy, as well as to the DMA's embrace of an ex-ante approach, in Section 3 it was argued that the determination of the exact scope of the gatekeepers' obligations requires making complex, principles- and values-based decisions (often involving trade-offs) on how fair and contestable digital markets should look like, and what they might achieve in terms of consumer

50 M. Schreieck, M. Wiesche, and H. Krcmar, Design and Governance of Platform Ecosystems – Key Concepts and Issues for Future Research, Paper presented at the 24th European Conference on Information Systems (ECIS), 2016.

51 Cfr. OECD, Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave, OECD Publishing, Paris, 2020, https://doi.org/10.1787/339306da-en (last accessed 14 July 2021).

52 Ibid., p. 5.

53 Ibid.

54 It could even be argued that as „much of the 'tech' underlying 'Big Tech' is a product of public investment", this „creates an even stronger case that publicly funded technology must serve the public interest", see M. Mazzucato, Mission Economy, 2021, p. 197.

choice and innovation.[55] The concrete ways in which the DMA is implemented will impact huge numbers of business users and end users on the different sides of the gate. In this respect, fairness, which is one of the objectives of the DMA itself, should also extend to governance, providing platform users with tools that aim to promote more balanced organisational forms of cooperation in the digital economy than platforms and digital ecosystems currently provide.[56]

As we all know, the paradigmatic shifts of the economy and society fuelled by digital technologies have engendered their own dynamics of economic growth, such as for instance the exploitation of personal data as powerful "accumulation logic". Digital technologies contribute to new structures of power, as well as to the commodification and manipulation of user experiences.[57] From the economic analysis of alternative governance models, for instance, inspiration can be drawn on how to mitigate tensions through more distributed governance.[58] While the DMA does not appear to be the right policy mechanism by which to question and discipline the use of specific digital technologies such as in particular algorithms,[59] tackling gatekeeper power is certainly at the core of this new regulatory framework, and this should be done comprehensively, that is also by promoting more and better involvement of platform's users, namely its

55 In other words, the Commission here is required to do "more than just fixing market failures", ibid. p. 172.

56 See also D. Holtmannspötter, U. Heimeshoff, J. Haucap, I. Loebert, C. Busch, A. Hoffknecht, Soziale Marktwirtschaft in der digitalen Zukunft, Foresight-Bericht Strategischer Vorausschauprozess des BMWi, 2021, p. 303, https://www.bmwi.de/Redaktion/DE/Downloads/F/foresight-abschlusskonferenz-abschlussbericht-lang.pdf?__blob=publicationFile&v=20 (last accessed 14 July 2021), p. 303.

57 See S. Zuboff, The Age of Surveillance Capitalism, 2019.

58 E. Ostrom, Governing the commons: the evolution of institutions for collective action. Cambridge England: Cambridge University Press, 1990.

59 See for this in particular European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021) 206 final) (hereafter 'AI Act').

end-users and business-users, in the DMA's overall implementation.[60]

The concrete suggestion put forth by this Study would be to enshrine into the DMA a new « Article 32 a » titled 'Users Panel' with the following tentative wording: "Each designated gatekeeper shall have a dedicated users panel composed of an equal number of randomly selected representatives of business users and end users." The process of selection of the user representatives would be based on online, voluntary application submission mechanisms followed by well-tried methods of 'sortition', namely random sample from a larger pool of voluntary candidates. Importantly, successful experiences of civic participation [61]should be carefully adapted to the digital platform setting.

The new provision should at the very last provide for the right of the user representatives of the gatekeeper's respective core platform services to be informed before the Commission adopts particularly relevant decisions, for instance on the specification of Article 6 obligations and on the results of market investigations to detect new types of practices that may limit the contestability of core platform services or may be unfair. Moreover, users' representatives should have the right to be periodically informed by the independent compliance officer responsible[62], about his or her compliance monitoring activities. Interactions with digital clearinghouse's similes, in whatever form,[63] should be frequent. Most importantly, the user panels should serve as accurate sensors able to capture early warnings of unfair behaviour by gatekeepers. Therefore, the European Commission would be particularly keen on receiving this type of feedback in order to ensure that the DMA remains relevant in the digital economy.

60 Conflicting visions in this respect could definitely emerge, as „ participation is not a silent harmonious process. Economic theory, on the other hand, does not think about participation, which is left to those areas of political science focused on participatory institutions", see Mazzucato (n 54), p. 199.

61 See OECD, n 51.

62 See Section 4 above for this suggestion.

63 Ibid.

7. CONCLUSION

The Proposed Digital Markets Act is an unprecedented regulatory framework that aims to tame the power of gatekeepers. These key firms' entrenched market power in digital markets with specific, well analyzed characteristics is such that competition problems are expected to persist over time and therefore demand an ongoing and specific oversight that traditional competition law is unsuitable to provide. The Commission's proposal tabled at the end of 2020 is therefore highly welcome, albeit still lacking in many relevant respects, as this Study has argued. Several suggestions have therefore been put forth in order to improve it, focusing on refining and expanding the gatekeepers' obligations, ensuring their effective compliance, future-proofing their impact and, finally, on making the regulatory framework more participatory.

www.martin-schirdewan.eu