

Shaping the New Modality of the Digital Markets: The Impact of the DSA/DMA Proposals on Inter-Platform Competition

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1. Introduction

The Digital Markets Act, as proposed by the Commission,¹ alongside with discussed Parliamentary amendments² and ECN specifications,³ has triggered ‘a Copernican

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¹ 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). Hereinafter ‘The DMA Proposal’.

² Amendments proposed by 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 (Hereinafter ‘The Draft Parliamentary Committee on the Internal Market and Consumer Protection Report’); Amendment proposed by European Parliament, Committee on Legal Affairs Draft Opinion for the Committee on the Internal Market and Consumer Protection 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)), 03.06.2021, Rapporteur: Tiemo Wölken (Hereinafter ‘The Draft Parliamentary Committee on Legal Affairs Opinion’); Amendment proposed by European Parliament, Committee on Economic and Monetary Affairs Draft Opinion for the Committee on the Internal Market and Consumer Protection 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)), 07.07.2021, Rapporteur: Stéphanie Yon-Courtin (Hereinafter ‘The Draft Parliamentary Committee on Economic and Monetary Affairs Opinion’).

³ Joint paper of the heads of the NCAs of the European Union ‘How National Competition Agencies Can Strengthen the DMA’, the ECN Directors General’s meeting, 22 June 2021.

transformation of the field'.⁴ Together with comparable in terms of their significance bills, drafted by the US House Judiciary Committee,⁵ US President Executive order 14036⁶ and remarkable developments taking place in other important antitrust jurisdictions,⁷ a new generation of competition rules are shifting the area of the digital economy towards a 'regulatory Big Bang'.⁸

An unprecedented recalibration of the rules regulating the functioning of competition in the digital markets has catalysed diverse reactions among the main stakeholders. The proposed approach to regulating gatekeepers will have a paradigmatic impact on European consumers, businesses and public institutions. It will have equally significant implications for the theoretical foundations of competition law, economics and policy.

⁴ Pablo Ibáñez Colomo, 'Protecting the 'Law' in Competition Law', *Journal of European Competition Law & Practice*, Vol. 11, No. 7, 2021, p. 333.

⁵ H.R.3825 – Ending Platform Monopolies Act, Bill referred to the House Committee on the Judiciary, 11 June 2021; H.R.3816 - American Choice and Innovation Online Act, Bill referred to the House Committee on the Judiciary, 11 June 2021; H.R.3826 - Platform Competition and Opportunity Act of 2021, Bill referred to the House Committee on the Judiciary, 11 June 2021.

⁶ President of the US Executive Order 14036, 'Promoting Competition in the American Economy', 09 July, 2021.

⁷ Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen („GWB-Digitalisierungsgesetz“), 18.01.2021; UK Department for Digital, Culture, Media & Sport and Department for Business, Energy & Industrial Strategy, 'A New Pro-Competition Regime for Digital Markets', Open consultation, 20 July, 2021. The Parliament of the Commonwealth of Australia, House of Representatives, 'News Media and Digital Platforms Mandatory Bargaining Code Act', Act no: 21, 02 March 2021; UK Competition and Market Authority, 'Online platforms and digital advertising Market study' Final report, 1 July 2020; 'Digital Era Competition: A BRICS View. Report by the BRICS Competition Law and Policy Centre', September 2019, 1295 p.; European Parliament, 'Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice', Directorate-General for Internal Policies Commissioned Report, 21 June 2021; Autorité de la concurrence Décision 21-D-11 du 07 juin 2021 relative à des pratiques mises en œuvre dans le secteur de la publicité sur Internet, 07 June 2021.

⁸ Christina Caffarra, Oral contribution at the 'Regulatory Challenges in Digital Markets: the DMA', BCCP Online Panel, 18 June 2021.

While formally the DMA is complementing, not substituting, existing provisions of competition *de lege lata*,⁹ such a substantial extension of the rationale and instruments of competition policy is likely to have significant implications also for the application of *ex-post* rules.¹⁰ The entire apparatus of competition law will be extended by the new modality.

On one hand, such an extension may be seen as an enrichment. For decades, the great variety of the ideas about economic competition and its regulation have been substantially narrowed down and standardised by the Law & Economics analysis.¹¹ Clearly, such a limitation was put in place for good reasons: homogenisation, commensuration, universalisation, expediency, predictability and calculability are among the undisputable advantages of analysing competition through the lens of neoclassical microeconomics. The optimisation, however, comes at a cost. Evidently, the value of economic competition is not always reduceable to a singular metric¹² particularly if such a monovalent methodology is underpinned categorically by a monovalent normative ethos of non-intervention. Supposedly, the phenomenon of competition is more diverse and not as rigid and singular as the prevalent approach claims it to

⁹ Both regulations are proposed under Art 114 TFEU, regulating the measures adopted for the approximation of the internal market. This legal basis allows avoiding the application of a more narrowly construed provisions of Art 103 TFEU, regulating the adoption of the rules giving effect to the provisions of Arts 101 & 102 TFEU (assuming the DMA merely gives effects to the provisions of Arts 101 & 102 TFEU) or using Art 352 TFEU, regulating the adoption of the rules, creating new powers necessary to attain one of the Union's objectives (assuming the proposed rules create such new powers, as argued in Alfonso Lamadrid de Pablo, Nieves Bayón Fernández, 'Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It', available at <https://antitrustlair.files.wordpress.com/2021/04/why-the-proposed-dma-might-be-illegal-under-article-114-tfeu-and-how-to-fix-it-3.pdf>). The selected legal basis makes the DMA not a mere extension of the rationale of the *ex-post* competition rules. This allows for and formally justifies a more interpretative, asymmetric and interventionist rationale of the DMA.

¹⁰ Alfonso Lamadrid de Pablo, 'The Proposed New Competition Tool: A Follow-Up', Chillin' Competition Blog, 29 June 2020: 'Competition 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 [... the DMA] could have an impact on the nature of the discipline'.

¹¹ Ioannis Lianos, 'Polycentric Competition Law', *Current Legal Problems*, Vol. 71, No. 1, 2018, p. 163: 'Technocracy pre-supposes the systematic integration of scientific expertise in policy-making, in particular economics and its methods, not only at the level of policy conception but also at its implementation'.

¹² Oles Andriychuk, 'The Normative Foundations of European Competition Law: Assessing the Goals of Antitrust through the Lens of Legal Philosophy', Edward Elgar, 2017, p. 197.

be. To an extent, the DMA epitomises this broader vision. By introducing a new type of competition rules, it essentially embodies a new role of competition policy in the constitutional constellation of public goals and values. In this sense, the proposal reflects a more general trend, that is not exhausted by the processes taking place in the area of *ex-post* competition policy internally. On the other hand, however, the proposed recalibration is likely to raise many additional issues and challenges for the discipline.¹³ Some of them are discussed in this article.

Out of the wide spectrum of changes introduced by the DMA/DSA proposal, this article identifies and analyses one of the central – though not so commonly discussed – elements of the transformation. It asks a *normative* question about what kind of competition in the digital markets the European Union should seek to establish, and a *methodological* question about procedural and substantive legal mechanisms used for shaping such a new format.

The main focus is placed on the phenomenon of inter-platform competition. This dimension of competition in the digital markets is of a strategic importance. Most of the provisions of the DMA – despite being designed primarily for regulating intra-platform competition (i.e., competition *within* platforms) – will also have a positive impact on competition *between* platforms. Promoting competition *within* entrenched online platforms facilitates new entries, thereby making inter-platform competition more plausible.

There could be, however, some situations in which the promotion of intra-platform competition does not automatically lead to an increase of inter-platform competition. In some rare – but most important for this article – cases the relationship between these types of competition could be even antithetical: the promotion of one could lead to the distortion of the other. The proposed regulatory reform may trigger, strengthen or reinforce some of these situations, particularly as far as the DSA is concerned. This article explores those among the *procedural* provisions of the DMA, and those among the *substantive* provisions of the DSA, which while remaining procompetitive in the sense of intra-platform competition, may harm its inter-platform dimension.

The DMA encapsulates the new features of competition policy *sensu lato*. It is characterised by a wider flexibility of competition rules and principles, their de-axiomatisation and more

¹³ Cani Fernández, 'A New Kid on the Block: How Will Competition Law Get along with the DMA?', *Journal of European Competition Law & Practice*, Vol. 12, No. 4, 2021, p. 271.

purposeful interpretation.¹⁴ The area is in an epistemic transition from the universal, standardised, monovalent, axiomatic, deterministic rules to more dialogical, individualised, asymmetric, interpretative principles. The decline of the price theory-oriented Law & Economics approach re-introduces greater uncertainty about the relevant parameters of the discipline. At the same time, the emerging paradigm does not presuppose an emergence of a new methodological and normative consensus. It is very likely that different goals, theories, approaches and methodologies will be competing with each other to receive regulatory priority in each difficult case *ad hoc*.¹⁵

The age of polycentricity expands and softens the boundaries between competition-centred goals and broader societal values.¹⁶ The latter receive greater appreciation, and their interaction and correlation with competition *sensu stricto* will become even more pervasive and even more unavoidable. The metamorphosis of the discipline allows for a gradual transposition of a broader set of societal factors to the discussion on the goals of competition law. Under the conceptual framework of polycentricity, these factors do not necessarily have

¹⁴ Philip Marsden, Rupperecht Podszun, 'Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement', KAS Report, November, 2020, pp. 41–48.

¹⁵ 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'.

¹⁶ Ioannis Lianos, 'Competition Law for a Complex Economy', *IIC – International Review of Intellectual Property and Competition Law*, Vol. 50, No. 6, 2019, p. 648: '[T]he broader array of interactions, beyond market exchanges, between the different stakeholders, invites us to broaden our understanding of competition law, beyond the monocentric model focusing on price and output that has so far prevailed [...] Competition law will have to acquire a polycentric dimension [...] However, we crucially lack the operational concepts, tools and metrics to develop this agenda further. Traditional equation-based modelling, although rigorous and insightful, may not cater for these very complex systems'.

to be steering or decisive. Hierarchically, they may remain inferior to the established goals of competition policy. Their status of being ‘factors’ rather than ‘goals’ presupposes a rather implicit and external presence. This article takes one such external factor – the concept of digital sovereignty – and explores the importance of inter-platform competition primarily through its prism. The focus on inter-platform competition and its exploration through the perspective of the digital sovereignty is a *choice* of this article, not a logical *consequence* of its analysis of the DMA.

Section 2 explains the importance of inter-platform competition in the digital markets. Section 3 shapes the previous argument through a narrower prism of the digital sovereignty. Section 4 shifts the discussion to the main epistemic features of the DMA, embedded in the ideas of a greater regulatory flexibility and asymmetric approach to different market players. The emergence of such new type of competition law enables a more interpretative and purposive application of the rules allowing the enforcers a greater choice of the normative prism through which they may pursue a specific competence and action in the field. Such a polycentricity of the new digital competition rules underpinning the proposals, alongside the market integration narrative, allows some conceptual space for the digital sovereignty factor to be taken into account. Section 5 outlines various possible modalities for designating the addressees of the new rules. It compares the pros and cons of the binary approach, opted for by the DMA, and the pyramidal one selected by the DSA. The main conclusion of this section is that the binary model better fits the interests of inter-platform competition as it allows for potential newcomers scaling up under much less restrictive regulatory regime. On the other hand, the quantitative thresholds proposed by the Commission, and in particular their increase as envisaged by the Draft Parliamentary Committee on the Internal Market and Consumer Protection Report, may become too high, as the new thresholds supposedly only aim to capture the biggest and the most obvious incumbents.¹⁷ This situation would be even more plausible in conjunction with the proposed amendment of the designation suggesting a new requirement to cover only undertakings operating at least two core platform services (CPSs) with 45 million active monthly users each.¹⁸ The problem is complex, requiring cosmetic precision. Any

¹⁷ Javier Espinoza, Interview with Andreas Schwab, ‘Financial Times’, 31 August 2021.

¹⁸ 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

possible format is likely to have advantages and shortcomings. The main ones are analysed in the remainder of this article. Section 6 addresses the so called ‘King Midas’ problem. It refers to the ability of the gatekeepers to adapt with remarkable efficiency to the new regulatory requirements, turning most of the grey zone areas to their benefit. This is explained by the evident asymmetry of information between the gatekeepers on one side and all their horizontal and vertical competitors, business- and end users, as well as legislators, regulators, enforcers and judiciary on the other. The parameters of the digital environments are designed by the gatekeepers, and they possess a remarkable ability to use most of the regulatory initiatives to change the *status quo* to their own advantage. One such potential opportunity concerns the issue of increased transparency, as envisaged by the substantive provisions of the DSA. Under the new regime, all of the major players – noticeably, including the real and potential competitors to the gatekeepers – will be required to make public a massive amount of strategic business data. There is a danger that such an excessive transparency model could allow the gatekeepers to entrench their dominance further, as they would be able to exploit the information provided to the public by their competitors to a much greater extent than any other undertaking.

2. The importance of inter-platform competition and the factors shaping it

The provisions of both legislative proposals make it evident that the attention of the drafters is focused on the protection and the promotion of intra- rather than inter-platform competition. Such an approach is very understandable, as most of the tasks in terms of controlling and shaping the ways of doing digital business in the EU are achievable by an effective enforcement of the measures designed to protect and encourage competition *within*, not necessarily *between*, core platform services. Intra-platform competition is the most important and most realistic dimension of competition in the digital markets.

In addition, it may often be the case that inter-platform competition could be myopically criticised by business users themselves. The emergence of meaningful inter-platform

turnover in the last three financial years. The document also proposes to add as an additional condition the provision of not only one but, at least, two CPSs with 45 million active monthly users each – The Draft Parliamentary Committee on the Internal Market and Consumer Protection Report, p. 32).

alternatives forces them to adjust to the requirements of the new upstream entrant. Such adjustments often lead to duplication and fragmentation. As platform competition often consists of more than two vertical layers, there may be many business users with *de facto* entrenched positions *within* a platform-gatekeeper. Inter-platform competition makes their position less entrenched, as it facilitates new entries into those markets. This makes a top-layer inter-platform competition (i.e., competition between CPSs) even more important to seek, but even more difficult to achieve.

From the functional perspective, achieving real inter-platform competition in the digital markets, with their natural susceptibility to monopolisation, is almost impossible without the systemic prioritisation of new entrants; and such systemic prioritisation is almost impossible without invoking measures very close to the borderline of acceptability in terms of protecting the principles of free market and equidistant regulatory neutrality.

It would be a truism to note that any attempt to support a local entrant, which does not meet the highest quality thresholds in terms of delivering (rather than just promising) the digital services comparable to those offered by the incumbent, would be as grotesque as it would be counterproductive. Clearly, the regulatory steps directed towards the promotion of inter-platform competition should stop at the level of designing and enforcing the rules, enabling and encouraging such an entry. This does, however, leave room for considering the protection and promotion of inter-platform competition as an important goal of the EU digital competition law, and for a discussion about the specific features of inter-platform competition.

The main question in this respect would concern the type of inter-platform competition that the rules and policies would seek to promote. On one hand, the systemic trend towards the synergy of digital services, single-homing and practical functionality impel the incumbents to expand into areas entrenched by other gatekeepers. The ultimate goal of such a move is the creation of a comprehensive digital *ecosystem*, locking the users into a single platform by offering the whole spectrum of digital products and services and making anything existing outside the ecosystem both inconvenient and unnecessary.¹⁹ The real alternatives to the

¹⁹ Frederic Jenny, 'Changing the Way We Think: Competition, Platforms and Ecosystems', *Journal of Antitrust Enforcement*, Vol. 9, No. 1, 2021, pp. 1–18.

existent incumbents would be undertakings of comparable size and recognition, leveraging their expertise and resources from the entrenched market to the new and *vice versa*.

Supposedly, a tendency towards mutual expansion of the ecosystems may imply an instance of well-functioning inter-platform competition. Digital ecosystems competing with each other in all core platform markets would be a situation tolerated by a universalistic, inward-oriented monovalent price theory approach to competition. Such a format would be equally supported by the new strand of ‘Schumpeterian’ literature.²⁰ As long as this format would trigger intra-platform competition, the situation would be *prima facie* compatible with the premises of such form- and value-oriented theories as Ordoliberal or Neo-Brandeisian Schools. Essentially all of the traditional goals of competition policy could be achieved with such inter-ecosystem competition.

Even if all of the above is correct, and even if substantive arguments demonstrating the anticompetitive nature of inter-ecosystem competition,²¹ or its numerous shortcomings from the perspective of the theory²² and the practice,²³ are refuted, the question remains whether such a format of inter-platform competition is indeed one that requires promotion or regulatory priority.²⁴

²⁰ Nicolas Petit, ‘Big Tech and the Digital Economy: The Moligopoly Scenario’, Oxford University Press, 2020, p. 320.

²¹ Jonathan Zittrain, Testimony before the Subcommittee on Competition Policy, Antitrust, and Consumer Rights Committee on the Judiciary United State Senate, 15 June 2021: ‘[T]his kind of competition offers the worst of both worlds. It’s fragmented enough to be frustrating for consumers [...] And once a consumer has made an investment in one of those systems, each new physical device purchased for use with that system can serve to lock the consumer into that standard, even if a competing ecosystem turns out to be more desirable if there were a clean slate. That undermines a critical form of consumer self-defence, which is the basis for fulsome market competition’.

²² Michael Jacobides, Ioannis Lianos, ‘Ecosystems and Competition Law in Theory and Practice’, UCL Centre for Law, Economics and Society Research Paper Series, 1, 2021.

²³ ‘Competition Economics of Digital Ecosystems’, OECD Roundtable Discussion, 3 December 2020; UK Competition and Markets Authority – Press release: ‘CMA to scrutinise Apple and Google mobile ecosystems’, 15 June 2021.

²⁴ Stefan Thomas, ‘Horizontal Restraints on Platforms: How Digital Ecosystems Nudge into Rethinking the Construal of the Cartel Prohibition’, *World Competition: Law & Economics Review*, Vol. 44, No. 1, 2021, pp. 53–80.

The problem concerns not the intensity, efficiency or benefits of such competition, but the very impossibility of entering such an ‘elite club’. An additional implicit question may be raised about the composition of the ecosystems-competitors, and the absence among them of any European platform. It is possible to articulate the question from the external perspective of digital sovereignty.

3. Digital sovereignty as an emerging factor in EU competition law

The protection and promotion of effective inter-platform competition is important from the perspective of any established goal of competition law. The direct beneficiaries of inter-platform competition ‘on the merits’ are business- and end-users. It is equally beneficial to the level of rivalry, economic growth and the promotion of innovation. Not contesting the impact of inter-platform competition on these values and interests, this section looks at its importance from the perspective of the digital sovereignty. Such a focus aims at complementing rather than redirecting existing benefits of inter-platform competition.

EU digital sovereignty is an emerging category. While being for a long time overshadowed by and misconstrued as its sister-concept, ‘economic protectionism’, the idea of digital sovereignty is gaining momentum. Despite its somewhat toxic pedigree,²⁵ the concept is steadily entering into the competition vocabulary,²⁶ mainly via the proxy of industrial policy. Despite its conceptual novelty, political background, polyvalent meaning and rather rhetorical connotations, the idea of EU digital sovereignty is maturing rapidly, penetrating into various regulatory areas of the digital economy. For decades EU competition law was proud of its insulation from broader political and macroeconomic interests. These areas were seen as inherently vague and influenced by discretion and case-by-case choices. The discretion implies immeasurability. In contrast, competition law, economics and policy were focused on

²⁵ Ioannis Lianos, ‘Polycentric Competition Law’, *Current Legal Problems*, Vol. 71, No. 1, 2018, p. 162: ‘For the past few decades, most competition law scholars would have done everything to avoid being accused of the ‘bad taste’ of mixing political with economic/legal questions’.

²⁶ Andreas Schwab, Arba Kokalari, Pablo Arias Echeverria, ‘How Can Europe Become A Global Digital Champion?’, *Euractiv*, 3 June 2021: ‘European technology companies are struggling to compete globally: difficult investment conditions and a fragmented EU market have not helped. The foreign digital giants are benefiting from our internal market and our infrastructures’.

advancing their price theory neoclassical toolkit, underpinned, refined and expanded by meticulous mathematised modelling, offering an expedient reduction of the whole variety of economic processes to a single measurement. Such an epistemic insulation allowed the mastering of inward-focused legal and economic technical expertise, contributing to the clarity, predictability, commensurability and practicality of the field.

Although the concept of digital sovereignty has very different characteristics, the role of this factor in the area of competition is likely to be increasing steadily. The notion of EU digital sovereignty is rising to the top of the EU's strategic interests and tactical priorities to the point where, *inter alia*, it was declared by the German Presidency of the EU Council to be a 'leitmotiv of European digital policy'.²⁷ The European Parliamentary Research Centre defines it as 'Europe's strategic autonomy in the digital field'.²⁸

Not engaging with ontological considerations of the similarities and differences between the conceptions of the territorial and digital sovereignty,²⁹ it is important to focus on a purely applied dimension of the concept. EU as a polity and its Member States jointly and separately aim to maintain greater control over the digital society in general and the digital economy as one part of it. Such control is not necessarily related to intervention, limitation and prohibition, yet it necessarily implies the *ability* to competently and effectively intervene, limit and prohibit. Presumably, the current *modus vivendi* in the area of digital technology does not allow sufficient confidence in the very ability of the public authorities to perform these inherent attributes of sovereignty. There is also the possibility of conceptual conflict between the traditional(-ist) approach to the goals of competition policy and the question *cui bono*.³⁰

In terms of its addressees, the concept of EU digital sovereignty has three interrelated vectors: (i) it may concern the relationship between the EU and the biggest digital corporations, which are *de facto* the main actors in the field; (ii) it may concern the EU's external relationships with third countries and trade blocs; (iii) it may also concern the relationship between the EU

²⁷ The German Presidency of the EU Council: Together for Europe's Recovery: Programme for Germany's Presidency of the Council of the European Union, 1 July to 31 December 2020.

²⁸ EPRS Ideas Paper Towards a More Resilient EU, 'Digital Sovereignty for Europe', July 2020.

²⁹ Julia Pohle, Thorsten Thiel, 'Digital Sovereignty', *Internet Policy Review*, Vol. 9, No. 4, 2020, pp. 7-12.

³⁰ Shaurya Aron, 'Innovation: An Antitrust Trojan Horse?', *World Competition: Law & Economics Review*, Vol. 44, No. 2, 2021, pp. 227-244.

and some of its Member States, which have different visions of the EU's digital strategy and their own priorities. These Member States may be guided by their own tactical interests and design their digital policies in a way that allows them to use their 'one stop shop' access to the entire internal market as a proxy, encouraging the biggest digital corporations to move their EU seats to that specific EU jurisdiction.

Big data and network infrastructure become decisive factors in shaping the patterns of our life and behaviour. The ability to accumulate, develop, control, channel, design and respond to these factors defines the place of each polity in the future global division of labour, and as such may become important in placing a polity in either the vanguard or the periphery of the industrial progress. Thus, the question about the composition of the participants of inter-platform competition becomes strategic, if seen from such a perspective.

While in the 1990s the consensual approach to the emerging digital technology could be seen as 'digital optimism', recent developments in the field have moved the public perception into a phase of 'digital pragmatism'. To an extent, this new paradigm impels the polities to revise their excessively permissive regulatory attitude towards the gatekeepers, the reconfiguration of the *Wild-West-Wonderland* with no or only *pro-forma* control of how the power is accumulated, how the business- and end users are exploited and how any potential horizontal competition is eliminated. Strengthening the rules for the digital society will have as one of its consequences a significant limitation on any potential newcomer's ability to use these exploitative opportunities to build expertise and competence comparable with those held by the entrenched gatekeepers (second-mover disadvantages). No clear solution to this *aporia* appears to be feasible. *Saltem*, the problem requires proper articulation.

The rapid increase in use of the vocabulary of digital sovereignty – as well as adjacent concepts, which aim to shape the legal and political architecture in the digital society – necessarily raise a question about its *role* in and *impact* on competition policy. As far as its *role* is concerned, it is and should always remain fairly limited. The ideas of digital sovereignty are seldom articulated, let alone used, for the normative steering of competition cases. However, the *impact* of digital sovereignty on competition policy is increasing. The very emergence of the ideas encapsulated in the DMA may be seen as an embodiment of such an impact. It can be also seen in a rapid refocusing of the *ex-post* competition enforcement priorities towards the

area of the digital economy.³¹ While never being an explicit legal or economic concept, operating within competition community, the notion of digital sovereignty does begin influencing discussions about the goals of competition policy, becoming thereby one of its implicit *objectives* (for those prepared to internalise the concept into the disciplinary parameters of polycentric competition law, economics and policy) – or at least a very important external *factor* (for those opposed to such internalisation). In both cases, the concept of digital sovereignty is becoming an important parameter (be it an *internal* goal or an *external* factor) for discussions about the future functioning of digital competition law. The modes of communication between different competition-centred values – as well as the modes of their interaction with other legitimate societal values – require a proper articulation within the epistemic community of competition law.

4. The DMA as a factor influencing digital sovereignty

Recognising at least a minimal presence of external digital sovereignty motifs in proposals for rebuilding the regulatory architecture of digital competition, it is important to outline through this perspective the most relevant procedural and substantive provisions of the proposals. Both acts offer a number of innovative juristic formulas, capable of bringing a new dynamic to competitive processes in the digital economy. The key features of the new rules are particularly present in the DMA, which can be seen as a conceptual bridge between the *ex-post* competition rules *sensu stricto* and *ex-ante* regulation of competition *sensu lato*. Both models have their advantages and shortcomings, and the proposal aims to synthesise the former and avoid the latter.

In spite of being formally a market integration measure, the DMA remains a *sensu lato* competition law, being embedded intellectually into the rich conceptual silo of competition philosophy. The clearest are the links with Art 102 TFEU. Both mechanisms aim to deal with the issues of market power but have different instruments and mandates for addressing it. At the same time, the DMA has formal features of *ex-ante* regulation. In the traditional taxonomy, *ex-*

³¹ For the latest paradigmatic example see European Commission – Press release, ‘Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector’, 22 June 2021.

post rules are characterised by their broad scope, which allows a wide margin of appreciation for the enforcers. Clearly, the margin is narrowed down by the established conventions, case- and soft-law, yet the scope of the rules remains broad. The rules regulating competition *ex-ante* are much narrower, clearer, detailed and technical. Compliance with these rules is easier as they do not leave room for a meaningful enforcer's discretion. The more precise the obligation for the gatekeeper is, the easier the adaptation to it.

The dialogical format of the DMA combines both, but changes the modality: it introduces the rules, which are as broad and general as the traditional *ex-post* competition law tends to operate, but which are as prescriptive, binding and in a sense punitive as the *ex-ante* regulation. The sanctions for non-compliance with the obligations imposed by *ex-ante* rules are the sanctions of the second order. The sanctions of the first order are the obligations themselves. In some sense, compliance may be seen as a sanction. The binary mode of the DMA implies that such sanction is imposed for being a gatekeeper. Otherwise, the mechanism of the substantive provisions of the DMA obligations would require its application proportionate to the size and the impact of an undertaking on the digital markets (as it is the case with the pyramidal structure of the DSA). The compliance with the DMA may be seen as a sanction in the same sense as the compliance with Art 102 TFEU: being one step below the dominance threshold implies a complete inapplicability of Art 102 TFEU. Being one step above the threshold leads to its full applicability. Non-compliance leads to an additional sanction, forcing the addressee to accept the previous. In the traditional *modus vivendi* this punitive mechanism is compensated by the deterministic clarity and monovalence of the rules, leaving the undertakings, which are subject to compliance with no or only hypothetical concern about misinterpretation of the prescribed conduct. The undertaking, intending to comply, will know what it should comply with.

Such a balance between additional obligations on one side, and their clarity and unambiguity on the other, is being changed by the DMA. The obligations of the DMA are formulated in very vague terms and are inherently broad. No inhouse compliance team can give sufficient certainty about meeting at all time all the relevant requirements of the DMA obligations. The

rules are shaped so broadly and so vaguely³² that they allow a hypothesis about their ‘opacity by design’. If such an assumption is at least partially correct (and the very title of Art 6 DMA leaves little room for doubts), this could become a systemic element of the new *modus vivendi* between the gatekeepers and the enforcers. The rationale of this new format is in shifting the bargaining power in interpreting the obligations to the enforcers.

The core of the new modality can be seen in the provisions of Art 6 DMA. Unlike obligations stipulated in Art 5 DMA (and even Arts 12 and 13 DMA), the obligations of Art 6 are not supposed to be ‘self-executing’ but are considered as ‘susceptible of being further specified’ by means of the regulatory dialogue. This would explain their vagueness and all-inclusiveness. In reality, however, the mechanism of liability for non-compliance with the catalogue of Art 6 DMA obligations is identical to the ‘ordinary’ one, as envisaged for non-compliance with Art 5 DMA. The mechanism of the regulatory dialogue allows for a finetuning, yet it does not put an embargo on the binding nature of obligations of Art 6 DMA.

All the catalogue of obligations envisaged in Art 6 DMA remain binding for all gatekeepers (unless otherwise is explicitly stated in each specific point of Art 6(1) DMA) even if the eventual calibration via the regulatory dialogue fails. This feature appears to be designed to incentivise the gatekeepers to being more receptive and open to the dialogue. If a consensus is not reached, the potential liability for non-compliance would begin *ex-tunc* (i.e., from the moment when such obligations emerged). A more receptive conduct of the gatekeeper would make the scope of the potential liability for non-compliance narrower and *ex-nunc* (i.e., it would begin from the moment when such obligations have been calibrated via the regulatory dialogue). Art 7(3) DMA states that ‘[p]aragraph 2 of this Article [i.e., specification of ‘the measures that the gatekeeper concerned shall implement’] is without prejudice to the powers of the Commission under Articles 25, 26 and 27’,³³ i.e., liability rules; and pursuant to Art 25(1) DMA and Art

³² Rupperecht 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: ‘[DMA obligations appearing to] look more like a random selection of past and ongoing cases’.

³³ The DMA Proposal, Art 7(3).

25(1)(a) DMA, '[t]he Commission shall adopt a non-compliance decision [...] where it finds that a gatekeeper does not comply with [...] any of the obligations laid down in Articles 5 or 6'.³⁴

Such disparity in the positions of the participants in the regulatory dialogue aims to remedy the supposed ineffectiveness of the current *ex-post* paradigm of competition law. The current rules allow 'grotesque'³⁵ procedural opportunities to the defenders. Alongside the asymmetry of information and the systemic status of the entrenched incumbents, such a disparity would make any other framework of the regulatory dialogue unproductive. The proposed format aims to align the disequilibrium. It is asymmetric precisely because the systemic conditions in the digital markets are asymmetric. Making it more symmetric would only cement the *status quo*. The opacity and asymmetric scope of the DMA appear to be not bugs but features, not a choice but a necessity.

5. Evaluating different models of designation

The regulation introduces a binary mechanism for designating gatekeepers, building upon the rationale of Art 102 TFEU but shifting the designation of the gatekeeper status from *ex-post* case-by-case to *ex-ante* universality. This format brings a number of important consequences to inter-platform competition. The designation of the gatekeeper's status leads to the applicability of the DMA obligations on all CPSs provided by the gatekeepers (not only on those which meet the qualifying thresholds).

If all the thresholds are calibrated correctly, the binary either/or mechanism of designation appears to be the most suitable for inter-platform competition, as it imposes a range of market limitations on the gatekeepers while allowing their potential competitors to scale up without being subject to DMA obligations. The higher the qualifying thresholds, the longer the time available for the potential competitors to strengthen their market presence without becoming subject to the DMA.

This approach stands in contrast to the mechanism of designating the addressees of the DSA. Unlike the binary structure of the DMA, the DSA operates a pyramidal one. It categorises

³⁴ The DMA Proposal, Art 25(1) & Art25(1)(a).

³⁵ Christina Caffarra, Oral contribution at the 'Regulatory Challenges in Digital Markets: the DMA', BCCP Online Panel, 18 June 2021.

the intermediaries into five layers of a pyramid, assigning the lowest set of obligations to those at the bottom and the highest to those at the top: very large online platforms (VLOPs). As the mechanism uses only one quantitative parameter for moving the intermediaries between the categories, it makes such transitions up and down almost ubiquitous for a significant number of intermediaries. From the perspective of inter-platform competition such flexibility is problematic as it does not allow a potential new entrant to scale up being surrounded by numerous second-mover disadvantages. After gaining a comparable number of users, it would become subject to very strict rules envisaged for the VLOPs. Furthermore, the gradual transition from one layer of the pyramid to the next increases the list of demanding obligations, making market penetration slower. Additionally, as the substantive scope of the DSA obligations concerns transparency disclosures, with a significant portion of them becoming publicly available, it would be likely to decrease the scope for inter-platform entry, as such information would be used by the incumbents to learn about many relevant practices of (potential) competitor/s and adapt accordingly. Of course, VLOPs themselves would be subject to such transparency requirements, but the companies with the entrenched position possess much higher competence to extract added value from publicly available information about their potential competitors than *vice versa*. Furthermore, the incumbents would benefit from the accessibility of such information not only about their real or potential competitors but about all participants in the market. Last but not least, as the definition of the VLOP under the DSA is much broader than the definition of the gatekeeper under the DMA (particularly after the refinements proposed by the Draft Parliamentary Committee on the Internal Market and Consumer Protection Report), a significant number of those who are not gatekeepers would be qualified as VLOPs. Any new entrant would become VLOP much earlier than it would reach a size and impact comparable to those of the gatekeepers. As no meaningful inter-platform competition is possible without a quantitative scaling up, all the new entrants would become DSA-VLOPs before reaching the status of the DMA-gatekeepers, and as such they would become subject to numerous requirements and constraints, which would slow their growth and allow the incumbents (the DMA-gatekeepers) to prepare and respond accordingly. Clearly, from the perspective of the objectives of the DSA such a situation does not appear to be problematic as the interests of inter-platform competition are at the very margins of the DSA scope – if relevant at all. The situation does not appear to have a practical solution as the

pyramidal scope for designating addressees of the DSA is one of its systemic features and is indeed the most suitable for achieving its direct goals.

In the current circumstances, the binary model appears to be the only one, suitable for protecting and promoting inter-platform competition. At the same time, the binary format is susceptible to both under- and over-qualification.³⁶ The entire scope of all the relevant obligations would be applicable to those platforms which barely meet the qualifying thresholds, and no obligations of the DMA would be applicable to those platforms which have only just escaped at least one of the qualifying thresholds. If the quantitative thresholds are calibrated accurately, the format is indeed the most suitable for the potential inter-platform competition. If, however, the thresholds are set too high, this would allow the smallest out of the gatekeepers to attempt to decrease some of their operations. Going under radar of at least one of the cumulative thresholds implies full non-applicability. In light of the all-inclusiveness of the DMA obligations, such a decrease may in some cases be a suitable tactical decision. On the other hand, setting the thresholds too low would either make the new entrants' scaling-up time shorter or capture too many existing CPS providers to make the potential inter-platform entry from those CPS providers less likely, as they would also be subject to the strict rules. Both scenarios are equally problematic.

As the correlation between the thresholds being set too high and too low is a matter of empirical fact and regulatory judgement rather than a fundamental strategic issue requiring parliamentary and intergovernmental scrutiny, setting concrete thresholds in the legislation appears to be suboptimal. Expecting any further legislative change to any of the established parameters would be practically impossible. Any potential loophole in any of the thresholds would be operationalised making over- and, in particular, under-qualification very plausible.

Designation of gatekeepers requires surgical precision, and it should not be reduced to a mechanistic box-ticking exercise. It is a mastery of navigation between the Scylla of over- and the Charybdis of under-qualification. The former would lead those scaled-up platforms, which are in fact the most likely alternatives to the entrenched incumbents, to be included in the category of gatekeepers too soon. The latter may lead to the possibility of excluding some of

³⁶ Can Celiktemur, Arnd Klein, Vivek Mani, Marc Rysman, 'Taming Gatekeepers – But Which Ones?' CPI Antitrust Chronicle, Vol. 6, No. 3, 2021, p. 6.

those undertakings that do play a systemic gatekeeping role in the digital markets from the scope of the DMA outright. Such tactical competencies and regulatory flexibility, as well as such strategic vision, are correctly attributed by the DMA to the Commission. Art 3 DMA allows the Commission for bounded discretion in calibrating the quantitative parameters of the designation.

Art 3(1) DMA lists three key *qualitative* features for the platform to be designated as a gatekeeper: (a) a significant impact on the internal market; (b) operation of ‘a core platform service which serves as an important gateway for business users to reach end users’;³⁷ and (c) enjoyment of ‘an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future’.³⁸

Art 3(2) DMA offers a *quantitative* specification of these three criteria: (a) ‘an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years’³⁹ (alternatively, if the average market capitalisation is at least EUR 65 billion, in the last financial year), with the requirement of providing a CPS in three or more Member States; (b) offering a CPS to at least 45 million monthly active EU end users and 10 000 or more yearly active EU business users; (c) meeting the quantitative threshold of Art 3(2)(b) DMA in each of the last three financial years. The latest requirement has an autonomous positive implication for inter-platform competition, as it allows the successful entrant to develop its commercial success for at least three years after reaching a size comparable to that of the incumbent gatekeeper.

The Commission cannot change the *qualitative* characteristics of Art 3(1) DMA but can change *ad hoc* the *quantitative* ones envisaged in Art 3(2) DMA. This flexibility is subject to strict proportionate limitations, yet it is available in Art 3(6) DMA: ‘[t]he Commission may identify as a gatekeeper [...] any provider of core platform services that meets each of the requirements of paragraph 1 [i.e., the qualitative thresholds], but does not satisfy each of the thresholds of paragraph 2 [i.e., the quantitative thresholds]’.⁴⁰ Such a format allows the Commission to change the precise scope of the criteria without changing their overarching rationale.

³⁷ The DMA Proposal, Art 3(1)(b).

³⁸ The DMA Proposal, Art 3(1)(c).

³⁹ The DMA Proposal, Art 3(2)(a).

⁴⁰ The DMA Proposal, Art 3(6).

In addition, it may well be possible that different markets in different circumstances would require different quantitative thresholds for designating gatekeepers. An expanded interpretation of the provisions of Art 3(6) DMA may also allow for such a differentiated approach. Some participants of the legislative process propose granting even greater flexibility to the Commission, not limiting its discretion with rather marginal quantitative adjustments, but essentially moving from the form/quantity-based designation to a more context/effect-oriented approach, as well as proposing a substantial decrease of quantitative thresholds⁴¹ for designation (or in Opinion's proposed terminology 'qualification')⁴² as gatekeepers.

The Draft Parliamentary Committee on the Internal Market and Consumer Protection Report introduces two important amendments to these thresholds. The first concerns an increase in the quantitative parameters specified in Art 3(2)(b) DMA, proposing to move the requirement of an annual EEA turnover from EUR 6.5 billion to EUR 10 billion (or market capitalisation from EUR 65 billion to EUR 100 billion).⁴³ The second amendment proposes the requirement of Art 3(2)(b) concerning the operation of *one* CPS with at least 45 million monthly active EU end users and 10 000 or more yearly active EU business users to *two or more* CPSs with at least 45 million monthly active EU end users and 10 000 or more yearly active EU business users each.⁴⁴

These two proposed amendments raise two important issues: a procedural one and a substantive one. The procedural one concerns the ability of the Commission to use the provisions of Art 3(6) DMA to overcome these increased thresholds by moving them further up or lower down. As both amendments concern the quantitative features of the designation (i.e., Art 3(2) DMA) and not the qualitative features (i.e., not Art 3(1) DMA), such an option appears feasible – clearly, at least as far as the turnover, capitalisation and monthly/yearly user's requirements are concerned; much less so for the shift from requirement of operation of at least one to the operation of at least two CPSs. The nature of the latter requirement appears to be of strategic rather than tactical importance (for competition in general and for inter-

⁴¹ Amendments 27, 29 and, in particular, 30 of the Draft Parliamentary Committee on Legal Affairs Opinion.

⁴² Amendment 25 of the Draft Parliamentary Committee on Legal Affairs Opinion.

⁴³ Amendment 38 of the Draft Parliamentary Committee on the Internal Market and Consumer Protection Report, p. 32.

⁴⁴ Amendment 39 of the Draft Parliamentary Committee on the Internal Market and Consumer Protection Report, p. 33.

platform competition in particular). However, the amendment is introduced again as a refinement of the quantitative, not qualitative, thresholds (despite the fact that the requirement for a single CPS is also present explicitly in Art 3(1)(b)). This implies that the Commission may in principle apply its bounded discretion within the limits of Art 3(6) to either disregard the requirement for a second CPS or at least decrease the quantitative thresholds for such second service.

The substantive aspects of the proposed amendments concern the normative choice of moving from ≈ 20 to ≈ 5 biggest market players. This may indicate a vision that those biggest players act as the real bottlenecks to effective competition, and that many companies meeting all but one increased quantitative threshold do not constitute a systemic problem. It can also be read as a critical position towards inter-ecosystem competition. Supposedly, a platform may be an important gateway for business users to reach end users, yet it would no longer qualify as a gatekeeper from the perspective of the proposed amendment, as it would be operating only one CPS with an important gateway function, and thus would not leverage its power from one CPS to the other (i.e., it would not be engaging in inter-ecosystem competition).

On the other hand, such an increase may harm inter-platform competition in the CPSs, operating autonomously and not synergising to such an extent their data and competencies. This leads to a normative question about a need for substantiation or the impact assessment of such choice. In addition, the more individualised the designation requirements become, the more vulnerable the EU position becomes vis-à-vis the allegations of using DMA as a proxy in industrial policy; although, after comparable bills were introduced by the US House Judiciary Committee and the US President Executive order 14036 was issued, such claims would be far less convincing.

A regime with even more bespoke rules is being discussed in the UK. A dedicated Digital Markets Unit will be enforcing a mandatory code of conduct, governing the behaviour of the gatekeepers-monopolists.⁴⁵ It is very likely that each of the biggest gatekeepers, defined in the

⁴⁵ UK Competition and Markets Authority Press release 'Government unveils proposals to increase competition in UK digital economy', 20 July 2021; 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

context of the ‘Online platforms and digital advertising market study’ (evidently, gatekeeping status is held by a digital advertising duopoly),⁴⁶ would be assigned specific obligations, calibrated specifically for such an undertaking.

Last but not least, an improvement with regard to granting the Commission greater flexibility in terms of defining CPSs would be also welcomed.⁴⁷ Making the exhaustive list of 8 CPSs more open to adding/removing other important digital services (such as, e.g., browsing,⁴⁸ voice assistance,⁴⁹ digital labour platforms,⁵⁰ virtual assistants⁵¹ or video-streaming⁵²) could offer a more accurate regulatory response to the systemic challenges faced by the digital economy.

Designating the addressees of the reform plays a pivotal role in its effective implementation and functioning. This section has discussed the main opportunities and problems related to the proposed format of the designation. Its overall conclusion is that the DMA offers an elegant juristic way of solving or mitigating most of the potential pitfalls associated with the calibration of gatekeepers' status.

6. Many shades of transparency

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.

⁴⁶ UK Competition and Market Authority, ‘Online platforms and digital advertising Market study’ Final report, 1 July 2020.

⁴⁷ Draft Parliamentary Committee on Legal Affairs Opinion, p. 3: ‘The exhaustive nature of [the CPS] list limits the flexibility of the Regulation in addressing new and emerging categories of CPS. Digital markets move fast, and the regulatory framework should reflect this aspect of the digital economy. The Rapporteur therefore proposes to make the list non-exhaustive, in order to render the DMA more futureproof’.

⁴⁸ David Temkin (Google Director of Product Management, Ads Privacy and Trust), ‘Charting a Course Towards a More Privacy-First Web’ [Privacy Sandbox], ‘Google Ads & Commerce Blog, 03 March 2021.

⁴⁹ European Commission – Press release, ‘Commission publishes initial findings of consumer Internet of Things sector inquiry’, 09 June 2021.

⁵⁰ Amendment 18, Draft Parliamentary Committee on Legal Affairs Opinion.

⁵¹ Amendment 30, Draft Parliamentary Committee on Economic and Monetary Affairs Opinion.

⁵² Alexandre de Stree, Richard Feasey, Jan Krämer, Giorgio Monti ‘Making the Digital Markets Act More Resilient and Effective’, CERRE Recommendations Paper, May 2021, p. 12–21.

One of the main distinctive features of the digital economy is the pervasive designing and exploitation of business- and end users' behavioural patterns by the platforms, making our individual choices as well as our entire functioning in the digital universe not autonomous, rational and explicit, but nudged, curated and subliminal. The systemic digital intermediaries not only *gatekeep*, they in a sense also *design* us. We rely on recommendations and suggestions more than on our own autonomous will. A great body of literature explores this phenomenon from various perspectives.⁵³ Such a race to create a functional architecture of digital products, which enables the maximum level of retention and engagement, is systemic and unavoidable. The algorithmic society is opaque by default: the borderline between independent and steered choices is stealth and undetectable.

Such an objective precondition has numerous negative implications for competition policy. One of the most important is the opacity of the services and T&Cs offered by the digital gatekeepers to their business- and end users. The clearest examples can be seen in the areas of digital advertising,⁵⁴ privacy,⁵⁵ self-preferencing,⁵⁶ Internet of things,⁵⁷ or the exploitative

⁵³ Richard Thaler, Cass Sunstein, 'Nudge: Improving Decisions About Health, Wealth, and Happiness', Penguin Books, 312p. For an example of a broader impact on the digital society see e.g., Shoshana Zuboff, 'The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power', Public Affairs, 2019, 704p. For some more specific implications to competition-centred discussions see e.g., Amanda Reeves, Maurice Stucke, 'Behavioural Antitrust', Indiana Law Review, Vol. 86, No. 4, 2011.

⁵⁴ See e.g., a comprehensive market study and the follow-on development: UK Competition and Market Authority, 'Online platforms and digital advertising Market study' Final report, 1 July 2020 or a commitment decision by the French competition authority with regard to some of those practices by Google in the French markets Autorité de la concurrence Décision 21-D-11 du 07 juin 2021 relative à des pratiques mises en œuvre dans le secteur de la publicité sur Internet, 07 June 2021.

⁵⁵ Oberlandesgericht Düsseldorf, Kart 2/19 (V), ECLI:DE:OLGD:2021:0324.KART2.19V.00; CMA, 'Consultation on proposed commitments in respect of Google's 'Privacy Sandbox' browser changes', Case ref. 50972, 11.6.2021.

⁵⁶ Commission Decision of 27.6.2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 - Google Search (Shopping)); European Commission – Press release, 'Commission opens investigation into possible anti-competitive conduct of Amazon', 17 July 2019.

⁵⁷ Commission Staff Working document, Preliminary Report – Sector Inquiry Into Consumer Internet of Things, Brussels, 9.6.2021 SWD(2021) 144 final.

use of copyrighted materials⁵⁸ – but the elements of opacity by default are omnipresent, and their impact is omnipotent.

Against this background, the DSA/DMA tandem designs a range of ‘countermeasures’, aimed at mitigating the negative impact of these systemic trends. The obligations imposed on intermediaries by the DSA and on gatekeepers by the DMA appear to have far reaching implications and may indeed counterbalance the opacity-by-design trend. This proposed new format has two mutually supportive elements: (i) the asymmetry of obligations – with the highest level of obligations imposed on the most important market players (discussed in Section 4); and (ii) the catalogue of obligations requiring a higher transparency and accountability. The latter is discussed in this section. Attention is given to the obligations envisaged by the DSA rather than the DMA. This is because the binary structure of designating gatekeepers (discussed in Section 5) as well as the broad catalogue of obligations (discussed in Section 4) allow the maximum possible room for new entrants, with the potential of becoming gatekeepers’ inter-platform competitors, to scale up, making the substantive requirements of the DMA targeted at the right addressees for the right reasons. This is, however, not always the case with regard to the substantive provisions of the DSA.

The pyramidal structure of the DSA addressees implies the proportionate increase of obligations with the intermediary’s growth. The challenge is in the gradual requirement for entrants to disclose and make available to the public (not only to the authorities) more and more information, which could be used by the current incumbents to defend and strengthen their entrenched position against the eventual entry, as well as becoming subject to stricter and stricter obligations more generally. The remainder of this section exemplifies this unintended consequence.

The ethos of the DSA is embedded into the vision of the higher responsibility of online intermediaries vis-à-vis their business- and end users. It replaces the previous stage of the minimum liability by significantly increasing the catalogue of obligations and by designing

⁵⁸ The Parliament of the Commonwealth of Australia, House of Representatives, ‘News Media and Digital Platforms Mandatory Bargaining Code Act’, Act no: 21, 02 March 2021; Arts 15 & 17, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1, OJ L 130, 17.5.2019, p. 92–125.

various mechanisms that enable effective monitoring, control and sanctioning. In most instances, such an approach complements and reinforces the rationale of the DMA, particularly, concerns about intra-brand competition. There could be instances, however, of the new order envisaged by the DSA becoming problematic for inter-brand competition (while remaining to be beneficial for intra-brand competition). This is explained both by the structure of the designated intermediaries (i.e., procedural aspects of the DSA, as discussed in Section 5) as well as by the content of the obligations themselves.

As far as the structure is concerned, the pyramidal model of the addressees envisages at least five groups of intermediaries, with the micro and small⁵⁹ intermediaries at the bottom of the pyramid not being subject to the rules at all, and the very large online platforms (VLOPs) at the top of the pyramid being subject to the most extensive obligations. Similar to the provisions of the DMA, the VLOP is defined based on the number of active participants (over 45 million average monthly active recipients). Differing from the DMA, this is the only criterion necessary for qualifying the intermediary as a VLOP. Such a situation means that there would be undertakings qualified as VLOPs who are not gatekeepers.

Many or some of these VLOPs could be potential inter-platform competitors to the entrenched gatekeepers, and the structure of the DMA correctly exempts them from any of the DMA obligations. The positive impact on inter-platform competition depends precisely on the correct calibration of the borderline between those undertakings who are entrenched incumbents and those who are most likely to become disruptors in the future. The binary modality of the DMA captures this rationale perfectly. It is not, however, the case with the DSA. Contrary to the DMA, it is not concerned with the protection and promotion of competition (even if defined through the prism of ‘fairness’ and ‘contestability’). Yet the implications of its provisions on intra- and inter-platform competition would be equally important.

The problem does not end with the much broader scope of the intermediaries, who would be qualified as VLOPs while not (for the right reasons) being subject to the DMA. The problem

⁵⁹ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC), Annex, Art 2(2): ‘[A] small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million’.

expands downstream the pyramid up to the very bottom. The new rules become particularly strict for the VLOPs, but they will be proportionately stricter for all but small and micro intermediaries. This implies that *any* potential new entrants would have to design their market strategy taking into account the increasing requirements of the DSA. In markets with numerous network effects, which are inherently susceptible to the mono- or oligopolistic structure even under the current rules, the emerging order may well lead to cementing the *status quo* rather than changing it. Such a scenario is likely, as the DSA *de-facto* puts into the digital markets a massive amount of new data, which are currently kept secret not only by the VLOPs but by all market players. It is very likely that such an unprecedented amount of free data would be generated and processed in order to learn about the business models of each market and each player. It remains to be seen who would become the champion in this emerging market. It is very possible, however, to anticipate that the current gatekeepers – with their remarkable ability to synergise and bundle data from different markets – would be the most plausible winners in this game. Clearly, such a situation would strengthen their entrenched position even further and would be detrimental to any meaningful inter-platform competition. At the same time, it is likely to be beneficial for intra-platform competition.

There is little doubt that the rules will improve the rights of the business- and end users, making the VLOPs and all other major players much more accountable and controllable by the public authorities. Such a tendency is welcome. Yet it may well be that new *modus vivendi* would be essentially a normative compromise between the EU and the biggest digital corporations. The compromise would imply a much more transparent, safe and fair digital environment provided by the current incumbents. Such obedience would de-toxify public opinion and calm the enforcers' appetite. This would be partially done, however, by reducing the opportunity for the emergence of inter-platform competition, particularly, from the perspective of EU digital sovereignty. All the competition and innovation would be done within the safe and transparent online environment, designed, controlled and embedded into the digital infrastructure of the current incumbents. The question remains whether it is in the strategic interest of the EU to channel such a form of competition, and whether by closing one dimension of the *Wild-West-Wonderland*, the DSA unintentionally opens another.

An important obligation imposed on all online intermediaries concerns the requirement of Art 13 DSA for producing annual reports written in clear and easily comprehensible language,

in which the intermediaries are required to communicate any ‘content moderation they engaged in during the relevant period’.⁶⁰ Not only would it place a disproportionate compliance burden on smaller intermediaries, but it could also be a useful source of information about these practices for those capable of systematising and processing these data across EU digital markets. Art 23(1)(a) DSA extends the requirements of Art 13 DSA, imposing further obligations on all online platforms with regard to transparency in content moderation.

Additionally, Art 23(1)(c) DSA mandates publication of information about any automatic content moderation.⁶¹ Algorithmic moderation, to a great extent, defines visibility of content. An increase in transparency of such an important parameter of the functioning of the digital markets has an obvious potential for promoting and intensifying competition *within* and *between* platforms. At the same time, the new condition is likely to be exploited by the gatekeepers for entrenching further their position in the markets by collecting, systematising and operationalising the newly available sensitive data.

Another important transparency requirement is related to the central feature of the digital economy: online advertising. All online platforms (not only VLOPs) would be required to inform the viewers about ‘the main parameters used to determine the recipient to whom the advertisement is displayed’.⁶² This obligation could contribute most to learning about the nuances of targeting specific audiences, and as such is susceptible to backfiring for inter-platform competition. A lot would depend on whether such sensitive information could be technically systematised by special aggregators, and if the answer is affirmative this would become another lucrative business model potentially operationalised and utilised by incumbents.

VLOPs would be also required to set up a publicly available repository about the content of advertisement and the specific data about the audience.⁶³ Such a database has to contain information about the central features of each advertisement. This would be a very valuable

⁶⁰ Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Brussels, 15.12.2020 COM(2020) 825 final 2020/0361 (COD), (hereinafter The DSA Proposal), Art 13.

⁶¹ The DSA Proposal, Art 23(1)(c).

⁶² The DSA Proposal, Art 24(c).

⁶³ The DSA Proposal, Art 30(1).

information for those undertakings with the entrenched position in the area of digital advertising.

It should be borne in mind, of course, that the online advertising gatekeepers would be also subject to this increased transparency rules, and the potential harm for inter-platform competition is likely to be mitigated, moderated or compensated by a more intense competition both *within* as well as *between* platforms.

The character of the implications of the increased transparency rules on competition in the digital markets is non-linear. One of the main features of the polycentric model of competition policy is widening the monosemic metrics of price theoretical calculus. This implies that the eventual improvements of some aspects of intra- and inter-platform competition do not necessarily authorise a decrease of other aspects of inter-platform competition, caused by the new transparency rules. These aspects are not necessarily in the relationship of direct causality.

Answering the question if the increased transparency would be beneficial to inter-platform competition is a matter of a *post factum* analysis. The purpose of this paper in this context is limited to an articulation of the very possibility of the harm for inter-platform competition caused by the new rules. It would be necessary, in addition, (i) to establish the scope of the potential harm and the parameters for its measuring; as well as (ii) to design legal mechanisms allowing a refinement of the (enforcement of the) relevant provisions of the DSA in light of the newly established implications.

A possible improvement may appear to be in making some of the transparency obligations reportable not to the public but to the enforcers. The accountability requirement would be satisfied, while the potential danger for inter-platform competition would be substantially decreased. On the other hand, such a modification would block the opportunities of the newcomers to benefit from the increased amount of information about gatekeepers (as well as about all other market players). For example, arguably, in areas such as online advertising with the lion's share of all expertise and infrastructure being accumulated in a well-known duopoly, there is very little additional information which could be made available to these duopolists. There is a lot of information about duopoly advertising practices, which their potential competitors could learn about from these databases. The pros and cons are antithetical. If the increased transparency would be mainly exploited by the newcomers, the

reform is beneficial for inter-platform competition. If it will allow a greater data synergy for the incumbents – the reform would harm inter-platform competition.

7. Conclusion

The main purpose of this article is to analyse the impact of the provisions of the DSA/DMA proposal on inter-platform competition. It addresses this issue through the perspective of digital sovereignty. Such an approach is based on an assumption that if the stakes in the global digital race are decisively high, and if the EU needs to improve not only quantitative conditions in its digital markets, but their strategic parameters and scope, then competition law is very likely to be used (or amended and then used) to address these challenges: either by an expansion of its goals or by becoming more open to external factors.

To assess the impact of the proposals on inter-platform competition, this article analyses the relevant provisions of both drafts, focusing on three main issues: (i) the juristic specificity of the new modality of the dialogical, asymmetric, participatory enforcement of Arts 6, 7 and 25 DMA, enabling the Commission to calibrate the meaning of the provisions of Art 6 DMA obligations as applied to each individual gatekeeper, and allowing it by Arts 7 and 25 DMA to penalise any instance of non-compliance with the obligations either *ex tunc* (presumably, if the gatekeeper is not sufficiently engaging in the regulatory dialogue) or only *ex nunc* (presumably, if the preparedness to cooperate with the Commission is manifested more clearly); (ii) the mechanisms of designating gatekeepers, focusing on the analysis of the binary and pyramidal modalities of the designation as well as discussing the pros and cons of the various proposed quantitative thresholds of the designation; and (iii) discussing the substantive provisions of the increased transparency.

The overall conclusion of this article is that the DSA/DMA proposals embody a paradigmatic change in how digital relations are controlled and regulated. They open a new stage in the regulatory history of digital competition law. This stage addresses the specificities of the digital economy with a new set of regulatory tools. Such a reconfiguration of the digital competition

law does not refute, but refines all the existing legal and theoretical instruments,⁶⁴ adapting them to the rapidly changing digital environment.

⁶⁴ 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 are in the original): '[W]hile no longer being competition *law* proper, and therefore correctly not being based on Art. 103 TFEU, it remains competition *policy*'.