

The Digital Markets Act and EU Antitrust Enforcement: Double & Triple Jeopardy

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Executive Summary

In contrast to its stated aims to promote a Digital Single Market across the European Union, the proposed Digital Markets Act (DMA) could serve to fragment Europe's legal framework even further, largely due to overlaps with competition law. This paper provides an analytical overview of areas where conflicts would inevitably arise from dual application of the DMA and European and national-level antitrust rules. It counsels full centralization of the DMA's enforcement at the EU level to avoid further fragmentation, as well as constraining the law's scope by limiting its application to a few large platform ecosystems.

I. INTRODUCTION

The Digital Markets Act (DMA) has entered the last and decisive stage of its approval process. With the Council of Europe having reached consensus on its general approach¹ and the European Parliament having adopted amendments,² the DMA proposal has moved into the inter-institutional negotiations known as the so-called "trilogue."

The DMA has spurred a lively debate since it initially was proposed by the European Commission in December 2020.³ This deliberative process has touched on all the proposal's features, including its aims and scope, the regulations and rule-based approach it would adopt, and the measure's institutional design. However, given the positions

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¹ *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets on the Digital Sector (Digital Markets Act) - General Approach*, COUNCIL OF THE EUROPEAN UNION (Nov. 16, 2021), available at <https://data.consilium.europa.eu/doc/document/ST-13801-2021-INIT/en/pdf>.

² *Amendments Adopted 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)*, EUROPEAN PARLIAMENT (Dec. 15, 2021), https://www.europarl.europa.eu/doceo/document/TA-9-2021-12-15_EN.html.

³ *Proposal for a Regulation on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, EUROPEAN COMMISSION (Dec. 15, 2020), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>.

expressed by the Council and the Parliament, the rationale for DMA intervention and the proposal's relationship with antitrust law remain relevant topics for exploration.

The DMA is grounded explicitly on the notion that competition law alone is insufficient to effectively address the challenges and systemic problems posed by the digital platform economy. Indeed, the scope of antitrust is limited to certain instances of market power (e.g., dominance on specific markets) and of anti-competitive behavior.⁴ Further, its enforcement occurs *ex post* and requires extensive investigation on a case-by-case basis of what are often very complex sets of facts.⁵ Moreover, it may not effectively address the challenges to well-functioning markets posed by the conduct of gatekeepers, who are not necessarily dominant in competition-law terms.⁶ As a result, proposals such as the DMA invoke regulatory intervention to complement traditional antitrust rules by introducing a set of *ex ante* obligations for online platforms designated as gatekeepers. This also allows enforcers to dispense with the laborious process of defining relevant markets, proving dominance, and measuring market effects.

The DMA's framers declare that the law aims to protect different legal interests than antitrust rules do. That is, rather than seeking to protect undistorted competition on any given market, the DMA look to ensure that markets where gatekeepers are present remain contestable and fair, independent from the actual, likely, or presumed effects of the conduct of a given gatekeeper.⁷ Accordingly, the relevant legal basis for the DMA is found not in Article 103 of the Treaty on the Functioning of the European Union (TFEU), which is intended to implement antitrust rules pursuant to Articles 101 and 102 TFEU, but rather in Article 114 TFEU, covering "Common Rules on Competition, Taxation and Approximation of Laws." Further, from an institutional-design perspective, the DMA opts for centralized implementation and enforcement at the EU level, rather than the traditional decentralized or parallel antitrust enforcement at the national level.

Because the intent of the DMA is to serve as a complementary regulatory scheme, traditional antitrust rules will remain applicable. However, those rules would not alleviate the obligations imposed on gatekeepers under the forthcoming DMA regulations and, particularly, efforts to make the DMA's application uniform and effective.⁸

Despite claims that the DMA is not an instrument of competition law⁹ and thus would not affect how antitrust rules apply in digital markets, the forthcoming regime

⁴ *Ibid.*, Recital 5.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*, Recital 10.

⁸ *Ibid.*, Recital 9 and Article 1(5).

⁹ Margrethe Vestager, *Competition in a Digital Age*, speech to the EUROPEAN INTERNET FORUM (Mar. 17, 2021), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age_en.

appears to blur the line between regulation and antitrust by mixing their respective features and goals. Indeed, the DMA shares the same aims and protects the same legal interests as competition law.¹⁰ Further, its list of prohibitions is effectively a synopsis of past and ongoing antitrust cases.¹¹ Therefore, the proposal can be described as a sector-specific competition law,¹² or a shift toward a more regulatory approach to competition law—one that is designed to allow assessments to be made more quickly and through a more simplified process.¹³

Acknowledging the continuum between competition law and the DMA, the European Competition Network (ECN) and some EU member states (self-anointed “friends of an effective DMA”) have proposed empowering national competition authorities (NCAs) to enforce DMA obligations.¹⁴ Under this approach, while the European Commission would remain primarily responsible for enforcing the DMA and would have sole jurisdiction for designating gatekeepers or granting exemptions, NCAs would be permitted to enforce the DMA’s obligations and to use investigative and monitoring powers at their own initiative. According to supporters of this approach, the concurrent competence of the Commission and NCAs is needed to avoid the risks of conflicting decisions or remedies that would undermine the effectiveness and coherence of both the DMA and antitrust law (and, ultimately, the integrity of the internal market.)¹⁵

These risks have been heightened by the fact that Germany (one of the “friends of an effective DMA”) subsequently empowered its NCA, the Bundeskartellamt, to intervene at an early stage in cases where it finds that competition is threatened by large digital companies—in essence, granting the agency a regulatory tool that is functionally equivalent to the DMA.¹⁶ Further, several member states are preparing to apply national rules on relative market power and economic dependence to large digital platforms, with the goal of correcting perceived imbalances of bargaining power between online platforms and

¹⁰ 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*, 3 ZEUP 503 (Jun. 11, 2021).

¹¹ Cristina Caffarra and Fiona Scott Morton, *The European Commission Digital Markets Act: A Translation*, VOX EU (Jan. 5, 2021), <https://voxeu.org/article/european-commission-digital-markets-act-translation>.

¹² Nicolas Petit, *The Proposed Digital Markets Act (DMA): A Legal and Policy Review*, 12 J. EUR. COMPET. LAW PRACT 529 (May 11, 2021).

¹³ Marco Cappai and Giuseppe Colangelo, *Taming Digital Gatekeepers: The More Regulatory Approach to Antitrust Law*, 41 COMPUT. LAW SECUR. REV. 1 (Apr. 9, 2021).

¹⁴ *How National Competition Agencies Can Strengthen the DMA*, EUROPEAN COMPETITION NETWORK (Jun. 22, 2021), available at https://ec.europa.eu/competition/ecn/DMA_joint_EU_NCAs_paper_21.06.2021.pdf; *Strengthening the Digital Markets Act and Its Enforcement*, GERMAN FEDERAL MINISTRY FOR ECONOMIC AFFAIRS AND ENERGY, FRENCH MINISTÈRE DE L'ÉCONOMIE, LES FINANCE ET DE LA RELANCE, DUTCH MINISTRY OF ECONOMIC AFFAIRS AND CLIMATE POLICY, (May 27, 2021), available at https://www.bmwi.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4.

¹⁵ European Competition Network, *supra* note 14, 6-7.

¹⁶ See Section 19a of the GWB *Digitalization Act* (Jan. 18, 2021), <https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2021/0001-0100/0038-21.html>.

business users.¹⁷ As a result of these intersections among the DMA, national and European antitrust rules, and national laws on superior bargaining power, a digital platform may be subject to cumulative proceedings for the very same conduct, facing risks of double (or even triple and quadruple) jeopardy.¹⁸

The aim of this paper is to guide the reader through the jungle of potentially overlapping rules that will affect European digital markets in the post-DMA world. It attempts to demonstrate that, despite significant concerns about both the DMA's content and its rationale, full centralization of its enforcement at EU level will likely be needed to reduce fragmentation and ensure harmonized implementation of the rules. Frictions with competition law would be further confined by narrowing the DMA's scope to ecosystem-related issues, thereby limiting its application to the few large platforms that are able to orchestrate an ecosystem.

The paper is structured as follows. Section II analyzes the intersection between the DMA and competition law. Section III examines the DMA's enforcement structure and the solutions advanced to safeguard cooperation and coordination with member states. Section IV illustrates the arguments supporting full centralization of DMA enforcement and the need to narrow its scope. Section V concludes.

II. DMA INTERSECTION WITH COMPETITION LAW

Multiple overlaps and conflicts may arise from the dual application of the DMA and competition rules. As this section explains, this includes overlaps with both European competition rules as well as national competition laws, including platform-specific rules and rules against the abuse of economic dependence in trading relationships

A. Overlaps with European Competition Law

Doubts and concerns about the relationship between the DMA and the enforcement of competition rules reflect the unclear aims and scope of the former. The DMA is not supposed to be competition law and its legal basis requires distinctive objectives and principles to justify the shift from competition law to regulation. However, despite ostensibly protecting a different legal interest, there is little to demarcate how the DMA's promotion of fairness and contestability differs in substance or scope from competition law.¹⁹ The DMA merely states that it aims to promote fairness and

¹⁷ See, e.g., German GWB Digitalization Act, *supra* note 16; See, also, Belgian Royal Decree of 31 July 2020 Amending Books I and IV of the Code of Economic Law as Concerns the Abuse of Economic Dependence, BELGIAN OFFICIAL GAZETTE (Jul. 19, 2020), http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2019040453&table_name=loi.

¹⁸ Marco Cappai and Giuseppe Colangelo, *A Unified Test for the European Ne Bis in Idem Principle: The Case Study of Digital Markets Regulation*, SSRN working paper (Oct. 27, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951088.

¹⁹ Pinar Akman, *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*, 47 EUR. LAW REV. 85 (Dec. 17, 2021); Schweitzer, *supra* note 10.

contestability, without defining either of these concepts or indicating how the obligations it would impose on digital gatekeepers will fulfill each objective.²⁰ The overlap with antitrust law is even more obvious in the amendments approved by the European Parliament, which expanded the regulation's scope to include fostering innovation and increasing consumer welfare.²¹

Moreover, the obligations introduced by the DMA essentially capture practices subject to past and ongoing antitrust investigations.²² For example, the prohibition on combining personal data across a gatekeeper's services is clearly inspired by the German Bundeskartellamt case against Facebook.²³ The rule on most favored nation (MFN) clauses (or parity clauses) targets the longstanding disputes between NCAs and online travel agents (OTAs) such as Booking.com and Expedia,²⁴ as well as the European Commission's e-books case against Amazon.²⁵ Another obligation takes inspiration from the Commission's *Google Android* case by prohibiting platforms from requiring users who wish to subscribe to or

²⁰ See Alexandre de Stree, Richard Feasey, Jan Kramer, and Giorgio Monti, *Making the Digital Markets Act More Resilient and Effective*, CENTRE ON REGULATION IN EUROPE RECOMMENDATIONS PAPER, 43 (May 26, 2021) <https://cerre.eu/publications/european-parliament-digital-markets-act-dma-resilient-effective> (finding that it is vital that the meanings of the contestability and fairness concepts are clear); Gregory S. Crawford, Jacques Crémer, David Dinielli, Amelia Fletcher, Paul Heidhues, Monika Schnitzer, Fiona M. Scott Morton, and Katja Seim, *Fairness and Contestability in the Digital Markets Act*, THE TOBIN CENTER FOR ECONOMIC POLICY AT YALE, Digital Regulation Project Policy Discussion Paper No. 3 (Jul. 6, 2021), available at <https://tobin.yale.edu/sites/default/files/Digital%20Regulation%20Project%20Papers/Digital%20Regulation%20Project%20-%20Fairness%20and%20Contestability%20-%20Discussion%20Paper%20No%203.pdf> (noting that, although they would seem to refer to different phenomena, the DMA uses the terms “fairness” and “contestability” almost exclusively in conjunction); Petit, *supra* note 12 (noting that the DMA is underspecified and that it does not give the reader confidence that there is clarity of purpose behind legislative efforts to increase fairness and contestability); Rupperecht Podszun, Philipp Bongartz, and Sarah Langenstein, *The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers*, 2 EUCML 60 (2021) (arguing that the DMA needs a more principled approach).

²¹ European Parliament, *supra* note 2, Article 1.

²² The list of obligations is a “curious game of charades,” according to Caffarra and Scott Morton, *supra* note 11. See, also, European Competition Network, *supra* note 14, 15 (noting that the DMA is built on the evidence provided by competition-law cases and sectoral inquiries of various European competition authorities, including the Commission); Podszun, Bongartz, and Langenstein, *supra* note 20 (arguing that the DMA's approach lacks a set of meaningful principles and that its rules resemble a random selection of theories from past and ongoing competition cases).

²³ Case B6-22/16 *Facebook*, BUNDESKARTELLAMT (Feb. 6, 2019), available at https://www.bundeskartellamt.de/SharedDocs/Entscheidungen/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5.

²⁴ For an overview, see Pinar Akman, *Online Platforms, Agency, and Competition Law: Mind the Gap*, 43 FORDHAM INT. LAW J. 209 (2019); Margherita Colangelo, *Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking*, 8 J. EUR. COMPET. LAW PRACT. 3 (2017).

²⁵ Case AT.40153, *Ebook MFNs and Related Matters (Amazon)*, EUROPEAN COMMISSION (May 4, 2017), available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40153/40153_4392_3.pdf.

register with one core platform service to also have to subscribe to or register with another core platform service operated by the same gatekeeper.²⁶

Some of the contested practices in online advertising markets (*i.e.*, the so-called “adtech” supply chain) that led the European Commission to open proceedings in the *Google AdTech* case find a regulatory answer in the DMA’s obligation for gatekeeper platforms to provide information regarding prices paid by advertisers and paid to publishers, both for a given ad and for each of the relevant advertising services provided by the gatekeeper, to any advertisers and publishers to whom a gatekeeper supplies advertising services.²⁷ Another rule codifies the *ex ante* treatment of self-preferencing, which the European Commission first raised in the *Google Shopping* case.²⁸ The investigations launched by the European Commission and some NCAs into the *Amazon Buy Box* (and, more recently, into *Facebook Marketplace*) appear to have inspired the DMA’s ban on “sherlocking” (*i.e.*, the use of a business user’s data to compete against them).²⁹

Finally, some of the DMA’s prohibitions are explicitly intended to tackle controversial practices in the Google and Apple app-store ecosystems, which are at the center of several antitrust cases and legislative initiatives around the world.³⁰ These include the duty to allow sideloading and to offer fair, reasonable, and non-discriminatory (FRAND) access conditions to business users, as well as the ban on anti-steering rules; on preventing end users from uninstalling any pre-installed software applications; and on providing preferential access to technical functionality to a platform’s own ancillary services, such as identification or payment services and technical services that support the provision of payment services.

As a result, the DMA initiative appears to be guided not by distinctive principles and theories of harm, but rather by the need to fill perceived antitrust-enforcement gaps. Indeed, the Impact Assessment supporting the proposal argued that competition law is not

²⁶ Case AT.40099 *Google Android*, EUROPEAN COMMISSION (Jul. 18, 2018), available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

²⁷ Case AT.40670 *Google - AdTech and Data Related Practices*, EUROPEAN COMMISSION (Jun. 22, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143; see, also, *Digital Platforms Inquiry – Final Report*, AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (Jul. 26, 2019), available at <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>; and *Online Platforms and Digital Advertising - Market Study Final Report*, U.K. COMPETITION AND MARKETS AUTHORITY (Jul. 1, 2020), <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

²⁸ Case AT.39740 *Google Search (Shopping)*, EUROPEAN COMMISSION (Jun. 27, 2017), available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

²⁹ Case AT.40703 *Amazon – Buy Box*, EUROPEAN COMMISSION (Nov. 10, 2020), https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40703; Case AT.40684 *Facebook Leveraging*, EUROPEAN COMMISSION (Jun. 4, 2021) https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40684.

³⁰ See Oscar Borgogno and Giuseppe Colangelo, *Platform and Device Neutrality Regime: The Transatlantic New Competition Rulebook for App Stores?*, Stanford-Vienna TTLF Working Paper No. 83 (Feb. 14, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4000597.

always the ideal solution to address the challenges posed by the digital economy, citing problems in defining relevant markets, lengthy timeframes to bring enforcement actions, high legal thresholds to prove abuse, and the backward-looking nature of intervention.³¹ The European Commission has noted that it considers antitrust tools unfit to effectively tackle the conduct of digital gatekeepers because they are applied *ex post* and at the end of extensive investigations of complex facts on a case-by-case and context-specific basis.³² Scholars who endorse the European policy initiative similarly acknowledge that a key motivation is to speed the implementation of remedies.³³ The most convincing objections raised regarding competition law's inability to address the issues covered by the DMA concern not the substance of the law, but rather the procedural and institutional framework for its enforcement.³⁴

Therefore, the *raison d'être* for the DMA's *ex ante* regulation resides more in perceived enforcement failures than in market failures.³⁵ The emphasis is on the speed of intervention. The DMA thus differs from the current regime of antitrust liability more in degree than in the nature of the law.³⁶

In service of this goal of speedier enforcement, the DMA dispenses with economic analysis and the efficiency-oriented consumer welfare test, substituting lower legal standards and evidentiary burdens.³⁷ Indeed, the DMA frees enforcers from the constraints of antitrust law by removing the requirements to define relevant markets or to establish proof either of dominance or of effects on the market. Further, it prohibits certain practices without even allowing for objective justification or an efficiency defense. Moreover, it not only relaxes the burden of proof relative to the standards of competition law, but also fundamentally shifts responsibility for that burden; instead of the Commission needing to

³¹ *Digital Markets Act Impact Assessment Support Study - Synthesis Report*, EUROPEAN COMMISSION, at 17 (Dec. 14, 2020), available at <https://op.europa.eu/en/publication-detail/-/publication/0a9a636a-3e83-11eb-b27b-01aa75ed71a1>.

³² European Commission, *supra* note 3, Recital 5.

³³ Luís Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso Valletti, and Marshall Van Alstyne, *The EU Digital Markets Act*, EUROPEAN COMMISSION JOINT RESEARCH CENTRE, at 10 (2021), available at https://publications.jrc.ec.europa.eu/repository/bitstream/JRC122910/jrc122910_external_study_report_-_the_eu_digital_markets_acts.pdf; see, also, Giorgio Monti, *The Digital Markets Act – Institutional Design and Suggestions for Improvement*, TILBURG LAW AND ECONOMICS CENTER (Mar. 5, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730 (considering the DMA as a well-designed tool that surmounts what have been perceived as the main weaknesses of using competition law in digital markets, namely the slowness by which antitrust cases proceed and the lack of teeth in the remedies imposed).

³⁴ Pierre Larouche and Alexandre de Streel, *The European Digital Markets Act: A Revolution Grounded on Traditions*, 12 J. EUR. COMPET. LAW PRACT. 542 (Aug. 27, 2021).

³⁵ Cappai and Colangelo, *supra* note 13.

³⁶ Petit, *supra* note 12.

³⁷ Pablo Ibáñez Colomo, *The Draft Digital Markets Act: A Legal and Institutional Analysis*, 12 J. EUR. COMPET. LAW PRACT. 561, 566 (Feb. 22, 2021).

prove that there has been a violation in an individual case, gatekeepers must prove affirmatively that they comply with the DMA's statutory obligations.³⁸

In sum, the DMA's departure from competition law is merely aimed at getting rid of the "more economic" approach, in order to shorten the process, avoid time-consuming assessments, and secure the result of prohibiting certain practices.³⁹

The European Commission, however, apparently also decided to avoid some legislative constraints. Instead of reforming competition rules pursuant to Article 103 TFEU, the Commission opted for Article 114 TFEU as the DMA's legal basis. This choice amounts to a complete overhaul of the competition-policy toolkit. Nonetheless, because the DMA ostensibly pursues different (but complementary) objectives and protects different legal interests than does competition law, Articles 101 and 102 TFEU, as well as the corresponding national antitrust rules, remain applicable to digital gatekeepers. The DMA cannot prevent parallel actions.⁴⁰

There is therefore a tangible risk of overlap between the DMA and the enforcement of competition law. Digital platforms face the risk that they may be prosecuted in parallel cases for the same conduct, which would be at odds with the legal principle of *ne bis in idem* ("not twice about the same"). Platforms also may be exposed to regulatory fragmentation and inconsistency. The risk of overlap with competition law is heightened by the DMA's proposed designation process, which may further widen the law's scope in the future.

The DMA's scope is defined according to a two-step process that includes, first, scrutinizing the nature of services an online platform provides and, then, designating the platform as a "gatekeeper." With regard to the former, the DMA introduces the concept of "core platform services" to define those digital services that, because of their economic features, can confer to a gatekeeper position to the provider.⁴¹ To the long list of services detailed in the draft proposal (including intermediation services, search engines, social networks, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud-computing services, and advertising services), the European Parliament suggested to also add web browsers, virtual assistants,

³⁸ *Recommendations for an Effective and Efficient Digital Markets Act*, MONOPOLKOMMISSION, at 10 (Oct. 5, 2021), <https://www.monopolkommission.de/en/reports/special-reports/special-reports-on-own-initiative/372-sr-82-dma.html>.

³⁹ Conversely, see Monti, *supra* note 33 (arguing that the DMA is more than an enhanced and simplified application of antitrust rules because, while the obligations may be criticized as based on existing competition concerns, they are forward-looking in trying to create a regulatory environment in which gatekeeper power is contained and perhaps even reduced).

⁴⁰ European Commission, *supra* note 3, Article 1(6).

⁴¹ *Ibid.*, Article 2(2).

and connected TV.⁴² Moreover, the DMA allows the Commission to add new services as a result of a market investigation.⁴³

An online platform is designated as a gatekeeper according to a test of three qualitative criteria (*i.e.*, if it has a “significant impact” on the internal market, serves as an “important gateway” for business users to reach end users, and enjoys an “entrenched and durable position” in its operations or it is foreseeable that it will enjoy such a position in the near future), each of which are presumed to be met when a prescribed quantitative threshold is crossed.⁴⁴ Following a market investigation, the Commission also may identify as a gatekeeper any provider of core platform services, even if it does not satisfy each of the thresholds.⁴⁵ Moreover, with the aim of preventing market tipping, the DMA considers it appropriate to designate an emerging firm as a gatekeeper if it meets the criteria of significant impact and important gateway, and it is foreseeable that it may meet the criteria of an entrenched and durable position in the future.⁴⁶

Given these criteria, the DMA may be overinclusive. Indeed, according to the Impact Assessment accompanying the proposal, the aforementioned thresholds could result in the identification of 10 to 15 gatekeepers.⁴⁷ This risk has been acknowledged by the Council, which has suggested improving the DMA’s criteria for designating gatekeepers such that only a few large online platforms are targeted.⁴⁸ Further, by relying on quantitative thresholds and identifying gatekeepers on the basis of their providing just a single core service, the designation process appears focused more on size than on whether a platform would actually be able to orchestrate an ecosystem.⁴⁹ For these reasons, it has been suggested that the DMA’s designation criteria should be narrowed by requiring that gatekeeper status be reserved for providers of at least two core services; recognizing relevant differences in platforms’ business models; and including measurable proxies of multi-homing as part of the definition of entrenchment of market power.⁵⁰ Without some further

⁴² European Parliament, *supra* note 2.

⁴³ European Commission, *supra* note 3, Article 17(a).

⁴⁴ *Ibid.*, Article 3.

⁴⁵ *Ibid.*, Article 3(6).

⁴⁶ *Ibid.*, Article 15(4).

⁴⁷ European Commission, *supra* note 31, para. 148.

⁴⁸ Council of the European Union, *supra* note 1.

⁴⁹ See, *e.g.*, German Federal Ministry for Economic Affairs and Energy, et al., *supra* note 14 (arguing that the DMA’s scope should be more targeted and should take the role of ecosystems into account more explicitly).

⁵⁰ See, *e.g.*, Cabral, Haucap, Parker, Petropoulos, Valletti, and Van Alstyne, *supra* note 33; de Streel, Feasey, Kramer, and Monti, *supra* note 2; Damien Geradin, *What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?*, SSRN working paper (Feb. 18, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788152; Michael G. Jacobides, *What Drives and Defines Digital Platform Power?*, EVOLUTION LTD. (Apr. 19, 2021), available at https://events.concurrences.com/IMG/pdf/jacobides_platform_dominance.pdf; Mario Mariniello and Catarina Martins, *Which Platforms Will Be Caught By the Digital Markets Act? The ‘Gatekeeper’ Dilemma*, BRUEGEL BLOG (Dec.

constraints on the designation process, the DMA is expected to cover an increasingly large number of firms—well beyond Big Tech and native tech companies—as platform business models emerge in a growing number of industries.⁵¹

B. Overlaps with Other Antitrust Rules

The concerns related to overlapping proceedings are further exacerbated by concomitant national legislative initiatives that target anticompetitive behaviors in digital markets. Indeed, although the DMA prohibits EU member states from imposing further obligations on gatekeepers,⁵² member states remain free to adapt their competition laws to digital markets in accordance with the leeway granted by Article 3(3) of the Modernization Regulation. Moreover, member states may be eager to exploit national rules on economic dependence to tackle potential imbalances of bargaining power between online platforms and their business users.

Four categories of overlap are particularly salient in this regard. The first concerns the conflicts that may arise from enforcement of national rules, particularly where digital platforms are concerned. The second stems from platform-specific amendments to national competitions laws, such as that adopted in Germany. A third source of overlap concerns national laws on economic dependence. Finally, sector-specific legislation—that is, legislation intended to protect weaker parties against the superior bargaining power exerted by digital intermediaries—could also be a source of conflicting obligations for online platforms.

Given this, the same practice may be subject to multiple proceedings, thereby exposing platforms to the risks of double jeopardy and inconsistent treatment, which may vary depending on the NCA and specific national legislation involved.

I. National Antitrust Enforcement

Given that the DMA's obligations largely codify practices that have been subject to past and ongoing antitrust investigations, the first potential overlap is with the parallel application of existing European and national antitrust rules. The risk practically regards the application of these rules by NCAs. Indeed, since the DMA will free the Commission from the constraints of competition-law analysis, the European authority is not expected to apply antitrust rules to tackle practices covered by the DMA.

14, 2021), <https://www.bruegel.org/2021/12/which-platforms-will-be-caught-by-the-digital-markets-act-the-gatekeeper-dilemma>; Schweitzer, *supra* note 10.

⁵¹ See, for instance, Mariniello and Martins, *supra* note 50 (comparing the effects that the proposals would have on the number of designated companies and noting that the choice between designating platforms with just one core service or two core services would make a huge difference to the DMA's scope).

⁵² European Commission, *supra* note 3, Article 1(5).

Besides the German *Facebook* case,⁵³ which inspired the DMA prohibition of combining personal data across a platform's services, there are several other examples of conduct that has been investigated by the NCAs that will be codified by the DMA. For instance, terms and conditions for accessing mobile ecosystems and app stores have been scrutinized in various jurisdictions. Notably, the Italian Competition Authority (AGCM) fined Google for refusing to integrate Enel's Recharge app (JuicePass) into Android Auto.⁵⁴ Referring to Google's gatekeeping position and the purported conflict of interests generated by its dual role played as both platform and provider of a competing app (Google Maps), the AGCM considered Android Auto indispensable for the purposes of applying the essential facility doctrine (EFD). According to the ACGM, in refusing to integrate JuicePass into the Android Auto ecosystem, Google was attempting to favor its own app. As a result, the authority mandated that the company ensure a level playing field by developing a proper template to accommodate the needs of third-party recharge applications, thereby allowing their interoperability with Android Auto.

Further, the Netherlands Authority for Consumers & Markets (ACM) launched an investigation into terms, conditions, and other measures limiting access to near field communication (NFC) functionality for rivals, based on the competitive concern that Apple had undermined competition by reserving NFC technology exclusively for its own proprietary payment app.⁵⁵ Moreover, the ACM recently ordered Apple to adjust the conditions applied in its App Store to dating-app providers, allowing them to use their own in-app payment systems.⁵⁶

Finally, following referrals from press publishers who monetize the content of their websites and mobile apps through the supply of advertising space, the French Competition Authority (AdIC) found that Google engaged in abusive practices to favor its own advertising-intermediation technologies—*i.e.*, that it was granting preferential treatment to its proprietary technologies offered under the Google Ad Manager brand.⁵⁷ Among the other things, the AdIC explicitly stated that the limitation on interoperability with third-party services servers cannot be considered competition on the merits.⁵⁸

⁵³ Bundeskartellamt, *supra* note 23.

⁵⁴ Decision No. 29645, AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO (Apr. 27, 2021), available at [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/D7C5BF86903B8387C12586D800495AB1/\\$File/p29645.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/D7C5BF86903B8387C12586D800495AB1/$File/p29645.pdf).

⁵⁵ *Investigation into Users' Freedom of Choice Regarding Payment Apps on Smartphones*, AUTORITEIT CONSUMENT & MARKT, (Dec. 4, 2020), <https://www.acm.nl/en/publications/acm-launches-investigation-users-freedom-choice-regarding-payment-apps-smartphones>.

⁵⁶ *ACM Obliges Apple to Adjust Unreasonable Conditions for Its App Store*, AUTORITEIT CONSUMENT & MARKT (Dec. 24, 2021), <https://www.acm.nl/en/publications/acm-obliges-apple-adjust-unreasonable-conditions-its-app-store>.

⁵⁷ *Decision 21-D-11 Google*, AUTORITÉ DE LA CONCURRENCE (Jun. 7, 2021), <https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-online-advertising-sector>.

⁵⁸ *Ibid.*, para. 410.

The aforementioned national antitrust cases all center on various forms of self-preferencing, which the DMA also treats as the central concern related to the dual roles played by online platforms. Digital gatekeepers effectively act as both regulators and traders on their own platforms, which arguably provides incentive for them to leverage their power and give preferential treatment to their own products and services relative to those provided by other entities. From this perspective, self-preferencing is effectively a catchall term that covers various practices belonging to the general category of (offensive and defensive) leveraging, but that are evaluated according to differing antitrust legal standards (*i.e.*, refusal to deal, margin squeeze, tying, discrimination).

The recent General Court decision in the *Google Shopping* case, however, contributed uncertainty by regarding self-preferencing as a standalone offense under specific circumstances.⁵⁹ In particular, the Court extended to a dominant platform the principle of equal treatment usually applied to public services. It justified the departure from traditional antitrust theories of harm by placing the emphasis on the business model that Google had adopted—specifically, “the universal vocation” and openness of its search engine, and its “superdominant” (or “ultra-dominant”) position as a gateway to the Internet.⁶⁰ Moreover, the Court introduced an unprecedented quasi-EFD, arguing that Google’s general results page has characteristics “akin to those of an essential facility.”⁶¹ Therefore, while it is unclear whether the Court was sanctioning self-preferencing as such, the ruling may provide NCAs with a new and convenient shortcut to significantly lower the burdens of proof otherwise requested to target practices traditionally assessed under the requirements of refusal to deal, margin squeeze, tying, and discrimination.

Indeed, just one month after the General Court decision, relying on a broad application of *Google Shopping*, the AGCM issued a monster fine against Amazon for having combined its marketplace and fulfillment services to exclude logistics rivals.⁶² According to the AGCM findings, Amazon took advantage of vertical integration to tie the use of its fulfillment service to access to a set of exclusive benefits (*e.g.*, the Prime label) that was essential to gain visibility and increase sales on its marketplace (*e.g.*, being displayed in the Buy Box). As a result, pursuant to the decision, Amazon is required to grant sales benefits and visibility on the marketplace to all third-party sellers able to comply with fair and nondiscriminatory standards for order fulfilment in line with the level of service that Amazon intends to guarantee to Prime consumers.

⁵⁹ *Case T-612/17, Google LLC and Alphabet Inc. v. European Commission*, EU:T:2021:763, GENERAL COURT (Nov. 10, 2021).

⁶⁰ *Ibid.*, paras. 176, 180, and 183.

⁶¹ *Ibid.*, para. 124.

⁶² *Decision No. 29925*, AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, (Nov. 30, 2021) available at [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/801201274D8FDD40C12587AA0056B614/\\$File/p29925.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/801201274D8FDD40C12587AA0056B614/$File/p29925.pdf).

It is worth noting that the European Commission launched an investigation into Amazon concerning the very same facts.⁶³ The General Court dismissed Amazon's request to annul this investigation insofar as it excluded Italy from its territorial scope.⁶⁴ Amazon complained that these parallel proceedings required the company to defend itself against two different authorities, in compliance with different procedural rules and guarantees. Moreover, they could lead to divergent applications of competition law and the imposition of divergent penalties. Indeed, although the Commission's action formally covers the whole of the European Economic Area (with the exception of Italy) there is apparent overlap with the Italian decision.

The *Amazon* case is illustrative of the issues posed by the parallel application of the DMA and competition rules. To justify their interventions, NCAs may either craft the geographic scope of their investigations or rely on the fact that the DMA formally protects a different legal interest. Indeed, Amazon's terms and conditions previously had been investigated in Austria,⁶⁵ Germany,⁶⁶ and Luxembourg.⁶⁷

Moreover, the DMA may grant NCAs additional leeway in evaluating cases of refusal to access. According to the Europe's essential facility doctrine (EFD), a refusal to deal may trigger an antitrust violation only when exceptional circumstances are met.⁶⁸ Namely, access to the essential product or service must be indispensable for a firm to transact business in a market; the refusal must be unjustified and must exclude competition on a secondary market; and, if the refusal involves licensing of intellectual property, it must prevent the emergence of a new product for which there is potential consumer demand. In this context, it has often proven difficult to establish the indispensability of the facility at stake. Indeed, according to the *Bronner* decision, access to an input is indispensable if there are no technical, legal, or economic obstacles that make it impossible (or unreasonably difficult) to duplicate it.⁶⁹ However, in the recent *Slovak Telekom* decision, the Court of

⁶³ Case AT.40703 *Amazon – Buy Box*, EUROPEAN COMMISSION (Nov. 10, 2020), https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40703.

⁶⁴ Case T-19/21 *Amazon.com and Others v. European Commission*, EU:T:2021:730, GENERAL COURT (Oct. 14, 2021).

⁶⁵ *Amazon.de Marketplace*, BUNDESWETTBEWERBSBEHÖRDE (Jul. 17, 2019), available at https://www.bwb.gv.at/fileadmin/user_upload/Fallbericht_20190911_en.pdf.

⁶⁶ Case B2-88/18, BUNDESKARTELLAMT (Jul. 17, 2019), <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.html>.

⁶⁷ Case 2019-MC-01, CONSEIL DE LA CONCURRENCE (Jul. 3, 2019), available at <https://conurrence.public.lu/dam-assets/fr/decisions/mesures-conservatoires/2019/Decision-2019-MC-01-Version-unique.pdf>.

⁶⁸ *Joined Cases C-241/91 P and 242/91 P, RTE and ITP v. Commission*, EU:C:1995:98, COURT OF JUSTICE OF THE EUROPEAN UNION (Apr. 6, 1995).

⁶⁹ Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, EU:C:1998:569, COURT OF JUSTICE OF THE EUROPEAN UNION (Nov. 26, 1998).

Justice (CJEU) implied that antitrust enforcers do not have to prove indispensability when access to the facility has been granted as a result of a regulatory obligation (e.g., the DMA), rather than voluntarily.⁷⁰ Further, the EFD exceptional circumstances do not apply when the dominant firm gives access to its infrastructure but makes that access subject to unfair conditions.⁷¹

2. Platform-Specific National Antitrust Rules

Magnifying the potential areas of overlap between the DMA and national enforcement of competition rules is the possibility that member states will seek to strengthen their antitrust-enforcement tools by introducing platform-specific rules.

This possibility became reality in January 2021, when the German Bundestag adopted an amendment to its national antitrust law.⁷² This new Section 19a entrusts the Bundeskartellamt with new powers to identify positions of particular market relevance (firms with “paramount significance for competition across markets”) and the possible anti-competitive effects in digital ecosystems where individual companies may have a gatekeeper function.⁷³

As a first step, the relevant factors in designating such a firm are its dominant position on one or more markets, its financial strength or access to other resources, its vertical integration and activities on otherwise related markets, its access to data relevant for competition, the importance of its activities for third parties’ access to supply and sales markets, and its related influence on third parties’ business activities. Once the designation has been made, the German competition authority can prohibit the designated company from engaging in anti-competitive practices. In particular, the new rule introduces a list of seven types of abusive practices the Bundeskartellamt may prohibit, unless the firm is able to demonstrate that the conduct at stake is objectively justified.

Both the aim of the initiative and the list of prohibited practices are sufficiently similar to the DMA as to be functionally equivalent. The primary differences are that the German rule regards the list of prohibited practices as exhaustive, and the rule does not consider the practices at stake to be *per se* prohibited. Rather, it introduces a reversal of the burden of proof, allowing firms to provide objective justifications for their conduct, which is not possible under the DMA.

⁷⁰ Case C-165/19 P, *Slovak Telekom a.s. v. Commission*, EU:C:2021:239, COURT OF JUSTICE OF THE EUROPEAN UNION, para. 57 (Mar. 25, 2021).

⁷¹ *Ibid.*, para. 50.

⁷² GWB Digitalization Act, *supra* note 16. For an analysis, see Jens-Uwe Franck and Martin Peitz, *Digital Platforms and the New 19a Tool in the German Competition Act*, 12 J. EUR. COMPET. LAW PRACT 513 (May 2, 2021).

⁷³ *Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Wettbewerbsrechtlicher Bestimmungen*, DEUTSCHER BUNDESTAG (Oct. 19, 2020), available at <https://dserver.bundestag.de/btd/19/234/1923492.pdf>.

The Bundeskartellamt has already initiated proceedings against Amazon,⁷⁴ Apple,⁷⁵ Facebook,⁷⁶ and Google⁷⁷ based on Section 19a. Google has been the first platform to be designated as of paramount significance for competition across markets.⁷⁸ Therefore, the German competition authority has demonstrated that it is inclined to impose obligations on large digital platforms well before the DMA will enter into force, frustrating the EU law's attempt at harmonization and undermining its goals and scope.

But while the German legislative initiative contravenes the spirit of the DMA, it cannot be considered formally in conflict with the latter. Indeed, as mentioned, because the DMA claims to protect a different legal interest, the relevant legal basis for the European regulation is represented by Article 114 TFEU. While Article 1(5) of the DMA prohibits member states from imposing further obligations on gatekeepers, they are free to introduce new rules that are mere extensions of their national competition laws. The DMA's Impact Assessment even considered potential national measures as "supportive of and potentially complementary to EU solutions."⁷⁹

Alongside Germany, other national administrations also have taken steps to implement measures that overlap with the DMA. The Italian AGCM referred explicitly to the German approach in suggesting the Italian government introduce a similar rule.⁸⁰ However, the annual competition law approved by the government (still waiting to be confirmed by the Parliament) did not include this rule.⁸¹ In a similar vein, the Hellenic Competition Commission supported the idea to include a new rule in the Greek Competition Act, under which the Commission could exert *ex post* control over abusive

⁷⁴ *Proceedings Against Amazon Based on New Rules for Large Digital Companies*, BUNDESKARTELLAMT (May 18, 2021), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html.

⁷⁵ *Proceeding Against Apple Based on New Rules for Large Digital Companies*, BUNDESKARTELLAMT (Jun. 21, 2021), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html.

⁷⁶ *First Proceeding Based on New Rules for Digital Companies*, BUNDESKARTELLAMT (Jan. 28, 2021), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.html.

⁷⁷ *Proceeding Against Google Based on New Rules for Large Digital Players*, BUNDESKARTELLAMT (May 25, 2021), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/25_05_2021_Google_19a.html; *Bundeskartellamt Examines Google News Showcase*, BUNDESKARTELLAMT (Jun. 4, 2021), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/04_06_2021_Google_Showcase.html.

⁷⁸ *Case B7-61/21*, BUNDESKARTELLAMT (Dec. 30, 2021), available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2022/B7-61-21.pdf?__blob=publicationFile&v=6.

⁷⁹ European Commission, *supra* note 31, 47.

⁸⁰ *ICA: Proposals for Pro-Competitive Reforms (Annual Competition Law Proposal) Have Been Sent to Palazzo Chigi*, AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO (Mar. 23, 2021), <https://en.agcm.it/en/media/press-releases/2021/3/ICA-proposals-for-pro-competitive-reforms-Annual-Competition-Law-proposal-have-been-sent-to-Palazzo-Chigi>.

⁸¹ *Legge Annuale per il Mercato e la Concorrenza*, SENATO DELLA REPUBBLICA (2022), available at https://www.ansa.it/documents/1636051142145_concorrenza.pdf.

conduct by a firm holding a position of power in “an ecosystem of paramount importance for competition.”⁸² Unlike the DMA, the rule would have taken into account the business model of the ecosystem in question and would allow efficiency defenses. However, the proposed rule on ecosystems did not survive in the final amendments to the Competition Act approved by the Hellenic Parliament.⁸³ Austria also has amended its competition law to make it possible for the competition authority to request the Competition Tribunal to declare a firm dominant in multi-sided digital markets.⁸⁴ The rationale behind the Austrian measure was to allow the Competition Authority to take preventive action where *ex post* investigations would be difficult and inefficient. Unlike the German law, the Austrian measure does not provide specific abuse rules for digital gatekeepers. The new rule instead adds three criteria that are to be taken into account when assessing whether a firm has a dominant position: the significance of a company’s intermediation services for other companies’ ability to access upstream or downstream markets, the company’s access to data, and the relevant network effects.

It is worth noting that Germany has since moved to regulate access to NFC functionality, a practice already specifically tackled by the DMA. As illustrated in the DMA, prohibiting gatekeepers from offering preferential access to technical functionality in their own ancillary services (such as identification or payment services, as well as technical services that support the provision of payment services) is intended to address gatekeepers’ incentive to leverage market power in their core platform services to adjacent markets.⁸⁵ In this sense, Section 58a of the German Payment Services Supervisory Act already provides e-money issuers and mobile-payment service providers the right to access the functionalities of online devices’ operating systems and the respective NFC-interface technical infrastructure that are integrated in mobile phones and other devices.⁸⁶

3. National laws on economic dependence

An additional layer of overlap with the DMA aims and obligations can be found in national rules on the abuse of economic dependence. Over the years, several EU member states have

⁸² *Modernization of Competition Law for the Digital Age - Amendment of Law 3959/2011 and Incorporation of Directive (EU) 2019/1 of the European Parliament and of the Council Of 11 December 2018*, HELLENIC MINISTRY OF DEVELOPMENT AND INVESTMENT (Aug. 6, 2021) <http://www.opengov.gr/ypoiar/?p=12356>. For theoretical background, see Michael G. Jacobides and Ioannis Lianos, *Ecosystems and Competition Law in Theory and Practice*, 30 IND. CORP. CHANG. 1199 (Jan. 24, 2021).

⁸³ *Modernization of Competition Law for the Digital Era*, HELLENIC PARLIAMENT (Jan. 20, 2022), https://www.hellenicparliament.gr/Nomothetiko-Ergo/Psifisthenta-Nomoschedia?law_id=d5fa28cd-0208-4508-b40b-ae1a01508595.

⁸⁴ *Competition Law Amendment Act (KaWeRAG) 2021*, BUNDESGESETZBLATT FÜR DIE REPUBLIK ÖSTERREICH (Sep. 9, 2021), https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2021_I_176/BGBLA_2021_I_176.html.

⁸⁵ European Commission, *supra* note 3, Recital 14.

⁸⁶ *Payment Services Supervisory Act (Zahlungsdiensteaufsichtsgesetz - ZAG)*, BUNDESMINISTERIUM DER JUSTIZ (2020), https://www.gesetze-im-internet.de/zag_2018/_58a.html. See Jens-Uwe Franck and Dimitrios Linardatos, *Germany’s “Lex Apple Pay”: Payment Service Regulation Overtakes Competition Enforcement*, 12 J. EUR. COMPET. LAW PRACT. 68 (Jun. 1, 2020).

adopted specific rules to scrutinize terms and conditions believed to present an unfair imbalance of bargaining power between business parties. Rules forbidding the abuse of economic dependence reflect concerns about the asymmetry of economic power in business-to-business relationships, which are considered a potential source of unfair trading practices. Indeed, in some situations, because of peculiar economic and market conditions, contracts may have extremely one-sided terms that almost exclusively benefit one party at the expense of the other. Accordingly, rules on economic dependence are intended to protect weak parties vis-à-vis large firms to ensure fair terms against the exploitation of superior bargaining power.

Considerations of economic dependence are framed in terms of *relative* market power, rather than the *absolute* market power that triggers competition-law enforcement. Indeed, investigations of economic dependence target the use of economic power in a contractual relationship (*i.e.*, between specific trading partners), rather than power on the market (*i.e.*, among any counterparties). Accordingly, a claim of abuse of economic dependence does not require enforcers to demonstrate that a given firm has dominant position in a relevant market.

As mentioned, the bargaining imbalance that national rules aim to restore emerges from certain economic and market conditions. Notably, economic dependence is primarily the result of significant switching costs that may lock a party into a business relationship where it cannot find equivalent alternative solutions.

As shown by transaction-cost economics, the governance of contractual relations is influenced by specific investments that parties may be required to undertake to support their trading relationship—also referred to as asset specificity.⁸⁷ This may result from structural features of the agreement (*e.g.*, the need to safeguard the goodwill of a brand in a franchising agreement) or from strategic behavior. For instance, relationship-specific investments may lead to economic dependence and the scope for opportunistic behavior because, once those costs have been sunk, they would be lost if the relationship terminates. Before signing an agreement, a party usually deals with a “large numbers” bargaining situation in which it is able to select its trading partner among several options. But once the agreement has been signed and transaction-specific investments have been undertaken, the party faces a “small numbers” bargaining situation, being unable to change the selected trading partner without suffering significant sunk costs. Therefore, the larger the size of transaction-specific investments, the stronger the bargaining power of the counterparty.

When weak parties are exposed to actual *ex post* opportunism or holdup, the threat of terminating the business relationship may induce the weak party to accept unfair

⁸⁷ OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS*, (1975); Oliver E. Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J LAW ECON 233 (Oct. 1979).

amendments to the agreement that allow the strong party to appropriate its rents.⁸⁸ Information asymmetries, bounded rationality, and contractual incompleteness can further heighten the bargaining weakness of a party and the related risk of being exposed to holdup behavior.

Economic dependence also may be deemed to emerge where a party needs access to inputs that are in the exclusive control of the counterparty, rendering the latter an unavoidable trading partner. In this scenario, the superior bargaining power is akin to market power and the stronger party may abuse its role not only by imposing unfair conditions, but also by refusing to deal.

The difficulty in drawing a clear distinction between *relative* market power and *absolute* market power reflects the fact that the line separating the impact of the alleged abuse on a contract from its effects on the market could be blurry. After all, *ex post* lock-ins and associated potential opportunistic and holdup behavior are typically associated with the kinds of market-power problems that are the focus of antitrust scrutiny. At the same time, it could be argued that, by taking account of the contractual environment, contract law is superior to antitrust law in *ex post* opportunism cases and that contractual holdups are part of the competitive bargain. Hence, these would not constitute antitrust problems so long as the *ex ante* market is reasonably competitive.⁸⁹ Anticipating that a deal might leave them exposed to opportunistic behavior, rational economic agents will likely respond by asking for better terms (notably, by leveraging offers from competitors) or filling certain contractual gaps.⁹⁰ Accordingly, *relative* market power is, arguably, only an issue when one party to a contract benefits from *absolute* market power.

This explains why the scope of the rule has traditionally been debated. Indeed, national rules on the abuse of economic dependence include requirements and tackle practices which imply an assessment of market conditions—well beyond the features for the specific agreement at stake. In order to prove economic dependence, such rule require demonstrating barriers to exit from the commercial relationship and the impossibility for the abused company to find adequate alternatives on the market. Further, although abuse of economic dependence is not regulated at the European level, national laws on this matter are authorized by Article 3(2) of the Regulation 1/2003 on the implementation of competition rules, which allows member states to adopt and apply local rules that more

⁸⁸ Benjamin Klein, Robert G. Crawford, and Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J LAW ECON 297 (Oct. 1978).

⁸⁹ Benjamin Klein, *Market Power in Aftermarkets*, in ECONOMIC INPUTS, LEGAL OUTPUTS: THE ROLE OF ECONOMICS IN MODERN ANTITRUST, at 47 (1998), 47; Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J LAW ECON ORGAN 95 (2002).

⁹⁰ See, e.g., Dirk Auer and Julian Morris, *Governing the Patent Commons*, 38 CARDOZO ARTS & ENT. L.J. 354 (Aug. 5, 2019), (discussing how firms in the standard-essential patent space have adopted rules and norms that mitigate the scope for opportunistic behavior).

stringently prohibit or sanction unilateral conduct.⁹¹ Yet, Recital 8 of the same regulation refers specifically to national rules that prohibit or impose sanctions on abusive behavior toward economically dependent firms.

One can see evidence of the uncertainty regarding which sets of rules pertains to abuses of economic dependence in the different approaches adopted at national level. Admittedly, the legal framework on this issue is fragmented, as some member states have included rules on the abuse of economic dependence within their competition laws, while others have opted to place them outside the scope of competition law, such as in unfair competition acts, civil codes, and sector-specific legislation.⁹² Bulgaria,⁹³ the Czech Republic,⁹⁴ Greece,⁹⁵ and Spain⁹⁶ belong to the latter category, while Austria,⁹⁷ Belgium,⁹⁸ Cyprus,⁹⁹ France,¹⁰⁰ Germany,¹⁰¹ Italy,¹⁰² and Portugal¹⁰³ belong the former. It is worth

⁹¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, EUROPEAN COUNCIL (Dec. 16, 2002).

⁹² See Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain, EUROPEAN PARLIAMENT AND EUROPEAN COUNCIL (Apr. 19, 2019); see, also, Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain, EUROPEAN COMMISSION (Feb. 26, 2014), <https://op.europa.eu/it/publication-detail/-/publication/c82dc8c6-ec15-11e5-8a81-01aa75ed71a1/language-en>, (providing a list of EU member states that have adopted *ad hoc* rules for the agri-food supply chain).

⁹³ See No. 102, Articles 37b and 37c, COMMISSION FOR PROTECTION OF COMPETITION (Nov. 28, 2008), available at <https://www.cpc.bg/storage/file/CPCLAW.pdf>. Although the provision is included in the Protection of Competition Act, it belongs to a sector-specific ban of unfair trading practices between economic operators in the agricultural and supply chain.

⁹⁴ No. 89 (Civil Code), Section 433, PARLIAMENT OF THE CZECH REPUBLIC (Feb. 3, 2012), available at <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>.

⁹⁵ No. 146 (Unfair Commercial Practices Act), Article 18a, HELLENIC PARLIAMENT (Jan. 27, 1914), <https://wipolex.wipo.int/en/legislation/details/9769>.

⁹⁶ No. 3 (Unfair Competition Act), Article 16(2), GOBIERNO DE ESPAÑA (Jan. 10, 1991), <https://wipolex.wipo.int/en/legislation/details/18729>.

⁹⁷ KaWeRAG, *supra* note 84, Article 4(3).

⁹⁸ Royal Decree, *supra* note 17, Article 4.

⁹⁹ No. 13(I) (Competition Act), Article 6(2), COMMISSION FOR THE PROTECTION OF COMPETITION (2008), <http://www.competition.gov.cy/competition/competition.nsf/All/21234C251CB3FE9AC2257EC3003DF8DA?OpenDocument>.

¹⁰⁰ No. 1920, Article 3, Amending the Book IV of the Commercial Code, Article L 420-2(2), RÉPUBLIQUE FRANÇAISE (Dec. 29, 2016), <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000005634379>.

¹⁰¹ GWB Competition Act Section 20, FEDERAL MINISTRY OF JUSTICE (Jul. 27, 1957), https://www.gesetze-im-internet.de/englisch_gwb.

¹⁰² No. 57, Article 11, PARLAMENTO ITALIANO (Mar. 5, 2001), <https://web.camera.it/parlam/leggi/010571.htm>.

¹⁰³ No. 19 (Competition Act), Article 12, AUTORIDADE DA CONCORRÊNCIA (May 8, 2012), available at https://www.concorrencia.pt/sites/default/files/documentos/legislacao/Law_19_2012_bilingual_en_0.pdf.

noting that in Bulgaria,¹⁰⁴ Greece,¹⁰⁵ and Spain,¹⁰⁶ it also was previously the case that abuse of economic dependence formed part of the national competition act. In Italy, the rule was first introduced in the field of contract law¹⁰⁷ and then extended to antitrust law, thus establishing the concurrent competence of the NCA.

Because of their aims and requirements, abuse of economic dependence rules may represent a powerful alternative to the DMA in evaluating the relationship between digital platforms and their business users. For instance, in evaluating whether Google's policy complied with the new neighboring right granted to press publishers on the digital use of their publications, the French Competition Authority recently considered applying the national rule on abuse of economic dependence to safeguard publishers' weak bargaining position vis-à-vis online platforms.¹⁰⁸ Abuse of economic dependence rules share one of the DMA's primary goals, which is to address the asymmetry of bargaining power. The DMA's objective of fairness points to much of the same conduct, such as whether gatekeepers act fairly toward business users who depend to a significant degree on a gatekeeper's core platform services.¹⁰⁹ Also like the DMA, abuse of economic dependence rules do not require enforcers to establish proof of market dominance, nor to define a relevant market. Therefore, like the DMA, the main advantage provided by the abuse of economic dependence regime stems from granting regulators the ability to avoid the hurdles and burdens of standard antitrust analysis.

Several recent legislative initiatives demonstrate leaders' willingness to rely on abuse of economic dependence rules to address digital platforms' conduct. In 2020, Belgium approved an amendment to its Code of Economic Law to insert a rule on the abuse of economic dependence,¹¹⁰ justifying the change with specific reference to the legislative gap concerning digital platforms.¹¹¹ In 2021, alongside the new antitrust tool for firms of

¹⁰⁴ No. 102 (*Protection of Competition Act*), Article 37a, COMMISSION FOR PROTECTION OF COMPETITION (Nov. 28, 2008), available at https://www.minfin.bg/upload/39100/Protection_of_Competition_Act.pdf.

¹⁰⁵ No. 703, Article 2a, HELLENIC PARLIAMENT (Sep. 26, 1977).

¹⁰⁶ No. 16, Article 6(1)(b), Amended by Law, 3 July 2007, OFFICIAL STATE GAZETTE (Jul. 17, 1989), available at <https://www.cnmc.es/file/64176/download>.

¹⁰⁷ No. 192 (*Subcontracting in Production Activities*), Article 9, AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO (Jun 18, 1998), <https://en.agcm.it/en/scope-of-activity/competition/detail?id=04566191-adb3-4b31-81bb-ba3a8f9e8f3e&parent=Legislation&parentUrl=/en/scope-of-activity/competition/legislation%22>.

¹⁰⁸ Decision 20-MC-01 on Requests for Interim Measures by the Syndicat des Éditeurs de la Presse Magazine, The Alliance De La Presse D'information Générale and Others and Agence France-Presse, AUTORITÉ DE LA CONCURRENCE, 9 (Apr. 9, 2020), <https://www.autoritedelaconcurrence.fr/en/decision/requests-interim-measures-syndicat-des-editeurs-de-la-presse-magazine-alliance-de-la>.

¹⁰⁹ European Commission, *supra* note 3, Recitals 2, 38, and 64. See also Monopolkommission, *supra* note 38, 5, (recommending that the DMA objective of fairness should address the economic dependence of business users vis-à-vis a gatekeeper).

¹¹⁰ Royal Decree, *supra* note 17, Article 4.

¹¹¹ Jan Blockx, *Belgian Prohibition of Abuse of Economic Dependence Enters into Force*, 12 J. EUR. COMPET. LAW PRACT 321 (Jan. 22, 2021).

“paramount significance for competition across markets,” the German Bundestag has also extended its economic dependence rule to firms acting as “intermediaries on multi-sided markets” insofar as companies are dependent on their intermediary services to accessing supply and sales markets in such a way that sufficient and reasonable alternatives do not exist.¹¹² According to the German rule, such dependency may also arise when a firm depends on access to data controlled by another enterprise. The Italian annual competition law likewise included a rule that introduced a (rebuttable) presumption of economic dependence when a firm uses intermediation services provided by a digital platform that, due to network effects or the availability of data, plays a “key role” in reaching end users or suppliers.¹¹³

Another relevant feature of the German rule is that it attempts to widen the scope of economic dependence by including refusal to access cases that should be analyzed according to the essential facility doctrine. Notably, traditional rules on economic dependence typically consider refusal to supply or sell an example of abusive conduct. Economic dependence presupposes a significant imbalance of bargaining power due to lock-in investments, and a hypothetical refusal to deal implies the existence of a previous trading relationship. It would be illogical to complain about an asymmetry of bargaining power and idiosyncratic investments where there has never been a contract. Further, in the case of newcomers, an alleged refusal to deal would require proving that the counterparty is an unavoidable trading partner due its position on the market (*i.e.*, a dominant position), rather than because of the transaction-specific investments imposed during the business relationship. Otherwise, as already mentioned, a party that has not yet signed an agreement is dealing with a “large numbers” bargaining situation.

With regard to intermediaries in multi-sided markets, however, the new German Section 20 makes specific reference to an enterprise dependent on access to data controlled by another enterprise. Under Section 20, refusing access to such data may constitute an abuse even if “there had not yet been a trade regarding these data.” The rule therefore opens the door to applying economic dependence beyond its traditional boundaries, including a digital platform’s refusal to grant access to data it controls to newcomers. In this way, it appears the German rule attempts to avoid the requirements of both the essential facility doctrine (*i.e.*, *Bronner’s* indispensability of the asset) and economic dependence (*i.e.*, transaction-specific investments).

The Italian annual competition law’s new rule pursues a similar goal, potentially with even wider scope. Although it doesn’t specifically reference scenarios in which the firms have no prior trading relationship, the rule extends application of the abuse of economic dominance to digital platforms that act as gatekeepers (“key role”) to reach

¹¹² GWB Digitalization Act, Section 20, *supra* note 16.

¹¹³ Italian Government, Annual Competition Law Bill, Article 29, *supra* note 81.

customers or suppliers, not only in terms of data availability but also because of network effects.

As a result, both old and new national laws on economic dependence raise further concerns about potential overlap with DMA obligations.

4. National Laws on Fairness and Bargaining Imbalance in Online Markets

Some EU member states have also pursued sector-specific legislative initiatives that target protecting weaker parties from the supposed superior bargaining power exerted by digital intermediaries. In particular, Austria,¹¹⁴ Belgium,¹¹⁵ France,¹¹⁶ Italy,¹¹⁷ and Portugal¹¹⁸ all in recent years have enacted rules to ensure hotels the freedom to grant their customers any rebate or economic advantage they choose, hence banning online travel agents (OTAs) from enforcing so-called “parity” clauses—also known as platform most-favored nation (MFN) agreements or across-platform parity agreements (APPAs).¹¹⁹

These national rules forbid both the wide and the narrow versions of parity clauses, namely the guarantee for an OTA (e.g., Booking and Expedia) that the prices quoted by a hotel on its platform will be as favorable as those offered not only on any other platform, but also on the hotel’s own website. The proclaimed rationale for these rules is to ensure fair conditions and end what has been perceived as an endemic structural imbalance of power between tourist-accommodation operators and OTAs.

At least in Italy and Portugal, the rules are explicitly part of antitrust, having been included in the annual competition law and the national competition law, respectively. Nonetheless, these *per se* prohibitions are applied regardless of a given OTA’s market power. Moreover, from the perspective of pure competition law, parity clauses long been a subject

¹¹⁴ Amending the Act on Price Marking Act, §7, RECHTSINFORMATIONSSYSTEM DES BUNDES (Nov. 17, 2016), available at https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1992_146/ERV_1992_146.pdf.

¹¹⁵ C-2018/31580, on the Freedom of Tariffs for Tourist Accommodation Operators in Contracts Concluded with Operators of Online Reservation Platforms, Article 5, BELGISCH STAATSBAD (Jul. 30, 2018), available at https://www.ejustice.just.fgov.be/mopdf/2018/08/10_1.pdf#Page64.

¹¹⁶ No. 990, on Economic Growth, Activity and Equal Opportunities, Article 133, RÉPUBLIQUE FRANÇAISE (Aug. 6, 2015), https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000030979755.

¹¹⁷ No. 124, Annual Competition Law, Article 1, Para. 166, GAZZETTE UFFICIALE (Aug. 4, 2017), <https://www.gazzettaufficiale.it/eli/id/2017/08/14/17G00140/sg>.

¹¹⁸ No. 108, Article 5, AUTORIDADE DA CONCORRÊNCIA (Dec. 7, 2021), available at https://www.concorrencia.pt/sites/default/files/documentos/legislacao/Decreto-Lei%20n%20108-2021_%20de%207%20de%20dezembro%20-%20segunda%20alteracao%20a%20lei%20da%20concorrencia.pdf.

¹¹⁹ Jens-Uwe Franck and Nils Stock, What is ‘Competition Law’? - Measuring EU Member States’ Leeway to Regulate Platform-to-Business Agreements, 39 YEARB. EUR. LAW 320 (Sep. 8, 2020).

controversy, especially as they regard hotel-booking platforms, although the case law is mixed.¹²⁰

Notably, these clauses raise competition concerns because they may reduce intra-brand competition, thereby lowering the incentives for platforms to compete on commission charged to suppliers or on quality dimensions.¹²¹ Further, they may restrict the entry by low-cost retail platforms and facilitate horizontal collusion, either among the suppliers or the platforms. In particular, the use of broad MFN clauses together with the agency model that platforms frequently adopt (according to which suppliers set final prices) would render them comparable to the horizontal element of resale price maintenance (RPM), whereby the upstream firm sets identical retail prices across all intermediaries. At the same time, however, parity clauses can produce efficiency-enhancing effects. Namely, they are usually justified to protect platforms' investments in that they help avoid the risk of free-riding. They also may be used by new market entrants whose business model is based on having the best available resale prices or the widest product range.¹²²

As a result, the European Commission's assessment endorsed a case-by-case and effects-based approach to parity clauses.¹²³ In general, broad parity clauses are considered

¹²⁰ See, e.g., *Case B6-46/12*, BUNDESKARTELLAMT (Dec. 9, 2013), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf;jsessionid=F17E154BDF4CA058F785741754304062.1_cid387?__blob=publicationFile&v=2 (finding the price-parity clause as a hardcore restriction that was not indispensable for Amazon marketplace efficiencies and did not allow consumers a fair share of the resulting benefit). See, also, *OFT Welcomes Amazon's Decision to End Price Parity Policy*, UK Competition and Markets Authority (Aug. 29, 2013), <https://webarchive.nationalarchives.gov.uk/ukgwa/20140402160400/http://oft.gov.uk/news-and-updates/press/2013/60-13>. In literature, see, e.g., Pinar Akman, *A Competition Law Assessment of Platform Most-Favoured-Customer Clauses*, 12 J. COMPETITION LAW ECON. 781 (2016); Pinar Akman and Daniel Sokol, *Online RPM and MFN under Antitrust Law and Economics*, 50 REV. IND. ORGAN. 133 (2017); Jonathan B. Baker and Fiona M. Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2017-2018); Andre Boik and Kenneth S. Cortts, *The Effects of Platform MFNs on Competition and Entry*, 59 J LAW ECON 105 (2016); Ariel Ezrachi, *The Competitive Effects of Parity Clauses on Online Commerce*, 11 EUR 488 (2015); Amelia Fletcher and Morten Hviid, *Broad Retail Price MFN Clauses: Are They RPM "At Its Worst"?*, 81 ANTITRUST LAW J. 65 (2016); Chengsi Wang and Julian Wright, *Search Platforms: Showrooming and Price Parity Clauses*, 51 RAND J. ECON 32 (2020).

¹²¹ *Commission Staff Working Document Accompanying the Report from the Commission to the Council and the European Parliament Final Report on the E-commerce Sector Inquiry*, EUROPEAN COMMISSION, 179-180 (2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017SC0154>; *Implications of E-commerce for Competition Policy*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, 25-26 (2018), available at [https://one.oecd.org/document/DAF/COMP\(2018\)3/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)3/en/pdf).

¹²² However, see Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, *Competition Policy for the Digital Era*, EUROPEAN COMMISSION, 56-57 (May 20, 2019), available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> (claiming that any practice intended to protect the investment of a dominant platform should be minimal and well-targeted: on such basis, banning only the broad MFN would be sufficient in cases where competition between platforms is vigorous; on the other hand, it would also be appropriate to prevent narrow MFNs in cases where competition between platforms is weak and thus the pressure on the dominant platforms can only come from other sales channels).

¹²³ *Commission Staff Working Document*, *supra* note 121, 180.

more likely to produce net anti-competitive effects in online markets, while efficiency justifications usually prevail in the case of narrow parity clauses, since they have no impact on competition among platforms.¹²⁴

In line with these findings, NCAs dealing with hotel-booking platforms have focused their concerns on broad parity clauses, ending their investigations when the latter have been replaced by narrow parity clauses.¹²⁵ In a similar vein, the Portuguese competition authority (AdC) raised serious doubts about a government proposal to amend the national competition act to ban all parity clauses in the tourist-accommodation sector.¹²⁶ The AdC suggested that, rather than prohibiting MFN clauses, it would have been preferable to enable a case-by-case analysis of their effects, similar to analysis of such clauses under EU competition law.

The lone exception to this trend has been the German Bundeskartellamt, which also prohibited narrow best-price clauses.¹²⁷ The Federal Supreme Court recently supported the Bundeskartellamt's strict approach, ruling that a narrow price-parity clause used by an OTA was unlawful under competition law.¹²⁸ Notably, in the Court's view, a price-parity clause is not an ancillary restraint exempt from application of Article 101(1) TFEU and does not satisfy the conditions for exemption set out in Article 101(3) TFEU, since any advantages associated with combating free riding do not balance out its anti-competitive effects in the form of a significant impediment to hotels' own online distribution.

¹²⁴ *Approval of the Content of a Draft for a Communication on Guidelines on Vertical Restraints*, EUROPEAN COMMISSION (Jul. 9, 2021), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC0907%2802%29>.

¹²⁵ See Italian, French, and Swedish competition authority parallel proceedings: *Decision No. 25422, Mercato Dei Servizi Turistici-Prenotazioni Alberghiere On Line*, AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO (Apr. 21, 2015), <https://en.agcm.it/en/media/detail?id=42f88c3c-d668-409f-b604-40581a05c97b>; *Decision No. 15-D-06, Booking.com*, AUTORITÉ DE LA CONCURRENCE (Apr. 21, 2015), <https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-bookingcom-by-bookingcom-france-sas-and-bookingcom>; *Decision No. 596/2013, Booking.com*, KONKURRENSVERKET (Apr. 15, 2015), available at https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/beslut/13_0596e.pdf. See, also, *Decision No. 595/2015, Expedia*, KONKURRENSVERKET, (May 10, 2015), available at <https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/beslut/13-0595e.pdf>.

¹²⁶ *Opinion on Law-Decree No. 108/2021, of 7 December, Which Changes the Portuguese Competition Act and the Legal Frameworks Applicable to Restrictive Individual Trade Practices (PIRCS) and Standard Terms and Conditions*, AUTORIDADE DA CONCORRENCIA (Dec. 7, 2021), available at https://extranet.concorrencia.pt/PesquisAdC/EPR.aspx?Ref=EPR_2021_35&isEnglish=True.

¹²⁷ *Case B9-121/13, Booking.com*, BUNDESKARTELLAMT (Dec. 22, 2015), <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.html>.

¹²⁸ *Case KVR 54/20, Booking.com*, BUNDESGERICHTSHOF (May 18, 2021), <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=7a5e4c9a67eee1f8680fcce08bf544aa&nr=120991&pos=0&anz=1>. See, also, Rupperecht Podszun and Tristan Rohner, *Narrow Price Parity Clauses: Beyond Booking.com (Germany)*, J. EUR. COMPET. LAW PRACT, forthcoming (2022).

Against this background, the DMA reflects the ongoing split on parity clauses. While the European Commission’s proposal forbade gatekeepers from imposing broad parity clauses in their relationships with business users,¹²⁹ the Parliament approved an amendment to also ban narrow parity clauses.¹³⁰ This is particularly relevant to OTAs since, although they are neither vertically integrated firms nor ecosystems, they may nonetheless be deemed “gatekeepers” under the DMA’s designation process.

Therefore, regardless of the choice made in the DMA’s final text, the treatment of parity clauses in Europe will remain unsettled. Indeed, they will be subject to several different standards pursuant to sector-specific national laws, the application of competition law at EU level, the enforcement of competition law at the national level, and the DMA itself. Accordingly, a platform designated as a gatekeeper under the DMA that adopts parity clauses will have to contend with two degrees of fragmented rulemaking. The first is that OTAs will face a total ban on parity clauses in some member states, while other platforms will not. The second regards the different ways that parity clauses are assessed under the DMA and under competition law.

III. THE DMA’S INSTITUTIONAL DESIGN

The legal framework described here demonstrates reveals that, in the wake of the DMA’s imminent approval, the landscape of European competition policy will be crowded with several sets of overlapping rules. Digital market platforms will be particularly exposed to the risks of double jeopardy and conflicting decisions. Because of the DMA’s legal basis, NCAs will, indeed, be permitted to apply traditional and new platform-specific antitrust rules. Further, NCAs may engage in so-called “antitrust gerrymandering,”¹³¹ drawing the relevant market as narrowly as needed to capture platforms’ conduct and strategies within national geographical boundaries, as already happened in the German *Facebook*¹³² and Italian *Amazon*¹³³ investigations. A broad interpretation of the General Court ruling in *Google Shopping* may further empower NCAs with significant leeway to tackle relevant practices that are also targeted by the DMA.¹³⁴ Finally, national laws on economic dependence may represent an alternative and powerful tool to assess the fairness of terms and conditions imposed by digital platforms on their business users.

This fragmentation of the European regulatory framework raises questions both about the DMA’s aims and its legal basis. The original rationale for the DMA, and the justification for harmonization at the EU level under Article 114 TFEU, was ostensibly

¹²⁹ European Commission, *supra* note 3, Article 5(b).

¹³⁰ European Parliament, *supra* note 2.

¹³¹ See Nicolas Petit, *EU Engaged in Antitrust Gerrymandering Against Google*, THE HILL (Jul. 31, 2018).

¹³² Bundeskartellamt, *supra* note 23.

¹³³ Autorità Garante della Concorrenza e del Mercato, *supra* note 62.

¹³⁴ General Court, *supra* note 59.

the cross-border nature of services provided by digital platforms. Digital platforms often deploy their business models globally, thus making impossible for member states acting alone to effectively address the identified competition problems.¹³⁵ Indeed, the application of national rules had been deemed to undermine the goal of a Digital Single Market and the functioning of digital markets writ large.¹³⁶ But as this paper illustrates, the confluence of the DMA and national antitrust rules threatens to further fragment the European regulatory landscape.

This illustrates why it is necessary to ensure that the DMA is applied through a centralized enforcement structure, with the European Commission granted sole enforcement power. This institutional design model has significant precedents in the European experience (i.e., the single supervisory mechanism (SSM) established as part of the first pillar of the banking union;¹³⁷ the General Data Protection Regulation (GDPR);¹³⁸ and the Merger Control Regulation¹³⁹). It is premised on the idea that a one-stop shop is needed to avoid fragmentation and ensure effective results in overseeing platforms operating at a global scale.

As a consequence, pursuant to the Commission's proposal, member states are prevented from applying national rules specific to the types of firms and services covered by the DMA.¹⁴⁰ Notably, while the DMA is without prejudice to European and national competition rules, the application of the latter does not affect the obligations imposed on gatekeepers and their uniform and effective application in the internal market. Nothing precludes member states from pursuing other legitimate public interests by imposing obligations on gatekeepers to protect consumers or to fight against acts of unfair competition. But member states are not allowed to impose on gatekeepers further obligations for the purpose of ensuring contestable and fair markets.¹⁴¹ To uphold this aim, the Commission and member states will need to work in close cooperation and coordination in their enforcement actions.¹⁴²

¹³⁵ European Commission, *supra* note 3, Explanatory memorandum.

¹³⁶ *Ibid.*.

¹³⁷ Council Regulation (EU) No. 1024/2013 of 15 October 2013 Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions, EUROPEAN COUNCIL (2013).

¹³⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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), EUROPEAN PARLIAMENT AND EUROPEAN COUNCIL (2016).

¹³⁹ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Firms, EUROPEAN COUNCIL (2004).

¹⁴⁰ European Commission, *supra* note 3, Recital 9 and Article 1(5).

¹⁴¹ *Ibid.*, Article 1(5).

¹⁴² *Ibid.*, Article 1(7).

But despite this declaration of intent, and despite the risk of overlap with *ex post* competition law enforcement, the DMA proposal does not set any specific rules on cooperation mechanisms with national bodies.¹⁴³ The Advisory Committee appointed to assist the Commission does not even guarantee the participation of NCAs.¹⁴⁴

As the DMA will be implemented alongside EU and national competition law, the European Competition Network has pointed to the need for an articulation of enforcement powers between the European Commission and NCAs so as to preserve the integrity of the internal market and avoid the adoption of conflicting decisions.¹⁴⁵ Further, the French, German, and Dutch governments issued a joint statement declaring that the DMA should leave sufficient leeway for national rules applicable to gatekeepers, because of the complexity of the investigations required and the importance of digital markets for national economies.¹⁴⁶ Under this view, a larger role should be played by NCAs, with close coordination and cooperation between the Commission and NCAs to ensure a coherent application of legal regimes and to avoid enforcement bottlenecks. Notably, under this approach, the Commission would remain primarily responsible for enforcing the DMA and would have sole jurisdiction for designating gatekeepers or granting exemptions, while NCAs would play a complementary role by initiating or enforcing proceedings against gatekeepers on the basis of the DMA, carrying out investigative and monitoring actions.¹⁴⁷

This tension among DMA enforcement, the parallel application of competition law, and the associated role of NCAs, has been among the primary issues on the table during the trilogue negotiations. Adopting its general approach, the Council confirmed that the European Commission would act as sole enforcer, but shared concerns about the need to strengthen coordination with member states by recognizing the role of the ECN and empowering NCAs to conduct investigations into possible DMA infringements and transmit their findings to the Commission.¹⁴⁸

On a different note, the amendments approved by the Parliament served to reinforce the aim of centralized enforcement. Indeed, the request to facilitate cooperation and coordination with member states went well beyond competition law, but also included data protection, electronic communications, and consumer protection. The Parliament supported establishing a high-level group of regulators and entrusting competent national authorities with the task of supporting the Commission in monitoring compliance with

¹⁴³ *Ex Ante Regulation of Digital Markets, Background Note*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, at 28 (Dec. 2, 2021), <https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm>.

¹⁴⁴ European Commission, *supra* note 3, Article 32.

¹⁴⁵ ECN, *supra* note 14, 7.

¹⁴⁶ German Federal Ministry for Economic Affairs and Energy, et al., *supra* note 49.

¹⁴⁷ ECN, *supra* note 14, 9; German Federal Ministry for Economic Affairs and Energy, et al., *supra* note 14.

¹⁴⁸ Council of the European Union, *supra* note 1, Article 32a.

and enforcement of the DMA's obligations.¹⁴⁹ The Parliament, however, also empowered the Commission with a veto right in cases where it found that the measures imposed on gatekeepers by a national authority ran counter to the DMA or to a decision adopted by the Commission under the DMA.¹⁵⁰ This amendment and the related weakening of NCAs' competence have been considered "unacceptable" by the German government.¹⁵¹

IV. A CENTRALIZED REGULATORY REGIME

The DMA has been criticized on several grounds.¹⁵² Rather than pursuing distinctive aims and protecting defined legal interests, it essentially appears as a sector-specific competition law. Indeed, its content stems from recent antitrust investigations and its rationale appears merely to make the competitive assessment of some practices faster and simpler. Further, by applying the same obligations to all gatekeepers, it disregards relevant differences among the business models that platforms employ. Moreover, it opts for detailed, backward-looking, and non-individualized rules, which are at odds with the complexity and fast-changing nature of digital markets.

Given these doubts about the content and the rationale of the DMA, we should at least be able to guarantee its coherent application. Toward this aim, the cross-border reach of the players targeted and of the effects generated by their conduct both support the choice for centralized enforcement. Further, the creation of a one-stop shop is consistent both with the rationale of the DMA and its legal basis. Indeed, decentralized enforcement at national level would be at odds with the goal of promoting the Single Digital Market by harmonization and would further blur the boundaries with competition law, calling into question the DMA's reliance on Article 114 TFEU as its legal basis.

As correctly noted, since the choice of the legal basis determines both the relevant legislative procedure and the scope for EU action, the failure to accomplish its proclaimed mission may undermine the DMA's compatibility with EU primary law.¹⁵³ The scenarios of parallel application of DMA rules and antitrust rules analyzed here suggest that the DMA falls short of its declared objective of preventing regulatory fragmentation.¹⁵⁴ As a consequence, we have called attention to the significant risk of cumulative proceedings

¹⁴⁹ European Parliament, *supra* note 2, Articles 31a, 31b, and 31c.

¹⁵⁰ *Ibid.*, Article 31d.

¹⁵¹ *Draft Minutes*, COUNCIL OF THE EUROPEAN UNION, at 11 (Dec. 14, 2021) available at <https://data.consilium.europa.eu/doc/document/ST-14464-2021-INIT/en/pdf>.

¹⁵² See Cappai and Colangelo, *supra* note 13.

¹⁵³ Alfonso Lamadrid de Pablo and Nieves Bayón Fernández, *Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It*, 12 J. EUR. COMPET. LAW PRACT. 576 (2021).

¹⁵⁴ *Ibid.* (arguing that none of the existing or likely sources of regulatory fragmentation identified to justify the adoption of the DMA would actually be affected by the DMA).

stemming from enforcement of antitrust rules at the national level, which may generate duplicative sanctions and conflicting rulings.

Given the risk that the same practices may be assessed under multiple jurisdictions, full centralization of DMA enforcement at the EU level should not only be preserved, but strengthened. The Commission should be empowered with a veto right, as requested by the European Parliament. This power should not be limited to national measures on gatekeepers that run counter to the DMA or to a decision adopted by the Commission under the DMA, but it should also include prohibiting national authorities from carrying out investigations at their own initiative without authorization by the Commission.¹⁵⁵

However, full centralization of DMA enforcement alone would be not sufficient to ensure the law achieves its declared goals. A significant redefinition of its scope is also required.¹⁵⁶ Notably, risks of fragmentation generated by frictions with competition law would be contained by circumscribing the scope of the DMA to ecosystem-related issues, thus limiting its application to a few large platforms that able to orchestrate an ecosystem. This would also reinstate the very justification of the DMA, which is the emergence of a few large platforms acting as gatekeepers and enjoying an entrenched position as a result of conglomerate ecosystems.¹⁵⁷ Indeed, in terms of competition policy, the DMA was intended to specifically address problems related to ecosystems.¹⁵⁸ Yet, experts appointed by the European Commission to design a competition policy for the digital era highlighted the fact that competition in the digital economy is increasingly a competition among ecosystems, pointing to the circular relationship among network effects, data advantage, and portfolio effects as the feature that would make digital markets highly concentrated, prone to tipping, and not easily contestable.¹⁵⁹

Changes in the designation process of targeted platforms would also require a reduction in the list of *ex ante* obligations the DMA imposes. They should reflect differences in the business models platforms employ, being tailored to the specific firm under scrutiny, rather than implementing a one-size-fits-all approach.

There are compelling arguments against the policy choice to regulate platforms and their ecosystems like utilities.¹⁶⁰ The suggested adaptations would at least acknowledge the

¹⁵⁵ Pursuant to European Parliament, *supra* note 2, Article 31d (where a national authority intends to launch an investigation of gatekeepers based on national laws, it shall inform the Commission in writing of the first formal investigative measure).

¹⁵⁶ See also Lamadrid de Pablo and Fernández, *supra* note 153, 587-589.

¹⁵⁷ European Commission, *supra* note 3, Explanatory memorandum.

¹⁵⁸ Monopolkommission, *supra* note 38, 9.

¹⁵⁹ Crémer, de Montjoye, and Schweitzer, *supra* note 123, 33-34.

¹⁶⁰ Cappai and Colangelo, *supra* note 13. See also Tobias Kretschmer and Sven Werner, *Regulating Platforms as Utilities? A Business Model Perspective*, SSRN working paper (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3807310.

regulatory nature of the DMA, removing the suspicion that it is just an antitrust intervention vested by regulation.

A useful benchmark here is provided by the model adopted in the United Kingdom, where the Competition and Markets Authority (CMA) has welcomed the adoption of a legally binding and firm-specific code of conduct for online platforms with “strategic market status.”¹⁶¹ Accordingly, the CMA’s expectation is that only a small number of digital firms are likely to meet the strategic market status test.¹⁶²

V. CONCLUSION

The DMA has been justified with the need to prevent regulatory fragmentation and safeguard the functioning of the Digital Single Market, given the emergence of large digital platforms that operate EU-wide. Accordingly, because of the cross-border nature of services provided by these platforms, national rules have been deemed unfit to address the identified competition problems. Further, their application may even jeopardize the functioning of digital markets.

But the ambiguous relationship of the DMA with competition law may frustrate the attempt at harmonization. The DMA will not displace competition rules but will be implemented alongside them. As a result, several overlapping regulatory layers can be identified. In particular, the very same practices targeted by the DMA may be investigated by NCAs pursuant to European and national competition laws, national competition laws specific to digital markets, and national rules on economic dependence. The parallel application of the DMA and antitrust rules poses risks of double jeopardy and conflicting decisions, threatening the integrity of the internal market, and undermining both the DMA’s rationale and its legal basis.

Against this backdrop, the paper maintains that the full centralization of DMA enforcement at EU level should be both preserved and further strengthened. Moreover, to reduce overlaps and frictions with competition law, the DMA’s scope should be narrowed to address only ecosystem-related problems, thus designating as gatekeepers only platforms able to orchestrate an ecosystem.

¹⁶¹ *A New Pro-Competition Regime for Digital Markets. Advice of the Digital Markets Taskforce*, UK COMPETITION AND MARKETS AUTHORITY (2020), <https://www.gov.uk/cma-cases/digital-markets-taskforce>.

¹⁶² *Ibid.*, para. 4.23.