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DMA Begins

I. INTRODUCTION

12 October 2022 marks the official birth of the Digital Markets Act (DMA).[1] As with the General Data Protection Regulation (GDPR)[2], the European Union sets itself as a forerunner in digital economy rulemaking, attempting to strengthen its global regulatory leadership, through the so-called and well-described Brussels effect.[3] The new Regulation is, indeed, complemented by other relevant interventions addressing the role of data and digital intermediaries such as the Data Governance Act[4], the Digital Services Act[5], and the proposal for a Data Act[6], which will shape the European digital policy.

Against the emergence of large online platforms, several proposals have been advanced by policy-makers around the world to tame digital gatekeepers, including public utilities-style regulations, break-ups, bans on vertical integration, and reforms of competition laws.[7] Despite such different approaches, however, the envisaged solutions share the same premise, namely the urgent need for bespoke interventions because of the distrust towards current antitrust rules to face effectively the challenges of the brave new world.

The DMA endorses this view stating that, although antitrust rules apply to the conduct of gatekeepers, the scope of these provisions is "limited to certain instances of market power" (e.g., dominance on specific markets and of anti-competitive behaviour) and its "enforcement occurs *ex post* and requires an extensive investigation of often very complex facts on a case-by-case basis."[8] Moreover, competition law does not address, or

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[1] Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1. The rules entered into force on 1 November 2022 and will start to apply as of 2 May 2023.

[2] Regulation (EU) 2016/679 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 [2016] OJ L 119/1.

[3] Anu Bradford, *The Brussels effect: How the European Union rules the world* (2020) New York: Oxford University Press.

[4] Regulation (EU) 2022/868 on European data governance (Data Governance Act) [2022] OJ L 152/1.

[5] Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

[6] European Commission, Proposal for a Regulation on harmonised rules on fair access and use of data (Data Act) COM(2022) 68 final.

[7] Marco Cappai and Giuseppe Colangelo, 'Taming digital gatekeepers: the more regulatory approach to antitrust law' (2021) 41 Computer Law & Security Review 105559.

[8] DMA (n 1) Recital 5.

does not address effectively, the challenges to the well-functioning of the market posed by the conduct of gatekeepers, which are not necessarily dominant in competition law terms.[9]

According to this line of reasoning, given that competition law alone is unfit to tackle systemic problems posed by the platform economy, a regulatory intervention is enacted to introduce a set of *ex ante* obligations for digital gatekeepers dispensing enforcers from the standard antitrust analysis (i.e., relevant market definition, proof of dominance, and assessment of anticompetitive effects) and restraining gatekeepers from even providing an efficiency defence.

Against this background, the paper provides an overview of the critical aspects of the DMA to investigate whether the European Union will effectively benefit from a first-mover advantage. Section II illustrates the main features of the DMA highlighting some mismatches between its declared justification and the way in which the new Regulation will be effectively applied. Section III questions the coherency of an intervention that ostensibly disregard the ecosystem-based approach, even if it was intended to address the specific issues related to the fact that the competition in the digital economy is increasingly a competition among ecosystems. Section IV concludes.

II. ECONOMIC RATIONALE AND LEGAL BASIS: SOME RELEVANT MISMATCHES

The scope of the DMA is defined according to a two-step process. It includes (i) the nature of the services provided which, because of their economic features, can confer on the provider a gatekeeping position and (ii) the designation of an online platform as a gatekeeper. Therefore, specific economic features are supposed to support the definition of both core platform services and gatekeepers.

Notably, Recital 13 refers to extreme scale economies, very strong network effects, multisidedness, lock-in effects, vertical integration, and the lack of multi-homing as the most prevalent properties of digital services where weak contestability and unfair practices are more frequent and that allow a few large undertakings to emerge as gatekeepers.

Gatekeepers are defined as "a small number" of large players with "considerable economic power" and a "significant impact" on the internal market, providing "gateways" for business users to reach consumers on different markets, which in turn enables them to "leverage their advantages" (e.g., their access to data) from one area of activity to another.[10] Some of them exercise "control over whole platform ecosystems" and are "structurally extremely difficult to challenge."[11] Further, the combination of such features is likely to lead to "imbalances in bargaining power" allowing gatekeepers to set terms and conditions in a unilateral and detrimental manner for business users as well as for end users.[12] Moreover, in certain circumstances, gatekeepers are in a dual-role position as intermediaries for third-party undertakings and as sellers directly providing products and services. Consequently, such gatekeepers may be incentivized to give

[9] Ibid.
[10] Ibid Recitals 3 and 6.
[11] Ibid Recital 3.
[12] Ibid Recital 4.

preferential treatment to their own products and services, compared to those provided by other entities.[13]

However, despite these premises, the designation of gatekeepers revolves just around quantitative criteria, which, at best, provide information about the size of the players, rather than their potential gatekeeping role. Qualitative criteria are considered relevant only with regards to the possibility to identify as a gatekeeper a provider that does not satisfy each of the thresholds.

Moreover, despite the fact that choosing a business model has significant implications for strategies and incentives of a platform, the designation is model-independent. Such a business model agnostic approach also disregards the role played by platform design and governance in the creation of value.[14] Indeed, in accordance with the natural dualism of multi-sided markets, the very same economic factors that allow ecosystems to grow also represent the main threats to their success, requiring a difficult balance to be struck in order to ensure the ecosystem continues to thrive and so as not to dissuade a specific user group from engaging with the platform. Notably, platform ecosystems are extremely sensitive to negative externalities generated by bad behaviour. As the value created is not fully under the control of the platform owner but depends upon the participation and actions of complementors, governance is crucial to the success of ecosystems. This is why platform owners regulate access to, and interactions around their, ecosystems to preserve their value and integrity.

Against these insights from the economic literature, the DMA instead applies the same obligations to all gatekeepers irrespectively of their different business models. In addition, it is expected to be over-inclusive, resulting in the identification of around 10-15 companies, as predicted by the Impact Assessment accompanying the proposal.[15] That is, well beyond the presence of platforms orchestrating ecosystems and the ordinary meaning of "a small number" of large undertakings.

Further doubts emerge with respect to its legal basis. The DMA declares that it protects different legal interests to those of antitrust rules. Namely, it aims to ensure that markets where gatekeepers are present are, and remain, contestable and fair. Hence, its relevant legal basis is represented by Article 114 TFEU, rather than Article 103 TFEU, which is intended for the implementation of antitrust provisions pursuant to Articles 101 and 102 TFEU.

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[13] Ibid Recitals 46 and 57.

[14] Tobias Kretschmer, Aija Leiponen, Melissa Schilling, and Gurneeta Vasudeva, 'Platform ecosystems as meta-organizations: Implications for platform strategies' (2022) 43 Strategic Management Journal 405; David Evans, 'Governing Bad Behavior by Users of Multi-sided Platforms' (2012) 27 Berkeley Technology Law Journal 1201; Kevin J Boudreau and Andrei Hagiu, 'Platforms Rules: Multi-Sided Platforms as Regulators' (2009) (Annabelle Gawer, ed) *Platforms, Markets and Innovation*, Cheltenham, Edward Elgar Publishing, 163. See also Carmelo Cennamo, Tobias Kretschmer, Panos Constantinides, Cristina Alaimo, and Juan Santaló, 'Digital Platform Regulation: An Innovation-Centric View of the EU's Digital Markets Act' (forthcoming) Journal of European Competition Law & Practice.

[15] European Commission, 'Digital Markets Act Impact Assessment support study' (2020) para 148, <https://op.europa.eu/en/publication-detail/-/publication/0a9a636a-3e83-11eb-b27b-01aa75ed71a1/language-en?WT.mc_id=Selectedpublications&WT.ria_c=41957&WT.ria_f=5961&WT.ria_ev=search> accessed 6 November 2022.

The justification for harmonization at EU level under Article 114 TFEU is represented by the cross-border nature of services provided by digital platforms, which often deploy global (or at least pan-European) business models, thus making it impossible for Member States acting alone to effectively address the identified competition problems.[16] It is, indeed, maintained that fragmentation of the internal market can only effectively be averted if Member States are prevented from applying national rules which are within the scope of and pursue the same objectives of the new Regulation.[17] Accordingly, from the institutional design viewpoint, the DMA opts for centralization of its implementation and enforcement at EU level against the traditional decentralized or parallel antitrust enforcement at national level.

However, despite the claim that the DMA is not a competition law instrument[18], there is no indication that the promotion of fairness and contestability differs from the substance and the scope of competition law.[19] The suspicion that the DMA may just represent a sector-specific competition law is also supported by the fact that the list of obligations is a synopsis of past and ongoing antitrust cases.[20]

Furthermore, the decision to opt for detailed and backward-looking rules appears at odds with the properties of digital markets, which are fast-changing, innovative and dynamic. The inflexibility of such a rules-based approach is only partially mitigated by the possibility for the Commission to update the obligations at the end of a market investigation. Likewise, narrowly defined prohibitions are not necessarily self-executing and therefore effective. They may rather incentivize companies to design their practices and strategies to bypass the regulation or at least make its implementation more difficult.

This mix of features and goals belonging to regulation and antitrust has relevant implications. Indeed, in light of the purported complementarity between the DMA and the competition law enforcement, traditional antitrust rules remain applicable, although their application should not affect the obligations imposed on gatekeepers.[21] Although Article 1(5) of the DMA prohibits Member States from imposing further obligations on gatekeepers, Member States are still free to introduce new rules which are mere extensions of their national competition laws. After all, this was not unexpected. The Impact Assessment of the DMA noted that some national administrations have taken steps to implement national measures, considering, however, these potential interventions as "supportive of and potentially complementary to EU solutions."[22]

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[16] DMA (n 1) Recital 7.
[17] Ibid Recital 9.
[18] Margrethe Vestager, 'Competition in a digital age' (2021) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age_en> accessed 6 November 2022.
[19] Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022) 47 European Law Review 85; 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' (2021) 3 ZEuP 503.
[20] Cristina Caffarra and Fiona Scott Morton, 'The European Commission Digital Markets Act: A translation' (2021) <https://voxeu.org/article/european-commission-digital-markets-act-translation> accessed 6 November 2022; Nicolas Petit, 'The proposed Digital Markets Act (DMA): A legal and policy review' (2021) 12 Journal of European Competition Law & Practice 529.
[21] DMA (n 1) Recital 10 and Article 1(6).
[22] European Commission (n 15) 47.

As a result, the German legislator has updated its national antitrust law, introducing a specific provision aimed at targeting undertakings of "paramount significance for competition across markets" and addressing conducts substantially similar to those also prohibited under the DMA.[23] Recently, the German Economic Ministry has advanced further reform of competition law, suggesting the introduction of a market investigation tool to establish open standards, grant access to interfaces, and order ownership unbundling among the other things.[24] Moreover, both Germany and Italy enacted provisions to apply to digital players national rules on economic dependence, with the aim of protecting weaker business parties against the superior bargaining power exerted by digital intermediaries.[25]

Because of such overlaps with competition law, the DMA may fall short of its declared objective of preventing regulatory fragmentation and the European legal framework risks becoming even more fragmented in the post-DMA scenario. Such an outcome would question the very aims and legal basis of the DMA.

Moreover, given this risk of overlaps, gatekeepers may be prosecuted in parallel cases for the same conduct, which would be at odds with the *ne bis in idem* principle. Indeed, as a result of the parallel application of 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 issues of double, or even triple and quadruple jeopardy.[26] The topic is extremely relevant also in light of the recent judgements delivered by the Grand Chamber of the Court of Justice (CJEU) in *bpost*[27] and *Nordzucker*.[28]

Notably, *bpost* raises critical questions about the enforcement of the DMA and its relationship with the enforcement of antitrust provisions. According to the CJEU, any limitation on the double jeopardy principle must be provided for by law and, subject to the principle of proportionality. Limitations may be made only if they are necessary and genuinely meet objectives of general interest. As a consequence, by merely declaring to pursue different legal interests from competition law, the DMA will not prevent courts from evaluating the real objectives at stake in order to assess the compatibility of a duplication of proceedings with the *ne bis in idem* principle. In this regard, and specifically to satisfy the proportionality test, the institutional design and the provision of a cooperation mechanism with national competition authorities (NCAs) also play a relevant role.

In the aftermath of *bpost* and *Nordzucker,* the final version of the DMA has been amended to explicitly cope with the *ne bis in idem* principle. In particular, it has been stated that the Commission and the relevant national authorities should coordinate their

[23] See GWB Digitalization Act, 18 January 2021, Section 19a.
[24] German Federal Ministry for Economic Affairs and Climate Action, 'Competition Enforcement Act', 11th Amendment to the GWB (2022) <https://www.bmwk.de/Redaktion/DE/Downloads/Wettbewerbspolitik/wettbewerbsdurchsetzungsgesetz-referentenentwurf-bmwk.pdf?__blob=publicationFile&v=4> accessed 6 November 2022.
[25] See the German GWB Digitalization Act (n 23) Section 20; and the Italian Annual Competition Law, 5 August 2022, Article 33.
[26] Giuseppe Colangelo, 'The European Digital Markets Act and antitrust enforcement: a liaison dangereuse' (2022) *47 European Law Review 597.*
[27] Case C-117/20, *bpost SA v. Autorité belge de la concurrence*, EU:C:2022:202.
[28] Case C-151/20, *Bundeswettbewerbsbehörde v. Nordzucker AG and Others,* EU:C:2022:203.

enforcement efforts and the Commission should take into account any fines and penalties imposed on the same legal person for the same facts through a final decision in proceedings relating to an infringement of other Union or national rules, so as to ensure that the overall fines and penalties imposed on the same legal person for the same facts correspond to the seriousness of the infringements committed.[29] Furthermore, the final version also brings back the traditional mechanism of cooperation between the Commission and NCAs (i.e., the European Competition Network).[30] These additions seem compliant with the findings of the CJEU in *bpost* and *Nordzucker*. However, some questions remain unanswered (i.e., the criterion to identify the same fact and the issue regarding whether national competition laws targeting market power of large digital platforms can be considered implementing EU law) and may undermine the sound implementation of the *ne bis in idem* principle in the digital economy.[31]

III. LOOKING FOR AN ECOSYSTEM-BASED APPROACH

In essence, the illustrated contradictions about aims and justifications of the DMA question the very nature of the EU initiative and the fundamental relationship with competition law.

From a competition policy perspective, the DMA has been intended to specifically address the problems related to ecosystems.[32] Experts appointed by the European Commission to design a competition policy for the digital era noted that competition is increasingly a competition among ecosystems and that the combination of network effects, data advantage, and portfolio effects, along with strategic investment policies, sunk costs and strong corporate cultures, make digital markets highly concentrated, prone to tipping, and not easily contestable.[33]

Against this background, the message conveyed by EU policy-makers points to the need to integrate the antitrust toolkit (instead of overhauling competition provisions) with *ex ante* measures which would ensure a quick and timely response also against the concerns posed by emerging gatekeepers (i.e., players that it is foreseeable will enjoy an entrenched and durable position in the near future). According to this view, digital markets move too fast to be supervised *ex post* and antitrust enforcers would often intervene once the tipping point had already been reached. Moreover, digital gatekeepers enjoy a brand-new type of market power which implies greater responsibilities. In sum, the economic features of digital markets and the strategic role played by large platforms are the premises of a shift from competition law towards regulation.

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[29] DMA (n 1) Recital 86.
[30] Ibid Article 38.
[31] Marco Cappai and Giuseppe Colangelo, 'Applying *ne bis in idem* in the aftermath of *bpost* and *Nordzucker*: the case of EU competition policy in digital markets' (2022) mimeo.
[32] Monopolkomission, 'Recommendations for an effective and efficient Digital Markets Act' (2021) 9 <https://www.monopolkommission.de/en/reports/special-reports/special-reports-on-own-initiative/372-sr-82-dma.html> accessed 7 November 2022.
[33] Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, 'Competition policy for the digital era' (2019) 33-34 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 7 November 2022.

However, by relying on merely quantitative criteria and refusing to assign a decisive role to the specific properties of ecosystems (in particular, to multi-homing, distinguishing when it is present on both sides of a platform or just on one side), the new Regulation betrays its own economic rationale and ends up targeting the mere bigness of some companies, irrespective of whether they actually act as gatekeepers. Indeed, the DMA is going to be applied to a significant number of players, representing *de facto* an attempt to take over antitrust law rather than complementing it. Insights from the economic literature, it bears noting, are also ignored with regards to the differentiation of business models and strategies. Finally, the argument related to the need to speed up the enforcement because of the lengthy process usually faced by antitrust enforcers is not compelling. While the seven years long *Google Shopping* investigation is used as an example of how burdensome the competitive assessment can be under traditional antitrust rules[34], several investigations successfully conducted by NCAs (e.g., in France, Germany, and Italy) against so-called Big Techs required on average two years.

Therefore, instead of reflecting the distinctive features of digital markets, the revival of regulation appears just motivated by the twofold goals of introducing an enforcement shortcut and entrusting the European Commission with the sole control over the competition policy. To a certain extent, this is acknowledged in Recital 5 where the DMA complains about the fact that antitrust enforcement requires extensive investigations on a case-by-case basis. Moving away from the more economics-based approach, hence lowering annoying legal standards and evidentiary burdens, will definitely make the job easier.

A different process for the designation of targeted platforms (i.e., narrowing down the scope of the DMA to ecosystem orchestrators) and the definition of obligations tailored to the business model under scrutiny would have safeguarded the economic justification and the regulatory nature of the DMA.

In this respect, to avoid the risk of blurring the line between regulation and competition law, the UK bespoke approach seems more coherent. Indeed, the Competition and Markets Authority (CMA) supported the adoption of a regulation for online platforms with "strategic market status" (SMS) which relies on principles-based and firm-specific codes of conduct, rather than promoting a sectoral intervention with a list of one-size-fits-all rules.[35] These legally binding codes of conduct will be tailored to the specific activity and business model of the firm with a strategic position and CMA's expectation is that only a small number of digital firms are likely to meet the strategic market status test.[36] Indeed, the concerns motivating the case for a new regime extend beyond a concern that a firm might have substantial and entrenched market power in a narrow area: "The case for a new regime is motivated by concerns that in certain circumstances the effects of a firm's market power can be particularly widespread or significant. … it is such circumstances that are crucial in contributing to a firm having strategic market status rather than merely having substantial, entrenched market power. Therefore, *this is an important aspect justifying the introduction of the SMS regime, distinguishing the SMS*

[34] Case AT.39740, *Google Search (shopping)*, confirmed by Case T-612/17, *Google LLC and Alphabet Inc. v. European Commission*, EU:T:2021:763.
[35] UK Competition and Markets Authority, 'A new pro-competition regime for digital markets. Advice of the Digital Markets Taskforce' (2020) <https://www.gov.uk/cma-cases/digital-markets-taskforce> accessed 6 November 2022.
[36] Ibid para 4.23.

regime from existing law, and significantly reducing the number of firms which could satisfy the SMS test."[37]

A similar approach has been recently endorsed by the Australian Competition and Consumer Commission (ACCC).[38]

IV. OUTLOOK

Recent regulatory proposals stem from the premise that current antitrust rules are unfit to address the rise of digital platforms. The very same concept of market power has been questioned. Therefore, to justify the departure from traditional competition law, new forms of market power have been envisaged with regards to digital markets.[39] Notably, to describe the peculiar role played by digital platforms as intermediaries between business users and end users, terms as gatekeepers, unavoidable trading partners, firms with strategic market status, and of undertakings of paramount significance for competition across markets, have been introduced. Such labels attempt to capture the specific economic properties of these markets and the dynamics of an environment in which the competition is increasingly a competition among ecosystems.[40]

The debate on the capability of antitrust frameworks to harness digital markets is far from over. There is room to argue that antitrust doctrine is supple enough to handle the competitive issues presented by the digital economy and nothing in the structure of the antitrust statutes prevents the inclusion of ecosystem competition in antitrust analysis.[41] Indeed, the number of investigations and decisions delivered by antitrust authorities around the world in recent years suggests that competition rules are still fit to tackle (alleged) new practices and risks.[42]

However, as a matter of fact, at least in Europe, the emergence of platform business models has determined a shift in the equilibrium between antitrust and regulation. Indeed, despite the proclaimed economic and legal justifications, the DMA appears to be merely an antitrust intervention vested by regulation. By and large, its key motivation is to dismiss the economic analysis and the careful, facts-driven, process of antitrust enforcement. As a result, the revival of regulation seems supported more by an alleged enforcement failure than by a market failure. Moreover, the definition of narrow rules

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[37] Ibid Appendix B, para 35 (emphasis added).

[38] Australian Competition and Consumer Commission, 'Digital platform services inquiry – Regulatory reform' Interim report No. 5 (2022) <https://www.accc.gov.au/media-release/accc-calls-for-new-competition-and-consumer-laws-for-digital-platforms> accessed 16 November 2022.

[39] OECD, 'The Evolving Concept of Market Power in the Digital Economy' (2022) <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf> accessed 7 November 2022.

[40] See, e.g., Marc Bourreau, 'Some Economics of Digital Ecosystems' (2020) <https://www.oecd.org/daf/competition/competition-economics-of-digital-ecosystems.htm> accessed 7 November 2022; Amelia Fletcher, 'Digital competition policy: Are ecosystems different?' ibid; Georgios Petropoulos, 'Competition Economics of Digital Ecosystems' ibid.

[41] Daniel A Crane, 'Ecosystem Competition and the Antitrust Laws' (2019) 98 Nebraska Law Review 412, 424.

[42] Giuseppe Colangelo, 'Antitrust unchained: The EU's case against self-preferencing' (2022) ICLE Working Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4227839> accessed 7 November 2022.

that mimic previous antitrust investigations may jeopardize the expectations about the fast and furious implementation of the regulation. Finally, the cohabitation with old and new competition law provisions may increase the fragmentation of the internal market also raising relevant issues of double jeopardy.

Time will prove whether such concerns are grounded.