



Ex Ante Regulation and Competition in Digital Markets



Please cite this paper as:

OECD (2021), *Ex ante regulation of digital markets*, OECD Competition Committee Discussion Paper, <https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm>

This work is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the OECD or of the governments of its member countries or those of the European Union.

This document and any map included herein are without prejudice to the status or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city, or area.

Foreword

Digital platform markets have particular characteristics that may warrant specific regulation, as discussed by a number of high-profile reports by experts appointed by governments and regulators in recent years. To address these particularities, over the past year many jurisdictions have proposed some form of ex ante regulation to supplement existing ex-post competition law enforcement. However, there has been a lack of co-ordination across jurisdictions. This has resulted in significant divergences in the way that the regulations seek to solve the problems, which ultimately could affect their success. To support a discussion about the merits and objectives of ex ante regulation amidst the regulatory cacophony, this paper gathers some of the most salient regulatory proposals and amendments to existing laws, which were available to the public as of August 2021 to compare and contrast them. This *vue d'ensemble* aims to help the debate about the degree to which it is possible to dovetail the world-wide regulatory approaches to platforms.

This paper was written by Ania Thiemann, Competition Expert & Economist, and Gaetano Lapenta, Junior Competition Expert, with text boxes contributed by Thaianie Abreu. The authors received useful comments and feedback from Ori Schwartz, Head of the Competition Division, as well as from Antonio Capobianco, Pedro Caro de Sousa, James Mancini, Federica Maiorano, Takuya Ohno, and Carolina Abate (all OECD Competition Division). It was prepared as a background note to discussions on ex ante regulation and competition in digital markets at the December 2021 session of the OECD Competition Committee, <https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm>.

Table of contents

Foreword	3
1. Introduction	6
1.1. The main regulatory initiatives under analysis	7
2. Rationale and objectives of the regulation	9
2.1. A rising concern about entrenched market power in digital platform markets	9
2.2. A perceived lack of effectiveness of competition law enforcement alone	11
2.2.1. The relationship of competition and ex ante regulation in digital markets	12
3. The purpose of the <i>ex ante</i> regulations in the digital sphere	16
3.1. Fairness	16
3.2. Contestability and market power	18
3.3. Innovation and transparency	20
4. Key measures contained in the main regulatory initiatives	24
4.1. Scope of application and the subjects of the provisions ("Who?")	24
4.1.1. Scope of application of the proposed regulations	24
4.1.2. Definition of firms subject to ex ante rules	26
4.1.3. The process of designating the relevant firms subject to ex ante regulation	29
4.1.4. Institutional setting: the authority in charge of enforcing the new ex ante rules	29
4.2. <i>Dos</i> and <i>don'ts</i> ("How?")	31
4.2.1. Per se prohibitions, justifications, and further considerations	31
4.2.2. Principles-based and rules-based regulations	32
5. Measures addressed at preventing anti-competitive conduct	35
5.1. Measures to address potential for exploitative conduct	35
5.1.1. Self-preferencing	35
5.1.2. Tying and bundling	37
5.1.3. Most-Favoured Nation clauses and Across-Platform Parity Agreements	38
5.2. Measures on data access: mitigating the risk of exclusionary practices	40
5.2.1. Data portability	40
5.2.2. Obligations to grant access to data	42
5.2.3. Interoperability	45
5.3. Ensuring Transparency and Fair Business Practices	46
5.4. Merger control	48

6. Fines and remedies for non-compliance	49
7. Conclusion	51
Endnotes	54
References	67

Figures

Figure 1. DMT's proposed process for making the code	33
--	----

Boxes

Box 1. Regulation and competition law enforcement in the OECD debate	13
Box 2. The UK Digital Regulation Cooperation Forum	30
Box 3. The European Commission's <i>Google Shopping</i> case	36
Box 4. The benefits and the limitations of data portability measures in digital platform markets	41
Box 5. Economies of data-scale and the prohibition on inter-source data pooling	43

1. Introduction

The global digital economy has reached a very large scale. The influence of digital platforms has expanded significantly, not least during the 2020-21 COVID-19 pandemic which has driven an ever-growing number of users online for commercial as well as social transactions. Estimates from Oxford Economics puts the value of the digital economy at as much as USD 11.5 trillion globally, or around 15.5% of world GDP.¹ Profits of leading digital platforms have experienced a rising trend since 2017, including in 2020 amid the economic crisis resulting from the pandemic. Net income of the leading digital platforms in the United States reached USD 192.4 billion in 2020, an increase of 21.1% compared with the year before.² The rise of big technology companies, such as Google, Amazon, Apple, Microsoft, and Facebook, that act both as intermediary platforms and providers of services and goods in several markets, has heightened concerns about potential economic harms brought by the concentrated structure of the digital economy (S. Prado, 2020^[1]).

Without neglecting the substantial benefits and efficiencies brought by the digital platforms, their reach beyond the market place is undeniable. As online intermediaries the digital platforms bring together individuals or firms that seek information, entertainment, transactions and social interaction as buyers, sellers, software producers and users, ancillary service providers and so on. Because of this central position, these platforms often act as gateways or in some cases, gatekeepers (Cabral et al., 2021^[2]), for businesses and consumers in order to access digital markets. They frequently play a dual role of being simultaneously operators for the platform (e.g., a marketplace) and sellers of their own products and services in competition with rival sellers. Moreover, these firms can bundle a range of digital services into a seamless data-driven offer that enables them to expand into adjacent markets. The impact of these so-called ecosystems is compounded by their opacity and complexity and the data advantage they have over both business users and potential competitors (Fletcher, 2020^[3]) (Cabral et al., 2021^[2]).

A large number of reports and policy papers in recent years have argued that the key features of digital platform markets present the hallmarks of market failure (Colangelo, 2020^[4]), warranting regulatory action, in addition to ex post antitrust enforcement, in view of their significant influence on markets and society at large (Furman et al., 2019^[5]) (Marsden and Podszun, 2020^[6]). These concerns include aspects such as whether these companies are purposefully moving to prevent competition as these companies have become increasingly powerful in their respective domains (Cappai and Colangelo, 2020^[7]), but also issues related to data privacy and data protection, politics, control of the media³ and even the democratic process itself (Cabral et al., 2021^[2]). Academics, regulators and governments have discussed the need for pro-competitive remedies aimed to ensure that the digital economy continues to generate high and long-lasting levels of investments and innovation to support economic development and welfare increases (Prado, 2020^[8]); (US House of Representatives Sub-Committee on Antitrust, 2020^[9]) (Competition and Markets Authority, CMA, 2020^[10]) (Cr mer, de Montjoye and Schweitzer, 2019^[11]) (Stigler Committee, 2019^[12]).

This Secretariat background paper is part of a long-running theme on digital markets that has been addressed by the OECD Competition Committee and its working parties⁴. In December 2020, the OECD Competition Committee devoted two roundtable discussions to the issue of Abuse of Dominance in Digital Markets and Digital Ecosystems.⁵ They were followed by a more technical discussion in June 2021 on Data portability, interoperability and competition.⁶ As a continuation of the theme, and reflecting recent

developments, the purpose of this paper is to discuss some of the regulatory initiatives that have been put forward over the past 12 months, to impose rules on digital platform markets.

Our paper takes its starting point in the particular features of digital markets that may warrant specific regulation, as discussed by a number of high-profile reports by experts appointed by governments and regulators in recent years (Crémer, de Montjoye and Schweitzer, 2019^[11]) (Furman et al., 2019^[5]) (Stigler Committee, 2019^[12]). To address these particularities, over the past year many jurisdictions have proposed some form of ex ante regulation to supplement existing ex-post enforcement. Despite the pervasiveness of the problem, as well as the near-universal consensus that some form of ex ante regulation – or at the very least a revision of competition law – is needed, there has been a lack of co-ordination across jurisdictions. This has resulted in significant divergences in the way that the regulations seek to solve the problems, which ultimately could affect their success. To support a discussion about the merits and objectives of ex ante regulation amidst the regulatory cacophony, this paper gathers together some of the most salient regulatory proposals and amendments to existing laws, which were available to the public as of August 2021 in order to compare and contrast them. This *vue d'ensemble* aims to contribute to a debate about the degree to which it is possible to dovetail the regulatory approaches to platforms.

The paper is structured as follows. Section 2. summarises the particular characteristics of digital platform and the challenges faced by competition law enforcement, as an underlying rationale for the proposing ex ante regulation of these markets. Section 3. discusses some of the specific objectives that occur frequently in the regulatory initiatives, in particular fairness and contestability. Section 4. describes the scope of the regulations and the economic activities and services to which they do or will apply. Section 5. then walks the reader through the main provisions of the regulations, with a focus on measures to mitigate exploitative and exclusionary conduct, highlighting convergences and divergences among the various initiatives. Section 6. deals with fines and possible remedies for non-compliance and section 7. concludes.

Before moving onto the main discussion, we list below the regulatory initiatives that are under review. These were all available to the public as of August 2021. A full discussion of all current regulatory initiatives addressing digital platforms world-wide is not possible here, but we seek to be representative of the types of regulatory approaches that different jurisdictions have chosen.

1.1. The main regulatory initiatives under analysis

In the interest of accessibility and meaningfulness, this background note does not purport to be an exhaustive list of all regulatory proposals across all OECD member jurisdictions. Rather, reflecting the public debate, as well as with a view to cover as many distinctive approaches as possible, this note will focus on the following initiatives:

- Australia: Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021; Royal assent: 2 March 2021; Enacted: 25 February 2021 (with amendments from the Senate)
- Germany: Act against Restraints of Competition (Competition Act – GWB), 10th amendment, enacted 18 January 2021 (in particular new Section 19(a));
- European Commission: Proposal for a Regulation Of The European Parliament And Of The Council on Contestable And Fair Markets In The Digital Sector (Digital Markets Act, DMA), submitted on 15 December 2020;
- France: Draft law, approved by Senate aimed at ensuring consumer choice in the digital space and returned to the National Assembly on 20 February 2020;⁷
- Italy: Proposal of competitive reforms within the framework of the annual law for the market and competition of 2021 (AS1730, 22 March 2021);⁸

- Japan: Act on Improving Transparency and Fairness of Specific Digital Platforms (Reiwa 2nd Year Law No. 38; 2020; enforcement date 1 February 2021);
- United Kingdom: Advice from the UK Digital Markets Taskforce (henceforward "DMT" or Taskforce) on a "New pro-competition regime for digital markets", UK Competition and Markets Authority (CMA); as well as the CMA's Digital Markets Strategy, version "February 2021 refresh";
- United States: 5 Bills introduced in the House of Representatives by several individuals on 11 June 2021 and subsequently referred to the Committee on the Judiciary:
 - H.R. 3816 ("American Choice and Innovation Online Act");
 - H.R. 3825 ("Ending Platform Monopolies Act");
 - H.R. 3826 ("Platform Competition and Opportunity Act of 2021");
 - H.R. 3843 ("Merger Filing Fee Modernization Act of 2021"; and
 - H.R. 3849 ("Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021", or the "ACCESS Act of 2021").

These and other initiatives will be discussed during the Hearing in the Competition Committee on 2 December 2021.

2. Rationale and objectives of the regulation

This section briefly discusses the rationale for the regulatory initiatives under review. The arguments put forward fall in two broad categories. The first relates to market failure in digital platform markets stemming from the platforms' having entrenched positions of market power. The second set of arguments are related to a perceived lack of efficacy of competition law enforcement to fully address the competition problems posed by digital platform markets.

2.1. A rising concern about entrenched market power in digital platform markets

Many of the regulatory initiatives covered in this note stem from a growing concern that a small number of major digital platform firms have become entrenched in a position of market power. This concern is visible in a 2020 report by the United States (US) Antitrust Sub-Committee.⁹ Referring to the four largest digital platforms, Amazon, Apple, Facebook and Google, the Antitrust Sub-Committee states its findings:

(...) First, each platform now serves as a gatekeeper over a key channel of distribution. By controlling access to markets, these giants can pick winners and losers throughout our economy. They not only wield tremendous power, but they also abuse it by charging exorbitant fees, imposing oppressive contract terms, and extracting valuable data from the people and businesses that rely on them. Second, each platform uses its gatekeeper position to maintain its market power. By controlling the infrastructure of the digital age, they have surveilled other businesses to identify potential rivals, and have ultimately bought out, copied, or cut off their competitive threats. And, finally, these firms have abused their role as intermediaries to further entrench and expand their dominance. Whether through self-preferencing, predatory pricing, or exclusionary conduct, the dominant platforms have exploited their power in order to become even more dominant.

The market power of the digital platforms referred to in this quote results partly from the digital markets' distinctive economic features that, when taken together, may lead to a degree of failure of the natural competitive process to deliver competitive outcomes. These include:

- the presence of strong economies of scale with low or zero marginal costs;
- extreme direct and indirect network effects that make it easier for a platform with a large number of established users to attract more users;
- a data-driven feedback loop which further strengthens the network effects;
- remarkable economies of scope due the role of data as a critical input; and
- conglomerate effects.¹⁰

The latter are reinforced by consumers' behavioural biases and single-homing tendency. These in turn are encouraged by the platforms, the second reason for the entrenchment of market power.

Together, these features generate a winner-takes-all/winner-takes-most dynamics where markets are prone to tipping and become highly concentrated around a single or a few dominant platforms. If a platform has access to key inputs (such as data or access to essential online infrastructure), capital and a large, stable number of users as a result of the dynamics referred to above, it can leverage such market power

on other markets. Such strategy can be carried out throughout the acquisition of other companies, for example in order to obtain a crucial data set or to eliminate a potential competitor (so-called "killer acquisitions"¹¹), creating "moats" around their businesses (Fletcher, 2020_[3]). Given the significant barriers to entry that make them not easily contestable (Benelux competition authorities, 2019_[13]) (Fletcher, 2020_[3]) (Cappai and Colangelo, 2020_[7]) (Thiemann and Neto, 2021_[14]) (Cabral et al., 2021_[2]), large incumbent players appear not to be under threat from new entry, and are hard to dislodge while innovative digital firms and start-ups that do not have access to the same competitive advantages (e.g. user base, data, presence across different markets) find it difficult to compete with them.

The leveraging of market power means that gatekeeper platforms are able to create an ecosystem of services, in which users may become locked-in by high switching costs that may be raised by each new service added to the ecosystem (Bourreau, 2020_[15]) (Benelux competition authorities, 2019_[13]). In some cases, damage to competition may be difficult to reverse.

The impact on the market and the negotiating position vis-a-vis users can reach a point where a gatekeeper platform amounts to a sort of private regulator, which is able to set rules on the market whilst being subject neither to accountability through democratic checks and balances (like public regulators) nor to market discipline. For example, large platforms are in a position to set opaque terms and conditions that consumers are obliged to accept if they wish to use their services (which is an issue that the Japanese Act on transparency, amongst others, aims to address). These rules can be used to strengthen the platform's own position, for example by deterring users from multi-homing or switching to another service provider, by gathering more data that then feed data feedback loops or by preventing consumers from making informed choices about the (alternative) services they (could) use (Takigawa, 2021_[16]). This means that markets may well be dominated by just a few gatekeeper undertakings and not competitive (Benelux competition authorities, 2019_[13]). Difficulty in switching away by consumers may be compounded by asymmetric information about the collection and use of data by digital platforms (Carugati, 2020_[17]) or the value of the service actually provided by such platforms to consumers.

These competition issues have consequences, not only for competitors, but also for consumers and society at large. The UK's Digital Markets Taskforce (DMT) notably refers to the specific harm to consumers arising from the market power of the platforms, including the fact that in a more competitive market, consumers might not need to provide quite so much information about themselves to access internet services; they might be provided with greater "protection and control of their data" or could receive some sort of reward for providing data.¹² Other harms listed include generally higher prices across the economy than would otherwise be the case; and reduced innovation and choice.¹³ The DMT also lists harm to innovators, to the economy, and to society at large, with impacts on issues of "mental health, media plurality, accuracy of news and democracy".¹⁴ ¹⁵ The US Subcommittee on Antitrust also concurs that the harm from the digital platforms' market power touches all of society:

The effects of this significant and durable market power are costly. The Subcommittee's series of hearings produced significant evidence that these firms wield their dominance in ways that erode entrepreneurship, degrade Americans' privacy online, and undermine the vibrancy of the free and diverse press. The result is less innovation, fewer choices for consumers, and a weakened democracy.¹⁶

In sum, the digital platforms or ecosystems generate competition problems which need to be tackled, as highlighted by the German Commission for "Competition Law 4.0".

The combination of dominance on the platform market with a gatekeeper position and rule-setting power gives rise to the risk of distorted competition on the platform and the expansion of market power from the platform market to neighbouring markets. In view of the strong steering effect that platforms can exert on their users' behaviour, the often rapid pace of development on digital markets and the importance of first-mover benefits, non-intervention or late intervention against abusive behaviour typically comes at a very high price.¹⁷

The next section looks at the second set of arguments related to the perceived failure of competition law enforcement in tackling concerns on the digital platforms.

2.2. A perceived lack of effectiveness of competition law enforcement alone

A number of competition cases have been brought against the large platforms in recent years. These have often focused especially on abuse of dominance or monopoly and on possibly anti-competitive mergers. Cases against Amazon, Apple, Facebook, and Google (the "GAFA") have been brought by the European Commission; the German *Bundeskartellamt*; the UK's Competition and Markets Authority (CMA); Korea Fair Trade Commission, India's Competition Commission, both the US Federal Trade Commission and the Department of Justice, and by groups of US state attorneys general.¹⁸ Several of these have been years underway before reaching a resolution (Furman et al., 2019^[5]) (Crémer, de Montjoye and Schweitzer, 2019^[11]).

Taking its impetus from some of these cases, the discussion on why *ex ante* regulation of digital platforms is needed tends to centre on the fact that competition law enforcement has appeared not to tackle efficiently and speedily enough the competitive challenges that have arisen. Here, the arguments fall in two broad camps: those that focus on the economic structure of the digital markets as being somehow beyond the full reach of competition law enforcement tools; and those that find faults with the way that competition law and its enforcement work in digital markets.

In the first group, arguments include the fact that the particular market dynamics, where markets tend to tip towards dominance or monopoly (the (European Commission, 2020^[18]) refers to "sudden and radical decreases in competition"), mean that traditional competition tools have been less effective in reaching satisfactory outcomes for competing firms: competition law enforcement in the digital sphere has been too complex, too slow, and at times too specific (related to very particular misconducts) to protect effective competition in these markets, (Budzinski and Mendelsohn, 2021^[19]) (Furman et al., 2019^[5]) (Stigler Committee, 2019^[12]), (CERRE, 2020^[20]); or "lacking the remedial measures necessary to preserve and restore the benefits of a competitive market to [...] consumers" (Monti, 2021^[21]).

(Marsden and Podszun, 2020^[6]) find that "*proceedings take a long time, developing theories of harm in individual cases is burdensome, [and] finding the right remedies has proved very difficult in the past*"¹⁹. (Wheeler, Verveer and Kimmelman, 2020^[22]) contend that "*the systems developed to oversee an earlier time are burdened by industrial era statutes and decades of precedent that render them insufficient for the digital present*" and that the lengthy legal "battles" between antitrust authorities in the US and the EU and the large platforms show the limitations of purely *ex-post*, anti-trust remedies to foster competition in the platform economy (S. Prado, 2020^[1]). According to some, this has led in some cases to underenforcement, or at the very least a risk of it (Stigler Committee, 2019^[12]).

This is a rationale for proposing *ex ante* regulation by the European Commission which notes "*competition policy alone cannot address all the systemic problems that may arise in the platform economy*", including the private gatekeepers control of access to markets, customers and information (European Commission, 2020^[18]). The proposed Digital Markets Act (DMA) stresses that

(...) existing Union law does not address, or does not address effectively, the identified challenges to the well-functioning of the internal market posed by the conduct of gatekeepers, which are not necessarily dominant in competition-law terms.²⁰

Similar views are reflected in other initiatives: the UK's Digital Markets Taskforce, referring to previous studies, also stipulates that "existing competition laws are not, by themselves, sufficient to address these challenges"²¹.

In the US on the other hand, the criticisms have focused more on the perceived flaws of the enforcement itself. In a paper (Chopra and Khan, 2020^[23]) expose their views of what they see as a weakness of competition law enforcement in the US:

*Antitrust litigation and enforcement are protracted and expensive, requiring extensive discovery and costly expert analysis. In theory, this approach facilitates nuanced and factspecific analysis of liability and well-tailored remedies. But in practice, the exclusive reliance on case-by-case adjudication has yielded a system of enforcement that generates ambiguity, drains resources, privileges incumbents, and deprives individuals and firms of any real opportunity to participate in the process of creating substantive antitrust rules.*²²

As the legal framework in the US differs from that of the EU, barriers to effective competition law enforcement are likely to differ in the two jurisdictions. In the US, as early as 2017, (Khan, 2017^[24]) argued that a revision of competition law was needed to empower competition authorities with newer, more agile, and effective tools to combat competitive misconduct of digital platforms, which may be taken as an argument in favour of *ex ante* regulation in certain circumstances. The House of Representatives Subcommittee put forward a similar analysis, arguing that the US "laws must be updated to ensure that our economy remains vibrant and open in the digital age."²³

Finally, a number of competition authorities²⁴ have experienced and remarked upon the difficulties of using conventional competition tools based on prices and consumer welfare to handle emerging competition issues in the digital economy. This is mainly due to the multisided nature, as well as zero-price services, network effects, economies of scale and scope and the importance of access to and monetisation of data of digital markets (UNCTAD, 2021^[25]) (OECD, 2020^[26]) (OECD, 2019^[27]). Others²⁵ have reported defining the relevant market and determining dominance in digital markets as particularly challenging.²⁶ Standard economic analysis mechanisms and traditional competition tools, such as market share and the small but significant and non-transitory increase in price test (used to define the relevant market in abuse of dominance and merger control assessments) have also been found insufficient in cases involving digital platforms (UNCTAD, 2021^[25]) (OECD, 2016^[28]) (OECD, 2019^[27]).

Hence there seems to be a broad consensus that some form *ex ante* regulation is needed as a complement to competition law enforcement to deliver fast and effective action against structural barriers and risks of anti-competitive practices in rapidly evolving digital platform markets. That said, national competition authorities as well as jurisdictions still differ in what they see as the best approach: whether they want separate sector-type *ex ante* regulation; new competition law instruments or simply an adaptation of existing competition law tools.²⁷

2.2.1. The relationship of competition and ex ante regulation in digital markets

From the above it appears that a general dissatisfaction with the effectiveness and speed of competition law enforcement to tackle the platform specific anti-competitive behaviour, coupled with concern about the consequences of the structural market features, underpin the rationale for moving towards a regime of *ex ante* regulation. The risk that ex-post remedies may be ineffective and not timely, can favour *ex ante* regulation to protect market openness and competition (Kobayashi and Wright, 2020^[29]). Regulation should prevent the dominant firms from exercising their market power in a harmful way (Chopra and Khan, 2020^[23]). This is particularly the case when there is significant learning from past enforcement and when private litigation would be unlikely. While the case law on digital platforms is not yet vast, it has undoubtedly informed many of the clauses found in the regulations, including on self-preferencing and on access to data²⁸. Moreover, so far, there seems to be very little scope for or interest in private litigation²⁹.

These considerations likely account for the shape of some of the regulatory propositions. Often, the proposals seem to be intended as a complement to existing competition law and to counterbalance the risk of underenforcement in digital markets, as highlighted by the Stigler Committee.³⁰ The risk of underenforcement is also a particular concern of the Digital Markets Taskforce, in particular in relation to

the merger regime proposals.³¹ The German (Commission 'Competition Law 4.0', 2019_[30]) also seems to indicate that its recommendations are intended to complement competition law, both at the national and the EU level. The US measures also seem to aim at completing existing competition law as most of the bills explicitly refers to a breach of the provisions also being a breach of antitrust law.

The DMA seeks to make this point explicitly. Recital (5) addresses the question of the articulation between competition law and *ex ante* regulation. It highlights in particular that

*Whereas Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, their scope is limited to certain instances of market power (e.g. dominance on specific markets) and of anti-competitive behaviour, while enforcement occurs ex post and requires an extensive investigation of often very complex facts on a case by case basis. Moreover, existing Union law does not address, or does not address effectively, the identified challenges to the well-functioning of the internal market posed by the conduct of gatekeepers, which are not necessarily dominant in competition-law terms.*³²

Apart from timeliness and effectiveness of competition enforcement, the measures also aim to address structural features of digital markets that may prevent entry and expansion by new players, i.e. both supporting competition *in* the market and competition *for* the market. This leads to the proposals such as the DMA or the German Competition Law Art 19(a) being asymmetric, i.e. applying only to some companies in the market, rather than evenly across the board (Botta, 2021_[31]) (Carugati, 2020_[17]). In the digital economy, owing to the structural barriers to entry and winner-takes-most dynamics, firms tend to compete for the market, rather than in the market (OECD, 2016_[28]) (Carugati, 2020_[17]) (Eisenmann, Parker and Van Alstyne, 2011_[32]). However, some of the measures are clearly aimed at allowing and encouraging competition in the market as well, for example by singling out only (very) large platforms (Franck and Peitz, 2021_[33]); granting access to large firms' datasets,³³ or by ensuring transparency to enable consumers to make informed choices. Whether this will work depends on whether the market failures observed in the digital markets are structural competition problems (i.e. resulting from structural market failures, such as the network effects and zero marginal costs); or whether they are caused by the large platforms themselves (monopoly market failure) (Carugati, 2020_[17]).

Several of the initiatives refer specifically to the need for a better and more clearly articulated relationship between competition law, the *ex ante* regulations proposed for the digital markets and other regulations, such as data protection, consumer protection, and so on (see for instance (Competition and Markets Authority, CMA, 2020_[10])). Box 1 discusses the complementarity between *ex ante* regulation and competition enforcement.

Box 1. Regulation and competition law enforcement in the OECD debate

In June 2021, the Competition Committee discussed competition enforcement and regulatory alternatives. The section on regulation and competition law as a means to address market failure is particularly relevant here.¹

Competition law and regulation are often presented as alternative approaches to governing competition and addressing market failures (Shelanski, 2019_[34]). The concept of **market failure** is quite wide-ranging, but it is often used as shorthand for a large number of justifications for public intervention in the operation of markets. The main sources of market failure listed in (OECD, 2021_[35]) are (1) market power; (2) public goods (and free riding); (3) externalities; (4) asymmetric or imperfect information; (5) factor immobility; and (6) lack of clear property rights (see also (OECD, 2019_[36])). Of particular relevance for the regulation of digital platforms is the exploitation of behavioural biases as another reason why markets might not operate well (Ishenko et al., 2016_[37]).

An initial distinction between regulation and competition law in the background note concerns the type of market failures they seek to address. Competition law aims to prevent the illegitimate acquisition of market power and, where market power has already been accumulated, to control its exercise, so that the typical benefits of competition – lower prices, greater choice, higher quality – are realised fully (Dunne, 2015_[38]). Given that economic

regulation also has a key role in mitigating market failures, including monopoly power, for instance in the presence of a natural monopoly, this distinction is not particularly useful (OECD, 2019^[36]).

(OECD, 2021^[35]), citing (Dunne, 2015^[38]), notes that regulation on the other hand can address a much wider set of concerns than competition law, and often goes beyond simply addressing market failures narrowly understood as the inability of market to be as efficient as it could. There may also be alternative grounds for regulation, such as distributional justice, geographic consideration, and protection of rights. As a result, justifications other than market failure often underpin the adoption of regulation, but not competition law. (OECD, 2021^[35]) notes that regulation sometimes displaces the objectives of competition law altogether in the pursuit of other social goals. For instance regulated utilities that are subject to universal service obligations based on equity considerations, but unrelated to their monopoly situation.

The paper also discusses the choice of applicable **market monitoring regimes**, noting that the classical position is that competition enforcement should be preferred where possible. Market imperfections only provide an economic rationale for economic regulation where market responses do not remedy them effectively (or even exacerbate them), and where there exist feasible interventions that, at least in principle, can achieve net welfare improvements (Ishenko et al., 2016^[37]). Nonetheless, competition law cannot be preferred to regulation in all instances. First, regulation can pursue goals other than pure market efficiency, and can tackle challenges other than market power, such as health concerns and safety standards (OECD, 2011^[39]). Second, even if there are concerns about market power, regulation may be better placed than competition law to address the relevant problems, as may be the case in natural monopolies, or in sector regulation. Competition law has limited effectiveness against structural market issues, including those that involve the mere existence of a monopoly or oligopoly, exploitative behaviour, or issues that require ongoing implementation or monitoring². Proceeding directly via specifically enacted regulation may provide a more comprehensive and effective means by which to remedy ongoing market failures than episodic antitrust enforcement. The paper thus concludes that

...market problems often can be addressed by means of competition enforcement or of a regulatory alternative – or by a form of public intervention that combines elements of both. Depending on the circumstances, regulation and competition enforcement can be alternative solutions, or they may complement each other. What is more, often the solution that will be adopted in practice will contain elements of both regulation and competition law, even if only one of these market supervision tools is formally being relied upon. This dual nature of public intervention is not limited to enforcement – in effect, a number of legal instruments expressly adopt a ‘hybrid’ nature, reflecting both competition and regulatory characteristics. Such legal instruments are typically adopted to address limitations of competition and regulatory approaches, and combine the virtues of each – something that, as this background paper makes clear, competition and regulatory enforcement also seek to achieve in practice.³

Notes:

¹ See the roundtable webpage which, in addition to the Secretariat Background paper, also contains videos by the expert speakers and country submissions: <https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives.htm>

² See also the 2011 OECD Roundtable discussion on The Regulated Conduct Defence. "The regulated conduct defence is important to ensure that the state can exercise its sovereign power to apply regulation that it deems justified for economic and/or social reasons even though the regulation may conflict with competition policy." <https://www.oecd.org/daf/competition/mergers/48606639.pdf>

³ (OECD, 2021, p. 44^[35])

Source: OECD (2021), Competition Enforcement and Regulatory Alternatives, OECD Competition Committee Discussion Paper, <http://oe.cd/cera>

Given the existence of national competition provisions, some have questioned whether new *ex ante* regulations are warranted at all, and whether the aims and objectives of the new rules are not already covered by existing provisions and *ex post* enforcement (Competition Policy Council Communiqué, 2021^[40]). This begs the question of what would be the added value of regulations from a competition enforcement point of view, given that competition law operating *ex post* can already regulate the market by prohibiting certain conducts (Strowel and Vergote, 2016^[41]). For instance, the Competition Policy Council of Canada states that "For economic policy, appropriate application of competition law enforcement in digital markets should be the first defence and direct regulation the last resort."³⁴ The Council argues that there is a risk of

falling for the "big is bad" fallacy", since "even in a market with strong network effects, competitors may vigorously compete for the market".^{35 36}

Possible conflicts of overlapping competences may also arise between federal and state competition law, or between *ex ante* regulation and other areas of law, such as data protection regulation (Takigawa, 2021_[16])³⁷. There may also be situations where the issue of joint jurisdiction may arise; whether because of its federal constitution (US, Germany, Switzerland and other federal states), or for instance in the EU.

Recognising these difficulties, a joint paper of the Heads of the national competition authorities of the EU, published in June 2021,³⁸ highlights the risk of conflicting decisions being adopted at the EU level and at the national level. The paper stresses the value of Competition Law as an "*effective means of maintaining the competitive dynamics also in the digital economy*". Nonetheless, the paper acknowledges the need for a comprehensive set of tools owing to the complexity and fast-evolving nature of digital markets, and therefore points to complementarity between (European) competition law and the DMA. To enhance enforcement, the joint competition agencies call for the establishment of a co-operation and co-ordination mechanism between the national agencies and a complementary possibility of enforcement of the DMA by national competition authorities in addition to the European Commission.

The rationale for the new regulatory initiatives thus seems firmly grounded in both a concern for the ability to adequately address the competition issues arising from the economic structure of the digital platform ecosystems; as well as a desire to add new tools to the traditional competition law toolbox, for instance with regard to market definition and the burden of proof. These issues are further developed in sections 4. and 5. of this paper. The thorny issue remains the articulation of these new regulations with existing competition law. As suggested by the discussion in (OECD, 2021_[35]), the solution will likely have to be found in a hybrid, possibly novel form of regulating and monitoring the digital platforms.

Having discussed the underlying rationale for proposing *ex ante* regulation of digital markets, the next section turns to the purpose and objectives of these initiatives.

3. The purpose of the *ex ante* regulations in the digital sphere

Broadly speaking, the initiatives on *ex ante* rules are intended to ensure fairness, contestability, transparency and innovation, as well as to safeguard public interests that extend beyond purely economic considerations (Cappai and Colangelo, 2020^[7]). The notions of fairness and contestability appear as a frequent leitmotif. This section starts by looking at the two, in turn, highlighting how some terms remain poorly or vaguely defined, which may defeat the purpose of making the provisions easily applicable and, in turn, enforceable. The final subsection briefly highlights the two other objectives that are frequently cited: transparency and innovation.

3.1. Fairness

The notion of "fairness", "fair competition" or the "protection of fair competition" is a recurring theme in almost all of the regulatory initiatives under analysis. Imposing a condition of fairness on digital platforms is one way to address the concerns about market power and exploitative or abusive conducts of the platforms in a position of dominance.

While not as such a legislative proposal, the UK DMT's report "Advice of the Digital Markets Taskforce"³⁹ states that the purpose of the future code of conduct is to prevent "practices from a firm [with Strategic Market Status] which could undermine fair competition".⁴⁰ The report proposes clear objectives for a future code of conduct, which would include "fair trading" and "open choices". The latter in particular is defined as "users fac[ing] no barriers to choosing freely and easily between services provided by the [dominant digital firms] and other firms".⁴¹

The DMA has numerous references to fair competition or fairness, including in its title.⁴² In particular, according to the recital (4), the key features of the core platform providers, or "gatekeepers" (see Section 4. for a full discussion of this term) lead to imbalances of bargaining power and therefore to "unfair practices and conditions for business users". Recital 5 notes: "*Fairer and more equitable conditions for all players in the digital sector would allow them to take greater advantage of the growth potential of the platform economy.*" The DMA singles out as problematic services that are characterised by multi-sided intermediation between business users and end-users, in the hands of "one of very few large digital platforms" that (i) dictate the "commercial conditions with considerable autonomy", (ii) "act as gateways for business users to reach their customers and vice versa", and (iii) "abuse their gatekeeper power by means of unfair behaviours vis-à-vis economically dependent business users and customers" (Budzinski and Mendelsohn, 2021^[19]).

Although there are no explicit provisions on fairness as such in the five US Bills to Congress, all the Bills (with the exception of the US Bill on *Merger Filing Fee Modernization*) stipulate that a violation of their provisions will "constitute an unfair method of competition" under section 5 of the Federal Trade Commission Act.

Fairness is also a general theme of the Japanese Act: Article 1 on its purpose states that among its goals is "improving the transparency and fairness of specific digital platforms by designating platform providers,

disclosing provision conditions, etc. by specific digital platform providers, evaluating the transparency and fairness of specific digital platforms, and taking other measures."⁴³ The Japanese Act takes a step further by putting the onus on the platforms to ensure this fairness: *"Measures related to improving the transparency and fairness of digital platforms are those in which digital platforms contribute to the enhancement of user benefits and play an important role in improving the vitality and sustainable development of Japan's economy and society. In view of this, digital platform providers should take voluntary and proactive efforts to improve the transparency and fairness of digital platforms (...)"*.⁴⁴

The German Act, 10th amendment, while not stipulating fairness as an overriding principle, has for objective to strengthen abuse control vis-à-vis powerful digital companies. It stipulates that an abuse exists if a dominant undertaking (...) *"directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from similar undertakings without any objective justification"*.⁴⁵

The term fairness is however conspicuously absent from the Australian New Media and Digital Platforms Mandatory Bargaining Code. (Cappai and Colangelo, 2020^[71]) point out that, in its approach to the large platforms, the Australian Competition and Consumer Commission (ACCC) has relied on a code of conduct to address what they see as an "imbalance of bargaining power" between online platforms and media businesses, which can be read as a lack of fairness in their dealings.

Observations

Fair trading principles in the regulatory initiatives are intended to address concerns about the potential for exploitative behaviour on behalf of the platforms (CMA, 2020^[42]). The good functioning of markets requires a minimum level of fairness among market participants. (Marsden and Podszun, 2020^[6]) note that fairness has proved to be a "pillar of the market economy" and that *"trust requires a basic level of fairness that ultimately has to be guaranteed through regulation"*.⁴⁶

Fairness is clearly a preoccupation of the drafters of the DMA. In the DMA, "fair" or "fairness" or similar terms are mentioned 137 times, often in phrases such as 'tackling unfair practices' or 'fairer and more equitable conditions for all players' (p. 10 of the explanatory memorandum accompanying the proposal). While recent societal developments, such as growing public distrust in governments and in the democratic process, and rising inequality may account for an increase in the use of the notion of fairness as a "lodestar" in European competition policy (Dunne, 2020^[43]), it is also a somewhat nebulous concept. As (Dunne, 2020^[43]) puts it: *"the proposition that the competition process should deliver fairness raises challenging questions: from, what is fairness, to fairness for whom?"*⁴⁷

It is not entirely clear from the DMA in particular, but also some of the other initiatives, what *fairness* is meant to be beyond a levelling of the playing field. The use of the term *fairness* in the regulations under scrutiny remains rather vague and needs further definition (Schnitzer et al., 2021^[44]) (Crawford et al., 2021^[45]). It is unclear whether it refers to a level playing field for companies, or to consumer welfare and market efficiency. This needs to be clarified for a better application of the regulations as there does not exist a "competition definition" of fairness (Crawford et al., 2021^[45]). It is also possible that fairness is used to mean something more than just fair *competition*. In light of developments such as rising concentration, rising consumer prices, increased inequality, and the consequences of fall-out from the Covid-19 pandemic, there is a growing feeling in society that antitrust also can or should fulfil other objectives. Framing regulations in terms of *fairness* may therefore also refer to redistribution, better treatment of users, or a host of other goals.

Looking for clarification we can turn to (Motta, 2004^[46]) who first defines fairness in terms of fairness towards customers, that are protected by the law for instance against excessive prices charged by dominant firms (p.25). However, he rightly points out that the concept of fairness may collide with the notion of equity or an economic welfare criterion.

Take for instance the politically sensitive issue of small shopkeepers v. large supermarket chains. In many countries, concern is often voiced that the supermarket chains exploit their bigger volumes so as to have bargaining power and buy from manufacturers much more cheaply than small shops. This allows the former to sell to lower final prices than the latter. As a result, small shops have economic difficulties and could be forced to close down. Some people would argue that this is unfair and that small shops should accordingly be protected. I doubt that this claim is justified from the point of view of fairness. Certainly, such a reasoning would be at odds with basic efficiency principles. (...) This process of rationalisation whereby only the most efficient firms will stay in the market is beneficial for a community as a whole, as it will bring market prices down to the benefit of consumers. Interfering in this process by limiting the ability of larger firms to charge lower prices would damage welfare.

Motta goes on to distinguish two sorts of equity: *ex ante* equity (same opportunities available to each firm), which he sees as compatible with competition policy and which should guarantee *a level playing field for all the firms* (author's emphasis); and *ex post* equity (i.e. equal outcomes) which, according to Motta, "unfortunately [is] not something which necessarily coincides with competition policy" (p.26).

Having a better definition of the terms will help with the interpretation of the obligations that are imposed on the platforms. The courts also need to share the same understanding when "(...) a firm accused by the Commission of breaching its obligations under the DMA seeks judicial redress".⁴⁸ (Crawford et al., 2021_[45]) caution that "inappropriate definitions of contestability and fairness will lead to misguided policy conclusions" (p.6). Therefore the authors propose a definition of fairness which should guide the interpretation of the draft regulations:

*Fairness is the organisation of economic activity to the benefit of users in such ways that they reap the just rewards for their contributions to economic and social welfare and that business users are not restricted in their ability to compete. (Crawford et al., 2021_[45])*⁴⁹

In any case, there seems to be a broad agreement that some terms need a common understanding in order for the proposals to be effective.

Some initiatives seem to see the idea of fairness to go beyond a desire to merely complement antitrust. For instance, the thrust of the analysis of the US Subcommittee on Antitrust⁵⁰ is also aimed at addressing societal and cultural issues related to data privacy and ensuring diversity in the media. Similar objectives underpin the Australian News Media and Digital Platforms Mandatory Bargaining Code.

The next section further discusses the notion of contestability.

3.2. Contestability and market power

Contestability is another fundamental principle of market theory. Freedom of competition is reduced when undertakings reach a monopolistic position (Marsden and Podszun, 2020_[6]). The objective of opening up digital markets (or elements within them) to more competition is a general red thread running through most of the regulatory initiatives under analysis, including the US and the EU (Schnitzer et al., 2021_[44]).

As described above, the largest platforms extend their dominance into new markets, using various techniques, such as envelopment and vertical integration, to create powerful ecosystems (Fletcher, 2020_[3]) (OECD, 2020_[47]) (Eisenmann, Parker and Van Alstyne, 2011_[32]). The very structure and underlying economic characteristics of these markets, such as economies of scale and scope and network effects, as well as potentially anti-competitive conduct, help entrench market power. This makes it difficult for other firms – whether rivals or business users – to compete or even gain entry. The provisions therefore aim to promote competition and mitigate the risk of anticompetitive conduct, while in some cases attempting to redress the perceived imbalance (Schnitzer et al., 2021_[44]).

In Europe, the DMA states that the general objective of the initiative is to ensure the proper functioning of the internal market by promoting effective competition in digital markets, in particular a contestable and fair online platform environment (European Commission, 2020_[48]). "Fairness and contestability" (and their

variants) are mentioned almost in every page of the 33-page long preamble to the DMA (Crawford et al., 2021^[45]). Recital (2) thus points to the fact that the characteristics of the "core platform services", "combined with unfair conduct", "can have the effect of substantially undermining the contestability of the core platform services". In the US, the objective of contestability is echoed in some of the Bills to Congress, in particular the Bill on *Augmenting Compatibility and Competition by Enabling Service Switching*, which states that its objective is to "promote competition, lower entry barriers and reduce switching costs for consumers and businesses online"⁵¹. Similarly, the 2021 reform proposals by the Italian Competition Authority,⁵² while not explicitly citing contestability, refers to the ability of competitors to get access to final users or suppliers through digital platforms.

Contestability may be achieved through enabling free user access, thereby facilitating multi-homing, which is seen as a key competitive constraint in digital markets (Schnitzer et al., 2021^[44]) (OECD, 2021^[49]) (Alexiadis and de Streel, 2020^[50]). Data portability or interoperability can be used on the other hand to address barriers to entry and feature as a central element in many provisions (CERRE, 2020^[51]). The amended Article 19(a) of the German Competition Law thus explicitly prohibits using collected data to raise market entry barriers or hindering competition by denying or impeding interoperability or portability of data (Franck and Peitz, 2021^[33]). The revised section 20 thus states that "*refusing to grant access to such data in return for adequate compensation may constitute and unfaire impediment...*". The US Bill on *Augmenting Compatibility and Competition by Enabling Service Switching* also explicitly imposes data portability as a means to enhancing competition.⁵³ Ensuring data portability and interoperability is also a central element of the EU's DMA.⁵⁴ (See section 5. of this note for a further discussion of data portability and interoperability provisions). A few of the initiatives seek to enhance user choice or multi-homing to increase market contestability. In France, the bill of law on "guaranteeing consumer choice in cyberspace"⁵⁵ to ensure contestability for end-users of equipment, aimed to enable the free choice between competing operating systems by stipulating that app stores should not prevent end-users from freely "accessing information and content" and sharing it, nor "using and supplying applications and services".

Granting access is also a preoccupation of the UK's Digital Markets Taskforce which emphasise that firms that have been found to have strategic market status should be subject to "pro-competitive interventions" which include "interventions relating to personal data mobility, interoperability and data access" (Section 4.5). The DMT finds that these are key elements that can be "used to address the factors which lead to the firm holding such a powerful position" (Section 4.5).

Observations

Contestability or open choice principles aim to address the potential for exclusionary behaviour (Marsden and Podszun, 2020^[6]). Alongside communications infrastructures and services, access to data that flows through such infrastructures is increasingly important because data is a key source of value, and its effective and innovative use and re-use can spur economic and social benefits. However, these benefits – ranging from innovative applications to increased transparency and accountability – are predicated on the availability of data (JFTC, 2017^[52]). As a result, enhancing access to and the sharing of data is a critical policy concern in the digital age (OECD, 2019^[53]) (OECD, 2021^[49]). Which is why, as a way to making markets more contestable, access to data is a key concern of most of the provisions.

As pointed out by some authors, just like the concept of fairness, the use of the phrase "contestability" is not very well defined either, for instance in the DMA (Budzinski and Mendelsohn, 2021^[19]). Again, for the DMA and similar regulations to serve a meaningful purpose, the "core aims" need to be "clear and serve as a yardstick for future developments".⁵⁶ Secondly, across the regulatory initiatives, the measures designed to promote contestability appear to seek not only to address structural features of markets that might prevent entry and expansion by new players, but also to prevent anticompetitive conduct.

(Colomo, 2021^[54]) states that indeed the notion of fairness under the DMA is broader than that of anticompetitive object or effect. With regard, for instance to most-favoured-nation clauses (MFN), in competition law, these are not inherently anticompetitive. Such clauses can even be fair when they address a problem of free-riding and are carefully and narrowly drafted. By contrast, DMA Article 5 simply prohibits them. Hence it seeks to ensure contestability and to re-balance the position of gatekeepers vs smaller firms, to give the latter a real chance to compete by neutralising the competitive advantages enjoyed by gatekeepers (Colomo, 2021^[54]). Thus fairness also equates to equal chances, or redistribution from those who have plenty to those who do not (for instance, with regard to data, as discussed supra), as a means to rein in market power.

This points to another general objective across most of the initiatives which is to complement existing competition provisions that aim to counter the abuse of dominant position, by inferring market power from observed characteristics, without the prior requirement of defining the market or establishing dominance (Marsden and Podszun, 2020^[6]). This is also the case for the amended German Competition Act. As a preventive measure the *Bundeskartellamt* can now prohibit certain types of conduct by companies which, due to their strategic position and their resources, are of paramount significance for competition across markets. Such conduct includes e.g. the self-preferencing of a group's own services or impeding third-party companies from entering the market by processing data relevant for competition.

Finally, there are grey areas where the provisions overlap in their purpose. Some of the regulations seem to interpret "fairness" as meaning the granting of access for competitors, rather than the final welfare outcome. These kind of provisions seems to overlap with the idea of contestability, including some of the measures in the amended German Art. 19a such as the prohibition of self-preferencing⁵⁷ or the making services conditional on the automatic use of data without choice⁵⁸ which also aim at opening up markets and granting access. Similar measures are also present in the DMA and in the US Bills as discussed in section 5 of this paper. This desire to tilt the market in favour of the gatekeepers' competitors can also be seen as an extension of the underlying principle of fairness towards protecting small or new firms.

The focus on the "little guy" however, seems to be represented by a new or small competitor seeking market access, rather than the final consumer. With the notable exception of the UK's DMT and the US Bill on *Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021*, there is comparatively little mention of or measures directly aimed at promoting consumer welfare beyond a general assumption, perhaps, that more competition is better for everyone. While this is undoubtedly true, as witnessed by a large literature⁵⁹, some functionalities linked to the integration of the digital platforms into ecosystems have generated efficiencies for consumers that can access a vast amount of services from the same universe and with a single password. Some measures that are intended to increase contestability and allow for a wider range of providers in the market – while aimed at preventing ecosystems from becoming overly dominant – may erect barriers to consumer access or usage (see also Box 4 and Box 5 on data issues).

We now turn briefly to two more objectives present in most of the initiatives, innovation and transparency.

3.3. Innovation and transparency

Other motives highlighted by the regulatory initiatives include the desire to spur innovation on the one hand, and to allow for more transparency on the other (e.g. regarding terms and conditions or other information available to users on the services provided by designated firms), whether for competing businesses or consumers. The European Commission has been concerned about a perceived lack of competitiveness and innovation of the European digital sector (European Commission, 2020^[18]). The Explanatory Memorandum and recitals of the DMA contain numerous references to the need to stimulate innovation.

In particular, Recital 79 stipulates that

The objective of this Regulation is to ensure a contestable and fair digital sector in general and core platform services in particular, with a view to promoting innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector.

Several provisions impose the sharing of and granting access to data with a view to enhancing the innovative potential of smaller firms (see section 5.3 for a discussion on this). The UK's Digital Taskforce is even more geared towards stimulating innovation as a key leitmotif. Much as the DMA links fairness and contestability (usually having the two words in the same sentence), so the DMT links "competition and innovation". In fact, "innovation" occurs 65 times in the report to the CMA, and is a central objective of the future Digital Markets Unit that the Taskforce advocates (see next section for more information). Recommendations 12 and 13 stress the importance of creating the right framework for competition and innovations, and addressing conduct that can impede innovation.

Stimulating innovation by preventing abusive conduct which may reduce incumbents' incentives to innovate is found in the US Bill No. 3816 (*American Choice and Innovation Online Act*) which lists three main and 10 additional discriminatory conducts that ultimately prevent competition and innovation and that will be found unlawful.⁶⁰ While the German Competition Act as amended does not stipulate innovation as an objective, it is notable that the degree of innovation stimulated by competitive pressures is one of the mitigating criteria when assessing the market power of an undertaking.⁶¹ The Japanese Act on Improving Transparency and Fairness, while not seeking directly to promote innovation highlights innovation as an underlying factor driving technological change. This

*creates new industries utilizing data, changes the socio-economic structure on a global scale, and plays the role of digital platforms. Given the growing importance, it is becoming an issue to protect the interests of users who provide products, etc. while giving consideration to the independence and autonomy of digital platform providers. Improving the transparency and fairness of specific digital platforms by designating platform providers, disclosing provision conditions, etc. by specific digital platform providers, evaluating the transparency and fairness of specific digital platforms (...)*⁶²

Neither the French nor the Italian proposals refer to innovation.

A related aspect, or one which may contribute to stimulating innovation, is that of transparency. Most of the regulatory initiatives contain provisions that seek to increase transparency in order to address a concern about the asymmetry of information between platforms and users.

Observations

Measures that seek to stimulate innovation and transparency in the regulatory initiatives are highly complementary to the two objectives of fairness and contestability. If the overarching goal of reforming the digital sector is to improve welfare (European Commission, 2020^[18]), then these objectives need to form a whole. The link between competition and innovation has been empirically established by several authors, although there is some disagreement about the exact nature of the relationship. Generally speaking, there is evidence that intervening to promote competition will increase innovation. Firms facing competitive rivals innovate more than monopolies (although *after* such competition a firm may of course end up with a monopoly through a patent). The relationship is not simple: it is possible that moderately competitive markets innovate the most, with both monopoly and highly competitive markets showing weaker innovation (OECD, 2014^[55]; Aghion et al., 2005^[56]).

(Crawford et al., 2021^[45]) discuss in detail regulation of the digital platforms and innovation. They join the proposals to promote fairness and contestability in the regulations and stress that "fairness can increase the rewards to innovation and contestability can make it easier for more innovative firms to compete".⁶³

They counter the argument that more regulation might stifle innovation by the platforms, stating among others that the key difference in innovation is:

*the difference between the absolute level of innovation by today's platforms compared to the level of innovation we would see if those platforms faced more competition. It is the difference between the two that matters for regulatory policy.*⁶⁴

In particular, they argue that increasing the contestability of the digital markets is likely to increase innovation, both by incumbents, and by entrants. Such measures are further supported by provision that increase transparency (of the usage of data, for instance). First, because it may provide essential inputs for competing firms, second, because it will increase the accountability of those holding the data and third, it will empower users and consumers.

With regard to transparency, this has also been a concern for policy makers for a while, not least in business relationships.⁶⁵ It may be said that transparency is a necessary, but not sufficient condition for a well-functioning, competitive digital market place. Transparency may help to tackle opacity or the "black box" functioning of platforms, especially their use of algorithms and artificial intelligence (Fletcher, 2020^[3]) (Ezrachi and Stucke, 2016^[57]) (OECD, 2016^[28]). Transparency principles are also intended to support choice by ensuring that platforms provide sufficient information to users, so that they are able to make informed decisions (Competition and Markets Authority, CMA, 2020^[10]). They are less helpful, however, for small companies (clients, suppliers or competitors) with no bargaining power. With more transparent rules they can more easily adapt, yet the rules are still set by the operator with superior bargaining power (Marsden and Podszun, 2020^[6]). Even so, enforcing transparency to reveal the usage of data, or the functioning of an algorithm is a step towards facilitating market access.

In sum, a central objective of most of the regulatory initiatives is to limit the dominant platforms' ability to exploit their market power by restricting or distorting competition either in their own or in related markets, and preventing this dominance from spilling over into new markets (Schnitzer et al., 2021^[44]). An *ex ante* regulation is necessary to complement *ex-post* competition enforcement, either to promote competition directly through stimulating entry (Carugati, 2020^[17]) or to replicate competitive outcomes where no actual competition is plausible, for instance through regulating output or prices or vertical relationships with suppliers and clients. In the digital economy in particular, according to (Carugati, 2020^[17]), if the goal of the regulation is to break the root causes of dominance by promoting transparency and consumer choice by reducing switching costs (e.g. by implementing data interoperability, interoperability and in exceptional cases mandatory data-sharing) then the regulation might be considered as a success.

Section 5.3 discusses the various provisions that aim to stimulate innovation and improve transparency to the benefit of consumer choice and trust.

Sub-Conclusion

To round off the whole section on the objectives and purposes of the regulations under discussion here, from what we have seen above it seems that they stem from a desire to find measures that address common concerns related to the digital platforms' ability to leverage their market power to engage in exclusionary or exploitative conducts. In addition, other policy concerns appear to form part of the intentions, such as the promotion of more fairness or equity beyond the platform itself, or the ability to monitor content. However, not all objectives of the regulations are explicitly enounced, which is unfortunate, as it leaves ample room for interpretation of the legal text and does not provide sufficient guidance for their enforcement (Budzinski and Mendelsohn, 2021^[19]) (Crawford et al., 2021^[45]). Rather, the objective sometimes needs to be inferred from the scope and content of the provisions. The absence of clear definitions in some cases may prove problematic for its future enforcement as also discussed in the section on fairness, *supra*. Without clearly stated and defined goals, there is a risk that the listed obligations appear like a "haphazard set of rules of an incomplete rule book, which is uncertain of its own

end-goals" (Budzinski and Mendelsohn, 2021^[19]). Where the underlying rationale seems clear, as a natural extension of the multiple reports, advice and public consulting over the past two years, some of the draft regulations would gain in usefulness from defining clearly the terms employed (Crawford et al., 2021^[45]).

Our paper now turns to a discussion of the regulatory measures themselves, first analysing their scope and application, before turning to the way they aim to address the objectives listed here, in particular exclusionary and exploitative or abusive conduct.

4. Key measures contained in the main regulatory initiatives

This section provides an overview of the scope of the regulations and the key approaches chosen by the various jurisdictions, aiming at identifying points of convergence and divergence. In particular it will deal with

- The scope of application; first *ratione materiae* (sectors and activities), then *ratione personae*, namely rules, criteria and procedures to identify the addressees of the new *ex ante* regulations as well as the institutions tasked with applying the new rules (the "Who" of the regulations);
- The models and procedures to determine the specific obligations and prohibitions applicable to designated firms, including the extent to which it is possible to put forward objective justifications, and/or carry out a case-by-case analysis (the "How").

4.1. Scope of application and the subjects of the provisions ("Who?")

4.1.1. Scope of application of the proposed regulations

The regulations and initiatives under discussion do not all have the same scope of application *ratione materiae* and thus apply to different sectors and economic activities.

Some regulations are not explicitly limited to a specific sector and could apply irrespective of the specific economic activity:

- The German *ex ante* provisions apply to undertakings active to a significant extent on multisided markets and networks.⁶⁶ While this includes all sorts of digital platforms (e.g. search engines, online marketplaces, mobile Operating Systems (OS) and app stores, video and audio streaming platforms, online dating platforms), it is not limited to digital markets and could in theory also cover traditional two-sided markets such as shopping centres, advertising-financed media newspapers, or TV (Franck and Peitz, 2021, p. 515^[33]);
- The Italian proposal is addressed in particular to markets that see the presence of a digital platform or of undertakings that need such a platform to have access to final consumers or suppliers, although the proposed text of the provisions is not specifically and explicitly limited to such markets;⁶⁷
- The French proposal on structuring firms does not refer to any specific type of economic activities or services;⁶⁸

Other initiatives refer broadly to digital markets:

- The UK Digital Markets Taskforce's (DMT's) advice targets digital markets in general. Its purpose is "to address harm arising from the market power and strategic position of the most powerful digital firms that have extensive reach and influence over many aspects of our lives."⁶⁹ However, at the moment of the designation, the Digital Markets Unit (DMU) will identify specific activities to which the code of conduct will apply.

- The Japanese Act on Improving Transparency and Fairness only concerns digital platforms defined as websites or other online space used by a large number of people to share goods, services or rights.⁷⁰ In addition, it includes digital services to be provided to persons through the Internet and other advanced information and communication networks, with the specific exclusion of broadcasting, as defined by the Broadcasting Act (Act No. 132 of 1952).

Finally, other proposals list specific digital services provided by designated firms to which the new regulations will apply:

- The EC's draft Digital Markets Act ("DMA") Art. 2 (2) lists eight so-called "core platform services" that are of concern:
 - online intermediation services;
 - online search engines;
 - online social networking services;
 - video-sharing platform services;
 - number-independent interpersonal communication services;
 - operating systems;
 - cloud computing services;
 - advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed above;

This list can be expanded further in the future, following a market investigation under Article 17 of the DMA.

- The US bills identify three broadly defined categories of online platforms that will be covered by the proposed rules⁷¹
 - A website, online or mobile application, operating system, digital assistant, or online service that *"enables a user to generate content that can be viewed by other users on the platform or to interact with other content on the platform"*
 - A website, online or mobile application, operating system, digital assistant, or online service *"that facilitates the offering, sale, purchase, payment, or shipping of goods or services, including software applications, between and among consumers or businesses not controlled by the platform"*
 - A website, online or mobile application, operating system, digital assistant, or online service *"that enables user searches or queries that access or display a large volume of information."*

Observations

These initiatives seem to take different views of how to define the economic activities within their scope. Some regulations are not at all limited to specific economic activities and apply across markets. Whether they will focus on specific digital markets or issues will mostly depend on their actual application. Concerning those initiatives that are limited to specific services, i.e. the US bills and the DMA, there is significant overlap between the services listed in the DMA and the *American Choice and Innovation Online Act*⁷². For example, the first broadly defined category of the US provisions (which refer to websites, OS or services that enable a user to generate content that can be viewed by other users) encompasses at least two specific core platform services listed in the DMA, namely online social networking services and video-sharing platform services. Similarly, there seems to be a significant overlap between the third category listed in the US bill on user searches or queries and the DMA's category of online search engines.

However, there are also differences in the spectrum of services covered. For example, the US bill does not explicitly encompass number-independent interpersonal communication services. While one may

argue that they have some social networking functionality and thus fall within the second category above, the application of the US provisions to such services is not entirely clear (Schnitzer et al., 2021, p. 7_[44]). Similarly, the US bill does not separately cover advertising services. Such services will likely be captured only to the extent that they form an intrinsic part of the platform business model, e.g. where they are the means for the platform to cross-subsidise its free-of-charge services, although this is not entirely clear (Schnitzer et al., 2021, p. 7_[44]). On the other hand, the US bill can potentially capture additional services under the third above-mentioned category, such as virtual assistants and browsers that are not listed under the DMA (Schnitzer et al., 2021, p. 8_[44]).

At the same time, listing in an exhaustive manner specific services to which the new rules will apply, as is the case of the DMA, can have both its advantages and disadvantages:

On the one hand, a precise list laid down in the law provides legal certainty and ensures targeting only those (platform) services that, based on experience, have seen or are likely to see most competition problems, although this goal could also be achieved through the designation process (by identifying specific services covered in the designation decision) (Schnitzer et al., 2021, p. 8_[44]). The DMA explicitly highlights that core platform services have certain features that can be exploited by their providers. These include extraordinary scale economies, very strong network effects, an ability to connect many business users with many end users through the multi-sidedness of these services, a significant degree of dependence of both business users and end users, lock-in effects, a lack of multi-homing, vertical integration and data-driven advantages.⁷³ Some authors highlight that there is already evidence that markets of certain listed services (like search engines, social networking and operating systems) show a high degree of concentration and a resulting dependency of business users on certain platforms, while for other services (messaging, cloud computing) similar dynamics may be possible though less compelling (Schweitzer, 2021, p. 15_[58]).

On the other hand, listing specific activities may run counter to the objective of laying down future-proof regulations and seems instead to reflect current competitive relationships among services that might change in the future. For example, the DMA only covers video-sharing platform services but, according to some authors, does not seem to cover subscription-based video and audio streaming services (Cappello, 2021_[59]) (Budzinski and Mendelsohn, 2021, p. 14_[19]). Yet, there are strong arguments suggesting that there exists some competition between these services (Budzinski, Gaenssle and Lindstädt, 2021_[60]). For example, according to (Budzinski and Mendelsohn, 2021, p. 14_[19]) a video-sharing platform like YouTube offers the possibility to rent movies, thus addressing similar consumer needs as those of subscription-based video streaming services without requiring a subscription. By contrast, including specifically defined services in the regulations may lead to applying a different treatment to competing services, depending on the business model adopted by the operator, e.g. whether it chose to provide a subscription-based platform or a service enabling sharing videos on demand through an advertised-financed platform. In sum, given the rapid pace of innovation, with a constant introduction of new services and new features that change competitive dynamics; and given that in any case there is a designation process that ensures legal certainty as it will identify the specific services/activities to which *dos* and *don'ts* apply eventually, there are arguments in favour of having a broad scope of application of the measures.

4.1.2. Definition of firms subject to ex ante rules

As noted above in Section 2. and in (OECD, 2018_[61]), digital markets show certain specific features that are inclined to give rise barriers to entry. Competition-for-the-market dynamics, multi-sidedness, network effects and strong economies of scale and scope can make it more difficult for new competitors to enter and thus make certain digital markets, such as digital platform markets, easily prone to market tipping. While dominance is not prohibited per se, once a dominant platform is established in light of these features, it is difficult for rivals to dislodge it. The dangers associated with dominant conglomerate firms are

particularly worrisome when they become “gatekeepers”, i.e. economic agents that control access by a group of users to certain products or to another group of users (Bourreau and de Stree, 2019^[62]).

With regards to digital platforms, (Bourreau and de Stree, 2019^[62]) identify two scenarios in which the presence of a gatekeeper may restrict competition:

- A gatekeeper controls access by other firms to certain users. If consumers do not multi-home (i.e. they only use the gatekeeper’s platform), firms that wish to offer their new products have no alternative than using that platform in order to have access to single-homing consumers. For instance, given its large user base, Facebook may control access to users (in particular those that spend significant time on that platform) by advertisers, who have no viable alternatives to reach those same users than using Facebook’s social network (Bourreau and de Stree, 2019, p. 19^[62]).
- A gatekeeper controls customers’ access to products or services, thus being able to influence their consumption patterns, e.g. by showing results in its search engine in a certain ranking. For example, Google search can show search results in a certain ranking, thus influencing users’ choice and diverting it towards certain products or suppliers. Similarly, Spotify could use its recommendation system or its “weekly discover” function to divert users to certain music providers (subsequently threatening them in case they decide to increase their royalties to display their music content) (Bourreau and de Stree, 2019, p. 19^[62]).

Under both scenarios, certain market characteristics and consumer behaviours are particularly important for a gatekeeper position to materialise:

- The extent of a firm’s market power in the upstream intermediation market or in the market for users’ terminals (mobile phones, tables, operating systems). For example, though not being dominant, a platform operator can be the only or main provider of intermediation services;
- The durable or transitory nature of the firm’s market power, including entry barriers to existing or future services (CERRE, 2020^[20]);
- Existence of businesses that depend on the gatekeeper’s product, service or position (CERRE, 2020^[20]);
- Whether users multi-home or at least can switch to alternative suppliers, i.e. whether they use one or more services or just remain within one ecosystem for example;
- Consumer biases, such as framing bias (being influenced by the way different options are presented), salience bias (focusing on the most prominent choice item), and default bias (accepting the default option),⁷⁴
- A firm’s vertical integration, or ecosystem, that may provide an incentive to leverage market power in other markets and foreclose competitors;
- Access to competition-relevant inputs, such as data, that enable the firm to offer better products or services and tailor them to customers, while competitors do not dispose of the same advantage.

These elements are all to a wider or lesser degree reflected in the different *ex ante* regulations discussed here. While regulations use different denominations to refer to the undertakings subject to the new provisions (e.g. “gatekeeper” in the DMA, “undertakings of paramount significance for competition across markets” in Germany, firms with “strategic market status” in the UK, “structuring firms” in the French proposed law, “firms with primary importance for competition in several markets” in Italy, “covered platform operator” under the US bills), the **qualitative criteria** to identify them refer for example to:

- the firm’s ability to control third parties’ access to supply and sales markets⁷⁵ and act as an “*important gateway for business users to reach end users*”,⁷⁶
- the firm’s entrenched market power that is durable and is not likely to be competed away in the short term;⁷⁷
- the firm’s vertical integration;⁷⁸

- the firm's access to data relevant for competition.⁷⁹

However, there are also differences and divergences in the criteria adopted.

First, the German Act, and the French and Italian proposals, refer to the concept of dominance across one or several markets, thus requiring at the outset the definition of the relevant market (Franck and Peitz, 2021^[33]) and possibly the finding of a dominant position (including analysis of the features of the relevant market as well as the firm's position in relation to its rivals).⁸⁰ The DMT and the EC take a different stance and, while stressing the importance of direct evidence of entrenched market power (e.g. substitutability, competitive rivalry, barriers to entry and expansion),⁸¹ they do not require a finding of dominance or even a definition of the relevant market. The DMT highlights this aspect very clearly when observing that

*Formally defining the relevant market involves drawing arbitrary bright-lines indicating which products are 'in' and which products are 'out'. Attempting to draw such bright-lines is often unnecessary. The relevant evidence can be analysed and interpreted without having formally defined a relevant market. For example, internal documents discussing competitors, views from customers or competitors on substitutes and evidence of customer switching can be analysed without having defined the relevant market. Market shares can also be calculated on multiple different bases and interpreted without concluding on market definition. Drawing such bright-lines also adds unnecessary complexity. For instance, it can create unnecessary duplication and inefficiency as the same evidence is considered twice: once when defining the relevant market and a second time when assessing the position of a firm within that market. Similarly, it can lead to questions being formulated in abstract and indirect ways that are poorly related to the available evidence. Finally, formal market definition also encourages a narrow approach in which each product or service is allocated to a specific market making it difficult to consider important interactions within an ecosystem of products. This makes formal market definition particularly ill-suited to digital markets where firms may have developed complex ecosystems of interrelated products.*⁸²

Under some of the *ex ante* initiatives under discussion, the finding of (entrenched) market power might require some form of market definition. In this case, it would entail for instance assessing whether there are viable alternatives to the gatekeeper's product or service. However, this would cut across some of the rationale for moving towards *ex ante* regulation of these markets in the first place, which is to enable more timely interventions before any harm occurs. There is a risk that the formal requirement to define the relevant market and possibly identify a dominant position as a condition to designate relevant firms might have increase substantially the duration of the proceedings (for instance by raising disputes about the correct market definition) (Franck and Peitz, 2021, p. 517^[33]) and the effective application of the new *ex ante* rules (Botta, 2021^[31]), re-introducing an element of rigidity that runs counter the objective of timely addressing structural competition problems in dynamic markets characterised by disruptive innovation (CERRE, 2021, p. 11^[63]).

While the qualitative criteria are similar across regulations, the DMA, the DMT's advice, the Japanese Act on Transparency and Fairness as well as certain US bills provide for **specific turnover-based or market capitalisation-based thresholds** that apply irrespective of a finding of dominance in order to identify firms subject to the new regulations. The purpose of such quantitative criteria is to ensure that new regulations cover the platforms of the very biggest firms that have extensive ecosystems and that so far have raised most competition concerns (Schnitzer et al., 2021^[44]). The DMA and the US bills also add a criterion relating to the **number of active end users and active business users** of the platform.⁸³ The DMT's advice only mentions the number of users as a possible criterion to assess the size or scale of the firm and highlights that *"the most appropriate metric is likely to depend on the specific context."*⁸⁴ Unlike the US bills, the DMA gives the EC some flexibility to designate a gatekeeper even when such turnover-based and number-of-users-based thresholds are not met. This will be possible following a market investigation assessing the size of the provider, the number of business and end-users that rely on the platform, the entry barriers and other structural factors.⁸⁵ On the one hand, the greater flexibility of the EU provisions reflects a stronger focus on proportionality to avoid targeting firms without good justification while allowing capturing firms that do not formally meet the quantitative criteria. Furthermore, it aims to make the new rules future-proof and

to avoid that service fragmentation be strategically used by companies to avoid meeting the quantitative criteria (Schnitzer et al., 2021, pp. 5, 10, 11^[44]). On the other hand, such flexibility might create ambiguity about the outcome of the designation process and raise costs and risks for firms that need to self-assess whether they fall within the scope of the new provisions.

By contrast, although it also considered the option of introducing turnover-based thresholds for the purpose of designating firms with paramount cross-market significance (Mundt, 2021^[64]), Germany eventually introduced specific turnover-based thresholds only under its new merger control rules and not as a criterion to identify firms subject to the new *ex ante* prohibitions. The new merger control rules as per their last amendment give the *Bundeskartellamt* the power to order an undertaking to notify every concentration in one or several specific sectors of the economy.⁸⁶

4.1.3. The process of designating the relevant firms subject to *ex ante* regulation

The new *ex ante* regulations broadly adopt two different models concerning the way in which relevant firms are identified:

- Under the first model, companies need to **self-assess** whether they meet the qualitative and, if any, quantitative criteria laid down in the law, the cabinet order or the guidelines. If they meet such criteria, they must **notify** the competent authority and provide all relevant information. This is the model proposed in the EU, although Article 3(3) of the DMA provides that in case the company fails to notify, the EC is not prevented from designating such firm as a gatekeeper. This is also the model adopted under the Japanese Act on Improving Transparency and Fairness.⁸⁷
- Under the second model, the competent authority must **designate** the firms subject to the *ex ante* regulations, and address a decision to them or include them on a list of firms to which the new rules will apply. This seems to be the model adopted in Germany,⁸⁸ and proposed in France,⁸⁹ Italy,⁹⁰ the UK,⁹¹ and in four of the bills presented in the US,⁹² as in none of these provisions there is any mention of a notification obligation imposed upon firms.

Furthermore, the DMA establishes a reversal of the burden of proof and requires the provider to show with its notification that, although formally meeting the quantitative thresholds, it does not satisfy the qualitative requirements (contrary to what happens under Article 102 TFEU whereby it is for the authority to show to the requisite legal standard that the firm is dominant). However, the UK Digital Markets Taskforce (DMT) clearly advises against such reversal. The DMT recommends instead that the authority “bear the evidential and legal burden of establishing that a firm should be designated as having SMS [strategic market status] and discharge that burden to the ordinary civil standard, on the balance of probabilities”.⁹³

Finally, under all proposals, decisions identifying relevant firms are periodically reviewed, every two years (e.g. under the DMA) or every five (e.g. in Germany, Italy and the UK) or ten (e.g. US) years.

4.1.4. Institutional setting: the authority in charge of enforcing the new *ex ante* rules

When it comes to the body in charge of enforcing the new rules, three models can be identified:

- Under one model, the **competition authority as currently structured** is tasked with enforcing the new rules. Thus, the new rules do not explicitly require creating a new unit within the competition authority or establishing a new body. This is the model adopted in Germany⁹⁴ and proposed in Italy⁹⁵ and France,⁹⁶ where the provisions as currently drafted only refer to the national competition authority without further specifications or requirements.
- A similar model has been proposed under some of the US bills, which task the competition authorities (FTC and DOJ) with the power to enforce the new rules. The difference compared to the previous model reflects the specificities of the US system and concerns the **plurality of**

responsible bodies, since not only the FTC and the DOJ will be charged with the task, but also any attorney general of a State, who may bring a civil action for violation of the new provisions.⁹⁷

- Finally, under a different model, a **specialised unit or body** is established within or outside the competition authority. The DMA provides for the establishment of a new specialised unit with 80 new staff by 2025 (assuming the DMA is adopted by 2022), although it is not clear whether this will be placed within DG Competition, established as a separate department (Botta, 2021^[31]) or as an across-DGs department involving the three leading DGs (DG COMP, DG GROW and DG CNECT, that, pursuant to the proposed provisions, will bear the administrative expenditure) (Budzinski and Mendelsohn, 2021, p. 11^[19]). With regards to co-operation of this new unit, the DMA establishes the Digital Markets Advisory Committee⁹⁸ and provides that national competition authorities shall not take decisions that run counter to a decision adopted by the Commission. However, while generally referring to the need of close co-operation of enforcement actions,⁹⁹ the DMA does not set any specific rules on co-operation mechanisms with other EU or national bodies, despite the risk of overlaps with sector regulators or ex post competition law enforcement (since many of the conducts tackled under the new *ex ante* rules could also be - and have been in the past - targeted ex post pursuant to competition law).
- While adopting a similar model, the DMT provides more details on the proposed institutional setting. It recommends creating a specialised Digital Markets Unit (DMU) with “primacy” over the application of the new rules, but also recommends sharing the power to set and enforce the code of conduct with Ofcom and the FCA.¹⁰⁰ The UK’s DMU is also set up to co-operate and share information with national and foreign counterparts. The DMU was established within the CMA in April 2021 to focus on operationalising and preparing for the new regime when this comes into force.¹⁰¹ To foster co-operation among authorities with different competences on regulations of digital markets, the UK has also established the Digital Regulation Cooperation Forum (DRCF) as explained in Box 2 below.

Box 2. The UK Digital Regulation Cooperation Forum

In July 2020, the Competition and Markets Authority (CMA), the Information Commissioner’s Office (ICO) and the Office of Communications (Ofcom) established the Digital Regulation Cooperation Forum (DRCF). Its goal is to foster greater co-operation between the three authorities with respect to regulation of digital markets. The Financial Conduct Authority (FCA) joined as a full member of the DRCF in April 2021.

These public entities hold different competences regarding regulation of digital markets, comprising matters of competition, consumer protection, information rights, and the regulation of online content, media and news plurality, and financial services.

In order to ensure coherent, informed and responsive regulation, the newly established DRCF has six objectives:

- Collaborate to advance a coherent and effective regulatory approach by the competent bodies that are in charge of different aspects of the digital economy, through open dialogue and joint working;
- Inform regulatory policy making by using the expertise of all member bodies to develop solutions to regulate the digital space;
- Improve regulatory capabilities by sharing knowledge and resources to ensure that all bodies have the expertise, tools and skills to carry out their functions in an effective way;
- Foresee future developments in online services by promoting common understanding of emerging digital trends;
- Promote innovation by sharing experiences and knowledge;

- Strengthen international engagement by exchanging information and best practices concerning approaches to the regulation of digital markets.

The DRCF does not have any decision-making powers and does not provide formal advice or direction to its members. Co-ordination with other networks and government bodies beyond its members will also be possible.

In March 2021, the DCRF published its work plan for 2021/2022, announcing that it will focus on three priority areas:

- Providing strategic response to industry and technological developments;
- Developing joint and coherent regulatory approaches;
- Building skills and capabilities by sharing knowledge, expertise and resources.

Here are two examples of what the DRCF is currently involved in. In January 2021, the CMA opened a formal investigation into Google's plan to remove third party cookies and other functionalities from Google Chrome and replace them with a new set of tools for targeting advertising and other functionality that will allegedly better protect consumers' privacy. In order to address legitimate privacy concerns without distorting competition, the CMA has discussed with the ICO through the DRCF. Second, the DRCF is acting as a co-operation forum in the ICO's investigation into the use of personal data in real time bidding in digital advertising. While ICO focusses on the data protection aspects of such a system, the DRCF will ensure that the CMA's considerations on the impact on competition are duly included in the probe.

Source: <https://www.gov.uk/government/publications/digital-regulation-cooperation-forum/>; https://www.ofcom.org.uk/__data/assets/pdf_file/0017/215531/drcf-workplan.pdf; https://ico.org.uk/media/about-the-ico/documents/2619734/drcf-response-to-dcms_-_v3-april-12.pdf; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987358/Joint_CMA_ICO_Public_statement_-_final_V2_180521.pdf.

4.2. *Dos and don'ts* ("How?")

Once the firm has been designated according to the above requirements, certain positive or negative obligations (may) apply to it. This section analyses the form that these obligations take, in light of the objectives of the proposed regulatory regimes.

4.2.1. *Per se prohibitions, justifications, and further considerations*

The analysis that must be carried out by the authority in order to impose behavioural obligations varies significantly under the different regulations, although none of the provisions require the competent body to prove the anticompetitive object or effects of a conduct. On a spectrum of the extent to which firms can justify their conduct to avoid that certain *dos* and *don'ts* apply to them, the rules can approximately be divided as follows:

- On one side of the spectrum, the DMA includes an exhaustive list of positive and negative obligations that apply **quasi-automatically** to designated gatekeepers, regardless of the specific business model (Cappai and Colangelo, 2020, p. 19_[7]), or the exact definition of the product or geographic market in which they operate. From the firm's perspective, once it has been designated as a gatekeeper, the firm will not be able to justify its behaviour, for instance by arguing that it brings efficiencies (e.g. innovation, better service quality that benefits final consumers) or that it does not have any foreclosure or exclusionary effect on competitors (Chirico, 2021_[65]) (CERRE, 2021, p. 33_[63]). This will likely speed up the regulatory process (Cabral et al., 2021, p. 10_[2]). The DMA makes this point very clear when it notes that only "*in exceptional circumstances, justified on the limited*

grounds of public morality, public health or public security”, the EC can decide that a certain obligation does not apply to the specific core platform service.¹⁰²

- On the opposite side of the spectrum, the DMT’s advice **does not lay down any pre-defined obligations** or per se prohibitions, and rather sets out general objectives to pursue when the DMU designs the code of conduct with the SMS firm. They would provide for exceptions, since in specific circumstances a conduct might be necessary or objectively justified, as it brings efficiencies, innovation or other benefits.¹⁰³
- The US, German and Italian initiatives seem to lie in the middle of the spectrum. Both the German Act and the Italian proposals explicitly give undertakings the possibility to prove that their conduct is “objectively justified.” The explanatory memorandum accompanying the proposal of the German amendments states that

*within the context of objective justification, a balancing of interests is required, which, on the one hand, takes into account the law’s objective of protecting free competition and, on the other hand, the legitimate freedom of business and possible pro-competitive elements’ of the conduct in question.*¹⁰⁴

For example, the *Bundeskartellamt* will be able to consider efficiency defences put forward by the firms (which could argue that certain listed prohibitions are not objectively justified under the specific circumstances) (Botta, 2021, p. 6_[31]), the impact of the conduct on the market, what market is at stake and what the chance of success is if it were to impose certain obligations with a view to ensuring market contestability and free competition (Mundt, 2021_[64]).

Similarly, though not granting them room for an efficiency defence, the US proposals allow firms to present an “affirmative defence” of a conduct that breaches the regulatory requirements by proving that their conduct does not harm the competitive process or is necessary to prevent a violation of the law, or to comply with privacy rules.¹⁰⁵ Nevertheless, to avoid slowing down the application of the *ex ante* rules and undermining the initial objective of such rules, the provision puts the burden of proof on the firm, which must submit “clear and convincing evidence” and cannot offset a harm to competition with any benefits such as efficiencies or quality enhancements (Schnitzer et al., 2021, p. 20_[44]).

4.2.2. Principles-based and rules-based regulations

The previous section discussed the room available to the enforcement body and the designated firms, respectively, to conduct an effects-based analysis and submit objective justifications of a certain conduct. This section deals with a similar but distinct aspect, i.e. how and to what extent *dos* and *don’ts* can be tailored to the designated firm.

One of the main differences between the *ex ante* regulations under discussion concerns indeed the level of detail that the prohibitions will have and the discretion granted to the enforcement body when defining the prohibitions and obligations imposed upon the designated firm. In other words, while certain regulations seem to define an exhaustive rigid list applying to all designated firms, others give the authority in charge of applying the new rules the power to adapt them to the specific firm or business model, thus tailoring the *dos* and *don’ts* to the specific business model.

On the one hand, certain *ex ante* provisions provide for **principles-based regulations**, thus granting flexibility both to the authority when defining the applicable obligations and the firm when applying them.

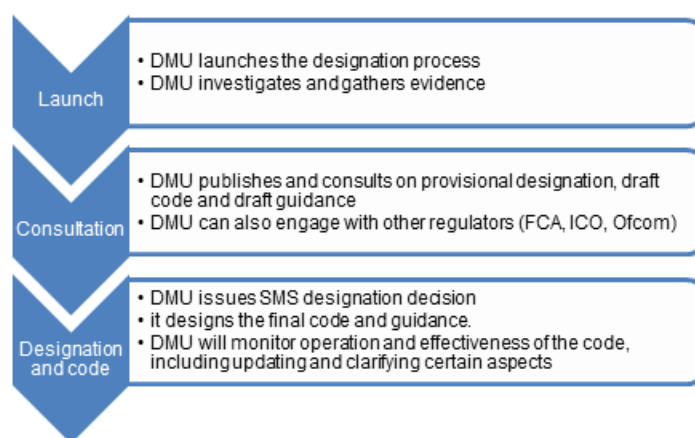
- This is the case of the advice of the DMT. It calls for an “evidence-based approach, with interventions targeted at addressing particular problems rather than relying on ‘one-size-fits-all’ rules”¹⁰⁶ and recommends laying down general goals while requiring a case-by-case assessment (Cappai and Colangelo, 2020_[71]).¹⁰⁷ *Dos* and *don’ts* (in the form of goals to achieve and principles to comply with) shall be **tailored to each firm and address specific possible conducts of the designated firm** so as to influence its specific behaviour upfront, with the aim of preventing significant harm before it

materialises. This is the recommendation of the DMT, which suggests introducing a specific code of conduct for each SMS firm. The code of conduct should lay down:

- the specific objectives that it seeks to deliver (e.g. fair-trading, open choices, trust and transparency) taken from a list of **common objectives exhaustively set out in legislation**;
- the **principles** and standards as to how the firm should behave, including what a firm must or must not do in order to achieve the objectives (e.g. trading on fair and reasonable contractual terms, providing clear information to consumers in relation to the services they receive, not imposing undue restrictions on the ability of customers to use other providers that compete with the SMS platform). Unlike a narrow blacklist of specific restrictions, these principles would be high-level without being too prescriptive (e.g. they shall not define whether firms should provide information on price or delivery format of their services) in order to keep flexibility to address firms' changing and evolving behaviours. Also, they would provide for exceptions, since in specific circumstances a conduct might be necessary or objectively justified, as it brings efficiencies, innovation or other benefits; and
- guidance on the interpretation of those principles, with non-exhaustive "*examples*" of prohibited conducts (e.g. a term may be unfair to consumers if it is applied by default and benefits the SMS firm by comparison to alternatives, unless there are offsetting benefits to advertisers from the default option).¹⁰⁸

While the code of conduct would be designed by the DMU, it would be informed by the consultation held during the designation process.¹⁰⁹

Figure 1. DMT's proposed process for making the code



Source: adapted by OECD authors from DMT's advice, Appendix C, p. C26

On the other hand, a second group of provisions provide for specific **rules-based regulations**. In other words, rather than setting out principles, the competent authority will impose specific *dos* and *don'ts*. Yet, the room left to authorities in the definition of the applicable prohibitions varies significantly across jurisdictions:

- A first sub-group of regulations includes specific **positive and negative obligations** that apply as **such** to the designated firm, while the competent authority does not have any flexibility to extend or reduce the obligations applying to the designated firm. In other words, once the firm has been identified, there is no room for tailoring the *dos* and *don'ts* to the specific case. To a certain extent, this is the model adopted by the DMA, as the listed conducts have already been identified as *per se* harmful, ("*taking into account the features of the digital sector*" and the "*experience gained, for*

example in the enforcement of the EU competition rules”¹¹⁰ and therefore are of immediate application (Chirico, 2021_[65]), although there is some scope for flexibility in the DMA.¹¹¹

- A second sub-group of regulations give authorities a margin of discretion and enables them to **select applicable *dos* and *don'ts* among a set list of positive and negative obligations** laid down in the law. This is the case in Germany and in Italy. In Germany, the *Bundeskartellamt* “may prohibit” the undertaking with paramount cross-market significance from implementing conducts listed und Section 19a(2) of the German Act. The use of the term “may” suggests that, before the prohibitions apply to a firm, the authority can conduct a more case-specific analysis and choose, for each firm, whether those prohibitions should apply or not (Mundt, 2021_[64]). However, the *Bundeskartellamt* can only impose the obligations listed in the law. Only the Ministry for Economic Affairs and Energy can initiate the procedure to expand the list of *dos* and *don'ts* after four years by presenting a report to the Parliament. In other words, the list of prohibited conducts is exhaustive, and while the *Bundeskartellamt* can impose fewer prohibitions on designated firms, it cannot impose additional prohibitions. Similarly, if approved, the new Italian provisions would give the Italian Competition Authority the power to prohibit the designated firm from implementing certain listed conducts.^{112 113}

However, the boundaries between the three models are not so clear-cut and there will still be room for interpretation. The DMA lists the *dos* and *don'ts* that apply to any designated gatekeeper and the EC cannot reduce or extend the list in relation to a certain gatekeeper. On the other hand, firms will still have room of manoeuvre since the specific content of the positive or negative obligations will allow the firm to determine which provisions apply to it in practice (CERRE, 2021, p. 32_[63]). In other words, the measures are asymmetric (e.g. the obligation to allow installation and effective use of third-party software application using the gatekeeper’s operating system will only apply to suppliers of an operating system), while others are universally applicable (e.g. the prohibition to prevent business users from raising issues with a public authority in relation to a practice of the gatekeeper).

Yet, it will be for the gatekeeper to self-assess which provisions apply in practice to its specific service or business model. The risk is that, whenever the enforcing authority finds a breach of the *ex ante* rules, litigation may arise as to whether material conditions existed for specific prohibition or obligation to apply to the firm’s business model or services, which are very heterogeneous (e.g. social network, non-transaction platform, non-transaction matching platform, etc.) (ARCEP, 2020_[66]) and thus whether the gatekeeper was under an obligation to comply (Mundt, 2021_[64]). An example is the obligation to ensure interoperability, provided for under Article 6(1)(c) of the DMA, which only applies to the use of third-party software applications or application stores using the gatekeeper’s operating system. The gatekeeper can take proportionate measures in order to avoid that third-party software endanger the integrity of its system. In case litigation arises as to whether a measure is proportionate, this would be similar to a competition law investigation (with the notable exception that the firm rather than the authority would bear the burden of proof), thus potentially reducing the advantage of having *ex ante* regulations in place (Mundt, 2021_[64]).

On the other hand, a firm-specific or case-by-case approach might reduce legal certainty and predictability since “ensuring there is sufficient flexibility for the code to address future conduct is in tension with providing certainty for SMS firms about what the code could capture and the speed at which formal action could be taken.”¹¹⁴ The lower predictability is partially mitigated by the fact that the objectives pursued by the code of conduct are set out in legislation, so that firms are able to determine in advance what conduct the code can theoretically address. For example, while it should deal with competition concerns, the code of conduct should not be designed to force firms to take steps to remove illegal content from the web, which in turn should be dealt with via other wider reforms.¹¹⁵ At the same time, flexibility avoids the risk that regulations quickly become obsolete in digital markets where the pace at which products and services develop is very rapid and avoid the risk of over-intervention or unintended consequences such as the reduction of innovation and the risk of circumvention (Cappai and Colangelo, 2020, p. 16_[7]).

5. Measures addressed at preventing anti-competitive conduct

Once the undertaking has been designated as a gatekeeper or as a firm with significant market status or similar terms, as per above, a number of prohibitions and obligations will apply to it. The provisions contain numerous and very specific measures related to data, data access, portability, interoperability, data sharing and so on. Such rules are particularly aimed at addressing the issue of structural barriers to entry and the risk of exclusionary and exploitative conduct ("fairness" and "contestability"). Of course, many of the measures, while addressing the potential to exploit a position of market power, also aim at levelling the playing field, for example by facilitating access to data.

This section is structured as follows:

- Provisions addressing conduct with exploitative and exclusionary potential (5.1)
- Provisions aimed at mitigating exploitative practices by allowing data access (5.2)
- Provisions ensuring transparency and fair business practices (5.2.3)
- Merger control (5.4).

Section 6. will provide an overview of the remedies available in case of non-compliance.

5.1. Measures to address potential for exploitative conduct

While many of the measures discussed in this section seem to spring from a desire to mitigate harmful conduct by platforms in a position of dominance, several measures also support a more accessible market, seeking to foster competition in the market and levelling the playing field.

5.1.1. Self-preferencing

Recent cases have raised the attention on specific abusive practices whereby firms active in multiple markets favour their own products compared to competing products. This issue mostly arises in relation to platforms that, in addition to providing intermediation services, also sell their own products. Therefore, they might have an incentive to favour their own products, for example by giving them a preferential ranking on the platform compared to third-party competing products.¹¹⁶ The concern about self-preferencing is similar to those in tying and bundling strategies, i.e. leveraging market power in one market (e.g. the intermediation platform) to foreclose competitors in a related market (e.g. the downstream retail market of a given product).¹¹⁷ As noted in (OECD, 2020, p. 54_[26]), given that many digital platforms are hybrids that integrate, either vertically or horizontally, one or more products, and their business model may be premised on recovering investments in one market through cross-subsidisation from other markets, self-preferencing theories of harm might become more frequent in competition enforcement. An example is the EC's Google Shopping case (Box 3).

Box 3. The European Commission's Google Shopping case

In June 2017, the EC fined Google EUR 2.4 billion after finding that it abused its dominant position by favouring its comparison shopping service and demoting rivals' in its general search result pages.

The EC established that the conduct of displaying and positioning, in its general search result pages, Google's comparison shopping service more favourably was abusive since it foreclosed competing comparison shopping sites from the market and reduced the ability of consumers to access the most relevant comparison shopping services. The EC provided specific evidence that this behaviour had the effect of diverting traffic from comparison shopping services competitors to Google's own comparison shopping service.

When applying its theory of harm, the EC adopted a similar legal approach as for tying and refusal to deal conducts (OECD, 2020, p. 54_[26]). It assessed whether: (i) Google discriminated competitors in light of a relevant competitive parameter; (ii) the conduct was capable of having anticompetitive effects; and (iii) there was no objective justification or efficiency for the conduct.

Google provided some justifications, mainly related to: (i) the fact that Google should be entitled to monetise space on its own general search result pages; and (ii) the conduct was necessary to preserve and improve the quality and usefulness of its own general search service. The EC dismissed all Google's claims after concluding that the company did not provide verifiable evidence to demonstrate that its conduct was indispensable for the claimed efficiencies neither that the exclusionary effect of its conduct could be counterbalanced by efficiency gains or consumer benefits.

Source: EC decision in case AT. 39740 Google Search (Shopping), 27 June 2017.

The regulations under discussion include very similar provisions to address issues relating to self-preferencing with a view to ensuring fairness and avoiding leverage of market power in other markets:

- The DMA imposes a prohibition on granting preferential treatment in ranking services to the gatekeeper's own products;¹¹⁸
- The German Act prohibits undertakings of cross-market paramount significance to favour their own offers over the offers of their competitors when mediating access to supply and sales markets, in particular by presenting their own offers in a more favourable manner;¹¹⁹
- The Italian proposal, if adopted, would empower the competition authority to prohibit certain undertakings from granting preferential treatment to their own products when providing intermediation services. The provision provides the example of preferential treatment by means of display positioning of the products.¹²⁰
- The US proposal seeks to make unlawful preferential treatment to the designated firm's own products in relation to user interfaces, such as search or ranking engines.¹²¹

Observations

All these provisions aim to ensure fairness and contestability, by preventing firms to take advantage of the market power they have in the intermediation market to extend it to other related markets.

They are based on the premise that, by means of self-preferencing, vertically integrated firms could extend their market power in adjacent markets and compromise market contestability and fairness in competition (Marty, 2021, p. 16_[67]). Relying on *ex ante* prohibitions may avoid irreversible damages to competition and

the use of self-preferencing as a tool for maintaining or expanding a dominant position (Marty, 2021^[67]), and provide a satisfactory level of legal certainty (Khan and Chopra, 2020^[68]).

While the premises are similar, the scope of the provisions seem to be different. For example, while the DMA only covers self-preferencing in ranking services, the US, German and Italian initiatives are broader (thus search engines are only some of the possible user interfaces to which the new prohibition would apply). Ongoing discussions within the European Parliament and its Committee on Economic and Monetary Affairs propose however extending the scope of the DMA provision to cover also other types of self-preferencing conduct, e.g. in relation to display, pre-installation, activation of default settings.¹²²

Enforcement authorities will need to be well-equipped to enforce the new provisions. Indeed, platforms' self-preferencing strategies might be difficult to identify and sanction as they are mostly implemented via algorithms that place a firm's products above those of competing companies. To facilitate the authority's role in monitoring measures and obligations, Article 24(2) of the DMA provides for the possibility of appointing independent external experts and auditors that would assist the EC.¹²³ With the same goal, the French proposal grants public authorities access to the principles and methods of conception of algorithms as well as to the data used therein.¹²⁴

These measures can be complemented with a provision whereby third parties could complain about platforms' display practices and request remedies from an arbitrator with sufficient independence, technical knowledge and access to the platforms' data and algorithms (Cabral et al., 2021, p. 14^[2]).

5.1.2. Tying and bundling

As mentioned above, digital firms could leverage their market power on one market in order to expand into other markets and foreclose competitors therein. Many measures, for instance, the DMA, are concerned with the leveraging of market power from one core platform service to another (Colomo, 2021^[54]). Self-preferencing strategies are not the only way to foreclose competitors. In the presence of substantial entry barriers, firms could do so by linking their monopoly product or services to other complementary products or services to which they intend to expand their market position (Nalebuff, 2004^[69]). If a firm has market power over product A and ties it to its complementary product B, then potential entrants on the market for product B will be deterred, as there will not be any demand for product B without product A and new entrants will need to produce both products in order to compete (Nalebuff, 2004^[69]). This response by potential competitors however will be difficult if the market for product A is characterised by substantial entry barriers, thus practically foreclosing competitors on the market for product B. The specific situations in which anticompetitive harm arises from tying and bundling have been extensively discussed in the literature (OECD, 2020, p. 41^[26]).

All the regulations under discussion include similar provisions on tying and bundling:

- the DMT suggests a code principle whereby SMS firms should not bundle services together whenever this can have more adverse effects than efficiency gains for consumers. Adverse effects include for example reduced competition or availability of fewer alternatives.¹²⁵ Given the potential for divergent conclusions, the DMT suggests clarifying, in the guidance provided with the code of conduct, the scope of the services covered by this prohibition, what should be considered as bundling and how to assess adverse effects and benefits of bundling.
- Similarly, to take account of the possible mixed effects, the German Act seems to focus more on the effects than on the practice as such and prohibits a designated firm from foreclosing competitors on a market on which it can rapidly expand its position by means of tying and bundling strategies. The Act provides specific examples of such prohibited strategies. In particular, bundling conducts susceptible of foreclosing competitors include *linking* the use of a firm's offer to the automatic use of another of its offers (though the latter is not necessary for the use of the former) without giving the user *sufficient* choice (e.g. by offering the bundle at a discount although

theoretically consumers can still buy the two products separately). Also, firms with paramount cross-market significance may foreclose competitors by means of tying conducts whereby they make the use of one of their offers offer *conditional* on the use of another offer (for example, to use an example from the explanatory memorandum accompanying the draft bill,¹²⁶ by requiring necessarily a user account with another platform service in order to sign up to a different unrelated service).¹²⁷

- Similarly, though with a broader and more general formulation, the Italian proposal suggests enabling the competition authority to prohibit conduct seeking to foreclose firms in other markets by means of tying and bundling strategies.¹²⁸
- In the same vein, in the light of the possibly mixed effects of tying and bundling, the DMA does not impose a clear-cut prohibition of these practices. It rather highlights that the mere offering of a product or service, including by means of pre-installation, cannot be considered as such as a barrier to switching and thus unlawful.¹²⁹ Rather than prohibiting tying and bundling at the outset, the DMA imposes an obligation to “*allow end users to un-install any pre-installed software applications on its core platform service.*” However, gatekeepers will still be entitled to impede un-installation of software applications when these are essential for the functioning of the operating system or the device and cannot technically be offered on a standalone basis by third-parties.¹³⁰ In addition to this broadly applicable but nuanced provision, the DMA also imposes a narrowly defined per se prohibition on certain bundling and tying practices, by prohibiting gatekeepers to require users to subscribe to or register with any other core platform services as a condition to access, sign up to, or register with any of their core platform services.¹³¹
- In a similar fashion, the US proposals declare unlawful the practice whereby covered platforms impede users to un-install pre-installed applications or change default settings.¹³²

Observations

The provisions here seem to be based on the recognition that tying and bundling strategies may have mixed positive and negative effects for competition and thus it is difficult to predict with certainty their overall final consumer welfare impact.¹³³

As a result, unlike for other practices, none of the above-mentioned provisions imposes a clear-cut prohibition of tying and bundling conducts. Instead, either they narrowly define their scope of application, limiting it to enabling consumers to un-install default applications, or they provide a stronger focus on foreclosure effects and/or efficiencies.

Even those authors that have a more interventionist view still lean towards including tying and bundling strategies in a grey-list of practices that are *in principle* considered anticompetitive but for which a pro-competitive justification is possible, though the designated firm will bear the burden of proof for the efficiency defence (Cabral et al., 2021^[2]).

5.1.3. Most-Favoured Nation clauses and Across-Platform Parity Agreements

While the German Act and the Italian proposals do not include any rules on most-favoured nation clauses (MFNs), the DMA declares unlawful any provision whereby gatekeepers restrict business users from offering their goods or services under more favourable conditions on other intermediation platforms than the one of the gatekeeper.¹³⁴ While this constitutes an outright ban on wide MFNs (Colomo, 2021, p. 9^[54]), nothing is said on narrow MFNs that restrict business users’ ability to offer lower prices on their own sale channels compared to those offered on the gatekeeper’s platform.

By contrast, the US proposals seem to be broader and prohibit any interference or restriction of a business user's pricing of its goods or services,¹³⁵ thus covering both narrow and wide MFNs (Schnitzer et al., 2021, p. 18_[44]).

By prohibiting (at least narrow) MFNs, the regulations under discussion seem to aim to increase inter-platform competition, by allowing new platforms to enter the market and compete thanks to their lower commission fees and thus increasing contestability.

Observations

At the outset, it is important to distinguish between

- Wide MFNs, which ensure that the price and terms offered on one platform are not higher than the price available on the supplier's own website or on any other intermediation platform used by the supplier; and
- Narrow MFNs, whereby suppliers are not allowed to offer on their own website prices that are higher than those offered on one platform. However, they will be allowed to offer lower prices on other intermediation platforms (OECD, 2015_[70]).

Both narrow and wide MFNs aim to avoid free-riding. They address the risk that suppliers take advantage of the platform's investments in demand-enhancing features and incentivise consumers to use the platform for search, information and other services on the product while eventually diverting them to their own website or to a third-party intermediation platform to conclude the final transaction, thus avoiding payment of (higher) fees on the actual sale. In turn, as noted by some authors

absent such protection – narrow or wide – the risk of being undercut by rivals or suppliers could lead to a hold-up-problem and would likely stifle investment downstream. The short term gain which the supplier or competitor obtains when free riding, would ultimately result in long term inefficiency, absorbed by the market as a whole. Failure to address this problem may undermine PCWs [price comparison websites] and consequently inhibit their contribution to information flow, access and competitive market dynamics (Ezrachi, 2015_[71]).

However, wide MFNs also entail additional risks. In particular, they raise the risk of industry-wide high price uniformity (as suppliers would lack any incentive to reduce prices on one platform if this results in an across-the-board reduction on any other platform enjoying a wide MFN clause) and reduce inter-platform contestability as they create a disincentive for the platforms to reduce their commission fees (given that suppliers will not be in a position to react to the increase in the platform's fees by increasing their price on that platform only). Furthermore, wide MFNs might raise barriers to entry for low-cost platforms that will be unable to secure lower prices from suppliers although offering lower commission fees.

For these reasons,

the more limited intrusion into the supplier's freedom to set its price and terms under narrow MFNs has been accepted in several jurisdictions as providing a satisfactory equilibrium, which promotes downstream investment in demand-enhancing features and information provisions without constituting too intrusive a restriction on competition (Ezrachi, 2015, p. 26_[71]).

The initiatives under discussion contain very different provisions. While some do not prohibit at all wide or narrow MFN clauses (e.g. Germany, Italy), others include rules only on wide MFNs (e.g. DMA) or on both wide and narrow MFNs (e.g. US bills).¹³⁶

5.2. Measures on data access: mitigating the risk of exclusionary practices

To facilitate market access for new or existing competitors, several measures are directly aimed at granting access to data in one way or another. Consumers as well as companies increasingly take up connected devices, they increasingly share their data online, either intentionally (so called volunteered data) or unknowingly as a by-product of the use of digital platforms (so called observed data, e.g. purchase histories, history of webpages visited or queries submitted to search engines). A third category of data are inferred data. These are the data that can be inferred from a user's behaviour (what they click on, how long they stay on the page, in which order they browse topics), and is derived using a platform's algorithm and artificial intelligence. This type of data in particular has high value and is inaccessible to a new competitor. Data are used to forecast demand, develop or improve products and services, or target advertisements. They have become so important that in certain circumstances they are an essential input to be able to compete (OECD, 2020, p. 27^[26]) and therefore the lack of access to data can constitute a barrier to entry. In particular, platform ecosystems that can take data from adjacent markets to analyse with a central algorithm, create a high barrier to entry (Thiemann and Neto, 2021^[14]). In addition, firms can process such data with increasing efficiency to their own benefit to monetise and improve their services (Carugati, 2020^[17]). The volume, velocity and variety of data that firms accumulate make them extremely important for firms to compete effectively on the market. Of course, data accumulation in itself does not raise barriers to entry as the propensity of access to data to raise barriers to entry depends on the nature and use of data as well as the availability of alternative resources.

Access to data can be a source of market power, for instance when a digital platform collects large datasets thanks to the size of its user base, which in turn gives it a significant informational advantage than can be used to improve the product or service (so called feedback loops).¹³⁷ This is recognised, for example, by the EC, when in the preamble to the DMA it observes that data can be a very high barrier to entry and reduce market contestability, thus creating a market failure.¹³⁸ Also, data can be a source of market power when users do not multi-home, when firms combine large amounts of end-user data from different sources or when the market is characterised by direct or indirect network effects that make a strong market position more difficult to dislodge. Therefore, if competitors do not have access to this firm's data, consumers might find themselves locked-in with the dominant firm's services (Carugati, 2020^[17]).

Below we provide an overview of *ex ante* regulations addressing data-related practices by designated firms with a view to enhancing contestability and granting other firms an edge to compete with designated firms.

5.2.1. Data portability

Access to data is critical to help overcome the negative consequences of network effects for competition and thus promote market contestability.¹³⁹ Data portability might be a way to grant competitors access to data necessary to compete, by enabling consumers to port their personal data away from a company to another company, thus switching more easily to alternative suppliers, without losing all the benefits linked to the use of the same product or service over a long period.

Several provisions in the *ex ante* regulations under discussion aim to ensure that businesses provide an effective right to data portability:

- In the UK, the DMU will be entitled to enact data-related interventions, including measures to support greater control by consumers over their own data,¹⁴⁰ for example by facilitating consumer-led data mobility;¹⁴¹
- In the EU, if approved, the DMA will impose upon gatekeepers an obligation to provide effective portability of data and to facilitate the exercise of data portability rights provided under data protection regulations, including through continuous and real-time access;¹⁴²

- In the US, the proposed *American Choice and Innovation Online Act* prohibits a covered platform operator from preventing the portability of data by business users to other systems or applications.¹⁴³ Similarly, the proposed *Augmenting Compatibility and Competition by Enabling Service Switching Act* provides that a covered platform operator should maintain an interface enabling the secure transfer of data to a user or, with the consent of a user, to a business user in a structured, commonly used and machine-readable format,¹⁴⁴ although (unlike the EU) there is no requirement for the data feed to be real-time and continuous (Schnitzer et al., 2021, p. 21_[44]);
- The German amendment enables the *Bundeskartellamt* to prohibit designated firms from refusing data portability or make it more difficult with the consequence of impeding competition;¹⁴⁵
- Similarly, if approved, the Italian proposal would enable the Italian Competition Authority to prohibit designated firms to raise obstacles to data portability.¹⁴⁶

Observations

These *ex ante* obligations are intended to address some structural barriers and are critical for opening up digital platform markets and ensuring contestability and competition *in* the market (Schnitzer et al., 2021, p. 21_[44]). They seem to be sufficiently broad to ensure that data portability is “*effective*” and that firms do not make the exercise of this right “*more difficult*”. Ensuring data portability rights is perceived by most commentators as being essential to mitigate the risk of exclusionary conduct (Competition and Markets Authority, CMA, 2020_[10]) (Furman et al., 2019_[5]) (Cr mer, de Montjoye and Schweitzer, 2019_[11]). The actual success of data portability rights in promoting competition *in* the market will depend on a number of factors (see Box 4 below).

Box 4. The benefits and the limitations of data portability measures in digital platform markets

Data portability can help address some of the barriers to entry that arise from the accumulation of data in digital platform markets.

It can reduce switching costs, thus easing entry by new market participants and intensifying competition among firms already in the market. For example, without data portability, users may be dissuaded from switching to another social network if this requires them re-uploading all of their photos, content or profile information. By giving them the right to port their data, consumers may face less obstacles to select alternative services and, as a result, new firms might enter the market. Data portability could also enable multi-homing if consumers are able to move their data to multiple providers.

Data portability can also promote competition across multiple markets. Absent the possibility to port data to alternative suppliers, dominant firms in one market might be able to use their data to extend their market power to other markets. By contrast, data portability ensures that firms in those markets are still able to compete by having access to those same data whenever the advantage of the dominant firm arises from access to data that can be ported.

Finally, while there is a risk of negatively affecting incentives to invest in data collection, portability of non-rivalrous data could spur innovation by promoting competition on the basis of data analytics and usage rather than data collection. Indeed, incumbents as well as new entrants might have more incentives to invest in data processing rather than competing for consumers’ attention and time to collect their data.

Of course, the actual impact of data portability on competition will depend on the market in question. The benefits that users receive from porting their data depends on the degree of customisation or personalisation involved in the service (de Streel, Kr mer and Senellart, 2020_[72]). The scope of the data

covered under portability also matters (e.g., whether these are observed data or only data provided by consumers).

At the same time, current experience in some digital platform markets suggests that access to ported data on its own may not be sufficient to enable the entry of competing products. As noted by the ACCC, data portability will have a limited impact in concentrated digital platform markets featuring significant barriers to entry and expansion, since users will not have any competing services to which they can switch in the short or medium term (Australian Competition & Consumer Commission, 2019^[73]).

The effectiveness of data portability may be limited when:

- The scope of the ported data is limited due to privacy constraints;
- Economies of scale from data processing are limited;
- Strong network effects are present which could impede the entry of new services even when they have access to a user's data, since users' willingness to switch will be limited if they lose the possibility to interact with their contacts on another platform;
- Data portability rights are static in nature, meaning that they only require one-off data transfers (that become rapidly outdated) rather than continuous real-time flows of data.

Furthermore, by making switching to a new platform easier, users may be more willing to provide their data to a platform and thus could even enhance the position of incumbents. Also, if portability rights apply equally to all firms, incumbents will also have access to other firms' user data, thus preventing entrants from acquiring a foothold.

Source: (OECD, 2021^[49])

While all of these measures aim at addressing some structural barriers and ensuring contestability and competition *in* the market, there are two significant points of difference in the regulations under discussion.

First, while including an obligation to ensure *effective* portability of data, the DMA, unlike the US proposal, does not lay down any specifications on the data-format to employ or the duty to use open APIs (CERRE, 2021^[63]). Therefore, to port their data, consumers might have to download them and then re-upload their data on a different platform. This might have an impact on the utility that the transfer of such data can have for potential competitors.¹⁴⁷

Second, the DMA specifies that data transfers should be continuous and in real time, which is a requirement not included under other regulations (e.g. US, Germany) (Schnitzer et al., 2021, p. 21^[44]).

5.2.2. Obligations to grant access to data

Given the importance of data to compete, a distinct *ex ante* obligation has been proposed alongside data portability, consisting of granting access to a firm's dataset upon request of another (actual or potential competitor) firm. Studies have shown the importance of data to provide high quality services, such as search engines. As noted by (CMA, 2020, p. 365^[42]), search data, in particular uncommon search queries, are a valuable input into the platform's algorithm that drives the provision of high-quality search results, and thus dominant firms' competitors might face high barriers to entry if they are unable to access these data.

In light of the above,

- In the UK, if data are a key barrier to new entrants preventing them from developing new products, the DMU will have the power to impose upon SMS firms an obligation to grant third-party firms access to them.¹⁴⁸ Rather than preventing the SMS firm from taking advantage of its powerful

position, such a remedy would address the root cause of market power, the barrier to entry itself which prevents new competitors from driving greater competition and innovation (CMA, 2020, p. 365^[42]).

- Based on the same premises, i.e. that data can constitute a barrier to entry and expansion, the DMA also lays down specific data access remedies concerning search engines. Thus, if the new provisions are adopted, gatekeepers will have to provide any third-party providers of online search engines with access on FRAND terms to ranking, query, click and view data in relation to free and paid search generated by end users on their services, subject to anonymisation of personal data.¹⁴⁹ This provision aims explicitly at ensuring contestability by giving third-party providers an edge to improve their services and thus compete with the core platform service of the gatekeeper.¹⁵⁰ In addition to portability rights granted to consumers, business users will also enjoy a similar data portability right inspired by the right granted to natural persons under Article 20 of the GDPR. Thus, business users will have free real-time continuous access to data generated by them and by end users when using their services in the context of the gatekeeper's core platform.¹⁵¹

The German Act does not include any *ex ante* obligation imposed on designated firms to share data, although access to data necessary to compete is now regulated under the provisions on abuse of economic dependence.¹⁵²

Some of the regulations under discussion also deal with the risks arising from the combination of different datasets. The risk is that combining data from different sources may grant firms a potential advantage in terms of accumulation of data and thus raise barriers to entry, also in adjacent markets, especially *vis-à-vis* those firms that are only active in one market and have no similar possibilities of combining data (see Box 5).

Box 5. Economies of data-scale and the prohibition on inter-source data pooling

In certain circumstances, dominant firms have an incentive to extend their dominant position from one market to another to obtain additional and complementary user data available therein. This is known in the literature as envelopment (OECD, 2020, p. 27^[74]). The risk is that combining data from different sources may grant firms a potential advantage in terms of accumulation of data and thus raise barriers to entry for firms that are only active in one market (CERRE, 2020, p. 71^[51]).

Having access to large amount of data, the biggest digital companies can leverage them across markets and share them across their own divisions while denying access to them by third parties (Fletcher, 2020, p. 8^[3]). In addition, if data obtained in a new market can be monetised in a core market, digital firms active in a connected core market might have an incentive to enter such new markets at a loss. This option is not available to firms that are not active in the core market and thus will not be able to gain the same data advantage and compete effectively, even if their product is better (Fletcher, 2020^[3]) (Bourreau, 2020, p. 8^[15]). Furthermore, network effects make it easier for established platforms to enter new markets, for example by making strategic use of their existing customer base and bundling services into new markets (Fletcher, 2020, p. 9^[3]).

At the same time, commentators have highlighted that combining datasets from different complementary services can also bring significant value to consumers (CERRE, 2020, p. 82^[51]), for instance in terms of better and more innovative services (Budzinski and Mendelsohn, 2021, p. 12^[19]). The development of multi-product ecosystems is a good example of how companies can achieve economies of scale and scope, leverage competencies applicable across markets, achieve data synergies across markets, and enhance interoperability (Bourreau, 2020^[15]) (Fletcher, 2020^[3]).

To prevent designated firms from obtaining non-replicable data advantages and extending market power in adjacent markets, and to ensure market contestability, certain proposed regulations prohibit

them from merging data from different services, thus capping their data superiority. These regulations can take different forms such as:

- **data silos**, which create Chinese walls among datasets collected from different services supplied by the same designated firm. This remedy was discussed in the Google/Fitbit merger before the EC. It is now envisaged for example by the DMA when preventing gatekeepers from combining personal data that originate from different services offered by them. This remedy is also envisaged in the UK in order to “limit how data can be shared and used between different business units within an SMS firm.”
- **short data retention periods**, limiting the time during which data can be exploited, while still allowing firms to collect and use data from different sources; and
- **line of business restrictions**, limiting the markets and services that designated firms can extend to and operate in. They can include separation restrictions ranging from structural to behavioural separation (accounting, functional or legal) (OECD, 2020^[75]).

Source: OECD; OECD (2021), Data portability, interoperability and digital platform competition, OECD Competition Committee Discussion Paper, <http://oe.cd/dpic>; OECD (2020), Abuse of dominance in digital markets, www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf; Google/Fitbit case: Case M.9660 – GOOGLE/FITBIT, REGULATION (EC) No 139/2004 MERGER PROCEDURE, https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf

Observations

The above-mentioned provisions stem from the recognition that data can be an important barrier to entry preventing new firms from developing new products and/or competing with powerful incumbents. At the same time, the non-rivalrous nature of certain data (meaning that access by one firm to a dataset does not preclude access by another firm as it would be the case for physical assets) and their low specificity (which allows repurposing and re-using data differently) (Krämer, 2020^[76]) (OECD, 2021, p. 16^[49]) make data access and data sharing obligations ideal remedies (CERRE, 2020, p. 93^[51]), in particular to ensure contestability and give firms a real chance to compete.¹⁵³

Several authors, however, have highlighted the challenges that may arise from the *ex ante* obligation to grant access to data.

First, there may be frictions with privacy rules and data protection principles. While non-personal data or data that can be anonymised can be easily transferred, the same is not true for personal data, whose transfer requires in many jurisdictions (e.g. the EU, but not only) the consent of all the data subjects to which those data pertain. Furthermore, specific requirements apply to the manner in which such personal data are transferred in order to ensure secure transfer and storage. This point is also highlighted by the UK’s DMT when it observes that “*compliance with data protection laws will need to be considered where personal data is involved.*”¹⁵⁴ To strike a balance between compliance with privacy rules requiring specific consent and the need to share data in order to ensure contestability of the market, the EU DMA provides that as far as personal data are concerned, access to them is only possible when (i) access and use of personal data is directly connected with the use that the end users make of the service offered by the gatekeeper; and (ii) the end-user has opted in to such sharing with a valid consent under the GDPR. However, this significantly restricts the amount of valuable data that must be shared with an actual or potential competitor. As noted by some authors, designated firms will most likely deploy significant efforts to claim that such data access rights should not be enforced as the data concerned are personal and sharing them would breach privacy rules (Lundqvist, 2021^[77]).

Second, as mentioned above, the obligation to share data with third parties aims to enable them to optimise their services and contest the designated firm’s market position. However, the value and the efficiency of

certain platforms (e.g. search engines) to end users also depend on economies of scale and scope in data aggregation, whilst fragmenting the market could erode the magnitude of network effects with detrimental effects on consumer welfare (Cabral et al., 2021, p. 23^[2]). Furthermore, granting access to data may entail a risk of negatively affecting incentives to invest in data collection.

Finally, the value of these data might be lessened once they are ported out of the original platform, with subsequent loss of context (Cabral et al., 2021^[2]), especially if shared data do not encompass inferred and derived data resulting from the firm's analytics and innovation efforts. For this reason, to make data access remedies work, some authors recommend granting *in-situ* rights to access end-user data, rather than transferring data from the designated firm to another business user.

5.2.3. Interoperability

Given the importance of the services offered by designated firms in order to operate on a market, some regulations impose obligations aimed at avoiding foreclosure, increasing market contestability and facilitating entry of operators developing new services, either substitutable or complementary to those of the incumbent.

Interoperability obligations appear to be particularly important for this purpose. They enable other firms' services to interoperate with the core functions of the firm's services (protocol interoperability) or more extensively they allow substitutable platforms to interoperate (full protocol interoperability, e.g. between two substitutable messaging systems) (CERRE, 2020, p. 14^[20]). For example, interoperability is necessary to allow applications to run on a mobile operating system, which is particularly important if there are concerns of market power in one market being leveraged into others (OECD, 2021, p. 20^[49]). If a firm limits interoperability of third-party applications with its platform or ecosystem, competitors would need to offer the full ecosystem provided by that firm in order to compete effectively with it. More broadly, by allowing users to mix products and services from different suppliers, interoperability can contribute to preventing the emergence of market power through anticompetitive leveraging and/or reducing barriers to entry stemming from network effects.

The scope of interoperability obligations varies significantly across regulations:

- The DMA imposes upon gatekeepers an obligation to allow the installation and effective use of third party software applications or software application stores using, or interoperating with, the operating system of the gatekeeper. However, to avoid any detrimental effect on the gatekeeper's service, it will still be possible to take proportionate measures to ensure that third-party software do not endanger the gatekeeper's OS.¹⁵⁵ Furthermore, the DMA imposes upon gatekeepers an obligation to allow providers of ancillary services (e.g. third-party payment, identification services, cloud hosts) interoperability with the same operating system, hardware or software features that the gatekeeper enjoys when providing its own similar ancillary services;¹⁵⁶
- The proposed American Choice and Innovation Online Act seeks to make unlawful the restriction of interoperability with the platform, OS, hardware or software available to the covered platform's own services;¹⁵⁷
- More broadly, the German Act gives the *Bundeskartellamt* the power to prohibit any conduct by the designated firm refusing or making more difficult the interoperability of products and services, and "*in this way impeding competition*;"¹⁵⁸
- Even more broadly, the Italian proposal gives the competition authority the power to prohibit any conduct by the designated firm that poses an obstacle to the interoperability;¹⁵⁹
- The DMT recommends enabling the DMU to impose interoperability remedies, ranging from making a single function interoperable to an entire service. The DMT highlights that such obligations are important to lower barriers to entry created by network effects and limit the ability of firms to engage in potentially abusive behaviours, for instance by differentiating the level of access provided to third parties based on their perceived competitive threat.¹⁶⁰

Observations

The scope of these interoperability obligations is very different. While some narrowly aim to ensure interoperability between third-party software or ancillary services and designated firms' operating systems, others impose broad interoperability obligations, thus possibly covering other consumer services or core functions of the platforms, such as messaging media or social networks.

On the one hand, a narrow scope might be justified because of the threat that interoperability poses to privacy, as continuous and real time access to data by competing services might entail a significant breach of privacy. Also, some authors note that, given the quasi-automatic applicability of certain provisions, imposing a broad and extensive duty to ensure interoperability may be disproportionate and even difficult to apply effectively (CERRE, 2021, p. 54^[63]). For example, the absence of any rules on the pricing of access makes it difficult to assess compliance with interoperability obligations (CERRE, 2021, p. 63^[63]).

On the other hand, broadly defined obligations allow tackling issues arising in different markets going beyond ancillary services and third-party software running on designated firms' operating systems. They might be appropriate in markets with strong direct network effects, which lead to concerns about market tipping. An example could be the market for social networks, that is sometimes thought to have these characteristics (CERRE, 2020, p. 65^[20]). In these markets users are often locked-in as they lack the option of switching to an alternative supplier without losing the network of contacts they have built on a specific platform.

Furthermore, while interoperability obligations can lower barriers to entry and prevent anticompetitive leveraging of market power into other markets, since they involve some level of standardisation (to ensure that different products and services actually interoperate), they have the potential of reducing innovation and variety in relation to the functionality that is standardised.¹⁶¹ Furthermore, they might bring the risk of entrenching certain technologies or business models of certain firms (e.g. as they reduce the incentives to develop new competing standards), especially if incumbents control or have a determining influence on the definition of the standard, thus resulting in the unintended consequence of strengthening market power.

5.3. Ensuring Transparency and Fair Business Practices

Platforms' reliance on sophisticated algorithms that make automated real-time decisions makes it difficult for consumers and business users to understand and challenge how decisions are made.¹⁶² Furthermore, businesses and consumers can only make informed decisions about the use of alternative platforms if they have knowledge of the service they receive from the designated firm, e.g. its price, value and performance (CERRE, 2021, p. 45^[63]). The availability of such information and more transparency will in turn foster contestability, which is one of the objectives of many of the regulations under discussion (see section 3. above). For these reasons, the *ex ante* regulations under discussion impose transparency obligations upon designated firms, both to allow businesses and consumers to make informed choices and to enable responsible authorities to enforce (and assess compliance with) *ex ante* regulations.

Consistently with its general principle-based approach described above (section 3.3 above), the DMT recommends laying down a **general transparency goal** that can be further defined in the code of conduct. More specifically, to address the asymmetry of information between platforms and users, the DMT recommends including "*trust and transparency*" among the possible overarching objectives that can be pursued through the code of conduct and that will enable the DMU to lay down specific principles therein guiding SMS firms' behaviour.¹⁶³ The ultimate purpose of this objective is to give users clear and relevant information to understand what services SMS firms are providing and allow them to make informed decisions on how they interact with the SMS firm.¹⁶⁴

With the same objective of enabling informed choices and thus enhancing contestability, other regulations impose **narrow and specific transparency obligations**:

- The German Act imposes an obligation to provide sufficient information about the scope, quality or success of the service rendered or commissioned and, more generally, prohibits designated firms from making it more difficult for customers to assess the value of the service provided;¹⁶⁵
- In a similar manner, the proposed Italian provision prohibits a designated firm from providing insufficient information about the services it provides or from raising obstacles to firms' ability to assess the value of the services they receive from the designated firm;¹⁶⁶
- Japan introduced specific transparency obligations applying to designated digital platform providers.¹⁶⁷ In particular, such firms will be under an obligation to disclose their terms and conditions to users and send them a prior notification of changes in such conditions. The disclosure obligations shall concern amongst others the scope of data use as well as basic matters that determine search ranking.
- The French reform also empowers the competition authority to have access to the principles and conception methods of the algorithms used by firms under investigation as well as to the data used in such algorithms.¹⁶⁸

Finally, certain regulations only impose transparency obligations for **specific services**, such as advertising. The DMA imposes transparency obligations in the relationships between the gatekeeper and advertisers and publishers that use their services. If adopted, the new provisions will oblige the gatekeeper to provide advertisers and publishers with information on the price they pay, and the amount or remuneration paid to the publisher (e.g., for publishing a given ad).¹⁶⁹ This provision will likely help putting an end to a situation in which publishers do not receive any information on the actual price paid by the intermediary to the platform or the breakdown of the charges paid by them (Cabral et al., 2021, p. 16_[2]). Again, as the other transparency provisions, the objective is to enhance contestability: such obligations will likely allow advertisers and publishers to compare the value added of different providers and verify how much platforms are actually charging, thus possibly leading to a “*fairer, more transparent and contestable platform environment*” with lower prices.¹⁷⁰ With the same goal, the gatekeeper must also provide those same subjects with access to the performance measuring tools and the information necessary to carry out an independent verification of the ad inventory.¹⁷¹

Observations

Transparency obligations seem to pursue broader fairness and contestability objectives, in particular concerning the relationships between designated firms and their customers. By providing businesses and consumers with sufficient information to assess the actual value of the services they receive from the designated firm, the provisions under discussion will enable businesses and consumers to compare those products or services with competing alternatives. This in turn will foster contestability.

However, the scope of the provisions described above is significantly different. While some impose broad transparency obligations, others (e.g. DMA) limit their scope to pricing information provided to advertisers and publishers.

To further enhance the efficiency of these provisions, some commentators have suggested providing additional details in the law on (i) the format for disclosure; and (ii) the stage of the supply chain in relation to which the disclosure must be made (to avoid that firms only disclose information on the price of the final bundle rather than on the prices charged at each stage of the tech supply chain) (CERRE, 2021, p. 61_[63]).

5.4. Merger control

One recurrent issue in digital markets concerns the risk of so-called "killer acquisitions" or of large firms buying highly valued start-ups without the transaction being subject to merger control rules that focus upon turnover (OECD, 2020^[78]). The regulations under discussion seem to acknowledge that merger control rules with turnover-based thresholds are unsuitable to catch those transactions in the digital economy whose value lies in the number of users, the amount of data or the innovative business model of the target. Therefore, the new regulations under discussion aim to broaden or complement current merger control thresholds in order to allow the competition authority to be aware of any transaction entered into by designated firms:

- the DMA provides that gatekeepers “shall inform” the EC of any intended concentration prior to their implementation.¹⁷² Although this does not amount to a formal notification under the EUMR, gatekeepers shall inform the EC about the acquisition targets, their EEA and worldwide annual turnover, the number of yearly active business users and the number of monthly active end users, as well as the rationale of the intended concentration.
- Similarly, the DMT recommends imposing upon SMS firms an obligation to inform the CMA of all the transactions they enter into.¹⁷³
- France has also opted for the same model, thus imposing upon designated structuring undertakings an obligation to inform the competition authority of any concentration that is susceptible of having an impact on the French market.¹⁷⁴

Germany has opted for a slightly different model, whereby firms with paramount cross-market significance are not automatically subject to the obligation to notify all transactions. While the 9th amendment of the German Act had already introduced transaction value thresholds to capture acquisitions of small competitors by large firms that went under the radar, the latest amendments enable the *Bundeskartellamt* to order an undertaking to notify all transactions in a given sector if specific thresholds are met.¹⁷⁵ However, the provisions subjects such power to the *Bundeskartellamt* having conducted an investigation in the sector concerned. Once such an order has been issued, it will apply for a period of three years.

Similarly, the Italian Competition Authority recommends introducing a new power enabling it to make it mandatory to notify a transaction that does not meet all the turnover-based thresholds. However, such power would only concern transactions over the last six months and for which there is a suspicion (“*fumus*”) of competition risks.¹⁷⁶

6. Fines and remedies for non-compliance

All the regulations discussed include ways to ensure compliance and thus disincentivise delays and non-compliance by means of fines and structural remedies.

First, authorities in charge of applying *ex ante* regulations have the power to impose **fines** for non-compliance with the obligations. Provisions on fines are generally very similar across regulations and, though still generally similar, differences can be observed mainly with regards to their amount:

- The DMA grants the EC the power to impose fines of up to 10% of the gatekeeper's total turnover if, amongst others, it fails to comply with the *dos* and *don'ts* laid down under Articles 5 and 6. Furthermore, it can impose fines not exceeding 1% of the total turnover if the firm does not provide correct and complete information required to assess its possible designation as gatekeeper.¹⁷⁷
- Similarly, the DMT recommends granting the DMU the power to impose penalties up to a maximum of 10% of the worldwide turnover for breach of the code of conduct.¹⁷⁸ Interestingly, the DMT clarifies that the focus of the new regime should be on remedying the unlawful conduct by engaging with the designated firm, therefore breaching the code should not automatically lead to penalties, which must be exceptional and limited to the most serious breaches that cause significant harm.¹⁷⁹
- The German Act provides that an administrative offence is committed by whoever intentionally or negligently acts contrary to Section 19a(2).¹⁸⁰ In such a case, a fine of up to EUR 1 million may be imposed but this can be increased to up to 10% of the total turnover.
- The Italian proposal extends the application of the provisions on fines for antitrust infringements to the breach of *ex ante* regulations, thus enabling the ICA to impose fines of up to 10% of the total turnover.¹⁸¹
- Under the US bills, breach of *ex ante* rules can lead to a civil penalty amounting to the highest between (i) up to 15% of the total US revenue, or (ii) up to 30% of the US revenue in any line of business affected or targeted by the unlawful conduct.¹⁸²

Whilst provisions on fines are broadly similar, significant differences exist concerning the possibility and procedures to impose (behavioural or structural) remedies.

Certain regulations provide for general powers to impose remedies without laying down any particular conditions:

- As currently drafted, the Italian proposal grants the ICA the power to *"impose behavioural or structural remedies on designated undertakings in order to put an end to the infringement or to its effects or to avoid the reiteration of prohibited conducts."*¹⁸³

Other regulations provide for more or less strict requirements to impose remedies:

- The DMA provides for structural (and behavioural) remedies when a firm has systematically infringed the *dos* and *don'ts* under Articles 5 and 6 and has further strengthened or extended its gatekeeper position.¹⁸⁴ A finding of systematic non-compliance requires at least three non-compliance or fining decisions within a five-year period prior to the decision to open a market

investigation. Remedies must be proportionate to the infringement and necessary to ensure compliance. A structural remedy can only be applied if a behavioural remedy would not be as effective;

- the German Act provides for the *Bundeskartellamt* to take all necessary behavioural or structural remedies that are proportionate to the infringement and necessary to bring it effectively to an end. However, it limits to possibility to impose structural remedies only to situations in which there is no behavioural remedy that would be equally effective or the behavioural remedy would entail a greater burden for the undertakings.¹⁸⁵
- the US *American Choice and Innovation Act* requires divestiture be considered if “a violation arises from a conflict of interest related to the covered platform’s concurrent operation of multiple lines of businesses.”¹⁸⁶ The *Ending Platform Monopolies Act* makes it immediately unlawful for a covered platform operator to own, control, or have a beneficial interest in a line of business when it ties it to its platform or when it provides the operator with an incentive to self-prefer its own product or services.¹⁸⁷

Finally, certain regulations exclude at the outset the possibility to impose certain types of remedies:

- the DMT recommends granting the DMU the power to enact pro-competitive interventions. However, “with the exception of ownership separation, the DMU should not be limited in the types of remedies it is able to apply.”¹⁸⁸ These could include data-related interventions, interoperability and common standards, consumer choice and default interventions, obligations to provide access on fair and reasonable terms, and also separation remedies but only limited to operational and functional separation (for example on the operations of different units within an SMS firm). By contrast, the DMT makes it clear that the DMU “should not be able to impose full ownership separation.” This power should only lie with the CMA following a market investigation. The DMT explains the rationale of this policy choice. It observes that “[t]his recommendation recognises the significance of a decision to pursue a divestiture remedy, given the costs associated with this remedy, the fact it interferes to a greater extent with a company’s property rights, and that the decision cannot be reversed.”¹⁸⁹

The room to impose remedies are therefore significantly different, especially when it comes to structural remedies. While they are excluded from the *ex ante* regulations under the DMT’s advice, the possibility to resort to these remedies under the US bills is much broader than under the DMA. Pursuant to the former, structural remedies can be applied in a wider set of situations and are immediately available, without the need to find systematic non-compliance over a period of five years (Schnitzer et al., 2021, p. 24_[44]). This may raise issues in the future, for example as the timing difference reduces the possibility to coordinate structural remedies across jurisdictions (Schnitzer et al., 2021, p. 24_[44]). Furthermore, structural remedies might require divestitures beyond national borders but it will be difficult to implement them in jurisdictions where structural remedies are not provided as a solution for non-compliance with *ex ante* regulations.

7. Conclusion

A large number of reports and policy papers in recent years have argued that the large digital platforms have acquired substantial market power, and that the key characteristics of digital platform markets present the hallmarks of market failure, warranting regulatory action, in addition to ex post antitrust enforcement, in view of their significant influence on markets and society at large.¹⁹⁰ Over the past year, a number of regulatory initiatives have been put forward around the world that aim to regulate large digital platforms *ex ante*.

This paper summarises a number of the main regulatory initiatives, aiming at identifying the salient measures as well as main points of convergence and divergence among them. These initiatives have sprung from the same desire to protect competition in digital markets in face of overwhelming market power by the large platforms. Despite this common goal, the proposed ways to tackle the problem are fairly diverse. The consensus on the need for action has not led to a consensus on the best form that economic regulation of the digital market should take. Section 2. discussed the rationale for proposing regulation. Some point to the structural competition issues that are specific to platforms, such as extreme network effects and tipping, as justifying *ex ante* rules.¹⁹¹ In particular, they stress the length of time of litigation, whereas the markets they intend to regulate are very fast-moving. Others argue that ex-post competition law remains an effective enough instrument, and that what is needed are more resources and better digital tools for competition agencies.¹⁹² From this point of view, competition law is sufficiently broad to also be applicable to the specific features of digital platforms.

Ultimately, the choice of market monitoring regimes will depend on the regulators' objectives.¹⁹³ We saw in Section 3. that they include fairness and contestability, to address issues of exclusionary and exploitative conduct by the digital platforms, as well as other objectives, such as innovation and transparency to foster consumer and societal welfare. However, some the objectives are neither well defined, nor fully articulated.

The regulatory initiatives share some common approaches. These include (sections 4. and 5.):

- The application of the provisions to a limited set of firms, which are identified *ex ante* by a number of means (qualitative or quantitative) that are subject to periodic review;
- The definition of specific qualitative criteria to identify firms subject to the new regulations, largely based on the extent of a firm's market power in the upstream intermediation market, the durable or transitory nature of the firm's power, and the existence of businesses that depend on the firm's product or service to access other markets;
- The need to ensure a speedy process in dynamic markets with rapid pace of innovation, by limiting the need to conduct an analysis of the effects of a conduct or to define a market;
- The obligation to inform the competition authority of any concentration that the designated firm enters into, possibly subject to specific conditions (e.g. the presence of a suspicion of competition risks, having conducted a market investigation in the sector).
- Another point of convergence is the ability to fine those firms that are found in breach of the regulations. Provisions on fines are generally very similar across regulations (Section 6.).

However, a number of important divergences in the approach to regulation have also come to fore. These include:

- The criteria to identify the firms subject to review, that do not always include specific quantitative turnover-based or market capitalisation-based thresholds;
- The possibility for firms to justify their conduct, based on objective justifications or efficiency defences;
- The level of detail that the obligations and prohibitions shall include, which goes from principles-based guidance to very specific and prescriptive rules of conduct;
- The different scope of several provisions (e.g. on self-preferencing, tying and bundling, interoperability), that apply to a large spectrum of services or are narrowly tailored to specific services or specific ways of implementing a potentially damaging practice;
- Significant differences also exist concerning the ability and procedures to impose (behavioural or structural) remedies.

As highlighted in this paper, the substantial divergences both in scope and in content among the various regulatory initiatives carry some risk for their efficacy in tackling the problems they were created to solve: with such a fragmented legislative landscape, legal uncertainty increases and may increase reluctance to innovate rather than foster it. There is also a risk that inconsistent or diverse regulation will create unnecessary costs, reduce service quality, and dampen innovation. Another final risk from the fragmentation is compliance: evidence from OECD competition assessment projects¹⁹⁴ demonstrates that the more complicated and cumbersome a rule set, the less likely market players are to comply.

More specifically, the broad variety of terms – for instance the very designation of the main platforms that are the target of the regulations – leads to a legal cacophony. Borrowing from (Chopra and Khan, 2020^[23]), *ex ante* regulation of digital platforms ought to have at least the following three goals:

1. Reduce ambiguity around what the law or regulation is, enhancing predictability;
2. Reduce the burdens of litigation and enforcement, enhancing efficiency; and
3. Reduce opacity to enhance transparency and participation.¹⁹⁵

In addition to these concerns about the regulatory content, some points remain unsolved. For instance, what will be the relationship between these new regulations and existing competition law? *Ex ante* rules are mostly not competition law (with the exception of the German and Italian amendments, for instance) and may not involve enforcement by competition authorities – a point that needs clarifying. And while provisions aimed at enhancing contestability by granting access to gatekeepers' competitors go beyond previous competition cases and aim to address structural barriers to entry (e.g., provisions on access to data provisions), others clearly draw on past competition cases. Given that some of the prohibited conducts and obligations relate to past antitrust cases, it is plausible that some overlapping with competition law will occur. Guidance would be welcome by legislators to guide authorities on what happens if a conduct (e.g. self-preferencing, MFN clauses) is implemented by a dominant firm that has also been designated as a gatekeeper, (or structuring firm, firm with paramount cross-market significance and so on): will it be penalised twice?

Another point that likely will require further discussion is the role of the consumer and consumer welfare as a result of the new regulations. Many provisions aim to create competition *in* the markets by allowing interoperability, data sharing and so on. However, while it may facilitate market entry, it is possible that some measures might degrade the consumer experience, for instance, by breaking up ecosystems. A user, who currently can navigate an entire ecosystem with a single point of entry (and a single password), would have to log in repeatedly to access separate services (email, searches, chat, hotel reservations and so on). Other consumer concerns may be related to data privacy. By allowing more transparency and data sharing, the individual's data privacy may be compromised. In the UK and in Australia, previous initiatives related to Open Banking and consumer data rights have spurred innovation, clarity of terms, and ease of use for consumers. Such measures could perhaps also serve as examples for platform regulation.

Finally, regulatory fragmentation across jurisdictions also makes enforcement more difficult across borders, for example when remedies need to be designed and co-ordinated on a global scale. As most of the targeted platforms are genuinely global, it would make sense to formulate a global framework, with allowances for national differences. Moreover, the transnational nature of the digital platforms and the issues arising means that regulation in any one jurisdiction could have extra-territorial effects. The different legal approaches taken across jurisdictions make absolute consistency unrealistic and probably undesirable. However, "*greater coherency should make regulation more effective, more proportionate, and better able to limit any negative consequences*".¹⁹⁶ Therefore, having identified the points of convergence, as in this paper, there is an opportunity to enhance co-operation in a more systematic way. The European Competition Network (ECN), for instance, has called for a co-operation mechanism to be established between national competition agencies to support enforcement of the DMA. Identifying best practices in international co-operation for the implementation of *ex ante* regulation of digital markets would support a more coherent outcome.

Promoting competition in the design of *ex ante* regulations, may therefore be of increasing importance for the competition policy community. These measures fit into a broader debate about the role of government policy in promoting innovation, and addressing wider concerns about market access on the one hand, and consumer welfare on the other. Currently, there is a window of opportunity, while regulations are still at the draft stage, for jurisdictions across the world, to share their experiences and learn from each other to draw up rules to tackle conduct and structures in digital platform markets that distort competition and undermine economic wellbeing.

Endnotes

¹ Oxford Economics with Huawei: Digital Spillover. Measuring the true impact of the digital economy (2017).

² UNCTAD, Digital Economy Report 2021, https://unctad.org/system/files/official-document/der2021_en.pdf

³ The OECD Competition Committee will be discussing the issue of digital markets and news media on 3 December 2021. See the Secretariat background paper: OECD (2021), Competition issues concerning news media and digital platforms, [https://one.oecd.org/document/DAF/COMP\(2021\)16/en/pdf](https://one.oecd.org/document/DAF/COMP(2021)16/en/pdf).

⁴ See the home page for previous OECD Competition Committee best practice roundtables: <https://www.oecd.org/daf/competition/roundtables.htm>

⁵ Competition Economics of Digital Ecosystems: <https://www.oecd.org/daf/competition/competition-economics-of-digital-ecosystems.htm>; Abuse of Dominance in Digital Markets: <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets.htm>

⁶ See OECD (2021), Data portability, interoperability and digital platform competition, OECD Competition Committee Discussion Paper, <http://oe.cd/dpic>

⁷ Authors' translation. The bill is currently on hold as the French authorities are awaiting the result of the DMA. Nonetheless it is an indication of the intentions of the French legislator and serves an illustrative purpose.

⁸ Authors' translation

⁹ (US House of Representatives Sub-Committee on Antitrust, 2020^[9])

¹⁰ (Bourreau, 2020^[15]) (Benelux competition authorities, 2019^[13]).

¹¹ See also the OECD Competition Committee Roundtable on *Start-ups, killer acquisitions and merger control* (2020): <https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm>

¹² (Competition and Markets Authority, CMA, 2020^[10]) paragraph 2.8 p.18

¹³ *Idem*

¹⁴ (Competition and Markets Authority, CMA, 2020^[10]) *op. cit.* paragraph 2.10 p 19

¹⁵ See also the OECD background note on Competition Issues in News Media and Digital Platforms: <https://www.oecd.org/daf/competition/competition-issues-in-news-media-and-digital-platforms.htm>

¹⁶ (US House of Representatives Sub-Committee on Antitrust, 2020^[9]) p. 7

¹⁷ The German "Commission Competition Law 4.0", 2019 p.48

¹⁸ This webpage lists all cases opened against the GAFAs since *Google Shopping* in 2010 and until 2021: <https://qz.com/2066217/a-cheat-sheet-to-all-the-antitrust-cases-against-big-tech-in-2021/>

¹⁹ (Marsden and Podszun, 2020^[6]) p. 16.

²⁰ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), recital 5.

²¹ (Competition and Markets Authority, CMA, 2020^[10]) paragraph 5, p. 3.

²² (Chopra and Khan, 2020^[23]) p.359

²³ US Subcommittee on Antitrust, op.cit. p.7

²⁴ Argentina, Colombia, Pakistan, the Russian Federation and Turkey, as reported by (UNCTAD, 2021^[25])

²⁵ The competition authorities of Egypt, Kenya, Peru and Turkey, see UNCTAD op.cit.

²⁶ This issue was also addressed in a roundtable discussion in the OECD Global Forum on Competition in December 2020. See (OECD, 2020^[26]) regarding practical challenges faced by competition authorities when conducting abuse of dominance or monopolisation investigations.

²⁷ The meeting of the Competition Committee on 2 December will also discuss this aspect, and the summary of discussion will be made available on www.oecd.org/daf/competition.

²⁸ On the particular issue of data, see also the 2017 Report of Study Group on Data and Competition Policy from the Japan Fair Trade Commission (JFTC), the English summary of which can be found here: https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606_files/170606-3.pdf

²⁹ On 10 November 2021 it was announced that the UK's Supreme Court had thrown away a class action lawsuit against Google, brought in the English courts on behalf of more than 4m Apple iPhone users over Google's alleged tracking of personal data on the grounds of the difficulty of calculating any damage: <https://www.ft.com/content/006461a0-6e1c-4547-80e9-79dd1045c8fb>

³⁰ Stigler Committee on Digital Platforms: Final Report, 16 September, 2019, <https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report> ("..the body of research that indicates increasing problems of underenforcement is growing rapidly". p.79

³¹ (Competition and Markets Authority, CMA, 2020^[10]) see for instance, paragraph 4.121: "There are widely-held concerns about historic underenforcement against digital mergers in the UK and around the world." Such views are shared widely, see also (Takigawa, 2021^[16]) on the difficulty of estimating potential competition in merger analysis in digital markets.

³² (European Commission, 2020^[48])

³³ Most of the regulatory initiatives includes measures to facilitate or mandate third-party access to data (e.g DMT, paragraph 4.68, p. 45)

³⁴ "Digital Platforms: Oversight if Necessary, But Not Necessarily Regulation", Communiqué from the Competition Council (Canada), 7 January 2021
https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique_2021_0107_CPC.pdf

³⁵ Communiqué from 7 January 2021, op.cit. p.2

³⁶ This is also discussed in several OECD roundtables, for instance, (OECD, 2016^[28])

³⁷ (Takigawa, 2021^[16]) refers notably to the US *Computer Fraud and Abuse Act* of 1986 which prohibits a rival platform's access to the dominant platform's data.

³⁸ European Competition Network, "How national competition agencies can strengthen the DMA", Joint paper of the heads of the national competition authorities of the European Union, published 21 June 2021
https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/DMA_ECN_Paper.pdf?__blob=publicationFile&v=2

³⁹ (Competition and Markets Authority, CMA, 2020^[10])

⁴⁰ UK Advice of the Digital Markets Taskforce, op.cit. , 4.33

⁴¹ Op.cit. section 4.38.

⁴² The full title is " Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)"

⁴³ Act on Improving Transparency and Fairness of Specific Digital Platforms, Article 1 (Purpose), Google Translation.

⁴⁴ Act on Improving Transparency and Fairness of Specific Digital Platforms, Article 3 (basic principles), Google Translation.

⁴⁵ German Competition Act, Section 19, Art. (2) No1.

⁴⁶ (Marsden and Podszun, 2020^[6]) p.38

⁴⁷ (Dunne, 2020^[43]), p. 231. The emphasis is by the author herself.

⁴⁸ (Crawford et al., 2021^[45]), p.2.

⁴⁹ (Crawford et al., 2021^[45]) p.6.

⁵⁰ (US House of Representatives Sub-Committee on Antitrust, 2020^[9])

⁵¹ The "Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021", 11 June 2021

⁵² AS1730 - *Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021*. Translation by Thiemann/Lapenta.

⁵³ US Bill *Augmenting Compatibility and Competition by Enabling Service Switching*, June 11, 2021, section 3.

⁵⁴ See also OECD (2021), *Data portability, interoperability and digital platform competition*, OECD Competition Committee Discussion Paper, <http://oe.cd/dpic>

⁵⁵ *Proposition de loi adoptée par le Sénat visant à garantir le libre choix du consommateur dans le cyberspace*, N°2701, enregistrée à la Présidence de l'Assemblée Nationale le 20 février 2020. Translation by Thiemann/Lapenta. The bill is currently on hold pending the adoption of the final version of the DMA.

⁵⁶ (Budzinski and Mendelsohn, 2021^[19]), p. 18.

⁵⁷ German Competition Law Art. 19a (2) 1.a)

⁵⁸ Op.cit. (19a (2) 4.)

⁵⁹ See for instance, (OECD, 2014^[55]).

⁶⁰ H.R. 3816, Sec 2. (b)

⁶¹ Section 18, 3(a) line 5.

⁶² Act on Improving Transparency and Fairness of Specific Digital Platforms, Article 1.

⁶³ (Crawford et al., 2021^[45]) p.27

⁶⁴ idem

⁶⁵ From (Marsden and Podszun, 2020^[6]): "The Platform-to-business-regulation of the European Union from 2019 is the first attempt to provide an encompassing legal framework for the relations of digital platforms and businesses. The rules require online intermediation services and online search engines to follow certain restrictions regarding their behaviour in the internal market. In particular, the P2B-regulation requires a higher degree of transparency from platforms on matters such as their terms and conditions, the ranking parameters, the differentiated treatment of their own products and products of third parties (self-preferencing), access to data, exclusivity clauses or price parity agreements. The rules primarily require transparency, but do not prohibit specific behaviour. The P2B-regulation is to be reviewed as early as 2022, after only a short period of time of implementation. This indicates that law-makers were aware that the transparency rule may not suffice for regulating P2B-relationships." (p. 18)

⁶⁶ Section 19(a)(1) of the German Act, which refers to Section 18(3a) of the same law.

⁶⁷ Article 3-bis of the Italian Competition Authority's proposal.

⁶⁸ Article 7(3) of the French proposal.

⁶⁹ DMT's advice, para. 4.3.

⁷⁰ Article 2 of the Act on Improving Transparency and Fairness of Specific Digital Platforms.

⁷¹ Section 2(g)(10) of the H.R. 3816, the American Choice and Innovation Online Act.

⁷² US Bill nr H.R. 3816

⁷³ Recital 2 of the DMA.

⁷⁴ (OECD, 2020_[26]).

⁷⁵ Section 19a(1), No. 5 of the German act; Article 3-bis(1)(v) of the Italian Competition Authority's proposal; para. 4.19 of the DMT's advice; Article 7(3) of the French proposal; Section 5(7) of the H.R. 3825, the Ending Platform Monopolies Act.

⁷⁶ Article 1(1)(b) of the DMA

⁷⁷ Para 4.12 of the DMT's advice; Article 3(1)(c) of the DMA.

⁷⁸ Section 19a(1)(3) of the German Act, Article 3-bis(1)(ii) of the Italian Competition Authority's proposal; Article 7(3) of the French proposal.

⁷⁹ Section 19a(1)(4) of the German Act; Article 3-bis(1)(iii) of the Italian Competition Authority's proposal; Article 7(3) of the French proposal.

⁸⁰ It is worth noticing that in its report the Italian Competition Authority clarifies that the criteria listed in the proposed law are not exhaustive nor cumulative. This means that the authority is not always required to find a dominant position in order to designate the firm to which *ex ante* regulations apply. This also seems to be the interpretation to give to Article 7(3) of the French proposal, which requires the competition authority to take into account "*several*" (and not all) listed criteria.

⁸¹ DMT's advice, Appendix B, p. B11.

⁸² DMT's advice, Appendix B, paras 33-34

⁸³ See Article 3(2) of the DMA; Section 5(5)(B)(i-iii) of the H.R. 3825, the Ending Platform Monopolies Act and Section 5(6)(B) of H.R. 3849, the Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021 or the ACCESS Act of 2021.

⁸⁴ DMT's advice, Appendix B, para. 43. For example, the DMT observes that the number of users and the time they spend using a product is particularly informative for an advertising-funded product while when dealing with online marketplaces the gross value of transactions facilitated seems to be a more informative measure.

⁸⁵ Article 15 of the DMA. The list of factors is included under Article 3(6) of the DMA.

⁸⁶ Section 39a of the German Act.

⁸⁷ Article 4(2) of the Act on Improving Transparency and Fairness of Digital Platforms. The Ministry of Economy, Trade and Industry has designated certain digital platform providers as specified digital platform providers subject to the new provisions. The list is available at: https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/index.html.

⁸⁸ Section 19a(1) of the German Act.

⁸⁹ Article 7(2) of the French proposal.

⁹⁰ Article 3-bis(1) of the Italian Competition Authority's proposal.

⁹¹ DMT's advice, Appendix B, paras 89 ff.

⁹² See Section 4 of the H.R. 3826, the Platform Competition and Opportunity Act of 2021, which gives the FTC or the DOJ the power to "designate whether an entity is a covered platform" for the purposes of the act. Similarly Section 6 of the H.R. 3825, the Ending Platform Monopolies Act, Section 6 of H.R. 3849, the Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021 or the ACCESS Act of 2021.

⁹³ DMT's advice, Appendix B, para. 87. However, see section 3.3 below on requiring transparency regarding the possibility to reverse the burden of proof on the existence of conditions justifying an exemption from an obligation laid down in the code of conduct.

⁹⁴ Section 19a(1) and, for merger rules, Section 39^o(1) of the German Act.

⁹⁵ Article 3-bis(1) of the Italian Competition Authority's proposal.

⁹⁶ Article 7(2) of the French proposal.

⁹⁷ Section 5 of H.R. 3826, the Platform Competition and Opportunity Act of 2021.

⁹⁸ Article 32 of the DMA.

⁹⁹ Article 1(7) of the DMA.

¹⁰⁰ DMT's advice, para. 6.12. In the DMT's view, once the firm is designated as having SMS in relation to an activity, any subsequent activities of this firm can be designated by the DMU, the Office of Communications (Ofcom) (e.g., in relation to personal communication services such as WhatsApp, television operating systems, cloud services or internet of things support services) or the Financial Conduct Authority (FCA) (e.g., in relation to payment services, cryptocurrencies, insurance or banking).

¹⁰¹ <https://www.gov.uk/government/collections/digital-markets-unit>.

¹⁰² Recital 60 of the DMA. The room for exemptions from particular obligations is very limited. Article 8 allows gatekeepers to submit a reasoned request to suspend exceptionally, in whole or in part, a specific obligation "where the gatekeeper demonstrates that compliance with that specific obligation would endanger, due to exceptional circumstances beyond the control of the gatekeeper, the economic viability of the operation of the gatekeeper in the Union, and only to the extent necessary to address such threat to its viability." Article 9 allows platforms to submit a reasoned request to be exempted from specific obligations on grounds of public morality, health or security.

¹⁰³ DMT's advice, para. 4.43.

¹⁰⁴ Explanatory memorandum to the German bill (*Beschlussempfehlung*), p. 113, <https://dserver.bundestag.de/btd/19/258/1925868.pdf>.

¹⁰⁵ Section 2(c) of the H.R. 3816, the *American Choice and Innovation Online Act*.

¹⁰⁶ DMT's Appendix C, para. 7.

¹⁰⁷ However, the DMT also refers to specific conducts that will most likely be addressed in the codes of conduct, such as those on news media identified in the Cairncross Review.

¹⁰⁸ DMT's advice, Appendix C, p. C4 and C10.

¹⁰⁹ DMT's advice, Appendix C, p. C18.

¹¹⁰ Recital 33 of the DMA.

¹¹¹ The DMA also provides for some flexibility, so the statement is more nuanced. First, while Article 5 includes obligations applying as such to all designated gatekeepers, Article 6 includes obligations "*susceptible of being further specified*." The difference lies in the fact that the latter bring a "*transformative potential*" (Colomo, 2021^[54]) and empower the EC to alter the business model of the gatekeeper, for instance by changing the way it monetises its services, by opening to other firms some layers of its ecosystems or by forcing it to share certain data. Second, while the DMA's two lists of *dos* and *don'ts* are exhaustive, Article 10 provides some flexibility as new obligations can be added through a specific comitology procedure that does not require approval by the European Parliament and the Council. Third, Article 8 allows gatekeepers to submit a reasoned request to suspend exceptionally, in whole or in part, a specific obligation "*where the gatekeeper demonstrates that compliance with that specific obligation would endanger, due to exceptional circumstances beyond the control of the gatekeeper, the economic viability of the operation of the gatekeeper in the Union, and only to the extent necessary to address such threat to its viability*." Finally, Article 9 allows platforms to submit a reasoned request to be exempted from specific obligations on grounds of public morality, health or security.

¹¹² The Italian provisions are directly modelled on the German Law: Italian Competition Authority explicitly suggests introducing "specific provisions modelled on the German experience" (p. 57 of the report).

¹¹³ As in the German case, the use of the term "may" (as well as the above-mentioned possibility for the firm to demonstrate that certain prohibitions are not "*objectively justified*") suggests that there is room for adjusting the prohibitions to the specific characteristics of the firm, its business model or its impact on the market and consumer welfare.

¹¹⁴ DMT's advice, Appendix C, p. C3.

¹¹⁵ DMT's advice, Appendix C, p. C16.

¹¹⁶ For more examples of self-preferencing practices by Amazon and other platforms, see (US House of Representatives Sub-Committee on Antitrust, 2020^[9]).

¹¹⁷ Similarities also exist with refusal to deal strategies (since the competitive harm arising from self-preferencing is premised on the existence of an important input or facility that is necessary to compete, such as a major platform to reach customers) or margin squeeze (by discriminating against competitors when proving access to or interoperability with its input).

¹¹⁸ Article 6(1)(d) of the DMA lays down an obligation to "*refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking*."

¹¹⁹ Article 19a(2), No. 1 of the German Act.

¹²⁰ Article 3-bis, para 2, lett. a) of the Italian proposal imposes a prohibition to grant “*preferential treatment, in the intermediation for access to supply and sales market, to their own products or services compared to those of other firms, in particular by favouring them in the display or by pre-installing their own services or product or by integrating them in other firm’s offerings.*”

¹²¹ Section 2(b)(7) of the H.R. 3816, the American Choice and Innovation Online Act, makes unlawful “*in connection with any user interfaces, including search or ranking functionality offered by the covered platform, treat[ing] the covered platform operator’s own products, services, or lines of business more favourably than those of another business user.*”

¹²² Draft Opinion of the EP Committee on Economic and Monetary Affairs.

¹²³ In the EU, such provisions are completed by other regulations, in particular the Platform-to-Business (P2B) Regulation which aims to increase transparency in P2B relations (Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services). Based on this regulation, the EC has adopted precise guidelines on ranking transparency to assist providers of online intermediation services and of online search engines with the application of the legal requirement to set out the main parameters determining ranking and the reasons for their relative importance as opposed to other parameters (see Commission Notice Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council 2020/C 424/01, OJ C 424, 8.12.2020, p. 1–26).

¹²⁴ Article 7(7) of the French proposal.

¹²⁵ DMT’s advice, Appendix C, p. C13. SMS firms shall not bundle services “*when the adverse effects for users, including making it harder to access alternatives and ultimately a reduction in competitors, outweigh the efficiency benefits for users, resulting in adverse effects.*”

¹²⁶ Explanatory memorandum to the German bill (Beschlussempfehlung), p. 116, <https://dserver.bundestag.de/btd/19/258/1925868.pdf>.

¹²⁷ Article 19a(2), No. 3.

¹²⁸ Article 3-bis(2), letter c) of the Italian Competition Authority’s proposal. It lays down a prohibition to “*foreclose other firms on the markets on which the designated company, albeit not being dominant, could rapidly expand its position, in particular by means of tying and bundling strategies.*”

¹²⁹ Recital 41 of the DMA.

¹³⁰ Article 6(1)(b) of the DMA.

¹³¹ Article 5(f) of the DMA.

¹³² Section 2(b)(5) of the H.R. 3816, the *American Choice and Innovation Online Act*. If adopted, it will be unlawful to “*restrict or impede covered platform users from un-installing software applications that have been preinstalled on the covered platform or changing default settings that direct or steer covered platform users to products or services offered by the covered platform operator.*”

¹³³ As discussed in previous OECD roundtables, tying and bundling strategies can have both positive and negative effects on competition. They can benefit consumers by generating substantial economies of scope or scale, enhancing network effects or increasing quality (OECD, 2020^[26]). For example, from a demand perspective, they can provide consumers with a one-stop shop, or they can increase the value of

a platform to consumers by increasing the number of active users thereof. As long as they are still able to un-install them and download a different software, consumers most likely find it more convenient if certain basic apps (e.g., a camera app, the calendar or the web browser) are pre-installed when they purchase a new phone. From a supply side, tying or bundling might be the core of a business model in which certain products are offered at low or zero price thanks to the cross-subsidisation from tied products. However, they can also be used as a strategy to foreclose competitors, for example when bundling seeks to deny rivals a user base and thus sufficient network effects to compete, or when they are a way to prevent the entry of standalone products (OECD, 2020, p. 50^[26]).

¹³⁴ Article 5(b) of the DMA.

¹³⁵ Section 2(b)(8) of the H.R. 3816, the *American Choice and Innovation Online Act*.

¹³⁶ The divergent conclusions reached in the past concerning the effects of MFNs might partially explain the divergence in the regulations. In the past, national competition authorities and courts in the EU have reached very different conclusions when assessing MFNs and Across-Platform Parity Agreements (APPAs). In 2015, several EU member states accepted commitments made by Booking.com to remove hotels' obligation to offer on its platform rates that were equal or more favourable than those offered on other platforms (see <https://news.booking.com/bookingcom-announces-support-of-new-commitments-in-europe/> and also European Commission, Press Release, *Antitrust: Swedish, French, and Italian competition authorities obtain commitments in online hotel booking sector*, 21 April 2015). In contrast, the Bundeskartellamt took a more strict approach and required a complete ban on MFNs (see Bundeskartellamt, Decision B 9 – 121/13 dated 22 December 2015). While, on appeal, in 2019 the Higher Regional Court Düsseldorf emphasised the pro-competitive effects of narrow parity clauses preventing free-riding (see Judgment of the Düsseldorf Higher Regional Court (Oberlandesgericht) of 4 June 2019 (VI-Kart 2/16 (V) – booking), a recent decision by Germany's Federal Court of Justice has reversed the regional court's decision and uphold the Bundeskartellamt's prohibition of Booking.com's narrow MFNs (see MLex Insight, *Booking.com loses German antitrust case over "narrow" hotel-reservation clauses*, 18 May 2021). For an overview, see Commission Staff Working Document, *Evaluation of the Vertical Block Exemption Regulation* (8 September 2020), p. 184.

¹³⁷ (OECD, 2016, p. 10^[28]; OECD, 2019^[27]).

¹³⁸ Recital 3 of the DMA.

¹³⁹ User data are what drives social media and content-sharing platforms, they are the input for algorithms of digital platforms such as search engines, and are necessary to improve service quality and ad targeting (OECD, 2021, p. 15^[49]). Furthermore, data often show economies of scale (i.e., there are substantial fixed costs associated with data collection, processing and analysis) and of scope (i.e., a dataset can have multiple applications and thus data gathered in one platform market can be a valuable asset for entering other markets) (OECD, 2021, p. 15^[49]).

¹⁴⁰ DMT's advice, main report, p. 43. The DMU will be entitled to make "*data-related interventions - including interventions to support greater consumer control over data, mandating third-party access to data and mandating data separation/data silos.*"

¹⁴¹ DMT's advice, Appendix D, p. D9. The DMT recommends granting the DMU powers to impose consumer control remedies enabling "*consumers to better control their personal data, for example by controlling the terms on which it is collected, how it is used, who it is shared with and facilitating consumer-led data mobility. They would complement existing data protection rights under the General Data Protection Regulation and the Data Protection Act 2018.*"

¹⁴² Pursuant to Article 6(1)(h) of the DMA, gatekeepers will have to “*provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of continuous and real-time access.*”

¹⁴³ Section 2(b)(4) of the H.R. 3816, the *American Choice and Innovation Online Act*.

¹⁴⁴ Section 3(a) of H.R. 3849, the *Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021* or the ACCESS Act of 2021.

¹⁴⁵ Section 19a(2), No. 5 of the German Act.

¹⁴⁶ Article 3-bis(2), letter e) of the Italian Competition Authority’s proposal.

¹⁴⁷ A real-life experiment by (Nicholas and Weinberg, 2019^[79]) consisted in giving junior engineers and top executives with strategic decision power access to Facebook’s exported and anonymised user data. Despite having access to such data, when asked about how they would use them to compete and why they were not already using them to build their own competing services, they clarified that they struggled to come up with new competitive products from ported Facebook data. This was because of a number of reasons, including the insufficiency of complementary data, the lack of inferences that Facebook had drawn from data, and the fact that such data were very specific to a service like Facebook and thus ill-suited to build a radically different service capable of competing with the social network.

¹⁴⁸ DMT’s advice, Appendix D, p. D9.

¹⁴⁹ Article 6(1)(j) of the DMA.

¹⁵⁰ Recital 56 of the DMA. The objective of this obligation is explicitly to allow “*third-party providers [to] optimise their services and contest the relevant core platform services.*”

¹⁵¹ Pursuant to Article 6(1)(i) of the EU DMA, gatekeepers shall “*provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users.*”

¹⁵² Following the latest amendments, the prohibition on abusing a dominant position also applies to situations in which an undertaking is dependent on a firm with relative or superior market power. According to the new provisions, such a situation may arise *inter alia* when a firm is dependent on accessing data controlled by another firm in order to carry out its own activities. See Section 20(1a) of the German Act, which provides that a situation of economic dependence “*may also arise from the fact that an undertaking is dependent on accessing data controlled by another undertaking in order to carry out its own activities. Refusing to grant access to such data in return for adequate compensation may constitute an unfair impediment*”.

¹⁵³ Nonetheless, as noted by some authors (Krämer, 2020, p. 267^[76]), while generally non-rivalrous, data can be excludable, which means that the data controller can impose constraints to prevent sharing of data and thus preventing others to have access to them. Also, the collection of data and the derivation of value from them is subject to intense competition between firms.

¹⁵⁴ DMT’s advice, Appendix D, p. D9.

¹⁵⁵ Pursuant to Article 6(1)(c) of the DMA, “*the gatekeeper shall not be prevented from taking proportionate measures to ensure that third party software applications or software application stores do not endanger the integrity of the hardware or operating system provided by the gatekeeper.*”

¹⁵⁶ Article 6(1)(f) of the DMA.

¹⁵⁷ Section 2(b)(1) of the H.R. 3816, the *American Choice and Innovation Online Act*

¹⁵⁸ Section 19(a)(2)(5) of the German Act.

¹⁵⁹ Article 3-bis(2), lett. e) of the Italian Competition Authority’s proposal.

¹⁶⁰ DMT’s advice, Appendix D, p. D12.

¹⁶¹ DMT’s advice, Appendix D, p. D13.

¹⁶² DMT’s advice, para. 2.4.

¹⁶³ Aware of the difficulties that the DMU might face in monitoring firms’ compliance with the code of conduct, given the lack of transparency of their decision-making, the DMT recommends granting the DMU the power to specify who should bear the burden of proof for proving that the conditions for an exemption from an obligation laid down in the code of conduct are met. The DMT highlights indeed that “*[t]his is likely to be most important when there is not sufficient transparency about the actions of the SMS firm for the DMU to reasonably be able to monitor compliance with the relevant principle*” (DMT’s advice, Appendix C, p. C12.)

¹⁶⁴ DMT’s advice, para 4.38. The DMT also recommends stronger enforcement of the P2B Regulation, which focusses “*on providing business users with appropriate transparency in areas such as terms and conditions, parameters used for determining search rankings, restrictions on selling elsewhere and data use*” (DMT’s advice, para. 5.30).

¹⁶⁵ Section 19a(2)(6).

¹⁶⁶ Article 3-bis, para 2, lett. f) of the Italian proposal.

¹⁶⁷ Japan’s Act on Improving Transparency and Fairness of Digital Platforms, promulgated on 3 June 2020.

¹⁶⁸ French proposal, Article 7(7). It is worth noting that this is a new general power granted to the competition authority and does not apply only to designated structuring enterprises.

¹⁶⁹ Pursuant to Article 5(g) of the DMA, gatekeepers will have to “*provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper.*”

¹⁷⁰ See recital 42 of the DMA.

¹⁷¹ Article 6(g) of the DMA.

¹⁷² Article 12 of the DMA

¹⁷³ DMT's advice, para. 4.135. SMS firms should make the CMA aware of the transactions “*within a short period after signing.*” In addition, the DMT also recommends introducing a mandatory notification for certain transactions meeting clear-cut thresholds entered into by SMS firms. In the DMT's view, such thresholds should refer to the value of the transaction and also require some connection to the UK. Once notified, such transactions would be subject to the ordinary merger control standards currently applied by the CMA when reviewing mergers. Finally, with regards to SMS firms, the DMT also recommends introducing more far-reaching changes, specifically to lower the probability threshold at which the CMA can intervene when assessing a merger in Phase II. It recommends replacing the “more likely than not” test with a test ascertaining a “realistic prospect” that the merger gives rise to a substantial lessening of competition (DMT's advice, para. 4.153). In other words, this will enable the CMA to intervene in mergers having the potential to cause consumer harm, although it cannot be established that this outcome is more likely than not.

¹⁷⁴ French proposal, Article 7(4). It is worth noticing that in addition to this obligation, pursuant to Article 7(5) the Authority would also be empowered to request such companies to proceed to a formal notification following the standard merger control rules.

¹⁷⁵ Section 39a of the German Act.

¹⁷⁶ Italian proposed Article 16, para. 1-bis of the Law No. 287/1990 (see report, p. 54).

¹⁷⁷ Article 26 of the DMA.

¹⁷⁸ DMT's advice, para. 4.96.

¹⁷⁹ DMT, Appendix C, paras 159-160.

¹⁸⁰ Section 81(2) of the German Act.

¹⁸¹ Article 3-bis(4) of the Italian proposal.

¹⁸² Section 2(f) of the H.R. 3816, the *American Choice and Innovation Online Act*.

¹⁸³ Article 3-bis(4) of the Italian proposal.

¹⁸⁴ Article 16 of the DMA.

¹⁸⁵ Section 32 of the German Act.

¹⁸⁶ Section 2(f)(2)(D) of the H.R. 3816, the *American Choice and Innovation Online Act*.

¹⁸⁷ Section 2(a) of the H.R. 3825, the *Ending Platform Monopolies Act of 2021*.

¹⁸⁸ DMT's advice, para. 4.67.

¹⁸⁹ DMT's advice, para. 4.70

¹⁹⁰ (Crémer, de Montjoye and Schweitzer, 2019^[11]) (Furman et al., 2019^[5]) **Invalid source specified.** (Colangelo, 2020^[4]).

¹⁹¹ For instance (Fletcher, 2020^[3]) or (Marsden and Podszun, 2020^[6]).

¹⁹² See for instance (Khan, 2017_[24]).

¹⁹³ OECD (2021), Competition Enforcement and Regulatory Alternatives, OECD Competition Committee Discussion Paper, <http://oe.cd/cera>

¹⁹⁴ See amongst others The Competition Assessment Reviews of Greece (2013, 2016) and Portugal (2018) <https://www.oecd.org/daf/competition/assessment-toolkit.htm>

¹⁹⁵ (Chopra and Khan, 2020_[23]) p. 358

¹⁹⁶ (Schnitzer et al., 2021_[44]) p.2.

References

- Aghion, P. et al. (2005), “Competition and Innovation: an Inverted-U Relationship”, *The Quarterly Journal of Economics*, Vol. 120/2, pp. 701-728, <http://dx.doi.org/10.1093/qje/120.2.701>. [56]
- Alexiadis, P. and A. de Stree (2020), “Designing an EU Intervention Standard for Digital Platforms”, *EUI Working Papers*, Vol. Research Paper No. 2020/14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544694. [50]
- ARCEP (2020), *Arcep’s contribution to the public consultation on the DSA Package and the New Competition Tool - n asymmetric ex-ante regulation of structuring digital platforms for open digital infrastructures*. [66]
- Australian Competition & Consumer Commission (2019), *Digital Platforms Inquiry: Final Report*. [73]
- Benelux competition authorities (2019), *Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in the digital world*, https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdclcl.int_memorandum_191002.pdf. [13]
- Botta, M. (2021), “Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila”, *Journal of European Competition Law & Practice*. [31]
- Bourreau, M. (2020), *Some Economics of Digital Ecosystems – Note by Marc Bourreau for the OECD Hearing on Competition Economics of Digital Ecosystems*. [15]
- Bourreau, M. and A. de Stree (2019), “Digital Conglomerates and EU Competition Policy”, <https://ssrn.com/abstract=3350512>. [62]
- Budzinski, O., S. Gaenssle and N. Lindstädt (2021), “The Battle of YouTube, TV and Netflix – An Empirical Analysis of Competition in Audio-visual Media Markets”, *SN Business & Economics*. [60]
- Budzinski, O. and J. Mendelsohn (2021), “Regulating Big Tech: From Competition Policy to Sector Regulation?”, *Illmenau Economics Discussion Papers*, Vol. 27/154. [19]
- Cabral, L. et al. (2021), *The EU Digital Markets Act - A report from a Panel of Economic Experts*, <http://dx.doi.org/doi:10.2760/139337>. [2]
- Cappai, M. and G. Colangelo (2020), *Taming digital gatekeepers: the more regulatory approach to antitrust law*, Stanford-Vienna TTLF Working Paper No. 55, <https://dx.doi.org/10.2139/ssrn.3572629>. [7]

- Cappello, M. (2021), "The Digital Services Act Package and the Audiovisual Sector", *IRIS Special, European Audiovisual Observatory, forthcoming*. [59]
- Carugati, C. (2020), "Regulation in the digital economy. Is ex-ante regulation of "gatekeepers" an efficient and fair solution?", *Working paper*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3705928. [17]
- CERRE (2021), *Making the Digital Markets Act more resilient and effective*. [63]
- CERRE (2020), *Digital Markets Act: Making economic regulation of platforms fit for the digital age*. [20]
- CERRE (2020), *The role of data for digital markets contestability - Case studies and data access remedies*. [51]
- Chirico, F. (2021), "Digital Markets Act: A Regulatory Perspective", *Journal of European Competition Law & Practice*, <https://doi.org/10.1093/jeclap/lpab058>. [65]
- Chopra, R. and L. Khan (2020), "The Case for "Unfair Methods of Competition" Rulemaking", *The University of Chicago Law Review*, Vol. 87/2, pp. 357-379, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6181&context=uclev>. [23]
- CMA (2020), *Online platforms and digital advertising - Market study final report*. [42]
- Colomo, P. (2021), "The Draft Digital Markets Act: a legal and institutional analysis", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276. [54]
- Commission 'Competition Law 4.0' (2019), *A new competition framework for the digital economy*, Federal Ministry for Economic Affairs and Energy, <http://www.bmwi.de>. [30]
- Competition and Markets Authority, CMA (2020), *Advice of the Digital Markets Taskforce: A new pro-competition regime for digital markets*, CMA 135, https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf. [10]
- Competition Policy Council Communiqué (2021), "Digital Platforms: Oversight if Necessary, But Not Necessarily Regulation", *Twentieth Report of C.D. Howe Institute Competition Policy Council*, https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique_2021_0107_CPC.pdf. [40]
- Crawford, G. et al. (2021), "Fairness and Contestability in the Digital Markets Act", *Digital Regulation Project, Policy Discussion Paper No. 3*. [45]
- Crémer, J., Y. de Montjoye and H. Schweitzer (2019), *Competition Policy for the Digital Era*, Publications Office of the European Union, <http://dx.doi.org/10.2763/407537>. [11]
- de Streel, A., J. Krämer and P. Senellart (2020), *Making data portability more effective for the digital economy*. [72]
- Dunne, N. (2020), "Fairness and the Challenge of Making Markets Work Better", *The Modern Law Review*, Vol. 84/2, pp. 230-264, <http://dx.doi.org/10.1111/1468-2230.12579>. [43]
- Dunne, N. (2015), *Competition Law and Economic Regulation*, Cambridge University Press, <http://dx.doi.org/10.1017/cbo9781107707481>. [38]

- Eisenmann, T., G. Parker and M. Van Alstyne (2011), "Platform Envelopment", *Strategic Management Journal*, Vol. 32, pp. 1270-1285, <http://dx.doi.org/10.1002/smj.935>. [32]
- European Commission (2020), *Communication 'Shaping Europe's digital future'*, COM(2020) 67 final 8. [18]
- European Commission (2020), *Digital Markets Act*, European Commission. [48]
- Ezrachi, A. (2015), "The Competitive Effects of Parity Clauses on Online Commerce", *Paper submitted for information for Item 7 of the 124th OECD Competition Committee on 27-28 October 2015*. [71]
- Ezrachi, A. and M. Stucke (2016), *Virtual competition : the promise and perils of the algorithm-driven economy*, Harvard University Press. [57]
- Fletcher, A. (2020), "Digital competition policy: Are ecosystems different? -- Background note for the OECD Hearing on Competition Economics of Digital Ecosystems", <https://www.oecd.org/daf/competition/competition-economics-of-digital-ecosystems.htm>. [3]
- Franck, J. and M. Peitz (2021), "Digital Platforms and the New 19a Tool in the German Competition Act", *Journal of European Competition Law & Practice*. [33]
- Furman, J. et al. (2019), *Unlocking digital competition. Report of the Digital Competition Expert Panel ('Furman Review')*, HM Treasury. [5]
- Ishenko, Z. et al. (2016), *Economics for Effective Regulation*, Financial Conduct Authority, <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-13.pdf>. [37]
- JFTC (2017), *Report of Study Group on Data and Competition Policy (English summary)*, https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606_files/170606-3.pdf. [52]
- Khan, L. (2017), "Amazon's Antitrust Paradox", *Yale Law Journal*, Vol. 126. [24]
- Khan, L. and R. Chopra (2020), "The Case for "Unfair Methods of Competition" Rulemaking", *The University of Chicago Law Review*. [68]
- Krämer, J. (2020), "Personal Data Portability In The Platform Economy: Economic Implications And Policy Recommendations", *Journal of Competition Law & Economics*, Vol. 17/2, pp. 263-308. [76]
- Lundqvist, B. (2021), "The Proposed Digital Markets Act and Access to Data: A Revolution, or Not?", *International Review of Intellectual Property and Competition Law* 52, pp. 239-241, <https://doi.org/10.1007/s40319-021-01026-0>. [77]
- Marsden, P. and R. Podszun (2020), *Restoring Balance to Digital Competition - Sensible Rules, Effective Enforcement*, Konrad-Adenauer-Stiftung, <http://www.kas.de>. [6]
- Marty, F. (2021), "Competition and regulatory challenges in digital markets: how to tackle the issue of self-preferencing?", *GREDEG Working Papers Series*. [67]
- Monti, G. (2021), "The Digital Markets Act – Institutional Design and Suggestions for Improvement", *SSRN Electronic Journal*, <http://dx.doi.org/10.2139/ssrn.3797730>. [21]
- Motta, M. (2004), *Competition Policy Theory and Practice*, Cambridge University Press. [46]

- Mundt, A. (2021), *12th New Frontiers of Antitrust: Regulation of platforms: one size fits all? EU, UK, USA, Germany.* [64]
- Nalebuff, B. (2004), "Bundling as an Entry Barrier", *The Quarterly Journal of Economics*, Vol. 119/1, pp. 159-187. [69]
- Nicholas, G. and M. Weinberg (2019), "Data portability and Platform Competition - Is user data exported from Facebook actually useful to competitors?", <https://www.law.nyu.edu/centers/engelberg/pubs/2019-11-06-Data-Portability-And-Platform-Competition>. [79]
- OECD (2021), *Competition Enforcement and Regulatory Alternatives*, OECD Competition Committee Discussion Paper, <http://oe.cd/cera>. [35]
- OECD (2021), *Data Portability, Interoperability and Digital Platform Competition*. [49]
- OECD (2020), *Abuse of Dominance in Digital Markets*. [26]
- OECD (2020), *Competition Economics of Digital Ecosystems*. [47]
- OECD (2020), *Conglomerate Effects of Mergers - Background Note by the Secretariat*. [74]
- OECD (2020), *Line of Business Restrictions - Note by the Secretariat*. [75]
- OECD (2020), *Start-ups, Killer Acquisitions and Merger Control*. [78]
- OECD (2019), *Enhancing Access to and Sharing of Data: Reconciling Risks and Benefits for Data Re-use across Societies*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/276aaca8-en>. [53]
- OECD (2019), *Independent Sector Regulators DAF/COMP/WP2(2019)3*, <https://www.oecd.org/daf/competition/independent-sector-regulators.htm>. [36]
- OECD (2019), *Practical approaches to assessing digital platform markets for competition law enforcement: Background note by the Secretariat for the Latin American and Caribbean Competition Forum*, [https://one.oecd.org/document/DAF/COMP/LACF\(2019\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2019)4/en/pdf). [27]
- OECD (2018), *Rethinking Antitrust Tools for Multi-Sided Platforms*. [61]
- OECD (2016), *Big data: Bringing competition policy to the digital era: Background paper by the Secretariat*, [https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf). [28]
- OECD (2015), *Roundtable on Competition and cross platform parity agreements - Summary of discussion*. [70]
- OECD (2014), *Factsheet on how competition policy affects macro-economic outcomes*, <https://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf>. [55]
- OECD (2011), *Regulated Conduct Defence DAF/COMP(2011)3*, <https://www.oecd.org/daf/competition/mergers/48606639.pdf>. [39]
- Prado, T. (2020), "Assessing the Market Power of Digital Platforms", *Quello Center Working Paper, TPRC48: The 48th Research Conference on Communication, Information and Internet Policy* Quello Center Working Paper, <https://dx.doi.org/10.2139/ssrn.3747793>. [8]

- S. Prado, T. (2020), "Assessing the Market Power of Digital Platforms", *SSRN Electronic Journal*, <http://dx.doi.org/10.2139/ssrn.3747793>. [1]
- Schnitzer, M. et al. (2021), "International coherence in digital platform regulation: an economic perspective on the US and EU proposals", *Digital Regulation Project, Policy Discussion Paper No. 5*. [44]
- Schweitzer, H. (2021), "The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Markets Act Proposal", *Forthcoming - Zeitschrift für Europäisches Privatrecht* 3. [58]
- Shelanski, H. (2019), "Antitrust and Deregulation", *Yale Law Journal*, Vol. 127/7, pp. 1925-1928. [34]
- Stigler Committee (2019), *Stigler Committee on Digital Platforms, Final Report, September 2019*, <https://research.chicogobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report>. [12]
- Strowel, A. and W. Vergote (2016), "Digital Platforms: to Regulate or Not To Regulate? Message to Regulators: Fix the Economics First, Then Focus on the Right Regulation", *Responses to the Public Consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy..* [41]
- Takigawa, T. (2021), "Super platforms, big data, and competition law: the Japanese approach in contrast with the USA and EU", *Journal of Antitrust Enforcement*, Vol. 9, pp. 289-312, <http://dx.doi.org/10.1093/jaenfo/jnaa053>. [16]
- Thiemann, A. and A. Neto (2021), "Barriers to entry in the digital market: An overview of EU and national case law", *e-Competitions*, Vol. Art N° 100184/Barriers to entry in the digital markets, <https://www.concurrences.com/fr/bulletin/special-issues/barriers-to-entry-in-the-digital-market/barriers-to-entry-in-the-digital-market-an-overview-of-eu-and-national-case-law> (accessed on 10 September 2021). [14]
- UNCTAD (2021), *Competition law, policy and regulation in the digital era, Note by the UNCTAD secretariat*, https://unctad.org/system/files/official-document/ciclpd57_en.pdf (accessed on 8 September 2021). [25]
- US House of Representatives Sub-Committee on Antitrust (2020), *Investigation of competition in digital markets*. [9]
- Wheeler, T., P. Verveer and G. Kimmelman (2020), *New Digital Realities; New Oversight Solutions in The case for a Digital Platform Agency and a new approach to regulatory oversight*, <https://shorensteincenter.org/new-digital-realities-tom-wheeler-phil-verveer-gene-kimmelman/>. [22]
- Wright, J. and D. Ginsburg (eds.) (2020), *Antitrust and Ex-Ante Sector Regulation*, The Global Antitrust Institute, <https://gaidigitalreport.com/>. [29]
- Wright, J. and D. Ginsburg (eds.) (2020), *Evaluating the Case for Regulation of Digital Platforms*, The Global Antitrust Institute, Antonin Scalia Law School, George Mason University, <http://www.gaidigitalreport.com>. [4]

www.oecd.org/competition

