Regulating gatekeepers to protect contestability in digital markets: Learning from international experience

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I. Introduction

Over the past few years, a vast array of regulators, academics, politicians, and companies, have expressed concerns about the market power gained by the so-called GAFA (i.e., Google, Apple, Facebook, and Amazon) in a variety of digital markets. These concerns have been expressed in a wide range of reports commissioned by public authorities[1] or prepared independently by experts,[2]

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1 See, for instance, "Unlocking digital competition. Report of the Digital Competition Expert Panel" ("Furman Report"), March 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; UK Competition and Markets Authority, "Online platforms and digital advertising – Final report", July 2020, available at https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study; Australian Competition and Consumer Commission, "Digital Platforms inquiry – Final report", July 2019, available at https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report; Jaques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, "Competition Policy for the Digital Era – Final report" ("EU Report"), 2019, available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Competition and Markets Authority, "A new pro-competitive regime for digital markets. Advice of the Digital Markets Taskforce" ("Advice"), December 2020, available at https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.

2 For instance, "Stigler Committee on Digital Platforms: Final Report" ("Stigler Report"), 16 September 2019, available at https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report; CERRE, "Big Tech Acquisition: Competition and Innovation Effects & EU Merger Control", February 2020, available at https://cerre.eu/publications/big-tech-acquisitions-competition-and-innovation-effects-eu-merger-control.

as well as in books,[3] academic articles,[4] and press stories.[5] Few issues have raised as much attention as what needs to be done with Big Tech.

While there is no question that the GAFA provide extremely valuable services, which have revolutionized existing industries[6] or have created new ones,[7] these companies have been subject to substantial criticism regarding, *inter alia*, the fact that they have often crushed smaller rivals,[8] taken advantage of their users or radicalized them through "echo chambers",[9] invaded privacy,[10] or

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3 For example, Jonathan Tepper and Denise Hearn, *The myth of capitalism. Monopolies and the Death of Competition* (John Wiley & Sons, Inc., 2019); Soshana Zuboff, *The age of surveillance capitalism: The fight for the human future at the new frontier of power* (PublicAffairs 2019); Tim Wu, *The Attention Merchants. The Epic Scramble to get Inside our Heads* (Alfred A. Knopf 2016); Tim Wu, *The Curse of Bigness. Antitrust in the new gilded age* (Columbia Global Reports 2018).

4 For example, Fionna Scott Morton and David Dinielli, "Roadmap for an antitrust claim against Facebook" (2020) *OMIDYAR NETWORK*, available at https://www.omidyar.com/news/roadmap-antitrust-case-against-facebook; Dina Srinivasan, "The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy" (2019) 16 *Berkeley Bus. L.J.* 39.

5 For example, Aoife White, "Epic Games attacks Apple in antitrust complaint in the EU", *Bloomberg*, 17 February 2021, available at https://www.bloomberg.com/news/articles/2021-02-17/epic-games-attacks-apple-in-complaint-to-eu-antitrust-watchdog; Lauren Feiner, "Google's antitrust mess: Here are all the major cases it's facing in the U.S. and Europe", *CNBC*, 18 December 2020, available at https://www.cnbc.com/2020/12/18/google-antitrust-cases-in-us-and-europe-overview.html; Alison Durkee, "Justice Department Sues Google For Antitrust Violations", *Forbes*, 20 October 2020, available at https://www.forbes.com/sites/alisondurkee/2020/10/20/justice-department-suing-google-for-antitrust-violations/; Adams Satariano, "Amazon Charged With Antitrust Violations by European Regulators", *The New York Times*, 10 November 2020, available at https://www.nytimes.com/2020/11/10/business/amazon-eu-antitrust.html#:~:text=LONDON%20%E2%80%94%20European%20Union%20regulators%20brought,the%20company%20to%20reach%20customers.

6 One example is the retail industry where digitalization has allowed for a range of business models to emerge with the advantage of new technology and marketing opportunities.

7 The most prominent example is, of course, social media platforms such as Facebook.com.

8 Nicas and Collins. "How Apple's Apps Topped Rivals in the App Store It Controls", *Wall Street Journal*, 9 September 2019, available at https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html ("Apple's apps have ranked first recently for at least 700 search terms in the store, according to a New York Times analysis of six years of search results compiled by Sensor Tower, an app analytics firm."); Bill Goodwin et al. "How Facebook's 'Switcheroo' plan concealed scheme to kill popular apps", *Computer Weekly*, 6 November 2019, available at https://www.computerweekly.com/feature/How-Facebooks-Switcheroo-plan-concealedscheme-to-kill-popular-apps.

9 Eli Pariser, *The filter bubble: What the Internet is hiding from you* (Penguin 2011); Kieron O'Hara and David Stevens, "Echo Chambers and Online Radicalism: Assessing the Internet's Complicity in Violent Extremism" (2015) *Policy & Internet*. Vol. 7 (4), pages 401-422.

10 Fionna Scott Morton and David Dinielli, "Roadmap for an antitrust claim against Facebook" (2020) *OMIDYAR NETWORK*, available at https://www.omidyar.com/news/roadmap-antitrust-case-against-facebook; Arnold Roosendaal "Facebook Tracks and Traces Everyone: Like This!" (2010) *Tilburg Law School Legal Studies Research Paper Series* No. 03/2011, available on SSRN: https://ssrn.com/abstract=1717563; Amir Efrati, ""Like Button" follows web users", *Wall Street Journal*, 18 May 2011, available at https://www.wsj.com/articles/SB10001424052748704281504576329441432995616.

even destroyed the press.[11] While these criticisms initially emerged in Europe, they are now widely shared in the United States, where on 29 July 2020, the CEOs of Google, Apple, Facebook, and Amazon were invited to testify in the US Congress where they faced a barrage of criticisms for the alleged wrongdoings of their companies.[12]

From a competition policy standpoint – which will be the focus of this paper – three main concerns have been expressed. First, that these companies may be able to leverage the market power they have gained in their core market(s) to adjacent markets, with the risk that rivals may be excluded from such markets (exclusionary claims). Second, that these companies may use their market power in the markets they dominate to impose unfair trading conditions on their individual and business users (exploitative claims). Third, that these companies would eliminate the competitive threat generated by smaller firms by acquiring them.

This is not the first time that such exclusionary and exploitative claims have been levelled against large companies. Similar claims were, for instance, made for much of the second part of the 20th century against telecommunications, energy and other utility operators.[13] The theory was that these companies could take advantage of their control of essential infrastructures (e.g., the local loop in telecoms or the electricity transmission network) to impede competition in service markets and, in the absence of such competition, take advantage of their users through high prices, low quality and lack of innovation. These problems were addressed in most parts of the world through a combination of sector-specific regulation[14] and antitrust enforcement.[15]

The issues at stake when it comes to digital platforms are more complex for several reasons. First, while utility operators were challenged by their users due to the high price and low quality of their services, the same cannot be said for digital platforms whose services are often free and generally of high quality. Second, while utility operators enjoyed the quiet life of monopolists, digital

11 Matt Stoller, "Tech Companies Are Destroying Democracy and the Free Press", *The New York Times*, 17 October 2019, available at https://www.nytimes.com/2019/10/17/opinion/tech-monopoly-democracy-journalism.html.

12 Hearing from the Subcommittee on Antitrust, Commercial, and Administrative Law on "Online Platforms and Market Power: Examining the Dominance of Amazon, Apple, Facebook and Google", 29 July 2020, available at https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3113.

13 Damien Geradin, *Controlling Market Power in Telecommunications* (Oxford University Press 2003); Damien Geradin, *The liberalization of electricity and natural gas in the European Union* (Kluwer Law International 2001).

14 US Telecommunications Act 1996; Directive (EU) 2018/1972 establishing the European Electronic Communications Code, OJ L 321, 17/12/2018; Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24/04/2002.

15 See, for instance, Case C-280/08 *P Deutsche Telekom v Commission*; Case C-202/07 P, *France Télécom v Commission*; Case C-52/09, *TeliaSonera*; Case C-295/12 P, *Telefónica SA v Commission*; Case T-851/14, *Slovak Telekom v Commission.*

platforms firms invest large sums in research and development ("R&D").[16] Third, while utility operators had fairly similar business models, digital platforms operate different models: (i) Google and Facebook essentially operate free services that are funded by advertising, (ii) Amazon generates revenues through fees charged on transactions flowing through its e-commerce platform, and (iii) Apple generates revenues through the sale of hardware, commissions generated on its App Store and the provision of a growing range of services. Fourth, while utility operators usually focused on their domestic market and concentrated their efforts on protecting their monopoly, digital platforms seek to expand their activities across product and geographic markets.

This does not mean, however, that the tools that were used by governments to address the competitive concerns created by utility operators are no longer relevant; indeed, most of the reports dealing with the problems raised in digital markets recommend a combination of regulatory and competition law interventions to address these concerns.[17] But the greater heterogeneity of business models and the wider range of markets involved generates a level of complexity not seen in the past, which explains why governments and competition authorities have commissioned a variety of reports designed to identify the issues requiring the attention of regulators based on the available evidence, and to suggest the right combination of tools to address these concerns.

Against this background, the purpose of this paper is to identify the competition policy concerns raised by the activities of digital platforms (so-called digital gatekeepers) and outline the solutions proposed to address these concerns.[18] This paper is divided in seven parts. Following this introductory part, **Part II** comprises an introduction to digital markets and platforms. **Part III** discusses the competition policy concerns that have been identified by three of the most influential reports on competition in digital markets, namely the Competition policy for the digital era report (the "EU Report"), the Stigler Committee on Digital Platform, Market Structure and Antitrust Subcommittee Report (the "Stigler Report"), and the Unlocking Digital Competition Report (the "Furman Report"). Subsequently, **Part IV** refers to the recommendations that have been made in these reports to address these competition concerns in digital markets. **Part V** then discusses the initiatives that have already been pursued in the European Union, and notably the Proposal for a Digital Markets Act issued by the European Commission in December 2020, while **Part VI** examines the UK Digital Taskforce Advice published in the same month. **Part VII** finally concludes.

II. Introduction to digital markets and platforms

16 According to Statista, in 2019, Alphabet (Google's parent company) reported to have spent 26 billion US dollars in R&D, while Facebook reported 13.6 billion US dollars spent in R&D. See further, Furman Report, page 26.

17 Furman Report; EU Report; Stigler Report.

18 For a discussion on what is a digital gatekeeper, see Damien Geradin, "What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?", 18 February 2021, available on SSRN: https://papers.ssrn.com/abstract_id=3788152.

Digital markets have been defined as "*those in which companies develop and apply new technologies to existing businesses or create new services using digital capabilities*."[19] Many of these markets are dominated by multi-sided platform businesses, which involve "*distinct but interdependent sets of users interacting with one another via the platform*."[20]

As noted above, digital platforms can be distinguished according to their model:

- A first category of platforms are ***ad-supported consumer platforms***. These platforms aggregate users by offering them a "free" service, which is monetized by selling ads to advertisers. While these platforms do not require users to pay a monetary compensation for the use of the service, users effectively pay with the data they allow the platforms to collect, which are then used to optimize advertising. Platforms such as Google Search, Facebook or Instagram belong to this category.

- A second category of platforms are ***marketplaces***, which intermediate the relationship between different categories of users. App stores, such as the Apple App Store or the Google Play Store, for instance, allow app developers and mobile device users to transact. Marketplaces also include e-commerce platforms, such as Amazon, e-Bay or Zalando. These platforms generate revenues by charging a commission on the transactions they allow.

- A final category of platforms are ***software platforms***, such as operating systems. Platforms like Windows or Android allow developers to build hardware (e.g., printers, screens, etc.) or software solutions (e.g., HR or billing solutions) that they can sell to the users of the platforms. While some of these software platforms are licensable by hardware makers (e.g., Windows and Android), others (e.g., iOS) are not licensable to third parties. Software platforms can either be licensed by users for a fee or they can be monetized through the sale of devices or fees charged to developers for the distribution of their apps.

While platforms differ in important ways, such as how they generate income, the markets on which they operate tend to share common characteristics that impact the conditions of competition. First, these markets typically witness large economies of scale (given the large proportion of fixed costs, such as R&D) and economies of scope (as the same assets – i.e., infrastructure and data assets – can be used to deliver distinct services). Second, these markets are characterized by direct network effects (as the user utility of a service grows with the number of other users of the service), as well as indirect network effects (as the value of the service increases for one user group when a new user of a different user group joins the network). As illustrated by Google's domination of the

19 Competition and Markets Authority, "The CMA's Digital Markets Strategy", July 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cma_digital_strategy_2019.pdf, page 5.

20 OECD, "An Introduction to Online Platforms and their Role in the Digital Transformation", 2019, available at https://doi.org/10.1787/53e5f593-en, page 21.

generic search market or Facebook's domination of social networks, these characteristics can trigger "winner-takes-all" dynamics and thus lead to market concentration.[21]

III. Competition policy concerns raised by digital gatekeepers

From a competition policy standpoint, the concerns expressed regarding large online platforms, such as the GAFA, can be divided into two broad categories: (i) dominance-related issues, and (ii) merger-related issues. When it comes to the former, the concern is that large digital platforms would use their market power to engage in two types of anticompetitive conducts: (a) exclusionary conducts, whereby they would engage in practices designed to leverage their market power from their core market(s) to adjacent markets and/or protect their market power in their core market(s); or (b) exploitative conducts, whereby their market power would allow them to take advantage of their users (businesses or individuals) to charge excessive prices (for instance on advertisers), lower quality or impose unfair trading conditions. When it comes to the latter, i.e., mergers eliminating actual or potential rivals, the difficulty is that, because the companies acquired have no or low turnover, the transactions will often fall below the turnover thresholds, thus escaping merger control review.

A. Abusive use of market power

In this Section, I first refer to concerns raised due to exclusionary practices adopted by digital gatekeepers (Sub-section 1), before turning to exploitative practices adopted by such firms (Sub-section 2).

1. Exclusionary practices

The European Commission, which is one of the most active antitrust enforcers in the world, recently adopted three decisions against Google, i.e., the *Shopping* decision,[22] the *Android* decision,[23] and the *AdSense* decision,[24] and is currently investigating Apple,[25] Facebook[26] and Amazon.[27]

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21 See, e.g., Furman Report, Chapter 1: The causes of concentration in digital markets.

22 Commission Decision of 27 June 2017, Case AT.39740 – *Google Search (Shopping)*.

23 Commission Decision of 18 July 2018, Case AT.40099 – *Google Android*.

24 Commission Decision of 20 March 2019, Case AT.40411 – *Google (AdSense)*.

25 On 16 June 2020, the Commission decided to open proceedings against Apple in cases: AT.40437 - *Apple - App Store Practices (music streaming)*, and AT.40652 - *Apple - App Store Practices (e-books/audiobooks)*.

26 Foo Yun Chee, "Facebook in EU antitrust crosshairs over data collection", *Reuters*, 2 December 2019, available at https://www.reuters.com/article/us-eu-facebook-antitrust/facebook-in-eu-antitrust-crosshairs-over-data-collection-idUSKBN1Y625J.

27 On 10 November 2020, the Commission sent a Statement of Objections to Amazon in the case AT.40462 – *Amazon Marketplace*, and opened a second investigation into Amazon's buy-box in case AT.40703.

In all these cases, the firm in question is accused of leveraging its market power in a core market to conquer an adjacent market. A variety of anticompetitive tactics can be used by dominant firms to exclude rivals. For instance, in the *Shopping* decision, the Commission found that Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors (a practice sometimes referred to as "self-preferencing").[28] Similarly, in the *Android* case the Commission found that Google required manufacturers to pre-install the Google Search app and the Google browser app (Chrome), as a condition for licensing Google's app store (the Play Store) (in other words, "tying").[29] In the *AdSense* decision, the Commission took issue with the fact that Google had included a number of restrictive clauses in contracts with third-party websites which prevented Google's rivals from placing their search ads on these websites ("exclusive dealing").[30]

While the Commission is investigating Facebook for its data collection practices, as well as for tying its Marketplace into its eponymous social network app,[31] the Commission's investigations of Apple[32] and Amazon[33] explore the potential exclusionary issues that may arise when a dominant firm exercises a dual role, in that (i) it operates a platform, and (ii) competes on the platform against third-party users of the platform, hence raising the concern that it may use its upstream market power in order to distort competition in downstream markets.

Other antitrust authorities are also looking closely at potentially exclusionary behaviour of large online platforms. For instance, the UK Competition and Markets Authority ("CMA") conducted a comprehensive Market Study on Online Platforms and Digital Advertising, which identified potentially exclusionary conduct by Google in the ad tech sector.[34] The CMA also recently opened an investigation into Google's Privacy Sandbox browser changes,[35] and Apple's practices with

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28 Commission Decision of 27 June 2017, Case AT.39740 – *Google Search (Shopping)*.

29 Commission Decision of 18 July 2018, Case AT.40099 – *Google Android*, paragraph 752.

30 European Commission Press Release, "Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising", 20 March 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

31 See cases AT.40437 - *Apple - App Store Practices (music streaming)*, and AT.40652 - *Apple - App Store Practices (e-books/audiobooks).*

32 Foo Yun Chee, "Facebook in EU antitrust crosshairs over data collection", *Reuters*, 2 December 2019, available at https://www.reuters.com/article/us-eu-facebook-antitrust/facebook-in-eu-antitrust-crosshairs-over-data-collection-idUSKBN1Y625J.

33 See case AT.40462 – *Amazon Marketplace*, in which a Statement of Objections has been sent to Amazon.

34 UK Competition and Markets Authority, "Online platforms and digital advertising – Final report", July 2020, available at https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.

35 CMA Press Release, "CMA to investigate Google's 'Privacy Sandbox' browser changes", 8 January 2021, available at https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes.

regards to the App Store.[36] The Russian Federal Antimonopoly Service recently found that Apple abused its dominant position in relation to developers of parental control mobile applications and limited competition in the distribution market for applications for mobile devices running on the iOS operating system.[37] In the US, Google faces three major lawsuits, for a variety of alleged anticompetitive behaviours: a lawsuit filed by the Department of Justice and 11 States focusing on search, a second lawsuit filed by the State of Texas plus 9 other States focusing on ad tech and a third lawsuit filed by 38 States and territories focusing on search and verticals.[38]

While these decisions and investigations involve a variety of antitrust issues, they typically raise the same enforcement challenges, which were particularly salient in the European Commission's investigations of Google. First, because of the complexity of the matters at stake, competition law investigations usually take a long time (at least 4-5 years in the most challenging cases), which is a significant problem in fast-moving markets that are prone to tipping. Hence, unless the authority adopts interim measures, the market may have tipped and the damage to competition may have become permanent by the time the authority completes its investigation and issues a decision. Second, because competition cases tend to be highly facts-specific and therefore are generally narrow, they do not necessarily address *systemic* problems. For instance, while the European Commission's *Shopping* decision focused on comparison-shopping services, it did not deal with similar issues that arise in a range of other verticals (such as travel booking, etc.), where similar self-preferencing tactics by Google are also manifest. Similarly, because the remedies imposed by competition authorities typically aim at addressing the specific competition concerns investigated in the case at hand, they tend to be narrow. Finally, competition authorities tend to have limited resources and thus can only handle a few cases every year, with the consequence that many anticompetitive practices may be left unchallenged.

2. Exploitative practices

The notion of abusive exploitation is quite unique to EU competition law. For instance, US federal courts have made it clear that *"even a monopolist is free to exploit whatever market power it may possess*" by "*charging uncompetitive prices*",[39] and that exploitation is also alien to many antitrust laws.

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36 CMA Press Release, "CMA investigates Apple over suspected anti-competitive behaviour", 4 March 2021, available at https://www.gov.uk/government/news/cma-investigates-apple-over-suspected-anti-competitive-behaviour.

37 Federal Antimonopoly Service of the Russian Federation, "FAS found Apple abusing its dominant position in the mobile apps market", 11 August 2020, available at http://en.fas.gov.ru/press-center/news/detail.html?id=54965.

38 See "Justice Department Sues Monopolist Google For Violating Antitrust Laws", 20 October 2020, available at https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws; Diane Bartz and Paresh Dave, "Texas, nine U.S. states accuse Google of working with Facebook to break antitrust law", *Reuters*, 16 December 2020, available at https://www.reuters.com/article/us-tech-antitrust-google-idTRNIKBN28Q2RL; Diane Bartz and Paresh Dave, "'Gorilla' Google hit with third lawsuit as U.S. states sue over search dominance", *Reuters*, 17 December 2020, available at https://www.reuters.com/article/us-tech-antitrust-google-colorado-idUSKBN28R2T0.

39 *Kartell v. Blue Shield of Mass., Inc*., 749 F.2d 922, 927 (1st Cir. 1984).

Article 102(a) of the Treaty on the Functioning of the European Union ("TFEU"),[40] however, provides that dominant firms may commit an abuse when "*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*." This allows the European Commission and national competition authorities to pursue so-called excessive pricing cases or cases where the dominant firm uses its market power to take advantage of its customers by imposing unfair trading conditions on them. Exploitative cases are relatively rare, and the European Commission has not yet pursued an exploitative case in the digital space. National competition authorities have, however, taken a more aggressive stance, as illustrated by the German Competition Authority's decision against Facebook and the French Competition Authority's decision against Google.

In its decision of 6 February 2019, the German Competition Authority (the Bundeskartellamt) took issue with Facebook's data policy. Concretely, it held that Facebook Inc. had abused its dominant position in the market for social networks in Germany by making the use of Facebook's social network conditional upon its collection of user and device-related data from outside sources (i.e., from other Facebook-owned services, such as WhatsApp and Instagram), and merging that data with the Facebook.com user accounts without the users' consent.[41] The Bundeskartellamt considered that no effective consent to the users' information being collected has been granted if their consent is a prerequisite for using the Facebook.com service in the first place.

Similarly, in its decision of 20 December 2019, the French Autorité de la concurrence ("ADLC") imposed a €150 million fine on Google for abuse of a dominant position.[42] The ADLC considered that Google Ads operating rules imposed by Google on advertisers were established and applied under non-objective, non-transparent and discriminatory conditions. The opacity and lack of objectivity of these rules made it very difficult for advertisers to apply them, while allowing Google unfettered discretion to modify its interpretation of the rules in a way that is difficult to predict and decide accordingly whether its users comply with them or not. Hence, Google could apply the Google Ads rules in a discriminatory or inconsistent manner, leading to damages for both advertisers and search engine users. The ADLC requested Google to clarify its Google Ads' operating rules and account suspending procedures. Google will also have to put in place measures to prevent, detect and deal with the Google Ads violations of the "Rules".

Competition law cannot, however, bring a definitive response to dominant firms' use of their market power to take advantage of their customers, because these cases may be too frequent,

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40 The Treaty on the Functioning of the European Union ("TFEU") is one of the two Treaties forming the constitutional basis of the EU. Articles 101 and 102 TFEU are the "competition provisions" of the TFEU: the former deals with anticompetitive agreements and practices between undertakings, while the latter deals with abuses of dominant position.

41 Decision B6-22/16 of the Bundeskartellamt of 6 February 2019 in the administrative proceedings against Facebook.

42 Autorité de la concurrence, Decision19-D-26 of 19 December 2019 regarding practices employed in the online search advertising sector. An (unofficial) English translation is available at https://www.autoritedelaconcurrence.fr/sites/default/files/attachments/2020-04/19d26_en.pdf.

especially when digital platforms have "regulatory powers" allowing them to set the rules of the game with regards to access to their platforms.[43] While the adoption and enforcement of such rules often has a legitimate objective, the rules may be used by the dominant firms to take advantage of their users (through, for instance, the charging of excessive transaction fees or the imposition of terms and conditions that are disadvantageous to users).

B. Mergers eliminating actual or potential rivals

One important feature of large digital platforms is that these companies have been incredibly acquisitive, acquiring hundreds of other companies over the past decade, including successful or promising start-ups.[44] For instance, Google has acquired over 200 companies, including in some cases sizeable businesses, but in many others start-ups. Mergers between established firms and start-ups are not inherently bad. For instance, start-ups may not be able to commercialize their products and services due to a lack of resources and expertise. Moreover, being acquired by a larger firm is a classic "exit strategy" for start-ups that is seen favourably by investors, hence facilitating access to private funding for high-risk projects. However, there is a growing concern among experts that some acquisitions that were made by digital platforms, such as for instance the acquisition of DoubleClick by Google[45] and of Instagram by Facebook,[46] have negatively impacted competition.

The large number of acquisitions made by digital platforms raise two distinct competition policy issues:

- The first issue is linked to the fact that the acquisition of start-ups by established firms may escape merger control review as these start-ups generally do not meet the turnover

43 EU Report, page 54; See also, Speech of Commissioner Vestager at the Conference on Competition and Digitisation, Copenhagen, 29 November 2019.

44 CERRE, "Big Tech Acquisition: Competition and Innovation Effects & EU Merger Control", February 2020, available at https://cerre.eu/publications/big-tech-acquisitions-competition-and-innovation-effects-eu-merger-control. See further Elena Argentesi et al, "Merger Policy in Digital Markets: An Ex-Post Assessment", December 2019, *CESifo Working Paper no. 7985*, available at https://www.econstor.eu/bitstream/10419/214987/1/cesifo1_wp7985.pdf, page 19 ("Another striking feature of acquisitions carried out by Amazon, Facebook, and Google is the very young age of the targets. At the time of the acquisition, targets are four-years-old or younger in nearly 60% of cases. More specifically, the median age of Amazon's targets is 6.5 years; that of Facebook's targets is 2.5 years; and that of Google's targets is 4 years.")

45 See, for example, Elizabeth Montalbano, "Microsoft launches campaign against Google-DoubleClick merger", *ComputerWorld,* 24 September 2007, available at https://www.computerworld.com/article/2541146/microsoft-launches-campaign-against-google-doubleclick-merger.html; See also Jenny Lee, "The Google-DoubleClick Merger: Lessons From the Federal Trade Commission's Limitations on Protecting Privacy", (2020) Communication Law and Policy 25, no. 1, pages 77-103.

46 Elena Argentesi et al, "Merger Policy in Digital Markets: An Ex-Post Assessment", December 2019, *CESifo Working Paper no. 7985*, available at https://www.econstor.eu/bitstream/10419/214987/1/cesifo1_wp7985.pdf, pages 20-26.

thresholds that trigger such review.[47] For instance, when Google acquired Waze in June 2013 for $966 million, this company had about 100 employees and hardly any turnover.[48] This acquisition was, however, potentially problematic as Waze was one of very few competitors in the mobile mapping sector to Google's own Google Maps.[49]

- The second issue relates to the substantive test for mergers, which is often seen as too "static" and not easily capturing situations "*where a dominant platform and/or ecosystem, which benefits from strong positive network effects and data access that act as significant barriers to entry, acquires a target with a currently low turnover but a large and/or fast-growing user base and a high future market potential*."[50] Hence, the mergers and acquisitions that do fall within the thresholds have arguably been subject to an inadequate form of review.[51]

Against this background, some EU Member States, such as Germany and Austria, adapted their merger control regime by focusing not only on turnover thresholds but also on the "value" of the transaction taking place.[52] These notification thresholds ensure that potentially "killer acquisitions" are properly assessed and do not go unnoticed by competition authorities.[53]

IV. Recommendations to address the issues raised by digital gatekeepers

This Part outlines the recommendations put forward by three of the most influential reports on competition in digital markets published throughout 2019 and 2020, namely the Competition policy for the digital era report (the "EU Report"), the Stigler Committee on Digital Platform, Market Structure and Antitrust Subcommittee Report (the "Stigler Report"), and the Unlocking Digital Competition Report (the "Furman Report").

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47 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, pages 1–22, Article 1; See, further, EU Report, page 116.

48 Amit Teig, "Waze Employees Clinch Most Lucrative Exit in Israeli History", *Haaretz*, 13 June 2013, available at https://www.haaretz.com/israel-news/business/.premium-waze-workers-sharing-in-google-buyout-1.5278721.

49 Elena Argentesi et al, "Merger Policy in Digital Markets: An Ex-Post Assessment", December 2019, *CESifo Working Paper no. 7985*, available at https://www.econstor.eu/bitstream/10419/214987/1/cesifo1_wp7985.pdf, pages 28-29.

50 EU Report, page 116.

51 Kate Beioley, "CMA's Andrew Tyrie says regulators not tough enough on digital mergers", *Financial Times*, 3 March 2020, available at https://www.ft.com/content/d528a206-5d56-11ea-b0ab-339c2307bcd4.

52 Section 35(1a) GWB (Germany) and Section 9(4) KartG (Austria); See also Bundeskartellamt / Bundeswettbewerbsbehörde, "Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)", July 2018, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?.

53 OECD, "Start-ups, killer acquisitions and merger control – Note by Germany", 28 May 2020, available at https://one.oecd.org/document/DAF/COMP/WD(2020)20/en/pdf, page 2.

Although all three reports form part of a broader international debate regarding the direction that competition law and policy should take in the changing digital market environments, each of these reports was prepared with a particular jurisdiction in mind, to the effect that their analysis and proposals are specific to the jurisdiction they focus on. First, the EU Report was commissioned by Commissioner Vestager for the Directorate-General for Competition, and it explores how EU competition policy should evolve to promote pro-consumer innovation in the digital age. Second, the Furman Report, chaired by Professor Jason Furman who was appointed by the Chancellor of the Exchequer and Secretary of State for Business, Energy, and Industrial Strategy to lead the review, makes recommendations for changes to the UK competition framework to face the economic challenges posed by digital markets. Finally, the Stigler Report was prepared by the Stigler Committee on Digital Platforms, an independent and non-partisan Committee, and it addresses the impact of digital gatekeepers on different facets of the American society, proposing a range of solutions for lawmakers and regulators.

I now review the general recommendations made by these reports (Section A), before turning to how they recommend dealing with abuse of dominance issues (Section B) and merger control (Section C). Finally, we will examine how these reports recommend dealing with data (Section D).

A. General recommendations

In the first place, ***all three reports acknowledge the shortcomings of both antitrust enforcement and merger control in tackling competition challenges in the digital sector***. The Furman and the Stigler Reports both consider that the existing competition law framework in their respective jurisdictions is insufficient to deal with competition challenges in digital markets. Hence, they emphasize the need for efficient and speedy regulatory action in this area.

In particular, the Furman Report considers that "*existing antitrust enforcement […] can be often slow, cumbersome and unpredictable*," while the digital sector is "*fast-moving*,"[54] and recommends the creation of strong *ex ante* regulation and a Digital Markets Unit ("**DMU**") which should have three main functions:

- First, to ***develop a code of competitive conduct*** with the participation of stakeholders. This code of conduct should apply only to companies pre-designated by the DMU as having a "strategic market status" ("SMS"),[55] in order to avoid creating extensive burdens or barriers for smaller firms.[56] In determining whether a company has SMS, the Report recommends relying on the "significant market power" test used in telecoms regulation.[57] A firm having significant market power is one which has "*the ability to control access and charge high fees; the ability to manipulate rankings or prominence;*

54 Furman Report, page 6.

55 Id. page 41. The Furman Report defines a "strategic market status" as "the ability to control access and charge high fees; the ability to manipulate rankings or prominence; and the ability to control reputations."

56 Id., page 5.

57 Id., page 81.

and the ability to control reputations."[58] The development of a clear legal test is essential to identify "*where companies operating platforms are in a position to exercise potentially enduring market power, without granting an excessively broad scope and bringing within the bounds of regulation companies who are effectively constrained by the competitive market. Only a small number of companies should be within the definition of a well-defined test that matches the characteristics of this market*."[59]

- Second, to ***enable greater personal data mobility and systems with open standards*** where these tools will increase competition and consumer choice.[60]

- Third, to ***advance data openness*** where access to non-personal or anonymised data will tackle the key barrier to entry in a digital market, while protecting privacy.[61]

The Stigler Report largely share the same view and recommends the creation of a Digital Authority ("**DA**"), which would develop targeted regulation and monitor and enforce such regulation. The DA would have the authority to define "bottleneck power" and should update the definition regularly.[62] It would also promulgate regulations to identify and prohibit market foreclosure.[63] Some of the regulatory tools would be set out to apply to all market players and not only to bottleneck firms, but a small business exception and a new business exception should be set out, "*to allow very small entrants, who may benefit competition, time to ramp up against larger established companies*."[64] Bottleneck power is described by the Stigler Report as "*a situation where consumers primarily single-home and rely upon a single service provider (a "bottleneck"), which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly*."[65] For instance, many websites depend on Google to provide their services and access end-users, making Google a bottleneck for internet traffic.[66] The Stigler Report points out that such bottleneck power is stronger where one side of the market single-homes and therefore regulation should encourage multi-homing to address and limit network effects.[67] Finally, the Stigler Report considers that forward-looking regulations will increase business certainty about

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58 Ibid. This "significant market power" test would provide a good starting point as the market features relevant to digital platforms are similar to those of the telecommunications sector, i.e., the potential to act as bottleneck, economic dependence, access to market etc.

59 Ibid.

60 Id., page 5. The Furman Repot further specifies that "[p]ersonal data mobility means agreeing common standards to give consumers greater control of their personal data so they can choose for it to be moved or shared between the digital platform currently holding it and alternative new services." See Id., page 15.

61 Id., page 6.

62 Stigler Report, page 106.

63 Id., page 115.

64 Id., page 107.

65 Id., page 105

66 Id., page 7.

67 Id., page 43.

permitted conducts and enforcement actions, and that this predictability may even encourage companies to comply with the law.[68]

While also acknowledging the shortcomings of EU competition law enforcement in digital markets, the EU Report considers how *current* competition policy and rules could effectively apply to digital markets, and, to that extent, does not envisage the creation of a new general regulatory tool in the short run. While it contemplates the need for regulation in the longer run, for monitoring purposes,[69] it considers that, in the meantime, a "*case-by-case approach will be found to remain the most appropriate legal framework*."[70] Thus, the EU Report suggests that the EU framework remains based on the use of *ex post* competition tools. It must be noted, however, that reflecting upon the issue of regulation was not within the scope of the EU Report.

In the second place, ***all three reports acknowledge that the digital economy is characterized by a high degree of innovation and rapid market changes***, meaning that there is inevitably uncertainty as to the consequences of competition policy intervention or non-intervention.[71] The important question, therefore, arises as to whether the cost of intervention, or non-intervention, is greater than the benefits associated with it.

The Furman Report emphasises the need to avoid false negatives (Type II errors) in digital markets, by opposition to false positives (Type I errors).[72] Though some balancing is necessary between those two types of errors, the Furman Report points out that there have been no false positives in the enforcement of merger control concerning the digital platforms. This, in turn, suggests the existence of underenforcement in that area, as there has been little scrutiny and no blocking of acquisitions by major digital platforms. Although acquisitions made by digital gatekeepers have benefited consumers, they have also allowed these companies to consolidate their strong position in the market.[73] To that extent, some economists recommend tolerating some false positives to avoid false negatives.[74] Thus, they suggest that some acquisitions should be blocked, in a precautionary manner, even though in the longer run it may be realised that they would have brought more consumer benefits.

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68 Id., page 105.

69 EU Report, page 126.

70 Id., page 52.

71 Id., page 50.

72 In competition law, a Type I error represents a false judgment whereby a conduct that was not anticompetitive is condemned. Type I errors reflect over-enforcement. Conversely, a Type II error represents a false judgment whereby a conduct that is anticompetitive has not been condemned. Type II errors reflect under-enforcement.

73 Furman Report, page 92.

74 Id., page 100; Allison Schrager, "A Nobel-winning economist's guide to taming tech monopolies", *Quartz*, 27 June 2018, available at https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies/; Carl Shapiro, "Antitrust in a time of populism", (2018) *International Journal of Industrial Organization* 61, pages 714-748.

Similarly, the Stigler Centre considers that "*it is time for antitrust law to recalibrate the balance it strikes between the risks of false positives and false negatives. Underenforcement is likely to be costlier than previously thought because, among other things, market power of large technology platforms is more enduring*."[75]

On this issue, the EU Report considers that the test to determine the error cost of intervention (the "error cost framework") should not be applied on case-by-case basis but "*rather should try to translate general insights in error costs into legal tests*."[76] We will come back to the recommendations that are specific to merger control in Section C below.

In the third place, ***all reports acknowledge data as an input of the highest competitive relevance in digital markets***, and thus agree on the importance of ensuring data portability / mobility and data sharing and openness. We will analyse the data-specific recommendations in Section D below.

B. Dealing with abuses of dominance

While all three reports agree on the considerable benefits that digital markets bring to consumers and businesses alike, they also concur that the common characteristics of digital markets (such as the high barriers to entry and expansion, the advantages of economies of scale and scope and the acquisition strategies pursued by digital gatekeepers) tend to insulate dominant undertakings from dynamic competition, thus creating a tendency towards concentration and leveraging of market power from one market to another. This, in turn, harms consumers and businesses.[77]

Against this background, all reports agree that digital gatekeepers raise competition challenges and discuss various solutions to address such challenges. For example, the Furman Report recalls that "*[r]egardless of the route that many platforms have taken to achieve and cement their dominance, the result is that one, or in some cases two firms in certain digital markets have a high degree of control and influence over the relationship between buyers and sellers, or over access by advertisers to potential buyers*."[78] Hence, "*[t]his gives the platforms three distinct forms of power: the ability to control access and charge high fees; the ability to manipulate rankings or prominence; and the ability to control reputations*."[79]

The reports, however, are not fully in line as to the methods proposed to deal with those challenges, although the differences largely result from the different scopes of these reports. In the first place, ***not all reports take the same stance towards the need for specific ex ante regulation to complement the existing competition law framework***. Both the Stigler and the Furman Reports conclude that complementary *ex ante* regulation is necessary, since *ex post* antitrust enforcement is not sufficient to address the structural problems and complexities of digital markets. The Furman

75 EU Report, page 94.

76 Id., page 51.

77 Furman Report, page 50.

78 Id., page 41.

79 Ibid.

Report, for instance, argues that "*antitrust enforcement, although having an important role, moves too slowly and, intentionally, resolves only issues narrowly focused on a specific case. In digital markets this has not established clear and generalisable rules and principles to give businesses certainty about the boundaries of acceptable competitive conduct*."[80]

Hence, the Furman and Stigler Reports recommend establishing and providing sufficient resources to pro-competition authorities whose tasks would be to secure competition in digital markets. The Furman Report, for example, recommends the "*establishment of a digital markets unit, given a remit to use tools and frameworks that will support greater competition and consumer choice in digital markets, and backed by new powers in legislation to ensure they are effective.*"[81] Likewise, the Stigler Report recommends creating a new Digital Authority,[82] which would designate firms as having bottleneck power and would develop, monitor, and enforce relevant rules and regulations.[83]

On the other hand, the EU Report does "*not envision a new type of 'public utility regulation' to emerge for the digital economy. The risks associated with such a regime – rigidity, lack of flexibility, and risk of capture – are too high.*"[84] As explained above, however, it was not part of the scope of the EU Report to reflect upon the issue of regulation. Moreover, neither the Furman not the Stigler Reports suggest the need for "public utility regulation", which would indeed be undesirable in dynamic industries. Finally, the EU Report does acknowledge that there may be "*areas where regulation might be appropriate, in particular where similar issues arise continuously and intervention may be needed on an ongoing basis*."[85] This is especially the case, according to the EU Report, in the longer run.[86]

In the second place, ***the stance taken towards ex ante regulation has a direct correlation with each report's recommendations on how to deal with gatekeepers acting as private regulators of their own ecosystems***. Although all reports share the view that gatekeepers play a primary role in establishing a level playing field in their own ecosystems, they differ in the proposed approaches to deal with problems that may arise due to gatekeepers having total control over their respective ecosystems: the Furman and Stigler Reports recommend addressing this issue through the proposed *ex ante* regulation, whereas the EU Report takes the stance that antitrust law is suitable to deal with such issues.

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80 Furman Report, page 55.

81 Id., page 5. Regarding the DMU, the Furman Report specifies that "[t]he unit's approach should combine participation and consultation with the scope for regulatory enforcement that will be necessary to overcome incentives against compliance and make its solutions operate effectively and quickly. It should only intervene where doing so is effective and proportionate to achieve competitive aims. And to avoid burdens on smaller companies, its enforcement powers should be focused on companies with 'strategic market status,' those in a position to exercise market power over a gateway or bottleneck in a digital market, where they control others' market access."

82 Stigler Report, page 90.

83 Id., pages 111-112.

84 EU Report, page 126.

85 Id., page 70.

86 Id., page 126.

In particular, the Furman Report proposes overarching principles so that business users are (i) provided with access to designated platforms on a fair, consistent, and transparent basis, (ii) provided with prominence, rankings, and reviews on designated platforms on a fair, consistent, and transparent basis, and (iii) not unfairly restricted from, or penalised for, utilising alternative platforms or routes to the market.[87]

Similarly, the Stigler Report recommends that the DA should impose regulations to the effect that businesses with bottleneck market power do not discriminate and unduly foreclose rivals, as well as "*prevent digital businesses with bottleneck power from inefficiently expropriating rents created by complements on their platform*."[88]

In the third place, ***the reports take different views when it comes to the question of whether (and in what way) enhancing antitrust enforcement is necessary***. On the one hand, the Furman Report recommends not only creating a DMU (and thus a regulatory framework), but also updating the CMA's enforcement tools against anticompetitive conducts by digital gatekeepers. For instance, the inclusion of interim measures to the toolbox of the CMA is set to make antitrust enforcement more efficient, by enhancing the CMA's ability to intervene quickly and effectively.[89]

On the other hand, both the EU and the Stigler Reports recommend relaxing the burden of proof when assessing abuses of dominance by digital gatekeepers. Concretely, the EU Report contemplates a reversal of the burden of proof, whereby the incumbent should be responsible for showing that its conduct is pro-competitive.[90] According to the EU Report,

> "[b]ecause of the innovative and dynamic nature of the digital world, and because its economics are not yet completely understood, it is extremely difficult to estimate consumer welfare effects of specific practices. Given the concentration tendencies of platforms, and the high barriers to entry in some of the markets they dominate, a finding that they restrict the ability of other firms to compete either on the platform or for the market in a way which is not clearly competition on the merits should trigger a rebuttable presumption of anti-competitiveness."[91]

The Stigler Report also recommends that antitrust rules should be revised and that a reversed burden of proof should be adopted to ensure that the plaintiffs "*are not required to prove matters to which the defendants have greater knowledge and better access to relevant information*."[92] According to the Report, this would involve "*adopting rules that will presume anticompetitive harm on the basis of preliminary showings by antitrust plaintiffs and shift a burden of exculpation*

87 Furman Report, page 61.

88 Stigler Report, page 115.

89 Furman Report, page 105.

90 EU Report, page 51.

91 Id., page 71.

92 Stigler Report, page 98.

to the defendant or by ensuring that plaintiffs are not required to prove matters to which the defendants have greater knowledge and better access to relevant information."[93]

C. Merger control for digital gatekeepers

Having considered the general recommendations made by the Furman, Stigler and EU Reports (Section A), and the recommendations with regards to dealing with abuses of dominance (Section B), I now analyse the recommendations made with regards to merger control in cases of acquisitions involving digital gatekeepers.

In the first place, all reports argue in favour of ***greater intervention in the field of digital mergers, with a particular focus on non-horizontal digital mergers***. While recognizing that mergers may bring benefits, in that they may result in lower prices and increase innovation, the Furman Report points out that, up until now, merger control in the UK has focused greatly on avoiding false positives to the effect that all digital mergers have been permitted.[94] What is more, the UK merger control regime is quite particular, in that the CMA, UK's national competition authority, has only a voluntary rather than a mandatory notification regime, meaning that the merging firms can decide whether to notify the CMA when they consider there is a possible competition concern. According to the Furman Report, such a voluntary system, coupled with the CMA's focus on avoiding false positives, has likely resulted in problematic underenforcement that needs to be tackled via a legislative change.[95] In addition, the Furman Report emphasises that special attention needs to be paid to "killer acquisitions",[96] i.e., the situation where large digital companies acquire smaller innovative firms in adjacent or overlapping markets with the intent to eliminate competition.[97]

Similarly, the EU Report acknowledges that the European Union Merger Regulation ("**EUMR**") may not be sufficient to capture various acquisitions made by Big Tech firms for two main reasons: first, the acquired firms are usually start-ups that still have very low turnovers, meaning that the transaction does not satisfy the EUMR thresholds.[98] Second, even if the EUMR thresholds are reached, meaning that the transaction is notifiable to the European Commission, the Commission would still have a hard time distinguishing the pro-competitive or neutral deals from the anticompetitive ones.[99] However, in a more moderate tone, the EU Report is careful to circumscribe its analysis to "*a market setting characterised by a high degree of concentration and high barriers to entry, resulting, inter alia, from strong positive network effects, possibly reinforced by data-driven feedback loops*,"[100] and to emphasise the importance of avoiding false positives.

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93 Ibid.

94 Furman Report, page 91.

95 Ibid.

96 Furman Report, page 92.

97 Ibid.

98 EU Report, page 110.

99 Id., page 112.

100 Ibid.

Finally, the Stigler Report also acknowledges the concerns regarding underenforcement in the field of merger control. To prove such underenforcement, the Report recalls that "*there is increasing evidence that the enforcement agencies and courts have permitted too many mergers between competing firms that have led to post-merger price increases and other indications of increased market power*."[101] It, moreover, points out that monopsony power is a growing problem in the US, and notes that there have been very few antitrust challenges to exclusionary conduct.[102]

In the second place, both the Furman Report and the Digital Markets Taskforce Advice (the "Advice"),[103] as well as the Stigler Report argue in favour of a ***change in the relevant jurisdictional thresholds and the notification system for mergers***. The Furman Report proposes that "*[d]igital companies that have been designated with a strategic market status should be required to make the CMA aware of all intended acquisitions.*"[104] The Advice, in turn, acknowledges the shortcomings of the UK's jurisdictional tests (i.e., the "turnover threshold"[105] and the "share of supply test"[106]),[107] and argues in favour of tests "*designed to establish a transaction's materiality and connection to the UK.*"[108] In particular, the Taskforce recommends that the materiality of a transaction be assessed by reference to its transaction value, whereas "*[t]he connection that a transaction has to the UK (the 'UK nexus') could be assessed by reference to certain clearly defined criteria relating to the activities of the target business in the UK, such as revenues, assets, or end-users*."[109] In any case, the Taskforce further proposes that there should be a "safety net" in case a transaction is not captured by the above-mentioned test but, nevertheless, could raise competition concerns.[110]

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101 Stigler Report, page 84.

102 Id., page 85.

103 The Digital Markets Taskforce Advice (the "Advice") published in December 2020 provides advice to the UK government on the design and implementation of a pro-competition regime for digital markets. The Advice builds upon the recommendations of the Furman Report, which is why we include it in the discussion of this Section. The Advice is presented in more detail in Part VI below.

104 Furman Report, page 12.

105 Id., paragraph 4.127, the turnover test applied in the UK requires the business being acquired to generate an annual revenue of at least £70 million in the UK. According to the Taskforce Report, such a test may fail to capture "transactions entered into by the most powerful digital firms, which often involve the acquisition of nascent, potential competitors or firms whose early stage business model is to initially offer 'free' services to consumers, which may be generating little or no revenue in the UK."

106 Id., paragraph 4.128, the share of supply test, on the other hand, is met when the undertakings concern supply or acquire goods or services of a similar kind, and after the merger they will collectively supply or acquire 25% of more of those goods or services. The risk of relying on this test, according to the Taskforce is that it fails to "capture many transactions entered into by the most powerful digital firms, which often involve moving into adjacent markets, because it cannot capture mergers where the relationship between the merging parties is purely vertical in nature."

107 Digital Markets Taskforce Advice, paragraphs 4.127-4.128.

108 Id., paragraph 4.136.

109 Id., paragraph 4.140.

110 Id., paragraph 4.145.

In the same vein, the Stigler Report advocates for a Digital Authority that would have authority to review "*all transactions involving digital businesses with bottleneck power*." It further specifies that "*[b]usiness[es] with bottleneck power would notify the [Digital Authority] and obtain pre-clearance for an acquisition of any size*."[111]

The EU Report, on the other hand, does not suggest a change in the EUMR thresholds, arguing that "*broadening EU's merger control jurisdiction to cover competitively relevant transactions irrespective of turnover raises a set of difficult issues*."[112] However, it recommends that "*the EU should wait and assess a) how the new transaction value-based thresholds in Austria and Germany play out in practice, and b) whether the referral system would ensure that transactions of EU-wide relevance are ultimately analysed at EU level*."[113]

In the third place, the reports take a different stance on the ***substantial assessment that is required when conducting the merger control review***. First, the Furman Report recommends a change in the "*substantial lessening of competition on a balance of probability approach*" in favour of a new "*balance of harms*" approach,[114] a more economic approach which "*takes into account the scale as well as the likelihood of harm in merger cases involving potential competition and harm to innovation*."[115] Reflecting upon this, the Taskforce Advice argues that the "balance of harms" test cannot currently be applied in a transparent and robust way.[116] As a result, the Taskforce diverts from such a test. Instead, it supports the use of the "*significant lessening of competition*" test but with a lower and more cautious standard of proof. In particular, the Advice suggests that the relevant test should be "*whether there is a 'realistic prospect; that a merger gives rise to an SLC*."[117]

Second, while recognising that the "significant impact on effective competition" test – and the "strengthening of dominance" criterion in particular – remain a sound basis for assessment, the EU Report acknowledges that there exists a gap in currently accepted theories of harm:

> "When it comes to […] conglomerate mergers where the operator of an ecosystem with a dominant position in a core market buys up a firm that is active in a separate, but related market and has the potential to grow into a competitive threat beyond that market, competition authorities should inquire whether acquirer and target operate in the same "technological space" or "users' space"."[118]

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111 Stigler Report, page 114.

112 EU Report, page 114.

113 Id., page 115.

114 Furman Report, page 98.

115 Id., page 101.

116 Digital Markets Taskforce Advice, paragraph 4.154.

117 Id., paragraph 4.153.

118 EU Report, pages 116-117.

Based on this criterion, the assessment of the risk to competition covers not only the foreclosure of rivals' access to input, but also extends to the strengthening of dominance, since these acquisitions fortify the dominance of the ecosystem, "*in part because the new services add value to the consumer for which they are complements and in part because they help retain other users for which they are partial substitutes*."[119]

Third, the Stigler Report argues that "*[m]ergers between dominant firms and substantial competitors or uniquely likely future competitors should be presumed to be unlawful, subject to rebuttal by defendants*."[120] Moreover, in relation to non-horizontal mergers, the Report mentions that "*[c]ourts should not presume efficiencies from vertical transactions*" and that "*[c]rediting of efficiencies should require strong supporting evidence showing merger-specificity and verifiability*."

Finally, the Furman Report, and the Stigler Report consider that ***legal change is necessary*** to bring about the proposed reforms to merger control. For example, the Furman Report recommends a change in legislation to institutionalise the "balance of harms" approach in the substantive assessment of mergers. It, moreover, argues that "*the CMA's Merger Assessment Guidelines should be updated to reflect the features and dynamics of modern digital markets, to improve effectiveness and address underenforcement in the sector*,"[121] although for the latter, legislative change is not strictly required. As seen above, the Digital Taskforce considers that the "balance of harms" approach is not desirable.

The EU Report, on the other hand, argues that legislative change is not currently required, as it may run counter to principles such as legal certainty. However, the EU Report acknowledges that "*it will be of particular interest to monitor the performance of the transaction value-based thresholds recently introduced both in Austria and in Germany. Should systematic jurisdictional gaps arise in the future, a "smart" amendment to the European thresholds may be justified*."[122]

D. <u>Dealing with data</u>

The Furman, Stigler and EU Reports all acknowledge that data is an input of high competitive relevance in digital markets. The EU Report, for example, considers that data is "*a core input factor for production processes, logistics, targeted marketing, smart products and services as well as (AI)*," driving "*interoperability in interconnected environments*."[123] Similarly, the Furman Report recognises the "*importance of data in sustaining and supporting competitive digital markets*."[124]

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119 Id., page 122.

120 Stigler Report, page 98.

121 Furman Report, page 97.

122 EU Report, page 124.

123 Id., page 81.

124 Furman Report, page 54.

Hence, all reports agree on the importance of access to data for the maintenance of competitive digital markets. The reports essentially focus on two ways in which data can be accessed, namely data portability/mobility and data openness/sharing.

Data portability/mobility refers, broadly, to data moving around from one service to another. *Data portability*, a concept found in Article 20 of the European General Data Protection Regulation ("**GDPR**"),[125] refers to consumers being able to themselves request access to and move data from one business to another. This can be complex and time-consuming process, which may deter consumers from engaging in data portability. *Data mobility* is a broader concept, as it is not limited to consumers moving their own data. Rather, it encompasses the ability for the "*data to be moved or shared directly between a business and a third party at the customer's request. Where a consumer wants to move or share their data, data mobility should make this easy for them, enabling their data to be moved or shared with whoever they wish, at the click of a button*."[126]

The reports emphasise the pro-competitive effects of data mobility/portability. For example, the EU Report recognises that data portability may "*facilitate a data subject's switching between services*."[127] Similarly, the Furman Report acknowledges that data mobility may help in overcoming network effects,[128] and the Stigler Report acknowledges how data mobility may facilitate market entry.[129]

At the same time, the EU Report makes it clear that not only there is still considerable uncertainty as to the precise interpretation of Article 20 of the GDPR, but also that data portability has not been "*designed as a right to continuous data access or to request data interoperability*."[130] In addition, it also acknowledges that the extent of this portability is limited by privacy concerns as well as the "*costs imposed on the data controller*."[131]

Hence, these reports agree that data mobility/portability alone is unlikely to be sufficient to address all competition concerns related to data arising in digital markets. As a result, they all agree that more demanding regimes of data openness/sharing should be imposed. However, although the

125 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ("**GDPR**"), OJ L 119, 4.5.2016, pages 1–88, Article 20: "The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided."

126 Furman Report, page 65.

127 EU Report, page 81.

128 Furman Report, page 57.

129 Stigler Report, page 109.

130 EU Report, pages 81-82.

131 Id., page 82. Actually the report is of the idea that "[a]rguably, a more stringent data portability regime can be imposed on a dominant firm in order to overcome particularly pronounced lock-in effects."

reports agree on the same idea of data sharing, they diverge as to the way in which this should be achieved.

The EU Report argues that data openness/sharing can be achieved through existing antitrust law, subject to only minor modifications. Following the framework of Article 102 TFEU, a duty to supply access to data can be imposed on a dominant undertaking when data is considered an essential facility. In assessing whether this is the case, the EU Report proposes a "balance of interests" test, whereby the competent authority would take into consideration "*both the need to protect the dominant firm's investment incentives and the need to ensure that strongly entrenched positions of market power, protect by high barriers of entry, remain contestable*."[132] Moreover, the EU Report argues that "*[r]efusals to grant access should be subject to a more elaborate Article 102 TFEU assessment where (1) the data controller holds a gatekeeper position of some relevant kind, i.e. access to its data is essential for competing on one or more neighbouring markets; (2) data access requests for this purpose are somewhat standardised*."[133]

The Stigler and Furman Reports, however, do not agree with the EU Report on the proposition that the existing legal framework is sufficient to deal with data sharing. Instead, they propose a combination of government legislation and pro-competitive policies put in place by their proposed authorities, namely the Digital Authority and the DMU, respectively.

V. Regulating digital gatekeepers in the EU: The Digital Markets Act

Having presented the three most influential reports discussing digital markets – the Furman, Stigler, and EU Reports, explaining the main competition concerns raised in these reports and the recommendations put forward to deal with such concerns, we now look at the first major initiative to regulate digital gatekeepers, namely the Proposal for a Digital Markets Act ("DMA") adopted by the European Commission (the "Commission") in December 2020.

In Section A, we briefly look back to two separate initiatives relevant for the regulation of digital platforms in the EU, presented by the Commission in June 2020: the *ex ante* regulation of very large online platforms acting as gatekeepers (as part of the Digital Services Act ("DSA") package) and the New Competition Tool ("NCT"). Then in Section B, we analyze the DMA Proposal presented by the Commission on 15 December 2020, which ultimately emerged as the Commission's Proposal for the regulation of digital gatekeepers.

A. Towards the DMA

One of the political priorities of the von der Leyen Commission (2019-2024) is to make Europe fit for the digital age.[134] In the Communication "Shaping Europe's digital future", the European Commission recognized that some digital platforms have acquired significant scale, allowing them

132 Id., page 98.

133 EU Report, page 100.

134 Political Guidelines for the next European Commission 2019-2024, available at https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf.

to act as private gatekeepers to markets, customers and information.[135] In order to ensure that markets characterized by the presence of such gatekeepers remain fair and contestable for businesses, innovators and market entrants, the Commission pledged to explore the adoption of *ex ante* rules in the context of the DSA package.[136]

On 2 June 2020, the Commission launched the much-awaited public consultation on the DSA package, which would include rules (i) on the modernization of the EU legal framework for digital services (centered around the e-Commerce Directive, which would be complemented/updated) and (ii) on the *ex ante* regulation of large online platforms acting as gatekeepers.[137] At the same time the Commission published two inception impact assessments representing the above two pillars of the (original) DSA.[138] On the same day, the Commission also launched a public consultation and published an inception impact assessment on a possible "New Competition Tool" ("NCT") that would address structural competition problems in a timely and effective manner.[139] The purpose of these impact assessments and public consultations was to allow all stakeholders to get a first insight into and to comment on a range of possible measures the Commission was exploring with regards to future regulation of digital platforms (*ex ante* regulation) and the potential review of EU competition rules to make them fit for the digital age (NCT).

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135 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 19 February 2020, "Shaping Europe's digital future", COM(2020) 67 final, page 9.

136 Id., page 9.

137 European Commission, "Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers", available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/public-consultation; European Commission Press Release, "Commission launches consultation to seek views on Digital Services Act package", 2 June 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_962.

138 European Commission, "Digital Services Act – deepening the internal market and clarifying responsibilities for digital services", available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services; European Commission, "Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers", available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers.

139 European Commission, "Public consultation: Single Market – new complementary tool to strengthen competition enforcement", available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/public-consultation; European Commission, "Inception Impact Assessment: Single Market – new complementary tool to strengthen competition enforcement", available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool.

I now briefly outline the options that the Commission considered with regards to the *ex ante* regulation of large gatekeeping platforms (Sub-section 1) and the NCT (Sub-section 2), before analyzing the DMA Proposal.[140]

1. The impact assessment on the *ex ante* regulation: establishing a fair trading environment for platform ecosystems in the EU's internal market

Regulating large online platforms has been a hot topic in discussions about the EU's digital future. As a first step towards regulation of digital platforms, the EU adopted in 2019 the Platform-to-Business ("P2B") Regulation, an instrument seeking to establish a fair and transparent business environment around online intermediation services.[141] However, this instrument does not specifically deal with the market power held by large online platforms having a gatekeeper position, leaving room for the development of such an EU regulatory framework.[142] In this context, the Commission presented its initial policy options and sought feedback on the development of criteria

140 While not directly regulating digital gatekeepers, the first pillar of the (original) DSA, aimed at modernizing the liability framework for online platforms, would also concern gatekeepers. These companies would also be bound by the obligations included in the DSA, which could be for example rules on horizontal due diligence, on the tackling of illegal content offered or hosted on their platforms, "know your business customer" obligations etc.

141 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, *OJ L 186*, pages 57-79. The P2B Regulation applies to online platform intermediaries and general online search engines that provide their services to business established in the EU and that offer goods or services to consumers located in the EU. Such online platform intermediaries are third-party e-commerce marketplaces (e.g., Amazon Marketplace, eBay etc.), app stores (e.g., Google Play, Apple App Store, Microsoft Store etc.), social media for businesses (e.g., Facebook pages, Instagram used by makers/artists etc.) and price comparison tools (e.g., Google Shopping, Skyscanner). The P2B Regulation does not apply to online advertising, payment services, search engine optimization and services that connect hardware and applications that do not intermediate direct transactions between businesses and consumers, as well as intermediaries that operate between businesses only (e.g., online advertising exchanges). The Regulation also excludes online retailers, such as supermarkets and retailers of brands (e.g., Adidas.com) to the extent that such online retailers directly sell their own products. Online search engines covered by the P2B include those that facilitate web searches based on a query on a subject and provide result corresponding with the search request (e.g., Google Search, DuckDuckGo, Yahoo! etc.). In brief, the Regulation requires online platform intermediaries to make their standard terms and conditions ("T&Cs") more transparent, easily available and announce changes in advance to allow business users to be better informed. The Regulation also sets out rules with regards to the restriction, suspension, and termination of business accounts, including the requirement that they be accompanied by a statement of reasons for the decision. It, moreover, prohibits online intermediation platforms from preventing their business users from making their identity visible, it requires search engines and online intermediation platforms to inform users about their ranking parameters either in the T&Cs or in a publicly available documents, and it provides for effective and quick means to resolve disputes between business users and online intermediation services (in particular, it requires all but the smallest enterprises to establish an internal complaint handling system and it requires all platforms to name in their T&Cs two or more (specialized) mediators which with they are willing to engage). Finally, the P2B Regulation envisages that organizations and associations representing business users' interests can take action before national courts to stop or prohibit non-compliance by online intermediation services and search engines with the Regulation.

142 Note that some EU Member States, such as Germany and France, have adopted or initiated legislative changes aimed at addressing the economic power held by digital gatekeepers.

that could be used to identify the platforms that would be subject to the *ex ante* regulation, on the rules/principles that would form part of this regulatory framework and on the enforcement of this regulatory framework.

In its impact assessment, the Commission put forward three policy options to be considered with regards to dealing with digital gatekeepers going forward: (a) to revise the horizontal framework set in the P2B regulation, (b) to adopt a horizontal framework, empowering regulators to collect information from large online platforms acting as gatekeepers, or (c) to adopt a new and flexible *ex ante* regulatory framework for large online platforms acting as gatekeepers.[143]

The first option would not entail a revision of the current provisions of the P2B Regulation but would establish additional horizontal rules for online intermediation services currently falling within the scope of the P2B Regulation. In this framework, the Commission could adopt prescriptive rules on specific practices currently addressed by transparency obligations in the P2B Regulation and/or adopt prescriptive rules on new, emerging practices (e.g., certain forms of self-preferencing, data access policies and unfair contractual provisions).

The second option would entail the adoption of rules that would allow a dedicated EU regulatory body to request targeted information from gatekeepers on their business practices and their impact on consumers. However, the regulator would not be vested with the power to impose behavioural and/or structural remedies on platforms.

The third option would entail the adoption of a new *ex ante* regulatory framework that would apply specifically to "*large online platforms that benefit from significant network effects and act as gatekeepers*." This new, targeted framework would complement the P2B regulation (which would continue to apply to the broader category of online intermediation services and online search engines). To establish which large online platforms would be subject to the additional *ex ante* framework, the Commission would set out a set of clear criteria, such as the existence of significant network effects, the size of the user base and/or the ability of the platform to leverage data across markets. The regulation would then set out a list of obligations that digital gatekeepers would have to comply with, as well as a list of "blacklisted" practices, i.e., certain unfair trading practices that would be prohibited or restricted. The Commission would consider whether to adopt principle-based prohibitions with horizontal scope (i.e., that apply regardless of the sector in which the online platforms concerned intermediate) or more specific substantive rules on problems associated with certain actors (e.g., relating to operating systems or online advertising). The framework could also provide for tailor-made remedies that could be imposed on large online platforms acting as gatekeepers where necessary and justified. These remedies would be imposed and enforced by a regulatory body (in principle acting at the EU level), and could be principles on data access obligations, personal data portability or interoperability.

143 Note also the existence of a baseline scenario: The Commission would take no further action and would focus on the application and enforcement of the existing regulatory instruments applicable to online platforms – i.e. the P2B Regulation, EU competition law (Articles 101 and 102 TFEU, as well as merger control), as well as consumer and data protection rules.

The two first options were unlikely to provide a helpful tool in dealing with the market power held by large online platforms acting as gatekeepers: the first option would apply horizontally to all online platforms and thus would not constitute a targeted tool, while the second option would not give the regulator the power to intervene and remedy the gatekeepers' harmful conduct. It thus became clear from the beginning that the third option – adopting a regulatory framework targeting digital gatekeepers and comprising a clear list of blacklisted practices and obligations as well as tailor-made remedies – would be the most effective option going forward. After all, there was growing consensus in the EU and other jurisdictions about the need to regulate large digital platforms.

2. The impact assessment on the NCT: tackling structural competition problems that cannot be adequately addressed under current EU competition rules

Multiple reports, articles and press stories have pointed out that the existing EU competition law framework is not sufficient to address certain structural competition problems (e.g., monopolization strategies by non-dominant companies with market power, as Article 102 TFEU only prohibits abuses by *dominant* companies) or to address them effectively (e.g., parallel leveraging strategies by dominant companies into multiple adjacent markets).[144] The NCT was, therefore, proposed by the Commission to address these gaps in the application and enforcement of EU competition rules, allowing for timely and effective intervention before markets have "tipped".

The Commission in its impact assessment proposed four options to address structural competition problems through the creation of an NCT.[145] None of these options would allow the Commission to find an infringement of EU competition rules and to impose fines, which would generate rights to launch damage claims. These options examined (in different combinations) whether, first, a dominance-based or a market structure-based competition tool should be adopted, and second, whether the competition tool should have a horizontal scope (i.e., apply across all sectors of the economy) or have a limited scope, applying only to certain sectors of the economy (e.g., digital or digitally-enabled markets).

144 Structural competition problems refer to the existence of structural market characteristics that have adverse consequences on competition, thus likely resulting in higher prices, lower quality, less choice, and innovation. Structural competition problems can broadly be grouped under two headings: (a) structural risks for competition and (b) structural lack of competition. Structural risks for competition refer to scenarios where certain market characteristics (e.g., network and scale effects, lack of multi-homing and lock-in effects) combined with the conduct of companies operating in these markets create a threat for competition. Such risks for competition could be prevented by early intervention to prevent the "tipping" of the markets. Structural lack of competition refers to scenarios where a market is not functioning well and not delivering competitive outcomes due to its structure – i.e., a structural market failure. This could happen for example in markets characterized by high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation or in oligopolistic markets with an increased risk for tacit collusion.

145 The baseline scenario would be to adopt no further regulation and to maintain the EU competition law framework as it currently stands. The Commission, however, noted that under this scenario, structural competition problems could not effectively be tackled or addressed.

Having a dominance based-competition tool would only allow the Commission to intervene when a company was found to be dominant. Thus, if a dominance-based competition tool were to be adopted, the trigger for Commission intervention would be market dominance (much like under Article 102 TFEU).[146] A market structure-based competition tool, on the other hand, would allow the Commission to intervene and remedy structural competition problems that arise due to conduct by companies that are not necessarily dominant. Thus, what would trigger intervention is a finding that the internal market is not functioning properly because of structural characteristics. The Commission could impose behavioural and/or structural remedies and could also recommend legislative action to improve the functioning of the market concerned.

B. The Commission's DMA Proposal

Stakeholder engagement with the two public consultations – on the *ex ante* regulation (as part of the DSA package) and the NCT – was high. Numerous commentaries, discussions and debates about the desired scope and content of the proposed instruments followed, and large platforms that would be affected by the forthcoming regulation stepped up their lobbying efforts. As expected, much of the discussion focused on the criteria for designation of companies as "gatekeepers" (which would determine the number of companies that would be covered by the *ex ante* regulation),[147] as well as the content of the obligations or prohibitions that gatekeepers would have to comply with (on which point, a leaked Commission document gave stakeholders an idea of what the Commission had in mind).[148]

In October 2020, it was revealed that the *ex ante* regulation (which was initially conceptualized as part of the DSA) and the NCT would eventually merge into one single text, the DMA, an instrument focused on digital markets, which would feature the two complementary pillars – i.e. the *ex ante* regulation and a watered down version of the NCT (case-by-case enforcement).[149]

On 15 December 2020, the Commission published its Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets

146 The difference from intervention under Article 102 TFEU would be that, while under Article 102 TFEU the Commission must find an infringement before it can intervene, the tool would allow the Commission to impose behavioural and/or structural remedies without any finding of infringement (and therefore much faster). The Commission would still however need to establish dominance.

147 See, for example, Javier Espinoza, "EU targets Big Tech with 'hit list' facing tougher rules", *The Financial Times*, 11 October 2020, available at https://www.ft.com/content/c8c5d5dc-cb99-4b1f-a8dd-5957b57a7783.

148 See "DGs CNECT/GROW informal working document", available at https://www.politico.eu/wp-content/uploads/2020/09/SKM_C45820093011040.pdf.

149 Laura Kayali, "Brussels eyes bigger stick to take on Big Tech", *Politico*, 12 October 2020, available at https://www.politico.eu/article/margrethe-vestager-brussels-seeks-to-strengthen-competition-tool-against-big-tech-digital-services-act/. The DSA would be an instrument separate from the *ex ante* regulation of gatekeeping platforms.

Act).[150] In this Section, I analyze the DMA Proposal, looking at the process for the designation of gatekeepers (Sub-section 1), at the obligations imposed on designated gatekeepers (Sub-section 2), and the implementation and enforcement of the Regulation (Sub-section 3).

It should, however, be noted that this is not the final document. The Commission's Proposal will now have to go through the European Parliament and the Council of the European Union – where it is expected that it will undergo (possibly substantial) amendments – before the final DMA text is adopted.[151]

1. The designation of gatekeepers

The process for the designation of gatekeepers is laid down in Article 3 of the Proposal and involves the assessment of qualitative and quantitative criteria.

Article 3(1) of the Proposal – the qualitative criteria. Article 3(1) of the Proposal lays down the qualitative criteria that, if fulfilled, will lead to the designation of a provider of "core platform services" ("CPS") as a gatekeeper:

> "A provider of core platform services shall be designated as gatekeeper if:
> (a) it has a significant impact on the internal market;
> (b) it operates a core platform service which serves as an important gateway for business users to reach end users; and
> (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future."

Central to the definition of the gatekeeper is that it provides a CPS, which, according to Article 2(2) of the Proposal, may be online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services, and 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 previously mentioned.

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150 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final ("**DMA Proposal**"). On the same day, the Commission also published its Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final ("**DSA Proposal**"), which aims to create a safer digital space in which the fundamental rights of all users of digital services are protected and amends the e-Commerce Directive.

151 The DMA is to be adopted through the so-called "ordinary legislative procedure" or "co-decision procedure". This procedure starts with a legislative proposal from the Commission (in this case, the DMA Proposal published on 15 December 2020), which is then passed through the European Parliament and the Council of the EU (which comprises representatives of the EU Member States). The two co-legislators (the European Parliament and the Council) adopt legislation jointly, having equal rights and obligations: neither of them can adopt a legislative act without the agreement of the other and both co-legislators must approve an identical text.

According to the Commission, CPSs "*feature a number of characteristics that can be exploited by their providers*", which include, *inter alia*,

> "extreme scale economies, which often result from nearly zero marginal costs to add business users or end users, […] 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 for the same purpose by end users, vertical integration, and data driven-advantages."[152]

The above characteristics combined with unfair conduct by providers of these services can limit the contestability of core platform services and have a negative impact on the fairness of the commercial relationship between core platform service providers and their business and end users.

However, the DMA would not apply to all CPS providers, but only a small subset of large CPS providers which act as gateways for many business users to reach end users (which allows them to take advantage of these business users), and whose conduct may thus have a significant impact on the European internal market. In this regard, the Recital of the DMA Proposal makes it clear that

> "[t]he core platform services in scope are only those where there is strong evidence of (i) high concentration, where usually one or very few large online platforms set the commercial conditions with considerable autonomy from their (potential) challengers, customers or consumers; (ii) dependence on a few large online platforms acting as gateways for business users to reach and have interactions with their customers; and (iii) the power by core platform service providers often being misused by means of unfair behavior vis-à-vis economically dependent business users and customers."[153]

Article 3(2) of the Proposal – the quantitative criteria. The DMA Proposal provides for a rebuttable presumption that the qualitative criteria of Article 3(1) have been met if the quantitative thresholds of Article 3(2) of the Proposal are exceeded.

The first criterion, i.e., that the CPS provider "*has a significant impact on the internal market*" will be presumed to be fulfilled "*where the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform*

152 Preamble of the DMA Proposal, paragraph 2.

153 DMA Proposal, pages 5-6 [emphasis added]. According to the DMA Impact Assessment, such evidence is based on the "enforcement experience under EU competition rules both at the EU and national level, numerous expert reports and studies – including the study supporting the present Impact Assessment – and the results of the [open public consultation]." See Commission Staff Working Document – Impact Assessment Report Accompanying the document "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 Impact Assessment Report**"), 15 December 2020, SWD(2020) 363 final, page 37.

service in at least three Member States."[154] These thresholds must be met not by the CPS provider itself but by the "undertaking" to which the CPS provider belongs.

The second criterion, i.e., that the CPS provider "*operates a core platform service which serves as an important gateway for business users to reach end users*" will be presumed to be met where the CPS provider "*provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year.*"[155]

The third criterion, i.e., that the CPS provider "*enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future*" will be presumed to be met where the thresholds of Article 3(2)(b) – i.e., 45 million monthly active end users and more than 10.000 yearly active business users – "*were met in each of the last three financial years.*"[156]

Article 3(4) of the Proposal – rebutting the presumption. CPS providers that meet the quantitative thresholds of Article 3(2) of the Proposal can, based on Article 3(4), rebut the presumption that they are gatekeepers by presenting "*sufficiently substantiated arguments to demonstrate that, in the circumstances in which the relevant core platform service operates, and taking into account the elements listed in paragraph 6, the provider does not satisfy the requirements of paragraph 1.*" When a CPS provider presents such sufficiently substantiated arguments, the Commission will have to take into consideration the elements listed in Article 3(6) (i.e., the size, operations and position of the CPS provider, the number of dependent business users, entry barriers derived from network effects and data driven advantages, scale and scope effects, business or end user lock-in and other structural market characteristics) in order to assess whether the presumption can be rebutted. Article 3(4) provides a safety net against the risk of over-inclusiveness (i.e., the Proposal leading to the designation as gatekeepers of digital platforms that may be large but are not true gatekeepers).

Article 3(6) of the Proposal – qualitative assessment. A CPS provider that does not meet the quantitative thresholds of Article 3(2) may still be designated as a gatekeeper by the Commission following a qualitative assessment on the basis of Article 3(6) of the Proposal:

> "The Commission may identify as a gatekeeper, in accordance with the procedure laid down in Article 15, any provider of core platform services that meets each of the requirements of paragraph 1, but does not satisfy each of the thresholds of paragraph 2, or has presented sufficiently substantiated arguments in accordance with paragraph 4.
> For that purpose, the Commission shall take into account the following elements:
>
> (a) the size, including turnover and market capitalisation, operations and position of the provider of core platform services;

154 DMA Proposal, Article 3(2)(a).

155 Id., Article 3(2)(b).

156 Id., Article 3(2)(c).

(b) the number of business users depending on the core platform service to reach end users and the number of end users;
(c) entry barriers derived from network effects and data driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities;
(d) scale and scope effects the provider benefits from, including with regard to data;
(e) business user or end user lock-in;
(f) other structural market characteristics."

Article 3(6) is the way through which the Proposal seeks to deal with the risk of under-inclusiveness – i.e., the DMA failing to capture as gatekeepers CPS providers that may not (yet) meet the quantitative thresholds of Article 3(2) TFEU, but which have a gatekeeping position in the market.

Both when a CPS provider meets the quantitative thresholds of Article 3(2) but presents "sufficiently substantiated arguments" and when a gatekeeper does not meet the quantitative thresholds, but the Commission engages in a qualitative assessment to determine whether the CPS provider should nevertheless be designated as a gatekeeper, the procedure to be followed is the market investigation set out in Article 15 of the Proposal. Such a market investigation should be concluded within five months from its opening where a CPS provider meets the quantitative thresholds of Article 3(2) but submits sufficiently substantiated arguments,[157] and within twelve months from its opening when the Commission seeks to examine whether a CPS provider that does not meet the quantitative thresholds should be designated as a gatekeeper.[158]

In all instances, the Commission is the body responsible for designating CPS providers as gatekeepers. According to Article 3(4) of the Proposal, if a CPS provider meets the quantitative thresholds of Article 3(2) and does not contest that it is a gatekeeper, "*[t]he Commission shall, without undue delay and at the latest 60 days after receiving the complete information referred to in paragraph 3, designate the provider of core platform services […] as a gatekeeper.*" If the CPS provider meets the quantitative thresholds of Article 3(2) but presents "sufficiently substantiated arguments" as per Article 3(4) or if the Commission opens a market investigation to assess whether a CPS provider that does not meet the quantitative thresholds should nevertheless be designated as a gatekeeper on the basis of a qualitative assessment, the Commission may designate it as gatekeeper on the basis of Article 3(6). According to Article 3(7),

> "For each gatekeeper identified pursuant to paragraph 4 or paragraph 6, the Commission shall identify the relevant undertaking to which it belongs and list the relevant core platform services that are provided within that same undertaking and which individually serve as an important gateway for business users to reach end users as referred to in paragraph 1(b)."

Review of the status of gatekeeper. The DMA Proposal also makes provision for the review of the status of gatekeepers. Article 4(1) of the Proposal provides that the Commission may, at any moment on its own initiative or upon request, reconsider, amend or repeal a designation decision

157 Id., Article 15(3).

158 Id., Article 15(1).

adopted pursuant to Article 3 if "*there has been a substantial change in any of the facts on which the decision was based*" or "*the decision was based on incomplete, incorrect or misleading information provided by the undertakings.*" Article 4(2) requires the Commission to review regularly, and at least every two years, whether designated gatekeepers are still gatekeepers or whether new CPS providers should be designated as gatekeepers. The regular review envisaged in Article 4(2) should also "*examine whether the list of affected core platform services of the gatekeeper needs to be adjusted.*"

The Commission, according to Article 4(3) of the Proposal, "*shall publish and update the list of gatekeepers and the list of the core platform services for which they need to comply with the obligations laid down in Articles 5 and 6 on an on-going basis.*"

2. The obligations imposed on designated gatekeepers

CPS providers that are designated as gatekeepers must comply with obligations and prohibitions listed in Articles 5 and 6 of the Proposal within six months after they have been included in the list of designated gatekeepers pursuant to Article 3(7).[159] All obligations and prohibitions must be "*fully and effectively complied with*."[160] In fact, gatekeepers should ensure compliance with the DMA by design – in other words, the necessary measures to comply with the DMA obligations should be "*as much as possible and where relevant integrated into the technological design used by the gatekeepers.*"[161] The difference between the Article 5 and 6 obligations is that the former are considered to be sufficiently clear and unambiguous to be "self-executing", while the latter are "*susceptible of being further specified*" by the Commission following a regulatory dialogue with

159 Id., Article 3(8).

160 Id., Article 11. See also Article 7(1): "The measures implemented by the gatekeeper to ensure compliance with the obligations laid down in Articles 5 and 6 shall be effective in achieving the objective of the relevant obligation." The Proposal provides for very limited exceptions to this (which are to be construed narrowly): Article 8(1) of the Proposal provides that "[t]he Commission may, on a reasoned request by the gatekeeper, exceptionally suspend, in whole or in part, a specific obligation laid down in Articles 5 and 6 for a core platform service by decision adopted in accordance with the advisory procedure referred to in Article 32(4), 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, furthermore, provides that the Commission may exempt a gatekeeper, in whole or in part, from a specific obligation laid down in Articles 5 and 6 in relation to an individual CPS identified pursuant to Article 3(7), where such exemption is justified on grounds of public morality, public health or public security. Note also Article 15(4): when it comes to "emerging gatekeepers" – i.e., CPS providers that do not yet enjoy an entrenched and durable position in their operations, but it is foreseeable that they will enjoy such a position in the near future – the Commission "shall declare applicable to that gatekeeper only obligations laid down in Article 5(b) and Article 6(1) points (e), (f), (h) and (i) as specified in the designation decision. The Commission shall only declare applicable those obligations that are appropriate and necessary to prevent that the gatekeeper concerned achieves by unfair means an entrenched and durable position in its operations."

161 Preamble of the DMA Proposal, paragraph 58.

the gatekeeper – the specification concerning the appropriate measures to be implemented to ensure full compliance with these obligations.[162]

The obligations and prohibitions listed in Articles 5 and 6 deal with the most flagrant practices of gatekeepers that limit the contestability of digital markets or that are unfair. They seek, *inter alia*, to prevent self-preferencing or tying/bundling practices of gatekeepers, to limit the data-driven advantages they enjoy and to prohibit certain obstacles to interoperability. These obligations are inspired by the numerous complaints that have been filed to the Commission and national competition authorities and the investigations carried out by these authorities, and it is, to a large extent, possible to identify to which company – and, in fact to which conduct of each company – each obligation refers. In this context, it is surprising that the obligations contained in the DMA apply to all designated gatekeepers; the Proposal does not make a distinction (or group together obligations) according to the CPS each gatekeeper provides – e.g., have the obligations applying to app stores grouped together and being separated from the obligations applying to online search engines, and so forth.

The list of obligations of Articles 5 and 6 of the Proposal may be updated by the Commission, as envisaged in Article 10 – a provision which seeks to future-proof the DMA:

> "The Commission is empowered to adopt delegated acts in accordance with Article 34 to update the obligations laid down in Articles 5 and 6 where, based on a market investigation pursuant to Article 17, it has identified the need for new obligations addressing practices that limit the contestability of core platform services or are unfair in the same way as the practices addressed by the obligations laid down in Articles 5 and 6.
>
> A practice within the meaning of paragraph 1 shall be considered to be unfair or limit the contestability of core platform services where:
>
> (a) there is an imbalance of rights and obligations on business users and the gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the gatekeeper to business users; or
>
> (b) the contestability of markets is weakened as a consequence of such a practice engaged in by gatekeepers."

162 DMA Proposal, Article 7. This regulatory dialogue may either be initiated by the Commission when it finds that the measures that the gatekeeper intends to implement or has implemented do not ensure effective compliance with Article 6 obligations or may be requested by the gatekeeper in order for the Commission to determine whether the measures that it intends to implement or has implemented are effective in achieving the objective of the relevant obligation in the specific circumstances. See also Preamble of the DMA Proposal, paragraph 58: "it may in certain cases be appropriate for the Commission, following a dialogue with the gatekeeper concerned, to further specify some of the measures that the gatekeeper concerned should adopt in order to effectively comply with those obligations that are susceptible of being further specified. The possibility of a regulatory dialogue should facilitate compliance by gatekeepers and expedite the correct implementation of the Regulation."

By allowing the Commission to update the list of obligations for designated gatekeepers, it will be possible for the DMA to adapt to the evolving conducts of gatekeepers that may jeopardize the fairness and contestability of digital markets.

In this Section, we will first present the obligations of Article 5 (Sub-section 2.1), before analysing the Article 6 obligations (Sub-section 2.2). We then refer to the Article 12 obligation to inform about concentrations, and the Article 13 obligation of an audit (Sub-section 2.3).

2.1. The obligations of Article 5 of the Proposal

Article 5 contains a list of seven obligations for designated gatekeepers that are "self-executing".

Article 5(a) of the Proposal requires gatekeepers to refrain from combining personal data sourced from the CPS with personal data from any other services offered by the gatekeeper or with personal data from third-party services. It also requires gatekeepers to refrain from automatically signing in end users to other services of the gatekeeper to combine personal data, unless the end user has been presented with the specific choice and has granted valid consent in the sense of the GDPR. This obligation seeks to address the data-driven advantages gatekeepers enjoy because they offer a variety of business and consumer-facing products, which can lead to the erection of barriers to entry, limiting the contestability of digital markets.[163]

Article 5(b) requires gatekeepers to "*allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper.*"[164] It, therefore, prohibits the use of wide parity/most favoured nation ("MFN") clauses, while not touching upon narrow parity/MFN clauses. This obligation aims to prevent the imposition of such clauses, which have a "*significant deterrent effect on the business users of gatekeepers in terms of their use of alternative online intermediation services, limiting inter-platform contestability, which in turn limits choice of alternative online intermediation channels for end users.*"[165]

Article 5(c) of the Proposal obliges gatekeepers to allow business users to promote offers to end users acquired via the CPS and to conclude contracts with these end users "*regardless of whether for that purpose they use the core platform services of the gatekeeper or not*." It, moreover, requires gatekeepers to allow end users to access and use, through their CPS, "*content, subscriptions, features or other items by using the software application of a business users, where these items have been acquired by the end users from the relevant business user without using the core platform*

163 See Preamble of the DMA Proposal, paragraph 36.

164 The prohibition of wide parity clauses does not only concern clauses that limit business users from choosing to differentiate commercial conditions (including price), but extends to "any measure with equivalent effect, such as for example increased commission rates or de-listing of the offers of business users." See Id., paragraph 37.

165 Ibid.

services of the gatekeeper." This obligation aims to prevent further reinforcing the dependence of business users on the CPS of the gatekeeper and to safeguard end user choice.[166]

Article 5(d) prohibits gatekeepers from preventing or restricting business users (through any practices, including but not limited to confidentiality clauses in agreements or other written terms) from raising issues with any relevant administrative or other public authority with regards to the gatekeepers' practices. This prohibition aims at safeguarding a fair commercial environment and protecting the contestability of the digital sector by allowing business users to complain about unfair practices adopted by gatekeepers, such as discriminatory access conditions, unjustified closing of business user accounts or unclear grounds for product de-listings.[167]

Article 5(e) of the Proposal prohibits gatekeepers from requiring business users to "*use, offer or interoperate with an identification service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper.*" It, therefore, obliges gatekeepers to refrain from tying the use of their identification service to the use of their core platform service. This prohibition recognizes that identification services are crucial for business users to conduct their business, as they allow them to optimize their services and to inject trust in online transactions.[168]

Article 5(f) of the Proposal prohibits gatekeepers from making access to any of their CPSs conditional on the business or end user subscribing to or registering with any other CPS offered by the gatekeeper. As it currently stands, the Proposal does not impose such a prohibition when it comes to ancillary services offered by the gatekeeper.

Finally, Article 5(g) requires gatekeepers to provide advertisers and publishers to which they supply advertising services, upon their request, with information regarding 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. This obligation seeks to address the opacity of the ad tech ecosystem, recognizing that advertisers and publishers often lack information and knowledge about the conditions of the advertising services they use, which limits their ability to switch to alternative providers of online advertising services. It also recognizes that "*the costs of online advertising are likely to be higher than they would be in a fairer, more transparent and contestable platform environment*" and that these costs are "*likely to be reflected in the prices that end users pay for many daily products and services relying on the use of online advertising.*" [169]

2.2. The obligations of Article 6 of the Proposal

166 See Id., paragraph 38.

167 Id., paragraph 39.

168 Id., paragraph 40.

169 Id., paragraph 42.

As mentioned above, Article 6(1) of the Proposal contains a list of 11 obligations, the measures to comply with which being susceptible to further specification by the European Commission during a regulatory dialogue with the gatekeeper. We will now review these obligations, referring to the purpose they seek to achieve.

Article 6(1)(a) of the Proposal requires gatekeepers to "*refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users.*" This obligation aims to prevent the data advantage gatekeepers which are vertically integrated – in other words, which have a dual role as a CPS provider (whereby they provide a CPS to their business users) and as a downstream competitor of those same business users "*in the provision of the same or similar services or products to the same end users*" – enjoy.[170] In particular, the Commission acknowledges that

> "a gatekeeper may take advantage of its dual role to use data, generated from transactions by its business users on the core platform, for the purpose of its own services that offer similar services to that of its business users. This may be the case, for instance, where a gatekeeper provides an online marketplace or app store to business users, and at the same time offer services as an online retailer or provider of application software against those business users. To prevent gatekeepers from unfairly benefitting from their dual role, it should be ensured that they refrain from using any aggregated or non-aggregated data, which may include anonymised and personal data that is not publicly available to offer similar services to those of their business users. This obligation should apply to the gatekeeper as a whole, including but not limited to its business unit that competes with the business users of a core platform service.
>
> Business users may also purchase advertising services from a provider of core platform services for the purpose of providing goods and services to end users. In this case, it may occur that the data are not generated on the core platform service, but are provided to the core platform service by the business user or are generated based on its operations through the core platform service concerned. In certain instances, that core platform service providing advertising may have a dual role, as intermediary and as provider of advertising services. Accordingly, the obligation prohibiting a dual role gatekeeper from using data of business users should apply also with respect to the data that a core platform service has received from businesses for the purpose of providing advertising services related to that core platform service.
>
> In relation to cloud computing services, this obligation should extend to data provided or generated by business users of the gatekeeper in the context of their use of the cloud computing service of the gatekeeper, or through its software application store that allows end users of cloud computing services access to software applications."[171]

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170 Id., paragraph 43.

171 Id., paragraph 43-45 [emphasis added].

Article 6(1)(b) of the Proposal requires gatekeepers to allow end users to un-install any pre-installed software applications, unless such applications are essential for the functioning of the operating system or of the device, and they cannot technically be offered on a standalone basis by third parties. This obligation seeks to remedy one of the self-preferencing practices gatekeepers may adopt (pre-installing), which not only harms third-party app developers which offer apps similar to those offered by the gatekeeper but also limits end user choice.

Article 6(1)(c) of the Proposal requires gatekeeper to open up their OS to third-party app stores and third-party software applications distributed by means other than the gatekeeper's CPS. This obligation will contribute to increasing (or in some cases – e.g., when it comes to the iOS environment – introduce) competition between different app stores, as well as various alternative app distribution channels, increasing business and end user choice and contributing to the fairness and contestability of the market. This provision also includes a safety net for gatekeepers in that it allows them to take "*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.*"[172] It, therefore, strikes a balance between ensuring fair and contestable markets, to the benefit of business and end users, and safeguarding the integrity and quality of the gatekeepers' hardware or OS.

Article 6(1)(d) of the Proposal prohibits another self-preferencing practice adopted by certain digital gatekeepers that are vertically integrated, namely the preferential treatment in ranking of services and products offered by the gatekeeper itself or any third party belonging to the same undertaking compared to similar services or products offered by third parties.[173] Due to their dual role, gatekeepers "*have the ability to undermine directly the contestability for those products or services on these core platform services, to the detriment of business users which are not controlled by the gatekeeper.*"[174] The prohibition on self-preferencing in ranking covers "*any form of differentiated or preferential treatment in ranking on the core platform service, whether through legal, commercial or technical means.*"[175] Article 6(1)(d) of the Proposal, furthermore, introduces a more general obligation to "*apply fair and non-discriminatory conditions*" to ranking (which

172 See also Id., paragraph 47: "In order 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 the gatekeeper concerned may implement proportionate technical or contractual measures to achieve that goal if the gatekeeper demonstrates that such measures are necessary and justified and that there are no less restrictive means to safeguard the integrity of the hardware or operating system" [emphasis added].

173 Such preferential treatment in ranking can occur, for example, "with products or services, including other core platform services, which are ranked in the results communicated by online search engines, or which are partly or entirely embedded in online search engines results, groups of results specialised in a certain topic, displayed along with the results of an online search engine, which are considered or used by certain end users as a service distinct or additional to the online search engine. Other instances are those of software applications which are distributed through software application stores, or products or services that are given prominence and display in the newsfeed of a social network, or products or services ranked in search results or displayed on an online marketplace." See Id., paragraph 48.

174 Ibid.

175 Id., paragraph 49.

covers "*all forms of relative prominence, including display, rating, linking or voice results*").[176] What is more, the Commission envisages that in order to ensure that this obligation is effective and cannot be circumvented "*it should also apply to any measure that may have an equivalent effect to the differentiated or preferential treatment in ranking.*"[177]

Article 6(1)(e) of the Proposal obliges gatekeepers to refrain from "*technically restricting the ability of end users to switch between and subscribe to different software applications and services to be accessed using the operating system of the gatekeeper, including as regards the choice of Internet access provider for end users.*" In other words, it prohibits gatekeepers from raising artificial technical barriers to entry, to make switching impossible or ineffective, reducing end user freedom of choice. This provision aims to ensure that many providers can offer their products and services leading to a wider choice for end users, that "*the rights of end users to access an open internet are not compromised by the conduct of gatekeepers*" and that there exists a "*level playing field for Internet access services*" to the benefit of end users.[178]

Article 6(1)(f) obliges gatekeepers to offer business users and providers of ancillary services access to and interoperability with the same OS, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services. This obligation concerns cases where a gatekeeper has a dual role as a developer of OS and a device manufacturer. Its purpose is to ensure that business users and third parties that wish to offer ancillary services have access to the functionalities of the device (e.g., near-field-communication technology and the software used to operate this technology) that are necessary to effectively offer such ancillary services, and that access to such functionalities is not reserved for the gatekeeper.[179] In this way, competition and innovation by providers of ancillary services can be enhanced, and so can choice for end users of such ancillary services. However, the DMA Proposal stays away from imposing a general obligation of interoperability – only limiting this to the features necessary for the provision of ancillary services.

Article 6(1)(g) of the Proposal requires gatekeepers which provide online advertising services to "*provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory.*" This obligation aims to address the opacity, lack of transparency and lack of information for advertisers and publishers in the online advertising ecosystem, seeking to "*further enhance fairness, transparency and contestability of online advertising services designated under [the DMA] as well as those that are fully integrated with other core platform services of the same provider.*"[180]

176 Ibid.

177 Ibid.

178 See Id., paras. 50-51.

179 See Id., paragraph 52.

180 Id., paragraph 53.

Article 6(1)(h) of the Proposal requires designated gatekeepers to offer effective data portability when it comes to data generated through the activity of a business user or end user, and, in particular, to provide tools for end users to facilitate the exercise of data portability, in line with the GDPR, including by the provision of continuous and real-time access. This provision addresses the data-driven advantages gatekeepers enjoy due to having access to troves of data collected while providing their CPS or other digital services. It requires them to provide access to such data "*in a structured, commonly used and machine-readable format.*" By providing for effective, real-time data portability, the DMA Proposal aims to facilitate switching or multi-homing, which will in turn lead to an increased choice for business and end users and an incentive for gatekeepers and business users to innovate.[181]

Article 6(1)(i) constitutes another data-related provision of the DMA Proposal which requires gatekeepers to "*provide business users, or third parties authorised by a business user, free of charge, with effective, hight-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.*" To comply with this obligation, gatekeepers "*should not use any contractual or other restrictions to prevent business users from accessing relevant data and should enable business users to obtain consent of their end users for such data access and retrieval, where such consent is required under [the applicable privacy laws].*"[182] Gatekeepers can comply with this obligation by, e.g., putting in place high quality application programming interfaces ("APIs").

Article 6(1)(j) of the Proposal requires gatekeepers to "*provide to any third party providers of online search engines, upon their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper.*" Where such data constitute personal data, they should be anonymised. Datasets containing information about what end users searched for and how they interacted with the results that they were served are valuable to improve the provision of online search engine services. Therefore, the lack of access to such data constitutes an important barrier to entry and expansion for third-party online search engine providers, which undermines the contestability of online search engine services.[183] By obliging gatekeepers to provide access to such data on FRAND terms, the DMA Proposal aims to allow third-party providers to optimize their services and compete with digital gatekeepers offering online search engine services.

Finally, Article 6(1)(k) of the Proposal requires gatekeepers to apply fair and non-discriminatory general conditions of access for business users to their software application stores. The Commission acknowledges that gatekeepers which provide access to app stores "*serve as an important gateway for business users that seek to reach end users.*"[184] Consequently, the imbalance of power that exists between those gatekeepers and business users (as business users have no other option but to

181 Id., paragraph 54.

182 Id., paragraph 55.

183 Id., paragraph 56.

184 Id., paragraph 57.

offer their apps through the app store of the gatekeeper or else lose access to their user base) allows them to impose general conditions, including pricing conditions, that are unfair or lead to unjustified differentiation. Such conducts will not be tolerated under the DMA. In the Preamble, the Commission gives us an idea of what actions could be found to be unfair:

> "Pricing or other general access conditions should be considered unfair if they lead to an imbalance of rights and obligations imposed on business users or confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users or lead to a disadvantage for business users in providing the same or similar services as the gatekeeper. The following benchmarks can serve as a yardstick to determine the fairness of general access conditions: prices charged or conditions imposed for the same or similar services by other providers of software application stores; prices charged or conditions imposed by the provider of the software application store for different related or similar services or to different types of end users; prices charged or conditions imposed by the provider of the software application store for the same service in different geographic regions; prices charged or conditions imposed by the provider of the software application store for the same service the gatekeeper offers to itself."[185]

A criticism that is regularly made about this extensive set of obligations is that they apply to all designated gatekeepers independently of their core platform services or business model. Given, for instance, the different nature – as well as different competitive challenges – raised by, for instance, a search engine and an app store, it may be questioned whether it makes sense to submit the gatekeepers provided such services to the same rules. It would not thus be entirely surprising if amended where made to the proposal as it goes through the legislative process for a greater "personalisation" of the above-mentioned obligations.

2.3. The Article 12 and 13 obligations

On top of the lists of obligations contained in Articles 5 and 6, the Proposal imposes two additional obligations on designated gatekeepers, namely the obligation to inform about concentrations (Article 12) and the obligation of an audit of any profiling (Article 13).

Article 12 of the Proposal requires gatekeepers to inform the Commission of any intended concentration involving another provider of CPS or of any other services provided in the digital sector, regardless of whether such a concentration is notifiable to the Commission or a national competition authority. Notification to the Commission should take place following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest, but prior to the implementation of the agreement. The notification should, at minimum, describe "*for the acquisition targets their EEA and worldwide annual turnover, for any relevant core platform services their respective EEA annual turnover, their number of yearly active business users and the number of monthly active end users, as well as the rationale of the intended concentration.*"[186]

185 Ibid.

186 DMA Proposal, Article 12(2).

The purpose of the Article 12 obligation is to inform the review of gatekeeper status as well as the adjustment of the list of CPSs provided by the gatekeeper. More broadly, such notifications will also provide important information for the monitoring of contestability trends in the digital sector – and consequently can be a useful factor to take into account in the context of market investigations carried out by the Commission on the basis of the DMA (more on which below). The inclusion of Article 12 in the DMA Proposal comes as no surprise. As explained in Section III.B above, large digital platforms have long used mergers and acquisitions to strengthen their presence in digital markets or to even eliminate existing or potential rivals.

Article 13 of the Proposal provides that gatekeepers shall, within six months after their designation, submit to the Commission "*an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services identified pursuant to Article 3. This description shall be updated at least annually.*" The description should include information as to

> "whether personal data and data derived from user activity is relied on [for the performance of the profiling], the processing applied, the purpose for which the profile is prepared and eventually used, the impact of such profiling on the gatekeeper's services, and the steps taken to enable end users to be aware of the relevant use of such profiling, as well as to seek their consent."[187]

The reason behind this obligation is to put external pressure on gatekeepers to prevent them from making deep consumer profiling the industry standard. By doing so, the contestability of digital markets would be increased: potential entrants or start-up providers cannot engage in similar-scale profiling and thus compete effectively with gatekeepers that are able to engage in such practices. Thus, by preventing gatekeepers from engaging in extensive consumer profiling, the asymmetries between them and third parties will be reduced. Moreover, by enhancing transparency as to the profiling practices of gatekeepers, third-party providers of similar services could differentiate themselves better through the use of superior privacy guaranteeing facilities.[188]

3. Implementation and enforcement

The DMA Proposal envisages a centralized implementation and enforcement system (i.e., implementation and enforcement at the EU level). The European Commission is at the centre of the DMA's implementation and enforcement. The Commission justifies this choice as follows:

> "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. This cannot be sufficiently achieved by the Member

187 Preamble of the DMA Proposal, paragraph 61.

188 Ibid.

States, but can only, by reason of the business model and operations of the gatekeepers and the scale and effects of their operations, be fully achieved at Union level."[189]

Under the Proposal, the role of EU Member States is limited. Member States are involved in the adoption of non-compliance decisions taken by the Commission through their participation in the Digital Markets Advisory Committee,[190] as well as in the adoption of decisions on systematic non-compliance.[191] Furthermore, on the basis of Article 33 of the Proposal, three or more Member States can request the Commission to open an Article 15 investigation "*because they consider that there are reasonable grounds to suspect that a provider of core platform services should designated as a gatekeeper*," although the Commission is not obliged to act upon such a request.

The Proposal grants the power to the Commission to carry out market investigations with the purpose of examining whether a CPS provider should be designated as a gatekeeper (Article 15), with the view of possibly adopting a decision of systematic non-compliance (Article 16), or in order to examine whether one or more services within the digital sector should be added to the list of core platform services or to detect types of practices that may limit the contestability of CPSs or may be unfair and which are not effectively addressed by the DMA (Article 17).[192] The Commission may also carry out proceedings in order to examine whether the measures that the gatekeeper intends to implement or has implemented to ensure compliance with Article 6 obligations are effective and to specify the measures that the gatekeeper concerned shall implement. It may also carry out proceedings with the view of possibly adopting a decision of non-compliance as per Article 25 or a fining decision as per Article 26.

The Proposal bestows upon the Commission extensive investigative powers: it may send requests for information (Article 19), it has the power to carry out interviews and take statements (Article 20) and it is empowered to conduct on-site inspections (Article 21). The Commission may also impose fines of up to 10% of the total annual turnover of the undertaking in the preceding financial year (Article 26), as well as periodic penalty payments of up to 5% of the average daily turnover in the preceding financial year per day (Article 27). In the case of systematic non-compliance with the obligations laid down in Articles 5 and 6 of the Proposal which has led the gatekeeper to further strengthen or extent its gatekeeping position, the Commission may impose behavioural or structural remedies on the gatekeeper (Article 16). Structural remedies may only be imposed "*where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the gatekeeper concern than the structural remedy.*"[193] The Commission also has the power to accept commitments offered by the gatekeeper (Article 23). Finally, an

189 Preamble of the DMA Proposal, paragraph 79 [emphasis added].

190 See DMA Proposal, Articles 25 and 32.

191 Id., Articles 16 and 32.

192 The possibility for the Commission to carry out market investigations represents a watered-down version of the New Competition Tool, the possible adoption of which was examined by the Commission in the relevant impact assessment and public consultation launched in June 2020. While a full-scale NCT was ultimately not adopted, the market investigations envisaged in the DMA Proposal still allow the Commission to intervene in tipping markets.

193 Id., Article 16(2).

important tool for the Commission is the possibility to adopt interim measures on the basis of Article 22 when there is a *prima facie* finding of an infringement of Articles 5 or 6 and there is a risk of serious and irreparable damage for business or end users of the gatekeeper.[194]

VI. Regulating digital gatekeepers in the UK: the Digital Taskforce Advice

In March 2020, the UK government commissioned the CMA to lead a Digital Markets Taskforce (the "Taskforce"), working closely with Ofcom, the UK Communications Regulator, and the Information Commissioner's Office ("ICO"), to provide advice on the design and implementation of a pro-competition regime for digital markets. In December 2020, the Taskforce published its Advice, laying down its views on the functions, processes and powers needed to ensure "*greater competition and innovation in digital markets in a proportionate and efficient way.*"[195]

Within this new pro-competition regulatory regime, a so-called "SMS regime" is envisaged to address harm arising from the market power and strategic position of the most powerful digital firms and to drive vibrant competition and dynamic innovation in the markets in which SMS firms are active.[196]

This Part briefly describes this SMS regime, as proposed by the Taskforce.[197] While it is not (a proposal for) legislation, it explains how the regime is expected to function. Section A explains the process for designating a firm with SMS. Section B then describes the three pillars that, according to the Taskforce, should form part of the SMS regime. Finally, Section C refers to the monitoring and enforcement of the SMS regime.

A. SMS designation

The entry point to the SMS regime is an assessment of whether a firm has strategic market status. This evidence-based assessment should involve two steps: (i) an assessment as to whether a firm has "*substantial, entrenched market power in a particular digital activity,*" and (ii) an assessment as to whether the firm has a "*strategic position,*" meaning that "*the effects of its market power are likely to be particularly widespread and/or significant.*"[198] The Advice recommends that the assessment be carried out by the DMU, which will be responsible for designating a firm with SMS.

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194 Interim measures may only be adopted in the context of proceedings opened in view of the possible adoption of a decision of non-compliance pursuant to Article 25(1), See DMA Proposal, Article 22(2).

195 Digital Markets Taskforce Advice, paragraph 1.11.

196 Id., paragraph 4.3.

197 While the Taskforce Advice includes recommendations not only for the SMS regime, but also more generally with regards to the new pro-competition regime for digital markets (including making provision for stronger consumer protection, competition and market laws that are better adapted for the digital era, and recommendations as to the responsibilities of the Digital Markets Unit to be created within the CMA), we will focus on the SMS regime, as this is the targeted way of dealing with digital gatekeepers or companies having a strategic market status in the UK.

198 Digital Markets Taskforce Advice, paragraph 4.4.

With regards to the first step, i.e., the assessment of whether a firm has "*substantial entrenched market power*" in a digital activity, the DMU shall assess whether there is a lack of good alternatives and a limited threat of entry or expansion by other firms. It will also assess whether the market power that the firm enjoys is entrenched, as the temporary attainment of market power will not be sufficient to lead to an SMS designation.[199] The assessment is to be carried out with regards to a specific activity.[200]

With regards to the second step, i.e., the assessment of whether the effects of the firm's market power can be particularly widespread or significant so that it can be considered that the firm has SMS, factors to be taken into account by the DMU include: (i) whether the firm has achieved "*very significant size or scale*" in the activity, (ii) whether the firm is "*an important access point to customers (a gateway) for a diverse range of other businesses or the activity is an important input for a diverse range of other businesses*," (iii) whether the firm "*can use the activity to extend market power from one activity into a range of other activities and/or has developed an 'ecosystem' of products*" which protects its market power, (iv) whether the firm can use the activity "*to determine the rules of the game*" within its ecosystem and, in practice, for a wide range of market participants, or (v) whether the activity has significant impact on markets with a broader social or cultural importance.[201]

The Advice provides that the designation process should be open and transparent with a consultation on the provisional decision, as well as swift, with a statutory deadline of 12 months being recommended.[202] The SMS designation would then be set for a fixed period (the Taskforce recommends for five years), before being reviewed. However, within these five years, the DMU could receive applications from firms to remove the designation with regards to an activity "*where there had been a material change in circumstances which made the designation no longer appropriate.*"[203] While the SMS designation would apply to the firm as a whole, the rules and remedies forming part of the SMS regime would only apply to a subset of the firm's activities – i.e., those for which the firm has been designated as having SMS.[204]

B. <u>The pillars of the SMS regime</u>

It is expected that only a small subset of digital firms will meet the SMS test. If a firm fulfils the two-step test and thus is found to have SMS, it will then be subject to the three pillars of the SMS regime: (i) an enforceable code of conduct (Sub-section 1), (ii) pro-competitive interventions (Sub-section 2), and (iii) SMS merger rules (Sub-section 3).[205]

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199 See Id., paragraphs 4.10-4.14.

200 Id., paragraph 4.15: "By activity we mean a collection of products and services supplied by a firm that have a similar function or which, in combination, fulfil a specific function."

201 Id. paragraph 4.19.

202 Id., paragraph 4.25.

203 See Id., paragraphs 4.28-4.29.

204 Id., paragraphs 4.30-4.31.

205 Id., paragraph 4.5.

1. The code of conduct

The first pillar of the SMS regime, i.e., the code of conduct, will set out clearly how the SMS firm is expected to behave *in relation to its designated activity* to prevent it from taking advantage of its power and position. This code will (i) set out the objective it seeks to deliver ("*fair trading*", "*open choices*", "*trust and transparency*"), (ii) include principles that articulate in detail what the particular firm must or must not do (e.g., "*to trade on fair and reasonable contractual terms*"), and (iii) provide guidance as to how the principles included in the code should be interpreted, with specific examples of what conduct would be expected to breach these principles.[206]

The Taskforce recommends that legislation sets out the overarching objectives of the code, with the DMU designing the rest of the code (i.e., the principles and associated guidance) on a case-by-case basis – even though many principles could be common across the codes of SMS firms and activities. The Taskforce also recommends that the DMU, in setting the principles, would be able to allow for "exemptions", allowing the SMS firm to argue, e.g., that the conduct is "*necessary, or objectively justified, based on the efficiency, innovation, or other competition benefits it brings.*"[207]

The code of conduct should be consulted upon and established in parallel to the designation assessment, as "*the decision as to whether a firm has SMS in relation to a particular activity is closely linked to the decision as to the code which should apply to that activity*."[208] Its content should be reviewed when designation is reviewed, while alterations to its content could also be made by the DMU at any time within the (five-year) designation period.

The Taskforce provides that SMS firms should be under a legal obligation to always comply with the code of conduct, the DMU having the ability to "*take tough action when firms don't comply.*"[209]

2. Pro-competitive interventions

The second pillar of the SMS regime, i.e., the possibility to impose pro-competitive interventions ("PCIs") on SMS firms, seeks to address the sources of market power and drive longer-term dynamic changes in designated activities, allowing for greater competition and innovation. The DMU should, under this pillar, be able to impose remedies such as personal data mobility, interoperability, and data access. Such remedies cannot be imposed via the code of conduct, but are nevertheless crucial in dealing with features, e.g., barriers to entry, that prevent market entrants from driving competition and innovation.[210]

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206 Id., paragraph 4.35.

207 Id., paragraphs 4.37-4.41.

208 Id., paragraph 4.52.

209 Id., paragraph 4.57.

210 Remedies under the code will be limited to requiring firms to change their behaviour so that they no longer breach the code. They, therefore, cannot be used to address underlying competition problems. See Id., paragraph 4.63.

The aim of such PCIs is to promote competition and innovation in digital markets, benefiting consumers. To achieve this goal, the DMU will be able to choose the remedy it deems necessary in each particular case (with the exception of full ownership separation),[211] having regard to the principles of reasonableness, effectiveness, practicability and proportionality.

In order to impose such PCIs, the DMU should carry out a PCI investigation which, according to the Advice, should be concluded within 12 months. PCIs may be carried out during or shortly after the designation assessment but could also be initiated by the DMU at any time after the designation.[212] PCIs should be implemented for a limited duration (as set out in the respective decision), and the DMU would then be able to review its effectiveness to decide whether to continue with the remedy, amend it and/or consider the need for additional measures. In other words, the DMU would be able to "layer" PCIs over time, imposing smaller intervention in the beginning and potentially adopting more interventionist remedies at a later stage.[213]

The Advice emphasizes that the DMU should be able to implement PCIs anywhere within an SMS firm and not only with relation to the designated activity. It is only in this way that the DMU can fully and effectively address concerns related to the substantial entrenched market power and strategic position of the SMS firm in a designated activity.

3. Merger control for SMS firms

The third pillar of the SMS regime comprises merger rules specific for SMS firms, to ensure closer scrutiny of transactions involving such firms. As explained above, concerns have been voiced and strong criticisms have been made due to the unfitness and underenforcement of merger rules in digital markets. The Advice, therefore, proposes the introduction of a new merger regime for SMS firms to be operated by the CMA alongside the wider merger control regime.

Under this new SMS merger regime, SMS firms would be required to report all transactions to the CMA shortly after signing. Furthermore, transactions that meet clear-cut thresholds (e.g., a certain transaction value, UK revenues, assets or number of end users) would be subject to mandatory notification,[214] with completion (i.e., implementation) prohibited prior to clearance (whether unconditionally or subject to conditions).[215] Firms failing to comply with the mandatory notification requirement would be subject to financial penalties.

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211 While the DMU will not have the power to impose full ownership separation, the CMA will continue to be able to do so following a market investigation. The DMU may, however, make or recommend a market investigation reference if it considers that in a particular case full ownership separation would likely be the only effective solution. See Id., paragraphs 4.70-4.71.

212 Digital Markets Taskforce Advice, paragraph 4.78.

213 Id., paragraph 4.81.

214 Id., paragraphs 4.134-4.140.

215 See Id., paragraphs 4.146-4.147.

While not proposing a change in the substantive test of the merger assessment regime, the Taskforce points out the need to adopt a lower and more cautious standard of proof when it comes to acquisitions by SMS firms: instead of, therefore, having a "more likely than not" standard of proof, the Taskforce proposes adopting a "realistic prospect" test.[216]

C. Monitoring and enforcement

The DMU, to be set up within the CMA in April 2021, according to the Advice, should have oversight over the SMS regime: it will support SMS firms to comply with the code, and it will undertake monitoring in relation to SMS firms, taking swift proactive action where it identifies risks of potential problems occurring or where those risks have crystalized, and problems exist.

The Advice emphasizes the need for the DMU to be forward-looking, to have tools that can help it understand emerging issues and monitor compliance with the SMS regime and to deploy such tools in a proportionate and targeted manner. In particular, the DMU should be able to gather information from SMS firms and other parties, to conduct its check of conduct or carry out reviews on practices across SMS firms, to hold confidential discussions with stakeholders and implement a secure whistle-blower channel for employees of SMS firms and to review complaints submitted to it by interested parties.[217] By having such tools, the DMU will be able to identify, in a timely manner, potential problems.

In order to address such identified problems, the DMU should, where appropriate, try to resolve concerns using a participatory approach, whereby it would engage with all affected parties (which may be better placed to identify an appropriate resolution than the DMU) in order to ensure a fast and effective resolution of the problem. At the same time, the DMU should have the power to conduct formal investigations into breaches of the code, impose penalties (of up to 10% of the firm's worldwide turnover) for breaches of the code and for breaches of code and PCI orders, adopt interim measures and carry out scoping assessments to consider whether a particular conduct or behaviour by an SMS firm has an adverse effect on competition or consumers.

Overall, the Advice provides for a DMU that operates in an open and transparent way, whereby it publicly announces when it opens assessments and investigations and provides opportunities to the SMS firm and third parties to provide input. Even when it comes to the participatory approach, the Advice expects that the DMU will be as transparent (to the public and wider stakeholders) as possible. The DMU is also expected to set out its provisional decisions and allow those affected to make representations, and to publicly consult on provisional designation decisions and provisional codes of conduct.[218]

216 See Id., paragraphs 4.149-4.153.

217 Id., paragraph 4.84.

218 See Id., paragraphs 4.110-4.111.

VII. Conclusion

In recent years, several reports, the most influential of which are the Furman, EU and Stigler Reports, have identified competition concerns arising in digital markets as a result of the market power gained by a few Big Tech firms, which act as necessary and unavoidable gateways between businesses and consumers. These reports all concluded that the nature and common features of digital markets (economies of scale and scope, data-driven advantages, direct and indirect network effects and "winner-takes-all" dynamics) have allowed the concentration of market power in the hands of a few large digital platforms (notably, the so-called GAFA), allowing them to engage in exclusionary and/or exploitative practices to the detriment of businesses relying on them. In addition, these reports have pointed out inefficiencies in the current merger control regimes, which have allowed large digital platforms to avoid scrutiny with regards to "strategic" or "killer" acquisitions that enable them to eliminate actual or potential rivels, further increasing or entrenching their market power.

Having identified these concerns, these reports provided suggestions as to how to deal with the dominance-related and merger-related issues arising in digital markets where large digital platforms are present, as well as the data-driven advantages these companies enjoy. Within this context, the adoption of *ex ante* regulatory frameworks to complement existing competition rules, which may sometimes prove insufficient to deal with competition concerns arising from the conduct of large online platforms, has received increasing support.

In the EU, the European Commission adopted in December 2020 the Proposal for a DMA, leading the way for the regulation of large digital platforms acting as gatekeepers. This document puts forward obligations and prohibitions with which designated gatekeepers must comply. In the UK, the Digital Markets Taskforce published its Advice on how to achieve greater competition and innovation in digital markets in a proportionate and efficient way, including its recommendation to adopt an "SMS regime" to apply to the small number of platforms that have a "strategic market status".

Whether similar ex ante regulatory regimes will be proposed in other parts of the world is hard to tell. In the United States, current efforts seem to be focused on overhauling antitrust laws and increase the level of enforcement. As noted above, several major antitrust lawsuits have been filed by the DoJ and the states against Google and Facebook, and further cases might follow. In any event, the regulatory proposals that have been made in the EU and the UK will provide experiments in how to ensure greater contestability of digital markets, as well as to prevent large digital platforms to take advantage of their gatekeeper position at the expense of the business users that rely on their platforms.

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