Department of Economics and Finance

Course of Market law and regulation

The Digital Markets Act

Context, objectives and impact of the proposal for a European regulation on contestable and fair markets in the digital sector

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Summary

Preface

On 15 December 2020, the European Commission adopted a proposal for a regulation aimed at ensuring the fairness and contestability of markets in the digital sector, which takes the name of «Digital Markets Act».

The legislative initiative in question is part of a broader and more ambitious reform package, included within the «Shaping Europe's Digital Future» strategy, intended to profoundly renew the regulatory framework applicable in the European Union to digital operators. The main legislative instruments are the Digital Markets Act and the «Digital Services Act», a proposed regulation aimed at increasing the responsibility of the platforms for the contents that are published online.

The Digital Markets Act is intended to harmonize at European level the legal framework applicable to larger digital platforms, since the significant market power enjoyed by these operators allows them to unilaterally determine the structure of contractual relations with business users and end users of the services provided. In addition, the characteristics of the digital sector, such as economies of scale and network effects, facilitate the adoption of commercial strategies aimed at hindering the entry or expansion of competing companies, distorting the competitive dynamics of the affected markets.

In this context, the reasons that led to the need to strengthen legislation in the digital sector are many: on the one hand, the growing spread of technologies, the increasing role of the digital economy and the emergence of

large platforms in the various digital markets; on the other hand, the need to prepare a unitary regulatory instrument able to deal with potentially distortive practices before they are adopted.

The Commission's proposal consists of an incisive and articulated regulation of the conduct of the main economic operators in the digital sector which reserves the enforcement powers exclusively to the Commission itself.

This work is structured in six chapters.

The first chapter provides an overview of digital markets, the development in the last decade in Europe and the applicable regulations.

The second chapter illustrates the initiatives proposed by the European Commission within the context of «Shaping Europe's digital future» and the third chapter deepens the proposed Digital Markets Act.

The fourth chapter presents an examination of the proposed regulation, illustrating the difficulties inherent in the centralized application system, in the adoption of a preventive regulatory framework and in the wide discretion enjoyed by the Commission in identifying the companies to be subject to regulation, the conducts to be disciplined and the remedies to be adopted to restore competitiveness.

The fifth chapter illustrates an assessment of the possible outcomes of the regulatory instrument with reference to the sustainability of the business models of the platforms, the possibility of creating greater value for companies and the opportunities to increase innovation and competition in the digital sector.

Finally, the sixth chapter presents a comparison with some national legislations that have updated their regulatory instruments pursuing the same purposes as the Digital Markets Act.

This work is enriched with the information gathered during an enriching internship experience at the Italian Ministry for Economic Development, during which it was possible to deepen the proposed regulation through high-level meetings with other Ministries, European Delegations, regulatory Authorities, stakeholders, companies and consulting firms.

Chapter 1.
The evolution of digital markets in the European Union

1. Preface

Applications, online purchases, social networks and search engines are an essential part of everyday life for each of us. Searching on Google for the answer to an unknown question, chatting with a friend on the other side of the world on Skype, sharing the dinner menu in the family group on Whatsapp, booking a hotel on Booking, buying a TV on Amazon: these are habitual behaviours that we can perform with a click on the PC or a tap on the smartphone.

2. From the traditional economy to the digital economy

Traditionally, the value of the economy is associated with the production of goods and services, through variables that are relevant both in the production processes and in the distribution methodologies and, finally, in the use of profits through investment policies and social interventions. The actors of the traditional economy are producers, consumers and the government, while the factors of production are labour and capital, material and human.

Over the last decade, the world economy has undergone a rapid transformation due to the rapid spread of new digital technologies.

On the one hand, widespread digitalisation has indisputable and until recently unimaginable advantages, such as the possibility for a surgeon to perform an operation through a robot or the possibility for a student to attend school lessons even from home[1]. The added value created by digitization is considerable.

First, it is possible to consider the jobs created in the field of information and communication technologies and digital programming. The information and communication technology sector, better known by the acronym ICT, includes various professions relating to integrated communication systems, such as software developers, application developers, SEO specialists and social media managers. Statista shows that from 2003 to 2021 the number of employees in the sector in Germany increased by more than 60%[2].

Secondly, digitalization allows companies to be present on multiple markets, increasing competition and encouraging innovation and competitiveness. Businesses that take advantage of digitalisation experience increased productivity, reduced operating costs and a greater ability to collect and process data efficiently. Studies carried out by McKinsey have shown that digitization reduces the time spent searching for information by 50%, reduces operational costs for data retention by up to 90% (by moving to the cloud, organizations can stop investing in hardware equipment that takes up physical space and requires ongoing maintenance) and to significantly improve the user experience by processing preferences and customizing navigation[3].

Thirdly, public administrations also have the possibility to provide public services with greater convenience and less bureaucracy. The transformation of

[1] LUISS University has been the first university in Italy to introduce remote learning after the COVID-19 pandemic closed the campus (https://www.cisco.com/c/en/us/about/case-studies-customer-success-stories/luiss-university.html).

[2] The study of Statista is published at the following link: https://www.statista.com/statistics/479594/ict-employees-in-germany/.

[3] The studies of McKinsey are published at the following links: https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/the-social-economy and https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/accelerating-the-digitization-of-business-processes.

public administration, the promotion of digital options in public education and the use of digital technologies in the public health sector can serve as a trigger for the wider uptake and acceptance of digital technologies throughout the economy.

On the other hand, there is a risk that digital disruptions and the gap between advanced and underdeveloped countries hinder and limit equitable and inclusive development[4]. Even within the same country, the gap remains between those who can afford Internet access through high-performance devices and those who do not have the tools or skills to surf online. Digital divide is the definition of gap between those who have adequate access to the internet and those who do not, by choice or not. Among the categories most threatened by digital exclusion are the elderly (intergenerational digital divide), women who are not employed (digital gender divide), immigrants (linguistic-cultural digital divide), people with disabilities, prisoners and in general those who, having low levels of schooling and education, are unable to use ITC tools. According to the criteria of the European Commission, which defines «first level of digital divide» the lack of fixed broadband coverage of at least 2 Megabits and «second level digital divide» the lack of ultra-broadband coverage, increasingly necessary for an adequate" connection to internet services, AGCOM[5] data show that in Italy 5.6% of the population does not have access to the ADSL line and a percentage between 20% and 40% of the population does not have access to ultra-broadband[6].

[4] See *The Global Risks Report 2021* published by the World Economic Forum – https://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2021.pdf.

[5] AGCOM stands for Autorità per le Garanzie nelle Comunicazioni (Authority for Communications Guarantees). It is the regulator and Competition Authority for the communication industries in Italy. It was established in 1997 with Legge 31 July 1997, n. 249 – Istituzione dell'Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo.

[6] See the AGCOM website: https://www.agcom.it/mappatura-delle-reti-di-accesso-ad-internet.

Despite the critical issues and difficulties above mentioned, that actually affect all the countries of the European Union, so that digital transformation is one of the six pillars of the Recovery and resilience facility[7], digitization continues its run and traditional economic models are taking on new guises.

The new business models of the digital economy include other actors, such as platforms, but above all other production factors, such as the monetization of personal data and behavioural habits.

The European Central Bank[8] presented a study that illustrates how digitization, or the spread of digital technologies that lead to a digital economy, is undergoing a rapid rise and assuming an increasingly central role in the economy.

Although the digital economy in Europe is smaller than in the United States, where a large component is the manufacturing sector, in Europe the *Digital economy and society index* went from under 40 in 2015 to over 60 in 2020. The *Digital economy and society index* (DESI) summarizes Europe's digital performance indicators and tracks the progress of EU countries[9].

A study by United Nations Conference on Trade and Development[10] (UNCTAD) estimates that in 2019 the value of the digital economy assumed a value between 4.5% and 15.5% of global GDP, depending on the different definitions that can be attributed to the concept of digital economy and the services that can be included. Between 2010 and 2018, the share of digitally deliverable services exports more than doubled compared to global services

[7] The Recovery and Resilience Facility (RRF) is the key instrument at the heart of NextGenerationEU, the financial instrument adopted by the European Commission to help the EU emerge stronger and more resilient from the current crisis depending on COVID-19 pandemic (https://ec.europa.eu/info/strategy/recovery-plan-europe_en).

[8] See *The digital economy and the euro area* published in ECB Economic Bulletin, Issue 8/2020 – https://www.ecb.europa.eu/pub/economic-bulletin/html/eb202008.en.html.

[9] See https://digital-strategy.ec.europa.eu/en/policies/desi.

[10] See *Cross-border data flows and development: For whom the data flow* published in UNCTAD Digital economy report 2021 – https://unctad.org/webflyer/digital-economy-report-2021.

exports (from $ 1.2 trillion to $ 2.9 trillion) and the export of ITC services went from $175 trillion to $ 568 trillion.

The reason for such a high economic value is soon said. Digital data takes on a very high economic value once it is transformed into digital intelligence and monetized, through a process that involves collection, storage, aggregation, analysis through algorithms and econometric projections of data. Thus, the platforms can sell advertising space for targeted campaigns, to offer products and services in the marketplaces that may be of interest to the user, to transform consumer goods into rental services and to propose data storage solutions through online servers.

3. Market regulation

Market regulation, and in particular the protection of competition, makes a valuable contribution to economic growth. In the report sent to the Italian Government[11], on the occasion of the preparation of the National Recovery and Resilience Plan in March 2021, AGCM[12] supports this thesis by reporting some historical facts, confirmed by extensive literature: the loosening of the rules of competition prolonged the recession of the 1930s; the indulgence in merger control did not favour either efficiency gains or greater financial stability during the global financial crisis of 2009; the sectors characterized by the most intense competitive dynamics were those that before others began to grow and regain competitiveness, while the sectors protected with restrictive measures of

[11] The document represents a reporting activity of the Italian Competition Authority and is available (only in Italian) on the Authority website: https://www.agcm.it/dotcmsdoc/allegati-news/S4143%20-%20LEGGE%20ANNUALE%20CONCORRENZA.pdf.

[12] AGCM stands for Autorità Garante della Concorrenza e del Mercato, it is the Italian Competition Authority. It was established in 1990 with Legge 10 October 1990, n. 287 – Norme per la tutela della concorrenza e del mercato.

competition were those where the negative impact on productivity was more marked.

Competition promotes productivity and job creation, inducing companies to be more productive and innovative, favouring a better allocation of resources between economic activities and allowing more innovative and efficient companies to enter the market and grow.

Regarding the regulation of digital markets, reference should be made to European legislation, as it establishes valid and uniform principles for all European countries. To date, the specific legislation on digital markets is truly residual, and as regards the protection of competition in these markets and the regulation of the economic actors present therein, it is appropriate to refer to the provisions of the Treaty on the functioning of the European Union[13] (TFEU) in competition matters.

Within Title VII, "Common rules on competition, taxation and approximation of laws", various provisions are envisaged to allow the proper functioning of the Union's internal market, with the aim of guaranteeing the well-being of citizens, businesses and society in the EU as a whole. Articles 101 to 109 make it possible to prevent restrictions and distortions of competition in the internal market, through the prohibition of anticompetitive agreements between companies and abuses of dominant positions, the control of mergers and acquisitions with a European dimension and the prohibition of State aid which distort competition.

Article 101 TFEU provides for the general prohibition of agreements restricting competition: all agreements between companies capable of distorting

[13] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

competition and capable of affecting trade between Member States are prohibited and void, such as cartels through which companies establish prices, limit production or divide the market.

Article 102 TFEU prohibits the abusive exploitation of the dominant position on the market. The dominant position is « a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers»[14]. The European legal system does not consider the dominant position as an illegal situation: reaching large dimensions and acting on a large scale or in multiple markets does not distort competition per se, on the contrary it turns out to be in favour of consumers since it means that the owner of this position offers quality or price of products that better meet their needs than what is offered by competing companies. On the other hand, the abuse of this situation of dominant position is prohibited: the behaviour of a dominant company that exploits its economic power in such a way as to prevent competitors from operating regularly on the market, consequently also causing damage to consumers, is illegal.

Control of mergers and acquisitions is exercised in accordance with the provisions of Regulation (EC) no. 139/2004[15], which define mergers that significantly hinder effective competition in the common market, for example through the creation or strengthening of a dominant position, incompatible with the internal market.

[14] The definition comes from Judgment of the Court of Justice of 14 February 1978, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, Case 27/76, ECLI:EU:C:1978:22.

[15] See Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation): https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139.

These provisions follow the rules already present in the first treaties that entered into force since the establishment of the European Economic Community in 1957. For several years, the European Union has embarked on an attempt to reform and modernize its legislation framework precisely to facilitate the development of a digital economy based on data and to regulate the sectors of digital markets and services with greater specificity.

The first initiatives took place in 2014, when the European Commission adopted the regulation on the free flow of non-personal data[16], the regulation on cybersecurity[17] and the directive on open data[18]. In addition, in 2016, the Commission also adopted the General Data Protection Regulation[19] (GDPR).

In 2018, the Commission presented an AI strategy[20] for the first time and agreed on a coordinated plan with Member States for its implementation, proposing initiatives to make the use of artificial intelligence more efficient and to make artificial intelligence itself more efficient, to enable it to be used advantageously by EU citizens and businesses.

In 2019, the President of the European Commission Ursula Von der Leyen presented her guidelines in a document entitled «A Union that strives for

[16] Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union.

[17] Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act).

[18] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.

[19] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

[20] COM(2018)237 Communication from the Commission to the European Parliament, the European Council, the Council, the European economic and social Committee and the Committee of the Regions - Artificial intelligence for Europe.

more: my agenda for Europe – Political guidelines for the next European Commission 2019-2024»[21].

In the document, Von der Leyen underlined the emergence of two priorities that would have characterized the political action of the five-year period: the green transition and the digital transition.

About the digital transition, the President announced multiple actions, intended both to increase investment in artificial intelligence and to regulate the digital services sector. In particular, the President stated that «A new Digital Services Act will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market».

But was action at European level necessary, moreover presented as one of the Commission's priorities in the five-year period 2019-2024, with the first interventions to be implemented within the first 100 days?

4. The advancement of the web giants

The growing use of new technologies and digital services reveals from some statistics.

In March 2021, every Italian online user spent an average of 773 minutes on platforms hosted by Google, in addition to 1,500 on Facebook and 139 on Amazon[22].

In 2019, bookings for hotel stays in Germany were made online for 42.9% (dedicated online platforms and hotel websites), 42.6% through direct

[21] See https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf.

[22] See Statista: https://www.statista.com/statistics/1068649/italy-monthly-time-spent-on-leading-websites/.

contact via email or telephone and only 6.9% through traditional travel agencies[23].

In ten years, Amazon has increased its net revenues by 12 times, from $9.86 billion in the first quarter of 2011 to $125.56 trillion in the fourth quarter of 2020[24].

Digital services encompass a wide range of daily activities: brokerage services for goods and services, social networking services, search engine services, video viewing and sharing services, cloud services, operating systems and application software stores.

In industries based on digital technologies there is a problem linked to entry barriers: the pioneers of the first services (for example, Google for search engines, Facebook for social networks, Amazon for intermediation services) were able to conquer a large share of the market, initially acting as monopolists and subsequently maintaining a dominant position. The other companies that would like to enter the market would therefore find themselves held back in the process of imitation and with extremely small slices of the market to which to offer their services, however innovative and efficient they may be.

This depends on two types of factors: on the one hand, a quantitative factor, linked to economies of scale and network effects, whereby large numbers of commercial users can really reach large numbers of end users; on the other hand, a qualitative factor, where commercial users consider digital services the best resource for reaching potential customers and end users develop a dependence on platforms.

[23] See Statista: https://www.statista.com/statistics/865829/germany-hotel-booking-distribution-channels/.

[24] See Statista: https://www.statista.com/statistics/273963/quarterly-revenue-of-amazoncom/.

Examples of barriers to entry can be the inertia of the consumer, where she has always been accustomed to the Microsoft Outlook interface and does not feel the need to activate a new account for e-mail; or, the increase in returns to scale, since a platform that registers more users is able to better study their behavior and optimize the various algorithms; finally, the strong direct and indirect network effects contribute to increasing market power, when, for example, many users use Whatsapp to chat and exchange media and new users are forced to use the same platform, as there is no interoperability.

Over time, therefore, large platforms have been able to almost "control" the *gateways*, i.e., the access points, assuming the function of *gatekeeper*, that is, being the controllers of access and the meeting points between commercial and end users. For the reasons already explained, gatekeepers have a huge impact in the digital markets in which they are rooted and effectively control access, since, due to the large slice of the market on which they insist, they create a strong dependence between them and many commercial users.

In recent years, some online services have aroused particular interest: there have been some critical circumstances, but it is difficult to address them into an abuse of a dominant position.

First, there are highly concentrated multilateral platform services in which one or a few large platforms almost unilaterally set the trading conditions. This is the case, for example, of Airbnb, a platform that connects travellers and hosts who have rooms or apartments to rent or share: Airbnb, in addition to offering the showcase with the available apartments and allowing users to refine the research, acts as an intermediary in payments and takes a percentage on transactions, ranging from 3% applied to the host to 20% applied to the user[25]. Today the availability is 350,000 homes in nearly 200 countries.

[25] See www.airbnb.com/help/article/1857/what-is-the-airbnb-service-fee.

Second, there are the few large digital platforms that serve as an access point between business users and customers. An example is the Amazon Marketplace, a sort of large online "mall" where many undertakings sell their products. Amazon intervenes by establishing the ranking of products, proposing different shipping methods, return policies and guarantees; in addition, Amazon earns a percentage for each product sold, ranging from 6% for personal computers to 45% for electronics accessories, even if the commonly applied rate is 15% of the transaction value[26].

In the digital sector, where both the size of the platforms and the multiplicity of services offered are constantly growing, the application of existing European competition law has limitations such as to be likely to compromise the proper functioning of the internal market. Articles 101 and 102 TFEU, on the one hand, require lengthy investigations[27] by the Competition Authorities, on the other hand they are difficult to apply where it is not possible to precisely define the relevant market or identify prohibited and distorting commercial practices[28].

[26] See https://sellercentral.amazon.com/gp/help/external/200336920/ref=asus_soa_p_reffees?Id=NSGoogle.

[27] The decisions taken in 2020 and 2021 by the European Commission concern proceedings that lasted, on average, between 3 and 4 years. See the list on https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=1.

[28] The concept of the relevant market constitutes a tool for identifying and defining the context in which undertakings compete and the context within which the Commission should implement the competition policy. The objective of the definition of the relevant market – declined in the meanings of product and geographic market – is to identify the actual competitors that influence the commercial decisions of companies, as well as to define the space of action of a company and determine its market power. The definition of the relevant market and the method in which it is identified is not universal but differs between different sectors and can evolve over time: the geographic market, for example, can vary from national or local markets to global markets, depending on the product in consideration, of the structure of the sector and of the barriers. In recent years, globalization has introduced ever more rapid and new changes, breaking down geographical limits and making developing countries protagonists within the value chains, as well as the progressive elimination of national barriers to trade within the single market, digitization and the rise of new important players in some sectors have expanded the boundaries, methods and tools of trade and commercial relations. The definition of the relevant market dates to 1997 (Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)) and may no longer be relevant. On 26 June 2020, the European Commission launched a public consultation to collect input on the possible need to adapt and update the definition of «relevant market» in EU competition law. See https://ec.europa.eu/info/law/better-

In recent years, the European Commission and the national Competition Authorities have launched some investigations with the aim of countering the emergence of some commercial practices exercised by digital platforms and deemed to be distorting competition.

In May 2021, the AGCM sanctioned the companies Alphabet Inc. (holding of Google LLC), Google LLC and Google Italy S.r.l. for violation of Article 102 TFEU, by imposing a fine of over €102 million for abuse of a dominant position, relating to access to the app market[29].

The AGCM found that Google holds a dominant position through the Android operating system and the Google Play app store, being able to control the access of app developers to end users. The AGCM investigation was born from a report by the company Enel X Italia, which had developed an app called JuicePass with the aim of providing services relating to the charging of electric cars, such as the search, booking and management of the charging sessions. However, to develop apps compatible with Android Auto, developers use the programming tools made available by Google and could not use others: in this way, Google has the possibility to decide which apps can be present on Android Auto and which not, by intervening between developers and end users. Despite the requests from Enel X Italia, Google did not prepare the adequate ITC solutions so that JuicePass could be available on Android Auto, unjustifiably hindering the possibility for Enel X to spread its app and for consumers to use it. With this conduct, Google favored its own Google Maps app, usable on Android Auto, which provided almost the same services as JuicePass.

regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law.

[29] See the press release: https://en.agcm.it/en/media/press-releases/2021/5/A529.

The following month, in June 2021, the Autorité de la concurrence[30] also fined Google €220 million for abuse of dominant position in the field of digital advertisement[31].

The Authority's investigations were launched in 2019, based on some complaints made by the three editorial groups News Corp, Le Figaro and Rossel La Voix who accused Google of having a monopoly on the sales of online advertisements.

In fact, Google owns Double Click for Publishers (DFP), the system with which site and app publishers can sell their advertising spaces, and of Google Ad Exchange (AdX), an online platform in which publishers and advertisers contract to auction on advertising space.

Taking advantage of its dominant position, Google has penalized the competition in the online advertising market, reworking the data acquired by AdX to reserve more competitive prices on the DFP platforms for the spaces available on its sites, encouraging advertisers to choose their offers to the detriment of its competitors in the online advertising market.

Sanctions had also been imposed on Google previously by the European Commission, again for the abuse of a dominant position.

In July 2018, the European Commission fined Google €4.34 billion for breaching EU rules on abuse of dominant position. In detail, the Commission's investigations contested three practices against Google[32].

First, Google has required smartphone manufacturers to pre-install the Google Search application and its Google Chrome browsing application as a condition for granting the license for the Google Play Store application sales portal; therefore, if the Google apps for search and navigation had not been pre-

[30] The Autorité de la concurrence is the French Competition Authority.

[31] See the press release https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-hands-out-eu220-millions-fine-google-favouring-its-own.

[32] See the press release https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

installed in the smartphones, users would not have had the possibility to download applications from the marketplace.

Second, Google paid some large mobile network manufacturers and operators to exclusively pre-install the Google Search application on their devices, favouring their application over competing applications.

Finally, Google prevented manufacturers who wanted to pre-install Google applications from also selling other mobile devices that didn't work with the Android operating system.

Google was also sanctioned in 2017 of €2.42 billion, again for abusive exploitation of its dominant position as a search engine, granting an illegal advantage to its comparison-shopping service[33]. The Commission's dispute focuses on two unfair practices. On the one hand, Google has systematically attributed a pre-eminent position to its comparison-shopping service, displaying the products sold on Google channels at the top of the search; secondly, Google has demoted competing services, allowing them to be displayed only on the pages following the first, by specially setting up the algorithms that rearranged the results.

5. A legislation no longer in step with the times

Competition law protects economic freedom by prohibiting and sanctioning anti-competitive behaviours and by monitoring mergers that could affect the internal market. The reform work on competition policy rules was initiated during the previous 2014-2019 mandate of the European Commission, by Competition Commissioner Margrethe Vestager.

[33] See the press release https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

Under his leadership, the Directorate-General for Competition (DG COMP) has begun to manifest all its power by preferring, to work behind the scenes, large actions against some of the largest multinationals with the sole aims of restoring the correct functioning of the internal market, to protect consumers in the single market and to ensure equal tax treatment for all businesses. Over the span of five years, Vestager has conducted and closed investigations against Google, Amazon, Apple and many other companies.

However, in the digital economy sector, sometimes waiting for investigations to be concluded and the imposition of a sanction for abuse of a dominant position can be harmful to competitors and to the efficient functioning of the internal market. For example, in the 2018 decision against Google[34], the Commission found that Google's illegal practices had a significant impact on competition, allowing Google to make significant gains in traffic over its competitors and to the detriment of European consumers. Since the start of the abuses alleged by the Commission, Google has seen a 45-fold increase in traffic in the United Kingdom, 35 in Germany, 19 in France, 29 in the Netherlands, 17 in Spain and 14 in Italy. Instead, following the relegations of competitors in the secondary pages, traffic to its competitors has undergone a sharp contraction, with percentages close to 85% in the UK, 80% in France and up to 92% in Germany.

This is one of the reasons that led the Commission to imprint a regulatory tool[35] that allows it to act in advance, establishing ex-ante which commercial practices are to be considered unfair, the obligations that digital platforms must comply with and the prohibitions that they must comply with. respect. Furthermore, the Commission found that Article 102 TFEU is no longer

[34] See above.
[35] The regulation in question will be presented further.

sufficient to address all the problems related to gatekeepers, as not all of them hold a dominant position and practices do not always fall within the scope of Article 102 if there is no demonstrable effect on competition in clearly defined markets.

In this sense, Germany was the first country within the European Union to amend its legislative framework of competition law to include special competition rules for digital platform companies with overwhelming importance for competition on more markets. The amendments are known as the GWB Digitalization Act or ARC Amendments[36].

The input comes from a series of high-profile and much-debated antitrust investigations into the conduct of digital platform companies such as Facebook[37] recently conducted by the Federal Cartel Office (FCO), which reported limitations in German antitrust law that did not allowed regulators and courts to move fast enough to stop alleged abuses of market power in rapidly changing digital markets. The amendments expand the concept of dominant position to include an «intermediary power» (i.e. the importance of the intermediary role that a platform can assume for access to supply and sales markets), prohibit a dominant company from refusing access to a competing network and insert some new factors in the assessment of the hypothesis of abuse of dominant position, such as the availability of financial resources in comparison with competitors, vertical integration or the exercise of activities in related markets and access to relevant data. In addition, the amendments prohibit self-preferencing, which also includes the pre-installation or integration of its products or services on devices.

[36] GWB stand for Gesetz gegen Wettbewerbsbeschränkungen, which means Act Against Restraints of Competition (ARC is the English version).

[37] In February 2019, the German Antitrust Authority placed limitations on the processing of user data, contesting an abuse of a dominant position relating to the processing of data that the platform was able to manage through the collection carried out by Facebook, Whatsapp and Instagram. See https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

What is more, the Commission has also received political input originating from instances of different Member States.

In February 2020, Germany, France, Italy and Poland signed a letter[38] addressed to the Commissioner for Competition Vestager putting forward some proposals in order to strengthen the European regulatory framework on competition in the light of the change in market conditions that occurred in the last few years.

First, the signatory countries suggested a revision of the guidelines on horizontal mergers, the definition of the relevant market and the legislation itself, to strengthen the competitiveness of European companies in global value chains.

Secondly, the four underlined the growing digitalization of the economy which has led on the one hand to the expansion of the market towards online platforms and on the other to the birth of large digital companies that use and process large amounts of personal data, in the absence a European regulatory framework or homogeneous rules among the Member States. The letter, therefore, requires the Commission to take measures to regulate the broad power enjoyed by digital businesses.

Finally, the need to facilitate European industry was highlighted by considering the entire value chain, which includes both large multinationals and small and medium enterprises.

Subsequently, again in February 2020, Italy drew up a non-paper position on competition policy, disseminated through the diplomatic network of the Member States. The document, confirming the need to update the competition strategy within the European Union, in order to adapt it to the

[38] See https://www.politico.eu/article/eu-big-four-france-germany-italy-poland-press-executive-vice-president-margrethe-vestager-to-clear-path-for-champions/.

changed international context, highlights some qualifying points of the reflection conducted by the Ministry of Economic Development, the Ministry of Foreign Affairs and the Ministry of Economy and Finance. Among the requests, there is the need to counter the enormous market power of big tech multinationals.

The digitalization process of the economy was so fast and so fickle that the legislation was unable to update itself accordingly. In fact, when new services, new markets and new commercial practices come to light, the regulatory aspect should also be updated to ensure proper functioning of the market, the protection of the rights and duties of the players in the field and a discipline compliant with the rules already in force and applicable elsewhere.

Thus, on the 81st day of her inauguration, the President of the European Commission Ursula Von der Leyen presented the strategy «Shaping Europe's digital future»[39].

The Commission's program aims to accompany the European Union towards the digital transition, protecting the functioning of the internal market, promoting its development, efficiency and innovation and protecting consumers. Through surveillance and greater regulation of the digital sector, the Commission argues that it can create new opportunities for businesses, improve the use of technology, increase the possibilities for the population to exercise their democratic rights and pave the way towards the green transition.

The European strategy is founded on three main pillars.

The first of these aims to bring technology back to the service of people and provides for various initiatives by the Commission: investments in digital

[39] See https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future_en.

skills to allow citizens to govern technologies and make use of them in a safe and intelligent way, avoiding cyber threats and identity theft; investments in structures and infrastructures to bring ultra-fast broadband to the service of homes, businesses and public administrations such as schools and hospitals; encourage the development of artificial intelligence to produce cutting-edge solutions in the fields of medicine, transport and environmental protection[40].

The second pillar relates to the conditions of competitiveness in the internal market and aims to create an optimal situation without friction, such as integration of the single internal market and the possibility for companies to increase their productivity and competitiveness in global markets. The initiatives include support for start-ups and small and medium-sized enterprises, through the facilitation of obtaining grants and loans and the incentive to build transnational value chains. Start-ups and small and medium-sized enterprises make up 99% of European businesses, providing two thirds of jobs in the private sector and contributing more than half of the total added value created by European businesses, are fast growing and have a great potential for innovation and adaptability to changing market conditions[41]. Furthermore, the Commission's actions are designed to increase the accountability of platforms, to ensure adequate regulation to the evolutions of the digital sector, to protect fair competition in the digital internal market and to improve the possibilities of access and re-processing of data, protecting personal and sensitive data[42].

Finally, the third pillar aims to improve social conditions, increase citizen participation and promote the green transition. The Commission's initiatives envisage the use of technology to achieve zero climate impact by

[40] Ibidem, see the paragraph «Technology that works for the people».

[41] See https://www.europarl.europa.eu/factsheets/en/sheet/63/small-and-medium-sized-enterprises.

[42] See the paragraph «A fair and competitive digital economy» on the website https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future_en.

2050, the reduction of carbon in the digital sector, the use of citizens' health data to promote research, diagnosis and treatment, the fight against disinformation and the improvement of cognitive processes through the web[43].

Within the second pillar initiatives, «A fair and competitive digital economy», there are the two legislative proposals that the Commission presented on 15 December 2020: the Digital Services Act and the Digital Markets Act.

[43] Ibidem, see the paragraph «An open, democratic and sustainable society».

Chapter 2.
The new legislative instruments

1. Preface

The European strategy highlights the need to ensure fair conditions in the internal market for the benefit of all the companies that compete there and the citizens. On the one hand, it is therefore appropriate that the rules on the protection of competition and consumers in force in real markets also apply to digital markets; on the other hand, it must be considered that the companies that first plowed the digital markets were able to build empires, appropriate technologies and acquire large slices of the market, becoming, to date, giants in the various sectors in which they are active. They have become gatekeepers, that is, they are able to control access to digital markets.

In this sense, a limitation of traditional competition policy is that it cannot be applied effectively in a context, such as the digital one, in continuous evolution, where the boundaries of the market are not clear, where it is not possible to determine market power and competitors and where the value of the transactions is inextricably linked to the value of personal data, which is difficult to measure.

For this reason, the Commission has proposed new legislative instruments that can guarantee, in advance and in an updated way, contestability, fairness and innovation and the possibility of entry into digital markets.

These tools are the Digital Services Act and the Digital Markets Act.

2. The regulation on digital services

The proposal for a regulation on digital services[44] (Digital Services Act, DSA) was presented by the Commission on 15 December 2020 with the aim of modernizing the rules of the digital market, maintaining some basic principles contained in the E-commerce directive, but re-evaluating the liability regime of market operators, in particular of digital platforms.

Over the years, the digital market has experienced a disruptive expansion, creating new and multiple business opportunities, also for the benefit of consumers, in a context with references, however, unclear and uniform. The expansion of the market and digital services has also generated risks related to illegal content and activities that have revealed the need to be regulated for the benefit of consumers and operators. Finally, by ensuring greater transparency and better competitiveness, the DSA wants to offer fairer conditions of access even to smaller companies, often holders of innovative potential, making effective the scale-up possibilities that the market can offer.

The regulation, therefore, is destined to have an important impact on a wide range of subjects, digital service operators (online intermediaries, hosting services and platforms), users and other rights holders.

The proposed regulation provides for a due diligence liability regime that outlines a progressive and asymmetrical system, with the maximum content of

[44] 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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A825%3AFIN.

obligations for the large platforms. The obligations envisaged follow a pattern of increasing commitment, starting from generalized obligations up to additional and targeted obligations.

The generalized obligations, intended for all intermediation service providers, establish basic operating principles such as the obligation to establish a contact point and a legal representative and clearly state the terms and conditions of the services (articles from 10 to 13).

The obligations for hosting service providers, including online platforms, include operational obligations of notice and action (N&A) and know your business content (KYBC), with relative explanation of the justifications of the actions carried out (articles 14 and 15).

The specific obligations for online platforms (excluding those of small and micro enterprises) aim to ensure effective means to combat illegal content and services, through numerous provisions: the mandatory introduction of internal complaint management systems; the obligation to submit to external dispute resolution mechanisms; taking initiative to suspend manifestly illegal services; communication to the Authorities in the event of suspicion of criminal activity and, in general, the adoption of enhanced measures to ensure the transparency of the contents (articles from 16 to 24).

Finally, at the most demanding level, there are the obligations addressed specifically to large platforms, in addition to the previous ones, and aimed at strengthening the transparency of the contents, such as the obligation to guarantee independent audits and the obligation to introduce risk mitigation systems (articles from 25 to 33).

At the governance level, the proposal provides for a tripartite structure shared between the Digital Service Coordinators (DSC), i.e., the independent Authorities in each Member State, the European Board of Digital Services, i.e., the advisory body to which the DSCs are part, chaired by the Commission and called upon to provide mandatory but not binding opinions, and the European

Commission, which is assigned specific enforcement powers towards large platforms, such as investigative and sanctioning powers (articles from 38 to 49).

At the level of enforcement, the DSA provides that the Commission, on the recommendation of the Board or on its own initiative after consulting the Board, can initiate proceedings against large platforms suspected of having breached the obligations established by the regulation. Among the sanctions, it is also possible to inflict fines, up to a value equal to 6% of the platform's total turnover (articles from 50 to 66).

Finally, the regulation reserves a chapter specifically aimed at intermediation services, providing that these must react quickly to remove or disable illegal content, defining a more active – compared to the system of the e-commerce Directive, where it was merely technical and automated – of the service providers (articles 67 and 68).

3. The regulation on digital markets

Together with the Digital Services Act, on 15 December 2020 the Commission also presented the proposal for a regulation on fair and contestable markets in the digital sector[45], better known as the Digital Markets Act (DMA).

By regulating the power held by large platforms, the DMA aims to guarantee a competitive market by redefining actors and perimeter of action, intervening in digital markets where, in recent years, platforms have grown by concentrating multiple roles (access points to market, service providers and data custodians) and, sometimes, by initiating self-preferential practices that are

[45] Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0842&qid=1642419983655.

detrimental to the principles governing the efficient functioning of the single market.

The DMA applies to core platform service providers who are identified under the regulation as gatekeepers. This definition reflects a mix of qualitative and quantitative requirements, such as the significant impact on the market, the provision of core platform services in at least three Member States and the long-lasting and consolidated presence in the related digital sector (article 3).

For gatekeepers, articles 5 and 6 of the regulation establish a list of practices considered unfair or contrary to market contention and which are therefore prohibited. These include the ban on combining data obtained from the platform with data collected from other services provided by the same gatekeeper, the ban on using data generated by companies that rely on the platform to favour their own platform products and the ban on preventing users. to uninstall pre-installed software or apps.

In parallel with the prohibitions, the proposed regulation gives the Commission investigative powers both in relation to designation decisions and in the event of infringements (articles from 18 to 21). The Commission is also responsible for making the decisions taken effective, through an enforcement power that also contemplates the possibility of sanctioning companies that fail to comply with their obligations or break prohibitions with sanctions ranging from 6% to 10% of annual turnover (articles from 22 to 28).

Chapter 3.
The Digital Markets Act

1. Preface

The Digital Markets Act (DMA) is a proposal for a regulation aimed at regulating the power of large online platforms through European ex-ante rules, harmonized and complementary to the current competition law. It aims to create a future-proof competition tool for a dynamic and rapidly evolving market such as the digital one. More specifically, the proposal aims to counter unfair practices and behaviours on the part of large platforms that have a role in accessing the market, restoring greater contestability in the offer of core platforms services and generating positive effects on consumers in terms of expansion of the offer and quality of services.

The regulation is limited to a few core platform services: intermediation services; search engines; social networking; video sharing platform service; number-independent interpersonal electronic communication services; operating systems; cloud services; advertising services.

It applies to gatekeepers, i.e., to providers of the aforementioned services that meet the following conditions, illustrated in article 3, paragraph 1 of the DMA: they have a «significant impact on the internal market»; they operate a core platform service which serves as an «important access point for end users»; they have an «entrenched and durable position» in its operations or are expected to acquire it «in the near future».

The DMA integrates existing European competition law, introducing areas of intervention other than those of application of Articles 101 and 102 TFEU. It is based on the current P2B regulation[46] and, as regards the profiling of end user data, contributes to a better application of the GDPR. The legal basis is Article 114 TFEU, as the Commission considers that harmonization at European level is necessary in view of the inherently cross-border nature of the core platform services provided by gatekeepers.

In its original formulation, the proposed regulation contains 39 articles, divided into six chapters.

2. General provisions, purpose and scope of application

Article 1 illustrates the object and scope of the regulation: the regulation applies only to the core platform services, listed in article 2 below, provided by gatekeepers, as defined in article 3 below, with the aim of establish harmonized rules to ensure the fairness and contestability of digital markets within the European Union. Article 1 also clarifies that Member States may not impose additional obligations on gatekeepers other than those contained in the DMA and that the DMA does not affect the application of Articles 101 and 102 TFEU or any other European and national legislation on competition.

[46] 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.

3. Designation of gatekeepers

Article 3 illustrates the three conditions to define a core platform service provider as a gatekeeper.

First, it must have «a significant impact on the internal market». This requirement is met if the firm achieves an annual turnover in the EEA equal to or greater than €6.5 billion in the last three financial years or if the capitalization is equal to or greater than €65 billion in the last financial year, and if it provides a core platform service in at least three Member States.

Secondly, it must manage a core platform service that constitutes an «important» access point («gateway») in the relationship between commercial users and end users. This requirement is met if the service has involved more than 45 million monthly end users and more than 10,000 annual commercial users in the last financial year.

Finally, it must hold, or assume in the future, a «entrenched and durable» position, a condition that occurs if the thresholds for the number of users have been reached in the last three financial years or are expected to be reached in the near future.

The gatekeeper who satisfies these requirements is obliged to notify the European Commission, which however has the power to designate, even without prior notification, any gatekeeper who exceeds the quantitative thresholds.

However, the article also leaves room for the Commission to designate a gatekeeper on the basis of qualitative criteria: this circumstance occurs when a platform has a «significant» impact, constitutes an «important» gateway and assumes a «entrenched position» even though it does not exceeding the

quantitative thresholds, in consideration of the size of the company, the number of active users, the barriers to entry, the effects of scale and the structural characteristics of the market.

The Commission periodically checks, at least every two years, the quantitative requirements, updating, if necessary, the list of core platform services for each gatekeeper.

4. Practices by gatekeepers that limit contestability and are unfair

Article 5 of the proposed regulation illustrates some conducts to which the designated gatekeepers must comply.

First, the gatekeeper cannot combine personal data from the core platform services with personal data from other services offered by the gatekeeper. This is the case, by way of example, of Meta[47], the company that owns the social networks Facebook, Instagram and Whatsapp. According to the forecast, Meta could not profile the user who uses Whatsapp to propose targeted advertising on the other two social networks[48].

Second, the gatekeeper must allow commercial users to offer the same products or services to end users through other brokerage services even at different prices or conditions. By way of example, a platform such as Booking

[47] See https://about.facebook.com/meta/.
[48] See the case sanctioned by the German Competition Authority referred to in a previous note.

cannot prevent a hotel from offering the same rooms at a lower price on its website[49].

Third, the gatekeeper must allow commercial users to promote offers to previously acquired end users through the platform and enter into new contracts with them even outside the platform. For example, a platform like Ebay must allow companies to relate to their customers, without prohibiting them from reaching them through other channels even after the transaction is completed.

In addition, the gatekeeper may not require commercial users to use a gatekeeper identification service and may not require commercial or end users to subscribe or subscribe to another core platform service as a precondition for using another core platform service. For example, Alphabet could not force anyone wishing to use YouTube to log in only with Google or GMail credentials.

Furthermore, to the provisions of article 5, directly applicable following the designation as a gatekeeper, the proposed regulation provides for other provisions in article 6 that can be considered as additional obligations that the Commission may impose on each gatekeeper. The list includes the prohibition of self-preferencing[50], the obligation to guarantee data portability (for example, a user should be able to download all the browsing data of a social network and consult them also outside the platform), the prohibition to use data from commercial users in competition with them, the obligation to allow users to uninstall pre-installed applications, the obligation to provide advertisers and

[49] In 2015, the Italian Competition Authority launched an investigation against Booking and Expedia, noting how the platforms prevented hotels from offering customers on their websites services at a lower price than those offered on the platforms. See (in Italian) https://www.osservatorioantitrust.eu/it/agenzie-turistiche-on-line-lagcm-accetta-gli-impegni-presentati-da-booking-com-b-v-e-da-booking-com-italia-s-r-l/.

[50] See the case of Google sanctioned by the European Commission referred to in a previous note.

publishers with the tools for an independent verification of the results of advertising campaigns and the obligation to guarantee end users the possibility of installing third-party app stores and software.

The following articles 8 and 9 illustrate the cases in which the Commission can suspend the application of certain obligations (for example, if they have significant effects on the economic viability of the gatekeeper) or even exempt a gatekeeper from compliance with the provisions for reasons of public morality, health or safety.

Article 10 provides the Commission the power to update the list of obligations set out in articles 5 and 6 by adopting delegated acts, in accordance with article 37 of the regulation.

Finally, the Commission must be notified in advance of any proposed merger between undertakings involving core platform service providers, even where the notification thresholds provided for by the merger control legislation are not exceeded, according to article 12.

5. Implementation and enforcement

The Commission has the power to launch market surveys for multiple purposes, according to articles 14, 15, 16 and 17.

First, it may be interested in assessing whether a company that does not meet the quantitative criteria for the designation as gatekeeper meets the qualitative criteria, or if it is likely that a company will assume an entrenched position in the near future.

Secondly, the Commission can carry out a market investigation to assess whether a gatekeeper has violated the obligations to which he was subject, thus establishing any behavioural or structural remedies.

Finally, the Commission can use a market survey to identify new core platform services to be understood within the regulation or new practices to be included in the list of obligations and prohibitions.

In addition, the Commission is allowed to formulate requests for information (article 19), organize hearings (article 20) and carry out inspections and investigations to verify the correct conduct of the platforms to which the regulation applies (article 21). Moreover, it can impose precautionary measures, impose behavioural or structural remedies and accept commitments (articles from 22 to 25).

Article 26 gives the Commission the possibility to impose fines of up to 10% of the total turnover of the platform if it detects non-compliance with the obligations of articles 5 and 6 or if the platform does not transmit the requested information, transmits false information or does not facilitate any inspections.

The Commission is the competent Authority for the implementation of the regulation, assisted by the Advisory Committee for digital markets set up pursuant to article 32 of the proposed regulation. The Committee includes representatives of the Member States and of the Competition Authorities; it operates pursuant to Regulation (EU) no. 182/2011[51] providing non-binding opinions that the Commission takes into consideration. The Committee is interested in the adoption of any decision taken pursuant to the regulation (designation, application of additional obligations, imposition of sanctions).

[51] Regulation (EU) no. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

Finally, articles 36 and 37 empower the Commission to adopt implementing acts to change the criteria for designating gatekeepers, change the quantitative thresholds and update the list of obligations contained in articles 5 and 6.

Chapter 4.
An examination of the proposal

1. Preface

The proposed regulation consists of a harmonization intervention aimed at introducing ex-ante obligations for the gatekeepers, in order to guarantee contestability and fair competitive conditions within the digital single market, in a context characterized by systemic concentrations of power economic over a few large global digital platforms.

The significant market power enjoyed by these operators allows them to unilaterally determine the structure of contractual relations with business users and end consumers of the services they provide. Furthermore, the specific characteristics of the digital sector, such as marked economies of scale and network effects, facilitate the adoption of commercial strategies aimed at hindering the entry or expansion of competing companies, distorting the competitive dynamics of the affected markets.

The Commission's action to harmonize legislation at Union level makes it possible to counter the segmentation of the internal market that would result from a proliferation of regulatory interventions by national legislators, which would prove to be undesirable, increasing the compliance costs for companies and the legal uncertainty for all economic operators[52].

[52] See the considerandum 6 to the DMA.

The relevance of the proposal is measured based on the effects that the new facility will produce for better protection of consumer rights, on the impact on businesses and the economy and on the role that the European Union will assume at a global level in the digital field. However, the structure of the proposed regulation poses some critical issues of a primary nature, linked to the institutional structure that derives from the regulation and the centralized attribution of implementation and enforcement powers to the Commission.

2. The central role of the Commission and the marginal role of the Member States

The first issue is represented by the extent of the powers left to the discretion of the Commission, which would be responsible for the exclusive enforcement of the Regulation. In particular, the Commission's power to designate gatekeepers would include the possibility of identifying them also on the basis of market surveys or qualitative indices with a rather generic scope (size, entry barriers, scale effects, structural characteristics). The same applies to emerging platforms, which may be designated gatekeepers on the basis of a similar evaluation process left to the discretion of the Commission.

Again, following the outcome of market surveys and by means of a delegated act, according to the layout of the draft, the Commission may also introduce further new obligations for gatekeepers that are similar to those already envisaged by the future Regulation. This possibility appears to be in contrast with Article 290 TFEU[53], as it would be left to the total discretion of

[53] Article 290 of the TFEU establishes that «A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act». The Treaty gives the legislator (jointly with the European Parliament and the Council in the case of the ordinary legislative procedure, only one of the two

the Commission to identify which obligations are "similar" to those already existing, thus allowing them in fact, to intervene on essential regulatory elements of the DMA, outside a sufficiently limited power.

The centralization of application competences appears destined to affect the institutional role of the national competition and consumer protection Authorities[54]: although the proposed regulation provides that the rules do not prejudice the application of Articles 101 and 102 TFEU and national legislation on competition, at the same time specifies, however, that member States cannot impose any further obligations on gatekeepers and that national Authorities cannot adopt decisions in contrast with those taken by the Commission pursuant to the regulation.

In addition, the involvement of national Authorities is limited to the advisory committee referred to in article 32, which expresses its opinion on the Commission's draft decisions, as well as on some delegated acts[55].

For these reasons, it seems legitimate to question whether the radical centralization of decision-making powers is fully compliant with the principle

institutions in the case of a special legislative procedure) the possibility of delegating to the Commission the adoption of non-legislative binding legal acts.

[54] In a document of 2014, the Studies Service of the Constitutional Court illustrates how the limits of national sovereignty are left to favor Italian legislation adopted at a unitary level. In the context of digital markets and services, the Commission's premises to the proposals for DSA and DMA regulations highlight the need to adopt harmonized legislation at European level to avoid fragmentation caused by the adoption of various measures at national level between Member States. See (in Italian) https://www.cortecostituzionale.it/documenti/convegni_seminari/STU_262.pdf.

[55] The reference to Article 4 of EU Regulation n. 182/2011 (Regulation (EU) n. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers) excludes the binding nature of the opinion: the Commission will therefore be able to decide freely on the draft implementing act to be adopted, «taking the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered». On the contrary, if the referral were to Article 5 of the aforementioned regulation, the opinion expressed by the committee would have binding value, with application of the examination procedure described in the article and the consequent need for the majority provided for by Article 238, paragraph 3, TFEU for the acts to be adopted on a proposal from the Commission

of subsidiarity[56], which governs the division of regulatory competences between the Union and its member States. If the intrinsically cross-border nature of the digital phenomenon militates, in fact, for the adoption of a fully harmonized regulatory system at the Union level, which avoids the fragmentation of the internal market along national borders, the applicative competences could instead be effectively shared with member States.

3. The difficulties of ex-ante legislation

The detailed system of obligations and prohibitions imposed on gatekeepers escapes the traditional economic analysis conducted by the Competition Authorities in terms of the net impact on consumer welfare. Articles 5 and 6 of the Commission proposal contain a detailed list of active and omissive behavioural obligations imposed on the subjects designated as gatekeepers, intended to guarantee the contestability of the markets concerned and to avoid the adoption of unfair practices, which take the form of a long blacklist of imposed or prohibited behaviours.

On the one hand, such an extensive blacklist inevitably ends up including commercial practices whose impact in terms of economic efficiency and consumer well-being could, in certain circumstances, turn out to be neutral or even positive: the removal of such conduct from an economic effects-based evaluation could then determine undesirable consequences precisely on the competitive dynamics of the markets that it is intended to safeguard[57]. An

[56] The principle of subsidiarity is defined in article 5 of the Treaty on European Union (TEU). It aims to ensure that decisions are taken as closely as possible to the citizen and that action at EU level is justified in light of the possibilities available at national, regional or local level. Specifically, it is the principle whereby the EU does not take action, unless it is more effective than action taken at national, regional or local level. See https://eur-lex.europa.eu/summary/glossary/subsidiarity.html.

[57] The importance of an effects-based regulation in the field of competition can be found in the European Commission report of 2014 *Ex-post economic evaluation of competition policy enforcement: A review of the literature*. See https://ec.europa.eu/competition/publications/reports/expost_evaluation_competition_policy_en.pdf.

example can be the prohibition of «most favoured nations» clauses[58] of article 5, paragraph 1, letter b) of the proposal, according to which the gatekeeper must allow commercial users to offer the same products or services to end users through third party intermediation services at prices or different conditions.

In this sense, the general principle of proportionality would require limiting the scope of prohibited behaviours only to cases that involve, with a reasonable degree of certainty, an appreciable sacrifice of consumers' interests. In the current formulation of the proposed regulation, there is a risk that in the specific case, competently neutral or even desirable conduct is prohibited.

On the other hand, the tumultuous expansion of the digitalization of the economy and the strong competition in this sector, characterized by the importance of innovation, the sudden technological evolution, the rivalry between business models and the consequent succession of quasi-monopolies over time expose a regulatory framework based on punctual prohibitions to rapid obsolescence, for which it appears useful, if not even convenient, to provide for a changing and easy to update regulatory framework.

In this sense, the proposed regulation provides for the possibility for the Commission to grant cases of suspension and exemption, albeit in the exceptional circumstances provided for by the text: for suspension, if the fulfilment of regulatory obligations could jeopardize the economic sustainability of the company concerned; for exemption, in order to protect public morality, health or safety.

In this circumstance, however, the need to update the regulatory framework with the changing technological context and the evolution of the

[58] The «most favoured nations» (MFNs) clauses are clauses by which hotels engage to the booking platforms to which they are affiliated not to offer on their direct channels or other platforms prices or other conditions for accommodation that are more advantageous or favourable to the consumer.

markets concerned is achieved only through the attribution of greater power to the Commission, through the adoption of delegated acts in a manner that is unrelated to certain quantitative thresholds and specific legal criteria, jeopardizing their legal certainty and effectively establishing an exclusive competence of the Commission in the digital sector. Holtse[59] highlights how legal certainty is fundamental in markets that undergo continuous technological transformations. Through clear, transparent and predictable enforcement rules, the Commission has the opportunity to increase the overall fairness and predictability of the global market system.

4. The criteria for designating gatekeepers

Article 3, paragraph 1, of the proposal sets out the criteria for the designation of regulated entities, identifying as gatekeepers the platforms that have a «significant» impact on the market, that offer a «core» online intermediation service, which constitutes a portal of «important» access so that professional users of the platform can reach final consumers and occupy a «entrenched and durable» market position, current or reachable in the near future.

These requirements are deemed to be met when the quantitative thresholds referred to in paragraph 2 are reached, but article 3, paragraph 6, represents the provision potentially more fraught with problematic consequences, as it confers on the Commission the power to designate as gatekeepers also entities that do not meet the quantitative thresholds of paragraph 2, provided that the qualitative criteria referred to in paragraph 1 are met.

[59] See https://academic.oup.com/jeclap/article/11/8/446/5940772?login=true.

Also in this case, the assessment entrusted to the Commission appears to be characterized by excessive discretion: the Commission may consider the regulatory obligations applicable to any company that has a «significant» impact on the market, provides an «important» gateway for users and has a position «entrenched and durable». The vagueness of these criteria seems likely to undermine the legal certainty of economic operators, who would not have tools, means and measures to learn in advance whether to comply with the legal framework of the regulation.

In the circumstance in which an actor or a market appears likely to compromise the proper functioning of the single market through the possible acquisition of a dominant position and the consequent abuse of it, in the event that a complex analysis of the structure of the markets concerned is required, competition rules should operate, which include the adoption of appropriate remedial, structural and behavioural tools to ensure the restoration of the competitive dynamics of the affected markets[60]. In this sense, national Authorities could be vested with the power to prohibit anti-competitive conduct undertaken in order to acquire a dominant position on the market and concretely likely to have this effect, along the lines of what is provided in the United States by section 2 of the Sherman Act[61].

A further criticality lies in the possibility for the Commission, pursuant to article 3, paragraph 5, to determine by means of a delegated act the methodology for calculating the quantitative thresholds and to regularly adapt

[60] An analysis of the effectiveness of structural and behavioural remedies is provided by Osinski in https://www.competitionpolicyinternational.com/defining-remedy-success/.

[61] The Sherman Antitrust Act (1890), also known as the Sherman Act, is the oldest antitrust law in the United States of America and is the first facility by the US government to limit monopolies and trusts. Section 2 of the Sherman Act makes it unlawful for any person to «monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations».

it to technological and market evolution. Although the purpose of the rule is compatible with the objective of keeping the structure of the regulation updated to the evolution of the markets and the economy, the delegated act should only concern the methodology for calculating the thresholds and not the amount the thresholds themselves: the power to proceed with a unilateral adjustment of the thresholds would give the Commission an exclusive margin of discretion.

A similar consideration also applies to the inclusion of the reference to the «foreseeable» acquisition of an « entrenched and durable position in its operations in the near future» among the criteria for designating gatekeepers. For the same reason, the evaluation entrusted to the Commission would be detached from certain parameters: the proposal, in fact, does not specify the relevant standard of evidence for ascertaining predictability, nor the relevant time frame for conducting this evaluation. This uncertainty is particularly serious in the digital sector, characterized by a significant level of innovation, which makes it less easy to anticipate the evolutionary trajectory of the affected markets.

5. Market investigations

The proposed regulation gives the Commission the power to carry out market surveys for three purposes: the designation of the gatekeepers, the verification of the systematic non-compliance by the gatekeepers of the obligations and prohibitions and the analysis of new services or new practices.

First, the Commission may initiate a fact-finding investigation, in order to ascertain whether a company should be designated as a gatekeeper and/or whether a given online intermediation service can be considered as core,

pursuant to article 3, paragraph 6. This case also gives the Commission the power to unilaterally determine the subjective dimension of the regulated sphere and to expand the audience of interested parties without reference to precise quantitative criteria. The investigative powers of the Commission should be limited only to cases in which the company that meets the quantitative thresholds demonstrates that it does not meet the qualitative requirements.

Secondly, the Commission can impose structural and behavioural remedies on the company that has systematically failed to comply with regulatory obligations, to be identified through a contradiction. The proposal takes up the formulation of article 7, paragraph 1, of EC Regulation 1/2003[62], according to which «structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy»; however, the aforementioned dictation appears superseded by article 10, paragraph 1, of Directive 2019/1/EU[63], which states that «when choosing between two equally effective remedies, national Competition Authorities shall choose the remedy that is least burdensome for the undertaking, in line with the principle of proportionality». In addition, the timing of the fact-finding investigation, which must close within twelve months of the opening decision, is significantly more compressed than the duration of the investigative investigations by the Commission on antitrust matters, which can last for years.

[62] Council Regulation (EC) n. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001.

[63] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the Competition Authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0001.

Thirdly, the Commission may conduct a market analysis aimed at verifying whether additional services deserve to be included in the list of core services or to identify new types of unfair commercial practices. Also in this case, if the assessment were to lead to the adoption of a delegated act that modifies articles 5 and 6 of the regulation, it would fall in the case of the wide margin of discretion in the hands of the Commission.

Chapter 5.
Implications of the DMA

1. Preface

The proposed regulation presented by the Commission was accompanied by a detailed impact assessment, which highlights the benefits of the new legislative act on the functioning of the internal market. The new rules should be able to combat unfair practices, improve the contestability of the digital market and harmonize regulation in the European Union. With the new instrument, there should be a more uniform distribution of revenues and profits, a stimulation of innovation and research and development and an improvement in the conditions in which consumers act within the market, through an increase in consumer surplus[64]. Brynjolfsson, Hu and Smith[65] have shown that efficiency gains from increased competition in online markets significantly increase consumer surplus, all the more so if retailers (in this case, online marketplaces) are able to offer a wide range of variety of products.

However, the implementation of the proposed regulation and some rules contained therein are likely to create undesirable effects on the functioning of the internal market. Alongside the disputes found on the institutional set-up illustrated in the previous chapter, it is appropriate to analyse the impact of the regulation on various aspects related to the functioning of the platforms and their ability to create value.

[64] See the annex I to the above-mentioned impact assessment «Digital Markets Act: impact assessment support study: annexes», p. 74.

[65] See https://pubsonline.informs.org/doi/epdf/10.1287/mnsc.49.11.1580.20580.

Indeed, platforms create value in various ways[66]. For example, through aggregation, online marketplaces facilitate correspondence between producers and end consumers, who have the opportunity to compare dozens of products by taking advantage of a very wide offer in a safe and reliable environment; through intermediation, review sites make it possible to overcome information asymmetries, where consumers can learn, based on the experiences of others, the characteristics of an object they intend to buy, in addition to the conditions of purchase and the reliability of the seller; finally, thanks to innovation, through an ecosystem that integrates a range of complementary products and services, such as digital assistants and home automation, consumers can try personalized experiences that facilitate some practices of daily life.

For these purposes, some practices such as tying and bundling[67] and self-preferencing[68] can be useful, if not necessary and essential, to improve the user experience, develop innovative products and, finally, create value[69]. It is therefore worth asking whether the limits imposed by the regulation and the new rules introduced have implications in these issues.

2. The impact of the DMA on the functioning of the platforms

[66] See the Oxera analysis commissioned by the organization Computer & Communication Industry Association – https://www.oxera.com/insights/reports/how-platforms-create-value/.

[67] Tying occurs when a supplier makes the sale of one product (the tying product) conditional upon the purchase of another (the tied product) from the supplier. Bundling refers to situations where a package of two or more products is offered at a discount. See https://www.compcomm.hk/en/practices/what_is_comp/tying_bundling.html.

[68] Self-preferencing involves actions by an undertaking which are designed to favour its own products or services over those of its competitors. See https://digitalfreedomfund.org/wp-content/uploads/2020/05/5_DFF-Factsheet-Self-preferencing-and-EU-competition-law.pdf.

[69]

The proposed regulation aims to «ensure contestable and fair digital markets»[70], to be achieved through a series of eighteen provisions, including the obligations and prohibitions contained in articles 5 and 6, which are applicable de facto to companies that the Commission identifies as gatekeepers. The application of a universality of measures to different platforms, according to a «catch all» model, may not be effective and compromise the functioning of the platforms in a context, such as the digital market, where there are different actors and models completely unrelated businesses[71], all the more so if the list of obligations and prohibitions arises from the analysis of previous antitrust decisions on specific cases of violation of the antitrust rules of European law[72], but without a specific analysis based on the effects.

By way of example, article 5, letter c) obliges gatekeepers to allow commercial users to contact customers acquired through the platform also through other channels and to conclude transactions even outside the platform[73].

The provision appears to be related to the investigations conducted by the Commission and other national Competition Authorities into online stores for applications to be used on mobile devices, such as Apple (App Store) and Google (Play Store).

Apple produces several mobile devices (iPhone, iPad, AppleWatch), develops its own mobile operating systems (iOS, iPadOS, watchOS) and

[70] It is quoted the considerandum 8 of the Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act).

[71] See https://www.oxera.com/about-us/media-centre/the-dma-risks-over-enforcement-by-restricting-business-practices-that-have-benefits-for-society/.

[72] See the «Digital Markets Act: impact assessment support study: annexes», p. 9.

[73] The provision is: «[…] A gatekeeper shall […] allow business users to promote offers to end users acquired via the core platform service, 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, and allow end users to access and use, through the core platform services of the gatekeeper, content, subscriptions, features or other items by using the software application of a business user, where these items have been acquired by the end users from the relevant business user without using the core platform services of the gatekeeper».

controls the only market for mobile applications on all its devices: owners of Apple devices can install the applications only through the Apple «App Store». Apple, therefore, is in a unique market position as a provider of an integrated hardware and software ecosystem and controls the single point of access to the market for application developers, defining both the type of applications that can be distributed, the technical characteristics to be used to create the applications and the fees that commercial users must pay to sell their applications. This situation occurs both in the general case of application producers, and in the specific case of application developers competing with Apple's official applications, such as Apple Music for downloading and listening to music, Wallet for making electronic payments via NFC technology, or Maps, to be used as a navigator or street directory.

In March 2019, Spotify[74] filed a complaint with the European Commission accusing Apple of unfair business practice related to self-preferencing. According to the complaint, Apple would have reserved some advantages over competing applications, guaranteeing access to a greater number of user data, reserving the possibility of dealing directly with end users and asking extremely expensive tariffs from commercial users who produce competing applications[75].

In June 2020, the Commission launched an investigation against Apple[76], reserving the right to investigate any violations of Articles 101 TFEU, 102 TFEU and of the provisions of EC Regulation 1/2003. On April 30, 2021, the Commission found some objections to Apple, in the form of a Statement of

[74] Spotify is an audio streaming service developed since October 2006. Besides music, audio books, podcasts and videos can also be streamed. The online service is now available in more than 90 different countries, including large parts of Europe and America. See https://www.spotify.com/uk/about-us/contact/.

[75] See the website created by Spotify: https://www.timetoplayfair.com/timeline/.

[76] See the press release: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073.

Objections[77], relating to the abuse of a dominant position pursuant to Article 102 TFEU. First, the Commission challenged developers' mandatory use of the Apple store for the sale of their applications, as Apple charges developers a 30% commission on subscriptions consumers sign up using Apple products, with the result that developers raise the selling price to the detriment of consumers. Secondly, the Commission criticized the limitation, for developers, to indicate to consumers other purchasing alternatives, especially as regards music[78].

In this case, specifically as regards the conduct identified by the Commission following an in-depth investigation which also assessed the economic impact of the conduct to the detriment of the platforms and end users, the provision of article 5, letter c, of the DMA would prevent this unfair commercial practice and would guarantee actors, such as Spotify, a more competitive and fairer environment in which to compete with the other participants.

On the other hand, however, this provision applied to another context in digital markets may not result in the same desired expected effect. In the case of commission-based intermediary platforms, such as an online travel agent (OTA)[79] identified as gatekeeper, it should be subject to the same provision, seeing its business model completely impracticable.

In general, OTA platforms allow end users to choose the facilities to stay in by earning on the commissions applied at the time of booking, resulting in a free tool for both end users and commercial users, who, on the other hand, can

[77] A Statement of Objections is a formal step in an investigation, where the Commission informs the companies concerned in writing of the objections raised against them. See https://www.vogel-vogel.com/faq-items/statement-of-objections-eu/?lang=en.

[78] See the press release: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061.

[79] An online travel agency (OTA) is a web-based marketplace that allows consumers to research and book travel products and services, including hotels, flights, cars, tours, cruises, activities and more, directly with travel suppliers. See https://welcome.expediagroup.com/en/resources/hotel-distribution-strategy-resources-tips/otas-work-use-one.

pay a fee for ensure a better positioning on the platform[80]. This model maximizes network effects and economies of scale by attracting users on both the demand and supply side, as users can compare numerous structures at the same time, which, on the other hand, pay a commission only on transactions concluded through the platform.

If article 5, letter c, of the proposed regulation apply again in this case, hotels would have the possibility of intercepting customers through the OTA, but of concluding the transaction outside the platform: the OTA would lose commissions, its business model would no longer be sustainable and it would probably lose its role of intermediation and aggregation, facilitating other types of inefficiencies in digital markets.

3. The impact of DMA on value creation

The central part of the proposed regulation resides in articles 5 and 6, which trace a blacklist of conducts that the platforms designated as gatekeepers must or cannot follow. Alongside the problem of the «catch all» application described in the previous paragraph, as regards the creation of value, it should be noted that even the application of prohibited or imposed measures «per se» can have negative consequences, especially as regards the possibility for platforms to create value through the exercise of tying and bundling, self-preferencing or leveraging practices that benefit the end user experience.

In competition law and jurisprudence used up to now in the field of competition protection and antitrust, restrictions «per se» concern conducts

[80] See https://hoteltechreport.com/news/online-travel-agencies.

which causes negative effects on the market by their very nature, such as the fixing of prices or the implementation of cartels[81].

The prohibition of conduct of tying and bundling[82] is explicit in article 5, letter f, according to which the gatekeeper cannot force users to subscribe to another core platform service in order to access one of the core platform services that provides the platform[83].

The origin of the arrangement can be traced by analysing the Microsoft 365 business model. Microsoft is a leader in the PC software market, providing both the operating system[84] and word processing applications within the Microsoft Office package (today Microsoft 365) [85] as well as Exchange services such as e-mail and remote connection platforms[86]. Since 2011, Microsoft has integrated the functionality of its programs with cloud storage capabilities, through the Microsoft Azure platform[87]. For Microsoft, the advantage was twofold, in which it managed both to provide an additional service to the owners

[81] According to Article 101 TFEU, if, instead of competing, companies decide to limit competition, there would be a distortion of the level playing field which, in turn, would harm consumers and other businesses. The Article prohibits and void all agreements between undertakings which have the object or effect of distorting competition and which are likely to affect trade between Member States, such as explicit agreements (cartels) and concerted practices to fix prices, limit production or share the market among firms (territorial protection clauses). See https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy.

[82] Holzweber illustrates that tying and bundling was initially developed for the combined sale of two products in traditional markets. With digital markets taking over, the business practice has also been applied to cases such as software integration or prioritized display in search engine rankings, making it very common and widespread. In the context of digital markets, the practice of tying and bundling has evolved into a general theory of leverage, inducing firms to match products or services and reducing the market for bundled products. See https://www.tandfonline.com/doi/full/10.1080/17441056.2018.1533360.

[83] The provision is: «[…] A gatekeeper shall […] refrain from requiring business users or end users to subscribe to or register with any other core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3 (2) (b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article».

[84] See https://www.microsoft.com/en-gb/windows/.

[85] See https://www.office.com/?omkt=en-GB.

[86] See https://www.businessinsider.com/what-is-microsoft-exchange?r=US&IR=T and https://support.microsoft.com/en-us/topic/what-is-microsoft-teams-3de4d369-0167-8def-b93b-0eb5286d7a29.

[87] See https://azure.microsoft.com/en-gb/overview/what-is-azure/.

of word processing software, and to offer the same software to users of the cloud service only, perhaps for archiving photos and videos. For these reasons, given Microsoft's extensive presence in different markets (operating systems, word processing software, cloud services and business communication platforms), Microsoft can potentially benefit from the joint use of all services, creating a dependency on users.

However, there is no doubt that there can be numerous advantages from greater integration between platforms: the user can purchase hardware in which to install an operating system perfectly integrated with the software package and produce documents that are automatically saved on the cloud, ready for sharing with colleagues or friends. In this case, if there is no abuse of a dominant position and there are no negative effects for consumers or competitors (subscription fees too high in the first case, excessive discounts to the detriment of competitors with less market power in the second case), the introduction of generic ex-ante provision without an economic assessment can be harmful both for the platform and for the end users, who cannot enjoy an optimal experience. Mandrescu[88] shows that the detection of an abuse of a dominant position in digital markets requires great diligence the supply of products or services is an intrinsic factor in the commercial evolution of commercial platforms and, at times, does not cause anti-corrective negative effects but legitimate expansion strategies, to be ascertained through traditional antitrust investigations.

[88] See https://www.sciencedirect.com/science/article/pii/S0267364920301047.

On the other hand, the prohibition of self-preferencing conducts is included in article 5, letter c, and in article 6, letters c[89] and f[90].

The provision appears to be related to the conduct of Amazon, the largest e-commerce platform in the markets of the United States of America[91] and Europe[92].

Amazon is an e-commerce site where consumers can purchase products directly from Amazon (Retail) or by independent sellers who offer their products on Amazon (Marketplace). As for the retail model, Amazon buys products directly and sells them to consumers, while in the marketplace model Amazon provides sellers with a virtual showcase where companies can upload and sell their products. Currently over 60% of the products sold on Amazon.it[93] come from independent sellers, which include both large companies and small and medium enterprises that are so able to reach a potentially global clientele. In addition to the sales service, Amazon also provides logistics services, such as packaging, shipping and returns management, and since 2004 it has been selling its own products under the «Amazon basics» brand.

[89] The provision is: «[…] A gatekeeper shall […] allow the installation and effective use of third party software applications or software application stores using, or interoperating with, operating systems of that gatekeeper and allow these software applications or software application stores to be accessed by means other than the core platform services of that gatekeeper. The gatekeeper shall not be prevented from taking proportionate measures to ensure that third party software applications or software application stores do not endanger the integrity of the hardware or operating system provided by the gatekeeper».

[90] The provision is: «[…] A gatekeeper shall […] allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services».

[91] As of October 2021, Amazon accounted for 41% of the U.S. e-commerce market, making it by far the leading online retailer the country. Second place was occupied by the e-commerce site of retail chain Walmart, with a 6.6% market share, followed in third place by eBay, with 4.2%. See https://www.statista.com/statistics/274255/market-share-of -the-leading-retailers-in-us-e-commerce.

[92] See https://www.retaildetail.eu/en/news/general/european-e-commerce-dominated-marketplaces.

[93] See https://www.aboutamazon.it/sostegno-alle-piccole-medie-imprese.

In recent years, several Competition Authorities have launched investigations against Amazon[94], suspecting the abuse of a dominant position, pursuant to Article 102 TFEU, for the imposition the obligation for sellers to disclose their purchase prices, the ranking of products based on non-transparent algorithms, the imposition of excessively burdensome prices for commercial users and the imposition of unfair terms that would have benefited their products to the detriment of competing products.

In November 2020, the Commission also notified Amazon a Statement of Objections challenging the systematic use of non-public commercial data from independent sellers, to facilitate the production and positioning of Amazon products, calibrating offers for consumers and facilitating the adoption of strategic business decisions[95].

This conduct, certainly anti-competitive towards competitors, appears instead destined to improve the user experience, even if the long-term damages (such as the exclusion of potential competitors and the acquisition of an ever-wider market power) are far greater than the short-term benefits to consumers. Caro de Sousa[96] illustrated that online firms, through online marketplaces, practice self-preferencing by favouring their products and services over competing ones and very often this commercial practice leads to efficiency in terms of integration and subsidiarity, highlighting that anticompetitive effects, such as the unjustified exclusion of some competitors, should be demonstrated through antitrust investigations.

[94] See the press release of Austrian Competition Authority of 14 February 2019: https://www.bwb.gv.at/en/news/detail/news/austrian_federal_competition_authority_initiates_investigation_proceedings_against_amazon. See also the report of German Competition Authority of 17 July 2019: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.html?nn=3599398.

[95] See the press release: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

[96] See https://www.competitionpolicyinternational.com/what-shall-we-do-about-self-preferencing/.

Indeed, there may be some consumers who prefer to purchase goods and services in closed or regulated ecosystems, in which there is greater integration, practicality or privacy. This may be the case with Apple Pay, Apple's payment system that uses a local chip within the hardware to store and encrypt a user's payment information[97].

Finally, article 6, letter a, prohibits the gatekeeper from using non-publicly accessible data generated by commercial users in competition with commercial users themselves[98].

Platforms leverage data to create value and offer better and personalized services to end users, for the benefit of the user experience. This circumstance is widely documented in the literature: Constantiou and Kallinikos[99] highlight that the collection and processing of data are useful for customer segmentation, recommending more suitable and personalized goods and services; Chen, Chiang and Storey[100] also reach the same conclusion, while Schreieck, Wiesche and Kremar (2016)[101] a directly proportional relationship between the amount of data available to a platform and the effectiveness of direct and third party advertisements, to the advantage both advertisers who can reach an optimal target and final consumers who can benefit from interesting ads.

In addition, through the collection and reprocessing of data, platforms can introduce new innovations or new services, making the market more

[97] See https://support.apple.com/it-it/HT203027.

[98] The provision is: «[…] A gatekeeper shall […] 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».

[99] See http://eprints.lse.ac.uk/63017/1/Kallinikos_New%20Games%20New%20Rules.pdf.

[100] See https://www.jstor.org/stable/41703503?seq=1#metadata_info_tab_contents.

[101] See https://www.researchgate.net/publication/320225739_Deriving_Content_for_an_Electricity_and_Mobility_Platform_Digital_Spaces_as_Drivers_for_Sustainable_Mobility.

competitive and favouring the development of products and services capable of responding to the ever-changing needs of users. Just think of the voice assistants (Siri for Apple[102], Alexa for Amazon[103], Cortana for Microsoft[104]) which in a few seconds can indicate to users the best travel solutions or the most relevant results of a search thanks to the storage of the history of past searches, movements, habits and lifestyles.

Also in this case, an application of the legislation without economic evidence of the presence of disadvantages to the detriment of competitors or users can be harmful to the digital market and to the user experience.

4. The impact of the DMA on innovation and competition

The objective of ensuring platforms contestable and fair digital markets seems to be more oriented towards fostering competition in the short term, without considering the impact of legislation on competition and innovation of which large platforms are protagonists in the medium and long period.

In particular, on the one hand, it can legitimately be asserted that competition and innovation increase where new companies can enter existing markets, take advantage of the basic know-how of large platforms and offer new and innovative services[105]; on the other hand, however, it should be considered that broad-spectrum innovation is achieved through investments in research and

[102] See https://www.apple.com/siri/.
[103] See https://www.amazon.com/b?ie=UTF8&node=21576558011.
[104] See https://support.microsoft.com/en-us/topic/what-is-cortana-953e648d-5668-e017-1341-7f26f7d0f825.
[105] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003985/uae-ccp-report__1_.pdf.

development, which can be made above all by large companies that can afford to allocate substantial resources to research.

Shapiro[106] highlights that investment in innovation depends on two contextual factors: the contestability of the markets, where new companies can enter by offering new services, and the appropriability of the value created, where demand can compensate, through the purchase of new products and services, the costs incurred and admitting a profit for the manufacturer.

The numerous limitations imposed by the DMA which are applicable in an ex-ante way, without economic evaluation, in the limits already illustrated in the previous paragraph, could determine distorting effects on the ability of gatekeepers (therefore of the main players on the market) to invest in qualitative improvements of the user experiences and in new services to be offered so as to satisfy new segments of demand[107].

All provisions on contestability, such as those aimed at allowing access to advertising performance measurement tools (article 6, letter g[108]), at guaranteeing data portability (article 6, letter h[109]) and at allowing access to user data in both aggregate and non-aggregated form (article 6, letter i[110]), together

[106] See https://onlinelibrary.wiley.com/doi/full/10.1111/j.1748-5991.2012.01131.x.

[107] See https://www.oxera.com/about-us/media-centre/european-regulation-of-digital-markets-puts-future-innovation-at-risk/.

[108] The provision is: «[…] A gatekeeper shall […] 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».

[109] The provision is: «[…] A gatekeeper shall […] provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of continuous and real-time access».

[110] The provision is: «[…] A gatekeeper shall […] provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users; for personal data, provide access and use only where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/679».

with the provisions that prohibit platforms from reprocessing the data acquired within their services (article 5, letters e and f), on the one hand they can facilitate the entry on the market of new subjects, but on the other hand they are likely to limit the competition between companies that derives from innovation, dynamism and the consequent ability to create value with new products and new services. Indeed, it is not only by weakening entry barriers that competition in a market increases.

Finally, in this circumstance, the consumer surplus can be positive in the first place, if correlated to the presence of major platforms that also compete at the price level. The Commission estimates that the application of the DMA leads to an increase in consumer surplus equal to 13 billion euros per year[111].

However, there is a significant trade-off, as the end user experience can be compromised if the platforms do not have the ability to innovate and create products and services that respond to the new demands of an ever-changing market.

[111] See https://publications.jrc.ec.europa.eu/repository/handle/JRC122910.

Chapter 6.
The innovations in the German and English legislations

1. Preface

The formulation of the proposed regulation, which sets out a list of prohibitions and obligations that are directly applicable ex-ante to platforms that are designated as gatekeepers both after exceeding certain quantitative thresholds and at the discretion of the Commission through a qualitative assessment, represents a novelty in the European legal context, especially in the field of competition and antitrust legislation. Usually, competition law requires compliance with legal principles and an economic analysis of market conditions.

Traces of this can be found in the rules provided for by EC Regulation 1/2003, Directive 2019/1/EU and by the relevant jurisprudence. For example, for the violation of Article 101 TFEU, in the cases GlaxoSmithKline Services Unlimited (2006, Case T-168/01)[112], T-Mobile Netherlands BV (2009, Case C-8/08)[113] and A. Ahlström Osakeyhtiö (1988, Case C-89/85)[114], the Court of Justice of the European Union clarify that the burden of proving the distorting effects of the agreements falls on the Commission and should be based on the

[112] See https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2006.294.01.0039.01.ENG.

[113] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2009%3A343.

[114] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0089%2801%29.

economic assessment of the anti-competitive effects on competitors or final consumers. For the violation of Article 102 TFEU, sentences France Télécom (2007, Case T-340/03)[115], Compagnie Maritime Belge (2008, Case T-276/04)[116] state that the Commission is not required to demonstrate concrete competitive effects, but only the abusive potential of the exploitation of the dominant position, or that some practices exercised by the company are capable of producing effects of exclusion or exploitation on the market.

In this sense, the DMA seems to move away from the legal principles and economic analysis that have been central to legislative acts and judgments up to now. In fact, the measures for the designation of gatekeepers and the imposition of directly applicable obligations and prohibitions do not require either the identification of the relevant markets[117], or the initiation of an analysis of the dominant position or the power to market. This structure appears more misaligned the more it is considered that the indication of numerous obligations and prohibitions, as illustrated in the previous chapter, derive from the assessment of some investigations by the Commission and the national Competition Authorities in the matter of violation of Articles 101 and 102 TFEU. Without adequate economic evaluation, the «catch all» and «per se» approach risks leading to excessive application, also limiting some common commercial practices that may not be harmful to the market and consumers.

Felt the need to intervene in the digital sector, as early as 2019[118] some countries have started a review of their legislative framework in the field of competition, evaluating possible additions to allow national regulations to adapt

[115] See https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2007.069.01.0017.01.ENG.

[116] See https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2008.209.01.0043.01.ENG.

[117] The definition of «relevant market» itself is in the process of being updated by the Commission, as the current definition dates back to 1997, as explained above.

[118] See https://www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy.

also to digital markets and platforms. Examples are Germany and the United Kingdom, which have made the instruments and bodies in charge more flexible, anticipating the content and functions of the Digital Markets Act.

In the case of Germany, an amendment to the law on competition introduces a specific section for digital firms and markets. The section illustrates the criteria for identifying potentially dangerous platforms, the conduct that could be subject to analysis by the Competition Authority and the tools available to platforms to justify such practices for economic reasons. Instead, in the case of the United Kingdom, a unit has been set up within the Competition Authority invested with the power of investigations in the digital sector and tasked with proposing a new legislative instrument (in the form of a code of conduct) intended to prevent the adoption of practices and conduct that are potentially distorting competition in digital markets. In both cases, compliance with the legal principles already in force and the importance of economic evaluation are the hallmarks of the new tools available.

2. The legislation in Germany

The Bundeskartellamt is the independent Competition Authority of Germany with the task of protecting competition in Germany[119]. The main competition law instrument is the Act Against Restraints of Competition (GWB, in German)[120], which prohibits restrictions and conduct capable of producing distorting effects on the national market.

[119] See https://www.bundeskartellamt.de/EN/AboutUs/aboutus_node.html.
[120] See https://www.gesetze-im-internet.de/englisch_gwb/index.html.

The tenth amendment to the GWB came into effect on January 18, 2021, with a law that was presented by the government in November 2020 and passed in parliament with a large majority[121]. The amendment introduces a new «Section 19a» within the GWB, giving the Competition Authority the possibility of prohibiting certain conducts, such as self-preferencing and data processing, which, if exercised by large digital platforms that enjoy strategic position or have significant economic resources, can potentially produce distorting effects on competition.

The amendment identifies companies with over 45 million end users as «gatekeepers», grants greater investigative powers to the Competition Authority, provides prior notification before any merger between digital platforms, assigns greater responsibilities to platforms in terms of improper contents, lists some potential remedies such as the sale of company branches and illustrates a sanctioning regime for the exercise of abusive conduct, based on the legislation already in force in traditional markets[122].

The main elements of the new regulatory instrument are different. First, the Authority must ascertain that the company «is of paramount significance for competition across markets», through a quantitative assessment of the dominant position on one or more markets, the financial soundness and financing capacity, the vertical integration, the amount of data it manages and on its role of intermediary between commercial users and final consumers. Secondly, the new section introduces some practices that can be considered problematic and on which the Authority can place limitations[123], following the outcome of the economic analysis on the business model of the company. Finally, in the

[121] See https://www.concurrences.com/en/bulletin/news-issues/january-2021-en/the-german-parliament-passes-the-10th-amendment-of-the-german-act-against.

[122] See https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

[123] See Paragraph 2 of Section 19a.

German legislation, the companies identified as «gatekeepers» have the possibility of providing an objective justification on the correctness of their conduct, with the burden of proof against it, based, once again, on quantitative data and economic evaluations.

3. The legislation in the United Kingdom

In the United Kingdom, the national Competition Authority is the Competition and Markets Authority (CMA). It is a non-ministerial government department in the United Kingdom, entrusted with the tasks of strengthening the functioning of the market through the detection, repression and prevention of anti-competitive activities[124]. The main competition law instrument in the UK is the Competition Act 1998, which prohibits any agreement, business practice or conduct that could distort competition[125].

After the first announcements dating back to November 2020, on 7 April 2021 the UK government and the CMA announced the establishment, within the CMA, of the new Digital Markets Unit (DMU)[126], a regulatory body intended to address competition and data management issues in digital markets. The DMU oversees to develop a legislative instrument (a kind of code of conduct) capable of offering consumers greater choice and control over their data, promoting online competition and repressing unfair practices that distort competition, by facilitating market entry for small and medium-sized enterprises and controlling over the commercial practices of large platforms.

[124] See https://www.gov.uk/government/organisations/competition-and-markets-authority/about.

[125] See https://www.legislation.gov.uk/ukpga/1998/41/contents.

[126] See https://www.gov.uk/government/news/new-watchdog-to-boost-online-competition-launches-3.

The proposals so far advanced by the DMU are only partially comparable with the content of the DMA. The regulatory package under study of the DMU would also be aimed at platforms «with strategic market status (SMS)», but the economic analysis based on the effects assumes a central role, to be conducted to identify both SMS and potentially distorting practices for competition, and corrective remedies[127].

The approach of the English legislation therefore appears to be more personalized whit respect to the business models of the platforms, especially due to the fact that the remedies, before being imposed, must be evaluated through the «adverse effect on competition or consumers (AECC)» test, a new implemented version of the «adverse effect on competition (AEC)» test already used by the CMA in traditional competition investigations.

The AECC assesses not only the quantitative conditions of the market, such as market power and price level, but also the qualitative conditions of the market and platforms, such as the degree of innovation of the companies and the qualitative potential on the services offered, also highlighting the costs, proportionality and potential undesirable consequences of the proposed remedies.

[127] See https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.

Conclusion

The Digital Markets Act is a regulation proposal presented by the European Commission with the aim of ensuring the fairness and contestability in digital markets by regulating the power held by large platforms.

In the last decade, the world economy has undergone a rapid transformation due to the rapid spread of new digital technologies: in 2019 the value of the digital economy was between 4.5% and 15.5% of global GDP, thanks to the economic value created by the collection and processing of digital data.

The platforms have grown, concentrating several roles on themselves at the same time: they have become points of access to the market (gateway), service providers and junctions between supply and demand. In this context, also due to the economies of scale and network effects typical of digital markets, the largest platforms have begun to initiate self-preferential practices that are detrimental to the internal market.

In the course of the discussion, the limits of European competition law were illustrated: Articles 101 and 102 TFEU, which prohibit the exercise of practices that distort competition and abuse of a dominant position, in fact, on the one hand, require lengthy investigations by competition Authorities, on the other hand, they are difficult to apply where it is not possible to precisely define the relevant market or identify prohibited and distorting commercial practices.

The scope of the DMA is revolutionary because it regulates a new sector and provides a harmonized tool to be applied in the European Union.

The DMA establishes a list of practices considered unfair or contrary to market contestability which are therefore prohibited. The DMA provides for the ban on combining data obtained from the platform with data collected from other services provided by the same gatekeeper, to avoid excessive competitive advantages; the ban on using data generated by companies that rely on the platform to favour their own platform products; a ban on preventing users from uninstalling pre-installed software or apps; the prohibition of imposing exclusivity clauses on commercial users to contact end users through the platform.

The list of obligations and prohibitions applies to the platforms designated by the Commission as gatekeepers. The definition of gatekeeper includes platforms that have a significant impact on the market, provide core platform services in at least three countries and take a durable position over time. The requirements occur when certain quantitative thresholds defined in the proposed regulation are exceeded, but also on the discretionary assessment of the Commission, which has the power to designate as gatekeeper any platform that meets these requirements, while not exceeding the quantitative thresholds.

Furthermore, the proposed regulation assigns investigative powers to the Commission in relation to both the designation decisions and the ascertainment of breaches of obligations by a gatekeeper. Finally, the Commission can adopt delegated acts to amend substantial elements of the proposed regulation, such as the methodology for identifying the requirements for designation as gatekeeper. The Commission, therefore, assumes a central role in the application and enforcement of the proposed regulation, limiting the role of

national competition Authorities and Member States through participation in an advisory committee.

The results of the public consultations conducted by the European Commission in 2020 revealed positive support from large parts of civil and economic society, in favour of new and more appropriate competition instruments to the criticalities posed by the conduct of the major players in the digital market. Furthermore, it is also appropriate to take into account the joint letter, signed by Italy, France, Poland and Germany, in February 2020, addressed to the Commissioner for Competition Vestager, asking for the adoption of competition measures aimed at large digital platforms.

However, the current wording of the proposed regulation presents several critical issues.

With reference to the layout of the proposal for a regulation, it was first illustrated how the centralization of powers within the Commission and the excessive discretion allowed by the text of the regulation may be liable to compromise legal certainty, the experience of the Authorities of competition and the application of European competition law. Secondly, it was highlighted how the ex-ante imposition of obligations and prohibitions, without a prior economic evaluation, could lead to an excessive application of the regulation, limiting or banning some practices that could also benefit end consumers.

With reference to the impact of the regulation on platforms, the provision of obligations and prohibitions according to a «catch all» and «per se» methodology can compromise the economic sustainability of some business models, which adopt practices such as self-preferencing and tying and bundling in order to create greater value for the benefit of end consumers, without producing distortionary effects either for the market or for users. Finally, it was

illustrated how the DMA could indeed facilitate the entry into the market of new competing companies, but also limit the research and development capacities and the innovation potential attributable mainly to large platforms, which have adequate economic resources for investments and the ability to rework user data by anticipating future trends and filling unsatisfied demand sectors.

Finally, examples of German and English legislations were presented, since the two countries updated their regulatory instruments to make their competition policy more flexible to be effective also in the digital sector.

The regulation of the rapidly evolving and highly potential digital sector is necessary, but the analysis proposed in this paper suggests that DMA may be effective in the short term to increase market contestability, while it is likely to create undesirable effects in the long term, with reference to equity, the ability to create value and the ability to innovate of platforms.

However, the substantially positive reception reserved for the proposal would seem to make it possible to be adopted by the first half of 2022 during France's rotating presidency of the Council, provided that a correct balance can be found in the negotiations, especially as regards legal certainty, a fundamental element of the competition law of the European Union.

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Executive summary

Context: Digital markets in the European Union in a weak regulatory framework

The Digital Markets Act is a proposal for a regulation presented by the European Commission on 15 December 2020, with the aim of ensuring the equity and contestability of digital markets by regulating the power held by large platforms.

Over the last decade, the world economy has undergone a rapid transformation due to the rapid spread of new digital technologies.

Widespread digitization has indisputable advantages. The jobs created in the field of ICT, telecommunications and digital programming have increased significantly; digitization allows companies to be present on multiple markets, increasing competition and encouraging innovation and competitiveness; finally, the transformation of public administration, the promotion of digital options in public education and the use of digital technologies in the public health sector can serve as a trigger for a wider dissemination and acceptance of digital technologies throughout the economy.

The new business models of the digital economy include other actors, such as platforms, but above all other production factors, such as the monetization of personal data and behavioural habits. It is estimated that in 2019 the value of the digital economy assumed a value between 4.5% and 15.5% of

global GDP, thanks to the economic value created by the collection and processing of digital data.

The platforms have grown, concentrating several roles on themselves at the same time: they have become points of access to the market, service providers and junctions between supply and demand. Even more in this context, market regulation, and in particular the protection of competition, offers a valuable contribution to economic growth: competition promotes productivity and job creation, inducing companies to be more productive and innovative, favouring a better allocation of resources among economic activities and allowing the most innovative and efficient companies to enter the market and grow.

As regards the regulation of digital markets, to date, the European Union legislation on digital markets is residual, and as regards the protection of competition in these markets and the regulation of the economic actors present therein, it is appropriate to refer the provisions of the Treaty on the Functioning of the European Union in the matter of competition.

Articles 101 to 109 make it possible to prevent restrictions and distortions of competition in the internal market, through the prohibition of anticompetitive agreements between companies and abuses of dominant positions, the control of mergers and acquisitions with a European dimension and the prohibition of state aid which distort competition.

Article 101 TFEU provides for the general prohibition of agreements restricting competition: all agreements between companies capable of distorting competition and capable of affecting trade between Member States are prohibited and void, such as cartels through which companies establish prices, limit production, or divide the market. Article 102 TFEU prohibits the abusive

exploitation of the dominant position on the market. The European legal system does not consider the dominant position as an illegal situation: reaching large dimensions and acting on a large scale or in multiple markets does not distort competition per se, on the contrary it is in favour of consumers since it means that the owner of this position offers the quality and/or price of the products that better meet their needs than what is offered by competing companies. On the other hand, the abuse of this situation of dominant position is prohibited: the behaviour of a dominant company that exploits its economic power in such a way as to prevent competitors from operating regularly on the market, consequently also causing damages to consumers, is illegal.

These provisions follow the rules already present in the first treaties that entered into force since the establishment of the European Economic Community in 1957 and have recently been applied also in the digital platform sector.

In July 2018, the European Commission imposed a fine of € 4.34 billion on Google for violating EU rules on abuse of dominant position: Google had required smartphone manufacturers to pre-install the Google Search application and its Google Chrome browsing application as a condition for granting the license for the Google Play Store; it had paid some large manufacturers and mobile network operators to exclusively pre-install the Google Search application on their devices, favouring its application over competing applications; finally, it prevented manufacturers who wanted to pre-install Google applications from also selling other mobile devices that did not work with the Android operating system. Google was also sanctioned in 2017, again for abusive exploitation of its dominant position as a search engine, granting an illegal advantage to its comparative shopping service to the detriment of competing service providers. In May 2021, the Italian Competition Authority sanctioned Google for the violation of Article 102 of the TFEU, imposing a fine

of over 102 million euros for abuse of dominant position, in relation to the restrictions placed on competitors in accessing the market for smartphone applications. The following month, the French Antitrust Authority also fined Google 220 million euros for abusing its dominant position in the field of digital advertisement.

In industries based on digital technologies there is a problem related to entry barriers, since the pioneers of the first services were able to conquer a large slice of the market, initially acting as monopolists and subsequently maintaining a dominant position. Also due to the economies of scale and network effects typical of digital markets, the largest platforms have begun to initiate self-preferential practices that are detrimental to the free market, to the structural power gained over time.

The application of existing European competition law has limitations that in the current context of explosion of markets and digital services can compromise the effective functioning of the internal market. In fact, Articles 101 and 102 TFEU, on the one hand, require lengthy investigations by the Competition Authorities, on the other hand they are difficult to apply where it is not possible to precisely define the relevant market or identify prohibited and distorting commercial practices.

Objectives: the new European strategy for digital and the Digital Markets Act

For several years, the European Union has embarked on an attempt to reform and modernize its body of legislation precisely to facilitate the

development of a digital economy based on data and to regulate the sectors of digital markets and services with greater specificity.

The first initiatives took place in 2014, but in 2019 the President of the European Commission Ursula Von der Leyen announced multiple actions to promote and speed up the digital transition, intended both to increase investment in artificial intelligence and to regulate the sector. of digital services.

The «Shaping Europe's digital future» strategy aims to accompany the European Union towards the digital transition, protecting the functioning of the internal market, improving its development, efficiency, innovation and consumers protection. Through surveillance and greater regulation of the digital sector, the Commission argues that it can create new opportunities for businesses, improve the use of technology, increase the possibilities for the population to exercise their democratic rights and pave the way towards the green transition.

The main legislative instruments, in this context, are the Digital Services Act, a proposed regulation aimed at increasing the responsibility of platforms for the contents that are published online, and the Digital Markets Act. The Digital Markets Act (DMA) is intended to harmonize at European level the legal framework applicable to larger digital platforms, since the significant market power enjoyed by these operators allows them to unilaterally determine the structure of contractual relations with business users and end-users of the services provided. The scope of the DMA is revolutionary because it regulates a new sector and provides a harmonized tool to be applied in the European Union.

The DMA is a proposal for a regulation aimed at regulating the power of large online platforms through European ex-ante rules, harmonized and

complementary to the current competition law. It aims to create a future-proof competition tool for dynamic and rapidly evolving markets such as the digital ones. More specifically, the proposal aims to counter unfair practices and behaviours on the part of large platforms that have a role of access to the market (gatekeeper), restoring greater contestability in the offer of core platforms services and generating positive repercussions on consumers in terms of expansion of the offer and quality of services.

The regulation is limited to a few core platform services: intermediation services; search engines; social networking; video sharing platform service; number-independent interpersonal electronic communication services; operating systems; cloud services; advertising services.

It applies to gatekeepers, i.e., to providers of the aforementioned services that meet the following conditions: they have a significant impact on the internal market; they operate a core platform service which serves as an important access point for end users; have an entrenched and durable position in its operations or are expected to acquire it.

The DMA establishes a list of practices considered unfair or contrary to market contestability which are therefore prohibited. First, the gatekeeper cannot combine personal data from the core platform services with personal data from other services offered by the gatekeeper. Second, the gatekeeper must allow commercial users to offer the same products or services to end users through other brokerage services even at different prices or conditions. Third, the gatekeeper must allow commercial users to promote offers to previously acquired end-users through the platform and enter into new contracts with them even outside the platform. In addition, the gatekeeper may not require commercial users to use a gatekeeper identification service and may not require

commercial or end users to subscribe to another core platform service as a precondition for using another core platform service.

In addition to the provisions directly applicable following the designation of gatekeepers, the proposed regulation includes other provisions which can be considered as additional obligations that the Commission may impose on each gatekeeper. The list includes the prohibition of self-preferencing, the obligation to guarantee data portability, the prohibition to use data from commercial users in competition with them, the obligation to allow users to uninstall pre-installed applications, the obligation to provide advertisers and publishers with the tools for independent verification of the results of advertising campaigns and the obligation to guarantee end users the possibility of installing third-party app stores and software.

Furthermore, the proposed regulation assigns investigative powers to the Commission in relation to both the designation decisions and the ascertainment of breaches of obligations by a gatekeeper. Finally, the Commission can adopt delegated acts to amend substantial elements of the proposed regulation, such as the methodology for identifying the requirements for designation as gatekeeper. The Commission, therefore, assumes a central role in the application and enforcement of the proposed regulation, limiting the role of national competition authorities and Member States through participation in an advisory committee.

The results of the public consultations conducted by the European Commission in 2020 revealed positive support from large parts of civil and economic society, in favour of new and more appropriate competition instruments to the criticalities posed by the conduct of the major players in the digital markets. However, the current wording of the proposed regulation presents several critical issues.

Impact: too many discretionary powers in the hands of the Commission and the undesirable effects for the sustainability of the platforms and the efficiency of the market

The first problematic element is represented by the extent of the powers left to the discretion of the Commission, which would be responsible for the exclusive enforcement of the Regulation. In particular, the Commission's power to designate «gatekeepers» would include the possibility of identifying them also on the basis of market surveys and on the basis of qualitative indices with a rather generic scope (size, entry barriers, scale effects, structural characteristics). The same is true for emerging platforms, which may be designated as gatekeepers on the basis of a similar evaluation process left to the discretion of the Commission. Again, following the outcome of market surveys and by means of a delegated act, according to the layout of the draft, the Commission may also introduce further new obligations for gatekeepers that are similar to those already envisaged by the future regulation. This possibility appears to be in contrast with Article 290 TFUE (provision governing the legislative acts delegated to the European Commission), as it would be left to the total discretion of the Commission to identify which obligations are "similar" to those already existing, thus allowing it to intervene on essential regulatory elements of the DMA, outside a sufficiently limited power. Furthermore, the radical centralization of decision-making powers is likely to cause perplexity regarding the application of the principle of subsidiarity, which governs the division of regulatory powers between the Commission and Member States. If the intrinsically cross-border nature of the digital phenomenon militates, in fact, for the adoption of a fully harmonized regulatory system at the Union level, which avoids the fragmentation of the internal market along national borders, the applicative competences could instead be effectively shared with Member States.

Secondly, the detailed system of obligations and prohibitions imposed on gatekeepers escapes the traditional economic analysis conducted by Competition Authorities in terms of the net impact on consumer welfare. Such an extensive blacklist of obligations and prohibitions inevitably ends up including corporate behaviours whose impact in terms of economic efficiency and consumer well-being could turn out, in certain circumstances, to be neutral or even positive: the removal of such conduct from an economic evaluation based on the effects could then determine undesirable consequences on the competitive dynamics of the markets that the regulation is intended to safeguard. The general principle of proportionality would require limiting the scope of prohibited behaviours only to cases that involve, with a reasonable degree of certainty, an appreciable sacrifice of consumers' interests. In the current formulation of the proposed regulation, there is a risk that in the specific case competently neutral or even desirable conduct is prohibited.

Thirdly, the fact that the Commission may consider the regulatory obligations applicable to any company that has a «significant» impact on the market, provides an «important» service for users and has a «entrenched and durable» market position, through the designation as gatekeeper of platforms that do not exceed the quantitative thresholds, seems likely to undermine the legal certainty of economic operators, who would not have the tools, means and measures to learn in advance whether to comply with the legal structure of the regulation.

Continuing the examination of the criticalities of the proposed regulation, from the point of view of firms there are some elements that could create undesirable negative effects.

The DMA aims to ensure a contestable and fair environment for online platforms, to be achieved through a series of eighteen provisions that are

applicable to firms that the Commission identifies as gatekeepers. The application of a universality of measures to different platforms, according to a «catch all» model, may not be effective and compromise the functioning of the platforms in a context, such as the digital market, where there are different actors and completely unrelated business models between them.

By way of example, the DMA obliges gatekeepers to allow commercial users to contact acquired customers through the platform also through other channels and to conclude transactions even outside the platform. The provision appears useful to prevent cases similar to the conduct exercised by Apple in the music streaming sector, since, by abusing its dominant position, it has harmed competitors by increasing the fees for inclusion in its store and limiting the diffusion of competing applications and services. However, in the case of commission-based intermediary platforms, such as an online travel agents (OTA), the provision would compromise the business model of companies, which would lose both sources of revenue and the role of intermediation and aggregation, facilitating other types of inefficient digital market.

Furthermore, as regards the creation of value, it should be noted that even the application of prohibited or imposed measures «per se» can have negative consequences, especially as regards the ability of platforms to create value through the exercise of tying and bundling, self-preferencing or leveraging practices that benefit the end-user experience.

The prohibition of conduct of the type tying and bundling can be efficient in limiting the propagation of multiservice platforms such as Microsoft 365 (operating system, word processing applications, cloud services, e-mail and messaging tools) that can create a dependency on users and tie them to the use of the universe of services of the firm. The application of a ban «per se» in this sense, if there is no abuse of a dominant position and there are no negative

effects for consumers or competitors, can be harmful both for the platform and for the end users, who cannot enjoy an optimal experience.

Furthermore, as regards the prohibition of self-preferencing conduct, it seems to effectively counteract the practices exercised, for example, by Amazon, which took advantage of its powerful marketplace by abusing its dominant position (it imposed the obligation on competing sellers to disclosing their purchase prices, classified products on the basis of non-transparent algorithms and imposed excessively burdensome prices for commercial users) and benefiting their products to the detriment of competing products. However, the widespread application of the prohibition of self-preferencing can compromise some business models that improve the user experience, increasing the value of the platforms and the well-being of the consumer, where they provide additional services such as greater integration, convenience or privacy.

Going forward, the ban on reprocessing non-publicly accessible data generated by business users can prevent the creation of value and the offer of better and personalized services for the benefit of users, limiting the introduction of innovations, increasing competitiveness among businesses and the development of products and services capable of responding to the ever-changing needs of users.

Finally, the objective of guaranteeing platforms a fair and contestable environment seems to be more oriented towards fostering competition in the short term, without considering the impact of the legislation on competition and innovation of which large platforms are protagonists in the medium and long term. period. The numerous limitations imposed by the DMA and applicable ex-ante could have distorting effects on the ability of gatekeepers (i.e., of the main players on the market) to invest in qualitative improvements of the experiences offered to users and in new services to be proposed to satisfy new

segments of demand that they arise from the ability to innovate, from the dynamism and competitiveness of the market and from the ability to create value with new products and new services.

Conclusions

The Digital Markets Act seems to move away from the legal principles and economic analysis that have been central up to now in legislative acts and in European jurisprudence. In fact, the measures for the designation of gatekeepers and the imposition of directly applicable obligations and prohibitions do not require either the identification of the relevant markets, nor the initiation of an analysis of the dominant position or market power. Without adequate economic evaluation, the «catch all» and «per se» approach risks leading to excessive application, also limiting some common commercial practices that may not be harmful to the market and consumers.

Germany and the United Kingdom have started a review of their legislative framework in the field of competition, evaluating possible additions to allow national rules to adapt also to digital markets and platforms, making the tools and bodies in charge more flexible, anticipating the content and the functions of the DMA. In the case of Germany, an amendment to the competition law introduces a specific section for digital firms and markets, which describes the criteria for identifying potentially dangerous platforms for digital markets, the conduct that could be investigated by the Competition Authority and the tools available to platforms to justify such practices for economic reasons. Instead, in the case of the United Kingdom, within the Competition Authority a unit has been set up, invested with the power of investigations in the digital sector and tasked with proposing a new legislative

instrument (in the form of a code of conduct) intended to prevent the adoption of practices and conducts that may potentially distort competition in digital markets. In both cases, compliance with the legal principles already in force and the importance of economic evaluation are the hallmarks of the new tools available.

The regulation of the rapidly evolving and highly potential digital sector is necessary, but the analysis proposed in this paper suggests that DMA may be effective in the short term to increase market contestability, while it is likely to create undesirable effects in the long term, with reference to equity, the ability to create value and the ability to innovate of platforms.

However, the substantially positive reception reserved for the proposal would seem to make it possible to be adopted by the first half of 2022, provided that a correct balance can be found in the negotiations, especially as regards legal certainty, a fundamental element of the competition law of the European Union.