The Digital Markets Act between the EU Economic Constitutionalism and the EU Competition Policy

by

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Abstract

Given that a lot has already been written by legal scholars on the practical implications that the entry into force of the Digital Markets Act will have, the present article intends to bring the discussion back to the theoretical level, trying to find out where the roots of this proposed regulation lie, with an analysis of the context in which it falls, the EU principles and values upon which it is based, the objectives it intends to pursue, and the legal-economic theories behind it.

Resumé

La doctrine a déjà beaucoup écrit sur les implications pratiques de l'entrée en vigueur du Digital Markets Act, c'est pourquoi le présent article vise à ramener la discussion au niveau théorique, en essayant d'identifier les racines de cette

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proposition de règlement, a travers une analyse du contexte dans lequel il s'inscrit, des principes et valeurs de l'UE sur lesquels il repose, des objectifs qu'il entend poursuivre et des théories juridico-économiques qui le sous-tendent.

Key words: Digital Markets Act; EU Economic constitutionalism; EU competition policy; Big Tech; EU Law.

JEL: K21, K42, L43

I. Introduction

The digital reform is a challenge that has been embraced in various parts of the world and it is quite difficult to structure, as it is necessary to keep up with technology, to protect fundamental rights, to safeguard innovation by not holding it back, and to establish a level playing field for businesses operating on the market.

The European digital reform project started in 2015 and led to the adoption of several pieces of secondary legislation as well as to the proposal by the Commission, at the end of 2020, to adopt two complex regulations, the Digital Services Act (hereinafter: DSA)[1] and the Digital Markets Act (hereinafter: DMA)[2], which are currently at the centre of the academic and institutional debate[3].

[1] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.

[2] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

[3] The DMA, in particular, was the subject of numerous amendments (available here: https://www.europarl.europa.eu/committees/it/imco/documents/latest-documents). On 22 November 2021, the Internal Market Committee (hereafter: IMCO) of the European Parliament adopted its position on the proposed regulation by 42 votes in favour, 2 against and 1 abstention (available here: https://www.europarl.europa.eu/news/en/press-room/20211118IPR17636/digital-markets-act-ending-unfair-practices-of-big-online-platforms). The Council, instead, approved its position on 25 November 2021 (see https://www.consilium.europa.eu/en/press/press-releases/2021/11/25/regulating-big-tech-council-agrees-on-enhancing-competition-in-the-digital-sphere/). The text was then submitted to the vote of the plenary of the European Parliament during the December 2021 session and was approved by 642 votes in favour, 8 against and 46 extensions. Negotiations with EU governments on the DMA were opened in the first half of 2022 under the French Council Presidency and on 24 March 2022, the Council and the Parliament reached a provisional political agreement. The European Parliament approved on 5 July 2022 the final text by 588 votes to 11. The consolidated text (available here: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0270_EN.html#title2) was then approved by the European Council on 18 July 2022.

These legislative initiatives fit into the peculiar context of what might be called 'EU Economic constitutionalism'[4]. For the purposes of the present article, this expression will be used to refer to the set of EU law's own principles and values, whose primary purpose is to guarantee the freedom of individuals and the exercise of their rights, as well as to the set out rules that are essential for establishing a fair and open economic system. This form of constitutionalism has *sui generis* contents, which derive from the peculiarity and originality of the Union's legal order, and is based on values that are common to the Member States, such as those of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, in a society characterized, among other things, by pluralism, non-discrimination and solidarity (Article 2 of the TEU).

After a brief outline of the digital reform in Europe, this article will focus on the actions, aimed at tackling the Big Tech's overwhelming power, implemented in Europe and in the rest of the world. The subject of a more in-depth analysis will be the legislative proposal of the DMA that is an act that can be seen as the European *ad hoc* instrument to fight against the Big Tech's illegal behaviours on digital markets. The DMA will complement the rules of competition law that so far have done most of the work against problematic behaviours of such actors. The DMA's features relating to the protection of fundamental rights and to the protection of competition will be examined carefully, in order to demonstrate that this act is based on a competition policy approach that is

[4] On the concept of "EU Economic Constitutionalism", *cf. ex multis*, Guillaume Grégoire and Xavier Miny (eds), *The Idea of Economic Constitution in Europe*, *Genealogy and Overview* (Brill 2022); Christian Joerges, "The European Economic Constitution and its Transformation Through the Financial Crisis" in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley-Blackwell 2016); Josef Drexl, 'The European Economic Constitution and Its Relevance to the Ordo-Liberal Model' (2011) 4 Revue internationale de droit économique 419–454. On the more general concept of "European constitutionalism" (very debated since there is neither an unambiguous definition nor unanimity in the legal literature on the very existence of such a constitutionalism), *cf. ex multis*, Lorenzo Federico Pace, *La natura giuridica dell'Unione europea: teorie a confronto, l'Unione ai tempi della pandemia*, (Cacucci Editore Bari 2021) 11–13; Suvi Sankari and Kaarlo Tuori, *The many Constitutions of Europe* (Routledge 2016); Miguel Poiares Maduro, 'Three Claims of constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional pluralism in the European Union and Beyond* (Hart Publishing 2012); Neil Walker, 'Re- framing EU Constitutionalism' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the world* (Cambridge University Press 2009); Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Oxford: Hart Publishing, 2009); Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union*, (Sweet & Maxwell, 2005); Miguel Poiares Maduro, 'Europe and the Constitution: What if this is as Good as it Gets?' in J.H.H. Weiler and Marlene Wind (eds), *European constitutionalism beyond the State* (Cambridge University Press 2003); J.H.H. Weiler, *The Constitution of Europe: 'Do the new Clothes have an Emperor?' and other Essays on Euro- pean Integration* (Cambridge University Press 1999).

different from the past, in terms of both the objectives to be pursued and the instruments to be used. In fact, this policy seems both taking greater account of the fundamental values and principles on which the Union is founded, rather than merely pursuing the objective of economic growth, and aiming at a faster action that adapts to the pace of change of the online markets.

In a nutshell, given that a lot has already been written by legal scholars on the practical implications that the entry into force of the Digital Markets Act will have, the present article intends to bring the discussion back to the theoretical level, trying to find out where the roots of this proposed regulation lie, with an analysis of the context in which it falls, the EU principles and values upon which it is based, the objectives it intends to pursue, and the legal-economic theories behind it.

II. Setting the scene: the digital reform in Europe…

The digital reform in Europe traces its roots back in 2015, when the European Union's Digital Market Strategy proposed to remove online barriers and facilitate cross-border online sales. The milestones of this reform have been marked by the entry into force of several acts of secondary legislation, as well as by recent proposals of revision of existing acts and by the introduction of new regulations.

The first piece of secondary legislation adopted was the Geo-Blocking Regulation of 2018[5], which introduced rules to prevent unjustified geo-blocking and forms of direct and indirect territorial discrimination. The second act that entered into force was the Regulation on online intermediation services of 2019[6], designed to provide greater transparency for firms using online platforms with a focus on marketplaces, software application services, social media services, and online search engines. Two directives were adopted next: the 2019 Copyright Directive[7], which ensures greater cross-border access to

[5] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ 2018 L 60I, p. 1–15.

[6] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ 2019 L 186, p. 57–79.

[7] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 L 130, p. 92–125.

online content and provided for simpler licenses for online broadcasts, and the 2019 Directive on the Modernization of Consumer Protection Rules[8], aimed at ensuring more transparency in online markets and providing the same consumer rights for the 'free' digital.

With regard to the revision of existing acts of secondary legislation, it must be mentioned that the Commission launched in July 2021 a public consultation inviting comments from stakeholders on a draft revised Block Exemption Regulation on vertical agreements[9], which has been adopted on 10 May 2022 and entered into force on 1 June 2022[10]. The revision was deemed necessary to adapt the legislation on vertical agreements (that is, agreements between suppliers of goods and services and their distributors) to market developments, with particular attention to e-commerce and online platforms that, in the last decade, have revolutionized the way companies operate.

Finally, the European Commission has proposed the adoption of two complex regulations to update the rules governing digital services in the European Union: the DSA and the DMA. These acts have two main objectives: to create a safer digital space in which the fundamental rights of all users of digital services are protected, and to establish a level playing field to promote innovation, growth and competitiveness, both in the European single market and globally[11].

More specifically, the DSA focuses on issues such as liability of online intermediaries for third party content, safety of users online and asymmetric due diligence obligations for different providers of information society services, depending on the nature of the societal risks such services represent. In concrete terms, this proposed regulation contains a set of new EU-level harmonized obligations that will apply to all digital services that connect consumers to goods, services or contents, and provides for new procedures for a faster removal of illegal contents and a comprehensive protection of the fundamental rights of online users.

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[8] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ 2019 L 328, p. 7–28.

[9] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102, p. 1–7.

[10] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, C/2022/3015, OJ 2022 L 134, p. 4–13.

[11] The DMA and the DSA together form the so-called "Digital Services Act Package", whose objectives are made clear at the following link: https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

The DMA, instead, can be considered as the European tool to fight against the Big Tech's overwhelming power in digital markets and, in fact, it deals with economic imbalances, unfair business practices, which can be implemented by platforms that have assumed the role of controllers over the access to the digital market (so-called 'gatekeepers') and their negative consequences, such as weakened contestability of platform markets. Thus, this proposed regulation contains harmonized rules defining and prohibiting certain gatekeepers' unfair practices[12], and providing for an enforcement mechanism based on market investigations[13].

III. …and the actions to address the Big Tech's overwhelming power

In addition to Europe, digital reforms are also being implemented in various other parts of the world. What brings the European reform and all the others together is the particular attention that has been paid to actions aimed at curbing the power of Big Tech, that is, the largest companies in the technology sector. The latter can be divided into three groups: 'GAFAM' (Google, Apple, Facebook – now Meta, Amazon and Microsoft, also known as the 'Big Five' or 'Tech Giants') operating in the information technology sector and active all over the world, especially in Europe and in the United States; 'BATX' (Baidu, Alibaba, Tencent and Xiaomi), giants operating in China; 'NATU' (Netflix, Airbnb, Tesla and Uber), undisputed protagonists of the digital disruption of latest years, inasmuch as they are new technologies that deeply changed certain activities and certain previous business models[14].

In order to avoid problems of fairness and contestability in digital markets, various instruments have just been adopted or are currently under discussion in the various countries: in some legal orders, legislative reforms have been envisaged, in others, *ad hoc* regulatory bodies have been set up, in others still, it has been decided to introduce instruments of *ex-ante* regulation of the obligations to which the Big Tech must be subject.

In particular, the action against Big Tech in the United States originated from the initiative of a bipartisan group of the U.S. House of Representatives, and has resulted in the presentation of five new draft bills on antitrust (currently

[12] See Article 5, 6, 7 of the DMA consolidated text.

[13] See Recital 69 of the DMA consolidated text.

[14] Netflix introduced a new streaming service, Airbnb became the leader in homestays, Tesla introduced the electric car, and Uber created an app capable of connecting users and drivers and beyond.

under discussion)[15], whose purpose is to prevent the perpetration of anti-competitive conducts by GAFAM[16]. The first draft bill prohibits platforms from owning subsidiary companies that operate on their own platform, in the event that such companies compete with other companies. In that case, the Big Tech will be forced to sell these assets in order to restore the platform's neutrality and healthy competition. The second draft bill makes it illegal, in the majority of cases, for the company to give preference to its own products within its platform. It also provides, in case of violations, a heavy penalty of 30% of the national revenue of the company concerned. The third draft bill requires platforms to refrain from engaging in any mergers, unless it can be demonstrated that the acquired company does not compete with any product or service in the market where the platform operates. The fourth draft bill calls upon platforms to allow users to transfer their data, if they wish, elsewhere, even to the platform of a competing company. Finally, the fifth draft bill increases the obligations of the Department of Justice and the Federal Trade Commission to evaluate large companies in order to ensure that the mergers that are implemented are legal.

In China, instead, the Anti-Monopoly Guidelines for the Platform Economy have been published, clarifying how the Anti-Monopoly Law will be applied to potential anti-competitive practices of online platforms[17].

Regulatory reforms have also been implemented in Japan[18], where a new law for the regulation of digital platforms called the 'DP Act' came into force

[15] "Ending Platform Monopolies Act", "American Choice and Innovation Online Act", "Platform Competition and Opportunity Act", "Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act", "Merger Filing Fee Modernization Act". These five bills are joined by a sixth, the "State Antitrust Enforcement Venue Act" on jurisdiction. For a comment on these proposals, see Caitlyn Chin, 'Breaking Down the Arguments for and against U.S. Antitrust Legislation' (*Center for Strategic & International Studies*, 2 April 2022) <https://www.csis.org/analysis/breaking-down-arguments-and-against-us-antitrust-legislation> (accessed 23 September 2022).

[16] See Marina Rita Carbone, 'Big Tech, ecco il nuovo antitrust negli USA: le conseguenze e i prossimi passi' (Agenda Digitale, 15 December 2021) <https://www.agendadigitale.eu/mercati-digitali/big-tech-ecco-la-stretta-antitrust-negli-usa-le-conseguenze-e-i-prossimi-passi/> (accessed 23 September 2022); Leah Nylen, 'House Democrats about to uncork 5-pronged assault on tech' (*Politico*, 6 September 2021) <https://www.politico.com/news/2021/06/09/house-democrats-announce-tech-bills-492703> (accessed 23 September 2022).

[17] See Alexandr Svetlicinii, 'China to discipline online platforms with antitrust enforcement?' (*Kluwer Competition Law Blog*, 17 February 2021) <http://competitionlawblog.kluwercompetitionlaw.com/2021/02/17/china-to-discipline-online-platforms-with-antitrust-enforcement/> (accessed 23 September 2022); Karry Lai, 'PRIMER: China's new anti-monopoly rules for tech companies' (IFLR, 25 March 2021) <https://www.iflr.com/article/b1r3bt1z7g1771/primer-chinas-new-anti-monopoly-rules-for-tech-companies> (accessed 23 September 2022).

[18] See Toshio Dokei, Toshio Dokei, Arthur M. Mitchell, Hideo Nakajima and Takako Onoki, 'Recent Developments in Competition Law and Policy in the Digital Economy in Japan' (*Competition Policy International*, 12 March 2021) <https://www.competitionpolicyinternational.

on 1 February 2021. Moreover, since 2019, Japan has an *ad hoc* regulatory body called 'Digital Headquarters' concerned with competition of the digital market.

As for the United Kingdom, in April 2021, the creation of a new Digital Markets Unit ('DMU') was announced within the Competition and Markets Authority ('CMA'), which consists of a regulatory body designed to address competition and data management issues in digital markets[19].

By contrast, it has been decided in Australia to introduce an *ex ante* regulation, with indication of the prohibited anti-competitive conduct of Big Tech[20], in the wake of what was already done in the electricity and telecommunications fields.

The European Union, within the context of the digital reform outlined in the previous paragraph, has proposed the adoption of the DMA[21] in order to combat unfair practices implemented by the largest providers of digital core platform services – the gatekeepers. The DMA is also designed to address the problem of the lack of contestability in digital markets, which creates inefficiencies in terms of higher prices, lower quality, less choice and less innovation, to the detriment of European consumers[22].

The proposed regulation is characterized by two aspects: it is a sectorial regulation and it is an *ex ante* regulatory tool.

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com/recent-developments-in-competition-law-and-policy-in-the-digital-economy-in-japan/> (accessed 23 September 2022); Jeffrey J. Amato and Tomonori Maezawa, 'Japan: Japanese Legislature Passes Act To Regulate Big Tech Platforms' (*Mondaq*, 12 January 2021) <https://www.mondaq.com/antitrust-eu-competition-/1024456/japanese-legislature-passes-act-to-regulate-big-tech-platforms> (accessed 23 September 2022).

[19] See https://www.gov.uk/government/publications/non-statutory-digital-markets-unit-terms-of-reference; Barbara Calderini, 'La nuova Digital Markets Unit (DMU) del Regno Unito è un organismo di regolamentazione destinato ad affrontare le questioni relative alla concorrenza e alla gestione dei dati nei mercati digitali. Nasce dall'urgenza, sentita in tutto il mondo, di "governare" i giganti del web e il loro incontrollato potere' (*Agenda Digitale*, 22 April 2021) <https://www.agendadigitale.eu/mercati-digitali/big-tech-e-antitrust-in-uk-arriva-la-digital-markets-unit-ruolo-e-obiettivi/> (accessed 23 September 2022).

[20] See John Davidson, 'Big tech faces tough new laws under ACCC plan' (*Financial Review*, 7 September 2021) <https://www.afr.com/technology/big-tech-faces-tough-new-laws-under-accc-plan-20210905-p58p0r> (accessed 23 September 2022).

[21] From now on, in the present paper, all references to DMA's Articles and Recitals relate to the consolidated text approved by the European Parliament on 5 July 2022 (available here: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0270_EN.html#title2), unless stated otherwise.

[22] On the definition of "contestability", see Ginevra Bruzzone, 'Verso il Digital Markets Act: obiettivi, strumenti e architettura istituzionale' (2021) 2 Rivista della regolazione dei mercati 329–330.

In fact, given the aforementioned failures in the digital sector, and the inefficiency of existing legislation[23], the Commission perceived the need to introduce a specific set of rules in the form of a sectorial regulation[24] that applies only to the digital sector[25] and to a particular group of entities – the gatekeepers. The latter are providers of core platform services (that is, the digital services most used by business users and end-users) such as: (i) online intermediation services (including, for example, marketplaces, app stores, and online intermediation services in other sectors such as mobility, transport or energy); (ii) online search engines; (iii) social networking; (iv) video sharing platform services; (v) number-independent interpersonal electronic communication services; (vi) operating systems; (vii) cloud services; and (viii) advertising services[26]. The DMA focuses on these types of platforms because they are considered to be the services 'where the identified problems are most evident and prominent and where the presence of a limited number of large online platforms that serve as gateways for business users and end users has led or is likely to lead to weak contestability of these services and of the markets in which these intervene'[27]. The fact that a digital service qualifies as a core platform service does not mean that issues of contestability and unfair practices arise in relation to every provider of these core platform services. Rather, these concerns appear to be particularly strong when the core platform service is operated by a gatekeeper. Providers of core platform services can be deemed to be gatekeepers[28] if they: (i) have a significant impact on the internal

[23] See the DMA explanatory memorandum, p. 1–2. See also Recital No 13 DMA.

[24] For an assessment on the type of regulation the DMA can be considered to be, see Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act', (16 December 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978625> (accessed 23 September 2022).

[25] The existence of a fully-fledged "digital sector" is debated. On this point, see Akman (n 24) 18, who affirms that: "the DMA differs substantially from traditional modes of ex ante regulation, for the following reasons. First, the DMA does not apply to a particular "sector" of the economy despite the suggestions in the legislative proposal to the contrary. Rather, the DMA applies to a particular group of entities whose commonality that brings them within the scope of the regulation is found not in the "sector" in which they operate, but in their size and economic importance (i.e. the characteristics that qualify them as "gatekeepers"). Although the "core platform service" providers that fall within the scope of the DMA are all providers of digital services, it is not possible to think of them as operating in the same "sector" of the economy: "digital" is not a distinct sector of the economy".

[26] Based on the 22 November 2021 agreement reached at IMCO, browsers, virtual assistants and smart TVs should also be included.

[27] DMA explanatory memorandum, p. 2.

[28] Note that Article 3 of the original Commission proposal reads: "A provider of core platform services shall be designated as gatekeeper if […]" whereas the text approved by IMCO reads "*An undertaking* (emphasis added) shall be designated as gatekeeper if […]".

market; (ii) provide a core platform service which is an important gateway for business users to reach end-users; and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations[29]. Such gatekeeper status can be determined either with reference to clearly circumscribed and appropriate quantitative metrics, which can serve as rebuttable presumptions to determine the status of a specific provider as a gatekeeper, or be based on a case-by-case qualitative assessment by means of a market investigation[30].

In addition, the proposed DMA is an *ex ante* regulatory tool as it contains a list of specific competition obligations for gatekeepers that aim at preventing unfair practices or practices that limit market contestability[31]. In particular, Articles 5–7 of the DMA contain several types of provisions that can be divided into two groups: Article 5 sets out obligations that are considered to be self-executing, in that their fulfilment does not require any further specific detail, while Articles 6 and 7 set out some obligations whose implementation may require a specification that is obtained through an interaction with the Commission[32]. In this regard, Article 8(2) DMA clarifies that the Commission may adopt an implementing act, specifying the measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations laid down in Articles 6 and 7. Moreover, according to Article 8(3) DMA, a gatekeeper may request the Commission to engage in a process to determine whether the measures that the said gatekeeper intends to implement, or has already implemented, to ensure compliance with Articles 6 and 7 are

[29] Article 3 DMA. In this regard, it should be noted that the text of the provisional political agreement reached on March 24, 2022 stipulates that, in order to be considered gatekeepers, in addition to being present in at least three EU countries, to having at least 45 million monthly active end users established or located in the Union and at least 10.000 yearly active business users established in the Union in the last financial year, it will also be necessary to hold a market capitalisation of 75 billion (and not 65 billion as originally proposed by the Commission). Therefore, in addition to GAFAM, other companies such as Booking or Zalando could also be considered gatekeepers.

[30] For a comment on this aspect, see Akman (n 24) 6–8.

[31] On the choice of the type of regulation, see Pierre Larouche and Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) Journal of European Competition Law & Practice 543–548; Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12(7) Journal of European Competition Law & Practice 566–569. For an analysis of the single provisions of the DMA, see Pietro Manzini, 'Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act' (*AISDUE*, 25 February 2021) <https://www.aisdue.eu/pietro-manzini-equita-e-contendibilita-nei-mercati-digitali-la-proposta-di-digital-market-act/>.

[32] Article 8 DMA. In the first version of the DMA text, it was written that the obligations set out in Article 6 were "susceptible of being further specified" and this phrase was commented by Akman (n 24) 12–13, who defined it "not immediately clear". The phrase has then been modified and the consolidated text of the DMA now reads "obligations for gatekeepers susceptible of being further specified *under Article 8*" (emphasis added).

effective in achieving the objective of the relevant obligation in the specific circumstances of this gatekeeper. The Commission has discretion in deciding whether to engage in such a process, respecting the principles of equal treatment, proportionality and good administration.

Despite being defined as an *ex ante* regulatory tool, it is possible to affirm that this proposed sectorial regulation appears as a hybrid between the traditional forms of economic regulation and competition law, as it imposes on market actors, at the same time, positive obligations requiring them to perform certain actions, and negative obligations prohibiting them to undertake certain actions[33]. Indeed, on the one hand, the proposed regulation seems a codification of a number of concerns noted by competition authorities[34], and on the other hand, it provides for a number of *ex ante* duties without requiring an assessment of the object or effect of the underlying practices.

Finally, it should be noted that alongside the DMA proposal made at the European level, one Member State has independently taken an initiative to regulate Big Tech. In January 2021, the German parliament approved the X amendment to the *Gesetz gegen Wettbewerbsbeschränkungen* (hereinafter: GWB, German Competition Act) introducing a new section to the GWB, namely section 19(a)[35]. Under the latter, the *Bundeskartellamt* (German NCA) can prohibit various conducts by companies of 'key importance in different markets' (that is, digital conglomerates) without the need to prove

[33] On the advantages and disadvantages of these two kind of approaches, see Akman (n 24) 16–18.

[34] It is no mystery that some of the obligations set out in the DMA are inspired by cases that the European competition authorities have dealt with, such as: (i) the *Facebook* case (Bundeskartellamt, *Facebook*, B6-22/16, 6 February 2019, currently on appeal, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5) inspiring Article 5(2) DMA; (ii) the *Amazon* case (Case COMP/AT.40153) Commission Decision C(2017) 2876 final [2017] inspiring Article 5(3) DMA; (iii) the *Apple App Store* case (Case COMP/AT.40437), 16 June 2020 (Opening of Proceedings), 20 April 2021 (Statement of Objections) see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40437) inspiring Article 5(4) DMA; (iv) the *Google AdTech* case (Cases COMP/AT. 40670, Opening of Proceedings), see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40670) inspiring Article 5(10) DMA; (v) the *Amazon Marketplace case* (Case COMP/AT.40462) 17 July 2019 (Opening of Proceedings), 10 November 2020 (Statement of Objections) see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40462) inspiring Article 6(2) DMA; (vi) the Apple *App Store case* (Case COMP/AT.40716) 16 June 2020 (Opening of Proceedings), see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40716) inspiring Article 6(12) DMA; etc.

[35] On this point, see Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12(7) Journal of European Competition Law & Practice 513–528.

a violation of competition law[36]. Section 19(a) of the GWB shares a number of common features with the Commission's DMA and UK DMU proposals[37]. However, it should be stressed that the Commission has pointed out that regulatory fragmentation across Member States could seriously undermine the functioning of the single market in digital services and of the digital markets in general. Hence, the Commission has perceived the need to put in place an EU-level harmonization of the topic, given the inherently cross-border nature of the core platform services provided by gatekeepers. It is for this reason that with the DMA it was decided to opt for an EU Regulation, an act that is directly applicable in the Member States, and for Article 114 TFEU as its legal basis.[38]. Despite these choices, fragmentation could possibly occur since national authorities will continue to apply existing laws to behaviours in digital markets. In fact, according to Article 1(6) DMA, this regulation will be without prejudice to the application of Articles 101 and 102 TFEU; of national competition rules prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices, abuses of a dominant positions as well as other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers, or amount to the imposition of further obligations on gatekeepers; and of the EU Merger Regulation 139/2004[39] and national rules concerning merger control. This means that the DMA is intended to minimise the detrimental structural effects of unfair practices *ex ante*, without limiting the ability to intervene *ex post* under EU and national competition rules.

IV. The DMA and the EU Economic Constitutionalism

What prompted the Union to take action against Big Tech and to propose the adoption of the DMA?

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[36] An English version of the X Amendment can be found at the following link: https://www.d-kart.de/ wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf.

[37] For a comparison of the three regulatory proposals, *cf*. Marco Botta, 'Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila' (2021) 12(7) Journal of European Competition Law & Practice 500–512.

[38] For a comment on the choice of the legal basis, see Alfonso Lamadrid de Pablo and Nieves Bayón Fernández, 'Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It' (2021) 12(7) Journal of European Competition Law & Practice 576–589; Ginevra Bruzzone, 'Verso il Digital Markets Act: obiettivi, strumenti e architettura istituzionale' (2021) 2 Rivista della regolazione dei mercati 331.

[39] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24, p. 1–22.

In recent years, we are witnessing a real failure by Western constitutionalism to deal with Big Data economy. It is now well known that Big Tech uses technology to acquire more and more data that leave the property of those who generate them and enter that of those who exploit them. These data transform the human being into a product and even manage to induce them to consume and to modify their behaviour, eroding their free will. Hence, there is a need to carefully consider privacy implications and to regulate Big Tech's behaviours, in order to safeguard our democratic and personal structure. The European Union, to address the first of these two needs, has adopted the GDPR Regulation[40]; the adoption of the DMA addresses the second.

European values and the protection of fundamental rights are at the heart of the DMA proposal. In fact, in the writer's opinion, an organic reading of the text leads to identify two objectives, other than the explicit ones of fairness and contestability, underlying the new rules in the DMA, which intend to pursue: on the one hand, that of protecting consumers and their fundamental rights online more effectively, especially their freedom of choice; on the other, that of making the digital markets fairer and more open for all and, therefore, of ensuring the freedom to conduct business referred to in Article 16 of the Charter of Fundamental Rights of the European Union[41].

In order to achieve these objectives, the Commission has first of all drafted a proposal for an *ex ante* regulation. The choice of such an instrument, rather than a competition enforcement tool, is in itself indicative of the fact that the EU wishes to ensure, irrespective of the commission of anti-competitive offences, the existence of a fair and contestable environment in which the fundamental rights of all companies and consumers are respected. A competition enforcement tool, by definition, would have postponed the moment of protection to a later stage compared to that of the commission of the offence by a Big Tech, so that the objectives it could have pursued would have been only that of re-establishing the competitiveness of the market by ordering the interruption of the unlawful practice, if necessary, that of punishing the infringer by imposing a sanction, and possibly that of compensating the damage, in a more markedly economic perspective than of protection of the right to participate in a highly competitive market.

Furthermore, in order to achieve the first of the two above-mentioned objectives, namely to protect consumers and their freedom of choice, an

[40] 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), OJ 2016 L 119, p. 1–88.

[41] On this point, see the DMA explanatory memorandum, p. 11.

attempt has been made in the DMA to adapt certain antitrust items to the digital environment and needs[42].

For example, Article 5(2) DMA provides for a prohibition for gatekeepers to (a) process, for the purpose of providing online advertising services, personal data of end-users using services of third parties that make use of core platform services of the gatekeeper; (b) combine personal data from the relevant core platform service with personal data from any further core platform services, or from any other services provided by the gatekeeper, or with personal data from third-party services; (c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice-versa; and (d) sign-in end-users to other services of the gatekeeper in order to combine personal data, unless the end-user has been presented with the specific choice and provided consent in the sense of the GDPR. It is clear that this provision tends to limit the exploitation of consumers and to give them real choice. In addition, the envisaged opt-in system contributes to limiting deep profiling by indirectly restraining the exploitation of consumers for targeted advertising and personalised pricing.

Furthermore, Article 5(8) DMA prohibits gatekeepers from tying one core platform service to another, so that it will not be possible to impose on business users or end-users the subscription or registration to any further core platform service as a condition for being able to use, access or register to another of the gatekeeper's core platform services. For instance, a provider of an app store cannot make access to the service conditional on the use of its search engine. Again, this provision serves to promote freedom of choice.

Article 6(3) DMA serves the same purpose, in that it obliges the gatekeeper to allow and technically enable end-users to easily uninstall any pre-installed software applications on the operating system of the gatekeeper. They must be able to do so without prejudice to the possibility for a gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device, and which cannot technically be offered on a standalone basis by third-parties.

Finally, Article 6(6) DMA also guarantees the freedom of choice by requiring gatekeepers to remove technical restrictions that prevent an end-user from switching between, and subscribing to software services and applications other than those originally authorised by the platform. For example, a user of

[42] On the role of competition law in digital markets, see Pablo Ibáñez Colomo, 'What can competition law achieve in digital markets? An analysis of the reforms proposed' (6 January 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723188> (accessed 23 September 2022); Antonio Manganelli, 'Il regolamento Eu per i mercati digitali: ratio, criticità e prospettive di evoluzione' (2021) 3 Mercato Concorrenza Regole 473–500.

an operating system must be free to switch to other word processors (such as Microsoft Word) if the operating system allows the use of word processors.

On the other hand, in order to achieve the second of the above-mentioned objectives, that is to ensure the freedom to conduct business, as referred to in Article 16 of the Charter of Fundamental Rights of the European Union, the DMA contains several provisions.

First of all, even in this case, Article 5(2) DMA that prohibits the combination of personal data, comes into play, since another objective of this provision is to improve the conditions of contestability for new companies (so-called 'new comers') in a given core platform service and in adjacent markets.

Moreover, Article 5(3) DMA provides that gatekeepers must allow business users to offer the same products or services to end-users, through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper. By limiting the gatekeepers' ability to impose restrictions on business users, this provision ensures the latter's freedom to conduct business, as it facilitates the entry conditions to other online intermediation services competing with a gatekeeper's distribution platforms (for example, app stores, intermediation platforms and operating systems).

Furthermore, Article 5(4) DMA requires gatekeepers to allow business users, free of charge, to communicate and promote offers, including under different conditions, to end-users acquired via its core platform service, or through other channels, and to conclude contracts with these end-users regardless of whether they use the core platform services of the gatekeeper or not for that purpose. This practice is known as 'side loading' and is often relevant in the context of app stores. The provision also adds that gatekeepers must allow the use on their platform of services purchased outside it by end users. This clarification is crucial because otherwise end users would never buy services outside the platform. Thus, this provision protects the freedom to conduct business in that it allows business users to use different channels to sell their services and, at the same time, it also has the effect of giving consumers more choice when shopping online.

From the analysis of the examples given above, it is clear that the provisions of the DMA are remarkably aimed at protecting consumers and businesses' fundamental rights and not only at achieving economic growth. This approach of the institutions is very different from the previous one, which was more concerned with avoiding real or presumed negative effects on innovation and investment than with the risk of long-term impacts on the consumer's freedom of choice and the newcomers' freedom to conduct business. Probably

the watershed that triggered a strong need to re-examine the effectiveness of the existing antitrust toolkit and to consider possible *ex ante* measures such as the DMA, was the 2016 Cambridge Analytica case[43], despite the fact that it had a more data protection-related implication, an essentially political relevance and was limited to only one platform (Facebook). The case, as is well known, concerned the fraudulent collection of personal data of millions of accounts, which were then used for political propaganda and targeted marketing campaigns. It immediately raised concerns more about privacy and freedom of citizens to form an undistorted opinion at election time than from an antitrust perspective. Subsequently, however, the fact that a company had been able to exploit data in that way and to have a major influence on political dynamics made people think, more generally, about the big data economy, its implications in various fields, including that of competition between undertakings, and about the circumstances under which regulatory intervention was possible, preferable or advisable. This reflection gave rise to main regulatory proposals and to the new approach of the institutions, more focused on the protection of fundamental rights in order to respond to the digital revolution and to counter the power assumed by technological platforms.

In fact, in the writer's opinion, with the DMA there seems to be a reaffirmation of the fundamentals of the Ordoliberal doctrine[44], which had been quite abandoned following the 2008 economic crisis but whose principles (such as freedom of trade, competitiveness, prohibition of State aid, balanced budgets) have had a great influence on the European economic law[45]. This doctrine is opposed to the classical *laissez-faire* view and is based on the assumption that it is not possible to develop a good natural economic order through the free market alone. In fact, the experience with *laissez-faire policies* had shown that market economy left to its own devices eventually lead to the concentration

[43] For an in-depth look at this case, see Emanuele di Menietti, 'Il caso Cambridge Analytica, spiegato bene' (*Il Post*, 19 March 2018) <https://www.ilpost.it/2018/03/19/facebook-cambridge-analytica/> (accessed 23 September 2022).

[44] For an in-depth study of Ordoliberal doctrine, see Malte Dold and Tim Krieger (eds), *Ordoliberalism and European Economic Policy* (Routledge 2021); Josef Hien and Christian Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Hart Publishing 2017).

[45] See Lorenzo F. Pace, 'Il principio dell'indipendenza della banca centrale e la stabilità dei prezzi come obiettivo della politica monetaria: quale influenza dell'ordoliberalismo in Germania e nell'Unione Europea?' (2019) 72(288) Moneta e Credito 349–364. Consider also the influence exerted by the Freiburg Ordoliberal School and, in particular, by Prof. Ernst-Joachim Mestmäcker, special advisor to the Commission from 1960 to 1970, on the interpretation of the principles of Articles 81 and 82 TEC. On this point, see Lorenzo F. Pace, *I fondamenti del diritto antitrust europeo* (Milan 2005) 100–102.

of economic power in private hands[46]. This is the reason why, according to Ordoliberals, markets have to regarded as not self-correcting but rather as "fragile creatures" to be preserved by vigorous antitrust enforcement and, in the case of natural monopolies, even by regulation[47]. The stigma of the Ordoliberal doctrine can be summarised as follows: to regulate the market in order to make it effectively free. And this is exactly what the DMA does: it regulates the behaviours that Big Tech must assume in order to make the digital market free, free for firms to actually exercise their freedom to conduct business, and free for consumers to choose whether to share their personal data, whether to subscribe to a service, which software applications to use, etc.. Just as in the Ordoliberalism the state intervenes only to make the market less anarchic and to avoid the danger that, without any regulation, monopolies or oligopolies might emerge, so the DMA intervenes to establish rules to create a fair and contestable market and to combat the Big Tech's monopolies. In this set-up, it is clear that a key role lies with the companies themselves and their proactive role. Indeed, in order to avoid problems due to information asymmetries, the burden is shifted over companies, which have easier access to information concerning their own structures and market position and which can proactively adapt their conducts to comply with the rules set out in the DMA. This approach is also in line with the Court of Justice of the European Union's case-law, in particular with the *AstraZeneca*[48] and *Deutsche Telekom*[49] judgments in which the Court relied upon the "special responsibility" argument to justify dominant firms' duty to proactively self-assess their conduct, even beyond the requirements of sector regulation[50].

In conclusion, thanks to the DMA, the EU Economic constitutionalism regains strength in comparison to the last years and a greater freedom on the market is ensured by virtue of an approach that seems to be inspired by the Ordoliberal doctrine, with the effect that the protection of consumers and companies' fundamental rights return in the spotlight, exceeding the goal of the economic growth.

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[46] See Walter Eucken, 'Das Problem der wirtschaftlichen Macht", in Walter Eucken, *Unser Zeitalter der Mißerfolge. Fünf Vorträge zur Wirtschaftspolitik.* (1951, Tübingen) 1–15; Amadeo Arena, 'The relationship between Antitrust and Regulation in the US and the EU: Can legal tradition account for the differences?' 2014 3(2) Cambridge Journal of International and Comparative Law 353.

[47] Walter Eucken, *Grundsatze der Wirtschaftpolitik* (7th edn,, UTB, Stuttgart, 2004) 297.

[48] Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc v. European Commission*, EU:C:2012:770.

[49] Case C-280/08 P, *Deutsche Telekom AG v. European Commission*, EU:C:2010:603.

[50] On this point, see Maarten Pieter Schinkel and Pierre LaRocuhe, 'Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act', in Roger D. Blair and D. Daniel Sokol (eds), The Oxford Handbook of International Antitrust Economics, (Oxford University Press, 2015), (2).

V. The DMA and the EU Competition Policy

It is worth asking the following questions: why is regulating the Big Tech's behaviour on the market important in order to promote effective competition in digital markets[51]? Why is a specific act necessary for this purpose?

To answer these questions, it is appropriate to start from two general assumptions. The first is that competition is a means, not a goal. The goal is to ensure the proper functioning of the economic activity and optimal conditions of consumer welfare, while competition is a necessary means where resources are limited and access to them must be guaranteed. In fact, Adam Smith said that competition is a race to conquer limited resources[52]. To regulate this race is the task of law, whichever sphere it relates to, wherever resources are limited, because, if they were not, there would be no race and, therefore, no need for law. This leads to the second assumption: competition requires rules. Ronald Coase, a British economist, wrote that "if there is anything approaching perfect competition, it normally requires a complex system of rules and regulations"[53] and this complex system of rules and regulations is called market. The market, therefore, is not a spontaneous formation but an institution whose form is given by regulatory discipline.

In the case under consideration in this paper, in the context of core platform services (such as online intermediation services, search engines, social networking services, video sharing platform services, interpersonal electronic communication services, operating systems, cloud services and advertising services), what have been defined as "resources" can be identified in the access points for business users to their customers and vice versa, and they appear to be effectively limited because few large digital platforms (i.e. Big Tech) own them. Therefore, a "race" to conquer these limited resources – or at least to have access to them – really exists and, therefore, there is a need for the law to regulate it. The law at issue is contained in the DMA. The latter will complement existing EU and national competition rules,[54] which are deemed insufficient to regulate the "race". In fact, "although Articles 101 and

[51] As stated in the DMA proposal, both in the Impact Assessment, p. 9 and at point 1.4.1. of the Legislative Financial Statement, the Commission's multiannual strategic objective targeted by the proposal is "to ensure the proper functioning of the internal market by promoting effective competition in digital markets, in particular a contestable and fair online platform environment".

[52] George J. Stigler, 'Perfect Competition, Historically Contemplated' (1957) 65(1) Journal of Political Economy 1.

[53] Ronald H. Coase, *Impresa, mercato e diritto* (Il Mulino 2006) 49.

[54] On this point, see Assimakis Komninos, 'The Digital Markets Act: How Does it Compare with Competition Law?' (14 June 2022) <https://ssrn.com/abstract=4136146?> .

102 TFEU apply to the conduct of gatekeepers, the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behaviour, and enforcement occurs *ex post* and requires an extensive investigation of often very complex facts on a case by case basis. Moreover, existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms"[55]. Thus, the DMA is intended to address unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules. However, the complementarities between the DMA and competition law raise many interesting issues (such as the one on the concurrent application of EU and/or national competition rules by national competition authorities and national courts[56]) that can only be discussed in the future. As for now, an important remark on the topic is that under the most recent case law of the Court of Justice[57], the principle of *ne bis in idem* has been found to be applicable between sectoral regulation and competition law enforcement, as long as the respective cases relate to the same facts. However, a limitation of that principle can be justified on the basis of Article 52(1) of the Charter of Fundamental Rights. In that case, an *ad hoc* assessment is required and the conditions for the justification are the following: (i) the duplication of proceedings must be acknowledged as a possibility in the law itself; (ii) there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; (iii) the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe, and (iv) the overall penalties imposed correspond to the seriousness of the offences committed[58].

These premises serve to lay the basis for an assessment on the need to adopt an act such as the DMA and on its quality and effectiveness. Indeed, some scholars – albeit in the context of overall positive considerations of the legislative proposal – have indirectly criticised it, either because the cases it regulates overlap with the provisions of Article 102 TFEU[59], or because

[55] Recital No 5 DMA.

[56] See Assimakis Komninos (n 54).

[57] Case C-117/20, *bpost SA v Autorité belge de la concurrence*, ECLI:EU:C:2022:202.

[58] *Ibidem*, paras 54–58. On this point, see also Recital No 86 DMA, which has now adopted the described test.

[59] Manzini (n 31); Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (22 February 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730#> 14–17.

it is incomplete[60], too complex, or badly structured[61]. In fact, these issues – which will not be discussed in this paper as they have already been extensively examined elsewhere – are quite evident. However, there are some arguments that lead to the conclusion that today competition in digital markets could greatly benefit from an act such as the DMA, even if it seems to need some adjustments.

As regards the need to adopt an act like the DMA, it should be noted that, given the peculiarities of the sector, there are three needs that must be addressed and to which the DMA seems to provide a fairly satisfactory response, although it does require some adjustments.

First of all, there is a need for an act that overcomes what have been perceived as the main weaknesses of the use of competition law in digital markets, namely the slowness with which antitrust cases proceed. In this respect, the merit of the legislative proposal lies in the fact that it consists in an *ex ante* regulation (as noted in the previous paragraphs), which allows to anticipate the protection at a time prior to the commission of the offences by the Big Tech.

At the same time, there is a need for an act that adapts to the changing reality of the online world and the DMA provides for the possibility for the Commission – either on its own initiative or following a justified request of at least three Member States[62] – to conduct investigations to identify new unfair practices or practices limiting market contestability[63]. Thus, in addition to the obligations already established in the text, the DMA provides for the possibility of updating and expanding the list of gatekeepers' obligations by advancing a proposal to amend the Regulation[64] or by adopting delegated acts[65]. This ensures that the DMA can keep pace with digital developments. There is, therefore, a certain foresight on the part of the European legislator in attempting to create a regulatory environment in which the power of the gatekeeper is fairly contained.

Finally, it is essential to regulate in a more systematic way the Big Tech's behaviour on the market, and thanks to the DMA, a good degree of systematic regulation can certainly be achieved. However, it is precisely for this purpose that some adjustments to the DMA text would be desirable since, as already noted by legal scholars, the list of obligations for gatekeepers contained

[60] Monti (n 59).

[61] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12(7) Journal of European Competition Law & Practice 540; Monti (n 59) 2–3.

[62] Article 41 DMA.

[63] Recital No 69, Articles 16 and 19 DMA.

[64] *Ibidem*.

[65] Recital No 78, Articles 12 and 49 DMA.

therein appears confusing, with numerous prescriptions that are "extremely heterogeneous and different from each other"[66]. In the writer's opinion, the existence of an *ad hoc* act on digital markets is undoubtedly a value in itself, but this act could be better structured, perhaps providing for a more rational subdivision of obligations, with an organisation into distinct groups on the basis of the objectives pursued, which should not simply be the generic ones of fairness and contestability that inspire the entire digital reform act, but should be more specific (for example, promoting access to data, facilitating consumers' choice, promoting transparency, etc.).

Turning to the issue of the quality and effectiveness of the DMA, it should first be noted that such an act creates at the same time greater legal certainty and greater deterrent effect for Big Tech. They know in advance what specific obligations they have to comply with, they have the possibility to communicate with the Commission to discuss the effectiveness of the measures they intend to implement in order to avoid infringements[67], they know that there is an institution (i.e. the Commission with its High-Level Group[68]) that is highly aware of the most common anti-competitive practices in digital markets, that is ready to act and that has at its disposal an *ad hoc* tool upon which to quickly base its action. On this latter point, it has to be noted that even national competition authorities could play a key role as according to Articles 37 and 38 DMA[69] those authorities shall cooperate with the Commission on any matter relating to the application of the Regulation and in monitoring *ex-post* compliance[70].

As regards the abovementioned deterrent effect of the DMA, it should be pointed out that it could even be strengthened by combining public enforcement with private enforcement. On this topic, actually, in the first version of the DMA's proposal there was a complete lack of provisions[71]. On

[66] Manzini (n 31) 33.

[67] Article 8(2) DMA.

[68] The high-level group provides the Commission with advice and expertise. See Article 40 DMA.

[69] Article 38 DMA is inspired by Article 11 of Regulation 1/2003, even though the system of cooperation that it introduces is not completely identical. In fact, it does not include a rule equivalent to Article 11(6) of that Regulation, so the opening of proceedings by the Commission to investigate a violation of the DMA rules does not relieve national authorities of their competence to apply EU or their national competition law.

[70] On this point, see Monti (n 59) 6; Christophe Carugati, 'The Role of National Authorities in the Digital Markets Act', (20 October 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3947037>.

[71] On this point, see Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' in Nicolas Charbit and Sebastien Gachot (eds) *Eleanor M. Fox Liber Amicorum, Antitrust Ambassador to the World* (Institute of Competition Law 2021).

the contrary, Articles 38 and 39 of the DMA's consolidated text provides for some rules that open and coordinate the system with private enforcement actions. However, in the writer's opinion, more could have been done in terms of introducing provisions facilitating actions for damages. It is clear that the damages suffered by victims of a breach of the DMA are certainly small compared to the revenues that Big Tech manages to obtain, so the danger of being exposed to actions for damages that can be more easily brought by customers, albeit numerous, would contribute only to a limited extent to discourage gatekeepers from behaving in a way that is incompatible with their obligations. However, it is undeniable that the introduction of such provisions would have various positive effects, also in terms of completeness of the system (as private enforcement would be a concrete option and complement to public enforcement) and protection of the individual. Moreover, it has to be taken into account that the DMA appears to be a particularly fertile ground for private enforcement. It is so, first of all, because while gatekeepers are best placed to internalise the obligations set out in the DMA and adapt their business practices in order to ensure compliance with them, their customers are best placed to verify whether there has been a failure to comply with those obligations[72]. Secondly, because it is up to the Commission to designate the gatekeepers, so anyone wishing to bring an action for damages would not be faced with the difficulty of having to define the relevant market and the dominant position. Furthermore, the obligations under Article 5 of the DMA are self-executing, so anyone who considers that they have not been complied with can appeal to the national courts. The obligations referred to in Article 6 and 7 of the DMA, instead, are susceptible to further specifications that the Commission indicates in a decision, which is the result of an *ex ante* agreement with the gatekeeper on the measures that the latter must implement. In the event of violation of such a decision, the latter could be precious for the proposition of an action for compensation of damages, since it will become a parameter of legality of the conduct of the gatekeeper and will facilitate, in this way, the proof of the commission of the unlawful act. Finally, it should be stressed that the provision within the DMA of rules facilitating the bringing of damages actions would be in line not only with various judgments of the Court of Justice of the European Union (such as *Francovich* or *Courage*[73]) but

[72] Monti (n 59) 12.

[73] Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, EU:C:1991:428, in which the Court made it clear that individuals may enforce before national courts the rights enshrined in Community rules and noted that the full effectiveness of Community rules and the full protection of the rights recognised by them would be jeopardised if individuals were unable to obtain compensation in the event of an infringement of Community rules attributable to a Member State. This same approach was later used in the judgment in

also with other acts of EU law providing for an enforcement in the hands of private actors acting as "private attorneys general" (i.e. a kind of prosecutor in US law). This is the case, for example, of the rules introduced by the so-called "Damages Directive"[74] in the context of antitrust enforcement, such as those relating to the binding nature of final decisions adopted by national competition authorities and review courts for the purposes of follow-on actions[75] or those relating to the disclosure of evidence[76].

Overall, since competition law has proved to be insufficient in addressing the challenges posed by digital markets, there is a concrete need to adopt the DMA to complement the system. The interaction between those two

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case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, EU:C:2001:465, para 27, in which the Court affirmed that: "Indeed, the existence of such a right [to compensation] strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.".

[74] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349, p. 1–19 (hereafter: Directive 2014/104/EU).

[75] *Ibidem*, Article 9. On this point, see ex multis, Mario Siragusa, 'L'effetto delle decisioni delle autorità nazionali della concorrenza nei giudizi per il risarcimento del danno: la proposta della commissione e il suo impatto nell'ordinamento italiano' 2014 Concorrenza e mercato 297–315; Renato Nazzini, 'The Binding effect of decisions by Competition Authorities in the European Union' 2015 2(2) Italian Antitrust Review; Bruno Nascimbene, 'La vincolatività del provvedimento di condanna dell'Autorità garante successivamente alla direttiva sul private enforcement (Direttiva 2014/104/UE',' (14 November 2016) <http://rivista.eurojus.it/wp-content/uploads/2017/01/Relazione-14.11.2016.pdf> (accessed 23 September 2022); Claudia Massa, 'The effects of decisions adopted by competition authorities in the framework of Directive 2014/104/EU: criticalities and future prospects' in Roberto Mastroianni and Amadeo Arena (eds), *60 years of EU competition law. Stocktaking and future prospects* (Editoriale Scientifica Naples 2017) 113–128.

[76] Directive 2014/104/UE, Articles from 5 to 8. On this point, see ex multis, Stefano Bastianon, 'La tutela dei privati e l'accesso alle informazioni riservate: recenti sviluppi' in Giuseppe Tesauro, *Concorrenza ed effettività della tutela giurisdizionale tra ordinamento dell'Unione europea e ordinamento italiano*, (Editoriale Scientifica Naples 2013); Caterina Fratea, *Il private enforcement del diritto della concorrenza dell'Unione europea – Profili europei, internazionalprivatistici e interni* (Edizioni Scientifiche Italiane 2015) 47–62; Cristina Lo Surdo, 'Programmi di leniency, accesso e divulgazione nel giudizio civile alla luce della Direttiva sul danno antitrust' (26 May 2015) <http://www.osservatorioantitrust.eu/it/programmi-di-leniency-accesso-e-divulgazione-nel-giudizio-civile-alla-luce-della-recente-direttiva-sul-danno-antitrust/> (accessed 23 September 2022); Michele Trimarchi, 'La divulgazione delle prove incluse nel fascicolo di un'autorità garante della concorrenza nella direttiva sull'antitrust private enforcement (direttiva 2014/104/UE)' 2015 24 AIDA 204–220; Claudia Massa, 'The disclosure of leniency Statements and other Evidence under directive 2014/104/EU: an Undue Prominence of Public Enforcement?' 2018 2(1) Market and Competition Law Review 149–169.

instruments – competition law and DMA – may pose some problems even if, as stated above, there are rules in the DMA's consolidated text that try to regulate this coexistence. Anyway, it seems that the DMA has the right qualities and a good degree of effectiveness to respond to the peculiarities of the digital sector.

VI. Final remarks

Several states in different continents are currently grappling with digital reforms. What all of these reforms have in common is the focus on one of the most complex issues to be faced nowadays: the Big Tech's enormous market power and their anti-competitive behaviours. Various instruments have been used to restore fairness and contestability to digital markets: in some legal orders, legislative reforms have been envisaged (e.g. in the US, China and Germany), in others *ad hoc* regulatory bodies have been set up (e.g. in Japan and the UK), and yet in others the introduction of instruments for *ex ante* regulation of the obligations to which Big Tech must be subject has been opted for (e.g. in the EU and Australia).

The EU legislator has proposed the adoption of a regulation, the DMA, containing harmonised rules defining certain obligations to prevent some gatekeepers' unfair practices and providing for an enforcement mechanism based on market investigations. The proposed Regulation is characterised by being a sectoral regulation (as it applies only to the digital sector and to a particular group of entities, the gatekeepers, i.e. providers of core platform services) and is presented as an *ex ante* regulatory tool, imposing obligations that Big Tech must comply with, without requiring an assessment of the object or effect of the underlying practices.

An organic reading of the DMA leads to identify two main objectives of the DMA, other than the explicit ones of fairness and contestability: that of more effectively protecting consumers and their fundamental rights online, especially their freedom of choice, and that of making digital markets fairer and more open for all and, therefore, of ensuring the freedom to conduct business referred to in Article 16 of the Charter of Fundamental Rights of the European Union. The attention to the protection of these fundamental rights within the DMA emerges from numerous provisions: on the one hand, there are some provisions which ensure that consumers are not exploited, that their data are not profiled, that they are not subject to abusive tying practices between one service of the core platform and another, that they are given the possibility to choose which software applications to use, etc.;

on the other hand, there are other provisions aimed at facilitating the entry of newcomers into a given core platform service or adjacent markets or into an online intermediation service competing with the distribution platforms of a gatekeeper, at hindering practices such as the side loading, etc. Thus, it is possible to affirm that the approach of the European legislator in the DMA seems to be inspired by the principles of the Ordoliberal doctrine, whose stigma is that the market should be regulated in order to make it effectively free. In fact, this is precisely the task of the DMA, namely that of regulating the behaviour that Big Tech must assume in order to make the digital market free, both for companies and consumers.

As far as the relationship between the DMA and competition law, they will complement each other since the DMA is intended to address unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules. However, the complementarities between the DMA and competition law raise questions that can only be discussed in the future. For the time being, the only certainty on the topic is that the Court of Justice affirmed that the principle of *ne bis in idem* is applicable between sectoral regulation and competition law enforcement, as long as the respective cases relate to the same facts, and a limitation of that principle can be justified on the basis of Article 52(1) of the Charter of Fundamental Rights.

In any case, the DMA seems to be promising in addressing the main weaknesses in the use of competition law in digital markets (i.e. the slowness with which antitrust cases proceed), by taking the form of an *ex ante* regulatory tool, in adapting to the changing reality of the online world, by containing provisions that allow the Commission to identify new unfair practices, and in regulating in a more systematic way the Big Tech's behaviour on the market, although a greater rationality in the categorisation of the obligations provided for would be desirable. Moreover, also from the point of view of the effectiveness of competition in digital markets, the DMA has a major relevance, mainly because it tries to create a greater legal certainty (by introducing a specific legal framework, knowable in advance and ensuring the possibility of confrontation with the Commission) and a greater deterrent effect for Big Tech. In relation to this latter aspect, it has been pointed out in this paper that a greater deterrence and, consequently, the maintenance of a more effective competition in the EU could be achieved by combining public enforcement with private enforcement. Articles 38 and 39 of the DMA's consolidated text provides for some rules on this topic but more could have been done. After all, the DMA is perfectly compatible with such a combined system, as its features and the tools it introduces already make it prone to facilitating damages actions.

Overall, the DMA allows the EU Economic constitutionalism to regain strength compared to recent years, as it ensures a more effective protection of fundamental rights and greater freedom on the market, by virtue of an approach that seems to be inspired by the Ordoliberal doctrine and that no longer has the economic growth as its sole objective. At the same time, the promotion of competition in digital markets is strengthened, as the DMA seems to have the right characteristics to overcome the inefficiencies of competition law in this field, although the relationship between these two instruments might be difficult. Finally, the DMA ensures legal certainty and a good degree of deterrent effect, even though to this end some changes to the text would be recommended, for example with regard to a more rational reorganisation of the obligations laid down and to the introduction of more specific rules to facilitate the bringing of private actions for damages.

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