**Vilnius University Faculty of law**

Adriano Capasso,
II study year, International and European Law Programme Student

**Master's Thesis**

# Digital Markets Act – Challenges and opportunities for European Competition law and policy

# Skaitmeninių rinkų aktas - iššūkiai ir galimybės Europos konkurencijos teisei ir politikai

Supervisor: assoc. prof. dr. Lauras Butkevicius

Reviewer: prof. dr. Sarunas Keserauskas

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“Non è nelle stelle che è conservato
il nostro destino,
ma in noi stessi.
Uomini forti, destini forti.
Uomini deboli, destini deboli.
Non c’è altra strada!”

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# Abstract and Keywords

Digital platforms have achieved prominent positions in the economy and in daily life, becoming indispensable intermediaries for interactions and exchanges between individuals. In this capacity, they not only provide the infrastructure for interactions, but also act as regulators of that space, assuming the role of "gatekeeper."

In this context, awareness of the need for innovative regulatory intervention in digital markets to regulate the figures of "gatekeepers" is widespread.

The Digital Markets Act (DMA) is the new European regulation on digital markets, gaining approval by the EU Parliament on 5 July 2022, in parallel with the Digital Services Act (DSA), a regulation dealing with digital services. Together, these two acts constitute the Digital Services Package.

In light of what are the problems related to the gatekeeper role of some dominant digital platforms, this paper aims to identify the limitations and potential of the Digital Markets Act.



**Keywords:** digital platforms, gatekeepers, regulation, digital markets act, European competition law.



Skaitmeninės platformos užėmė svarbią vietą ekonomikoje ir kasdieniame gyvenime, tapdamos nepakeičiamais tarpininkais asmenų tarpusavio sąveikai ir mainams. Tokiu būdu jos ne tik sukuria sąveikos infrastruktūrą, bet ir veikia kaip šios erdvės reguliatoriai, prisiimdami "sargų" vaidmenį.

Šiomis aplinkybėmis plačiai suvokiama, kad skaitmeninėse rinkose reikia inovatyvios reguliavimo intervencijos, kuri reguliuotų "sargų" figūras.

Skaitmeninių rinkų aktas (DMA) - tai naujas Europos reglamentas dėl skaitmeninių rinkų, kurį ES Parlamentas patvirtino 2022 m. liepos 5 d., kartu su Skaitmeninių paslaugų aktu (DSA), reglamentu, susijusiu su skaitmeninėmis paslaugomis. Šie du teisės aktai kartu sudaro skaitmeninių paslaugų rinkinį.

Atsižvelgiant į tai, kokios yra problemos, susijusios su kai kurių dominuojančių skaitmeninių platformų sargo vaidmeniu, šiame straipsnyje siekiama nustatyti Skaitmeninių rinkų akto apribojimus ir galimybes.



**Pagrindiniai žodžiai:** skaitmeninės platformos, sargai, reguliavimas, Skaitmeninių rinkų įstatymas, Europos konkurencijos teisė.

# Introduction

This paper, entitled " Digital markets act - challenges and opportunities for European competition law and policy," while focusing more on challenges rather than opportunities, is based on the research of digital platforms and their functioning. In fact, starting precisely from their definition, the following thesis seeks to understand the difficulties, but especially the challenges related to the application of the DMA and the related differences provided by the EU antitrust framework.

In recent years, the figure of the gatekeeper, responsible for controlling access to online resources and marketplaces, has gained crucial importance. Currently, many digital platforms have become privileged meeting places and essential marketplaces. However, contrary to what is desired, these platform-owning companies are replacing regulators, using technology to shape online conditions and rules. The next section will examine some common structural and practical features of digital platforms, focusing primarily on a theoretical perspective. Then, through an analysis of the Digital Markets Act (DMA), a proposed European regulation, the ways in which some platforms exploit their dominance to impose conditions and rules will be explored. The literature review will highlight how approaching digital markets requires an unconventional perspective, considering network effects, economies of scale, the key role of data and algorithms, multihoming and other issues. Despite the benefits of technology, of concern is the presence of a few large corporations that control most of the value online, threatening competitiveness.

Market forces appear not to ensure a healthy competitive environment, as digital platforms preclude the application of traditional legal tools such as antitrust. Therefore, government intervention is needed to address the problems and potential harms. This thesis work focuses on legislative responses, specifically the European Digital Markets Act, unveiled in December 2020.

Without going into the details of the specific objectives of the DMA, it is important to note that this regulatory instrument proposes preventive regulation to ensure competition and fairness in digital markets by targeting unfair practices of dominant platforms. The European Commission assumes strong regulatory and inspection power to ensure regulatory consistency in the internal market and act promptly and effectively.

In light of what are the problems related to the gatekeeper role of some dominant digital platforms, this paper aims to identify the limitations and potential of the Digital Markets Act by trying to answer the question: Can the DMA, as a regulatory instrument of an ex-

ante nature, be the most effective method of countering the problems generated by digital platforms, enabling, above all, a strengthening of competition law?

# Chapter I - The market dominance of digital platforms in the global digital environment

## 1.1 Digital Platforms: understanding structures and mechanism in the digital economy landscape

To fully understand DMA and its concrete application, it is first necessary to understand what digital platforms are and how they operate. In the modern era, there are many companies that have one of the highest market capitalizations in the world. Among the most famous are Amazon, Microsoft, Apple, Google, X, Facebook and Alibaba. These platforms are the most famous and have in common that they represent the leaders in the platform industry. From this premise, one has to understand how these companies, in just a few years, have managed to achieve a dominant position in the market.

Thus, starting precisely from these considerations, for the purposes of understanding, it is necessary to analyze their structure and the mechanisms operating within them. Above all, it is necessary to ask how it is possible that the aforementioned digital platforms have become established within the economy and societies, among other things assuming a dominant role.

As we shall see later, the unique characteristics of these platforms have led to changes in traditional models of economic competition. The academic literature has conducted numerous studies on the characteristics and practices that have allowed these companies to emerge, but due to the complexity of these topics and their topicality, there is still no unambiguous and definitive picture. The main challenge is to move away from traditional economic, microeconomic and socio-cultural theories, which are constantly challenged by today's rapidly changing scenarios.

## 1.2 Rise of digital platforms in the modern economy

Nowadays, the term 'platform' has become increasingly common; however, different meanings are attributed to this term. The subject of this analysis is the digital platform.

The latter are major players in today's modern economy and society.

Before going into the details of platforms, however, it is good to provide a definition: "A platform is an activity based on the activation of value-creating interactions between external producers and consumers. The platform provides an open and participatory infrastructure/architecture for these interactions and defines their governance conditions. The purpose of the platform is to match users and facilitate the exchange of goods, services or social currency, thereby enabling the creation of value for all participants' [1]. This definition is based on what is its main characteristic, namely the interaction between multiple individuals through the use of an intermediary figure, namely the platform.

Within this sector, however, interaction for the user can have various purposes: economic and social.

The European Commission's definition is also based on the same idea, where in fact 'Online platforms can be described as software-based facilities offering two-or even multi-sided markets where providers and users of content, goods and services can meet'. Thus, the Commission emphasizes the economic aspect of platforms and for this reason has long sought ways to protect users and thus consumers.

Digital platforms are many and offer heterogeneous services and products (social network, video streaming, booking, marketplace, search engine, etc.). It is also clear that platforms such as Google, Facebook, Amazon, Airbnb, etc. are technically structured differently and rely on different business models. In this regard, Schrepel[2] (2021), writes that in common jargon the term 'platform' is misused to label entities that actually differ greatly from one another. This leads to a reductive representation of reality and instead, the concept of platform needs to be deepened and separated from that of aggregators. While platforms represent foundations on which to 'build' components, software and applications (think of the operating systems of Apple, Microsoft, Google, etc.), aggregators, on the other hand, have the function of collecting large amounts of information (websites, products, films, user profiles, etc.) and offering services to users (think of TripAdvisor, Facebook, Spotify, etc.).

This separation is indispensable in order not only to understand the technical differences and to approach the different business models with more awareness, but also, from a legal point of view, to intervene in different ways in different cases. Many authors[3] in a broader perspective, identify four different types of platform models: exchanges, transaction

[1] Choudary P., Van Alstyne M., Parker G., 2016. *Platform Revolution: How networked markets are transforming the economy and how to make them work for you.* WW Norton & Company.

[2] Schrepel T., 2021. *Platforms or aggregators: implications for digital antitrust law.* Journal of European competition Law & Practice.

[3] Fijneman R., Kuperus K., Pasman J., 2020. *Unlocking the value of the platform economy.* Dutch transformation forum. KPMG NV 2019.

systems, advertising-supported media and hardware/software standards. Exchange platforms (digital exchanges) enable producers and providers of services and products to meet consumers, examples are eBay or Airbnb. Digital transaction systems, on the other hand, act as intermediaries between two parties to facilitate payments or other financial transactions, e.g., PayPal or Apple Pay. As for advertising-supported media, these are platforms, such as social networks or websites that provide advertising inserts and offer consumers a range of media content at a very low price or free of charge as their activity is subsidised by advertisers who pay to reach the target audience.

Finally, there are a type of platforms (hardware or software) that form a base on which manufacturers can design and create applications, content and programmes that can be used by end consumers, via the base platform; examples are game consoles or operating systems.

### 1.3 The Impact of digital platforms on competition: How the practice of lock-in influences market strategies

What has been discussed so far refers to the substantive characteristics of platforms. However, before continuing with the analysis, attention must be paid to the typical characteristics of platforms and understanding why they place themselves in a dominant position, becoming the market themselves.

It is important to refer to one of the most important practices of platforms, lock-in.

The goal of a platform is to retain as many users as possible and according[4] to the literature, this practice can take place in two ways: coercive lock-in and value-driven lock-in. The first practice involves the use of direct costs so that users do not migrate to another platform. The second, on the other hand, the preferred one, involves the development of a platform with more functions, hence value, than another.

An example of this can be found in Amazon's practice: for a seller to give up selling his products on the e-marketplace would mean not being able to address his offer to many potential buyers and this would lead him to lose significant earnings.

So, in conclusion, the practice of lock-in allows the company providing the digital service to have as loyal a user as possible and in doing so obtains such a strong position that it is difficult to attack.

[4] Tiwana A., 2013. *Platform ecosystems: Aligning architecture, governance, and strategy.* Newnes.

### 1.4 The governance of digital platforms involves gatekeepers, profiling, and its impact on consumers, competition and innovation

Platform governance is the set of actions aimed at managing the complexity of behavior and interactions within the platform. According to the literature[5], the concept of platform governance encompasses three closely related dimensions: the division of authority between the platform owner and app developers, the mechanisms by which platform owners exercise control over app creators, and pricing policies. Analyzing the second aspect, i.e. the ways in which the platform owner controls that developers work in line with the platform's goals and in its interests, according to the author, there are various mechanisms, both formal and informal, for exercising this control, including 'gatekeeping': 'gatekeeping represents the degree to which the platform owner uses predefined objective criteria to assess which apps and app developers are allowed into the platform[6] ecosystem'. This means not only establishing behavioral rules and supervising app developers, but also deciding who can enter the platform ecosystem and offer their products or services.

As mentioned above, platforms create an infrastructure for a real market, where different parties meet. Therefore, if a company owns the platform, it can effectively play the role of market arbitrator. For example, Apple assesses which apps can be installed on iOS, Amazon Kindle decides which e-books can be published, Google determines which content can appear in search results, and so on.

According to Tiwana, there are three requirements that should be fulfilled in order for a gatekeeping mechanism to work and for app developers to agree to be present in the platform ecosystem: the platform owner must have the expertise to accurately evaluate app developers' submissions, the evaluation must be fair and fast, and app developers must be willing to accept this gatekeeping system. However, at present, this last aspect is not always guaranteed, as some dominant platforms represent a space where participants can obtain exceptional value, effectively forcing them to undergo the gatekeeping process.

In contrast, a further theory, that of Clemons[7], analyses business models that pose potential threats to the economy, although they are not limited to digital platforms, but also apply to sectors such as credit cards and airlines. However, these models have spread considerably in digital platforms.

The first model is called 'Third Party Payer Systems'. In this case, users use the platform for free, as it is the providers who pay for it. The platform is crucial for providers to reach

[5] Tiwana A., 2013. *Platform ecosystems: Aligning architecture, governance, and strategy.* Newnes.
[6] Tiwana A., 2013. *Platform ecosystems: Aligning architecture, governance, and strategy.* Newnes.
[7] Clemons E.K., 2018. *New patterns of power and profit: A Strategist's guide to competitive advantage in the age of digital transformation*. Springer.

customers, so they are willing to cover the costs. For example, as is the case with radio, where advertisers bear the costs of getting ads to users. This type of system can become mandatory, making suppliers dependent on the platform, excluding competition and allowing the platform to increase costs for suppliers instead of reducing them.

The second model is called 'Online Gateway Systems'. These are online services that connect buyers and sellers, such as search engines that decide what to show to customers. These systems can become essential for sellers, creating a dependency on their part. This can lead to a lack of awareness among buyers as to how they are directed to certain products or services.

When an online gateway system functions as a 'Mandatory Participation Third Party Payer', Clemons argues that this harms competition and consumers. Providers become dependent on the platform and must accept its terms or give up part of the market. This leads to limited choice and higher prices for consumers. Furthermore, a platform that achieves a dominant position may decide to compete directly with suppliers, as Amazon does by acting both as an intermediary between producers and buyers and as a product supplier. Microsoft followed a similar strategy by integrating computer manufacturing into its business.

### 1.5 Evaluating competition through a platform-based perspective

Digital transformation has revolutionized traditional companies and given rise to new business models, leading to a redefinition of relationships between organizations. One effect of technological innovation is the loss of rigidity and permeability of industry boundaries. Take Tesla, for example, which cannot easily be categorized as a normal car manufacturer like traditional car manufacturers. Currently, we speak of 'asymmetric competition', a type of competition that is not limited by static or defined industry boundaries, and that involves companies operating in different sectors, offering different products or services. It is a competition that extends beyond traditional boundaries, creating a broader competitive environment.

We are witnessing a constant transformation of entire economic sectors that are becoming increasingly interconnected, to the extent that some are evolving into new converging sectors[8]. This phenomenon can be understood through concrete examples: today, a car manufacturer not only competes with other companies in its sector, but also has to consider competition from car sharing companies or services such as Uber. Similarly, a TV channel

[8] Cennamo C., 2021. *Competing in digital markets: A platform-based perspective.* Academy of Management Perspectives.

does not only compete with other channels, but also must compete with numerous streaming platforms.

It is evident that, in order to analyze the competition, one must not focus only on the platform itself, but rather on the actual source of value that characterizes it, i.e., the ecosystem that develops around it. Some of these ecosystems are unique and endowed with extremely complex complementarities and networks; think, for instance, of Amazon: it has clearly created a unique ecosystem architecture that is practically impossible to replicate.

In the context of competition, data play a crucial role. Indeed, platforms often use data to conduct analyses and evaluations in order to understand how to optimize services and ensure maximum user satisfaction. By examining consumer data, such as transactions, behavior on the platform and feedback, it is possible to improve the competitiveness and performance of the platform.

This concept is related to platform design. It is crucial for platforms "[...] to improve the quality of the tools[9] they provide to pull in users"; superior platform design can be a significant source of competitive advantage. In this context, we speak of "platform-added value", indicating that it is not enough to provide users with a simple neutral channel, but it is essential to offer a set of features and tools that improve the overall quality of the platform, thus increasing the perceived value for participants. In this scenario, platforms compete to offer the most excellent and attractive services. This characteristic also recalls the concept of 'platform envelopment' discussed earlier: the attractiveness of a platform depends not only on the type and quality of tools and services available to users, but also on their diversity.

It is interesting to examine the barriers to entry in the platform market to understand how some companies manage to establish a dominant position that is virtually immune to competition. In the context of digital platforms, one of the barriers that used to be a significant barrier, namely high costs, now carries less weight. Thanks to digital technologies, the initial capital required to start a business, develop a product or service is significantly reduced. Many start-ups today do not require high initial investments and can still emerge easily and quickly, especially in the case of a platform-based business model. In this context, the success of a platform does not primarily depend on significant physical assets or investments, nor on the ownership or possession of tangible resources, but rather on the configuration and offering of the service to consumers.

[9] Rogers D.L., 2016. *The digital transformation playbook: Rethink your business for the digital age.* Columbia University Press.

In platform markets, it is common for a particular platform to achieve a dominant position in its category, making the launch of a competing platform providing similar services or products considerably complex.

### 1.6 Digital platforms and abuse of dominant position: Google, Amazon, Facebook, Apple and Microsoft

In the context of digital platform markets, situations arise in which a few technology companies hold a dominant position. These companies, known in Europe by the acronym GAFAM (Google, Amazon, Facebook, Apple and Microsoft), are at the center of intense political debates. However, in the literature, there is no clear consensus on how to view these realities and identify the key factors of their success. In some cases, it is believed that these companies have become overly powerful due to several requirements, previously discussed in connection with winner-take-all markets, which naturally favor high market concentration. Other interpretations argue that the reasons for the current landscape cannot simply be traced back to phenomena such as network effects or the use of big data. It is emphasized that, for the consumer, competition is 'just a click away' and therefore the causes of these companies' success[10] must be sought elsewhere.

In addition to the dynamics that characterize winner-take-all markets, there are other elements that contribute to the formation of concentrated market structures within digital platforms. One of these factors, on which large technology companies focus their attention, is the significant economies of scale typical of platform-based business models.

Economies of scale, often associated with network effects, are considered key elements explaining the rapid and marked growth of some firms in the digital sector. An analysis conducted by Cusumano, attempts to determine whether some digital firms can be considered natural monopolies. Economies of scale have always been recognized as an important driver of market concentration in traditional industries, but with digitization this phenomenon has become more pronounced. In the context of multisided markets and digital platforms, the costs for the platform itself do not increase as the number of users increases. Economies of scale also apply to data collection and utilization: the positive cycle resulting from data collection, examined above, means that "the quality-adjusted cost of data collection and analysis[11] can become smaller for larger platforms".

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[10] Cusumano M.A., Gawer A. and Yoffie D.B., 2019. *The business of platforms: Strategy in the age of digital competition, innovation, and power*. New York: Harper Business.

[11] Ducci, F., 2020. *Natural monopolies in digital platform markets.* Cambridge University Press.

In the area of digital technologies, in addition to economies of scale, economies of scope are a distinctive feature. Since data can be reused, the same data can be subjected to different algorithms and used to deliver different services. This concept helps explain why most leading technology companies adopt diversification strategies.
The big players in the digital sector do not simply specialize in a single type of product or service; on the contrary, they offer an extremely varied portfolio.

### 1.7 Gatekeepers in digital economy: companies exercising control over information, representing an important point of access between commercial users and consumers

So far, it has been necessary to examine the internal competitive dynamics of the digital platform sector, focusing on competitive strategies and barriers to entry. However, it is now necessary to change perspective and consider the fact that some of these digital platforms have not only achieved dominant positions in the market, but also act as arbiters within the markets they have created. As already pointed out, digital markets appear highly concentrated, with a few companies dominating the scene.
As examined above, platforms facilitate the connection between two or more types of actors. In the age of digitization, these platforms perform a function of removing intermediaries and mediation. Disintermediation implies the removal of intermediaries or companies that act as bridges in transactions, thus allowing users to interact directly with each other.
As intermediaries and 'disintermediaries', some digital platforms position themselves[12] as 'gatekeepers'.
In the literature, the term 'gatekeeper' is often associated with the topic of information management. Some theories define gatekeeping as a process of selecting and controlling information[13] within a network. However, when it comes to digital platforms, the role of gatekeeper is no longer limited to the control and selection of information. The 'gate' manned by the platform concerns user access.
Gatekeepers have the power to hinder or restrict people's access to content, goods and services[14], affecting both aspects of a platform. Firstly, users and consumers do not receive

[12] On the point, please visit the website: https://www.agendadigitale.eu/mercati-digitali/editoria-digitale-cosi-il-digital-markets-act-cambia-riequilibra-i-rapporti-con-le-big-tech/
[13] Cusumano M.A., Gawer A. and Yoffie D.B., 2019. *The business of platforms: Strategy in the age of digital competition, innovation, and power*. New York: Harper Business.
[14] Cusumano M.A., Gawer A. and Yoffie D.B., 2019. *The business of platforms: Strategy in the age of digital competition, innovation, and power*. New York: Harper Business.

a transparent offer, but rather an offer controlled by the platform. On the other hand, producers risk exclusion from the market under the platform or may be subject to harmful economic conditions. Previously, we examined gatekeeping as a control mechanism in the governance of the platform. One example is Apple, which is a mandatory channel for iOS app developers, allowing Apple to control who can provide apps for devices and to impose fees.

In this regard, there are those who use the term[15] 'kill zone expropriation', indicating that a digital platform offers a viable space for application providers, but the platform owner can arbitrarily decide to eliminate some content, products or services rather than others. Each provider is thus in a 'zone' of uncertainty controlled by the platform owner.

Another issue of considerable importance, related to the gatekeeper role, concerns data. Gatekeepers have significant control over the personal data circulating within the platform, enabling the platform to use profiling techniques to offer content, services and products tailored to the specific interests[16] of users.

Although it seems that the profiling process offers efficiency advantages for users, being profiled in certain ways implies that the user will be exposed to a specific range of content, excluding him/her from content that apparently does not match his/her profile interests. This problem is related to the 'black-box' concept, as users and consumers do not know the selection criteria used in the profiling and customization processes. Consequently, they are unable to assess whether or not what is proposed represents an accurate view[17] of reality.

Some platform companies, in their effort to remain industry leaders, sometimes engage in excessive data collection and manipulation, to the detriment of privacy and democracy. Specific digital platforms, such as Facebook or Google, serve as important advertising vehicles to reach large audiences quickly and easily. The characteristics of these platforms as third-party payers allow them to impose prices on advertisers, also influencing competition between manufacturers and traditional providers.

It is clear from this brief analysis that the impact of certain digital platforms on consumers, competition and innovation stems from their role as gatekeepers, which in turn is determined by the specific characteristics of leading digital platform companies.

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[15] Tiwana A., 2013. *Platform ecosystems: Aligning architecture, governance, and strategy.* Newnes.

[16] Clemons E.K., 2018. *New patterns of power and profit: A Strategist's guide to competitive advantage in the age of digital transformation*. Springer.

[17] Cusumano M.A., Gawer A. and Yoffie D.B., 2019. *The business of platforms: Strategy in the age of digital competition, innovation, and power*. New York: Harper Business.

### 1.8 Legal issues related to digital platforms: role of regulation and a new framework for a better competition

It is undeniable that promoting competition within an industry is essential, firstly, to ensure price competition, higher quality of products and services, thus creating more advantageous conditions for consumers. Secondly, competition stimulates innovation and discourages firms from engaging in anti-competitive[18] behavior. Historically, when market forces have failed to control firms' behavior, regulation has always[19] been used. Although some research suggests that, e.g., within the EU, there is no need for an update of the competition regulatory[20] framework with regard to digital platforms, the most common global assumption is that traditional antitrust laws are insufficient to regulate digital markets and effectively counter potential harm caused by some dominant companies. Indeed, decisions made by digital platforms can determine the success or failure of companies, radically influence people's choices, create trends and change the market.

Internet giants raise three main issues: privacy, threats[21] to democracy and economic dominance.

The role of platforms as gatekeepers, with control over the content and resources accessible to users, requires an approach that goes beyond the economic and competitive aspect and also includes social dimensions. It is evident that some practices of digital platforms violate the fundamental rights of consumers and users. However, current competition law is not designed to fully address the implications on fundamental rights. Therefore, antitrust laws alone seem insufficient. Moreover, antitrust law is mainly ex-post in nature, and seems to require a set of ex-ante rules. The enforcement of antitrust laws occurs on a case-by-case basis, and litigation is often lengthy and costly due to legal and economic complexity. Traditional, time-consuming procedures should be flanked by faster and more efficient ones, and for this reason an integrated system of ex-ante and ex-post rules might be optimal. The reasons why an updating or supplementation of existing antitrust regulatory frameworks seems inevitable are manifold and involve not only economic concerns, but also social and democratic aspects. Regulatory intervention is essential, first of all, because the economics of multi-sided markets are very different from those of traditional single-sided markets. The classical price, cost and benefit analyses used for traditional markets

[18] Nooren, P., van Gorp, N., van Eijk, N. and Fathaigh, R.Ó., 2018. *Should we regulate digital platforms? A new framework for evaluating policy options.* Policy & Internet, 10(3), pp.264-301.
[19] Tiwana A., 2013. *Platform ecosystems: Aligning architecture, governance, and strategy.* Newnes.
[20] Feld, H., 2019. *The case for the Digital Platform Act: Market structure and regulation of digital platforms.* Roosevelt Institute.
[21] Nooren, P., van Gorp, N., van Eijk, N. and Fathaigh, R.Ó., 2018. *Should we regulate digital platforms? A new framework for evaluating policy options.* Policy & Internet, 10(3), pp.264-301.

cannot be applied to multi-sided markets, especially in the context of digital platforms, which are characterized by anything but traditional business models. From a traditional perspective, the price of a product or service is an indicator of a company's market power, but this practice is hardly applicable to multi-sided markets. For instance, users of Google or Facebook do not pay any price to use the platform's services; the revenues of these platforms come, in fact, from the advertisers' side.

According to Feld Harold[22], addressing some key issues is essential to protect consumers and ensure a healthy and balanced competitive environment. These include facilitating the reduction of barriers to entry as much as possible, enhancing supervision of mergers and acquisitions, promoting competition between digital platforms, establishing rules adapted to the new environment concerning data ownership and exchange, data sharing and data sharing. Over the last few years, numerous proposals have been made and various instruments evaluated to respond appropriately to the issues outlined above. Some solutions considered credible include ensuring data portability for users, limiting vertical integration operations, ensuring multihoming, and regulating[23] the movement and use of personal data. However, making decisions about large digital companies is an extremely sensitive issue. First, multisided platforms represent a highly heterogeneous category. Therefore, any legal and policy changes should avoid the mistake of treating all multisided platforms[24] as a single subset, distinguishing them from other markets.

Consequently, regulation should be carefully calibrated to balance obligations and rules so as not to erode the benefits consumers gain from using the services of digital platforms. At the same time, it is crucial to prevent ex-ante measures from discouraging innovation.

# Chapter II - Digital markets act (DMA): establishing a safe digital environment in which fundamental rights of all users are preserved

[22] Feld, H., 2019. *The case for the Digital Platform Act: Market structure and regulation of digital platforms.* Roosevelt Institute.

[23] Feld, H., 2019. *The case for the Digital Platform Act: Market structure and regulation of digital platforms.* Roosevelt Institute.

[24] Ducci, F., 2020. *Natural monopolies in digital platform markets.* Cambridge University Press.

## 2.1 Digital markets act (DMA): a legal and institutional analysis

As previously announced, the Digital Markets Act (DMA) is the new European regulation on digital markets, gaining approval by the EU Parliament on 5 July 2022, in parallel with the Digital Services Act (DSA), a regulation dealing with digital services. Together, these two acts constitute the Digital Services Package.

The distinctive feature of the Digital Markets Act lies in its function as an instrument to regulate and define behavior and obligations for companies before any abuses occur. However, before examining the provisions of the DMA in detail, it is appropriate to take a step back to understand its evolution and the reasons behind its creation.

On 15 December 2020, within the context of the European Digital Strategy called 'Shaping Europe's Digital Future', the two legislative proposals were put forward.

The proposals aim to achieve[25] two far-reaching objectives: "to establish a safer digital environment in which the fundamental rights of all users of digital services are preserved, and to establish a level playing field to foster innovation, growth and competitiveness, both within the European single market and globally."

While the Digital Services Act aims to ensure a safe and reliable online environment by enhancing transparency, security and access conditions to online services, the Digital Markets Act adopts a predominantly commercial and competitive-oriented approach. The latter explicitly focuses on digital platforms acting as gatekeepers, establishing criteria for their identification and imposing a set of obligations and rules. In its essence, the Digital Markets Act was created to fill certain gaps in the regulatory environment of competition in digital markets. It should be emphasized that this regulation does not aim to replace, but rather to complement, conventional antitrust laws and rules from other EU legislation[26] on digital matters, playing the role of a complementary instrument.

The need to introduce new legislation stems from the fact that digital markets have presented new challenges in the application of competition rules. Antitrust rules are usually applied retroactively, i.e., after a competition problem has occurred. This approach may be reasonable for conventional markets, but in the digital economy there is an increasing need for more dynamic and proactive interventions.

Currently, the European Commission "has no tools at its disposal to intervene pre-emptively, i.e., before a competition problem occurs."

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[25] On the point, please visit the website: https://ec.europa.eu/digital-single-market/en/digital-services-act-package.

[26] Ibáñez Colomo, P., 2021. *The Draft Digital Markets Act: a legal and institutional analysis.* Journal of European Competition Law & Practice, 12(7), pp.561-575.

The first innovative feature of the Digital Markets Act is its nature as an ex-ante legislative instrument, setting behavioral standards, rules and prohibitions for certain digital platforms. The introduction of ex-ante regulations, in addition to the traditional European ex-post approach to competition issues, marks a significant change in mentality that could speed up public sector actions and favor a prompter response by the authorities.

An analysis of the proposal clearly shows a strong stance by the Commission, which takes a strong regulatory and enforcement role, rather than relying on the authorities of individual Member States. For instance, as will be examined below, the Commission will be empowered to establish a direct regulatory dialogue with gatekeepers, conduct market surveys, impose tailor-made behavioral rules, adapt the instrument to meet new requirements, and sanction gatekeepers, among other things.

As stated in the text of the proposal, legislative intervention is justified by the inherent characteristics of digital platforms, including the wide presence of network effects and their function as intermediaries between end-users and commercial[27] users. These characteristics have led to a situation where a few platforms dominate the European digital market. The proposal emphasizes that some of these platforms are increasingly taking on the role of access points[28] or gatekeepers, and according to the Commission, the greatest damage resulting from this scenario is manifested through higher prices, lower quality, reduced choice options and less impetus for innovation.

In order to address gatekeeper issues, the Digital Markets Act initially sets out the conditions for assigning the gatekeeper role to a digital platform. Subsequently, obligations are outlined from which a platform can only be exempted in specific circumstances, as explained below. Finally, measures are proposed to address violations or non-compliance with the regulation.

At a more recent date, namely 6 September 2023, the Commission, in accordance with the DMA, designated six companies[29] as gatekeepers within the meaning of Article 3 of the aforementioned legislation.

With this designation, the Commission has taken a crucial step towards the practical implementation of the DMA. The companies designated as gatekeepers will have until 6 March 2024 to comply with the new requirements, obligations and prohibitions introduced by the DMA, aimed at ensuring a fair and open digital market in the European Union.

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[27] Ibáñez Colomo, P., 2021. *The Draft Digital Markets Act: a legal and institutional analysis*. Journal of European Competition Law & Practice, 12(7), pp.561-575.

[28] Larouche, P. and de Streel, A., 2021. *The European digital markets act: A revolution grounded on traditions*. Journal of European Competition Law & Practice, 12(7), pp.542-560.

[29] On the point, please visit the website: https://www.altalex.com/documents/news/2023/10/04/digital-markets-act-dma-commissione-individua-6-gatekeepers

Specifically, the major technology companies involved will be required to fulfil several obligations. These include the obligation to allow end-users to unsubscribe from the gatekeeper's core platform services as easily as they sign up, and the prohibition to monitor end-users outside the gatekeeper's core platform service for targeted advertising purposes without obtaining the necessary consent.

In addition, gatekeepers are required to submit a detailed compliance report describing the measures taken to comply with the DMA within six months of their designation.

### 2.2 Digital markets act objectives: safeguarding against market power abuse and promoting market entry for small players

The Digital Markets Act has as its primary objective "to promote the full development of the potential of platforms by addressing at EU level the main consequences of unfair practices and lack of contestability. This is to enable end-users, including business users, to reap the full benefits of the platform economy and the digital economy as a whole, in a fair and contestable environment." (Digital Markets Act; p. 3). The proposal's impact assessment[30] document, in addition to this general objective, identifies three specific objectives: addressing market inefficiencies to ensure contestable and competitive digital markets for greater innovation and consumer choice; addressing unfair gatekeeper conduct; and improving[31] consistency and legal certainty to preserve the internal market. The first of these objectives relates to contestability in the digital market, which seems not to function properly due to situations that create significant barriers to entry, such as the high degree of vertical integration in some sectors, strong economies of scale and information asymmetries. In this context, the Digital Markets Act aims to make digital markets more competitive by ensuring that barriers to entry are removed.

The second objective focuses on the commercial dynamics and relationships between corporate users, as producers and suppliers of services or products, and gatekeeper platforms. Certain practices, such as consumer lock-in, prevent the possibility of multihoming, generating a strong dependency of corporate users on the platform and allowing it to impose unfair commercial conditions. The lack of multihoming also has a

[30] On the point, please visit the website: https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact
assessments_it#:~:text=Le%20valutazioni%20d'impatto%20determinano,e%20sostenere%20il%20processo%20decisionale

[31] Ibáñez Colomo, P., 2021. *The Draft Digital Markets Act: a legal and institutional analysis*. Journal of European Competition Law & Practice, 12(7), pp.561-575.

negative impact on innovation, hindering the adoption of new or alternative platforms. The Commission therefore considers it essential to protect corporate users and to ensure regulated environments.

Finally, the Digital Markets Act aims to strengthen the European internal market, recognising that, without harmonised rules and supranational intervention, it would be extremely difficult to effectively address the problems related to digital gatekeeper platforms. In the context of the principle of subsidiarity, it is emphasised that 'the objectives of the proposal cannot be achieved by the individual action of Member States (Digital Markets Act; p. 5) since the problems are of a cross-border nature and are not confined to individual Member States or a subset of Member States'. The proliferation of national laws created by the various Member States has led to a patchwork of heterogeneous legislation that lacks unity, coherence and homogeneity within[32] the European Union.

Some European national authorities, aware of the challenges of digitisation, have taken regulatory or antitrust initiatives. For instance, the Italian AGCM[33] has expressed its willingness to adapt regulations to the challenges of the digital economy. The presence of different regulations in different Member States also generates problems in terms of compliance costs, with firms having to bear significant burdens to operate in differently regulated digital markets. Legal fragmentation leads to excessive compliance costs, especially for small and medium-sized European companies, favouring large companies. The Commission therefore expects Member States not to adopt provisions other than those of the regulation with regard to gatekeepers (Digital Markets Act; par. 1.5 e art. 1.7).

### 2.3 Definition of Gatekeeper in the article 2 of the digital markets act

In the previous chapter, we devoted ourselves to analyzing the figure of the gatekeeper but identifying who can be considered such is not an easy task, as there is no objective and universal definition of gatekeeper platforms. It is therefore interesting to examine how the European Commission outlines the figure of the gatekeeper and which platforms will be subject to the obligations of the Digital Markets Act, based on this definition.

An analysis of the rules on the designation of gatekeepers reveals the Commission's clear intention to delineate the distinctive features of this figure as far as possible. Initially, the DMA focuses exclusively on digital services widely used by both business and end users,

[32] De Streel, A., Feasey, R., Kraemer, J. and Monti, G., 2021. *Making the Digital Markets Act more resilient and effective.* Available at SSRN 3853991.

[33] On the point, please visit the website: https://www.agcm.it/media/comunicati-stampa/2021/3/S4143.

i.e., 'basic platform services' (Article 2 DMA). These services have specific characteristics identified by the Commission, especially with regard to the way they are offered. First of all, they are services in highly concentrated markets, dominated by a few large companies that dictate the rules of the market. Secondly, there is often a strong dependence on the part of users (both end-users and businesses) on the services offered by the platform they use. Finally, some providers, thanks to their dominant position, may adopt unfair behavior and practices that harm business users and end consumers.

Article 2 of the DMA specifies a precise category of included services, such as online intermediation services (e.g., marketplaces or app stores), online search engines, online social networking services, video sharing platform services, number-independent interpersonal communication services (e.g., web-based electronic messaging systems) and operating systems. This selection is based on the fact that these services share characteristics that often lead to high market concentration and undermine competition, such as strong network effects, economies of scale and scope, multisideness, lock-in effects for users, lack of multihoming, vertical integration and significant benefits from data usage. Furthermore, Article 17 provides for the possibility for the Commission to conduct market investigations to assess the appropriateness of adding one or more digital services to the list of basic platform services and to identify potentially unfair practices. A periodic review at least every two years is foreseen, allowing the Commission to update the list of basic platform services.

### 2.4 Article 3 DMA: a set of narrowly defined objective criteria for qualifying a large online platform, identified as Gatekeeper

The provision of one or more of the basic platform services mentioned in the previous paragraph by a platform does not automatically imply its role as gatekeeper. In order for a platform to be designated as such, it must fulfil three general criteria: (1) have a significant impact on the internal market; (2) control an important gateway between end-users and business users; (3) enjoy, currently or in the foreseeable future, an established and lasting position in its business. According to the DMA, these three criteria are presumptively met when a provider of basic platform services reaches specific quantitative thresholds in the European Union (Article 3). These thresholds refer to indicators of size, economic dependence on the platform and persistence in the market.

The first criterion is presumed to be met when the platform provider has a turnover of at least EUR 6.5 billion in the previous three financial years, or when the average market

capitalization or equivalent fair market value is at least EUR 65 billion in the last financial year. In addition, the platform service must be provided in at least three Member States. The second criteria is deemed to be met when the active end-users using the platform service are more than 45 million per month, and the annually active business users exceed 10,000.

The third criterion is deemed to be met if, in each of the last three financial years, the above-mentioned thresholds for the number of end-users and business users are maintained.

### 2.5 Analyzing the imposed duties: digital markets act obligations on Gatekeepers and their potential implications

The Digital Markets Act imposes a number of duties on platforms designated as gatekeepers, which include specific prohibitions and practices to achieve the objectives set by the DMA itself. The obligations are divided into two lists: the 'obligations of gatekeepers,' detailed in Article 5 and uniformly applicable to all gatekeepers, and obligations potentially subject to further specification, outlined in Article 6. In the latter case, these are rules allowing the Commission to establish a direct regulatory dialogue with the gatekeeper concerned in order to implement effective and proportionate measures.

The detailed analysis of the Commission's obligations is useful, first of all, to implicitly understand which gatekeepers' practices do not contribute to a fair and competitive environment, harming consumers, businesses and innovation. Moreover, as will be evident below, although the Commission remains vague on the specific identity of the platforms targeted by these provisions (avoiding mentioning the name of specific companies), it is clear that the rules refer to certain large technology companies. It is noticeable that not all obligations are uniformly applicable to all gatekeepers, seeming instead to be addressed to specific platforms. This hypothesis is supported by the fact that the European Commission, in drafting the DMA, relied mainly on ongoing or past antitrust investigations, as highlighted in the impact assessment document of the regulation. This aspect, as we will discuss later, raises questions about the ability of this regulatory instrument to adequately address future scenarios.

## 2.6 Focus on the analysis of article 6 and 7 of the digital markets act (DMA)

Having examined in detail the rationale behind the Digital Markets Act (DMA), it is now necessary to analyze the obligations imposed on so-called gatekeepers, starting with Article 5.

With regard to the first set of obligations, the misuse of data by a gatekeeper is initially addressed. Gatekeepers are obliged to refrain from 'combining personal data from such basic platform services with personal data from any other service offered by the gatekeeper or with personal data from third parties, and from accessing with end-user registration other services of the gatekeeper for the purpose of combining personal data', unless the user has expressly consented to this (Article 5(a)). The establishment of this obligation stems from a practice that has often attracted the attention of the authorities as being detrimental to consumers and competition.

One example is Google, which has changed its privacy policies several times in order to combine data from the various services offered by its platform, acquiring important information on users directly from the Chrome browser. Google has claimed that it adopts this practice in order to improve the efficiency of its services and enrich the offer for consumers.

However, the use of data and information in this way allowed the giant to consolidate its market position and make considerable profits, especially in advertising[34] management.

It is clear that the combination of data has negative effects on both consumers and competition, confirming the need for new regulation in the sector. Competition rules in the digital sector must be designed to integrate economic concerns with respect for fundamental consumer rights, such as the right to privacy.

The second obligation requires the gatekeeper to allow 'commercial users to offer the same products or services to end users through third-party online intermediary services at prices or conditions that differ from those offered through the gatekeeper's online intermediary services' (Art. 5(b)).

The third obligation stipulates that a gatekeeper must allow its business users to promote and conclude contracts with end users acquired on the platform, also outside the platform. Furthermore, consumers should be able to use on the platform and through its services 'content, subscriptions, components or other items' acquired outside the platform in question (Art. 5(c)). These provisions mainly concern app stores, such as the Google Play Store and the Apple Store.

[34] ILIEVA, P., 2021. *Implementing Lessons from the Microsoft and Google Sagas to Address Challenges Met with Past Remedial Solutions in the Novel DMA Proposal.*

The fourth obligation, which is of a general nature, requires gatekeepers to refrain from 'preventing or restricting commercial users from raising with any competent public authority issues relating to gatekeeper practices' (Art. 5(d)).
The fifth obligation prohibits gatekeepers from 'requiring commercial users to use or offer a gatekeeper identification service, or to interoperate with it, in the context of services offered by commercial users using that gatekeeper's core platform services' (Art. 5(e)).
The sixth obligation states that the gatekeeper may not force end or commercial users to subscribe or register for a basic platform service as a condition for accessing, registering or subscribing to another basic platform service (Art. 5(f)). The purpose of this obligation is to counteract a procompetitive practice in which a platform exploits its dominant position in one sector to impose advantageous conditions in another, adjacent market sector.
The last obligation, the seventh, applicable to all gatekeepers, concerns the field of online advertising. In particular, the gatekeeper should provide advertisers and publishers, upon request, with all information concerning the prices paid for the gatekeeper's services, as well as the remuneration paid to the publisher (Article 5(g)).
Online advertising is at the center of many legal and economic issues. Here, however, we will not delve into the mechanics and technologies behind these services. However, it is important to emphasize that the increasing use of digital platforms as online advertising channels has enabled a few large platforms to become crucial channels for advertisers and publishers in their communication with the public. The automation of advertising services and the use of technologies and algorithms to generate targeted offers are significant resources for companies.
However, it is not uncommon for some digital platforms, taking advantage of their dominant position, to impose specific conditions on advertisers and publishers, even managing to keep crucial information on costs, profits and ad placement confidential.

### 2.7 Exemptions and sanctions for digital platforms in the digital markets act (DMA)

Each gatekeeper is obliged to fulfil the obligations set out in the regulation, but there are certain scenarios in which these obligations may be suspended or waived. According to Article 8 of the regulation, the Commission has the power to suspend an obligation imposed on a gatekeeper. However, it will be the responsibility of the gatekeeper to prove that the fulfilment of this obligation jeopardises its viability in the European Union. Exemption from one or more obligations is provided for in Article 9 only in three cases, motivated by reasons of: (i) public morality; (ii) public health; (iii) public security (Digital Markets Act; art. 9, comma 2).

Finally, the regulation lays down a series of sanctions for gatekeepers who do not comply with the stipulated provisions. In particular, there are fines of up to 10 per cent of the total turnover, as well as periodic penalty payments of up to 5 per cent of the average daily turnover (Digital markets act article 26 and 27).

# Chapter III - A critical analysis of the Digital Markets Act: legal challenges on the application of the obligations expected by the DMA

### 3.1 Legal challenges for the digital markets act: is it possible to predict the future of digital platforms?

Once some concepts concerning the architecture and economics of digital platforms have been clarified, with a focus on the main characteristics of digital markets, one can examine the European Commission's proposal for a regulation, known as the DMA, focusing on different perspectives from the world of research, business and politics. Although it is impossible to predict the future of digital markets and platforms in Europe, a number of prominent issues have been identified, including the need for and complexity of regulatory intervention in digital markets, the choice of criteria for designating gatekeepers, and the nature and structure of prohibitions and obligations. These challenges form the core of the DMA research.

First, the question of the 'ex-ante' nature of the Digital Markets Act was explored and the reasons why the Commission preferred such a regulatory approach instead of addressing the problems through an antitrust, typically 'ex-post'[35] perspective. Assessments were made on the necessity of this regulatory intervention, also considering the possible risks and benefits associated with the implementation of a regulatory solution in a highly dynamic and rapidly developing sector such as digital platforms.

The analysis then focused on two key elements underpinning the Digital Markets Act, namely the criteria for designating gatekeepers and the characteristics and nature of the obligations established by the regulation. In particular, it was examined whether the method for designating gatekeepers proposed by the Commission is effective in recognizing all platforms that actually play the role of 'access controllers' in the market. As already pointed out, there is no unambiguous definition in the literature for the figure of gatekeepers, and there is therefore a risk of targeting platforms that do not actually cause damage to the market. With regard to the obligations and prohibitions proposed by the draft law, the analysis of the instrument and the impact assessment suggests that the Commission has relied on past or ongoing antitrust litigation cases to identify conduct to be corrected. It is important to note that the planned obligations and prohibitions apply to all gatekeepers indiscriminately, regardless of whether they support different services with different business models. It is therefore appropriate to explore the reasons, advantages and disadvantages of such choices.

[35] Pettersson, D., 2022. *Sector-Specific Ex Ante Regulation in Digital Markets-A Complement or Substitute to Antitrust Enforcement?*. Europarättslig tidskrift, 4.

### 3.2 Identification of Gatekeepers: why their recognition can pose a legal problem

The issue of the designation of gatekeepers is certainly crucial in our study. Indeed, it is clear that the basis of effective regulation lies in the ability to accurately identify the economic actors that require intervention. Can it be said with certainty that the legislature has created a mechanism for designating gatekeepers that can accurately identify the platforms responsible for problems? As already pointed out, the lack of a clear and unambiguous definition of such figures in the economic literature makes the identification process extremely complex. It is important to pay particular attention to the choice of the legislature to use quantitative thresholds as an indication of a presumed gatekeeper position. In general, the consensus view is that quantitative thresholds are essential in a regulatory instrument, again, because they provide an objective criterion that is useful in providing legal certainty. However, it is also true that the Commission has wide latitude, being able to designate as gatekeepers even those who do not meet the quantitative thresholds but who meet the three general qualitative[36] criteria. However, this requires specific investigation and dialogue with the gatekeeper himself, and there is no guarantee that this confrontation will occur quickly and without conflict. The Digital Markets Act is sometimes seen by some as a rather vague and confusing instrument, mainly because of the criteria used to designate gatekeepers. First, the lack of clarity on the goals the legislature intends to achieve makes it difficult to assess the effectiveness of the identification mechanism. Does the proposal aim to target a few gatekeepers and subject them to specific rules, or rather to prohibit specific behaviors to all platforms that can influence the market? If the ultimate goal is to target GAFAM companies, then the use of quantitative thresholds might be appropriate. However, in that case, it would have been possible to explicitly name the target companies. If, on the other hand, the goal is to ensure fairness and competition and to identify positions of control and power in the creation and dissemination of value by targeting gateways, then a purely quantitative analysis might not be appropriate. Indeed, in markets with lower business volumes, distortions similar to those caused by GAFAM could still occur. Another consideration concerns the inherent dynamism of digital markets. Digital platforms provide services in an all but static market, which means that the number of users or the economic size of the platform can fluctuate greatly. Although quantitative criteria can be a quick and straightforward way to identify actors to take action on, many authors consider them excessively "static." A better solution might have been achieved by considering percentage

[36] Colangelo, G., 2023. *DMA begins.* Journal of Antitrust Enforcement, 11(1), pp.116-122.

changes in the number of users or turnover over a given period, in order to include market dynamism in the evaluation.

### 3.3 The biggest challenge: legislative instrument with a preventive function

Reading the previous chapter reveals fundamental differences between the Digital Markets Act and antitrust laws, although the central focus of the proposal remains on economic competition. Antitrust law, in fact, according to the Treccani dictionary definition, includes the set of rules and supervisory actions aimed at preventing corporate behavior and strategies that could lead to monopoly positions or collusive arrangements harmful to consumers. The objective is to prevent obstacles to the entry of competing firms into the market and to prevent distortions of free competition in terms of prices, product quality and technological innovations. Looking at the legal basis of the Digital Markets Act, this is outlined in Article 114 of the Treaty on the Functioning of the European Union (TFEU), which aims to standardize the laws of member states. Unlike antitrust, which aims to sanction competition-damaging behavior or unfair practices once they occur, the distinctiveness of the DMA lies in its role as an instrument for the functioning of the internal market. The goal is to restore competition and fairness in digital markets, as reflected in the objectives the Commission intends to achieve through the implementation of this regulation. The question then arises as to whether it is really necessary to intervene with regulations in an area as dynamic and rapidly evolving as digital platforms, and what are the risks and difficulties associated with this approach. To effectively regulate a given area, it is essential to understand in detail the specific situation to be regulated and the actors involved. Some academics argue that there may be a lack of a solid basis for effective regulatory intervention, perhaps because of the extraordinary complexity of digital markets and the unique scenarios that emerge. Indeed, the digital economy represents an extremely diverse and deep field in terms of the complexity of the dynamics and technologies underlying digital services.

Despite the challenges and other difficulties, the generalized and established view, not only in academia, is that an "ex-ante" regulatory[37] approach is essential. The real complexity lies in the implementation of this intervention.

[37] Georgieva, Z., 2021. *The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, Infused with Competition Principles.* European Papers-A Journal on Law and Integration, 2021(1), pp.25-28.

First of all, it is important to point out a substantial difference from competition rules, since the latter, unlike the DMA, constitute the very structure of the European Union and are incorporated into the Treaty. The new framework, on the contrary, derives from sectoral regulation, as pointed out by Komninos[38]. Therefore, the new proposal does not introduce a new "scenario," but merely supplements and implements the antitrust discipline of EU competition law.

As pointed out, over the years antitrust has struggled to ensure a timely and effective response to issues related to digital markets, as the practices of some players go beyond a simple abuse of dominance. Rather, these are actors who take on the role of the legislature in defining the rules of the markets in which they operate.

The decision to adopt "ex-ante" regulation was also motivated at the policy level by the positive experience in regulating other sectors, such as telecommunications[39] or energy. However, it is important to point out that these sectors, such as telecommunications or energy, are significantly more uniform than the complex landscape of digital platforms. Within the latter, the supply of services to consumers is extremely varied and diverse. Moreover, even where platforms offer the same products or services, there is no guarantee that they follow the same business and operating models. A key distinction between the DMA and the antitrust framework is that, while the latter specifies that certain practices are prohibited only if the authority demonstrates their anti-competitive effects and provided that the market participant does not prove that such practices generate pro-competitive effects greater than the harm caused, the Digital Markets Act establishes a list of practices that are always considered harmful and unfair (self-preferencing, tying, lack of transparency, etc.). In Komninos' view of the Commission's choice of "ex-ante" intervention, such regulation is preferable to "ex-post" intervention as in antitrust, where rules are adapted to contexts that do not lend themselves easily to their application.

### 3.4 Divergences between DMA and Antitrust: “prohibition and abuse” control system

As mentioned earlier, there are many differences between the two disciplines. Certainly, the most notable is the adoption of an "ex ante" regulatory instrument, but there are also

[38] Komninos, A., 2022. *The Digital Markets Act: How Does it Compare with Competition Law?*

[39] Beems, B., 2023. *The DMA in the broader regulatory landscape of the EU: an institutional perspective.* European Competition Journal, 19(1), pp.1-29.

other disparities that deserve in-depth analysis. First, the DMA departs from the discipline of Article 102 TFEU. In the field of competition law, the term "prohibition system" is often used because it is considered the most efficient way to deal with cartels and anticompetitive agreements. On the other hand, antitrust discipline is commonly referred to as an "abuse control system" because it does not simply prohibit the existence of a dominant position, but rather its abuse. For this reason, the DMA, not relying on an abuse control system, follows the discipline of Article 101 TFEU. This article states that all agreements between undertakings that have the effect of preventing, restricting or distorting competition[40] in the internal market are prohibited. This is in line with the DMA, which imposes prescriptive obligations on a limited number of market participants, without the need to examine the nature of the conduct of the designated "gatekeeper." Unlike exclusionary abuses covered in Article 102 TFEU, which require the fulfillment of two conditions (the use of methods inconsistent with "competition on the merits" and the ability to produce exclusionary effects), the DMA does not require such an analysis. Gatekeeper behavior need not be inconsistent with "competition on the merits" or other concepts related to the DMA's objectives, such as contestability and fairness. In this context, it is necessary to elaborate further, as several authors characterize the DMA as a body of law that incorporates "per se" rules. Indeed, the DMA differs significantly from Articles 101 and 102 TFEU in that it does not rely on flexible general clauses, but instead adopts detailed and rigid lists of express rules such as positive obligations or negative prohibitions. Unlike Articles 101(1) and 102 TFEU, the respective general clauses of "restriction of competition" and "abuse of dominant position" are more open and flexible. In the context of the Treaty rules, some examples of anticompetitive conduct are given, but these examples are not considered exhaustive, and in practice, neither enforcers nor courts have ever focused on identifying conduct by referring to such examples. Unlike this approach, the DMA is not based on a general clause. Articles 5, 6 and 7 present a numerus clause of standards. This, of course, increases legal certainty. Firms classified as gatekeepers are aware that by complying with the specific lists of rules, their conduct is in accordance with the law.

[40] Komninos, A., 2022. *The Digital Markets Act: How Does it Compare with Competition Law?*

### 3.5 A critical analysis of the Digital Markets Act: challenges and ambiguities in addressing digital platform gatekeepers

As highlighted earlier, some digital platforms have achieved prominent positions in the economy and in daily life, becoming indispensable intermediaries for interactions and exchanges between individuals. In this capacity, they not only provide the infrastructure for interactions, but also act as regulators of that space, assuming the role of "gatekeeper." Thanks to this controlling position, some digital platforms can impose unfair conditions on their users, gaining considerable economic advantages and strengthening their own position. Clearly, leaving these platforms free to self-regulate is undesirable for the economy and society as a whole.

However, it has become apparent that the current regulatory framework and traditional antitrust rules are not sufficient to deal with these "market controllers." In this context, awareness of the need for innovative regulatory intervention in digital markets to regulate the figures of "gatekeepers" is widespread. Examples of this are the various legislative initiatives at the national level already planned or implemented, as mentioned on several occasions.

In addition to criticisms, albeit well-founded, of some aspects of the European legislature's actions, Europe has taken a firm and determined approach to large "gatekeepers" in digital markets, as evidenced by the Digital Markets Act (DMA). This piece of legislation represents a means that has generated great expectations and could become a model for many governments around the world. However, its ambitious goals are far from guaranteed. The DMA is not only a legal instrument to ensure competition in digital markets but is an attempt to shape the European internal market with principles and guidelines aimed at supporting general economic development and limiting the seemingly unlimited power of certain organizational entities, mainly of cross-border origin. It should be noted that in addition to economic issues, the proposal also considers crucial issues such as fundamental rights and user freedom.

As discussed earlier, one of the key aspects of the "gatekeeper" role concerns the processing of data within platforms. The DMA addresses this issue by introducing rules to ensure greater portability and sharing of data, with the aim of fostering competition in the industry. At the same time, there are prohibitions for platforms regarding the use of data in ways that may undermine the full contestability[41] of the market, such as data-aggregation and the use

[41] Petit, N., 2021. *The proposed digital markets act (DMA): a legal and policy review.* Journal of European Competition Law & Practice, 12(7), pp.529-541.

of data accumulated by the platform in competition with commercial users. However, the content of these provisions raises several concerns, perhaps due to the inherent complexity of dealing with these issues. Some believe that the European Commission, building on the experience of the GDPR, has taken partial measures, such as simply ensuring data portability or abolishing data aggregation altogether.

Finally, despite critical views on some specific provisions (especially those related to data), it can be said with some confidence that the Commission has effectively identified the malpractices of "gatekeepers" and outlined their role as "controllers." However, enforcement and problem-solving through the proposed legislative instruments, such as the imposition of general obligations, are still uncertain and pose a challenge in pursuing their goals. Large platform companies will inevitably face the consequences of European intervention and may be forced to scale back their power.

Exploring the topic of competition in digital markets inevitably presents several challenges, and this study is not without limitations. First, as already pointed out, the main difficulty in analyzing the realities of digital platforms lies in distancing oneself from the logic of traditional businesses and adapting to a completely new and constantly changing economic environment. This implies immersing oneself in a complex and nonlinear logic, in which theoretical and operational aspects are closely interconnected[42] and interdependent. Focusing on the figure of "digital platform gatekeepers" is equally complex, as this is a situation that is not completely defined by research. What is known, in addition to the basic mechanisms and strategies of digital platforms, are some specific practices implemented over time by a few digital platform companies, the consequences of which on the socioeconomic fabric are worrisome. Analysis of the gatekeeper, and thus also of regulatory interventions such as the DMA, is made difficult by the lack of unambiguous consensus in economic research on certain aspects. Identifying when a practice is harmful, when it is fundamental to the digital economy, or when it is necessary to ensure efficiency and benefits for users and the market is not an immediate task.

For example, the case of big data, dealt with by the DMA, is the subject of several recent studies that highlight the difficulty and sensitivity in intervening on such a large resource. In conclusion, it has been pointed out repeatedly that the current antitrust regulation and legislative framework are inadequate to address the problems associated with gatekeepers. Traditional solutions used in previously highly concentrated industries, such as telecommunications or energy, appear to have limitations in the context of digital markets.

[42] Bentata, P., 2021. *Regulating'Gatekeepers': Predictable 'Unitended Consequences' of the DMA for Users' Welfare.*

However, the paper highlights how the approach that seemed to be an immediate and viable solution (ex-ante regulation) turns out to be a complex road ahead.

# Conclusions

The focus of this thesis was the Digital Markets Act, a European regulation that marks a significant turning point in the digital economy. The analysis was conducted with a critical look at the reasons and challenges of ex-ante regulatory intervention aimed at scaling back the power of major platforms acting as gatekeepers in digital markets.

Initially, the structural characteristics, mechanisms and behaviors related to the governance of digital platforms were outlined. This insight helped to understand their vast economic power and dominant positions within markets, with a focus on competitive dynamics and the emergence of a winner-take-all scenario, in which a few digital platforms attract the majority of users.

Next, the gatekeeper function of these platforms was examined, considering their crucial role in accessing markets and users. Taking advantage of this privileged position, gatekeepers impose harmful conditions and rules on economic actors dependent on their services, generating negative social and economic returns.

The analysis of the proposed legislation allowed for a more precise definition of the gatekeeper concept and highlighted the unfair practices present in digital markets. The importance of regulatory intervention to regulate the online space was stressed, considering it imperative to prevent a few digital platforms from holding such significant control over the economy, innovation and fundamental rights, thus threatening democracy.

Finally, three key aspects of the European Commission's proposal were examined: the ex-ante nature of the Digital Markets Act, the process of designating gatekeepers, and the typology of obligations and prohibitions under the regulation. This in-depth study provided an understanding of both the potential and the limitations of such a regulatory intervention.

The entire in-depth study conducted had as its clear purpose to answer the original research question, namely: Can the DMA, as a regulatory instrument of an ex-ante nature, be the most effective method of countering the problems generated by digital platforms, enabling, above all, a strengthening of competition law?

The actual analysis first shows that the introduction of ex-ante regulations alongside traditional antitrust[43] laws is essential. However, digital markets, characterized by dynamism and rapid evolution, together with digital platforms offering diverse services based on complex technologies, present a considerable challenge for regulation. Examples

[43] Komninos, A., 2022. *The Digital Markets Act: How Does it Compare with Competition Law?*

of this complexity include challenges in taking action on data management, identifying optimal conditions to stimulate innovation, and assessing when a practice is harmful or, conversely, critical to the economics of the platforms.

The analysis also shows that although the DMA appears to be able to identify the main unfair practices of gatekeepers, which are responsible for the most significant harms, there is no guarantee that the Commission's proposed modes of intervention, such as blanket obligations and bans on all gatekeepers, can really achieve the legislature's ambitious goals.

In conclusion, further questions arise about the possibility of relying on regulatory intervention that does not take into account differences between platforms, forgoing detailed case-by-case analysis. The DMA is an important step in the European digital strategy, but, as originally envisioned, issues arise regarding this first draft of the regulation, leaving open the possibility of future negative effects during implementation. Therefore, although the DMA is essential for the regulation of digital markets to protect the economy, competition, and fundamental rights, it cannot currently be considered completely conclusive and free of inaccuracies. It is desirable for the European legislature to carefully consider the critical elements to make this intervention fully adhere to the needs of the current and immediate future socioeconomic environment.

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# Summary

## Digital Markets Act – Challenges and opportunities for European Competition law and policy

Adriano Capasso

This thesis focuses on the Digital Markets Act (DMA), a pivotal European regulation addressing the power of major digital platforms as gatekeepers. The analysis critically explores the reasons and challenges of ex-ante regulatory intervention in restraining these platforms. The study begins by examining the structural characteristics of digital platforms and their dominant positions, emphasizing the winner-take-all scenario. The gatekeeper function is then scrutinized for its impact on market access and the imposition of harmful conditions.

The proposed legislation is analyzed to define the gatekeeper concept and reveal unfair practices in digital markets. The importance of regulatory intervention is stressed to prevent a concentration of power that could threaten democracy. The European Commission's proposal is examined in terms of its ex-ante nature, the process of designating gatekeepers, and the obligations and prohibitions outlined. The study aims to answer whether the DMA, as an ex-ante regulatory instrument, is the most effective means of addressing issues in digital platforms and strengthening competition law.

The analysis suggests that combining ex-ante regulations with traditional antitrust laws is crucial, but the dynamic and rapidly evolving nature of digital markets poses challenges. While the DMA identifies key unfair practices, doubts arise about the effectiveness of blanket obligations and bans on all gatekeepers. The conclusion emphasizes the need for careful consideration of differences between platforms and potential negative effects during implementation. The DMA is deemed essential but not conclusively free of inaccuracies, urging the European legislature to refine it for optimal alignment with the current socioeconomic environment.

# Summary (Lithuanian)

## Skaitmeninių rinkų aktas - iššūkiai ir galimybės Europos konkurencijos teisei ir politikai

Adriano Capasso

Šiame darbe daugiausia dėmesio skiriama Skaitmeninių rinkų įstatymui (DMA) - svarbiausiam Europos reglamentui, kuriuo sprendžiamas didžiųjų skaitmeninių platformų, kaip sargų, galios klausimas. Analizėje kritiškai nagrinėjamos ex ante reguliavimo intervencijos, skirtos šioms platformoms suvaržyti, priežastys ir iššūkiai. Tyrimas pradedamas nagrinėjant skaitmeninių platformų struktūrines charakteristikas ir jų dominuojančias pozicijas, pabrėžiant nugalėtojo ir laimėtojo scenarijų. Po to kruopščiai nagrinėjama sargybinio funkcija, atsižvelgiant į jos poveikį patekimui į rinką ir žalingų sąlygų nustatymui.

Siūlomi teisės aktai analizuojami siekiant apibrėžti sargybinio sąvoką ir atskleisti nesąžiningą praktiką skaitmeninėse rinkose. Pabrėžiama reguliavimo intervencijos svarba siekiant užkirsti kelią galios koncentracijai, kuri gali kelti grėsmę demokratijai. Europos Komisijos pasiūlymas nagrinėjamas atsižvelgiant į jo ex ante pobūdį, sargų skyrimo procesą ir įvardytas pareigas bei draudimus. Tyrimu siekiama atsakyti į klausimą, ar DMA, kaip ex-ante reguliavimo priemonė, yra veiksmingiausia priemonė skaitmeninių platformų problemoms spręsti ir konkurencijos teisei stiprinti.

Analizė rodo, kad labai svarbu derinti ex ante reguliavimą su tradiciniais antimonopoliniais įstatymais, tačiau dėl dinamiško ir greitai besikeičiančio skaitmeninių rinkų pobūdžio kyla sunkumų. Nors DMA nustato pagrindinius nesąžiningos praktikos atvejus, kyla abejonių dėl bendrų įpareigojimų ir draudimų visiems sargams veiksmingumo. Išvadoje pabrėžiama, kad reikia atidžiai atsižvelgti į platformų skirtumus ir galimą neigiamą poveikį jas įgyvendinant. Manoma, kad DMA yra esminė, tačiau joje nėra galutinai išvengta netikslumų, todėl Europos teisės aktų leidėjas raginamas ją patobulinti, kad ji optimaliai atitiktų dabartinę socialinę ir ekonominę aplinką.