UPPING THE *"ANTE"* ON COMPETITION REGULATION: **GAMBLING WITH THE FUTURE OF BIG TECH?**

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UPPING THE "*ANTE*" ON COMPETITION REGULATION: GAMBLING WITH THE FUTURE OF BIG TECH?

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Policymakers, regulators, and commentators alike have criticized antitrust enforcers' attempts at constraining "Big Tech" as excessively lenient and far too slow. This perceived failure, along with widespread declarations of certain platforms' incontestable dominance, have led to calls for a revamped approach to competition in digital markets, including expansive new regulatory structures like the European Union's Digital Markets Act ("DMA"). But attempts to clip the wings of large platforms through *ex ante* regulation carry some risk, as new compliance burdens, uncertainty, and other unintended consequences may do more to impede competition in these dynamic and evolving markets than nurture it. In this article, we examine these risks, key provisions in the DMA, and the unanswered questions that still remain even after its enactment.

01
INTRODUCTION

Antitrust enforcement efforts aimed at reining in "Big Tech" in recent years have been lax and ineffectual – at least, that is the familiar refrain we hear from policymakers, regulators, and numerous antitrust commentators. Leadership in the U.S. antitrust agencies, Congress, and the European Commission ("Commission") contend that various errors and omissions in the past and shortcomings in the existing antitrust toolkit require an overhaul and entirely new approach to slaying the Big Tech Leviathan. As Assistant Attorney General Jonathan Kanter recently asserted, online platforms' "[g]atekeeper power has become the most pressing competitive problem of our generation at a time when many of the previous generations' tools to assess and address gatekeeper power have become outmoded."[2] For those critics of Big Tech, the established digital platforms have now attained durable and nigh-unassailable market dominance because of enforcers' unwillingness or inability to address pressing competitive issues arising in these markets.

The response to this Big Tech conundrum? Calls for new *ex ante* regulation, with the European Union's Digital Markets Act ("DMA")[3] leading the way. Of course, *ex ante* regulation runs contrary to longstanding competition policy (most conspicuously in the United States) that has focused on opening markets, rather than regulating them, and relied primarily on *ex post* examination of evidence to determine whether anticompetitive conduct has occurred. As a result, large platforms now face a veritable pincer movement between Europe and the United States: compliance with the DMA on one side of the Atlantic and litigation through the U.S. system of cases and controversies in the judicial branch on the other.

But are digital markets truly more prone to dominance than markets more generally? The evidence may be more mixed than widely assumed. Herbert Hovenkamp recently concluded that "[t]here is little empirical support for the proposition that digital-platform markets are winner-take-all. Rather, the landscape for digital markets resembles the one for markets generally: some of them are more conducive to single-firm dominance than others."[4] So one might ask whether the advent of *ex ante* regulation of Big Tech will achieve the DMA's laudable goal of "ensuring fair and open digital markets,"[5] or if the cure may ultimately prove worse than the asserted disease. Even the most clearsighted among us cannot hope to predict how tech markets will evolve, as innovations, new entrants, and previously unimagined high-tech marvels continuously emerge. Rigid *ex ante* regulation thus carries risks, a minefield of costly new burdens on market players, byzantine and fraught compliance obligations, and potential for stagnating innovation and reducing output.[6]

As political leaders and antitrust agencies construct and enforce new regimes like the DMA, the proposed solutions may raise more questions than answers about the future of affected markets. Will regulations effectively pick winners and losers by clearing a path for some competitors while constructing roadblocks for others? Will U.S. platforms, such as Apple, Google, Amazon, and Meta, be unfairly targeted or disproportionately encumbered by new regulations given their incumbent positions? And what potential unintended consequences might arise from *ex ante* regulatory regimes aimed at dynamic and evolving tech markets?

In this paper, we explore these and other questions in three sections. First, we discuss the DMA regime, its prohibitions, and requirements, including its blend of *ex ante* constraints and *ex post* scrutiny and enforcement. Second, we examine the risks and potential pitfalls of *ex ante* regulation of competition. And third, we consider what lies ahead and the open questions that remain in the wake of the DMA's adoption.

2 Assistant Attorney General Jonathan Kanter, Opening Remarks at the Second Annual Spring Enforcers Summit (Mar. 27, 2023), *available at* https://www.justice.gov/opa/pr/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-second-annual-spring.

3 (EU) 2020/1828 Digital Markets Act (effective Nov. 1, 2022); Council Regulation (EU) 2022/1925, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1 [hereinafter, collectively, the "DMA"].

4 Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1978 (2021).

5 European Commission, *The Digital Markets Act: ensuring fair and open digital markets*, *available at* https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

6 See generally John Taladay & Paul Lugard, The Ten Principles of Ex Ante Competition Regulation, COMPETITION POL'Y INT'L (Nov. 2, 2022), https://www.competitionpolicyinternational.com/the-ten-principles-of-ex-ante-competition-regulation/.

02

DOUBLING DOWN: THE DMA'S PROHIBITIONS, OBLIGATIONS, AND ENFORCEMENT REGIME

The DMA,[7] which took effect on November 1, 2022, is often described as *ex ante* regulation, but it may be more accurately characterized as a hybrid of *ex ante* "parking brake" rules and *ex post* investigation and intervention. The *ex ante* principles arise out of legal obligations and prohibitions imposed on a set group of "gatekeepers" to ensure "contestability and fairness for the markets in the digital sector."[8] Traditional competition law, particularly in the United States, utilizes investigative tools to determine whether there is evidence of anticompetitive behavior and effects. In contrast, the DMA attempts to address "the challenges to the effective function of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms" *before* the conduct has occurred.[9] The *ex post* nature of the DMA is evident in the Commission's public and private enforcement authority. The Commission not only has access to a plethora of investigative tools and enforcement proceedings, but also has the authority to impose non-compliance sanctions.[10] In addition, under EU antitrust law, companies can bring private actions under the DMA.[11]

Responding to the widespread belief that digital markets are a hotbed for "weak contestability and unfair practices," the DMA seeks to impose a series of "regulatory safeguards" for business and end users of "core platform services."[12] These services include those that both businesses and consumers use every day: "online intermediation services, online search engines, operating systems, online social networking, video sharing platform services, number-independent interpersonal communication services, cloud computing services, virtual assistants, web browsers and online advertising services."[13]

The DMA consists of 22 obligations and prohibitions.[14] We highlight five sets of provisions here due to their broad implications for potential gatekeepers and competition generally in digital markets: (i) gatekeepers; (ii) self-preferencing; (iii) interoperability; (iv) "FRAND" terms for data sharing; and (v) enforcement and sanctions. We discuss each in turn, followed by an overview of the timeline for the DMA to take full effect.

A. Five Key DMA Provisions

1. The Gatekeepers

The DMA's rules apply only to those entities designated as "gatekeepers" for core platform services. Under Article 3(1), an entity qualifies as a gatekeeper if it meets three qualitative criteria: (1) "it has a significant impact in the internal market;" (2) "it provides a core platform service which is an important gateway for business users to reach end users;" and (3) "it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the future."[15]

These three qualitative criteria will be presumed if certain quantitative thresholds are met. Specifically, an entity that provides the same core platform services in at least three

7 Although we focus our discussion primarily on the DMA, a number of *ex ante* regulatory regimes are in place or under consideration elsewhere, including in the UK, Australia, Germany, Japan, and South Korea. For example, the Digitization Act (effective Jan. 19, 2021), which amends the German Competition Act, adds a new *ex ante* tool that prohibits conduct that may amount to unfair competition. And in Japan, the Ministry of Economy, Trade, and Industry passed the Improving Transparency and Fairness of Digital Platforms Act ("TFDPA") (effective April 2021), which designates five providers of online shopping malls and application stores as subject to the new regulation. And in the United States, Congress has considered but not voted on new antitrust laws aimed at digital markets, including the America Innovation and Choice Online Act, S. 2992, 117th Cong. (2022); H.R. 3816, 117th Cong. (2022), and the Open App Markets Act, S. 2710, 117th Cong. (2022); H.R. 5017, 117th Cong. (2022) (identical); H.R. 7030, 117th Cong. 2022 (related).

8 DMA, *supra* note 3, at 2–3, ¶ 7.

9 *Ibid.* at 2, ¶ 5.

10 *Ibid.* at 46-54, arts. 21, 22, 23, 26, 29, 30, 31, and 32.

11 *Ibid.* 33-34, 57, arts. 5(6), 39.

12 *Ibid.* at 2-3, ¶ 7.

13 *Ibid.* at 28-30, art. 2.

14 For a more detailed discussion of the full range of DMA provisions, see Vanessa Turner, *The EU Digital Markets Act—A New Dawn for Digital Markets?*, ANTITRUST, (Dec. 22, 2022).

15 DMA, *supra* note 3, at 30-32, art. 3 ¶ 1.

Member States is presumed to have a significant impact on the internal market where it achieves an annual turnover equal to or above €7.5 billion within the EU in each of the last three financial years, or where its average market capitalization or its an equivalent fair market value amounts to €75 billion in the last financial year.[16] The rationale for these thresholds is that, when combined with a large number of users, qualifying gatekeepers can use their financial strength to "monetise those users" and cement their current market status.[17] A core platform service has an "entrenched and durable position" or the "foreseeability" of such a position where "contestability . . . is limited."[18] A presumption of limited contestability exists where an entity "provides a core platform service that in the last financial year has an average of at least 45 million monthly active end users and at least 10,000 yearly active business users established in the EU."[19]

Article 5(2) proscribes a range of actions with users' personal data. For example, the DMA prohibits gatekeepers from: (1) processing personal data of end users using third-party services for the purpose of online advertising, (2) combining personal data from more than one core platform service, (3) cross-using personal data between a core platform service and other gatekeeper services, and (4) signing end-users in to other services of the gatekeeper to combine personal data.[20] These prohibitions reflect the concern that gatekeepers, particularly those that provide online advertising services, have an advantage over competitors in accumulating data and creating barriers to entry.[21]

2. Self-Preferencing

Under Article 6(5) of the DMA, a gatekeeper acting "in a dual role of online intermediary for third parties and itself may not rank its own services and products more favourably than similar services or products of a third party and must apply transparent, fair, and non-discriminatory conditions to such ranking."[22] Where the gatekeeper has "the ability to undermine directly the contestability . . . [of] products or services . . . to the detriment of business users which are not controlled by the gatekeeper," the DMA states that "the gatekeeper should not engage in any form of differentiated or preferential treatment" in favor of its own products or services.[23]

Article 5(2) proscribes a range of actions with users' personal data

3. Interoperability

Article 7 largely addresses practices that promote interoperability of "number-independent interpersonal communication services."[24] For example, gatekeepers must offer a service that, at the very least, allows for "end-to-end text messaging" and "sharing of images, voice messages, videos and other attached files" between two individual end users.[25] Shifting the focus to operating systems, Article 6(7) requires that gatekeepers allow "business users and alternative providers of services" interoperable access to "the same operating system, hardware or software features" that is available to and used by the gatekeeper.[26]

4. "FRAND" Access

Under Article 6(11), gatekeepers that offer online search engines must provide third parties with access to "fair, reasonable, and non-discriminatory ["FRAND"] terms to

16 *Ibid.* at 30, art. 3 ¶ 2a.

17 *Ibid.* at 5, ¶ 17.

18 *Ibid.* at 6, ¶ 21

19 *Ibid.* at 30, art. 3 ¶ 2.

20 *Ibid.* at 33, art. 5 ¶ 2.

21 *Ibid.* at 9, ¶ 36.

22 See Turner, *supra* note 14; see also DMA, *supra* note 3, art. 6 ¶ 5.

23 DMA, *supra* note 3, at 13-14, ¶¶ 51-52.

24 *Ibid.* at 37, art. 7 ¶ 1.

25 *Ibid.*

26 *Ibid.* at 37, art. 6 ¶ 7.

ranking, query, click and view data."[27] In addition, personal data must be anonymized. Article 6(12) similarly requires that gatekeepers apply FRAND "conditions of access for business users" to their designated "software application stores, online search engines, and online social networking services."[28] The DMA states that a helpful benchmark to determine fairness of access conditions is when gatekeepers offer different prices or conditions for access to the same services to business users or to end users.[29] Here, FRAND conditions are intended to prevent "unjustified differentiation" and an imbalance of bargaining power.[30]

5. Enforcement and Sanctions

Although the Commission is the sole governmental authority empowered to enforce the DMA, Member States may investigate possible violations.[31] The DMA functions as a complement to EU competition rules regarding unilateral conduct and merger control.[32] The Commission's enforcement authority includes Requests for Information, monitoring effective compliance with the obligations, conducting investigations into non-compliance, and imposing penalties and fines on gatekeepers for noncompliance.[33] The Commission also has the authority to conduct investigations to determine whether a service should be added to the list of core platform services.[34]

The DMA imposes a set of compliance obligations on gatekeepers, including creation of a compliance function within their organizations (including compliance officers independent of operations), annual reporting and publication of steps taken to comply with their obligations, and ongoing requirements to update the Commission of "any intended concentration . . . where the merging entities or the target of the concentration provide core platform services or any other services in the digital sector or enable the collection of data."[35] Penalties for gatekeepers that fail to live up to their obligations can be severe, ranging from cease and desist orders to imposing fines up to 10 percent of total worldwide turnover from the prior year.[36] For repeat offenders, the Commission can increase fines to 20 percent of total worldwide turnover from the prior year or subject the gatekeeper to substantial periodic penalty payments.[37]

> ***Although the Commission is the sole governmental authority empowered to enforce the DMA, Member States may investigate possible violations***

B. DMA Enforcement Timeline

While certain provisions took effect immediately, others will apply over time (e.g. Article 3 designation of gatekeepers).[38] An entity that provides core platform services must self-assess to determine whether it meets the designation criteria under Article 3 of the DMA. If it meets the criteria, it has two months to notify the Commission with relevant information substantiating its designation status.[39] The entity may also present information to argue that it should not be designated as a gatekeeper.[40] The Commission will then decide

27 *Ibid.* art. 6 ¶ 11.

28 *Ibid.* art. 6 ¶ 12.

29 *Ibid.* at 16, ¶ 62.

30 *Ibid.*

31 *Ibid.* at 23-24, ¶ 91.

32 *Ibid.* at 3, ¶ 10.

33 Turner, *supra* note 14.

34 DMA, *supra* note 3, art. 19.

35 *Ibid.* at 40, 42-43, 50-51, arts. 11, 14, 28.

36 *Ibid.* at 51, art. 30 ¶ 1.

37 *Ibid.* at 52-53, arts. 30 ¶ 2, 31.

38 *Ibid.* at 62, art. 54. The majority of the DMA's provisions are set to take effect on May 2, 2023.

39 *Ibid.* at 30-31, art. 3 ¶ 3.

40 *Ibid.* at 31, art. 3 ¶ 5.

whether to designate an entity as a gatekeeper within 45 working days of receiving the relevant information.[41] Within six months of the designation, the legal obligations promulgated by the DMA will take effect.[42]

03

PLAYING THE ODDS WITH *EX ANTE* COMPETITION REGULATION

Notwithstanding the DMA's vast array of obligations and restrictions, the Commission asserts that "[g]atekeepers will keep all opportunities to innovate and offer new services. They will simply not be allowed to use unfair practices towards the business users and customers that depend on them to gain an undue advantage."[43] But the old adage "the road to hell is paved with good intentions" counsels against assuming the DMA's perhaps commendable aims will necessarily be achieved. With that in mind, we consider three potential hazards confronting the DMA and other attempts to implement *ex ante* regulation of competition: (i) the "Brussels Effect;" (ii) excessive regulatory burdens that may outweigh any procompetitive benefits; and (iii) unintended consequences from prescribing (and proscribing) behavior in dynamic, evolving markets. We discuss each in turn.

A. The "Brussels Effect"

Although the global regulatory landscape is fractured, regulations in the EU can and often do have an outsized influence around the world. To describe the impact of the EU's regulatory regimes outside of Europe, Professor Anu Bradford coined the phrase, "the Brussels Effect," as a shorthand for the EU's "unilateral power to regulate the global marketplace," whether intentionally or otherwise.[44] As Professor Bradford explains:

> The EU today promulgates regulations that influence which products are built and how business is conducted, not just in Europe but everywhere in the world. In this way, the EU wields significant, unique, and highly penetrating power to unilaterally transform global markets, . . . [including] through the ability to set the standards in competition policy . . . .[45]

The *de facto* Brussels Effect causes global or multinational corporations to adjust their conduct *outside* of Europe to conform with the EU's regulations because they "have the business incentive to extend the EU regulation to govern their worldwide production or operations."[46] This incentive is strongest "whenever its production or conduct is non-divisible across different markets."[47] And when firms choose a standard, it is often most efficient to follow the "leading standard," which usually means "the most demanding standard imposed by a major jurisdiction that represents an important market for the corporation."[48]

Digital platforms' incentives are no different. Because the largest among them have a truly global presence – often existing in some form in nearly every country around the world[49] – they face a Hobson's choice of choosing between being bound by the "most demanding" regulatory regime (e.g. the DMA) on a global scale or converting their platforms into bespoke systems across multiple jurisdictions. Such a division into individualized offerings is in a sense nothing new: platforms must comply with local laws. By divorcing product mix from market forces and constraints like fixed costs, however, the Brussels Effect may reduce the variety of digital services available in other jurisdictions around the

41 *Ibid.* at 31, art. 3 ¶ 4.

42 *Ibid.* at 32, art. 3 ¶ 10.

43 *The Digital Markets Act: ensuring fair and open digital markets*, *supra* note 5.

44 ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 2 (1st ed. 2020).

45 *Ibid.* at xiv.

46 *Ibid.* at 2 ("The de jure Brussels Effect—which refers to the adoption of EU-style regulations by foreign governments—builds directly on the de facto Brussels Effect: after multinational companies have adjusted their global conduct to conform to EU rules, they have the incentive to lobby EU-style regulations in their home jurisdictions.").

47 *Ibid*.

48 *Ibid.* at 54.

49 Google's cloud services, for example, are available in over 200 countries. See https://cloud.google.com/about/locations.

world.[50] In this way, *ex ante* regulation can impose harmful boundaries on innovation and diversity of competition, in addition to the costs of compliance.

B. Excessive Regulatory Burden

Ex ante regulation "seeks to prevent harmful conduct from occurring," but complex or opaque requirements can impose burdens, costs, and restrictions that discourage investment.[51] On its face, the DMA inflicts compliance burdens – e.g. internal monitors, annual reporting – on gatekeepers that will add costs and create the potential for market inefficiencies and substantial expenses for those companies working within its regulatory framework.

As an example of regulation's potential downsides, one need look no further than the EU's General Data Protection Regulation ("GDPR"). While many have praised its privacy benefits, at least one analysis suggests that its impact on profits and competition in tech markets has been unexpectedly harmful. According to a recent study at the Oxford Martin School, GDPR caused an 8.1 percent drop in profits among companies exposed to the regulation, with an even greater impact on smaller IT firms, which saw a 12 percent profit reduction.[52] Moreover, contrary to the Commission's competition policy goals embodied in the DMA, the study found that "[l]arge technology companies . . . have seemingly taken market share from their smaller competitors, offsetting the compliance costs associated with GDPR."[53]

Antitrust practitioners and regulators know well the mantra that the antitrust laws are designed to protect competition, not competitors. For example, the antitrust laws have not traditionally required private actors – even monopolists – to contract with their rivals.[54] While the right to such a refusal to deal is "not unqualified," the Supreme Court explained in *Trinko* that it has been "very cautious in recognizing . . . exceptions" to the rule, and with good reason, given the Court's recognition of the "uncertain virtue of forced sharing."[55]

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But antitrust regulators on both sides of the Atlantic appear ready to chart an entirely new course. As AAG Kanter recently stated, "[d]igital platforms are profoundly different [from the facts of *Trinko*]—they are built with 1s and 0s, not poles and wires, and they are collaborative by nature. . . . So the underlying economic logic of *Trinko* will not apply in the same way."[56] Indeed, the DMA transforms the exception into the rule, imposing a strict duty to deal on gatekeepers, requiring them to open their services and data and grant access to rivals in ways akin to an essential facility. These include the aforementioned requirements that gatekeeper services be interoperable, abstain from self-preferencing or higher ranking of the gatekeeper's own services, and apply FRAND terms for access to rankings and other data, app stores, search engines, and social network services.[57] Meanwhile, opening a second front, DOJ's recent "ad tech" complaint puts similar con-

50 See BRADFORD, *supra* note 44, at 55.

51 Taladay & Lugard, *supra* note 6.

52 Giorgio Presidente & Carl Benedikt Frey, *The GDPR effect: How data privacy regulation shaped firm performance globally*, VOXEU.ORG (Mar. 10, 2022), https://cepr.org/voxeu/columns/gdpr-effect-how-data-privacy-regulation-shaped-firm-performance-globally; see also Pete Swabey, *GDPR cost businesses 8% of their profits, according to new estimate*, TECH MONITOR (Mar. 11, 2022) ("Europe's landmark privacy regulation caused an estimated 8.1% drop in profits and a 2.2% dip in sales for affected businesses, economists estimate."), https://techmonitor.ai/policy/privacy-and-data-protection/gdpr-cost-businesses-8-of-their-profits-according-to-a-new-estimate.

53 Presidente & Frey, *supra* note 52 ("Indeed, while European leaders have pledged to reign in the power of bigTech [sic], GDPR might even have strengthened them by weakening their competitors."); see also Swabey, *supra* note 52 ("Regardless of the benefits to consumers, it seems that [GDPR] has led to greater market concentration. It has benefitted bigger technology companies at the expense of smaller ones.").

54 See *Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) ("[A]s a general matter, the Sherman Act does not restrict the long-recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.") (quotations omitted) [hereinafter, *Trinko*].

55 *Ibid.*

56 Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Keynote at Fordham Competition Law Institute's 49th Annual Conference on International Antitrust Law and Policy (Sept. 16, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham.

57 See, e.g. DMA, *supra* note 3, at 33, 35-38, art. 5 ¶¶ 4-5; art. 6 ¶¶ 5, 8, 10; art. 7.

duct squarely in its crosshairs, alleging that Google violated Section 2 of the Sherman Act through, among other things, "opaque rules that benefit itself and harm rivals" as it feared being "forced to interoperate" with competitors.[58]

C. Unintended Consequences

Perhaps inescapably, *ex ante* regulations demand that regulators engage in a form of fortune telling. They must peer into the future of the markets they oversee and attempt to predict how they will evolve, either with or without their intervention. In an ideal world, they would "minimize costs and market distortions" caused by any regulation and instead, foster growth and "innovation through market incentives and goal-based approaches."[59] But that result is not a given. While *ex ante* regulations may be well suited for markets where the cost of failure is very high – e.g. healthcare, pharma, civil engineering – the crystal ball for markets subject to rapid and unpredictable development may be especially murky. Few could have foretold the upheaval in digital platform markets over the last decade, so we cannot assume current prognostications of durable dominance by a handful of players will prove more reliable now, particularly in the face of AI and other unanticipated advances to come.

Labyrinthine rules and requirements can inhibit development of new services and capabilities. Among other things, complex regulation can introduce uncertainty for market participants about what would be deemed acceptable conduct versus a violation of new rules, particularly where prohibitory language could be read broadly. For example, the DMA's Article 6(5) requiring that gatekeepers "shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party" leaves open the possibility that any "favoring," no matter how justified or minute, of one's product would be a violation.[60] And the effects of over-regulation may be particularly acute for the most dynamic and rapidly growing challengers, rather than established players who are better able to absorb the costs and burdens of complex frameworks. Through this uncertainty, over time, *ex ante* regulations may inadvertently cause currently dynamic markets to develop inefficiencies or promising competitors to fail, ultimately harming end users.[61]

To the extent *ex ante* regulation like the DMA benefits competitors, it also may unintentionally do so at the expense of end users. For example, consumers benefit from having a consistent and reliable method of payment for goods or services. But the DMA forbids gatekeepers from requiring business users to use certain services (e.g. payment systems or identification services) that may help to ensure a good end user experience.[62] And it remains uncertain whether requirements of interoperability and data sharing will present new security and privacy concerns.[63]

04
ALL BETS ARE OFF: THE UNCERTAIN ROAD AHEAD

As the process for designating gatekeepers and for imposing the DMA's prescriptive behavioral obligations moves forward in 2023, what can be said about the DMA's overarching goal of laying down rules to ensure digital markets are contestable and fair?[64] Does the DMA provide certainty by telling the gatekeeper businesses what to do and how to behave, or does it invite more investigation and leave market participants unsure about how to comply with its broad requirements?

58 Compl. at ¶¶ 7, 136, *United States v. Google LLC,* No. 23-cv-00108 (E.D. Va. Jan. 24, 2023).

59 Taladay & Lugard, *supra* note 6; see also ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Guiding Principles for Regulatory Quality and Performance* (2011), https://www.oecd.org/daf/competition/37318586.pdf.

60 DMA, *supra* note 3, at 35, art. 6 ¶ 5.

61 Moreover, there is a risk that regulators may impose a "tax" on non-domestic platforms (e.g. EC favoring European companies over U.S. companies). U.S. Senators have already voiced this concern with respect to the DMA. See, e.g. Kevin Pinner, *Senators Ask Biden To Curb EU's Agenda To Tax Big Tech*, LAW360 (Mar. 10, 2023), https://www.law360.com/tax-authority/articles/1584670/senators-ask-biden-to-curb-eu-s-agenda-to-tax-big-tech.

62 Regulatory capture can occur when established players influence the process (e.g. through lobbying) and resulting regulations make it difficult or impossible for small players to comply, and thus compete in the affected market. Here, the DMA appears to be focused solely on the biggest platforms, so risk of regulatory capture by biggest players is mitigated (e.g. DMA "gatekeeper" threshold). But the potential for concern remains, particularly as markets and regulations evolve.

63 See Bjorn Lundqvist, *Reining in the Gatekeepers and Opening the Door to Security Risks*, CENTER FOR EUR. POL'Y ANAL. (Mar. 30, 2023), https://cepa.org/comprehensive-reports/reining-in-the-gatekeepers-and-opening-the-door-to-security-risks/.

64 DMA, *supra* note 3, at 2-3, ¶ 7.

The answers to these questions may lie in examining the DMA's proscriptions and the role of regulators in enforcing them. The DMA purports to be *ex ante* in that it identifies issues in the market beforehand and attempts to dictate participant behavior to prevent harmful conduct from occurring. But how truly *ex ante* is the DMA? It repeatedly relies on "fairness" as its guiding principle. Indeed, the DMA uses the terms "fairness," "unfairness," and "contestability" numerous times, but it never defines them. Nor does it describe how fairness might be enhanced or compromised, leaving much to future interpretation.

Similarly, once a company has been designated a gatekeeper, the DMA's behavioral obligations are mandatory and the requirement for gatekeepers to comply is non-negotiable. Under Article 8 of the DMA, for example, which dictates the means for gatekeepers to comply with the DMA's obligations, there is no efficiency defense. But the DMA allows for market investigations and it will require factual foundations for many of its enforcement decisions. The DMA thus sets out structural limitations on the practices of large technology platforms, but it needs actual facts to determine a gatekeeper's compliance or non-compliance with its requirements. As noted above, in this sense, the DMA — though often described as *ex ante* — is more fairly characterized as a hybrid of *ex ante* and *ex post* regulation. It sets up the behavioral rules *ex ante*, but relies on *ex post* investigation and intervention to enforce its prohibitions.

Additionally, the DMA is widely viewed as a significant step toward the return to a structural based approach to antitrust. It sets quantitative thresholds to identify the digital platforms that fall under its purview and it creates *ex ante* rules and obligations for those gatekeepers without requiring the Commission to define a market, prove that the gatekeeper holds a dominant position, or present any evidence of anticompetitive effects. But it does not go so far as to shift the burden of proof away from the Commission to prove that a potential acquisition would harm competition. In the DMA's final iteration, policymakers rejected an amendment that would have placed the burden onto gatekeepers to demonstrate that any potential acquisitions would *not* harm competition. In keeping the burden of proof with the Commission, the DMA maintains a more balanced, if not nuanced, approach.

Digital markets are global, and it seems relatively certain that successful regulation of them will require some harmonization across countries. But presently the global regulatory landscape for large digital platform is highly disjointed. Will the DMA prove to be the first step in creating a more coherent global regulatory approach for digital markets? Will the Brussels Effect take hold, making the DMA a *de facto* global regime? Will there be a domino effect where other jurisdictions adopt even more restrictive laws in a "race to the bottom?" Or will distinct versions of digital platforms emerge that are tailored to the unique requirements of different geographies? Many Chinese platforms such as TikTok, for example, already have separate versions for domestic and global markets.

How lawmakers and the large digital platforms will answer these questions remains unclear. Several bills to regulate online platforms have been introduced in the United States, but Congress appears unlikely to pass any legislation in the discernible future. The road ahead thus will no doubt be filled with twists and turns as policymakers look to bolster laws that are perceived to inadequately safeguard competition in digital markets, as regulators work to implement those laws, and as the platforms strive to comply with these new regulatory regimes.

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CONCLUSION

Even as policymakers and regulators laud the benefits of new rules and appeal for expanded tools to constrain Big Tech, *ex ante* regulation's prospective impact on competition in digital markets remains indeterminate. They contend that the market power of digital gatekeepers requires intervention beyond mere *ex post* investigation and adjudication, which they assert lacks the speed and effectiveness to keep up in this digital age. But as other jurisdictions consider following in the DMA's footsteps, they should proceed with caution and keep in mind the attendant risks of *ex ante* regulatory regimes to innovation, output growth, and quality. If regulators go "all in" on *ex ante* frameworks, they may end up playing a losing hand.

> ***"…g… markets are global, and it seems relatively certain that successful regulation of them will require some harmonization across countries***

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