

RE GU LA TION

**DIGITAL MARKETS ACT:
A REVOLUTION
OR A LEGAL
CONTRADICTION?**



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KEY TAKEAWAYS

- The parallel production of the draft Digital Markets Act (“DMA”) and the draft Digital Services Act (“DSA”), which are presented as a legislative package to regulate digital platforms, raises questions of consistency. In fact, they are based on two different regulatory approaches and sometimes do not use the same definitions to describe the same operators.
- The novel construction of the draft DMA, somewhere between sector-based regulation and competition law, raises questions as to its legitimacy and effectiveness.
- As they stand, the provisions appear in many respects to be at odds with the construction of European Union law, and could therefore create a precedent that undermines the principle of legal security.
- While they are presented on the basis of the single market, namely as the harmonisation of legislation to avoid compartmentalisation, the provisions appear to address a different problem, that of competition law, namely the conduct of private companies.
- In this respect, they constitute a reversal of perspective in terms of competition law. The regulators do not start with a market failure, and then propose a remedy to resolve that failure. They presuppose that the power of the actor concerned – primarily defined by its size – constitutes a market failure in itself. Thus, the provisions introduce a system of presumption of harm to the functioning of the markets.
- Somewhat vague criteria to describe the digital platforms concerned (“gatekeepers”) are deduced from general remedies; this undermines equality before the law.
- Furthermore, the provisions introduce review mechanisms which leave considerable room for interpretation and consequently give operators little legal stability.
- The provisions also raise questions as to the separation of powers at the European Union institutions level, and as to the possible confusion of roles which may arise in the legal process when one and the same body, in this case the European Commission, defines the rules, investigates their potential breach, determines the sanction and, finally, adjusts that sanction.
- Also, the provisions scarcely mention coordination with national competition authorities, a network approach, or issues relating to the overlapping or coverage of the various European provisions encompassing digital services.
- The scope of the procedural guarantees also appears to be particularly narrow. This not only raises questions as to the respect for the right of businesses to defend themselves, but also as to the principles of respect for property rights and the protection of investments, which appear to be weakened.
- From an economic point of view, understanding the business models requires greater precision than that which appears to be offered by these provisions as they stand. Many of the envisaged remedies will result in a substantial alteration of the business models of the digital platforms concerned.
- Finally, since the core regulation in the draft DMA is based on thresholds and an *ex ante* approach, it carries with it a number of risks in terms of the dynamics of European start-ups, which should be anticipated.

INTRODUCTION

“We also want to build better digital markets and the Digital Markets Act is a good example of the way in which competition law and regulation can complement each other to keep markets open.”

**Margrethe Vestager, Vice-President of the European Commission,
L’Agefi, 4 February 2021**

From an economic point of view, analysing and regulating the digital sphere is a complex matter, since it is a sector with multiple markets as well as driving the transformation of other economic sectors. The digital economy has led to the emergence of digital platforms, somewhere between markets and businesses¹. It presents unprecedented challenges for the European single market. Indeed, the network effects on which it is based tend to lead towards an oligopolistic transformation of the markets² concerned. However, in itself, this concentration phenomenon is not unprecedented and exists in many markets. What is unprecedented is the speed with which this concentration has occurred and the capacities that have been developed by the largest of these digital platforms, the leading examples of which are Google, Facebook, Amazon, Apple and Microsoft. The protocols and standards of the technological infrastructures that underpin them can cause competitive problems that are difficult for regulators to understand: in particular, algorithmic collusion and transactional discrimination³. It is therefore difficult to apply competition law in the digital field, having regard to the asymmetry of resources – human, technical and financial – and information between these operators and the regulators responsible for ensuring the maintenance of competition⁴ on the markets concerned. At a time when the study of increasing volumes of data in controlled transactions, and the analysis of those

1 Renaissance Numérique, “Regulating digital platforms: Why and how?”, May 2020, 25 pp.: https://www.renaissancenumerique.org/ckeditor_assets/attachments/503/note_regulation_des_plateformes_en.pdf

2 Renaissance Numérique, “Platforms and competitive dynamics”, September 2015, 29 pp.: https://www.renaissancenumerique.org/system/attach_files/files/000/000/169/original/English-Note-RN.pdf?1530007902

3 Frédéric Marty, Sophie Harnay, and Joëlle Toledano, “Algorithms and antitrust decisions: Risks and opportunities”, *Revue d’économie industrielle*, vol. 166, no. 2, 2019, pp. 91-118.

4 Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., and Van Alstyne, M., “The EU Digital Markets Act”, Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-29788-8, doi:10.2760/139337, JRC122910: <https://ec.europa.eu/jrc/en/publication/eu-digital-markets-act>

markets, are becoming increasingly important, this discrepancy makes it difficult for regulators to analyse the markets and thus monitor competition. For example, it is particularly difficult to understand the impact of very high processing power on the various markets. The time spent by regulators on their procedures is therefore out of step with innovation and the transformation in these markets, and the remedies proposed become anachronistic⁵. The Google Shopping case illustrates this point⁶.

Against this background, the European Commission proposes that the European Union (EU) should equip itself with a new tool to guarantee the openness of these markets by strengthening its ability to monitor them. This is the purpose of the draft Digital Markets Act (“DMA”) presented on 15 December 2020⁷. This proposal is supplemented by another on the regulation of digital platforms, the draft Digital Services Act (“DSA”), published on the same date, which aims to revise the rules relating to the liability of suppliers of digital services for the content and products that they host⁸. In this respect, the production of these two proposed regulations, which are presented as a legislative package to regulate digital platforms, raises questions of consistency⁹.

The DMA, which falls midway between competition law and sector-based regulation, is based on three main principles:

- asymmetric regulation, targeting the large digital platforms, described as “gatekeepers”;
- *ex ante* regulation, imposing a certain number of obligations on these “gatekeepers”; and

5 Ibid.

6 Case AT.39740 Google Search (Shopping), Commission Decision of 27 June 2017: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740

7 European Commission, “Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)”, 15 December 2020: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>

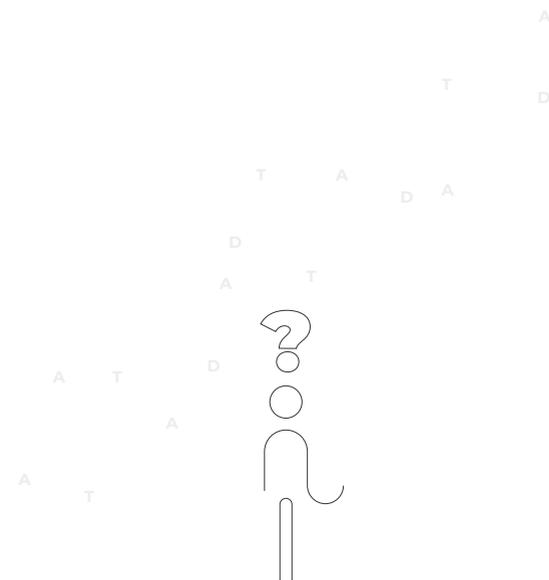
8 European Commission, “Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC”, 15 December 2020: https://ec.europa.eu/info/sites/info/files/proposal_for_a_regulation_on_a_single_market_for_digital_services.pdf

9 See the section called “An unprecedented concentration of powers within the European Commission”, in Part 1 of this note.

- increased resources to enable the European Commission to perform its supervisory function.

From a legal point of view, this legislative proposal appears in many respects to be at odds with the construction of EU law, and as such, could create a precedent that undermines the principle of legal security, due to the lack of clarity as to how it would interact with existing legal tools, to the introduction of a system of presumption of harm to the functioning of the markets, and to a concentration of powers. From an economic point of view, the proposed measures raise questions as to the soundness of the definition of the problems addressed, as to whether the business models of the operators concerned have been understood, and as to the consequences that they might have for innovation within the European single market.

The proposed DMA therefore raises a number of issues that should be clarified in order to avoid potential side-effects for the European economy and European law. In this note, the think tank Renaissance Numérique makes its own contribution to this exercise, in the hope that its analysis will provide a useful basis for the forthcoming discussions on these issues.



PART 1

A REVER- SAL OF THE CONSTRUC- TION OF EUROPEAN UNION LAW



Surprisingly, the draft DMA appears to take little account of European regulatory history in the construction of this new framework aimed at guaranteeing the openness of the digital single market. The approach taken opens the way for a lack of consistency between the new rules and the existing legal tools. This could result in significant conflicts and in profound legal uncertainty for operators on the European digital single market. In this respect, the proposed regulation could undermine the method of construction of European Union law.

WHAT LEGAL SECURITY IS PROVIDED BY THIS NEW FRAMEWORK?

HOW DOES THIS NEW TOOL FIT INTO THE EXISTING FRAMEWORK?

The architecture of EU law is shaken by the draft DMA. While its provisions are presented on the basis of the single market, namely as the harmonisation of legislation to avoid compartmentalisation, the provisions appear to address a different problem, one of competition law, namely the conduct of private companies. In this respect, it is interesting to note that the panel of economists that produced an analysis for the European Commission's Joint Research Centre only dealt with competitive issues¹⁰. The mere possibility of taking as a legal basis an authorisation given to the European Commission to enact rules, which would enable it to resolve inter-State questions to deal with issues of behaviour relating to the powers of private companies, could create an important precedent between the various tools on which European policies are based.

Accepting that the European Commission could create new rules that go beyond the powers conferred on it by the treaties in the area of competition law, for the sole purpose of regulating the behaviour of private operators and not to achieve convergence between diverging national objectives and views on the subject of the European market, would make the European Union a regulatory tool in itself, almost shaping the markets, and would undermine

¹⁰ Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., and Van Alstyne, *op. cit.*

its objective of simply ensuring the establishment of undistorted competition.

In this respect, the construction of European Union law, particularly through the stages of formalisation of legislation and its white and green paper¹¹ approach, is always based on a detailed analysis of the existing framework and a finding of divergences between the legislation of Member States. In the case of the DMA, the existing tools appear to have been little considered in the approach taken to the construction of this new framework.

Proceeding in this way would have been more readily understandable if instead of taking the decision to add a new brick to the European legal edifice, the work of the European Commission had primarily been intended to strengthen the intermediate tools for controlling competition on the markets that may exist at the level of the Member States. By way of example, the Platform-to-Business (P2B) Regulation¹², which entered into force in July 2020, and which regulates the commercial relationships between digital platforms and business users, already deals with several practices implemented by on-line intermediation services¹³.

In addition, if one is concerned only with competition law, the case-law already covers some of the issues that the DMA seeks to deal with. One example is preferential clauses, which have already been considered, in particular in the Booking.com¹⁴ case.

Similarly, the argument put forward by the European Commission in its explanatory memorandum, that competition law is always at risk of intervening too late, should be considered in more detail. In fact, the Commission has the

11 See their definition on the EUR-Lex website: https://eur-lex.europa.eu/summary/glossary/green_paper.html?locale=en

12 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN>

13 For example, more transparency with regard to the construction of rankings on such services.

14 Autorité de la concurrence, “Décision 15-D-06 du 21 avril 2015 sur les pratiques mises en œuvre par les sociétés Booking.com B.V., Booking.com France SAS et Booking.com Customer Service France SAS dans le secteur de la réservation hôtelière en ligne” : <https://www.autoritedelaconcurrence.fr/fr/decision/sur-les-pratiques-mises-en-oeuvre-par-les-societes-bookingcom-bv-booking-com-france-sas-et>

means to impose interim measures¹⁵. The imposition of interim protective measures could enable it to freeze potentially anti-competitive situations, to have the time to investigate and to define a potential abuse of a dominant position or vertical infringement. Admittedly, the Court of Justice of the European Union (CJEU) has somewhat paralysed the application of this tool by making its use subject to conditions that are too strict¹⁶. Consideration might have been given to a review of the procedural regulation that makes such measures possible, in order to give both the European Commission and third parties some room for manoeuvre, while awaiting feedback on the new directive on the harmonisation of national laws on this point. The effectiveness of this tool on emerging markets no longer needs to be proved, as is shown by the experience of the French Competition Authority.

The merger control criteria could also have been revised to cover the difficulties posed by this new economy¹⁷. In this respect, how Article 12 of the draft DMA, on the “obligation to inform about concentrations”, fits in with the existing framework, ought to be clarified, since it appears to be quite imprecise. In fact, two situations could arise: either the concentrations referred to in Article 12 are, in any event, subject to a notification obligation under the general regime applicable to concentrations, in which case the provision adds nothing; or the general regime applicable to concentrations does not provide for any administrative notification constraints, in which case it is difficult to see what the European Commission could do with regard to transactions that it does not have the possibility of controlling *a priori*.

15 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=en>

Interim measures were introduced by Article 8 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Articles 101 and 102 TFEU). They are provided exclusively for cartels and abuses of a dominant position. Article 22 of the proposed DMA reproduces this article, with the addition in paragraph 2 of the words: “This decision shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.” While the European Commission theoretically uses the same mechanism, this opens the way for a practice that differs from interim measures, depending on whether they are applied to competition or to the internal market.

16 Jacques Buhart, “Mesures provisoires imposées à Broadcom : le réveil d'un outil endormi ?”, *Les Echos*, 7 November 2019 : <https://business.lesechos.fr/directions-juridiques/droit-des-affaires/contentieux/0602181132839-mesures-provisoires-imposees-a-broadcom-le-reveil-d-un-outil-en-dormi-332883.php>

17 Concentrations are governed by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=en>

Apart from the tools associated with competition issues, the draft DMA forms part of a wider legal framework encompassing digital services, which must be properly understood in order to preserve the legal security of operators on the European single market¹⁸. In order to ensure consistency with the DMA, some of these provisions might have to be amended in order to avoid conflicting rules.

THE INTRODUCTION OF A SYSTEM OF PRESUMPTION

The confusion of these provisions with competition law could lead to the latter being distorted. The draft DMA reverses the perspective compared to competition law, because on the basis of its provisions, the regulator does not start with a market failure, and then propose a remedy to resolve that failure. They presuppose that the power of the operator concerned – primarily defined by its size – constitutes a market failure in itself. Moreover, the “gatekeeper” concept is not even linked to a specific market. From somewhat vague criteria to describe the digital platforms concerned (Article 3) are deduced general remedies; this undermines equality before the law. Why should a company be prohibited from engaging in certain conduct on the grounds that it is too powerful, without it being proved, subject to discussion and argument by all the parties concerned, that such power has an effect on the competitive functioning of the market¹⁹? Symmetrically, a company on the market affected by that activity, which is more powerful than the “gatekeeper”, could for its part be given free rein to become even stronger on that market.

This is a departure from the approach applied in the regulation regarded as possibly influencing the draft DMA, namely that of electronic communications. In fact, since the second telecoms package²⁰, the contribution made by European regulations is that they established the principle that a market regulation should respond to an identified problem, one that could not be dealt with by competition law and for which a remedy is provided, that remedy itself being analysed over a certain period, adjusted if necessary, or stopped if the problem is resolved.

¹⁸ The EU Observatory on the Online Platform Economy presents a non-exhaustive selection from this framework in its report “Measurement & Economic Indicators” (p. 14).

¹⁹ See, on this subject, the analysis of Article 30 at the end of this section.

²⁰ See the presentation on the website of the French Electronic Communications, Postal and Print media distribution Regulatory Authority (ARCEP): <https://archives.arcep.fr/index.php?id=9578&L=1#c51891>

The only example in EU legislation where this is the regulator’s reasoning is in the context of merger control, which is based on *a priori* thresholds. However, merger control is not aimed at factual situations. It relates to a project that can be abandoned by the companies that are parties to it, if they take the view that the regulatory constraints that will be imposed on them are too burdensome in comparison with the transaction’s expected benefits. The threshold approach that is applied is therefore a matter of procedure. It involves optimising the limited resources of the regulatory authorities, which can only check a certain number of transactions and which must therefore concentrate on those which they think could, *a priori*, pose a competition problem, though this has not yet been proved. Thus, between merger control and the draft DMA, the costs for businesses are not the same. Furthermore, merger control is based on a system of authorisation of private transactions that have not yet taken place, and not on measures imposed by the administration to change a business or the functioning of an already existing market. In terms of respect for the rights of defence, the difference is significant.

Furthermore, apart from the fact that the proposed DMA introduces a sort of presumption of competitive guilt, it does so on a particularly vague basis. In this respect, Article 3, which sets out the criteria for defining “gatekeepers”, leaves plenty of room for interpretation. Similarly, paragraph 4 of that Article explains that a provider of “core platform services” that meets the quantitative thresholds as a “gatekeeper”, can show that it does not belong to that category of operators, particularly on the basis of the “circumstances in which the relevant core platform service operates”: it is difficult to interpret these “circumstances”. In paragraph 1 of the same Article, the European Commission also mentions an operator that “enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future”, and in paragraph 6, explains that “in conducting its assessment, the Commission shall take into account foreseeable developments of these elements”. The possibility of being regarded as capable of becoming a “gatekeeper” – the concept of “emerging gatekeepers” (Recital 63) – opens the way for many possible interpretations by the regulator. In this respect, the European Commission relies on quantitative criteria, but also allows itself the possibility of using qualitative criteria if the quantitative thresholds are not met. However, how they approach the analysis of such cases is scarcely specified.

In this respect, the proposed DMA diverts market analysis from its original purpose: it goes from being an analytical tool to clarify a decision to being a

market surveillance and shaping tool. The process involves determining economic power – particularly on the basis of size – that potentially has an effect on multiple markets, and implementing a mechanism that requires market analysis to determine whether the operator concerned is indeed a “gatekeeper”. Thus, the provisions, while seeking to be free of competition law, are based on its tools. Rather than being led astray, market analysis could be redesigned and evolve. In the field of competitive analysis, work has been done to establish new approaches to these tools to make them more efficient. In this area, dynamic market analysis, which can be based on a large number of tools²¹, and not only on market shares, is often confused with static market analysis. Market analyses are methodological tools which, like all tools, are questionable and can be improved, but whose definition *a priori* allows those who are accused to explain themselves in adversarial proceedings on the basis of proven concepts. **A finding that power exists on a market cannot result in well-established adversarial procedures being bypassed.** If one compares Article 30 of the draft DMA, which sets out the “*Right to be heard and access to the file*”, to the rights of the defence set out in Article 27 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the openness of the proceedings is greater in the latter case, in particular because it allows third parties to be heard “*where they show a sufficient interest*” (paragraph 3). Furthermore, paragraph 4 of the same Article allows third parties to submit their observations before the European Commission makes its decision. One may therefore wonder why the Commission has not adopted these approaches in their entirety.

WHAT WILL BE THE FUTURE BALANCE OF POWER WITHIN THE EUROPEAN UNION?

The new distribution of powers introduced by the draft DMA distances the powers of the European Commission from the cardinal principles governing the balance of institutional powers. The extension of the Commission’s powers and the vague and therefore potentially discretionary nature of some of its measures raise questions as to the space given to adversarial proceedings by this text. Apart from the operators referred to here – the biggest digital platforms

21 For example, “signs of competitive pressure”. See Petit N., (2020), “Big Tech & The Digital Economy. The Mologopoly Scenario”, Oxford University Press, pp. 227-237.

– the consequences for other parts of the European legal framework, if such an approach became the norm, should be measured.

AN UNPRECEDENTED CONCENTRATION OF POWERS WITHIN THE EUROPEAN COMMISSION

As it stands, the proposed DMA raises questions as to the separation of powers at the level of European Union institutions, and the possible confusion of roles in the legal process arising when one and the same body is involved in defining the rules, investigating their potential breach, determining the sanction and finally adjusting it. That is the situation of the European Commission in the context of the draft DMA. The party that is involved in the definition of the rules is the same party that investigates non-compliance with them and determines the sanctions. This accumulation of functions is particularly evident in Article 16, paragraph 1, concerning the “*market investigation into systematic non-compliance*”: “*Where the market investigation shows that a gatekeeper has systematically infringed the obligations laid down in Articles 5 and 6 and has further strengthened or extended its gatekeeper position in relation to the characteristics under Article 3(1), the Commission may by decision adopted in accordance with the advisory procedure referred to in Article 32(4) impose on such gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with this Regulation.*”

The lawyer Olivier Fréget sets out the risk of such a concentration of powers quite clearly: “*apart from its symbolic dimension, the separation of powers is a matter of effectiveness. If the body that (badly) wrote the rule can correct it when they apply it and can impose penalties on an operator, when their complaint against that operator goes beyond what the provision that they themselves drafted lays down, such an accumulation of powers removes any incentive on the regulator’s part to draw up effective rules. (...) In the context of the Digital Markets Act, the Commission will thus arm itself with an additional and unprecedented power of ex ante intervention, while at the same time it can use a competition law – and does use it – which is already infinitely flexible, to regulate market failures.*”²²

This concentration of powers within the European Commission also poses a

22 See his interview, published on 20 January 2021, on Renaissance Numérique’s website: <https://www.renaissancenumerique.org/publications/digital-markets-act-cinq-questions-a-olivier-freget-avocat-specialiste-du-droit-de-la-concurrence>

problem of division of competences within the European Union. The coordination with national competition authorities and the network approach, which prevailed until now, are scarcely mentioned in the provisions, nor are issues relating to the overlapping or coverage of the various provisions, while the ECN+ Directive has recently reinforced their powers²³. By choosing different legal bases, national and European regulations could impair or even defeat the economic policy objectives they are intended to promote. In this respect, the main provision that rivals the proposed DMA is the new German competition law adopted on 18 January 2021²⁴. This law provides for the same mechanism as the draft DMA, but makes it an issue of competition law. Consequently, the only objective of the German competition authority, the *Bundeskartellamt*, will be free competition on a given market. Conversely, since the draft DMA is presented as a single market measure, it could eventually be the subject of case-law that would distance it from the competitive objective referred to in the German provision²⁵. What clarity and legal security is therefore being offered to operators? There is a risk of a competences competition and that the same conduct will be sanctioned by different legislation. How will regulators work together to avoid clashes? There is also the possibility of confusion with the second part of the legislative package aimed at regulating digital platforms: the proposed Digital Services Act (“DSA”). In fact, the DMA and the DSA are based on two different regulatory approaches and sometimes do not use the same definitions to describe the same operators: “gatekeepers” in the former, “very large online platforms” in the latter. Thus, the harmonisation ambition of the legislative proposal might not be achieved²⁶.

WHAT ABOUT THE FORESEEABILITY OF THE RULES?

Apart from this redistribution of powers, the proposed DMA introduces review mechanisms which leave considerable room for interpretation and consequently give operators little legal stability. According to Article 4, the European

23 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0001&from=EN>

24 Amendment of the German Act against Restraints of Competition, *Bundeskartellamt*, 19 January 2021: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungeng/2021/19_01_2021_GWB%20Novelle.html

25 Professors Jens-Uwe Franck and Martin Peitz mention a “foreseeable” fragmentation of the legal framework for digital platforms within the European Union. Jens-Uwe Franck, Martin Peitz, “Taming Big Tech: What Can We Expect From Germany’s New Antitrust Tool?”, *Promarket*, 7 February 2021: <https://promarket.org/2021/02/07/germany-antitrust-bundeskartellamt-19a-dma-big-tech/>

26 On this subject, see, in particular, the explanatory memorandum of the proposed DMA.

Commission must review the list of “gatekeepers” and the list of core platform services subject to the obligations “at least every two years”. Similarly, Article 10 empowers the European Commission to update the obligations imposed on “gatekeepers”. However, these two Articles contain few details about the implementation of such revisions, which are the prerogative of the European Commission. Thus, the regulator can trigger the designation of new “gatekeepers”, which will consequently be subject to a regulation calling into question the sustainability of any investments that they may have made (Article 4): for example, the words “substantial change” are open to numerous interpretations. Furthermore, the bases on which the Commission can impose new obligations on “gatekeepers” (Article 10) are quite vague, as is the concept of “contestability”. Also, according to Article 3, paragraph 5, “The Commission is empowered to adopt delegated acts in accordance with Article 37 to specify the methodology for determining whether the quantitative thresholds laid down in paragraph 2 are met, and to regularly adjust it to market and technological developments where necessary, in particular as regards the threshold in paragraph 2, point (a)”.

Apart from the issue of “economic viability” created by Article 8, which could result in the suspension of certain obligations²⁷, the European Commission can exempt operators identified as “gatekeepers” from certain obligations on the basis of particularly wide criteria: “public morality”, “public health”, and “public security²⁸”. These are administrative law criteria, the nature of which is often shaped by issues relating to fundamental freedoms. *A priori*, these criteria exist in the majority of Member States, based on sometimes divergent definitions and constitutional traditions, and have been analysed on a case-by-case basis by European Union judges²⁹, but always with a view to analysing the proportionality of legislation with the objectives of the European Union: private conduct

27 Furthermore, the procedures to be followed in order to prove such “economic viability” are yet to be defined.

28 Article 9 “Exemption for overriding reasons of public interest”.

29 Since 1970 (Court of Justice of the European Communities, 17 December 1970, *Internationale Handelsgesellschaft*) EU courts have taken the view that respect for fundamental rights forms an integral part of the general legal principles that the Court will enforce, and that while drawing on the constitutional traditions common to Member States, the protection of those rights must be assured in the context of the structure and objectives of the Community. These concepts are also set out in the Treaty on the Functioning of the European Union. Article 36 (formerly Article 30 of the Treaty establishing the European Economic Community): “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

does not have the same connection with public objectives, unless the business in question has an express obligation to carry out a public service mission. The variety of interpretations resulting from this case-law could allow the European Commission to derive very narrow definitions from it and thus to refuse to grant certain exemptions.

Of course, respect for the rule of law requires exceptions to be defined in an abstract way, on condition, however, that they are “updated” to apply to a specific case by parties that have no interest in their interpretation and that such interpretations can be the subject of effective judicial review.

Thus, the draft DMA opens the way for the possibility of a discretionary approach on the part of the European Commission. In order for the proportionality of its decisions to be reviewed, only the judicial route – in this case through the Court of Justice of the European Union – will therefore be available to businesses targeted by the DMA: namely, in *a posteriori* proceedings that are particularly lengthy, in which the fundamentals of the argument might escape the Court, since it may choose to deal only with certain procedural or substantive elements of the case. As the provisions currently stand, the scope of the procedural guarantees appears to be particularly narrow. This is not only a question of respect for the right of defence of businesses, which, as long as proof to the contrary is not produced, must be deemed to have reached their situation of power on their merits, but also of other principles of respect for property rights and protection of investments, which appear to be weakened in the proposed DMA.

Thus, as the provisions stand, the question arises as to what impact this new European law architecture could have on other economic sectors, if this approach were extended beyond the digital sphere.

PART 2

A NOVEL LEGAL TOOL THAT RAISES QUESTIONS AS TO THE UNDER- STANDING OF THIS NEW ECONOMY

THE DIGITAL MARKET AND ITS OPERATORS: THE CONCEPTUAL CONFUSION

The important concepts on which this new regulation is based are defined in a fairly imprecise way. Thus, even the definition of a “gatekeeper” remains quite vague. The same applies to “core platform services”, and the “tipping markets” threshold. Furthermore, what precisely are the obligations that might be imposed on such platforms? In this respect, the position of the European Commission’s Regulatory Scrutiny Board on the Commission’s impact study identifies the problem well: “*The report does not fully justify the selection of the core platform services to be covered by the initiative*”³⁰.

On the current wording of the DMA, one cannot tell whether a platform regarded as a “gatekeeper” will be affected in all the activities in which it operates. That depends on the definition of “core platform services”. In fact, multi-sided platforms, by their very nature, operate on several markets (sides). By virtue of a connectedness reasoning, will they be likely to be regarded as in a dominant position on several sides, including on a market on which they only occupy a secondary or marginal position, because their business model makes those activities connected? For example, will Amazon’s advertising activity, which is mainly aimed at vendors on its marketplace, be regarded as a core activity of the platform³¹?

Essentially, a “gatekeeper” is identified by its size, calculated on the basis of three criteria: turnover, the number of European users and stock market capitalisation. Thus, a platform is presumed to be a “gatekeeper” if it has more than 45 million monthly active users in the European Union and more than 10,000 annual active business users in the EU. Significant impact on the single market is presumed if the platform has had annual turnover in the European Economic Area (EEA) in excess of €6.5 billion in the last three financial years, or has had an average stock market capitalisation of more than €65 billion during the last financial year.

30 European Commission, “Regulatory Scrutiny Board Opinion - Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)”, 19 January 2021.

31 Amazon’s advertising activity was estimated at about \$20 billion in 2020, which is about 5% of its \$386 billion global turnover.

This approach does not take account of differences in usage between platforms. Thus, European consumers simultaneously use several social network platforms or marketplaces (multi-homing behaviour), while they will use a much more limited number of operating systems, another kind of digital platform that falls within the scope of the provisions. One might expect that user thresholds would be adjusted depending on the nature of the platform, but this is not the case.

With regard to the turnover criterion, apart from the fact that the threshold set is relatively low for the European single market, at this stage it remains uncertain for certain business models: intermediation and marketplace services, and app stores. Will account be taken of the platform’s Gross Merchandise Volume (“GMV”), or Gross Booking Value (“GBV”), or of its turnover, that is to say the amount of commission that it receives on its volume of business? For example, in 2020, Airbnb achieved a GBV of \$6.6 billion in the EMEA zone, and a turnover of \$1 billion in the same geographical area³².

Also, the use of stock market capitalisation, and its growth over three years, as a defining indicator to measure the financial power of an operator, is problematic in many respects. Many platforms capable of becoming “gatekeepers” are not listed and are financed by venture capitalists or private equity during their penetration and development phase, that is to say while they are seeking to attain the critical mass that triggers direct network effects. Furthermore, stock market valuations are not always the appropriate mechanism to estimate the real value of a digital platform’s assets and future income flows. In this respect, it seems that the “internet bubble” of the early 2000s and the extreme over-valuation of internet and telecommunications companies has been forgotten, as if such a phenomenon could not be repeated. The real valuations of certain digital platforms could also be questioned, at a time when, for the last decade, central banks have been feeding the financial markets with unprecedented volumes of liquidity (Quantitative Easing), thereby distorting the real value of the shares with an over-supply of liquidity.

The provisions introduce the concept of “tipping markets”, that is to say the moment when a platform becomes dominant on its market. In other words, the digital platform has succeeded in triggering network effects and accu-

32 Source: Airbnb, Annual report 2020.

mulating a growing number of users, making access to the market difficult for new entrants. The platform then benefits from “positive feedback effects” (Shapiro and Varian³³), and this situation is not temporary, but long-term. In such a context, the platform would no longer be encouraged to innovate and would find itself in a monopolistic income situation. This hypothesis is called into question in some recent academic works, which postulate that an absence of competitors does not mean an absence of competition and innovation³⁴. On this subject, the draft DMA provides that: “A particular subset of rules should apply to those providers of core platform services that are foreseen to enjoy an entrenched and durable position in the near future. The same specific features of core platform services make them prone to tipping: once a service provider has obtained a certain advantage over rivals or potential challengers in terms of scale or intermediation power, its position may become unassailable and the situation may evolve to the point that it is likely to become durable and entrenched in the near future. Undertakings can try to induce this tipping and emerge as gatekeeper by using some of the unfair conditions and practices regulated in this Regulation. In such a situation, it appears appropriate to intervene before the market tips irreversibly” (Recital 26).

As the scope of the provisions covers both an established “gatekeeper” situation and a situation in which the digital platform could become one, the question of assessing this tipping threshold becomes crucial in order to know which platform is affected by this regulation. How can this threshold be established? The provisions suggest the use of criteria such as “a very high market capitalisation, a very high ratio of equity value over profit or a very high turnover derived from end users of a single core platform service can point to the tipping of the market or leveraging potential of

33 Shapiro C., Varian H., (1998), *Information rules. A strategic guide to the network economy*, Harvard Business Review Press.

34 Petit N., (2020), *Big Tech & the digital economy. The moligopoly scenario*, Oxford University Press.

such providers” (Recital 25).

What sound methodology could be used as the basis for a decision of the European Commission? One can easily gauge the importance of such a criterion used as the basis for a decision to apply the DMA to certain digital platforms capable of becoming “gatekeepers”. How will such platforms be able to anticipate such a decision, and on the basis of which objective criteria?

A possible method that is more robust than using the stock market price would be to assess the growth in the number of users of the platform’s “core platform services” having regard to the volume of the platform’s investments³⁵. If the number of users grows while the volume of investment goes down, that might indicate a typical direct network effects situation. The nature of the investments considered in such a methodology remains to be defined. Furthermore, digital platforms regarded as “gatekeepers” invest in R&D massively and continuously, even after having exceeded the tipping threshold. Such a criterion does not therefore appear, on its own, to be any sounder than those proposed by the European Commission.

TOWARDS A QUESTIONING OF DIGITAL BUSINESS MODELS?

UNDERSTANDING BUSINESS MODELS IN THE DIGITAL SPHERE

Understanding business models requires greater precision than the provisions currently appear to offer. Thus, with regard to cloud computing infrastructures, the European Commission classifies cloud computing services among the eight categories of operators that might be regarded as “gatekeepers”. Yet these services are used directly by end consumers to carry out tasks, to build technological solutions and to automate internal functioning processes. It is not their purpose to act as intermediaries between business users and end users. In order to understand such a business correctly, it is necessary to distinguish several layers of services, some of which are only aimed at professionals (PaaS, IaaS). Within the software layer (SaaS), it

35 According to a proposal by N. Petit, see:

<https://twitter.com/CompetitionProf/status/1354334263735443456>

is also necessary to distinguish offers for private individuals from offers for businesses. Looking at the business of cloud computing infrastructures in a global way prevents one from correctly describing potential abuses of a dominant position.

Furthermore, many of the remedies envisaged by the draft DMA would lead to a substantial change in the business model of the platforms concerned, and not only to a reduction in their size through sales of assets or business activities. The constraints that might be imposed on digital platforms go well beyond the traditional restrictions of certain activities that exist in competition law (undertakings or injunctions), such as the prohibition of aggregation of data from several services or the obligation to offer non-personalised use of the service. The provisions propose several measures all of which impose a change of business model on the digital platform concerned.

Marketplaces will be obliged to allow third-party merchants to contract freely with the platform's customers, without the platform being entitled to interfere: *"allow business users to promote offers to end users acquired via the core platform service, and to conclude contracts with these end users regardless of whether for that purpose they use the core platform services of the gatekeeper or not, and allow end users to access and use, through the core platform services of the gatekeeper, content, subscriptions, features or other items by using the software application of a business user, where these items have been acquired by the end users from the relevant business user without using the core platform services of the gatekeeper"* (Article 5 (c)).

The same applies to app stores, which are merely marketplace variants: *"the business users of these gatekeepers should be free in promoting and choosing the distribution channel they consider most appropriate to interact with any end users that these business users have already acquired through core platform services provided by the gatekeeper"* (Recital 38).

Such measures amount to a transformation of the marketplace business model into an affiliation or business finder model. That amounts to dooming the marketplace model and generalising the affiliation model, or, in any event, limiting the marketplace model to a certain volume of transactions. With regard to app stores, the provisions go even further, as they oblige those platforms to allow other app stores or other software installation mechanisms: *"allow the installation and effective use of third party software applications or software application stores using, or interoperating with, operating sys-*

tems of that gatekeeper and allow these software applications or software application stores to be accessed by means other than the core platform services of that gatekeeper" (Article 6, paragraph 1 (c)).

Another obligation concerning the use of data by digital platforms would lead to a meaningful change of model: *"refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users"* (Article 6, paragraph 1 (a)). Such a measure would *de facto* prevent a digital platform from being able to use the sales data of merchants on the platform. Does one imagine that such an obligation will be imposed on food retailers? How could they develop their "retailer" brands that compete with national brands? Will "retailer" brands still be possible for a marketplace? Traditional food retailers therefore have the right to build their power relationship with their suppliers using sales data, but that possibility is denied to a digital platform.

Another of the measures proposed calls into question the personalisation of services offered by digital platforms. Thus, personalisation is seen as problematic in itself, since platforms must offer users services that are not personalised. The provisions do not show in what respect personalisation as such is a problem. It may be thought that such a practice has a sort of locking effect. However, any marketing technique intended to secure user loyalty would then be regarded as problematic in itself, since they all act in this way and have the same purpose: to retain a customer.

The draft DMA therefore imposes measures that call into question the business models of digital platforms and would require them to make radical changes to those models.

A MISSED OBJECTIVE FOR ADVERTISING?

The proposed DMA introduces a transparency obligation for operators on the online advertising market. While such transparency is welcome with regard to the price paid by advertisers and the publisher's fees, in a market in which the formation of the price and the sharing of value between the various mar-

ket players is complicated³⁶, the fear is that this will not be sufficient to develop competition in this sector³⁷. As is noted by the panel of economists that produced an analysis for the European Commission's Joint Research Centre: "Online targeted advertising is a very concentrated market that is also very opaque. Articles 5(g) and 6(f) focus on transparency, which is certainly very helpful. However these articles do not seem to focus enough neither on structural problems (e.g. several layers of the "open display" ad tech chain), nor on behavioural features such as exclusive distribution of inventory through one's own tech stack or limiting interoperability with rival tech intermediaries"³⁸.

The vertical integration between Google's upstream and downstream and its position as a market maker calls for regulation that is quite different from mere price transparency. In this respect, if one takes the view that the advertising markets operating in real time are marketplaces, then regulation of the financial supervision type might be envisaged, introducing a legal separation between the market maker and the supply and demand operators³⁹.

Furthermore, the difficulties, and sometimes even the impossibility of having audience measurements verified by independent operators is a structural problem on these markets, and one to which the provisions do not really respond. The provisions refer to prices that are too high, without any evidence to really support that, and, without a clear, precise and independent view of audiences, it is difficult to argue that advertising prices are too high.

Finally, the rapid evolution of business models, which is one

36 Observatory on the Online Platform Economy, (2021), "Market power and transparency in open display advertising – a case study": <https://platformobservatory.eu/research/>

37 Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., and Van Alstyne, M., *op. cit.*

38 *Ibid.*

39 Renaissance Numérique (2020), "Digital platforms: For a real-time and collaborative regulation", 10 pp.: <https://www.renaissancenumerique.org/publications/digital-platforms-for-a-real-time-and-collaborative-regulation>

of the characteristics of this environment, raises questions as to the relevance of these measures. If further proof were needed, Google's announcement at the beginning of March 2021 that it was ending the use of third-party cookies for targeted online advertising from 2022, constitutes a profound change in the rules of the game in this industry, which these provisions do not take into account.

PROHIBITION OR NEGOTIATION OF BUSINESS MODELS?

Faced with this difficulty of understanding business models, the approach presented in Article 5 of the draft DMA, of imposing self-executing obligations on "gatekeepers", raises questions as to their applicability, given that these obligations do not always appear to be appropriate for the business models referred to. The approach presented in Article 6 could therefore be more interesting, as it promotes discussion with the operators concerned and should therefore allow for better adaptation to the various business models. However, will the European Commission create an effective regulation, if it spends its time revising these provisions (every two years – cf. Article 5) and on its permanent negotiations (cf. Article 6)? Behind the proper understanding of business models, there is an issue of legal stability on the digital single market.

WHAT WILL BE THE IMPACT ON INVESTMENTS IN EUROPEAN INNOVATION?

The core regulation of the DMA, being based on a threshold and *ex ante* approach, carries a number of risks for the dynamics of European start-ups. At a time when the European Union seeks to foster the emergence of digital platforms of global proportions, capable of rivalling the American and Chinese platforms, a regulation of this kind could prove in part to be counter-productive.

The thresholds adopted in the proposed DMA could send a signal to entrepreneurs not to grow too much, or risk of being subjected to the specific rules introduced by the DMA, including a change of business model. This

appears to contradict the intention to foster the emergence of European digital platforms to compete with the Chinese and American platforms, which are of infinitely greater size.

Furthermore, in this respect, the provisions seek to prevent so-called “predatory” acquisitions of young start-ups by “gatekeepers”, which will be subject to an obligation to notify any proposed acquisition or concentration transaction as stipulated in Article 12: “A gatekeeper shall inform the Commission of such a concentration prior to its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest” (paragraph 1). The article specifies that any purchase must be notified, regardless of its size, even if it does not exceed the traditional notification thresholds for transactions under competition law: “irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules” (paragraph 1).

As has been noted previously, the Commission will thus have the power to authorise such acquisitions on bases that differ from those applicable under competition law. If predatory acquisitions of start-ups do exist, they are, in practice, extremely rare. A recent study on start-ups led by the French *Direction générale du Trésor*⁴⁰ shows that this phenomenon is extremely limited⁴¹. The study shows that, depending on the criteria used, only between 1% and 6% of acquisitions can be regarded as predatory. At the European level, it is impossible to describe acquisitions as being predatory or not, on the basis of the only data available. Those data only make it possible to calculate the number of acquisitions in a given period. Thus, in the period 2013-2019, of every 100 acquisitions made by a selection of 50 digital platforms, only 19%

40 The *Direction générale du Trésor* (Directorate-General of Treasury) is a directorate of the French public administration attached to the French Ministry of the Economy and Finance.

41 Roulleau G., Hafied F. and C. Rachiq (2021), « Prises de participation financière dans les start-ups françaises : prédation ou développement ? », Working document of the Directorate-General of the Treasury no. 2021/1, February.

concerned European companies, and eventually 6% were acquired by European companies. Acquisitions of European companies by American digital platforms represented 14% of their acquisitions, and no conclusion could be reached regarding the predatory nature of those acquisitions⁴².

The risk that certain transactions could be blocked by the European Commission is not insignificant; for start-ups that wish to be bought this could constitute a loss of opportunity. That could result in such companies choosing to be based in jurisdictions outside of the European Economic Area in order to avoid such a regulation.

Acquisitions of European start-ups by “gatekeepers” reflect a number of difficulties in the financing chain for innovative businesses within the European Union. These weaknesses are well-documented. They concern the financing of the late stages of growth and the absence of an exit market, such as Nasdaq, for investors at this last stage of the financing chain. As is emphasised by the Tibi Report in France⁴³: “Consequently, at the critical stage of their international development, firms have to choose between growth, via foreign venture capital funds, sale before reaching maturity, and stock market flotation”. This report emphasises that “since Dassault Systèmes in 1996, there has not been a single stock market flotation in France of a tech company valued at more than one billion euros. They have all chosen to be listed in the United States based on the model of Business Objects in 1994: Criteo (2013), DBV Technologies (2014), Celectis (2015) and Talend (2016)”.

The real challenge at the European level is therefore to foster the emergence of investment funds capable of supporting the development of innovative companies, particularly at the late stage of their development. More importantly, the question that arises is that of a European financial market for innovation, a European Nasdaq.

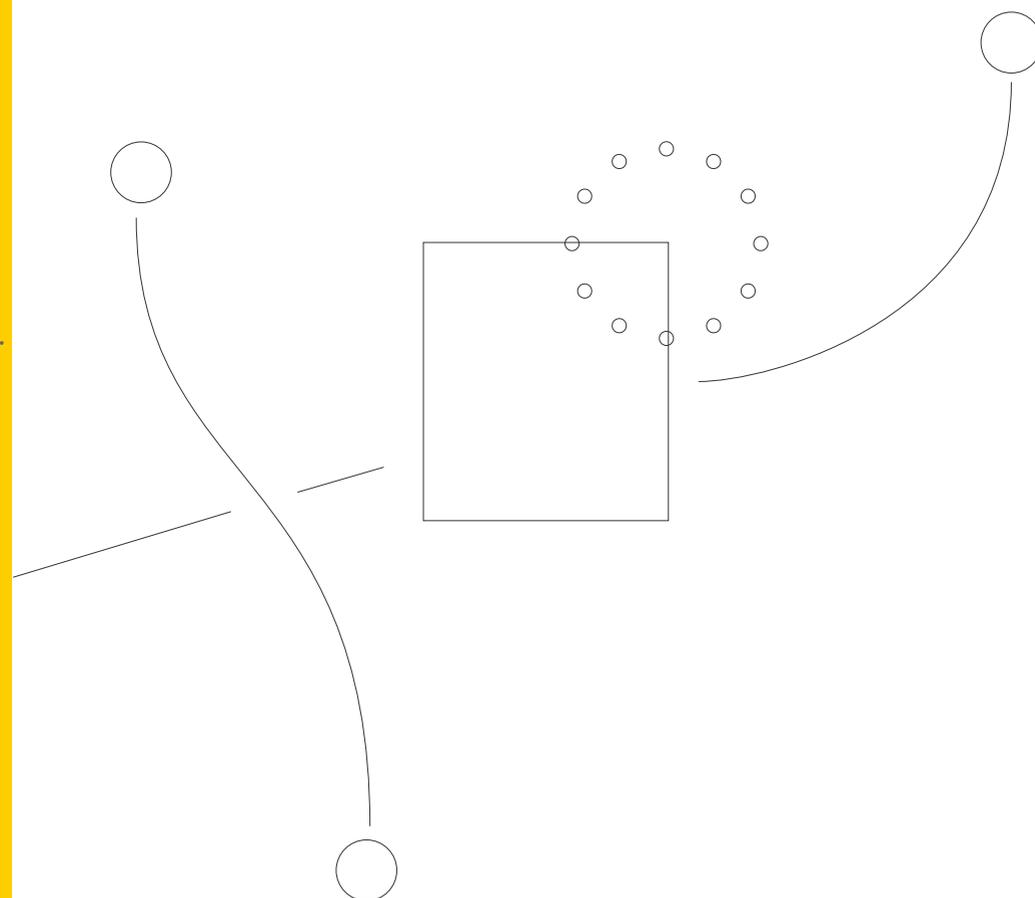
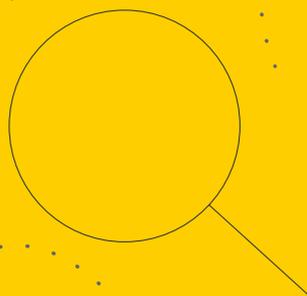
Thus, in the absence of alternative, robust and credible European solutions to finance their development, blocking acquisitions risks penalising European start-ups.

42 Observatory on the Online Platform Economy, (2021), “Measurement & Economic Indicators”: <https://platformobservatory.eu/app/uploads/2020/07/02MeasurementandEconomicIndicatorsoftheonlineplatformeconomy.pdf>

43 Philippe Tibi (2019), « Financer la IV^e révolution industrielle - Lever le verrou du financement des entreprises technologiques »: <https://www.economie.gouv.fr/rapport-philippe-tibi-finance-ment-des-entreprises-technologiques-francaises>

CONCLUSION

The novel construction of the draft DMA, somewhere between sector-based regulation and competition law, raises questions about its legitimacy and effectiveness. As currently drafted, before it moves on to the European Parliament, the way the provisions are intended to apply gives rise to a host of questions. The approach taken is that “gatekeepers” should self-notify and themselves implement the obligations contained in the provisions under the supervision of the European Commission and its new, dedicated unit set up under the provisions. How effective will such a procedure be? Will the provisions achieve their objective of developing competition on these markets? Will they enable the development of powerful European digital platforms capable of rivalling their Chinese and American competitors? Against a background of rapid and constant innovation, what will the European Commission do when faced with new kinds of platforms that might not be within the scope of the DMA?



FURTHER RESOURCES

Renaissance Numérique (2020), "Regulating digital platforms: Why and how?", 47 pp.: https://www.renaissancenumerique.org/ckeditor_assets/attachments/503/note_regulation_des_plateformes_en.pdf

Renaissance Numérique (2020), "Digital platforms: For a real-time and collaborative regulation", 9 pp.:
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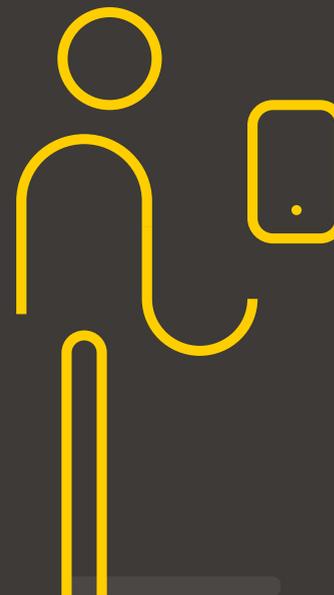
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Renaissance Numérique is France's main independent think tank focusing on the challenges of digital transformation in society. Bringing together universities, associations, corporations, start-ups and schools, it aims to develop workable proposals to help public stakeholders, citizens and businesses promote an inclusive e-society.

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