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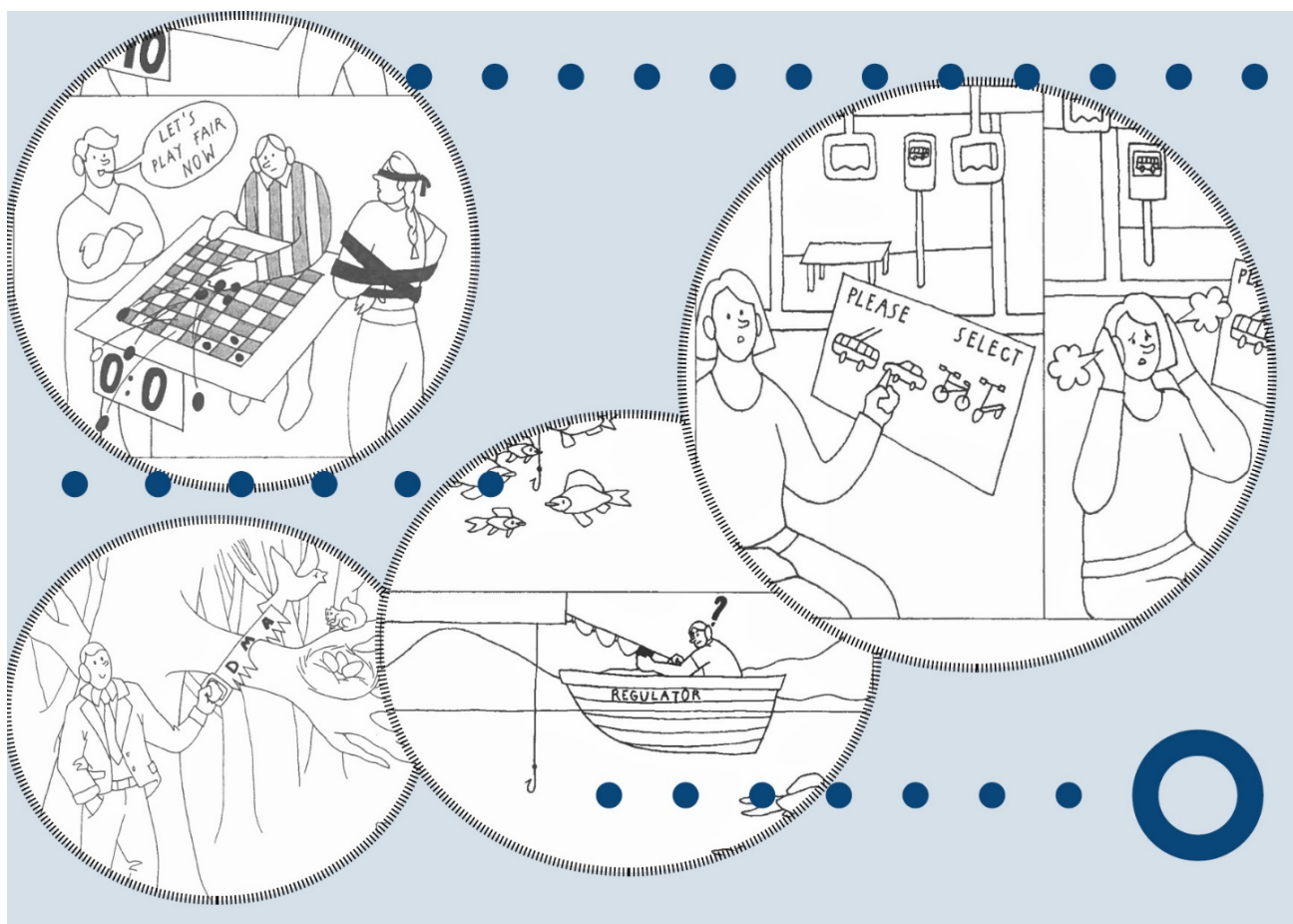
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DIGITAL MARKET ACT:

*COMPETITION, PROPERTY,
INNOVATION AND USER INTERESTS*



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COMPETITION, PROPERTY, INNOVATION AND USER INTERESTS

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INTRODUCTION

The Digital Markets Act (hereinafter the DMA)¹ was released in December 2020 as a Regulation Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector. The European Commission justifies the proposal by the need to avoid regulatory fragmentation in a single market, to create a safer digital space, and to establish a level playing field for businesses having in mind that some large online platforms act as "gatekeepers" in digital markets. Together with the Digital Services Act, the Digital Markets Act is one of the centerpieces of the European digital strategy.

This paper argues that the measures stipulated in the DMA do not match its calls for strengthening of the internal market, more competition, and innovation. The authors of the DMA claim that the Regulation will restrict only big firms, but this paper demonstrates that the enforcement of the proposed regulation will inevitably hurt SMEs and the end-users. The DMA Impact Assessment fails to prove the promised benefits and it underestimates likely losses. It is a source of concern that the proposed regulatory framework neglects some fundamental economic principles and values such as private property rights and presumption of innocence. The digital sector is treated separately from other economic sectors, which is at odds with the consumer perspective. The DMA is an attempt to construct an artificial competition and an artificial market whereby the consumer is left in the background, without their central role.

¹ Proposal 2020/0374. *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*. European Commission. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>

1. The declared goal of DMA lost along the way

The declared goal of the Digital Market Act (hereinafter the DMA) is to harmonize digital market regulations in the EU in order to tap the benefits of a single market. This goal is worthwhile and prudent as long as the harmonisation of regulation helps to increase legal certainty and to decrease the regulatory burden. As correctly stated in the Explanatory Memorandum (2020) of the DMA:

Different national legislations within the EU³¹ may lead to increased regulatory fragmentation and increased compliance costs for these large market players and the business users that rely on them.²

However, this goal is not carried through in the provisions of the DMA. As Article 1 provides:

Member States shall not impose on gatekeepers further obligations by way of laws, regulations or administrative action for the purpose of ensuring contestable and fair markets. This is without prejudice to rules pursuing other legitimate public interests, in compliance with Union law. In particular, nothing in this Regulation precludes Member States from imposing obligations, [...] in order to protect consumers or to fight against acts of unfair competition.

It is also without prejudice to the application of: national rules prohibiting anticompetitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions; national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers.³

Bearing in mind the willingness and more or less permanent drive of some Member States to have their own regulation of digital firms, the provisions of Article 1 seem to encourage rather than discourage such national initiatives. Given the experience with the long and uphill efforts towards harmonization in numerous areas while creating the EU's single market, a clear statement of harmonization is the least this regulation proposal could do. The present formulations make one question the declared goal of the Regulation proposal and try to identify any other goals that this initiative might be crafted to pursue.

The logical inconsistency in the formulation of the goal and its explication in the text does not only make the declared goal of the DMA hardly achievable and the need of the DMA questionable. It also undermines the EU legislative process. Furthermore, it deprives the DMA

² Ibid.

³ Ibid.

of a valid legal basis, which is likely to lead to a possible unconstitutionality of the DMA with respect to EU treaties.⁴

2. Certainty and uncertainty ratio

The economy functions fruitfully, i.e. it gives maximum benefits for consumers, when regulation is certain and market outcome is uncertain. The winner is determined by spontaneous competition for the users in a level playing field. Otherwise, the winner is decided by accidental or intentional compliance with legal and administrative requirements without the participation and decisions of the users, which also means with lesser consideration and reflection of their needs.

The DMA proposal delineates the opposite ratio: the concepts and requirements of the regulations are vague and do not contain the expected degree of certainty, while the market itself – its structure, certain services and relationships between the users and the providers – is pre-designed and pre-defined.

The vagueness and ambiguity of the proposed regulation are associated with:

- (i) poorly defined concepts, and
- (ii) the unrestricted scope and powers of the regulator.

The DMA aims to introduce special, *ex-ante* rules to limit the gatekeepers' ability to abuse their dominance. The rationale for this lies in the fact that, according to the EU Commission, the gatekeepers have often been found to pursue specific conducts that have resulted in abuses or other forms of activity detrimental to the competitors in multiple markets. However, there are a number of problems with this approach, ranging from the vagueness of some key concepts, such as the definition of a gatekeeper, to the assumption that, since gatekeepers A and B have previously engaged in behaviours x and y that were allegedly harmful, then all gatekeepers would also indulge in such conducts in the future.

(i) The following definitions lack the clarity to qualify as concepts:

- Gatekeeper - it is not defined explicitly what exactly gatekeepers keep and what criteria define them.
- Fair competition – “Fairness” is not an economic and stand-alone legal term. It only has meaning when contextualized and it depends on interpretation.
- Market – It is not clear how exactly this legal act defines the market, what scope of activity will be regarded as the market for the purpose of evaluating a lack of competition or its abundance.

⁴ Portuese, A. (2021a). The Digital Markets Act: Precaution over Innovation. European Policy Information Center. <http://www.epicenternetwork.eu/wp-content/uploads/2021/06/Digital-Markets-Act-precaution-over-innovation-final.pdf>

Article 3 of DMA states the following:

A provider of core platform services shall be designated as a gatekeeper if:

- a) it has a significant impact on the internal market;*
- b) it operates a core platform service that serves as an important gateway for business users to reach end-users; and*
- c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.⁵*

The underlined words are open to interpretation. Option (c) is totally up to the one who performs the evaluation and depends on the moment when the valuation is being done. It can hardly be treated as a criterion but rather as a feeling or perception. This definition is too context-sensitive, and contexts can change at any moment.

Conclusions based on option (a) depend solely on the definition of the market, and definitions may differ considerably depending on whether a market is defined from the users' perspective or from any other perspective (e.g. that of competitors). Market over-segmentation has become a dominant concept in competition policy, and the DMA fully employs this approach. As explicitly shown in Portuese (2021b),

Digital is a distribution channel—namely, an innovative business model - not a market.⁶

Inadequately defining a market for what merely is a distribution channel (i.e., digital markets for what really are digital means to reach consumers) consequently leads to misguided conclusions that certain digital firms are monopolists in their markets, as generally is true if one judges from a company's perspective. But it is not if judged from the consumers' perspective. Examples of incorrectly defined markets for digital services in competition policy are noted even by the media.⁷

The DMA approaches market definitions as a purely theoretical technique. It may look sound in calculations but has little reflection on the actual situation of genuine consumer choice and therefore it is erroneous and harmful. The same conducts may or may not be harmful depending on a number of case-specific circumstances: the DMA reverses the burden of the proof by stating that the gatekeepers should be always held guilty of unfair practices and therefore subject to behavioural constraints or obligations unless they show their conducts are "fair". In practice, however, despite all the theoretical effort to identify the features of so-

⁵ Proposal 2020/0374. *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*. European Commission. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>

⁶ Portuese, A. (2021b). *The Digital Markets Act: European Precautionary Antitrust*. Information Technology and Innovation Foundation. <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust>

⁷ The Economist. (2021, October 8). *Facebook is nearing a reputational point of no return*. https://www.economist.com/leaders/2021/10/09/facebook-is-nearing-a-reputational-point-of-no-return?utm_campaign=the-economist-today&utm_medium=newsletter&utm_source=salesforce-marketing-cloud

called “gatekeepers”, the DMA takes an ideological shortcut and proclaims that the only relevant and objective characteristic of a gatekeeper is that of being big.

(ii) Powers of the regulator are unrestricted:

A) The Regulator is not framed by rules while deciding whom to name as a gatekeeper:

The Commission is empowered to adopt delegated acts [...] to specify the methodology for determining whether the quantitative thresholds [...] are met, and to regularly adjust it to market and technological developments. (DMA, Article 3)

The Commission may identify as a gatekeeper [...] any provider of core platform services that meet each of the requirements of paragraph 1, but does not satisfy each of the thresholds of paragraph 2.

The Commission may upon request or its own initiative reconsider, amend or repeal at any moment a decision adopted pursuant to Article 3.⁸

B) The fines foreseen are extremely high and cannot be treated as proportionate measures when non-compliance with ex-ante rules rather than abusive actions are punished.

All the regulatory uncertainty associated with the DMA is likely to cost years of lawsuits just for the designation of gatekeepers. They may also impose tremendous financial and time expenses for companies as they try to avoid - or to comply with - the new regulatory framework that suffers from many untested new concepts and which has unclear links to the DMA goals.⁹ None of that contributes to innovation, entrepreneurial spirit, and digital market growth in the EU.

Legal complexity and uncertainty arise not only from the DMA itself but from related legal acts, including DSA, GDPR or P2B Regulation, which are not aligned enough in terms of concepts, definitions, and even obligations. The multiplicity of new regulations generates the risk of conflicts between legal acts. Not to mention regulatory burden, that will disproportionately hurt SMEs and ultimately will become a barrier either to market entry or expansion for certain companies.¹⁰

⁸ Proposal 2020/0374. Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act). European Commission. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>

⁹ Lithuanian Free Market Institute (2021, November 12). *Expert Workshop on Digital Market Policy* [Workshop], Vilnius.

¹⁰ Infobalt. (2021). *Digital Markets Act – and impact on SMEs*. <https://infobalt.lt/en/2021/12/17/digital-markets-act-and-the-impact-on-smes/>

3. Innovation-driven consumer value and competition as a means to an end

The DMA is presented as being essentially about better or “fair” competition. However, the concept of competition used in the DMA requires a closer look. The approach to competition is an artificial one. The DMA considers a certain setup and structure of the market as favourable for competition. The meaning of competition and contestability remains unclear when objectives and obligations are detached from market analysis.

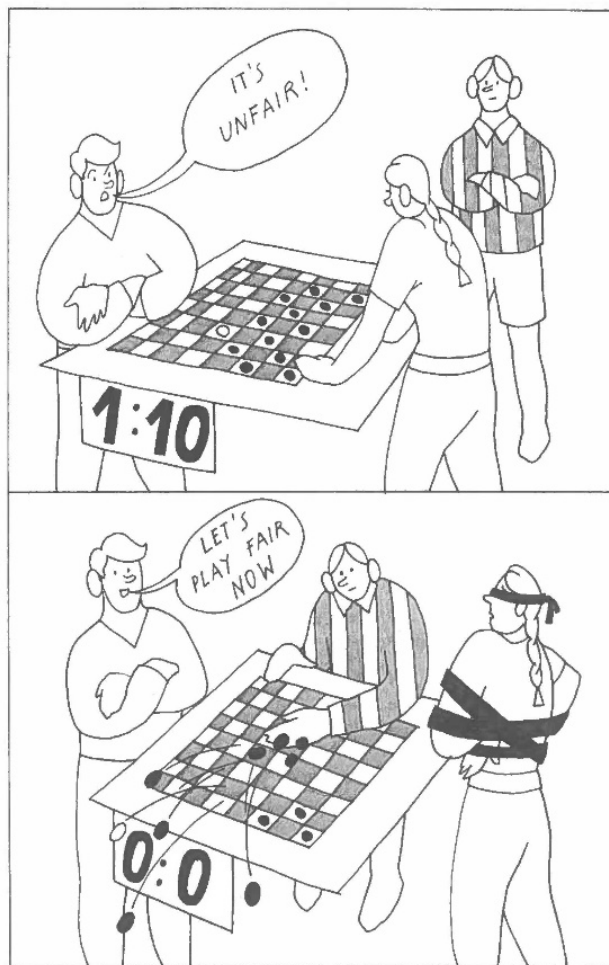
If strong competition is desirable for the sake of the user, a static or theoretical understanding does not help. A setup of the market that is best for the competition will differ depending on the service, situation, and time. This is true for all industries. In a digital area, however, it is more visible due to a shorter time between technological changes and their abundance.

Therefore, if the ultimate goal of a policy is to maximize benefits for the user, what matters is genuine market competition, that is competition of dynamic, ever-changing nature. However, a matrix of the size, number, and actions of market participants under such spontaneous competition cannot be described ex-ante. They are not known and cannot be known in advance. As Treece and Kahwaty (2021) of the BRG Institute suggests:

The Impact Assessment (IA) relies on industrial era tools for static competitive analysis. This causes the IA to significantly overestimate the likely positive effects of the DMA, and significantly underestimate the likely negatives [...] Instead of allowing for dynamic competition to continue between platforms, the DMA would reinforce existing market structures with regulation, ossify market boundaries, and stunt innovation in Europe.¹¹

Artificially constructed competition does not only fail to capture the evolutionary nature of competition and is therefore doomed to over-expand regulators’ influence and thus the regulatory burden on society. More importantly, it hardly reflects democratic and civil society values.

¹¹ Treece, D. J. & Kahwaty, H.J. (2021). *Is the Proposed Digital Markets Act the Cure for Europe’s Platform Ills? Evidence from the European Commission’s Impact Assessment*. BRG Institute. https://media.thinkbrg.com/wp-content/uploads/2021/04/11215103/Is-the-DMA-the-Cure_Teece_Kahwaty.pdf



In a free enterprise system competition for consumers is similar to the process of democratic direct elections: the users-voters select what they like regardless of the smartest projections of political scientists and preliminary voting results. Also, just like democracy is not perfect but still the most functional political system, so is spontaneous market competition the best way to satisfy consumer needs, even though abuses of the market position occur from time to time. In both cases, failures are addressed and resolved by respective legal acts when those failures occur and not prior to them happening.

By applying the ex-ante approach to competition instead of the classical ex-post, the DMA is based on a presumption of guilt. The absence of the presumption of innocence eliminates the legislative process from the rule of law tradition. How can all parties be represented in a regulatory debate equally when one party is already proclaimed guilty? This helps to explain why the regulatory debate is being carried out on a very superficial level and fundamental economic arguments are not taken into consideration.

4. Is the digital sector more prone to monopoly?

It [DMA] addresses unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules, considering that antitrust enforcement concerns the situation of specific markets, inevitably intervenes after the restrictive or abusive conduct has occurred and involves investigative procedures to establish the infringement that take time.¹²

Has there any fundamental change happened in the economy that would require a new competition policy paradigm? No. The matter is that of form, not of content.

In all economies, there are actors who perform systemic functions that in the short term may look like barriers for some to access resources and participate in wealth creation. Think of ports, airports, roads, big shopping centers, etc. Even a single enterprise can be viewed as a gatekeeper: some suppliers get onto its shelves and some do not, some job seekers are hired and some are not, some service providers are accepted and some are not. The ones rejected can feel discriminated but normally they do not because they understand the basics of economic activity: the law of limited resources makes all economic actors face scarcity and leave some actors (suppliers, collaborators, or even users) outside their “gates”. Everyone competes not to stay outside the gates but cannot avoid it altogether.

This phenomenon may look like discrimination or a sign of monopoly that needs to be regulated or even prevented. But this exceptional power or bottleneck effect blurs out if we look from the perspective of the whole market, where the user and the supplier make their decisions. Distinctive boundaries and bottlenecks diminish in time very clearly namely due to technology (in a broad sense of the word) that allows creating new pathways and new business models – with their respective limitations and bottlenecks. The DMA is clearly intended to limit the power of large, online platforms such as Amazon, Google, Facebook, Apple, and Microsoft. They are treated as natural monopolies but little (if any) evidence is provided that they have such features. For example, if you unplug any of them (as occasionally happens), the internet works equally fine, although some users may experience inconvenience.

¹² Proposal 2020/0374. *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*. European Commission. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>

As observed by Portuese (2021b),

*Digital is a different (often innovative) way of reaching end consumers in well-known markets. Thus, competition takes place in that product market, not on the digital channel.*¹³

He underlines that the distinction between digital and non-digital distribution channels which prevails in today's antitrust policy in general and the DMA in particular is increasingly irrelevant.

Traditional antitrust policy solves the "competition jams" where and when they evolve, investigating concrete cases of whether the power was misused and the users incurred damage. It is understandable that it takes time for institutions implementing antitrust policy to get adjusted to rapid growth and change in digital and digitally-enabled sectors, therefore some abusive situations can be overlooked or not dealt with. Such a situation requires strengthening the competencies of the referee but not changing the rules of the game. Because new rules will be new for everyone in this sector. In a new environment, the smartest and the fastest will win. The Impact Assessment of the DMA states that the regulation is needed because digital firms are too fast. This is tantamount to acknowledging that the regulators simply cannot catch up with them.

Competing within current technologies (horizontal competition) is only one way to develop. This way of competition is sustained differently in different markets and even in their segments. Take for example retail or café business. One can create a large variety of competing services in these sectors just by differentiating design and assortment, while in long distance logistics there are much fewer gaps to compete unless a new technological solution evolves. In such industries as digital services horizontal competition is not the optimal option. If competition occurs naturally, the market sees the development of technologies that initiate new business models and new ecosystems which then compete for the consumer, only in a different plane or with different services.

All economic sectors have their distinctive characteristics, but a single universal antitrust policy is used to prevent systemic errors – with the same general rules, principles, and institutions. The only exceptions for which sectoral regulation is generally accepted are the sectors that entail a natural monopoly, for example, energy networks. The DMA sees a digital market as an exception from the rest of the economy and demands specific rules, principles and institutions. The former is not true, the latter is not feasible without harming the market in general and the development of the technology sector in particular.

¹³ Portuese, A. (2021b). *The Digital Markets Act: European Precautionary Antitrust*. Information Technology and Innovation Foundation. <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust>

5. What are the needs of consumers?

If the goal of the DMA is to strengthen competition and the ultimate goal of the competition is to benefit the users, the needs of the users have to be clearly understood. What are the users' interests in digital services?

The interests of the users are twofold. First of all, the users are interested to continue to receive the services they receive. Secondly, the users are interested to optimize, not maximizing choice. Let us look at how the DMA will affect those interests.

Firstly, as was mentioned, the users are interested to continue to receive the services they receive and not having them terminated, degraded, or unexpectedly changed. As digital services are used massively today, continuity is the most important interest both for business as well as end-users.

The proposed regulation will clearly impact the services offered by today's mostly used providers. This is the target of the DMA. As the impact will be of restrictive character, the present services will be changed accordingly. So, the interests of the users to have service continuity will be damaged to a larger or smaller degree. This will have dire consequences for some businesses, first of all for all SMEs whose business models rely on the results of an internet search or those who provide services for the so-called "gatekeepers" will be seriously affected.

The inability to combine data as a part of the service offered by a single gatekeeper, for example, will change the way of using the service that, in the eyes of the consumer, has been a single service so far. It will lead to a decline in the quality of targeted advertising, which is the basis of many entrepreneurs' business models.¹⁴

The change will be very unexpected for most SMEs, and the reasons for this are twofold. First of all, the DMA is presented as a regulation that will target only very big companies. Secondly, small businesses usually do not follow any legislative processes, national or European. Many remain ignorant of legislation even when it is adopted, until they actually face the consequences, simply because of their inability to embrace a constant flow of new regulations.

¹⁴ Infobalt. (2021). *Digital Markets Act – and impact on SMEs*.
<https://infobalt.it/en/2021/12/17/digital-markets-act-and-the-impact-on-smes/>



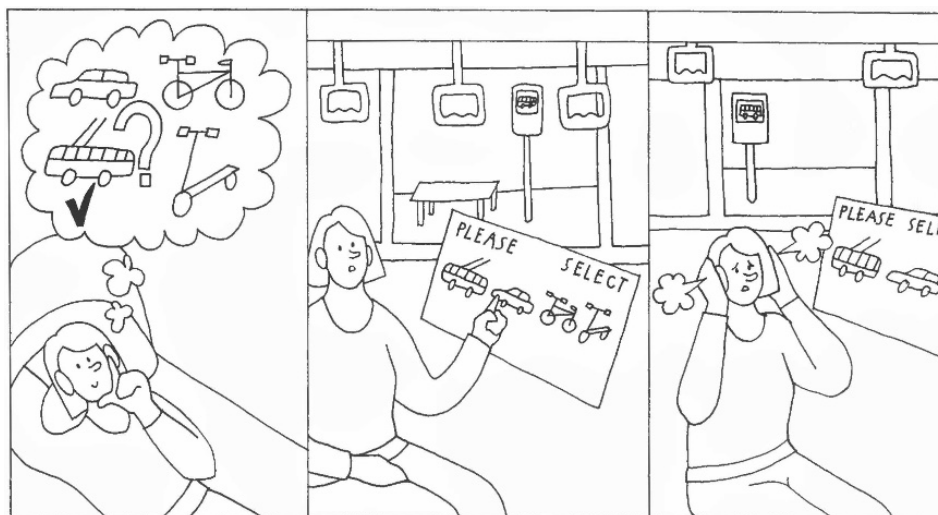
Some may argue that it is but a temporary inconvenience because allegedly new and more numerous services, as well as providers, will spring up, as the DMA explanations promise. But it will happen later, if at all, and it will be different – it is not possible to know in advance to what extent and when those new services or providers will reflect the interests of the users. The time gap for many users is crucial and it will imply costs and uncertainty in any case. Many platforms using firms of different sizes may lose their ranking or position obtained through many years. These translate into visibility and accessibility to their end-user or other business values that will have to be restored with additional resources.

Oxera's (2020) analysis concludes that the ex-ante regulation proposals from the Commission would reduce the ability and incentive of any firms caught within the regulations' scope to provide innovative products to consumers and businesses.¹⁵

Secondly, the users are interested to optimize, not maximizing choice. In the era of information, a bottleneck in decision making is not information shortage but its abundance, whereby information needs to be at least familiarised with (if not analysed) in order to make decisions. Choice is exercised only when needed, not for the sake of choosing; it is exercised by those who are engaged in value creation and pressured by time constraints and other scarce resources. To maximise choice could be a perfect interest of those, seeking just to complain – due to their vanity or intention to harm the service provider.

¹⁵ Oxera. (2020). *The impact of the Digital Markets Act on innovation. Helping or hindering innovation and growth in the EU?* <https://www.oxera.com/insights/reports/the-impact-of-the-digital-markets-act-on-innovation/>

Therefore, the obligations listed for the gatekeepers are generally of no concern to the end-users. Most users normally need one or two search engines, one e-mail provider and web page or blog host, a few shopping platforms, video communication platforms, and social networks. Most users also stick to default settings because they are satisfied with them.



Bowman (2021) points out that the open web is a paradise to specialists but a dangerous place to ordinary people.¹⁶ Not being neutral, platforms enable the users to navigate in this chaos of open internet safely and easily. Filters help us – not everyone is able to put them or would do it on their own, while platforms do.

Thus, filters, clear structures, pre-installed SW, default settings, priorities and rating - all of the so called “limitations” that platforms impose on the market - are the rescue ships in the vast and dangerous ocean for the ordinary user. But the DMA treats them as an abuse of power, not a service.

Selection pop-ups require much time and attention from the users, therefore many select an option that allows them to navigate in the fastest way possible. By doing so the users often ignore warnings and selections that would be beneficial for them, especially in terms of security.

As aptly observed by Portuese (2021b)

Consumer choice is a dubious goal. Imagine two markets: one that provides consumers with a multitude of higher prices and lower quality products, and one that provides them with a small number of lower cost, higher quality products. The EU's new standard would prefer the former, while virtually all

¹⁶ Bowman, S. (2021, November 24). *Controlling Tech and Platforms – Can Antitrust and Regulation Generate Better Competition?* [Webinar]. The European Centre for International Political Economy (ECIPE).

consumers would prefer the latter. This is even more true given social science research showing that too much choice lowers consumer welfare.¹⁷

6. How come property rights are not even mentioned?

Protection of private property rights is one of the fundamental principles of Western liberal democracies which is guaranteed by the constitutions of Member States as well as The Convention of Fundamental Human Rights and The EU Charter of Fundamental Rights. However, the protection of private property rights is completely overlooked in the DMA and absent from the discussions surrounding the DMA.

Private platforms are treated as public goods even though there is no rationale or ground whatsoever for such treatment, unlike in the cases below:

- 1) State-owned or long time accumulated and inherited public property – as it was in the case of incumbent operators of traditional economies: ports, railway lines, fixed-telephone lines. Even more, in the case of public utilities, regulation evolved over a long period of time with numerous unintended consequences and regulation revisions to mitigate them.
- 2) The inability of the user to satisfy its interest without engaging with the respective platform, as is the case with electricity, water supply, and even banking services. The users can advertise, play, shop, communicate and fulfill their other needs both online and offline with or without the services of the so-called “gatekeepers.” This is a sound and clear-cut criterion to define a monopoly used by traditional competition policy, but it is somehow “forgotten” in the DMA.¹⁸
- 3) Evidence of „natural monopolies“ such as the non-duplicable infrastructures for energy transmission or railways. In fact, there are several alternatives to the alleged “gatekeepers” available online and offline.

If we compare digital services with undertakings subject to monopoly regulation in other fields, we should acknowledge that digital services are relatively new developments – they did not evolve over a long period of time, they were not inherited from tribes, earlier generations or the state. We can trace back the pioneer and the first competitor who did better than the pioneer. It is natural and inevitable that the so-called “gatekeepers” of today have risen to their

¹⁷ Portuese, A. (2021b). *The Digital Markets Act: European Precautionary Antitrust*. Information Technology and Innovation Foundation. <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust>

¹⁸ Lithuanian Free Market Institute (2021, November 12). *Expert Workshop on Digital Market Policy* [Workshop], Vilnius.

position simply and largely because they have outcompeted their predecessors. And now the most innovative companies are being accused of controlling these markets.

As Chovanculiak (2021) points out:

*A company can become successful in two ways: When its customers have a choice and choose it or when they have no choice and have no other option but to choose it. A company that succeeds in the first instance is called an innovator. The one that succeeds in the second instance is a monopoly.*¹⁹

In a free-market economy, new businesses emerge as monopolies with their private rules: they decide what to produce and what not to produce, what to sell, where and for how much. Then other market players copy what they manage to copy and so a market of those particular goods or services is created. In the economic sense, this represents a fair situation whereby an entity controls its property/product to the extent which the users and competitors allow unless there is a resource that is indispensable for everyone in the field and it is not privately created. If private property is restricted or seized for valid public needs, it must at least be compensated.

Admittedly, there is some degree of confusion when it comes to “public goods.” When digital services evolved in the market, they seemed to be free of charge to many users. Only a few understood how digital services were monetized. It follows that for many people the discovery of the fact that they paid for digital service by participating in the provision of these services could look like fraud and could be psychologically unacceptable. The idea of “free” services was actually released, like Genie from the Magic Lamp, by the digital service creators themselves. This has very likely fuelled the idea of digital services as public goods, with everyone allegedly being entitled to them (a positive right).

History teaches us how pervasive, corrupting and conflict-prone the idea of free lunch is. However attractive the prospect of creating for the voters the illusion of “free goods” is, it is essential for those in the position of government power to acknowledge that resources are scarce and, if we substitute competition in the market with competition for compliance with regulations, we will very quickly lose the spirit and efficiency of innovation.

7. Innovation as the accelerator of change in the market

The essence of innovation is to materialize inventions. It is the process of putting inventions into a marketable venture. It could be a breakthrough technology and business model or a new communication or design solution. The digital sector is a huge innovation laboratory, and not only because many creative people work there. First of all, it provides cheap and easy tools

¹⁹ Chovanculiak, R. (2021). *Economic Analysis of Digital Market Act*. Institute of Economic and Social Studies. https://iness.sk/sites/default/files/documents/pdf/IPN/dma_economic_analysis.pdf

for everyone. An online laboratory is much more readily available for research in chemistry, physics, geography, arts, literature, etc. than a physical one.

Changes in laboratory rooms and tools inevitably impact the productivity of the users and the DMA is going to do just that. The proponents of the DMA claim that this change will be for the better. However, this claim has not been proved or demonstrated, while negative consequences in the immediate future are obvious: there will be unclear changes in the environment which has been viewed as predictable and comparably stable so far. When companies decide to make changes at their own initiative and of their own choice, they usually compensate the users for related inconveniences. They do so because the decisions are theirs – weighed and worthy of realization despite annoying some clients. When change is forced by the regulator, businesses just do it and say “sorry” to the users. Because they have no alternative.

The DMA clearly fails to keep with the principles of good regulatory design. The OECD’s “Recommendation of the Council on Regulatory Policy and Governance” from 2012 highlights that the challenges faced by governments today and in the foreseeable future require systematic principle-based policies and careful impact assessment:

[i]n designing regulation governments need to be aware of the incidence of regulatory costs on businesses and citizens and of disproportionate impacts on small to medium-sized enterprises and micro businesses²⁰.

Technology does not develop itself, as is often presented. People develop technology and the reason they do it is scarcity facing them. People concentrate their resources - financial and material resources as well as human capacities like intelligence and creativity - to create alternatives in order to be competitive and to be able to attract users. Innovation is a means for the firm to compete in the market for the user, not a goal in itself or an automatic output of competition.

An innovator who pioneers a new business model can later come to be labeled as “a big platform” or “a gatekeeper” in the DMA. When they first venture out to create something new, they take a big risk and experience large costs, and only later - and only if they succeed (which is more of an exception than a rule) - are they compensated by higher return in terms of earnings and/or market power. However, the return is clearly visible now, while the risk was taken some time ago. Investments and the ingenuity of the idea itself are not and cannot be adequately evaluated ex-post. This is one of the reasons why the reward of big companies in the digital market may look disproportionate at different moments in time, “*supranormal profit*” as it is called in the DMA context. The DMA completely overlooks or disregards the motivation of innovators, even though a change in motivation means a change in behaviour:

There cannot be a more powerful innovation deterrent effect for entrepreneurs to suggest that their innovation leading to first-mover advantages and leading

²⁰ OECD. (2012). *Recommendation of the Council on Regulatory Policy and Governance*.
<https://www.oecd.org/governance/regulatory-policy/49990817.pdf>

*market positions over the next three years may transform their companies into gatekeepers subject to numerous regulatory obligations.*²¹

Moreover, any configuration in the market is temporary. It is even more true for the digital market which is global and fast-growing. The competitors of a dominant player (in a digital sector this is often the creator of this business model) work hard to disrupt the existing dominance, test new approaches and create new technologies that at some point in time will likely make a breakthrough. This means the rise of a new winner with their private rules and new possibilities for the users and collaborators. They will collect their reward and later be outperformed by a new innovator – market extender.

*Innovation-driven competition leads to the constant obliteration and redefinition of market boundaries.*²²

The creation of new business models and expansion of markets is an essential value added to digital services as it unleashes the potential for new products and services throughout the economy that has not been possible before.

However, if the integrity of the destructive creation process is interrupted and incumbent businesses are outcompeted with the help of the regulator, the potential of the market is not utilised. The market is not allowed to mature towards a situation whereby competitors concentrate resources and employ totally new solutions in order to lure the users from the incumbent market players. If the present infrastructure nodes are artificially dismantled, the pressure to invent a solution for existing bottlenecks is withdrawn and circumstances are changed. Resources are redirected towards new goals that have nothing to do with technology or product development but are geared merely towards compliance with the regulation. Competition continues on the same plane but it creates much fewer new opportunities in comparison with genuine market changes which evolve when one private entity outsmarts and outcompetes another private entity in the race for the user. This also means less opportunity for innovation for the sake of the consumer, weaker technological development, and a general economic slowdown.

It should be stressed that with the enforcement of the DMA all market participants will have to constantly spend considerable resources just to comply with the regulations (to avoid them, to exploit them, or to adjust to them), not to mention the administrative and adjustment burden of regulations.

So even if the DMA unleashes some potential to make a step forward for certain firms in the sector, it will ruin the prospect of a leap forward for many.

²¹ Portuese, A. (2021b). *The Digital Markets Act: European Precautionary Antitrust*. Information Technology and Innovation Foundation. <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust>

²² Teece, D. J. & Kahwaty, H.J. (2021). *Is the Proposed Digital Markets Act the Cure for Europe's Platform Ills? Evidence from the European Commission's Impact Assessment*. BRG Institute. https://media.thinkbrg.com/wp-content/uploads/2021/04/11215103/Is-the-DMA-the-Cure_Teece_Kahwaty.pdf

The Digital Markets Act is expected to reduce rather than increase innovation. Reduced innovation is a real concern as the harm will be felt not just by the large global tech companies that would be subject to the regulation, but also by EU businesses and consumers.²³

8. Sketchy impact assessment: dubious benefits, underestimated losses

Several respondents, including startups, research institutes and trade associations, point out the positive impact of platforms on startups: by lowering the barriers to entry and extending to companies of all sizes the advantages of cost and speed that can be gained from trading online, they stimulate innovation and the dissemination of new products and technologies.²⁴

It is admitted in the Impact Assessment (IA) (2020)²⁵ that the present situation in digital services has created a lot of value for other markets actors as well as the end-users. However, it is a fact that all who are benefiting now – not only so-called “gatekeepers” but also their users and potential competitors – will be affected by the enforcement of the DMA. As it is clearly seen, the Impact Assessment fails to assess unintended consequences of the proposed Regulation, while the listed expected positive outcomes are not substantiated.

In its Opinion on the DMA, the Regulatory Scrutiny Board of the European Commission points out the need to “better define”, “make more clear”, “provide evidence” in many aspects of the DMA. Among them:

[t]he report should better define and justify the measures covered under the options. [...] It should consider the negative consequences of curtailing the size advantages following from network economies and economies of scale for consumers. [...] should better explain the limitations of the methodology used.²⁶

The following general positive outcomes of the DMA are officially proclaimed:

²³ Oxera. (2020). The impact of the Digital Markets Act on innovation. Helping or hindering innovation and growth in the EU? <https://www.oxera.com/insights/reports/the-impact-of-the-digital-markets-act-on-innovation/>

²⁴ European Commission. (2020). *Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52020SC0363>

²⁵ Ibid.

²⁶ European Commission. (2021). *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)*. https://ec.europa.eu/competition/sectors/ICT/DMA_opinion_of_the_board.pdf

- *Business users who depend on gatekeepers to offer their services in the single market will have a fairer business environment.*
- *Innovators and technology start-ups will have new opportunities to compete and innovate in the online platform environment without having to comply with unfair terms and conditions limiting their development.*
- *Consumers will have more and better services to choose from, more opportunities to switch their provider if they wish so, direct access to services, and fairer prices.*
- *Gatekeepers 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.²⁷*

As it was discussed in the previous chapters, these claims are not supported by sound economic arguments. Even more, they are not viable altogether.

As Treece and Kahwaty (2021) succinctly puts it:

IA makes a series of questionable, conclusory, and unsubstantiated assumptions.²⁸

Let us take a closer look at some of the promised positive outcomes of the DMA.

As stated in IA 279:

When businesses compete more fairly on their merits, this incentivises them to innovate and offer a better range of higher quality products and services that meet consumers' expectations. Greater competition also drives efficiency in processes, technology and service. [...] Shapiro (2012) highlights the considerable empirical evidence that greater competition spurs innovation.²⁹

It is true that

[t]here are strong links between patterns of innovation and competition.³⁰

It is also true that it can be put both ways for academic analysis – whether competition is the means to innovate, or innovation is the means to compete.

²⁷ European Commission. (2020, October 12). *The Digital Markets Act: ensuring fair and open digital markets*. https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

²⁸ Treece, D. J. & Kahwaty, H.J. (2021). *Is the Proposed Digital Markets Act the Cure for Europe's Platform Ills? Evidence from the European Commission's Impact Assessment*. BRG Institute. https://media.thinkbrg.com/wp-content/uploads/2021/04/11215103/Is-the-DMA-the-Cure_Teece_Kahwaty.pdf

²⁹ Shapiro, C. (2012). Competition and innovation: Did Arrow hit the bull's eye? In J. Lernerand & S. Stern (Eds.), *The Rate and Direction of Inventive Activity Revisited* (pp. 361 - 404).

³⁰ Ibid

However, empirically, only the latter implication is reasonable: firms do not compete to innovate. They innovate – invest in R&D, increase efficiency and pursue other improvements – to win the competition and to attract consumers. There is no such goal as to compete more in order to start innovating in business. Of course, a competitive environment is needed, otherwise, there is little point in making an effort to improve. However, the competitive pressure in the market always exists (unless some monopoly rights are granted by law) and this competitive pressure also applies to digital service providers. This is reflected in the amounts of investment and innovation made as well as the level of efficiency achieved in digital services, especially by so-called “gatekeepers”.

As correctly stated in the IA (point 279) with reference to the paper “Antitrust and Innovation: Welcoming and Protecting Disruption” written by Federico et al. (2019):

[a] significant amount of innovation is driven by disruptive firms. By making its offer to customers attractive in a new way, a disruptive firm can destroy a great deal of incumbent profit while creating a large amount of consumer surplus.

³¹

The paper, however, goes on to draw a conclusion that is not valid and is not substantiated in any way:

*Competition enforcement precisely seeks to protect the competitive process by which disruptive firms challenge the status quo.*³²

This conclusion does not hold because **firms can act disruptively only in the spontaneous market.** Regulated markets prevent such behaviour, first of all, because they restrict incumbent players themselves and ease the urge of other market participants to rival the incumbent firms. Second, regulated markets create totally different rules for “gatekeepers” and similar companies not designated as “gatekeepers”, thereby creating favourable conditions for companies not designated as gatekeepers. Third, because regulations withdraw a reward – firms do not take a risk to act disruptively so as to avoid falling into the category of “the incumbent” and thus bear its regulatory burden. Referring to the name of the aforementioned and quoted working paper, protected disruption is not disruption anymore. Just like a domesticated workhorse is not a mustang anymore.

Furthermore, the IA (point 280) states:

*Although the online platform sector invests heavily in innovation, smaller companies that depend on gatekeepers are discouraged from innovating so as not to compete with the gatekeeper.*³³

³¹ Federico, G., Morton, F. S., Shapiro, C. (2019).) *Antitrust and Innovation: Welcoming and Protecting Disruption* (Publication No. 26005). NBER.

³² Ibid.

³³ Ibid.

Small companies do not compete with the big ones – it would simply be unwise. Small and big ones all have their own competitive advantages that have different appeals for the users. Mixing these advantages leads to disadvantages. Therefore, competition in the market takes place between companies of similar sizes. Even if a small company develops a very smart solution that gives them an idea to disrupt the incumbent, it has to grow along the way before winning such competition. Meanwhile, big companies can be challenged by other big companies. If not restricted, a “gatekeeper” in one area of services can start competing with an existing “gatekeeper” in another service. Also, small fast-growing platforms may be disincentivized to grow further in order to avoid falling into the regulated category under the DMA. In this sense, the DMA may indeed protect the market shares of the large platforms rather than making them more contestable.

Point 281, IA:

Acquisition of startups is another way for gatekeepers to cement their market power³⁴. While acquisitions may have a positive effect for entrepreneurship and innovation, in the long-run they may result in higher market concentration and insufficient diffusion of innovation.³⁵

Small companies, just like all others, innovate not for the sake of innovation, but for their perceived self-interest. A good prospect of selling a start-up in the future is a serious incentive to launch and grow a startup. A potential prospect of selling a business diminishes the initial risk of investment for a startup (or increases its incentives to invest) because it offers a solution in case of business failure or unwillingness to continue the business for different reasons: a lack of resources, problems or more attractive activities. Some startups are originally created just to sell them in the near future and to profit. At any rate, the assumption that killer acquisitions may reduce competition does not necessarily support an argument for regulating large online platforms. Rather, it points towards smarter implementation of merger control and possibly revision of intellectual property laws. Both fall beyond the scope of this current paper, but it is important to emphasize that, if killer acquisitions are an issue, then the solution does not lie in the regulation of digital markets, as if killer acquisitions did not take place in the offline world.

There are more inconsistencies of this or similar type in the Impact Assessment of the DMA. The weakness of argumentation is a common line of critique for the DMA. This is a serious scientific drawback since what is targeted is not the policy measures per se, which can be attributed to political or ideological perceptions, but their validity.

As Treece and Kahwaty (2021) provides explicit critique on how the DMA impact on GDP, Employment, R&D, and innovation is assessed:

³⁴ The magnitude of online firms' acquisition is on the rise as highlighted by the Furman report, “Unlocking digital competition, Report of the Digital Competition Expert Panel”, reporting that the top 5 larger online platforms have carried out more 400 acquisitions worldwide in the last 10 years.

³⁵ Bryan, K. & Hovenkamp, E. (2019). *Antitrust limits on startup acquisitions. Review of Industrial Organization*, 56, 615–636.

[t]here is no analysis in the IA that attempts to estimate how R&D spending, employment, and innovation will change due to the implementation of the proposed DMA. All the empirical estimates of increased production and employment are derived from an artificial, arbitrary, and unsupported assumption as to how spending on data processing, related consultancy, web hosting, and the other factors detailed above will change, and these “shocks” are then traced through the system using an input-output model. Indeed, in our assessment R&D in total is highly likely to go down and not up as a result of the DMA. The assumption used is not only unjustified as to amount; it is unjustified as to direction.³⁶

The assessment of the economic impact laid down in Impact Assessment Parts 1 and 2 looks more like a consolation letter for consumers and small businesses, supported with references to research papers and speculations about the likelihood of behaviour on the part of the market actors after the adoption of the DMA. The IA does not even address possible negative consequences for the consumers and SMEs. The annexes provide valuations/modeling. However, as Treece and Kahwaty (2021) points out, the models of evaluation are not always sound:

An input-output model is an analysis technique applied in situations where the perturbations studied have a factual basis, such as the direct cost to build a factory or expand an airport. The DMA Impact Assessment, however, assumes higher investment in R&D related to the platform economy and has to develop an assumed level of R&D spending growth to make the model work. That assumed growth level may be what the EC intends to be the outcome or hopes will happen [...] In the Input-Output model used, the assumed increased investment in R&D flows through what are essentially accounting ratios built into the model to estimate the changes in the overall economy. If the starting point has no basis or support, the results of the models based on how these changes flow between the sectors of the economy similarly have no basis or support.³⁷

To sum up, the generally positive impact of the DMA is estimated based on three major assumptions, namely:

- With the DMA in place, the internal market is devoid of legal fragmentation. This assumption does not hold because the DMA allows additional national legislation for digital services (as shown in Part I of this paper).
- With the DMA in place, competition will increase as the gatekeepers will be restricted but will keep their services at the same level as well as go on

³⁶ Treece, D. J., & Kahwaty, H.J. (2021). *Is the Proposed Digital Markets Act the Cure for Europe's Platform Ills? Evidence from the European Commission's Impact Assessment*. BRG Institute. https://media.thinkbrg.com/wp-content/uploads/2021/04/11215103/Is-the-DMA-the-Cure_Treece_Kahwaty.pdf

³⁷ Ibid.

innovating, employing and investing in R&D. Such outcomes are simply not possible because their incentives and conditions will change (as discussed in Parts 3 and 4, Parts 6 and 7).

- With the DMA in place, other market participants, especially SMEs, will benefit and will have more opportunities to compete, grow, employ, innovate and spend on R&D. This is not true because all market participants are interconnected through user– provider relationships and so the restriction on one segment will inevitably hurt many others while benefiting few.

The Impact Assessment provides weak substantiation of the expected benefits of the DMA, contains flawed interpretations of economic laws and common logic fallacies, and relies on inadequate valuation tools, as demonstrated above.

9. Perfect services and perfect providers are akin to wishful thinking.

As a result of the weak competitive pressure experienced by these large players, the likelihood increases that these markets do not function well – or may soon fail to function well – and thus do not deliver the best outcome for consumers in terms of prices, quality, choice, and innovation.³⁸

As all aspects of human life are marked by imperfection (lack or incompleteness), the present state of the digital market, just like any other market or sector, as well as its participants, including big digital platforms, is imperfect and is in a constant pursuit of improvement and development.³⁹

In order to accelerate its development, regulatory changes are initiated on the EU level. However, the existing imperfect digital service providers cannot be transformed to or replaced with perfect actors. Any new players will also be imperfect, albeit in a different way.

Due to the ability of human mind to perceive a new potential, a man experiences also new forms of shortage that are inevitable because of the fruits of the mind that are not yet realized.⁴⁰

³⁸ European Commission. (2020). *Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*. (pp. 8) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52020SC0363>

³⁹ Leontjeva, E., Vainė, A. & Vyšniauskaitė, M. (Eds.). (2016). *The Phenomenon of Scarcity: Being, Man and Scarcity*. Lithuanian Free Market Institute & Lithuanian Culture Research Institute.

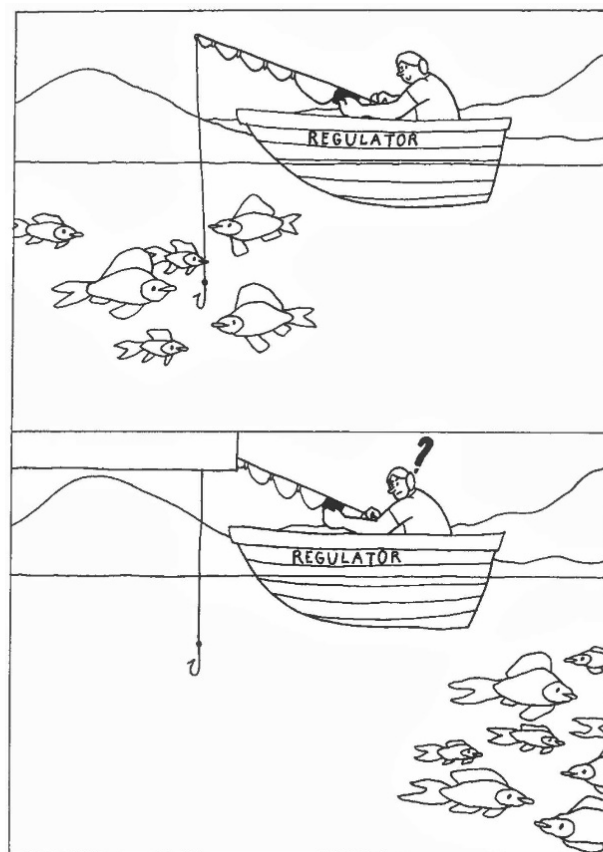
⁴⁰ Ibid.

Nothing is complete and perfect in human activity – neither users nor providers, services, competition. Regulation is even more imperfect because it always follows the market. If regulations are introduced in order to prevent a particular situation that is considered harmful, the market flow turns the direction and makes the regulator follow it anyway.

The dynamism and striving towards completeness is a *Perpetuum mobile* of human behaviour which is realised through market competition. Perfect competition or any other manifestation of perfection in the market is not only impossible but also not desirable, because they preclude the change – perfection is a status of stagnation or death.

Therefore, when proposing interventions in the market, any assumptions of perfect outcomes shall be put aside and at the very least positive and negative consequences should be carefully assessed. This should be done with even closer attention when services that are at stake concern large proportions of users and when competition policy itself, being a major tool of market regulation, is being changed.

In the case of the DMA, however, positive outcomes are not proved, just wishfully projected, while negative consequences are neglected altogether.



No argumentation is provided why these new winners, who will come after the DMA has been implemented and the rules of the game have been changed, will bring only positive effects and will not have any negative effects on consumers, innovation, and market potential. Why will they only open new opportunities but not close the present ones? It remains unclear how digital market participants will manage to maintain their present activities which the consumers, politicians and the regulator deem as good, and will abandon the unwanted activities without degrading their services, performance, and present interests of the users.

Technologies that are created in the market are the best possible at that particular moment in time. No one except the same or another innovator is in a position or has the capacity to theoretically decide which aspects are to be improved. All companies have to balance long- and short-term goals and only the most disruptive prioritise the long-term. They all have to experience times of failure and trial (especially while implementing something new), to weigh the different characteristics of their services that the consumers desire. Namely, these “business as usual” decisions of market participants, combined with regulatory requirements, cause from time to time situations that are defined as abusive or discriminatory. And this is simply because it is impossible to maintain all business aspects and product features at the maximum desired level. One cannot have equally high quality and cheap; accessible to everyone and safe; simple, quick and sophisticated, etc.

Let us take safety as an illustration. As rightly stated by Chovanculiak (2021),

*In a world of scarce resources and uncertainty, there is a real trade-off between security and open systems.*⁴¹

A certain degree of vertical integration for better security is not unique to the digital sector; it is also used in other security-sensitive sectors. For example, as food safety standards increase, in the organic food industry a tendency to get more integrated along the value chain can be observed. It has nothing to do with competition limitation but rather with the emphasis on safety, which the consumers appreciate and regulations emphasize.

Security is a feature of digital services most wanted and valued by a large proportion of consumers, therefore offered by certain companies by way of implementation of some features of vertical integration in their services. But not all consumers assign the same value to security, and so not all digital service providers pursue vertical integration.

Safety is an essential and challenging goal in digital services, both because of a permanent and increasing cyber threat and the largest information asymmetry—consumers can make better judgments about the level of security of digital services they use compared to their ability to make judgments about other features of these services (e.g. price, speed or convenience). In this context, it is not appropriate for the DMA to stipulate provisions that hamper safe solutions.

⁴¹ Chovanculiak, R. (2021). *Economic Analysis of Digital Market Act*. Institute of Economic and Social Studies. https://iness.sk/sites/default/files/documents/pdf/IPN/dma_economic_analysis.pdf

10. “We must do something” - the prevailing spirit of the DMA

In the Impact Assessment Report accompanying the Regulation Proposal, the European Commission claims that there is a legitimate fear that the market power that large platforms have acquired will be hard to challenge.⁴²

But again, what are the goals of the DMA? Negative consequences for the users and markets observed in the DMA analysis, weak arguments provided in support of its positive outcomes, and scant, sometimes even erroneous arguments of the Impact Assessment – all this brings us back to this initial question. As noted in Chapter 1, the declared goal of the DMA to harmonise digital market regulations in the EU is not incorporated into the regulation since the Member States are allowed to adopt extra regulations for digital firms. As analysis shows, DMA provisions will also fail to enhance innovation, R&D investments, and digital sector growth, which is likely to have the effect of hampering economic growth in the EU.

Numerous researchers and analysts point out the mismatch between the problems that are identified and addressed and the means that are chosen to solve them.

As Treece and Kahwaty (2021) notes:

*An economic assessment of the DMA ought to begin with an analysis of the European digital economy. It should identify areas where high prices, low quality, reduced output, or a lack of innovation are symptomatic, and explain how a lack of competition has caused these ills. It would then show how the DMA’s obligations are a proportionate prescriptive remedy to address Europe’s ills.*⁴³

Portuese (2021b) stresses the shift from the ex-post case-by-case competition policy to the ex-ante approach:

*[t]he risk-averse atmosphere enticed by the DMA is perhaps what the European innovation economy needed the least.*⁴⁴

⁴² European Commission. (2020). *Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*. (pp. 1) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52020SC0363>

⁴³ Treece, D. J, & Kahwaty, H.J. (2021). *Is the Proposed Digital Markets Act the Cure for Europe’s Platform Ills? Evidence from the European Commission’s Impact Assessment*. BRG Institute. https://media.thinkbrg.com/wp-content/uploads/2021/04/11215103/Is-the-DMA-the-Cure_Teece_Kahwaty.pdf

⁴⁴ Portuese, A. (2021b). *The Digital Markets Act: European Precautionary Antitrust*. Information Technology and Innovation Foundation. <https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust>

Bowman observes that the big tech is at the target of regulators all over the world because of growing suspicion of corporate power. It is not much related to monopolistic behaviour. The big tech has grown rapidly and accumulated a significant influence on the socio-economic environment which can be turned into political influence. This looks suspicious and threatening. Competition policy—big interventions and fines—is chosen as a powerful tool to counter these trends.⁴⁵

Politicians exercise very superficial assumptions about processes in the market and big companies such as the so-called “gatekeepers”. The assumption is that

*they are bad because they are big, and they are big because they are bad.*⁴⁶

This is superficial thinking that has no intellectual foundation.

The idea about “free digital services” or “free space to act and innovate” is closely connected with popular, though economically unviable (first of all, due to limited resources), concepts of positive freedoms. The freedom of some to use (or to be entitled) at the obligation for others to provide. In this respect the DMA’s attempts to remake the digital market could be mistaken for the fight for freedom.⁴⁷

Analysts also point to the problem of confusing concepts and unclear goals of the DMA. There is even more uncertainty in the understanding of how the DMA will be implemented. The regulations involve a paradigm shift of competition policy and will reshape all of the digital market and beyond, and so little effort is being made to evaluate related costs and outcomes. All this process lacks consistency and economic logic.

Besides the vanished goal of harmonised legislation in the EU, another striking fact is the determination not to take seriously unintended consequences, which will mostly hit the end-users and SMEs— the declarative beneficiaries of the DMA.

One can argue that this is all about projections and nobody knows how things will work out in reality. But such a statement is not completely true – there is evidence of very similar legislation. As Voss (2021), one of the initiators and authors of General Data Protection Regulation, concludes after several years of GDPR being implemented:

⁴⁵ Bowman, S. (2021, November 24). Controlling Tech and Platforms – Can Antitrust and Regulation Generate Better Competition? [Webinar]. The European Centre for International Political Economy (ECIPE).

⁴⁶ Stagnaro, C. Bruno at Lithuanian Free Market Institute (2021, November 12). *Expert Workshop on Digital Market Policy* [Workshop], Vilnius.

⁴⁷ Lithuanian Free Market Institute (2021, November 12). *Expert Workshop on Digital Market Policy* [Workshop], Vilnius.

*The DMA is the GDPR applied to digital competition: massive unintended consequences, compliance costs explosion, and barriers to European digital entrepreneurs' growth at the expense of consumers.*⁴⁸

The state of affairs when conclusions are not drawn from recent and painful mistakes makes one think whether there is a real intention to achieve the proclaimed goals. It is difficult to judge how much of this strive to regulate comes from a naïve but genuine belief that it is possible to engineer the market and how much of it is being driven by various interests. This is quite perplexing for the stochastic nature of our world is well known and there are numerous examples of regulatory failures and susceptibility of regulatory decisions to political interests.

In any way, one of the reasons for such initiatives is clearly a negative attitude towards big companies and technologies (tech lash) among certain groups and society in general. Building a policy on negative attitudes is sheer populism, if only with a taste of technology in this case. And as populism always does, it seduces politicians with clearly and visibly easy and popular solutions for problems that are neither simple nor clearly visible. And what is most regrettable, it ultimately harms those actors and processes that were supposed to improve.

Those groups of people who dislike the big platforms, the digital sector, or technologies altogether because of some real or imagined reasons will face very tangible and unexpected repercussions, such as changes of habitual digital services and a slowdown of innovation.

Innovation remains to be a positive concept in the public realm and in the minds of most people. However, the ignorance of the innovation mechanism prompts solutions that hinder innovations *per se*. Just as innovation is an ongoing process in competitive markets, the change in the market is continuous too. If ex-ante rules apply to punish certain market expressions, the span of innovation gets narrowed – just so as to escape such outcomes. Therefore, any ex-ante regulation means a slowdown of market change. This slowdown, however, may be observed among the goals of the DMA's initiators. A goal like this is legitimate and would be supported by some people. But it cannot be achieved without slowing down innovation and technological development itself.

The debate that is taking place around the Regulation proposal is dominated by a political standpoint, marginalizing discussions about economic consequences. The political discourse fails to address the questions of how innovations and technologies are created, what motivates people to pursue them, and what consequences the DMA will have for Europe's creative potential. Ironically, it also excludes concerns about the users' interests.

The only reasonable epilogue is that the DMA goal is not about competition, not about innovation, not about the users, and not about economics at all.

⁴⁸ Voss, A. (2021) *Fixing the GDPR: Towards Version 2.0*. EPP Group in the European Parliament. <https://www.axel-voss-europa.de/wp-content/uploads/2021/05/GDPR-2.0-ENG.pdf>

CONCLUSIONS

- If we care about the consumer, the digital market should not be regarded as a distinct market with its institutions and its regulations because the consumers choose from service providers, not from their specific channels or company sizes.
- If we cares about the consumer, private property rights should be observed because it is thanks to private property rights that people dare to engage in economic activity, to invest, especially in such long-term endeavors as R&D and such uncertain undertakings as innovation. Investors have to be certain that, upon reaching a certain volume of activity, their activity will not be restricted just because of its size and they will not be forced to provide their products and services free of charge.
- As competition is needed to offer the best options for the consumer, competition cannot be set up in advance but is determined by consumer preferences – i.e. ex-post, not ex-ante. It cannot be artificially constructed either: as perfect, efficient, static, or predefined in any other way. The wide variety of ever-changing consumers can influence only spontaneous market competition – a competition that reflects the constant change of consumers and their wants.
- Though investments into European tech nearly tripled in 2021 compared to 2020, government participation remains substantial (around 30%) and the role of foreign investors is growing – according to State of European Tech21, 95% of all deals at \$250m or more have now involvement from the US or Asian countries. Thus, the motivation of local enterprises to make genuine investments (without guarantees, subsidies, or other support schemes) is still an issue in the European Union.
- If the goal of the DMA is to invigorate the digital sector in the EU, attention should be drawn towards enhancing conditions for firms to take risks and to invest in the EU, not other markets. This involves protection of property rights, transparent and minimum regulation, preventing the Member States from building regulatory barriers to the single market (as they are prevented in the non-digital sector), employment flexibility, and other favourable business environment measures. Notably, competition with other countries is taking place throughout all of these aspects and this competition is very dynamic.
- There are numerous sensitive issues around digital service development. Some of them are caused by mistakes of particular firms, but most of them can be explained by new phenomena that we are only now experiencing, without any certainty how they shall be dealt with (like global private communication online). This creates a tense atmosphere around digital services and collective biases (like tech-lash). It is therefore important for politicians that before introducing any regulation, emotions and biases are separated clearly from sound arguments, so as not to sacrifice

essential foundational societal institutions of property protection, the presumption of innocence and consumer-driven competition for obscure goals.

- While admitting that digital services may have diverse effects on society and that individuals can find them too fast or too pervasive, we must conclude that the DMA will not achieve the economic objectives that it declares — more competition, innovation, and growth. Rather, the DMA will hold them back.
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