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Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause

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ABSTRACT

The Digital Markets Act (DMA), an EU Regulation establishing obligations for gatekeeper platforms in order to protect fairness and contestability in digital markets, will soon start to apply. In addition to the DMA, other (EU and national) instruments regulate platform conduct. Though the DMA explicitly provides that it will apply without prejudice to those other instruments, it is doubted whether it will merely complement them. In certain cases, the DMA may qualify as lex specialis, thereby prevailing over other regulations. In other cases, based on the principle of supremacy, the DMA may override national instruments that pursue legitimate interests other than fairness and contestability. There may also be occasions where the DMA may render certain tools devoid of purpose when this was not the intention of the legislator. In all the above cases, the DMA would not complement (but could possibly endanger) the effectiveness of the existing regime. Given the avalanche of legislative proposals for platforms, addressing potential conflicts between the DMA and other rules is essential to protect legal certainty and to ensure that the regulatory regime that governs harmful platform conduct reaches its full potential.

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I. Introduction

The Digital Markets Act (DMA),[1] a Regulation laying down rules that seek to protect fairness and contestability in digital markets where

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[1]Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act or DMA) [2022] OJ L265/1.

gatekeeper platforms are present, is now part of the EU *acquis*. The DMA will impose a series of "dos and don'ts" on designated gatekeepers, establishing rules of conduct *vis-à-vis* other businesses and end users.

Clearly, the DMA will not apply in a vacuum; it will interact with other EU and national rules that establish obligations for gatekeeper platforms. The DMA provides that the Regulation will apply "without prejudice" to several instruments, including the General Data Protection Regulation (GDPR), consumer protection rules, and competition rules.[2] A reading of the "without prejudice" provisions of the DMA suggests that all legislative instruments that govern the conduct of gatekeeper platforms (in the EU and domestically) will harmoniously co-exist and complement each other.

Indeed, there are cases where no tension is expected to arise because the instrument that may apply concurrently with the DMA regulates unrelated matters through provisions that do not contradict the DMA. For example, under the Copyright Directive, a video-sharing platform is required to obtain an authorization from right holders in order to communicate or make available to the public their works.[3] The DMA does not tackle copyright-related matters, nor does it impose any obligations that could put in jeopardy the regime established by the Copyright Directive.[4]

Yet, it is doubted whether the DMA will indeed apply without prejudice to (i.e., without detriment to any existing right or claim enshrined in) all the rules which have recently been revised or adopted to regulate platform conduct. In certain cases, the DMA may qualify as *lex specialis*, thereby prevailing over other rules. In other cases, based on the principle of supremacy of EU law, the DMA may override national rules that pursue different objectives. What is more, it cannot be excluded that

[2]ibid., Recitals (10)–(12) and (37), and Article 1(6).

[3]Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] *OJ L 130*/92, Article 17(1).

[4]The other instruments which are unlikely to clash with the DMA and which are specifically referred to in the DMA as applying "without prejudice" to the latter are the following: Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1; Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337/35; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L 201/37; Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services [2019] OJ L 151/70; and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

the implementation of the DMA may trigger the *ne bis in idem* principle in subsequent proceedings launched under other rules (to the effect that those proceedings are discontinued). There may also be occasions where the DMA may render certain rules devoid of purpose (when this was clearly not the intention of the legislator). In such cases, despite a "without prejudice" clause, the DMA would not necessarily complement (but could possibly endanger) the effectiveness of existing rules, thereby undermining the overall regulatory framework that seeks to protect businesses and consumers against problematic platform conduct.

Against the above background, this paper has a two-fold objective. First, it seeks to place the DMA in the existing regime of platform regulation in the EU, examining the gap that the DMA purports to fill. Secondly, it identifies areas of conflict with other instruments based on general principles of (EU) law. It does so by discussing the relationship between the DMA and a range of instruments which are expected to apply without prejudice to the DMA[5] and which regulate different matters and different levels of the supply chain. Those instruments are: the Unfair Commercial Practices Directive, which governs business-to-consumer relations and has recently been revised to adapt the prohibitions it establishes to the platform economy (Part 2); the Platform-to-Business Regulation, which regulates platform-to-business relations and imposes transparency obligations on platforms irrespective of their size (Part 3); the General Data Protection Regulation, which establishes rules for the processing of personal data, a key input in the platform economy (Part 4); the Audiovisual Media Services Directive, which has recently been revised to include in its scope video-sharing platforms and social networks and aims to protect, *inter alia*, media pluralism (Part 5); and competition rules, which the DMA is meant to complement (Part 6). Those instruments are arguably those instruments of the existing EU regime that establish obligations and prohibitions that may conflict with the DMA.[6]

The paper will illustrate that, contrary to the intention of the legislator, the DMA may not necessarily be compatible with other instruments. Amidst the avalanche of legislative proposals for platforms that currently takes place, addressing potential conflicts is essential to protect legal certainty and to ensure that the emerging regulatory regime that governs harmful platform conduct reaches its full potential.

[5]DMA, Recital (12).

[6]The other instruments referred to in the "without prejudice" clause of the DMA are not likely to conflict with the DMA because they regulate unrelated matters. See (n 4).

II. The interplay between the DMA and the platform-to-business (P2B) Regulation

The P2B Regulation is the predecessor of the DMA. Though the latter builds on the former to some extent, it may also jeopardize the P2B Regulation *acquis*, rendering it devoid of purpose.

A. The relationship between the platform-to-business Regulation and the DMA: Setting the scene

Both the P2B Regulation[7] and the DMA establish obligations that seek to promote transparency and fairness in the platform economy. However, the P2B Regulation primarily focuses on establishing transparency obligations[8] that apply to two categories of platforms, namely online intermediation service providers and search engines.[9] The DMA covers a wider range of services than the P2B Regulation (e.g. advertising services, online intermediation services, search engines, operating systems), and it is not restricted to addressing lack of transparency.[10] Moreover, contrary to the P2B Regulation, which applies irrespective of market (or gatekeeping) power, the DMA only applies to "gatekeeper" platforms.[11]

The DMA and the P2B Regulation are in a complementary relationship for two reasons. First, the DMA establishes an obligation or a prohibition where, due to the "gateway" function performed by a given platform, transparency guarantees are not sufficient to protect fairness in P2B relations. Secondly, because it promotes transparency, an effective implementation of the P2B Regulation would enable the Commission to keep track of practices that may warrant further regulatory intervention under the DMA.[12]

However, the P2B Regulation and the DMA may not co-exist as harmoniously as one might expect. Even though the latter relies on the former to define the services it covers, there are inconsistencies in the definitions that raise issues of compatibility. Moreover, the DMA does

[7]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 (P2B Regulation) [2019] OJ L 186/57.

[8]For a critical analysis of the obligations established in the P2B Regulation see Konstantina Bania, 'The Platform-to-Business Regulation: Taming the 'Big Tech' Beast?' (2020) 2 Concurrences Law Review 52–64.

[9]P2B Regulation, Article 1(1).

[10]DMA, Article 2(2) and Articles 5, 6, 7, 13 and 14.

[11]ibid., Article 3.

[12]The DMA sets up a mechanism whereby the Commission may update the obligations imposed on gatekeepers and designate additional platforms as gatekeepers. See Articles 12, 17 and 19.

not include any transparency safeguards in order to maintain the P2B Regulation *acquis*.

B. Matters of scope: Inconsistencies arising from the DMA may undermine the applicability of the P2B Regulation

The DMA undoubtedly fills an important gap left open by the P2B Regulation. It captures "advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services",[13] which have been left outside the scope of the P2B Regulation.[14] It is odd that the latter does not apply to those services; several initiatives have found that lack of transparency is pervasive in digital advertising markets and that the relevant information asymmetries have enabled powerful platforms to exploit their business users through various means.[15] The DMA addresses this *lacuna* by establishing a set of transparency duties that would require platforms to disclose, *inter alia*, price information as well as information that would enable advertisers and publishers to verify the relevant ad inventory.[16] No tension is expected to arise between the two instruments with respect to advertising services, for those services are not regulated by the P2B Regulation.

The same cannot be said of other types of services that are covered by both tools. The DMA defines "online intermediation services" by reference to the P2B Regulation. Though social networks, video-sharing platforms (VSPs), and virtual assistants are "online intermediation services" within the meaning of the P2B Regulation,[17] the DMA refers to the above as four ***separate*** categories of services it covers.[18] This ambiguity may jeopardize the objective the P2B Regulation seeks to achieve because it raises doubts as to whether the above platforms indeed qualify as "online intermediation services" within the meaning of the P2B Regulation. This is because the P2B Regulation clarifies that those platforms fall under its

[13]DMA, Article 2(2)(j).
[14]P2B Regulation, Recital (11).
[15]See, for instance, Jason Furman et al., 'Unlocking Digital Competition, Report of the Digital Competition Expert Panel' (2019), para 1.144 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> (all websites last accessed 23 November 2022); Competition and Markets Authority, 'Online Platforms and Digital Advertising Market Study. Statement of Scope' (2019), para 8(c) <https://assets.publishing.service.gov.uk/media/5d1b297e40f0b609dba90d7a/Statement_of_Scope.pdf>.
[16]DMA, Article 5(10).
[17]P2B Regulation, Recital (11).
[18]DMA, Article 2(2)(a), (c), (d), and (h).

scope in interpretative recitals,[19] but no mention of them is made in its operative provisions. According to a long line of case law, "recitals can help to establish the purpose of a provision or its scope [b]ut they cannot take precedence over its substantive provisions"[20] and have no binding legal force.[21] Contrary to the P2B Regulation, the DMA refers to social networks, video-sharing platforms (VSPs), and virtual assistants in its main text. As a result of the above, a paradox may arise whereby certain gatekeepers are not bound by transparency requirements that apply to (much) smaller competitors.

C. The uncertain future of the P2B Regulation once the DMA enters into force

In principle, it seems that the P2B Regulation and the DMA regulate largely the same issues in a synergistic manner. For example, the P2B Regulation requires the providers of online intermediation services to *disclose whether* they restrict the ability of business users to offer the same services to consumers under different conditions using means other than the platform's services (this may, for instance, cover Most Favoured Nation clauses).[22] However, the DMA *altogether prevents* gatekeepers from restricting the business users' ability to offer the same services under different conditions through other channels.[23] This example should not suggest that the P2B Regulation only addresses lack of transparency and that the DMA only tackles unfairness. For example, the P2B Regulation requires platforms to refrain from establishing retroactive changes to terms and conditions in order to ensure that contractual relations are conducted on the basis of *fair dealing*[24] whereas the DMA establishes obligations that seek to promote *transparency* in advertising markets.[25] However, those provisions do not contradict one another. Moreover, the P2B Regulation and the DMA regulate completely unrelated matters. For example, the P2B Regulation introduces the platforms' obligation to ensure that their Terms and Conditions are drafted in plain and intelligible language[26] and the DMA requires gatekeepers to refrain

[19]P2B Regulation, Recital (11).
[20]Roberto Baratta, 'Complexity of EU law in the domestic implementing process', (2014) 2 Theory and Practice of Legislation 293, 302.
[21]Case C-244/95 Moskof v EOK [1997] ECR I-6441, paras 44–45.
[22]P2B Regulation, Article 10.
[23]DMA, Article 5(3).
[24]P2B Regulation, Article 8(a).
[25]See, for instance, DMA, Article 5(10).
[26]P2B Regulation, 3(1)(a).

from tying a payment (i.e. an ancillary) service to the core platform service.[27] Based on the above, the likelihood that the two instruments will clash for the reason that they regulate the same issue in a different manner appears low.

However, the situation is more complex than it seems at first sight, for the future of the P2B Regulation after the DMA starts to apply is uncertain. This can be illustrated through the following example. Currently, under the P2B Regulation a gatekeeper platform must disclose whether it grants differentiated treatment to its own services through ranking.[28] Under the DMA, a gatekeeper platform should in all respects refrain from self-preferencing in ranking.[29]

As a result, the transparency obligation under the P2B Regulation is devoid of purpose. In other words, in such cases, the DMA does not apply without prejudice to the P2B Regulation, but it overrides it. This is because, in such cases, the DMA is not accompanied by a transparency obligation. In the above example, the DMA does not require platforms to disclose that they are not allowed to engage in self-preferencing. Yet, business users, especially small enterprises, cannot be expected to be familiar with their rights under the DMA. This will not only jeopardize the P2B Regulation *acquis* but also the effective enforcement of the DMA; business users that are aware of their rights are likely to actively monitor whether gatekeepers respect their obligations and to assist the Commission with its enforcement tasks.[30]

The evaluation of the P2B Regulation, which was scheduled to be completed by January 2022[31] (but got delayed), should address the inconsistency arising from the definition of core platform services in the DMA, which raises doubts as to whether social networks, voice assistants, and VSPs qualify as online intermediation services. The revised P2B Regulation should also establish specific transparency safeguards for gatekeepers (to the extent that the DMA quashes them).

[27] DMA, Article 5(7).
[28] P2B Regulation, 7(3)(b).
[29] DMA, Article 6(5).
[30] ibid., Article 27(1), which establishes that "[a]ny third party, including business users, competitors or end-users of the core platform services listed in the designation decision pursuant to Article 3(9), as well as their representatives, may inform the competent authority of the Member State, enforcing the rules referred to in Article 1(6), or the Commission directly, about any practice or behaviour by gatekeepers that falls within the scope of this Regulation".
[31] P2B Regulation, Article 18.

III. The interplay between the DMA and the Unfair Commercial Practices Directive

Moving away from the regulation of P2B relations to the regulation of platform-to-consumer (P2C) relations, this part discusses the interplay between the DMA the Unfair Commercial Practices Directive (UCPD).[32]

A. The relationship between the DMA and the Unfair Commercial Practices Directive: Setting the scene

The UCPD has a clearly defined goal to protect against "unfair commercial practices harming consumers' economic interests".[33] As for the DMA, though the legislative proposal broadly referred to the promotion of fairness in the digital sector as one of the objectives it would pursue,[34] it was added in the final text that the DMA is to the benefit of business users *and* end users alike.[35] This addition reflects the spirit and objective of several provisions of the DMA, which directly regulate the relationship between platforms and consumers. For example, pursuant to Article 6(3), "[a gatekeeper] shall allow and technically enable end users to easily uninstall any software applications on its operating system". In other words, the DMA regulates both P2B and P2C relations.

The UCPD applies to "traders", a broad term that refers to "any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession".[36] The Commission's Guidance on the UCPD clarifies that the instrument is "technology-neutral and applies regardless of the

[32]Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22 (Unfair Commercial Practices Directive or UCPD) as amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] L 328/7. The consolidated text of the Directive is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1585324585932&uri=CELEX%3A02005L0029-20220528>. For an analysis of how the UCPD applies to digital markets see, for instance, Bram Duivenvoorde, 'The Liability of Online Marketplaces under the Unfair Commercial Practices Directive, the E-commerce Directive and the Digital Services Act' (2022) 11 Journal of European Consumer and Market Law 43–52.

[33]UCPD, Article 1.

[34]Commission, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (DMA Proposal)' (Communication) COM(2020) 842 final.

[35]DMA, Article 1(1).

[36]UCPD, Article 2(b).

channel, medium or device used to implement a business-to-consumer commercial practice. It applies to online intermediaries, including social media, online marketplaces and app stores, search engines, comparison tools and various other traders operating in the digital sector".[37] In view of the above, it is undoubted that those platforms that are targeted by the DMA also fall under the umbrella of the UCPD.

Though there are areas where no overlap exists (those are the areas which the UCPD regulates with *per se* prohibitions), tension is expected to arise with respect to practices which the UCPD can only address (and ban) *ex post*, but which the DMA prohibits *ex ante*. In such cases, the following two challenging questions arise: First, which instrument prevails over the other in cases of conflict? Second, can the prevailing instrument effectively protect consumers?

B. Practices regulated by the DMA could also be "unfair practices" prohibited by the UCDP

Though both the DMA and the UCPD protect end users against unfair platform practices, the logic underlying the former is different from the one governing the latter on one important point. The prohibitions set in the DMA are defined in specific terms and apply *ex ante*. However, in addition to such "blacklisted" prohibitions,[38] the UCPD also establishes a *general* prohibition of unfair commercial practices, which are divided into three wide categories, namely misleading actions, misleading omissions, and aggressive commercial practices.[39] Those terms are defined fairly broadly,[40] but the UCPD refers to specific examples of practices that would be prohibited. For instance, the trader must provide information about the price *inclusive of taxes*.[41] If not, the practice qualifies as a misleading omission.[42] For our purposes, it is worth emphasizing that the lists of those examples are not exhaustive. This means that other practices, which are subject to an *ex post* assessment, can also be caught by the UCPD.

[37]European Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (UCPD Guidance)', [2021] OJ C 526/01, para 86.
[38]UCPD, Annex I.
[39]ibid., Articles 6–9.
[40]For an overview of the general prohibition of the UCPD (and whether it can achieve maximum harmonisation) see Anne de Vries, 'Maximum Harmonisation and General Clauses – Two Conflicting Concepts?' (2011) SSRN Working <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1703078>.
[41]UCPD, Article 7(3)(c).
[42]ibid.

The rules of the UCPD that are described in specific terms and apply *ex ante* are (a) the "blacklisted" practices that are defined in Annex I of the UCPD, and (b) the concrete examples set out in Articles 6–9 of the UCPD. No tension is expected to arise between the two instruments with respect to the implementation of the above rules of the UCPD, for those rules concern matters that the DMA does not tackle. By means of example, with respect to ad-related practices, the DMA establishes the gatekeepers' obligation to provide advertisers with information about the price and fees paid by an advertiser, the remuneration received by the publisher, and the metrics on which the prices, fees and remuneration are calculated.[43] The black list of the UCPD establishes the traders' obligation to disclose any paid advertisement or payment for achieving higher ranking within the search results provided by the trader in response to a consumer's query.[44] Both sets of rules seek to promote transparency in advertising markets, but they regulate a different issue.

However, there may be an overlap between the DMA and the UCPD in cases where practices that are caught by the former may also fall under the general prohibition established in the latter.[45] For example, Article 6(13) of the DMA prevents gatekeepers from establishing general conditions for terminating the provision of a core platform service which are disproportionate and which users exercise with difficulty. This practice targeted by the DMA could also be caught by Article 7 of the UCPD, which prohibits misleading omissions.[46] A platform may, for instance, fail to provide information about how the user can unsubscribe from a service. The Commission's Guidance on the UCPD clarifies that "dark patterns" (i.e. malicious nudging techniques) are unfair[47] and states that

> [i]n designing their interfaces, traders should follow the principle that **unsubscribing from a service should be as easy as subscribing to the service**, for example by using the same methods previously used to subscribe to the service or differing methods, as long as the consumers are presented with **clear and free choices, proportionate** and specific to the decisions they are being asked to make.[48]

[43] DMA, Article 5(9)
[44] UCPD, Annex I, 11a.
[45] On the steps followed to assess whether a practice falls under the UCPD, see the flowchart in the UCPD Guidance, at 26.
[46] UCPD, Article 7(1) lays down that "[a] commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise".
[47] UCPD Guidance, paras 99 et seq.
[48] ibid., at 102.

Similarly, practices regulated by the DMA that seek to enable end users to switch to a different provider[49] (e.g., restricting the ability of end users to switch between different services that are accessed using the core platform services of the gatekeeper;[50] restricting the ability of end users to easily un-install software applications and to easily change default settings)[51] could qualify as "aggressive commercial practices", which are prohibited by Article 9 of the UCPD and which rely on, *inter alia*, coercion or undue influence to impair the consumer's freedom of choice.[52] The Commission's Guidance on the UCPD refers specifically to Article 9(d), which prevents any "onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to […] switch to another product or another trader", as a means to reduce the risk of lock-in.

C. Can the DMA apply without prejudice to the UCPD?

In cases where practices addressed by the DMA could also fall under the general prohibition of the UCPD, the two instruments cannot apply concurrently. The *ex ante* (i.e., *per se*) prohibitions of the former conflict with the latter, for the practices concerned would be unfair and thus prohibited under the UCPD only *ex post* (i.e., after a case-by-case assessment).[53] What should the way forward be? Article 3(4) of the UCPD lays down that "[i]n the case of conflict between the provisions of this Directive and ***other [EU] rules*** regulating ***specific aspects*** of unfair commercial practices, ***the latter shall prevail and apply to those specific aspects***".[54]

Read in conjunction with the relevant case law, Article 3(4) establishes that a provision of EU law will take precedence over the UCPD if all of the following three conditions are fulfilled: (a) it has the status of EU law; (b) it regulates a specific aspect of commercial practices; and (c) there is a conflict between the two provisions or the content of the other EU law provision overlaps with the content of the relevant UCPD provision by

[49]See, for instance, DMA, Articles 5(5), 5(7), 5(8), and 6(4).
[50]ibid., Article 6(6).
[51]ibid., Article 6(3).
[52]ibid., Article 9.
[53]UCPD Guidance, at 9: "Article 12 of the Mortgage Credit Directive prohibits, in principle, tying practices whereby a credit agreement for a mortgage is sold with another financial product and is not made available separately. *This per se prohibition conflicts with the UCPD because tying practices would be unfair and thus prohibited under the UCPD only following a case-by-case assessment*" (emphasis added).
[54]UCPD, Recital (10) similarly lays down that "[i]t is necessary to ensure that the relationship between this Directive and existing [EU] law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. […] This Directive accordingly applies *only in so far as there are no specific [EU] law provisions regulating specific aspects of unfair commercial practices* […]. It provides protection for consumers *where there is no specific sectorial legislation at [EU] level* […]" (emphasis added).

regulating the conduct at stake in a more detailed manner and/or by being applicable to a specific sector.[55] The DMA provisions referred to above that govern practices which could also be addressed by the UCPD fulfil those three conditions. First, being a Regulation that relies on Article 114 TFEU to ensure the undistorted functioning of the internal market,[56] the DMA clearly has the status of EU law. Secondly, the DMA provisions under consideration seek to regulate specific aspects of commercial practices in which gatekeeper platforms engage (e.g., the proportionality of conditions for unsubscribing from a service). Finally, those same provisions regulate what could be regarded as "unfair practices" under the UCPD in a more detailed manner (e.g. Article 5(7) of the DMA specifies which ancillary services should not be tied to the core platform service to prevent gatekeepers from locking users into their ecosystems), and apply to the digital sector (as defined by Article 2(4) of the DMA). Put simply, the DMA qualifies as *lex specialis* that prevails over the UCPD. This has a distinct advantage; consumers (or those representing consumers' interests) would not need to engage in lengthy proceedings to prove that the practices under consideration meet the requirements set by the UCPD to qualify as "unfair".

That the DMA applies *ex ante* and addresses interpretation hurdles that could arise in the context of litigation under the UCPD does not mean that consumers would be better off if they were to rely on the DMA rather than the UCPD. This is because, in terms of enforcement safeguards, the former is not as robust as the latter. More particularly, as regards public enforcement, the DMA establishes that, in cases of non-compliance, the Commission may, *inter alia*, impose remedies, fines and periodic penalty payments.[57] However, there are no specific provisions on private enforcement. As opposed to the DMA, Article 11a(1) of the UCPD lays down that

> [c]onsumers harmed by unfair commercial practices shall have access to proportionate and effective remedies, **including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract**.

It is worth noting that the UCPD was recently revised and one of the key elements of the reform was the introduction of Article 11a; this was

[55]UCPD, Guidance, at 8, referring to Joined Cases C-54/17 and C-55/17 Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA and Vodafone Italia SpA EU:C:2018:710, paras 60–61.
[56]DMA, Preamble.
[57]DMA, Articles 18, 29 and 30.

deemed necessary because the implementation of the UCPD had made clear that relying on general and sparse provisions was not sufficient to establish effective redress for consumers.[58] As a result of this amendment, Member States are required to establish concrete remedies as well as their detailed effects (e.g., whether the contract termination remedy results in the nullity of the contract from its conclusion, or only in removing its future effects),[59] and the relevant provisions may take into account the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.[60]

The DMA establishes nothing similar to Article 11a of the UCPD, an aspect that has been severely criticized. Based on general principles of EU law and long-established case law,[61] the Commission attempted to resolve any doubts about whether damages would be available to those harmed by gatekeeper conduct, noting that "[t]he DMA is a Regulation, containing precise obligations and prohibitions for the gatekeepers in scope, which can be enforced directly in national courts. This will facilitate **direct actions for damages** by those harmed by the conduct of non-complying gatekeepers".[62] Nevertheless, it has correctly been pointed that this is far from an optimal solution for the following two reasons:

> Firstly, damages are just one part of private involvement, and a late one, as damages are usually the final element of an enforcement action. Litigation on damages may come years after the infringement, often too late for [those] that are severely battered. The other aspects of involvement are not covered. Secondly, the problems with damages claims in competition law show what it takes to get an individual right right: The devil is in the details. Despite [the] serious efforts of the European Court of Justice in the landmark cases of *Courage* and *Manfredi*, and a whole set of rules in the 2014 Damages Directive, actually getting compensation for victims of cartels is still very hard. Without precedents, patience and supportive legislation there is little hope to succeed.[63]

[58] UCPD Guidance, para 1.4.3.
[59] ibid.
[60] UCPD, Article 11a(1).
[61] See, for instance, Case C-26/62 van Gend & Loos v Netherlands Inland Revenue Administration EU:C:1963:1; Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others EU:C:2001:465; Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA EU:C:2006:461.
[62] European Commission, 'Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets (23 April 2022) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349>.
[63] Rupprecht Podszun, 'Private Enforcement and the Digital Markets Act. The Commission Will Not Be Able to Do this Alone' (*Verfassungsblog*, 1 September 2021) <https://verfassungsblog.de/power-dsa-dma-05/>.

It is uncertain whether the DMA, as the text currently stands, will ensure an adequate level of protection for end users from the perspective of private enforcement. Moving forward, a provision incorporated in the DMA that is modelled on Article 11a of the UCPD[64] may be warranted.

IV. The interplay between the DMA and the General Data Protection Regulation

Due to the role that data plays in driving the platform economy, the DMA establishes obligations that tackle a series of data-related practices in which gatekeepers engage. Those practices may involve the processing of personal data in which case the General Data Protection Regulation (GDPR)[65] is expected to apply concurrently with the DMA.

A. The relationship between the DMA and the General Data Protection Regulation: Setting the scene

To state the obvious, the GDPR covers the gatekeeper platforms that fall under the scope of the DMA; the GDPR is horizontal legislation that applies to all natural and legal persons that process personal data.[66] Such processing is one of the main activities of gatekeepers, which process data to deliver targeted advertising, personalize the services they offer, and strengthen synergies with other brands they own or their business partners.

One important clarification should be made at the outset regarding the relationship between the DMA and the GDPR. Broadly speaking, the DMA seeks to reduce the gatekeepers' data power. This is done in two different ways: First, the DMA establishes obligations that restrict the gatekeepers' data processing activities (e.g., gatekeepers should not use, in competition with business users, any data that is generated or provided by the end users of those business users[67]). Secondly, the DMA requires

[64]Article 15 of the P2B Regulation goes in a similar direction. The provision reads as follows: "Each Member State shall ensure adequate and effective enforcement of this Regulation. Member States shall lay down the rules setting out the measures applicable to infringements of this Regulation and shall ensure that they are implemented. The measures provided for shall be effective, proportionate and dissuasive".

[65]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or GDPR) [2016] OJ L 119/1. The GDPR defines personal data in Article 4(1) as "any information relating to an identified or identifiable natural person ('data subject')".

[66]GDPR, Article 4(7).

[67]DMA, 6(1).

gatekeepers to grant to their business users access to (personal and non-personal) data.[68] The latter solution may seem less "privacy-friendly" than the former. However, it would be wrong to assume that those provisions that facilitate data sharing and combination are in conflict with the GDPR (even if they are less privacy-friendly). This is because the objective of the GDPR is not to limit the processing of personal data, but to ensure that "natural persons […] have control of their own personal data".[69] As per the GDPR, this can achieved through various means, including through obtaining the end user's freely given, specific, and informed consent to such processing.[70]

End user consent plays a central role in certain data-related obligations established in the DMA. First, pursuant to Article 5(2) of the DMA, the end user should be "presented with the specific choice and [give] consent" in order for the gatekeeper to engage in specific data processing, data combination, data cross-use and sign-in practices. Secondly, Article 6(10) of the DMA requires gatekeepers to provide business users (and third parties authorized by a business user) access to aggregated and non-aggregated data.[71] To the extent that personal data is involved, data access can only be granted when "the end user opts in to such sharing by giving […] consent".[72] The term "consent" in the DMA is defined by reference to the GDPR.[73] Therefore, the requirements the GDPR establishes in relation to requesting and obtaining user consent remain applicable where consent is required under the DMA.

In view of the above, tension is *not* expected to arise in the case of personal data processing under the DMA where the DMA specifically refers to "consent". The GDPR sets standards that enable data subjects to control their personal data[74] and the DMA does not put in jeopardy those standards. However, the DMA does not always rely on the GDPR to create a framework that facilitates the flow of personal data.

[68] ibid., 6(10) and 6(11).
[69] GDPR, Recital (7).
[70] GDPR, Article 7. For an analysis of the problems arising from reliance on consent in digital markets, see Elinor Carmi, 'A Feminist Critique to Digital Consent' (2021) 17 Seminar.net <https://journals.oslomet.no/index.php/seminar/article/view/4291>; Neil M. Richards and Woodrow Hartzog, 'The Pathologies of Digital Consent' (2019) 96 Washington University Law 1461–503.
[71] Such access should be granted at the request of the business user, free of charge, and covers data that are provided for or generated in the context of their use of the gatekeeper's core platform service or services provided together with, or in support of, the relevant core platform service by the business user, as well as the end users of the business user.
[72] A further requirement is that such personal data must be "directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service".
[73] DMA, Article 2(32).
[74] GDPR, Article 5(1).

This is the case with Article 6(9), which requires gatekeepers to provide end users with effective portability of their (personal and non-personal) data. This is where conflict may emerge.

B. Are the DMA obligation to provide data portability and the GDPR right to data portability "two sides of the same coin"?[75]

Article 20(1) of the GDPR enshrines the right to data portability, which comprises the data subject's right to receive the personal data concerning her, and the right to transmit this data to another controller. Article 6(9) of the DMA establishes the gatekeepers' obligation to provide end users with effective data portability. Based on Recital (59) of the DMA, it appears that the obligation in question is composed of the same core elements as the GDPR right, namely (a) the right to receive the data in scope, and (b) the right to have the data ported to a third party.

In an attempt to clarify the relationship between the above provisions, the DMA notes that "**[f]or the avoidance of doubt**, the obligation on the gatekeeper to ensure effective portability of data […] **complements** the right to data portability under the [GDPR]".[76] This may imply that the right enshrined in the GDPR and the obligation established in the DMA are reciprocal. Indeed, this might have been the original intention; in its Communication on the application of the GDPR, the Commission acknowledged that, although individuals are increasingly aware of their rights under the GDPR, the right to data portability, which may "put individuals at the centre of the data economy by enabling them to switch between different service providers […], and to choose the most data protection-friendly services" has not reached its full potential.[77] The Commission noted that unlocking that potential was one of its main priorities because, with the increasing use of the Internet, "more and more data are generated by consumers, who risk being faced with unfair practices and 'lock in' effects".[78] The Commission further mentioned that it would explore how to boost data portability in preparation of the DMA.[79]

[75]This section draws from and builds on an article I authored together with Damien Geradin and Theano Karanikioti. See Damien Geradin, Konstantina Bania and Theano Karanikioti, 'The Interplay between the DMA and the General Data Protection Regulation' (2022) 3 Concurrences Law Review 31–37.
[76]DMA, Recital (59) (emphasis added).
[77]European Commission, 'Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation' (Communication) COM (2020) 264 final 8–9.
[78]ibid., 8.
[79]ibid., 9.

Nevertheless, there are two reasons why the DMA obligation may not merely enhance the GDPR right. First, there are significant differences in every single aspect of the respective provisions, ranging from the scope of data covered, the legal basis on which the users' right to data portability rests, and the (transactional and technical) conditions under which data portability should take place. Secondly, the DMA is sector-specific legislation. As a result, the end user's right to have data transmitted to a third party under the DMA may qualify as *lex specialis* that would prevail over the GDPR (the *lex generalis* in the case at hand).

C. The DMA obligation to provide data portability and the GDPR right to data portability are not "two sides of the same coin"

The DMA implies that the gatekeepers' obligation to provide data portability and the GDPR right to data portability are merely complementary. However, this section will set out that this is not the case.

1. The scope of data covered by the GDPR and the DMA

Starting from stating the obvious, the GDPR protects and applies to "personal data", that is, "any information relating to an identified or identifiable natural person".[80] Put differently, only personal data is in scope of a data portability request under the GDPR and any data that is anonymous or does not concern the data subject is not covered by Article 20.[81] However, no such restriction applies to data portability in the context of the DMA. Article 6(9) broadly refers to the term "data", which is in stark contrast with other DMA obligations that specifically refer to (and attach conditions to the use of) data that is "personal" within the meaning of the GDPR. Had the legislator intended for Article 6(9) to merely enhance the GDPR, an explicit reference to "personal data" would arguably have been made.

That Article 6(9) of the DMA covers the portability of non-personal data is not the only difference with the GDPR. Article 20(1) of the GDPR covers data that end users have "provided" to a controller. It has been clarified that the term "provided" covers data knowingly and (pro-)actively provided by end users (e.g. mailing address, user name, age) as well as data resulting from the observation of their activities

[80] GDPR, Article 4(1).

[81] Article 29 Data Protection Working Party, 'Guidelines on the right to data portability (Article 29 WP Guidelines)'. Adopted on 13 December 2016, as last revised and adopted on 5 April 2017, WP 242 rev.01, 9.

(e.g., raw data processed by connected objects, history of website usage).[82] However, the GDPR right to data portability does not cover inferred and derived data, that is, data created by the data controller itself (e.g. a user profile created through the analysis of raw data).[83]

Nothing in the DMA implies that the data falling under the scope of the portability obligation should be restricted to the above. Article 6(9) of the DMA establishes the gatekeepers' obligation to "provide […] effective portability of data provided by the end user **or generated through the activity of the end user** in the context of the relevant core platform service". This wording suggests that the DMA obligation may also cover inferred and derived data. The question arises whether requiring gatekeepers to ensure the portability of such data (i.e., data that has been produced following investments in time and technology) complies with the principle of proportionality. One might argue that such a requirement could reduce the gatekeepers' incentive to innovate because it facilitates free-riding. Yet, that the DMA may cover inferred and derived data finds support in Recital (59), which lays down that the data portability obligation it establishes is "[t]o ensure that gatekeepers do not undermine […] the innovation potential of the dynamic digital sector". In other words, one could also argue that the legislator has weighed the different interests at stake and that the balance has tilted in favour of the gatekeepers' end (and business) users.

A marked difference between the DMA and the GDPR that has an impact on the scope of data covered is the legal basis on which the right to data portability rests. Article 20(1) of the GDPR lays down that the right to data portability only covers data that has been processed on the basis of a contract (as per Article 6(1)(b) of the GDPR) or consent (in accordance with Article 6(1)(a) of the GDPR). In practice, this means that there is no obligation for the data controller to accommodate a data portability request concerning personal data that has been processed in line with the other legal bases provided for in the GDPR (e.g., a legitimate interest pursued by a data controller).[84] The gatekeepers' obligation to respond to a data portability request under the DMA is not subject to the above restriction. In practice, this means that the end users' request to have their data ported to a third party under the DMA would encompass a (far) larger dataset than a request to transmit data to another data controller under the GDPR. This

[82]ibid., 9–10.
[83]ibid., 10.
[84]ibid., 8.

includes the personal data that is processed pursuant to a legal basis other than consent and contract, as well as non-personal data (the only legal basis for the portability of the latter is Article 6(9) of the DMA).

Overall, the scope of the data covered by the DMA data portability obligation is more far-reaching than the scope of data covered by the GDPR data portability right.

2. Transactional and technical conditions attached to data portability

The DMA and the GDPR say different things about the conditions that must be met for data portability to be compliant with each instrument. Article 6(9) of the DMA specifically provides that the portability of data performed by the gatekeeper upon an end user's request should be "free of charge". Unequivocally, gatekeepers cannot ask users to pay for their data to be transmitted to a third party. However, the GDPR leaves that door open; pursuant to Article 12, the data controller may charge "a reasonable fee" where data portability requests are excessive, "in particular because of their repetitive character".[85] Yet, one cannot envisage how multi-homing could be achieved if data portability requests are not repetitive.

Furthermore, there are considerable differences with respect to the technical conditions attached to (effective) data portability. By means of example, under the GDPR, the data subject has the right to have the data "transmitted directly from one controller to another, **where technically feasible**".[86] Moreover, Recital (68) of the GDPR encourages data controllers to develop interoperable formats that enable data portability, but there is no obligation for controllers to adopt or maintain processing systems which are technically compatible.[87] The Article 29 WP Guidelines specify that "**[a]s a good practice**, data controllers should start developing the means that will contribute to answer data portability requests, such as download tools and Application Programming Interfaces".[88] The DMA goes beyond the GDPR. Recital (59) lays down that gatekeepers are required to implement "high quality technical measures, such as application programming interfaces". What is more, contrary to the GDPR, gatekeepers should ensure that the data is ported continuously and in real time.[89]

[85]GDPR, Article 12(5).
[86]GDPR, Article 20(1) (emphasis added).
[87]Article 29 WP Guidelines, 5.
[88]ibid., 3 (emphasis added).
[89]DMA, Recital (59). See also Recital (96), which reads as follows: "The implementation of some of the gatekeepers' obligations, such as those related to data access, data portability or interoperability

All in all, the differences in the scope of data covered, and the (transactional and technical) conditions that apply suggest that Article 6(9) of the DMA cannot be regarded as an obligation that merely intends to boost the exercise of Article 20 of the GDPR.

C. Can the DMA obligation to provide data portability really be "without prejudice" to the GDPR right to data portability?

The Article 29 WP Guidelines on the right to data portability explicitly state that "if it is clear from the request made by the data subject that his or her intention is not to exercise rights under the GDPR, **but rather to exercise rights under sectorial legislation only, then the GDPR's data portability provisions will not apply to this request**".[90] There is little doubt that the DMA qualifies as "sectorial legislation", for it only applies to clearly defined services[91] in the digital sector.[92] It is also clear that the DMA establishes a right for the end user; the gatekeeper's obligation is triggered only after a user makes a data portability request. It is also noteworthy that, as the text of the legislative proposal evolved, its wording was amended to specify that the DMA seeks to benefit business users *and* end users alike.[93] Finally, the approach suggested by the Article 29 WP is not alien to the law, including EU law. Aside from the general principle *lex specialis derogat legi generali*, the case law of the CJEU has also clarified that a provision in EU law prevails over another not only in cases of conflict, but also in cases where the former "[regulates] the conduct at stake in a more detailed manner and/or by being applicable to a specific sector".[94]

Even if the DMA could in theory prevail over the GDPR, in practice one would still need to establish that the intention of the data subject is not to exercise the right to data portability enshrined in the latter. How this will be determined is far from clear (should the user be presented with two options, a DMA route and a GDPR route? How could the user make an informed choice about which right to choose?).

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could be facilitated by the use of technical standards. In this respect, it should be possible for the Commission, where appropriate and necessary, to request European standardisation bodies to develop them".

[90] Article 29 WP Guidelines, pages 7–8 (emphasis added).

[91] DMA, Article 2(2).

[92] ibid., Article 2(4). Defined as "the sector of products and services provided by means of, or through, information society services".

[93] ibid., Article 1(1).

[94] UCPD Guidance, 8 (referring to Joined Cases C-54/17 and C-55/17 Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA and Vodafone Italia SpA EU:C:2018:710, paras 60–61).

V. The interplay between the DMA and the Audiovisual Media Services Directive

The DMA will not only interact with EU regulations that govern platform, but also with national rules that protect legitimate interests other than fairness and contestability. Based on the principle of conferral, the EU Member States may be primarily (or solely) responsible for safeguarding these interests. A good example is the power of Member States to adopt measures that go beyond those established in the Audiovisual Media Services (AVMS) Directive[95] with a view to protecting media pluralism.

A. The relationship between the DMA and the AVMS Directive: Setting the scene

The Audiovisual Media Services (AVMS) Directive seeks to complete the internal market for audiovisual media services. Until recently, it applied to linear broadcasters and video-on-demand platforms.[96] However, it was recently revised to cover video-sharing platforms (VSPs) and social networks.[97]

Broadly speaking, the DMA and the AVMS Directive address completely different matters. For example, the latter establishes obligations governing content that incites hatred or violence and audiovisual commercial communications.[98] The former regulates practices which prevent business users from reaching consumers. However, that the two instruments tackle different problems does not mean that they are fully compatible. In transposing the AVMS Directive, Member States may adopt rules (e.g., rules to ensure the prominence of general interest

[95]Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive or AVMS Directive) in view of changing market realities [2018] OJ L 303/69.

[96]Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L 95/1.

[97]AVMS Directive, Recital (4). For a critical assessment of the revision of the AVMS Directive see, for instance, Sally Broughton-Micova, 'The Audiovisual Media Services Directive' in Pier Luigi Parcu and Elda Brogi (eds), *Research Handbook on EU Media Law and Policy* (Edward Elgar 2021) 264–81; Peggy Valcke and Ingrid Lambrecht, 'The Evolving Scope of Application of the AVMS Directive' in Pier Luigi Parcu and Elda Brogi (eds), *Research Handbook on EU Media Law and Policy* (Edward Elgar 2021) 282–302; and Lubos Kukliš, 'Video-Sharing Platforms in AVMSD: A New Kind of Content Regulation' in Pier Luigi Parcu and Elda Brogi (eds), *Research Handbook on EU Media Law and Policy* (Edward Elgar 2021) 303–25.

[98]See, for instance, AVMS Directive, Article 28b and 9(1).

content) which apply to gatekeepers, and which are likely to contradict the DMA.

B. Prominence regulation as a potential area of conflict

The likelihood that the AVMS Directive and the DMA will clash is low. The AVMS Directive regulates aspects relating to content dissemination in order to protect the general public. The DMA does not establish such rules. The only area of common concern appears to be advertising, but no conflict is expected to arise. By means of example, the AVMS Directive establishes that VSPs must ensure that all audiovisual commercial communications (i.e., advertisements) must be readily recognizable as such and that they should not use subliminal techniques.[99] The DMA requires gatekeeper VSPs to provide advertisers with access to an independent verification of the advertisements inventory.[100] Both sets of obligations seek to promote transparency in advertising markets, but they do it differently and intervene at different levels of the supply chain.

However, the story about the interplay between the DMA and the AVMS Directive does not end here, for Member States can go beyond the obligations established in the latter. For example, the AVMS Directive provides that Member States may "impose obligations to ensure the ***appropriate prominence of content of general interest*** under defined general interest objectives such as media pluralism, freedom of speech and cultural diversity".[101] In such cases, the DMA "clarifies" that:

> [n]othing in this Regulation precludes Member States from imposing obligations on undertakings, including undertakings providing core platform services, **for matters falling outside the scope of this Regulation, provided that those obligations are compatible with Union law** and do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation.[102]

It is doubted whether the DMA would indeed be without prejudice to such national rules, including rules that ensure the appropriate prominence of general interest content. Though the Directive does not explain what form prominence rules might take (this is entirely left up to the Member State concerned), those are essentially rules imposing

[99]Ibid., Article 9(1)(a) and (b).
[100]DMA, Article 6(8).
[101]AVMS Directive Recital (25); Article 7a. For the status of transposition of the AVMS Directive see <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>.
[102]DMA, Article 1(5).

on platforms the obligation to engage in positive discrimination (so that the protected content is easy to find). This may, for instance, include higher ranking in the list of available content items. However, the DMA includes an obligation that will require platforms to (a) refrain from engaging in self-preferencing when ranking products or services *and* (b) apply fair *and non-discriminatory* conditions to such ranking.[103] It is far from clear whether this obligation only prohibits self-preferencing or whether it obliges platforms to refrain from discriminating altogether. Recital (52) of the DMA supports the latter interpretation because it lays down that

> the conditions that apply to […] ranking ***should*** also ***be generally fair and transparent***. […] To ensure that this obligation is effective and cannot be circumvented, it should also apply to any measure that has ***an equivalent effect to the differentiated*** or preferential ***treatment in ranking***.

"Differentiated treatment", which is defined in the P2B Regulation, covers self-preferencing *and* the preferential treatment of business users that the gatekeeper does *not* control.[104]

If the DMA indeed establishes a general non-discrimination obligation, the following two questions arise: First, are platforms covered by the DMA also covered by prominence regulation? If the scope of the two instruments is different, no tension would arise. Secondly, if the scope is the same, should the DMA prevail over prominence rules?

As regards the first question, the answer would depend on the media policy priorities of each Member State. For example, some Member State may choose to impose prominence rules on video-on-demand streaming platforms *only*, which are currently not covered by the DMA. Other Member States may choose to apply prominence rules to a wide range of platforms, ranging from operating systems to VSPs. By means of example, the prominence rules established in the Italian law transposing the AVMS Directive capture "**service providers that index, aggregate, or retrieve audiovisual or audio content, and providers that determine how content is presented on user interfaces**".[105] This is a broad

[103]ibid., Article 6(5).

[104]P2B Regulation, Article 7(1): "Providers of online intermediation services shall include in their terms and conditions a description of any differentiated treatment which they give, or might give, in relation to goods or services offered to consumers through those online intermediation services by, *on the one hand, either that provider itself or any business users which that provider controls and, on the other hand, other business users*" (emphasis added).

[105]Decreto Legislativo 08/11/2021, n. 208 (Gazzetta Ufficiale 10/12/2021, n. 293), Article 29(1) and (2) <https://www.ipsoa.it/documents/impresa/contratti-dimpresa/quotidiano/2021/12/11/servizi-media-audiovisivi-testo-unico-attuazione-direttiva-europea>.

definition that includes, *inter alia*, VSPs, social networks, app stores and operating systems. This would suggest an overlap in scope between the DMA and the Italian law. This brings us to the second question: in such cases, which law prevails?

In principle, based on the supremacy of EU law as per *Van Gend en Loos*,[106] the DMA would prevail over national rules. However, since the DMA protects the internal market and Member States are entitled to restrict the freedom to provide services under specific conditions, one would need to assess whether prominence rules could survive. The Court of Justice of the EU (CJEU) has been asked to rule on the compatibility with the internal market of national measures aimed at safeguarding media pluralism (this is the objective pursued by prominence regulation[107]). In these cases, the CJEU refused to read media pluralism within one of the narrowly interpreted grounds for justification laid down in Article 52 TFEU.[108] It has, however, acknowledged that a media policy may constitute an overriding requirement relating to the general interest, thereby justifying restrictions on the freedom to provide services.[109] The main criterion that the national rule must fulfil is that the restriction must be "objectively necessary" to achieve the objective it pursues. In certain cases, the CJEU held that rules seeking to protect media pluralism are not objectively necessary.[110] In other cases, it allowed the rules to override the EU provision(s) at stake.[111]

In view of the above, whether prominence regulation will continue to apply post-DMA depends on how those rules are designed by the Member State concerned to meet the "objective necessity" criterion and the CJEU's assessment of the matter on a case-by-case basis.

[106]Case C-26/62 van Gend & Loos v Netherlands Inland Revenue Administration EU:C:1963:1.
[107]AVMS Directive, Recital (25).
[108]See, for instance, Case 352/85 Bond van Adverteerders v Netherlands EU:C:1988:196, paras 31 et seq.; Case C-211/91 Commission v Belgium EU:C:1992:526, paras 7 et seq.
[109]See, for instance, Case C-288/89 Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media EU:C:1991:323, paras 23–29; Case C-353/89 Commission of the European Communities v Kingdom of the Netherlands, EU:C:1991:32, paras 29–31, and Case C-148/91 Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media EU:C:1993:45, paras 9–13.
[110]See, for instance, Case C-288/89 Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media EU:C:1991:323; Case C-353/89 Commission of the European Communities v. Kingdom of the Netherlands EU:C:1991:32.
[111]See, for instance, Case C-148/91 Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media EU:C:1993:45.

VI. The interplay between EU and national competition law

Most of the obligations established in the DMA reflect past or ongoing competition investigations. Even though the DMA is purported as an instrument that pursues normative objectives other than those that competition law seeks to achieve, how the latter will interact with the former is far from a straightforward exercise.

A. The relationship between the DMA and (EU and national) competition law: Setting the scene

Most of the obligations established in the DMA reflect past or ongoing competition investigations. Therefore, the DMA is not meant to fill a gap that competition law could not address. However, the DMA has been adopted to address certain weaknesses that are inherent in the design and enforcement of competition rules. This is explicitly stated in Recital (5) of the DMA, which reads as follows:

> **Although Articles 101 and 102** of the Treaty on the Functioning of the European Union (TFEU) **apply to the conduct of gatekeepers**, the scope of those provisions is limited to certain instances of market power, for example **dominance** on specific markets and of **anti-competitive behaviour**, and enforcement occurs **ex post** and requires an extensive investigation of often **very complex facts on a case by case basis**. Moreover, existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms.

Recital (5) essentially explains that the evidentiary standards that need to met for an infringement of competition law to be found are high, and that intervention comes only after a gatekeeper has engaged in harmful conduct. The DMA addresses those issues by setting concrete thresholds for a platform to fall under its scope (which are arguably lower than those set by competition law) and by establishing *ex ante* obligations.

The discussion about the interplay between (EU and national) competition law will focus on antitrust control, for it is clear that no tension between the DMA and the EU merger control rules is expected to arise. The DMA does not establish a sector-specific merger regime. It only introduces a reporting requirement whereby gatekeepers are required to inform the Commission of any intended "concentration"

within the meaning of the EU Merger Regulation (EUMR)[112] if the acquired entity provides core platform services, or any other services in the digital sector, or enables the collection of data.[113] In other words, the DMA does not give the Commission the power to investigate and block mergers;[114] those mergers the Commission is notified about under the DMA can only be examined under the EUMR or national merger rules (if the conditions set by those rules are met).

The situation is far less clear in the case of antitrust control. The DMA explicitly mentions that, since it aims "to complement the enforcement of competition law, it should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualized assessment of market positions and behaviour".[115] In practice, this means that the same platform could be subject to proceedings under different rules for the *same* conduct. This raises a specific set of issues, which relate to whether the *ne bis in idem* principle applies.[116]

B. The ne bis in idem principle in EU (competition) law: Recent developments

The *ne bis in idem* principle is a fundamental principle of EU law (and not only), which is enshrined in Article 50 of the Charter of Fundamental Rights of the EU ("CFREU"). This provision establishes that "[n]o one shall be liable to be tried or punished again in ***criminal proceedings*** for an offence for which he or she has already been ***finally acquitted or con-***

[112]Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/01, Article 3.

[113]DMA, Article 14(1). This obligation applies irrespective of whether the concentration is notifiable to a Union competition authority under the EU Merger Regulation or to a competent national competition authority under national merger rules.

[114]The provision allows the Commission to identify new core platform services that should fall under the scope of the DMA and to consider whether new obligations should be established in the DMA. Moreover, pursuant to Article 14(4) and (5), the information concerning a concentration will be received by national competition authorities, which may which may use it for the purposes of national merger control rules or the EU's merger control rules (Article 14(5) of the DMA makes explicit reference to Article 22 of the EUMR).

[115]DMA, Recital (10).

[116]For a comprehensive overview of the relevant case law and how it will affect the interplay between the DMA and competition law, see Dimitrios Katsifis, 'Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I' *The Platform Law* (28 March 2022) <https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/>; and Dimitrios Katsifis, 'Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II' *The Platform Law* (29 March 2022) <https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/>.

victed within the Union in accordance with the law". Though Article 50 CFREU makes reference to "criminal proceedings", this term has been defined by reference to criteria[117] that extend the principle to areas other than criminal law, including competition law.[118]

The *ne bis in idem* principle applies provided that two conditions are met. First, there must be a prior final decision on the facts (the "bis" condition).[119] Secondly, the prior final decision and subsequent proceedings must concern the same person and the same offence[120] (the "idem" condition).[121] The case law has been rather inconsistent as to whether the "idem" condition refers to the same person, the same facts *and* the same protected legal interest (the "idem crimen" approach that has been followed in rulings concerning competition law proceedings),[122] or *only* the same person and the same facts (the "idem factum" approach that has been adopted in rulings concerning other areas of law).[123] To state the obvious, the "idem crimen" approach narrows the scope of the principle.

An assessment of which approach is best goes beyond the scope of this paper. For our purposes, suffice it to say that two recent rulings, namely *Nordzucker*[124] and *bpost*,[125] seem to introduce a change in direction to address the above inconsistency and to align the approach to competition law proceedings with that underpinning the application of the *ne bis in idem* principle in other areas of law. Due to their relevance to the issue I examine here (i.e., whether proceedings may be brought under both the DMA competition rules for the *same* practice), I briefly examine the conditions that those judgments set for the principle to apply.

[117] In the Case of Engel and Others v the Netherlands (judgment of 8 June 1976, application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), the European Court of Human Rights set three criteria in order to clarify the concept of "charged with a criminal offence" in Article 6 of the European Convention on Human Rights (ECHR) and the concept of "penalty" in Article 7 of the ECHR. Those are the following: (a) the legal classification of the offence under national law, (b) the nature of the offence, and (c) the nature and intensity or degree of severity of the penalty imposed on the offender.

[118] See, for instance, Case C–501/11 Schindler Holding Ltd and Others v European Commission, EU:C:2013:522; ECtHR, A. Menarini Diagnostics S.r.l. v Italy, judgment of 27 September 2011, application no. 43509/08.

[119] Case C-148/14 Bundesrepublik Deutschland v Nordzucker AG EU:C:2022:203, para 34, referring to C–398/12 M EU:C:2014:1057, paras 28 and 30.

[120] ibid., para 36.

[121] ibid.

[122] See, for instance, Case 14–68 Walt Wilhelm and others v Bundeskartellamt EU:C:1969:4; Joined Cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00, and C-219/00 P Aalborg Portland A/S et al. v Commission of the European Communities EU:C:2004:6; Case C–17/10 Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže EU:C:2012:72; Case C-857/19 Slovak Telekom a.s. v Protimonopolný úrad Slovenskej republiky, EU:C:2021:139.

[123] See, for instance, Case C-524/15 Criminal proceedings against Luca Menci, EU:C:2018:197.

[124] Case C-148/14 Bundesrepublik Deutschland v Nordzucker AG, EU:C:2022:203.

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

In *bpost*, the Court ruled that, for *ne bis in idem* to apply, it needs to be established whether the material facts are identical[126] *and* that "the legal classification under national law of the facts and the legal interest protected are not relevant […] in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another".[127] The Court explicitly held that this applies to all fields of EU law, including EU competition law inasmuch as the scope of the protection conferred by Article 50 CFREU cannot vary from one field of EU law to another.[128] However, according to *bpost*, establishing that the offender and facts are the same is not sufficient for the *ne bis in idem* principle to apply. The Court held that it further needs to be assessed whether a limitation of the fundamental right guaranteed by Article 50 of the CFREU may be justified on the basis of Article 52(1). For duplicate proceedings to be justified, the following conditions must be fulfilled:

- The possibility of duplicate proceedings must be provided for by law;[129]
- The possibility of duplicate proceedings must respect the essence of the rights and freedoms affected: The legislation should not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but it should only provide for the possibility of a duplication of proceedings and penalties under different sets of rules[130] that pursue distinct legitimate objectives.[131]
- The duplication of proceedings must be proportionate, that is to say, it should not exceed what is "appropriate and necessary in order to attain the objectives" pursued by the applicable rules.[132] In particular, the proportionality of duplicating proceedings must be assessed against (a) whether there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities; (b) whether the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe; and (c)

[126] ibid., para 33.
[127] ibid., para 34.
[128] ibid., para 35.
[129] ibid., para 41.
[130] ibid., paras 41 and 43.
[131] ibid., para 44.
[132] ibid., para 48.

whether any penalty that may have been imposed in the first proceedings was taken into account when assessing the second penalty.[133]

In *Nordzucker*, which concerns duplicate proceedings brought by the Austrian and German competition authorities under Article 101 TFEU and which follows the approach set by *bpost*, a key matter related to establishing whether the facts are the same. Based on the relevant case law, the Court held that the relevant criterion for assessing the existence of the same offence is the identity of the material facts, understood as "the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned".[134] As regards the question whether the facts are the same, the Court held that "the question whether undertakings have adopted conduct having as its object or effect the prevention, restriction or distortion of competition cannot be assessed in the abstract, but must be examined with reference to the territory and the product market in which the conduct in question had such an object or effect and to the period during which the conduct in question had such an object or effect".[135]

Having briefly set out the conditions that recent case law established for the *ne bis in idem* principle to apply, I now turn to assessing whether those conditions could be met in cases where proceedings were brought under the DMA and under Articles 101 and 102 TFEU (or national equivalents).

C. Does ne bis in idem apply if proceedings are brought under the DMA and (EU and national) competition law?

We cannot exclude a duplication of proceedings under the DMA and (EU and national) competition rules with a view to investigating the same practice in which a specific gatekeeper engages. What is unlikely to happen is that those two sets of proceedings will both be brought by the Commission. This is because, contrary to Articles 101 and 102 TFEU, the DMA establishes *per se* prohibitions and does not require the Commission to define the relevant markets, prove that the platform under scrutiny is dominant, and to establish anti-competitive effects.[136]

[133]ibid., para 51.
[134]Case C-148/14 Bundesrepublik Deutschland v Nordzucker AG EU:C:2022:203, para 38.
[135]ibid., para 41.
[136]Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (2021) TILEC Discussion Paper 4/2021, Section 6, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730>.

What is more, similar to competition law, under the DMA, the Commission may impose fines and remedies.[137] In other words, the DMA offers the Commission a shortcut and there is no apparent reason as to why the Commission would prefer the long (and painful) path of competition law enforcement to address the same conduct. However, national competition authorities and national courts may decide to apply competition law to the same conduct that may have already been subject to DMA proceedings.[138] Alternatively, the Commission may decide to initiate proceedings under the DMA after a national competition authority decided (or a national court ruled) on the same matter. Does the *ne bis in idem* principle apply in such cases, thereby requiring that the second set of proceedings be discontinued as being incompatible with Article 50 CFREU?

We assume that the "bis" condition is satisfied (i.e. that there is a prior final decision). As regards the "idem" condition, we assume that the offender is the same, which is fairly easy to assess. However, establishing whether the facts are the same is arguably more complex. The Court has consistently held that the facts must be "identical".[139] Based on *Nordzucker*, this needs to be examined by reference to the territory, the relevant product market, and the period during which the conduct in question restricted competition.[140] Issues regarding the time period are straightforward. With respect to the territory, the national proceedings would presumably concern the domestic market. In other words, the "idem" condition would not be met for the territories of other Member States; as a result, the Commission would not be precluded from enforcing the DMA in (at least) those other territories (and perhaps the territory of the Member State where the first proceedings were brought, if the conditions discussed below are not met). As regards the product market, even if the DMA does not require a definition of the relevant product market, thereby raising questions as to how fulfilment of this condition should be assessed, the core platform services it covers (e.g., online search, social networks) have been found to constitute distinct markets in antitrust cases.[141] As a

[137]DMA, Articles 18 and 29.
[138]Case C-148/14 Bundesrepublik Deutschland v Nordzucker AG EU:C:2022:203, para 38.
[139]ibid.
[140]ibid., para 41.
[141]See, for instance, Bundeskartellamt B6-22/16 Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing (Bundeskartellamt Facebook decision), 3 <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4>; European Commission decision of 27 June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union

result, it is likely that the definition of the product market under national proceedings reflects the core platform service falling under the scope of the DMA. However, this may not apply to all possible scenarios (e.g., a product market in an antitrust decision may have been defined more narrowly than the market for social networks in order to distinguish between platforms that are used for professional purposes from other platforms;[142] the term "online intermediation services" covered by the DMA is a broad term that covers a wide array of platforms, ranging from app stores to booking websites, which may not belong to the same market). If a strict approach were followed, it could be argued that, to the extent that the product market does not correspond to the definition of the core platform service, the *ne bis in idem* is not triggered and duplicate proceedings are possible.

If the "idem" condition is satisfied, we would still need to assess whether the duplicate proceedings are compliant with Article 52(1) CFREU. An application of the criteria set in *bpost* follows:

- The possibility of duplicate proceedings must be provided for by law:[143] Article 1(6) of the DMA explicitly provides that it applies without prejudice to EU and national competition law;
- The possibility of duplicate proceedings must respect the essence of the rights and freedoms affected:[144] The key matter here is whether the DMA pursues the same objective as competition law. The DMA itself lays down that its aim is "to complement the enforcement of competition law" by protecting fairness and contestability in the digital sector.[145] Clearly, similar to what applies in the cases where the Court assesses whether an instrument rests on the correct legal basis, the Court is not bound by the text of the DMA, but it conducts a more thorough analysis of, *inter alia*, the ideological premises that underlie the instrument at stake.[146] Since most of the provisions of the DMA reflect ongoing or completed competition investigations,[147]

and Article 54 of the Agreement on the European Economic Area C(2017) 4444 final Case AT.39740 Google Shopping, para 154.

[142]See, for instance, Bundeskartellamt Facebook decision, 5.

[143]Case C-117/20 bpost SA v Autorité belge de la concurrence EU:C:2022:202, para 41.

[144]Ibid., 41 and 43.

[145]DMA, Recital (10).

[146]This is an approach that the Court has followed consistently throughout its case law. See, for instance, Case C-295/90 Parliament v Council EU:C:1992:294, para 13; Case C-300/89 Commission v Council EU:C:1991:244, para 10.

[147]Giuseppe Colangelo and Marco Cappai, 'A Unified Test for the European ne bis in Idem Principle: The Case Study of Digital Markets Regulation' (2021) SSRN Working Paper, 25 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951088>.

it could be argued that the ideological premise on which this instrument rests is the protection of undistorted competition. Moreover, Recital (7) of the DMA provides that its purpose is to "contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector". In the same vein, in *Nordzucker*, the Court held that Article 102 TFEU is "a provision that pertains to a matter of public policy which prohibits abuse of a dominant position and pursues the objective – which is indispensable for the functioning of the internal market – of ensuring that competition is not distorted in that market".[148] One could, therefore, argue that the ultimate objective of both the DMA and competition law is the same (even if they pursue it through different means). All in all, it is fairly unclear whether the DMA and competition law pursue distinct objectives.

- The proportionality of duplicating proceedings:[149] It could be argued that (at least in some cases) there are sufficiently clear and precise rules. The *per se* prohibitions established in the DMA are defined in concrete terms and most practices that are prohibited reflect the outcome of ongoing or completed investigations. In such cases, it is possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties. The key matter is therefore the degree of coordination between national competition authorities (or national courts) and the Commission. It is worth mentioning that, despite the fact that the original DMA proposal did not establish a system of cooperation between the former and the latter, the final text of the DMA (published in the aftermath of *bpost* and *Nordzucker*) includes such provisions.[150] However, whether the proceedings under consideration have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe, and whether any penalty that may have been imposed in the first proceedings was taken into account when assessing the second penalty are matters that can only be examined on an *ad hoc* (and *ex post*) basis.

Overall, recent developments in the case law may have attempted to bring the approach followed in cases involving competition law proceedings in line with the approach underpinning proceedings in other areas of law, but the situation remains rather unclear as to whether the DMA will

[148]Case C-148/14 Bundesrepublik Deutschland v Nordzucker AG EU:C:2022:203, para 46.
[149]Case C-117/20 bpost SA v Autorité belge de la concurrence EU:C:2022:202, para 51.
[150]DMA, Articles 38–39.

indeed apply without prejudice to competition law. The framework set by *Nordzucker* and *bpost* raises doubts as to whether duplicate proceedings under the two instruments are (possible as being) compatible with Articles 50 and 52(1) CFREU, for it is unclear whether the conditions those judgments establish are fulfilled (e.g., whether the DMA and competition pursue distinct legitimate objectives).

VII. Conclusions

The DMA is expected to change the rule book. It will establish a new regime for gatekeeper platforms in order to address imbalances in bargaining power that have given rise to practices which harm businesses and end users alike. Without disputing that the DMA may contribute to fair dealing in platform-to-business and platform-to-consumer relations, the reality is that it is not the only instrument that regulates platforms. A series of other instruments that pursue similar (e.g., fairness) or completely different (e.g., media pluralism) objectives have recently been adopted or revised. For the overall framework to reach its full potential, the DMA should apply in a way that does not undermine any existing rights or claims enshrined in those other instruments.

The DMA purports that it applies without prejudice to existing rules. However, the preceding analysis illustrates that there are many occasions on which the DMA may contradict those rules. The relationship between the DMA and the GDPR exemplifies that the DMA may qualify as *lex specialis*, overriding other rules. The obligations that may be imposed on platforms in the process of transposing the AVMS Directive demonstrate that the DMA may prevail over national rules that pursue legitimate interests other than fairness and contestability. Recent developments in the field of competition law showcase that the implementation of the DMA may trigger the *ne bis in idem* principle in subsequent competition proceedings. The example of the P2B Regulation depicts that the DMA may render certain rules devoid of purpose. In such cases, despite the "without prejudice" clause, the DMA would not necessarily complement existing rules. Depending on the case, the conflict under consideration could undermine the overall regulatory framework for protecting businesses and consumers against problematic platform conduct.

All in all, contrary to the intention of the legislator, the DMA may not necessarily be compatible with other instruments. At the outset, this may not necessarily harm businesses and end users protected by other regulatory tools. For example, in cases where the DMA qualifies as *lex*

specialis, a higher level of protection for those protected may be achieved. However, as is clear from the example of the UCPD, that a user does not need to prove that a practice already prohibited by the DMA is harmful does not suggest that (private) enforcement will be effective.

A word of caution is in order. This paper has focused on instruments that form part of the existing framework. How the DMA is placed in the overall structure is an exercise that should go beyond resolving the tension between those instruments and the DMA, for an avalanche of legislative proposals for platforms is currently taking place. Absent reflection on (and resolution of) this matter will undermine legal certainty and the objectives of the emerging regulatory regime for harmful platform practices.

Disclosure statement

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