Taming tech giants with a *per se* rules approach? The *Digital Markets Act* from the “rules vs. standard” perspective

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I. The strategy of the DMA: Relying exclusively on a set of ex ante per se obligations

1. Due to the problems of the traditional ex post approach of Article 102 TFEU in EU competition law to deal effectively with the manifold problems of digital markets, a widespread opinion has emerged about the necessity of an ex ante regulatory approach. The DMA proposal of the EU Commission in its, however, not only an ex ante regulatory approach, but it is rather a very specific type of ex ante regulation, because it relies exclusively on the strategy to solve the problems with a set of obligations (as per se rules), to which all gatekeepers have to comply as providers of core platform services (CPS). The key idea of this strategy is that through the direct decision of the legislator in the DMA on the list of (overall) 18 obligations (and on the list of 8 core platform services) and the per se (and self-executing) character of these obligations, fast enforcement of these obligations for all gatekeepers might be possible, since the Commission does not need to make investigations and assessments but only has to monitor the compliance of the gatekeepers. With this regulatory design, the Commission might be capable of avoiding all the well-known problems of the application of traditional competition law (like market definition, proving dominance and the abusive character of behaviour with its need for clear theories of harm, and the lengthy proceedings of judicial reviews).

2. This article intends to analyse this approach from the “rules vs. standard” approach in law and economics, which offers a broad analytical framework about the benefits and costs of using rules or standards for regulating behaviour. From this perspective, the DMA is a radical and bold approach that breaks with...
the decades-long development in competition law from per se rules towards a standard-based rule of reason approach (with its focus on case-specific economic analyses of effects on consumer welfare), and proposes a radical switch to the opposite extreme of a pure regime of per se rules (at least for gatekeepers). It is not surprising that already early in the discussion about the DMA proposals were made to soften this strict per se rule approach through introducing more flexibility, differentiation, and defences with regard to these obligations for gatekeepers.2 There are many good arguments for more flexibility, which might lead to a better targeted approach with less error costs and more effective rules. However, due to the need for additional investigations, assessments and decisions by the Commission, more flexibility can also lead back to some or many of the problems and costs of traditional competition law.

3. This paper will analyse the rationale and problems of the DMA as a per se rule regime from the “rules vs. standard” approach and provide a framework for the discussion about the advantages and problems of a more flexible and differentiated approach. After a brief overview of the “rules vs. standard” approach, section II explains the basic rationale of the DMA from this law and economics approach. Section III analyses the main problems of the per se rule regime of the DMA and discusses the advantages and problems of a more flexible approach. The final section IV draws policy conclusions for the further discussion of the DMA.

II. The rationale of the DMA from a “rules vs. standard” perspective

1. The “rules vs. standards” approach: A brief overview

4. The basic idea of the “rules vs. standard” approach in law and economics is that a legislator can either decide on rules which allow or prohibit a certain behaviour, and only have to be directly enforced, or on the establishment of a standard, which offers normative objectives that can be used by enforcement agencies and courts for assessing whether a behaviour is legal or not. Both approaches have benefits and costs from an economic perspective, and the well-known discussion in competition law about per se rules vs. the rule of reason reflects these two approaches.3 Per se rules have the advantage of fast clarification (and enforcement) of the law, and lower costs of the application of the law, whereas a standard-based rule of reason approach might allow distinguishing better between pro- and anticompetitive behaviour through deeper case-specific assessments into the effects of a behaviour, e.g., with respect to consumer welfare. This can reduce the costs of decision errors, i.e., that the law erroneously prohibits a beneficial behaviour (type I error, false positive) or does not prohibit a harmful behaviour (type II error, false negative). Such an approach, however, can require deep and lengthy investigations, the need for clear theories of harm (with respect to the standard) and case-specific evidence, and probably complex and long judicial reviews by courts. It might also take a long time before some legal clarity can be achieved about what behaviour is legal or illegal under certain conditions. However, a standard-based approach also allows for an evolution of the application of the law in response to new problems and conditions (in contrast to the rigidity of a per se rule approach).

5. Important is that strict per se rules and a full-blown rule of reason approach are only two extreme solutions on a continuum of options with varying degrees of rules or standard-based solutions. For example, quick look rules, presumptions, and legal tests with a limited number of criteria are broadly used legal techniques that allow for a larger differentiation of rules, and therefore a better distinction between harmful and beneficial behaviour, without requiring a full analysis of all effects according to a standard. Based upon Kaplow’s concept of the optimal complexity of law the “rules vs. standard” approach does not require to choose between a pure rule-based approach and a pure standard-based approach, but can ask for optimal intermediate solutions, which try to combine the advantages of rules with the advantages of additional investigations and assessments (“optimally differentiated rules”).4 In the terms of the well-known error cost rationale, solutions have to be sought that minimize the sum of costs of type I errors (falsely prohibiting a not harmful behaviour), the costs of type II errors (falsely allowing a harmful behaviour), and the manifold regulation costs. Therefore the discussion about introducing more flexibility into a strict system of per se rules (like the DMA) can be understood as the question of whether adding an additional scope for decisions of enforcement agencies based upon investigations would reduce the costs of type I errors more than leading to new type II error costs and the additional regulation costs. This would also include the costs of delaying enforcement and legal uncertainty. This approach can therefore be used for finding an optimal balance between the benefits and costs of a rules- and a standard-based application of the law.

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2 See, e.g., the proposals in Caffarra & Scott-Morton (2021), Cabral et al. (2021), de Streef et al. (2021a, 2021b), Monti (2021), Schweitzer (2021), and Zimmer & Göhsl (2021).
3 See Kaplow (1992), Easterbrook (1992), and as an overview Christiansen & Kerber (2006) with many references.
4 See Kaplow (1995) and for the concept of optimally differentiated rules in competition law Christiansen & Kerber (2006).
2. DMA as a per se rule regime

6. From the “rules vs. standard” approach the basic hypothesis of the DMA can be explained as follows: Imposing a uniform set of per se obligations on all gatekeepers as providers of all CPS leads to the advantage of fast compliance of the gatekeepers to all these obligations and the avoidance of the huge costs of widespread and long underenforcement (reduction of type II error costs). In combination with the saving of regulation costs these advantages can be (much) larger than the additional type I error costs that can arise, because the prohibited behaviours might not always have negative effects on the objectives. From the economic perspective of the error-cost approach, it is not necessary for implementing a per se rule that the prohibited behaviour always have negative effects. Therefore a set of per se rules can indeed lead to a more efficient enforcement regime than the traditional ex post control regime in competition law with its reliance on the application of a standard, if, on average (I), it leads to better overall results. This is in line with error-cost reasonings that have emerged in the current competition policy discussion: It was emphasized that (i) on digital markets the costs of type II errors might be much larger than in other markets; (ii) a large underenforcement problem can be diagnosed for the past; and (iii) type II error costs should be reduced by lowering or reversing the burden of proof between enforcement agencies and firms.5

7. It is true that the proposal of the DMA does not stick entirely to such a pure per se rule strategy:

– Article 6 obligations (in contrast to Art. 5 obligations) are susceptible to further specification (with the option of a regulatory dialogue). This implies some scope for differentiation and flexibility but also the need for investigations into the effectiveness of a specific compliance behaviour of gatekeepers. This is directly linked to the monitoring task of the Commission and making enforcement decisions in cases of non-effective compliance behaviours.

– The DMA tries to implement a rule-based approach also for the designation of the gatekeepers by making it directly dependent on three criteria with quantitative (and easily determined) thresholds, which are leading to a strong presumption about the gatekeeper status. However, it also entails provisions that offer additional options for both the firms and the Commission for either rebutting this presumption or designating additional firms as gatekeepers through a market investigation.6 This can lead to some flexibility and help to reduce both types of error costs.

– Both the list of CPS and the list of the obligations can be updated after a market investigation,7 which allows for an evolution and adaptation of the sets of per se obligations and CPS over time. This (dynamic) flexibility through the update mechanism plays a key role for the long-term effectiveness of the DMA in a fast-evolving digital economy, and can help to overcome the problems through the inflexibility of a per se rule regime enacted by legislators.

However, all these aspects do not change the basic strategy of the DMA that it relies exclusively on a set of self-executing per se obligations that have to be fulfilled by all gatekeepers as providers of all CPS. Only in the case of repeated non-compliance of gatekeepers does the DMA offer options for imposing additional specific behavioural and structural remedies, but this is seen as an instrument of last resort.8

8. The DMA differs from the traditional competition law not only through its ex ante and per se rule approach but also with respect to its objectives. The DMA states very clearly that it should not be seen as competition law in the sense of Articles 101 and 102 TFEU because it protects different legal interests than these traditional competition rules. Its main objectives are “contestability” and “fairness.” There is a lot of controversial discussion about the interpretation of these objectives.9 One interpretation tends to equate contestability with competition and tries to interpret fairness in a way that is compatible with a traditional competition analysis. The wording of the DMA also supports an interpretation that the objectives of the DMA go beyond a pure competition objective in the traditional sense and that therefore, e.g., fairness might entail additional normative criteria that cannot be taken into account in traditional competition law. This implies for our analysis that the DMA might also be capable of solving additional problems (as fairness problems between platforms and their business users or also data protection and consumer policy concerns, e.g., by protecting the choice of business and end users). However, we will see (in section III.4) that the lack of clarity in the DMA proposal about these objectives can lead to additional problems for the application of the DMA (as far as additional investigations and assessments are necessary).10

5 See, e.g., Crémer et al. (2019), 41–51. There is a broad consensus about the current problems of traditional ex post control in competition law (too high burdens of proof, too lengthy proceedings, lack of effective remedies, and danger of irreversible harm).
6 Art. 3 Draft DMA.
7 Art. 10 Draft DMA.
8 Art. 16 Draft DMA.
9 Recital 10 Draft DMA.
10 See also partly own proposals for their interpretation, e.g., de Streele et al. (2021b, 42–49), Schweitzer (2021), Podsakon, Bongartz & Langensträtter (2021), Cabral et al. (2021, 30).
11 It is important for the methodology of the error-cost approach that the error costs are always defined with respect to achieving the objectives of the law, i.e., here contestability and fairness. Therefore the “costs” of erroneous decision-making need not be measured in terms of economic welfare but in terms of not achieving the objectives.
III. Problems of the DMA as an \textit{ex ante per se} rules-based approach

1. Problem 1: Error costs through \textit{per se} application of all obligations to all gatekeepers and core platform services

9. One of the main problems is that the DMA strategy that all gatekeepers have to comply with the same 18 obligations for all CPS can lead to large error costs. Although it is clear that from the “error-cost” rationale it is not necessary to show that a behaviour has always negative effects for justifying a \textit{per se} prohibition, the selection of \textit{per se} obligations should consider the probability and size of error costs they might cause due to its application to all (!) gatekeepers and CPS.12 The obligations are nearly all derived from past and current competition cases or investigations regarding a specific firm and a specific platform service. Nearly all of them can be seen as representing a potential case group with specific theories of harm that can raise serious concerns. However, due to the heterogeneity of CPS and of gatekeepers (e.g., also through different business models), it can be expected that the effects of the same obligations will differ considerably, leading to potentially large error costs.13 Therefore it is also not clear why a behaviour, for which a broad consensus exists that it has negative effects on competition in a particular competition case, is also a good candidate for a \textit{per se} obligation for all gatekeepers and CPS. This would at least require a deeper analysis.

10. The proposals for more flexibility and differentiation can help to reduce these error costs. One option is that the Commission can decide that certain obligations are not applicable to a certain gatekeeper and/or a certain CPS.14 Another option is introducing defence possibilities that might allow gatekeepers to show that an obligation does not have negative effects on contestability and fairness.15 These options would provide the chance of reducing type I errors, but it would require additional investigations and decisions by the Commission, which might delay the implementation of the obligations and can also lead to new type II errors if the Commission makes wrong decisions of not applying an obligation or accepting a defence. Another important option for more flexibility would be additional powers for the Commission to also impose additional obligations for individual gatekeepers for dealing with gatekeeper-specific problems with regard to contestability and fairness that are not solved by the existing set of \textit{per se} obligations.16 This could reduce more type II errors. However, all these solutions for more flexibility would break to some extent with the \textit{per se} rule approach of the DMA proposal and lead to the additional problems and costs of more flexibility.

11. Another possible solution for reducing the potentially large error costs is a strategy to lower the number of gatekeepers, or reduce the list of CPS in the DMA, e.g., by increasing the quantitative thresholds or change the general criteria for designating gatekeepers.17 Since it can be expected that the error costs are increasing with a higher number and larger heterogeneity of gatekeepers and CPS, narrowing the DMA down to addressing only the most harmful gatekeepers and the most critical CPS can reduce error costs, not only through less type I error costs but also through allowing the design of better tailored obligations for the smaller number of remaining gatekeepers and CPS.

12. This strategy of applying all obligations to all gatekeepers and all CPS is also a serious problem for the updating mechanism for the set of obligations and CPS. If the Commission identifies a new problematic behaviour, e.g., through complaints about certain gatekeepers, then considering it as a candidate for a new obligation would require an analysis about the effects of this additional obligation on all gatekeepers and with respect to all CPS. If this new obligation only helps regarding a small group of gatekeepers, and might lead to problems in most of the others, then the net benefit with respect to contestability and fairness might be easily negative and a thorough market investigation would come to a rejection of such a new obligation. Both more flexibility in the above-discussed sense and a lower number of gatekeepers and CPS can make the evolution of the set of obligations through the update mechanism much easier and the DMA more effective in the long run.

2. Problem 2: Incompletely specified \textit{per se} rules

13. For the \textit{per se} rule strategy of the DMA it is a particularly difficult problem that most of the obligations are not clearly specified rules, i.e., they do not define precisely what behaviour is allowed or prohibited. This is already acknowledged in the DMA proposal itself, in which the Article 6 obligations are explicitly seen as susceptible of being further specified. However, the discussion about the DMA has shown that also several Article 5 obligations

\begin{footnotesize}
\begin{enumerate}
\item An error-cost analysis of the DMA would imply assessing for each obligation with respect to each CPS how large the error costs through the application of such a \textit{per se} rule might be.
\item See Caffarra & Scott-Morton (2021).
\item See Caffarra & Scott-Morton (2021), de Steele et al. (2021b, 34), Zimmer & Göhsl (2021, 53–56).
\item See Cabral et al. (2021, 11), Schweitzer (2021), Zimmer & Göhsl (2021, 53–56), de Streel (2021b, 96).
\item See Schweitzer (2021), Munti (2021, 11).
\item See for the discussion on designating gatekeepers Geradin (2021) and de Streel (2021b, 9–19).
\end{enumerate}
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might need more specification. The economic advantage of using per se rules is that both the firms and the enforcement authority can easily determine whether a behaviour is in compliance with the rule or not without a deeper investigation. If, however, the obligations are incompletely specified, a grey area emerges, which the gatekeepers can use for choosing a compliance behaviour in their own interest. Therefore the Commission has to monitor the compliance behaviour of each obligation closely, which might include the need to investigate the effectiveness of the specific compliance behaviour of the gatekeepers. The rules in Article 7 DMA with the possibility of a regulatory dialogue with gatekeepers (regarding Article 6 obligations) and also the powers of the Commission to make decisions about the specification of the obligation are institutional provisions for helping to deal with this problem.

14. However, this scope for a more concrete specification can also allow for more differentiation through a better tailoring of the obligation to the specific situation of a gatekeeper and a CPS, and therefore offers the chance to increase its effectiveness and reduce both types of error costs. Important is the question to what extent it is (also legally) possible to specify these obligations to each gatekeeper and each CPS in a different way. Sticking to the per se rule approach would mean that the Commission only specifies more the per se rule itself, which it then would apply to all gatekeepers in the same way. If, however, “further specification” means to specify the obligation to the concrete situation of each gatekeeper (as also the bilateral regulatory dialogue would suggest), then such a per se rule regime can get transformed into a system of gatekeeper- and CPS-specific obligations, with a potentially wide range of different specifications of the same obligation. Such a development would certainly be welcomed by all proponents of more differentiation and flexibility. However, it can also lead the Commission on the slippery slope to have to make (perhaps deep) investigations into the effects of these gatekeeper-specific and CPS-specific variants of the same obligation (with regard to contestability and fairness), and the consequence of getting into controversial and potentially lengthy discussions about the appropriate specification with each gatekeeper. In addition, the broader the discretionary scope of the Commission for this further specification of these obligations is, the larger will appear the need for an effective judicial review of these decisions by courts.

15. Incompletely specified per se rules are therefore an ambivalent instrument. The incompleteness is a problem for the per se rule approach because it can lead to the loss of much of the advantages of per se rules, but it also offers the chance for a differentiation of these obligations with respect to the problems of a specific gatekeeper and/or CPS, which can lead to a reduction of error costs and a larger effectiveness of the obligations. This reflects again the trade-off that is in the centre of the “rules vs. standard” approach to how to balance the benefits and costs of further differentiation. Therefore combining a per se rule regime with some flexibility for a further specification of these rules with respect to individual cases can be seen as an interesting intermediate solution between the extremes of strict per se rules and a pure standard-based approach, and therefore also be assessed positively if the balancing is done in a careful and sophisticated way.

3. Problem 3: Aggregate effects of the combination of obligations

16. So far neglected in the discussion is the question about the aggregate effects of the combination of all these per se obligations that gatekeepers have to fulfil on contestability and fairness. From an economic perspective, it is not sufficient to analyse only the effects of each obligation and how they can be made effective through proper specification independently from each other. Rather it is very clear that the effectiveness of the obligations might depend on other obligations, and that for the optimal specification of an obligation also its interplay with other obligations of the same gatekeeper might be very relevant. It is therefore important to analyse also the aggregate effects through the simultaneous application of several or many of the obligations to the same gatekeeper (and also with respect to several CPS of one gatekeeper).

This would also allow taking much better into account the cross-market effects of many behaviours, e.g., also through the superior availability of data by large tech firms with their conglomerate structure and deeply linked digital ecosystems. Such a more holistic view on the effects of obligations can also offer an additional reasoning for the strategy of the DMA to apply all obligations to one gatekeeper because the combination of obligations can lead to additional positive (synergy) effects on contestability and fairness. However, the basic architecture of the DMA with its (also procedural) emphasis on individual obligations leads to the danger that the Commission is getting too much focused (and perhaps distracted) on the specification and enforcement of many individual obligations, and does not analyse and take into account enough the effectiveness of the combination of obligations. Therefore a more coordinated approach regarding the specification of different obligations for the same gatekeeper might be necessary.

17. This question for the aggregate effects of the DMA is linked to the key question of whether the DMA as a per se rule regime for gatekeepers as providers of CPS is at all capable of dealing effectively with the economic power of the well-known small group of very large digital firms (i.e., primarily GAFAs) with their conglomerate structures, far-reaching and complex ecosystems, and control over vast amounts of data. This question cannot be discussed here, but a comprehensive analysis of the aggregate effects of the entire set of obligations on these firms would be necessary for answering it. 19
4. Problem 4: Investigations, analysis of effects, and the role of economics

18. The discussions in the last sections have shown that the Commission cannot expect to avoid with this per se rule strategy the need for making investigations, analyses of effects, and assessments regarding the behaviour of the gatekeepers. They are necessary for (i) monitoring the compliance behaviour of gatekeepers and further specification of the obligations; (ii) market investigations (e.g., for designating gatekeepers, and for updating the lists of obligations and CPS); (iii) further enforcement decisions in cases of non-compliance; and (iv), particularly in the case that the further legislative process would include additional flexibility into the DMA (e.g., regarding the applicability of obligations, defences, or additional specific obligations). A decisive (and so far also not sufficiently discussed) question for the success of the DMA is with what kind of criteria and methods such investigations should be carried out, to what extent are analyses of expected effects necessary (and effects on what?), what kind of evidence is needed, and what is the role of economics in such investigations.

19. The problem is that the well-established economic approach of traditional competition law analysis (in particular, analysing the effects on consumer welfare) cannot be applied in the same way for such investigations in the DMA:

- The entire project of the DMA was started because the established (largely economic) approach of competition analysis in Article 102 TFEU did not lead to effective enforcement in digital markets.
- The DMA is distancing itself very clearly from the basic concepts of traditional competition law analysis (by explicitly avoiding the concepts of market definition, market power, market dominance, and even “competition” can be found very rarely in the DMA).
- The objectives of the DMA (contestability, fairness) differ from the competition objective of Articles 101 and 102 TFEU, and any investigations and assessments have to refer to the still not sufficiently clarified objectives of contestability and fairness, i.e., consumer welfare might not be the sole and decisive criterion any more.
- Even if investigations in the DMA might include analyses of effects, a balanced approach regarding the advantages and costs of further differentiation and flexibility would also suggest a much more limited form of investigations than in a traditional competition law analysis.

20. Therefore the question emerges how such a new DMA-specific investigation and assessment framework will look like, and what the role of economics in the application of the DMA is. The application of a pure per se rule regime would have implied that no economic analysis of effects is necessary for monitoring the compliance of the gatekeepers, but we have seen that some investigations and assessments will be needed in the DMA. However, e.g., the concept of gatekeepers in the DMA is not identical with the concept of market dominance, as well as the concept of CPS is not the same as the concept of relevant markets. This implies that for designating gatekeepers economists cannot use the same criteria and methods as in traditional competition law. It is also unclear how economists would approach fairness problems, e.g., with respect to the distribution of rents between gatekeepers and business users. However, vice versa, it also cannot be expected that lawyers can address questions like the effectiveness of the compliance behaviour of gatekeepers or whether a new obligation should be added to the set of obligations without using economic expertise. Therefore the toolbox of theoretical and empirical methods of economists will still be very relevant for the DMA but might have to be used in a different way.

21. Therefore—parallel to the enactment of the DMA—it is also necessary to develop a clear approach to how these investigations and assessments should be carried out. What are the criteria that have to be fulfilled with respect to contestability and fairness for assessing whether the compliance behaviour of a gatekeeper is effective, and what methods should be used in such investigations? So far not much discussion has emerged about these questions. However, the more options for flexibility and differentiation are included in the DMA, the more important and urgent is the clarification of these questions.

IV. DMA: Options for a way forward

22. It was the task of this article to analyse the specific strategy of the DMA to rely exclusively on an ex ante per se rule regime for gatekeepers from a “rules vs. standard” perspective in law and economics. Instead of summarizing the results in detail, this last section asks what we can learn for the upcoming discussions about the DMA.

23. Since any per se rule regime can lead to rigidity and considerable error costs, it is not surprising from the “rules versus standard” perspective that in the discussion
about the DMA a number of proposals for more flexibility and differentiation have been made, which through deeper investigations might offer the chance to reduce the sum of error costs and regulation costs, and might lead to a more tailored and therefore effective enforcement: enabling additional decisions of the Commission of not applying obligations to certain gatekeepers or CPS, a wider scope for differentiating the obligations to the specific problems of individual gatekeepers (and CPS), introducing explicit options for defences, giving the Commission the power to also impose additional gatekeeper-specific obligations, or even viewing the set of obligations more as a menu from which the Commission can choose, are some of the options for more flexibility. With such a more flexible and differentiated approach, which leads to a larger tailoring of the ex ante regulatory regime, the DMA would also get closer to the basic architecture of the CMA taskforce proposal in the UK with its focus on firm-specific codes of conduct for firms with “strategic market status,” 23 or the new § 19a in German competition law, which offers the German competition authority a menu of behavioural rules, from which it can choose for dealing with firms “with paramount significance for competition across markets.”

24. However, from the “rules vs. standard” approach the crucial question is what the costs of more flexibility and differentiation are. The more the strict per se rule regulatory regime is made flexible, the more it will be necessary to make deeper (and lengthy) investigations with clear criteria and theories of harm, and the more it will be deemed necessary that courts can control these decisions of the Commission by an effective judicial review. Therefore a realistic view is necessary about the dangers that more flexibility and differentiation can lead to a further delay and also “watering down” of the effective implementation of the obligations of the DMA. The negative experiences with the problems of traditional competition law suggest that we should be very cautious not to overestimate the benefits and underestimate the costs of more flexibility, and not to be “overconfident” regarding the capabilities of the Commission to deal with these additional options for flexibility in an effective way (also with respect to its limited resources).

25. What conclusions can be drawn from this perspective for further discussion on the DMA?

– A very careful balancing between the advantages and costs of a fast and immediate implementation of obligations and the advantages and costs of more flexibility and differentiation is necessary. It might perhaps be a prudent strategy to start with a fairly strict approach and introduce only step-by-step (after more experience) more flexibility for refining the rule-based system as part of the evolution of the DMA.

– An alternative option to more differentiation is a reduction of the number of targeted gatekeepers and CPS, which would also allow a better tailoring of the ex ante per se rule regime. The entire regulatory regime could be focused much more on those few large digital firms, whose economic power is seen as the most harmful for contestability and fairness.

– The objectives of contestability and fairness of the DMA have to be clarified much more because any investigations and assessments have to refer to them. If the DMA is intended to achieve more and something different than traditional competition law, this should be stated much more explicitly.

– This is directly linked to the need for developing a clear framework for investigations and assessments in the DMA with criteria, methods, and a clarification of the role of economic analysis, because the traditional competition analysis (with its focus on effects on consumer welfare) cannot be applied any more in the same way.

– Since it is not clear whether such a regime of per se rules as in the DMA is alone a sufficiently powerful regulatory tool for solving the challenges of the large digital firms with their conglomerate structure, far-reaching and complex ecosystems and control over vast amounts of data, the DMA should:

(i) allow for an (also institutional) evolution of its per se rules-based regulatory regime (also beyond updating the set of obligations and CPS), and

(ii) avoid pre-empting the application of other competition-related legal instruments, e.g., also at the Member State level, that try to deal with the economic power of these large digital firms, because the DMA might leave serious gaps that have to be filled, and

(iii) collaborate actively with other policies, as, e.g., data protection and consumer policy, for a more holistic and integrated policy approach to deal with the manifold challenges of these large digital firms.
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