

Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It

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Abstract:

The European Commission's Digital Markets Act ("DMA") Proposal relies on the legal basis provided by Article 114 TFEU. The choice of this legal basis enables the EU legislature to avoid the unanimity requirement and to involve the European Parliament as co-legislator, but it also determines the limitations on the scope for EU action. An analysis of the DMA Proposal in light of the relevant EU case law regarding Article 114 TFEU suggests that the current text is likely to be incompatible with EU law. This paper submits that, to ensure that the DMA Proposal is compatible with EU law, the EU legislature needs to ensure (i) that the DMA is effectively designed to harmonize national rules and prevent regulatory fragmentation; and (ii) that the DMA's scope and list of obligations comply with the principle of proportionality and do not interfere with the fundamental rights of the companies affected beyond what is necessary to ensure the proper functioning of the internal market. Absent these changes, the DMA would, in our view, be vulnerable to an eventual legal challenge before the EU Courts.

1. Introduction

On 15 December 2020, the European Commission (the "Commission") published a [Proposal for an EU Digital Markets Act](#) (the "DMA Proposal").² The declared objective of the DMA Proposal is "to ensure the proper functioning of the internal market by promoting effective competition in digital markets and in particular a contestable and fair online platform environment".³

To attain this goal, the DMA Proposal seeks to create a new regulatory instrument including a set of new *ex ante* rules applicable to "gatekeepers" and a new set of far-reaching powers. These powers would enable the Commission to intervene in relation to certain digital operators free from the constraints inherent in other areas of EU law, particularly competition law.

The EU Treaties feature a provision, [Article 352 TFEU](#), that enables Member States to agree to the creation of new powers necessary to attain one of the Union's objectives.⁴ [Protocol 27 to the TEU on the internal market and competition](#) provides that "to [ensure that competition is not distorted], the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union". Article 352 TFEU was the legal basis used for the introduction of EU Merger Control Regulation in 1989.⁵ The EU Courts have clarified that Article 352 TFEU is the appropriate legal basis for EU

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² Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final.

³ DMA Proposal Explanatory Memorandum, p. 9 and Legislative Financial Statement, p. 58. See also Recitals 10, 12, 27 or 79 of the DMA Proposal.

⁴ Article 352 TFEU constitutes the so-called "subsidiary powers" clause. This provision enables the EU legislature to adopt legislative measures when action by the EU is necessary but no other Treaty provision provides for the necessary powers.

⁵ The [preparatory documents](#) to the Merger Regulation explain that "Articles [101] and [102], while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all

legislation that creates new legal forms or new legal rights in addition to those existing at the national level.⁶

While Article 352 TFEU would enable the Commission to create new competences, powers and obligations of the sort contained in the DMA Proposal, it requires unanimity among Member States and would deprive the European Parliament of co-legislative powers. It is likely due to these political and institutional constraints that the Commission's Proposal does not rely on this legal basis.

Instead, the DMA Proposal is based on [Article 114 TFEU](#), which does not require unanimity among Member States, and under which the Council and the Parliament act as co-legislators. The choice of a legal basis subject to lesser institutional requirements, however, inevitably has an effect on the ambitions and scope of the measure at issue. The EU Courts have made clear that Article 114 TFEU does not confer on the EU legislature a general power to regulate the internal market and, over decades of case law, have defined the boundaries for the use of this legal basis.

This paper assesses the implications that the choice of Article 114 TFEU as a legal basis has on the core elements of the DMA Proposal. Section 2 identifies the limits to the EU's legislative powers under Article 114 TFEU. Section 3 sets out the reasons why, under its current drafting, some of the core elements of the DMA Proposal would likely be contrary to EU primary law, and could eventually lead to the DMA's annulment. Section 4 concludes by identifying constructive solutions that could enable the EU legislature to achieve its goals while complying with the substantive requirements flowing from Article 114 TFEU and other general principles of EU law.

2. The Boundaries of the Commission's Powers to Regulate the Internal Market Under Article 114 TFEU

The EU can only legislate within the confines of the powers conferred upon it by the EU Treaties. Each legislative proposal needs to have a "legal basis" in the Treaties.⁷ The choice of the legal basis determines both the relevant legislative procedure and the scope for EU action. Given its relevance, the choice of the legal basis "*may not depend simply on an institution's conviction as to the objective pursued, but must be based on objective factors amenable to judicial review*".⁸ These are namely "*the content and main object of the measure*".⁹ Recourse to an inappropriate legal basis has, in the past, led to the annulment of various pieces of EU legislation.¹⁰

Article 114 TFEU enables the EU to adopt "*measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their*

operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article [103] but, principally, on Article [352] of the Treaty, under which the [EU] may give itself the additional powers of action necessary for the attainment of its objectives (...)" (emphasis added); see Proposal for a Council Regulation on the control of concentrations between undertakings COM(2002) 711 final.

⁶ [Case C-436/03 Parliament v Council](#), EU:C:2006:277, ¶¶37-40; [Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property](#), EU:C:1994:384, ¶59; and [Case C-377/98 Netherlands v Parliament and Council](#), EU:C:2001:523, ¶25.

⁷ Article 5(2) TEU states that "*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*".

⁸ [Case C-300/89 Commission v Council](#), EU:C:1991:244, ¶10.

⁹ See, for instance, [Case C-436/03 Parliament v Council](#), EU:C:2006:277, ¶35.

¹⁰ See, for instance, [Case C-137/12 Commission v Council](#), EU:C:2013:675 (in relation to a Council Decision on the signing, on behalf of the EU, of the European Convention on the legal protection of services based on, or consisting of, conditional access); [Joined Cases C-317/04 and C-318/04 Parliament v Council](#), EU:C:2006:346 (in relation to a EU-US agreement on the processing and transfer of passenger data by air carriers); and [Case C-376/98 Germany v Parliament and Council](#), EU:C:2000:544 (in relation to an EU Directive relating to the advertising and sponsorship of tobacco products).

object the establishment and functioning of the internal market". This provision is the most frequent legal basis for EU legislative action.

There is, accordingly, abundant EU case law clarifying the possible scope of measures adopted under Article 114 TFEU. The EU Courts have traditionally adopted a flexible interpretation, eventually clarifying that Article 114 TFEU can be used for the adoption of Regulations, and not only Directives;¹¹ that the EU legislator must be free to choose the most appropriate method of approximation;¹² and that, when necessary, Article 114 TFEU can even be used to create obligations applicable to market operators as opposed to Member States.¹³

At the same time, the case law has consistently identified certain limitations to the use of Article 114 TFEU. The EU Courts have made clear that Article 114 TFEU does not confer on the EU legislature a general power to regulate the internal market.¹⁴ Recourse to this legal basis is only justified when the measure at issue (i) has as its genuine object the improvement of the conditions for the establishment of the internal market through the approximation of national laws, and (ii) is designed to eliminate obstacles to free movement or appreciable distortions of competition arising from current or "likely" regulatory fragmentation.

The conditions for recourse to Article 114 TFEU were systematized by the CJEU in *Vodafone, O2 et al v Secretary of State*,¹⁵ where the CJEU held that:

"(32) According to consistent case-law the object of measures adopted on the basis of Article [114(1) TFEU] must genuinely be to improve the conditions for the establishment and functioning of the internal market.¹⁶ While a mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of Article [114 TFEU] as a legal basis, the Community legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market¹⁷ or to cause significant distortions of competition.¹⁸

(33) Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them" (emphasis added).¹⁹

¹¹ In the following precedents, for instance, the CJEU confirmed the use of Article 114 TFEU as the legal basis for several regulations, [Case C-270/12 UK v Parliament and Council](#), EU:C:2014:18; [Case C-58/08 Vodafone](#), EU:C:2010:321; [Case C-217/04 United Kingdom v Parliament and Council](#), EU:C:2006:279; and [Case C-66/04 UK v Parliament and Council](#), EU:C:2005:743.

¹² The EU legislature has discretion as regards the method of approximation most appropriate to achieve the desired result (in particular in fields with complex technical features), depending on the context and specific circumstances of the case; see, for instance, [Case C-482/17 Czech Republic v Parliament and Council](#), EU:C:2019:1035, ¶60; [Case C-547/14 Philip Morris](#), EU:C:2016:325, ¶63; and [Case C-58/08 Vodafone](#), EU:C:2010:321, ¶35.

¹³ [Case C-270/12 UK v Parliament and Council](#), EU:C:2014:18, ¶107; [Case C-217/04 United Kingdom v Parliament and Council](#), EU:C:2006:279, ¶¶44-45; and [Case C-359/92 Germany v Council](#), EU:C:1994:306, ¶37.

¹⁴ [Case C-376/98 Germany v Parliament and Council](#), EU:C:2000:544, ¶83 ("To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in [Article 5(2) TEU] that the powers of the Community are limited to those specifically conferred on it").

¹⁵ [Case C-58/08 Vodafone](#), EU:C:2010:321.

¹⁶ See also [Case C-217/04 United Kingdom v Parliament and Council](#), EU:C:2006:279, ¶42; and [Case C-491/01 British American Tobacco \(Investments\) and Imperial Tobacco](#), EU:C:2002:741, ¶60.

¹⁷ See also [Case C-380/03 Germany v Parliament and Council](#), EU:C:2006:772, ¶37 and the case-law cited.

¹⁸ See also [Case C-301/06 Ireland v European Parliament and Council](#), EU:C:2009:68, ¶63; and [Case C-376/98, Germany v Parliament and Council](#), EU:C:2000:544, ¶¶84, 106.

¹⁹ See also [Case C-482/17 Czech Republic v Parliament and Council](#), EU:C:2019:1035, ¶35; [Case C-547/14 Philip Morris](#), EU:C:2016:325, ¶¶59, 122; [Case C-301/06 Ireland v European Parliament and Council](#), EU:C:2009:68, ¶64; [Case C-217/04 United Kingdom v Parliament and Council](#), EU:C:2006:279, ¶¶60-64; [Case C-436/03](#)

In application of these principles, the EU Courts have made clear that Article 114 TFEU is not a valid legal basis for measures which do not approximate or harmonize national rules (e.g. because they aim at introducing new legal forms and/or leave unchanged the different national laws in existence),²⁰ nor for measures that merely have “incidental”²¹ or “ancillary”²² effects on harmonisation.

In addition, even where reliance on Article 114 TFEU as a legal basis may in principle be justified, EU measures seeking to rely on this legal basis must comply with the legal principles enshrined in the EU Treaties or identified in the case law, and in particular with the principle of proportionality (i.e. the measure must be appropriate for attaining the objective pursued and not go beyond what is necessary to achieve it).²³

The EU Courts have further clarified that Article 352 TFEU, and not Article 114 TFEU, would be the appropriate legal basis to create a new regulatory apparatus pursuing autonomous legal concepts and goals and operating independently of national laws.²⁴

3. The Questionable Legality of the DMA Proposal Under Article 114 TFEU

In its current drafting, the Commission’s DMA Proposal would appear not to meet the criteria established by the EU Courts to justify reliance on Article 114 TFEU. This is because, as it stands, the DMA Proposal (i) is not designed to prevent regulatory fragmentation; and (ii) would appear to breach the principle of proportionality. In what follows we discuss each of these claims in turn.

3.1. The proposed DMA does not primarily intend, and it is not designed, to prevent regulatory fragmentation

The DMA Proposal’s original and primary aim is to “*promot[e] effective competition in digital markets*”,²⁵ notably by addressing an alleged gap in EU competition law rules.²⁶

Concerns about regulatory fragmentation and the need for EU-wide harmonization were absent from the thinking that eventually led to the DMA Proposal. Coinciding with the initiation

[Parliament v Council](#), EU:C:2006:277, ¶39; and [Case C-380/03 Germany v Parliament and Council](#), EU:C:2006:772, ¶38 and the case-law cited.

²⁰ In [Case C-436/03 Parliament v Council](#), EU:C:2006:277, the Parliament and the Commission argued that a regulation establishing a European Cooperative Society should have been adopted on the basis of Article 114 (and not Article 352). The CJEU disagreed, ruling that Article 114 is not a valid legal basis for measures that aim at introducing “*new legal forms*” or that “*leave unchanged the different national laws already in existence*”, because such measures “*cannot be regarded as aiming to approximate the laws of the Member States*” (¶14).

²¹ [Case C-209/97 Commission v Council](#), EU:C:1999:559, ¶35; see also [Case C-155/91 Commission v Council](#), EU:C:1993:98, ¶19; and [Case C-70/88 Parliament v Council](#), EU:C:1991:373, ¶17.

²² [Case C-426/93 Germany v Council](#), EU:C:1995:367, ¶33; see also [Case C-187/93 Parliament v Council](#), EU:C:1994:265, ¶25; and [Case C-155/91 Commission v Council](#), EU:C:1993:98, ¶20.

²³ [Case C-482/17 Czech Republic v Parliament and Council](#), EU:C:2019:1035, ¶37; [Case C-547/14 Philip Morris](#), EU:C:2016:325, ¶62; [Case C-358/14 Poland v Parliament and Council](#), EU:C:2016:323, ¶36; [Joined Cases C-154/04 and C-155/04, Alliance for Natural Health and Others](#), EU:C:2005:449, ¶32; and [Case C-380/03, Germany v Parliament and Council](#), EU:C:2006:772, ¶¶41, 144.

²⁴ [Case C-436/03 Parliament v Council](#), EU:C:2006:277, ¶¶37-40; [Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property](#), EU:C:1994:384, ¶59; and [Case C-377/98 Netherlands v Parliament and Council](#), EU:C:2001:523, ¶25.

²⁵ DMA Proposal Explanatory Memorandum, p. 9. See also Cristina Caffarra and Fiona Scott Morton, “[The European Commission Digital Markets Act: A translation](#)” (VoxEU, 5 January 2021): “*the regime is not designed to regulate infrastructure monopolies, but rather to create competition as well as to redistribute some rents*”.

²⁶ The Explanatory Memorandum of the legislative proposal states that the DMA “*(...) complements existing EU (and national) competition rules. It addresses unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules, considering that antitrust enforcement concerns the situation of specific markets, inevitably intervenes after the restrictive or abusive conduct has occurred and involves investigative procedures to establish the infringement that take time (...)*” (p. 3); and seeks to address “*structural problems that cannot be addressed under the existing competition rules*” (p. 7).

of the legislative procedure, however, this concern has emerged prominently,²⁷ and it is now at the heart of the narrative justifying the adoption of the DMA.²⁸ This is because, in order to validly rely on Article 114 TFEU, the EU legislature would need to show that the genuine objective of the DMA Proposal is to address existing or likely discrepancies between national laws liable to hinder the freedom of movement of digital services or appreciably restrict competition.

The Commission's Proposal makes a visible attempt to tick this box, repeatedly asserting, in broad terms, a risk of future likely regulatory fragmentation. According to the Commission, "*without action at the EU level, existing and pending national legislation has the potential to lead to increased regulatory fragmentation of the platform space*".²⁹ The EU Courts have ruled, however, that the identification of the objective pursued by a given measure "*may not depend simply on an institution's conviction as to the objective pursued, but must be based on objective factors amenable to judicial review*".³⁰ Beyond language, the case law makes clear that "*the appropriate legal basis on which an act must be adopted should be determined according to its content and main object*".³¹ In addition, the EU Courts have insisted that any measures justified on the grounds of the likely emergence of obstacles to trade resulting from regulatory fragmentation "*must be designed to prevent them*".³²

To determine whether the DMA Proposal can validly rely on Article 114 TFEU as its legal basis, one must therefore, first, identify the sources of possible regulatory fragmentation and, second, verify that the DMA Proposal is designed to address them.

The DMA Proposal itself does not identify any specific "existing" or "likely" sources of regulatory fragmentation that the DMA would seek to address, but the Impact Assessment does.³³

Strikingly, or rather tellingly, none of the examples of existing or likely regulatory fragmentation identified by the Impact Assessment would be affected by the DMA. This evident mismatch between the reasons invoked by the Impact Assessment to justify the adoption of the DMA Proposal and the actual content of the latter could be of particular relevance in the event of judicial review.³⁴

²⁷ See *infra* footnote 29. See also the "[Speech by Executive Vice-President Margrethe Vestager: Building trust in technology](#)" (EPC Webinar, Digital Clearinghouse, 29 October 2020) and Javier Espinoza, "[Big Tech told work with EU or face patchwork of national laws](#)" *Financial Times* (Brussels, 20 January 2021).

²⁸ This is unsurprising, as it has become common for legislative proposals that intend to rely on the legal basis of Article 114 TFEU to adopt the same vocabulary. See Stephen Weatherhill, "[The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a 'Drafting Guide'](#)" (2011) 12 *German Law Journal* 827.

²⁹ DMA Proposal Explanatory Memorandum, p. 4; see also Recitals 6-9 of the DMA Proposal.

³⁰ [Case C-300/89 Commission v Council](#), EU:C:1991:244, ¶10.

³¹ [Case C-436/03 Parliament v Council](#), EU:C:2006:277, ¶35.

³² See, for instance, [Case C-482/17 Czech Republic v Parliament and Council](#), EU:C:2019:1035, ¶35; [Case C-547/14 Philip Morris](#), EU:C:2016:325, ¶59; [Case C-301/06 Ireland v European Parliament and Council](#), EU:C:2009:68, ¶64; [Case C-436/03 Parliament v Council](#), EU:C:2006:277, ¶39; and [Case C-380/03 Germany v Parliament and Council](#), EU:C:2006:772, ¶38.

³³ [Part 2](#) of the Impact Assessment accompanying the DMA Proposal refers to several instances of current regulatory fragmentation (pp. 109-110, in relation to Belgium, Bulgaria, Cyprus, France, Germany, Hungary, Italy and Romania), as well as to the risk of future fragmentation (pp. 112-114, 117, in relation to Germany, France and Romania).

³⁴ For a comment on the increasing relevance of Impact Assessments in the context of the judicial review of the adequacy of a given legal basis, see Koen Lenaerts (President of the CJEU), "[The European Court of Justice and Process-oriented Review](#)" (2012) College of Europe, pp. 7-8: "*In order to determine whether the challenged act is ultra vires or intra vires, the ECJ should not limit its scrutiny to a formal reading of the preamble thereof, but it should undertake a close examination of the explanatory memorandum and, notably, of the IAR [Impact Assessment Report]. I concur with Craig in that the elaboration of an IAR does not exempt the ECJ from checking whether the conditions for having recourse to Article 114 TFEU, as a legal basis, have been met. However, he correctly posits that the IAR does provide a helpful framework within which to address 'competence creep' or 'competence anxiety' concerns. In his view, 'if the justificatory reasoning to this effect in the [IAR] is wanting, then the ECJ should invalidate the relevant instrument, and thereby signal to the political institutions*

Indeed, a closer look at the current and national measures that, in the Commission's view, would justify the adoption of the DMA, shows that all of them would fall under one or both of the exceptions provided for in Articles 1(5) and 1(6) of the DMA Proposal. This is because they apply or would apply also to undertakings other than "gatekeepers" in the sense of the DMA Proposal or because they are part of national competition rules, thereby escaping any harmonising effect.

It is important to understand how these exceptions work, and the margin of maneuver that they confer upon Member States. Whereas Article 1(5) of the DMA Proposal provides that "*Member States shall not impose on gatekeepers further obligations by way of laws, regulations or administrative action for the purpose of ensuring contestable and fair markets*", this principle is immediately qualified in a way that allows Member States to easily circumvent it.

In the first place, the second part of Article 1(5) states that this harmonization obligation "*is without prejudice to rules pursuing other legitimate public interests, in compliance with Union law*", further stating that "*nothing in this Regulation precludes Member States from imposing obligations, which are compatible with Union law, on undertakings, including providers of core platform services where these obligations are unrelated to the relevant undertakings having a status of gatekeeper within the meaning of this Regulation in order to protect consumers or to fight against acts of unfair competition*" (emphasis added).

This means that "gatekeepers" subject to the DMA could in addition be subject to other obligations stemming from any other rules applicable also to companies other than "gatekeepers" as defined in the DMA (e.g. to companies with "*paramount cross-market significance*" in the sense of the recently adopted German competition rules). In practice, the effect of Article 1(5) would be to exempt, permit and leave unchanged all of the rules identified in the Commission's Impact Assessment as sources of existing or likely regulatory fragmentation.³⁵

In the second place, Article 1(6) provides that the DMA would also be without prejudice to EU and national competition rules prohibiting restrictive agreements and abuses of dominant positions, as well as to national competition rules prohibiting other forms of unilateral conduct "*insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers*".³⁶ Under this provision, Member States would remain free to enact new rules overlapping with those in the DMA, or even establish "*additional obligations*", provided that these are enacted as part of their national competition rules and do not only target gatekeepers as defined in the DMA. This is regardless of whether national rules pursue predominantly the same objectives as the DMA.

The margin of maneuver that this provision grants Member States is perhaps best illustrated by the adoption, in January 2021, of the reform to the German Competition Act. As noted above, the risk that initiatives such as this one could pass at the national level was the main

that the precepts in the Treaty are to be taken seriously" (emphasis added). See also Paul Craig, "[The ECJ and ultra vires action: A conceptual analysis](#)" (2011) 48 *Common Market Law Review* 395, 412.

³⁵ [Part 2](#) of the Impact Assessment identifies some alleged sources of existing fragmentation, but observes that "*those rules in most Member States (sic) of a horizontal nature, i.e., applicable also outside of digital platforms*". Indeed, the Impact Assessment refers to rules on economic dependency/superior bargaining positions in Belgium, Bulgaria, Cyprus, France, Germany, Hungary or Italy that are of horizontal application, not targeted to gatekeepers, and that would therefore not be affected by the DMA Proposal (pp. 109-110). The same is true in relation to the "likely" fragmentation resulting from a new Romanian law on relative bargaining power (p. 117).

³⁶ See also Recital 9 of the DMA Proposal: "*this Regulation is without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral behaviour that are based on an individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question. However, the application of the latter rules should not affect the obligations imposed on gatekeepers under this Regulation and their uniform and effective application in the internal market*".

argument invoked by the Commission to justify recourse to Article 114 TFEU.³⁷ In its current drafting, however, the DMA Proposal would appear to have no effect on the new German rules, nor on any other similar initiatives,³⁸ regardless of possible overlaps, differences or conflicts with the DMA's provisions.³⁹

The only other provision in the current DMA Proposal that, at first sight, would appear to seek to harmonize national rules is Article 1(7). This provision would prevent national authorities from taking decisions “*which would run counter to a decision adopted by the Commission under this Regulation*”. It is, however, doubtful that this provision would have any material effects given that (i) the principle of supremacy of EU Law already prevents Member States from adopting decisions conflicting with those adopted by the Commission;⁴⁰ and (ii) it refers only to direct contradictions (as opposed to other possible divergences) with the content of decisions adopted by the Commission (therefore excluding contradictions or divergences with the actual provisions of the DMA that would not require implementing decisions, including Articles 5 and 6).

For the reasons explained above, the DMA Proposal's introduction of these new obligations and powers would leave unchanged the different national laws in existence, and it would not appear to meaningfully limit the ability of Member States to enact new and possibly divergent rules. These are precisely the circumstances in which the EU Courts have held that recourse to Article 114 TFEU would not be appropriate.⁴¹

Admittedly, the enactment of a directly applicable Regulation prohibiting certain undertakings from engaging in particular forms of conduct across all Member States could have a certain harmonizing effect. This limited harmonizing effect, however, would be inherent, and ancillary, to the creation and implementation of any new EU regulatory powers. The case law makes clear that any ancillary harmonisation effects are not sufficient to justify resorting to Article 114 TFEU,⁴² particularly when the measure at issue introduces new legal forms, rights or

³⁷ For instance, the Explanatory Memorandum of the DMA Proposal, p. 4. See also ¶¶29, 52-54, 89-90, 99, 100, 105, 106, 111, 112, 126, 376 in [Part 1](#) of the Impact Assessment; and Annex 5.4 of [Part 2](#) of the Impact Assessment.

³⁸ See also the [Italian Competition Authority's proposal to amend the Italian Competition Act](#), which largely mirrors the German Competition Act (AS1730 - Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021, Bollettino n°13 of 29 March 2021, pp. 99-101).

³⁹ In this regard, see, for instance, Bernd Meyring, “[Germany's gatekeeper rules: the start of divergence for gatekeepers?](#)” (*Linklaters*, 19 January 2021), stating that “*Recitals 9 and 10 of the draft DMA make perfectly clear that, in the Commission's mind, competition rules like the ones that Germany is now introducing can be applied in addition to the DMA. This may be the price to pay to secure the Member State votes that will be needed for the DMA to come into force. But it also means that national rules can apply in addition to the DMA if they are diverging sufficiently. Strangely, this mechanism creates a built in incentive for Member States to diverge if they intend to legislate in this space. Despite the Commission's intent to centralise, digital gatekeepers may still face a rather complex patchwork of EU and national legislation, with a potential downside for the availability of digital services across the EU*”; Jens-Uwe Franck and Martin Peitz, “[Taming Big Tech: What Can We Expect From Germany's New Antitrust Tool?](#)” (*Promarket*, 7 February 2021), “*It is foreseeable, however, that national competition enforcement and ex ante regulation will lead to increasing differences in digital platform regulation across EU Member States. While the EU could react to such fragmentation by fully harmonizing domestic laws including competition law, this is not to be expected. For the foreseeable future, digital platforms and their users will have to bear the costs of fragmented rule-making in the EU's internal market*”; Simon Van Dorpe, “[Germany shows EU the way in curbing Big Tech](#)”, (*Politico*, 13 January 2021), “*While the EU is said to have come to an understanding with Germany that its regime is considered an extension of competition law and therefore exempted from the harmonization rule, legal experts agree that the German rules are at least a gray zone between competition law and regulation*”; and Arezki Yaïche, “[Big Tech faces beefed-up German antitrust rules as lawmakers leapfrog EU legislation](#)” (*Mlex*, 14 January 2021).

⁴⁰ [Case C-344/98 Masterfoods](#), EU:C:2000:689, ¶¶49, 52, 60.

⁴¹ In [Case C-436/03 Parliament v Council](#), EU:C:2006:277, ¶44. See also [Case C-547/14 Philip Morris](#), EU:C:2016:325, ¶71.

⁴² [Case C-426/93 Germany v Council](#), EU:C:1995:367, ¶33. The CJEU established: “[w]hilst it cannot be denied that the Regulation will also have effects on the establishment and functioning of the internal market, those effects are merely ancillary to the main aim described above, with the result that, contrary to the view of the German Government, Article 100a of the EEC Treaty [now Article 114 TFEU] cannot constitute the proper legal

obligations that are distinct from those provided under national law and that exist alongside them.⁴³

As a matter of fact, and paradoxically, by creating a new field of law and failing to set limitations for Member States to do the same, the effect of the DMA Proposal could be to spur the adoption of parallel national legal systems,⁴⁴ thereby resulting in more, not less, regulatory fragmentation. Indeed, some Member States, like Sweden, are now invoking the DMA to justify the adoption of supplementary autonomous national legal regimes.⁴⁵ For this reason, the absence of real limitations on Member States' ability to enact or maintain in force legislation pursuing predominantly the same objective as the DMA would not only compromise the intended use of Article 114 TFEU as its legal basis, but would also be likely to lead to unavoidable *ne bis in idem* concerns.⁴⁶

3.2. The current version of the DMA Proposal could breach the principle of proportionality

To validly rely on Article 114 TFEU, the case law of the EU Courts also requires that the EU legislature complies with the legal principles enshrined in the EU Treaties or identified in the case law and, in particular, with the principle of proportionality.⁴⁷ According to this principle, as laid down in Article 5(4) TEU, "*the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*".

In reviewing compliance with the principle of proportionality, EU law recognises the broad discretion of the legislature in relation to the nature, scope and basic facts surrounding the adoption of the measure at issue, and it does not require that the measure adopted be the only or best possible alternative. The legality of a given measure will generally only be compromised "*if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue*".⁴⁸

The EU Courts have nonetheless made clear that "*even where it has broad discretion, the EU legislature must base its choice on objective criteria and examine whether the aims pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators*"; or, in other words, "*draft legislative acts must take account of the need for any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved*".⁴⁹

To demonstrate compliance with these requirements, judicial review requires that EU institutions "*at the very least be able to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and*

basis for the adoption of the Regulation. As the Court has already held, the mere fact that an act may affect the establishment or functioning of the internal market is not sufficient to justify using that provision as the basis for the act". See also [Case C-187/93 Parliament v Council](#), EU:C:1994:265, ¶25; and [Case C-155/91 Commission v Council](#), EU:C:1993:98, ¶20.

⁴³ [Case C-436/03 Parliament v Council](#), EU:C:2006:277. See also the [Opinion of AG Stix-Hackl](#), EU:C:2005:447, in the same case, ¶¶89-90 and ¶96.

⁴⁴ See *supra*, footnote 39.

⁴⁵ Swedish Competition Authority, "[The competition on digital platform markets in Sweden](#)", English Summary of Report 2021:1, noting that the DMA "*would not affect the application of existing competition law*" (p. 13) and referring to a "*need for a supplementary legal framework in Sweden*" (p. 14). See also Nicholas Hirst and Lewis Crofts, "[EU gatekeeper regulation raises questions of 'proportionality,' member of top court says](#)" (*Mlex*, 10 March 2021): "*AG Pitruzzella has also noted the importance of coordination between the EU and national authorities, affirming that he saw "a real risk" of fragmentation and inconsistency across the EU bloc, unless coordination between the commission and national enforcers is bolstered in the draft proposal*".

⁴⁶ See [Case C-857/19 Slovak Telekom](#), EU:C:2021:139, ¶¶40-43.

⁴⁷ [Case C-482/17 Czech Republic v Parliament and Council](#), EU:C:2019:1035, ¶37.

⁴⁸ [Case C-482/17 Czech Republic v Parliament and Council](#), EU:C:2019:1035, ¶77.

⁴⁹ [Case C-482/17 Czech Republic v Parliament and Council](#), EU:C:2019:1035, ¶79; see also [Case C-358/14 Poland v Parliament and Council](#), EU:C:2016:323, ¶¶97-98.

on which the exercise of their discretion depended”.⁵⁰ This generally demands the EU legislature to show that its choices have taken into consideration the different options and interests at issue.⁵¹

A proportionality assessment is particularly important in the case of the DMA given that the proposed legislation would be directed at private parties,⁵² would impinge on the fundamental rights of those parties (notably on their freedom to conduct their business⁵³ and their right to property),⁵⁴ and would subject them to remedies (including potentially very high fines and structural remedies) which are *quasi-criminal* in nature.⁵⁵

In the Commission’s view, “*the proposed measures are proportionate since they achieve their objective by only imposing a burden on undertakings in the digital sector in a targeted manner*”.⁵⁶ The DMA Proposal’s Explanatory Memorandum argues that proportionality would be ensured because the measure “*applies only to those providers that meet clearly defined criteria for being considered a gatekeeper*”, and because “*the list of obligations foreseen by the proposal has been limited to those practices (i) that are particularly unfair or harmful, (ii) which can be identified in a clear and unambiguous manner to provide the necessary legal certainty for gatekeepers and other interested parties, and (iii) for which there is sufficient experience*”. The Proposal also refers to “*the possibility of a tailored application of some of the obligations through a dialogue between the Commission and the gatekeepers concerned*” as a means of ensuring proportionality.⁵⁷ In what follows, this paper will assess each of these arguments in turn.

i. Scope of the DMA: Designation of gatekeepers subject to the Regulation (Article 3)

The Commission considers that the DMA Proposal’s proportionality is ensured by the fact that its scope would be limited “*only to those providers that meet clearly defined criteria for being considered a gatekeeper*”.⁵⁸ As the Commission correctly notes, the principle of proportionality

⁵⁰ [Case C-482/17 Czech Republic v Parliament and Council](#), EU:C:2019:1035, ¶81; [Case C-310/04, Spain v Council](#), EU:C:2006:521, ¶¶122-123.

⁵¹ Koen Lenaerts (President of the CJEU), “[The European Court of Justice and Process-oriented Review](#)” (2012) College of Europe, p. 7.

⁵² In [Case C-270/12 UK v Parliament and Council](#), EU:C:2014:18, the CJEU rules that, under Article 114 TFEU it was permissible for an EU agency (ESMA) to adopt measures of general application and, “*in strictly circumscribed circumstances*”, also individual measures (see notably ¶98). In case [Case C-66/04 UK v Parliament and Council](#), EU:C:2005:743, the CJEU observed that even if the Commission was vested with the power to adopt final authorisation decisions directly affecting individuals, its powers had been “*determine[d] and circumscribe[d] precisely*” by the basic legal act (see ¶49).

⁵³ See Explanation on Article 16 “Freedom to conduct a business” of the [Explanations relating to the Charter of Fundamental Rights](#) (OJ C 303, 14.12.2007). See also Nicholas Hirst and Lewis Crofts, “[EU gatekeeper regulation raises questions of ‘proportionality,’ member of top court says](#)” (Mlex, 10 March 2021), “*I wonder whether too much rigidity could hinder efficiency and introduce a disproportionate limitation on the freedom to conduct a business,*” said [Advocate General] Pitruzzella, speaking at an online panel”.

⁵⁴ Jacob Parry, “[EU Advocate General notes DMA challenge to fundamental rights - Concurrences Digital](#)” (PaRR, 10 March 2021), “[Advocate General] Pitruzzella also pointed to the Charter as the key basis upon which the DMA will be interpreted. He said that the DMA would have to comply with Article 16, which allows for the freedom to conduct business, and Article 17, which allows for the free and lawful use and ownership of property”.

⁵⁵ The *quasi-criminal* nature of competition law has been consistently recognised by the EU Courts and by the European Court of Human Rights (the “ECtHR”). See e.g. [Case C-501/11 Schindler](#), EU:C:2013:522, ¶33, referring to the Judgment of the ECtHR in [Menarini Diagnostics](#), Application no 43509/08. The *quasi-criminal* nature of the remedies contemplated in the DMA Proposal further requires that any scope for the exercise of discretion be limited “*with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference*”; see, in this regard, [Case C-413/08 Lafarge v Commission](#), EU:C:2010:346, ¶94, which in turn cites the judgment of 25 February 1992 of the European Court of Human Rights in [Margareta and Roger Andersson v Sweden](#), Series A No 226, ¶75.

⁵⁶ DMA Proposal Explanatory Memorandum, p. 6.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

requires that the DMA's scope of application be limited by clear criteria.⁵⁹ In its current drafting, however, the DMA Proposal arguably falls short of imposing the minimum necessary constraints on the exercise of the Commission's discretion. Absent objective boundaries on the scope of application of the DMA Proposal it may not be possible to ascertain whether this scope is sufficiently limited and proportionate.

In accordance with Article 3(1), a given platform shall be designated as a gatekeeper where (i) it "*has a significant impact on the market*"; (ii) operates a service which is an "*important gateway for business users to reach end users*"; and (iii) enjoys or will *foreseeably* enjoy "*an entrenched and durable position*".

These are new, subjective and vague concepts for which there is no administrative practice or judicial precedent, and that would appear to afford the Commission a very significant margin of discretion to define which firms would qualify as "gatekeepers". The criteria governing the Commission's assessment in this regard would not appear to be circumscribed precisely, nor to offer adequate safeguards against arbitrary interference. It is, in fact, very doubtful that these criteria would meet the requirements under which the Commission itself examines whether Member States retain excessive discretion in other areas of EU law.⁶⁰

The current DMA Proposal only relies on objective thresholds for the purposes of the rebuttable presumption contained in Article 3(2).⁶¹ The Commission would remain free, however, to (a) exempt from the scope of the DMA companies that meet those objective thresholds when they provide "*sufficiently substantiated arguments*" that they do not meet the subjective criteria in Article 3(1);⁶² and (b) identify as gatekeepers undertakings that do not meet the objective thresholds, on the grounds that they do meet the subjective criteria in Article 3(1).⁶³ The subjective criteria in Article 3(1) can, in sum, always prevail over the objective thresholds in Article 3(2).

⁵⁹ See also the Joint Memorandum of the [Nordic Competition Authorities](#) on Digital platforms and the potential changes to competition law at the European level: "(...) *regulatory intervention should rely on a clear and objective set of criteria. It needs to be clear which companies are considered digital gatekeepers, and companies must be able to foresee which type of regulation they will be subject to*".

⁶⁰ See e.g. the [Commission Notice on the notion of State aid as referred to in Article 107\(1\) TFEU](#) (OJ C 262, 19.7.2016), ¶¶124-125.

⁶¹ Article 3(2) establishes that "A provider of core platform services shall be presumed to satisfy: (a) the requirement in paragraph 1 point (a) where the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States; (b) the requirement in paragraph 1 point (b) where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year; for the purpose of the first subparagraph, monthly active end users shall refer to the average number of monthly active end users throughout the largest part of the last financial year; (c) the requirement in paragraph 1 point (c) where the thresholds in point (b) were met in each of the last three financial years".

⁶² See Article 3(4), second paragraph.

⁶³ Article 3(6) provides that "*for that purpose, the Commission shall take into account the following elements: (a) the size, including turnover and market capitalisation, operations and position of the provider of core platform services; (b) the number of business users depending on the core platform service to reach end users and the number of end users; (c) entry barriers derived from network effects and data driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities; (d) scale and scope effects the provider benefits from, including with regard to data; (e) business user or end user lock-in; (f) other structural market characteristics*". Far from constraining the Commission's discretion, these market features are, to some degree, characteristic of most markets and undertakings in the digital world. The requirement that these be "*taken into account*" may not be sufficient to identify any meaningful limits to the exercise of the Commission's discretion. The DMA Proposal does envisage one procedural limitation, in the sense that the Commission would be required to conduct a market investigation within the meaning of Article 15, but contains no substantive safeguards.

As a result of the above, it would not be possible for many prudent traders to foresee in a sufficiently precise manner whether they would fall within the scope of the proposed DMA. Absent any objective criteria or public rules of conduct constraining the Commission's discretion, it is doubtful that the EU Courts would accept the Explanatory Memorandum's argument that the measure is proportionate because it "*applies only to those providers that meet clearly defined criteria for being considered a gatekeeper*".

ii. List of prohibited practices (Articles 5 and 6)

The Commission considers that the lists of obligations in Articles 5 and 6 of the DMA Proposal would comply with the principle of proportionality to the extent that these are limited to practices "*that are particularly unfair or harmful*", "*which can be identified in a clear and unambiguous manner to provide the necessary legal certainty*" and "*for which there is sufficient experience*".⁶⁴

The DMA Proposal's Explanatory Memorandum also refers to the view of the "*large majority*" of stakeholders, who noted that "*the proposed list of problematic practices, or blacklist, should be targeted to clearly unfair and harmful practices of gatekeeper platforms*".⁶⁵ These stakeholders include a number of national competition authorities, some of which cautioned, on the basis of their experience, against blacklists.⁶⁶

The DMA Proposal features two sets of obligations/prohibited practices. Article 5 lists seven self-executing obligations, while Article 6 lists another eleven obligations "*susceptible of being further specified*" pursuant to a dialogue between a given designated gatekeeper and the Commission.

Article 5. Whereas a number of the obligations in Article 5 relate to practices that could arguably be *prima facie* deemed as unfair,⁶⁷ this provision also arguably captures some practices that are known to have positive, mixed, or ambiguous effects on the internal market. In our view, the principle of proportionality would require Article 5 not to cover practices that are not evidently unfair or harmful;⁶⁸ this is in line with the maxim that the law has the right to forbid only actions harmful to society.

This is the case, for example, of Article 5(b),⁶⁹ which seeks to establish an absolute ban for Most-Favoured-Nation ("MFN") clauses. There is case law, experience, and economic analysis showing that, depending on the circumstances, MFN clauses might have positive effects on

⁶⁴ DMA Proposal Explanatory Memorandum, p. 6.

⁶⁵ DMA Proposal Explanatory Memorandum, p. 8.

⁶⁶ See, in this regard the Joint Memorandum of the [Nordic Competition Authorities](#) on Digital platforms and the potential changes to competition law at the European level: ("*... it is doubtful that it would be beneficial to introduce a detailed list of obligations and prohibitions within an ex ante regulatory framework. This is because the same type of conduct can have both pro and anticompetitive effects depending on the market and/or the specific gatekeepers, and because digital markets are fast-moving*"); and the position paper of the [Spanish Competition Authority \(CNMC\)](#) for the public consultation on the Digital Services Act (DSA) and a New Competition Tool (NCT): ("*Ex ante regulation with a list of DON'TS (prohibited clauses) aimed at solving competition problems in so different and dynamic markets can be dangerous for the functioning of markets and economic efficiency. For example, sharing data is neither bad nor good per se. It requires a case-by-case analysis*").

⁶⁷ This might be the case, for example, of the obligations contained in Articles 5(d) ("*refrain from preventing or restricting business users from raising issues with any relevant public authority*"), or 5(f) ("*refrain from requiring business users or end users to subscribe to or register with any other core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3(2)(b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article*").

⁶⁸ See, for instance, [Case C-376/98 Germany v Parliament and Council](#), EU:C:2000:544, ¶¶99, 101-104, 111-113; and [Joined Cases C-293/12 and C-594/12 Digital Rights Ireland](#), EU:C:2014:238, ¶¶51-69. In the latter case the CJEU considered that the Directive in question, adopted also on the basis of Article 114 TFEU, went beyond what was necessary and did not respect the principle of proportionality.

⁶⁹ Article 5(b) in respect of its core platform service, a gatekeeper shall "*allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper*".

consumers, and might not be unfair or weaken market contestability.⁷⁰ The ambiguity of this type of practice has in fact been the subject of intense debate. The evidence available suggests that a blanket prohibition on MFNs absent any analysis of competition in the relevant markets, or any balancing of positive and negative effects, could prove counterproductive and disproportionate to achieve the aims sought.

The fact that some practices might require a complex assessment under the competition rules does not necessarily mean that they could not be the subject of blanket prohibitions in order to protect other public interests. In many cases, however, the public objectives of “fairness” and “contestability” and protection of the internal market pursued by the DMA Proposal would appear to overlap with the interests protected by competition law.⁷¹ This would arguably suggest that the same legal interest may be protected via more proportionate solutions.⁷² In any event, the EU Courts would require that the legislature “*at the very least be in a position to produce and set out very clearly the basic facts which had to be taken into account as the basis of the contested measures*”.⁷³ It would therefore be necessary for the DMA to limit absolute prohibitions to practices for which the EU legislature has sufficient evidence of their “*clearly unfair and harmful*” nature by reference to the public objectives pursued.⁷⁴ Various institutional stakeholders have observed that, at present, such evidence would appear to be lacking.⁷⁵

⁷⁰ Pablo Ibáñez Colomo, “[Vertical Restraints after Generics and Budapest Bank](#)” (2020) 17 Concurrences (“*the mainstream position, as research stands, pleads in favour of a case-by-case assessment of the impact of these clauses and thus against a blanket ban that would fail to consider, inter alia, the market power of the platform requiring the MFN clause and the features of the relevant market*”). See also the Special Adviser’s Report, [Competition policy for the digital era](#) (2019), p. 5 (“*These clauses may have both pro- and anti-competitive consequences and their effects depend on the particular characteristics of the markets. A case-by-case analysis is therefore necessary*”), and the European Commission’s [Support studies for the evaluation of the VBER](#) (Brussels, May 2020).

⁷¹ It is indeed doubtful that the DMA Proposal’s objectives of ensuring “contestability” and “fairness” are different from interests protected by EU competition law. In recent speeches, Commission representatives in charge of competition policy have emphasized that “*keeping markets open and contestable*” is one of the main guiding principles/objectives for action in the EU competition policy field, and that “*fairness has always been a value underpinning EU competition law and its enforcement*”. See, for example, the Speeches of Johannes Laintenberger, then Director-General for Competition, of [15 September 2017](#) (“*Enforcing EU competition law: Principles, strategy and objectives*”) and [20 June 2018](#) (“*Fairness in EU competition law enforcement*”). In relation to the role of fairness in competition law, see also Alfonso Lamadrid de Pablo, “[Competition Law as Fairness](#)” (2017) 8 *Journal of European Competition Law and Practice* 147. The notion that the DMA Proposal does not pursue competition objectives has also been disputed by other commentators, including one of EVP Vestager’s Special Advisers: see Martin Schallbruch, Heike Schweitzer, Achim Wambach, “[Europa stützt die Datenmacht der Digitalkonzerne](#)” (*Frankfurter Allgemeine*, 21 January 2021), noting that “fairness” and “contestability” are also inherent in competition law, and that even if the DMA refers to a different legal interest, it should be understood as a concretization of the antitrust prohibition of abuse in its application to gatekeepers, or as a “further conceptualised” competition law to ensure contestability independent of abuse and competition on platforms and in digital ecosystems.

⁷² In our view, to the extent that the public objectives or the legal interests pursued by some of the obligations in the DMA may be predominantly the same as those of other areas of the law governing the same conduct (e.g. GDPR, in relation to Article 5(a)), blanket bans under the DMA would arguably not be proportionate when more targeted and nuanced remedies exist.

⁷³ [Case C-482/17 Czech Republic v Parliament and Council](#), EU:C:2019:1035, ¶81.

⁷⁴ See Recital 33 of the DMA Proposal.

⁷⁵ The Commission’s Regulatory Scrutiny Board has expressed reservations in relation to the Proposal, noting, among others, that “*it should present evidence of what determines persistent misuse of gatekeepers’ power vis-à-vis dependent business users and customers. It should more convincingly demonstrate for each of the selected core platform services that the identified weak contestability has negative effects in terms of higher mark-ups, lower quality of service, or reduced innovation*”; see [Regulatory Scrutiny Board Opinion](#) on the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) SEC(2020) 437. Similarly, in its position paper, the [Spanish Competition Authority \(CNMC\)](#), *supra* footnote 66, has stated that “[t]he need for intervention is taken for granted without delving into the alleged competition problems to be solved. [...] It is essential to further elaborate on the definition and specification of problems in digital markets or in other markets with characteristics that make them particularly prone to risks involved in digital markets, consider if traditional competition tools and existing *ex ante*

Article 6. Article 6 lists a set of obligations “*susceptible of being further specified*” pursuant to bilateral dialogues between designated gatekeepers and the Commission.

The recognition that these obligations might not be self-executing is positive and reflects a certain understanding of the complexity inherent in some of the practices that this provision targets. This recognition should arguably imply that none of the obligations currently listed in Article 6 could be moved to Article 5, as they lack the required degree of specificity.

At the same time, however, the DMA Proposal only envisages the possibility that these obligations *may* be further specified and, seemingly, only on an *ad hoc* and bilateral basis. The Proposal considers that the possibility to “*tailor*” these obligations may “*ensure their effectiveness and proportionality*”,⁷⁶ but it contains no indications as to the factors that would govern the Commission’s assessment and that would limit its discretion. As the Proposal stands, there would appear to be no clear limits to the margin of manoeuvre of the Commission as regards the interpretation of these obligations in any given case.

The open-ended contours of these obligations suggest that they would arguably not comply with the requirements flowing from the principle of legality.⁷⁷ The absence of consistent criteria governing the Commission’s decisions would also be liable to result in breaches of the principle of equal treatment.⁷⁸ Absent any limitations, moreover, many of the absolute obligations currently envisaged in Article 6 would also appear as disproportionate by reference to the aim of “*ensur[ing] the proper functioning of the internal market by promoting effective competition in digital markets and in particular a contestable and fair online platform environment*”.⁷⁹

The problem is compounded by the fact that the DMA Proposal would appear to place the burden of assessing compliance on gatekeepers, requiring them to show that their measures are “*effective in achieving the objective of the relevant obligation*” (Article 7(1)), without any reference to the principle of proportionality, which is central to the articulation of remedies in other areas of the law, including competition law.⁸⁰

To ensure proportionality, as the DMA Proposal itself acknowledges, “*the obligations should correspond to those practices that are considered unfair by taking into account the features of the digital sector and where experience gained, for example in the enforcement of the EU competition rules, shows that they have a particularly negative direct impact on the business users and end users*”.⁸¹

Indeed, the lessons learned in the enforcement of competition law are particularly relevant to the obligations in Article 6, given that many of them overlap with conduct that has been, or is currently, the subject of competition cases before the Commission or the EU Courts. Some commentators have in fact referred to the list of obligations as a “*catalogue derived from past*

regulation have been/are sufficient to address them, and specify in which situations intervention would be justified”.

⁷⁶ Recital 33 of the DMA Proposal: “*In addition, it is necessary to provide for the possibility of a regulatory dialogue with gatekeepers to tailor those obligations that are likely to require specific implementing measures in order to ensure their effectiveness and proportionality*”.

⁷⁷ See, for instance, [Case C-413/08 Lafarge v Commission](#), EU:C:2010346, ¶94.

⁷⁸ The principle of equal treatment is a general principle of EU Law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. This principle requires the Commission to apply the “*same criteria*” to, for instance, undertakings involved in a cartel when imposing the corresponding fines; see [Joined Cases C-628/10 P and C-14/11 Alliance One International and Standard Commercial Tobacco v Commission](#), EU:C:2012:479, ¶57; and [Opinion of AG Kokott in Case C-101/15 Pilkington Group and Others v Commission](#), EU:C:2016:258, ¶94.

⁷⁹ DMA Proposal Explanatory Memorandum, p. 9 and Legislative Financial Statement, p. 58. In this regard, see also Recitals 10, 12, 27 or 79 of the DMA Proposal.

⁸⁰ [Speech by Alexander Italianer: Legal certainty, proportionality, effectiveness: the Commission’s practice on remedies](#) (Charles River Associates Annual Conference, 5 December 2012). See also [Case T-395/94 Atlantic Container Line and Others v Commission](#), EU:T:2002.:49, ¶¶410-416.

⁸¹ Recital 33 of the DMA Proposal.

and current antitrust cases involving the usual set of big tech platforms”.⁸² Indeed, in practice, the consequence of the proposed DMA would be to reverse the burden of proof and free the Commission from the obligation of establishing anticompetitive effects, as suggested in some of the expert reports produced for the Commission.⁸³

In our view, however, any difficulties that the Commission might have establishing effects in these cases arguably stems not from any unreasonable standards, but rather from the complexity and ambiguity inherent to these practices. It is important to understand that the criteria developed by the EU Courts in their interpretation of the vague prohibitions in Articles 101 and 102 TFEU are not capricious, but ultimately seek to limit the prohibition to practices for which there is sufficient evidence of harmful effects in accordance with general principles of law.

If the experience under competition law shows anything is that the impact of most of these practices (including, for example, self-preferencing (Article 6(d)), or any conduct aimed at optimising externalities in a multi-sided setting) cannot be properly understood, less sanctioned, absent a case-by-case analysis.⁸⁴ This is why, on the basis of the same experience that the DMA Proposal invokes, several EU competition enforcers, among many other stakeholders, have observed that absolute-prohibitions and blacklists would be inappropriate and disproportionate.⁸⁵ Importantly, moreover, and as the Commission’s own Regulatory Scrutiny Board has observed, the DMA Proposal relies on the experience provided by cases that, in some cases, are not yet final, because they are still ongoing or that are pending before the EU Courts; the evidential value of ongoing cases may not be the same as that of established case law.⁸⁶

To put it graphically, the DMA Proposal’s approach to proportionality (absolute prohibition coupled with the possibility of the Commission tailoring the obligations on a case-by-case basis) is reminiscent of the proportionality approach taken by Arnaud Amalric when asked how to distinguish the Cathars from the Catholics in battle: *Caedite eos. Novit enim Dominus qui sunt eius* (i.e. “[Kill them all and let God sort them out](#)”).

The approach followed in Articles 5 and 6 of the DMA Proposal would impinge on platforms’ fundamental right to conduct their business and their right to property.⁸⁷ Economic literature shows that the role of platforms is precisely to set rules in order to balance different interests,⁸⁸ and that platforms thrive or fail depending on the choice of their architecture, balance of incentives, modularity, level of integration and openness.⁸⁹ The list of prohibited practices in

⁸² See Cristina Caffarra and Fiona Scott Morton, *supra* footnote 25.

⁸³ In this regard, see Javier Espinoza and Sam Fleming, “[Margrethe Vestager eyes toughening ‘burden of proof for Big Tech’](#)” *Financial Times* (Brussels, 30 October 2019); Alfonso Lamadrid de Pablo, “[Shortcuts and Courts in the Era of digitization](#)” (2019) CPI Antitrust Chronicle; Alfonso Lamadrid de Pablo, “[Meeting and Shifting- The Burden of Proof \(in Digital and Beyond\)](#)” (*Chillin’Competition*, 31 October 2019).

⁸⁴ In relation to self-preferencing, see e.g. [Streetmap v Google](#) (2016) EWHC 253 (Ch) and District Court of Hamburg, Ref 408 HKO 36/13, *Verband der Wetterdienstleister v Google*, Order of 4 April 2013. In relation to other competitive strategies in multi-sided settings, see [Case C-228/18 Gazdasági Versenyhivatal v Budapest Bank and Others](#), EU:C:2020:265.

⁸⁵ See *supra* footnote 66.

⁸⁶ The European Commission’s own Regulatory Scrutiny Board has observed that: “(7) *The report should better explain the limitations of the methodology used. When presenting evidence the report should differentiate more clearly between cases which are still being investigated or pending and the established case law*”; see [Regulatory Scrutiny Board Opinion](#) *supra* footnote 75.

⁸⁷ See *supra* footnotes 53 and 54.

⁸⁸ Jean-Charles Rochet and Jean Tirole, “[Platform competition in two-sided markets](#)” (2003) 1 *Journal of the European Economic Association* 990; David S. Evans and Richard Schmalensee, “[The industrial organization of markets with two-sided platforms](#)” (2005) National Bureau of Economic Research, Working Paper No. 11603; Marc Rysman, “[The economics of two-sided markets](#)” (2009) 23 *The Journal of Economic Perspectives* 125.

⁸⁹ European Commission, [Progress Report of Expert Group for the Observatory on the Online Platform Economy, Workstream on Differentiated Treatment](#), p. 12 (“*the starting point for our analysis is that platforms should be granted a certain degree of discretion in deciding how to design, so that some level of differentiation is to be regarded as inherent in their functioning- just like in any other sector of the economy*”). See also Eliana Garcés

the DMA Proposal would restrict their freedom to make such choices.⁹⁰ In the light of the principles set out in the case law, it would be necessary for the EU legislature to show that the impact that the new obligations may have on platforms' fundamental rights business model have been taken into consideration in making informed policy choices.⁹¹ The Impact Assessment recognizes that "*indirect (other than compliance costs) may be higher, as proposed measures are expected to have impact on gatekeepers' business models*" (sic), but considers that "*there are no indications that this would result in significantly higher fees and/or reduced quality for businesses and consumers*" because gatekeepers would still "*need to attract an important number of consumers*".⁹² The Impact Assessment does not clarify how the Commission has considered the impact that each obligation could have on the fundamental rights and incentives of gatekeepers, which could be of relevance in the case of eventual litigation.⁹³

Absolute prohibitions, in sum, would not appear to be proportionate means for ensuring the proper functioning of the internal market, particularly absent sufficient evidence of the harmful nature of the targeted practices. A more proportionate solution would be for the EU legislature to envisage some assessment on the merits, or a balancing of positive and negative effects on the internal market (which should balance effects on business users, final users, the platform operator and competition).

This balancing test could still greatly facilitate and accelerate enforcement because (i) it could take place on the basis of goals, criteria and legal interests wider than those governing EU competition law;⁹⁴ (ii) the Commission would not need to establish dominance; and (iii) the Commission would not need to meet the thresholds of effects set out by the EU Courts in their interpretation of Articles 101 and 102 TFEU. A balancing test could, in sum, still address the alleged shortcomings that the DMA Proposal sees in competition law.⁹⁵

More importantly, the introduction of any such balancing test, governed by clear and consistent criteria, could be sufficient to bring any new rules in line with the principles of proportionality, legality and equal treatment. It would be for the Commission to demonstrate that the potential or likely negative effects of a given practice on the internal market are likely to outweigh any potential or likely positive effects.⁹⁶ The Commission's decisions would be reviewable by the EU Courts.

Tolón, "[The Dynamics of Platform Business Value Creation](#)" (2017) CPI Antitrust Chronicle, and the literature cited therein.

⁹⁰ Some of the obligations set out in the DMA Proposal would in fact appear to challenge the very notion of vertical integration, which has been widely regarded as a source of potential economic benefits; see, for example, the Commission's [Guidelines on the assessment of non-horizontal mergers](#) (OJ C 265, 18.10.2008), ¶13.

⁹¹ [Case C-482/17 Czech Republic v Parliament and Council](#), EU:C:2019:1035, ¶79; see also [Case C-358/14 Poland v Parliament and Council](#), EU:C:2016:323, ¶¶97-98.

⁹² [Part 1](#) of the Impact Assessment, ¶302.

⁹³ See also Koen Lenaerts (President of the CJEU), "[The European Court of Justice and Process-oriented Review](#)" (2012) College of Europe, p. 7, noting how the CJEU "*now applies the principle of proportionality in a procedural fashion. Instead of second-guessing the merits of the substantive choices made by the EU legislator, the ECJ preferred to make sure that lawmakers had done their work properly: the EU legislator had to show before the ECJ that it had taken into consideration all the relevant interests at stake. In so doing, the ECJ stressed the importance of the preparatory study carried out by the Commission, in which the latter institution showed that it had examined different regulatory options and assessed their economic, social and environmental impact*".

⁹⁴ See DMA Proposal, Recital 10.

⁹⁵ DMA Proposal Explanatory Memorandum, p. 8: "*The Commission considered that Article 102 TFEU is not sufficient to deal with all the problems associated with gatekeepers, given that a gatekeeper may not necessarily be dominant, and its practices may not be captured by Article 102 TFEU if there is no demonstrable effect on competition within clearly defined relevant markets*". See also Recitals 5 and 10 of the DMA Proposal.

⁹⁶ See, Marc van der Woude, "[Judicial Control in Complex Economic Matters](#)" (2019) 10 Journal of European Competition Law and Practice 415, 418, "[W]here the contested conduct of the public authorities is repressive in nature, it is hard to conceive, at least in free democratic societies, that citizens and firms can be condemned on the basis of estimates, approximations or guesses, even if they are informed ones. Uncertainty must then be

4. Possible Changes to Ensure that the DMA Complies with the Conditions for Recourse to Article 114 TFEU

The principles and analysis set out in Sections 2 and 3 above suggest that, in its current form, the DMA Proposal might be contrary to EU primary law. Indeed, while the EU legislature is not bound to operate from the constraints that exist under competition law, it is bound to act within the boundaries set by EU constitutional rules and general principles of EU law. In our view, however, it would be possible for the EU legislature to address most of these flaws without renouncing its goal of introducing a system of *ex ante* regulation.

The most evident alternative to mitigate legal risks would be to adopt the DMA under Article 352 TFEU.⁹⁷ This legal basis would imply acting on the basis of unanimity among Member States. There is no doubt that, acting under this legal basis, the EU legislature could justify the creation of new powers, including the creation of an *ex novo*, autonomous and far-reaching EU regulatory instrument. It is nonetheless unlikely that the Commission and the European Parliament might be inclined to follow this alternative path. This is, first, because it is unclear that all Member States would be willing to support this initiative and, second, because under Article 352 TFEU the Parliament would lose its role as co-legislator.

A more realistic scenario is one where the Parliament and the Council will need to make sure that the DMA Proposal is amended in such a way as to enable its adoption on the basis of Article 114 TFEU. For this exercise to be viable, the EU legislature would need to adopt a revised version of the DMA in line with the principles set out in Sections 2 and 3 above. This would necessarily require ensuring (i) that the DMA's content and main object revolve around the harmonisation of national laws; (ii) that the DMA's scope and list of obligations comply with the principle of proportionality and do not interfere with the fundamental rights of the undertakings beyond what is necessary; (iii) that the DMA adequately circumscribes the powers of the Commission to reduce its margin of discretion. Failure to comply with these requirements could risk leading to the DMA's annulment.⁹⁸

In what follows, we identify ten changes that, in our view, would be necessary for the EU legislature to have a chance of acting under Article 114 TFEU. The changes below are mindful of the EU legislature's objectives, but seek to strike a balance between the desire for effectiveness and fundamental legal requirements.

i. Designation of gatekeepers subject to the Regulation⁹⁹

First, the DMA Proposal would need to circumscribe its scope mainly on the basis of objective criteria, known in advance by all stakeholders in order to ensure predictability and minimize the scope of administrative discretion. In line with the DMA's objectives, these would not need to be suggestive of a "dominant position" and could apply a stricter standard/lower threshold.

For instance, the DMA could rely on objective criteria suggestive of market power below the level of dominance such as, for instance, a 35-40% market share of a given service/traffic received by a category of undertakings/users/devices. These objective criteria would be relevant to calibrate the service's "*significant impact on the market*" and its role as an "*important gateway for business users*

balanced against the requirements of the presumption of innocence [...]. [T]his balance is struck by relying on legal concepts, such as the burden of proof".

⁹⁷ In the case of the DMA, this conclusion is further reinforced by [Protocol 27 to the EU Treaty on the internal market and competition](#), which provides that "to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union".

⁹⁸ The potential annulment of only some of the provisions in the DMA could result in the annulment of the legal act as a whole, if the removal of these provisions would have the effect of altering its substance; see [Case C-244/03 France v Parliament and Council](#), EU:C:2005:299, ¶¶15, 20.

⁹⁹ For an analysis of the reasons why changes in this regard are necessary, see *supra* Section 3.2.i.

to reach end users”, which are the subjective criteria currently featuring in Article 3(1) of the DMA Proposal.

Second, the Proposal could also rely on subjective criteria to the extent that these may have already been interpreted by the EU Courts and could therefore offer the necessary predictability and guarantees. These criteria could be relevant (i) for the Commission to confirm whether the objective criteria above are valid indicators of the market power of a given service vis-à-vis business users; and (ii) for undertakings to refute the notion that they hold market power vis-à-vis their business users.

Given the objectives pursued, the Proposal could seek to rely also on the notions of “lock-in” (currently featured among other relevant factors in Article 3(6)) and barriers to entry and switching, which have been the subject of abundant case law in the field of competition law and which are the key to the notion of contestability. While the existence of such barriers could be sufficient to confirm the relevance of market shares, their absence would be suggestive of contestability or lack of dependency. These criteria would be in line with the DMA Proposal’s intention to consider whether the company enjoys or will foreseeably enjoy “*an entrenched and durable position*”.

Third, the Commission’s designation Decisions should be based on a procedural system that is capable of ensuring effective judicial review, where the onus for designating gatekeepers would be on the Commission.

For example, at a first stage, companies who meet the thresholds would be required to notify their market shares on any given “*core platform service*” to the Commission, substantiating the reasons why they believe they should not be designated as gatekeepers. At a second stage, the Commission would adopt designation decisions and/or non-designation decisions, on its assessment of barriers to entry and switching. Both designation and non-designation decisions would be subject to appeal before the EU Courts, thus reducing the scope for discretion or unequal treatment.

Fourth, undertakings or services designated as gatekeepers under the DMA could not be subject to additional individualized, non-horizontal obligations under national laws that predominantly pursue the same objectives as the DMA (including national competition rules and other national rules targeting unilateral conduct).

The EU legislature could conceivably envisage a formal role for national competition authorities as part of the designation process. For example, and with a view to ensuring harmonization, the DMA could contemplate the possibility to designate gatekeepers that do not meet the EU-wide objective criteria as gatekeepers in relation to one or several Member States. Designation decisions at the national level could be governed by the same criteria set out in the DMA.

ii. Lists of self-executing obligations (Article 5)¹⁰⁰

Fifth, the list of self-executing obligations should be reduced and strictly limited to conduct whose nature is clearly and unambiguously unfair and harmful.

The DMA should, for example, not establish an absolute prohibition of MFN clauses (as currently provided in Article 5(b)). Experience and economic analysis shows that these clauses can have positive effects on the internal market. In addition, any future revision of this list should not include practices that are currently not regarded as sufficiently clear and self-executing.

Sixth, the list of obligations provided for in Article 5 should be exhaustive. Member States should not be able to impose any other absolute prohibitions (i.e. not requiring a case-by-case analysis) upon designated gatekeepers under any area of national law that pursues predominantly the same goals as the DMA, including national competition rules and other national rules targeting unilateral conduct.

¹⁰⁰ For an analysis of the reasons why changes in this regard are necessary, see *supra* Section 3.2.ii.

This formulation would lead to a real harmonizing effect, mirroring the harmonization mechanism in Directive 2005/29 on unfair commercial practices in relation to the exhaustive list of prohibitions applicable in all circumstances as set out in Annex I.¹⁰¹ The reference to other areas of national law pursuing predominantly the same objective relies on the same terminology used, for example, in the ECN+ Directive.¹⁰² This language would avoid the margin for regulatory fragmentation currently allowed by Article 1(5) and 1(6) of the DMA Proposal.

Seventh, the list of self-executing obligations should arguably not include practices that are already governed by specific and more targeted regulation under other rules of EU Law pursuing predominantly the same objectives as the DMA (e.g. Platform-to-Business Regulation or GDPR).

For instance, to the extent that obligations concerning data are already governed by the GDPR, the introduction of different parallel rules on the permissible extent of data processing in Article 5(a) is liable to lead to duplication, uncertainty, and contradictory outcomes, rather than harmonising existing rules.

iii. List of obligations requiring an individual analysis (Article 6)¹⁰³

Eighth, the obligations contained in Article 6 of the DMA Proposal should not be regarded as self-executing and should not automatically give rise to liability under the DMA. These obligations would relate to conduct for which there is no evidence of a clearly and unequivocally harmful nature and where effects might be context-dependent. The Commission could target conduct covered by this provision pursuant to an individualized weighing of their positive and negative effects on the internal market on the basis of pre-defined criteria equally applicable to all designated undertakings. The Commission's decisions would be reviewable by the EU Courts.

The balancing of positive and negative effects could be more flexible than the analysis carried out under competition law and could conceivably seek to protect other additional interests related to the protection of business users, final users and the internal market. From a proportionality standpoint, the introduction of a such balancing test, governed by clear and consistent criteria, would be preferable to absolute and self-executing prohibitions.

Ninth, Member States would be required not to prohibit any of the practices in Article 6 absent an individualized analysis weighing their positive and negative effects on the basis of the same pre-defined criteria governing the Commission's assessment.

The requirement for Member States not to establish absolute prohibitions of these practices and to assess them pursuant to pre-defined criteria would mirror the harmonization mechanism in Article 5(2) of Directive 2005/29 on unfair commercial practices, fixing the criteria that Member States should establish to assess whether a specific practice is or not unfair.

Tenth, the list of obligations provided for in Article 6 should be exhaustive. Member States should not be able to impose any other individualized (i.e. non horizontally applicable) obligations upon designated gatekeepers under any area of national law that pursues predominantly the same goals as the DMA, including national competition rules and other national rules targeting unilateral conduct.

¹⁰¹ See Recital 17 and Article 5(5) of [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 (OJ L 149, 11.6.2005). As Recital 17 explains, the practices contained in Annex I "*are the only commercial practices which can be deemed to be unfair without a case-by-case assessment [...]*".

¹⁰² [Directive \(EU\) 2019/1](#) of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ L 11, 14.1.2019).

¹⁰³ For an analysis of the reasons why changes in this regard are necessary, see *supra* Section 3.2.ii.

5. Conclusions

The Commission's DMA Proposal seeks to create a new regulatory instrument including new *ex ante* rules applicable to "gatekeepers" and a new set of far-reaching powers. Like any EU legislative initiative, the DMA must be grounded on a legal basis provided for in the EU Treaties. The choice of the legal basis determines both the relevant legislative procedure and the scope for EU action. Recourse to an inappropriate legal basis has in the past led to the annulment of various pieces of EU legislation.

The current DMA Proposal is based on Article 114 TFEU. This legal basis empowers the EU legislature to adopt measures that are designed to approximate national rules and to prevent regulatory fragmentation in the internal market, provided that these measures are proportionate to the objectives pursued.

An analysis of the DMA Proposal in light of the relevant EU case law suggests that the current text could be incompatible with primary EU Law.

First, the DMA Proposal does not appear to be designed to prevent regulatory fragmentation. The current text of the Proposal, and in particular Articles 1(5) and 1(6), would enable Member States to enact and maintain in force national rules overlapping with, or going beyond, EU rules. Some Member States have in fact invoked the DMA as a reason to adopt parallel "supplementary" national rules. Absent a real harmonization effect, the DMA Proposal could result in increased regulatory fragmentation, and even give rise to *ne bis in idem* concerns. The EU Courts have made clear, in this regard, that Article 114 TFEU is not a valid legal basis for measures which do not approximate or harmonize national rules because they aim at introducing new legal instruments and/or leave unchanged the different national laws in existence.

Perhaps the best illustration that the DMA Proposal falls short of its declared objective of preventing regulatory fragmentation is the fact that none of the existing or likely sources of regulatory fragmentation identified in the Commission's Impact Assessment to justify the adoption of the DMA would actually be affected by the DMA. The recent reform to the German Competition Act exemplifies how Member States could adopt new obligations simply by defining a scope of application that is not limited to "gatekeepers" as defined in the DMA and/or by presenting those obligations as an extension of their national competition rules.

Second, the definition of the DMA's scope in Article 3 and some of the obligations and prohibitions listed in Articles 5 and 6 would appear to risk breaching the principle of proportionality, and impinge on the fundamental rights of the companies subject to its obligations. To ensure the proportionality of the DMA's scope of application and content, the EU legislature would be required to set adequate limits on the Commission's discretion, and verify that, in the light of the available evidence, the limitations on gatekeepers' freedom to conduct their business and right to property do not go beyond what is necessary to ensure the proper functioning of the internal market.

For these reasons, this paper submits that the DMA Proposal would require important adaptations in order to validly rely on Article 114 TFEU, and avoid the unanimity requirement applicable under Article 352 TFEU. At the very least, the EU legislature would need to ensure (i) that the DMA's content and main object revolve around the harmonisation of national laws; (ii) that the DMA's scope and list of obligations comply with the principle of proportionality and do not interfere with the fundamental rights of the companies affected beyond what is necessary to ensure the proper functioning of the internal market; (iii) that the DMA adequately circumscribes the powers of the Commission to reduce its margin of discretion. Absent these changes, the DMA would, in our view, be vulnerable to an eventual legal challenge before the EU Courts.