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Ex-Ante Regulation and Competition in Digital Markets – Note by BIAC

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More documents related to this discussion can be found at https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm

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BIAC

1. Introduction

1. *Business at OECD* (BIAC) notes that digital platforms have generated significant consumer benefits and successfully contributed to the digital transformation of societies. BIAC also recognises the concerns associated with significant market power that digital platforms may obtain, as well as the perception of some commentators that competition law enforcement is in this context less effective or too slow in addressing these concerns.[1]

2. BIAC also acknowledges that there is a global debate surrounding ex ante regulation of digital platforms and that few laws have yet been adopted. BIAC appreciates the desire to ensure to foster fair and contestable markets yielding a high level of innovation, quality of service, user choice as well as competitive and fair pricing in the digital economy.

3. While BIAC appreciates that regulation might, in limited circumstances, be appropriate to address defined concerns, it is also concerned that ex ante regulation, if not properly calibrated, may give rise to significant static and dynamic inefficiencies. Moreover, the diverging nature of ex ante regulations proposed in a number of jurisdictions indicates that the debate around ex ante regulation is not settled and has not resulted in globally aligned views on if and how best to regulate digital platforms.

4. Among the many important issues associated with ex ante (market) regulation, is the relationship between regulation and competition enforcement in digital markets. This is particularly relevant as ex ante regulation tends to implicate a wider set of policy goals—including fairness, contestability of markets, data privacy, or consumer protection—than the predominant consumer welfare standard under relevant competition laws.

5. BIAC therefore welcomes the debate on this important topic and encourages the OECD member states to work towards ensuring that the benefits of effects-based competition policy is not undermined by the pursuit of ex ante regulation and to develop best practices for ex ante regulation of digital platforms.

6. This paper builds on previous contributions of BIAC on related subjects, including the June 2021 WP 2 Roundtable on Competition Enforcement and Regulatory Alternatives calling for clarity and predictability of ex ante regulation including the very different roles of regulators, on the one hand, and competition enforcers, on the other, when it comes to addressing concerns associated with digital platforms.[2]

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[1] In 2019, before many ex ante initiatives were proposed, the G7 Competition Authorities noted, "Competition law is flexible – it can and should adapt to the challenges posed by the digital economy without wholesale changes to its guiding principles and goals. The challenges of digital transformation require competition authorities to ensure that their specific tools, resources and skills for competition law enforcement are up-to-date." Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy" 2 (June 5, 2019), https://www.autoritedelaconcurrence.fr/sites/default/files/2019-07/g7_common_understanding.pdf [hereinafter G7].

[2] *See* OECD, Competition Enforcement and Regulatory Alternatives – Note by BIAC, DAF/COMP/WP2/WD(2021)18 (May 31, 2021), https://one.oecd.org/document/DAF/COMP/WP2/WD(2021)18/en/pdf.

2. General Observations Regarding Ex Ante Rules Versus Ex Post Enforcement

7. As a starting point, BIAC urges a thorough assessment as to whether ex ante regulation would be preferable to an ex post enforcement regime. The basis for economic regulation rests on the need to correct a structural market failure in a particular industry.[3] Existing market imperfections should be compared to market outcomes in the presence of proposed new regulation (taking into account error costs and administrability), rather than to the theoretical ideal of perfect or perhaps "better" competition. In this respect, BIAC notes that, at times, ex ante regulations initiatives in digital markets appear to focus less on industries than on particular platforms.[4]

8. Moreover, even if a market failure is identified through careful study of evidence, attention needs to be given as to whether a proposed regulatory solution sufficiently and proportionally corrects it and has an overall positive effect as determined by a rigorous economic analysis, including consideration of potential, unintended consequences.[5] Indeed, successful identification of a market failure is a necessary but not a sufficient condition to justify introducing regulation on economic grounds. Once a potential market failure has been identified, the proposed regulatory solution must itself survive a rigorous economic analysis, one that factors in the potential for imperfect regulation and unintended consequences as well as the effect of alternative solutions based on private ordering.[6]

9. An established motive for regulatory intervention is the lack of access to necessary assets that are impossible or uneconomical to replicate. Regulating access to such assets in order to encourage competition is a familiar concept but also one that has not proved simple to implement even if a framework exists for the specific instances at issue. The broad set of interventions currently being considered to instil competition or redistribute rights and obligations in digital markets is unprecedented and in many respects takes economic regulation in support of competition to uncharted territory.

10. Ex post enforcement, which benefits from an information advantage stemming from the fact that the assessment of behaviour takes place once its effects can be observed and assessed, may be favoured when regulators do not possess full information ex ante and firms are heterogenous.[7] Ex ante regulation may be favoured where there is an absence of

[3] *See* Joshua D. Wright, Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC, Address Before the Big Ideas about Information Lecture 9 (Apr. 2, 2015), https://www.ftc.gov/system/files/documents/public_statements/634631/150402clemson.pdf.

[4] *See* Frederic Jenny, *Competition Law and Digital Ecosystems: Learning To Walk Before We Run*, INDUS. & CORP. CHANGE, 2021, dtab047, https://doi.org/10.1093/icc/dtab047 ("First, the [EU DMA] proposal does not seem to aim at solving the competition issues raised by gatekeepers in the digital sector in general but limits itself to the sub-set of these problems raised by a small number of very large platforms without providing a clear rationale for this choice. Thus, it is difficult to avoid the impression that this proposal is driven more by the political desire to act against these large platforms than by the desire to promote competition and innovation in the digital sector in general.").

[5] *Id*. *See also* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1 (1969).

[6] *See* Koren Wong-Ervin, Anne Layne-Farrar & James Moore, *The Risks of Radicalism: Exacerbating Harms from Type I Errors*, COMPETITION POL'Y INT'L (April 9, 2020), https://www.competitionpolicyinternational.com/the-risks-of-radicalism-exacerbating-harms-from-type-i-errors/.

[7] Bruce H. Kobayashi & Joshua D. Wright, *Antitrust and Ex-Ante Sector Regulation, in* GAI REPORT ON THE DIGITAL ECONOMY 25, https://gaidigitalreport.com/2020/10/04/ex-ante-regulation-versus-ex-post-antitrust-enforcement/.

effective ex post remedies[8] or evidence that ex post instruments are incapable of sufficiently mitigating anticompetitive market failures, and there is a valid instrument to address anticompetitive actions that affect an entire market or sector in a well understood and predictable way.

11. One important cost associated with poorly thought through ex ante rules is that they may harm competition and consumers by chilling procompetitive or innovative conduct. Because they are generally more inflexible and less attuned to the specifics of a situation, ex ante rules carry a greater likelihood of error costs and, for this reason, may be associated with higher risks to innovation than an ex post enforcement framework. Creating ex ante rules in an attempt to prevent certain conduct may therefore risk sacrificing the efficiencies and other benefits of that conduct by imposing rigid rules that lack the flexibility of existing methods for competition assessments.

12. To date the main ex ante regulation initiatives being proposed for digital markets involve reforms to competition laws.[9] These differ, e.g., from the Japanese Act on Improving Transparency and Fairness of Digital Platforms, which entered into force on February 17, 2021, or the draft European Union Digital Markets Act (DMA) which are not competition law instruments in the strict sense.

13. In addition, BIAC notes the risk that increased regulation might advantage larger players at the expense of smaller competitors or potential new entrants if regulation is imprecisely designed. For example, increased costs and complexity in managing online platforms will tend to increase entry barriers and entrench incumbents particularly if smaller competitors and potential rivals face the very same or similar costs induced by regulation.[10] A competition and innovation risk exists even when only targeting larger players given the frequent reliance of entrants and start-ups on the efficacy of large platforms' tools and technologies in their initial stages.

14. Regulation is often believed inappropriate unless and until competitive harm has been identified that exceeds the benefits of the conduct being regulated. This trade-off is particularly complex as the possibility of ex-ante regulation leads to an uncertain regulatory environment and risks being over-inclusive, while at least some of the likely targeted

[8] *Id.*

[9] A non-exhaustive list of recent ex ante initiatives in digital markets, beyond those mentioned above includes:

in March 2021, the Italian Competition Authority, submitted competition law proposals to the Italian government including powers to designate undertakings having "primary importance for competition in multiple markets" to prevent certain conduct is particularly detrimental to competition;

in July 2021, the UK Government consulted on the creation of a specific regime to address the impact of companies designated as having "significant market status;"

in August 2021, a draft law was proposed by the Hellenic Competition Commission that includes a special rule on digital ecosystems prohibiting the "abuse of power in an ecosystem of structural importance for competition;"

in August 2021, the Australian Competition and Consumer Commission's Final report on its digital advertising services inquiry suggested creating sector-specific ex ante rules to address entrenchment of market power in that sector;

in October 2021, the American Innovation and Choice Online Act proposal would grant the U.S. Department of Justice and Federal Trade Commission the ability to classify a digital service as a "covered platform" enabling them to regulate certain digital services; and

in October 2021, China's State Administration for Market Regulation issued draft Guidelines seeking to define "super large platforms" and special rules that would apply to them.

[10] In addition, it is sometimes argued that large incumbents can absorb regulatory compliance costs more effectively than new entrants. Regulation that protects incumbents will tend to decrease competition.

conduct—for example, the extension of the activities of undertakings to adjacent markets—may also generate efficiencies as well as creating competitive pressure on incumbents.

15. On the other hand, some commentators believe that competition law has proven to be insufficient in curing persistent market failures associated with large and dominant online platforms in the past, and that ex ante rules may—if properly drafted and enforced—have the potential to keep markets competitive. In addition to ex ante proposals, many are updating various aspects of their competition regimes in light of the digital age, and competition scrutiny and enforcement are arguably not the same as they were a decade ago.

3. Observations on Regulatory Design of Ex Ante Rules

16. Once an informed decision has been made to regulate digital markets on an ex ante basis—that is, all of the conditions discussed above are satisfied—the question is which type of regulatory design is preferable. This raises the question of whether it is preferable to favour detailed rules over flexible standards.

17. None of the historically regulated sectors provide ideal models for the digital world, largely because these sectors were born from state owned entities with quasi-monopolies and public service functions. Digital markets tend to have emerged through private endeavour, are highly dynamic and characterized by either "competition for the market" or differentiating positioning and innovation.[11] While existing sector-specific regulation cannot simply be transposed to platforms markets, some elements of the existing regimes, such as telecom regulation calling inter alia for interconnection and interoperability of services, can provide crucial impetus for debate.[12] The main regulatory models are briefly discussed below.

18. Prescriptive rules are one option. When clear and objective, they can increase legal certainty and predictability, they ease compliance by regulators, they reduce the need to seek judicial review, they reduce the risk of diverging interpretation and enforcement,[13] and they avoid lengthy proceedings, which can matter when there are risks of irreparable damage. However, proscriptive rules should only apply when they are based on a clear course of experience, especially where presumptions are concerned. Presumptions should be avoided if these can catch pro-competitive practices, especially those that are legally recognised industry norms. Where clear, their impact on stakeholders may also be more easily measured than the impact of standards during a regulatory impact assessment phase.

19. Proscriptive rules should in particular not be applied where there is still debate about the meaning or scope of terms or where there is legal uncertainty surrounding the provisions.[14] This is particularly vexing in the current ex ante debate where relatively new

[11] Carmelo Cennamo, *Competing in Digital Markets: A Platform-Based Perspective*, 35 ACAD. MGMT. PERSP. 265-291 (2021).

[12] For a discussion on the applicability of current regulatory regimes to digital platforms, *see* Tobias Kretschmer & Sven Werner, *Platform Regulation: What Policymakers Can and Cannot Learn From Utility Industries*, VOXEU/CEPR (Aug. 28, 2021), https://voxeu.org/article/platform-regulation-lessons-utility-industries.

[13] On the comparative advantages of rules and standards, *see* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557-629 (1992).

[14] *See* Fabiana Di Porto, Tatjana Grote, Gabriele Volpi & Riccardo Invernizzi, *"I See Something You Don't See": A Computational Analysis of The Digital Services Act And The Digital Markets Act*, 1 STANFORD COMPUTATIONAL ANTITRUST 84 (2021).

theories of harm, such as self-preferencing, are still being disputed before the courts, as well as in the policy debate.[15]

20. On the other hand, flexible standards have the advantage of allowing for specification in light of the circumstances of the case or business model at hand and therefore may reduce under or over enforcement risks as they are more flexible and therefore more easily adaptable to market evolutions as well as enforcement experience. Standards, being outcome-focused by nature, may be more suitable in new areas where limited evidence is available[16] or the environment is fast changing.

21. Ex ante regimes may also be designed on the continuum between rules and standards and may thus incorporate both elements. This approach has been adopted in the EU's draft DMA[17] that aims to combine self-executing obligations (Article 5) with obligations that are susceptible of further specification by the Commission (Article 6). The Article 5 rules are per se prohibitions applicable to all designated gatekeepers, no matter what their business model or service. No objective justification is permitted. The Article 6 obligations susceptible of further specification imply an additional, albeit very circumscribed, regulatory dialogue. However, a comparison between the DMA, Section 19a of the German Competition Act and the United Kingdom's CMA Digital Markets initiative shows that regulatory design choices diverge on key issues, notably as relates how tailored rules should be to particular concerns, the role of objective justifications and remedies.

4. A Menu of Best Practices for Designing Ex Ante Regulation

22. This section identifies and discusses a number of considerations that governments should take into account when designing ex ante regulation for digital platforms.

4.1. Adequate Processes for Developing the Rules and Keeping Them Relevant

23. *Developing the Rules*: Processes used for designing particular regulation have a strong impact on the resulting regulation,[18] and it is therefore important that careful thought is given to the most appropriate method for designing such rules.

24. The most appropriate method will necessarily depend on local institutional considerations and requirements, but the development of regulation should in any event—in line with best practice—involve a clear problem definition and a careful risk assessment of the proposed legislation against a baseline "no action" scenario (in addition to other

[15] *See* Christine Ryu-Naya, Jane Antonio & Santos Leyva Rubio, Competition and Regulation: Friends or Foes?, COMPETITION POL'Y INT'L (Nov. 9, 2021), https://www.competitionpolicyinternational.com/competition-and-regulation-friends-or-foes/.

[16] OECD, Recommendation of the Council for Agile Regulatory Governance to Harness Innovation, OECD/LEGAL/0464 (Oct. 5, 2021), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0464.

[17] 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 (Dec. 15, 2020), https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:842:FIN.

[18] OECD, *Regulatory Impact Assessment*, OECD Best Practice Principles for Regulatory Policy (2020), https://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm.

scenarios), be transparent, and involve impacted stakeholders. There needs to be a clear, demonstrable, added value in introducing such regulation.

25. BIAC believes it is preferable to have the legislature involved in such a process, rather than having the process be purely technical and administrative in nature, given the significant public policy implications and the large impact that the rules have on affected subjects. However, if the regulation is based on competition law theories, it is important that the legal and economic grounding of competition law are not undermined by political priorities that may weigh more heavily on the minds of politicians. In contrast, it may not make sense to involve a legislator in the minutiae of such rules. For instance, a legislature could set the high-level principles, while leaving room for the relevant authority to tailor obligations, rather than the legislature being actually involved in the actual setting of the obligations themselves.[19]

26. Legislators and regulators should in any event not feel pressured to introduce such rules merely because they feel compelled to by political pressure,[20] and should actually believe that these rules add value, are necessary, and will be effective. Indeed, if regulatory regimes result from political pressure rather than balanced public policy choices, the credibility of the competition system is put at risk.

27. *Keeping the Rules Relevant*: Importantly, the regulation should be adaptable and its adequacy continuously reassessed. Disruption can occur very rapidly in the digital sector, and a set of specific obligations imposed on subjects of the regulation might make sense at the present time, but become inapplicable or redundant through time, due to technological advances. New obligations may also need to be added through time. Careful thought should also be given to the most appropriate processes for doing so, just as for the actual development of the rules. Given the importance that the imposition or withdrawal of new obligations may have, it may also be necessary to involve the legislature when updating such rules, at least when such revisions have a large impact on markets. The EU's DMA contains a process for updating obligations.[21] However, this appears to give the EU Commission the possibility to significantly expand the scope of the DMA at its own discretion and possibly in a politicised context. The fact that the Commission may introduce new obligations and (quasi) per se prohibitions by delegated acts for all gatekeepers only because it perceives an "imbalance of rights and obligations on business users" combined with a "disproportionate advantage" of the gatekeeper (Article 10 DMA) provides expansive powers and, in any event, should be strongly substantiated. It should also be noted more generally that a delegated act cannot change essential elements of an existing law (Article 290 (1) TFEU).

4.2. Ensuring the Rules are Fit for Purpose

28. *Strong Empirical Underpinnings:* Ex ante regulation should have strong empirical underpinnings and take into account the latest economic thinking in relation to digital platforms, so as to not be flawed by design.

29. Ex ante regulation should notably consider how the drivers of innovation in the specific digital markets at issue differ from the ones in non-digital markets (innovation and

[19] *See* Frederic Jenny, Competition Law Enforcement and Regulation for Digital Platforms and Ecosystems: Understanding the Issues, Facing the Challenges and Moving Forward 32 (June 1, 2021), https://ssrn.com/abstract=3857507 (comparing the EU and UK approaches).

[20] *Id.*

[21] DMA art. 10.

differentiation rather than low price and cost efficiency), the dynamics of competition (which may take place between ecosystems rather than between pipeline firms), and recognize that specific features of businesses can have an impact on whether certain practices have anti- or pro-competitive impacts.[22]

30. In other words, merely applying analysis grids and solutions that have only been effective in non-digital markets or applying solutions that have not been properly researched yet, will be unlikely to yield favourable results.

31. BIAC is sceptical of the notion that business model choices in digital markets, as such, should give rise to particular presumptions of harm, and supports the idea that market dynamics and ecosystems need to be understood properly in order to assess efficiencies and harm. Rules should be issued for conduct and situations that have been properly investigated and for which remedies have been tested. When insufficient investigation has taken place or for issues that are likely to be highly specific, a principles-based approach is desirable.

32. *Clearly Defined Scope:* Most of the ex ante rules that are currently being discussed are principally targeted, albeit in slightly different ways, at the digital sector. Nevertheless, some ex ante rules have a potentially wider scope of application. For instance, the German 19a rules—which apply to undertakings active to a significant extent on multi-sided markets and networks—could also apply in theory to more traditional markets such as shopping centres and advertising-financed media (newspapers, radio, or television).[23] It is important that ex ante rules have a clearly defined scope. Indeed, the G7 Competition Authorities Common Understanding on "Competition and the Digital Economy" noted the danger in rules specific to "digital" markets given that often markets cannot be so simply isolated: "Governments should assess whether policies or regulations unnecessarily restrict competition in digital markets or between digital and non-digital players, and should consider procompetitive alternatives where possible."[24]

33. If a choice is made to limit the scope of the rules to the digital sector, it is important to consider that the latter is ever-expanding and that the term might soon lose any meaning. Accordingly, it is necessary to clearly define to which activities and markets the rules apply , as the boundaries between "digital" and "non-digital" sectors are increasingly blurred.

34. If this sectoral approach is adopted, it may be necessary to ensure that regulatory overlaps are avoided, specifically with respect to sectors that are already heavily regulated, given that specific rules apply to these sectors already that can be updated.

35. Another possible method, which might provide more legal certainty to businesses, is—instead of designing sector-specific rules—to list the specific (digital) services to which the rules apply, as is the case under the DMA's proposed "core platform services" approach.[25] A potential downside of this approach is the risk of arbitrariness when identifying the specific types of services to which the rules will apply, and the difficulty in

[22] Jenny, *supra* note 19. Where multi-sided markets are concerned, there is also the question of balancing pro-competitive effects on one side of the market (e.g. for consumers) versus potential foreclosing effects on others (e.g. business users).

[23] Jens-Uwe Franck, Martin Peitz, *Digital Platforms and the New 19a Tool in the German Competition Act,* 12 J. EUR. COMPETITION L. & PRAC. 513–528 (2021). For a more detailed discussion of the scope of different ex ante rules, *see* the OECD Secretariat background note for the current session.

[24] *See* G7, *supra* note 1, at 2.

[25] DMA art. 2(2).

ensuring coherence and objectivity of the rules. Also, services are likely to evolve rapidly through integrations or innovations that have an impact in how they will be used. The exercise of defining the services in scope should not create a barrier to efficient and value enhancing evolution.

36. *Adequate Criteria and Processes for Identifying Subjects of the Rules:* Ex ante rules in digital markets tend to focus on a small number of subjects. As such, there should be adequate criteria and process for designating such subjects.[26]

37. In terms of process, BIAC believes that a process whereby market participants may fall under the scope of regulation, following a formal designation process based on clear and objective criteria and which includes due process protections[27] provides more legal certainty and may as such be preferable over a process that starts with a self-assessment by companies, such as is the case in the draft DMA.[28]

38. In terms of the criteria used to designate subjects of the ex ante rules, these can be quantitative, qualitative or a mix of both types of criteria, and it is important to incorporate market power criteria in this process, where competition law theories are being applied.[29]

39. A purely size-based quantitative method for designating subjects foregoing any sort of substantive economics-based assessment would seem to be inappropriate, as it could lead to over or under inclusion of subjects.[30] It also begs the question of size in relation to what: an economy, relevant market, number of users, clicks, downloads, transactions? Different authorities have so far approached this differently. For instance, the proposed DMA creates a rebuttable presumption that if certain quantitative thresholds are met the subject is presumed to be a gatekeeper,[31] whereas the proposed UK model would not rely on such formal quantitative presumptions.[32] The mere designation as a subject of the rules should not in itself result in a finding of breach of the rules. The interplay in the designation of subjects with the competition law concepts of market power and dominance should be clarified in the rules.

40. *Clarity of Key Concepts:* As noted above, it is of key importance that the principles on which ex ante rules rely are clearly defined. One recurrent notion in the various proposals for ex ante rules is the notion of "fairness." It is for instance mentioned in the UK proposal and the DMA.

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[26] *See e.g.*, Act against Restraints of Competition (Competition Act – GWB), § 19 https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html (Ger.) (applies to undertakings that have been designated as being of paramount cross-market significance).

[27] GWB § 19(1).

[28] DMA art. 3(3).

[29] *See* GUNNAR NIELS, HELEN JENKINS & JAMES KAVANAGH, ECONOMICS FOR COMPETITION LAWYERS § 4.3.3 (3rd ed., forthcoming).

[30] C.D. Howe Institute's Competition Policy Council argues that policymakers must resist the "big is bad" fallacy. *Digital Platforms: Oversight if Necessary, But Not Necessarily Regulation* (Jan. 7, 2021), Twentieth Report of C.D. Howe Institute Competition Policy Council, https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Communique_2021_0107_CPC.pdf.

[31] DMA art. 3.

[32] *See* CMA, A New Pro-Competition Regime For Digital Markets – Advice of the Digital Markets Taskforce (Dec. 2020), https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.

41. It is key that this nebulous concept is properly defined so that businesses are able to grasp what it meant by such principles and are able to operationalize them the furthest extent possible. As such, it would for instance be helpful if authorities were to provide more indications as to against which standard "fairness" is to be measured, and what is (if any) the relation of this concept with other key competition law concepts and standards. Other key concepts referred to in ex ante rules, e.g. "contestability" in the context of the DMA, should also be clarified, especially where these are similar, but not identical, to well established competition law concepts, such as market entry.

42. *Tailored Obligations:* A number of authorities have so far considered different approaches in relation to the obligations to be imposed on the subject of the rules.

43. In particular, the UK is suggesting introducing individualised codes of conduct for the subjects of its rules, against which their behaviour in relation to the activity motivating their "Strategic Market Status" designation will be measured.[33] On the other hand, the EU's approach is heterogenous, whereby some of the obligations[34] apply to all gatekeepers in a similar fashion, and others appear to be adaptable.[35]

44. Given the heterogeneity of digital services, a one-size-fits-all approach should be avoided.[36] BIAC also believes that generic obligations that apply across the board, regardless of the dynamics of competition in and between particular ecosystems or business models, are more likely to have a detrimental impact on innovation whilst being less effective at addressing areas of potential concern.

45. Rather, rules applicable to a particular subject should be defined by reference to the type of company in question, to its business model and services supplied (e.g. social media, cloud, search), taking into account the mechanisms for value generation and the need to appropriate some of the value generated, so as to ensure that only problematic behaviour is narrowly targeted.[37]

4.3. Appropriate Review Mechanisms and Possibility for Exemptions

46. *Appropriate Review Mechanisms*: BIAC believes that the subjects of the regulation should be able to challenge their designation as subjects of the regulation, and alleged breaches of the obligations imposed on them.

47. One criticism that has been addressed at ex ante regulations is that they circumvent due process rules normally applicable in antitrust proceedings. To address these concerns, BIAC believes the rights of defence of the subjects of the rules should be adequately safeguarded during proceedings brought under ex ante rules. The ability to challenge decisions should evidently exist. In this context, the EU's DMA for instance explicitly acknowledges the possibility of review by EU courts of decisions in which the Commission

[33] *Id*. ¶¶ 4.33-4.59.

[34] DMA art. 5 obligations.

[35] DMA art. 6.

[36] Heike Schweitzer, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal (Apr. 30, 2021), https://ssrn.com/abstract=3837341.

[37] What will make a conduct harmful is a constellation of factors such as market power, inefficient preferential access to resources or information, or the presence of unresolved externalities leading to too little or excessive appropriation.

imposes fines or periodic penalty payments.[38] Courts should be able to have a full review, not only of any sanctions, but also the assessment of fact and law undertaken by the decision-maker that led them to impose a sanction.[39]

48. *Possibility for Exemptions*: Companies should be given the possibility of relying on exemption grounds to ensure more pragmatic and flexible tools. Regulations should include provisions that enable companies to demonstrate that conduct is pro-competitive, notably if the conduct at issue is an industry norm, or to exculpate themselves if they are found to have breached obligations imposed by ex ante rules, on the basis that the behavior in question is not anticompetitive in light of the obligations applicable to them and/or the objectives pursued by the legislation.

49. It would be desirable to allow for such a possibility, and it should be possible to do so without unduly sacrificing the speed of enforcement, to ensure that optimal decisions are made by authorities and that behaviour that is not harmful is not prohibited. This is for instance possible under the German 19a tool, where the subjects of the rules can demonstrate that their behaviour is "objectively justified." However, this is not possible under the proposed DMA.

4.4. Minimizing Inter-System Frictions

50. *Conduct Should Be Enforced at the Appropriate Level and by an Appropriate Entity*: BIAC believes that authorities should give consideration as to what the most appropriate level of enforcement is when designing ex ante rules in the context of regional or federal enforcement systems, to avoid overlapping investigations.

51. Depending on the relation of the ex ante rules with antitrust rules, it may be appropriate to set up a dedicated entity to enforce these ex ante rules (within or outside the competition authority), given that these will be substantively and procedurally different from classic unilateral conduct proceedings. The UK for instance established in April 2021 a Digital Markets Unit within the CMA in non-statutory form, and proposed legislation seeks to formally establish it and grant it powers.[40]

52. *International Best Practice Alignment*: Regulators should seek to the extent possible seek to converge towards international rules and standards. There are currently significant differences in the approaches proposed, notably relating to the harms being addressed, the terms use, definitions and thresholds. When introducing such legislation, consideration should be given to all developing international rules and standards in the same field.[41]

53. *Clarity on the Relationship and Practical Interplay of Ex Ante Rules With Competition Law*: See section 5 below.

[38] DMA art. 35.

[39] *See* OECD, The Standard of Review By Courts In Competition Cases – Note by BIAC, DAF/COMP/WP3/WD(2019)4 (May 29, 2019), https://one.oecd.org/document/DAF/COMP/WP3/WD(2019)4/en/pdf.

[40] *Digital Markets Unit*, https://www.gov.uk/government/collections/digital-markets-unit.

[41] OECD, Recommendation of the Council on Regulatory Policy and Governance, OECD/LEGAL/0390 (Mar. 21, 2012), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0390.

5. Practical Implications of Co-Existence of Ex Ante Regulation and Antitrust Enforcement

54. This section discusses the relationship between ex ante regulation and ex post antitrust enforcement. It *inter alia* discusses the problem of *ne bis in idem* and suggests ways and principles to make the practical interplay of competition law and ex ante rules as smooth and as efficient as possible.

55. Economic regulation has a wider scope than antitrust law.[42] As such, ex ante rules are likely to have wider objectives than competition rules, which historically focus on the consumer welfare standard. Ex ante rules may seek to serve wider objectives that go beyond the consumer welfare standard.[43] In practice some ex ante rules currently being discussed may retain a close relation with antitrust law, while others do not.[44] BIAC believes that ex ante rules should seek to set out their policy goals in a clear manner,[45] and that their relation with, and distinctions from, competition rules should be made clear.

56. As a general proposition, the effectiveness of ex ante regulation will depend on its complementarity to competition law, and its ability to effectively address issues that it was designed to solve, and that competition law cannot fix. Ex ante regulation may be intended to cure durable market failures and dispense with often lengthy and ineffective procedures in digital markets whilst safeguarding rights of defence. This of course presupposes that the harm that the rules seek to solve is precisely identified and the regulation crafted to directly address the harm. There is some concern that, while ex ante regulatory proposals are considered "complementary" to unilateral conduct enforcement, there is a significant level of overlap which can translate into legal uncertainty at best, parallel enforcement and ne bis in idem cases at worst.

57. In terms of the more practical interplay between ex ante rules and antitrust enforcement, BIAC believes that the general legal principle of *ne bis in idem* should prevent the same acts from being sanctioned under both competition law and ex ante rules. Questions remain as to the precise scope of application of this principle in this context. The

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[42] Marco Cappai & Giuseppe Colangelo, *Taming Digital Gatekeepers: The More Regulatory Approach To Antitrust Law*, (Stanford-Vienna TTLF, Working Paper No. 55, 2020), https://ssrn.com/abstract=3572629.

[43] *Id*. at 13. Wider societal issues such as freedom of the press have often been raised in debates surrounding the failings of competition law, most famously in Australia which adopted in February 2021 a News Media and Digital Platforms Mandatory Bargaining Code. Press Release, Austl. Min. of Comm., Parliament passes News Media and Digital Platforms Mandatory Bargaining Code (Feb. 25, 2021), https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/parliament-passes-news-media-and-digital-platforms.

[44] As has been noted, the obligations set out in the EU's DMA can be linked to previous competition law cases. *See* OECD, Competition Enforcement and Regulatory Alternatives 31 (2021), https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives-2021.pdf. *See also* Cristina Caffarra & Fiona Scott Morton, *The European Commission Digital Markets Act: A Translation*, VOXEU/CEPR (Jan. 5, 2021), https://voxeu.org/article/european-commission-digital-markets-act-translation.

[45] Some commentators have contended that the DMA does not rest on a set of reasonably well articulated policy goals from which implementation measures can be deduced. *See* Alexandre de Streel & Pierre Larouche, *The European Digital Markets Act: A Revolution Grounded on Traditions*, 12 J. EUR. COMPETITION L. & PRAC. 542 (2021).

EU's proposed DMA for instance explicitly says that it is without prejudice to the application of EU and national competition rules.[46]

58. However, the EU's draft DMA obligations are largely inspired by past and current antitrust cases,[47] so it is foreseeable that the same practices could be pursued by the European Commission under European competition law or under the DMA, as well as under national competition authorities' competence to enforce European competition law, national competition law and under regulatory frameworks (in those cases where European Member States institute their own ex ante provisions).[48] In addition, in some instances, private enforcement may be envisaged.

59. Questions remain as to the precise scope of application of this principle in this context. The EU's proposed DMA for instance explicitly says that it is without prejudice to the application of EU and national competition rules.[49]

60. Where the behaviour in question has been declared not in breach of ex ante rules, the *ne bis in idem* principle arguably should also prevent action being brought under competition rules, which are often identifiably based on competition law precedents[50] (or vice-versa). Separately from such a potential violation of this principle, such dual enforcement could also be deemed problematic for regimes who often have as one of their core aims to accelerate investigations. The burden placed on companies subject to such dual enforcement might also legitimately be argued to be disproportionate.

61. A way forward may be for enforcers to ensure that their enforcement approaches are compliant with ex ante rules rather than limit themselves to exploratory enforcement, in what is (often) unchartered territory. Such an approach would prove to be particularly welcome in relation to obligations that are less straightforward to comply with and could ensure that the discussion around *ne bis in idem* remains a theoretical one. BIAC therefore encourages regulators to put in place in the context of ex ante rules mechanisms allowing for such dialogues aiming for compliance.

[46] DMA art. 1(6).

[47] *See* OECD, Competition Enforcement and Regulatory Alternatives, *supra* note 44, at 31.

[48] The European Commission's Competition Director-General Olivier Guersent recently noted, "The options available to regulators suspecting illegal conduct would be: an EU antitrust case; a probe under national antitrust law; application of the DMA; or use of broader national legislation against unfair commercial practices." Lewis Crofts, *DMA flexibility for watchdogs will help 'bigger enforcement system,' EU's Guersent says*, MLEX, (Oct. 28, 2021), https://content.mlex.com/#/content/1332992.

[49] DMA art. 1(6).

[50] Caffarra & Scott Morton, *supra* note 44.