e-Competitions
Antitrust Case Laws e-Bulletin

Concurrences
Antitrust Publications & Events

January 2021

# The EU Commission publishes a draft regulation aiming the imposition of ex-ante obligations on providers of certain pre-defined core platform services that qualify as gatekeepers

ECONOMIC EFFICIENCY, EUROPEAN UNION, ADVERTISING , REFORM, CONSUMER PROTECTION, INTERNET, COMPETITION POLICY, ECONOMIC ANALYSIS, ONLINE PLATFORMS, BIG TECH, PRIVACY, GENERAL ANTITRUST

EU Commission, *Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020/0374 (COD)*, Proposal, 15 December 2020
EU Commission, *Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act), 2020/0361 (COD)*, Proposal, 15 December 2020

Gönenç Gürkaynak | ELIG Gürkaynak Attorneys-at-Law (Istanbul)
Barış Yüksel | ELIG Gürkaynak Attorneys-at-Law (Istanbul)
Baran Can Yıldırım | ELIG Gürkaynak Attorneys-at-Law (Istanbul)
Zeynep Ayata Aydoğan | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

**e-Competitions News Issue January 2021**

## 1. Introduction

The draft Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) ("**DMA Proposal**") was announced by the European Commission ("**Commission**") on December 15, 2020. [*1*] The DMA Proposal envisages the imposition of numerous *ex-ante* obligations on providers of certain pre-defined "core" platform services that qualify as "gatekeepers" per the criteria laid down thereunder.

In this article, we evaluate the DMA Proposal under normative theories of regulation that set forth the conditions under which regulation is economically desirable, along with the aims that should ideally be pursued by such regulation. [*2*] As a part of this analysis, a comparison is made between the DMA Proposal and the New Regulatory Framework ("**NRF**") established in the beginning of 2000s (consisting of the Framework Directive, [*3*] EU Authorization Directive, [*4*] EU Access and Interconnection Directive, [*5*] EU Universal Services and User's Right Directive [*6*] and EU Communications Privacy Directive [*7*]) to regulate the recently privatized and liberalized electronic communications markets in the European Union ("**EU**"). [*8*] The comparison between the NRF and the DMA Proposal is useful because the NRF constitutes an example of how the standards set forth by the normative theories of regulation may be integrated into the design of *ex-ante* regulations. This article reveals the foundational differences between the NRF and the DMA Proposal, and, in light of these differences, it argues that the general framework set forth by the DMA Proposal fails to fall neatly into the confines of the normative theories of regulation. This article further aims to provide insights on whether the DMA Proposal should be deemed as a proper guideline for the non-EU countries that are used to following the EU's footsteps, when it comes to designing sector-specific economic regulations.

As such, Part 2 briefly explains the main theories of regulation; Part 3 provides a comparison between the NRF and DMA Proposal; Part 4 analyzes the question on whether taking only economic consideration into account would suffice when regulating digital markets; and Part 5 sets out the implications of the DMA Proposal for the non-EU countries.

## 2. Brief Explanations on the Main Theories of Regulation

Adam Smith's notion of "the invisible hand of the market" [*9*] of the 18th century still remains an accepted assumption on how the markets function. According to this theory, the normal functioning of the market provides the most efficient allocation of resources, and markets self-correct in case of any misallocation. Hence, any governmental intervention to this functioning market requires justification. However, the market is deemed fully functional only if certain assumptions are combined together: all market players act rationally to maximize their utility, their behaviors are formed by their preferences which are stable, and supply and demand in the market determine the market equilibrium. [*10*] If these

cumulative criteria are not satisfied, market failures ensue, [*11*] and the government may intervene to correct the inefficiencies resulting from such market failures. [*12*] These market failures may stem from the behaviors of the participants (*i.e.,* anti-competitive conduct) or the structure of the market, and it is generally assumed that while competition law is the best tool for dealing with the former, economic regulations are needed in the presence of the latter. [*13*] In that vein, the normative theories of regulation assume that, the aim of sector-specific economic regulations is to negate the unwanted consequences stemming from structural market failures, [*14*] and to maximize social welfare in the absence of actual competition *i.e.,* achieving the "second best" outcome.

Before moving onto the examples of market failures, it should be highlighted that non-market related (*e.g.,* rights-based or altruistic-based) considerations may also provide sufficient normative bases for economic regulation. [*15*] Nevertheless, since the DMA Proposal only refers to economic considerations, this part of the article focuses on what may lie under the category of these particular considerations.

For the purposes of this article, common structural market failures may be categorized under four categories: the existence of natural monopoly, information asymmetries, public goods, and externalities in the market. [*16*]

Firstly, the term "natural monopoly" does not refer to the actual number of sellers in a market but to the relationship between demand and the technology of supply. If the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is deemed to be a natural monopoly, whatever the actual number of firms in it. [*17*] Just like the other types of monopolistic markets, the presence of a single firm in a natural monopoly market may result in higher prices and reduced output to the detriment of consumers. However, in the particular case of natural monopolies, unlike the others, actual competition is undesirable as market entry would lead to inefficient outcomes by definition. Thus, the preferred option is to create legal monopolies through government intervention and use regulation to artificially determine competitive parameters such as price, output or quality, in order to correct the market failure. [*18*]

Second, the normal functioning of the market depends on the existence of consumers who are able to choose among competing products based on well-informed decisions. However, the consumers may be inadequately informed for several reasons. For instance, obtaining information may be costly and even the informed consumers may not be in a position to utilize such information due to their lack of expertise. In such cases, regulation may be adopted to enhance the accurate and cost-effective information flow between the market participants. [*19*]

Third, public goods refer to those goods that are non-rivalrous in consumption and non-excludable. [*20*] As the provision of non-rival and non-excludable goods by the private sector is difficult, the pure public goods are generally provided by the state itself. Pure public goods, and goods or services that only have some, but not all, characteristics of public goods (*e.g.*, club goods which are characterized by non-rivalry in consumption and the possibility of exclusion [*21*]) may be provided by private entities in the presence of various regulations that aim to handle the free-rider problem and promote the production.

Finally, externalities are classified as either negative [*22*] or positive [*23*] and result in either over-production (in case of the former) or under-production (in case of the latter). Regulations that deal with externalities aim to make sure that all the costs or benefits are internalized by market participants that lead to their creation. In network industries such as electronic communications and some digital markets, structural market failures mainly stem form network externalities, which is a special kind of externality. There are direct [*24*] and indirect [*25*] network externalities, both of which contribute to the value of an underlying good or service as a result of the actions of third parties, and may lead to the creation of entry barriers (especially with the help of feedback loops), [*26*] constituting a basis for economic regulation.

The normative theories of regulation set out the possible market failures in the market and argue that economic regulations should aim to correct these failures and create market conditions that resemble those of competitive markets.

It should be mentioned that the accuracy of these theories in explaining real life outcomes was tested in 1960s via numerous empirical studies. These studies showed that economic regulations rarely yielded the desired outcomes. Even regulations with seemingly strong economical foundations *i.e.*, those that were specifically designed to remedy obvious structural market failures such as natural monopolies, generally failed to create outcomes similar to those of competitive markets. [*27*] These studies led certain economists to reject the normative theories and to devise new positive theories that deem the regulators as rational actors aiming to maximize their own welfare (*e.g.*, via responding to incentives created by political and administrative processes) rather than that of the society. [*28*] Accordingly, taking into consideration the suggestions of the public choice theory, Stigler argued that the regulators, which are appointed by politicians who desire to keep their positions and need money and votes to do so, may prefer to pursue the interests of the regulated firms over that of ordinary citizens. This is because the citizens' ability to react to the outcomes of certain regulations (through votes or monetary support) is limited due to information and coordination costs. [*29*] This theory was referred to as the capture theory of regulation. [*30*] Peltzman slightly revised this view by arguing that the regulators seek to distribute rents among different interest groups including consumers, and suggested that empirical studies pointed towards a balance, *i.e.,* that the regulated prices are set somewhere between the competitive price and the monopoly price. Peltzman suggested that the regulators' tendency to cross-subsidize consumers to the detriment of regulated firms may be explained by this theory. [*31*]

The capture theory could provide significant insight for designing the appropriate institutional structures for regulators and assessing the expected impacts of regulations on the society. [*32*] However, it does not provide guidance in evaluating the soundness of the alleged justifications of economic regulations. The normative theories, on the other hand, successfully identify what the ideal economic rationale of sector-specific regulations should be, even though they may not always adequately explain real world outcomes. Since the aim of this article is to assess whether the DMA Proposal is built upon strong economical foundations, despite their shortcomings, the normative theories are deemed as the best available tools for this task.

## 3. A Comparative Analysis of the NRF and the DMA Proposal under Normative Theories

Further to this theoretical framework, ideally, sector-specific economic regulations should only be used in sectors that are characterized by structural market failures and should be designed with the sole purpose of remedying these particular failures. As such, it could be argued that regulations that are not concerned with remedying structural market failures, lack an economic rationale. Thus, from a purely economic perspective, regulating in the absence of such failures would mean preferring the second best (*i.e.*, dynamics synthetically created by regulation that tries to mimic competition) to the first best (*i.e.*, dynamics organically created by actual competitive process) [*33*] and thereby reducing welfare.

An analysis from this perspective reveals the careful design of the NRF. Indeed, in his speech about the NRF, the former European Commissioner Mario Monti underlined that the new regulation framework is entirely based on the principles of competition policy. He stated that the Commission`s approach to economic regulation envisages that "*intervention on the market is necessary and beneficial only when it offers the solution to certain sorts of market power, and in particular to market failures which derive from formerly monopolistic market structures.*" He went further by arguing that "*the only type of regulation which can foster the development of self-sustaining competitive market conditions is the regulation which is solidly grounded on the same set of principles of which competition policy makes use.*" [*34*]

With this approach in mind, under the NRF, it was ensured that (i) *ex-ante* regulations may only come into play after establishing that a given electronic communications market is characterized by structural market failures via a thorough market analysis process, (ii) obligations are imposed only on those operators that possess a very high degree of market power and (iii) these obligations are well suited to the specific problems which are carefully identified on a case-by-case basis.

The NRF realized these through the following three main principles: (i) Only markets that pass the three criteria test may be subject to *ex-ante* regulations, [*35*] (ii) Regulations may only be imposed on operators that holds a significant market power ("**SMP**") and (iii) A clear link between the *ex-ante* obligation to be imposed on an operator with SMP and the market failure to be addressed by this obligation must be established, along with the proportionality of the said obligation.

Per the first principle (*i.e.*, the *three criteria test*), the national regulators are required to show that (i) a relevant electronic communications market shows high and non-transitory barriers to entry, (ii) the structure of this market does not tend towards effective competition in a relevant time horizon and that (iii) the application of competition law alone does not adequately address the market failure, to be able to decide that this market may be susceptible to *ex-ante* regulation. [*36*] This guarantees that regulations are not used in well-functioning competitive markets or those markets where there are failures of a behavioral nature (*i.e.,* stemming from the conducts of the market participants such as abuse of dominance or anti-competitive agreements), which may be remedied via effective application of competition law. [*37*]

The second principle requires the national regulators to carefully assess the market power possessed by operators, via a method that closely resembles the dominance analysis in competition law, and ensures that the *ex-ante* regulations are not imposed on operators that do not have SMP, in order not to stifle their competitiveness. [*38*]

Finally, the third principle prevents national regulators from imposing unwarranted and excessive regulatory burdens on the operators with SMP, by mandating the regulators to show that all of the *ex-ante* obligations (among a list of pre-defined *ex-ante* obligations laid down in the relevant legislation) that are proposed to be imposed, are indeed necessary to deal with the problems associated with a specific and well-defined structural market failure. It should further be clarified that the relevant obligations are the least restrictive alternatives and that there is proportionality between the aims that they desire to achieve and the restrictions they impose on operators. It should be underscored that these assessments are made transparently on a case-by-case basis for individual relevant electronic communications markets and individual operators that are active in these markets. [*39*]

The DMA Proposal, on the other hand, seems to have internalized these processes in a rather opaque manner as it has already defined the core platform services to be regulated without any additional market analysis process, [*40*] determined the "gatekeepers" that will be subject to *ex-ante* obligations based on a quantitative criteria without further analyzing their actual market power [*41*] and provided the *ex-ante* obligations that will be imposed on gatekeepers without establishing any link between the obligations and the market failures that these obligations aim to deal with on a case-by-case basis. [*42*] This is actually a clear and intentional policy choice which was preferred for reasons explained in great detail under sections 5, 6, 7 and 8 of the Impact Assessment conducted by the Commission. [*43*]

With respect to the determination of the core platforms services, the DMA Proposal only refers to the general common characteristics of such markets in its preamble and does not provide detailed evaluations regarding individual services, which are deemed to be core platform services and therefore susceptible to *ex-ante* regulations. [***44***] The Impact Assessment, on the other hand, provides a comprehensive analysis of general market failures stemming from the presence of gatekeepers and the absence of effective regulation, [***45***] and a short explanation about service-specific issues. [***46***]

As the references and discussions in the relevant parts of the Impact Assessment indicate, the Commission was largely influenced by five studies regarding digital markets when identifying the markets that should be subject to *ex-ante* regulation. These studies are; the Furman Report, [***47***] the CMA's Report on Online Platforms and Digital Advertising [***48***] ("**CMA Report**"), the US House of Representative Majority Staff Report on Investigation of Competition in Digital Markets [***49***] ("**US Majority Staff Report**"), Stigler Center's Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report [***50***] ("**Stigler Center Report**") and the Australian Competition and Consumer Commission's ("**ACCC**") Digital Platforms Inquiry Final Report [***51***] ("**ACCC Report**"). In addition to the foregoing, the Commission also relied on a number of finalized and ongoing national and EU level competition law investigations to detect the problematic behaviors to be remedied by *ex-ante* regulations. [***52***]

It should be noted that some of the above listed studies relied upon by the Commission suggest that the problems in digital markets do not exclusively stem from economic considerations (*e.g.*, consideration of whether there are any structural market failures) and are also associated with social and political concerns. [***53***] These reports emphasize, among others, (i) the risk of the spread of misinformation and mal-information, [***54***] (ii) the risk of reduction in the quality and choice in media and journalism, the latter having resulted due to the drop in the advertising revenue of traditional print publishers owing to the trend towards consuming news and content online, [***55***] (iii) the risk to democracy [***56***] (iv) information asymmetries between consumers and digital platforms in relation to privacy issues, [***57***] (v) the risk to autonomy and data security increasing with the collection of data through different technologies, (vi) the risk of scams and fraudulent activities. [***58***] Yet, the Commission does not refer to such non-economic concerns in the preamble of the DMA Proposal or in the Impact Assessment.

It is also puzzling (from the perspective of the normative theories of regulation) to see that the Commission assumes that certain unilateral conducts of undertakings which were already deemed to constitute abuse of dominance under applicable competition laws and were dealt with accordingly, constitute justifications for *ex-ante* regulations. It may thus be argued that, either the Commission and the national competition authorities had previously erred in law by characterizing the consequences of structural market failures as abuses of dominant position, or the DMA Proposal is aiming to bypass the requirements of due process in competition law investigations (which are critical safeguards for undertakings' rights) to prohibit certain unilateral conducts that are not necessarily related with structural market failures and to impose strict remedies on undertakings without conducting a fair trial.

The DMA Proposal states that the aim of the relevant regulation differs from what is pursued under competition law. Accordingly, the aim is " *to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market.*" [***59***] Therefore, certain conducts provided under the DMA Proposal would be prohibited even if the gatekeeper proves that under the unique circumstances of the case, the conduct leads to economic efficiencies.

Similarly, as to the designation of gatekeepers; while the DMA Proposal stipulates that exceeding the quantitative thresholds constitute a rebuttable presumption that a provider of core platform services should be designated as a gatekeeper, it is not clear how this presumption may be rebutted in practice especially considering that the preamble of the DMA Proposal expressly deprives the firms from their right to raise "efficiency defenses," claiming that these are not relevant to the designation as a gatekeeper. [***60***] In fact, given *ex-ante* obligations are automatically imposed on gatekeepers without further analysis, efficiency defenses could actually demonstrate whether the decision to designate certain firms as gatekeepers would be economically beneficial in light of the concrete evidence. Hence, the Commission's claim that such defenses are irrelevant is inconsistent with the idea that regulation aims to correct economic-based problems which exist in digital markets.

To recap, unlike the NRF, the DMA Proposal fails to pass the test of the normative theories of regulation as it does not offer sound economic justifications for subjecting certain markets to strict *ex-ante* regulations. As it stands, it seems that the DMA Proposal may lead to an inefficient market structure and reduce consumer welfare, at the very least, it fails to adequately show that it would contribute to consumer welfare by remedying the inefficiencies in markets where competition could not work due to structural market failures. Yet, it should again be emphasized that this conclusion may be valid only to the extent that the DMA Proposal is assessed from a purely economic perspective without taking into consideration any social or political concerns that may be motivating its adoption.

## 4. Does it have to be all about Economics?

This article does not argue that intervention may only be justified in the presence of purely economic problems such as structural market failures. It acknowledges that there might be rights-based considerations for regulation and does not propose to prioritize "market failures" over these considerations. [***61***] Thus, it is accepted that non-economic concerns may constitute the basis of sector-specific regulations, either on their own

or along with economic ones.

It may even be the case that regulations which mainly address an economic problem may promote social and political values. [*62*] Going back to our comparison, the NRF mainly addresses the inefficiency created by natural monopolies, but, at the same time, imposes universal services obligation on monopolies (*i.e.*, an obligation to serve certain consumers to whom offering services would not be a viable option for a profit-making firm) with the pursuit of social goals. [*63*]

The important point is that legislators should identify all underlying concerns in a transparent manner and explain how the proposed intervention would serve these purposes. By distinguishing social and political problems from economic ones, the legislator would be able to provide separate and more suitable remedies for the particular nature of each diverging problem.

Indeed, as explained above, the studies conducted by various governmental and non-governmental organizations regarding digital markets that the Commission also relied on during the preparation of the DMA Proposal, suggest that there is a wide range of concerns related with the digital markets, most of which have social and political foundations rather than economic ones, that may warrant the governments' intervention to these markets via tools including but not limited to sector-specific regulations. [*64*]

This article contends that the problem with the DMA Proposal is that it does not spell out any non-economic concerns that would justify the proposed regulatory framework. An exception may be the reference made to the impact of the proposed regulation on employment in the Impact Assessment. [*65*] While the concept of "fairness" is also used in these documents (where some practices of gatekeepers are deemed to be unfair for their customers), the premises of this concept are not properly defined, not does it convey how the fairness of a conduct should be evaluated. Overall, both the DMA Proposal and the Impact Assessment almost exclusively rely on economics-based arguments to justify the need for sector-specific regulation.

The exclusion of non-economic concerns from the scope of the DMA Proposal may be understandable from a pragmatic viewpoint. That is because the absence of any reference to non-economic concerns, which are inherently subjective, creates a veneer of objectivity for the DMA Proposal. This pseudo-objectivity separates the DMA Proposal from most of the other studies that form its basis and may absolve the Commission from the criticisms that had been directed towards these studies due to their subjectivity. Moreover, the claim that the regulatory framework created by the DMA Proposal would be exclusively based on objective economic foundations may pre-empt the emergence of potential conflicts between the national interests of the EU Member States that would have been much more apparent if the DMA Proposal was vocal about the social and political concerns that may call for intervention. As sovereign states, the EU Member States may want to have more control on issues related with the preservation of democratic processes, ensuring diversity in the media, choice and quality of news and journalism, consumer protection, industrial employment policies and such.

Additionally, the absence of social and political concerns may allow the Commission to draw the boundaries of the debates regarding the appropriateness of the proposals set forth in the DMA Proposal. As a matter of fact, it could be easier to fine-tune the provisions of the DMA Proposal as long as the stakeholders (especially the Member States) approach the DMA Proposal from a purely economic perspective, whereas reconciling conflicting views on the ways to deal with social and political concerns may prove to be a much more difficult task.

However, despite all the conveniences that bestowing the DMA Proposal with a veneer of objectivity could bring about in terms of its swift entry into force, doing so could mask some underlying problems concerning digital markets that should be discussed in greater detail and it could prevent the stakeholders from collectively designing more effective and creative solutions by properly assessing all the facets of the issue at hand. Indeed, the DMA Proposal currently resembles an economically less sound and procedurally more rigid derivative of the NRF, which intentionally turns a blind eye to the significant differences between the economic justifications for regulating electronic communications markets and digital markets mainly for practical reasons.

## 5. What are the Implications for the Non-EU Countries?

The policies and legislations adopted by the EU in the fields that require a high degree of economic competence, generally constitute best practices for the non-EU countries that have limited institutional capacity but still desire to harmonize their national legislations with that of the EU. This was the case for competition law and economic regulations in those sectors that are characterized by natural monopolies, and network economies such as the electronic communication and electricity markets.

The reason why this strategy pays off most of the time for the non-EU countries may be that the basic principles of these policies and legislations are mainly objective and universal. Hence, adopting the EU framework may have enabled such countries to pursue coherent and effective national policies in these fields, despite certain differences in implementation (which may be explained by the differences in institutional capacities, positive theory of regulation [*66*] and diverging national interests that influence the implementation).

However, successful experiences in the past may not be sufficient to conclude that the best strategy for the non-EU countries would be to follow the footsteps of the EU in regulating the digital markets as well. Indeed, as explained in the preceding parts, the problems posed by the digital markets are much more diverse and the methods proposed in the DMA Proposal for dealing with these problems may not be entirely based on solid economic grounds. When dealing with social and political concerns, the benefits of non-EU countries' relying on the EU's high institutional capacity may diminish and protecting the national interests may become a more critical goal. Furthermore, importing the EU's methods for tackling these concerns may also create a legitimacy problem due to the inherent subjectivity of non-economic concerns. As such, national priorities concerning social and political issues are considerably more diversified when compared with those concerning economic issues, and this diversification stems from and reflects the preferences of the constituents. Therefore, it is important that the national legislators pay attention to these preferences while determining their policies to ensure their legitimacy.

To conclude, we believe that the non-EU countries should approach the DMA Proposal with caution and that they should thoroughly assess whether it is well suited to address all of their economic and non-economic concerns associated with the status-quo of the digital markets. If the answer to this question is not in the affirmative; it may be a better strategy to closely follow the debates around the globe concerning the formation of policies regarding the digital markets, identify all the economic and non-economic concerns and decide which concerns may be dealt with by adopting the existing solutions and which of them requires designing tailor-made policies in line with the national interests.

## 6. Conclusion

This article analyzed whether the DMA Proposal meets the standards set out by the normative theories of regulation, which state that government intervention to the market is justifiable only if there are structural market failures in the relevant market and remedies devised by the government address these failures.

It found that the DMA Proposal lacks such criteria as it defines the services and undertakings to be regulated from the outset and does not enable the national authorities to analyze whether (i) the relevant markets are in fact surrounded by market failures or (ii) the undertakings hold actual market power. It also does not explain why the remedies proposed would be effective in correcting the said market failures on a case-by-case basis. Furthermore, it prohibits the undertakings from raising efficiency defenses, from the start. Therefore, the DMA Proposal falls short of justifying intervention based on market-focused problems.

This article also argued it may well be the case that the DMA Proposal fails to demonstrate all of the underlying motives behind it. Although the DMA Proposal only touches upon the economic problems, as mentioned in the relevant reports that the DMA Proposal refers to, there are social and political aspects of this debate. Social and political considerations may well provide a case for intervention. However, for this, the Commission should discuss and identify the problems in a clear manner and explain why the proposed remedies would provide a solution to them.

We believe that this finding has implications for non-EU countries. First, even if the DMA Proposal had been prepared by taking into account the social and political concerns, the debate on these concerns does not seem to be settled, and it is unclear how the proposed rules would remedy such concerns. Second, it may not be prudent to follow the proposal of the EU in regulating digital markets because, unlike the case in regulating other areas, non-EU countries may not share the same concerns with the EU with respect to their non-economic nature. Therefore, we note that non-EU countries will need to approach with caution, before importing the DMA Proposal wholesale into their national legislation and regulatory practices.

[1] *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020/0374(COD), 15.12.2020.* (Available at: *https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN*) (Date of access: 05.01.2020)

[2] See P.S. Dempsey, *Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, Washington and Lee Law Review, 46 (1) 1989, pp.1-40, p.13-29; N. Dunne, *Competition Law and Economic Regulation, Making and Managing Markets*, Cambridge University Press, 2015, p.139-161.

[3] *Directive 2002/21/EC of the European Parliament and of the Council of 7.03.2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) OJ No L 108, 24.04.2002, p. 33–50* ("**Framework Directive**"). (Available at: *https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32002L0021*). (Date of access: 05.01.2020). (Repealed by *Directive 2018/1972/EU of the European Parliament and of the Council* of 11.12.2018 *establishing the European Electronic Communications Code, OJ No L 321, 17.12.2018, p. 36-214.*). (Available at: *https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018L1972*). (Date of access: 05.01.2020)

[4] *Directive 2002/20/EC of the European Parliament and of the Council of 7.03.2002 on the authorisation of electronic communications networks and services (***"Authorisation Directive"***) OJ No L 108, 24.04.2002, p. 21–32.* (Available at: *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0020*). (Date of access: 05.01.2020). (Repealed by *Directive 2018/1972/EU of the European Parliament and of the Council of 11.12.2018 establishing the European Electronic Communications Code, OJ No L 321, 17.12.2018, p. 36-214) (*Available at: *https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018L1972*). (Date of access: 11.01.2020)

[5] *Directive 2002/19/EC of The European Parliament and of the Council of 07.03.2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ No L 108, 24.4.2002, p.7-20. (*Available at: *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0019*). (Date of access: 11.01.2020). (Repealed by *Directive 2018/1972/EU of the European Parliament and of the Council establishing the European Electronic Communications Code, OJ No L 321, 17.12.2018, p. 36-214.*). (Available at: *https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018L1972*). (Date of access: 11.01.2020)

[6] *Directive 2002/22/EC of the European Parliament and of the Council of 07.03.2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) OJ No L 108, 24.4.2002, p. 51–77.* (**"The Universal Service and Users' Rights Directive"**) (Available at: *https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32002L0022*). (Date of access: 11.01.2020). (Repealed by *Directive 2018/1972/EU of the European Parliament and of the Council establishing the European Electronic Communications Code, OJ No L 321, 17.12.2018, p. 36-214.*). (Available at: *https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018L1972*). (Date of access: 11.01.2020)

[7] *Directive 2002/58/EC of the European Parliament and of the Council of 12.07.2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (***"Directive on privacy and electronic communications"***) OJ L 201, 31.7.2002, p. 37–47.* (Available at: *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0058*). (Date of access: 11.01.2020)

[8] Many of the Directives under the NRF were repealed by *Directive 2018/1972/EU of the European Parliament and of the Council of 11.12.2018 establishing the European Electronic Communications Code OJ No L 321, 17.12.2018, p. 36-214. (***"Directive Establishing the European Electronic Communications Code"***) (*Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2018.321.01.0036.01.ENG*).) (Date of access: 11.01.2020)

[9] A. Smith, *The Wealth of Nations*, Harriman House edn., Harriman House, [1776] 2007.

[10] G. S. Becker, *The Economic Approach to Human Behaviour*, University of Chicago Press, 1976, p.5.

[11] F. M. Bator, The Anatomy of Market Failure, *Quarterly Journal of Economics* 72(3) 1958, pp.351-379, p.351.

[12] N. Phedon, Regulation of Liberalised Markets: A New Roles for the States? (or How to Induce Competition Among Regulators), in *Regulation Through Agencies in the EU*, Geradin, Damien; Muñoz, Rodolphe & Petit, Nicholas (Eds.), Edward Elgar Publishing, Cheltenham, 2005, pp. 23–43, p.25.

[13] A. de Streel, The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications, *Reflets et perspectives de la vie économique* 47(1) 2008, pp. 55-72, pp. 68-70.

[14] P. L. Joskow and R. G. Noll, Regulation in Theory and Practice: An Overview, in *Studies in Public Regulation*, G. Fromm (Eds.), MIT Press, 1981, pp. 1-65.

[15] See T. Prosser, *The Limits of Competition Law*. Oxford University Press, 2004, p. 38; also see N. Dunne, *supra note* 2, p.12.

[16] For detailed examples about market failures see R. Baldwin, M. Cave, and M. Lodge. *Understanding regulation: theory, strategy, and practice*, 2nd Edition, Oxford University Press, 2012, p. 15-22.; also see Dempsey et al, *supra note* 2, p.13-25.

[17] R. A. Posner, *Natural Monopoly and Its Regulation*, Cato Institute, 1999, p. 1.

[18] Baldwin et al, *supra note* 16, p.16.

[19] Baldwin et al, *supra note* 16, p.18-19.

[20] A. Marciano and G. B. Ramello. *Encyclopedia of Law and Economics*. Springer, 2019, p. 1724.

[21] Ibid p.1724.

[22] A negative externality arises when a decision maker does not bear all of the costs of his or her decision. As a consequence, some costs are externalized onto others without compensating them (A. Marciano and G. B. Ramello, *supra note* 20, p. 844.).

[23] A positive externality arises when a decision maker does not capture all of the benefits of his or her decision (A. Marciano and G. B. Ramello, *supra note* 20, p. 844.).

[24] Direct network externalities arise from the fact that each new subscriber benefits from access to the group of preexisting users, but at the same time assumes a new possibility for communication (real or potential) for this customer base already connected (A. Marciano and G. B. Ramello, *supra note* 20, p. 1378.). For example, an increase in the number of an instant messaging application increases the value of the application for other users as well due to the increase in the number of contacts they can communicate with. See the Furman report, Unlocking digital competition, Report of the Digital Competition Expert Panel, 2019 (**"Furman Report"**), available at the UK Government's portal: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf para 1.80* ). (Date of access: 11.01.2020)

[25] Indirect network externalities arise from an increase in the quality or quantity of available services, a catalogue that grows with the number of users (A. Marciano and G. B. Ramello, *supra note* 20, p. 1378.). For example, an increase in the number of application developers for a specific application stores increases the value of this application store in the eyes of the consumers due to the increase in the number of applications that can be reached through the relevant application store. See Furman Report, *supra note* 24, para 1.80.

[26] Furman Report, *supra note* 24, para 1.80 -1.83.

[27] See, for example, G. J. Stigler and C. Friedland, What Can Regulators Regulate? The Case of Electricity, *Journal of Law and Economics*, 5-1962, pp. 1-16.

[28] G. J. Stigler, The Theory of Economic Regulation, *Bell Journal of Economics and Management Science*, 2(1)-1971, pp. 3-21.

[29] G. J. Stigler, *supra note* 28 pp. 3-21.

[30] W.A. Jordan, Producer Protection, Prior Market Structure and the Effects of Government Regulation, *Journal of Law and Economics*, 15-1972, pp. 151-76.

[31] S. Peltzman, The Economic Theory of Regulation after a Decade of Deregulation, *Brookings Papers: Microeconomics*, 1989-1989, pp.1-59, pp. 9-11.

[32] For the implications of these theories, see S. Peltzman, *supra note* 31, p. 9.

[33] As mentioned, we focus on the economic rationale as that is the only one referred under the DMA Proposal, but we do not exclude the possibility that social rationales may provide a basis for government intervention as long as the social problems are identified and the causal relationship between the social problem and the remedy devised under the regulation is established. See Part 4.

[34] Speech by Mario Monti, "Competition and Regulation in the Telecom Industry – The way forward", ECTA Conference, Brussels, Conrad Hotel, 10.12.2003, available at the European Commission's portal: *https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_03_604* (Date of access: 11.01.2020).

[35] *Commission Recommendation of 11.02.2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (notified under document number C(2003) 497) OJ No L 114 , 08/05/2003 p. 45 – 49. ("***Recommendation***") para 9; Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03), 11.7.2002 ("***Guidelines***") para 19-20, 27, 33-62.*

[36] Recommendation, *supra note* 35, para 9.

[37] See Recommendation, *supra note* 35, para 1 which states that "The aim [of the new legislation] is to reduce ex ante sector-specific rules progressively as competition in the market develops."

[38] Guidelines, *supra note* 35, para 70-88.

[39] Framework Directive, *supra note* 3, Art. 7, 8 and 16, Guidelines, *supra note* 35, para. 117-118.

[40] DMA Proposal, *supra note* 1 Art. 2(2).

[41] Ibid. Art. 3.

[42] Ibid. Art. 5 and 6.

[43] *Commission Staff Working Document Impact Assessment Report Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15.12.2020* ("**Impact Assessment**") available at the European Commission's Portal: *https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=72185*

[44] Preamble to the DMA Proposal, para 12.

[45] Impact Assessment, *supra note* 43, Ch. 2.3.1.

[46] Impact Assessment, *supra note* 43, Ch. 5.2.1.

[47] Furman Report, *supra note* 24.

[48] CMA, Online platforms and digital advertising, Market study final report, July 2020, available at the UK Government's portal: *https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf*. (Date of access: 11.01.2020).

[49] J. Nadler, D.N. Cicilline, Investigation of Competition in Digital Markets Majority Staff Report and Recommendations, 2020, available at the portal of House Committee on the Judiciary: *https://www.documentcloud.org/documents/7222836-Investigation-of-Competition-in-Digital-Markets.html*. (Date of access: 11.01.2020).

[50] George J. Stigler Center for the Study of the Economy and the State, Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report, 2019, available at the portal of the University of Chicago Booth School of Business *https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C*. (Date of access: 11.01.2020).

[51] Australian Competition and Consumer Commission, Digital Platforms Inquiry Final Report, 2019, available at the Australian Competition and Consumer Commission's portal: *https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf*. (Date of access: 11.01.2020).

[52] For the list of all relevant investigations see Impact Assessment, *supra note* 43, Annex 5.6.

[53] Although the Furman Report limits itself to questions of competition policy, it nevertheless mentions the problems associated with wider issues. See Furman Report, *supra note 24*, p.51.

[54] ACCC Report, *supra note 51*, Ch.8, CMA Report, *supra note 48,* p.71. US Majority Staff Report, *supra note 49,* p. 53. Stigler Center Report, *supra note 50,* p.41.

[55] ACCC Report, *supra note 51,* Ch. 6., Furman Report *supra note 24* p.51. CMA Report, *supra note 48,* p.70. US Majority Staff Report, *supra note 50,* p.57.

[56] US Majority Staff Report, *supra note 49, p.* 57-62. Stigler Center Report, *supra note 50* 9-11, 146-183.

[57] ACCC Report, *supra note 51,* Ch. 7. Furman Report, *supra note 24,* p.49. US Majority Staff Report, *supra note 49,* p.51. Stigler Center Report, , *supra note 50,* p.44.

[58] ACCC Report, *supra note 51,* Ch. 8. Furman Report, *supra note 24,* p.53.

[59] Preamble to the DMA Proposal, *supra note* 44, para 10.

[60] Ibid, para 23.

[61] For the concerns about prioritizing efficiency-based problems over rights-based problems see T. Prosser, *supra note* 15. Also see N. Dunne, *supra note* 2 (emphasizing that economic regulation should sometimes pursue non-market goals).

[62] Niamh Dunne, *supra note* 2, p.38.

[63] The Universal Service and Users' Rights Directive, *supra note* 6, Art 1.

[64] See Part 3.

[65] Impact Assessment, *supra note* 43, Ch 6.5.

[66] See S. Peltzman, *supra note* 31, p. 9-10. (Peltzman's theory explained in Part 2.)