PLATFORM REGULATION: TAKING STOCK OF LESSONS FROM THE MEDIA SECTOR

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Platform Regulation: Taking Stock of Lessons from the Media Sector

By Konstantina Bania

Over the past few years, online platforms have almost monopolized discussions in legal and policy circles. Various initiatives have recently culminated in legislative proposals. This contribution examines those proposals against the backdrop of rules regulating the media sector, which has characteristics similar to those of the platform economy. The paper discusses whether the proposals under consideration have taken stock of lessons learnt from the design and implementation of rules applicable to the media. It does so by focusing on the following four areas where useful analogies can be drawn between platform and media regulation: rules restricting concentration through presumptions of market power; the users' role in controlling market power; mandated access to a valuable input; and merger control rules. Though some provisions indicate that the legislator has made the effort to avoid certain drawbacks arising from the design and enforcement of media regulation (e.g. ownership thresholds), other provisions (e.g. user-centric rules) show that our experience from the media sector is not properly reflected in those proposals.

01
INTRODUCTION

Due to sector-specific economics, such as network effects and customer inertia, and the lack of appropriate regulation that could "tame" them, certain online platforms have engaged in various types of damaging conduct, ranging from user exploitation through the processing of excessive amounts of (personal and commercially sensitive) data to multi-layered self-preferencing practices, which have prevented other businesses from building a sustainable user base. In a first wave of initiatives, antitrust laws have taken the lead in addressing issues such as those described above. Numerous infringement decisions imposing hefty fines on platforms have been adopted while several jurisdictions have reformed (or are in the process of reforming) their competition rules to make them fit for the digital age.
Over the past couple of years, we have been witnessing a second wave of activity. Policymakers across the globe posit that, even if competition rules are adapted to the specificities of digital markets, they are not sufficient to address the problems arising from the "gatekeeping" role that certain platforms perform.[1] There seems to be broad consensus that vigorous competition enforcement must be complemented with *ex ante* rules that would level the playing field in digital markets by promoting fairness in platform-to-business relations. Numerous initiatives that have been undertaken in recent years, such as market studies and policy reports, have recently culminated in legislative proposals, including the EU proposal for a Digital Markets Act ("DMA")[2] and the U.S. Ending Platform Monopolies Act ("EPMA").[3]

To state the obvious, there are many sectors of the economy that have been subject to specific rules for the same reason that legislators around the globe attempt to regulate platforms; a natural tendency to concentration combined with a favorable regulatory regime has led to certain platforms acquiring significant bargaining power, depriving (business and end users) of choice. What is less obvious is whether the proposals for platform regulation that have emerged recently have taken stock of the lessons learnt from the design and implementation of rules regulating those other sectors. This contribution will attempt to answer this question by discussing those proposals in the light of the experience we have gained from the media sector. I will focus on the following four areas where I believe useful analogies between media and platform regulation can be drawn:

- Rules restricting concentration through presumptions of market power: In Part II, I will discuss whether recent proposals for platform regulation, which establish thresholds to adduce "gatekeeping" power, adequately consider and address the drawbacks that have arisen from quantitative criteria that have been set to restrict media concentration;

- The audiences' role in controlling market (or opinion-forming) power: In Part III, I will discuss whether relying on audiences to consume and create a wide range of information about matters of common concern has paid off. If not, why should we rely on online users to promote fairness in platform-to-business relations?

- Mandated access to a valuable input: In Part IV, I will attempt to draw lessons from the obligation imposed on certain broadcasters to share premium content in order to assess how the obligation to share data has been designed; and

- Merger control rules: In Part V, I will discuss issues arising from "killer acquisitions" and whether the approach followed in certain jurisdictions to regulate media mergers could prove useful to facilitate scrutiny of M&A activity in markets where platforms operate.

I conclude by making some forward-looking remarks on the legislative proposals for platform regulation that have surfaced in recent years.

02
RESTRICTING CONCENTRATION THROUGH PRESUMPTIONS OF MARKET POWER

Media markets have a natural tendency to concentration, which several jurisdictions have attempted to restrict in or-

1 See, for instance, European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector ("DMA Proposal"), COM(2020) 842 final, Recital (5), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en; U.S. House of Representatives, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets (U.S. House Report) , pp. 6, 20 and 396.

2 *Ibid*.

3 A bill to promote competition and economic opportunity in digital markets by eliminating the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses (Ending Platform Monopolies Act or "EPMA"). H.R.3825 — 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/3825/text?r=34&s=1.

der to limit the power of specific organizations to influence public opinion. It is generally believed that, due to the ability of the media to shape the political agenda and to guide public opinion, accumulation of market power in the hands of a few "may result in a skewed public discourse where certain opinions are excluded or under-represented."[4] The means through which national laws aim at alleviating concerns over media concentration vary from one country to another. For example, certain States establish limitations on the (ad) market shares that may be acquired by the same person or organization, whereas others impose restrictions on the size of the audiences that a media firm may reach.[5] Once the relevant thresholds are fulfilled, the media company under consideration is presumed to have acquired significant opinion-forming power, thereby falling under the scope of stricter rules pertinent to "content bottlenecks."

Those thresholds can be (and have been) criticized on several grounds. First, the design of those rules has undermined their effectiveness. For example, in several jurisdictions, the authority in charge of overseeing **compliance** can examine whether the applicable thresholds have been exceeded only after an *ex officio* investigation or once a complaint has been submitted.[6] In other words, there are no rules that require the company concerned to notify the competent authority that it indeed meets those thresholds. The absence of rules that would increase transparency of media ownership has exacerbated enforcement problems.[7] Second, broadly speaking, rules attempting to restrict media concentration are far from **flexible or balanced**. There are no rules that would enable the competent authority to examine whether an entity that does not meet those thresholds may nevertheless hold significant opinion-forming power (e.g. because the regulatory thresholds are high). Moreover, there is no mechanism that would enable the companies that exceed the applicable thresholds to rebut the presumption that they can affect citizen behavior. Third, "static" rules for media markets, which move at a **fast pace**, are likely doomed to fail.

Recent proposals for platform regulation are based on the same logic as the above rules. Most notably, the DMA proposal[8] and the EPMA[9] establish a set of quantitative criteria (accompanied by a set of qualitative parameters) to determine whether a platform qualifies as a "gatekeeper" or "covered platform." If those criteria are met, that platform is presumed to have the ability to engage in unfair practices that harm its business users. Compared to antitrust enforcement, which requires a detailed analysis of the competitive constraints exercised on the company under investigation, this approach has a distinct advantage, namely straightforwardness; quantitative criteria "curb shenanigans and flannelling by companies trying to argue against all common sense, and speed up the process of designation."[10] But, have the EU and U.S. legislators drawn any lessons from the flaws underpinning the media ownership rules discussed above?

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Designation process and information gathering. Leaving aside the fact that the European Commission has yet to explain why it proposed the thresholds it did (e.g. why is having 45 – and not 46 – million monthly active users sufficient for a platform to qualify as a gatekeeper?), the DMA proposal would seem prepared to address some of the issues that arose from the design and implementation of media ownership restrictions. For starters, business users would not rely only on the Commission to monitor whether a platform falls under the scope of the DMA. Though the Commission would not be prevented from designating platforms as "gatekeepers" at any time,[11] the platforms concerned would be required to notify the Commission within three months after the applicable

4 European Commission Staff Working Document on Media Pluralism in the Member States of the EU, SEC (2007) 32, 5.

5 An overview of rules that apply in Europe can be found in Centre for Media Pluralism and Media Freedom (2021). Monitoring Media Pluralism in the Digital Era, https://cadmus.eui.eu/bitstream/handle/1814/71970/CMPF_MPM2021_final-report_QM-09-21-298-EN-N.pdf?-sequence=1&isAllowed=y.

6 See, for instance, Greek Law No. 3592/2007 of 19/07/2007 on Media Concentration and Licensing Procedures [2007] Official Gazette 161/3371.

7 See, for instance, Centre for Media Pluralism and Media Freedom (2021). Monitoring Media Pluralism in the Digital Era. Country Report. Greece, p. 10, https://cadmus.eui.eu/bitstream/handle/1814/71948/greece_results_mpm_2021_cmpf.pdf?sequence=1&isAllowed=y.

8 DMA proposal, Article 3(2).

9 EPMA, Section 5(B).

10 Cristina Caffarra & Fiona Scott Morton, The European Commission Digital Markets Act: A Translation, VOX (January 5, 2021), https://voxeu.org/article/european-commission-digital-markets-act-translation.

11 DMA proposal, Article 3(4).

thresholds are met and provide it with all the relevant information.[12]

Unfortunately, the EPMA does not clarify how the designation of a company as a "covered platform" is to take place.[13] Would it be the platform or the regulator (the Federal Trade Commission or the Department of Justice) that would collect the relevant data? If it is the latter, our experience from the media sector indicates that the compliance hurdles may be considerable.

Flexible and balanced rules. Turning to the matter of whether the recently proposed rules for platforms are adaptable to the specificities of digital markets, the EPMA is quite rigid. Similar to the instruments setting media ownership restrictions, it does not include rules that would enable the competent authorities to assess whether a platform that does not fulfil the quantitative criteria it sets should comply with the obligations the Act establishes. This approach falls short of addressing one of the issues that might prevent effective competition in digital markets that was discussed in the U.S. House Report, that is, "tipping" (the Report goes to great lengths to explain how Facebook has tipped the social network market in its favor).[14] Contrary to its U.S. counterpart, the DMA proposal is more flexible; it establishes a mechanism that would allow the Commission to bring under the DMA's scope platforms that do not exceed the thresholds it establishes. Though it is meant to address concerns relating to "tipping,"[15] the proposed rule is not devoid of drawbacks.

> ***Unfortunately, the EPMA does not clarify how the designation of a company as a "covered platform" is to take place***

As it currently stands, the proposal mentions that, in conducting the relevant assessment, the Commission is expected to consider several parameters, such as lock-in, scale and scope effects arising from data, and structural market characteristics.[16] An element that is arguably missing from the above list is user behavior. In other words, an assessment of whether a large online platform is a gatekeeper must not be restricted to supply-side considerations. It should further consider consumption patterns.[17] Part III will explain in detail how ignoring the demand side has affected the effectiveness of media regulation and how it sets certain provisions of the DMA up for failure. For the purposes of this section, suffice it to say that having a flexible rule in place to allow for early intervention in order to prevent concentration of market power is not enough; the rule in question must adequately reflect how the market it regulates works in practice.

Approaching the matter of flexibility from the platforms' perspective, both the DMA proposal and the EPMA establish rules that would enable a platform to rebut the presumption that it is a "gatekeeper" or a "covered platform." Pursuant to the EPMA, a party that is subject to a covered platform designation may petition for review within 30 days of the issuance of such designation (and at a later stage as markets evolve).[18] Under the DMA proposal, a platform may present "sufficiently substantiated" arguments to demonstrate that it does not qualify as a "gatekeeper."[19] Essentially, this would apply to platforms that meet the thresholds but may not constitute an "important gateway" (e.g. because there is no business user or end user lock-in).[20] Compared to media ownership rules, which are based on presumptions that cannot be rebutted, the above rules are not only able to take account of the specificities of the markets they regulate, they are also aligned with the principle of proportionality. Put differently, they are more balanced (i.e. mindful of the rights of both sides).

Reliance on *qualitative* criteria. Finally, though the EU and U.S. proposals have opted for the same approach that was followed to regulate media concentration, recent initiatives in other jurisdictions seem to dismiss the idea of using "static" criteria to adduce gatekeeping power. Pursuant

12 *Ibid*. Article 3(3).

13 EPMA, Section 6(A).

14 U.S. House Report, pp. 13, 134, 141-143, and 384.

15 DMA proposal, Recital (25).

16 *Ibid*. Article 3(6).

17 This is vividly illustrated by recent antitrust decisions. See, for instance, Commission Decision of June 27, 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (Case AT.39740, *Google Shopping*), C(2017) 4444 final, paragraphs 307-312 and fn. 333.

18 EPMA, Sections 7 and 6(b).

19 DMA proposal, Article 3(4).

20 DMA proposal, Recital (23).

to the recently revised German Act Against Restraints of Competition,[21] the Bundeskartellamt may issue a decision declaring that an Undertaking is of Paramount Significance for Competition Across Markets ("UPSCAM").[22] Contrary to the EPMA and the DMA proposal, the German Act does not set quantitative criteria that an UPSCAM must fulfil in order to qualify as such. The German Act refers to qualitative parameters that may influence the Bundeskartellamt's decision, including vertical integration and its activities in otherwise related markets, access to data relevant for competition, and its influence on third parties' businesses.[23]

The UK seems to be moving in the same direction; the Code of Conduct for platforms with a "Strategic Market Status" ("SMS") is likely to be influenced by qualitative considerations, such as the "position to exercise market power over a gateway or bottleneck in a digital market, where [it controls] others' market access" and the "powerful negotiating position" a platform holds vis-à-vis businesses that rely on it to survive.[24] Focusing on qualitative considerations is not groundless; invariable conditions may be designed in a way that does not accommodate markets that evolve rapidly. Nevertheless, one may wonder whether relying on qualitative parameters alone can serve legal certainty, which is also important for protecting the rights of those operating in such markets.

It is too soon to tell which approach is best. Germany has only recently started to undertake enforcement initiatives against platforms that may qualify as UPSCAM,[25] whereas in the other three jurisdictions examined above the legislative process has not been concluded yet. On the face of it, drawing from the application of media ownership rules, it seems that the DMA proposal introduces a sensible approach. Though it establishes quantitative conditions to assess whether a platform is a "gatekeeper," there are two mechanisms to address issues arising from the rigidity of (user, business user, and turnover/market capitalization) thresholds. The Commission may designate as gatekeepers platforms that do not fulfil the quantitative criteria, whereas platforms that meet the thresholds are allowed to put forward arguments to rebut designation. The examples discussed above show that the relevant rules would benefit from improvements, but they seem to be a step in the right direction.

03

THE ROLE OF USERS IN CONTROLLING MARKET (OR OPINION-FORMING) POWER

Two of the main changes that digital technologies have brought about in the media sector are content abundance and the audiences' ability to exercise control over content. Those two changes have prompted a wave of de-regulation; some jurisdictions have either softened or altogether abolished their media ownership restrictions for the reason that the amount of information citizens have at their fingertips and their ability to choose or create content allow for a "healthy varied (media) diet" and an active participation in public discourse.[26] However, the assumption on which de-regulation was grounded was false, for it did not reflect audience behavior. The ability to consume content on-demand has increased content personalization, which restricts exposure to diverse ideas, whereas it can be doubted whether audiences use platforms that have emerged in recent years (e.g. social networks) to distribute content that contributes to public discourse (rather than taking selfies).[27] In other words, it was wrong to rely on the audiences in order to achieve the normative goal initially pursued by media ownership rules, namely media pluralism.

Regrettably, some of the recent proposals for platform regulation either purposefully or unintentionally ignore the lesson learnt from the media sector. Most notably, the DMA proposal includes provisions that place the burden on the online user as a means to achieve the objective the instrument pursues, that is, fairness in P2B relations. One of those

21 An unofficial translation into English is available at: https://www.d-kart.de/wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf.

22 *Ibid*. Section 19a(1).

23 *Ibid*.

24 J. Furman, D. Coyle, A. Fletcher, D. McAuley, & P. Marsden (2019), Unlocking Digital Competition, Report of the Digital Competition Expert Panel (Furman report), pp. 55 and 59. The logic underlying the Furman recommendation was endorsed by the CMA in its sector inquiry report. See CMA (2020), Online Platforms and Digital Advertising Market Study, paragraph 7.56 et seq.

25 See, for instance, Bundeskartellamt. Press Release of June 21, 2021. Proceeding against Apple based on new rules for large digital companies (Section 19a(1) GWB) – Bundeskartellamt examines Apple's significance for competition across markets https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html.

26 I discuss these issues in detail in Konstantina Bania, The Role Of Media Pluralism in the Enforcement of EU Competition Law, pp. 50-83 (Concurrences, 2019).

27 *Ibid*. pp. 74-83.

provisions is the obligation that would require platforms to refrain from combining personal data sourced from many different services. However, such prohibition would *not* apply if the end user were presented with the specific choice and provided consent in the sense of the GDPR.[28] It is submitted that this solution is not adequate to address the issues it seeks to resolve. Though it is based on the standard set by the GDPR, it does not reflect how users actually behave. The GDPR is grounded on the principle of "informational self-determination."[29] This principle rests on the assumption that data subjects are sufficiently informed about and able to assess how their data is processed when they grant their consent. However, in practice, this does not represent how data subjects act. This is best illustrated by the so-called "privacy paradox," a term that is used to describe the well-documented phenomenon that, while users claim to care about data protection, this is not mirrored in their online behavior;[30] users usually agree with the platforms' Terms of Use *without* reading them or after *only partially* reading them.[31] Even if users' consent in the above cases renders data processing compliant with the GDPR, the privacy paradox reinforces concentration of market power. In other words, the DMA proposal does not adequately consider whether users exercise competitive constraints on platforms amassing excessive amounts of data.

> ***Regrettably, some of the recent proposals for platform regulation either purposefully or unintentionally ignore the lesson learnt from the media sector***

Similar remarks can be made on other obligations included in the DMA proposal. For example, according to the DMA proposal, gatekeepers should allow end users to uninstall any pre-installed apps on a CPS.[32] Gatekeepers should also refrain from technically restricting the end users' ability to switch between different services to be accessed through the gatekeepers' OS.[33] The above provisions do not take account of certain important characteristics of the markets regulated by the DMA. Those markets are characterized by customer inertia and "stickiness" to default settings. Clearly, the Commission is aware of these issues. For example, in the Impact Assessment accompanying the DMA proposal, it refers to behavioral bias as a problem that merits attention.[34] Interestingly, the Impact Assessment correctly identifies **the cause** of the problem, pinpointing the advanced behavioral profiling and testing techniques (e.g. sneaking items into the user's shopping basket, social pressure) used by gatekeepers to nudge users into certain decisions.[35] The Impact Assessment further identifies the various **types of biases** (e.g. "escalation of commitment,"[36] "availability bias,"[37] "social norming") that users suffer from. Finally, it pinpoints **the problems** brought about by such biases. It notes specifically that biases lead to "increased insight into user profiles and preferences, allowing gatekeepers to offer them more personalized services and advertisements, thus attracting even more users and reinforcing consumer lock-in, favoring single-homing and rendering switching to alternative platforms more difficult."[38]

Against this backdrop, one may wonder whether a more paternalistic approach is needed (similar to the one that has underpinned media regulation before the process of deregulation discussed above was initiated). A telling example is the revised German Act Against Restraints of Competi-

28 DMA proposal, Article 5(a).

29 European Union Agency for Fundamental Rights and Council of Europe, Handbook on European Data Protection Law, 18 (2018).

30 See, for instance, Susanne Barth & Menno J.T. de Jong, The privacy paradox – Investigating discrepancies between expressed privacy concerns and actual online behavior – A systematic literature review, 34(7) *Telematics and Informatics* 1038-1058 (2017).

31 See, for instance, European Commission, Data Protection Report, Special Eurobarometer 431 (2015), https://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_431_en.pdf; Pew Research Center, What Internet Users Know About Technology and the Web, 3 (2014), www.pewinternet.org/files/2014/11/PI_Web-IQ_112514_PDF.pdf.

32 DMA proposal, Article 6(1)(b).

33 *Ibid*. Article 6(1)(e).

34 European Commission, 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, *SWD(2020)* 363 final, paragraph 73, https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act.

35 *Ibid.* paragraph 80.

36 *Ibid*. paragraph 81.

37 *Ibid*.

38 *Ibid*. paragraph 84.

tion, which lays down a prohibition of exclusive pre-installing of a gatekeeper's own services.[39] In other words, the German Act does not rely on consumers to un-install apps the gatekeeper offers; it imposes a positive obligation on the gatekeeper, arguably getting at the core of the problem. The EPMA uses different means to achieve the same objective. Contrary to the German Act Against Restraints of Competition, it does not regulate specific issues (e.g. default settings). The EPMA is drafted in broad terms that focus on how platforms should behave (rather than on how *users might* behave). For example, the Act prevents "conflicts of interest." Such conflicts exist where:

> a covered platform operator owns or controls a line of business, other than the covered platform; and the covered platform's ownership or control of that line of business creates the incentive and ability for the covered platform to advantage the covered platform operator's own products […]; or […] disadvantage, the products […] of a competing business.

The above wording would arguably capture "data aggregation" and practices relating to the installation of default settings that were discussed above.

For reasons relating to consumption patterns, the approach followed in Germany and in the U.S. seems more appropriate than the DMA proposal to tackle unfair platform practices. Similar to the regulatory initiatives in the media sector that were undertaken in recent years, the DMA proposal is grounded on the uncorroborated assumption that users act responsibly. When discussing the process of de-regulating the media sector, Helberger argued that "ill-advised is the idea that governments can simply shift the responsibility for qualitative and diverse information away from the suppliers onto the … consumers."[40] Putting all of the above in a DMA context, it is not reasonable to believe that the user has been mutated from a set of powerless eyeballs in a fully enlightened and vigilant consumer.

04

MANDATED ACCESS TO A VALUABLE INPUT

Competition enforcement and regulation have often mandated access to arguably the most valuable input in audiovisual markets, that is, "premium content" (e.g. popular football events, Hollywood blockbusters).[41] Such intervention was meant to protect competition and promote media pluralism; reducing exclusivity was deemed to enable competing providers (or companies active in neighboring markets) to reach viewers, thereby offering audiences more choice.

The DMA proposal is based on the same logic as the above intervention. It includes two obligations that are meant to ensure access to the equivalent of "premium content" in digital markets, namely (personal and non-personal) data. In the case of search engines, gatekeepers would be required to grant to competing search engines access to ranking, query, click and view data on FRAND terms.[42] In the case of gatekeepers offering services other than search engines, the obligation would govern platform-to-business relations and data would be provided for free.[43]

Some lessons we have learnt from "access to premium content" obligations can inform the design of the proposed DMA provisions. Based on aspects that have occasionally rendered access obligations onerous or ineffective, there are three thorny issues that would need to be resolved, namely the scope of the regulatory duty, the pricing mechanism whereby data will become available to competing search engines, and enforcement gaps that may deprive the duty of its purpose.

First, as regards the scope of the obligation, in many cases, the term "premium content" was poorly defined, thereby giving rise to disputes. This is arguably a problem that arises from the DMA proposal, which broadly refers to the duty to provide access to "effective" and "high quality" data. Nevertheless, what qualifies as such is not easy to determine.

39 German Act Against Restraints of Competition, Section 19a(2)(2)(a).

40 Natali Helberger, From Eyeball to Creator – Toying with Audience Empowerment in the Audiovisual Media Service Directive, 6 *Entertainment Law Review* 134–5 (2008).

41 For a comprehensive overview of the issues that arose from the relevant licensing mechanisms see Ofcom (2009). Wholesale must-offer remedies: International examples.

42 DMA proposal, Article 6(1)(j).

43 *Ibid*. Article 6(1)(i).

For example, should data be raw or processed?[44] Some might argue that, for data to be effective and high quality, it needs to have been processed by the gatekeeper. Others might say that the DMA should comply with the principle of proportionality and that its implementation should not chill innovation; as a result, gatekeepers should only be required to provide raw data.

Second, in the case of search engines, access to data would come at a cost. However, the Commission does not specify what would qualify as fair and reasonable prices that competitors would have to pay to access the data concerned. In many cases where the Commission has imposed access remedies, it would leave it to the firms concerned to propose the pricing mechanism that would determine the fees paid by competitors (e.g. retail minus, wholesale plus).[45] The Commission has occasionally failed to conduct a proper assessment of such pricing mechanisms, which led to litigation over whether the prices charged were fair and reasonable.[46] Though there should be room for commercial negotiations, the Commission should provide concrete guidance on the elements that govern pricing in cases of mandated data sharing.

Third, in setting out the characteristics of data that gatekeepers need to share with their business users, the Commission refers to "real-time" data because the latter is more valuable to business users. One example illustrating the problems that may arise in the absence of a concrete timeframe concerns cases where the Commission established the duty to grant access to major sports competitions, which are more valuable when they are transmitted "live." In relevant decisions, the Commission did not set a deadline by which the merged entity should grant access to the content that fell under the umbrella of the access remedy.[47] The decision merely provided that the wholesale offer "[should] be made on reasonable terms and conditions," but without explaining what is meant by "reasonable."[48] Related to this issue, introducing a binding arbitration system does not fully address the concerns that may arise from compliance with the obligation to grant access within a "reasonable" time frame.[49] For example, in *News Corp/Telepiù*, it took the International Court of Arbitration two years to decide whether the FIFA World Cup was must-offer content covered by the remedy.[50] The above illustrates that there needs to be adequate guidance on how disputes over lack of access to "real time" data will be resolved. The existing uncertainty is expected to cause problems to gatekeepers and business users alike.

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It is worth noting that the EU is currently the only jurisdiction that has dared to propose rules that would mandate access to data. It remains to be seen whether the relevant obligations will apply in a way that promotes fairness in digital markets.

05

OBLIGATION TO INFORM ABOUT CONCENTRATIONS

One of the concerns that has emerged in recent years is that merger control may not have been particularly effective to address problems arising from M&As affecting digital markets. The Furman report notes that "*over the last 10 years the 5 largest firms have made over 400 acquisitions globally. None has been blocked and very few have had conditions attached to approval* (…) *or even been scrutinized by competition authorities.*"[51] This can be attributed

44 For a categorization of data based on the levels of the supply chain see, for instance, Michal S. Gal & Daniel L. Rubinfeld, Access Barriers to Big Data, 59 *Arizona Law Review* 339 (2017); Inge Graef *et al*., Limits and Enablers of Data Sharing An Analytical Framework for EU Competition, Data Protection and Consumer Law, (TILEC Discussion Paper 24, 2019), 4-5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3494212.

45 For an overview of cases affecting media markets see Konstantina Bania, *supra* note 26, 128 et seq. and 151 et seq.

46 *Ibid*.

47 Commission Decision of April 2, 2003 (Case COMP/M.2876 *NewsCorp/Telepiù*), 2004 O.J. (L 110) 73.

48 Konstantina Bania, *supra* note 26, 134.

49 *Ibid*.

50 *Ibid*.

51 Furman report, p. 12.

to various factors, including the inability of merger control rules to "capture" the acquisition by dominant platforms of potential rivals and nascent competitors.

The U.S. House Report notes that "potential rivals and nascent competitors play a critical role in driving innovation, as their prospective entry may dislodge incumbents or spur competition. For this reason, incumbents may view potential rivals and nascent competitors as a significant threat, especially as their success could render the incumbent's technologies obsolete."[52] In the EU, the acquisition of potential rivals and nascent competitors may not meet the thresholds set by the Merger Regulation because those firms may generate low revenues at the time of their acquisition. It is thereby feared that mergers that stifle competition may fly under the Commission's radar. One of the solutions the Commission is considering to address the above issue is a provision in the DMA proposal that would require gatekeepers to inform the Commission of any intended concentration involving another provider of CPS ***or*** of any other services provided in the digital sector[53] irrespective of whether it is notifiable to a Union competition authority under the EU Merger Regulation or to a competent national competition authority under national merger rules.[54] The proposal currently lacks teeth in the sense that it does not afford the Commission the powers to block the acquisition by a gatekeeper of a potential rival or nascent competitor. As a result, it cannot be expected to prevent "killer acquisitions" in and of itself.

However, one of the amendments to the DMA proposal that the European Parliament's Internal Market Committee (IMCO) has recently adopted, would go a (significant) step further. Based on that amendment, the Commission would be afforded the power to prevent gatekeepers from making acquisitions in areas relevant to the DMA for a limited period "provided that such restrictions are […] necessary in order to remedy the damage caused by repeated infringements ***or to prevent further damage to the contestability and fairness of the internal market***."[55] It is not clear whether this wording could amount to a disproportionate interference with the freedom to conduct a business. Though the amendment would seek to produce a deterrent effect on repeated infringers, the text in bold leaves one to wonder how broadly the amended provision could be interpreted to block acquisitions that may not undermine the objective of the DMA.

In between the two proposals discussed above, one could envisage a *via media* in the future, that is, stricter notification requirements for gatekeepers. In many jurisdictions, media companies are bound by lower turnover thresholds that trigger the obligation to notify with a view to ensuring that media pluralism is not harmed.[56] Since the DMA pursues fairness, that is, a legitimate interest that is distinct from those competition law seeks to serve, the argument could be made that sector-specific merger rules are needed to protect that value. Of course, the question remains as to what notification requirements in the case at hand should be set. Nevertheless, this is an avenue worth exploring. Indeed, the UK, which is currently in the process of designing its own regulatory regime applicable to SMS platforms, is considering establishing rules that would require SMS firms to report *all* transactions to the CMA (i.e. not only those that would meet the applicable jurisdictional tests).[57]

06
CONCLUSIONS

Platform regulation is not a piece of cake. It is a daunting task to propose instruments that achieve a number of (sometimes opposing) goals. Digital markets evolve rapidly. As a result, the applicable rules must ensure a reasonable degree of legal certainty so that large platforms know how to behave, and business users know whether their rights have been violated. At the same time, precisely because they are fast-paced, the applicable rules must also be flexible. Though platform regulation should reduce platforms' bargaining power, it should also comply with the principle of proportionality. Those aspects are difficult to reconcile. However, many sectors that have characteristics similar to those of the platform economy have been regulated. In many cases, such sector-specific regulation has applied for

52 U.S. House Report, p. 394.

53 The term "digital sector" is defined in the DMA as the sector of products and services provided by means of or through information society services. See DMA Proposal, Article 2(4).

54 *Ibid*. Article 12(1).

55 Andreas Schwab, Digital Markets Act Version of November 18, 2021 (Compromise Amendment A), Article 16(1a), https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2021/11-22/DMA_Comrpomise_AMs_EN.pdf.

56 See, for instance, Greek Law No. 3592/2007 of 19/07/2007 on Media Concentration and Licensing Procedures [2007] Official Gazette 161/3371.

57 CMA (2020). Appendix F: The SMS regime: a distinct merger control regime for firms with SMS, pp. 12 et seq.,https://assets.publishing.service.gov.uk/media/5fce706ee90e07562d20986f/Appendix_F_-_The_SMS_regime_-_a_distinct_merger_control_regime_for_firms_with_SMS_-_web_-.pdf.

decades, which enables the legislator to understand what might prove effective for digital markets. Our discussion of recent proposals for platform regulation against the backdrop of rules regulating the media showcases that the proposals in question do not always reflect the lessons learnt from the media sector. Though it is still soon to tell how the final texts of this first generation of proposals will look like, taking a step back to consider what has worked in sectors with similar traits should be a continuous effort to maximize the effectiveness of this new, complex, and arguably necessary legal toolkit.

> ***In between the two proposals discussed above, one could envisage a via media in the future, that is, stricter notification requirements for gatekeepers***

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