EX ANTE REGULATIONS

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LETTER FROM THE EDITOR

Dear Readers,

Classically, the competition rules are known as an *ex post* instrument, whereas (sectoral) regulation is known as *ex ante*. In reality, however, the lines between the two categories are frequently blurred. *Ex ante* competition rules are laid out in general terms in legislation (in the EU, in the Treaty, Regulations, and Guidelines issued by the EU Commission; and in the U.S., in Acts of Congress and the various guidelines issued by the FCC, FTC, and DOJ, among others). Competition authorities (and judges) take decisions that establish past behavior as having infringed those rules or not (and such decisions are typically regarded as *ex post*).

Yet these decisions and judgments establish precedents and conventions that can reasonably be deemed to then form part of the corpus of *ex ante* rules, which are then used by companies and their advisors to guide their future advice and actions. As such, both *ex ante* rules proper and *ex post* actions by the authorities, in some sense, form part of a broader set of *ex ante* guidance for corporations in their commercial conduct.

That said, recently, particularly in the context of the regulation of the "platform economy" (including notably the EU Digital Markets and Digital Services Acts, and similar initiatives worldwide) the question of *ex ante* regulation proper has been gaining greater prominence. There has also been an evolution in the respective roles of *ex ante* regulation v. *ex post* competition enforcement in telecommunications markets as the rollout of universal fiber broadband access has continued apace. The pieces in this Chronicle take a contemporary look at these and other developments and assess the role of what is classically seen as *ex ante* regulation in the modern landscape.

To open, **Stephen Kinsella & Karla Perca Lopez** explore the new powers the UK's Competition and Markets Authority ("CMA") is to receive to regulate digital companies with Strategic Market Status ("SMS"). Once the new regime is in place, the nature of the relationship between the newly regulated companies and the CMA's Digital Markets Unit ("DMU") will significantly change. The first challenge for both will be to navigate the transition towards this new relationship, which will be a continuous, long-term relationship. This shift may be a challenge for both given the often-confrontational nature of their interactions so far. The second challenge will be for the CMA to choose between its different enforcement powers. The authors contend that it would be reasonable to

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assume that the CMA will have an incentive to choose to use its *ex ante* powers. This raises the question of what space will be left for abuse of dominance cases in digital markets, especially as behaviors addressed under both tools can be similar.

Indeed, policymakers, regulators, and commentators alike have criticized antitrust enforcers' attempts at constraining "Big Tech" through *ex post* tools as excessively lenient and far too slow. **Ben Bradshaw, Peter Herrick & and Sheya Jabouin** discuss how this perceived failure have led to calls for a revamped approach to competition in digital markets, including expansive new regulatory structures like the European Union's Digital Markets Act ("DMA"). But, as the authors note, *ex ante* regulations carry some risk, as unintended consequences may do more to impede competition in dynamic markets.

Following on from this, **Alberto Quintavalla & Leonie Reins** discuss the connection between the timing and the locus of a regulatory intervention. In their view, it should excite considerable interest in the study of *ex ante* regulation. To illustrate their argument, they draw analogies with the so-called "precautionary principle." Timing is clearly important when legislation is being drafted. However, time is not the only relevant variable in decision-making. For example, policymakers should address both when it is the right time to regulate new or emerging technologies and at which governance level. Addressing such questions would allow them to strike a balance between facilitating the development of new technologies and addressing the legitimate concerns of consumers.

Taking a Canadian perspective, **John Pecman & Huy Do** examine the debate around *ex ante* regulations for Big Tech platform companies. They explore the need for, and costs associated with *ex ante* regulation and conclude that pursuing such regulations in Canada would be ill-advised. The paper contends that no empirical evidence has been offered with respect to actual market failure. The paper provides a brief overview of international policy developments aimed at addressing vertical issues stemming from the network effects and scale economies in the EU, the U.S., and elsewhere. It then focuses on recent Canadian competition policy developments, and in particular on calls for *ex ante* regulation of Big Tech platform companies. The paper argues that the expressed goals of *ex ante* regulation are often amorphous and that there are significant costs associated with its implementation, as well as potential legal and constitutional hurdles in the Canadian context.

Turning more sociological and humanitarian concerns, **Mignon Clyburn** looks to the implications of the passage of the Martha Wright-Reed Just and Reasonable Communications Act of 2022. Signed into law by President Joe Biden on January 5th, this legislation requires the Federal Communications Commission to ensure that charges for payphone services, including advanced (e.g. audio or video) communications services in correctional institutions are "just and reasonable." The article explores the potential for the legislation to improve conditions for the families of incarcerated persons, but underlines the need for continued vigilance in its enforcement.

Looking at the potential for regulatory divergence in the new world of *ex ante* regulation, **Will Leslie & John Eichlin** note how the new wave of potential rules has sparked intense debate on both sides of the Atlantic and worldwide. In their view, the potential challenge to consistent transatlantic policy and regulation requires detailed consideration. The potential introduction of myriad new regimes across Europe, Germany, the UK, the U.S., and other jurisdictions could put significant strain on an area of competition policy that until now, at least, has seen signs of increasing convergence. The authors explore the degree to which such divergence is likely to result in regulatory conflict or impose practical costs on market participants.

Finally, on a related theme, **Cristina Poncibò & Laura Zoboli**'s piece focuses on the ever-evolving relationship between EU Competition Law and *ex ante* regulation by specifically analyzing the case of so-called regulatory sandboxes, i.e. varying approaches to introducing experimental *ex ante* regulation. It also provides some case studies of regulatory sandboxes and questions their impact on the goals of promoting competition and innovation in the EU. Among other things, the article concludes that regulatory sandboxes, if properly designed, could well create a level playing field for new entrants and mitigate barriers to entry. On the other hand, regulatory experimentalism has the potential to exacerbate risks for both consumers and competition.

As always, many thanks to our great panel of authors.

Sincerely,
CPI Team

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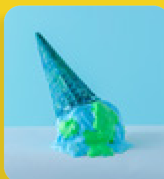
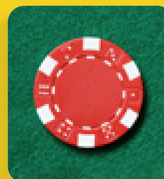


BRAVE NEW WORLD?

By Stephen Kinsella & Karla Perca Lopez

The UK's Competition and Markets Authority is expected soon to get new powers to regulate digital companies with Strategic Market Status ("SMS"). Once the new regime is in place, the nature of the relationship between the newly regulated companies and the DMU will significantly change. The first challenge for both will be to navigate the transition towards this new relationship, which will be a continuous, long term relationship. This shift may be a challenge for both given the often-confrontational nature of their interactions so far. The second challenge will be for the CMA to choose between its different enforcement powers. There are several factors that the CMA may consider in making this decision, but it would be reasonable to assume that the CMA will have an incentive to choose to use its *ex ante* powers. This raises the question of what space will be left for abuse of dominance cases in digital markets, especially as behaviors addressed under both tools can be similar.



UPPING THE "*ANTE*" ON COMPETITION REGULATION: GAMBLING WITH THE FUTURE OF BIG TECH?

By Ben Bradshaw, Peter Herrick & and Sheya Jabouin

Policymakers, regulators, and commentators alike have criticized antitrust enforcers' attempts at constraining "Big Tech" as excessively lenient and far too slow. This perceived failure, along with widespread declarations of certain platforms' incontestable dominance, have led to calls for a revamped approach to competition in digital markets, including expansive new regulatory structures like the European Union's Digital Markets Act ("DMA"). But attempts to clip the wings of large platforms through *ex ante* regulation carry some risk, as new compliance burdens, uncertainty, and other unintended consequences may do more to impede competition in these dynamic and evolving markets than nurture it. In this article, we examine these risks, key provisions in the DMA, and the unanswered questions that still remain even after its enactment.

EX ANTE REGULATION IN AN ERA OF FAST-PACED INNOVATION – CONNECTING THE TIME AND LOCUS OF REGULATION

By Alberto Quintavalla & Leonie Reins

The connection between the timing and the locus of a regulatory intervention should excite considerable interest in the study of *ex ante* regulation. To illustrate this argument, we draw on the example of the precautionary principle. It emerges that timing is important when legislation is being drafted. However, time is not the only relevant variable in decision-making. When it is ripe for application, both temporal and locus-of-regulation considerations matter. For instance, a question that policymakers should address is when it is the right time to regulate new or emerging technologies and at which governance level. Addressing such questions would allow them to strike a balance between facilitating the development of new technologies and addressing the legitimate concerns of their citizens.

BEWARE *EX ANTE* REGULATION: INTRODUCING "CUT AND PASTE" *EX ANTE* REGULATIONS IN CANADA AGAINST SELECT BIG TECH COMPANIES IS JUST BAD ECONOMIC AND LEGISLATIVE POLICY

By John Pecman & Huy Do

This paper examines the international and Canadian debate around *ex ante* regulations for Big Tech platform companies. The paper explores the need for and costs associated with *ex ante* regulation and concludes that pursuing such regulations in Canada would be ill-advised. While some argue that ex ante regulation is necessary to prevent market failure and protect incentives for innovation, this paper contends that no empirical evidence has been offered with respect to actual market failure. The paper provides a brief overview of international policy developments aimed at addressing vertical issues stemming from the network effects and scale economies in concentrated digital platform markets. These include the European Union's *Digital Markets Act*, the United Kingdom's *Digital Code of Conduct*, the United States' *American Innovation and Choice Online Act*, and the G7's Digital Policy. In addition, it examines recent Canadian competition policy developments, focusing on calls for *ex ante* regulation of Big Tech platform companies. The paper argues that the expressed goals of *ex ante* regulation are often amorphous and that there are significant costs associated with its implementation, as well as potential legal hurdles in the Canadian context. Moreover, the current ex post enforcement framework of the *Competition Act*, with some tweaking, is capable of protecting the competitive process in Canada. In light of these factors, pursuing *ex ante* regulations in Canada would be ill-advised and potentially unconstitutional.

WILL THIS MARK THE END OF A FINANCIAL ASSAULT ON THE INCARCERATED AND THEIR FAMILIES?

By Mignon Clyburn

This paper examines the consequences of an exploitative prison payphone regime and the devastating financial, emotional, and social burdens forced upon the loved ones of incarcerated persons. These families often face numerous economic and social vulnerabilities, including income inequality and alienation trauma experienced by children of the incarcerated. In reviewing the history of the prison payphone industry and its actions, as well as the federal and state responses to these actions, this article presents readers with an inside view of prison payphone providers' dispassionate actions, the institutions that enabled these actions, and regulatory actions over decades tackling prison payphone reform. This article reveals the moment in the payphone industry's history when profiteering over people began and when mutually enriching arrangements with jails and prisons was birthed. This commentary also provides access to the regulatory, advocate, and grass roots communities' campaigns to end the economic and social assault on families of incarcerated persons. Congressional action and the passage of the Martha Wright-Reed Just and Reasonable Communications Act have empowered the Federal Communications Commission ("FCC") to establish just and reasonable rates for both interstate and intrastate payphone services. It is unlikely, however, that prison phone providers will abandon the captive golden goose, namely the families of incarcerated persons, and will merely seek to replace lost revenues with new and creative exploitive schemes. The question is whether Congress armed the FCC with sufficient ammunition to ward off future creative attempts to extort outrageous communications fees from the families of our nation's incarcerated persons.

REGULATORY SANDBOXES: *EX ANTE* REGULATION OR COMPETITION POLICY?

By Cristina Poncibò & Laura Zoboli

This paper focuses on the relationship between EU Competition Law and *ex ante* regulation by specifically analyzing the case of regulatory sandboxes. It also provides some case studies of regulatory sandboxes and questions their impact of on the goals of promoting competition and innovation in the EU.

BRUSSELS EFFECT? CONVERGENCE AND DIVERGENCE ON PLATFORM REGULATION IN TRANSATLANTIC COMPETITION POLICY

By Will Leslie & John Eichlin

The merits of *ex ante* regulation have sparked intense debate on both sides of the Atlantic. But their potential challenge to consistent Transatlantic competition policy and market regulation requires further consideration. The potential introduction of myriad new regulation and enforcement regimes across Europe, Germany, the UK, the U.S., and other jurisdictions is likely to put significant strain on an area of competition policy that has otherwise seen signs of increasing convergence. We explore here both the risk regulatory divergence on digital markets and the degree to which such divergence is likely to result in regulatory conflict or impose practical costs on market participants.

BRAVE NEW WORLD?

BY
STEPHEN KINSELLA

&
KARLA PERCA LOPEZ

Karla Perca Lopez is a Partner at Flint Global. Stephen Kinsella is a Specialist Partner at Flint Global. All opinions are our own.

The UK's Competition and Markets Authority ("CMA") is expected soon to get new powers to regulate digital companies with Strategic Market Status ("SMS"). While in the EU the Digital Markets Act ("DMA") has already conferred similar powers on the European Commission, in the UK, after months of uncertainty, the Digital Markets, Competition and Consumer Bill is expected to be introduced this month. In addition to its current antitrust, mergers, market investigations and consumer enforcement powers, the CMA (more precisely, the Digital Markets Unit ("DMU"), currently operating in shadow form) will formally become an *ex ante* regulator from as early as Q1 2024.[2]

01 FROM ANTITRUST TO "TRUST"

Once the new regime is in place, the nature of the relationship between the newly regulated companies and the DMU will substantially alter. The first challenge for both will be to navigate the transition towards this new relationship.

2 Assuming Royal Assent in January 2024, however timings are still uncertain.

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Interactions between the CMA and SMS firms so far have taken place in the context of antitrust investigations, merger reviews, consumer enforcement cases and market studies or investigations. Therefore, a dialogue only began when there was a perceived "problem," and often where there was a complaint.

The new reality will necessarily be a continuous, long-term relationship, rather than entirely case-specific. It is therefore in the interest of a well-functioning regime, as well as of the DMU and SMS firms, to develop a relationship based on trust. This may be a challenge for both, given the nature of their interactions so far.

SMS firms will not only need to comply with the new rules, but also consider how they should manage the new relationship with the DMU (including for example, information requirements, reporting obligations, stakeholder workshops, etc.), with regulatory affairs teams and technical experts likely playing a more prominent role, rather than interactions being driven purely by legal teams in highly confrontational contexts. The DMU will need to find the right balance between trust and the risk of regulatory capture.

It is also far from clear yet what will be the status and involvement of third parties, whether competitors, customers, or consumer bodies. We would expect they would still be bringing complaints and raising issues with the DMU, but will they be given a more active role in relation to monitoring compliance and developing their own continuous relationship with the DMU?

02

HOW WILL THE DMU'S *EX ANTE* POWERS COEXIST WITH THE CMA'S POWERS?

The second challenge will be for the CMA to choose between its different enforcement powers, especially where many of the behaviors that the new regime intends to tackle can also be addressed by using its current tools.

In the EU, it appears that the DMA will be the primary tool of choice, with the traditional antitrust powers reserved for "new" behaviors. These new behaviors could then inform new obligations to be added to the DMA at a later stage,[3] much as the DMA itself was based on experience of particular difficult cases.

In the UK, the likely evolution is less clear. At present the CMA and regulators with concurrent competition powers[4] cooperate with each other and coordinate case allocation according to the concurrency framework established in 2014.[5] When deciding on which tool to use, regulators must take into account the primacy of competition law, (that is, whether the use of their competition powers under the Competition Act ("CA98") is more appropriate) before using their sectoral powers. Each regulator is expected to determine which tool is more appropriate on a case-by-case basis.

It remains to be seen how the CMA will determine whether its CA98 powers or its new *ex ante* regulation powers will be more appropriate, especially in cases where potentially anticompetitive behaviors could be investigated using either tool.

Reasons provided by regulators in the recent past for choosing to use their sectoral regulator powers over their antitrust powers were often that the issues did not involve competition concerns. Other reasons included that the use of sectoral regulation allowed a more targeted approach to a problem of wider relevance in the market, that it would

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3 For example, France's Autorité de la Concurrence's 2023-2024 roadmap mentions that "The DMA and competition law are two complementary and mutually reinforcing tools. Competition law will apply to operators and practices not covered by the DMA and will guide future developments of this text." See https://www.autoritedelaconcurrence.fr/sites/default/files/2023-03/feuille-de-route-2023-2024-EN.pdf.

4 Sector regulators can enforce competition law to deal with anti-competitive agreements or abuses of a dominant position in their respective sectors (with some exceptions, e.g. to issue guidance on penalties or on commitments and to make procedural rules).

5 The concurrency were introduced in their current form by the Enterprise and Regulatory Reform Act 2013 and provide for cooperation between the CMA and the sector regulators in relation to their concurrent powers. See for example the 2022 Annual Concurrency Report, available at https://www.gov.uk/government/publications/annual-report-on-concurrency-2022/promoting-competition-in-services-we-rely-on-the-annual-concurrency-report-2022#fn:1.

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allow a timelier outcome,[6] or that regulatory powers would be able to achieve a more comprehensive solution.[7]

What factors will the CMA consider in making a choice? The CMA is likely to consider the expected speed of intervention, the ability to investigate and intervene beyond narrowly defined relevant markets, and the expectation for a change in market conditions resulting from an investigation. Other relevant considerations will likely be whether complaints are made in relation to a breach of antitrust rules or *ex ante* codes of conduct, potential deterrence effects, and resources required. The appeals standard may also play a role – if the *ex ante* powers are subject to judicial review, rather than the full merits appeal that follows antitrust decisions (which provides more accountability for the substantive analysis underpinning decisions), the regulator might be tempted to lean towards the former route.[8]

Although there may be pros and cons associated with each of these factors, overall, it would be reasonable to assume that the CMA will have an incentive to choose to use its *ex ante* powers. One major reason could be that it has already taken a designation decision, and has already conducted an assessment of competition conditions and established tailored codes of conduct, while at the same time, the expectation for a participative approach introduces flexibility to enforcement, and decisions are subject to defined timescales.

03 CONCLUSION

The nature of the relationship between the DMU and SMS firms will change once the new digital competition regime is in operation. It will transition from a primarily confrontational, case by case relationship, to one where a degree of trust is needed. It will likely take some time until SMS firms and the DMU develop this trust. Frictions caused by either side, including for example actual or perceived attempts to circumvent the rules and a prior history of a lack of cooperation by SMS firms, or disproportionate use of the new powers by the DMU, would likely hinder this process.

The CMA will also need to find the right balance between the use of its traditional tools and *ex ante* regulation. Which tool is more appropriate? The answer in part will be determined by the final shape of the framework after the legislative process is complete. However, the existence of this new *ex ante* regime raises the question of what space will be left for abuse of dominance cases in digital markets, especially as behaviors addressed under both tools can be similar. After all, a new digital regulation regime was considered necessary to provide for a faster, more flexible, and more forward-looking alternative to antitrust rules when dealing with competition issues in digital markets.[9] Given that ambition, is the primacy of competition law still a valid principle?

Though it is early days and much of the focus has been on the jeopardy of ex ante regulation for SMS firms, there may also be certain benefits. For instance, an *ex ante* regime may provide more certainty and smoothed out compliance, rather than the "shocks" of infrequent but confrontational enforcement. Depending on how the regime works in practice, the fees for regulation may turn out to be less than the costs of litigation. Moreover, it has to be possible that light touch regulation achieved through regular dialogue may throw up fewer decisions of a type that could give rise to follow on damages actions.

The extent to which the UK model will differ to the model chosen in the EU is still unclear. Will the participatory approach proposed for the UK regime result in a different type of regulatory relationship between SMS firms and the DMU compared to gatekeepers' relationship with the European Commission or national competition authorities? Will there be any differences in how regulators balance *ex ante* regulation and *ex post* enforcement? It will be important to see if there is an approach that ultimately results in better outcomes for consumers.

6 For example, see the 2021 Annual Concurrency Report: "Ofwat was satisfied in one case that its functions under Part 1 of the Competition Act 1998 were exercisable, but that it was more appropriate for it to proceed by exercising functions using the Water Industry Act 1991. In its enforcement action against Thames Water, Ofwat considered that 2 of the issues under investigation would be better dealt with under the Water Industry Act 1991 for 2 main reasons. First, with respect to issues around the accuracy of customer data made available to water retailers when the business retail water market opened, it would allow a more targeted approach to address strategically significant issues regarding data quality which have wider relevance in the business retail market and water sector. Secondly, with respect to the fairness of certain credit terms applied to water retailers, it would allow for a more timely outcome." See https://www.gov.uk/government/publications/annual-report-on-concurrency-2021/promoting-competition-in-services-we-rely-on-the-annual-concurrency-report-2021.

7 See for example CAA's primacy assessment in its final decision report on Project Palamon (2020) "the enforcement tools under TA00 would be more likely to achieve a comprehensive solution to all aspects of the complaint, rather than one discrete allegation under the CA98 […] A CA98 investigation would be limited to looking at alleged competition law infringements under the framework of Chapter I and Chapter II; this would not cover a number of the complainants' allegations. We consider that the CAA's finite resources are used most effectively by considering the allegations in the round under TA00." See https://publicapps.caa.co.uk/docs/33/CAP2100%20Project%20Palamon%20–%20Final%20Decision.pdf.

8 The CMA has expressed concerns about the appeals process for CA98 cases (see for example the CMA's response to the Government consultation on Reforming Competition and Consumer Policy). In its advice to Government, the Digital Markets Taskforce, led by the CMA, recommended a judicial review standard for appeals to DMU decisions "Recommendation 9d: The DMU's decisions should be judicially reviewable on ordinary judicial review principles and the appeals process should deliver robust outcomes at pace". See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022615/Reforming_Competition_and_Consumer_Policy_publication_4.10.21.pdf and https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf , respectively.

9 See for example, the Furman Review report: "Existing antitrust enforcement, however, can often be slow, cumbersome, and unpredictable. This can be especially problematic in the fast-moving digital sector." See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

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UPPING THE "*ANTE*" ON COMPETITION REGULATION: **GAMBLING WITH THE FUTURE OF BIG TECH?**

BY BEN BRADSHAW

& PETER HERRICK

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01 INTRODUCTION

Antitrust enforcement efforts aimed at reining in "Big Tech" in recent years have been lax and ineffectual – at least, that is the familiar refrain we hear from policymakers, regulators, and numerous antitrust commentators. Leadership in the U.S. antitrust agencies, Congress, and the European Commission ("Commission") contend that various errors and omissions in the past and shortcomings in the existing antitrust toolkit require an overhaul and entirely new ap-

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proach to slaying the Big Tech Leviathan. As Assistant Attorney General Jonathan Kanter recently asserted, online platforms' "[g]atekeeper power has become the most pressing competitive problem of our generation at a time when many of the previous generations' tools to assess and address gatekeeper power have become outmoded."[2] For those critics of Big Tech, the established digital platforms have now attained durable and nigh-unassailable market dominance because of enforcers' unwillingness or inability to address pressing competitive issues arising in these markets.

The response to this Big Tech conundrum? Calls for new *ex ante* regulation, with the European Union's Digital Markets Act ("DMA")[3] leading the way. Of course, *ex ante* regulation runs contrary to longstanding competition policy (most conspicuously in the United States) that has focused on opening markets, rather than regulating them, and relied primarily on *ex post* examination of evidence to determine whether anticompetitive conduct has occurred. As a result, large platforms now face a veritable pincer movement between Europe and the United States: compliance with the DMA on one side of the Atlantic and litigation through the U.S. system of cases and controversies in the judicial branch on the other.

But are digital markets truly more prone to dominance than markets more generally? The evidence may be more mixed than widely assumed. Herbert Hovenkamp recently concluded that "[t]here is little empirical support for the proposition that digital-platform markets are winner-take-all. Rather, the landscape for digital markets resembles the one for markets generally: some of them are more conducive to single-firm dominance than others."[4] So one might ask whether the advent of *ex ante* regulation of Big Tech will achieve the DMA's laudable goal of "ensuring fair and open digital markets,"[5] or if the cure may ultimately prove worse than the asserted disease. Even the most clearsighted among us cannot hope to predict how tech markets will evolve, as innovations, new entrants, and previously unimagined high-tech marvels continuously emerge. Rigid *ex ante* regulation thus carries risks, a minefield of costly new burdens on market players, byzantine and fraught compliance obligations, and potential for stagnating innovation and reducing output.[6]

As political leaders and antitrust agencies construct and enforce new regimes like the DMA, the proposed solutions may raise more questions than answers about the future of affected markets. Will regulations effectively pick winners and losers by clearing a path for some competitors while constructing roadblocks for others? Will U.S. platforms, such as Apple, Google, Amazon, and Meta, be unfairly targeted or disproportionately encumbered by new regulations given their incumbent positions? And what potential unintended consequences might arise from *ex ante* regulatory regimes aimed at dynamic and evolving tech markets?

In this paper, we explore these and other questions in three sections. First, we discuss the DMA regime, its prohibitions, and requirements, including its blend of *ex ante* constraints and *ex post* scrutiny and enforcement. Second, we examine the risks and potential pitfalls of *ex ante* regulation of competition. And third, we consider what lies ahead and the open questions that remain in the wake of the DMA's adoption.

"*But are digital markets truly more prone to dominance than markets more generally? The evidence may be more mixed than widely assumed*"

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2 Assistant Attorney General Jonathan Kanter, Opening Remarks at the Second Annual Spring Enforcers Summit (Mar. 27, 2023), *available at* https://www.justice.gov/opa/pr/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-second-annual-spring.

3 (EU) 2020/1828 Digital Markets Act (effective Nov. 1, 2022); Council Regulation (EU) 2022/1925, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1 [hereinafter, collectively, the "DMA"].

4 Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1978 (2021).

5 European Commission, *The Digital Markets Act: ensuring fair and open digital markets*, *available at* https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

6 See generally John Taladay & Paul Lugard, The Ten Principles of Ex Ante Competition Regulation, COMPETITION POL'Y INT'L (Nov. 2, 2022), https://www.competitionpolicyinternational.com/the-ten-principles-of-ex-ante-competition-regulation/.

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02

DOUBLING DOWN: THE DMA'S PROHIBITIONS, OBLIGATIONS, AND ENFORCEMENT REGIME

The DMA,[7] which took effect on November 1, 2022, is often described as *ex ante* regulation, but it may be more accurately characterized as a hybrid of *ex ante* "parking brake" rules and *ex post* investigation and intervention. The *ex ante* principles arise out of legal obligations and prohibitions imposed on a set group of "gatekeepers" to ensure "contestability and fairness for the markets in the digital sector."[8] Traditional competition law, particularly in the United States, utilizes investigative tools to determine whether there is evidence of anticompetitive behavior and effects. In contrast, the DMA attempts to address "the challenges to the effective function of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms" *before* the conduct has occurred.[9] The *ex post* nature of the DMA is evident in the Commission's public and private enforcement authority. The Commission not only has access to a plethora of investigative tools and enforcement proceedings, but also has the authority to impose non-compliance sanctions.[10] In addition, under EU antitrust law, companies can bring private actions under the DMA.[11]

Responding to the widespread belief that digital markets are a hotbed for "weak contestability and unfair practices," the DMA seeks to impose a series of "regulatory safeguards" for business and end users of "core platform services."[12] These services include those that both businesses and consumers use every day: "online intermediation services, online search engines, operating systems, online social networking, video sharing platform services, number-independent interpersonal communication services, cloud computing services, virtual assistants, web browsers and online advertising services."[13]

The DMA consists of 22 obligations and prohibitions.[14] We highlight five sets of provisions here due to their broad implications for potential gatekeepers and competition generally in digital markets: (i) gatekeepers; (ii) self-preferencing; (iii) interoperability; (iv) "FRAND" terms for data sharing; and (v) enforcement and sanctions. We discuss each in turn, followed by an overview of the timeline for the DMA to take full effect.

A. Five Key DMA Provisions

1. The Gatekeepers

The DMA's rules apply only to those entities designated as "gatekeepers" for core platform services. Under Article 3(1), an entity qualifies as a gatekeeper if it meets three qualitative criteria: (1) "it has a significant impact in the internal market;" (2) "it provides a core platform service which is an important gateway for business users to reach end users;" and (3) "it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the future."[15]

These three qualitative criteria will be presumed if certain quantitative thresholds are met. Specifically, an entity that provides the same core platform services in at least three

7 Although we focus our discussion primarily on the DMA, a number of *ex ante* regulatory regimes are in place or under consideration elsewhere, including in the UK, Australia, Germany, Japan, and South Korea. For example, the Digitization Act (effective Jan. 19, 2021), which amends the German Competition Act, adds a new *ex ante* tool that prohibits conduct that may amount to unfair competition. And in Japan, the Ministry of Economy, Trade, and Industry passed the Improving Transparency and Fairness of Digital Platforms Act ("TFDPA") (effective April 2021), which designates five providers of online shopping malls and application stores as subject to the new regulation. And in the United States, Congress has considered but not voted on new antitrust laws aimed at digital markets, including the America Innovation and Choice Online Act, S. 2992, 117th Cong. (2022); H.R. 3816, 117th Cong. (2022), and the Open App Markets Act, S. 2710, 117th Cong. (2022); H.R. 5017, 117th Cong. (2022) (identical); H.R. 7030, 117th Cong. 2022 (related).

8 DMA, *supra* note 3, at 2–3, ¶ 7.

9 *Ibid.* at 2, ¶ 5.

10 *Ibid.* at 46-54, arts. 21, 22, 23, 26, 29, 30, 31, and 32.

11 *Ibid.* 33-34, 57, arts. 5(6), 39.

12 *Ibid.* at 2-3, ¶ 7.

13 *Ibid.* at 28-30, art. 2.

14 For a more detailed discussion of the full range of DMA provisions, see Vanessa Turner, *The EU Digital Markets Act—A New Dawn for Digital Markets?*, ANTITRUST, (Dec. 22, 2022).

15 DMA, *supra* note 3, at 30-32, art. 3 ¶ 1.

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Member States is presumed to have a significant impact on the internal market where it achieves an annual turnover equal to or above €7.5 billion within the EU in each of the last three financial years, or where its average market capitalization or its an equivalent fair market value amounts to €75 billion in the last financial year.[16] The rationale for these thresholds is that, when combined with a large number of users, qualifying gatekeepers can use their financial strength to "monetise those users" and cement their current market status.[17] A core platform service has an "entrenched and durable position" or the "foreseeability" of such a position where "contestability . . . is limited."[18] A presumption of limited contestability exists where an entity "provides a core platform service that in the last financial year has an average of at least 45 million monthly active end users and at least 10,000 yearly active business users established in the EU."[19]

Article 5(2) proscribes a range of actions with users' personal data. For example, the DMA prohibits gatekeepers from: (1) processing personal data of end users using third-party services for the purpose of online advertising, (2) combining personal data from more than one core platform service, (3) cross-using personal data between a core platform service and other gatekeeper services, and (4) signing end-users in to other services of the gatekeeper to combine personal data.[20] These prohibitions reflect the concern that gatekeepers, particularly those that provide online advertising services, have an advantage over competitors in accumulating data and creating barriers to entry.[21]

2. Self-Preferencing

Under Article 6(5) of the DMA, a gatekeeper acting "in a dual role of online intermediary for third parties and itself may not rank its own services and products more favourably than similar services or products of a third party and must apply transparent, fair, and non-discriminatory conditions to such ranking."[22] Where the gatekeeper has "the ability to undermine directly the contestability . . . [of] products or services . . . to the detriment of business users which are not controlled by the gatekeeper," the DMA states that "the gatekeeper should not engage in any form of differentiated or preferential treatment" in favor of its own products or services.[23]

Article 5(2) proscribes a range of actions with users' personal data

3. Interoperability

Article 7 largely addresses practices that promote interoperability of "number-independent interpersonal communication services."[24] For example, gatekeepers must offer a service that, at the very least, allows for "end-to-end text messaging" and "sharing of images, voice messages, videos and other attached files" between two individual end users.[25] Shifting the focus to operating systems, Article 6(7) requires that gatekeepers allow "business users and alternative providers of services" interoperable access to "the same operating system, hardware or software features" that is available to and used by the gatekeeper.[26]

4. "FRAND" Access

Under Article 6(11), gatekeepers that offer online search engines must provide third parties with access to "fair, reasonable, and non-discriminatory ["FRAND"] terms to

16 *Ibid.* at 30, art. 3 ¶ 2a.

17 *Ibid.* at 5, ¶ 17.

18 *Ibid.* at 6, ¶ 21

19 *Ibid.* at 30, art. 3 ¶ 2.

20 *Ibid.* at 33, art. 5 ¶ 2.

21 *Ibid.* at 9, ¶ 36.

22 See Turner, *supra* note 14; see also DMA, *supra* note 3, art. 6 ¶ 5.

23 DMA, *supra* note 3, at 13-14, ¶¶ 51-52.

24 *Ibid.* at 37, art. 7 ¶ 1.

25 *Ibid.*

26 *Ibid.* at 37, art. 6 ¶ 7.

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ranking, query, click and view data."[27] In addition, personal data must be anonymized. Article 6(12) similarly requires that gatekeepers apply FRAND "conditions of access for business users" to their designated "software application stores, online search engines, and online social networking services."[28] The DMA states that a helpful benchmark to determine fairness of access conditions is when gatekeepers offer different prices or conditions for access to the same services to business users or to end users.[29] Here, FRAND conditions are intended to prevent "unjustified differentiation" and an imbalance of bargaining power.[30]

5. Enforcement and Sanctions

Although the Commission is the sole governmental authority empowered to enforce the DMA, Member States may investigate possible violations.[31] The DMA functions as a complement to EU competition rules regarding unilateral conduct and merger control.[32] The Commission's enforcement authority includes Requests for Information, monitoring effective compliance with the obligations, conducting investigations into non-compliance, and imposing penalties and fines on gatekeepers for noncompliance.[33] The Commission also has the authority to conduct investigations to determine whether a service should be added to the list of core platform services.[34]

The DMA imposes a set of compliance obligations on gatekeepers, including creation of a compliance function within their organizations (including compliance officers independent of operations), annual reporting and publication of steps taken to comply with their obligations, and ongoing requirements to update the Commission of "any intended concentration . . . where the merging entities or the target of the concentration provide core platform services or any other services in the digital sector or enable the collection of data."[35] Penalties for gatekeepers that fail to live up to their obligations can be severe, ranging from cease and desist orders to imposing fines up to 10 percent of total worldwide turnover from the prior year.[36] For repeat offenders, the Commission can increase fines to 20 percent of total worldwide turnover from the prior year or subject the gatekeeper to substantial periodic penalty payments.[37]

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B. DMA Enforcement Timeline

While certain provisions took effect immediately, others will apply over time (e.g. Article 3 designation of gatekeepers).[38] An entity that provides core platform services must self-assess to determine whether it meets the designation criteria under Article 3 of the DMA. If it meets the criteria, it has two months to notify the Commission with relevant information substantiating its designation status.[39] The entity may also present information to argue that it should not be designated as a gatekeeper.[40] The Commission will then decide whether to designate an entity as a gatekeeper within 45

27 *Ibid.* art. 6 ¶ 11.

28 *Ibid.* art. 6 ¶ 12.

29 *Ibid.* at 16, ¶ 62.

30 *Ibid.*

31 *Ibid.* at 23-24, ¶ 91.

32 *Ibid.* at 3, ¶ 10.

33 Turner, *supra* note 14.

34 DMA, *supra* note 3, art. 19.

35 *Ibid.* at 40, 42-43, 50-51, arts. 11, 14, 28.

36 *Ibid.* at 51, art. 30 ¶ 1.

37 *Ibid.* at 52-53, arts. 30 ¶ 2, 31.

38 *Ibid.* at 62, art. 54. The majority of the DMA's provisions are set to take effect on May 2, 2023.

39 *Ibid.* at 30-31, art. 3 ¶ 3.

40 *Ibid.* at 31, art. 3 ¶ 5.

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working days of receiving the relevant information.[41] Within six months of the designation, the legal obligations promulgated by the DMA will take effect.[42]

03

PLAYING THE ODDS WITH *EX ANTE* COMPETITION REGULATION

Notwithstanding the DMA's vast array of obligations and restrictions, the Commission asserts that "[g]atekeepers will keep all opportunities to innovate and offer new services. They will simply not be allowed to use unfair practices towards the business users and customers that depend on them to gain an undue advantage."[43] But the old adage "the road to hell is paved with good intentions" counsels against assuming the DMA's perhaps commendable aims will necessarily be achieved. With that in mind, we consider three potential hazards confronting the DMA and other attempts to implement *ex ante* regulation of competition: (i) the "Brussels Effect;" (ii) excessive regulatory burdens that may outweigh any procompetitive benefits; and (iii) unintended consequences from prescribing (and proscribing) behavior in dynamic, evolving markets. We discuss each in turn.

A. The "Brussels Effect"

Although the global regulatory landscape is fractured, regulations in the EU can and often do have an outsized influence around the world. To describe the impact of the EU's regulatory regimes outside of Europe, Professor Anu Bradford coined the phrase, "the Brussels Effect," as a shorthand for the EU's "unilateral power to regulate the global marketplace," whether intentionally or otherwise.[44] As Professor Bradford explains:

> The EU today promulgates regulations that influence which products are built and how business is conducted, not just in Europe but everywhere in the world. In this way, the EU wields significant, unique, and highly penetrating power to unilaterally transform global markets, . . . [including] through the ability to set the standards in competition policy . . . .[45]

The *de facto* Brussels Effect causes global or multinational corporations to adjust their conduct *outside* of Europe to conform with the EU's regulations because they "have the business incentive to extend the EU regulation to govern their worldwide production or operations."[46] This incentive is strongest "whenever its production or conduct is non-divisible across different markets."[47] And when firms choose a standard, it is often most efficient to follow the "leading standard," which usually means "the most demanding standard imposed by a major jurisdiction that represents an important market for the corporation."[48]

Digital platforms' incentives are no different. Because the largest among them have a truly global presence – often existing in some form in nearly every country around the world[49] – they face a Hobson's choice of choosing between being bound by the "most demanding" regulatory regime (e.g. the DMA) on a global scale or converting their platforms into bespoke systems across multiple jurisdictions. Such a division into individualized offerings is in a sense nothing new: platforms must comply with local laws. By divorcing product mix from market forces and constraints like fixed costs, however, the Brussels Effect may reduce the variety of digital services available in other jurisdictions around the world.[50] In this way, *ex ante* regulation can impose harmful

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41 *Ibid.* at 31, art. 3 ¶ 4.

42 *Ibid.* at 32, art. 3 ¶ 10.

43 *The Digital Markets Act: ensuring fair and open digital markets*, *supra* note 5.

44 ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 2 (1st ed. 2020).

45 *Ibid.* at xiv.

46 *Ibid.* at 2 ("The de jure Brussels Effect—which refers to the adoption of EU-style regulations by foreign governments—builds directly on the de facto Brussels Effect: after multinational companies have adjusted their global conduct to conform to EU rules, they have the incentive to lobby EU-style regulations in their home jurisdictions.").

47 *Ibid*.

48 *Ibid.* at 54.

49 Google's cloud services, for example, are available in over 200 countries. See https://cloud.google.com/about/locations.

50 See BRADFORD, *supra* note 44, at 55.

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boundaries on innovation and diversity of competition, in addition to the costs of compliance.

B. Excessive Regulatory Burden

Ex ante regulation "seeks to prevent harmful conduct from occurring," but complex or opaque requirements can impose burdens, costs, and restrictions that discourage investment.[51] On its face, the DMA inflicts compliance burdens – e.g. internal monitors, annual reporting – on gatekeepers that will add costs and create the potential for market inefficiencies and substantial expenses for those companies working within its regulatory framework.

As an example of regulation's potential downsides, one need look no further than the EU's General Data Protection Regulation ("GDPR"). While many have praised its privacy benefits, at least one analysis suggests that its impact on profits and competition in tech markets has been unexpectedly harmful. According to a recent study at the Oxford Martin School, GDPR caused an 8.1 percent drop in profits among companies exposed to the regulation, with an even greater impact on smaller IT firms, which saw a 12 percent profit reduction.[52] Moreover, contrary to the Commission's competition policy goals embodied in the DMA, the study found that "[l]arge technology companies . . . have seemingly taken market share from their smaller competitors, offsetting the compliance costs associated with GDPR."[53]

Antitrust practitioners and regulators know well the mantra that the antitrust laws are designed to protect competition, not competitors. For example, the antitrust laws have not traditionally required private actors – even monopolists – to contract with their rivals.[54] While the right to such a refusal to deal is "not unqualified," the Supreme Court explained in *Trinko* that it has been "very cautious in recognizing . . . exceptions" to the rule, and with good reason, given the Court's recognition of the "uncertain virtue of forced sharing."[55]

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But antitrust regulators on both sides of the Atlantic appear ready to chart an entirely new course. As AAG Kanter recently stated, "[d]igital platforms are profoundly different [from the facts of *Trinko*]—they are built with 1s and 0s, not poles and wires, and they are collaborative by nature. . . . So the underlying economic logic of *Trinko* will not apply in the same way."[56] Indeed, the DMA transforms the exception into the rule, imposing a strict duty to deal on gatekeepers, requiring them to open their services and data and grant access to rivals in ways akin to an essential facility. These include the aforementioned requirements that gatekeeper services be interoperable, abstain from self-preferencing or higher ranking of the gatekeeper's own services, and apply FRAND terms for access to rankings and other data, app stores, search engines, and social network services.[57] Meanwhile, opening a second front, DOJ's recent "ad tech" complaint puts similar conduct squarely in its crosshairs, alleging that Google violated Section 2 of the Sherman Act through, among other things, "opaque rules that benefit itself and harm rivals"

51 Taladay & Lugard, *supra* note 6.

52 Giorgio Presidente & Carl Benedikt Frey, *The GDPR effect: How data privacy regulation shaped firm performance globally*, VOXEU.ORG (Mar. 10, 2022), https://cepr.org/voxeu/columns/gdpr-effect-how-data-privacy-regulation-shaped-firm-performance-globally; see also Pete Swabey, *GDPR cost businesses 8% of their profits, according to new estimate*, TECH MONITOR (Mar. 11, 2022) ("Europe's landmark privacy regulation caused an estimated 8.1% drop in profits and a 2.2% dip in sales for affected businesses, economists estimate."), https://techmonitor.ai/policy/privacy-and-data-protection/gdpr-cost-businesses-8-of-their-profits-according-to-a-new-estimate.

53 Presidente & Frey, *supra* note 52 ("Indeed, while European leaders have pledged to reign in the power of bigTech [sic], GDPR might even have strengthened them by weakening their competitors."); see also Swabey, *supra* note 52 ("Regardless of the benefits to consumers, it seems that [GDPR] has led to greater market concentration. It has benefitted bigger technology companies at the expense of smaller ones.").

54 See *Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) ("[A]s a general matter, the Sherman Act does not restrict the long-recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.") (quotations omitted) [hereinafter, *Trinko*].

55 *Ibid.*

56 Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Keynote at Fordham Competition Law Institute's 49th Annual Conference on International Antitrust Law and Policy (Sept. 16, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham.

57 See, e.g. DMA, *supra* note 3, at 33, 35-38, art. 5 ¶¶ 4-5; art. 6 ¶¶ 5, 8, 10; art. 7.

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as it feared being "forced to interoperate" with competitors.[58]

C. Unintended Consequences

Perhaps inescapably, *ex ante* regulations demand that regulators engage in a form of fortune telling. They must peer into the future of the markets they oversee and attempt to predict how they will evolve, either with or without their intervention. In an ideal world, they would "minimize costs and market distortions" caused by any regulation and instead, foster growth and "innovation through market incentives and goal-based approaches."[59] But that result is not a given. While *ex ante* regulations may be well suited for markets where the cost of failure is very high – e.g. healthcare, pharma, civil engineering – the crystal ball for markets subject to rapid and unpredictable development may be especially murky. Few could have foretold the upheaval in digital platform markets over the last decade, so we cannot assume current prognostications of durable dominance by a handful of players will prove more reliable now, particularly in the face of AI and other unanticipated advances to come.

Labyrinthine rules and requirements can inhibit development of new services and capabilities. Among other things, complex regulation can introduce uncertainty for market participants about what would be deemed acceptable conduct versus a violation of new rules, particularly where prohibitory language could be read broadly. For example, the DMA's Article 6(5) requiring that gatekeepers "shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party" leaves open the possibility that any "favoring," no matter how justified or minute, of one's product would be a violation.[60] And the effects of over-regulation may be particularly acute for the most dynamic and rapidly growing challengers, rather than established players who are better able to absorb the costs and burdens of complex frameworks. Through this uncertainty, over time, *ex ante* regulations may inadvertently cause currently dynamic markets to develop inefficiencies or promising competitors to fail, ultimately harming end users.[61]

To the extent *ex ante* regulation like the DMA benefits competitors, it also may unintentionally do so at the expense of end users. For example, consumers benefit from having a consistent and reliable method of payment for goods or services. But the DMA forbids gatekeepers from requiring business users to use certain services (e.g. payment systems or identification services) that may help to ensure a good end user experience.[62] And it remains uncertain whether requirements of interoperability and data sharing will present new security and privacy concerns.[63]

04

ALL BETS ARE OFF: THE UNCERTAIN ROAD AHEAD

As the process for designating gatekeepers and for imposing the DMA's prescriptive behavioral obligations moves forward in 2023, what can be said about the DMA's overarching goal of laying down rules to ensure digital markets are contestable and fair?[64] Does the DMA provide certainty by telling the gatekeeper businesses what to do and how to behave, or does it invite more investigation and leave market participants unsure about how to comply with its broad requirements?

The answers to these questions may lie in examining the DMA's proscriptions and the role of regulators in enforcing them. The DMA purports to be *ex ante* in that it identifies

58 Compl. at ¶¶ 7, 136, *United States v. Google LLC,* No. 23-cv-00108 (E.D. Va. Jan. 24, 2023).

59 Taladay & Lugard, *supra* note 6; see also ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Guiding Principles for Regulatory Quality and Performance* (2011), https://www.oecd.org/daf/competition/37318586.pdf.

60 DMA, *supra* note 3, at 35, art. 6 ¶ 5.

61 Moreover, there is a risk that regulators may impose a "tax" on non-domestic platforms (e.g. EC favoring European companies over U.S. companies). U.S. Senators have already voiced this concern with respect to the DMA. See, e.g. Kevin Pinner, *Senators Ask Biden To Curb EU's Agenda To Tax Big Tech*, LAW360 (Mar. 10, 2023), https://www.law360.com/tax-authority/articles/1584670/senators-ask-biden-to-curb-eu-s-agenda-to-tax-big-tech.

62 Regulatory capture can occur when established players influence the process (e.g. through lobbying) and resulting regulations make it difficult or impossible for small players to comply, and thus compete in the affected market. Here, the DMA appears to be focused solely on the biggest platforms, so risk of regulatory capture by biggest players is mitigated (e.g. DMA "gatekeeper" threshold). But the potential for concern remains, particularly as markets and regulations evolve.

63 See Bjorn Lundqvist, *Reining in the Gatekeepers and Opening the Door to Security Risks*, CENTER FOR EUR. POL'Y ANAL. (Mar. 30, 2023), https://cepa.org/comprehensive-reports/reining-in-the-gatekeepers-and-opening-the-door-to-security-risks/.

64 DMA, *supra* note 3, at 2-3, ¶ 7.

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issues in the market beforehand and attempts to dictate participant behavior to prevent harmful conduct from occurring. But how truly *ex ante* is the DMA? It repeatedly relies on "fairness" as its guiding principle. Indeed, the DMA uses the terms "fairness," "unfairness," and "contestability" numerous times, but it never defines them. Nor does it describe how fairness might be enhanced or compromised, leaving much to future interpretation.

Similarly, once a company has been designated a gatekeeper, the DMA's behavioral obligations are mandatory and the requirement for gatekeepers to comply is non-negotiable. Under Article 8 of the DMA, for example, which dictates the means for gatekeepers to comply with the DMA's obligations, there is no efficiency defense. But the DMA allows for market investigations and it will require factual foundations for many of its enforcement decisions. The DMA thus sets out structural limitations on the practices of large technology platforms, but it needs actual facts to determine a gatekeeper's compliance or non-compliance with its requirements. As noted above, in this sense, the DMA — though often described as *ex ante* — is more fairly characterized as a hybrid of *ex ante* and *ex post* regulation. It sets up the behavioral rules *ex ante*, but relies on *ex post* investigation and intervention to enforce its prohibitions.

Additionally, the DMA is widely viewed as a significant step toward the return to a structural based approach to antitrust. It sets quantitative thresholds to identify the digital platforms that fall under its purview and it creates *ex ante* rules and obligations for those gatekeepers without requiring the Commission to define a market, prove that the gatekeeper holds a dominant position, or present any evidence of anticompetitive effects. But it does not go so far as to shift the burden of proof away from the Commission to prove that a potential acquisition would harm competition. In the DMA's final iteration, policymakers rejected an amendment that would have placed the burden onto gatekeepers to demonstrate that any potential acquisitions would *not* harm competition. In keeping the burden of proof with the Commission, the DMA maintains a more balanced, if not nuanced, approach.

Digital markets are global, and it seems relatively certain that successful regulation of them will require some harmonization across countries. But presently the global regulatory landscape for large digital platform is highly disjointed. Will the DMA prove to be the first step in creating a more coherent global regulatory approach for digital markets? Will the Brussels Effect take hold, making the DMA a *de facto* global regime? Will there be a domino effect where other jurisdictions adopt even more restrictive laws in a "race to the bottom?" Or will distinct versions of digital platforms emerge that are tailored to the unique requirements of different geographies? Many Chinese platforms such as TikTok, for example, already have separate versions for domestic and global markets.

How lawmakers and the large digital platforms will answer these questions remains unclear. Several bills to regulate online platforms have been introduced in the United States, but Congress appears unlikely to pass any legislation in the discernible future. The road ahead thus will no doubt be filled with twists and turns as policymakers look to bolster laws that are perceived to inadequately safeguard competition in digital markets, as regulators work to implement those laws, and as the platforms strive to comply with these new regulatory regimes.

05 CONCLUSION

Even as policymakers and regulators laud the benefits of new rules and appeal for expanded tools to constrain Big Tech, *ex ante* regulation's prospective impact on competition in digital markets remains indeterminate. They contend that the market power of digital gatekeepers requires intervention beyond mere *ex post* investigation and adjudication, which they assert lacks the speed and effectiveness to keep up in this digital age. But as other jurisdictions consider following in the DMA's footsteps, they should proceed with caution and keep in mind the attendant risks of *ex ante* regulatory regimes to innovation, output growth, and quality. If regulators go "all in" on *ex ante* frameworks, they may end up playing a losing hand.

"Digital markets are global, and it seems relatively certain that successful regulation of them will require some harmonization across countries

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EX ANTE REGULATION IN AN ERA OF FAST-PACED INNOVATION – **CONNECTING THE TIME AND LOCUS OF REGULATION**

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01 THE TIME AND LOCUS OF REGULATION

Two variables serve as the fulcra around which most academic studies resolve. The two are time and locus. Studies on law and governance studies are no exception. Time affects the effectiveness of the regulatory frameworks that governments design. Can old laws resolve new issues effectively? Several legal quandaries turn on this very question. The debate on the long-

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term applicability of regulatory provisions is a salient example, as is the controversy about sunset clauses, a *cause célèbre* in many an academic circle.[2] A regulatory framework that features such clauses would, the argument runs, be aligned more closely to the preferences of citizens without, however, running the risk of becoming anachronistic.[3]

Locus is the second key variable in the study of *ex ante* regulation. Generally, the term "locus" refers to the geographical scope of a given regulatory framework as well as to the level at which it is adopted. The common questions that arise are whether it is adoption at the local, the national, or the supranational level that would be most effective and who it is that should be bound by the regulatory framework in question. This type of inquiry is particularly important given the ever-expanding set of jurisdictions characterized by a multi-level governance. Moreover, the emergence of transnational issues, such as environmental challenges and the growing influence of multinationals, in the contemporary world makes this discussion particularly prominent.

The locus at which regulation is adopted is of critical importance to its effectiveness. Indeed, while regulations that are adopted at the global or the supranational level may be more effective in addressing particular transboundary or global problems, such as climate change, they are arguably also further removed from the citizens that are subject to them. Questions may also arise about the enforcement of globally negotiated norms because, absent an authority with powers of enforcement, issues of free riding are bound to occur and recur. Their recurrence may prompt states to adopt unilateral measures that are intended to incent third parties to comply.[4] The Carbon Border Adjustment Mechanism, which seeks to shield EU industries from the carbon leakages that may result from the failure of the signatories to the Paris Agreement to abide by their commitments, is a case in hand.[5]

Time and locus are not discussed in the same depth in all of the legal disciplines. There is an imbalance between the two in the domain of technological regulation. Scholars in that domain are concerned mainly with timing – temporal considerations are thought to be more exigent than locus ones.[6] The explanations for this imbalance range from the entrenchment of social practices to the perceived dangers that lurk behind novel technologies. In the present day, an innovation can dismantle established social and legal routines in the blink of an eye. For instance, the rapid emergence of artificial intelligence-related applications such as ChatGPT means that regulators are always lagging behind developments. By the time legislation is promulgated to control one application of AI, dozens of others may have entered the social domain, and the regulatory framework may already be outdated.[7] Accordingly, time is becoming ever more important. When is the right time to regulate new or emerging technologies? Is a technology-specific approach to regulation desirable, or should principles predominate?

02 THE ISSUE OF TIMING IN THE REGULATION OF TECHNOLOGY

The Collingridge dilemma is one of the most widely cited propositions of social science. It has to do with control over new technologies: "[a]ttempting to control a technology is difficult, and not rarely impossible, because during its early stages, when it can be controlled, not enough can be known about its harmful social consequences to warrant controlling its development. By the time these consequences are apparent, control has become costly and slow."[8] In other words, timing is decisive for the regulation of new or emerging technologies.

2 Sofia Ranchordás, *Sunset clauses and experimental regulations: blessing or curse for legal certainty?*, 36(1) STATUTE LAW REVIEW 28 (2015); Antonios E. Kouroutakis, *Disruptive innovation and sunset clauses: The case of Uber and other on demand transportation networks*, in TIME, LAW, AND CHANGE: AN INTERDISCIPLINARY STUDY 291 (Sofia Ranchordás & Yaniv Roznai eds., 2020).

3 Ranchordás, *id*.

4 PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (4th. ed. 2018).

5 *Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism*, Brussels, 14.7.2021, COM(2021) 564 final, 2021/0214(COD).

6 See, e.g. Lyria Bennett Moses & Monika Zalnieriute, *Law and Technology in the Dimension of Time*, in TIME, LAW, AND CHANGE: AN INTERDISCIPLINARY STUDY 303 (Sofia Ranchordás & Yaniv Roznai eds., 2020); Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to Keep Up with Technological Change*, UNIVERSITY OF ILLINOIS JOURNAL OF LAW, TECHNOLOGY AND POLICY 239 (2007); Gary E. Marchant, *The Growing Gap Between Emerging Technologies and the Law*, in THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-ETHICAL OVERSIGHT: THE PACING PROBLEM 19 (Gary E. Marchant, Braden Allenby & Joseph Herkert eds., 2011).

7 Ronald Leenes, *Regulating new technologies in times of change*, in REGULATING NEW TECHNOLOGIES IN UNCERTAIN TIMES 3 (Leonie Reins ed., 2019).

8 D. COLLINGRIDGE, THE SOCIAL CONTROL OF TECHNOLOGY 19 (1980).

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The Collingridge dilemma originated from the social science. In the legal context, the question that it poses to practitioners concerns the point in time at which technological developments should be subjected to regulatory interventions. Early action is difficult because "insufficient, conflicting or confusing data about the nature and impact of the new technology" may render the intervention premature and ineffective.[9] When a technology is nascent, its adverse impact on society or the environment is neither clear nor even predictable. It may therefore be impossible to formulate an efficient regulatory regime at this point. If, however, the regulatory intervention arrives too late, the technology is liable to have become entrenched in society. At that stage, "influence and change become correspondingly more difficult [slow and expensive][10] to effect."[11]

Another example of the salience of the time factor originates from the long-running debate about the need to develop a separate *ad hoc* body of law to regulate matters that the legislators of yore failed to anticipate. This issue was central to the academic discussion of the so-called "law of the horse." The expression dates back to the mid-1990s. Then, Judge Easterbrook drew a parallel between the need for having a sectoral regulation on the then-incipient cyberspace and the need for creating a law of the horse.[12] According to Judge Easterbrook, the *ad hoc* regulation of cyberspace would have been undesirable.[13] Lessig challenged Easterbrook's theory, and the course of events proved him right.[14] Time was at the core of the discussion: the argument was not that the cyberspace should not be regulated specifically but simply that the time was not yet ripe for an *ex ante* regulation.

This theme features in other debates in technology regulation in which the link to timing is neither obvious nor particularly intimate. The debate about the type of regulation that should be applied to technology supplies an apposite example. Scholars distinguish between uncertain and risky technologies.[15] When a technology is uncertain, humans cannot anticipate the consequences of its deployment by attributing numerical probabilities to various eventualities; when a technology is merely risky, the risks that it entails are calculable.[16]

Despite being somewhat blurry, this distinction can be handy to policymakers. By examining types of technologies, policymakers can identify the regulatory bodies that are likely to be most capable of observing the impact of an innovation and, if necessary, of regulating its use. Uncertain technologies call for action on the part of legislators, whereas risky ones can be addressed more effectively by the courts. This is so because the existence of unpredictable consequences entails decisions that turn on subjective preferences – the courts lack both the legitimacy and the competence to strike such balances.[17] Risky, that is, calculable, consequences, conversely, can be addressed through extensions of extant regulations, a task at which the judiciary evidently excels.[18]

This theme features in other debates in technology regulation in which the link to timing is neither obvious nor particularly intimate

In this framework, time takes a secondary, yet still prominent, role. Time is essential for the conversion of an uncertain technology into a risky one. Society collects observations that, over time, enable it to convert uncertainty into risk. This accumulation of information also changes the attitudes of legislators towards the regulation of technologies. This is so because an uncertain technology that eventually becomes risky gradually comes to require more attention from the judiciary rather than from the legislature. Accordingly, the need to regulate from scratch becomes less pressing over time.

9 Graeme Laurie, Shawn H.E. Harmon & Fabiana Arzuaga, *Foresighting Futures: Law, New Technologies, and the Challenges of Regulating for Uncertainty*, 4 Law, Innovation and Technology 1, 5f (2012).

10 Lyria Bennett Moses, *How to Think about Law, Regulation and Technology: Problems with 'Technology' as a Regulatory Target*, 5 Law, Innovation and Technology 1, 8 (2013).

11 Laurie, Harmon & Arzuaga, *supra* note 2, at 5f.

12 Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, U. Chi. Legal F. 207 (1996).

13 *Id.*

14 Lawrence Lessig, *The law of the horse: What cyberlaw might teach*, 113(2) Harvard law review 501 (1999).

15 Marta K. Kołacz, Alberto Quintavalla & Orlin Yalnazov, *Who should regulate disruptive technology?*, 10(1) European Journal of Risk Regulation 4 (2019).

16 The distinction builds on the difference between risk and uncertainty made by Knight. See Frank Knight, Risk, Uncertainty, and Profit (1921).

17 Kołacz et al., *supra* note 15.

18 *Id.*

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03

EX ANTE REGULATION AND THE NEED TO ACCOUNT FOR LOCUS CONSIDERATIONS

The regulation of technological innovation calls for caution. *Ex ante* regulation occupies a prominent role in the legal literature. The precautionary principle, which enables intervention to occur at an early stage of the innovative process, is a crystal-clear example. The principle provides a general framework for those who make law and policy when they decide to intervene in a given domain. The framework, moreover, is robust to many uncertainties. At the same time, the precautionary principle does not imply that when one is in doubt, one should opt out.[19]

Despite its laudable objective of generating stronger protections for citizens and the environment, the precautionary principle has been said to be subject to a number of important limitations. For instance, Sunstein argues that the precautionary principle paralyses because risks are everywhere and the principle, in itself, forbids action.[20] The application of the principle is therefore limited to the prioritization and allocation of risks: its content is vague; accordingly, it provides little effective guidance to the policymaker, it is argued.[21] Another argument against its use is that its application may obstruct innovation and hinder progress in practice.[22]

Yet another criticism, which is critical to the present ends, has to do with locus, a variable that is mostly neglected in the literature on technology regulation. As things stand, the applicability of the precautionary principle is circumscribed, and its effectiveness is limited. Its legal force is constrained to the specific jurisdictions in which it has been adopted; even there, its application and definition are sources of controversy. In the EU, for example, the precautionary principle is included in primary legislation on the environment.[23] By virtue of the integration principle,[24] it is also applicable to other policy areas such as trade, finance, agriculture, industrial policy, and such like. However, the guidance on its application is restricted to a non-binding Communication, which does not even attempt to define it.[25]

In general, few jurisdictions have implemented the precautionary principle, and it is not considered to be a principle of customary international law.[26] In consequence, the risks that could stem from the deployment of an innovation are neglected in a large number of polities. The influence of the precautionary principle thus varies, which is undesirable for two principal reasons. First, only a handful of individuals are protected. Second, and even worse, the individuals in question may suffer harm regardless of the protection that the precautionary principle affords to them.

An illustration may help. Let us suppose that the deployment of a ground-breaking innovation is harmful to the environment because it increases greenhouse gas emissions by a significant margin. The EU might then invoke the precautionary principle and regulate the innovation. Other jurisdictions may refrain from acting thus, either because scientific consensus is (inevitably) lacking at the point in time at which the innovation is rolled out to market or merely to boost corporate profits. The innovation, then, is deployed without reservations in some jurisdictions, while others either ban it or introduce novel regulatory requirements in order to mitigate its harmful effects to the environment. The consequences of such a development would be dire for the citizenry of the laissez-faire jurisdictions and even worse for those who live in the EU. The latter must bear the negative consequences of the deployment of the technology while reaping none of the benefits, be they pecuniary or otherwise.

The benefits in question accrue to the jurisdiction that does not regulate; the harms are distributed evenly across the globe. To adopt the economic jargon that is currently in vogue, this type of situation materializes whenever there is a possible harm to a global public good such as climate

19 Geert Van Calster, Diana Megan Bowman & Joel D'Silva, *'Trust me, I'm a Regulator': the (In)adequacy of EU Legislative Instruments for Three Nanotechnologies Categories*, in Dimensions of Technology Regulation 207, 230 (Morag Goodwin, Bert-Jan Koops & Ronald Leenes, eds., 2010).

20 Cass R. Sunstein, Laws of Fear – Beyond the precautionary principle 26f (2005).

21 *Id.*

22 Daniel Castro & Michael McLaughlin, *Ten ways the precautionary principle undermines progress in artificial intelligence* (Information Technology and Innovation Foundation 2019). For an opposing view, see Oliver Todt & José Luis Luján, *Analyzing precautionary regulation: do precaution, science, and innovation go together?*, 34(12) Risk Analysis 2163 (2014).

23 Article 19 Treaty on the Functioning of the European Union.

24 Article 11 Treaty on the Functioning of the European Union.

25 *European Commission, Communication from the Commission on the precautionary principle*, Brussels, 2.2.2000, COM(2000) 1.

26 David Freestone and Ellen Hey, The Precautionary Principle and International Law: The Challenge of Implementation (1996).

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change mitigation.[27] In short, *ex ante* regulation and, even more specifically, the adoption of the precautionary principle in a single jurisdiction are not entirely effective in preventing harmful activities.

One corollary of the foregoing is that the locus of regulation matters. Therefore, there is at least an arguable case for elevating the precautionary principle to a more global level and for integrating it into customary international law, a proposal that has been ventilated for decades. What is clear at present is that the regulatory approaches that are adopted in various jurisdictions and the cultural norms that animate them differ widely. In consequence, no agreement has been reached on the locus of the precautionary principle.

Another issue that pertains to the locus of regulation is that, as mentioned previously, no institution has the authority to enforce rules on a global level. There is no world police. Responsibility for the enforcement of global norms ultimately rests with the states that negotiate them. Accordingly, there is always a risk of discrepancies between commitments that are made or obligations that are assumed on the global level and their municipal enforcement. The Nationally Determined Contributions of the Paris Agreement are a vivid illustration.[28] Although all of the parties to the agreement decided to limit their greenhouse gas emissions to certain levels by certain points in time, no-one except the signatories is authorized to enforce compliance with these undertakings.

04 CONCLUSION

As noted at the outset, timing and the locus of regulation are linked inextricably in the context of *ex ante* regulation. We used the precautionary principle as an illustration in order to outline the problem. None of what we wrote should be taken to imply that the principle ought to be discarded. The precautionary principle can be effective when time is of the essence. The objective should be to integrate locus-of-regulation considerations into its application. It is important to determine when it is appropriate for a certain technology to be regulated at a certain level of governance.

A more fundamental question is whether technology should be regulated globally through uniform and harmonized laws and regulations or whether it would be more desirable to enable different polities to tailor their approaches to the particularities of specific technologies. Global norms and rules may be desirable from the standpoint of efficiency, but it is important not to overlook local preferences or considerations. The legitimacy of the resultant regulations is also a problem of considerable import. The further the locus of regulation is from the populace that is subject to it, or which is intended to benefit from its protection, the stronger the resistance that the deployment of the technology is likely to induce at the local level. When it comes to problems with global dimensions, of which climate change is but one, the rollout of novel and disruptive technologies can produce radical and sudden change at the local level. In such contexts, it is imperative that regulators strike an appropriate balance between legitimacy and effectiveness. *Ex ante* regulation should not serve primarily to hamper the development of new technologies, but the legitimate concerns of the citizens whose are most directly exposed to the negative consequences must never be ignored.

"As noted at the outset, timing and the locus of regulation are linked inextricably in the context of ex ante regulation

27 William D. Nordhaus, *Paul. Samuelson and Global Public Goods*, in Samuelsonian Economics and the Twenty-First Century 88 (Michael Szenberg, Lall Ramrattan & Aron A. Gottesman, eds., 2006).

28 Article 4(2) of the Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

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BEWARE *EX ANTE* REGULATION: INTRODUCING "CUT AND PASTE" *EX ANTE* REGULATIONS IN CANADA AGAINST SELECT BIG TECH COMPANIES IS BAD ECONOMIC AND LEGISLATIVE POLICY

BY JOHN PECMAN

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01 INTRODUCTION

Nearly 25 years ago Google and Amazon were at their infancy, Facebook and the Apple App Store had yet to be developed, and Microsoft was engaged in its epic antitrust battle against the U.S. Department of Justice for bundling its operating system and web browser applications. Since then, these so-called digital "gatekeepers" have introduced a vast number of innovative products and services that benefit consumers and businesses. At the same time,

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antitrust policy concerns regarding vertical discrimination have again come to forefront following successful enforcement actions in the European Union ("EU") and an increase in speculation that the large digital intermediation platforms might be harming competition by favoring their own content over that of their competitors.

Despite its successes in the courts tackling alleged anticompetitive behavior by large digital platforms and before any market failure has occurred, the EU has introduced experimental *ex ante* regulations with the *Digital Markets Act* (the "DMA"), which targets a few large U.S. digital platform companies by, for example, prohibiting their use of certain vertical restraints, such as self-preferencing practices that are said to favor their own downstream products at the expense of competitors. Regulations can be an useful policy instrument to assist in the functioning of markets and the stability of an open market economy. However, poorly designed and executed *ex ante* regulations have been proven to stifle innovation and consumer welfare. With the introduction of the DMA, the EU has now set a dangerous precedent that may foreshadow increasing government sector regulation worldwide, which risks impeding future technological progress in the digital sector.

This paper will: (1) provide a brief overview of the international policy developments in response to the vertical issues stemming from the network effects and scale economies in concentrated digital platform markets; (2) provide a summary of the Canadian competition policy developments; (3) examine the need for, and costs associated with, *ex ante* regulation and (4) explain why *ex ante* competition regulation of the digital sector is ill-advised in the Canadian context. The focus of the paper will, however, be on the Canadian policy debate and the need, if any, to amend the current abuse of dominance provisions under the *Competition Act*, (the "Act") to align itself in whole, or in part, with the *ex ante* regulations introduced by the DMA.

The European sector regulations were developed in large part because it was the EU's view that the lengthy competition law investigations and subsequent judicial reviews of digital platforms were too slow to keep up with the fast-moving digital economy. Many are no doubt familiar with Adam Smith's famous term the "invisible hand," which he used to describe how free markets incentivize individuals, working in their own self-interest, to produce efficiently what is necessary for society. The paper raises the concern that DMA-like *ex ante* prohibitions, which require certain digital platforms to collaborate with their competitors, would appear to place handcuffs on Adam Smith's metaphorical hand for the sake of the competition authority's inability to act more quickly under existing competition law processes. Before other policymakers follow the EU's lead, greater consideration should be given to the cost of *ex ante* regulation and the availability of other legal tools and mechanisms to speed up competition law investigation and adjudication in digital markets. Failing to do so risks significant distortionary effects on market incentives and output that would arise from sector regulation.

02

OVERVIEW OF KEY INTERNATIONAL POLICY DEVELOPMENTS

There have been tremendous policy debate and legislative initiatives internationally when it comes to competition law reform, including in relation to adoption of *ex ante* regulation. A more fulsome summary and discussion of the significant international developments has been canvassed by the OECD in its paper *Ex Ante Regulation and Competition in Digital Markets.*[2] Below are summaries of significant developments in Europe and the U.S., being the jurisdictions that are often looked upon by competition policymakers in other jurisdictions, such as Canada.

A. EU – DMA

The EU's DMA, which entered into force on November 1, 2022, is considered an *ex ante* instrument that seeks to preemptively fix digital markets in anticipation of harm. Its regulations are inspired by the EU's past and current antitrust cases against large online platforms.[3]

The DMA seeks to foster fairer competition and contestability in digital markets and identifies gatekeepers who must comply with its obligations and prohibitions. Gatekeepers are defined as "large platforms providing core platform services," such as online search engines, app stores, and messenger services.

Gatekeepers must comply with the obligations that are set out in the DMA, specifically, the obligations set out in Articles 5, 6, and 7. Additionally, there are many other obligations that gatekeepers will have to comply with, including:

· Prohibition of self-preferencing: the DMA forbids gatekeepers from treating their own services and products more favorably in ranking, indexing, and web-crawling

2 OECD (2021) Ex Ante Regulation and Competition in Digital Markets, OECD Competition Committee Discussion Paper.

3 EU Digital Markets Act: next steps and long-term outlook, December 7, 2022.

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· Prohibition of most-favored-nation clauses: Under Article 5(3), gatekeepers are prohibited from imposing most-favored-nation clauses on their business users
· Prohibition of anti-steering practices: gatekeepers must permit businesses using their intermediation services to promote offers to end users free of charge and conduct transactions with these users without relying on the gatekeepers' services
· Restriction on gatekeepers' use of data: the DMA places limitations on how gatekeepers can use the data they collect through their activities
· Access to gatekeepers' data: gatekeepers must provide end users, business users, and competitors with access to different types of data

B. UK – Digital Code of Conduct

On November 17, 2022, the United Kingdom's government confirmed that the Digital Markets, Competition and Consumer Bill would be brought forward in 2023. Among its reforms to competition and consumer law in the UK, this bill would contain several significant wide-ranging reforms to the regulation of digital markets and the existing competition and consumer law regimes.

With part of the focus on a pro-competitive regime,[4] the Digital Markets Unit, within the Competition and Markets Authority, designates companies that have a Strategic Market Status ("SMS").[5] Additional information on the criteria that will determine whether a company has an SMS will be included in legislation and the Digital Markets Unit will also be required to publish further guidance. Once designated, companies will be subject to regulation, including through "an enforceable code of contract; and mandatory reporting requirements for transactions meeting certain thresholds."[6]

Conduct requirements will be outlined in each code of conduct and tailored to the specific SMS company at issue. The code of conduct is still being finalized and, as such, further details on the proposed regime and the extent of regulatory authority that the Competition and Markets Authority will possess remains to be seen; however, such code may include prohibiting SMS companies from applying discriminatory terms and conditions, bundling, or tying services, and leveraging other parts of their business to entrench their power in a designated activity.[7]

> ***Conduct requirements will be outlined in each code of conduct and tailored to the specific SMS company at issue***

C. U.S. – American Innovation and Choice Online Act ("Klobuchar Bill")[8]

While there have been numerous legislative initiatives in the U.S. with respect to antitrust, the Klobuchar Bill, which was sponsored by Democratic Senator Amy Klobuchar, appears to have gained the most traction, being co-sponsored Republican Senator, Chuck Grassley. That said, passage of this bill remains uncertain owing to other legislative priorities.[9]

Among other things, the Klobuchar Bill would prohibit *ex ante* certain large online platforms from engaging in the following conduct:

· self-preferencing;
· unfairly limiting the availability of competing products on the platform;
· discriminatory application or enforcement of the platform's terms of service; and
· restricting access to platform data generated by the activity of competing business users.

In addition, the Klobuchar Bill would restrict a platform's use of non-public data obtained or generated on the platform.

D. G7 Digital Policy

Competition authorities from Canada, France, Germany, Italy, Japan, the United Kingdom, and the U.S. attended

4 Freshfields Bruckhaus Deringer, "UK competition, consumer and digital regulation reforms," October 12, 2021.

5 Ashurst Competition Law Update, UK, "UK Government Update on Digital Markets, Competition and Consumer Bill," November 22, 2022.

6 *Ibid.*

7 *Ibid.*

8 See American Innovation and Choice Online Act, S. 2992, 117th Cong. (as reported by S. Comm. On the Judiciary, March 2, 2022), available at: www.congress.gov/bill/117th-congress/senate-bill/2992/text.

9 George L. Paul, Daniel Sokol and Gabriela Baca, "Key Developments in the United States," Global Competition Review, November 25, 2022, available at: https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/key-developments-in-the-united-states.

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the 2021 G7 Summit held in the UK, at which digital markets were a key agenda item. The competition authorities published a compendium describing the "high level of commonality in the approaches that authorities are taking to address competition concerns" as well as setting out proposals for strengthening enforcement.[10]

An issue highlighted in the compendium is concern over the enforcement of digital mergers. Nonetheless, it has also recognized that competition authorities have become more active in challenging and remedying proposed mergers in the digital markets.[11] Algorithms present increasingly complex issues, but the G7 competition authorities are being more involved in the understanding of this space through the creation of technical teams with specialized knowledge. One of the most important outputs of the 2021 G7 Summit is the emphasis on global cooperation for a coordinated response to digital markets. The question that remains is how cross-border cooperation among the G7 countries will play out. As seen, the EC proposed the DMA, the UK proposed tailored rules for select large digital players, and the U.S. proposed more stringent enforcement under the Klobuchar Bill.

03
CANADIAN POLICY DEBATE

The policy debate over competition law reform in on-going and evolving in Canada. While not strictly focused on competition policy, the Canadian government's announcement of its Digital Charter foreshadowed the initiatives that were to follow, namely Senator Wetston's consultation on competition policy; limited amendments to the Act through the *Budget Implementation Act*; and, most recently, Innovation Science and Economic Development Canada's ("ISED") *The Future of Competition Policy in Canada* ("ISED Consultation Paper").

A. Digital Charter

Announced in June 2022, Canada's Digital Charter is a framework outlining Canadians' rights and expectations in the digital world. It includes 10 principles, such as universal access, safety and security, and control and consent.[12] The Charter also includes a proposed Digital Bill of Rights and several measures to protect privacy and data, including Bill C-11, which updates Canada's privacy laws for the digital age.

B. Senator Wetston's Consultation on Competition Policy

In 2019, Senator Howard Wetston, a former head of the Canadian Competition Bureau (the "Bureau") and former Federal Court Justice with deep experience and interest in competition policy, launched a public consultation on the modernization of the Act to address concerns about the effectiveness of the existing competition policy framework in the face of digital markets. The consultation sought input from stakeholders on how to promote competition, address new forms of anti-competitive conduct, and adapt competition law to the rapidly changing technological environment.

As part of the consultation process, Professor Edward M. Iacobucci of the University of Toronto Faculty of Law was commissioned to prepare a discussion paper. This discussion paper, titled *Examining the Canadian Competition Act in the Digital Era*, analyzed the distinctive features of digital markets and highlighted possible amendments to the Act.[13] Among other things, the discussion paper addressed the need for technologically neutral competition law; the powers of the Bureau to address anti-competitive conduct in the digital economy; the "abuse of dominance" provision, including a new "digital platform definition"; data access and privacy issues; and international cooperation on competition law in the digital era. The discussion paper recommended modest changes to the Act, including prohibiting wage-fixing and no-poaching agreements; amending section 96 of the Act so that the "Commissioner need not rely on quantitative evidence to establish a probably substantial lessening or prevention of competition from a merger";[14] and amending the abuse of dominance provisions so that there is better clarification that anti-competitive acts do not require a negative effect on a competitor, demystifying the relationship between subsections 79(1)(b) and 79(1)(c), and increasing Administrative Monetary Penalties.

The discussion paper's findings provided important insights into how Canada can maintain and enhance competition in the digital age. For example, it highlights that digital markets are particularly prone to the emergence of firms with

10 Freshfields Bruckhaus Deringer, "Tackling the global challenges of digital markets – key issues from the G7 competition authorities meeting in London", December 13, 2021.

11 *Ibid.*

12 "Canada's Digital Charter: Trust in a digital world" (August 30, 2022), online: Government of Canada https://ised-isde.canada.ca/site/innovation-better-canada/en/canadas-digital-charter-trust-digital-world.

13 Edward M. Iacobucci, "Examining the Canadian Competition Act in the Digital Era" (September 27, 2021), online (pdf): https://sencanada.ca/media/368377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf.

14 *Ibid*. at page 33.

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market power, which can set prices, quality, or other conditions while being partially shielded from intense competitive pressure. Despite this, the discussion paper argues that the Act can still be effective in addressing these concerns, though certain changes may be required to account for the unique features of digital markets. It is important to note that the discussion paper does not advocate for utility-like *ex ante* regulations for digital markets. Overall, it stresses the importance of ongoing dialogue and analysis in adapting competition law to the changing economic landscape. The insights gained during Senator Wetston's consultation will be invaluable in promoting economic welfare, innovation, and productivity in Canada.

More than 25 submissions, including a detailed submission from the Bureau, were received in response to Senator Wetston's consultation. Copies of these submissions can be found here.

> ***"As part of the consultation process, Professor Edward M. Iacobucci of the University of Toronto Faculty of Law was commissioned to prepare a discussion paper***

C. The Bureau's Submission on Digital Markets

The Bureau's submission to Senator Wetston included 35 wide-ranging recommendations that, if implemented, would fundamentally reshape competition enforcement in Canada.[15] Although Senator Weston's consultation was focused on the digital economy, the Bureau's recommendations were, for the most part, more general in nature – applying equally to the digital economy and traditional markets. According to the Bureau, its recommendations were intended to "[modernize] the Act so that Canadian consumers and businesses can prosper in a competitive and innovative marketplace"[16] and provide the Commissioner with "the right tools to ensure that individuals and companies comply with the Act across a wide range of economic activity."[17] Broadly speaking, the Bureau's recommendations dealt five broad topics, namely (1) merger review, (2) abuse of dominance, (3) competitor collaborations, (4) consumer protection / deceptive marketing and (5) litigation. Significantly, the Bureau did not call for utility-like *ex ante* regulation, whether in the digital platform context or otherwise. In fact, the Bureau stated that being "big" is not a problem under the Act, as businesses can gain market share through the competitive process.[18]

D. Submissions With Respect to Ex Ante Regulation

While the Bureau's legislative wish list did not call for *ex ante* regulation of Big Tech, other submissions provided to Senator Wetston have suggested that *ex ante* regulation be explored or adopted. For example, Vass Bednar (Executive Director of McMaster University's Master of Public Policy in Digital Society Program) submits:

> Further study is required in order to consider revisions specific to digital markets in a Canadian context. … Changes could be made to section 78 of the Act to name anticompetitive conduct that is specific to digital markets.
>
> In June, the U.S. House Democrats introduced five antitrust bills as part of an antitrust agenda under "A Stronger Online Economy: Opportunity, Innovation, Choice." These include: the "American Innovation and Choice Online Act," to … *prohibit discriminatory conduct by dominant platforms, including a ban on self-preferencing and picking winners and losers online*; the "Ending Platform Monopolies Act," to eliminate the ability of dominant platforms to leverage their control over across multiple business lines to self-preference and disadvantage competitors; and the "Platform Competition and Opportunity Act," prohibiting acquisitions of competitive threats by dominant platforms, as well acquisitions that expand or entrench the market power of online platforms.[19]

Similarly, Keldon Bester (independent consultant and researcher), once again referencing the U.S., calls for more prescriptive competition rules, including *ex ante* civil *per se* provisions, instead of relying on case-by-case determinations:

15 Examining the Canadian Competition Act in the Digital Era" (February 8, 2022), online: Government of Canada https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 Vass Bednar, "Senator Wetston Response re: *Examining the Canadian Competition Act in the Digital Era Consultation Paper"* (December 15, 2021) at 12, online (pdf): https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1eaeb7152687ffc0cb574/1674701548598/bednar.pdf.

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> In the United States, there is a building discussion on reviving the role of competition authorities in addressing unfair methods of competition, a core but underutilized authority held by the Federal Trade Commission ("FTC"). Sandeep Vaheesan points out three potential policy areas for FTC rulemaking to clarify the bounds of fair competition, including a ban on exclusive dealing and exclusionary contracts by dominant firms, below-cost pricing by near-dominant firms, and the violation of other existing laws, suggesting examples of environmental and labour, to gain a competitive edge. The merit of each of these and other potential boundaries on unfair competition is worth debating, but Vaheesan's example provides a model of how an expanded competition law could be more prescriptive in addressing conduct determined to be unfair and detrimental to Canadians. *Instead of relying predominantly on case by case determinations, a set of civil per se provisions, for example, could provide greater certainty as to what Canadians consider to be fair competition*. [Footnotes omitted and emphasis added].[20]

Moreover, Vivic Research (an economic consulting firm) submits that:

> Another solution to the indeterminacy problem is to reform the substantive tests associated with the civil provisions so that they are more rule-based, or what some call *per se* tests. Jedlickova describes this approach to evaluating anticompetitive conduct as the deontological approach common to EU law, in contrast to the consequentialist approach employed in Canada and elsewhere. The deontological approach would not require the Commissioner to assess the effects of the conduct. Rather the conduct may be deemed to be anticompetitive based on its character. Assessing conduct based on its characteristics rather than effects avoids the problem of the Tribunal or Commissioner having to weigh the various relevant effects of the conduct. The deontological approach has the added benefit of perhaps being more predictable in general.[21]

On the other hand, other submissions provided to Senator Wetston argue against *ex ante* regulation. For instance, in their submission on behalf of the MacDonald Laurier Institute, Anthony Niblett (law professor at the University of Toronto) and Daniel Sokol (law professor at the USC Gould School of Law) discuss the challenges of competition policy in digital markets, including issues such as economies of scale, self-preferencing, privacy, network effects, and control over data. The authors argue that while there is a need for greater attention to these issues, some of the push to regulate large digital players around the world seems to be based on the idea that "big is bad," which can harm consumers through higher prices, lower quality, reduced product offerings, and a chilling effect on innovation. The authors suggest that Canada's competition law framework is sufficient to deal with anti-competitive behavior, and that radical changes to the Act are not required. Incremental changes such as increasing penalties for abuse of dominance and perhaps allowing private rights of action for section 79 cases may serve to promote and encourage pro-competitive behavior. The authors warn that regulations that restrict integration of digital platforms and affect the ability of platforms to control their data will likely fail to capture the very diverse ways in which digital platforms compete and innovate; and could harm consumers.

"On the other hand, other submissions provided to Senator Wetston argue against ex ante regulation

E. Budget Implementation Act Reforms to the Act

Bill C-19, also known as the *Budget Implementation Act*, included significant amendments to the Act, expanding its scope, particularly with regards to digital markets. While the intention of these amendments was to promote competition and protect consumers, there are concerns that certain of the amendments may have unintended consequences. For example, the amendments include expanding the scope of the abuse of dominance provisions to explicitly capture conduct intended to have an adverse effect on competition or a selective or discriminatory response to an actual or potential competitor. The amendments also allow private parties to apply to the Competition Tribunal for a remedy arising from alleged abuse of dominance and increase administrative monetary penalties for a first violation by a corporation to up to three times the value of the benefit derived from the conduct or, if such amount cannot be reasonably

20 Keldon Bester, "SUBMISSION: Examining the Canadian Competition Act in the Digital Era" (December 15, 2021) at 5, online (pdf): https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1ec1390984d17ee0f7c30/1674701844128/bester.pdf.

21 Vass Bednar et al, "Study of Competition Issues in Data-Driven Markets in Canada" (January 2022) at 2, online (pdf): https://static1.squarespace.com/static/63851cbda1515c69b8a9a2b9/t/63d1f4b6217f9e441123144e/1674704058295/vivic-research-competition-data-driven-markets-final-report-2022.pdf.

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determined, up to 3 percent of a party's annual worldwide gross revenues. Bill C-19 also includes an explicit prohibition against drip pricing, an expansion of relevant factors when assessing competitive effects of proposed mergers, and a new anti-avoidance provision. Finally, a new criminal provision for wage-fixing and no-poaching agreements, and increased penalties under the existing criminal cartel provisions of the Act, will come into effect in June 2023. In spite of the tweaks proposed to the competition framework, there was no *ex ante* regulation for Big Tech platform companies or markets in the *Budget Implementation Act* as passed.

F. ISED Consultation Paper

On November 17, 2022, the Honourable François-Philippe Champagne, Minister of Innovation, Science and Industry, launched the much-anticipated public consultation for the second round of potential amendments to the Act. In his announcement, Minister Champagne notes that "[t]his consultation is meant to be a wide-ranging review of our ground rules and an exploration of all aspects of the Competition Act and if they are fit for purpose" – particularly in "a modern economy that continues to evolve quickly."[22]

The accompanying ISED Consultation Paper explores a wide range of areas of potential amendments, including with respect to merger review (e.g. efficiencies defense, interim relief, standard for merger remedy); unilateral conduct (e.g. joint dominance, test for remedial order, relevance of intent and/or competitive effects, structural presumptions); competitor collaboration (e.g. algorithmic activity, "agreement" and "intent" in the age of artificial intelligence); deceptive marketing; and administration and enforcement (e.g. market study powers, private enforcement and damages). [23]

Notwithstanding the breadth of potential amendments included in the ISED Consultation Paper, *ex ante* regulation is not an area of focus. In fact, the ISED Consultation Paper spends very little time on *ex ante* regulation, noting:

> The Act does not proactively dictate how to conduct business, allocate resources among stakeholders, or designate entrants, participants, winners, or losers in the free market. Direct management of business conduct, through codified rules or *ex ante* structures or regulation – while tremendously influential to the state of competition – fall generally outside the Act's purview, and in many cases are reserved for provincial and territorial jurisdiction in Canada's federal system.[24]

04

NEED FOR AND ECONOMIC COSTS OF *EX ANTE* REGULATION

As noted by Taladay and Lugard,[25] competition authorities have spent decades advocating for de-regulation in order to remove inefficient government constraints. However, some are now calling for *ex ante* regulation in the name protecting competition (i.e. because of perceived market failures and/or the inability of regulators to curtail alleged anti-competitive behavior through *ex post* enforcement). In this context, Taladay and Lugard cite recommendations from the OECD to articulate the following 10 principles of *ex ante* regulation:

> 1. Good regulation should serve clearly identified policy goals;
> 2. Good regulation should have a sound legal and empirical basis;
> 3. Good regulation should produce benefits that justify costs, considering the distribution effects across society;
> 4. Good regulation should minimize costs and market distortions;
> 5. Good regulation should promote innovation through market incentives and goal-based approaches;
> 6. Good regulation should be clear, simple and practical for users;
> 7. Good regulation should be consistent with other regulations and policies;
> 8. Good regulation should be compatible with competition, trade, and investment-facilitating principles at domestic and international levels;
> 9. Good regulation should maintain competitive neutrality; and

22 "Statement from Minister Champagne on the launch of the Competition Act review" (November 17, 2022), online: *Government of Canada* https://www.canada.ca/en/innovation-science-economic-development/news/2022/11/statement-from-minister-champagne-on-the-launch-of-the-competition-act-review.html.

23 "The Future of Competition Policy in Canada" (22 November 2022), online (pdf): *Government of Canada* https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf.

24 *Ibid.* at 13.

25 John Taladay, Paul Lugard, "The Ten Principles of *Ex ante* Competition Regulation" (November 2, 2022), online: *Competition Policy International* https://www.competitionpolicyinternational.com/the-ten-principles-of-ex-ante-competition-regulation/.

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10. Good regulation should preserve due process protections.[26]

As we debate the desirability and appropriateness of *ex ante* competition regulations, the first three of these principles are of particular relevance, with the remaining principles coming into play if, and when, concrete *ex ante* regulation proposals are put forward. These three principles require us to consider a number of questions, such as the following: why is *ex ante* regulation necessary? What policy goal does it serve? What are the attendant costs associated with *ex ante* regulation?

Because of allocative inefficiencies generated by sector regulations, competition authorities around the world advocate with governments and policymakers to rely on market forces and competition law oversight unless there is clear evidence of market failure. For example, the Bureau advises government stakeholders as follows:

> ***As we debate the desirability and appropriateness of ex ante competition regulations, the first three of these principles are of particular relevance***

In all sectors of the economy, regulation should only be put in place when there is good evidence to show that, without regulation, policy objectives will not be met. Empirical evidence that demonstrates how the benefits of regulation will outweigh the cost to consumers is the best evidence in most cases.[27]

As set out in a paper prepared by the OECD, "[t]he market power of the digital platforms … results partly from the digital markets' distinctive economic features that, when taken together, *may* lead to a degree of failure of the natural competitive process to deliver competitive outcomes" [emphasis added].[28] It is notable that no empirical economic evidence is offered to support the proposition that there has, in fact, been market failure when it comes to digital markets. One should not confuse enforcement failure with market failure. Until there is credible evidence of real market failure, competition policymakers should exercise caution in resorting to *ex ante* regulation, lest it does more harm than good.

Moreover, some of the concerns articulated with respect to digital markets and platform companies to support the call for *ex ante* competition regulation revolves around policy concerns that have nothing to do with competition. For instance, the UK's Digital Markets Taskforce lists harm to society at large, with impacts on issues of "mental health, media plurality, accuracy of news and democracy,"[29] which appear to go well beyond traditional purposes of competition laws. This leads us back to the first principle cited above, namely that good regulation should serve clearly identified policy goals. A competition law that purports to deal with all of society's concerns (from income inequality, to environment, social and governance, to privacy and to democratic norms) ceases to be a competition law that is justiciable. Rather, it becomes a law revolving around "public interest" that will be extremely difficult – if not impossible – to apply and adjudicate.

In the context of the DMA, the EU's concern about the perceived absence of competition and innovation in digital platform markets was one of the underlying rationales for the introduction of the DMA. The EU's objective was to ensure contestable and fair digital platforms markets with a view to promoting innovation, competitive prices, and high-quality digital products. The EU makes a clear link between competition and innovation to justify its use of *ex ante* regulation in the digital sector.[30] Economist Joseph Schumpeter, famous for his theory of "creative destruction" observed that greater competition reduces post-innovation profits, which reduces the incentive to innovate relative to an industry with fewer competitors. He observed that firms often will receive a greater benefit from innovation when they have a greater share of the market. Several economists have found that there generally appears to be a complex, non-linear relationship between innovation and economic concentration across an industry that resembles an invert-

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26 *Ibid.*

27 Competition Bureau Canada, Competition Advocate, Jan. 2020.

28 *Supra* note 2. These distinctive economic features include:
· the presence of strong economies of scale with low or zero marginal costs;
· extreme direct and indirect network effects that make it easier for a platform with a large number of established users to attract more users;
· a data-driven feedback loop which further strengthens the network effects;
· remarkable economies of scope due the role of data as a critical input; and
· conglomerate effects.

29 "A new pro-competition regime for digital markets" (2020) at 19, online (pdf): *Competition and Markets Authority* https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.

30 *Supra* note 2 at 21.

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ed "U."[31] Although the economic literature finds there is an ambiguous impact of concentration on innovation, the EU has taken the mixed economic scholarship on the relationship between product market competition and innovation to decree, unequivocally, that more competition results in more innovation. Overstating the benefits of competition is no way for a government to develop economic policy and to introduce costly sector regulations.

> *In the context of the DMA, the EU's concern about the perceived absence of competition and innovation in digital platform markets was one of the underlying rationales for the introduction of the DMA*

When appropriate, sector regulations can promote important social goals, including the protection of workers, public health, safety, and the environment. Economists widely recognize that complying with regulations increases both direct and indirect economic costs. The former refers to resources devoted to the administration and compliance of regulations. Indirect costs relate to the costs that result from a regulation that affects market structures or consumption patterns. Such regulations can create barriers to entry, limit competition, and impose opportunity costs.[32] As a result of these entry restrictions, there can be substantial regulatory costs associated with barriers to innovation, decreased choice and quality for consumers, and higher prices that are completely opposite to the stated objectives of the EU's *ex ante* regulations for digital platforms.

The DMA regulatory design, introduced without any empirical evidence demonstrating its net benefit to consumers, favors contestability by smaller firms who may introduce innovation to the market at the risk of limiting innovation and investment by successful, large incumbent firms. A recent study by Narayanan and Lee-Makiyama estimates the economic impacts of the EU shifting from *ex post* to *ex ante* regulation for digital platforms "is … a loss of about 85 billion EUR in GDP and 101 billion EUR in lost consumer welfare based on a baseline value of 2018. Also, it will reduce the labour force by 0.9 [percent]."[33]

In their zeal to prohibit what they perceive as anti-competitive behavior by the large digital platform companies, policymakers are looking at the DMA as a silver bullet to foster competition and curb market power. However, the DMA has come under scrutiny for its heavy use of *per se* rules, which do not require proving actual harmful effects but instead outlaw the conduct itself, leading to false positives and false negatives.[34] Furthermore, firms that have the resources and expertise may be able to adapt their business conduct in a way that achieves a similar result but is not subject to the existing *per se* rules and, as a result, is not explicitly outlawed.

The DMA's strategy of applying the same obligations to all gatekeepers and core platform services may lead to significant error costs due to the heterogeneity of gatekeepers and services.[35] The obligations are derived from past and current competition cases and investigations regarding specific firms and platform services, but the effects of these obligations may differ considerably for different gatekeepers and services, leading to potentially large error costs and a net negative impact on contestability and fairness. Additionally, the inflexibility of regulatory requirements under the DMA can create significant barriers to entry for new market entrants.[36]

The DMA also creates a skewed playing field against digital channels and companies identified as gatekeepers. Its focus on increasing the "contestability" of core platform services rather than digital markets suggests that the EC designed the regulation explicitly to uproot the gatekeep-

31 Philippe Aghion et al., "Competition and Innovation: An Inverted-U Relationship" (2005) The Quarterly Journal of Economics, Vol. 120, No. 2 at 6.

32 New South Wales Government, MEASURING THE COSTS OF REGULATION, June 2008.

33 Economic Costs of Ex ante Regulations, Hosuk Lee-Makiyama Badri Narayanan Gopalakrishnan, Ecipe Occasional Papers, October 2020 https://ecipe.org/publications/ex-ante/.

34 Anne C. Witt, "Can the EUs' Digital Markets Act rein in big tech?" (21 October 2022), online: The Conversation https://theconversation.com/can-the-eus-digital-markets-act-rein-in-big-tech-192373. False positives occur when the regulation outlaws conduct that does not actually harm the market, potentially impeding innovation and competition. False negatives occur when the regulation fails to catch harmful conduct, allowing large firms to circumvent the rules and continue their anti-competitive behavior.

35 Wolfgang Kerber, "Taming tech giants with a per-se rules approach? The Digital Markets Act from the "rules vs. standard" perspective" (2 June 2021), online (pdf) at page 6.

36 *Ibid.* at page 5.

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ers' market positions in favor of other companies.[37] This may encourage rent-seeking and free-riding behaviors at the expense of incentives to innovate, potentially leading to inferior services being offered to consumers.[38]

The DMA may hinder the widespread adoption of digital technologies as it creates extra regulatory costs that could harm businesses in the digital space. The obligation to share data with and grant access to rivals may make it cheaper for firms to copy market leaders' moves, thereby discouraging innovation.[39] Furthermore, the DMA pushes antitrust activity into the regulatory realm, assuming that digital gatekeepers do not act according to competitive market forces and must be directed before entering those markets.[40] As Carl Shapiro cautions in a recent paper regarding the U.S. bills containing *ex ante* regulations akin to the DMA, "misguided regulatory interventions" may do more harm than good, "harming end users and stifling innovation." Shapiro reminds us of the U.S. experience regulating industries, in which effective regulation to promote competition in dynamic industries can be subverted by regulatory capture and can be overtaken by technological progress.[41]

Similarly, Professor Daniel Sokol cautions against destroying entrepreneurship with poorly designed *ex ante* antitrust legislation in his op ed on the Klobuchar Bill.

If large tech companies cannot vertically integrate, this will have a significant impact on their incentive to acquire startups and thus damage the entire venture capital backed ecosystem. Most successful exits happen not via IPO but by acquisition. In prior work, I identified that deal value has gone up significantly since 2006, whereas IPOs are down significantly relative to the late 1990s. Without a well-functioning M&A system, there will not be successful exit for many ventures.[42]

In a recent presentation, Professor Sokol examined the impact of DMA-like regulations in China (in the form of anti-monopoly guidelines) on entrepreneurship. The data showed that "[a]fter release of the anti-monopoly guidelines, the average number of investments by platform CVC [corporate venture capital] experienced a volatile decline."[43] He further concluded that "China's platform regulation has a chilling effect on entrepreneurship."[44]

05

EX ANTE COMPETITION REGULATION INAPPROPRIATE FOR CANADA

The concerns noted above with respect to the perceived need for and costs associated with *ex ante* regulation should give Canadian policymakers cause for concern when it comes to adopting such regulations in Canada. There is no clear evidence substantiating the need for such regulation, the implementation of which would give rise to significant costs and unintended consequences. Moreover, to the extent that the need for *ex ante* regulation stems from a desire for timely resolutions of enforcement over alleged anticompetitive conduct in the fast-moving digital sector, the existing framework of the Act could, to the extent necessary, be modified and tweaked to address this specific issue. Lastly, it is unclear whether amending the Act to specifically regulate the digital platforms would pass constitutional muster.

A. Current Competition Law Framework in Canada Can Tackle any Anti-Competitive Conduct by Digital Platforms

Many Canadian practitioners and experts submit that the Act currently includes a sufficient legal framework to address anticompetitive conduct in the digital economy. That said, international studies demonstrating durable market power held by large digital platform firms resulting from network effects

37 Henrique Schneider, "A critical look at the Digital Markets Act" (29 October 2021), online: *GIS Reports Online* https://www.gisreportsonline.com/r/digital-markets-act/.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 Carl Shapiro, "Regulating Big Tech: Factual Foundations and Policy Goals" *Network Law Review*, Feb 2023.

42 Daniel Sokol, "Don't destroy entrepreneurship with poorly designed antitrust legislation," oped for The Hill, March 12, 2023, available online at: https://thehill.com/opinion/congress-blog/3896647-dont-destroy-entrepreneurship-with-poorly-designed-antitrust-legislation/.

43 Daniel Sokol, "Big Tech Regulation and Tech Entrepreneurship: Evidence from China" (2023) University of Southern California Working Paper at 11.

44 *Ibid.* at 25.

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suggest that the Act could benefit from some minor retooling to improve its effectiveness to better deal with any anti-competitive acts in the digital sector. In contrast, progressive reformers in Canada are looking for more dramatic changes to Canada's competition law in line with competition policy developments in the EU, which have introduced *ex ante* sector regulations against so-called gatekeeper Big Tech firms. The EU's approach is a significant departure from the traditional organizing framework of consumer surplus economic analysis combined with evidence of competitive harm that has been the cornerstone of international competition law enforcement over the past 40 years. In June 2022, in an effort to address concerns about market concentration, the Government of Canada amended the Act to include an expanded list of factors to be considered when assessing the impact of business practices on competition in the digital sector. While the government is considering further ways to strengthen the Act, it is important to note that this so-called first round of amendments maintained the traditional antitrust principles that underline the Act.

Also of significance is that Canada's competition authority, the Bureau, did not call for utility-like *ex ante* regulations as the appropriate solution to temper digital platform conduct in the policy debate leading up to the initial round of amendments. Nor did the Bureau seek *ex ante* regulation of Big Tech platforms in its submissions to Senator Wetston's consultation[45] and its submissions in response to the ISED Consultation Paper.[46] Moreover, in its 2022 market call-out for the digital economy,[47] the Bureau reiterated its enforcement approach towards digital platforms, as described in its "Big Data and Innovation" report published in February 2019,[48] validating the notion that traditional competition law enforcement principles apply for big data investigations. Specifically, the Bureau sought to strike the right balance between taking steps to prevent behavior that truly harms competition and over-enforcement that chills innovation and dynamic competition. The Bureau's approach does not condemn firms merely because they are "big" or possess valuable big data. Companies that achieve a leading market position – even a dominant one – by virtue of their own investment, ingenuity, and competitive performance are not penalized for doing so.

> ***"Many Canadian practitioners and experts submit that the Act currently includes a sufficient legal framework to address anti-competitive conduct in the digital economy***

It is evident that the rise of digital markets raises some interesting questions for competition policy. Issues such as two-sided markets, economies of scale, ecosystems, self-preferencing, privacy, network effects, and control over data are receiving significant attention today. However, so-called "big data" is not an entirely new phenomenon. In fact, not only have firms been developing and using data for a very long time (such as loyalty cards), but competition law enforcement in Canada has also dealt with "big data" issues in a number of instances. For example, two-sided markets were at issue in the alleged anti-competitive conduct of credit card companies, which serve both merchants and customers (*The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated,* 2013 Comp. Trib.). There are also cases in Canada that have dealt with refusing access to data as an anti-competitive act (*Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd (1995), 64 CPR (3d) 216 (Comp. Trib.)*) and harm to innovation (*The Commissioner of Competition v The Toronto Real Estate Board, 2016 Comp. Trib.*). Moreover, the abuse of dominance provisions under the Act are sufficiently flexible to enable enforcement action against anti-competitive self-preferencing practices or conduct by dominant firms that result in the lowering of customer privacy protection.

Similarly, in Europe, for example, existing competition laws have been successfully deployed in digital markets including multiple cases against Google concerning its comparison shopping service,[49] Android devices[50] and online advertising services,[51] and, more recently, in obtaining com-

45 *Supra* note 15.

46 The Future of Competition Policy in Canada – Submissions by the Competition Bureau, available online at: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada.

47 Government of Canada, "Competition Bureau call-out to market participants for information on potentially anti-competitive conduct in the digital economy".

48 Government of Canada, "Big data and innovation: key themes for competition policy in Canada," February 19, 2018.

49 European Commission, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service," (June 27, 2017).

50 European Commission, "Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine," (July 18, 2018).

51 European Commission, "Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising," (March 20, 2019).

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mitments from Amazon with respect to self-preferencing practices.[52]

To the extent that the driver for *ex ante* regulation is enforcement failure, as opposed to market failure, (i.e. enforcement takes too long), then this can be addressed through reform of the investigation and adjudication process. In this context, employing *ex ante* regulations (with its attendant costs) to remedy slow investigative and adjudication processes is analogous to using a sledgehammer to swat flies.

B. Constitutionality of Using the Act to Regulate Big Tech Platform Companies

The constitutionality of the Act from a division of powers perspective has been settled by the Supreme Court of Canada in a series of decisions. The enactment of the criminal provisions of the Act clearly falls within the federal government's jurisdiction over criminal law, while the other parts of the Act have been found to be a valid federal exercise of its legislative authority over "general trade and commerce."[53]

With respect to the invocation of the "general trade and commerce" jurisdiction of the federal government in relation to the civil damages provision of Act, in *General Motors* v. *National Leasing*, the Supreme Court of Canada laid out the following five indicia in determining the constitutional validity of a legislative provision pursuant to the "general trade and commerce" power:

1. Is the impugned legislation part of a general regulatory scheme?
2. Is the scheme under the oversight of a regulatory agency?
3. Is the impugned legislation concerned with trade as a whole, rather than with a particular industry?
4. Is the impugned legislation of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it?
5. Would failure to include one or more provinces or localities in the impugned legislative scheme jeopardize its successful operation in other parts of the country?

The constitutionality of the Act from a division of powers perspective has been settled by the Supreme Court of Canada in a series of decisions

The above list of indicia was subsequently cited and applied by the Supreme Court of Canada in *Reference re Pan-Canadian Securities Regulation.* In doing so, the Court stated:

> The scope of Parliament's jurisdiction over trade and commerce has been greatly influenced by "the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights" (*General Motors*, at p. 659). The concern here is that an overly broad interpretation of the general branch under s. 91(2) could entirely supplant the provinces' jurisdiction over property and civil rights (s. 92(13)) and over matters of a purely local nature (s. 92(16)), while an unduly narrow interpretation could leave this branch "vapid and meaningless" (*General Motors*, at p. 660).[54]

The third criterion establishes a requirement that the federal legislation be general in nature. The criterion indicates that in exercising its jurisdiction over "general trade and commerce," Parliament should not target specific companies, industries, or trade activities, but, rather, should target issues that affect trade as a whole. While the Supreme Court held that the above list is not exhaustive and that failure to meet one or more of these criteria is not necessarily determinative, given this jurisprudence, it is questionable whether *ex ante* regulation of just Big Tech platform companies would be found to be a valid exercise of federal legislative jurisdiction under the general trade and commerce power. Such regulations would not be concerned with trade as a whole, but rather with a particular industry, thereby failing the third indicia and risking supplanting the provinces' jurisdiction over property and civil rights. As noted by Mahmud Jamal, "if the trend towards industry-specific regulation continues, those portions of the Act may be on a less secure constitutional footing."[55]

52 European Commission, "Antitrust: Commission accepts commitments from Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime," (December 20, 2022).

53 Mahmud Jamal, "Constitutional Issues in Canadian Competition Litigation" *Canadian Business Law Journal*, 41, 2004-2005, pp.66-102.

54 [2018] 3 SCR 189 at para. 100.

55 *Supra* note 49 at 69-70.

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It is worth noting that that the Act currently has industry-specific provisions in relation to federal financial institutions (s.49) and professional sports (s.48).[56] However, these are criminal prohibitions and there is no question that Parliament has the constitutional jurisdiction over criminal matters. Also, until its repeal in 2004, there was an industry-specific abuse of dominance provision in relation to airlines. Presumably, such provision would not have given rise to a constitutional division of powers issue as it had been held by the Privy Council that the federal government has jurisdiction over aeronautics under the "peace, order and good government" head of power under the Constitution.[57]

As competition policy reform is debated and implemented internationally, there have been calls from various quarters for ex ante regulation when it comes to Big Tech platform companies.

06 CONCLUSION

As competition policy reform is debated and implemented internationally, there have been calls from various quarters for *ex ante* regulation when it comes to Big Tech platform companies. As discussed above, many of these calls point to possible market failure and the need to protect and enhance incentives for innovation. However, the case for *ex ante* regulation of Big Tech is weak. In summary, (a) no empirical evidence has been provided to support the notion that there has indeed been a market failure which would necessitate *ex ante* regulation; (b) the goals of *ex ante* regulation are in some cases amorphous (with policy objectives that stretch beyond competition); (c) there are significant costs associated with *ex ante* regulation; (d) the current *ex post* enforcement framework of the Act, with some tweaking, can be up to the task of protecting the competitive process in Canada; and (e) it is questionable whether it would be constitutional in Canada for Parliament to enact *ex ante* regulation targeting Big Tech platform companies. In these circumstances, pursuing such regulations in Canada would be ill-advised.

56 There are other provisions that are superficially industry-specific, such as in relation to amateur sports (s.6(1)), securities underwriting (s.5) and lotteries (s.74.06). However, the provisions relating to amateur sports and securities underwriting are exemptions or carve-outs from the Acts or certain provisions thereof, as opposed to regulate those industries. Similarly, s.74.06 does not purport to regulate lotteries, but rather deal with deceptive marketing in relation to "contest, lottery, game of chance or skill, or mixed chance and skill," which are also regulated under the *Criminal Code*.

57 *Re Aerial Navigation, Canada (AG) v. Ontario (AG) et al,* [1932] 1 DLR 58 (PC).

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WILL THIS MARK THE END OF A FINANCIAL ASSAULT **ON THE INCARCERATED AND THEIR FAMILIES?**

BY
MIGNON CLYBURN

Mignon L. Clyburn served as a member of the Federal Communications Commission (FCC) from 2009 to 2018.

01 INTRODUCTION

Could it be we are witnessing the beginning of the end of one of the most egregious cases of market failure I have seen during my 20 years of regulatory public service? The short and highly optimistic answer is yes with the passage last year of the Martha Wright-Reed Just and Reasonable Communications Act of 2022. Signed into law by President Joe Biden on January 5, 2023,[2] this long-awaited and welcomed piece of legislation requires the Federal Communications Commission to ensure that charges for

2 Martha Wright-Reed Just and Reasonable Communications Act of 2022, S.1541, 117th Congress (2021-2022)(enacted). https://www.congress.gov/bill/117th-congress/senate-bill/1541.

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payphone services, including advanced (e.g. audio or video) communications services in correctional institutions, are just and reasonable.[3]

Imagine, if you will, sending your sons or daughters off to camp and their only means of contacting you is calling collect using a payphone controlled by that camp. You then are charged rates set by a monopoly telecommunications provider (they have an established and mutually beneficial relationship with) at up to 90 cents per minute, on top of which is added up to a $3 per call connect fee. What if, however, you planned well and opted to set up an account in your child's name with the chance to replenish the balance, if it runs low, only to be told it may cost up to $3 to set up such account, another fee to add money to the account, and up to an additional $3 to close the account when the camp ends? This scenario is not episodic for the nearly two million people held in the thousands of prisons, jails, detention, and correctional facilities in this country, it is an everyday reality.[4]

To make matters worse for those wishing to maintain a connection with their incarcerated relatives and friends, and clients represented by public defenders, is that the cost of those collect calls may exceed your agency's budget or the family's combined monthly grocery and electricity bills. Now you are forced to make the painful "Sophie's Choice" between eating, keeping the electricity flowing, or maintaining that most prized and legally consequential connection. This is precisely the gruesome dilemma forced upon millions of households in this country.[5] Even more tragic, within these households are approximately 2.7 million children with at least one parent in prison who wants and needs to stay in touch.[6]

Applying any reasonable standard, it is morally shameful that the costs of telephone calls to incarcerated people in the United States is well beyond what most people in our country pay for telephone service and what too many can afford. It is often cheaper to call Singapore from a cell phone than it is to speak to someone in our nation's prison or jail.[7] Just how high can these charges be? In 2015, it was reported that one call from a pro bono attorney in Florida was $56 with all the fees for a 4-minute conversation, and even if this is an extreme case, the fact that it's possible tells you the system is broken.[8] While many of these exorbitant payphone charges are accurately representative of prison and jail calling rates over the previous five to 10 years and earlier, and recent data suggests that prison and jail calling rates have marginally moderated, most still hover around a meteoric nationwide average of $5 for a 30 minute call.[9] At these levels, the rates and fees continue to place an onerous burden on incarcerated people and those that care for and about them.

> *Imagine, if you will, sending your sons or daughters off to camp and their only means of contacting you is calling collect using a payphone controlled by that camp*

One might ask just how did we get here and why are we still here? In a flat-rate environment where most are enjoying decreasing calling rates, how is it that incarcerated persons and their families are faced with payphone rates at such high levels? After all, we are talking about families that are, in large part, the most economically challenged of all Americans. Given the disproportionate confinement of African Americans and Latinos, the high cost of phone calls creates a de-facto community destabilization policy that chronically

3 *Id.*

4 Wendy Sawyer and Peter Wagner, Prison Policy Initiative Report (March 14, 2022).

5 Mignon L. Clyburn, Commissioner, Federal Communications Commission ("FCC"), Another Step Toward Fairness in Inmate Calling Services (September 30, 2015). https://www.fcc.gov/news-events/blog/2015/09/30/another-step-toward-fairness-inmate-calling-services.

6 Mignon L. Clyburn, Commissioner, Federal Communications Commission ("FCC"), FCC's Inmate Calling Workshop Prepared Remarks of Commissioner Mignon L. Clyburn (July 9, 2014). https://www.fcc.gov/document/remarks-chairwoman-mignon-clyburn-fcc-inmate-calling-workshop.

7 Leanza, Cheryl. "Theory Applied: Walking the Halls of Power and the Streets in the Successful Campaign to End Predatory Long Distance Prison Phone Rates." Journal of Civil Rights and Economic Development, Vol 28. Issue 2, Article 5 (Fall 2015): Page 185. https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1773&context=jcred.

8 Clyburn, *supra* note 5.

9 Juliana Kim, Biden signs a bill to fight expensive prison phone call costs, NPR (January 6, 2023), https://www.npr.org/2023/01/01/1146370950/prison-phone-call-cost-martha-wright-biden.

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and negatively impacts the overall health and well-being of communities of color.[10]

Prison.org sees the prison and jail communications industry as being rife with problems – from sky-high phone rates to inexplicable consumer fees to expensive and unnecessary "premium services" – and most of these problems can be traced to a single moment in the industry's history: *When the companies decided to offer facilities a percentage of their revenue to provide a competitive edge when they answer a request for proposal* ("RFP").[11] Prison.org asserts the genesis of payphone provider profiteering is a simple collusion with jails and prisons, where, before long, facilities began to prioritize commissions over the then low rates.[12] From these fateful beginnings where competing phone companies enthusiastically agreed to submit bids that included the payment of fees or commissions to facilities, they solidified a model that for decades has imposed financial hardship for the families and legal representatives of incarcerated individuals.

While it is inconsequentially whimsy today, it is with curious speculation that I wonder whether any bidding payphone provider CEO ever paused to consider the societal and financial harm this regime would cause. If providers never offered site fees or commissions, millions of incarcerated people would likely have been afforded the opportunity to have established a much stronger and regular connection to family and community to which he or she would one day return. Of course, fortunes would not have been made and prison and jail equipment, unrelated to the provision of phone service, would not have been purchased. That, in a nutshell, is the tradeoff – stronger families and communities with reduced recidivism versus good old fashion profiteering.

When I was appointed to the Federal Communications Commission in 2009, there were many, critical issues that immediately demanded my attention. Some were particularly technically challenging and adversarial while others were admittedly administratively thorny. There were very few issues in my view, however, that were so obviously inequitable and unjust as Inmate Calling Services ("ICS") – an issue that lingered and went unaddressed at the FCC for over a decade. After educating myself and learning more about the complexities of this regime, I decided that if ever there were a time to stand up for fundamental fairness in the telecommunications industry, this was it. In all my years as a public servant and policy maker at both the state and federal levels, I have never been exposed to such a clear case of market failure as what I witnessed with ICS. As a communications regulator, it was the most glaring type of regulatory malpractice I'd ever seen.

The federal Communications Act intended "to make available, as far as possible, to all the people of the United States, . . . - a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . ."[13] Further still, the Commission tentatively concluded that Congress gave it express authority in Section 276, to establish a per-call compensation plan "for each and every intrastate and interstate call" and it also directs that the Commission "shall preempt" any inconsistent state regulations.[14]

"When I was appointed to the Federal Communications Commission in 2009, there were many, critical issues that immediately demanded my attention

But here we were witnessing and, by default, being complicit with a regime where egregious and exploitative rate designs could be found anywhere from federal detention centers to the smallest county jail, and the tension between this reality and my moral, ethical, equitable, and legal compass kept growing and growing. It was clear that the only way to right this wrong was for the FCC to do everything within its statutory power to correct this massive social, economic, and legal injustice. To be clear, the primary vehicle the FCC possesses to correct legal injustices is its statutory duty to set just and reasonable rates and to make basic phone calls affordable for all – a requirement in the statute that for too long had been ignored with respect to ICS rates.

Efforts to convince the FCC to reform the ICS regime, however, did not begin with me. The journey began in 2003 when petitioners led by Mrs. Martha Wright, a retired nurse from Washington, D.C., came before the Commission seeking

10 Leanza, *supra* note 7, page 185.

11 Peter Wagner and Alex Jones, On kickbacks and commissions in the prison and jail phone market, Prisonpolicy.org (February 11, 2019) https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions/.

12 *Id.*

13 47 U.S.C. §151.

14 47 U.S.C. §276.

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relief from the hundred-dollars-a-month bills she was making significant personal sacrifices to pay so she could stay in touch with her imprisoned grandson. Over the next decade, others from around the country tried to gain traction at the FCC but on March 20, 2012, I and my legal advisor met with a large group of advocates to address "the predatory pricing of telephone calls to incarcerated people." The asked for a reform champion, and I accepted the challenge.

In 2013, as interim Chairwoman, I shared with my colleagues a proposal to reform the exorbitant interstate prison calling regime. I was equally honored to hold the gavel when the prison calling reform Order was adopted in August 2013,[15] and humbled that many of the petitioners who demanded change – including Mrs. Wright's grandson Ulandis – were in the Commission Meeting Room that day.

> ***In 2013, as interim Chairwoman, I shared with my colleagues a proposal to reform the exorbitant interstate prison calling regime***

Prior to adoption of the prison calling reform Order, the FCC engaged in discussions with legislators, ICS payphone providers, the prison calling reform advocacy community, sheriffs' offices, and others. In 2015, the FCC voted to cap costs on *in-state* prison phone calls.[16] Unfortunately, two years later the D.C. Court of Appeals stayed part of the reforms opining that the FCC had no such authority to set intrastate rate caps. The Commission's interstate rate caps and critical findings on the nature of site commissions were left in place.

It was transparently predictable that some sheriffs' associations and states would intervene in the appeal challenge to the FCCs Order in an effort to maintain the flow of commission kickbacks from revenue generated from these phone calls. And, some did just that contending that caps imposed by the FCC would not cover necessary security-related costs for prison phone services. That was a red herring, though, as 11 state Department of Corrections (DOCs) currently charge phone rates below the $.11/min. cap in the FCC's order, which indicates that low rates are possible without sacrificing security needs.[17]

I could not help but ask: Is this about pleasing shareholders or surveillance and data collection to ensure safety and the well- being of the community? Interestingly, the ICS payphone community would point its collective finger at prisons and jails as the profiteering culprits. According to Brian Oliver, CEO of Global Tel*Link or GTL, the biggest player in the market for prison phone calls, "if the commission really wants to do something about prison phone rates, it should go after site commissions." Site commissions, according to Oliver, can account for as much as 60 or 70 cents of every dollar an incarcerated person's family spends.[18]

Now, after years of agonizing advocacy, a decade of regulatory inaction, and years of regulatory purpose – hundreds of millions, if not billions of dollars in the transfer of wealth, legions of alienated children and loved ones, the persistence and dedication of federal legislators, FCC commissioners, and the advocacy community, Congress enacted the Martha Wright-Reed Just and Reasonable Communications Act of 2022.

This law has the potential to completely reconstruct and improve the entire prison phone call industry. It fundamentally accomplishes two crucially important objectives. Firstly, the law makes it clear that the FCC has authority to regulate in-state calls placed from correctional facilities. Secondly, the bill clarifies that the FCC has the authority to regulate video calls. So, eight years after the FCC's vote to cap calls on in-state prison phone calls was struck down by the D.C. Circuit Court, Congress has acted and explicitly authorized the FCC to set intrastate rates for phone calls originating from correctional facilities. This grant of authority now frees the FCC to evaluate in-state fees and establish just and reasonable rates. The FCC has indicated that it will soon evaluate in-state rates and align the rates according to the just and reasonable standard.

As recently as October 2022, FCC Chairwoman Jessica Rosenworcel, explained to NPR's *Weekend Edition* that "just and reasonable is not an abstract concept, but a legal term that the FCC has been using since the Communications Act of 1934.[19] She went on to say that "What it means is that those rates are fair and not discriminatory. No matter who you are or where you live in this country,

15 79 FR 33709 (6/12/2014), 78 FR 67956 (11/13/2013)

16 https://apnews.com/article/7b5f0b2b437d4b11a18a361894c3393c.

17 D.C. Circuit Court Partially Stays FCC Order Capping Prison and Jail Phone Rates, *Prison Legal News*, 2016, https://www.prisonlegalnews.org/news/2016/mar/31/dc-circuit-court-partially-stays-fcc-order-capping-prison-and-jail-phone-rates/.

18 Joel Rose, FCC Moves To Cut High Cost Of Prisoners' Calls, NPR (October 21, 2015) https://www.npr.org/2015/10/21/450464766/fcc-moves-to-cut-high-cost-of-prisoners-calls.

19 https://transition.fcc.gov/Reports/1934new.pdf.

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whether you're incarcerated or not, you should be charged about the same to make some basic phone calls." We will now have the chance to see the FCC follow through on its commitment to bring much-needed rate relief to the families of incarcerated individuals. The law requires the FCC to publish regulations beginning no earlier than 18 months after the date of enactment of the Act and no later than 24 months after the date of enactment of the Act. The FCC will likely complete its charge near the end of 2024. In a press release,[20] Chairwoman Rosenworcel committed to "expeditiously move new rules forward." Many families and advocates are looking forward to seeing new rules published and being charged rates that do not require them to make impossibly difficult financial choices.

As the FCC lines up its next actions and as states continue to consider their steps to reform intra-state correctional facility calling rates, it is unlikely that ICS payphone companies will slink quietly into the night and leave the golden goose behind. Continued wealth accrual, amassed on the backs of mostly low-income and economically vulnerable families, is an objective not easily forsaken.

Even as voice and video calling regulations become stronger, corporations that dominate the industry are expanding their business footprints inside of these facilities. Companies are growing the number of "services" they offer to prisons and jails with expensive electronic messaging products as stricter policies around mail[21] and in-person visits are put into place.[22] How do we ensure that companies are not substituting equally price egregious services for another? The hope is that state legislators and regulators will follow Congress' lead and not sit idly by as new exploitative services into state correctional facilities are introduced.

As for the FCC, The Martha Wright-Reed Act represents the clearest path to date in the fight for prison and jail phone justice, but it must be accompanied by continued vigilance. Having served more than eight years at the FCC, I have no doubt that the agency's regulatory infrastructure is able to manage its legislative charge as long as the ICS policy goals are clearly articulated. The Martha Wright-Reed Act provides a sound legal basis from which policy can be formulated more seamlessly, and with the Commission's use of the just and reasonable standard together with comprehensive data collection allowing for careful consideration of total expected costs and benefits, the FCC has the tools it needs to make legally sustainable and socially conscionable decisions.

There were many days since I was summoned by advocates to that toasty, cramped room two days before my 50th birthday that I questioned if we would ever see the enactment of this life, family, and community altering legislation, but a few weeks after my 61st birthday, here we are. This single issue that failed to make it above the fold for decades finally has the legislative teeth we collectively need to make our communities better connected, safer, healthier, and more prosperous. Who knew that applying the Title 47 "just and reasonable" rate clause of the Communications Act, making "available, as far as possible, to all the people of the United States would be apropos with prison phone justice?

We did.

"As for the FCC, The Martha Wright-Reed Act represents the clearest path to date in the fight for prison and jail phone justice, but it must be accompanied by continued vigilance

20 https://docs.fcc.gov/public/attachments/DOC-390396A1.pdf.

21 https://www.prisonpolicy.org/blog/2022/11/17/mail-scanning/.

22 https://www.prisonpolicy.org/visitation/report.html.

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Greetings from

BRUSSELS

BELGIUM

BRUSSELS EFFECT? CONVERGENCE AND DIVERGENCE ON PLATFORM REGULATION IN TRANSATLANTIC COMPETITION POLICY

BY
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&
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Large digital platforms have captured the zeitgeist of current competition policy. The introduction of *ex ante* regulation for the sector represents one of the most significant changes in competition policy in decades. This proposed regulation is far from consistent, however, covering a slew of enacted and proposed legislation with a variety of mechanisms for achieving a myriad of policy goals. Its introduction is also expected to trigger a wave of litigation as

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market participants adjust to the new regulatory environment.[2]

Of the many challenges, the risk of regulatory divergence has so far received little scrutiny. It carries, however, real practical significance. Competition regulators have over the last three decades sought to strengthen cooperation and, where possible, reach consensus on competition policy.[3] EU and U.S. competition authorities have recently affirmed the need for cooperation in the tech sector as part of the wider EU – U.S. technology council aimed at preserving open technology markets.[4] The prospect of regulatory divergence as some jurisdictions press ahead *ex ante* regulation and others don't, and differing conceptions of what such rules should do, risks undermining the Transatlantic regulatory convergence that has taken place to date.

These risks are all the more pertinent for digital services which are frequently global in nature. These economic linkages introduce the practical risk of regulatory friction: ranging from the costs of adapting services to comply with different legal rules through to the risk of regulatory conflict where firms are subject to incompatible regulatory obligations.[5]

We explore the prospects and practical risks of *ex ante* regulation causing regulatory divergence. That *ex ante* regulation will result in divergence is straightforward: the introduction of the EU's Digital Markets Act and the absence of similar legislation in the U.S. in the near term means there will inevitably be divergence. However, there are a number of salient questions to understand the implications. What, if anything, will drive potential divergent outcomes rather than simply divergence in regulatory instruments? How great is such divergence likely to be? And what practical impact will it have? Are imminent rules in Europe likely to ultimately have a "Brussels Effect" in setting *de facto* global regulatory standards, notwithstanding that most of the companies are headquartered in the U.S.?[6] Or will companies adopt a patchwork of business models adapted to each relevant jurisdiction or set of jurisdictions?

01

EX ANTE REGULATION OF LARGE DIGITAL PLATFORMS: COMPARING (REGULATORY) APPLES, PEARS, AND ORANGES

The *ex ante* label is applied to the EU's digital markets act (hereafter the "DMA"), S.19A of Germany's competition act (hereafter "S.19A GWB") and the UK's legislative proposals for empowering its digital markets unit (hereafter the "DMU").[7] In the U.S., lawmakers in both the Senate and the House have introduced legislative proposals aimed at similar policy goals, but the prospects for this legislation are far less certain.[8] Other regimes sit somewhere across this spectrum. For example, China has pursued an evolving approach to its own unique landscape of digital platforms, most recently shifting its focus to a prevention regime aimed

2 Foo Yun Chee, Top EU judge expects a wave of litigation from tech giants against new tech law, March 17, 2023, Reuters, https://www.reuters.com/technology/top-eu-judge-expects-wave-litigation-tech-giants-against-new-tech-law-2023-03-17/.

3 See in particular, the Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws OJ 1995 L 95/47, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21995A0427(01)&from=EN. Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws OJ 1998 L 173/28

4 EU-U.S. Joint Technology Competition Policy Dialogue Inaugural Joint Statement between the European Commission, the United States Department of Justice Antitrust Division, and the United States Federal Trade Commission

5 See e.g. Alden F. Abbott, 'Competition Policy and Its Convergence as Key Drivers of Economic Development, https://www.ftc.gov/system/files/attachments/key-speeches-presentations/2009unctapaper.pdf.

6 Anu Bradford, The Brussels Effect: How the European Union Rules the World (OUP 2020).

7 Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828; S.19A (Abusive Conduct of Undertakings of Paramount Significance for Competition Across Markets) of Germany's Competition Act in the version published on June 26, 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245 (as amended); BEIS, *'A new pro-competition regime for digital markets - government response to consultation'* Command Paper: CP 657

8 See e.g. American Innovation and Choice Online Act (AICOA), S. 2992, 117th Cong. (2021) (creating a cause of action for the federal agencies prohibiting certain forms of discriminatory conduct, subject to certain affirmative defenses). See generally Heidi M. Silton, Craig S. Davis & Halli Spraggins, Congressional Antitrust Bills Seek to Regulate a New Internet Era, Antitrust (Spring 2022) (providing an overview of recent legislation).

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at developing bespoke solutions tailored to particular platforms.[9]

These initiatives address similar perceived deficiencies in competition law's ability to regulate digital markets effectively: namely insufficiently fast intervention, weak deterrent effect, and a perception that traditional enforcement either does not permit intervention to address all of the substantive issues occurring in digital markets or that the thresholds for intervention are too burdensome. Many of these rules seek to address the special market features and common practices that proponents identify as raising barriers to effective competition, including network effects that feed into economies of scale and scope. They also rely on a policy recalibration that the risk of harm to competition outweighs the potential chilling effect on innovation or introducing security risks.

These legislative instruments are, however, far from a uniform model of market regulation. Their commonality has two main dimensions.

- First, they use a model whereby a regulator must designate firms and their digital services as "gatekeepers," "platforms of paramount importance" or having "strategic market status" and, in turn, are subject to additional rules. The model is similar, albeit not identical to sectoral regulation such as telecoms and public utilities.[10]
- Second, they employ effectively *per se* rules or presumptions of competitive harm to specific conduct by those designated firms, mechanisms previously reserved for conduct that always or almost always achieved anticompetitive outcomes.[11]

Their commonality, however, largely ends there.

The regulations pursue, in the first instance, various differing underlying policy objectives. The DMA focuses on goals of "contestability" and "fairness" as explicitly distinct from the objective of undistorted competition underpinning EU competition law. S.19A GWB forms part of German competition law. The DMU proposal seeks to protect consumers. U.S. legislation is primarily rooted in traditional competition enforcement aimed at protecting consumers, but includes an undercurrent of fairness considerations that pervades current enforcement rhetoric.[12]

Their form equally differs. For example, the DMA applies an ostensible one-size-fits-all model, with the same rules across all designated gatekeepers even where the logic of particular rules for some gatekeepers may not be clearly established. Conversely, on the basis of the legislative proposal, the DMU would tailor codes of conduct to firms designated as having strategic market status. And, unlike the *ex ante* regulatory approach in other jurisdictions, the U.S. legislative proposals tend to be framed more as law enforcement measures that shift traditional enforcement burdens.

Finally, the various regulations envisage different obligations and remedies. Most fundamentally, the DMA and S.19A GWB are primarily intended to regulate designated firms' conduct rather than effect structural change. The DMU and some of the U.S. legislation,[13] on the other hand, would permit structural remedies such as the break-up of different business lines within a firm if necessary to achieve the desired objectives.

02

IS THE INTRODUCTION OF *EX ANTE* REGULATION LIKELY TO RESULT IN REGULATORY DIVERGENCE?

Regulatory divergence occurs where firms in the same economic position are treated differently by rules serving the same underlying purpose or firms in different economic po-

9 State Administration for Market Regulation ("SAMR"), Press Release, SAMR to Further Specify the Detailed Anti-Monopoly Rules for Internet Platform Rules and Enhance Normalised Supervision Abilities, April 13, 2023, https://finance.sina.com.cn/jjxw/2023-04-13/doc-imyqfnhp3263465.shtml.

10 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast)

11 Article 102 TFEU previously included some categories of abuse that were *per se*. See, for example, T-286/09 - *Intel v. Commission* [2014] ECLI:EU:T:2014:547, paras 72 – 94 in relation to exclusivity rebates. The Court of Justice subsequently overturned the judgment.

12 Federal Trade Commission, Prepared Statement of the Hearing on Fiscal Year 2024 Budget, Before the Committee on Energy and Commerce Subcommittee on Innovation, Data, & Commerce, U.S. House of Representatives (April 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p210100testimonyfy2024budget.pdf.

13 See e.g. Ending Platform Monopolies Act ("EPMA"), H.R. 3825, 117th Cong. (2021) (prohibiting covered platforms from operating multiple lines of business that generate certain conflicts of interests).

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sition are treated the same. If *ex ante* platform regulation is viewed as regulating economic power, the introduction of *ex ante* platform regulation will inevitably result in *some degree* of regulatory divergence from competition law and between different *ex ante* regulations. The salient question is rather the degree of regulatory divergence.

Ex ante regulation is inherently set to diverge from competition law at home and abroad. The DMA provides, for example, for the designation of incipient "gatekeepers" (i.e. firms operating platforms that are likely to be become gatekeepers): thereby encompassing non-dominant platforms in contrast to competition law. All of the proposed regulations also envisage more intrusive obligations on platforms. The DMA, S.19A, the DMU, and to a lesser extent the U.S. legislation all contemplate, for example, requiring digital platforms to interoperate with their rivals, provide access to data which they collect and provide FRAND access to services.[14] These are novel obligations which competition law in Europe and the U.S. has so far either never mandated or required only in limited circumstances.

The prospect of regulatory divergence is, moreover, not a bug but a function of legislative intent for at least some jurisdictions. By pursuing different objectives, the DMA is *intended* to have different regulatory outcomes to competition law. This does not hold to the same degree for S.19A GWB and the DMU since the two regulations are, in contrast to the DMA, intended to be competition law. The different underlying objectives also mean that the DMA serves ostensibly distinct purposes and hence is simply *different* to competition law. The challenge is that it equally seeks to regulate economic power and, more practically, its rules are derived from competition law. S.19A GWB and the DMU in contrast are intended as competition law but will nevertheless impose obligations that go beyond those typically imposed. The practical effect is however the same: platforms will be subject to new rules focused on protecting effective market functioning that previously did not exist.

There is also a question of whether and to what degree the experience of *ex ante* regulation in one jurisdiction will influence future enforcement or regulatory outcomes in another. The potential divergence in regulatory rules will create an unprecedented natural experiment. The lessons of this experiment may in practice drive further convergence or divergence. As new *ex ante* regimes come into force, there is a prospect that the answers to some of the "what-ifs" that have cautioned prudence in many jurisdiction rules enforcement rules will be answered. For example, new access rules are intended to open up previously closed systems or require access to particular technologies. The results could either confirming the potential risks of intervention or undermine arguments on the counterfactuals. Those lessons will undoubtedly influence the confidence of courts and lawmakers in the risks of predicting outcomes of imposing enforcement remedies.

03

WHAT ARE THE IMPLICATIONS FOR REGULATORY DIVERGENCE?

The practical implications of different regulatory approaches across jurisdictions depend on the nature and degree of potential conflict. At its most substantial, divergence can arise from direct conflict between irreconcilable obligations across different regimes. While this is perhaps unlikely to occur strictly within competition policy, an example would be where companies are faced with access rules in one jurisdiction that conflict with data privacy rules in another. Other areas of divergence occur across a spectrum. In some instances, rules in one jurisdiction may have *de facto* extra-territorial effect where the proverbial lowest common denominator applies to all jurisdictions. In others, firms may be able to reasonably comply with different standards in different jurisdictions at varying difficulties and costs of compliance.

Despite some global convergence in competition law, regulatory divergence is already a feature of transatlantic rules for competition enforcement involving unilateral conduct. Article 102 TFEU encompasses exploitative abuses as well as exclusionary abuses, unlike Section 2 of the Sherman Act. Furthermore, differences in case law (as well as competition authorities' selection of cases) mean that there are already differences in competition law standards across jurisdictions. The EU's *Google Shopping* and *Google Android* cases are not, for example, mirrored by similar enforcement in the United States, which has not clearly adopted similar standards for self-preferencing as a theory of harm. As a result, Google has chosen to implement the EU's decisions in the EU alone.[15] In short, *some* regulatory divergence is manageable, albeit potentially imposes additional costs for business.

The risk of extra-territorial effect where one jurisdiction's rules *de facto* impose an outcome for other jurisdictions is

14 DMA, Articles 6(10), 6(12) and 7; Augmenting Compatibility and Competition by Enabling Service Switching Act of 2022 ("ACCESS Act"), S. 4309, 117th Cong. (2022).

15 See e.g. Hiroshi Lockheimer, Google in Europe: Complying with the EC's Android Decision, The Keyword Blog, Oct 16, 2018, https://www.blog.google/around-the-globe/google-europe/complying-ecs-android-decision/.

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higher where regulation addresses *market structure* rather than *conduct*. For example, merger control which regulates the nature of the firms permitted to participate allows the most stringent regulator to impose the most restrictive outcome on all jurisdictions. This has in the past raised political hackles. The UK Competition & Markets Authority's extraterritorial merger enforcement initiatives in the digital sector was presaged by earlier examples such as European Commission's prohibition of General Electric's proposed acquisition of Honeywell, which elicited significant criticism in the U.S. where both parties were headquartered.[16] Since the DMA and S.19A GWB regulate conduct, the risk of true conflict with other jurisdictions is unlikely to arise. Albeit the political challenge of regulating firms predominantly operating from other jurisdictions remains. The DMU on the other hand is currently expected to allow for structural interventions, which carry a greater risk of direct regulatory conflict.

Provided that structural remedies do not feature significantly in the future, the impact of divergence in digital platform regulation may largely drive increased regulatory cost for businesses. On the one hand, businesses can maintain a single business model. In this case the lowest common denominator applies: firms will need to adapt the business model to the jurisdiction with the most onerous rules – the so-called Brussels effect. Alternatively, firms can potentially offer different business models in different jurisdictions to comply with the relevant rules. In which case, the effect is the emergence of different regulatory ecosystems. The outcome is not, however, binary. Firms can choose different models for different products. There is also already evidence of such divergence. Google has, for example, publicly announced that it will adopt a different app store model for the EEA versus that used for consumers elsewhere.

04 CONCLUSIONS

Ex ante regulation is only just starting to move from drawing board to practical reality: whether we will see regulatory consensus or frictional divergence will play out in the coming months and years. Its significance is also likely to turn on the extent to which jurisdictions converge in relation to the substance of *ex ante* regulation, the approach of regulators to their new powers, and the degree to which companies seek to preserve a single operating business model, or mix and match between their different operating regions.

The practical application of the rules is, moreover, likely to be dynamic rather than static: regulators will not take decisions in a vacuum and will learn lessons from each other as the relationship between *ex ante* regulation and competition law as well as with *ex ante* regulation in other jurisdictions works itself out. So while the outcome is uncertain, the prospect of more regulatory cooperation aimed at easing the hard edges of regulation seems somewhat inevitable.

> ***Despite some global convergence in competition law, regulatory divergence is already a feature of transatlantic rules for competition enforcement involving unilateral conduct***

16 Tobias Buck, Court upholds EU ban on GE-Honeywell merger, Financial Times, Dec. 14, 2005, https://www.ft.com/content/420694e0-6c8b-11da-90c2-0000779e2340.

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REGULATORY SANDBOXES: *EX ANTE* REGULATION OR COMPETITION POLICY?

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01 INTRODUCTION

The European Commission has adopted a clear strategy to promote competition in the digital services markets through a form of asymmetric, sector-specific regulation. In particular, it has recently adopted the Regulation of the European Parliament and of the Council for fair and contestable markets in the digital sector or Digital Market Act ("DMA"). With this legislation, the EU has clearly expressed a certain diffidence towards the *laissez-faire* approach in general and, in particu-

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lar, towards the emergence of the digital economy, as the absence of public regulatory action was too risky in the long run for the proper functioning of the single market.

However, the choice to intervene through *ex ante* regulation also has some clear limitations with respect to the speed of technological innovation, as well as the risks of creating a burdensome and fragmented regulatory framework that ends up increasing in complexity and in implementation costs for companies and, ultimately, for citizens themselves.

The decision to resort to such an articulated form of regulation, which is difficult to enforce in the EU member states, reflects the mistrust of the European institutions towards the effectiveness of competition law vis-à-vis digital platform operators and, in particular, large platforms (precisely: *gatekeepers*). Now, the aforementioned mistrust is rather worrying when one only considers the tumultuous development of new technologies ranging from *blockchain* to artificial intelligence; in other words, public authorities will soon also be called upon to grapple with the new digital service markets linked to the emergence of such innovations.

If competition law is actually ineffective, the fundamental error of the public actors with respect to the governance of the digital economy may be found in the rather long time lapse between the emergence of these new economic powers - the large platforms - and the ability of the authorities themselves to understand and appropriately regulate these realities, taking into account their particular nature and the associated risks (think, for example, of the protection of users' personal data). In other words, it would have been preferable to intervene when this phenomenon came to the attention of markets and society. However, public authorities did not have the tools and methodologies at that time to ensure a dynamic approach and, thus, a prompt response also through the application of European competition policy. A reflection of this nature is particularly important not so much for the past, but for the near future where, as mentioned, public authorities will soon be confronted with new technology-related markets.

That said, this contribution considers a different model of regulation from the traditional regulatory one, which also includes the DMA. We are interested here in considering, in particular, those new pro-competitive regulatory strategies that are characterized by an experimental nature (regulatory experimentalism).

Precisely, the article dwells on *regulatory sandboxes*, i.e. an experimental approach aimed at public regulation of markets and, even more interesting for our purposes, at promoting competition in the new digital markets. It should also be pointed out that the term *regulatory sandbox* itself should be understood as a general term implying different mechanisms depending on the jurisdiction. These mechanisms are, however, united by their experimental nature and the *mentoring* function of public authorities with respect to the companies participating in the experiment.

02

REGULATORY SANDBOXES AND COMPETITION POLICY

It should be noted how the growing interest in promoting competition policy through *ex ante* regulation also emerges in relation to the case of *regulatory sandboxes*. A form of competition policy that, operating when a new market is born, would like to contribute to establishing the rules of the game (so to speak), or rather the regulatory framework that may well include economic as well as social objectives, such as sustainability. In this way, regulatory sandboxes could be used by public authorities to prevent the emergence of strong economic powers in digital markets and the consequent creation of barriers to entry.

Now, competition law scholars have not yet investigated the relationship between competition law and regulatory sandboxes, whereas public authorities seem to believe that sandboxes can generally foster both innovation and competition in fast-moving digital markets. For instance, the Financial Conduct Authority ("FCA") established a regulatory sandbox in 2015 in order to promote effective competition in digital financial services markets. Specifically, the regulatory sandbox should enable the FCA to collaborate with innovators, ensuring consumer welfare and promoting competition in financial services for small and medium-sized enterprises.

More generally, the CGAP (Consultative Group to Assist the Poor) and World Bank (2019) study on regulatory sandboxes, identifies competition policy as one of the objectives of regulatory sandboxes.

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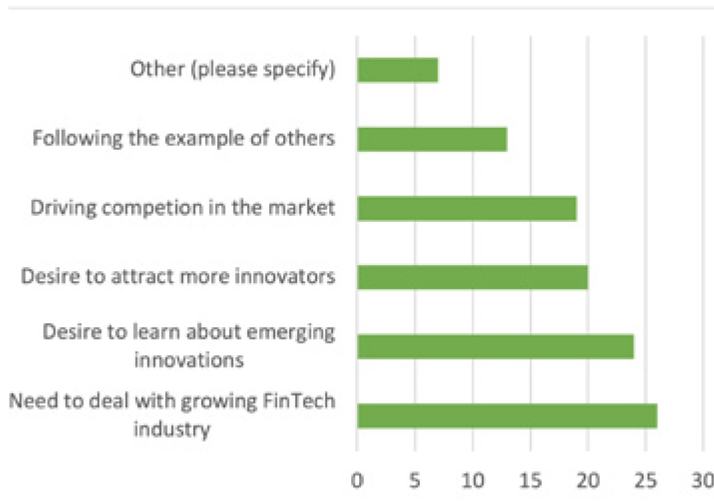

***Source**: CGAP-World Bank study (2019), Motivations driving implementation of innovations facilitators.*

In spite of the confidence expressed by public authorities in the capacity of these experimental tools to contribute to the regulation of digital services markets, it should be pointed out that empirical research is still at an early stage and that it will take time to obtain results and, therefore, to make an accurate assessment of the potential of these innovative regulatory tools.[2] In truth, regulatory sandboxes have been very positively received by national authorities, as they allow for a revisiting of the proportionality principle of European law, leaving more room for flexibility and activism with respect to innovation. In relation to our case, it is also possible to detect a sort of competition between systems, in the sense that the national authorities seem to be interested in competing in the search for the most up-to-date and promising methods of regulation.

As noted above, following the British example, several jurisdictions have chosen to create innovation-friendly sandboxes for companies and start-ups. It should come as no surprise, therefore, that innovation markets in digital services (especially in financial services) take center stage for the experimentation of these new tools. In this context, it is of paramount importance to distinguish what is truly innovative in the practice of digital market regulation from mere announcements that are often aimed at promoting a national regulation as the most favorable for companies wishing to establish their registered office and offer newly developed digital services.

03

REGULATORY SANDBOXES: CASE STUDIES

As mentioned, *regulatory sandboxes* have gained importance in the fintech sector, playing a crucial role in understanding how to regulate those technology applications in the financial sector with which the regulator was not yet fully familiar.

A. Financial Conduct Authority

The pioneer of regulatory sandboxes in Europe and what can be called the benchmark model in this field was the one launched by the FCA in the UK in 2016. The rapid rise of the financial technology sector and the resulting regulation (sandbox) in the UK led to a new methodology that, according to proponents, should ensure competition and consumer welfare and mitigate market risks, while encouraging the innovation needed by both market participants and consumers.

A key objective of financial market regulation should be to promote competition on the merits, ensuring that firms must comply with the same rules and bear the same costs. In this form of regulation, innovation can occur when firms seek to distinguish themselves from their competitors, rather than simply identifying a gap in existing regulation, which is often subsequently filled. [3]

Although the success of *regulatory sandboxes* is closely linked to the financial (in particular: fintech) and banking sectors, this model of experimental regulation is finding application in a very wide range of markets, including transport (e.g. drones, autonomous vehicles), energy, health, to name but a few.[4] In general, public authorities

2 For example, as pointed out by D. Arner, J. Barberis & R. P. Buckley ("Fintech, Regtech and the Reconceptualisation of Financial Regulation" 37 *Northwestern Journal of International Law and Business* (2017), 373-385), the first sandbox experience in the UK covered only a very small fraction of the total number of financial services firms, a significant number of which are now in liquidation or insolvent.

3 L. Bromberg, A. Godwin & I. Ramsay, "Fintech Sandboxes: Achieving a Balance between Regulation and Innovation," 28 *Journal of Banking and Finance Law and Practice* (2017), 314-336.

4 Council Conclusions on Regulatory sandboxes and experimentation clauses as tools for an innovation-friendly, future-proof and resilient regulatory framework that masters disruptive challenges in the digital age, November 16, 2020, https://data.consilium.europa.eu/doc/document/ST-13026-2020-INIT/en/pdf.

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are trying to overcome the inherent limitations of traditional regulation. The EU institutions themselves recently launched a pan-European regulatory sandbox for innovative use cases involving Distributed Ledger Technologies, aimed at addressing sensitive issues such as data portability, inter-company data exchange, digital identity, and smart contracts.[5]

B. Artificial Intelligence

Equally interesting is the European Commission's framework *regulatory sandbox* in the field of artificial intelligence. Precisely, this form of experimental regulation is governed by Title V of the Artificial Intelligence Act entitled "measures in support of innovation," which encourages the competent national authorities to create spaces for regulatory experimentation and defines a basic framework in terms of governance, control and accountability.[6] These regulatory "testing spaces" for artificial intelligence would be aimed at creating a controlled environment to test such innovative technologies for a limited period of time on the basis of a program agreed with the competent authorities.[7] And interestingly, such a sandbox should in no way exempt participants from the obligation to comply with existing EU regulations, including the Data Protection Regulation.[8] This choice is indeed puzzling, as it risks depriving this instrument of one of its main features, as well as of a fundamental incentive for companies to participate.

As mentioned, each jurisdiction follows different paths in the creation of regulatory sandboxes to the extent that the very term *regulatory sandbox* should be correctly understood as a general definition that may imply very different experimental realities. More generally, it is evident that jurisdictions increasingly apply a trial-and-error process in order to ascertain what best suits the regulatory and business environment of each state. This naturally reinforces the differentiations between jurisdictions even in the EU. In this regard, it is possible to identify a number of recurring regulatory sandbox models in different legal systems - with respect to which observations can be made under the lens of competition protection.

> *Equally interesting is the European Commission's framework regulatory sandbox in the field of artificial intelligence*

First, we must mention the traditional (or standard) sandboxes that are accessible to companies that have certain requirements and may be interested in testing new digital services in a controlled environment. These are distinguished from sandboxes, which are applied on a case-by-case basis and in the presence of a few selected companies.[9]

Moreover, depending on the regulatory sandbox at issue, there are cases where the regulatory framework for sandbox participants remains completely unchanged, as compliance rules are not relaxed by public authorities during the trial period (as is the case under the Artificial Intelligence Act). This usually happens, for instance, when the sphere of personal data protection is concerned.[10] This helps to limit fears of favorable treatment for those who participate in the sandbox and consequent unfavorable treatment for those who are excluded. As will be seen below, this approach may reduce the risk of anti-competitive effects resulting from the creation of a regulatory sandbox.

On the other hand, the second recurring model sees regulatory sandboxes operating in a context where the authority can relax the application of certain rules. Once again, the example of this approach is the FCA's regulatory

5 European Commission, "Launch of the European Blockchain Regulatory Sandbox," February 14, 2023, https://digital-strategy.ec.europa.eu/en/news/launch-european-blockchain-regulatory-sandbox.

6 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, {SEC (2021) 167 final}.

7 Regulatory sandboxes in the field of artificial intelligence are also mentioned in: Council of EU, "Conclusions on Regulatory sandboxes and experimentation clauses as tools for an innovation-friendly, future-proof and resilient regulatory framework that masters disruptive challenges in the digital age" (2020); Commission, "EU Coordinated Plan on AI" (2018 and its 2021 review); EU Parliament "Resolution of 12.02.2019"; G20, "Ministerial Statement on Trade and Digital Economy" (2019).

8 Regulation (EU) 2016/679 (General Data Protection Regulation), in OJ L 119, 04.05.2016.

9 Jurisdictions where customised regulatory relaxation is permitted include the State of Arizona (U.S.), Brunei, Canada, Hong Kong, Indonesia, Malaysia, and Singapore, see D. M. Ahern, "Regulators Nurturing FinTech Innovation: Global Evolution of the Regulatory Sandbox as Opportunity Based Regulation" 60 *European Banking Institute Working Paper Series* (2020).

10 See, for instance, Datatilsynet (Norwegian Data Protection Authority), "Sandbox for responsible artificial intelligence" (2021) ; CNIL (Commission nationale de l'informatique et des libertés), "Bac à sable données personnelles" (2021).

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sandbox,[11] which provides, at least theoretically, for the possibility to waive some of the existing rules in the course of experimentation. On the contrary, an actual relaxation of the rules can be seen in the sandbox used in the Netherlands in order to test innovative solutions in the energy field. In particular, the Dutch public authority authorized the energy cooperatives and associations admitted to the sandbox to deviate from the national energy regulations in at least some respects. [12]

04
HELLENIC COMPETITION COMMISSION

The regulatory sandbox proposed by the Greek competition authority is a third and interesting example of the relationship between experimental regulation and competition law.

In particular, the Hellenic Competition Commission ("HCC") has set up a sandbox in order to promote the goals of sustainability and competition in the Greek market.[13] In particular, the sustainability sandbox proposed by the HCC has applications in sectors of the economy, e.g. energy, recycling and waste management, industrial production of consumer products, food production and distribution, pharmaceuticals, to name but a few. Precisely, the sandbox under consideration would offer companies the opportunity to test new services that can promote sustainable development *without* significantly impeding competition in the relevant market.

In this way, the Greek authority would like to support small and medium-sized Greek companies that may be lagging in innovation and in the adoption of new sustainable technologies, by offering these private entities the opportunity to test innovative solutions in a controlled environment and with the collaboration of the authority itself. In such a model, companies may submit their proposals to the HCC and these proposals may also refer to the opportunity to allow agreements between competitors (horizontal agreements) or within supply chains (vertical agreements) in order to promote the public objectives mentioned above. Needless to say, such an approach could abstractly lead to a kind of derogation from the application of competition law in the concrete case in order to favor or balance other objectives. For the sake of completeness, it should be mentioned that such exemptions could also concern unilateral conduct on the part of undertakings that could constitute an abuse of a dominant position.

The latter case would indeed constitute an exceptional hypothesis according to the guidelines of the Greek authority itself. It should also be pointed out that the aforementioned sandbox of the HCC is specifically aimed at the most complex cases, in which it might be necessary to scrutinize the restriction of competition in order to achieve a certain objective linked, first and foremost, to the priority of the issue of sustainable development.

Once the companies have submitted their proposals, the HCC will assess their content and take into consideration existing European and national competition law, as well as the case law on the assessment and inclusion of public interests in the application of Art. 101(1) and (3) TFEU and the corresponding Greek framework. We feel it is important to emphasize that in this context the HCC should, for example, consider different criteria, indicators and performance keys concerning processes that are directed towards sustainable development goals.[14] After assessing the proposal, the authority could consider not applying the European or national competition law framework in the case at hand, or reject the request, considering the existing regulatory framework to be applicable.

In addition, the Greek authority would have to provide undertakings with guidelines to clarify the timing of the regulatory experimentation and the limits of such an exemption; and could also set certain conditions to be met by undertakings participating in the sandbox. The same authority proposes to constantly monitor the implementation of the experiment and to organize regular meetings on the progress of the initiative. Finally, participating companies should come out of the sandbox with a sort of "sustainability license" that would end up representing, in any

11 FCA (Financial Conduct Authority), "Regulatory Sandbox" (2022) https://www.fca.org.uk/firms/innovation/regulatory-sandbox.

12 E.C. van der Waal, A.M. Das, T. van der Schoor, *Participatory Experimentation with Energy Law: Digging into a Regulatory Sandbox for Local Energy Initiatives in the Netherlands*, in Energies, 2020, 13(2), 458, https://doi.org/10.3390/en13020458.

13 Hellenic Competition Commission, "Competition Law and Sustainability" (2021). This mechanism was introduced following a public consultation by the authority. See Hellenic Competition Commission, "Public consultation: Proposal for the creation of a sandbox for sustainability and competition in the Greek market" (2021); see also the relevant press release of July 13, 2021.

14 For example, the objectives of the Paris Agreement on Climate Change (C.P. Carlarne, "Balancing Equity and Effectiveness: The Paris Agreement & The Future of International Climate Change Law," Ohio State Public Law Working Paper No. 477 (2019)) or the goals of the sustainable development agenda (see "Transforming our world: the 2030 Agenda for Sustainable Development," UNGA Res 70/1 (September 25, 2015).

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case, a novelty of considerable relevance in the EU regulatory landscape.

Having framed the Greek initiative, is worth questioning whether the HCC is reverting to the previous practice of notifying competition authorities about agreements between companies, which has now been replaced by self-assessment undertaken by the firms themselves and, more concretely, whether the HCC has the financial and professional resources to take charge of this process, given that this area of practice is undoubtedly a novelty for national competition authorities.

05
PRELIMINARY CONCLUSIONS

The article analyzed the relationship between competition law and experimental regulation, taking the case of *regulatory sandboxes*.

What emerges, then, is a very fragmented picture of the sandbox phenomenon, in which each experiment differs in its objectives and methods. However, the above analysis allows for some considerations on the relationship between regulatory sandboxes and competition law.

It is, first of all, interesting to note how the aforementioned experimental approach ends up representing an area of convergence between competition policy and regulatory requirements. This also implies overcoming the traditional distinction mentioned above between mechanisms that operate *ex ante* and instruments that are instead only active a posteriori.[15] In this sense, it is true that regulation determines the field of action of competition law and, conversely, the latter influences the field of evolution of regulation. It is clear, therefore, that the aforementioned regulatory sandboxes can also be understood as a form of co-evolution of the two disciplines that is characterized by a kind of overcoming of the traditional dichotomy mentioned above. To clarify, they can overcome the traditional (di)vision of the work between regulation and competition, and, in this way, sandboxes can contribute to changing our perspective from a mere and unresolved issue of competence towards a new form of competition policy. The latter would apply from the moment public authorities define the rules of the game in the markets for new digital services for businesses and end consumers.

And again, while welcoming the attempt to develop new methodologies, even based on experiments, we must conclude that, at least in the EU, the shift towards an *ex ante* perspective will once again favor - as in the case of traditional regulatory regulation, such as the recent DMA - the role of the regulatory state. In other words, it seems interesting to underline how innovation, and specifically digitalization, is once again fueling the expansion of the fields in which public power is inevitably called upon to exercise itself. Yet, this model inevitably seems to be somewhat outdated and unconvincing with respect to the great changes taking place on the technological and social fronts, with the risk that the DMA will fail to achieve the results expected by the European institutions when it is applied in practice.

In other words, there is an expansion of the area of public regulation in nascent and innovative markets. At the same time, European and national competition authorities may be able to extend their scope of action through experimental mechanisms to include, as in the case of the Greek competition authority, far-reaching objectives, such as checking the sustainability of certain products and services.

The analysis also allows us to see how the objective of creating competitive digital markets through *regulatory sandboxes* is based on a kind of revisitation of the doctrine of *experimentalist governance*.[16] Well, experiments are not necessarily born equal: the structure of the sandbox itself may influence its proper functioning. Some actors may reap considerable benefits, while others may incur considerable costs. In short, it must be made clear that experimentation is not merely a technical activity, as it implies renewing our faith in the role of the regulatory state.

Our contribution confirms that a regulatory sandbox can produce both benefits and risks with respect to competition policy. On the one hand, it helps to improve collaboration between actors and the learning capacity of public authorities with respect to new emerging services and technologies. Thus, the fact that regulatory sandboxes represent regulatory regimes with reduced legal risks may also favor the evolution of such regimes in maintaining competitive market conditions. Moreover, regulatory

15 D. A. Zetzsche et al, *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation*, in Fordham J. Corp. & Fin. L.,2017, 31, p. 23.

16 C. F. Sabel, J. Zeitlin, Jonathan, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture*, Oxford: Oxford University Press, 2010, pp. 1-28. On this point, see also Y. Svetiev, *Experimentalist Competition Law and the Regulation of Markets*, Hart, Oxford, 2020.

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sandboxes, if properly designed by supervisory authorities, could well create a level playing field for new entrants and mitigate barriers to entry. On the other hand, however, regulatory experimentalism may also exacerbate risks for both consumers and competition, as well as introduce some critical aspects related to the peculiarities of such mechanisms.

Last, it is possible to consider regulatory sandboxes as an alternative or, in any case, a complementary tool to traditional regulation, e.g. the DMA. The challenges of the present and near future call for a profound rethinking of the very nature of competition policy. In this context, the article highlights how the use of experimental regulation may contribute reshaping the application of competition law in the relevant markets, shifting the focus towards a kind of *anticipatory* competition policy, leading competition authorities to the forefront of market *governance* and assigning them greater responsibilities with respect to nascent markets.

> ***Our contribution confirms that a regulatory sandbox can produce both benefits and risks with respect to competition policy***

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