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COMPETITION ENFORCEMENT IN DIGITAL PLATFORMS: A FRAGMENTED RESPONSE TO A GLOBAL CHALLENGE

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Competition enforcement in digital platforms: a fragmented response to a global challenge

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I. INTRODUCTION

In light of the growing consensus that traditional antitrust enforcement tools may not be fully effective in addressing concerns raised by the development of the digital economy, key stakeholders across the world are making great efforts to address the issue. In particular, the efforts made by the European Union (EU) and the United Kingdom (UK) have been prominent in this area with detailed market studies, reports, and legislative initiatives. Most recently, the United Sates (US) has also shown signs that there are concerns about concentrated economic power whereby antitrust appears to be relevant to retain control not just over competition but also over the social and political process. Remarkably, an important number of bills that contain radical reforms in the area of antitrust enforcement have been presented by Democrats and Republicans who share the idea that something needs to be done[1]. Likewise, the Biden administration is staffed by antitrust critics of big tech[2] and, in July 2021, President Joe Biden enacted the "Executive Order on Promoting Competition in the American Economy", encouraging the American antitrust agencies to focus on dealing with identified enforcement issues in key markets, among them the technology sector, and to coordinate other agencies' ongoing response to corporate consolidation[3].

Yet, even if all of these efforts are noteworthy, it remains unclear whether the variety of the recently proposed interventions would respond effectively to the threats that digital platforms pose. Additionally, what seems even more relevant is to find convergence among the different initiatives, a need that was highlighted during the last G7 Summit in 2021, where it was recognised that by working together there would be a greater likelihood of finding "*coherent and complementary ways to encourage competition and support innovation in digital markets*"[4]. Hence, the purpose of this paper is twofold: first, to discuss and

1 "House lawmakers release anti-monopoly agenda for «A stronger online economy: Opportunity, innovation, choice»", *Congressman David Cicilline* (11th June, 2021), https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-stronger-online-economy-opportunity.

2 Matt Stoller, "The antitrust revolution has found its leader", *BIG by Matt Stoller* (16th June, 2021), https://mattstoller.substack.com/p/the-antitrust-revolution-has-found; "Fact sheet: Executive order on promoting competition in the American economy", *The White House* (9th July, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

3 "Fact sheet: Executive order on promoting competition in the American economy".

present a comparative analysis between the EU, UK, and US initiatives, with an attempt to highlight the key features and the relevant differences and commonalities. Second, in comparing these initiatives, and under the assumption that they will serve as a benchmark for other jurisdictions seeking to introduce similar legislative reforms, this paper will identify the most significant aspects that should be either adopted or disregarded and will provide some final remarks.

II. THE EU, UK, AND US ANTITRUST INITIATIVES: OVERVIEW

After months of stakeholder consultations and internal debate[5], in December 2020 the European Commission (EC) presented the Digital Markets Act (DMA) legislative initiative, which was conceived to control the economic power of large online platforms (LoPs)[6] and to ensure the expansion of European platforms in fair and contestable markets[7]. The DMA proposal includes an *ex-ante* regulation tool and places the EC as the digital regulator[8], whose decisions may be subject to the advisory procedure before the Digital Markets Advisory Committee (DMAC)[9]. One of the most important elements of the proposal is that if a company meets the qualitative and quantitative criteria it is presumed to be a gatekeeper. There are three important aspects related to the designation of a company as a gatekeeper that deserve special attention. First, even if the quantitative thresholds are met, based on a 'rebuttable presumption', companies are entitled to request that the EC makes its determination using a qualitative standard[10]. Second, in some cases and based on this qualitative standard, companies can be designated as gatekeepers even if the thresholds are not met. And third, the Commission can intervene when a gatekeeper is just emerging with the aim of preventing the market from tipping irreversibly[11].

A gatekeeper needs to start observing two groups of obligations six months after the designation. The first set of obligations are contained in Article 5 and describe practices that limit contestability or are unfair and whose compliance takes place through sanctions. The second set are in article 6 and include those that are

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4 Department for Digital, Culture, Media & Sport, *Ministerial Declaration*. G7 *Digital and Technology Ministers' meeting* (April 2021), 5, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/981567/G7_Digital_and_Technology_Ministerial_Declaration.pdf

5 European Commission, "Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers", *Published initiatives*, accessed: 13th August, 2021, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers and European Commission, "Single Market – new complementary tool to strengthen competition enforcement", *Published initiatives, accessed*: 13th August, 2021, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool.

6 European Commission, *Proposal for a regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (2020), https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf

7 European Commission, *Proposal for a regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (2020).

8 European Commission, *Proposal for a regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (2020).

9 Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R0182&from=EN

10 Qualitative criteria: (i) High concentration: commercial conditions are imposed by one or very few LoPs with considerably autonomy from their (potential) challengers, customers, or consumers; (ii) dependence on a few LoPs acting as gatekeepers for business users to reach and have interaction with their customers, (iii) the power by core platform services providers often being misused by means of unfair behaviour vis-à-vis economically dependent business users and customers.

11 European Commission, *Proposal for a regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (2020), 20.

susceptible to being further specified, which, besides sanctions, will be accompanied by measures[12]. Equally, the DMA requires gatekeepers to inform the Commission about all acquisitions of businesses providing any services in the digital sector[13] and proposes maximum fines of 10% of annual worldwide turnover[14].

The United Kingdom has been particularly active in assessing the digital markets and the potential approaches to making them more competitive. The findings of the different reports[15] have resulted in the creation of a digital markets unit (DMU) that will remedy the informational gap existing between technology companies and enforcers[16]. They have also influenced the current government consultation process, named "A new pro-competition regime for digital markets," which would legally create the DMU, articulating its tasks and powers[17]. This proposal accepts most of the findings and recommendations, including the designation of digital firms with Strategic Market Status (SMS) by the DMU, subjecting them to legally binding principles contained in a code of conduct grouped under three objectives (fair trading, open choices and trust and transparency) and some pro-competitive interventions, as well as new merger rules[18]. According to the proposition, the intention is to create a constructive environment in which the DMU and the firms could engage to address existing concerns, albeit the DMU would enjoy strong powers. Among these powers would be fines of up to 10% of global turnover, orders envisaged to comply with the code and senior management liability[19]. The firms that will fall within the category of SMS are those which enjoy an entrenched substantial market power that provides them with such a strategic position that its effects are widespread within and beyond its main markets of operation. The SMS designation assessment would focus on digital activities where key digital firms operate, reviewing not just quantitative thresholds, but also including some qualitative indicators[20]. The new proposed merger rules require SMS firms to report all mergers to the Competition and Markets Authority (CMA), to notify those who meet a reduced threshold, and to observe mandatory pre-closing clearance. In substantive terms, a lower standard of proof to find competition concerns at Phase 2 is proposed (a 'realistic prospect' standard)[21].

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12 European Commission, *Proposal for a regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (2020), articles 5 and 6.

13 European Commission, *Proposal for a regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (2020), article 12.

14 European Commission, *Proposal for a regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (2020), article 26.

15 Jason Furman et al., *Unlocking Digital Competition, Report of the Digital Competition Expert Panel* (marzo 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; CMA, *A new pro-competition regime for digital markets. Advice of the Digital Markets Taskforce* (diciembre 2020), https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice_--.pdf

16 CMA, *A new pro-competition regime for digital markets. Advice of the Digital Markets Taskforce* (diciembre 2020), 3, recommendation no. 6, stating that the DMU "*should be a centre of expertise for digital markets, with the capability to understand the business models of digital firms, including the role of data and the incentives driving how these firms operate*".

17 Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for Business, Energy and Industrial Strategy, *A new pro-competition regime for digital markets* (July 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf

18 Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for Business, Energy and Industrial Strategy, *A new pro-competition regime for digital markets* (July 2021).

19 Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for Business, Energy and Industrial Strategy, *A new pro-competition regime for digital markets* (July 2021), 39-40.

20 Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for Business, Energy and Industrial Strategy, *A new pro-competition regime for digital markets* (July 2021), 23.

21 Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for Business, Energy and Industrial Strategy, *A new pro-competition regime for digital markets* (July 2021), 48-49.

In the US, a set of bills that contain antitrust reforms were introduced to Congress in June 2021. Briefly, the "Merger Filing Fee Modernization Act" proposes to rise antitrust enforcement resources by increasing pre-merger filing fees[22]. The "American Choice and Innovation Online Act", deals with companies who can leverage their online platforms to favour their own products over competitors, a concern that can be mitigated by the imposition of some measures such as return on property, restitution, contract rescission, etc., or the demonstration of some efficiencies. The Bill also proposes the creation of the Bureau of Digital Markets within the Federal Trade Commission (FTC) to enforce this Act[23]. The "Ending Platform Monopolies Act", contemplates structural separation when a designated covered platform's ownership or control of a line of business creates unreconcilable conflicts of interest[24]. The "Platform Competition and Opportunity Act", makes it difficult for dominant platforms to end competitive threats through mergers and acquisitions, creating a presumption that the merger would be anti-competitive and allowing affirmative defence[25]. Furthermore, the "Augmenting Compatibility and Competition by Enabling Services Switches (ACCESS) Act", intends to lower barriers to entry and switching costs for businesses and consumers through interoperability and data portability requirements, by which the creation of a Technical Committee that will help in creating standards is suggested[26]. One final bill, the "Tougher Enforcement Against Monopolist Act" or the "TEAM Act", recommends transferring all antitrust enforcement jurisdiction from the FTC and FCC to the Department Of Justice (DOJ), to ban any merger that results in a market share of more than 66% unless required to prevent "serious harm" to the US economy, increase the budget of the DOJ and the fees of the largest mergers, and impose a prohibition on the federal government in regard to awarding contracts to companies that have violated the antitrust in the previous five years[27].

III. THE EU, UK, AND US ANTITRUST INITIATIVES: A COMPARATIVE ANALYSIS

3.1 General structure

The starting point of this analysis rests on the general architecture of the regulations. That is, the DMA does not differentiate between business models and is expected to uniformly address issues coming from social media, e-commerce, and search engine activities, among others. By contrast, the UK intends to design a regime that focuses on the digital activities in which competition concerns may emerge, allowing sufficient room to include future business models by avoiding the adoption of pre-fixed

22 See House of Representatives, *Merger Filing Fee Modernization Act* (2021), https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/Merger%20Filing%20Fee%20Modernization%20Act%20of%202021%20-%20Bill%20Text%20%281%29.pdf

23 See House of Representatives, *American Choice and Innovation Online Act* (2021), https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/American%20Innovation%20and%20Choice%20Online%20Act%20-%20Bill%20Text.pdf

24 See House of *Representatives, Ending Platform Monopolies Act* (2021), https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/Ending%20Platform%20Monopolies%20-%20Bill%20Text.pdf

25 See House of *Representatives, Platform Competition and Opportunity Act* (2021), https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/Platform%20Competition%20and%20Opportunity%20Act%20-%20Bill%20Text%20%281%29.pdf

26 See House of Representatives, *Augmenting Compatibility and Competition by Enabling Services Switches (ACCESS) Act* (2021), https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/ACCESS%20Act%20-%20Bill%20Text%20%281%29.pdf

27 See House of Representatives, *Tougher Enforcement Against Monopolist Act (TEAM Act)* (2021), https://www.lee.senate.gov/services/files/23028e91-a982-43d0-9324-f6849c7522fc

classifications. The US intends to regulate dominant online platforms that own and control a line of business. The Ending Platform Monopolies Act considers that an online platform could be a website, online or mobile app, operating system, digital assistant, or online service that generates content, facilitates trading transactions, and enables searches or queries.

One important implication of aiming to regulate companies that operate in completely different settings within specific ecosystems, through a unique legal provision grounded on uniform categorizations (DMA), is that there is a high risk that any derived assessment will not capture the business realities[28]. This issue may lead to under-enforcement if the examination fails to identify that the entity enjoys market power in a specific part of the business even if the entire business does not show such power, or to over-enforcement if the whole business has market power but not necessarily in the part where the competition concern is taking place. A better approach seems to be to properly understand the business environment and then to identify on which activity or activities the agency needs to focus its attention, without having to be subject to pre-existing rigid classifications[29]. This flexibility may provide the agencies with a significant scope of manoeuvre, prevent enforcement errors, and facilitate the adaptation to future business developments (UK). Lastly, it is worth mentioning that even the proposed US regulation just targets firms that own or control a line of business (the bill does not define what a line of business is); this does not mean that it will not end-up covering a significant number of different business models that fall within the scope of this wide regulation. We expect more guidance through the discussions of the bill, and more importantly, the recognition that the functioning of every business model is distinctive, which demands an individualised analysis that correctly defines the activity or activities in which the antitrust violation might arise.

3.2 Designation

The next important aspect that needs to be outlined is the nuanced approach to the definition of a gatekeeper contained in the DMA. A number of thresholds have been set up to identify the gatekeepers subject to the *ex-ante* regulation, which is complemented by a set of qualitative factors such as network effects and data. A first issue is that it is not easy for a core platform service to be sure whether it would be designated as a gatekeeper. The current wording indicates that a provider would be designated if it operates a core platform service that serves as an important gateway for business users to reach end users[30]. It is known that these core platforms provide not one but several services, so identifying which service constitutes part of the core intermediation service could be difficult. Also, it is unclear whether a tech firm that provides a service where business users are reached directly rather than serving as an intermediary between business users and end users would scape designation. A second issue is that if a quantitative threshold were established, firms would feel discouraged to grow to the point where they may need to be subject to this regulation. Ironically, a mechanism that has been created with the intention of spurring growth and innovation could lead to the opposite. An additional issue is that such a threshold may imply that an unintended high number of firms be eligible to be gatekeepers, a circumstance that is aggravated by the lack of an efficiencies defence mechanism.

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28 Aurelien Portuese, "The Digital Markets Act: European Precautionary Antitrust", *Information Technology & Innovation Foundation* (May 2021), 7, https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust

29 For a good analysis about the business models and the implications in enforcing the DMA see Cristina Caffarra and Fiona Scott Morton, "The European Commission Digital Markets Act: A translation", *VoxEU* (5th January 2021), https://voxeu.org/article/european-commission-digital-markets-act-translation

30 European Commission, *Proposal for a regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (2020), article 3(1)(b).

In the UK, the designation of a firm with SMS derives from the substantial and entrenched market power that is shown in at least one of the activities where it operates. Substantial market power arises in business environments lacking good choices and contestability. Entrenched market power means that it is expected to remain over time. To establish a strategic position there is a set of four factors that need to be measured: the scale and size achieved by the firm in an activity, if the activity drives other businesses, if the firm can further entrench or protect its market power in that or other activities, and if the activity allows the company to impose the rules of the game within the firm's own ecosystem or in the wider market. The SMS designation assessment would consider qualitative factors such as market share, revenue, or number of users. However, the proposal has stressed that as these indicators can be misleading, the examination would pay more attention to quality and range of alternatives, barriers to entry, competitive interactions between firms, customer switching and behaviour. Once again, the examination of the activities in which the potential competition violation is taking place suggests that the assessment would be more accurate. It also implies a good knowledge of the business environment, which would derive a better understanding of the root of the issue and therefore facilitate the design of more effective remedying measures.

According to the US Ending Platform Monopolies Act, the designation of a covered platform depends on two quantitative factors: (i) the number of users, and (ii) the annual sales or market capitalization. The bill also considers the ability of the covered platform to restrict or impede the access of a business user to its business or customers, or the access to tools to serve them (critical trading partner). One issue worth remarking on is the omission of market power as part of the whole assessment, a circumstance that makes one wonder whether the bill is intending to tackle various issues unrelated to competition. It is also possible that firms will refrain from reaching the thresholds set in the bill to avoid enforcement. Unlike the EU, the US contemplates an affirmative defence, a sort of efficiency defence.

In the EU and the US, the designation of gatekeepers and covered platform operators, respectively, relies heavily on the size of the firm and the type of platform services. Although the EU scope is wider as it includes a qualitative criterion, firms that are not big enough can still be caught by the regulation. Unlike the US and EU, the UK focuses on qualitative considerations rather than just the size of the firm and pays great attention to the environment in which the firm operates, which seems to avoid an unintentional number of firms falling within the scope.

3.3 Obligations

Once a platform has been designated as a gatekeeper, SMS, or covered platform, they are subject to some obligations. The DMA imposes some specific obligations on the gatekeeper that are a replication of behaviours that have been observed in previous cases dealt with by the EC. While this approach comprises conducts that have proven to be very likely to occur, it does not encapsulate those shaped by future developments and therefore it would not be possible to correct them. Contrary to the DMA, the UK initiative does not depart from a fixed pre-established list of responsibilities and instead provides for a code of conduct that is expected to be enforced in a constructive environment in which all the parties involved could engage to address existing concerns. In the US, the obligations of a covered platform are more severe. The designation implies a presumption of illegality when the activities of the owner or controller of the platform raise conflicts of interest with the users of the platform. For instance, a covered platform that serves as a retailer on its own platform violates the provision and is obliged to terminate such a service[31]. In other words, the obligation has been designated in a way that prevents covered platforms from becoming users of their own platforms, or

31 The House of Representatives, *Ending Platform Monopolies Act* (2021), Section 4(b).

if they were users before the designation, it categorically reverses that condition. These types of obligations can be perceived as very intrusive and cast doubt on whether in the process of containing big tech's market power, consumers' benefits are being impaired, as the next part discusses in more detail.

3.4 Consumers' interests

This section departs from two principles that will delineate the contours of the subsequent analysis: the inspection -rather than the intervention- of the markets and the freedom to do business. These two principles have been thought to be relevant in this discussion as they are the cornerstone of free markets, a concept that nurtures the following deliberations and insights. Firstly, it is important to remember that a core purpose of competition law is to invigilate the functioning of the markets rather than to dictate their structuring rules[32]. A second principle is the freedom to do business, which influences the desire to trade under the assumption that, subject to some limitations, there will be a reliable environment where the trader can largely decide how to achieve her commercial aspirations[33]. Then, any attempt to regulate or to intervene in the markets should observe these two principles. Likewise, one should bear in mind that a common theme that lies at the heart of either invigilating the markets or doing business is customers; the former, with the aim of protecting them, and the latter with the aim of attracting them. Notably, it appears that the current proposals, particularly those coming from America, show a strong inclination towards protecting competitors while little consideration is given to consumers. Hovenkamp's observation of the Ending Platform Monopolies Act is pertinent: this is the "most anti-consumer" initiative in this collection[34]. The examination of some statistics might shed some light on this. It has been reported that in 2020 Amazon reached a net income of 21.33 billion U.S. dollars, up from a 11.6 billion U.S. dollar net income in the previous year[35]. It could be argued that the Covid-19 pandemic exacerbated or even forced consumers to use this e-commerce platform, and therefore the numbers do not reveal a real tendency. However, during the years prior to the pandemic the company's net income showed a constant increase. The numbers also show that there was an e-commerce sales increase from 14% in 2018 to 20% in 2021, with the recognition that even after the pandemic there will not be a return to past patterns[36]. These data bring us to the next point: consumers' preferences.

It is undeniable that e-commerce has transformed the way we do shopping. Within this e-commerce realm there are a multitude of options and market participants can design how to operate their business. Hence, through the functioning of the different options the preferences of customers are revealed[37]. Nevertheless, a legislative proposal that impedes the functioning of a specific way of doing business is hindering the possibility of identifying the predilections of the customers and is restraining the freedom to do business.

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32 See OECD, *Italy – The Role of Competition in Regulatory Reform* (2000), 43, https://www.oecd.org/daf/competition/sectors/2497327.pdf

33 European Union Agency for Fundamental Rights, *Freedom to conduct a business: exploring the dimensions of a fundamental right* (2015), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf

34 Herbert Hovenkamp, "Congress' Antitrust War on China and American Consumers", *Promarket* (25th June, 2021), https://promarket-org.cdn.ampproject.org/c/s/promarket.org/2021/06/25/congress-antitrust-china-consumers-merger/?amp; see also Mark A. Lemley, who discusses the likely harm that platform regulation might cause, "The Contradictions of Market Regulation", *Journal of Free Speech Law* 1, N° 1 (February 2021), 324-335, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778909

35 Daniela Coppola, "Annual net income of Amazon.com from 2004 to 2020", *Statista* (7th July, 2021), https://www.statista.com/statistics/266288/annual-et-income-of-amazoncom/

36 "How American Retailers Have Adapted to the Amazon Effect", *The Economist* (21st August, 2021), https://www.economist.com/leaders/2021/08/21/how-american-retailers-have-adapted-to-the-amazon-effect

37 Florian Wagner-von Papp, "Information Exchange Agreements" in *Handbook on European Competition Law*, eds. Ioannis Lianos and Damien Geradin (Cheltenham: Edward Elgar Publishing, 2013), 144.

Here it is also important to note that even if consumers often prefer things that differ from what is considered societally preferable, that does not mean that a competition issue is at stake and does not justify extreme intervention[38]. A reference that illustrates this circumstance well was the antitrust enforcement movement seen during the 1960s in America, which aimed at protecting small firms from the penetration of chain stores and simply failed because customers embraced the convenience of the latter[39]. Likewise, the online competitive process has demonstrated that an important number of market players have been successfully experimenting with new means of reaching customers through their own apps and platforms, to stop their dependency on dominant platforms, which signifies that the dynamism of the e-commerce market makes unnecessary the adoption of intransigent regulation[40]. In short, in addressing the excessive market power that some online platforms enjoy, one has to be careful not to punish productive competitive processes and consumers' preferences.

3.5 Mergers

While the DMA does not suggest any changes in the European merger control in digital markets, the UK foresees some merger rules intended to adopt a lower standard of proof to find competition concerns at Phase 2. From the fragmented US initiatives, two bills intend to create a presumption of anticompetitiveness unless some efficiencies or the need to avoid a serious harm to the US economy are proved. This unprecedented shift in the US approach makes one wonder whether we will witness the emergence of an intricated bias against transactions involving designated firms, or whether this was a necessary step to alleviate the relentless approval of mergers seen in the US during the last decades[41].

From the above, it is evident that the proposals reviewed point in different directions. Therefore, the EU, UK and US legislators would be well-advised to try to reach some consensus in the assessment of digital market transactions, as the majority will involve various jurisdictions. Some convergence would facilitate the assessment process, improve merger enforcement, and offer some guidance to other competition authorities.

IV. CONCLUSIONS

This paper has examined the main features of the different proposals intended to regulate digital platforms in the EU, UK, and US, which have emerged from the common need to adopt ex-ante measures to improve the enforcement efforts against tech giants. For this purpose, all of the initiatives contemplate that the scope would be determined by the designation of certain firms, who will endure specific obligations. However, the criteria for determining such a designation differ among them. The EU and US enforcement efforts gravitate around firm size and types of platform services, with the EU adding some qualitative factors, making the scope wider. The trade-offs involved in targeting firms based on thresholds is that firms may feel discouraged in regard to growing to avoid regulation and an unintended number of firms will fall within the scope, and both will be difficult to justify. By contrast, the UK focuses on the business environment in which firms operate. This seems to be a more cautious approach that will yield more positive results without

38 Stefan Thomas, "Normative Goals in Merger Control – Why Merger Control Should Not Attempt to Achieve 'Better' Outcomes than *Competition" in Competition Enforcement: Is there a final frontier*?, ed. Ioannis Kokkoris (Cheltenham: Edward Elgar Publishing, forthcoming, 2021).

39 Herbert Hovenkamp, "President Biden's Executive Order on Promoting Competition: an Antitrust Analysis", *University of Pennsylvania, Institute for Law & Economic Research Paper*, N° 21-24 (July 2021), 10, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887776

40 "How American Retailers Have Adapted to the Amazon Effect".

41 See the White House, "FACT SHEET: Executive Order on Promoting Competition in the American Economy".

compromising growth and avoid over enforcement.

Also, the prospect of regulating different business activities through one piece of regulation containing uniform classifications raises concerns about ignoring business realities, especially in view of the DMA structure. A better approach seems to be to adopt some principles and to ensure some flexibility according to business realities. The same argument applies to obligations, which should be imposed on a case-by-case basis rather than on pre-fixed terms. Similarly, designated firms should have the opportunity to justify their conduct through some sort of efficiency defence, an aspect included in the US initiatives that could be considered in the EU. Another factor that deserves special attention is consumers' interests. Even if the purpose is to limit the excessive power enjoyed by certain tech firms, it is important to avoid unintended consequences, particularly from the consumer's point of view. Yet legal initiatives prohibiting platform owners from being users facilitate enforcement but are also detrimental to the freedom to do business and obstruct the normal competitive process of the markets. In relation to mergers, perhaps being silent or adopting presumptions of illegality are approaches that could be revisited and more efforts seeking to avoid regulatory contradictions should become a necessity.

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