Organisation for Economic Co-operation and Development

DAF/COMP/WD(2021)66

Unclassified

English - Or. English

25 November 2021

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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

2 December 2021

This document reproduces a written contribution from BEUC submitted for Item 2 of the 136th OECD Competition Committee meeting on 1-3 December 2021.

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

Please contact Mr Antonio Capobianco if you have questions about this document [Email: Antonio.CAPOBIANCO@oecd.org].

JT03486216

BEUC

1. Introduction

1. BEUC – The European Consumer Organisation welcomes the opportunity to contribute to the Roundtable on "Ex ante regulation of digital markets". The issue of consumer-centric regulation of digital markets is very important. The OECD organised a Roundtable on Competition Enforcement and Regulatory Alternatives in May 2021, which addressed numerous questions relevant to this issue, such as the respective scope of competition law enforcement and regulation, and how the two interact and influence one another.[1] Therefore, this note focuses specifically on why ex ante regulation is needed in addition to competition law in digital markets and on how such regulation can and, given the nature of digital markets, *should* go beyond the practices targeted by competition law in cases of an abuse of a dominant position and anti-competitive agreements. Regulation can also help to advance broader objectives such as consumer protection, data protection and privacy. In the following we focus on regulation of digital markets in the EU[2] and in particular on the proposed Digital Markets Act (DMA).[3]

2. **Importance of digital markets**. Today, a significant percentage of commercial and social interactions occur in digital markets. Consumers shop on online marketplaces, download mobile apps on their smartphones, listen to music on streaming platforms, book their hotels through online price comparison websites, and interact with one another and gather information on social media platforms. These are just some of the numerous digital activities that consumers conduct daily. Digital markets have now taken a central place in the lives of consumers who spend an ever-growing amount of time using digital and online services and this trend is likely to continue with further digital innovation. It is therefore essential that the interests and rights of consumers are both safeguarded and strengthened in digital markets.

3. **Specific characteristics of digital markets**. Digital markets are characterised by features such as big data, big analytics, strong network effects, the presence of multi-sided platforms, zero or subsidised prices, controlled digital ecosystems and switching costs for consumers.[4] In addition, the key players active in many digital markets are often large digital online platforms. All of these characteristics raise exceptional challenges for the effective functioning of digital markets and the ability of competition law to deal with them.

[1] Organisation for Economic Co-operation and Development, 'Competition Enforcement and Regulatory Alternatives' (2021) OECD Competition Committee Discussion Paper <https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives-2021.pdf>.

[2] It is noted, however, that several other jurisdictions around the world are considering similar digital markets regulation.

[3] Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final (hereinafter "DMA proposal").

[4] Organisation for Economic Co-operation and Development, 'Abuse of Dominance in Digital Markets' (2020) 7 <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>; BEUC, 'The Role of Competition Policy in Protecting Consumers' Well-Being in the Digital Era' (2019) <https://www.beuc.eu/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf>.

Digital markets are also unique in the sense that the actions of some of the key players have a broad impact and generate significant knock-on effects outside of the market where they are active. For instance, the conduct of large social media companies and other online platforms can have ramifications for media pluralism, public debate and polarisation, voting and democratic processes, (mental) well-being, and even public health as we see with the disinformation surrounding Covid-19 and vaccines. Notwithstanding the concerns and problems raised by digital markets, society as a whole benefits greatly from these digital products and services; however, the extreme power and influence of large digital platforms makes ex ante rules essential, in addition to competition law, to prevent and correct their deleterious impacts.

4. **Digital markets are consumer-facing**. While competition law ultimately always involves consumers as the final buyers or users of products and services, be it beer, cement, milk cartons, or credit cards, consumers may often only be impacted indirectly since the anti-competitive conduct often takes place at or between manufacturer and wholesaler, or supplier and retailer level. In contrast, many digital markets are directly consumer-facing markets such that harmful practices whether by the platforms or their vertically integrated operations can have a direct impact on the final consumer. Hence anti-competitive practices occurring in those markets can have a much more immediate and visible effect on consumers This is the case for example in the EU Google Shopping and Android cases,[5] or the current investigations into online music streaming,[6] Apple mobile payments (Apple Pay),[7] or Amazon Marketplace.[8] The consumer-facing aspect of digital markets means it is particularly important to take into account consumers' attitudes and behaviours when assessing harmful practices, and when trying to prevent them both under competition law and under ex ante regulation.

2. The benefits of ex ante regulation of digital markets

5. Notwithstanding the paramount importance and role played by competition law enforcement in digital markets, it is not a panacea that can solve every market failure nor every problem that arises in digital markets most effectively. The following addresses some of the shortcomings of competition law when it is applied in digital markets and considers how ex ante regulation such as the DMA proposal can help fill an enforcement gap and remedy certain market failures.

[5] Commission decision of 27 June 2017, case AT.39740, *Google Search (Shopping)*; Commission decision of 18 July 2018, case AT.40099, *Google Android.*

[6] European Commission, 'Commission Sends Statement of Objections to Apple on AppStore Rules for Music Streaming Providers' (2021) IP/21/2061 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061>.

[7] European Commission, 'Antitrust: Commission Opens Investigation into Apple Practices Regarding Apple Pay' (2020) Press release IP/20/1075 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075> accessed 20 November 2020.

[8] European Commission, 'Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its e-Commerce Business Practices' (2020) Press release IP/20/2077 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077>.

2.1. Procedural limitations of competition law enforcement

6. **Scope for intervention.** While competition law may intervene in many sectors, its scope in the EU is limited to agreements between undertakings (Article 101 TFEU) or abuse of dominance (Article 102 TFEU).[9] A decision fining two undertakings for collusion or a company for abuse of dominance will often not be appropriate to correct certain systemic market failures. Market practices or functioning falling outside of Articles 101 and 102, even if particularly harmful, both towards other businesses and final consumers, cannot be corrected. Ex ante regulation can solve this since its scope of intervention is defined by the legislator.[10]

7. **Case-by-by case approach.** Competition law, exceptions aside,[11] is fundamentally a case-by-case instrument that focuses on one individual situation with a specific set of facts where one specific undertaking—or a few undertakings in the case of an anti-competitive agreement—is found to be in violation of competition rules. In other words, competition law is a case and fact specific tool; it does not automatically produce erga omnes effects. Although the adoption of a decision should have a precedent and deterrent effect on other undertakings not involved in the specific case and discipline their future behaviour, this is far from certain and is unlikely to be as effective as ex ante rules that can tackle recurrent and systemic problems affecting a sector.

8. If a competition authority wanted to sanction and prohibit a specific practice that it considers particularly harmful, it would have to conduct as many investigations as there are dominant undertakings implementing such practice across potentially multiple markets. These repeated enforcement actions would consume a lot of time and resources. When experience shows that specific behaviour or a specific set of practices are generally harmful, it might be more appropriate for the legislator to adopt legislation rather than to rely solely on repeated competition enforcement cases to correct a market problem. This is the rationale behind the Unfair Commercial Practices Directive (UCPD) which bans outright certain misleading or aggressive commercial practices which are considered, no matter the context, harmful to consumers.[12] The legislator made a policy choice to ensure a high level of consumer protection and that case-by-case assessment every time such practices were used was unnecessary since experience had shown that these were always (on balance) prejudicial.

9. **Timing.** Competition law enforcement, especially when focused on digital markets, tends to be complex and time consuming with investigations lasting several years followed

[9] In the interests of simplicity and conciseness, we do not discuss merger control or the state aid regime in the EU.

[10] For example, following its market investigation into retail banking in 2016, the CMA imposed an order in 2017. The CMA considered that the problems it had identified could not be remedied with ex post competition enforcement and required regulatory intervention. For a brief summary of the 'Open Banking' remedies, see the submission of the United Kingdom to the OECD Roundtable, United Kingdom, 'Competition Enforcement and Regulatory Alternatives – Note by the United Kingdom' (Organisation for Economic Co-operation and Development 2021), DAF/COMP/WP2/WD(2021)19.

[11] For example, the Vertical Block Exemption Regulation is of general application.

[12] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22 ('Unfair Commercial Practices Directive').

by lengthy challenges before the courts. The *Google Shopping* case was formally opened in November 2010, with a decision adopted nearly seven years later. On 10th November 2021, the General Court largely upheld the Commission's decision. While this outcome is welcome, it has (so far and an appeal is still possible) taken 11 years to confirm that Google's practices violated Article 102 TFEU.[13] The *Intel* case which began in the early 2000s also raises issues of importance in digital markets which have still not been finally decided, some 20 years on.[14] There are few people who would say we should wait a decade or more to deal with the harms thrown up in digital markets.

10. **Redress.** Finally, the absence of erga omnes effects of antitrust decisions means that third parties directly impacted by the same anti-competitive conduct in other markets or by other market players cannot immediately rely on the finding of an infringement to claim damages before national courts. This contrasts with the position under regulation such as the UCPD.

2.2. Policy objectives other than efficient markets

11. **Competition law as a starting point**. Competition law often serves as the basis for regulatory actions by informing the legislator as to where systemic problems and market failures may exist and require attention. As the OECD acknowledged in a previous roundtable, regulation and competition enforcement can influence each other.[15] The in-depth investigations into market structures and harmful practices conducted by competition authorities can help identify market or structural issues and inform the legislator in relation to the possible need for ex ante regulation. The widely successful EU roaming regulation was based on a European Commission sector inquiry into roaming in the telecoms sector[16], following which the Commission identified serious competition concerns regarding roaming charges but considered that a regulation on roaming fees was more appropriate since it would tackle those issues in a more systematic manner.

12. Whilst one possible starting point, replicating competition law and its objective of consumer welfare should not, however, be the end point of regulation. Ex ante regulation can and should go further since regulation is a vehicle for the legislator to decide which societal objectives to achieve. This can be seen for example in fields such telecommunications,[17] postal services,[18] and in digital markets in the EU proposal for a DMA.

[13] At the time of writing, it is not known whether the General Court's judgement will be appealed to the European Court of Justice. Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763.

[14] Commission Decision of 13 May 2009, Case 37.990, *Intel*; Case T-286/09, *Intel v Commission*, ECLI:EU:T:2014:547; Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632;

[15] Organisation for Economic Co-operation and Development (n 1) 23.

[16] This followed a submission by BEUC based on a report prepared by BEUC's French member, UFC Que Choisir drawing attention to identified concerns.

[17] Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union.

[18] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1998] OJ L 15/14.

13. **The need to consider broader policy goals.** While certain objectives and criteria can and should be taken into account in competition enforcement, others are beyond the scope of the competition rules as currently understood and it is generally more appropriate to tackle these policy issues with specific legislation. For example, while it has been argued –correctly - that data protection can be integrated under competition law as a key non-price parameter of competition, namely under quality,[19] it would be difficult to achieve the same aims and level of protection that were adopted in the GDPR.[20] This is especially clear regarding how the GDPR defines consent as an explicit and informed choice made by the user where pre-ticked boxes and opt-out mechanisms do not amount to consent. The GDPR also frames personal data, not only as an economic good that is collected and traded as such, but as part of the human rights of the individual who can assert control and self-determination over what happens to their personal, and sometimes very intimate and private, information. In that context, the GDPR foresees the crucial "right to be forgotten" which allows any individual to decide for themselves what happens with their data and to ask for its complete deletion unless there are overriding reasons against this. These rights, among many others contained in the GDPR, demonstrate that specific ex ante rules can go further than any competition case and associated remedies could. In the context of consumer protection, while Article 102 TFEU prohibits exploitative conduct, it would be impractical to ensure, solely through competition law, a high level of protection in the context of unfair contract terms or unfair trading practices. These market-wide issues are not related to the dominant position of an undertaking, but in fact stem from market failures such as asymmetric and imperfect information.

14. **Diverse policy objectives.** When the legislator adopts ex ante regulation, it has the freedom to consider a broader set of policy goals than are traditionally attributed to competition law. The role of the legislator is to formulate and agree on policy objectives that can be achieved through ex ante regulation. Such objectives can include climate change, media plurality or high-speed internet access. In this context, ex ante regulation serves to correct and remedy market failures—asymmetric information, externalities, public good (and the associated free riding)[21]—which competition law alone is not necessarily designed to address. This can also apply to digital markets.

15. **Societal goals in other regulated sectors.** Expanding the scope of digital market regulation to non-directly competition related objectives would follow the approach in other sectors also subject to ex ante rules in the EU, for example geo-blocking[22], postal services and telecoms. Notwithstanding past and possible future competition enforcement in these sectors, few would claim that regulation is completely unnecessary, and that competition law alone is sufficient. For example, Regulation 531/2012 abolished roaming

[19] See e.g. Samson Yoseph Esayas, 'Privacy-As-A-Quality Parameter: Some Reflections on the Scepticism' (Stockholm University 2017) 43 <https://www.ssrn.com/abstract=3075239> accessed 28 March 2019; Maria C Wasastjerna, 'The Role of Big Data and Digital Privacy in Merger Review' (2018) 14 European Competition Journal 417.

[20] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1 (General Data Protection Regulation).

[21] Organisation for Economic Co-operation and Development (n 1) 6.

[22] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market [2018] *OJ L 60 I/1*.

charges in the EU.[23] The objectives of this regulation would have been complex, if not impossible, to achieve using only competition law. The importance of bringing and pursuing other values aside from pure allocative efficiency—values that market forces alone may not achieve—is also evident in the universal postal service obligation where Member States are obliged to guarantee a permanent, affordable, and universal postal service within their territory.[24] This obligation deviates from what would be the status quo under normal market forces where only profitable territories would be covered by postal services or tariffs that fluctuate based on supply and demand. The rationale was to ensure that everyone retained proper and affordable access to basic postal services since they are essential services both for businesses and private individuals while maintaining coherence in the internal market. Therefore, it is perfectly sensible to bring in other essential societal goals and values when the legislator adopts ex ante sectoral regulation.

2.3. Interplay with competition law

16. **Symbiosis between ex ante regulation and competition rules.** Ex ante rules can also promote competition directly or indirectly. The UCPD, aside from protecting consumers from unfair commercial practices taking place before, during and after a transaction, can also bolster competition by indirectly protecting legitimate businesses from their competitors who do not play by the rules in the Directive[25]. The Universal Service Directive was also paramount in promoting effective competition in the telecoms sector by providing number portability when consumers want to switch from one network provider to another.[26] This substantially reduced the switching costs for consumers and promoted such switching. While it is theoretically possible that competition law could have addressed this issue from the angle of the abuse of dominance, any remedies could only have been imposed on dominant undertakings. Although this could have encouraged users to switch away from the incumbent to other providers, this would not have helped users switching from one non-dominant provider to another.

17. **Competition law as a safety net**. Markets, whether or not they are subject to ex ante regulation, constantly evolve with new actors entering the sector and new technologies, products, services and practices being developed and introduced. In the case of regulated sectors, this might mean that existing legislation is not up-to-date and does not address new problems, leading to the need to update existing rules or adopt new ones. Here, competition policy would constitute a fall-back mechanism or "background regime"[27] that can be used to sanction anti-competitive behaviour that the specific ex ante regulation was

[23] Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union [2012] OJ L L 172/10.

[24] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1998] OJ L 15/14.

[25] Recital 8 of the UCPD.

[26] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services [2002] OJ L 108/51 ('Universal Service Directive'). This Directive was repealed in 2020 and replaced with the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L 321/36 (Recast).

[27] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (European Commission 2019).

not designed to regulate when it was adopted[28] or situations that the legislator decided not to regulate specifically but instead leave to competition law. In the context of markets that are not yet subject to sector-specific regulation, the legislator might, in appropriate cases, be encouraged to consider adopting ex ante rules to remedy certain issues. In both these situations, competition law can act as a safety net.

3. The DMA – and how it could tackle market failures in digital markets

18. In the following we consider whether and how the above principles are reflected in the EU's proposal for a Digital Markets Act.

19. The proposed DMA constitutes ex ante regulation designed to improve the functioning of the internal market and to promote fairness, contestability, and ultimately innovation in digital markets in the EU in light of their specific characteristics. It is one of several proposals to regulate digital markets in the EU. Other legislation is being considered to introduce obligations on digital intermediaries in relation to online marketplaces and content-related rules[29], artificial intelligence[30], data use[31], and data governance.[32]

20. **Asymmetric internal market regulation.** The DMA is a proposal for asymmetric regulation of so-called "gatekeepers" in digital markets; it would only apply to the largest companies that would be selected on the basis of qualitative and quantitative thresholds and to certain digital products or services ("core platform services"). For the undertakings designated as gatekeepers, a set of harmonised obligations and prohibitions would automatically apply to their core platform services in the EU; this would avoid different, and potentially conflicting, rules from being adopted in Member States to deal with the problems arising in digital markets. At the same time, it leaves room for the continued application of EU and national competition law, including to identify future harmful behaviour in fast-moving digital markets that is not within the DMA's current scope.

21. **Competition law inspiration**. The DMA reflects competition law principles and findings. As mentioned above, when experience shows that certain practices are nearly always harmful and prevent digital markets from being open and contestable, it is logical to move from a lengthy case-by-case enforcement ex post regime based on competition law to an ex ante regime. In the case of the DMA, this shift is both evident and sensible. Many

[28] European Union, 'Competition Enforcement and Regulatory Alternatives – Note by the European Union' (Organisation for Economic Co-operation and Development 2021) DAF/COMP/WP2/WD(2021)13 <https://one.oecd.org/document/DAF/COMP/WP2/WD(2021)13/en/pdf>.

[29] Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.

[30] 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, COM/2021/206 final.

[31] At the time of publication, the European Commission has not yet published its proposal for a Data Act. For reference, see the published Inception Impact Assessment published on 28 May 2021 and available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13045-Data-Act-including-the-revie
w-of-the-Directive-96-9-EC-on-the-legal-protection-of-databases-_en>.

[32] Proposal for a regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act), COM/2020/767 final.

of the obligations imposed in the DMA proposal are based on previous or current enforcement cases brought by competition authorities, although the obligations under the DMA would not depend on a finding of market dominance.

22. Some will use the fact that many of the obligations are based on competition cases to argue that the DMA proposal is in fact competition law wrapped in an Article 114 TFEU internal market legal basis. This represents a rather selective and partial view of the DMA. The inspiration from competition law enforcement experience is an advantage and supports the DMA proposal as ex ante regulation. The DMA proposal benefits from the experience gained from competition law, which justifies adopting pre-emptive rules including obligations and prohibitions focused on certain players and practices to avoid the burden of repeated and lengthy enforcement cases. But, as set out further below, the DMA goes further than this, embodying – amongst others – consumer protection principles.

23. **Efficiency defence and the discretion of the legislator.** Unlike competition law, however, the DMA proposal does not include the possibility for a gatekeeper to argue that a practice should be allowed on the ground that it generates efficiencies that are passed on to consumers. This is because experience has shown that consumer benefits are highly unlikely in respect of the practices at issue. The absence of an efficiency defence is therefore well within the role and discretion of the legislator when adopting regulation. During this process, the legislator considers many different objectives and, sometimes conflicting, interests, and conducts a balancing exercise. There may be advantages to speeding through the streets in individual cases—like getting to your meeting on time—but on balance legislators have decided that the advantages of having uniform legal speed limits in terms of saving lives or reducing pollution outweigh the efficiencies in individual cases.

24. **Wider policy goals**. Beyond competition law, the DMA also reflects wider societal policy goals. In prohibiting certain practices and imposing obligations on gatekeepers, the DMA seeks, aside from promoting fairness and market contestability, to specifically reduce entry barriers, stimulate innovation from rivals and companies who depend on the gatekeepers to reach consumers and, ultimately, to ensure that consumers enjoy a healthy, non-exploitative digital environment. Such ex ante regulation is needed because the knock-on effects of certain gatekeeper practices can leave the purely economic sphere and negatively impact crucial societal values.

25. Such was also the case for the GDPR which is based on a fundamental right to data protection overriding possible economic benefits of broad and unrestricted collection of personal data. Companies cannot bypass the legal grounds to collect personal data by claiming that such collection would generate efficiencies. A similar logic in relation to potential efficiencies applies to the regulation of unfair contract terms and commercial practices; businesses cannot argue that aggressive or misleading practices generate efficiencies that could makes such practices legal. A balancing exercise is done during the law-making process. It is for the legislator to decide if some efficiencies will be sacrificed to promote and reach other broader societal goals. These goals can, not only include consumer protection, but also media pluralism. For example, Article 21(4) of the EU Merger Regulation states that Member States may take appropriate measures to protect legitimate interests, inter alia the plurality of the media.[33] This shows that other values can under certain circumstances override competition law. Assuming the DMA is adopted as currently proposed, the legislators will have decided that the advantages to society of

[33] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

setting out directly applicable rules to prevent known harms outweigh any potential efficiencies in individual cases.

26. **Consumers at the heart of the DMA.** Although phrased as obligations imposed on gatekeepers, the DMA proposal ensures consumers a degree of protection from exploitation and confers on them certain important rights. The European Commission's proposal may well, and in our view, should, be amended to go further in this direction by the EU co-legislators (the Council and European Parliament). Under the current proposal as amended by the Council and European Parliament, consumers ("end users") will, for example, have the right to uninstall apps that are preinstalled on their devices; gatekeepers will not be allowed to combine data about end users collected from different product or services unless those end users explicitly consent to such combination. End users will have the right to data portability—and potentially interoperability in relation to some services—and the right to switch applications and app stores unhindered by gatekeepers. In addition, it has been proposed by both the European Parliament and the Council, that a prohibition on the use of so-called "dark patterns"[34] should be included in the DMA as part of the DMA's anticircumvention provision to prevent gatekeepers from using these and other user interface techniques to circumvent their obligations. The addition of such a provision would substantially ensure, not only that consumers are protected from deceptive tactics and practices in the digital environment but would also help to promote contestability and fairness of digital markets by preventing gatekeepers from relying on these unfair tactics to keep rivals out of the market. Dark patterns take advantage of consumers' inherent psychological biases to lead them for example to subscribe to a service or dissuade, or even prevent, them from unsubscribing, to take an additional and unrelated service when they actually only want a specific product or service, to extract consent by tricking and confusing users, or to discourage them from changing default settings or switching to a competitor's product. All these tactics raise entry barriers for rivals and limit the fairness and contestability of digital markets.

27. In light of the consumer-facing nature of many digital markets, the above aspects of the DMA are of particular importance. They would also require effective redress mechanisms for consumers.[35]

4. Conclusion

28. Ex ante regulation and competition law are both essential in digital markets for the reasons detailed above. They are complementary essential tools, not substitutes - as has been shown in other sectors. They should be understood as different arrows in a quiver to achieve different but not antagonistic purposes, with each playing to its particular strengths, which ultimately benefit consumers and society as a whole.

[34] Dark patterns refers to the situation where product design and end users choices are presented in a non-neutral manner. These and other user interface techniques can be employed to subvert or impair user autonomy, decision-making, or choice via the structure, function, or manner of operation of a user interface or a part thereof.

[35] This could be done by adding the DMA to Annex I of the Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1.