The Digital Markets Act’s Innovation Paradox: Towards a Digital Magna Carta and Leviathan?

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ABSTRACT

The Digital Markets Act (‘DMA’) represents the culmination of over a decade of debate and litigation on how to deal with the impact of the largest technology companies in the European economy. The DMA explicitly seeks to promote fairness and contestability. However, another key motivation behind the regulation was the promotion of competition and innovation in digital markets. This article aspires to partially address a simple yet complex question: Will the DMA promote innovation? It will be argued that the predominant forms of competition innovation in the DMA will fall under a broad principle of ‘equitable contestability’ with an emphasis on the structural redistribution of economic rents to achieve its aims. The promotion of equitable contestability represents both the genius and principal failing of the regulation. By prioritising structural rent redistribution, the DMA fails to acknowledge the idiosyncrasies of individual digital markets. Instead, it favours particular forms of competition. Rather than becoming a regulatory Magna Carta, a rulebook promoting the most effective forms of innovation competition, the DMA is at risk of becoming a regulatory Leviathan: an overbearing set of rules, imposing or fostering particular forms of competitive pressure in the digital sector, regardless of whether such competition is effective.

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I. INTRODUCTION: CHAMPIONING INNOVATION WHILE ELUDING A (REGULATORY) LEVIATHAN

‘Big Tech finally has commandments to abide by’,¹ The Financial Times’ editorial board rejoiced upon the passing of the Digital Markets Act (‘DMA’) in September 2022.² This sentiment, no doubt, was echoed by many in the digital competition law and policy space. Hailed as part of a ‘revolution grounded on traditions’,³ the DMA is anticipated to shake up the current market dynamics that have, hitherto, given rise to the unprecedented dominance of a small number of firms.⁴ Several expert reports on competition in digital markets are in consensus that the presence of network effects, extreme scale and scope economies, as well as the role of data as a competitive advantage, have resulted in the advent of powerful incumbent platforms that are difficult to dislodge.⁵ Furthermore, these firms have been found to have abused their market dominance on several occasions, and it is believed that they engage in practices that undermine the development of effective competition in the digital sector.⁶ That is precisely why the DMA has been viewed as revolutionary, and why the language of the Financial Times is apt.

Through imposing detailed ‘commandments’ — prohibitions and prescriptions — on the largest digital platforms, the DMA aspires to be a digital

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⁵ Furman Report (n 4) 38-42.
⁶ Crémer Report (n 4) 36.
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Magna Carta. In pursuit of that aim, it encompasses a set of rules and principles for dominant digital platforms to comply with, seeking to invigorate competition within the European digital sector. With the overarching aim of promoting ‘contestability and fairness’ in digital markets, the DMA seeks to champion vigorous innovation competition. European consumers consequently benefit from greater choice and quality as more players enter digital markets. However, while the promises of a digital Magna Carta are welcome, a close analysis of the DMA indicates insufficient concern for the counterfactual: a regulatory Leviathan. The DMA imposes stringent and far-reaching obligations on the largest digital platforms that fall within its jurisdiction. These obligations target the business models of the technological powerhouses that propelled us into the digital age. For example, dominant digital platforms are now obliged to enable the technical installation of third-party application stores, compelled to guarantee effective interoperability of number-independent interpersonal communication services, and prohibited from favouring their products on their online search platforms.

Therefore, it will be argued that there is an outsized risk of undermining the effective forms of competition and innovation that these firms have contributed to the digital sector. If the DMA’s obligations are implemented in the manner predicted in this article, there is a significant risk of the emergence of a regulatory Leviathan: an overbearing set of rules, the aim of which is to impose particular forms of competitive pressure in the digital sector, regardless of whether such competition is effective. The article will begin in Section II with an analysis of a form of ‘economic’ contestability present in the DMA. Section III will then consider the particular type of contestability — ‘equitable contestability’ — that is predominantly prioritised in the regulation. Through an analysis of the various permutations of the self-preferencing obligation in Section IV, the DMA’s innovation paradox will be uncovered. It will be shown that, despite the regulation being touted as a digital Magna Carta, it is more likely to devolve into a Leviathan,

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7 DMA (n 2) Recital 7.
8 DMA (n 2) arts 3, 19.
9 DMA (n 2) art 6(4).
10 DMA (n 2) art 7(1).
11 DMA (n 2) art 6(5).
promoting specific elements of competition in innovation to the detriment of other competitive processes.

II. DECODING ‘ECONOMIC’ CONTESTABILITY: COMPETITION, INNOVATION, AND INNOVATION COMPETITION

The DMA, in its recitals, states that its purpose is ‘to ensure contestability and fairness for the markets in the digital sector in general’. Despite the centrality of contestability and fairness in the regulation, the DMA leaves both terms undefined. This section will deal with contestability. The DMA broadly features two different forms of contestability. The first, and less significant manifestation, can be described as ‘economic contestability’. The second, and main form of contestability, can be defined as ‘equitable contestability’. Equitable contestability, and how it functions as the regulation’s raison d’être, will be explored in Section III. This section focuses on economic contestability. It will explore the relationship between competition, innovation, and innovation competition in the digital sector.

A. Contestability: Theory and (Regulatory) Practice

Economic contestability is articulated or approximated in the DMA’s recitals as relating to the ability of firms to ‘effectively overcome barriers to entry and expansion to challenge [gatekeepers] on the merits of their products and services’. This mirrors the understanding of contestability in

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12 DMA (n 2) Recital 7.
13 DMA (n 2) Recital 32. The term ‘gatekeepers’ in the DMA is used to refer to dominant digital platforms (undertakings) that operate what the regulation deems ‘core platform services’ that serve as important gateways for business users to reach end users. Furthermore, the core platform service must be operated by undertaking a significant impact on the EU internal market. ‘Core platform services’ are not explicitly defined in the DMA. Instead, the DMA, in Recital 14, provides examples of core platform services, which include online intermediation services, advertising intermediation services, operating systems, and online social networking sites and applications. Per Recital 14, the important quality that makes a product a ‘core platform service’ is ‘the capacity to affect a large number of end users and businesses, which entails a risk of unfair business practices.’
antitrust/competition law and policy scholarship. In economic theory, contestability is closely related to the concept of contestable markets, postulated by William Baumol and his co-authors. Contestable markets are those which firms can enter and exit while benefitting from very low or non-existent barriers to entry. Their central assertion was that by reducing barriers to entry for prospective or potential market participants, the market conditions in those so-called perfectly contestable markets mirrored the competitive/price dynamics of perfectly competitive markets. This was the case even in markets where one firm held the majority or the entirety of the market share. This is because the threat of potential competition curbs their ability to enjoy monopoly profits. Although the theory advanced by Baumol and his co-authors has faced fierce criticism since its publication, some of its insights remain influential in innovation-focused sectors. The chief contribution of this version of contestability theory vis-à-vis competition policy is its demonstration that the threat of potential competition can sufficiently discipline highly dominant firms to behave in a manner akin to perfectly competitive markets.

Although the threat of entry into a market can have constraining effects on the exercise of market power by dominant firms, for this factor to be effective, the threat of entry must be ‘credible’. Competition can be a ‘click away’, but if

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16 Baumol and others (n 15) 5.
18 Crémer and others (n 14) 117-122.
20 Crémer and others (n 14) 121.
21 David Wismer, ‘Google’s Larry Page: “Competition Is One Click Away” (And Other Quotes Of The Week)’ (Forbes, 14 October 2012) <https://www.forbes.com/sites/davidwismer/2012/10/14/googles-larry-page->
an incumbent’s prospect of disruption by several new entrants is de facto negligible, such competitive threats are superficial or ineffective. Therefore, to promote the welfare of consumers and the overall competitive potential of an economy, a mere increase in the number of potential competitors is insufficient. The quality of the entrants, as well as their ability to effectively compete, matter. As Crémer and his co-authors rightly assert, the regulatory policy must be directed at prohibiting conduct by incumbent firms that impairs the ability of new entrants to enter and/or expand in a market, in addition to the need for ‘proactive pro-competitive interventions’ to promote the entry of potential entrants.

B. Competition, Innovation, and Innovation Competition

Competition and innovation are closely related to the theory of contestable markets. The more contestable a market is (i.e., the fewer barriers to entry and expansion there are), the more incentivised new entrants will be to enter a given market. This increases the probability of vigorous competition and innovation. To compete effectively, especially in the digital sector, firms must innovate and produce products and services (hereinafter, ‘products’) that consumers desire. Innovation can be understood to be the process of devising novel formulations and/or applications of products, services, and/or processes. There is general agreement in competition and policy circles that the production of new products improves the overall welfare of consumers.

Despite innovation seldom being referenced in the DMA itself, communications and publications by the European Parliament and the European Commission (‘Commission’) clearly show that innovation is considered to be an important goal of the regulation. Therefore, understanding innovation, and what

22 Crémer and others (n14) 121-122.
23 Crémer and others (n 14) 122.
24 Crémer and others (n 14) 123-124; Crémer Report (n 4) 35.
25 See generally: Crémer Report (n 4) and Furman Report (n 4).
incentivises firms to engage in this process, is crucial to discerning the type of competition that the DMA seeks and ought to promote: innovation competition.\textsuperscript{27}

In economics, debates surrounding the nature of innovation centre around the (in)famous Arrow–Schumpeter debate on whether monopolistic/oligopolistic or ‘product market’ competition best incentivises innovation. One of Joseph Schumpeter’s core postulations was that the prospect of monopoly power motivated (often large) firms to engage in innovative endeavours, producing products that increased consumer welfare.\textsuperscript{28} Because firms believe that there is a possibility, through their entrepreneurial endeavours, to attain a monopoly position, they engage in pro-competitive behaviour. They will, for example, invest heavily in capital for their businesses and create new products or production processes to pursue this monopoly position. Though the motivation behind this pro-competitive behaviour is the establishment of a monopoly, firms nonetheless engage in pro-competitive conduct in the process. Therefore, for proponents of a Schumpeterian conception of innovation, the promotion of innovation competition lies in incentivising firms to chase the prospect of monopoly profits \textit{ex-ante}.\textsuperscript{29}

By contrast, Kenneth Arrow argued that large firms operating in oligopolistic/monopolistic markets have fewer incentives to innovate in comparison to firms in more competitive markets.\textsuperscript{30} This is due to a monopolist’s interest in maintaining the status quo. Non-monopolist competitors in a market, on the other hand, have far more to gain in potential revenues by innovating and offering new value propositions to consumers. They are, therefore, more inclined

\footnotesize{\textsuperscript{27} DMA (n 2) Recital 107; Daniel Spulber, ‘Antitrust and Innovation Competition’ (2023) 11 Journal of Antitrust Enforcement 5.\textsuperscript{28} Joseph Schumpeter, \textit{Capitalism, Socialism and Democracy} (London: Routledge 1994) 83-84.\textsuperscript{29} Carl Shapiro, ‘Competition and innovation: did arrow hit the bull's eye?’ in \textit{The rate and direction of inventive activity revisited} (University of Chicago Press 2011) 361, 364.\textsuperscript{30} Kenneth Arrow, Economic Welfare and the Allocation of Resources to Invention’ in \textit{The Rate and Direction of Inventive Activity: Economic and Social Factors} (Princeton University Press 1962) 609, 619-622.}
to innovate.\textsuperscript{31} Crucially, Arrow argued that the innovation from non-monopolists is more likely to ‘disrupt’ the status quo and result in a greater overall increase in consumer welfare. Therefore, to increase innovation competition in a market, it is essential to ensure that non-incumbents or non-monopolists are incentivised to innovate.

Critics of Schumpeter argue that Schumpeter’s theory relies on existing monopolies and/or oligopolistic markets to foster innovation and investment.\textsuperscript{32} To accept Schumpeter’s proposition that the prospect of monopoly profits incentivises companies to engage in innovation does not necessarily entail agreement with his separate assertion that monopolies or large incumbent firms are better innovators.\textsuperscript{33} In some circumstances, such as firm investment in new virtual or augmented reality platforms, large incumbents do indeed dominate or lead on innovation.\textsuperscript{34} Nevertheless, in other sectors involving emerging technologies, there is a greater diversity of firms competing in the market. Most of these firms are, in turn, arguably motivated by the prospect of monopoly profits.\textsuperscript{35}

Similarly, Arrow’s argument regarding atomistic markets having more robust competition does not always hold true. From an \textit{ex-ante} perspective, firms need to have a degree of certainty that they will be able to appropriate their innovations: they should be able to profit off of or enjoy the fruits of their innovation(s).\textsuperscript{36} As highlighted by others, Arrow’s analysis suggesting that product market competition spurs innovation is contingent on the assumption that

\begin{itemize}
\item \textsuperscript{33} ibid; Schumpeter (n 28) 99-106.
\item \textsuperscript{36} Shapiro (n 29) 364.
\end{itemize}
competitive firms will be able to protect their innovations through patents.\textsuperscript{37} This is not necessarily the case, especially in digital markets where intellectual property is not always as important as other factors, like network effects or scale economies.\textsuperscript{38} Nevertheless, this is not to say competition within markets — a form of innovation competition the DMA seeks to promote — can never exert effective competitive pressure on incumbents and promote innovation within a market. In the social networking market, the introduction of products like Snapchat, TikTok, and most recently, Meta’s Threads,\textsuperscript{39} has demonstrated the benefits of such competition for consumers. Incumbents, faced with products from new entrants that offer unique value propositions distinct from their existing applications, modify their platforms in response. Consumers benefit from increased choice and arguably higher quality applications as the incumbents are forced to respond to new customer preferences by upgrading their applications and offering new features that improve users’ experiences.

Rather than adopting an absolutist approach in the Schumpeter vs Arrow debate, a preferable approach would be to recognise the industry and

\textsuperscript{37} Elhauge (n 32) 298.
\textsuperscript{38} Baker (n 31) 645-648. Network effects is the term used to describe the phenomenon where the utility users derive from a product, service, or platform increases as more users join said products or platforms. For example, the more people that use a text messaging application (e.g., WhatsApp, iMessage or Telegram), the better it is for those on the platform as they can communicate with more users. Scale economies or economies of scale refer to when a business is able to increase its overall output while enjoying lower per unit costs. In more traditional (or non-digital) industries where product development is a key component of competition, several authors, analysing competition from a competition law/antitrust realm, argue that scale economies and network effects are more important competitive advantages than intellectual property. See generally: John Newman, ‘Antitrust in Digital Markets’ (2019) 72 Vanderbilt Law Review 1497; Furman Report (n 4); Çağlagül Koz, ‘Searching for a New Theory of Harm for Startup Acquisitions by Digital Ecosystems: A Review of the EU Merger Control Regime’ (2018/19) (SSRN, 13 October 2020) MIPLC Master Thesis Series, <https://ssrn.com/abstract=3702200> accessed 14 February 2024; Antonio Robles Martín-Laborda, ‘Merger Control and Online Platforms: The Relevance of Network Effects’ (2017) 1 Market and Competition Law Review 69.
\textsuperscript{39} Ivan Mehta, Instagram’s Threads app reaches 100 million users within just five days’ (TechCrunch, 10 July 2023) <https://techcrunch.com/2023/07/10/instagrams-threads-app-reaches-100-million-users-in-just-five-days/?guccounter=1> accessed 27 December 2023.
market-specific nature of innovation competition. The structural dynamics of industries like the digital sector are idiosyncratic: different factors push firms to innovate, and often, innovation comes from unexpected places. Firms in the digital sector often take unique paths to compete with or disrupt incumbents. Just a few years ago, hardly anyone would have predicted the serious challenge that ByteDance's TikTok would pose to Meta's Facebook and Instagram, Apple's venture into augmented/virtual reality, or the new waves of disruption that many expect generative AI to ignite in the coming years. TikTok exemplifies the idiosyncratic, iterative, and unpredictable nature of innovation in the digital sector. The popular social media platform began as an application where users of more popular platforms could create and edit short videos with music to share on said platforms. Often, users of Musical.ly (the predecessor to TikTok) used the application to enhance or augment their experience of using applications like Instagram. Over time, ByteDance, the company behind TikTok, developed a

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45 Ben Smith, 'How TikTok Reads Your Mind' (The New York Times, 5 December 2021) <www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html> accessed 4 January 2024; For a discussion of how the rise of TikTok and other applications that complement incumbent products, see: Ishmael Liwanda, 'Brexit, Big Tech, and Competition law: The Case for a New Economic Magna Carta Fit for The Digital Age' (2023) 6 De Lege Ferenda 71, 96-98.
product and social network capable of competing with incumbents like Facebook and Instagram.\textsuperscript{46}

There was no clear path from Musical.ly to TikTok. The social media sensation was born out of constant iteration and experimentation on the part of ByteDance, as well as the evolution of the way users interacted with the social network over time. This is the case for many other innovations in the digital sector. Incumbents like Apple, Amazon, and Google all built their products over an extended period of time, experimenting with new ideas, responding to customers, and acquiring companies in pursuit of enhancing their offerings. This process, in turn, changed the way people interacted with the digital realm. Although the aforementioned companies operate in largely separate markets, they are all part of the digital sector. It is well-known that they took vastly different paths to achieve their innovations and dominance. Therefore, if innovation competition in the digital sector is accepted as being idiosyncratic, a regulatory regime that effectively promotes innovation competition must account for these peculiarities and market dynamics.

\textbf{C. Innovation Competition: Ex-Ante and Ex-Post Dimensions}

Although the DMA is to operate as a standalone regulation with the aim of safeguarding a wholly ‘different legal interest’ from those protected under EU competition law,\textsuperscript{47} several of the regulation’s obligations and prohibitions on gatekeepers essentially amount to ‘codification[s] of […] competition law investigation[s]’ and cases.\textsuperscript{48} Thus, the experiences of antitrust law in digital markets, in particular, the abusive practices it has dealt with and, more importantly, the nature of the remedies utilised to address perceived practices, offer useful learnings to evaluate the possible effectiveness of the DMA. As has been mentioned above, the principal aim of the DMA is to promote innovation competition and contestability in digital markets. To conclude Section II’s discussion of contestability and innovation, it is, therefore, crucial to understand both the need to engage in an analysis of the \textit{ex-ante} and \textit{ex-post} dimensions of innovation competition, and whether such an analysis affecting conduct by large

\textsuperscript{46} Smith (n 45); Liwanda (n 45) 96-98.
\textsuperscript{47} DMA (n 2) Recital 11.
incumbents in digital markets should be viewed as harmful to innovation or necessary to encourage it.

The proper assessment of whether practices of designated ‘gatekeeper’ firms are anticompetitive can only be conducted if the ex-ante and ex-post dimensions of innovation competition are considered.\(^4^9\) As Ibáñez Colomo notes, ‘the pro-competitive benefits resulting from a particular strategy cannot be taken for granted and assumed to have existed in the absence of the restraints with which it is intertwined.’\(^5^0\) Due to the presence of scale and scope economies and network effects, innovation is centred around maximising rents that can be accrued from the winner-takes-all nature of innovation competition in digital markets. A common — or rather, core — innovation strategy, in this context, consists of ‘platform ecosystem competition’.\(^5^1\) This describes a business model following which firms create multiple entry points for consumers to use their various products. This is done to maximise the amount of potential and actual rents that could be gained from their platform ecosystems. In such markets much of the large incumbents’ conduct — like Alphabet engaging in self-preferencing, i.e., favouring or making its own products more prominent on Google search — has been deemed by commentators and competition as being anticompetitive and exclusionary.\(^5^2\) Therefore, due to the serious risk of sanctioning pro-competitive conduct by dominant firms in the digital sector, it is imperative for regulators to adopt a cautious approach when analysing the anticompetitive effects of such allegedly exclusionary conduct.\(^5^3\)

This is because most firms in such markets rely on ‘particular strategies’ to compete in the digital sphere. This occurs through either design choices of


\(^5^0\) ibid.


\(^5^2\) Crémer Report (n 4) 65-67.

\(^5^3\) Ibáñez Colomo (n 49) 17.
their products, such as the quality or structure of an app (hereinafter, ‘product design’) or the ‘core strategy or set of strategies’ that firms use to monetise their assets (hereinafter, ‘business model’). Firm conduct will almost always look exclusionary and/or anticompetitive, as well as detrimental to innovation when analysing the design of a firm’s product or its business model from an ex-post perspective: after their product or ecosystem model has already been implemented or developed. However, if we account for the ex-ante dimension of innovation competition, the prospect of attaining monopoly profits encourages firms to engage in innovation that enhances product quality and overall benefit for consumers. This is exemplified by Alphabet featuring its product Google Maps on searches for restaurants in a city. Google Maps is integrated into Google Search, putting it in a privileged position compared to other online map providers. This integration arguably enhances the search experience for users of Google Search, who can quickly transition from searching for restaurants online to receiving directions to said places. This integration comes at the cost of excluding Google Maps’ competitors, who do not have access to such integrations. Therefore, from a purely ex-post perspective, Alphabet’s product design that integrates Google Maps into Google Search is harmful to competition. It disincentivises innovation by depriving competitors of the same level of prominence. However, if ex-ante considerations are duly accounted for, it becomes clear that the prospect of monopoly profits or market power is precisely what drove Alphabet to create a product integration/innovation that resulted in a better user experience. Without the incentive of greater market power and the increased profits or revenues resulting from it, Alphabet would have had fewer incentives to innovate and improve its online search product.

The prior example highlights the issue with analysing the effects of firm behaviour from a purely ex-post perspective: most business conduct will then be deemed exclusionary. This is the case even when the behaviour, despite being detrimental to competitors, results in the incumbent firm engaging in innovation that grants it a competitive edge and improves its efficiency. The incumbent is

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54 Ibáñez Colomo (n 49) 7.
55 Ibáñez Colomo (n 49) 10.
56 Ibáñez Colomo (n 49) 18; Elhauge (n 32) 296.
57 ibid.
58 Ibáñez Colomo (n 49) 18; Elhauge (n 32) 296.
59 Elhauge (n 32) 316-320.
able to entice more customers to use their products, undermining competitors as a result.

Given that many of the obligations in the DMA constitute codifications of previous competition litigation or investigations, determining whether the remedies prescribed by the DMA consider both the *ex-ante* and *ex-post* dimensions of innovation competition is fundamental to a proper analysis of the effectiveness of the regulation. If the regulation is to be viewed as a Magna Carta, offering a rulebook enabling and fostering fair innovation competition that benefits consumers, then it must properly account for the *ex-ante* and *ex-post* dimensions of innovation competition. Otherwise, it risks promoting particular forms of competition, unnecessarily constraining the development of innovation in digital markets. It would become a regulatory Leviathan: imposing specific, and perhaps ineffective forms of innovation competition in the digital sector.

### III. EQUITABLE CONTESTABILITY AS THE DMA’S RAISON D’ÊTRE

Contestability as a goal is seldom referred to in the DMA on its own. It mostly appears alongside or in close conjunction with the notion of fairness. In its recitals, the DMA states the purpose of the regulation is to ensure contestability and fairness in digital markets for both business and end users. The DMA explicitly notes that ‘[c]ontestability and fairness are intertwined.’ It presumes that a lack of contestability fosters the ability for large firms to engage in so-called ‘unfair’ practices. Therefore, to understand both the type(s) of innovation and contestability the DMA is prioritising, and to appreciate the ‘regulatory idea’ of the regulation, a careful analysis of the interaction between contestability and fairness in the regulation will provide a useful analytical framework. Furthermore,

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60 Ibáñez Colomo (n 49).
61 DMA (n 2) Recital 7.
62 DMA (n 2) Recital 34.
it will help to evaluate the benefits and limitations of the DMA’s focus on what this essay will term as a generalised principle of ‘equitable contestability’.

A. Contestability and Fairness Under the DMA: Two Sides of the Same Coin

Some criticisms of the DMA highlight the *prima facie* conflict between the regulation’s two main aims of promoting fairness and contestability. Contestability, it is claimed, relates to inherent structural features of digital markets. Fairness, in contrast, is concerned with the conduct of dominant undertakings that stems from the imbalance of power between platform owners and their participants, consisting of business and end users.\(^{64}\) While the former is focused on systemic factors that reduce the competitive potential of business users, the latter primarily deals with the conduct of said platforms.\(^{65}\) This, critics argue, results in a ‘two-headed’ regulation, where it is not clear if the goal of the DMA is to constrain perceived anticompetitive conduct by dominant undertakings, or to prevent the ‘tipping’ of (emerging) markets in favour of a handful of powerful digital platforms.\(^{66}\) As this sub-section will demonstrate, the above dichotomy fails to adequately consider the regulation’s presumption of an inextricable link between structure and conduct in the digital sector. It will be shown that an appreciation of the connection between fairness and contestability is key to understanding the regulation’s overall aim and why there is no conflict between the two goals.

Despite being undefined in the regulation, Recital 33 states that unfairness in the DMA relates to ‘an imbalance between the rights and obligations of business users’\(^{67}\) where gatekeepers enjoy a ‘disproportionate advantage’.\(^{68}\) The


\(^{65}\) ibid.

\(^{66}\) Akman (n 64) 106.

\(^{67}\) DMA Recital 33. For the purposes of the DMA, ‘business users’ refers to third-party entities that are dependent on gatekeeper platforms as their primary pathway to reach end users and offer them products and services. ‘End users’ describes the individuals and entities that purchase, use and/or consume products and services through gatekeeper platforms.

\(^{68}\) ibid.
Recital further notes the need for business users to ‘adequately capture’\textsuperscript{69} — or appropriate — the fruits of the innovative endeavours.\textsuperscript{70} This concept of appropriability is key in innovation literature.\textsuperscript{71} Appropriability refers to the ability of firms to profit from their entrepreneurial endeavours.\textsuperscript{72} To be incentivised to compete and innovate, firms, \textit{ex-ante}, need to identify a pathway to profit from their investments.\textsuperscript{73} The lower the prospect of effective or adequate appropriability, the less incentivised firms are to innovate, harming the contestability of a market.\textsuperscript{74} Appropriability as an aspect of fairness is an important starting point for understanding the link between contestability and fairness. When discussing contestability, the DMA notes that weak contestability further reduces incentives for non-dominant firms to innovate and compete in digital markets.\textsuperscript{75} Furthermore, a key aspect of contestability in economic, legal, and management literature relates to the ability of firms to appropriate their investments.\textsuperscript{76} Therefore, both fairness and contestability constitute two sides of the same coin when analysing the competitive potential of non-incumbent market participants in the digital sector.

This is in contrast with the assertions made by some proponents of ‘dynamic competition’ approaches to competition policy and regulation. They argue that innovation competition — and the factors promoting it — are heterogeneous and idiosyncratic.\textsuperscript{77} Under this paradigm, industry dynamics and market structure define and shape the way innovation develops and firms compete. This is exemplified by the innovation competition present, for example, in the pharmaceutical industry. The process of producing profitable ‘breakthrough’ drugs is long, costly, and uncertain. However, the prospect of enjoying monopoly profits secured by intellectual property laws incentivises pharmaceutical firms to engage in such endeavours. Therefore, proponents of

\begin{flushleft}
\textsuperscript{69} DMA Recital 33  \\
\textsuperscript{70} ibid.  \\
\textsuperscript{71} Shapiro (n 29) 364-365.  \\
\textsuperscript{72} Shapiro (n 29) 364-367.  \\
\textsuperscript{73} ibid.  \\
\textsuperscript{74} Shapiro (n 29) 364-367.  \\
\textsuperscript{75} DMA Recital 32.  \\
\textsuperscript{76} Shapiro (n 29) 364.  \\
\textsuperscript{77} See, for example: Nicholas Petit and David Teece, ‘Innovating Big Tech Firms and Competition Policy: Favoring Dynamic Competition over Static Competition’ (2021) 30 Industrial and Corporate Change 1168, 1170ff, 1184-1193.
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vigorousschumpeterian innovation argue that protecting the enjoyment of monopoly profits and other property rights drives the innovative process. This is deemed necessary to ensure ex-ante incentives to innovate are sufficiently high to encourage firms to invest large volumes of human and financial capital to produce said pharmaceutical products. The same arguments are prevalent in discussions of competition in digital markets. Network effects, scale and scope economies, and the role of data are features, not bugs, of innovation markets. To enjoy the revolutionary innovations that have defined the digital age, proponents of dynamic competition assert that we must accept that Schumpeter’s prospect theory holds true and formulates competition policy with this reality in mind.

The DMA rightly rejects simplistic conceptualisations of innovation competition by emphasising the link between unfair platform conduct and contestability. Unfair conduct by dominant platforms is both a symptom and a cause of weak market contestability. Weak contestability emboldens and incentivises gatekeeper platforms to engage in so-called unfair practices. Such conduct undermines the ability of business users and other players to effectively compete in digital markets. The structural features of said markets accentuate the effects and incentivise the exploitative and unfair conduct of gatekeepers. As a result, competition is no longer primarily about the merits (i.e., price or quality) of a product. Instead, competition devolves into a race where firms compete intending to attain monopoly positions to exploit the sector’s tendency toward monopolistic market structures.

If the presumed symbiotic nature of unfairness and contestability in the DMA is entertained, it is difficult to distinguish between situations where platform conduct, or the structural features of the digital sector could harm the competitive potential of non-dominant undertakings. Therefore, by devising a regulatory regime that addresses structural concerns and platform conduct, the DMA justifiably takes a holistic approach to competition regulation. This is because, similar to the pharmaceutical sector, large digital firms engage in remarkable innovation. They create platforms that generate immense value for consumers and business users in pursuit of monopoly profits. However, while

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78 Lemley (n 40) 642-644.
79 Crémer Report (n 4) 19-37.
80 DMA Recitals 13 and 34.
81 ibid.
industries like the pharmaceutical sector have intellectual property regimes that manage innovation incentives at different phases of competition, no such regime exists in digital markets. This is particularly concerning considering how innovation occurs in digital markets. While incumbent digital platforms perform important functions in creating and maintaining innovative products and platforms that business and end users benefit from, the ‘bottleneck’ components of said platforms are a result of co-creation. This is especially true in relation to the networks of consumers and business users that make such platforms nearly indispensable.

The incumbent gatekeeper and the participants of the platform all play important roles in giving life to a platform: without the latter group, the value of the platform is diminished. Yet, the DMA contends, a platform’s participants lack the power or ability to adequately appropriate the fruits stemming from their participation in this process of co-creation. Through its proscriptive and prescriptive obligations, the DMA imposes a remedial regime focused on redistributing rents to address this structural imbalance and ensure that all participants in digital markets can adequately appropriate their investments. This is evidenced through the way unfairness is discussed in the regulation. The translations of ‘fairness’ employed in the French, Italian, and Spanish versions of the DMA are *équitable*, *equo*, and *equitativo* respectively. The emphasis on equity, as opposed to equality, suggests a desire for a redistribution of rents in the digital sector.

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84 Linus Hoffman ‘Fairness in the Digital Markets Act’ (2023) 8 European Papers, European Forum 17, 20-22; Crémer and others (n 14) 137-139; Ibáñez Colomo (n 48) 564-565.

85 Hoffman (n 84) 20.

86 ibid.
This is evident in the way prohibited conduct is assessed under the regulation. The Commission, empowered by the DMA to update or impose new obligations after a market investigation, is mandated to address practices that disproportionately confer an advantage to gatekeepers in comparison to business users. The language of proportionality and fairness, present throughout the DMA, further reinforces the observation that the regulation will be primarily concerned with administering redistributive remedies. Furthermore, the regulation has a specific beneficiary in mind: business users. The DMA, in both its recitals and the designation process, explicitly notes that it is only to apply to core platform services (CPSs) provided by gatekeepers that serve as ‘important gateway[s] for business users to reach end users’. Even in the context of CPSs that do not directly deal with business users, the fact that such platforms constitute important pathways for business users to reach end users is sufficient to bring the CPS within the ambit of the regulation.

This redistribution is pursued in the hopes of promoting competition and innovation among business users, even at the expense of other forms of competitive pressures. The DMA’s recitals reason that business users ought to receive a greater share of rents from the platforms they participate in. They should also not be subject to conduct that denies them an equitable share of the profits they help generate, or the opportunity to grow their economic activities. This is understandable because platforms and their participants play a key role in creating the network externalities that make said platforms invaluable. Without both end and business users supplying droves of data and providing immense value to platforms, as is the case with online shopping platforms like Amazon’s marketplace, the e-commerce behemoth would arguably not be as valuable to all users as it currently is. It is, therefore, reasonable to ensure that the participants who help create the value that platforms produce are adequately compensated.

To realise its goal of the equitable redistribution of rents in the digital sector, the DMA seeks to upend the enjoyment of the best fruit of monopoly

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87 DMA (n 2) art 19(1).
88 DMA (n 2) arts 12(5)(a)–(b)
89 DMA (n 2) Recitals 15, 24, art 3(1)(b)
90 DMA (n 2) Recital 15.
91 Hoffman (n 84) 20.
profit: ‘a quiet life’. This is because the structural features of digital markets result in a tendency towards monopoly which distorts the innovation incentives of incumbent firms. They are presumed to no longer compete on the basis of offering higher quality and/or cheap products (i.e., meritorious competition). Instead, they enjoy the quiet life of operating a digital bottleneck. Part of the ‘quiet life’, the DMA envisions, is the ability to set terms unilaterally — some of which can be classified as ‘unfair’ — on business users and consumers. This would undermine the ability of smaller firms to challenge said incumbents or impose artificial restrictions on the ability of users to switch between different digital services.

By utilising the ‘imbalance of rights and obligations’ that result from winning the race to monopoly, competition shifts away from being predominantly based on quality-focused innovation competition. It instead becomes predicated upon exploitative or exclusionary (i.e., unfair) conduct that reinforces the structural, monopolistic proclivities of the markets incumbent digital platforms operate in. Consequently, the DMA presumes, meritorious competition becomes an afterthought. Contestability and fairness are inextricably linked because the presence of the former eliminates or subdues the incentives for incumbent platforms to engage in conduct contrary to the latter. Understood through this lens, the DMA’s regulatory raison d’être is to promote a form of equitable contestability: redistributing economic rents from incumbent platforms to business users. This is done in hopes of amplifying their competitive potential, increasing their incentives to engage in innovation competition and acting as effective forms of competitive pressure on dominant, incumbent firms.

Nevertheless, the DMA’s genius in directly tackling the structural and behavioural aspects of digital markets that increase their tendency toward monopoly will likely be its downfall. As aforesaid, the DMA seeks to promote business user-based innovation competition and contestability in digital markets. However, if we accept the assertion articulated throughout Section II that innovation and incentives for engaging in innovative endeavours are industry-

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93 DMA (n 2) Recital 33.
94 ibid.
specific and somewhat idiosyncratic, it becomes easy to understand the unease surrounding the DMA’s sector- and platform-agnostic approach.

Sector- and/or platform-agnosticism means that, under the DMA, gatekeepers’ CPSs are all subject to the same obligations. Furthermore, there is little to no ability for firms to contextualise their conduct to the Commission. Take the context of online search for example. Article 6(5) prohibits any favourable treatment ‘in ranking and related indexing and crawling’ between ‘services and products offered by the gatekeeper itself than similar services or products of a third party’. This means that, regardless of whether the CPS concerned is Google’s Search product, or Amazon’s online store, the obligation remains the same. It will not account for the fact that both products often operate in different sectors and industries. As such, favourable treatment of one’s own product may not always be detrimental to competition. As will be shown in section IV, this ‘agnosticism’ risks the DMA becoming a regulatory Leviathan: an unnecessarily overbearing regime that strangles some forms of innovation competition in favour of a preconceived ideal of equitable contestability.

IV. **MAGNA CARTA OR LEVIATHAN? EVALUATING THE DMA THROUGH THE LENS OF THE SELF-PREFERENCING OBLIGATION(S)**

As mentioned above, the DMA is not a form of competition law. The legal basis for the DMA is Article 114 of the Treaty on the Functioning of the European Union. It is intended, *inter alia*, to complement competition law in promoting a more competitive European digital sector. Therefore, the regulation cannot directly be evaluated through the perspective of competition law. Nevertheless, it is widely understood that many obligations in the DMA draw heavily from the experiences of EU competition law in digital markets. In

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95 Lemley (n 40) 649.
96 Cennamo and others (n 83) 45-46.
97 DMA (n 2) art 6(5).
99 DMA (n 2) Recital 10.
100 Ibáñez Colomo (n 48) 565-566.
competition law, there is an increasing appreciation that there must be a focus on
the remedy necessary to bring an alleged infringement to an end in order to
analyse the effectiveness of a legal category or theory of harm.\textsuperscript{101} Therefore, the
EU, UK, and US experiences of the application of competition law remedies in
digital markets will be drawn upon to substantiate the arguments in this section.

Section IV will deal with the DMA’s self-preferencing obligation
contained in articles 6(4) and 6(5) of the regulation. Self-preferencing is a concept
that has become central to discussions regarding the state of competition in the
digital sector. The term refers generally to instances where an integrated
undertaking engages in preferential or favourable treatment in relation to its
affiliates at the expense of its rivals.\textsuperscript{102} Self-preferencing encompasses a range of
conduct too broad to discuss at length in this article. Instead, this section will use
two instances of self-preferencing addressed in the DMA to illustrate some of the
central concerns regarding the potentially detrimental impact of regulation on
innovation. Undertakings designated as gatekeepers controlling a CPS, for the
purposes of the DMA, are subject to a set of proscriptive and prescriptive
obligations. These obligations, it is argued, can be broadly categorised as relating
to the design of an undertaking’s product(s), or its business model.\textsuperscript{103} Further,
within that grouping, the obligations affect the nature of gatekeeper platform
competition from an intra- or inter-platform perspective, or both. This is
illustrated in Table 1:

<table>
<thead>
<tr>
<th>Type of Obligation</th>
<th>Product Design</th>
<th>Business Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proscriptive</td>
<td>Intra-platform competition</td>
<td>Inter-platform competition/intra-</td>
</tr>
<tr>
<td></td>
<td></td>
<td>platform competition</td>
</tr>
</tbody>
</table>


\textsuperscript{102} Pablo Ibáñez Colomo, ‘Self-Preferencing: Yet Another Epithet in Need of Limiting Principles’ (2020) 43 World Competition 417, 418.

\textsuperscript{103} Ibáñez Colomo (n 49) 7-13.
The scheme of analysis in Table 1 is useful for understanding the DMA’s various obligations and how they affect digital platforms that fall within its jurisdiction. This section will seek to demonstrate that the structural failings of the DMA present the risk that we have unleashed a regulatory Leviathan, the goal of which is to impose a particular form of competitive outcomes in digital markets regardless of the effect of such competition on consumers. Particularly, this section will focus on the DMA’s platform-agnostic approach and failure to allow for the provision of efficiency defences. Sub-section A will deal with the impact of the DMA on innovation from a product design/intra-platform competition perspective, while sub-section B will adopt a business model/inter-platform competition approach.

A. Self-Preferencing: An Intra-Platform Perspective

Article 6(5) DMA prohibits gatekeepers from treating their own ‘services and products’ more favourably than products or services provided by a third party in the context of ‘ranking and related indexing and crawling’.\(^{104}\) Ranking in the DMA relates to the ‘relative prominence’ given to products or services in the context of, \textit{inter alia}, online search.\(^{105}\) The Article 6(5) obligation contains both a proscriptive and prescriptive element. It prohibits gatekeepers from treating its products more favourably, while mandating the application of fair, transparent, and non-discriminatory (‘FTND’) conditions vis-à-vis ranking.\(^{106}\) It presumes that self-preferencing by gatekeepers disadvantages third-party providers, potentially resulting in a lack of contestability vis-à-vis third-party content and services.\(^{107}\) This relates to the ‘dual role’ that a number of integrated firms, such as Amazon, perform on their platforms:\(^{108}\) they act as mediators

\(^{104}\) DMA (n 2) art 6(5).
\(^{105}\) DMA (n 2) art 2(22).
\(^{106}\) DMA (n 2) art 6(5), Recital 52.
\(^{107}\) DMA (n 2) Recitals 61 and 52; Alexandre de Streel and others, \textit{Effective and Proportionate Implementation of the DMA} (Centre on Regulation in Europe Report, 2023) 97 [hereinafter, ‘CERRE Report’].
\(^{108}\) DMA (n 2) Recitals 61 and 52.
connecting businesses and end users while competing with rival firms on their platform. Despite the uncontroversial goal of ensuring that third-party providers of digital products are not unfairly excluded from digital markets, to understand the impact of the obligation on innovation, we must examine the remedy that it will likely entail: an equal treatment principle.\textsuperscript{109}

Insofar as the central concern underpinning the Article 6(5) obligation relates to the differential treatment of a gatekeeper’s own products and services, an appropriate remedy to ensure compliance with the obligation would likely mean some application of an ‘equal treatment principle’. On the application of this concept, a gatekeeper would be required to cease any ‘differentiated or preferential treatment’ vis-à-vis ranking and indexing.\textsuperscript{110} Some commentators have argued that within the DMA’s framework, the Commission will have discretion to delimit Article 6(5)’s meaning and scope, and the power to distinguish between ‘self-preferencing bias as opposed to legitimate differential treatment’.\textsuperscript{111} Such a scenario would be concerning, especially if the Commission interprets and enforces DMA obligations in line with the overarching principle of equitable contestability. This will likely lead to an application of the DMA favouring interpretations of self-preferencing that ensures economic rents are redistributed from gatekeepers to business users. This will likely lead to an application of the DMA interpretations of self-preferencing that ensures economic rents are redistributed from gatekeepers to business users. This would be pursued with the objective of increasing the competitive potential of the latter over the former.

Adopting the logic of equitable contestability, a scenario where gatekeepers do not engage in any differentiated treatment and perform their ranking operations on FTND terms would be one where the competitive potential of business users is prioritised over any possible efficiency considerations, which are expressly excluded from the regulation.\textsuperscript{112} Further, even if the aforementioned principle of equitable contestability is pursued to its natural

\textsuperscript{110} DMA (n 2) Recital 52.
\textsuperscript{111} CERRE Report (n 107) 98.
\textsuperscript{112} DMA (n 2) Recital 10; Ibáñez Colomo (n 48) 568.
conclusion, this does not necessarily mitigate the potential detrimental effects of this regulation on innovation. First, while some may attempt to argue that, in practice, the enforcement of the DMA would lead to the development of a framework for distinguishing ‘self-preferencing bias’ from ‘legitimate differential treatment’, neither an analysis of Article 6(5) nor its related recitals support this conclusion. In addition to the lack of an efficiency defence, Recitals 51 and 52 of the DMA note that where gatekeepers are performing their ‘dual role’, they ‘should not engage in any form of differentiated or preferential treatment’. This suggests that there will not be a distinction between so-called ‘legitimate’ differential treatment and self-preferencing, with a gatekeeper’s ranking regime being obligated to operate strictly on FTND terms.

This is because the nature of the equal treatment remedy necessary to realise the goal of the Article 6(5) obligation demands the implementation of the remedy ‘through legal, commercial or technical means’. The Article 6(5) obligations and the relevant Recitals are strict. They prohibit any form of differential treatment in contravention of the second sentence of Article 6(5). Therefore, irrespective of whether the differential treatment engaged by an undertaking is due to ‘quality or match value differences’ between first- and third-party offers the obligation for gatekeepers to ensure equal treatment vis-à-vis ranking seems, prima facie, rigid. The same is true regardless of the fact that the preferential treatment may have pro-competitive effects. This has several consequences with reference to the promotion of innovation competition in the digital sector. They will each be explored in turn.

(i) **Potential Prohibition of Pro-Competitive Conduct**

The failure of the DMA to consider potential pro-competitive efficiencies by imposing a blanket ban on gatekeepers’ preferential treatment risks banning conduct that is, in fact, pro-competitive. In doing so, it will prohibit behaviour that benefits consumers and enables gatekeepers to craft a product with

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113 CERRE Report (n 107) 98.
114 DMA (n 2) Recital 51.
115 DMA (n 2) Recital 52.
116 ibid.
117 CERRE Report (n 107) 98.
118 CERRE Report (n 107) 97-98.
better user experience. As is acknowledged in economic literature, self-preferencing can have pro-competitive effects. While there may be instances where a firm steers end users away from, for example, a third-party product that is cheaper and of the same quality as a more expensive first-party product, such situations would uncontroversially be categorised as a violation of the Article 6(5) principle. However, the situation becomes more complex when this self-preferencing is engaged with for the purpose of improving a consumer’s overall experience on the platform. Thus, a marketplace’s design may constitute algorithms that steer users who have a strong affinity toward quick delivery, irrespective of price, to (first-party) goods that are more expensive but are delivered faster. While it could be argued that so long as the ranking algorithm is deployed on FTND terms (and therefore compliant with Article 6(5)), there is no breach of the obligation, this becomes more difficult if a gatekeeper wishes to experiment with various strategies to improve end user experiences on the platforms.

For example, self-preferencing could be deployed for short periods to entice consumers in a specific location to purchase products on a marketplace that are delivered quickly. This could be done with the goal of rolling out a premium subscription service to increase customer loyalty. In such situations, a gatekeeper may leverage its vertically integrated structure to ensure the launch of its subscription service is successful. Such actions, evaluated holistically, are not always anticompetitive or detrimental to innovation. As acknowledged in innovation literature, the design of products in sophisticated industries like the digital sector means that firms must often operate as orchestrators. Platforms like the gatekeepers subject to DMA obligations are concerned with offering their customers an ‘overall’ product experience.

When consumers use an online marketplace like Amazon, they expect to receive, for example, premium quality goods on offer, relevant search results, and a great customer experience. To meet such expectations, platform operators

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must orchestrate the design and ‘feel’ of their platforms through a range of tools. Self-preferencing constitutes a mechanism through which firms leverage their integrated structure to create a product that produces a beneficial experience for end users. While, *ex-post*, such behaviour can be viewed as exclusionary or detrimental to some business users, given that they may feel that their goods are being unfairly ranked through an algorithm that they cannot understand, caution must be observed when attempting to remedy such alleged instances of unfairness. It cannot be taken for granted that the distinctive user experience of using a platform like Amazon would have been possible without conduct that would likely be in violation of Article 6(5). The same is true for the launch of new products like the aforementioned hypothetical premium subscription service.

The experience of courts regarding product design cases is instructive. In *Streetmap* [2016], Streetmap, a digital map service, alleged that Google abused its dominant position by modifying its online search product. The modification meant that a version of Google’s Maps product would appear in queries related to location. Streetmap argued that the new design favoured Google Maps over other competing mapping applications, resulting in anticompetitive foreclosure. However, the High Court accepted that, despite the change in Google’s product design resulting in greater volumes of traffic to Google Maps, Google’s conduct constituted a product improvement that consumers benefitted from. From a purely *ex-post* perspective, the claimant was, at least in principle, correct: Google’s product design did drive traffic away from other mapping applications. It constituted a worthwhile improvement that made Google’s main product — Online Search — more appealing to end users, increasing overall traffic to its platform, and benefitting it and its competitors in the long term. Thus, from an *ex-ante* perspective, Google’s conduct was correctly deemed pro-competitive.

The analysis in *Streetmap* is similar to that of the FTC’s assessment of Google’s specialised search designs. The FTC also concluded that the key question in the face of allegations that Google’s conduct could be deemed anti-competitive was whether its design changes resulted in the degradation of product

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120 *Streetmap.EU Limited v Google Inc* [2016] EWHC 253 (Ch).
121 *Streetmap.EU* (n 120) [62].
122 *Streetmap.EU* (n 120) [139]-[141], [166]-[171].
quality, resulting in ‘material consumer harm’. In other words, the FTC enquired whether the design changes by Google resulted in a decreased level of consumer welfare. The approaches taken in Streetmap and by the FTC emphasise the ex-ante aspect of innovation competition, i.e., accounting for a firm’s incentives to innovate. They adopted a cautious approach to questioning the exercise of a firm’s property rights analysing instead the alleged abusive conduct’s overall impact on innovation and competition. By contrast, the DMA lacks any such mechanism, instead giving the Commission discretion — with a guiding principle of equitable contestability — to determine the contours of conduct that constitute self-preferencing. If such discretion is exercised in a manner that favours the transfer of rents to business users over an, ex-ante, innovation-centric analysis of alleged DMA-inconsistent conduct, this would be detrimental to firm incentives to coordinate and develop product designs that would be to the benefit of consumers.

(ii) Uncertainty Around Equal Treatment as a Remedy

Moreover, EU competition law’s experience with the remedy of equal treatment suggests a cautious approach towards implementing the principle of equal treatment to address concerns that self-preferencing by gatekeeper platforms harms the competitive potential of business users. This is evident from the Google Shopping litigation, which focused on the preferential treatment that was given to Google’s affiliated comparison shopping service (‘CSS’) product. The self-preferencing in that instance consisted of the active promotion of Google’s CSS product, as well as the exemption of its own product from a system of demotions. The remedy for this Article 102 TFEU abuse consisted of

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125 Google Shopping (n 124) [341]-[344].
126 Google Shopping (n 124) [344].
Google being required to re-design its CCS product in congruence with the principle of equal treatment.\textsuperscript{127} 

Although the Commission stated that the equal treatment principle need not have forced Google to deal with rival CSSs, \textit{de facto}, this was the only available outcome; the alternative would have demanded shunning the lucrative revenue stream that the CSS market constituted.\textsuperscript{128} One key outtake from the \textit{Google Shopping} saga was that, despite the Commission accepting Google’s implementation of its remedy, there was nonetheless a mixed reception on the part of Google’s competitors. Some competitors lauded Google’s efforts and noted that significant improvements to their competitive potential had been undertaken,\textsuperscript{129} whilst others derided what they saw as a disingenuous or ineffective implementation of the equal treatment remedy.\textsuperscript{130} The lack of consensus vis-à-vis the remedy in \textit{Google Shopping} demonstrates the difficulty of

\begin{footnotesize}
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\item \textsuperscript{127} \textit{Google Shopping} (n 124) [697]-[700]; Graf and Mostyn (n 109) 564. Article 102 TFEU does not define the concept of an abuse of dominance. The concept of abuse under article 102 has been largely developed through case law and in the Guidance Paper to article 102. A classic definition of the concept of abuse can be found in Case C-86/76 Hoffmann-La Roche \& Co. AG v Commission of the European Communities, ECLI:EU:C:1979:36, at [91]: ‘The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and […] has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition’.\textsuperscript{128} Graf and Mostyn (n 109) 564-565.
\end{itemize}
\end{footnotesize}
implementing remedies to alleged instances of self-preferencing, even in the case-by-case assessment relied on in EU competition law.

Further, *Google Shopping* arguably demonstrates the dangers of failing to conduct a proper *ex-ante* analysis of the alleged conduct’s effects on competition and innovation. It could lead to remedies like the one in *Microsoft I*. The remedy applied in that case was deemed unsuccessful. Following its introduction, there has been a widespread acknowledgement that the remedy (the sale of two versions of Windows, one with and another without Windows Media Player Bundled with Microsoft’s operating system) failed to promote competition and produced a product that consumers did not want. If the DMA aspires to be a digital Magna Carta — creating a framework for competition in digital markets to flourish — there must be a focus on the remedy, and its effects on competition in the specific markets that individual CPSs operate in.

It is concerning that the DMA leaves no opportunity for firms to present efficiency justifications for their conduct. This is particularly worrying given the complexity involved in designing and implementing remedies in digital markets and the potentially negative effects of such remedies on competition and innovation incentives. Nor is the aforementioned push for equitable contestability encouraging for those that take the view that the most effective forms of competition and innovation are manifested from a variety of directions. This concerns business users, platforms and beyond. The potential for the DMA to be a regime that prioritises the allocation of rents from so-called gatekeepers to business users, regardless of the impact of product quality or innovation incentives, creates the risk of the advent of a regulatory Leviathan.

**B. Self-Preferencing: An Inter-Platform Perspective**

The DMA deals with self-preferencing, from a business model perspective, in part through its provision obliging gatekeepers to ‘allow and

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133 DMA (n 2) Recital 10; Ibáñez Colomo (n 48) 568.
technically enable the installation\textsuperscript{134} of third-party applications or application stores. As stated in sub-section IV(A), to understand the nature of the obligation, we must focus on how the Article 6(4) obligation will be achieved. The remedy will likely entail a duty to deal, whereby a vertically integrated, so-called gatekeeper platform operating an application store shall be required to enable ‘side-loading’. ‘Side-loading’ refers to the practice of installing applications without the use of a hardware product’s official app distribution channel. The intended targets of this provision are obvious: Apple’s App Store and Alphabet’s Play Store, whose platforms host approximately 91.4% of applications globally.\textsuperscript{135} This obligation is part of a wider goal by the DMA to achieve ‘vertical interoperability’, which refers to the ability of services at various stages of the value chain in digital markets to work together.\textsuperscript{136} In the spirit of equitable contestability, the obligation seeks to open up distribution channels for complementors to offer their applications outside a gatekeeper’s ecosystem.

The DMA notes that prohibitions by gatekeepers on end user side-loading and use of alternative (non-gatekeeper controlled) application stores affect their ability to access software applications outside of gatekeeper-controlled application stores.\textsuperscript{137} This has the potential of limiting potential distribution channels for business users, leading to lower contestability, since firms are presumed to have less of an incentive to invest if they are normally bound to one distribution channel.\textsuperscript{138} Furthermore, due to the artificial dependency created by the prohibition of alternate distribution channels for application software or stores, the likelihood of gatekeepers engaging in exploitative or unfair conduct is increased.\textsuperscript{139} These abusive forms of behaviour include the imposition of high commission fees for transactions using their platform or arbitrary exclusion from the application store altogether.

\textsuperscript{134} DMA (n 2) art 6(4).
\textsuperscript{135} Appfigures, ‘Number of apps available in leading app stores as of 3rd quarter 2022’ (Statista, 10 October 2022) <https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/> accessed 28 July 2023
\textsuperscript{136} CERRE Report (n 108) 154.
\textsuperscript{137} DMA (n 2) Recital 50.
\textsuperscript{138} ibid.
\textsuperscript{139} ibid.
This concern echoes complaints lodged against Apple regarding its commission rates,\(^\text{140}\) anti-steering provisions vis-à-vis its application store, and payments system.\(^\text{141}\) By providing complementors with alternative distribution channels, it is assumed that they will no longer be beholden to onerous and unfair conditions imposed by gatekeepers controlling current application stores. This will enable them to better appropriate their investments, a key factor in promoting innovation in digital markets.\(^\text{142}\) The DMA presumes that greater appropriability achieved by mandating gatekeepers to enable side-loading, as well as the interoperability in alternative application stores will increase contestability in digital markets. Consequently, this will reduce the commercial incentives and ability of gatekeepers to engage in unfair conduct discussed in Section III.

Unfortunately, as will be discussed below, the unqualified and platform-agnostic nature of the obligations is laden with an almost exclusively \emph{ex-post} appreciation of the competitive dynamics at play. It will be shown below that, despite the DMA’s meagre attempts at enabling gatekeepers to safeguard the integrity of their platforms, the likely application of the Article 6(4) obligation will lead to a regulatory \textit{Leviathan}. This will be detrimental to innovation incentives in the digital sector. The remedies that the DMA obligations necessitate amount to effectively mandating the platforms subject to this obligation to seek alternative monetisation strategies to deal with competitors. This goes against the lessons learned from EU competition case law on duties to deal.

\textbf{(i) Application Stores and Ecosystem Orchestration}

The principal failing of the Article 6(4) obligation is that it adopts an almost exclusively \textit{ex-post} perspective on innovation competition. It assumes or fails to recognise that there may be pro-competitive rationales for vertically integrated gatekeepers to restrict or prohibit access to their ecosystems, either through side-loading or interoperability with alternative application stores. Apple’s business strategy and execution is particularly helpful in illustrating this point. Vertical integration has been a signature feature of Apple’s overall business

\textsuperscript{141} Geradin and Katsifis (n 140) 567-570.
\textsuperscript{142} See generally: Shapiro (n 29).
model for decades.\textsuperscript{143} The firm adopts a holistic and vertical model for product and software development, closely controlling every aspect of software, hardware, and service development.\textsuperscript{144} This is done to produce a distinctive experience when using Apple products,\textsuperscript{145} one that is focused on a holistic, simplistic, and premium user experience.\textsuperscript{146} Its App Store forms an important aspect of this overall approach.

By prohibiting side-loading and the use of alternative application stores since the launch of its App Store, Apple made a business decision in favour of a distinctive, ‘walled garden’\textsuperscript{147} form of software and hardware integration. This reflects Apple’s preferred monetisation strategy and form of ecosystem orchestration. This is in contrast to its main competitor, Alphabet, whose Android operating system permits side-loading and non-Alphabet application stores.\textsuperscript{148} In pursuit of crafting a premium ecosystem experience, Apple has maintained tight control over access to its App Store. This is significant because the App Store is currently the only distribution pathway for developers to reach end users that use Apple’s operating systems. From an \textit{ex-post} perspective, as the DMA argues, this conduct is exclusionary, preventing developers and other parties from offering

\begin{footnotesize}
\begin{enumerate}
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\item ibid.
\item Netherlands’ Authority for Consumers and Markets, Market Study into Mobile App Stores, Case no: ACM/18/032693 (2019) 46, 50-51.
\end{enumerate}
\end{footnotesize}
alternatives to Apple’s App Store. However, in digital markets, the pro- and anti-competitive effects of innovative conduct are often intertwined.\textsuperscript{149} This is demonstrated when Apple’s conduct is viewed from an \textit{ex-ante} perspective.

Apple’s restrictions on access to its ecosystem have been in place since the introduction of the App Store. In addition to managing a platform that hosts millions of applications and handles billions of downloads, it has dedicated teams that screen and review applications on its platform.\textsuperscript{150} Apple imposes strict quality controls and removes applications that fall below its published standards.\textsuperscript{151} The result of this has been an application ecosystem that generated $1.1 trillion in developer billings and sales in 2022.\textsuperscript{152} The close management of its ecosystem, creating an experience that attracts users with a high propensity to spend on its App Store, has arguably benefitted developers. Moreover, the large investment that Apple has made to its ecosystem alongside the development of the App Store has aided the creation of an entirely new market since its launch in 2008.

Yet, the DMA seemingly second-guesses Apple’s business model and forces it to deal with undertakings wishing to side-load or develop alternative application stores. Commentary on the topic, as well as lessons from the ‘refusal to deal’ case law of the EU Court of Justice (hereinafter, ‘the Court’), suggests a need for circumspection when interfering with a firm’s right to property. The ability to exclude other persons or entities is a key property right\textsuperscript{153} and should

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\footnote{149} Ibáñez Colomo (n 49) 18.
\footnote{150} Völcker and Baker (n 144) 20-22, 23-25.
\end{footnotes}
not be heedlessly infringed. In Slovak Telekom, a case concerning a refusal to deal by an incumbent telecommunications operator, the Court noted that caution must be observed when mandating firms to conclude contracts with other parties. It stated that, when imposing duties to deal, it must be acknowledged that while such remedies can, in the short term, spur greater competition by enabling more firms to participate in a market, the impact of such duties in the long term may be detrimental to competition.

It may result in the artificial elevation of inefficient competitors who will, as would be the case in dealings with Apple, benefit from a successful undertaking’s innovative endeavours and platform orchestration. This reallocation of rents may, in the long term, discourage innovation, since the firm subject to an obligation to deal with competitors is ‘less inclined to invest in efficient facilities’ if there is a risk that, ‘at the mere request of its competitors’, it will be forced to share its facilities. This is why, in EU competition law, the case law requires Bronner indispensability firms are not to be mandated to share their facilities with competitors unless there are essentially no viable options for competitors to compete in a market. In contrast, the rationale of equitable contestability does not require Bronner-esque indispensability, but merely that the CPS concerned serves as an ‘important gateway’.

With regard to Apple, this raises several issues vis-à-vis the firm’s ability to exercise its property rights and incentives to further invest and innovate. By mandating it to deal with competitors, the DMA forces Apple to relinquish control over its ecosystem. This demand comes in spite of the fact that Apple, through its close management and supervision, has generated trillions of dollars’ worth of value. This value, it is argued, is in part due to the success of Apple’s close control over its ecosystem. Under the DMA, access could potentially be granted to competitors with lower security standards or product design choices that run contrary to the overall ecosystem experience that Apple wants to curate.

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154 Slovak Telekom v. Commission, Case C-165/19 ECLI:EU:C:2021:239.
155 Slovak Telekom (n 154) [47].
156 ibid.
157 Slovak Telekom (n 154) [49]-[50].
158 Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others, Case C- 7/97 ECLI:EU:C:1998:569 [41].
159 DMA (n 2) art 3(1)(b), Recital 24.
While the DMA notes the need for gatekeepers to ‘implement proportionate technical or contractual measures’\(^{160}\) to protect the integrity of its system, this will likely operate as a palliative rather than a long-term solution to the prospect of undertakings subject to Article 6(4), relinquishing its ability to control its ecosystems. This is because the DMA suggests that measures intended to preserve the integrity of a gatekeeper system cannot be implemented through the use of ‘default setting[s] or as pre-installation’.\(^{161}\)

This raises uncertainty as to the actual latitude afforded to gatekeepers to ensure quality standards within their ecosystems, likely undermining their ability to pursue pro-competitive and value-generating business strategies. This will privilege short-term competition that may degrade the overall quality of an existing ecosystem like Apple’s in pursuit of equitable contestability. This may not always be the most effective form of competitive pressure in that specific market. By prioritising the promotion of the competitive potential of smaller and arguably, in some instances, less efficient competitors, the Article 6(4) obligation is yet another example of the likely impact of the DMA being that of a regulatory Leviathan. This is because the new framework imposes a particular conception of innovation competition in digital markets notwithstanding evidence against this position from competition case law and scholarly literature.

V. CONCLUSION

This article has endeavoured to foreshadow, through an analysis of some provisions in the DMA, an incoming innovation paradox. It began in Section II with an analysis of legal and economic literature on the nature of competition, innovation, and competition on the basis of innovation (innovation competition). Two key assertions were made in that section. The first addressed the fact that innovation, and competition premised thereon, is idiosyncratic. The second key point was that, when analysing the competitive effects of the conduct and specifically innovation of an undertaking, there has to be an assessment of the ex-ante and ex-post dimensions of said conduct or innovations.

\(^{160}\) DMA (n 2) Recital 50, art 6(4)

\(^{161}\) DMA (n 2) Recital 50.
Relying on the aforementioned assertions, Section III then analysed the link between fairness and contestability in the DMA. It was suggested that the overarching principle guiding the DMA is that of ‘equitable contestability’. Namely, the redistribution of rents from dominant undertakings to smaller, less dominant firms. This is not unwarranted. In fact, one of the DMA’s great achievements is that it establishes a regulatory regime that deals with a pertinent structural problem: the arguably inadequate compensation of key participants of large digital platforms (business users). This is especially true if one adopts the view that the success and proliferation of digital platforms can be attributed to ‘co-creation’. This reflects the fact that business and end users’ participation and engagement on incumbent platforms has been a key factor in the success of these entities. Therefore, the rents accrued from this economic activity justifiably should be distributed fairly across the value chains. That being said, while the DMA purports to generate a regulatory regime that secures a level-playing field for all market participants, it is evident, both in its recitals and in the manner in which gatekeeper obligations are constructed in the regulation, that business users are the intended beneficiaries of the new rules.

This broad and seemingly unqualified focus on rent redistribution, as outlined in Section IV, is problematic from both an intra-platform (i.e., ‘product design’) and inter-platform (i.e., ‘business model’) perspective. From an intra-platform outlook, the unqualified pursuit of equitable contestability means that the DMA could prohibit undertakings designated as gatekeepers from engaging in conduct that is, on balance, pro-competitive. This point was explored through an analysis of the article 6(5) obligation that prohibits self-preferencing in ‘ranking and related indexing and crawling’\(^\text{162}\). The key assertion made was that, under the article 6(5) prohibition, there was no way of distinguishing self-preferencing that gave an unfair advantage to gatekeeper platforms and legitimate product improvements, as was explored in the *Streetmap* case.

Second, from an inter-platform perspective, the focus on rent distribution in article 6(4) of the DMA resulted in an obligation that did not give adequate consideration to the *ex-ante* competition dimensions of the monetisation strategies that firms like Apple employ. As was stated in Section IV(B), this amounts to a failure to recognise that there may be pro-competitive rationales to

\(^{162}\) DMA (n 2) art 6(5).
what may be prima facie exclusionary practices by dominant firms. In the case of Apple, this would concern its prohibition of sideloading prior to the DMA. Furthermore, to effectuate the article 6(4) obligation, the imposition of a duty to deal on the part of dominant platforms would be required. This, it was argued, would be detrimental to the innovation incentives of the dominant platforms, and amount to an unjustified infringement on their property rights.

Through the logic of equitable contestability, the DMA equips the Commission with newfound powers to engage in an exercise of rent redistribution in the digital sector. This is not necessarily undesirable. Concerns surrounding the perceived lack of competition in digital markets are valid. There are indeed legitimate anxieties regarding the conduct of incumbent digital platforms and the structural incentives they have to maintain the ultra-dominant positions they enjoy in their respective markets. However, the main criticism of the DMA that this paper seeks to advance is that, in correctly identifying the anti-competitive impact of a plethora of gatekeeper conduct, it fails to acknowledge and address the counterfactual: the potentially pro-competitive aspects of the gatekeeper conduct the DMA will prohibit. Through its obligations and recitals, the DMA presumes gatekeeper conduct like self-preferencing to be per-se detrimental to competition, barring the possibility for pro-competitive efficiencies generated from these practices to be sufficiently analysed and evaluated. This goes against the experience of competition law enforcement in digital markets, and insights from leading scholarship about the inextricably linked nature of the pro- and anti-competitive aspects of firm conduct in the digital sector. Further, while investment incentives of business users are prioritised, the regulation largely ignores the impact of its prescriptions and prohibitions on the incentives of incumbent platforms to innovate, undermining an important form of effective competition in the digital sector.

If the goal of the DMA is to be a digital Magna Carta, it must be reformed to better incorporate the complexities of digital competition, through measures such as permitting efficiency defences when analysing gatekeeper conduct. But such discussion goes beyond the scope of this article. Moreover, the topic of reform in general is inappropriate, given that the DMA came into force very recently. Nevertheless, it does seem that reform will be needed in the near future. Otherwise, there is potent risk that a regulatory Leviathan has been unleashed. One that operates under the guise of equitable contestability, while de
facto dictating what forms of competition innovation are acceptable in digital markets.

In addition to the issue of efficiency defences, there are many pertinent points of discussion that, due to the limited scope of this piece, were not explored. The key one, arguably, is how we can formulate a regulatory regime that adopts the overarching principle of equitable contestability, accounts for the idiosyncratic nature of competition innovation in digital markets, and enables the consideration of the *ex-ante* and *ex-post* aspects of competition when determining whether to prohibit or allow certain gatekeeper conduct. Lastly, whether the DMA succeeds in invigorating competition in digital markets remains to be seen. However, it seems that once the gatekeepers begin to comply with their obligations, the regulation’s innovation paradox will begin to unravel. If — or perhaps when — that happens, we shall likely uncover that the Emperor has no clothes.