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Tackling the digital economy from a fresh perspective: a comparison between the EU and the UK proposed sector regulation

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Resume: *Both the EU and UK have acknowledged the defects of traditional antitrust enforcement when tackling digital platforms. Hence both jurisdictions have proposed different models of sector regulation to supplement the conventional competition legislation. This essay will carry on a detailed comparison and examination of various aspects of the new regulations. To ultimately conclude, the new ex-ante regulation proposals on both sides of the Channel will create similar yet distinct regulations that will apply side-by-side.*

Introduction

Several expert reports state that the current antitrust enforcement is unfit to address the peculiarities of the digital economy. They point out that the lengthy investigations by the competition authorities and the subsequent judicial review has resulted in the competition policy being too slow to keep up with the fast-moving digital economy. Additionally, they state that the traditional antitrust remedies such as fines and cease-and-desist orders are insufficient to deter big techs market behaviour and their inappropriateness in handling the complexity of the digital markets.[1] Additionally, National Competition Authorities have consistently investigated dominant digital platforms for similar anti-competitive conducts, resulting in the acknowledgment of the persistent market failures characteristics and that ad hoc antitrust law is not equipped to deal with failures systematically, in tandem with the European Commission.[2]

Such insights started an agreement that traditional competition legislation should be complemented with sector regulation that continues competition policy from a fresh perspective. The European Commission announced the Digital Markets Act (DMA)

[1] Stavros Aravantinos, 'Competition law and the digital economy: the framework of remedies in the digital era in the EU' [2021] 17(1) ECJ 134.

[2] For example, the Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (Case AT.39740—Google Shopping). OJC-9/11, 12 January 2018.

proposal in the EU in December 2020.[3] Seven days earlier, the CMA had given the UK Government recommendations on establishing a new regulatory framework for digital platforms.[4] This year, the UK created a Digital Markets Unit (DMU), which will be responsible for enforcing new sector legislation.[5] The UK government issued a consultation on the new regime in July 2021. This essay will carry on a detailed comparison and examination between different aspects of the new regulations.

When the new sector regulation will be applicable

The new ex-ante laws will be confined to select digital platforms that are 'big' and govern portions of the digital economy, which is a common feature of both regulatory regimes.[6] In other words, the authorities chose asymmetric regulation to stimulate the introduction of smaller platforms that are not subject to such regulation, with the goal of encouraging market competition. Both proposals use similar expressions to define the subjects of the new regulatory regime. Under the DMA, they are named 'digital gatekeepers',[7] and under the CMA advice, firms that maintain 'strategic market status' (SMS).[8] However, such definitions do not necessarily fit within the concept of 'dominance' under Art. 102 TFEU, since the concept of dominance is neither expressly referred to in the UK nor the DMA proposals.[9] Such deviation will result in three main consequences: Art. 102 TFEU and the new ex-ante regulation will be applied parallelly. The (CJEU) case law on the dominant notion will not necessarily be considered by the enforcement authority for determining the threshold of the new ex-ante regulation. Ultimately, the market definition will not be required, speeding up the enforcement agency's work.[10]

The qualitative criteria to identify the subjects of the new regulation seems to be similar in both frameworks. The DMA identifies the 'gatekeepers" capability to have a 'significant impact on the internal market' and obtain an 'entrenched and durable' market position.[11] Similarly, CMA advice defines SMS as obtaining 'substantial',

[3] Proposal for a regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM [2020] 842 final.
[4] UK Competition and Market Authority, *A New Pro-Competition Regime for Digital Markets.* (2020) Advice of the Digital Markets Task Force. <https://www.gov.uk/cma-cases/digital-markets-taskforce> accessed 12/11/2021,
[5] Department for Business, Energy & Industrial Strategy and Department for Digital, Culture, Media & Sport,'Non-statutory Digital Markets Unit: terms of reference' (UK GOV 7 April 2021) https://www.gov.uk/government/publications/non-statutory-digital-markets-unit-terms-of-reference accessed 12/11/2021.
[6] Marco Botta, 'Sector Regulation of Digital Platforms in Europe: Uno', [2021] 12(7) ECLP 500
[7] Ibid 3 *Art* 3(1).
[8] Ibid 4, Para.4.4.
[9] Ibid 6.
[10] Ibid 4, Para.4.14
[11] Ibid 3 *Art* 3(1).

'entrenched market power' and 'strategic market position'.[12] Moreover, in both regimes, the qualitative criteria are complemented by clear quantitative thresholds. The DMA introduced the EU turnover/capitalization and the number of users in the last three years.[13] The three years requirement has a beneficial effect on inter-platform competition, which provides a successful entrant three years to enhance its commercial success after reaching a size similar to the incumbent gatekeeper before being subject to the regulation.[14] On the other hand, the UK proposal refers to the turnover within the UK and at the global level.[15]

The gatekeeper status is applicable if a platform meets the quantitative thresholds, unless additional evidence were introduced by the platform that rebuts the presumption.[16] Contrarily, the UK proposal does not mention any opportunity to deny the SMS. Additionally, DMU analyzes the SMS based on the mentioned qualitative criteria and DMU guidelines introduced later.[17] In both regulations, especially the UK's proposal, there is a cautious approach to not be a quantitative excessively focused approach, which might result in 'insufficiently nuanced designation assessments'.[18] However, in doing so and avoiding burdensome processes which might require market definition, it seems that the UK approach requires cumulative proof of the three qualitative criteria. However, if such an approach requires the fulfilment of many aspects before going into substantive issues, many aspects could be challenged on many minor/micro procedural technicalities.[19] Article Art 3 DMA offers a much better-balanced approach between the qualitative and quantitative criteria, which is a leeway against excessively high cumulative tests and over-inclusiveness.[20]

Another difference between the two proposals concerns the scope of application. The DMA applies to the eight digital economies 'core platform services'.[21] If such core platform services were to be extended, a market investigation would be required by the Commission, and any amendments should be submitted to the European Parliament and Council (which is lengthy and complex

[12] Ibid 4, Para. 4.10, 4.12 and 4.17
[13] Ibid 3 *Art*3(2).
[14] Oles Andriychuk, 'Shaping the New Modality of the Digital Markets: The Impact of the DSA/DMA Proposals on Inter-Platform Competition' (2021) 44(3) WC261.
[15] Ibid 4, Para.4.23.
[16] Ibid 3 *Art* 3(4) and (6).
[17] Ibid 4, Para. 4.25.
[18] UK Government Public Consultation, 'A new pro-competition regime for digital markets' (2021). <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf> accessed: 12/11/2021.
[19] Oles Andriychuk, 'A New Pro-Competition Regime for Digital Markets: Individual Submission by Oles Andriychuk.'<https://pureportal.strath.ac.uk/en/publications/a-new-pro-competition-regime-for-digital-markets-individual-submi> accessed 12/11/2021(University of Strathclyde, 2021).
[20] Ibid.
[21] Ibid 8

procedure).[22] Although the Commission cannot change the qualitative characteristics, it could change Article 3(2) DMA quantitative criteria, though subject to strict proportionate limitations.[23] However, the CMA proposal does not restrict the application of specific digital economy sectors.[24] A final common feature between the two legislations is the requirement to periodically review the status of platforms subject to ex-ante regulation. Every two years, the Commission should check the gatekeeper status under the DMA.[25] However, the CMA proposal extends such a period to every five years.[26]

Obligations imposed on online platforms

Considering the types of obligations imposed on online platforms, which represents a significant difference between the DMA and the UK proposal, Art. 5 of the DMA lists obligations are self-applicable by the gatekeepers; contrarily, Art. 6 obligations are subject to 'further specification' by the Commission. Both articles reflect the leading competition law investigation vis-a-vis digital platforms in the past few years. For instance, the German Facebook case is reflected in the requirement to maintain 'data silos',[27] while the (MFN) clause prohibition mirrors the Booking.com case.[28] The Google Android Commission decision is reflected in the obligation to permit users to uninstall any pre-installed app.[29] Similarly, the Google Shopping decision inspired self-preferencing forbidding.[30]

Nevertheless, such uniformed rules are independent of the business model; thus, it is questionable whether they will be effective where business models differ systematically.[31] However, it is noticeable that unlike Article 5 DMA, Article 6 DMA provisions appear to be vague and all-inclusive, which are designed to allow the enforcement authority to finetune such obligations to each specific gatekeeper through regulatory dialogue form, representing indirect possibilities of individualization.[32] Such dialogue nudges gatekeepers to cooperate with the Commission in the enforcement (instead, the totality of the obligations will be applied). Such enforcement cooperation is essential to keep up with the complex and fast-moving digital economy.[33] Although DMA is a hybrid

[22] Ibid 3, Art. 17.
[23] Ibid 18.
[24] Ibid 4, Para. 4.23
[25] ibid 3 *Art* 4(2).
[26] ibid 4, Para. 4.28.
[27] Ibid 3, Art. 5(a).
[28] Cristina Caffarra and Fiona Scott Morton, 'How Will the Digital Markets Act Regulate Big Tech? (Promarket, 11/1/2021).' <https://promarket.org/2021/01/11/digital-markets-act-obligations-big-tech-uk-dmu/#footnote_1_25371> accessed: 12/11/2021.
[29] Ibid
[30] Ibid
[31] Ibid
[32] Ibid 13
[33] Alexandre De Streel and others, 'The European Proposal for a European Digital Markets Act: A First Assessment.' (2021) CERRE Assessment Paper <https://cerre.eu/publications/the-european-

system, it preferred detailed obligations over general principles.

Nevertheless, such rules are less adaptable to the fast-changing and highly dynamic market (therefore, flexibility is critical). At times, they may not succeed in achieving the overall rationale of the legislation by gatekeepers applying the rules while undermining the legislation principles. But, such risk could be mitigated by Article 11. The Commission will enforce these rules; hence, there is no risk of divergence between authorities.[34] If the economic evidence is not considered when drafting these regulations, the Commission will play a role in disregarding economic evidence.[35] Therefore, it is questionable whether the vagueness mentioned will provide sufficient flexibility to tackle these problems.

Both Arts. 5 and 6 contain positive and negative obligations. Such negative obligations can, in practice, overlap with Art. 102 TFEU, abusing categories. Moreover, the DMA offers no efficiencies defences, which might be seen as a positive step, since the DMA applies to specific services to specific firms in specific markets to deal with specific problems.[36] Therefore, any efficiencies trade-offs with the obligations will already be considered by the legislator when drafting the regulation; therefore, there is no need to introduce a layer of complexity to interduce such defence. However, flexibility clause can be found in Art. 10 DMA, which gives the Commission the power to adopt further prohibited conducts not included in Arts. 5 and 6, via a delegated act subject to market investigation by the Commission and the approval Digital Markets Advisory Committee (comitology procedure),[37] thus avoiding the lengthy and complex procedure in case of amending the list of core platform services.

The exhaustive list of obligations in the DMA objective provides legal certainty to digital gatekeepers. However, the CMA proposal does not have a fixed list of obligations. Instead, codes of conduct will be negotiated (a dialogue) by the DMU and SMS platforms (to understand the business model and apply the appropriate rules).[38] Thereby, the new regulation will include general principles, and the DMU will develop its codes of conduct with the SMS platforms subject to its guidelines and the general principles provided.[39] Such codes of conduct will proactively try to shape the behaviour of the firms in the digital economy by tailoring what is required from each firm to prevent harmful conduct. The discretion to shape the code for each specific firm is essential, given

proposal-for-a-digital-markets-act-a-first-assessment/> accessed 12/11/2021.
[34] Ibid
[35] Ibid
[36] Ibid 6.
[37] Ibid 3, Art. 32
[38] Ibid 4, Para. 4.33.
[39] Ibid 4, Para. 4.38.

the difference in the digital markets. However, this approach bears a heavy burden on the DMU, since the failure to design an appropriate code of conduct will result in entire regulatory regime failure. The regulation will not apply to the whole firm's activities, but instead to the specific activities that meet the SMS test.[40] Contrary to the DMA, the UK's proposal leaves some room for an efficiency defence, which might be considered a defect, since the digital market is a zero price market, and the questionable conduct sometimes creates substantial efficiencies. Arguably, as the nature of the regulation is much different, the DMU has the discretion to shape the obligations, and it is not yet specified as the DMA (the efficiencies might not be considered when drafting the legislation) efficiency defence could be justified. However, it should be cautiously applied and very limited, or it might undermine the whole regulation.

The procedure to enforce ex-ante regulation

The CMA and the DMA proposals rely on a system of notification. Both firms obtaining SMS and digital gatekeeper position will be required to notify its status to DMU/Commission. After the notification, the regulations depart from each other.

The Commission gets two months to confirm the gatekeeper position and impose Art. 5–6 obligations.[41] Then, gatekeepers are given six months to comply with the Commission decision (top-down approach).[42] However, the DMU will take a bottom-up approach, thereby negotiating with SMS firms codes of conduct.[43] In case of breach of such obligations, both ex-ante regulations permit the enforcers to impose a fine of up to 10% of its annual turnover of the platform.[44] The DMA further allows behavioural and in exceptional circumstances, in the event of systematic non-compliance, to impose structural remedies.[45]

Apart from the notification system, both regulations include investigations tools. DMA includes a market investigations chapter. However, the investigations' powers are not comparable with the powers under the initial NCT proposal.[46] According to the DMA, a market investigation can be

[40] Ibid 17.
[41] ibid 3 *Art* 3(4).
[42] Pablo Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276> (accessed: 17/11/2021).
[43] Ibid 4, Para. 4.33.
[44] ibid 3 *Art.* 26 and ibid4, Para. 4.96
[45] ibid 3 *Art* 16(2).
[46] Richard Whish, 'New Competition Tool: Legal Comparative Study of Existing Competition Tools Aimed at Addressing Structural Competition Problems with a Particular Focus on UK's Market Investigation Tool,' *Expert Report Published on Behalf of the European Commission in October 2020.* <https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420573enn.pdf>(accessed: 12/11/2021).

conducted to point out gatekeepers who did not notify the Commission of its position, spot additional core platform services, identify continuous non-compliance, and include new forbidden conducts within DMA.[47] Consequently, the Commission will be unable to impose any pro-competitive remedy.

Unlike the DMA, the UK proposal permits the DMU following a market investigation to adopt pro-competitive Interventions (PCIs).[48] Such PCIs will '…seek to address the roots of market power' rather than imposing target obligations which is the role of codes of conduct.[49] The DMU can only impose behavioural rather than structural remedies as PCI to increase market contestability by perhaps enhancing data interoperability and mobility.[50] In this sense, PCIs are similar to the initial NCT proposal, which was abandoned when the DMA was drafted. However, it is argued that such PCIs should be empowered to tackle a systemic problem beyond the designated activity to be more effective, given the nature of such platforms and their activities.[51]

The two regulations introduce new merger control provisions, given they both understand that the traditional merger control laws are not suitable to monitor digital economy 'killer acquisitions' (threshold is too high and price-centred).[52] Many business models focus on strategic acquisitions to enhance and create market power.[53] The DMA imposes an obligation on the gatekeeper to notify any mergers to the Commission regardless of whether it meets Reg. 139/2004 or any other national law.[54] Nevertheless, it remains ambiguous whether transactions will be reviewed by the Commission and if any remedies will be imposed. In March 2021, the Commission under Art. 22 Reg. 139/2004 published a referral system allowing NCAs to refer to concentrations that do not meet turnover thresholds,[55] thus allowing the Commission to keep an eye on the market concentration of the gatekeepers and remedying that 97% of GAFAM acquisitions was not reviewed by any authority.

Nevertheless, without changing the merger regime, mergers will still be approved based on the standard of proof, which is considered unfit for purpose.[56] Both Caffarra

[47] Ibid 3, Art. 17
[48] Ibid 4, Para. 4.3
[49] Ibid 4, Para. 4.60
[50] Ibid 4, Para.4.68 and para.4.70
[51] Ibid 18.
[52] Ibid 4, Para. 4.121
[53] Ibid 28.
[54] ibid 3 *Art* 12(1).
[55] Communication from the European Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases. Brussels, 26.03.2021. C (2021) 1959 final.
[56] Luís Cabral and others, 'The EU Digital Markets Act: A Report from a Panel of Economic Experts.' <https://publications.jrc.ec.europa.eu/repository/ha

and Morton confirmed, 'Without explicit changes to merger rules, history is likely to repeat itself and hold back competition in this sector.'[57] This is confirmed as no GAFAM acquisitions were blocked till date. However, the Commission could at least accept commitments.

The CMA proposal requires all SMS platforms transactions to notify the CMA even if it is an acquisition of control.[58] Contrary to the DMA, such changes will be applied by amending the merger control rules in the UK, which means that the CMA investigate the transactions traditional merger control standards. The proposal introduces a more cautious standard of proof to remedy the traditional regime. While maintaining the substantive test 'substantial lessening of competition', the proposal moves from 'balance of probabilities' test to a 'realistic prospect' test. Such change will affect some mergers since already a handful of mergers are only subject to Phase 2 investigation each year, and it is not as interventionist as the other proposed standards (Balance of harm and Reverse standard of proof). Therefore, it is unlikely to undermine mergers pro-innovation and pro-competitive effects.

Who will be responsible for enforcing the new ex-ante regulation

Both proposals introduce new specialized units to enforce the new regulations. Under the DMA, the Commission suggested that by 2027, it will recruit 80 new officials and administrative staff.[59] It is not yet confirmed whether the new unit will be under the Directorate General or DG Competition.[60] Similarly, in April 2021, the UK established the DMU in a non-statutory form in the shadow of the CMA to enforce such rules.

In contrast to the DMU, there is no mention of cooperation between any sector regulators and the DMA. The DMA identified that the exclusive competence to enforce the new rules is in the hand of the Commission, thus ensuring coherent enforcement across all the EU.[61] However, member states will participate in enforcing DMA through the Digital Markets Advisory Committee. Such a committee will be consulted before any related digital gatekeepers' decision is enforced.[62] In addition, such a committee has the power to call on the Commission to identify new gatekeepers through sector inquiry.[63] Ultimately, any delegated act related to the

ndle/JRC122910> (accessed: 16/11/2021), (2021) Joint Research Centre of the European Commission.
[57] Ibid 28
[58] Ibid 3, Para. 4.138 and Para. 4.146
[59] Ibid 3.
[60] Ibid 4.
[61] Ibid 3, p. 7.
[62] Ibid 3, p. 7.
[63] Ibid 3, Art. 33

DMA adopted by the Commission should be first endorsed by the committee.[64]

Such exclusiveness in the commission competencies, as Monti confirmed, is justified for various reasons;[65] the global nature of these gatekeepers, across the whole EU market, gatekeepers are expected to supply the same services. More importantly, not all national authorities are equipped to oversee such gatekeepers, given the limited resources. It is expected that only a handful of firms will be subject to such regime, and it is doubtful that the appropriate approach will be to require each Member State to set up units to enforce such rules. Ultimately, it is believed that the Commission will be in a better place to ensure compliance rather than doing so by 27 national regulators.

Although such reasoning is well established, the role of each Member state remains limited in the Digital Markets Advisory Committee. Some would even argue that it is surprising that any institutional cooperation form is not incorporated with national agencies and telecom authorities.[66] More specifically, there is no evidence in the DMA of any form of collaboration with the digital economy highly involved EU authorities such as Data Protection authorities and BEREC. These question the ability of the commission's new unit to monitor these platforms without the help of any authorities.

On the other side of the English Channel, the situation is much different; the UK proposal confirms the importance of cooperation between different authorities in the digital market. Although the primacy to enforce the new rules is the task of the DMU, by negotiating the code of conduct, the DMU should consult other sector authorities such as Ofcom, ICO, and FCA.[67] Additionally, the DMU will work closely with the CMA enforcement teams, who are currently taking enforcement action against big techs. This leads to sufficient knowledge and expertise to deal with these firms in the best way possible. As explained, the DMU role is based on an evidence-based analysis approach as it gathers experience and adapts rules in a complex, fast-moving digital market, rather than merely a law enforcement role that would be considered sub-optimal.

Interaction between DMA and the UK regulatory frameworks

[64] Ibid 3, *Art* 10(1).
[65] Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement',(2021) SSRN<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730> accessed 12/11/2021.
[66] Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis', (2021), SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276> accessed 12/11/2021.
[67] Ibid 17

Trade and Cooperation Agreement was established in December 2020 to safeguard the trade after Brexit between the UK and the EU.[68] There is a chapter on 'digital trade' in the agreement,[69] which is identified 'by means of electronic communications' trade.[70] It includes prohibiting custom duties, 'prior authorization' to deliver the digital service, ensuring high data protection standers and several provisions on institutional cooperation.[71] The 'digital trade' definition will likely cover the online services delivered by these gatekeepers and SMS platforms, which will be subject to the two regimes. Therefore, the content of the two regulations will properly be debated by the Investments and Digital Committee. However, as the nature of the agreement is nowhere near the European Economic Area agreement, the obligation only lies in not introducing trade restrictions, contrary to the trade agreement. Therefore, both the DMA and UK proposals' enactment of different standards to regulate online platforms are unlikely to go against the free trade agreement wording.[72]

In the unlikely circumstance of a dispute arising in the context of the free trade agreement and the new regulations compatibility, the EU Court of Justice will not hear it; instead, the arbitration panel will, with a final remedy to suspend treaty obligation temporarily. Therefore, the ability of the dispute resolution system to resolve the negative impact of the different regulatory standards in each jurisdiction and their impact on the trade of both sides of the English Channel is relatively ineffective.

The DMA and member states

DMA allows member states to apply competition rules alongside the DMA and develop their regimes even if they are linguistically different, as long as they adhere to the DMA (Germany introduced similar regime under Section 19(a) GWB).[73] In the same vein, nothing prevents NCAs from, for instance, adopting self-preferencing sanction based Art. 102 TFEU or the corresponding national provision, parallel to a Commission decision based on the DMA on the same conduct. However, this kind of parallel application of different regulations targeting digital platforms will ultimately increase compliance costs and create legal uncertainty. More importantly, it might restrict the free movement of digital services in the European Union digital market.

[68] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part. OJ L-444/14, 31.12.2020.
[69] Ibid, *Title III (N 15)*-Part II.
[70] Ibid, Digit Art 2(1).
[71] Ibid, Art. DIGIT.8, Art. DIGIT.9, Art. DIGIT.7 and Art. DIGIT.13
[72] Ibid 6
[73] ibid 3 *Art* 1(5).

Conclusion

Following several years' debate and discussion, the new ex-ante regulations have emerged to remedy the shortcomings of the traditional antitrust law. The new proposals on both sides of the Channel will create similar yet distinct regulations which will apply side by side. Both proposals have similar features as to when the ex-ante rules will apply. Despite the semantic distinction, both regimes are concerned with limited big techs that control the digital eco-system, aiming to encourage competition in the digital market and prevent unfair practices. A major difference emerged in the different types of obligations imposed on online platforms, specifically regarding the extent of discretion enjoyed by each enforcement authority in shaping the obligations. The DMU enjoys much more discretion, thereby offering flexibility in fastmoving diverse digital economy. However, different regulatory standards could restrict the movement of digital services and substantially rise the compliance costs.

The two proposals introduce different powers to enforce the new rules: DMU codes of conduct and PCIs, while binding decisions and market investigations by the Commission. The new regimes requiring new specialized units to enforce the ex-ante regulations confirms a turning point to the traditional competition policy. The extent of cooperation between the different sector regulators and the new enforcement authorities is another area where the two regulations diverge. Contrarily to the UK proposal, the DMA offers a relatively limited degree of cooperation through Digital Markets Advisory Committee. Such lack of involvement of any other authority risks the conflict of decisions by the DMA and other NCAs and sector regulation. Such differences confirm that the two legislations represent different models of ex-ante regulation.

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