

Diritto dell'innovazione/Innovation Law

diretta da/Series Editors

G. Contaldi, G. Martinico, G. Morgese, O. Pollicino, G.M. Ruotolo

EU Rules on Transparency and Liability for Online Platforms

Challenges and Perspectives

Edited by

Giuseppe Morgese, Ilaria Ottaviano, Sara Pugliese, Nicola Ruccia



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“Diritto dell’innovazione”

Perché una Collana così intitolata? Si tratta, ne siamo consapevoli, di un’espressione che evoca un tema che potrebbe sembrare, ad una prima lettura, generico ancor prima che generale, e quindi di difficile individuazione, concretizzazione e configurazione. Semplicemente perché la prima impressione, come spesso capita, rischia di essere errata o quanto meno parziale, non essendo in grado di cogliere il valore aggiunto tanto dell’espressione, quanto del progetto culturale e scientifico che sta dietro la sua scelta.

Nella locuzione “diritto dell’innovazione” il valore aggiunto sta, a nostro avviso, nella sua capacità di evocare, da una parte, la vocazione genetica di *ogni* tecnologia, e in particolare di quella *digitale*, a innovare lo *status quo* e, quindi, la sua capacità di poter innescare percorsi di progresso economico e sociale, non fosse altro che per l’effetto trasformativo che porta con sé, in quella che è stata spesso definita *convergenza digitale*.

Dall’altra parte, il riferimento al “diritto” – che ovviamente include il profilo legato alla tutela *dei diritti* e all’elaborazione di modelli di regolamentazione – vuole porre l’accento, quale contraltare, sulla necessità di una trazione normativa e prescrittiva dello strumentario giuridico a disposizione, che consenta un bilanciamento ragionevole tra innovazione e progresso da una parte e, per l’appunto, protezione dei diritti e dei valori fondamentali delle democrazie liberali dall’altra.

Questa precisazione relativa al titolo della Collana ci consente ora di passare al secondo dei profili evocati, cioè quello legato alla progettualità e quindi al metodo che caratterizzerà gli studi che saranno ospitati nella Collana stessa.

L’esercizio di bilanciamento ragionevole prima evocato ha, a nostro avviso, una dimensione necessariamente multilivello, in cui convivono almeno quattro ambiti di ricerca ontologicamente complementari, perché nessuno di noi crede ai fili spinati tra settori disciplinari (come è evidente, peraltro, dalla formazione dei cinque direttori).

Innanzitutto, partendo dal basso di una ideale piramide, il livello interno, costituzionale, legato alle regole che deve darsi l’ordinamento giuridico della rete e alla consapevolezza che categorie classiche del diritto costituzionale come sovranità e territorio sono terribilmente attuali e rilevanti anche in quello che solo superficialmente può esser definito *mondo dei bit*, e che invece ha una dimensione reale assai rilevante.

In secondo luogo, il livello europeo, non fosse altro per la matrice e l’influenza eurounitaria di moltissime delle legislazioni domestiche rilevanti in ambito digitale e la necessità di tutelare valori e tradizioni costituzionali (sempre meno) comuni degli Stati membri.

In terzo luogo il livello internazionale: la “race to regulation” in tema, ad esempio, di intelligenza artificiale ha una natura ontologicamente transnazionale e l’Unione europea non può permettersi di essere una *Fortress Europe* digitale inespugnabile al suo interno ma senza ponti di interconnessione per cercare, e trovare, un linguaggio se non unificato, quanto meno armonizzato, e quindi da questi comprensibile, con gli altri poli regionali rilevanti, a cominciare da Stati Uniti e Cina.

In quarto luogo, e non assolutamente ultimo in senso di importanza, la prospettiva comparata, che a nostro giudizio costituisce la quintessenza di qualsiasi percorso di ricerca di natura e oggetto transnazionale, che sola consente una consapevole, profonda comprensione e contestualizzazione storica, culturale e giuridica dei trend normativi e giurisprudenziali all’interno dei singoli ordinamenti considerati alla luce dei valori di riferimento.



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The territorial scope of application of the DMA

Fabrizio Marongiu Buonaiuti

Abstract: The DMA defines expansively its territorial scope of application, addressing the delivery of core platform services to business users established in the Union or end users located in the Union by actors designated as gatekeepers, irrespective of their place of establishment or residence and independently of the law otherwise applicable to the provision of such services. The Chapter discusses the rationale for the broad approach adopted by the DMA in this respect, considering previous instances where the EU legislator or judiciary have adopted a similar approach, particularly in the fields of competition and data protection law. This approach is viewed as necessary to ensure the effectiveness of the Regulation in a domain dominated by influential actors primarily based in third countries. Some final considerations concern the indirect extraterritorial effects that the DMA is likely to produce, both in terms of establishing a model that national or regional regulators in other areas of the world might follow and in terms of inducing a phenomenon of spontaneous compliance by actors in the digital sector, even beyond its scope of application.

Keywords: Digital markets – Gatekeepers – Extraterritoriality – Brussels effect.

Summary: 1. The territorial scope of application of the DMA. – 2. The model established by the effects doctrine regarding the territorial scope of application of European Community competition law and its subsequent application in the field of data protection. – 3. The debate concerning extraterritoriality, as implied in the adoption of such a model of regulation, with particular regard to the distinction between direct and indirect forms of extraterritoriality. – 4. The real terms of the question in respect of the DMA: A proposed rather than imposed model for regulating digital markets.

1. The territorial scope of application of the DMA

The Regulation 2022/1925 on contestable and fair markets in the digital sector, commonly known as the Digital Markets Act (DMA), establishes expansively its territorial scope of application. It addresses the delivery of core platform services provided or offered to business users established in the Union, or to end users established or located in the Union, by actors designated as gatekeepers. These are to be identified as such by the European Commission in accordance with the criteria set out in the act itself. Provided the connection test is satisfied, the DMA applies irrespective of the place of establishment or residence of the gatekeepers,

and regardless of the law otherwise applicable to the provision of the services¹.

The latter specification confers an overriding mandatory character upon the rules set out in the DMA and seeks to prevent the risk of evasion by third-country-based gatekeepers – as most of them currently are² – by imposing choice-of-law clauses that subject the provision of the relevant services to the law of their country of establishment³. A similar avoidance effect, which the specification aims to prevent, could arise through the operation of objective connecting factors, pointing, where services are provided to business users, to the law of the country of establishment of the provider. This, once more, in the case of non-EU gatekeepers, would be the law of a third country⁴.

Surprisingly enough, a comparable specification does not appear in the otherwise

¹ Art. 1(2) of the Regulation (EU) 2022/1925, 14.9.2022, on contestable and fair markets in the digital sector.

² By a series of decisions adopted on 5 Sept. 2023 pursuant to Art. 3 DMA, the European Commission designated the first six gatekeepers: Alphabet Inc., incorporated in California (U.S.) and operating various platform services branded as Google; Amazon.com Inc., incorporated in Seattle, Washington (U.S.); Apple Inc., incorporated in California, U.S.; ByteDance Ltd, incorporated in the Cayman Islands and operating the platform service branded as TikTok; Meta Platforms Inc., headquartered in California (U.S.) and operating a series of well-known platform services including Facebook, Instagram and Messenger; Microsoft Corporation, headquartered in Redmond, Washington (U.S.). By a subsequent decision of 13 May 2024, the Commission also designated Booking Holding Inc., headquartered in Norwalk, Connecticut, U.S., as a gatekeeper. See the dedicated webpage on the European Commission website, available at digital-markets-act.ec.europa.eu/gatekeepers_en. See also, noting that the subjects designated as gatekeepers so far are essentially third-country based, H. Drewes, A. Kirk, “Extraterritorial Effects of the Digital Markets Act: The ‘elusive long arm’ of European digital regulation”, *World Competition*, 2024, p. 473 ff., p. 474.

³ As in the well-known Case C-381/98, 9.9.2020, *Ingmar GB*, EU:C:2000:605, paras 20-25, where the European Court of Justice (ECJ) ruled out that a choice-of-law clause in favour of the law of the U.S. State of California included in an agency contract concluded between a principal incorporated there and an agent established in the UK, at that time a Member State, could rule out the application of the rules concerning the indemnities due to self-employed commercial agents upon termination of an agency contract, contained in Directive 86/653/EEC, 18.12.1986, on the coordination of the laws of the Member States relating to self-employed commercial agents.

⁴ Based on the provision in Art. 4(1)(b) of the Regulation (EC) No 593/2008, 17.6.2008, on the law applicable to contractual obligations (Rome I Regulation), in the absence of a choice-of-law agreement between the parties, a contract for the provision of services is to be governed by the law of the country where the provider of the service has its habitual residence, also when the country in question is a third country, due to the universal application of the choice-of-law rules embodied in the Regulation pursuant to its Art. 2. Different rules apply, nonetheless, if the user of the service is considered a consumer, in which case Art. 6 of the same Regulation mandates the application of the law of the country of the consumer’s habitual residence, which, within the framework of the DMA, would in principle be the law of a Member State, provided it could be proved that the professional either pursued his or her activities in the country of the consumer’s habitual residence or directed those activities, by any means, to that country, or to more countries including the one concerned. See, concerning the interpretation of this requirement, Joined Cases C-585/08 and C-144/09, 7.12.2010, *Pammer and Hotel Alpenhof*, EU:C:2010:740, paras 75-84.

largely similar rule establishing the territorial scope of application of the parallel Digital Services Act (DSA) ⁵. Nonetheless, upon closer scrutiny, it should be considered that, unlike the DMA which mostly operates from a horizontal perspective by ensuring fair and contestable market conditions in the domain of core platform services, the DSA predominantly operates from a vertical perspective, aiming to regulate the provision of digital services to their users. The latter might be end users, who, being established in the Union, are eligible to qualify as consumers, and, accordingly, to be protected from the risk of being deprived of the protection granted to them by the act and the other relevant provisions of EU law as a consequence of the application of a third-country law ⁶. Alternatively, in the case of professional users, the provision of such services would be governed by Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services, whose application is expressly unaffected by the DSA ⁷ and whose rules apply irrespective of the provider's place of establishment and independently of the law otherwise applicable ⁸.

2. The model established by the effects doctrine regarding the territorial scope of application of European Community competition law and its subsequent application in the field of data protection

The solution adopted by the DMA regarding the territorial scope of application is likely to be affected by a degree of extraterritoriality, as it effectively aims to regulate the conduct of non-EU-based entities, such as powerful operators of large digital platforms that provide a wide variety of services critical for the functioning of digital markets. Nonetheless, the solution most probably resorted to the only feasible mode of implementing a regulation capable of being effective in a truly global market, namely core digital platform services, which is currently dominated by third-country based players ⁹.

⁵ Art. 2(1) of the Regulation (EU) 2022/2065, 19.10.2022, on a Single Market for Digital Services.

⁶ Under Art. 6(2) of the Rome I Regulation, a choice of law agreement entered into in respect of a consumer contract may not have the effect of depriving a consumer of the protection which would have been available in virtue of the law applicable in the absence of choice, namely the law of the country of habitual residence, which, when the act is deemed to apply, will normally be a Member State.

⁷ Art. 2(4)(e) DSA.

⁸ Art. 1(2) of the Regulation (EU) 2019/1150, 20.6.2019, on promoting fairness and transparency for business users of online intermediation services. See F. Marongiu Buonaiuti, "L'ambito di applicazione territoriale del Digital Markets Act e del Digital Services Act tra applicazione 'extraterritoriale' del diritto dell'Unione europea e attribuzione di un carattere internazionalmente imperativo alle sue norme", in G. Caggiano, G. Contaldi, P. Manzini (eds.), *Verso una legislazione europea su mercati e servizi digitali* (Cacucci, 2021), p. 171 ff., pp. 182-185.

⁹ See, again, H. Drewes, A. Kirk, "Extraterritorial Effects of the Digital Markets Act", cit., p. 475 ff.

Ultimately, the assumption that even third-country-based operators can come under the purview of EU rules insofar as they provide services to EU-based users, and therefore operate within the EU internal market, is not entirely foreign to the logic inherent in establishing the territorial scope of application of other sets of EU rules that similarly address domains where it would be difficult to limit the application of the relevant provisions solely to actors established in the Union. This is inevitably the case for cross-border activities or those frequently performed within the Union by operators based in third countries. For the Regulation being introduced to be effective, it must also address relevant third-country-based players, since their activities are directed toward users or recipients of the services or products located in the EU ¹⁰.

Probably, the first and best-known example of the aforementioned approach within the framework of EU legislation can be traced back to the spatial applicability of EU – and formerly EC – competition law. As the material objective of the policy in question is the preservation of the proper functioning of the internal market, the general assumption prevailing in that field is that EU competition law must, in principle, apply to anti-competitive behaviour capable of producing adverse effects on the functioning of such a market, regardless of whether the actors to which the said behaviour is attributed are established within the EU rather than in a third country ¹¹.

This construction has traditionally been classified as a form of effects-based prescriptive jurisdiction, whereby the EU has decided to regulate the conduct of economic actors based on the effects that such conduct is likely to produce within the borders of its legal system, independently of the nationality or place of establishment of the actors concerned, as well as the location where the relevant decisions of the said actors have been made. The likely jurisdictional overreach of that approach is curtailed in its practical implementation across the different branches of EU competition law, where the effects-based approach to prescriptive jurisdiction is qualified to a greater or lesser extent. As an example, with regard to the EU Merger Regulation, even undertakings established in a third country come within its purview whenever the merger they implement exceeds both a worldwide and an EU turnover threshold, the latter being based on the volumes of goods sold or services provided within the EU internal market ¹². In other sectors of competition law,

¹⁰ See, for a broader discussion of the phenomenon, J. Scott, “The new EU ‘extraterritoriality’”, *Common Market Law Review*, 2014, p. 1343 ff.

¹¹ See, among others, *id.*, p. 1356 f.; M. Martyniszyn, “On extraterritoriality and the Gazprom case”, *European Competition Law Review*, 2015, p. 291 ff.; H. Drewes, A. Kirk, “Extraterritorial Effects of the Digital Markets Act”, *cit.*, p. 476, referring to Case C-413/14 P, *Intel v Commission*, EU:C:2017:632, paras 40-65.

¹² Art. 1(2)(3) of the Regulation (EC) 139/2004, 20.1.2004, on the control of concentrations between undertakings (the EC Merger Regulation). See J. Scott, “The new EU ‘extraterritoriality’”, *cit.*, p. 1356 f.

such as agreements restricting competition, the effects doctrine has materialized in an implementation test, whereby agreements likely to result in a restriction of competition come under the purview of EU competition law when they are to be implemented in the EU¹³. A similar approach in terms of qualified effects, whereby the relevant conduct appears to have either actual or potential, immediate, substantial, or foreseeable effects within the EU internal market, is relied on in respect of conduct implying abuse of a dominant position¹⁴.

The so-called effects doctrine, whereby EU rules tend to apply to activities performed by non-EU established actors taking place outside the European Union based solely on the likelihood that the activity in question will produce substantial effects within the EU, has been further deployed in the regulation of financial markets – a field that can be considered transnational and heavily dominated by influential actors frequently established in third countries. Relevant legislation adopted by the EU in this area, such as the European Market Instruments Regulation (EMIR), concerning over-the-counter derivative contracts¹⁵, or the Markets in Financial Instruments Regulation (MiFIR)¹⁶, took their inspiration from this solution¹⁷.

Probably the most significant example of extraterritoriality – or, rather, a broad approach to regulating the territorial scope of application of EU rules to overcome the threat to their effectiveness resulting from the inherently transnational and dematerialised nature of the activities concerned – can be found in recent times in the EU rules concerning the treatment of personal data. In this respect, Art. 3 of the Regulation 2016/679, also known as the General Data Protection Regulation (GDPR) contemplates three alternative grounds for the application of its rules¹⁸.

The first ground is triggered when the treatment of personal data occurs in the context of the activities of an establishment of a controller or processor of personal data in the Union, irrespective of whether the processing actually takes place in the Union or elsewhere. The second ground, more in line with the effects doctrine, relates to the fact that the processing involves data subjects located in the Union. The latter ground, nonetheless, is qualified in a likely attempt to strike a balance between the effectiveness of the protection offered to persons domiciled in the Union and the foreseeability of application from the viewpoint of actors established in a third country. This ground for application is met insofar as the data being processed

¹³ See, among others, Joined Cases 89, 104, 114, 116, 117 and 125-129/85, 27.9.1988, *Ahlström v Commission*, EU:C:1988:447, paras 16-18; J. Scott, “The new EU ‘extraterritoriality’”, cit., p. 1357.

¹⁴ *Intel v Commission*, para. 42.

¹⁵ Arts 4(1)(a)(v) and 11(12) of the Regulation (EU) 648/2012, 4.7.2012, on OTC derivatives, central counterparties and third-party and trade repositories.

¹⁶ Art. 24(1) of the Regulation (EU) 600/2014, 15.5.2014, on markets in financial instruments.

¹⁷ See further J. Scott, “The new EU ‘extraterritoriality’”, cit., p. 1357.

¹⁸ Art. 3 of the Regulation (EU) 2016/679, 27.4.2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

are related to the supply of goods or the provision of services to data subjects located in the Union. Alternatively, processing the said data falls under the purview of the GDPR whenever it is conducted in the context of monitoring the behaviour of data subjects in the Union, provided that the relevant behaviour occurs within the Union itself. The third ground, which appears to be of more limited relevance in material terms and reflects adherence to the traditional principle of territoriality, refers to the processing of personal data by a controller not established in the EU that takes place in a location subject to the law of a Member State by virtue of public international law, such as diplomatic or consular posts¹⁹.

The first ground contemplated by Art. 3 GDPR has been the subject of extensive interpretation by the ECJ in its well-known judgment in *Google Spain*, in relation to the corresponding rule outlined by Directive 95/46, which embodies the pre-existing legislation on data protection²⁰.

In fact, the Court provided a broad interpretation of the rather vague criterion whereby, for the relevant EU rules to apply, the processing of personal data must occur in the context of the activities of an establishment of the controller or processor in the Union. The Court considered the existence of a link of instrumentality between the activity materially carried out by the EU-premised establishment and the processing of the personal data concerned to be sufficient for that purpose, even though the processing activity, strictly intended, is not carried out at the establishment located in the Union. In fact, in the *Google Spain* case, the processing of the relevant data did not materially take place at the premises of Google Spain, a subsidiary of Google Inc., the U.S.-based corporation operating the well-known Google search engine. Nonetheless, a functional nexus existed between the activities performed by the Spanish subsidiary, which offered positioning services on the Google search engine to traders in Spain, and the processing of personal data carried out by Google Inc., such that the activities performed by the subsidiary contributed to the financing of the operation of the Google search engine.²¹

Equally inspired by a logic favouring an expansive interpretation of the scope of application of EU data protection law was the subsequent ECJ ruling in the *Weltimmo* case, where the Court adopted a broad interpretation of the notion of establishment in the Union. This interpretation allows the requirement to be considered met not only in cases where a third-country based controller or provider possesses a subsidiary in a Member State, as in the case of *Google Spain*, but also in the presence of any form of stable organisation of the controller or provider in

¹⁹ See Recitals no. 22 to 25 GDPR; see also M. Gömann, “The new territorial scope of EU data protection law: deconstructing a revolutionary achievement”, *Common Market Law Review*, 2017, p. 567 ff., p. 574 ff.

²⁰ Case C-131/12, 13.5.2014, *Google Spain and Google*, EU:C:2014:317.

²¹ *Google Spain and Google*, paras 50-55; M. Gömann, “The new territorial scope of EU data protection law”, cit., p. 570 ff.

the Union, regardless of its legal form²². As the Court specified in its later judgment in the *Amazon* case, such a limited form of stable organisation in a Member State requires some form of physical presence and cannot consist solely of the existence of a website accessible to users located in a Member State²³.

With regard to the criterion based on processing personal data related to individuals in the EU in connection with the provision of goods or the offering of services to such individuals, reference appears to be made to the corresponding criteria relied upon by the ECJ for establishing the presence of a commercial or professional activity directed towards one or more Member States. This is a prerequisite for applying the special rules of jurisdiction regarding consumer contracts, currently embodied in the Brussels I-bis Regulation on jurisdiction, recognition, and enforcement of judgements in civil and commercial matters²⁴.

Within the framework of the aforementioned Regulation, or, rather, the corresponding rules embodied in the earlier Brussels I Regulation, the Court clarified that, for the purposes in question, the mere presence of a website owned or operated by the trader, accessible from the Member State where the consumer is domiciled, could not be deemed sufficient, particularly considering the ubiquitous nature of information available on the Internet²⁵.

For these purposes, other significant factors are likely to be taken into account, as they reveal the true intention of the trader to direct his or her services or offers of goods for sale to persons domiciled in the Member State concerned, and perhaps others. The evidentiary factors envisaged by the Court in this respect include the use of top-level domain names pointing to the Member State concerned, the use of neutral top-level domain names, the indication of a postal address and/or telephone numbers displaying international postal or dialling codes, and, if relevant, the provision of itineraries for reaching the premises of the trader from the Member State where the persons concerned are domiciled. Additionally, it may involve mentioning customers from the Member State in question or other Member States, including the one concerned, such as by providing reviews from customers from the Member States in question²⁶.

²² Case C-230/14, 01.10.2015, *Weltimmo*, EU:C:2015:639, paras 35-39; see M. Gömann, “The new territorial scope of EU data protection law”, cit., p. 572 ff.

²³ Case C-191/15, 28.7.2016, *Verein für Konsumenteninformation*, EU:C:2016:612, paras 75-77; M. Gömann, “The new territorial scope of EU data protection law”, cit., p. 572 f.

²⁴ Art. 17(1)(c) of the Regulation (EU) 1215/2012, 12.12.2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

²⁵ *Pammer and Hotel Alpenhof*, paras 68-74, referring to Recital no. 24 of the Rome I Regulation, and to a joint declaration by the Council and the Commission upon the adoption of the Regulation (EC) No 44/2001, 22.12.2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), pointing to the fact that the mere existence of a website accessible from the Member State of the consumer’s habitual residence is not sufficient for the purposes of the corresponding rule under Art. 15(1)(c) of the Regulation.

²⁶ *Pammer and Hotel Alpenhof*, paras 80-83.

Conversely, within this context, the Court gave less weight to other factors, such as the language or currency used, as long as these are the same as those in use in the country where the trader is established²⁷.

The criteria mentioned above, conceived for the intra-EU scenario in which, at least within the former Brussels I framework, the jurisdiction rules in question operate, would nonetheless be fairly easily adapted to the case considered here, of an extra-EU trader or professional directing his or her activities to data subjects located in the Union, as within the framework of the GDPR rules setting out the limits to its territorial or personal scope of application²⁸.

3. The debate concerning extraterritoriality, as implied in the adoption of such a model of regulation, with particular regard to the distinction between direct and indirect forms of extraterritoriality

As our inquiry has demonstrated through the various examples, the European Union increasingly applies its rules to activities conducted by entities not based in the EU, even those that do not take place in a Member State, whenever EU-based entities are involved or the proper functioning of the internal market may be affected. This trend is now widespread and consistent across various regulatory fields and can be seen as a legislative practice that has become well established. In reality, as previously noted, this approach should be seen as largely dictated by the material conditions under which certain activities and services are carried out in the current economic context. In this context, the advancement of European integration is closely linked to the ongoing spread of globalisation, despite some recent efforts to forcibly reverse the trend. This tendency suggests that a growing number of non-EU economic operators are providing their services to users within the EU, a phenomenon naturally supported by digital technologies, which allow providers to deliver services online to users situated in nearly any location, as seen with the core platform services dealt with in the DMA²⁹.

²⁷ *Id.*, para. 84.

²⁸ M. Gömann, “The new territorial scope of EU data protection law”, cit., p. 584 ff.; C. Kohler, “Conflict of law issues in the 2016 Data Protection Regulation of the European Union”, *Rivista di diritto internazionale privato e processuale*, 2017, p. 653 ff., p. 660.

²⁹ Concerning the distinctive features of the digital market, see, among others, G.M. Ruotolo, “La lotta alla frammentazione geografica del mercato unico digitale: tutela della concorrenza, uniformità, diritto internazionale privato”, *Diritto del commercio internazionale*, 2018, p. 501 ff., p. 503 ff.; G. Caggiano, “La proposta di *Digital Service Act* per la regolazione dei servizi e delle piattaforme online nel diritto dell’Unione europea”, in G. Caggiano, G. Contaldi, P. Manzini (eds.), *Verso una legislazione europea*, cit., p. 1 ff., p. 2 ff.; G. Contaldi, “Il DMA (Digital Markets Act) tra tutela della concorrenza e protezione dei dati personali”, *Ordine internazionale e diritti umani*, 2021, p. 292 ff., p. 294 ff.; P. Manzini, “Equità e contendibilità dei mercati digitali: il Digital Markets Act”, in G. Caggiano, G. Contaldi, P. Manzini (eds.), *Verso una legislazione europea*, cit., p. 99 ff., p. 101 ff.; A.C.

In the legal literature exploring the aforementioned legal phenomenon, a distinction is proposed between two different and parallel modes in which it is likely to occur: direct extraterritoriality and indirect extraterritoriality³⁰.

Regarding the former, which may be described as the ability of the relevant EU legislation to impose a specific form of conduct on actors established outside the territory of the Member States concerning activities strictly speaking carried out outside Union territory, probably more than true form of extraterritoriality, it may be appropriate to speak of an expansive notion of territoriality³¹.

In fact, as noted above in reviewing the most salient cases where EU legislation has adopted this approach, the applicability of the relevant EU rules is regularly triggered by a substantial connection of the activity concerned with EU territory, either in terms of addressing EU-based subjects or affecting the EU internal market. As a rule, it is not the activities of actors established in third countries that are addressed by EU legislation; this occurs solely to the extent that the activities have the aforementioned effects within the regulated domain. Such a broad form of territoriality, in the variable terms in which it is concretely implemented across the different fields reviewed, generally seems consistent with both a requirement of necessity – since, by the very nature of the economic activities involved, the adoption of rules limiting their effects solely to actors established and activities conducted within the EU would hardly be effective – and with a criterion of proportionality. Concerning the latter criterion, the measure of the impact of the rules in question on non-EU established actors generally reflects an effective ability of their activities to affect EU-based subjects, either by targeting them directly or by impacting the EU internal market in terms of meeting certain thresholds, thereby establishing a substantial, and not merely apparent, connection between the activity in question and the EU legal and economic framework³².

Regarding indirect extraterritoriality, a markedly different sort of legal issue is likely to come under scrutiny. Unlike so-called direct extraterritoriality, indirect

Witt, “The Digital Markets Act – Regulating the Wild West”, *Common Market Law Review*, 2023, p. 625 ff., p. 626 ff.

³⁰ See H. Drewes, A. Kirk, “Extraterritorial Effects of the Digital Markets Act”, cit., p. 475 ff.

³¹ As observed by J. Scott, “The new EU ‘extraterritoriality’”, cit., p. 1343 f., in fact, in the circumstances under consideration the application of the EU legislation is generally premised on a territorial connection of some sort of the conduct being regulated with the EU territory, based on the fact that EU-based subjects are affected by the conduct in question or that it has an impact on the EU internal market. Accordingly, to speak of a true form of extraterritoriality in such circumstances is probably likely to amount to an over-simplification, as it appears more plausible to style the said approach in terms of an expansive conception of territoriality.

³² See in particular the grounds upheld by the ECJ in considering the significant effects test as a legitimate justification for the application of EU competition law in relation to anticompetitive conduct put into place by a third-country-established undertaking, even when the agreements or other relevant acts are passed in a third country, in *Ahlström v Commission*, paras 16-18, and more recently in *Intel v Commission*, paras 40-65.

extraterritoriality does not refer to the ability of EU legislation to formally impose bounds on third-country actors or to regulate activities that do not materially take place within the EU; rather, it pertains to the EU's approach to acting in a standard-setting capacity. That is, its ability to establish a model for regulating critical fields of economic activity is likely either to promote voluntary compliance by economic actors operating in the relevant field – even beyond the limits within which the legislation in question claims applicability – or to foster the development of comparable regulations either at the national or regional level in other parts of the world. We are dealing, in this respect, with a phenomenon that has been given different labels in the legal literature concerned with it, either in terms of a normative power that the EU would, in substance, exercise well beyond the limits of the binding force of its legal system³³, or, in an extremely concise but telling form, of a 'Brussels effect'³⁴.

The ability of a regional economic integration organisation like the European Union to exercise such influence on the behaviour of economic actors beyond the scope of its legislation and to set a regulatory model likely to be followed, in closer or looser terms, by third countries or similar organisations, is grounded in a series of factors that appear to be simultaneously present in the case of the EU. These are related, first of all, to the large size of the market, which makes it attractive for producers of various kinds of goods and providers of different services. Other relevant factors include the effectiveness of the normative power, which is likely to turn out, as in the case with the DMA, to be an EU Regulation – a legal act capable of introducing an entirely binding and directly applicable set of rules across all Member States. Additionally, it serves as an inspiration for high standards in protecting users' rights and safeguarding general interests, such as fairness and contestability on the digital markets³⁵.

These are coupled with other factors which, in concrete terms, make the EU standards difficult for the relevant economic operators to evade. These should be identified with the inelasticity of the target, in such a way that if EU-based users are considered a target that an economic operator with a significant role in the

³³ See, among others, I. Manners, "Normative Power Europe: A Contradiction in Terms?", *Journal of Common Market Studies*, 2002, p. 235 ff.; T. Diez, "Normative Power as Hegemony", *Cooperation and Conflict*, 2013, p. 194 ff.

³⁴ See the seminal study by A. Bradford, *The Brussels Effect. How the European Union Rules the World* (Oxford University Press, 2020), p. 2 f., where the author styles the influx which the model posed by EU law has on the development of regulation by third countries or other regional economic integration organizations, as a *de jure* Brussels Effect, deeming the process of spontaneous compliance with EU standards by third-country based economic operators in circumstances falling beyond the scope of application of the relevant rules of EU law a *de facto* Brussels Effect. See also F. Marongiu Buonaiuti, "Anu Bradford, The Brussels Effect. How the European Union Rules the World", *Giornale di Storia costituzionale – Journal of Constitutional History*, 2020, n. 40, p. 299 ff.

³⁵ See, applying Bradford's rationale to the specific case of the DMA, H. Drewes, A. Kirk, "Extraterritorial Effects of the Digital Markets Act", *cit.*, p. 482 f.

relevant market cannot afford to neglect, it is simultaneously unlikely that those users would be willing to leave the EU to exempt themselves from EU legislation. Alongside this, relevance should be attributed to the indivisibility of the market in such a way that it would prove unfeasible, or economically inconvenient, for the relevant operators to arrange their business strategies in terms of the production of goods and the provision of services along two different lines: one for EU-based users and the other for non-EU-based users. This is particularly critical with regard to core platform services, where even though it is generally technically feasible, subject to the possibility of users using technical means inhibiting their localisation, to distinguish EU-based users from third-country based ones, the actual possibility of contemplating different ways of providing the services concerned is constrained by the cost-effectiveness of setting out separate modes of operation for the services, namely an EU-compliant one and a non-compliant one³⁶.

4. The real terms of the question in respect of the DMA: A proposed rather than imposed model for regulating digital markets

Turning to the DMA itself, the terms of its territorial scope of application set out in Art. 1(2) do not appear to exceed the limits of direct extraterritoriality or expansive territorial application experienced in relation to other EU legal acts, such as the GDPR or EU competition law. As already noted, considering the specific features of digital markets – characterised by the presence and overarching role of a limited number of significantly large players, the so-called gatekeepers, who operate large platforms providing a multiplicity of online services – the solution adopted, which makes its rules applicable based solely on the fact of offering those services to either business users or end users established or located in the Union, appears to be dictated by the need to ensure that EU standards are respected with regard to EU users. In this respect, an approach based on the place of establishment of the subject acting as a gatekeeper would have resulted in the adopted rules having a severely limited impact, considering that so far only one operator established in the Union has been identified by the European Commission as meeting the requirements set out in the DMA itself for providers of core platform services to be classified as gatekeepers, compared to the six operators established in third countries³⁷.

In the same vein, the further specification contained in Art. 1(2) DMA, whereby, in the circumstances contemplated in the provision, the Regulation contained in the

³⁶ See, focusing in particular on the prerequisite of non-divisibility as a decisive factor for the deployment of a *de facto* Brussels effect, in general terms, A. Bradford, *The Brussels Effect*, cit., p. 53 ff., especially, distinguishing between technical non-divisibility and economic non-divisibility, p. 57 ff., and, with specific regard to the case of core platform services addressed by the DMA, H. Drewes, A. Kirk, “Extraterritorial Effects of the Digital Markets Act”, cit., p. 483 ff.

³⁷ *Id.*, p. 475 ff.

act applies irrespective of the law otherwise applicable to the services in question, in such terms as to confer upon the rules set out in the act an overriding mandatory nature in the sense in which such an expression is used within the domain of private international law³⁸, is to be considered consistent with the goal pursued by the act. The objective, which consists of a general interest for the entire EU in ensuring fairness and contestability in digital markets, appears reasonable and proportionate. It ensures, by conferring an overriding mandatory character on its rules, that the application of the DMA cannot be circumvented through provision of the relevant services under third-country legislation, whether that legislation be made applicable pursuant to a choice-of-law clause introduced in contracts for the provision of services by a third-country based provider, or whether it would be applicable under conflict-of-laws rules such as those set out in the Rome I Regulation on the law applicable to contractual obligations³⁹.

Moving instead to the perspective of indirect extraterritorial effects, as discussed above, it seems perfectly likely that the DMA will play a significant role in standard-setting worldwide for the reasons already mentioned. Most of the prerequisites identified in the relevant legal literature for such effects to be likely to occur appear to be effectively met in this case: the size of the EU market, which makes it nearly impossible for relevant players to avoid addressing it in their business strategies; the effectiveness of both the law-making and law-enforcing capacities of the EU legal system, which make it difficult for any actor wishing to engage with users in the EU market to evade its rules; the high standards pursued in regulation, which render it illusory to circumvent them by proposing a more liberal and less demanding approach; the inelasticity of the regulatory target, which makes it unreasonable

³⁸ It should be noted for sake of clarity that different expressions are used to identify this category of rules within different legal systems, the French expressions of *lois de police* or *lois d'application immédiate* being of equally widespread use. As is well known, a definition of this category of rules is introduced in Art. 9(1) Rome I regulation, whereby “Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation”. This definition appears strictly inspired by that adopted by the ECJ in Joined Cases C-369/96 and C-376/96, 23.11.1999, *Arblade*, EU:C:1999:575, para. 30, which in turn seems to echo the definition proposed in earlier seminal studies by P. Francescakis, “Quelques précisions sur les lois d’application immédiate et leurs rapports avec les règles de conflit de lois”, *Revue critique de droit international privé*, 1966, p. 1 ff.; P. Francescakis, “Lois d’application immédiate et règles de conflit”, *Rivista di diritto internazionale privato e processuale*, 1967, p. 691 ff.

³⁹ As noted above, Section 1, in the absence of a choice of the applicable law by the parties, and except for cases where the user of the services concerned would qualify as a consumer, the conflict of laws rules set out in the Rome I Regulation mandates application of the law of the country where the service provider is habitually resident, i.e., the provider’s place of establishment, including in cases where that law is the law of a third country, in accordance with the universal application of choice-of-law rules contained in the Rome I Regulation, as well as in the other EU Regulations setting out choice-of-law rules in respect of other fields falling within the domain of judicial cooperation in civil matters.

to assume that EU-based users could relocate elsewhere to enable providers to escape the application of EU rules; and the indivisibility of the services provided.

As noted already, this is probably the only aspect in which third-country-based gatekeepers might avoid aligning the provision of their services with EU standards beyond the scope of application of the DMA, insofar as they might operate different versions of their platform services – one designed for EU-based users and one, or more, depending on the varying standards adopted in other parts of the world, for non-EU-based users. Nonetheless, although examples may be found in setting out different policies, particularly regarding data protection, by providers of online services based on the location of their respective users, a non-negligible limitation to this option is inherent in the cost-effectiveness of such a strategy. This is particularly true whenever the adoption of different versions of the same platform services, based on the location of the users, affects the structural features of the platforms – such as interoperability between the services offered – which would make it excessively burdensome and economically inefficient to establish different modes of operation based on users' locations⁴⁰.

Lastly, regarding the ability of the DMA to serve as a model for regulating digital markets that third countries or other regional integration organisations might follow, the proposal submitted by the European Commission in 2020 has in fact been followed in the short term by a series of legislative initiatives in leading third countries, including the UK⁴¹ (having left the Union), the U.S.⁴², Japan⁴³, South Korea⁴⁴ and Brazil⁴⁵. These initiatives aim to introduce comparable rules designed to protect the efficient and fair functioning of digital markets, both in general terms and in relation to specific types of digital services⁴⁶. The provisions adopted, or, for the time being, proposed in this regard frequently show similarities to those set out in the DMA, especially vis-à-vis the Digital Markets, Competition and Consumers Act (DMCCA) adopted in the UK in 2024, which similarly presupposes the

⁴⁰ See further H. Drewes, A. Kirk, "Extraterritorial Effects of the Digital Markets Act", cit., p. 482 f.

⁴¹ Digital Markets, Competition and Consumers Act 2024, 2024, Chapter 13.

⁴² Two legislative proposals have been proposed in the U.S. Senate: the American Innovation and Choice Online Act, S.2992 (2022) and the Open App Markets Act, S. 2710 (2021-2022).

⁴³ Act on Improving Transparency and Fairness of Digital Platforms, adopted on 27 May 2020, passed on 3 June 2020 and in force as of 1 February 2021.

⁴⁴ Fairness in Online Platform Intermediary Transactions Act (Draft). See R. Nazzini, "A Critical Appraisal of the KFTC's Draft 'Fairness in Online Platform Intermediary Transactions Act'", 30 Jan. 2022, available at ssrn.com.

⁴⁵ Legislative Proposal PL 2768/2022. See R. Rossini Parisi, "The Regulation of Competition in Brazil: Comments on the Digital Markets Law Bill (PL 2768/2022)", GW Competition & Innovation Lab Working Paper Series, 2024, n. 1, available at competitionlab.gwu.edu.

⁴⁶ See, for a broader survey, OECD, "G7 Inventory of New Rules for Digital Markets", OECD Submission to the G7 Joint Competition Policy Makers and Enforcers Summit, Nov. 2023; R. Murgatroyd, S. Lee, T. Van Dijk, "One Size Fits All? Competition Rules for Digital Markets Outside Europe", *World Competition*, 2023, p. 459 ff.

designation of particularly influential operators in the digital sector and provides for specific obligations to be imposed on them ⁴⁷.

Similar is the approach followed in the Japanese Act on Competition for Specified Smartphone Software ⁴⁸, whose substantive scope of application, as the title of the act shows, is, nonetheless, sector-specific, as critical and influential as market regulation in the specific field addressed by the said act may be ⁴⁹.

In general terms, the coexistence of similarities and differences between these concurrent legislative initiatives in the field concerned does not permit a straightforward answer to the question of whether those initiatives have followed the direction set by the EU in the DMA or whether a cross-fertilisation has taken place between these parallel initiatives ⁵⁰. Nonetheless, it seems inevitable to assume that the EU, with its impressive body of legislation adopted in just a few years to regulate the digital sector in its manifold forms, has most likely played the role of forerunner. Its model is certainly not deemed to be followed in its entirety in other jurisdictions where partly different needs and priorities might exist. Still, national and regional lawmakers in other parts of the world may find themselves having to confront it ⁵¹.

⁴⁷ Digital Markets, Competition and Consumers Act 2024, Chapter 2 – Strategic market status, especially Art. 2, providing for the designation of undertakings as having a strategic market status based on the criteria set out under Arts 3-8; Chapter 3 – Conduct requirements, setting out, especially, under Art. 20, the requirements to be imposed on undertakings designated as having strategic market status. See H. Drewes, A. Kirk, “Extraterritorial Effects of the Digital Markets Act”, cit., p. 481. A similar model, based on referring to “systematically important digital intermediaries” is to be followed in the relevant legislative proposal in India, whereas an investigation launched by the South African Competition Commission in 2020 referred to a notion of “leading platform status”, while in the Brazilian proposed legislation, reference is made to “the power to control essential access”: see R. Murgatroyd, S. Lee, T. Van Dijk, “One Size Fits All?”, cit., p. 471.

⁴⁸ Act on the Promotion of Competition for Specified Smartphone Software, passed on 12 Jun. 2024, expected to enter into force by the end of 2025, as reported on the website of the Japan Fair Trade Commission, available at jftc.go.jp.

⁴⁹ As indicated in the summary available on the website of the Japan Fair Trade Commission cited above, the act presupposes the designation by the said Commission of “Specified Software Providers”, based on the criteria set out in the act, imposing on these designated providers a series of obligations aimed at preventing adverse effects of their position on fair conditions of competition in the relevant sector.

⁵⁰ See H. Drewes, A. Kirk, “Extraterritorial Effects of the Digital Markets Act”, cit., p. 481 f.

⁵¹ *Id.*, p. 482, stressing the likely role as forerunner that the EU legislation is likely to have on a global scale; cf. R. Murgatroyd, S. Lee, T. Van Dijk, “One Size Fits All?”, cit., p. 477, pointing to the need to take into account the differences between different regional contexts, as a consequence of which any attempt to impose standards like those set out under the DMA on less mature digital markets might result in a counter-productive form of over-intervention.