Antitrust® Chronicle

DECEMBER · WINTER 2022 · VOLUME 3(2)

The Digital Markets Act

CPI COMPETITION POLICY® INTERNATIONAL

TABLE OF CONTENTS

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LETTER FROM THE EDITOR

Dear Readers,

The EU Digital Markets Act ("DMA") will impose far-reaching obligations on large technology firms operating in the European Union, and, as a consequence, worldwide. Notably, unlike existing rules, the DMA's definitions and obligations are designed to work without the need for an effects-based analysis. As such, they reflect the perceived need for speedy regulatory intervention in fast-moving technology markets (by contrast with the perceived lag in the enforcement of existing antitrust rules). The articles in this edition of the Chronicle seek to grapple with the implications of the DMA from a practical perspective.

To open, **Linsey McCallum, Antoine Babinet & Gunnar Wolf** outline the DMA as a new *ex ante* tool that is different from and complementary to competition law. Its goal is to ensure that digital markets characterised by the presence of gatekeepers are contestable and fair for all businesses in the EU. The qualitative thresholds set out in the DMA have a strong presumptive effect that can only be rebutted in exceptional circumstances. Once designated, gatekeepers bear the responsibility to comply with the directly applicable obligations that the DMA imposes on them within six months.

Alexandre de Streel builds on an analogy with Greek mythology, making recommendations to ensure that the implementation of the DMA does not end up becoming a Sisyphean task, i.e. one that is laborious and futile. Among the productive suggestions made by the author is that the European Commission should start by clarifying some of the obligations of the DMA on the basis of its overarching objectives (contestability and fairness) and principles (effectiveness and proportionality). Ultimately, the author contends, the success of the DMA will be gauged by the opportunities its creates for new innovators; and whether European digital markets are enlivened, rather than ossified over coming years (as has been seen in other sectoral regulation).

By contrast, **Philip Hanspach & Magdalena Viktoria Kuyterink** develop a more critical perspective, arguing that the DMA will impose far-reaching obligations on certain technology firms. The DMA's definitions and obligations are designed to take effect without effects-based analysis. The authors argue that this procedural goal will likely be missed. Rather, by being intentionally vague, the DMA will invite challenges, both on gatekeeper designation and obligations, that will only be resolved through thorough economic analysis.

Developing further on this line of argument, **Esther Kelly & Fiona Garside** make parallel points, noting that the duration of investigations was one of the key motivating factors behind the DMA. Sensibly, however, they note that a balance must be struck between speedy enforcement and protecting fundamental rights of defense. Commission officials, and, indeed, the text of the DMA itself, have emphasized that it is designed to complement (rather than replace) competition law. The concrete implementation of the DMA will give rise to opportunities as well as challenges: institutions, companies and advisors will need to work together closely to ensure that the DMA meets its objective of promoting consumer welfare without unduly chilling innovation.

Christian Ritz, **Benedikt Weiß & Tobias Kleinschmitt** take a broader perspective, noting that the power structures in digital markets are currently the subject of the attention of legislators in various jurisdictions. Given the possibility of fines up to 20 percent of the global turnover in case of intentional/negligent failure to comply with the DMA's core obligations, it is essential for affected companies to familiarize themselves with the DMA and to take the necessary precautions to ensure compliance with the DMA, especially as the DMA itself provides specific compliance obligations that must be implemented.

Taking a step further back, **Or Brook & Magali Eben** analyze the relationship between EU competition laws, national competition laws, and laws that regulate markets and market participants (e.g. unfair trading practices). The authors argue that the tests codified in the DMA represent a less-than-perfect solution, which is a result of a political compromise rather than legal-economic theory. The paper notes that this solution was at least partially inspired by the test for the resolution of conflicts under Articles 101 and 102 TFEU, and concludes by pointing to the difficulties of transplanting this thinking to the new DMA context.

Finally, **Arianna Andreangeli** discusses some of the implications of the DMA for the future application of the EU Competition rules in digital markets (and in particular for the continuing protection of the right against double jeopardy, enshrined in Article 50 of the EU Charter of Fundamental Rights). The author questions whether the possibility that the DMA and Articles 101 and 102 TFEU might apply concurrently would be incompatible with this important safeguard. Therefore, could a different approach provide a more balanced response to the need to reconcile effective competition enforcement with the observance of the DMA's ex-ante framework?

In sum, the articles in this edition of the Chronicle grapple the numerous novel dilemmas posed by the passage of the DMA. Only time will tell whether the new regime will serve to supplement or supplant the existing well-established antitrust rules governing the behavior of companies in technology markets, or whether the rules will have their predicted effect. The authors express divergent views, and this debate will no doubt continue long into the future.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

SUMMARIES

THE DIGITAL MARKETS ACT: TOWARDS A COMPLIANCE CONCEPT FOR GATEKEEPERS

By Christian Ritz, Benedikt Weiß & Tobias Kleinschmitt

The power structures in digital markets are currently the subject of the attention of legislators in various jurisdictions. This has been triggered by the rising market power of a few large digital companies ("Big Tech"), which are challenging the competitive structure of digital markets. In this article, we will focus on the European Union's approach to regulating Big Tech – the Digital Markets Act ("DMA"). With fines up to an equivalent of 20 percent of the global turnover in case of intentional/negligent failure to comply with the DMA's core obligations, it is essential for affected companies to familiarize themselves with the DMA and to take the necessary precautions to ensure compliance with the DMA, especially as the DMA itself provides specific compliance obligations that must be implemented. This article provides a brief overview of the DMA and focuses on specific measures that affected companies can incorporate into their compliance programs to ensure that they do not breach the (core) obligations of the DMA.

WHO SHOULD GUARD THE GATEKEEPERS: DOES THE DMA REPLICATE THE UNWORKABLE TEST OF REGULATION 1/2003 TO SETTLE CONFLICTS BETWEEN EU AND NATIONAL LAWS?

By Or Brook & Magali Eben

The relationship between EU competition laws, national competition laws, and laws that regulate markets and market participants (e.g. unfair trading practices) has been on the EU agenda from its very inception, and recently sparked additional debate with the entry into force of the DMA. The DMA replicates some of the concepts of Article 3 of Regulation 1/2003 to define the situations in which the EU regulation of gatekeepers excludes the application of other EU or national laws. Yet, the matter is far from settled. The test codified in Article 3 is a less-than-perfect solution, which is a result of a political compromise rather than legal-economic theory. This paper submits that the transposition of such a test to the DMA is likely to be met with an equal degree of legal uncertainty and fragmentation. It begins by discussing the conflicts of laws according to the DMA, shows that this solution was at least partially inspired by the test for the resolution of conflicts with Articles 101 and 102 TFEU, and concludes by pointing to the difficulties of transplanting the text of the latter into the former.

THE DIGITAL MARKETS ACT, EU COMPETITION ENFORCEMENT AND FUNDAMENTAL RIGHTS: SOME REFLECTION ON THE FUTURE OF *NE BIS IN IDEM* IN DIGITAL MARKETS

By Arianna Andreangeli

This article discusses some of the implications of the entry in force of the Digital Markets Act for the future application of the EU Competition rules in digital markets and in particular for the continuing protection of the right against double jeopardy, enshrined in Article 50 of the EU Charter of Fundamental Rights. It questions whether the possibility that the DMA and Articles 101 and 102 TFEU might apply concurrently might be incompatible with this important safeguard. On that basis the article argues whether a different approach to it could provide a more balanced response to the need to reconcile the demands of effective competition enforcement with the observance of the DMA's obligation and the efficient functioning of the ex-ante framework that the new Regulation introduces.

WHAT'S NEXT?

For January 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **Robinson-Patman Act**; and (2) **Defining Platform Markets**.

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CPI ANTITRUST CHRONICLES February 2023

For February 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **Mergers as Monopolization**; and (2) **White Collar Defense**.

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The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

THE DIGITAL MARKETS ACT – KEY ENFORCEMENT PRINCIPLES

BY LINSEY MCCALLUM, ANTOINE BABINET & GUNNAR WOLF[1]



1 Linsey McCallum is Deputy Director-General for Antitrust in the Directorate-General for Competition ("DG COMP"), Antoine Babinet and Gunnar Wolf work in DG COMP's Task Force Digital Markets Act. The views expressed are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Commission.

I. INTRODUCTION

The Digital Markets Act ("DMA"),[2] the EU's new regulatory tool to tackle the most pressing challenges to contestability and fairness raised by large digital platforms, has moved quickly through the legislative process to take its final shape. On March 24, 2022, the European Parliament and the Council, reached a political agreement on the adoption of the DMA. This agreement ended a 15-month long legislative debate triggered by the European Commission's proposal for a DMA in December 2020. While 15 months may sound like a long time, this is actually a very short time period for reaching an agreement on a completely new and powerful tool to regulate large digital platforms, reflecting the wide political consensus in the EU.

Following this political agreement, the DMA has now been published in the European Official Journal on October 12, 2022 and entered into force on the November 1, 2022.

The DMA has therefore concluded its legislative phase and will move into the enforcement phase. The enforcement timetable that lies ahead is ambitious, since the first wave of quantitative designations of gatekeeper platforms is due to happen around summer 2023. Designated gatekeepers will need to comply with the DMA's obligations in the first quarter of 2024.

Preparations to meet these enforcement milestones are well under way and they will accelerate further in the coming months.

As a reflection of the current state of the DMA, this article takes stock of some of the main final provisions in the DMA (II) and, looking ahead, it discusses a number of key enforcement principles which may guide relevant stakeholders in their interactions with the Commission (III).

II. FINAL DMA ARCHITECTURE

Overall, the EU co-legislators largely preserved the fundamental features of the Commission's proposal for the DMA. In particular, they endorsed the key principle according to which the DMA applies to a defined list of core platform services. They also confirmed that the DMA provides for an asymmetric regulation targeting the source of the problem, namely companies that enjoy an entrenched and durable position as a gateway for business users to reach end users. In the core platform services, market positions have become extremely difficult to contest and this may allow the gatekeepers to engage in unfair practices with respect to business and end users. Accordingly the regulation only applies to such companies, which, under the DMA, can be designated quantitatively or qualitatively as gatekeepers.

With respect to the nature of obligations imposed on these gatekeepers, the co-legislators also preserved the idea that designated gatekeepers have to abide by a limited set of clearly defined obligations, all of which are directly applicable and self-executing. Six months after being designated as a gatekeeper for a particular core platform service, gatekeepers will have to comply with all obligations.

As to the obligations, they also largely remained as proposed by the Commission, albeit with a couple of notable exceptions. For example, a new obligation for interoperability of text messages in messenger services has been included. There is also a staggered implementation clause for interoperability concerning group messages and audio or video calls.

III. KEY ENFORCEMENT PRINCIPLES

It is early days for the DMA; it is not yet applicable, and an enforcement practice will develop over time. Nevertheless, this section will already articulate some initial key enforcement principles reflecting guidance to be found in the text of the DMA and first contacts with stakeholders.

1. The DMA is a regulatory *ex ante* tool different from competition law. This means that competition law concepts and solutions are not applicable as such. Competition practitioners involved in DMA work should therefore take as a starting point the criteria as set out in the DMA and conduct a fresh analysis even on topics where there are partially overlapping competition law precedents.

2 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (OJ L 265, 12.10.2022, p. 1-66).

For example, it should be clear that the delineation of core platform services is different from the definition of relevant markets in antitrust or merger control law. The Annex to the DMA specifying the methodology for identifying and calculating end and business users for each core platform service listed in Article 2(2) contain some pointers and they differ from the criteria used in market definition assessments. Notably, the DMA sets out as main distinguishing factor the purpose for which a service is used. Unlike in competition law, it does not refer to demand or supply-side substitutability analysis. As a consequence, it is therefore likely that the delineation within the categories of core platform services will differ from the definition of the same markets in competition law cases.

Similarly, while it is clear that certain DMA obligations have been inspired by practices that have been subject to investigation in antitrust proceedings, these obligations constitute independent regulatory provisions whose scope may be different. This means that existing remedies for competition law infringements may not necessarily provide a fully transposable template in terms of how to comply with the DMA's obligations. It can be useful to look at the competition law precedents that inspired a given DMA obligation to understand aspects of the rationale behind that obligation. However, when assessing compliance, gatekeepers need to conduct a fresh assessment based on the obligation as set out in the DMA. They will ultimately need to come forward with compliance measures which are effective in achieving the objectives of the DMA and the relevant obligations.

2. Undertakings offering core platform services must self-assess whether they meet the quantitative thresholds. Article 3 of the DMA sets out a number of quantitative thresholds which, if they are met, give rise to a presumption that an undertaking providing core platform services meets the requirements for being a gatekeeper. It is the responsibility of undertakings offering core platform services to assess whether they meet the quantitative thresholds for one or several core platform services. Failure to notify may result in heavy fines.

In order to provide more clarity, the Commission intends to adopt as part of the DMA's implementing acts a notification form that will set out the information to be provided in notifications under Article 3 of the DMA. This form will be open for public comments towards the end of the year. Its content will in any event reflect the requirements of Article 3 of the DMA and undertakings concerned can therefore already start preparing on this basis.

Moreover, the Commission is available to help undertakings in their self-assessment whether they should notify one or several of their core platform services. The Commission has already engaged in such discussions with a number of potential gatekeepers. These discussions have proved mutually useful, and undertakings concerned that have not yet contacted the Commission are therefore invited to get in touch.

To make the most of the outreach, undertakings should approach the Commission with a complete overview of their core platform services, first estimates of which core platform services may meet the quantitative thresholds and explanations on the methodology used for calculating end and business users. Once the draft notification form is made public towards the end of the year, the Commission will also be available to provide feedback on draft notifications ahead of the formal notification deadline.

3. The DMA provides for a strong presumption in case the quantitative gatekeeper criteria are met. This presumption-based mechanism is intended to ensure the quick designation of undertakings that will most likely meet the gatekeeper requirements under Article 3. Consistent with this, the legislators have made the presumption of designation for a core platform service meeting the quantitative threshold a strong one, which may only be rebutted in exceptional circumstances.

For example, the legislators introduced a test that will allow the Commission to discard rebuttal submissions without an in-depth assessment if these submission *"do not manifestly put into question"* the presumption. On this basis, the Commission may for example discard rebuttal submissions if they are not in line with the guidance in recital 23 of the DMA, which specifies that the Commission should only take into account elements which directly relate to the quantitative criteria and, to the contrary, should discard any *"justification on economic grounds seeking to enter into market definition or to demonstrate efficiencies."*

4. Gatekeepers bear the responsibility to comply with the DMA within the deadline. Article 3(10) of the DMA provides that designated gatekeepers must fully comply with all DMA obligations within six months of their designation. This means that, according to the current timetable, quantitatively designated gatekeepers would have to be fully compliant around March 2024. In light of this deadline, it may be advisable that gatekeepers do not wait until their formal designation to start assessing their compliance with the DMA's obligations. Certain compliance projects involving changes to the gatekeeper's platform infrastructure or other changes to existing services may require significant preparation time. It is therefore advisable that gatekeepers carefully assess the preparation work that they will have to undertake in order to be sure to meet the deadline for compliance.

The DMA foresees that there may be a need for further specification for the obligations listed in Article 6. According to Article 8 of the DMA, a gatekeeper can request such further specification at the earliest after its designation. The Commission will consider whether to engage in such a process having regard to the principles of equal treatment, proportionality, and good administration. This however does not mean that undertakings cannot engage informally with the Commission on compliance with the DMA's obligations before they are designated as a gatekeeper. To the contrary, the Commission welcomes these contacts once there is a sufficient common understanding on the relevant core platform services that may be designated under the DMA.

We invite gatekeepers to engage in a continuous dialogue with the Commission. Compared to antitrust enforcement, this may require a change of mindset, since the question of the legality of a given practice is already answered in the DMA. Discussions should therefore focus on finding effective solutions. Gatekeepers should therefore come forward with concrete proposals and provide all the technical explanations required to assess whether the proposed solution is compliant. The Commission will review these proposals and provide timely feedback.

5. DMA compliance should be a transparent process adequately involving market participants. Market feedback will be key in the Commission's review of proposed or already implemented compliance measures. The DMA deals with highly technical and complex issues and reality checks with players who know the industry will therefore always be required. In this spirit, the gatekeepers should engage with market participants upfront in a transparent manner. It will help them demonstrating how their compliance proposals can be effective in achieving the objectives of the obligation and the DMA.

The Commission will also engage with third parties to hear their concerns relating to the DMA's obligations and tap into their technical knowledge. Third parties are therefore invited to proactively reach out to the Commission. Where possible and for the sake of efficiency, they should consider approaching the Commission with unified positions for the industry they are active in or for a group of relevant players. In addition to individual meetings, the Commission is organizing technical workshops on selected key DMA enforcement topics.

6. The DMA is complementary to the EU competition rules. As explained, the DMA's obligations will only become binding for gatekeepers at the beginning of 2024.

Once the DMA obligations become fully applicable, there will be an efficient system combining the DMA's sector-specific rules to tackle well-identified practices ex ante with the case-by-case application of competition law. Competition law will continue to play an important role, including as an ex post deterrent instrument, for example in relation to new types of conduct by gatekeepers or for new digital services that fall outside of the scope of the DMA. Continued experience from competition law will also be one of the main inputs for keeping the DMA up to date.

This interplay between the DMA and competition law will require coordination between the Commission and national competition authorities to ensure that the most effective tool is used to tackle digital issues. The existing coordination channels function well and will be put to use. In addition, the DMA provides for a number of new coordination mechanisms. In particular, the Member States' relevant authorities will have to notify their national draft decisions with a view to avoid conflicting or overlapping outcomes. The Commission is working on modalities on the future cooperation with the Member States' relevant authorities.

IV. CONCLUSION

In conclusion, the DMA offers significant opportunities to foster innovation and choice in the most important digital markets. The Commission intends to make full use of its powers to improve contestability and fairness to the ultimate benefits of European consumers and SMEs.

As with any new tool, some enforcement challenges can already be foreseen while others will appear as practice develops. The Commission is actively preparing to meet these challenges. To this end, the Commission will rely on all available expertise including by leveraging the complementary experience of the Directorate-General for Competition and Directorate-General for Communications Networks, Content and Technology, working closely with Member States' relevant authorities and specialized regulatory bodies and consulting market players.

Finally, the DMA seeks to address issues in the EU, but it may have an impact on all users around the world. There is therefore a clear need for close cooperation with other jurisdictions working on regulatory initiatives targeting the same issues in order to ensure a high level of consistency and to learn from each other's experience.

SISYPHUS, THE COMMISSION, AND THE DIGITAL MARKETS ACT

BY ALEXANDRE DE STREEL[1]

1 This contribution is based on the discussion and output of two different projects I did with colleagues on the implementation of the Digital Markets Act. The first at the Centre on Regulation in Europe with Marc Bourreau, Sally Broughton-Micova, Richard Feasey, Amelia Fletcher, Jan Kramer, Giorgio Monti and Martin Peitz, available at https://cerre.eu/publications/effective-and-proportionate-implementation-of-the-dma-2/; the second at Yale Tobin Center for Economic Policy with Jacques Cremer, David Dinielli, Paul Heidhues, Gene Kimmelman, Giorgio Monti, Rupprecht Podszun, Monika Schnitzer and Fiona Scott-Morton, available at https://tobin.yale.edu/digital-economy-project/policy-discussion-papers. I am extremely grateful to all those colleagues for very stimulating discussions.

I. INTRODUCTION

We all remember the destiny of Sisyphus who, due to hubris, was forced to perform an endless and useless task. In this short paper, I do not want to claim that the Digital Market Act ("DMA")[2] is an act of hubris; but I do want to show that the Commission must ensure that the implementation of the new law doesn't end up being both endless and useless. To prevent such an unfortunate outcome, the Commission should start by clarifying a number of the obligations contained in the DMA and then enforcing them in an agile way.

II. CLARIFYING THE OBLIGATIONS

A. The Need for Clarification and Interpretation

The DMA is based on detailed rules instead of broad standards to facilitate implementation and increase legal certainty. However, many of those rules are not self-executing; they leave room for clarification and interpretation which should be provided sooner rather than later, especially for the obligations that imply product re-design by the regulated gatekeepers.

The first type of clarification relates to the scope and the precise meaning of some of the obligations, for instance the applicability of the self-preferencing prohibition, the depth of access of the vertical interoperability obligation, the data and context which could be ported or the beneficiaries of search data access.[3] Those clarifications should build on – and be consistent with – EU laws on privacy, cybersecurity or IP and trade secrets. To ensure such consistency, the DMA high-level group, which is the hub between the Commission and several networks of national authorities coming from different legal fields (competition law, consumer protection, data protection, electronic communications, and media) would play a key role.

The second type of clarification relates to how compliance with the obligations will be assessed and demonstrated. This will be facilitated by the definition of a set of quantitative measurements on the impact of each obligation on the relations between the gatekeeper and their users. Those indicators should be defined with transparent, fair, and open industry-wide discussions between the Commission, the gatekeepers, and the users. They would introduce a degree of objectivity and shared factual understanding even if the interpretation of the measurements and the conclusions to be drawn from them will remain contentious.

To provide those legal clarifications, the Commission has several means under the DMA. Until March 2024 when the obligations will become applicable, the Commission may discuss informally with the gatekeepers and their business users. After 2024, the Commission may give those clarifications more formally and individually to each gatekeeper when receiving their compliance reports, engaging in formal regulatory dialogue or opening non-compliance proceedings. Ultimately, of course, the final clarification and legal interpretation will be provided by the Court of Justice of the EU. In giving those clarifications and interpretations, the Commission and the Courts should rely on the DMA objectives and principles.

B. Interpreting the DMA using the DMA Objectives

To facilitate the interpretation of the 22 prohibitions and obligations of the DMA, it helps to group them into clusters linked to the two main objectives of the law, i.e. contestability and fairness. On the one hand, *contestability* relates to reducing strategic and some structural barriers to entry, thereby facilitating entry by new digital platforms. On the other hand, *fairness* is a matter of balance in the relationship between the gatekeepers and their business users. Yet, there must be some limiting principles, otherwise the DMA would cover countless redistribution issues, even absent any real impact on competition or, more broadly, on welfare. Thus, fairness becomes an issue under the DMA where the

2 Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (Digital Markets Act), OJ [2022] L 265/1. This new European law entered into force on 1 November 2022 and its rules will apply from 2 May 2023. The European Commission should designate the gatekeepers subjected to the rules by September 2023 at the latest, and those platforms should comply with prohibitions and obligations in March 2024.

3 See CERRE Reports of December 2022 on an effective and proportionate DMA implementation.

imbalance between gatekeeper and business user deprives the latter of adequate reward for their efforts.[4] Both objectives should thus be understood with a reference to long-term competition[5] and, ultimately, lead to the promotion of innovation and users' choice.[6]

With this understanding of the objectives, the list of do and don't in the DMA could be grouped into three main clusters.[7] The first cluster aims to accelerate antitrust and prevent anti-competitive leverage from one service to another. This includes the prohibition of tying one regulated core platform service ("CPS") to another regulated CPS like the *Google Android*[8] case or tying one CPS to identity or payment services, as well as the prohibition of specific discriminatory or self-preferencing practices like in *Google Shopping*.[9]

The second cluster aims to facilitate the switching and multi-homing of the business and end users, thereby reducing entry barriers arising from user demand. This cluster includes the prohibition of Most Favored Nation clauses, anti-steering, and anti-disintermediating clauses, as well as disproportionate conditions to terminate services. It also includes the obligation to facilitate the change of defaults and the installation of applications, as well as to port data outside of core platform services. The third cluster aims to open platforms and data, thereby reducing supply-side entry barriers. This cluster includes horizontal and vertical interoperability obligations, FRAND access to app stores, search engines and social networks, and data access for business users as well as data sharing among search engines on FRAND terms.

C. Interpreting the DMA using the DMA Principles

Next to the objectives, the two main regulatory principles in the DMA would also be helpful in clarifying and interpreting its obligations. On the one hand, the measures taken by the gatekeepers should be *effective* in two ways: achieving the overall objectives of the DMA as a whole (general effectiveness) and achieving the objectives of each obligation (specific effectiveness). General effectiveness refers to the two DMA overarching objectives of contestability and fairness described above. Specific effectiveness relates to the objectives of each obligation which can be measured with quantitative metrics on the impact of obligations on relations between the gatekeeper and other relevant parties, as noted above.

On the other hand, the measures taken by the gatekeepers should also be *proportionate*. The application of this principle has several implications. First, it determines whether a DMA measure is necessary, in the sense that the same result could not be achieved through a less intrusive measure. Thus, proportionality limits what the Commission may impose on the gatekeepers to comply with the DMA. In this sense, proportionality channels the economic analysis that normally underpins an efficiency defense in antitrust (but is not present in the DMA) into a narrower framework and it compels the defendant firm to work within the specific set of core goals of the DMA.

Second, it helps the Commission and the Courts to find the right balance between the different trade-offs left open within the DMA between openness on the one hand, and privacy, service integrity, IP, or user safety, on the other. Thereby, proportionality contributes to ensuring consistency across the different legislations composing the (rapidly expanding) EU digital platforms acquis and to solving the tension between different laws having different objectives. Third, the principle of proportionality will also determine how far objective justification based on service integrity, security, or privacy, as allowed in the DMA, can be relied upon by the gatekeepers.

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4 Also, G.S. Crawford, J. Crémer, D. Dinielli, A. Fletcher, P. Heidhues, M. Schnitzer, F. Scott Morton, K. Seim, Fairness and Contestability in the Digital Markets Act, Yale Tobin Center for Economic Policy, Policy Discussion Paper 3, 2021.

5 H. Schweitzer, "The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Market Act Proposal," *ZEuP*, 2021, 509-518.

6 As I have shown with Pierre Larouche, the DMA promotes innovation by business users offering complementing services on the regulated platform as well as innovation by disruptive entrants offering alternative services to the regulated platforms: P. Larouche & A. de Streel, "The European Digital Markets Act: A Revolution Grounded on Traditions," *Jour. of European Competition Law & Practice* 12(7), 2021, 548-552.

7 A more specific fourth cluster aims to increase transparency in the opaque and concentrated online advertisement value chain. This cluster includes transparency obligations on price and performance indicators, which are to the benefit of advertisers and publishers.

8 Commission Decision of 27 June 2017, Case 39 740 *Google Search (Shopping)* which has been upheld by the General Court in Case T-612/17 *Google v. Commission*, ECLI:EU:T:2021:763.

9 Commission Decision of 18 July 2018, Case 40 099 *Google Android*, which has been upheld by the General Court in Case T-604/18 *Google v. Commission*, ECLI:EU:T:2022:541.

III. ENFORCING THE OBLIGATIONS

The Commission should also establish processes and use technologies which deal effectively with the innovation and complexity characterizing digital markets and firms.[10] In particular, the Commission enforcement should be participatory, adaptative and supported by big data and AI technologies. Maybe, ironically, the Commission should adopt in practice the same ways of working as the platforms it will regulate: as O'Reilly puts it, the Commission should behave like a platform.[11]

A. Participation

To increase the effectiveness and the legitimacy of the DMA's implementation, the Commission should be responsive to the regulatory environment and leverage its outside forces (i.e. the regulated platforms, the market and the community).[12] Thus, the compliance reports produced annually by the *regulated gatekeepers* will be one of the cornerstones of the DMA's implementation as it is the basis upon which the Commission and third parties could monitor the degree to which gatekeepers comply with their obligations.

Those reports should set out both how the gatekeepers propose to modify their conduct so as to comply as well as a demonstration that these measures are likely to prove effective. In the first instance, this may be achieved by the following means: (i) demonstrating that various options were considered and the one most likely to fulfil the aims of the DMA was chosen; (ii) showing that discussions with interested third parties about compliance measures were carried out to test various compliance options; (iii) embedding a regular review of the effectiveness of these measures in the process in collaboration with the compliance officer. This suggests that compliance reports would be living instruments that evolve as gatekeepers understand how to make compliance more effective and as technology changes.[13]

Moreover, while the DMA has no hierarchy of enforcement methods, an approach based on responsive regulation should be deployed. This system relies on assuming that gatekeepers wish to comply. It follows that the first stage is to persuade gatekeepers to comply via regulatory dialogue informed by the views of third parties. If this does not secure compliance, then enforcement can become progressively harsher until the gatekeeper responds to these signals and complies. This means that greater recourse would be made to the supervisory measures in the DMA than to the punitive measures.[14]

Next to gatekeepers, *business users and competitors* of the gatekeepers should also be involved at every stage of the DMA implementation: (i) when the gatekeeper is required to design or redesign its compliance efforts, (ii) during regulatory dialogues and procedures leading to a specification decision by the Commission as well as (iii) in the aftermath of a non-compliance decision. At each stage, the third party should be able to comment on a gatekeeper's proposal based on clear information.

Finally, *national antitrust and regulatory authorities* also have an important role to play as sources of information about non-compliance and as investigators assisting the Commission. They should be the points of contact for complaints, and they could cooperate to agree on how to best facilitate the processing of complaints. The Commission could also set up a joint investigation team with a staff of the national authorities as it has been done for banking supervision.[15]

B. Experimentation and Adaptation

Moreover, as put by the OECD, the Commission should pursue an "adapt and learn" style and not the traditional "regulate and forget" approach.[16] When specifying the measures to be adopted by the gatekeepers, the Commission could draw on the extensive evidence collected by gatekeepers and their users or competitors through A/B testing, and potentially require its own testing. Then, the Commission should monitor the evolution

10 Recommendation of the OECD Council of 6 October 2021 for Agile Regulatory Governance to Harness Innovation, OECD/LEGAL/464 and World Economic Forum, Agile Regulation for the Fourth Industrial Revolution: A Toolkit for Regulators, 2020.

11 T. O'Reilly, "Government as a Platform" in Lathrop and Ruma (eds) Open Government: Collaboration, Transparency, and Participation in Practice, O'Reilly Media, 2010, 11–40.

12 I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, 1992.

13 J. Cremer, D. Dinielli, P. Heidhues, G. Kimmelman, G. Monti, R. Podszun, M. Schnitzer, F. Scott-Morton & A. de Streel, Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust, Yale Tobin Center for Economic Policy, Digital Regulation Project, Policy Discussion Paper 7, December 2022.

14 Those proposals are made by G. Monti, Procedures and Institutions in the DMA, CERRE Report, December 2022.

15 https://www.bankingsupervision.europa.eu/banking/approach/jst/html/index.en.html.

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of the market conditions, particularly the quantitative measurements on the impact of the obligations. This will allow the Commission to determine whether the DMA obligations and the measures taken by the gatekeeper to comply with them achieve their intended effects. If it is not the case, the Commission may engage in a discussion with stakeholders to understand why so.

C. Use of Big Data and AI

Finally, the Commission should rely on the power of big data and AI to improve the efficiency of its regulatory operations. The uses of supervisory technologies ("suptech") by financial supervisors have shown that they can be helpful for data collection and significantly improving reporting, virtual assistance, and data management as well as for data analytics and enhancing market surveillance, misconduct analysis and prudential supervision.[17] More ambitiously, suptech could also be used for market evolution simulation with agent-based computational modelling.[18]

IV. HOW TO MEASURE THE SUCCESS OF THE DMA IMPLEMENTATION

To conclude, if the Commission does not want to become a contemporary Sisyphus, it needs to clarify a number of DMA obligations and orchestrate an "ecosystem of oversight and enforcement" by being participatory and adaptative, relying on digital technologies.

Ultimately, the success of the Commission's task will be measured by the opportunities created for new innovators and by how much the digital markets would be "shaken up" by those innovators. Indeed, the DMA aims to complement antitrust law in dynamizing market forces to increase end-user welfare.[19] Conversely, if the digital markets end up being "ossified" and the position of the existing gatekeepers ends up being entrenched, the DMA's implementation would be a failure. In this scenario, business users offering complementary services on the existing platforms may well be protected and some rents may be redistributed; but the entry of "frontal" competitors and "diagonal" disruptors would not be encouraged. We have seen such an outcome in some public utilities and in the financial sector, where an increase in regulation did not lead to a proportional increase in competition. However, a natural monopoly or public utility type of regulation would not be the best outcome for digital markets given their high potential for innovation and competition.[20]

17 S. di Castri, S. Hohl, A. Kulenkampff & J Prenio (2019), *The suptech generations*, Financial Stability Institute Insights 19. For an overview of the suptech used by financial supervisors, see the database of the Cambridge SupTech Law at the Cambridge Judge Business School: https://ccaf.io/suptechlab/.

18 W.B. Arthur, "Foundations of Complexity Economics," *Nature Review: Physics* 3, 2021, 136-145.

19 As shown in P. Larouche & A. de Streel, A compass on the journey to successful Digital Markets Act implementation, *Review Concurrences*, 2022/3. In this sense, the DMA then comes closer to the "managed competition" model that underpins other bodies of EU economic regulation, such as electronic communications law: L. Hancher & P. Larouche, "The coming of age of EU regulation of network industries and services of general economic interest" in P. Craig & G. de Búrca, eds., *The Evolution of EU Law*, 2nd ed, Oxford University Press, 2011, 743-781.

20 Similarly, Schweitzer, supra, note 5 recommends that the DMA should not be read as, or evolve into, a regime of public utility regulation. In the US, W.P. Rogerson & H. Shelanski, "Antitrust Enforcement, Regulation, and Digital Platforms," *Univ of Pennsylvania Law Rev* 168, 2020, 1911-1940, warn against utility regulation-type regulation for the digital platforms and recommend a "light-handed pro-competitive regulation."

YOU CAN (TRY TO) KEEP THE ECONOMISTS OUT OF THE DMA BUT YOU CANNOT KEEP OUT THE ECONOMICS

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1 Both European University Institute, Florence, Italy. We thank Natalia Moreno Belloso, Linus Hoffmann, and Lola Montero Santos for helpful comments and suggestions. All errors remain our own.

The European Union's Digital Markets Act ("DMA") is a big policy bet against the tech giants.[2] Its critics point at arbitrary thresholds to identify gatekeepers, vague and contradictory obligations, and the lack of an efficiency defense for regulated parties. The proponents of the DMA accept potential inefficiencies with a shrug and reply: "Do you want economists to drag you through endless econometrics and modeling exercises?" Avoiding costs in terms of time, money, and agency resources associated with economic analysis seems to be an important reason why the DMA was designed the way it was.

Enforcers in the current antitrust system are sometimes exhausted with the perseverance with which defendants, for example in Article-102-cases, sow doubt onto theories of harm, or conjure up efficiencies that justify practices under scrutiny.[3] However, the DMA will likely fail to cut out lengthy economic analyses. In this piece, we argue that the DMA's obligations will inevitably revert to effects-based analysis. This does not have to be a problem. If early enforcement practice and guidelines show the way, it might be possible to get the enforcement right without opening the door to endless back-and-forth between opposing economists.

First, what is the DMA? It is an ambitious legislative proposal that defines certain "core platform services" ("CPS") and quantitative thresholds for large platforms that are designated as "gatekeepers" for these services. These gatekeepers have to follow a list of obligations, for example not to use their business customers' data to compete against those same business customers. The DMA explicitly provides for the possibility to add new obligations in response to new developments.[4]

Within the two overarching substantial goals of "fairness" and "contestability," there is a procedural goal of simplifying and speeding up the process of limiting big tech conduct. While economists usually much prefer to discuss substance rather than procedure,[5] we want to focus on the latter in this article. It is not hard to see where the desire for simple rules comes from. Antitrust odysseys such as Google Shopping[6] or Google Android[7] bind the resources of enforcers for years, create legal uncertainty, and are of no help for competitors who might have been harmed by a conduct ten years ago but who have since disappeared from the market. The DMA tries to be a tool apart from antitrust by adopting some ideas and language from the field of regulation.[8]

At first, the approach seems straightforward. It centers around prohibitions of conduct, without opportunity for gatekeepers to argue that their behavior is efficient (in the sense of benefiting final consumers). In principle, this should leave no room for meddling economists and their expert reports. Surprisingly, there seems to be no big outcry from private sector economists and lawyers about missing out on revenue.

Instead, less self-interested commentators have called for a greater consideration of efficiencies. For example, the German Monopolies Commission, an independent expert committee, recommended exceptions for conducts that benefit consumers.[9] A more cautious case-by-case approach was also favored during the consultation phase, for example by the Netherlands.[10]

Finally, the Joint Research Center of the European Commission published a report[11] authored by several economists (including the European Commission's former Chief Competition Economist Tommaso Valletti), in which the authors warn of "an unfavorable trade-off between speed and quality of judgement" and chilling effects on innovation due to legal uncertainty. They suggest that effects-based analysis should play a role in the form of a grey list of conducts. Gatekeepers would then be allowed to demonstrate the efficiency of conducts on this grey list.

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2 https://www.promarket.org/2021/11/02/the-european-unions-big-policy-bet-against-the-tech-giants/.

3 https://www.promarket.org/2020/09/28/difference-between-research-academic-lobbying-hidden-funding/.

4 In contrast, UK adopts an approach of "enforceable codes of conduct." See Cusumano, Michael A., Annabelle Gawer & David B. Yoffie, "Can self-regulation save digital platforms?" Industrial and Corporate Change 30.5 (2021): 1259-1285. Some commentators see the UK approach as more tailored: https://voxeu.org/article/european-commission-digital-markets-act-translation.

5 https://voxeu.org/article/digital-markets-act-economic-perspective-final-negotiations.

6 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3965639.

7 https://www.politico.eu/article/google-eu-fine-court-hearing-android-antitrust-margrethe-vestager-european-commission/.

8 https://www.gleisslutz.com/en/Digital_Markets_Act_und_Digital_Services_Act.html.

9 https://www.monopolkommission.de/en/reports/special-reports/special-reporton-own-initiative/372-sr-82-dma.html.

10 https://technologyquotient.freshfields.com/post/102gm5k/a-christmas-present-from-brussels-the-digital-markets-act.

11 https://publications.jrc.ec.europa.eu/repository/handle/JRC122910.

That does not create sleepless nights for our hypothetical DMA defender: "Perhaps we accidentally ban some efficient conduct but you can't make an omelet without breaking a few eggs." Ironically, while there is little room for a gatekeeper to defend conducts on the grounds that they create efficiencies for consumers, DMA article 9 does allow for exceptions in the case of obligations that turn out to be too disruptive to gatekeepers themselves (or their business customers). This provision is supposed to be used only under very rare circumstances, but it raises the question why demonstrably efficient conducts could not be treated similarly.

There are additional reasons why a dismissal of effects-based analysis in the context of the DMA would be premature. Upon closer inspection, the DMA has several provisions that will ultimately hinge on economic analysis. When the DMA will inevitably be litigated, its wording will require a judge to rule on issues that are fundamentally effects-based, no matter how many times we hear that the DMA does not care about effects. There are (at least) two main problems: first, the shifting nature of the activities described as CPS will inevitably invite fights over market definition. Second, some obligations are premised on the suspected effects as we show further below.

First, the DMA is not clear on delineating the limits of the CPS it seeks to regulate, so quantitative market definition will be unavoidable. Take the example of "online search engines", one such CPS. Where does Google's search business end and where does the rest of its business start? Google Search is embedded in websites and search functionalities are included in ancillary services such as Google Maps. Meanwhile, big tech firms are disrupting traditional online search, for example via voice-based search on smart speakers. It is not hard to imagine disagreement between a gatekeeper and the enforcer over what business lines and technologies to include in this CPS.

Due to this ambiguity, a gatekeeper that faces what it perceives as "regulatory overreach" might find it attractive to battle out in court which parts of its business are regulated by the DMA. The overarching problem in regulation with regards to innovative sectors is that business models and technologies change all the time. In the future, what will still be considered "online search"? Judges will end up making judgement calls on what is included in the wording of each CPS. We know from competition law that an analysis-free search for the spirit of the law and the meaning of words can result in absurd or at least arbitrary definitions. Think of early enforcement of the Sherman Act in the U.S., where it was not even clear if potential antitrust violations in manufacturing could be prosecuted on the grounds that the Act spoke of "commerce."[12]

The well-known alternative from the antitrust toolkit is traditional market definition. Of course, this is precisely what the DMA is not interested in, as market definition requires data, painstaking analysis, and time. So, a DMA enforcer might confidently reply: "I'll recognize an online search engine when I see one." In the end, though, it is not clear that the shortcut offered by brief, verbal descriptions of CPS will speed things up. The descriptions are too vague not to be contested and gatekeepers have an obvious interest in minimizing the extent of their business that is affected by regulation.

Admittedly, market definition on platform markets is somewhat uncharted terrain. It is understandable that the DMA's creators do not want to hinge their enforcement on new market definition tools for these markets, such as proposed modifications of SSNIP tests that account for two-sided markets. As the likely targeted gatekeepers, such as Google or Meta, are singular in their scope and without obvious comparison in their markets, we also have to accept that the correct data for market definition might not be readily available.

A possible solution: early enforcement or soft law, such as enforcement guidelines, should acknowledge the principles surrounding market definition. The main principle is that the relevant market should include products that provide a competitive constraint on the candidate market.[13] This principle, courtesy of competition economists, is flexible enough to account for future technological developments.

If the enforcer does not want to resort to quantitative analysis, be it due to a lack of resources or satisfactory data, at least a qualitative argument can be brought forward based on this logical and accepted principle. By introducing this principle early in the DMA's lifespan, the enforcer can set predictable rules before technology changes too much. Agreeing on a theoretical principle might not sound like a lot. However, we believe it is superior to not having a systematic way of keeping the DMA's CPS aligned with reality.

Second, some obligations simply make no sense without an effects-based interpretation. Interoperability comes to mind: After all, we care less about whether an API gives us the impression that service A is interoperable with service B than about whether it has the intended effect of turning single-homing customers into multi-homing customers. (Whether this makes sense economically is a different question altogether. In many standard models of two-sided markets, single-homing customers are valuable and courted, while multi-homing customers tend to have a hard time).[14]

12 https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/sherman-anti-trust-act.aspx.

13 Motta, Massimo. "Competition policy: theory and practice" Cambridge University Press (2004): 102.

14 See, for example, Rochet, Jean-Charles & Jean Tirole. "Two-sided markets: a progress report." The RAND Journal of Economics 37.3 (2006): 645-667. "[T]he more general insight [is] that the single-homing side receives a large share of the joint surplus, while the multi-homing one receives a small share."

Therefore, any litigation against a decision based on these obligations will inevitably require an effects-based analysis. Disagreements over other obligations may hinge on effects as well. There is also the suspension of obligations that should take into account effects (article 9.3). Finally, how else, if not by quantitative analysis, will the necessary evaluation of the DMA's success a few years down the line assess "the chilling effects unfair conduct has on sales"?[15]

Consider a simplified and hypothetical example of self-preferencing in online advertisement: a business customer bidding for advertisement space accuses an online advertisement gatekeeper of self-preferencing. The claimant shows that it lost its bid against the gatekeeper's ad aggregator 5 percent of the time when it made the higher bid. How would you start to investigate self-preferencing without quantitative analysis? You might ask the gatekeeper to explain its algorithm for determining the ranking of bids for ad aggregators. To conduct an independent analysis, you need to analyze outcomes, however. More than one variable might determine which bidder wins the ad slot: there might be good commercial reasons not to always let the highest bidder win but also to let the type of content and bidder play a role.

To be sure, what constitutes self-preferencing in this case would come down to case-specific details within an investigation. It makes sense not to discuss this at the level of the DMA text. And just because it is not written down in the DMA does not mean that we would not get an appropriate, effects-based analysis in this hypothetical self-preferencing case. Our point is a reminder that effects-based analysis will take place, so how can the DMA be enforced without the delays and costs of an antitrust investigation? We make three suggestions:

First, we suggest drawing a clear link between the obligation (no self-preferencing) and a verifiable violation of this obligation (for example, an unexplained difference in bidding outcomes). Depending on the obligation, this could be a general principle of outcomes that violate the obligation or a non-exhaustive list of examples. The latter approach could suffice if a general principle is too difficult to define and we are concerned about specific conducts. The appropriate place for this might be in guidelines on DMA enforcement.

Second, rather than ignoring the issue of economic evidence, enforcers would be well advised to anticipate it and to set standards of proof in their favor: make it easy for business customers to bring evidence of a violation of obligations and make gatekeepers explain in detail why their conducts are compliant. This avoids the conundrum of antitrust where the defendants too often get away with just sowing doubt onto a test or claim (as with the as-efficient competitor test in the Intel judgement), even if the substantial argument should still carry the day.

Third, the European Commission should use its discretion to engage in regulatory dialogue to specify gatekeeper-specific obligations. This regulatory dialogue can result in public guidelines on the principles that inform gatekeeper-specific obligations. Then, observers can generalize these principles to other and new gatekeepers in similar lines of business. Some critics have noted that the DMA obligations remain too close to cases that we have seen in the past.[16]

This ties into the concerns about the cost and uncertainty introduced by economic analysis. By being public and transparent about its principles, the Commission will guide discussions and frame disagreements, including the economics of DMA enforcement. This transparency will simplify discussions by making it clear which questions need to be answered to analyze conduct. In pursuing clearer and faster economic analyses, transparency will achieve more than secrecy or ambiguity which open the door to gatekeepers' economists to come up with far-fetched arguments that might confuse judges.

For all of these reasons, we are skeptical whether the DMA can really speed up enforcement in the digital era. How can we avoid the dragged-out courtroom sagas of past antitrust cases without throwing notions of efficiency overboard?

Define the principles that will guide initial and future gatekeeper designations. They can be vague enough to allow for future technological development as long as they allow the European Commission to make a principled and defensible argument why some new and innovative services do or do not fall under the DMA. The German Federal Cartel Office's application of article 19(a) of the German Competition Act, dealing with abusive conduct of undertakings of paramount significance for competition across markets, might be an example of how this can work in practice. Our examples illustrate that by demonstrating more rigor at the outset, the enforcer can reduce the risk of a quantitative stalemate later on. Either early enforcement or guidelines should make it clear what will happen during enforcement.

If the problems that we list above are not addressed, we believe that the first few years of the DMA will be painful and unsatisfactory for all sides involved, regulators and gatekeepers, lawyers, and economists alike. We might then ask; how did we end up here? We believe that lack of communication between lawyers and economists plays a role in this. Economists have sometimes done a bad job winning the trust of

15 This formulation was used to describe the "expected result(s) and impact" of the DMA in the original proposal of the law.

16 https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation.

lawyers and helping the readers of their analyses to tell good from bad. This has sparked the desire among some people to sideline economic analysis altogether. Yet, as the DMA shows, even if you try, you can't get around analyzing effects if you want to pursue specific economic goals.

THE DIGITAL MARKETS ACT: CHALLENGES AND OPPORTUNITIES FOR BUSINESS

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I. INTRODUCTION

After reaching a political agreement earlier in 2022, the Digital Markets Act ("DMA") was formally adopted by the European Parliament on July 5, 2022 and by the Council on July 19, 2022. The text was published in the Official Journal on October 12, 2022 and certain provisions entered into force on November 1, 2022. A transitional period is expected with most of the remaining articles entering into force on May 2, 2023.

At 66 pages, the document, which the 109-paragraph preamble suggests will apply to a "small number" of companies, runs considerably longer than either the foundational articles of the European competition law regime, or its principal existing substantive regulations. It contains far-reaching obligations related to product design and even internal organization (including relating to a specific compliance function) backed by heavy fining powers.

The DMA has been heralded as a new era of regulatory enforcement in digital markets, an area of increasing regulatory scrutiny and political focus in recent years. Competition law enforcement has been in this field for some time, with high profile investigations and fines at European and national level including record fines in some high-profile cases.

This regulatory and enforcement focus comes at a time of political concern about the role of European companies in the digital space, and questions about the bloc's competitiveness in that sphere as compared to companies originally established in the United States of America.

The dual role of the Executive Vice President of the European Commission, Margrethe Vestager as Commissioner for Competition and responsibility for the strategic policy regarding "Europe Fit for the Digital Age" highlights this significant priority. Commissioner Vestager has emphasized publicly the objectives surrounding this regulatory reform, noting that it is intended to provide a "clear list of dos and don'ts for big digital gatekeepers, based on our experience with the sorts of behavior that can stop markets working well" and to "allow us to act much faster and more effectively, to tackle behavior that we know can stop markets working well." At the same time, the DMA aims to be "future proof" – allowing the European Commission to adapt to new situations in rapidly-evolving markets.[2]

This note will focus specifically on the DMA. However, it bears mention that this new regulatory tool does not exist in a vacuum. Competition law will continue to apply in the sector, the Digital Services Act entered into force in November 2022, and discussions regarding the competitiveness of the sector continue. Recent policy changes that are not specific to the digital markets sector, such as increased use of the referral mechanism under the European Merger Control Regulation 1/2004 also introduce new challenges that will also apply to the digital sector (including to target so-called killer acquisitions). The central procedural regulation for European Competition Law (Regulation 1/2003) is under review, as are the market definition guidelines. The relationship between these various evolving enforcement tools is still to be fully-worked-out and there are various overlaps and tensions between them.

Regulatory intervention and reform in the digital sector seem likely to continue, with the presidents of the European Commission, Council, and Parliament publishing a joint declaration on digital rights and principles as recently as December 15, 2022.[3] This declaration, is apparently intended to "serve as a reference point for businesses and other relevant actors when developing and deploying new technologies. Promoting research and innovation is important in this respect." It emphasizes that "[s]pecial attention should also be given to SMEs and start-ups." Such a publication indicates that, inevitably, digital markets remain high on the European agenda, and that the use of data, regulation of artificial intelligence, and access to so-called online public spaces will remain high on the bloc's agenda.

As such, the DMA fits into an increasingly complex regulatory sphere applicable to digital markets, challenging companies (and their advisors) to rapidly upskill and adapt. Among other things, the risk of possible over-enforcement, the importance of properly defining and establishing consumer benefits, the potential for inconsistent obligations, and possible chilling effects on innovation will need to be taken seriously by all parties.

II. RESPONSE TO A PERCEIVED "NEED FOR SPEED"

Speed of enforcement is commonly accepted to be one driving force behind the DMA: the duration of competition law proceedings in digital markets has been a constant point of discussion between regulators, companies, and advisors in recent years. The European Commission's

2 Speech by Executive Vice-President Margrethe Vestager: Building trust in technology, October 29, 2020, and Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms, December 15, 2020.

3 https://digital-strategy.ec.europa.eu/en/library/european-declaration-digital-rights-and-principles.

investigations in the digital sector have taken between approximately two years (Case COMP/AT.39847 *Amazon e-book distribution*) and nine years (Case COMP/AT.40411 *Google Search* (AdSense)).

The legislative process regarding the DMA was relatively fast, taking only 16 months from the European Commission publishing its first draft to agree on the final DMA text. Commissioner Vestager announced "that is really, really fast" for legislation to get through the legislative process.[4] Subsequently, there are a number of stages or gates of enforcement, and an extensive consultative process is expected to adapt the apparently bright line rules of the DMA to the realities of a highly complex and technical industry.

The majority of the DMA provisions (including those on gatekeeper designation) enter into force on May 2, 2023. Companies which meet the quantitative thresholds to be presumed a gatekeeper will then have up to two months to submit a notification to the European Commission. The European Commission will then have 45 working days to decide whether to designate a company as a gatekeeper therefore the first designation decisions are expected in September 2023. Once designated, gatekeepers will have six months to ensure compliance with the DMA's provisions which means that they will need to be able to demonstrate compliance by March 2024 at the earliest.

Compared to some of the longer investigative cases by the Directorate for Competition, the DMA might therefore appear to accelerate likely enforcement. However, two notes of caution bear mention. First, regarding companies' rights of defense, and second, regarding the likelihood of litigation (and ensuring consequences for legal certainty).

- **Rights of defense under the DMA**. There is an inherent tension between the "need for speed" and effective, proportionate enforcement that respects companies' rights of defense. The European Commission has suggested that clearly defined procedural rules will enable quick decisions. A balance must be struck to ensure that companies' rights of defense are preserved and to properly assess the impact of any enforcement activity, especially in fast-moving markets where remedies may be unnecessary or obsolete by the time they are imposed.

  The draft procedural regulation will be critical in this regard, and indeed appears to outline more limited rights of defense than competition practitioners would be familiar with.[5] It remains to be seen how much of this draft will survive (a relatively short one-month) consultation and input from concerned parties. The principal novelties for competition practitioners will be the provisions on access to documents, oral hearings, and questions over the role of the hearing officer. The draft is also particularly prescriptive as to the format of submissions (in a manner that appears to draw more from practice before the European Courts than before the European Commission).

  The draft implementing regulation foresees that "at least" those documents specifically cited in the European Commission's preliminary findings will be provided by default. Any additional documents will be listed, and the burden will shift to companies to submit substantiated requests to review them (unless such documents contain no information identified as confidential). Presumably, this approach is intended to avoid delays relating to redaction of confidential information in documents (as such discussions between the European Commission and third parties are commonly referred to as a delaying factor). However, the burden on companies may be substantial, and the justification process challenging depending on the level of detail about a document provided in the European Commission's list (with the risk of companies facing a kind of "preuve diabolique" when seeking access to documents identified as confidential in whole or part). It remains to be seen whether such provisions survive the consultation period, particularly when there are, in article 7 of the draft, relatively strict provisions as to timelines for the provision of proposed non-confidential versions.

  Practitioners may be divided about the provisions regarding an oral hearing. Such procedures have pros and cons for the targeted companies, on the one hand allowing a direct appeal to the European Commission hierarchy, on the other, providing an opportunity for complainants or competitors to "throw stones" at the target in real time. The inability of investigated companies to opt for such a hearing may, however, gives rise to concern.

  The absence of a reference to a hearing officer is likely to raise questions. The hearing officer typically plays an important role in competition proceedings, including in relation to disputes over access to file. Given the more complex access to file procedure foreseen in relation to the DMA, this role would be even more critical.

4 Remarks by Executive Vice-President Vestager for the political agreement on the Digital Markets Act, March 25, 2022, available here: https://ec.europa.eu/commission/presscorner/detail/en/speech_22_2042.

5 https://digital-strategy.ec.europa.eu/en/news/commission-launches-public-consultation-implementation-digital-markets-act#:~:text=On%20Friday%2C%20the%20Commission%20launched,applying%20on%202%20May%202023.

- **Litigation and the supposed "need-for-speed"**. As regards litigation, it appears quite possible that the DMA will unleash a new wave of litigation on both sides of the "gatekeeper" line. In the first instance, not only may companies appeal their designations, either in relation to one or multiple markets, but there may be challenges to the legal basis of the DMA itself (which is not without controversy). Any finding of infringement would present another opportunity for challenge. One might also imagine companies that are not designated instigating appeals for failure to act regarding their competitors or intervening in existing litigation brought by the gatekeepers themselves.

  An explosion of litigation under the DMA may prove a significant burden on the already-over-worked EU Courts, where 1,720 cases were brought in 2021 (an increase of 136 over the previous year).[6] Duration of proceedings before the EU Courts remains a topic of controversy, particularly in competition law cases – this situation seems unlikely to be improved if there is a significant increase in litigation concerning a new and complex regulatory text.

III. A COMPLEX AND WIDE-RANGING REGIME

As noted above, the DMA was apparently designed to provide additional legal certainty for companies while facilitating quicker enforcement by providing a clear list of "do's and don'ts" based on the European Commission's experience of competition law enforcement in the digital sector. Commissioner Vestager has suggested that the "tools are actually quite simple" but has acknowledged that enforcement will be "complex" particularly as regards the relationship with competition law.[7]

Caution regarding the potential for legal certainty and clarity offered by the DMA is arguably merited. Among others, at least four areas bear note: (a) the wide range of activities potentially caught by a literal interpretation of the DMA combined with a common list of obligations; (b) the deceptive simplicity of the thresholds for gatekeeper identification; (c) the relationship with (a constantly evolving) competition law; and (4) the relationship between the DMA and merger control enforcement.

- **The wide range of activities potentially caught by a literal interpretation of the DMA makes a single list of prohibited conduct an interesting enforcement challenge**. The DMA's principal limiting feature is its restriction to gatekeepers, defined as those involved in a Core Platform Service ("CPS") of which there are no less than ten defined in Article 2 and ranging from operating systems to search engines and virtual assistants.

  In reality, of course, this broad scope presents a number of challenges, both practical (in terms of compliance) and procedural. A gatekeeper may offer all, some, or only one of the relevant CPSs and will need to make submissions regarding, and be designated in respect of each of those individually. This may not happen at the same time, despite that the fact that certain obligations might imply changes to the design of multiple products and interactions between those same products.

  Likewise, the CPSs do not all offer the same functionality or service to customers, nor are they necessarily funded in the same way. However, the DMA provides that the same basic obligations will apply regardless of the type of CPS concerned. In reality, of course, the devil will be in the details. How self-favoring might look for a search engine is not necessarily the same as how it might look for a cloud computing system. The wide-ranging scope of the services covered by the DMA, combined with the detailed list of obligations is likely to raise a number of challenges in implementation (which might have been debated differently and extensively under a traditional competition law-based assessment). As noted below, the ongoing consultation with the European Commission is presumably intended to mitigate these concerns, however, the potential impact of the DMA on the core features of products, as well as the lead-time needed to design for compliance, is likely to remain a challenge. As a result, companies may be faced with difficult choices about how and when to attempt to design for compliance and whether to work on multiple alternatives in parallel, with related costs. Time and money that might otherwise have been spent on new or innovative offerings may need to be redirected to regulatory compliance, particularly in a challenging economic period.

- **The thresholds included in the DMA raise various questions in practice**. The preamble to the DMA anticipates that it will apply to a "small" number of "large" companies. However, there is considerable flexibility in its drafting, which raises questions as to which companies may, at some point, be designated. This, in turn, raises legal certainty challenges, particularly considering the positive notification obligations that the DMA imposes.
  Several points bear mention:

6 Annual Report of the Court of Justice of the European Union (2021). Available at: https://curia.europa.eu/panorama/2021/en/index.html.

7 Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms, December 15, 2020.

First, the wide range of activities defined as CPS might be interpreted as applying beyond the commonly anticipated target companies. This leaves considerable legal uncertainty for large organizations that have digital-related activities but are not traditionally thought of as players in that sector. Time will tell how enforcement proceeds in this space, and consultation with the European Commission is likely to be critical.

Second, reliance on market capitalization as a threshold for the presumption of gatekeeper status is an interesting choice. Market capitalization is a moveable threshold, and one that will shift based on market volatility and risk appetite. As share markets move, a question arises as to whether a company may meet the thresholds to be presumed a gatekeeper on one day and not on another.

Third, outside of the financial thresholds, the European Commission has significant discretion in designating a company a gatekeeper. A notion that arguably sits uncomfortably with the positive obligations imposed on companies to self-identify. Again, it seems that early and proactive engagement with the European Commission may be critical. However, there is, once more, an inherent tension with the supposed need for speedy enforcement, limited public and private resources, and such a complex and iterative process.

- **Competition law and the DMA:** A constantly evolving relationship? As noted, the DMA draws inspiration from a number of concepts established in the context of competition law, while arguably untethering those to some degree from foundational notions of that discipline, such as dominance under Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). Likewise, the DMA shifts to a prospective form of assessment, with considerable notification obligations imposed on certain companies.

  As time goes on, and litigation is pursued, competition law – including the concepts transported into the DMA – as well as precedent regarding the DMA will continue to evolve. Two significant questions then arise. First, how will evolving jurisprudence affect these parallel regimes? Second, what is the risk of double jeopardy?

- **Parallel jurisprudence**. Competition law will continue to apply in parallel to the DMA: Commissioner Vestager commented that "the DMA will not replace antitrust enforcement."[8] Recital 10 of the DMA notes that it "aims to complement the enforcement of competition law" and "should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules relating to unilateral conduct that are based on an individualised assessment of market positions and behaviour." Recital 11 highlights that the objectives of the DMA and competition law are complementary but distinct: competition law aims to preserve undistorted competition on any given market while the DMA seeks to ensure markets where gatekeepers are present are and remain contestable and fair. The DMA is a more targeted and specific regulation.

  It seems, therefore, inevitable, that the EU Courts will be faced with questions that relate to similar obligations under parallel regimes. For example, self-preferencing cases appealed under Article 102 alone and separate matters pursued under the DMA. Advisors and companies will be faced with challenging decisions when it comes to advising on compliance to the extent that these parallel regimes might begin to diverge.

Commenting on the Statement of Objections sent to Apple in relation to practices regarding Apple Pay, Commissioner Vestager commented that the "investigation will inform the future application of the Digital Markets Act."[9] The read across from DMA jurisprudence to competition law, however, may be more problematic as those decisions will be made in the specific context of regulating digital gatekeepers, and one which is arguably untethered from critical notions such as dominance and effect on competition in individual cases.

- A risk of double jeopardy? Some conduct might be sanctionable under the DMA or under Article 102. European Commission officials may therefore be faced with a choice as to how to proceed towards enforcement, a choice that may face challenge before the courts.

  The risk of double jeopardy or at least inconsistent application therefore becomes a live one to be avoided. Recital 73 was added to the DMA to encourage the European Commission to avoid duplicative proceedings: "the Commission should take into account

8 Speech, Commissioner Vestager, Fordham's 49th Annual Conference on International Antitrust Law and Policy, "Antitrust for the digital age," September 16, 2022, available here: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5590.

9 Remarks by Executive Vice-President Vestager on the Statement of Objections sent to apple over practices regarding Apple Pay, May 2, 2022, available here: https://ec.europa.eu/commission/presscorner/detail/en/speech_22_2773.

any fines and penalties imposed on the same legal person for the same facts through a final decision in proceedings relating to an infringement of other national or EU rules." This reflects recent case law of the Court of Justice of the European Union ("CJEU") on the *ne bis in idem* principle. Traditionally, the CJEU considered whether the objectives pursued were the same or different and additional penalties could apply where the CJEU concludes the legislative instruments pursued different objectives. However, in March 2022, the CJEU held that the key is whether the material facts (meaning the facts and identity of the wrongdoer) of the case are identical (Case C-117/20 *bPost*).

Coordination with national competition authorities will also be crucial. Although the DMA indicates that national governments should not create their own specific sectoral regulation for gatekeepers, it accepts that competition law enforcement will continue to apply.

- **Merger control and the DMA**. As has been widely reported, digital markets are an area in which discussion has focused on so-called "killer acquisitions"; and where debate has raged as to whether and how to address such situations. The European Commission's policy brief on the topic, summarizing recent and future practice, provides interesting insights on the topic.[10]

- Finally, the European Merger control thresholds have not been revised, although certain national authorities have taken a different approach. The DMA requires gatekeepers to inform the Commission of acquisitions if "the merging parties or the target" are involved in the provision of "platform services or any other services in the digital sector or enable the collection of data." The question is then what is the purpose of this notification and what might be the consequences. It is commonly thought to be a complement to the recent guidance on Article 22 of the EU Merger Regulation (relating to the ability of national competition authorities to refer matters to the European Commission). This provision arguably significantly expands the European Commission's possible role in the review of relatively small transactions in the digital sector and is likely to be the subject of continued challenges before the Courts, as well as increased legal uncertainty for companies.

IV. A NEW CONSULTATIVE PARADIGM?

Consultation procedures have long held a valued role in the relationship between the European institutions and private entities. In the case of the DMA, given its inherent complexity, speed of enactment, and need to technical application, this process continues at pace. These official European-level discussions complement a wide range of public and private discussions among actors in the field.

Specifically, the European Commission is holding a number of workshops, the first of which took place in early December 2022 to seek feedback from interested parties on how implementation of the DMA should evolve. The first of these consultations took place on December 5, 2022 and related to self-preferencing.[11] Materials from the event have been published online, including presentations submitted by various companies in the digital sector and a video recording of the discussions.[12]

Despite the challenges from a competition law perspective that such meetings might provide (including as to confidential information), they appear to have been broadly welcomed and companies/advisors will await the outcomes and evolution of this process with interest. Without doubt, they will be accompanied by extensive private discussions between key players and the European Commission.

Competition law enforcement has, historically, combined both openly adversarial and more clearly consultative or conciliatory processes. Indeed, the same cases have not infrequently combined both approaches. Article 102 cases have been closed in various ways, including by formal decisions and fines, formal commitments, and more informal or commercial concessions.

This new consultative approach, however, provides an opportunity for companies to actively shape the future of enforcement in digital markets and plead their case on challenging technical issues before enforcement becomes an issue. The next few months will therefore be a fascinating and critical time for all those involved in the sector.

10 European Commission, Directorate-General for Competition, Beaudouin, Y., Genevaz, S., Mernagh, S., et al., *Competition policy brief. Issue 2, December 2022*, European Commission, 2022, https://data.europa.eu/doi/10.2763/29297.

11 https://competition-policy.ec.europa.eu/dma/dma-stakeholders-workshop_en.

12 https://competition-policy.ec.europa.eu/dma_en.

V. CONCLUSIONS

The DMA represents a new era of regulatory enforcement for actors in the digital space. As Commissioner Vestager mentioned, we find ourselves at "the frontier of a new kind of regulation."[13] The far-reaching regulation presents many complex challenges, not all of which can be briefly addressed.

Remaining questions involve the provisions on circumvention, the definition of a durable position and its similarity to or difference from the traditional dominance standard, and the capacity of all concerned (not least European institutions) to resolve open questions by the time that companies are required to fully comply.

One thing is clear: implementation of the DMA will be challenging, complex, and full of risks and opportunities for all involved. Institutions, corporates, and advisors will need to work closely together to ensure that the DMA does indeed benefit European consumers without chilling innovation, reducing customer value, infringing the rights of defense, or resulting in a degree of over enforcement that chokes up the EU Courts and reduces access to justice. The European Commission's recent initiatives towards transparency, consultation, and openness to ideas from business are encouraging in this regard.

13 Speech by Margrethe Vestager on defending competition in the face of disruption by Practical Law Competition, May 2022.

THE DIGITAL MARKETS ACT: TOWARDS A COMPLIANCE CONCEPT FOR GATEKEEPERS

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I. INTRODUCTION

The power structures in digital markets are currently the subject of the attention of legislators in various jurisdictions. This has been triggered by the rising market power of a few large digital companies ("Big Tech"), which are challenging the competitive structure of digital markets. The first legal acts are already in force (e.g. Section 19a of the German Act against Restraints of Competition), others are about to become effective (Digital Markets Act) or are currently subject to the legislative dialog (UK Advice of the Digital Markets Taskforce, U.S. draft legislation of the Antitrust Subcommittee of the Judiciary Committee of the U.S. House of Representatives).

In this article we provide a practical overview of the Digital Markets Act ("DMA") and give some guidance on a DMA compliance concept. With fines up to an equivalent of 20 percent of the global turnover in case of intentional/negligent failure to comply with the DMA's core obligations, it is essential for companies affected by the DMA to take the necessary precautions to ensure compliance with the DMA, especially as the DMA itself provides specific compliance obligations that must be implemented.

In the following, we will give a brief overview of what the DMA is (II), explain who is affected by it (III) and highlight what obligations companies should expect (IV). We will then provide some practical guidance on how to ensure compliance with the DMA (V) before turning to the consequences of non-compliance (VI).

II. WHAT IS THE DMA?

In this chapter, we provide a very brief summary of the DMA (II.A), explain the reasons for its creation (II.B), before turning to the timing and implementation of the DMA (II.C).

A. A Very Short Summary of the DMA

The DMA is the European Union's approach to regulating the market power of the largest digital corporations (so-called *gatekeepers*).[2] Companies that are classified as gatekeepers under the DMA must comply with the obligations defined in the DMA. These obligations are aimed at maintaining competition in digital markets. If the obligations are not complied with, the DMA enables the European Commission ("Commission") to take countermeasures and impose fines.

B. Reasons for Creating the DMA

The goal of the DMA is to "*contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector.*"[3] Recital 5 of the DMA clarifies that

> *"market processes are often incapable of ensuring fair economic outcomes with regard to core platform services. Although Art. 101 and 102 […] TFEU apply to the conduct of gatekeepers, the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behaviour, and enforcement occurs ex post and requires an extensive investigation of often very complex facts on a case by case basis."*

The underlying assumption of the DMA is that the classic instruments of ex-post competition law interventions are not sufficiently suitable to deal with the competitive challenges of digital platforms and therefore require the introduction of complementary *ex ante* regulation.[4]

2 Despite the term "act," the DMA is a regulation within the meaning of Art. 288 (2) TFEU (see Eifert et al.: Taming the Giants, Common Market Law Review 58: 987-1028, 2021).

3 See DMA recital 7.

4 Achleitner in NZKart 2022, 359.

C. Timeline and Implementation of the DMA

The DMA was published in the Official Journal of the European Union on October 12, 2022.[5] It will enter into force on the twentieth day following the publication, i.e. on November 1, 2022.[6] Following that, it will take six months to apply, taking up to May 2023.[7] Then, the designation process will start, which might take up to the second half of 2023. Finally, the duty to comply with the core obligations imposed on designated gatekeepers will begin six months after the designation decision by the Commission.[8] Companies should therefore prepare to be bound by the core obligations of the DMA starting as of the first half of 2024.

III. WHO IS AFFECTED BY THE DMA?

The DMA is applicable to certain undertakings designated as *gatekeepers* by the Commission. Below we provide an overview of the requirements that must be met to become a gatekeeper (3.1, 3.2 and 3.3) and the specific procedure for designation provided in the DMA (3.4 and 3.5), which is generally initiated by undertakings meeting these requirements notifying the Commission thereof (notification procedure).

A. Requirements for Becoming a Gatekeeper and the Presumption under Art. 3 (2) DMA

Art. 3 (1) DMA determines that an undertaking shall be designated as a gatekeeper if (a) it has a *significant impact on the internal market* , (b) it provides a *core platform service*, which is an *important gateway for business users to reach end users*, and (c) it enjoys an *entrenched and durable position*, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

Given the rather complicated and new terminology it is worth shedding some light by explaining the practical meaning of terms such as "core platform service," "gatekeeper" and "business and end users," which are the main requirements for establishing which companies will have to prepare themselves to be affected by the DMA.

Some of these requirements are subject to a (rebuttable) presumption, which is based on fulfilling certain quantitative thresholds.[9] Due to the rather vague terminology of the qualitative criteria mentioned above, it can be assumed that this presumption will be of central importance for the designation as a gatekeeper. However, some requirements remain subject to a purely qualitative determination – this particularly applies to the requirement of offering a core platform service.

▪ Significant Impact on the Internal Market

An undertaking shall be presumed to have a significant impact on the internal market, where (1) it achieves an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and (2) it provides the same core platform service in at least three Member States.[10]

The term "undertaking" follows the terminology used in EU competition law. Therefore, undertaking means an entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, including all linked enterprises or connected undertakings that form a group through direct or indirect control of an enterprise or undertaking by another.[11]

▪ Core Platform Service

For the second requirement of the designation as a gatekeeper two conditions must be met. First the undertaking has to *provide a core platform service, which second has to constitute an important gateway for business users to reach end users.*

5 https://eur-lex.europa.eu/legalcontent/DE/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.DEU&toc=OJ%3AL%3A2022%3A265%3ATOC.

6 See Art. 54 DMA.

7 See Art. 54 DMA.

8 See Art. 3 (10) DMA: Compliance with Art. 5, 6 and 7 within six months after the designation decision.

9 Art. 3 (2) DMA.

10 Art. 3 (2) DMA.

11 Art. 2 (27) DMA.

(i) *Provision of a Core Platform Service*. Services that qualify as core platform services within the meaning of the DMA are listed in Art. 2 (2) lit. a-j DMA.[12] This list includes, among others, online intermediation services, search engines and social networking services. Art. 2 (3)-(15) DMA contains definitions of these services and therefore provides useful guidance in determining their precise scope.

(ii) *Constitution of an Important Gateway*. The fact that the core platform service constitutes an important gateway for business users to reach end users is presumed where the core platform service in the last financial year has on average at least 45 million monthly active end users established or located in the Union and at least 10.000 yearly active business users established in the Union.[13]

The number of users is identified and calculated in accordance with the methodology and indicators set out in the DMA Annex. This analysis is based on the definition of "end users" and "business users" in Art. 2 (20) and (21) DMA. In order to identify and calculate the number of "active end users" and "active business users" the Annex refers to the concept of "unique users." The concept of "unique users" encompasses "active end users" and "active business users" counted only once, for the relevant core platform service, over the course of a specified time period (i.e. month in case of active end users, and year in case of active business users), no matter how many times they engaged with the relevant core platform service over that period. This is without prejudice to the fact that the same natural or legal person can simultaneously constitute an "active end user" or an "active business user" for different core platform services.

In contrast to the calculation of the turnover thresholds, the user numbers are not determined at the level of the undertaking, but for each individual core platform service. Where an undertaking offers several services that qualify as core platform services, the number of users has to be determined separately for each of them.

(iii) *Entrenched and Durable Position*

An entrenched and durable position is presumed where the thresholds concerning the provision of a core platform service within the above meaning have been met in each of the previous three financial years.[14] However, it is sufficient that it is foreseeable that the undertaking will enjoy such a position in future.

B. Refutability of the Presumption

The presumption in Art. 3 (2) DMA can be rebutted if an undertaking presents sufficiently substantiated arguments with the notification that it does not satisfy the requirements listed in Art. 3 (1) DMA due to the circumstances in which the relevant core platform service operates, despite meeting all quantitative thresholds.[15]

The DMA does not specify what circumstances may be considered sufficient to rebut the presumption. In our view, it seems reasonable to use the criteria of Art. 3 (8) DMA as a guidance, as these provide general qualitative criteria for the classification of an undertaking as a gatekeeper and should equally serve the purpose of contesting a gatekeeper position.

C. Gatekeepers Beyond the Presumption under Art. 3 (2) DMA

The Commission may also designate an undertaking as a gatekeeper where the presumption is not applicable.[16] The following criteria are to be taken into account when making such a decision[17]:

- the size, including turnover and market capitalisation, operations, and position of that undertaking;
- the number of business users using the core platform service to reach end users and the number of end users;
- network effects and data driven advantages, in particular in relation to that undertaking's access to, and collection of, personal data and non-personal data or analytics capabilities;

12 The list in Art. 2 (2) DMA is exhaustive. If an undertaking provides services that are not covered, the DMA is not applicable.

13 See Art. 3 (2) lit. b DMA.

14 See Art. 3 (2) lit. c DMA.

15 See Art. 3 (5) DMA.

16 See Art. 3 (8) DMA.

17 See Art. 3 (8) lit. a-g DMA.

· any scale and scope effects from which the undertaking benefits, including with regard to data, and, where relevant, to its activities outside the Union;
· business user or end user lock-in, including switching costs and behavioural bias reducing the ability of business users and end users to switch or multi-home;
· a conglomerate corporate structure or vertical integration of that undertaking, for instance enabling that undertaking to cross subsidise, to combine data from different sources or to leverage its position; or
· other structural business or services characteristics.

These criteria give the Commission much more discretion in classifying an undertaking as a gatekeeper than the hard quantitative criteria of the presumption.

Nevertheless, it can be assumed that the application of the DMA will in fact remain limited to the largest digital companies: Art. 3 (8) DMA, last subparagraph, emphasizes that the Commission shall take into account the foreseeable developments in relation to the elements listed in Art. 3 (2) DMA, including any planned concentrations involving another undertaking providing core platform services or providing any other services in the digital sector, when carrying out an assessment under Art. 3 (8) DMA. It can therefore be assumed that Art. 3 (8) DMA is intended for cases in which the thresholds in Art. 3 (2) DMA have not yet been exceeded, but where it seems likely that they will be exceeded.

D. The Designation Procedure

Companies do not immediately become gatekeepers because they fulfil the criteria mentioned above. Rather, the Commission has to take a corresponding decision to designate them as gatekeepers (the so-called designation decision). This procedure is decisive, as many and the most important obligations under the DMA only bind the respective undertaking after the designation decision.

The standard procedure provided for in the DMA is that companies exceeding the thresholds defined in Art. 3 (2) DMA notify the Commission thereof within two months after reaching them.[18] The Commission has to consider the submission of the undertaking in an appropriate manner and then make a decision regarding the designation as gatekeeper within 45 working days.

However, the Commission may also designate gatekeepers that reach the thresholds of Art. 3 (2) DMA but fail to notify the Commission thereof within the time period mentioned above. In this case, the Commission must set a deadline for companies to provide the required information. When the undertaking then provides the information or fails to do so by the end of the deadline, the Commission will make the designation decision within 45 working days of the expiry of the submission deadline. Failure to comply with the notification obligation in Art. 3 (3) DMA entitles the Commission to designate an undertaking as a gatekeeper, based on the information available to the Commission.

When the Commission decides to designate gatekeepers according to the procedure in Art. 3 (8) DMA, the procedure will generally not be started by a notification of the gatekeeper (since the notification obligation is restricted to cases where the qualitative thresholds of Art. 3 (2) DMA are attained), but by the Commission. In such a case, the Commission will generally have to open a market investigation.[19] If such an investigation is to be opened, the Commission has to inform the undertaking concerned within 6 months after opening the investigation.[20]

E. Review of the Gatekeeper Status (Art. 4 DMA)

The Commission may, upon request or on its own initiative, reconsider, amend or repeal at any moment a designation decision by using the procedure laid out in Art. 4 DMA.

IV. WHICH OBLIGATIONS ARISE FROM THE DMA?

Once classified as gatekeeper, companies will face a broad range of obligations under the DMA. In order to minimize risks and avoid significant fines, compliance with these obligations is key. It would exceed the scope of this article to delve into the depths of the contents of these obligations, which is why we provide only a brief overview of them below.

18 Art. 3 (3) DMA.

19 Art. 17 DMA.

20 See Art. 17 (2) and Art. 16 (3) lit. a DMA.

Chapter 3 of the DMA defines the practices of gatekeepers that limit contestability or are unfair and at the same time contains the core obligations of the DMA (Art. 5-7 DMA). Compliance with these obligations has to be ensured within six months after the core platform service has been listed in the designation decision.[21]

A. Brief Overview of the DMA's Core Obligations

The DMA's core obligations are laid down in Art. 5-7 DMA. Examples of such obligations are the prohibition of parity clauses in Art. 5 (3) DMA, the prohibition on self-preferencing in rankings in Art. 6 (5) DMA or the obligation to ensure data portability for end users in Art. 6 (9) DMA. The difference between the obligations under Art. 5 and 6 DMA on the one hand and the obligations under Art. 7 DMA on the other hand is that the former are general obligations for all designated gatekeepers, whereas Art. 7 DMA provides specific obligations for gatekeepers that provide number-independent interpersonal communications services. Art. 7 DMA is separated from Art. 5 and 6 DMA, because it is using a staggered implementation process to address the time it might take for services to ensure interoperability on a technical level.

B. The Clarification Option

The gatekeeper may request the Commission to engage in a process to determine whether the measures that the gatekeeper intends to implement or has implemented to ensure compliance with Art. 6 and Art. 7 are effective in achieving the objective of the relevant obligation in the specific circumstances of the gatekeeper.[22] However, such a clarification will be without prejudice to the powers of the Commission under Art. 29-31 DMA.[23] It can therefore be assumed that the process under Art. 8 (3) DMA will be non-binding.

V. ENSURING COMPLIANCE WITH THE DMA: PRACTICAL IMPLEMENTATION

It is important to integrate DMA-specific compliance measures into the company's existing compliance program.

Especially for (potential) gatekeepers, DMA-specific risks must be sufficiently anticipated and accounted for by a customised compliance concept with specific and clear responsibilities as well as effective processes and corresponding (process) guidelines.

This is particularly important given that the DMA specifically requires a gatekeeper to provide the Commission with a report describing in a detailed and transparent manner the measures it has implemented to ensure compliance with the obligations laid down in Art. 5-7 DMA within 6 months after the company's designation.[24] This report has to be updated at least annually. It has to include a non-confidential summary, which will be made publicly available by the Commission.

If a designation is likely (or has already taken place), assessments should be carried out with a particular view on a company's platform service and past practices to better understand which of the DMA's core obligations need to be observed.

Once this is clear, particular attention should be paid to a clear communication of the legal requirements within the company. This includes the drafting of guidelines and manuals (e.g. a DMA handbook), but also the offering of training courses that explain the requirements of the DMA to the employees.

The employees of a company should also have a contact person for questions concerning the DMA, so they can be provided with reliable support. In this respect, it can only be emphasised that it is particularly important for the compliance department to have adequate staffing and financial resources for these tasks.

This is particularly true as gatekeepers are obliged to introduce a DMA-specific compliance function.[25] How exactly this compliance function is to be organized, staffed, and monitored is described in considerable detail in Art. 28 DMA. In principle, the monitoring body must be independent of the operational business of the undertaking and must be equipped with sufficient monetary and human resources and authority

21 Art. 3 (9-10) DMA.

22 Art. 8 (3) DMA,

23 Art. 8 (4) DMA.

24 See Art. 11 (1) DMA.

25 Art. 28 (1) DMA.

to monitor the gatekeeper's compliance with the provisions of the DMA.[26] Gatekeepers have to communicate the name and contact details of the head of the compliance function to the Commission.[27]

The introduction of a monitoring function does not relieve management of the task of approving and reviewing periodically, at least once a year, the strategies and policies for taking up, managing and monitoring the compliance with this the DMA.[28] Sufficient time has to be devoted to the management and monitoring of compliance with this Regulation.[29]

Control, monitoring and reporting mechanisms should be implemented to immediately detect and stop DMA violations. In this regard, Art. 15 of the DMA should be taken into account. It requires gatekeepers to submit an audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services and to update it annually. As for reporting mechanisms, a designated helpline or whistleblowing tool should be implemented to allow employees or third parties such as business users or end users to report (potential) violations of DMA.

All compliance measures should be carefully documented in order to be able to present them to the Commission in the event of corresponding enquiries.

VI. WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE?

The far-reaching powers of the Commission and the possibility of imposing extensive fines highlight the particular importance of effective compliance with the DMA's obligations.

A. Public Enforcement

The public enforcement of the DMA falls within the responsibility of the Commission. It decides on the designation of an undertaking as a gatekeeper, conducts investigations and imposes fines and other measures. The national competition authorities only play a supporting role in this respect; the DMA does not give them any powers of intervention of their own vis-à-vis the companies.

The Commission is empowered to impose fines on companies that violate the DMA's obligations. The potential amount of fines for violations is determined by Art. 30 DMA:

- Fines equivalent to 10 percent of the global turnover in case of intentional/negligent failure to comply with obligations laid down in Art. 5-7 DMA or other obligations listed in Art. 30 (1) DMA.
- Fines equivalent to 20 percent of the global turnover in case of repetitive infringement of Art. 5-7 DMA (for specific requirements see there).
- Fines equivalent to 1 percent of the global turnover in case of intentional or negligent failure to comply with the obligations listed in Art. 30 (3) DMA. This includes, among others, the failure to introduce a compliance function in the way described above.

The definition of the undertaking also applies to the calculation of fines. A legal/formal separation of the entity providing the core platform service will therefore not avoid the calculation of fines based on the turnover of the undertaking in the sense of Art. 2 (27) DMA.

B. Private Enforcement

The DMA does not explicitly mention the possibility of private enforcement. It therefore remains to be seen how private parties can sue for compensation under the DMA and whether private enforcement will be possible at all.[30]

26 Compare Art. 28 (1), 28 (2) DMA.

27 Art. 28 (6) DMA.

28 Art. 28 (8) DMA.

29 Art- 28 (9) DMA.

30 *Karbaum/Schulz* in NZKart 2022, 107 (111).

VII. CONCLUSION

The DMA's new terminology and regulatory technique poses significant challenges for companies when it comes to compliance. However, particularly in view of the serious consequences of violations, great importance should be attached to careful compliance with its requirements.

Companies falling (potentially) within the scope of the DMA will need to ensure compliance with the relevant DMA obligations by incorporating DMA-specific compliance measures into their existing compliance programs, in particular through the implementation of clear and specific responsibilities, processes and (process) guidelines. Finally, it will be key to ensure clear and diligent documentation of the respective compliance measures in order to be prepared for potential future information requests or challenges by the Commission.

WHO SHOULD GUARD THE GATEKEEPERS: DOES THE DMA REPLICATE THE UNWORKABLE TEST OF REGULATION 1/2003 TO SETTLE CONFLICTS BETWEEN EU AND NATIONAL LAWS?

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I. INTRODUCTION

The relationship between EU competition laws, national competition laws, and laws that regulate markets and market participants (e.g. unfair trading practices) has been on the EU agenda from its very inception. In recent years, the relationship between those laws and (EU and national) regulation of online platforms has sparked additional debate. The controversy revolves around the fate of national rules that are similar or overlapping with EU laws on competition (Article 101 and 102 TFEU) and on digital markets (the Digital Markets Act, "DMA").[2]

While at first sight such matters might appear purely technical, they are subject to heated political debate between the EU and its Member States. Matters of conflict of law determine which institutions have the power to govern markets and societies, the substantive rules and extent of their powers, and may considerably limit national legislation and action. In the context of the DMA, such questions will ultimately determine who would guard core platform services with considerable economic power – the digital gatekeepers.

When it comes to national laws conflicting or overlapping with the EU competition rules, Article 3 of Regulation 1/2003 (entered into force in May 2004) was supposed to have settled this matter, after many years of uncertainty.[3] More recently, the DMA replicated some of the concepts of Article 3 of Regulation 1/2003 to define the situations in which the EU regulation of gatekeepers excludes the application of other EU or national laws.

Yet, the matter is far from settled. As we have demonstrated elsewhere, the test codified in Article 3 to settle conflicts is a less-than-perfect solution, which is a result of a political compromise rather than legal-economic theory.[4] In this paper, we submit that the transposition of such a test to the DMA is likely to be met with an equal degree of legal uncertainty and fragmentation. We begin by discussing the conflicts of laws according to the DMA, show that this solution was at least partially inspired by the test for the resolution of conflicts with Articles 101 and 102 TFEU, and conclude by pointing to the difficulties of transplanting the text of the latter into the former.

II. CONFLICT OF LAWS ACCORDING TO THE DMA (DIGITAL PLATFORMS)

The enforcement of the DMA rests principally with the European Commission, albeit with some assistance from national authorities in the investigation of conduct. This (essentially) centralized enforcement system is, according to Article 37 of the DMA, justified by the desire to achieve coherent enforcement of "available legal instruments applied to gatekeepers" across the common market. This aim is also reflected by the legal basis for the DMA – Article 114 TFEU – aiming to ensure the proper functioning of the internal market.

It is no surprise, therefore, that Recital 9 of the DMA states that fragmentation of the internal market should be averted. On paper, the DMA attempts to avoid this fragmentation by opting for a centralized enforcement system, limiting the extent to which national authorities can impose obligations on gatekeepers alongside the DMA. At the same time, it does not preclude the application of *other national rules* to gatekeepers to the extent they differ from the DMA. To this end, the DMA provides two types of exceptions to the primacy of the DMA; for national laws regulating digital platforms (Article 1(5)) and for EU and national competition laws (Article 1(6)).

Article 1(5) starts by establishing the primacy of the DMA, stating that Member States are prohibited from imposing "further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets." Yet, it permits the Member States to impose national obligations on digital platforms – even when they provide core platform services – "for matters falling outside the scope" of the DMA, and as long as those obligations "do not result from the fact that [they] have the status of a gatekeeper within the meaning of" the DMA.

Article 1(6) deals with conflicts between the DMA and EU and national competition laws. It stipulates that the DMA is without prejudice to the application of *EU competition law*, namely Articles 101 and 102 TFEU and the EU merger control rules, and to the application of *national competition rules*. It is noteworthy that these national competition rules do not only include rules equivalent to those of EU competition law. They

2 Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) (2020) COM/2020/842 final.

3 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1 ("Regulation 1/2003").

4 Or Brook & Magali Eben, *Article 3 of Regulation 1/2003: a historical and empirical account of an unworkable compromise* (working paper, 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4237413.

also include rules that do not have equivalents at EU level, namely "national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of additional obligations on gatekeepers."

According to Recital 9 of the DMA, Member States are only prohibited from applying "national rules which are within the scope and pursue the same objectives" as the DMA. Other national rules, with a different objective, remain unaffected. National competition rules (both equivalent to 101 and102 TFEU, and those that go further (Article 1(6) rules)) are explicitly considered to have such a different objective. They remain applicable, therefore, as long as they do not undermine the uniform and effective application in the internal market of obligations imposed under the DMA.[5] Recital 11 further clarifies that the DMA's objective is distinct from these national competition rules, since competition law "protects undistorted competition on the market," while the DMA ensures that markets with gatekeepers are contestable and fair.

The tests informing the conflict of laws, therefore, depends on a few important criteria that are not fully clarified by the wording of Articles 1(5) and (6) of the DMA. First, to distinguish the situations caught by Article 1(5) from those of Article 1(6), one must distinguish between "competition rules" and other "obligations on gatekeepers by way of laws, regulations or administrative measures." This difference appears to hinge, at least at a minimum, on the objectives of those two sets of laws: if the obligations imposed on gatekeepers have, according to the DMA, the "purpose of ensuring contestable and fair markets," competition rules a priori seem to have a *different* objective. Yet, as we will show below, the objectives of those two pieces of legislations are not without doubts.

Second, it is not fully clear when an obligation "result[s]" from the "gatekeeper" status in the meaning of Article 5(1) of the DMA. If this is an important distinguishing criterion, it will need to be established how gatekeeper status differs from traditional concepts (e.g. significant market power, bottlenecks on which others are economically dependent, dominance) and new concepts (e.g. undertakings with "Strategic Market Status" as in the UK, or with "paramount significance for competition across markets" in Germany).

Third, to identify whether national competition rules on unilateral conduct can be applied to situations caught by the DMA by virtue of Article 1(6), it will be necessary to determine what it means for such resulting obligations to be "additional" to those listed in the DMA. Could the German Bundeskartellamt argue, for example, that the obligations it applies based on Section 19(a) of the German Competition Law (GWB), such as prohibitions on the combinations of data without offering users sufficient choice, are "additional" to those foreseen in Article 5 of the DMA?

As the next section shows, the uncertainty surrounding many of those open questions traces back to the historical origins – Article 3 of Regulation 1/2003.

III. CONFLICT OF LAWS ACCORDING TO ARTICLE 3 OF REGULATION 1/2003 (COMPETITION LAW)

The above-mentioned test of the DMA for resolving conflicts with overlapping EU and national laws seems to be inspired by the test guiding the relationship between EU competition law (Articles 101 and 102 TFEU) and national (competition and others) laws, as codified in Article 3 of Regulation 1/2003. The choice to adopt a similar solution for the DMA should not be taken for granted. Unlike the (essentially) centralized setting of the enforcement of the DMA, the enforcement of Articles 101 and 102 TFEU is based on a decentralized approach, whereby EU law is to be applied by the Commission and national competition authorities ("NCAs") in parallel. In this context, conflicts are mostly likely to arise between EU and national competition laws, and between EU competition laws to other national measures that regulate markets and market participants, such as abuse of economic dependence, unfair competition, and restrictive trading practices.

Article 3(1) of the Regulation enacts the principle of parallel application of *EU and national competition laws*, by obliging NCAs and national courts to apply Articles 101 and 102 TFEU when they apply their national *competition laws* to anti-competitive agreements and unilateral practices that affect trade between Member States. Article 3(2) sets the general principle of primacy of the EU competition law provisions. Yet, Articles 3(2) and (3) provide for two exceptions from this general rule. Member States are not precluded from the application of (i) "stricter" national rules on unilateral conduct (equivalent to Article 102 TFEU); and (ii) provisions of national law that "predominantly pursue an objective different" from that pursued by Articles 101 and 102 TFEU.

The resolution of conflicts, as codified in Article 3, is not based on solid legal or economic theory of market regulation. Rather, it is the product of heated political negotiations and compromise among the Member States. As we detail elsewhere based on an archival study, for the first 40 years of its existence, EU primary and secondary laws did not define the relationship between EU competition law and national (competi-

5 Recital 10.

tion and other) laws.[6] This was not a mere oversight. Article 87(2)(e) of the EEC Treaty had explicitly ordered the Council to adopt such rules within a period of three years after the Treaty entered into force. The Member States, however, failed to come to an agreement on this politically sensitive question. Instead, the Commission and ECJ were left to rule on those matters on a case-by-case basis. They adopted a complex and case-specific set of rules, reflecting the general principles of parallel application of EU competition and national law and the primacy of EU competition law.

Regulation 1/2003, therefore, was the first time in which the Council had acted on its powers to regulate the relationship between EU competition and national laws. Initially, the Commission advocated for a radical law reform, according to which Articles 101 and 102 TFEU should "apply to the exclusion of national competition laws" when a practice has an effect on trade between Member States.[7] According to the Commission, parallel application of EU and national laws was unwarranted because it will lead to unnecessary parallel proceedings.[8]

Yet the Member States strongly disagreed to limit their powers to adopt national legislations on markets and competition, and particularly to regulate unfair trading practices. The relationship between EU competition and national laws was one of the most controversial issues in the negotiation process of Regulation 1/2003. Bringing the discussion to a halt on more than one occasion, the Member States managed to reach a compromise only towards the very end of the negotiations. Article 3, as a result, is not based on a robust legal theory of decentralization. Its vague and complicated wording does not offer clear guidance on drawing the dividing line between practices that fall under the exceptions of Articles 3(2) and (3).

> Article 3:
> *1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101](1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101] of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102] of the Treaty, they shall also apply Article [102] of the Treaty.*
> *2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article [101](1) of the Treaty, or which fulfil the conditions of Article [101](3) of the Treaty or which are covered by a Regulation for the application of Article [101](3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.*
> *3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.*

The adopted wording of Article 3 does not offer a clear and predictable set of rules to settle conflicts between EU competition law to national rules on competition and unfair trading practices. In this context, two main sets of challenges arise:[9]

A first set of challenges relates to conflicts between EU and national competition laws, and more specifically what type of conduct falls under the exception of Article 3(2), prescribing that the Member States are not precluded from adopting and applying "stricter national laws which prohibit or sanction unilateral conduct." This wording raises a number of questions, including: while the Article refers to "stricter national laws" in general rather than to national competition laws, Recital 8 of the same Regulation states that this rule refers specifically to "stricter *national competition laws*";[10] Article 3(2) and Recital 8 refer to national competition laws that prohibit or sanction "unilateral conduct," unlike Articles 1 and 3(1) of the Regulation that refer to an "abuse prohibited by Article [102]." This suggests that Article 3(2) may codify conduct beyond abuse of a dominant position; Moreover, Article 3(2) does not clarify what "stricter" means. A broad range of possibilities may apply, such as a stricter standard of what constitutes an abuse, a lower level of market power to establish a position of dominance, different degrees and types of economic power (e.g. economic dependence, or gatekeeper powers), or rules applying to conduct that was objectively justified under Article 102 TFEU.

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6 Brook & Eben, *supra* note 4.

7 Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (2000/C 365 E/28), Recital 8.

8 Explanatory Memorandum to COM(2000)582 Implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, para 6.

9 We discuss these challenges, their historical origins and practical implications in Brook & Eben, *supra* note 4.

10 Emphasis added.

A second set of challenges relates to the distinction between rules covered by Article 3(2) (national competition law) and by Article 3(3) (other rules). The former exception is considerably more limited than the latter. National competition rules should be applied side by side the EU rules, are subject to procedural and institutional safeguards of EU law, and in case of divergence could be accepted only as long as they are "stricter" than Article 102 TFEU.[11]

Despite such implications, the dividing line between (stricter) national rules on unilateral conduct in the meaning of Article 3(2) and national rules with a predominantly different objective in the meaning of Article 3(3) is not a straightforward exercise. It hinges on identifying the objective or the national rules and determining whether they are sufficiently similar to those of EU competition law. Yet, the goals of EU competition law are subject to great debate, and there is no clear consensus.[12]

Similarly, identifying the objectives of the national legislation is by no means an easy task, and Article 3 does not indicate how they should be determined. We have shown elsewhere that three possible benchmarks can be used to identify the objectives of the national laws: according to the objective of the national statutes examined as a whole; the objective of the specific national provision to be compared with Article 101 or 102 TFEU; or the harm the enforcement of a national provision addresses in practice.[13]

By systematically studying the practice of French and German NCAs and courts as a case study (2004-2021), we demonstrated empirically that the decisions of NCAs and judgment of national court do not consistently identify a benchmark to inform the objectives of the national law, and that their practices do not consistently comply with a single benchmark. In fact, diverging interpretations and classifications do not only exist among jurisdictions, but even within a single Member State.

In particular, our findings showed that it is not entirely accurate to say that national rules that protect competition on the market directly are being classified as national competition laws (subject to Article 3(2)'s narrow exception), and those that are more concerned with the protection of individual interests, fairness, equilibrium in commerce, freedom, or ensuring access of individual market participants to the market are classified as other national laws (subject to Article 3(3)'s broad exception). Rather, national enforcement differed, ascribing different and often overlapping objectives to national competition and "other" laws.

Regulation 1/2003's test, focused on the objectives of the national laws and measures, in other words, does not appear to work smoothly in practice. The unclear test resulted in much legal uncertainty, and fragmentation in the applicable laws across the EU. As we argue in the concluding section, because the DMA has adopted a similar test, such weaknesses are likely to also affect the enforcement of the DMA.

IV. REPRODUCING AN UNWORKABLE TEST?

There are clear similarities between the approaches of Article 1 of the DMA and of Article 3 of Regulation 1/2003. Not only do both regulations seek to avert fragmentation of the internal market while allowing some space for the application of (diverging) national rules, but the test for resolving conflicts with national laws also uses similar concepts: both tests foresee that Member States can apply *national competition rules on unilateral* conduct (Article 3(2) of Regulation 1/2003 and Article 1(6) of the DMA)[14] as well as rules having a different *objective* (Article 3(3) of Regulation 1/2003 and Article 1(5) of the DMA).

Similarly to Article 3 of Regulation 1/2003, the DMA refers to the objectives of the national law to distinguish competition rules from non-competition rules. However, it seems to go further still, by adding that the national competition rules are those which are "based on an individualised assessment of market positions and behaviour, including its actual or likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments."[15] This seems to be a slight improvement from Regulation 1/2003, which appeared to consider that rules fell in the "predominantly different objective" category because they "pursue[d] a specific objective, *irrespective of the actual or presumed effects of such acts on competition on the market*."[16]

11 For a discussion see, Brook & Eben, *supra* note 4.

12 Stylianou & Iacovides, "The goals of EU competition law: a comprehensive empirical investigation" Legal Studies (2022).

13 Brook & Eben, *supra* note 4.

14 Admittedly, the wording of the DMA is not identical to that of Article 3: it does not explicitly refer to "stricter" national rules on unilateral conduct, but rather to national competition rules on unilateral conduct which amount to the imposition of additional obligations on gatekeepers or apply to non-gatekeepers.

15 Recital 10.

16 Recital 9, emphasis added.

The DMA, in other words, arguably provides two tests to differentiate between the DMA and other national (competition and non-competition) rules: first, the objectives of the national laws (Article 1); and, second, whether enforcement involves an assessment of market positions and effects on the market (Recitals 9-11).

The definition of the objective of competition law in the DMA is near identical to that in Regulation 1/2003.[17] The DMA and Regulation 1/2003 also both include references to "fairness" as non-competition law: while Regulation 1/2003 puts forward rules sanctioning unfair trading practices as examples of rules with a predominantly different objective, the DMA considers fairness one of its two main objectives. This would imply that the DMA is indeed distinct from competition law, which thus remains applicable in parallel under both pieces of legislation, because of its diverging objectives.

As the experience of applying Article 3 of Regulation 1/2003 has shown us, this is not an easy distinction to make in practice. Article 3 of Regulation 1/2003 did not provide a clear solution for settling conflicts between Articles 101 and 102 TFEU and national (competition and other) rules. European national practices are not aligned in defining the objectives of the national laws. Various and conflicting approaches are adopted not only across the Member States, but even within the same jurisdiction.

Replicating Article's 3 "different objective" test to the DMA, we therefore argue, is not a robust means to ensure uniformity, effectiveness, and legal certainty in the application of the DMA across the internal market.

Admittedly, the approach in the DMA is more concrete – focusing on the formal way in which effects analysis takes place – and may thus be a better benchmark to distinguish laws from each other. Yet, here too, it is possible to foresee a problem: despite the intentions of the legislator to avoid the lengthy and complicated process that results from the need to assess market positions, effects, and justifications, it cannot be ruled out completely that the DMA will require some assessment of this type: in, for example, the assessment of the effectiveness and proportionality of measures taken to comply with the obligations, during the judicial review, or as part of the limited possibility for an undertaking to provide "sufficiently substantiated arguments" that it is not a gatekeeper.

17 Recitals 9-11 of the DMA and Recital 9 of Regulation 1/2003.

THE DIGITAL MARKETS ACT, EU COMPETITION ENFORCEMENT AND FUNDAMENTAL RIGHTS: SOME REFLECTION ON THE FUTURE OF *NE BIS IN IDEM* IN DIGITAL MARKETS

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I. INTRODUCTION

The Digital Markets Act ("DMA") marks a significant change in the way in which the EU tackles practices restrictive of competition in the digital services industry. Designed to apply to platform service providers, it sets out a system for the designation of some of them as 'gatekeepers' by virtue of their position on the market, their financial strength and the reach of their activities. Gatekeeper designation has considerable consequences for the concerned undertakings, since it subjects them to several pervasive behavioral obligations. Their observance is backed by powers of investigation and sanction, enjoyed by the EU Commission. The Commission also enjoys powers of general supervision of platform services markets, by means of market investigations and studies.

The DMA therefore establishes an ex ante regulatory system for the policing of competition on an important sector of the digital economy. Rather than applying ex post facto, it imposes specific obligations on those providers that are in a position of "control" over entry in and/or the functioning of these markets. However, a cursory look at the Act shows that the obligations it imposes are closely modelled to commitments and remedies that have been sanctioned by the Commission and the EU Courts as a response to anti-competitive behavior.

The purpose of this article is to interrogate how the DMA and the mainstream competition rules are going to interact and at the same time ensure the continued observance of fundamental rights, in particular the principle of ne bis in idem. The right not to be prosecuted and sanctioned twice for the same offence is enshrined in Article 50 of the EU Charter of Fundamental Rights ("EU CFR"). The article will consider the nature of the relation existing between the DMA and the EU competition rules and discuss in particular the nature of the legislative purpose of the DMA. On that basis, it will argue that it might be difficult to disentangle the internal market objectives that the DMA purportedly seeks to achieve from the attainment of competition policy goals, which seem also to be inherent to the framework of the new Regulation.

On that basis the article will discuss the question of whether the concurrent application of the DMA and the EU competition rules might be compatible with Article 50 EU CFR. It will review the state of play as regards ne bis in idem generally and in respect of parallel or subsequent competition and sector regulation investigations. It will be argued that, in light of the most recent decisions of the CJEU, a more flexible framework for the assessment of questions relating to the observance of this principle might be emerging. The paper will conclude that it might be possible to accommodate the concurrent application of the new Regulation and of the mainstream EU competition rules. For this purpose, however, it is going to be essential to ensure that investigations and sanctions imposed on the basis of the DMA find their primary legislative purpose in the improvement of the functioning of the Internal Market.

II. THE DIGITAL MARKETS ACT AS THE EX ANTE REGIME FOR "IMPORTANT" PLATFORMS

The Digital Markets Act is the point of arrival of extensive debate concerning how to respond to collusive or abusive practices occurring in digital markets and especially in the market for the provision of platform services. Speaking in 2020 Margrethe Vestager, the EU Commission Vice-President recognized that Articles 101 and 102 had proved to be flexible and resilient enough to withstand the challenges posed to competition in digital markets. However, she recognized that systemic factors had sometimes prevented the Commission from addressing the special features and dynamics of platform markets, such as the impact of positive feedback loops on entry or expansion of rivals, in a timely and effective manner.[2]

The length of the proceedings, the ex post nature of the assessment they required and the limits associated with a finding of dominance did not allow timely and effective intervention in some cases.[3] In addition, the Commission saw the proposals for reform of platform services' regulation as a window of opportunity for embedding in competition analysis a number of non-economic systemic policy objectives, such as the need to safeguard pluralism and democracy in the online sphere and the transition toward a "green" economy.[4] Adopting an *ex ante* approach allowed the Commission to shape a vision for platform services markets that would not only "serve" competition but would also achieve these broader societal goals.[5]

2 Margrethe Vestager, speech given at the College of Europe, Bruges, on 2 March 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en.

3 Signoret, "Code of competitive conduct: a new way to supplement EU competition law in addressing abuses of market power by digital giants," (2020) 16(2) Eur Comp J 221 at 232-234; see also pp. 238-240.

4 EU Commission, "Strategy: priorities for 2019-2024—A Europe fit for the digital age," available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en.

5 See, *inter alia*, Cini & Czulno, "Digital single market and the EU competition regime: an explanation of policy change," (2022) 44(1) Journal of European Integration 41 at 42, 45.

With a view to tackling these concerns, the new Regulation enshrines substantive and procedural rules applicable to large online platforms that enjoy position of market power in relation to the entry in and the expansion of other competitors on specific digital market segments and/or consumer and supplier segments.[6] At its core is the designation of specific undertakings as "gatekeepers," either following a notification from individual platform services' providers or as a result of a market investigation. This designation has important consequences for the undertakings concerned who as a result are subject to an array of pervasive obligations as to future behavior on the market. Some are clearly defined and are enshrined in Article 5 of the DMA whereas other can be "further specified" by the EU Commission, in accordance with Article 6. Thus, according to Article 5, gatekeepers will no longer be allowed to impose price parity obligations on customers or tie the provision of certain services to others'. Article 6 expands the range of gatekeepers' duties by allowing the Commission to tailor the latter in a number of important areas, such as data portability and interoperability standards. The Commission enjoys exclusive powers of investigation and can punish undertakings that fail to comply with their obligations.[7]

It is clear from the above that the new Regulation brings about substantive change in the way in which rivalry and openness are maintained in platform markets. It is special, in that it only applies to a restricted number of undertakings. It is applicable ex ante and confers to the Commission an exclusive power of enforcement of its obligations, to the benefit of uniformity and legal certainty. It also centralizes enforcement powers on the Commission to the exclusion of the national competition authorities and sector regulators. It is however clear that its "feet" are firmly grounded in the EU competition law acquis. Articles 5 and 6 reproduce almost verbatim commitments and remedies that had been imposed by the EU Commission (and approved by the EU Courts) on undertakings that had infringed the EU competition rules.

This therefore raises important questions of consistency, coordination between institutional frameworks and, despite the DMA's best intentions, legal certainty. It is added that the circumstance that these obligations are imposed without the need for an individual decision or the obligation to meet exacting standards of proof gives the new Regulation a rather significant "edge" over "old-style" mainstream competition enforcement.[8] Is this the start of the end for the application of Articles 101 and 102 TFEU in important areas of the digital economy? How are the general EU competition rules and the DMA destined to interact in practice? Can the concurrent application of these two sets of rules remain consistent with the protection of fundamental rights? These questions will now be examined in turn.

III. THE EU COMMISSION AND THE NCA AND PLATFORM SERVICES MARKETS — ASYMMETRIC COORDINATION?

The previous section sketched the DMA and highlighted how its relationship with the general competition rules might actually prove critical to its effective application. This section will explore the nature of the interplay between the new Regulation and the enforcement of Articles 101 and 102 TFEU. According to Recital 10 of the Preamble, the DMA will not prejudice the applicability of EU or national competition laws to practices falling within its remit or prevent or limit the application of domestic sector regulation pursuing objectives other than preserving open and fair markets.[9] Furthermore, Article 1(6) of the Regulation expressly provides for the parallel application of the new Regulation and the mainstream competition rules as well as of sector specific regulation, whenever the latter is relevant.

The DMA also provides a mechanism designed to minimize the risk for inconsistent outcomes, which could in turn prejudice the effectiveness of the new Regulation's own framework. Article 40(5) establishes a high-level Group of Digital regulators, whose purpose is to act as a forum for the discussion of "matters of mutual cooperation and coordination between the Commission and the Member States in their enforcement actions."[10] The Group can also make recommendations to the EU Commission as regards new market investigations.[11] In addition, Article 38 introduces an obligation for all NCAs to inform the Commission of any investigations concerning identified gatekeepers[12] and to notify it of any

6 See Proposal for a Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act) (hereinafter referred to as DMA), 15 December 2020 (and successive amendments), available at: https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN , Preamble, Recitals 32-34.

7 See e.g. Monti, "The Digital Markets Act: institutional design and suggestions for improvement," (2021), TILEC Discussion Paper no 2021-04, available at: https://ssrn.com/abstract=3797730, pp.4-5.

8 See inter alia, Fernandez, "A new kid on the block: how will competition law get along with the DMA?," (2021) 12(4) JECLAP 271.

9 *Id.* Preamble, Recitals 9-10.

10 Amended DMA, Preamble, Recital 93.

11 *Id.* Article 40(5).

12 Amended DMA, Preamble, Recital 91; see also Article 1(7); Article 38(3).

decision it intends to adopt imposing obligations on them before the former is adopted. The Commission can object to the proposed decision on the ground that it "runs counter" the DMA and if this objection is made, the NCA will be prevented from adopting it.[13]

It is clear that the DMA provides a specialized framework for the regulation of platform services markets while at the same time recognizing the continuing applicability of the general EU and domestic competition rules.[14] It is suggested that this new structure responds to the need to preserve competition in markets that are perceived as critical not only for the attainment of economic goals, but also for the preservation of broader values, such as enhancing fairness, open democracy and contributing to the green transition.[15] It can be argued therefore that imposing generally applicable obligations, backed by sanctions in case of non-compliance and a designation mechanism, destined to enhance legal certainty, ensures that goals that are not as market-related as those pursued by the general competition rules can be achieved.[16]

The forgoing indicates that the DMA introduces a different approach to protecting competition in platform services markets. It is "special " in nature, as opposed to the general Articles 101 and 102 TFEU, both objectively and subjectively. It is applicable *ex ante*, namely before any prima facie restrictive practice occurs and imposes sanctions for non-compliance, regardless of whether conduct has an adverse impact on competition. Unlike with Articles 101 and 102 TFEU, it sets as its goals objectives that are non-economic in nature. Finally, differently from the general EU competition rules, whose application has been decentralized (albeit with the narrow exception contemplated by Article 11 (6) of Council Regulation No 1/2003), the DMA can only be applied by the Commission, albeit with a general commitment to preserving cooperation and coordination and thereby a role for the national competition agencies.[17]

It is however also clear that the extent to which this structure will deliver on its stated objectives, there is a potential risk that it would result in the gradual marginalization of Articles 101 and 102 TFEU when it comes to detecting and sanctioning restrictive practices affecting digital markets. It is acknowledged that the Regulation provides a framework where discussion can take place between the Commission and its national counterpart agencies. However, it is argued that the approach that the Commission will take to exercising its power to take over cases concerning gatekeepers from NCAs is going to be critical to defining the extent to which the "auxiliary" relationship envisaged in the DMA's Preamble will actually be achieved.[18] It could be suggested, not without merit, that the expansion of the DMA in these markets is a desirable outcome, since the new Regulation aims to provide a tailored response to restrictive conduct in fast-moving industries, whose competition dynamics are relatively sui generis compared with "bricks and mortar" markets. Nonetheless, it is argued that whether this outcome "fits" with the idea of a complementary relationship between the DMA and the general EU competition rules is highly uncertain.[19]

In light of the forgoing it can be concluded that the DMA is going to change significantly how we address restrictive practices in digital markets. Nonetheless, to the extent that it is likely to overlap with their application, the new Regulation might actually challenge the continuing enforcement of the Treaty competition rules and the role acquired by the NCAs under the Modernisation Regulation.

IV. THE DMA, EU COMPETITION ENFORCEMENT AND FUNDAMENTAL RIGHTS — IS THE "AUXILIARY" RELATIONSHIP CONSISTENT WITH THE PRINCIPLE OF *NE BIS IN IDEM*?

So far we discussed the issues arising from the structure of the DMA and its perspective relationship with the general competition rules. It was noted how the future interplay with the general competition rules might actually prove far more difficult to navigate than originally thought. The purpose of this section is to a highlight another source of potential uncertainty arising from this relationship, namely the extent to which the concurrent application of the new Regulation and of Articles 101 and 102 TFEU might be incompatible with the principle of ne bis in idem.

13 Amended DMA, Article 1(7); see also

14 Margrethe Vestager, speech given at the College of Europe, Bruges, on 2 March 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en.

15 EU Commission, "Strategy: priorities for 2019-2024—A Europe fit for the digital age," available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en.

16 *Id.* See also Cini et al., cit. (fn. 4), p. 46-47.

17 See *inter alia* Komninos, "The Digital Markets Act: how does it compare with competition law?," available at: https://ssrn.com/abstract=4136146, pp. 3-5.

18 Akman, "Regulating competition in digital platform markets: a critical assessment of the framework and approach of the EU Digital Markets Act," (2022) 47(1) ELRev 84, p. 102-103.

19 *Id.* p. 100.

As is well known, the parallel application of EU and national competition law has occurred from time to time and, according to the case law of the CJEU, is not necessarily incompatible with Union law. According to the much debated Wat Wilhelm decision, while Article 101 (then 85 EEC) is concerned with "obstacles which may result from trade between member states," domestic competition law looks at the impact that a prima facie unlawful arrangement can have on markets that are internal to its jurisdiction.[20] The only limitation to this principle is that of imposing on the authority proceeding after a sanction has already been imposed an "accounting obligation": "a general requirement of natural justice (…) demands that any previous punitive action must be taken into account in determining any sanction that is to be imposed."[21]

It can be suggested, in light of the above, that on the basis of the Walt Wilhelm judgment, it would be possible to apply the DMA concurrently with the general competition rules, only subject to the onus of adjusting any sanction in light of earlier penalties that might have been imposed on the same platform.[22] This approach, however, might be open to question if it is contrasted with more recent jurisprudential developments. IN particular, the case law of the Court of Justice shows that the *ne bis in idem* principle has been applied in a more expansive way, one which does away with the requirement of "identity of legal interest protected," in other areas of Union law. This more protective standard can be found in cases concerning the application of this principle when invoking the Convention for the Implementation of the Schengen Agreement, where *ne bis in idem* is enshrined. The Court of Justice held that the principle in question prevents every person from being tried in a criminal court in respect of an offence for which they had already been acquitted or convicted in different member state of the EU.[23] The notion of "same acts" was read as a set of concrete circumstances which are inextricably linked together, irrespective of their legal classification given to them or of the legal interest protected."[24]

The approach above and especially its mode of appraisal of the "idem factum" condition has since prevailed in cases concerning the concurrent investigation and sanction of the "same facts" in accordance with, respectively, stricto sensu criminal and non-criminal regulatory rules, such as financial regulation. In *Garlsson*, the Court of Justice expressly addressed the question of the impact of Article 50 of the EU CFR, which expressly protects the right against double jeopardy, on sanctions applied concurrently, albeit under different legal frameworks, by member states' authorities.[25]

The judgment found that the parallel investigation and sanction of the same behavior under, respectively, criminal and administrative laws should be regarded as an interference with the right enshrined in Article 50 of the EU Charter. As such, therefore, it should be scrutinized in light of the framework for assessment provided in Article 52(1) EU CFR. According to this provision, "any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by law and respect the essence of those rights and freedoms." Limitations can be imposed "only if they are necessary and genuinely meet objectives of general interests recognized by the Union or the need to protect the rights and freedoms of others" and in accordance with the principle of proportionality. The Court of Justice observed that the concurrent imposition of criminal and regulatory sanctions on the applicant had been prescribed by law and was appropriate to pursue the legitimate aim of protecting and maintaining financial stability.[26]

However, the Court took the view that in the case at hand the imposition of an administrative penalty on top of a criminal sanction did not conform to the requirement of proportionality, enshrined in Article 52(1) EU CFR. [27] The Court took the view that the regulatory sanction had duplicated the penalty that the criminal courts had already imposed on the applicant. [28] In light of the forgoing analysis, it appears difficult to reconcile the approach to *ne bis in idem* adopted by Walt Wilhelm with the one emerging from cases such as Garlsson, where the concurrent investigation and sanction of what appears to be "same facts" were assessed in light of the EU CFR.

The Court of Justice relied on a generally applicable test, as provided in the Charter, as opposed to a set of conditions that would only be applicable to one particular policy field. In addition, the Court framed the assessment of concurrent regulatory and criminal sections as a

20 Case 14/68, *Walt Wilhelm v Bundeskartellamt*, ECLI: EU: C: 1969: 4, para. 10.

21 *Id.* para. 11.

22 See e.g. Colangelo & Cappai, "A unified test for a European Ne Bis in Idem principle: the case study of digital markets regulation" 2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951088, p. 14-15. Also, Andreangeli, "The Digital Markets Act and the enforcement of EU competition law: some implications for the application of Articles 101 and 102 TFEU in digital markets", (2022) 43(11) ECLR 496, p. 500.

23 Case C-638/16, X, ECLI: EU: 2017: 173, para. 51.

24 *Id.* para. 71; see also, *inter alia*, C-261/09, Mantello, ECLI: EU: C: 2010: 683, para. 39-40.

25 Case C-537/16, Garlsson Real Estate SA, ECLI: EU: C: 2018: 13, para. 1-3.

26 *Id.* para. 54-55.

27 *Id.* para. 55-57.

28 *Id.* para. 59-61.

limitation of the right not to be prosecuted or sanctioned twice for the same offence, as such protected by the EU Charter, and accordingly, it subjected it to the scrutiny provided in one of the horizontal clauses of the Charter itself, namely Article 52(1). In this context, the Court regarded the different interest protected by each of the legal provisions allegedly violated not as a self-standing requirement for the applicability of *ne bis in idem*, but as one of the elements that should have been assessed to ensure that concurrent proceedings were truly "necessary" in accordance with Article 52(1).[29]

It should be noted that in a recent decision the CJEU seems to have moved a step closer to extending the "Charter-based " assessment of concurrent investigation and sanction of "same facts" to the parallel application of competition law and domestic sector regulation.[30] The Court observed that the principle of n bis in idem was applicable to the circumstances of the case on the ground that both proceedings, despite being non-judicial, retained a "criminal essence," in view of the severity of the sanctions they envisaged and of their general scope of application. It was also confirmed that the concept of "same facts" that should be applied to the question referred to the Court should be the one enshrined in the Garlsson preliminary ruling, namely "a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned. (…)" On this basis the CJEU considered whether, in accordance with its more recent decisions, the concurrent proceedings at issue in bpost were compatible with Article 50 EU CFR, on the ground of being "prescribed by law," having a "legitimate aim" and being "necessary in a democratic society," as prescribed by Article 52(1) EU CFR.[31] The Court emphasized that the "duplication of proceedings and penalties" preserved the "essence" of the right against double jeopardy only if "the national legislation (…) provides only for the possibility of a duplication of proceedings and penalties under different legislation."[32]

On this basis, The Court of observed that each of the proceedings in issue in *bpost* pursued different aims, namely the preservation of genuine competition and the liberalization of the postal services within the EU internal market.[33] It added that member states could provide for the duplication of sanctions for the same conduct, so long as these concurrent proceedings did not compromise the essence of the right against double jeopardy and in particular did not impose a disproportionate burden on the accused.[34] For this purpose, the national court should consider factors such as the existence of rules ensuring coordination between the competent agencies, a "sufficiently proximate timeframe" for the adoption of the final decision and a requirement to take into account, when imposing a sanction, any other penalties already inflicted for the same conduct.[35] In particular, ascertaining whether each set of proceedings pursued different legitimate policy objectives constituted another important element of the test of "necessity in a democratic society" of the interference with the accused's rights under Article 50 EU CFR.[36] This condition would be fulfilled if the proceedings in question constituted "distinct legal responses to the same conduct."[37]

In light of the forgoing analysis, it is argued that bpost represents a significant step toward ensuring a broadly consistent yet at the same time flexible approach to the principle of *ne bis in idem* in cases where competition enforcement takes place in parallel with the application of other regulatory framework. It is submitted that the holistic approach developed by the encompasses a varied set of factors ranging from the nature of and connection between the facts at issue to the nature of the legitimate aim pursued by each of the proceedings to the procedural rules assisting each of them, thereby focusing on the necessity and the proportionality of concurrent sanctions. In this context, the identity or otherwise of the "interest protected" by the applicable rules, while being relevant, is appropriately balanced against other considerations that relate to the nature of the facts at issue, the quality of the rules governing the imposition and timing of any penalties.[38]

Against this background, it is legitimate to query whether the rules of the DMA can be applied in parallel with and as a complement to the mainstream EU competition rules without infringing the principle of *ne bis in idem*. It was observed earlier that while the new Regulation

29 See *inter alia, mutatis mutandis,* Vetzo, "The past, present and future of the ne bis in idem dialogue between the Court of Justice of the European Union and the European Court of Human Rights," (2018) 11(2) Review of European Administrative Law 55, pp. 68-9; see also p. 77. Also, see Andreangeli, cit. (fn. 22), p. 502.

30 Case C-117/20, *bpost,* judgment of 22 March 2022, ECLI: EU: 2022: 202, see para. 2-3.

31 *Id.* para. 40-41.

32 *Id.* para. 43.

33 *Bpost*, cit. (fn. 29), para. 47.

34 *Id.* para. 49; see also, inter alia, appl. 24130/11 and 29758/11, *A and B v. Norway*, judgment of 15 November 2016, available at: https://hudoc.echr.coe.int/eng?i=001-168972, especially para. 130-132.

35 *Id.* para. 48; see also para. 51.

36 *Id.* para. 55.

37 *Id.* para. 57.

38 See *inter alia* Colangelo and Cappai, cit. (fn. 21), p. 28-29.

provides for mechanisms designed to ensure coordination and minimize the risk of overlap of the two systems, concurrent DMA and competition investigations, the latter especially on the part of NCAs, cannot be excluded.[39] It is submitted that the test elaborated by the CJEU in bpost does not appear to prohibit completely the parallel application of the DMA and the mainstream EU competition rules.[40] It is suggested that the approach it entails allows for the analysis of all the features of individual cases, of the characteristics of each of the regulatory frameworks involved and the intensity of the disadvantage that the same applicant had suffered due to the duplication of proceedings relating to "identical facts."[41]

This reading, therefore, seems to center on the substantive question of whether the scope of the right not to be prosecuted or sanctioned twice for the same "offence" had been limited to what was strictly necessary to attain the public interest pursued by the relevant regulatory framework.[42] The fact that any such limitation must be "prescribed by law" provides an additional safeguard, since it ensures that any restriction placed on the right prescribed by Article 50 EU CFR is contingent upon a set of exhaustively defined condition and as a result, is foreseeable.[43]

In light of the forgoing analysis it is concluded that the interpretation of the right against double jeopardy adopted by the CJEU in its recent case law is likely allow for the concurrent application of the DMA and of the EU competition rules, subject to an assessment of the "necessity" of the parallel proceedings, as dictated in bpost. It is submitted that the approach elaborated by the CJEU in its recent judgment is going to maintain the effectiveness of the right against double jeopardy while at the same time ensuring that both the DMA and the competition rules can be applied effectively in the circumstances of each case, without placing a disproportionate burden on the investigated undertakings.

V. REGULATING COMPETITION IN DIGITAL MARKETS — WHAT IS THE FUTURE HOLDING FOR PLATFORM UNDERTAKINGS? SOME CONCLUSIONS

The DMA represents an extremely significant development in the way in which we regulate digital markets. To the extent that it provides a set of *ex ante* rules applicable only to large online platforms and reinforces their observance with a complex institutional and sanctioning framework, the new Regulation breaks new ground *vis-à-vis* the "traditional approach" to the maintenance of competition and openness of markets.[44]

This contribution aimed to illustrate the terms of the debate that surrounds the new Regulation and argued that due to its scope and to the nature of the obligations it imposes the DMA is very likely to apply in parallel with the mainstream competition rules, thereby raising important questions as to their future substantive and procedural interplay. It was shown how these issues are especially relevant if seen against the framework for the protection of fundamental rights, enshrined in the EU Charter. It was argued that the possibility of the DMA and the mainstream EU competition rules applying in parallel could usher questions concerning the continued observance of the right against double jeopardy, protected by Article 50 EU CFR. This contribution summarized the current debate surrounding the reach of this right, its requirements and its scope of application, generally and in the area of competition law specifically. It was submitted that, although it remains to be seen how the CJEU will approach these questions going forward, the approach to the principle of *ne bis in idem* that seems to emerge from the Court's recent practice is likely to reconcile the demands associated with the effective application of the DMA with the protection of this important safeguard.

It can therefore be concluded that while questions remain as to their future interplay, Article 50 EU CFR does not appear to pose an absolute barrier to the auxiliary relationship that the DMA envisages vis-à-vis the general EU competition rules.

39 See e.g. Komninos, cit. (fn. 16), p. 5.

40 See *id.* p. 15-16.

41 *Id.*

42 See e.g. Luchtman, The ECJ's recent case law on ne bis in idem: implications for law enforcement in a shared legal order," (2018) 55 CMLRev 1717, pp. 1729-1733; especially pp. 1731-1732.

43 See mutatis mutandis, Colangelo and Cappai, cit. (fn. 21), p. 14.

44 Speech given by Margrethe Vestager, on 15 December 2020, IPR/20/2347.

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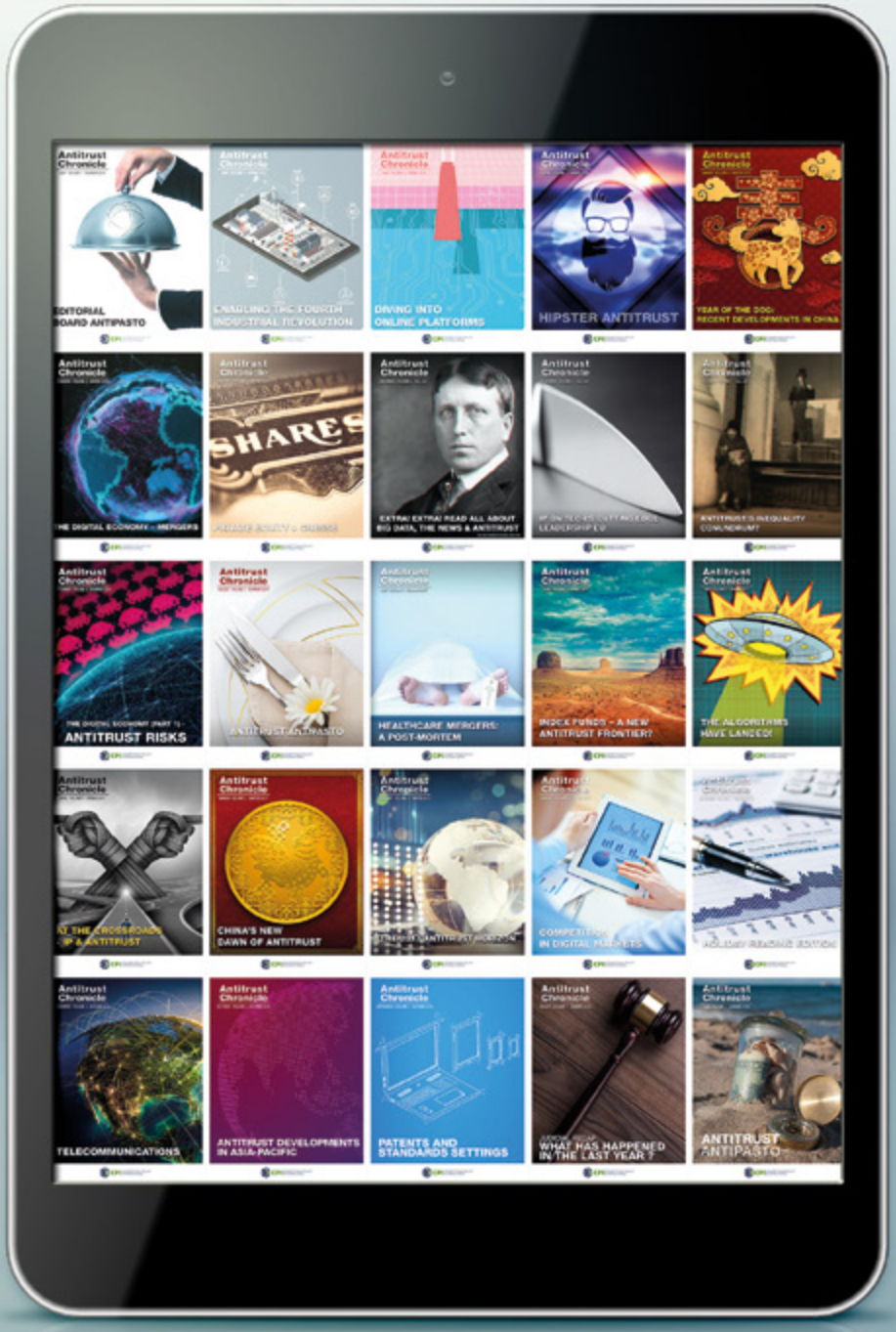


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