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The regulatory considerations behind the new Digital Markets Act

1. Introduction

On 15 December 2020, the European Commission (hereinafter: "**Commission**") introduced a legislative proposal for a regulatory package that lays down new obligations for large digital firms in terms of content management and competition. Despite the high-profile nature of the legislation, the package – consisting of two acts – was formally adopted by the European Parliament rather swiftly, one and a half years later 5 July 2022. The adopted DMA aims to increase the openness, contestability and fairness of the EU digital economy, by applying an ex-ante asymmetric regulation against large online platforms acting as "*gatekeepers*" in core platforms services. The Digital Services Act (hereinafter: "**DSA**"), focuses on ensuring that European consumers' fundamental rights are protected in a safe, predictable and trusted online environment.

This paper focuses on the DMA, which seeks to address concerns regarding unfair business practices by large online platforms, specifically those that are identified as "*gatekeepers*" – based on their size and impact on the internal market. By proposing the DMA, the Commission attempts to avoid the perceived obstacles of applying competition law to digital markets, especially the time-consuming specific market analysis, the duration of cases and the lack of effectiveness of the traditional remedies.[1] In the following, the paper focuses on the specificities of the DMA's regulatory approach and presents the possible challenges and critics related to the freshly adopted Regulation.

2. The DMA's background - specificities of the digital markets

The digital economy is profoundly and irrevocably changing market structures and the traditional standards of global competitiveness.[2] Large digital firms like Google, Amazon or Facebook, can take unfair competitive advantage of the specific features of digital markets, such as the massive collection of user (personal) data, zero price online services and products, low distribution costs, the opportunity to reach consumers beyond borders and strong network effects. From a competition law perspective, these peculiarities contribute to high barriers, concentration and tipping-effects on the market and result in a situation where competition will be pursued *for* the market rather than *in* the market, causing hardly restorable damages.[3] In

[1] Alexandre de Streel, Pierre Larouche, The European Digital Markets Act proposal: How to improve a regulatory revolution, May 2021, Concurrences N° 2-2021, Art. N° 100432, pp. 46-63. [Hereinafter: de Streel, Larouche (2021)] Point 2.

[2] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer: Competition Policy for the Digital Era: A Report for the European Commission (2019) [Hereinafter: Crémer Report (2019)] Conclusion.

[3] Jason Furman and others: Unlocking Digital Competition, Report of the Digital Competition Expert Panel (2019) [Hereinafter: Furman Report (2019)] point 1.81.

recent times, both national (e.g., Germany, United Kingdom) and supranational legislative proposals – as the Commission's DMA and DSA – emerged in order to address and effectively handle potential harms in competition and consumer welfare in the digital sector caused by big tech giants. To be able to follow these digital players more closely and react faster to the changes of the sector, on top of the new Regulation, the Commission opens a brand-new office in San Francisco. In the framework of the EU-s Digital Diplomacy the new office can play an important role in the implementation of the DMA and in the establishment of good contacts with authorities and stakeholders on the ground.[4]

3. The hybrid sector-specific nature of the DMA

The DMA represents a "*hybrid sector-specific regulatory approach"*, with features of both, competition law and unfair practices law.[5] The adopted Regulation goes beyond antitrust law by aiming to address the main regulatory concerns identifiable in digital markets: that of a small number of dominant platforms that expand their market power across a variety of different services and crushing the emergence of competitors.[6] Therefore, the scope of the regulation is limited to these certain very large platform businesses active in the digital sector i.e., intermediaries in two- or multi-sided markets. The DMA's general purpose could be summarized in the following two points: it aims (1) to contribute to the proper functioning of the internal market (2) by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular.[7]

3.1.Contestability and fairness as stand-alone purposes?

While the DMA does not provide an explicit definition of *contestability*, it can be interpreted as a general purpose to keep the digital markets open to new entrants and innovators. Besides that, contestability can also enhance platform disintermediation, meaning that a user has the opportunity to use some of the platform's services but may also in parallel utilize some of the services of another.[8] Also, on contestable markets it should be possible to prevent large digital platforms from leveraging, that is to say, forbidding the platform from extending its market power into adjacent markets.[9] *Fairness* among the players of the digital sector could be defined as a balance between the rights and obligations of each party and the absence of a disproportionate advantage in favour of the digital gatekeepers.[10] For example, the DMA will

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[4] Council Conclusions on EU Digital Diplomacy, 11406/22, Brussels, 18 July 2022
by the Council at its meeting held on 18 July 2022
Luca Bertuzzi: New EU office in the Silicon Valley mulls Big Tech diplomacy, 28 July 2022
[5] Matthias Leistner: The Commission's vision for Europe's digital future: proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act — a critical primer, Journal of intellectual property law & practice, 2021, Vol.16 (8), p.778-784 [Hereinafter: Leistner (2021)], point 3.5.
[6] Giorgio Monti: Taming Digital Monopolies: A Comparative Account of the Evolution of Antitrust and Regulation in the European Union and the United States, The Antitrust Bulletin 2022, Vol. 67(1) 40–68, [Hereinafter: Monti (2022)] point V.A.
[7] Recital 7 DMA.
[8] Monti (2022), point V.A.
[9] Ibid.
[10] de Streel, Pierre Larouche (2021), point 3.

allow businesses multihoming and offering their services via more than one platform and, at the same time, the gatekeeper platform cannot give preference to its own services at the expense of those of rival businesses operating through that same platform.[11]

3.2.The complementary role of the DMA

Contestability and fairness are clearly also pursued by the European competition law rules of Article 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter: "**TFEU**"). However, given the fast-changing and specific nature of the digital sector, the traditional competition law procedures prove less effective when controlling large platforms and their potentially abusive behaviour. Therefore clearly, there were some regulatory gaps identifiable in this regard, and it became questionable, whether competition law could be the best tool to address those challenges. That is why, the Commission instead of regulating the subject in a competition law context opted for a different legal basis and adopted the DMA with reference to Article 114 TFEU, as a sector specific regulation. Consequently, the *DMA complements and not substitutes other EU and national competition rules*[12] by addressing unfair practices of gatekeepers that cannot be addressed effectively by or fall outside of the existing EU competition legal framework.[13] That means in the practice, that both competition law and the DMA could apply concurrently in a particular case, unless their concurrent application puts the designated gatekeeper in a situation where it cannot comply with both regimes at the same time.[14]

Some critics were not satisfied with the Commission's approach and suggested that "*the assertion of difference* [between scope of competition law and the scope/objectives of the DMA] *might be seen as an attempt for freeing the Commission from competition law precedents and giving it more leeway".*[15] It is indeed without doubt, that the protection of the contestable and fair markets are also general goals of competition law, that is why, some suggested that the DMA should have rather been construed and applied as a means of competition policy.[16] Also, keeping the regulation in the existing competition law framework would clearly serve legal certainty and predictability for market players. On the other hand, keeping the traditional competition principles and setup in a new regulation concerning digital markets would potentially lead to the previously identified obstacles of extensive procedures and irreparable

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[11] For example, consumers might use a dominant operating system but then use an app store operated by another firm. Or businesses might sell via one platform but seek to receive payment using a service provided by another firm. Please see Monti (2022) point V.A and Articles 5(2) and 6(1) DMA.
[12] Article 1(3) of the DMA.
[13] Recitals 5 and 10 of the DMA; French Ministry of the Economy, German Federal Ministry for Economic Affairs and Dutch Ministry of Economic Affairs: Strengthening the Digital Markets Act.
[14] de Streel, Pierre Larouche (2021), point 33.
[15] Torsten Körber (Professor, University of Cologne) during the Webinar organised by Concurrences: Towards an effective DMA: Discussing Member States reactions and proposals... in partnership with Fréget Glaser & Associés, Meta and Oxera, with Catherine Batchelor (Director, Digital Markets Unit, UK Competition and Markets Authority), Olivier Fréget (Partner, Fréget Glaser & Associés). 10 November 2021 [Hereinafter: Concurrences' webinar on an effective DMA (2021)].
[16] Ibid.

damages to consumer welfare. The DMA's hybrid approach enables an immediate applicability of the law, meaning a faster and firmer reaction to the gatekeepers' unfair practices.

3.3.The objective to create a harmonized internal market

The largest digital platforms operate on a global scale impacting most, if not all, Member States and influencing the internal market as a whole.[17] Recital 6 of the DMA refers to the number of existing regulatory solutions adopted or proposed at national level to address unfair practices and the contestability of digital services.

3.3.1. Regulatory consistency

To be able to *ensure the proper functioning of the internal market* and to avoid future divergent regulatory solutions the Commission decided to strengthen the regulatory harmonization and reserve the legislative powers in this respect on the EU level. In line with this, the DMA prohibits Member States from imposing further obligations on gatekeepers for matters falling in the scope of the DMA. However, Member States remain free to impose obligations on large digital platforms (i) that pursue other legitimate interests such as consumer protection or unfair competition, or (ii) that are based on national competition rules, provided that this is compatible with EU competition law and do not result from the fact that the relevant platform has the status of a gatekeeper within the meaning of the DMA.[18] That means, that those platforms designated as gatekeepers shall comply with the DMA's minimum prohibitions and obligations, however, more may be imposed case-by-case by the Member States' authorities enforcing competition law by the national legislators, if the new rules are compatible with the EU law.[19] This is the case for instance with the newly adopted Section 19a of *German* Competition Act, which targets similar platforms with parallel imposition of obligations under the DMA but has a slightly different approach when targeting the large digital platforms. It is also worthwhile to mention the French 'Proposal for a Law to Ensure Free Consumer Choice in Cyberspace' which introduces the concept of a "structuring undertaking"[20] and very similar designation approach to the DMA's gatekeeper category. Similarly, according to a new amendment of the *Hungarian* Competition Act in December 2021, during merger clearance procedures on digital markets, the impact of the merger on innovation and competition resulting from the access of the undertakings concerned to competitively relevant data, as well as the

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[17] Jens-Uwe Franck, Giorgio Monti, Alexandre de Streel: Legal Opinion commissioned by the Federal Ministry for Economic Affairs and Energy concerning Article 114 TFEU as a Legal Basis for Strengthened Control of Acquisitions by Digital Gatekeepers, 20 September 2021 [Franck, Monti, de Streel (2021)], point III.1.

[18] Article 1(5) of the DMA.

[19] Monti (2022) point V.A.

[20] The proposal lists the relevant factors for this designation of an undertaking include its dominant position on one or more markets, in particular multi-sided markets, the number of unique users of the products or services it offers, its vertical integration and its activities on other related markets, the benefit it derives from the exploitation of significant network effects, its financial value, its access to data essential for access to a market or the development of a business, the importance of its activities for third- party access to markets, and the influence it exerts on the activities of third parties as a result. For further information please see: Franck, Monti, de Streel (2021) point IV.1.b).

financial leverage, economies of scale, data aggregation capacity and the aggregation of data sets of the undertakings concerned, should be examined in particular.
Article 1(7) of the DMA sets out further requirements and establishes that *no decision can be taken in the Member States that runs against a Commission decision*. From a practical point of view, it is questionable, what exactly does "run counter" mean? Where a Member State has its own regulatory approach similar to the DMA – meaning that the national regulation also addresses large digital platforms in similar context – it is relatively easy to admit that the domestic court decision cannot run against a Commission decision. However, as the President of the Belgian Competition Authority pointed out during a webinar in early 2021: "*if the Commission deals under the DMA with an issue, does that block the national competition authority? At first view, no, because it is without prejudice. But then you cannot make a decision that runs against other goals — even though they are presented as different, they are in reality not all that different"*.[21]

Let's see a partly hypothetical example in the context of the above mentioned new Section 19a of the German Competition Act, which sets out certain prohibitions for an undertaking with "paramount cross-market significance".[22] In July 2022 Germany's Bundeskartellamt decided that *Amazon* is of outstanding cross-market importance for competition, meaning it will be subject to the extended rules of market abuse control in Germany.[23] Amazon is a key player on the national market; according to the Bundeskartellamt's estimate, more than every second euro in the German online retail is spent on the Amazon platform and only in Germany, there are more than 350,000 sellers active on the market place.[24] Amazon was already in the Commission's focus because of digital giant's potentially anti-competitive conduct,[25] and it is without doubt that the platform will be also addressed by the DMA as a gatekeeper. Let's say, that in the course of its control, the German Bundeskartellamt would specify respective orders based on Section 19a, whereas the Commission would prescribe different measures under a future DMA after designating Amazon as a gatekeeper. According to the DMA, stricter measures are possible under Article 1(6), however, Member States shall not impose further obligations on gatekeepers than the Commission for the purpose of ensuring contestable and fair markets.[26] Our scenario shows, that a parallel imposition of obligations on an EU and national level could possibly undermine the internal market and, at

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[21] Jacques Steenbergen, the President of the Belgian Competition Authority during the Webinar of the "Law & Economics" Series organised by Concurrences, in partnership with Skadden, with Gabriella Muscolo (Commissioner, Italian Competition Authority), Martijn Snoep (Chairman, The Netherlands Authority for Consumers & Markets), Bill Batchelor (Partner, Skadden) and Ingrid Vandenborre (Partner, Skadden). 2 March 2021 [Hereinafter: Concurrences' webinar on EU digital markets: Where do we stand? (2021)]
[22] Section 19a of the German Competition Act, targets large digital platforms and rebalances power in favour of the German competition authority. Section 19a of the German Competition Act establishes that the Bundeskartellamt may declare that a firm is of "paramount significance for competition across markets" and prohibit it from certain specified practices presumed to be unlawful. Furthermore, decisions by the Bundeskartellamt under Section 19a can only be challenged at the German Federal Court of Justice as the first and only avenue of appeal.
[23] Bundeskartellamt: Für Amazon gelten verschärfte Regeln – Bundeskartellamt stellt überragende marktübergreifende Bedeutung fest (§ 19a GWB), 06.07.2022.
[24] Ibid.
[25] Cases COMP/AT.40462 and Case COMP/AT/40703.
[26] Leistner (2021) Point 3.6.

worst, could lead to incompatibility,[27] that is why strong coordination between the Commission and national legislators and authorities will be of paramount importance.

3.3.2. Coordination, cooperation, consultation

Based on the proposed changes by the European Parliament's rapporteur Andreas Schwab,[28] the adopted DMA provides rules in this respect.[29] According to Article 38 of the DMA, the *Commission shall closely cooperate, coordinate and consult* the *national authorities* on any matter relating to the application and/or the enforcement of the Regulation. This obligation includes the exchange of (confidential) information on matter of fact or of law, launching investigations on national level or on any (interim) measure taken in the given case.[30] Article 38(2)-(3) prescribes that if a national competition authority intends to launch an investigation or impose an obligation on a gatekeeper based on the national law, it should inform the Commission without further delay. The DMA does not detail the further possible consequences of such provision of information.

Similar to the national authorities, the DMA also provides rules on the cooperation with *national courts and* empowers the Commission to submit its observation to the national courts where the coherent application of the Regulation would require that.[31]

In addition to that, Article 40 introduces the obligation to set up a new expert group for the DMA. The so-called "*High-Level Group*" should bring together representatives of (a) Body of the European Regulators for Electronic Communications, (b) European Data Protection Supervisor and European Data Protection Board, (c) European Competition Network, (d) Consumer Protection Cooperation Network, and (e) European Regulatory Group of Audiovisual Media Regulators. The task of the group will be to facilitate cooperation and coordination between the Commission and Member States in their enforcement decisions, in the interests of a consistent regulatory approach. It would assist the Commission in monitoring compliance with the DMA by enabling the pooling of knowledge, resources and expertise across Europe.[32]

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[27] de Streel, Pierre Larouche (2021), point 33.

[28] Alain Ronzano, Competition policy: European Parliament publishes French version of draft report on Andreas Schwab's Digital Market Act proposal, 1 June 2021, Concurrences N° 4-2021, Art. N° 101246. [hereinafter: Ronzano (2021)].

[29] It is worthwhile to mention, that the original proposal of the Commission did not contain the current Articles 37, 38, 39 and 40. Therefore, critical opinions pointed out that (1) the Regulation lacks of satisfactory clarification on how the interchange between competition law, competition law enforcement and the DMA should be organised, and that (2) the coordination of the objectives between the laws should be further specified.

[30] Article 38 of the DMA.

[31] Article 39 of the DMA.

[32] Ronzano (2021)

3.4.The narrow circle of gatekeepers

The DMA targets a handful of the largest businesses of paramount global – or at least European – market power providing *core platform services* (hereinafter: "**CPS**")[33], that meet the cumulative qualitative and quantitative gatekeeper threshold. These undertakings are related to the most prominent and egregious problems recently identified on digital markets.[34] According to Article 3(1) *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.* With regard to the quantitative thresholds, the DMA sets out a rebuttable presumption[35] for each of the three qualitative criteria. According to the Article 3(2) an undertaking qualifies as a gatekeeper if it achieves an annual EU turnover of EUR 7,5 billion or its market capitalisation/value amounts at least EUR 75 billion and it has at least 45 million monthly active users[36] within the EU.

The specific qualitative and high quantitative thresholds limit the scope of the Regulation to a handful of regulated platforms functioning in a global dimension (possibly 5-7 Big Tech companies such as Google/Alphabet, Amazon, Apple, Microsoft or Facebook/Meta). Without any doubt, these undertakings should be targeted and preferably need to be dealt with at an EU level, as divergent regulatory solutions raise the risk of increased compliance costs and could lead to the fragmentation of the internal market.[37] With regard to the recent national competition case law, it is clear that national authorities are also having a special attention to the largest players of the digital markets. Amazon currently faces two more competition proceedings under the rules of classic abuse control already valid before the change in the German law and it was recently also designated as an undertaking with paramount cross-market

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[33] According to Article 2(2) DMA a "*'core platform service' means any of the following: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i).*"

[34] Tombal (2022) point 2.A.

[35] The rebuttable presumption means in this regard, that according to Article 3(5), the undertaking providing CPS has the opportunity to prove that it does not meet the gatekeeper threshold of Article 3(1) even if it meets the three quantitative presumption thresholds of Article 3(2).

[36] Evidently, after presenting the DMA proposal in 2020 December the potentially effected companies also expressed their concerns about the proposed thresholds. In October 2021 eight possibly targeted digital platforms (namely Booking.com, Zalando, bol.com, Allegro, eMag, Delivery Hero, Vinted and Wolt) urged the legislators to reconsider the proposal which would *"[…] define 'active end users' inaccurately as 'visitors' for all transaction-based platforms, regardless of their size"*. The letter said that the remuneration the companies receive for a purchase on their platforms generates the largest share of revenue and that "active customers" not "visitors" were what mattered. They stated that *"using website or app 'visitors' as the basis for counting the number of 'active end users' dramatically distorts the relevant user numbers"*.

[37] Recital 6 of the DMA.

significance based on Section 19a of the German Competition Act.[38] Besides Germany, the Italian Competition Authority (hereinafter: "**ICA**") has also found Amazon in breach of Article 102 TFEU.[39]

Besides the largest undertakings national authorities have also launched proceedings against smaller platforms. There is a great variety of digital platforms that play a dominant role on one or maybe three national markets within the EU. Their activities are also capable of distorting competition and negatively affect consumer welfare, however, because of the DMA's restrictive thresholds, they will not fall under the radar of the Regulation. These unfair practices then have to be dealt under national competition rules.

As an example, it is worthwhile to mention the Polish *Allegro*, which is by far the most popular on-line shopping platform on a national level.[40] Allegro acts as an intermediary platform in electronic commerce, but also competes on its platform with other sellers through its own on-line shop known as the Official Allegro Shop. Based on similar consideration as the Commission's *Google Shopping* decision[41] the Polish Office of Competition and Consumer Protection (hereinafter: "**UOKiK**") launched a procedure in December 2019 against the platform. UOKiK accused Allegro of abusing its dominant position in the Polish B2C e-commerce market by favoring its own retail sales over the sales activities of external sellers operating on the Allegro PL platform by (1) using information on the platform's operation, in order to better position and display its own offers; (2) reserving some sales or promotional features exclusively to the Allegro Official Shop.[42]

Others, like German online takeaway food company *Delivery Hero*, may meet the DMA thresholds in a few years' time. The company's activity drawn the attention of both the competition and data protection authorities in Germany. In September 2019 the undertaking was fined for violations of individuals' data protection rights under the General Data Protection Regulation (Regulation (EU) 2016/679) (hereinafter: "**GDPR**"). The expanding undertaking

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[38] In one case, the Bundeskartellamt investigates whether the digital undertaking uses algorithms and price control mechanisms to influence the pricing of sellers on Amazon Marketplace. In the other case, it is checking to what extent agreements between Amazon and brand manufacturers, which exclude third-party sellers from selling brand products on Amazon Marketplace constitute a violation of competition rules. For further information please see: the Bundeskartellamt's press release: Proceedings against Amazon based on new rules for large digital companies (Section 19a GWB). 18.05.2021.

[39] In its decision the ICA has defined Amazon's anticompetitive conduct as 'self-preferencing'. "The case concerns a series of exclusive and irreplicable benefits accorded to vendors subscribing to 'Fulfilment by Amazon' (FBA), with which Amazon aimed at gaining a dominant position in the Italian market for logistics services at the expense of other efficient competitors, consumers, and competition as a whole. ICA decision A528, 30 November 2021. For further information please see: Claudio Lombardi: The Italian Competition Authority's Decision in the Amazon Logistics Case: Self-preferencing and Beyond, CPI Columns April 2022.

[40] Based on research conducted in 2019 at the request of the Polish Office of Competition and Consumer Protection shows that when it comes to buying new items on-line, 79% of consumers prefer buying products from Allegro than from other e-commerce sites. More info on the procedure: UOKiK: Procedure against Allegro. Downloaded from: https://uokik.gov.pl/news.php?news_id=16014 [Hereinafter: UOKiK (2019)]

[41] Case AT.39740 (2017). The "Google Shopping" decision of 2017 is the classic reference in the context of ad-funded models, where "self-preferencing" took the form of Google favouring its own price comparison services and undermining third parties.

[42] UOKiK (2019)

also attracted the attention of the Commission as during the company's last merger procedure with the Spanish Glovo food delivery undertaking – in which Delivery Hero recently acquired a 94% stake – the EU regulator launched raids against Delivery Hero on suspicion of a cartel agreement.[43]

These cases will be dealt in line with the applicable national (mostly competition) rules, which means that the Member States shall apply the same lengthy procedures as in Article 101 and 102 TFEU cases.[44] To have the advantage of the DMA's "express reaction" and specific regulatory approach, Member States might also need to create their "own national DMA", with an occasionally broader scope of application, so that smaller platforms can also be targeted. However, as already presented above in point 3.1.1, the adopted version of Article 3(5) DMA limits, but not completely excludes the national legislation in this regard. In comparison to the original proposal the approved version of the Regulation provides a more detailed description on how the national laws should be construed in the light of the DMA. It says that Member States are allowed to impose obligations on undertakings providing core platform services, (1) for matters falling outside the scope of the DMA, provided that (2) those obligations are compatible with EU law and (3) do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of the DMA.

3.5.The ex-ante approach and the catalogue of obligations

Similar to the EC Merger Regulation,[45] the **DMA opts for an *ex-ante* regulatory approach** and aims to prevent harm from happening.[46] Instead of wide principles, in the form of non-closed black and grey lists, Articles 5, 6 and 7 set out clear and specific requirements what is expected from the gatekeepers, ensure the *legal certainty in advance* and establish a reversed burden of proof. In digital markets, where quick reactions are indispensable, this solution does not only spare precious time for the Commission by avoiding some burdensome ex-post control (with lengthy procedures such as in-depth relevant market assessments, economic and legal analysis, collection of evidence and contestation in court), but also allows (1) to prevent irreparable damages to consumer welfare and competition and (2) an immediate applicability of the Regulation. As digital markets have a tendency to tip (irreversibly), the cost of false negatives in ex-post competition assessments is high and a more preventionist approach is to be therefore required.[47]

The DMA admittedly aims to find the right balance between, on the one hand, being very clear and providing legal certainty ex-ante (Articles 5,6 and 7), but, on the other hand, allowing

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[43] Joan Faus and Toby Sterling: Germany's Delivery Hero, Spanish unit Glovo targeted in EU antitrust raids. Downloaded from: https://www.reuters.com/business/retail-consumer/eu-antitrust-watchdog-raids-online-food-groceries-delivery-companies-2022-07-06/

[44] Concurrences' webinar on EU digital market; Where do we stand? (2021)

[45] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Hereinafter: "**EC Merger Regulation**")

[46] Margarethe Vestager: Keeping the EU Competitive in a Green and Digital World, European Commission, Bruges (2 March 2020)

[47] Thomas Tombal (2022): Ensuring contestability and fairness in digital markets through regulation: a comparative analysis of the EU, UK and US approaches, European Competition Journal, DOI: 10.1080/17441056.2022.2034331, [hereinafter: Tombal (2022)] Introduction.

updates on gatekeepers' obligations following the development of the market and emerging new problems (Article 12). The catalogue of obligations is designed looking "*back to the future*"[48] at publicly known competition law cases with particular platform issues (with specific offenses, specific undertakings that were addressed by case-specific remedies). As Christina Caffarra and Fiona Scott Morton formulated: "*Some rules appear to have an "Apple" label on them, others a "Google" label, others an "Amazon" label; only a few appear relevant to more than one platform.*"[49] The Commission services explain that the 32 "commandments" were selected because they are considered unfair by taking into account the features of the digital sector and where experience gained, for example in the enforcement of the EU competition rules, shows that they have a particularly negative direct impact on the business users and end users.[50] In order to be able to update the listed obligations Article 12 empowers the Commission to supplement the lists set out in Articles 5, 6 and 7 in form of delegated acts (and thus without having to initiate the lengthy and complex legislative procedure) after conducting a market investigation.

Some criticism has come on those criteria from industry, Member States, advisers, practitioners and academics for different reasons. Some suggested that the presented black and grey lists of "to-dos and not-to-dos" are very rigid, not forward-looking and practically most of the cases have not been concluded so far in a legally binding manner. Therefore, applying them as principles and basis for the establishment of the obligations in the freshly adopted DMA seems to be a bold regulatory approach.[51] These critics also questioned, how futureproof the listed commandments can be if they have a rather backwards looking manner and "*what will happen when technology and business models change"*?[52] *"Within the next twenty years isn't the DMA going to be out of fashion fairly quickly if it's too strict?"* [53] Others pointed out that the incorporation of different business models are not possible under the regulations and maybe to generalise some case-specific obligations in a "one size fits all" manner over all digital platform services could be a questionable solution.[54]

In the context of the precisely defined obligations and gatekeeper designation, the DMA's approach contrasts with the national German and UK proposal, which are relying on the more traditional economic-related assessments under antitrust law. Both of these laws focusing on large digital undertakings and they both were presented parallel to the DMA proposal back then in December 2020.[55] Section 19a of the German Competition Act establishes that the Bundeskartellamt may declare that a firm is of "*paramount significance for competition across markets*" and prohibit it from certain specified practices presumed to be unlawful. The

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[48] Concurrences' webinar on an effective DMA (2021)
[49] Cristina Caffarra, Fiona Scott Morton: The European Commission Digital Markets Act: A translation. 05 January 2021. [Hereinafter: Caffarra, Scott Morton (2021)] Translating the Obligation.
[50] Impact Assessment, para. 153. Also DMA Proposal, recital 33.
[51] Concurrences' webinar on an effective DMA (2021)
[52] Caffarra, Scott Morton (2021), Conditioning on business models would be clearer and more useful.
[53] Concurrences' webinar on EU digital markets; Where do we stand? (2021)
[54] Concurrences' webinar on an effective DMA (2021)
[55] United Kingdom's Competition and Markets Authority published its proposal to government a week before the DMA, on 8 December 2020. Section 19a of the German Competition Act, entered into force in January 2021.

addressed undertaking carries the burden of proving the practice's countervailing procompetitive or efficiency-enhancing effects. Similarly, the UK proposal introduces an evidence-based economic assessment to determine whether there is strategic market status.[56] Time and practice will tell which of the two regulatory approach will be more efficient: a potentially more rigid "black-letter-law", that can quickly be applied (DMA), or a broader framework that allows more flexibly but would most probably be more time consuming (Germany, UK).

4. Conclusion

The DMA presents an ambitious and unique regulatory approach with many overlaps and features of competition law. The ultimate goal of the Commission is to take back control over the digital economy and guarantee the autonomy and self-determination of EU business users that depend on the biggest digital platforms.[57] While critical opinions still pointing out the possible weaknesses of the Regulation, comparing to the original proposal, the adopted version of the DMA provides more detailed provisions on coordination and cooperation between the Commission and the Member States, and sticks to an extended list of its specific commandments. It is clear that the large tech giants are already keeping an eye on the DMA's future obligations. Although the regulation is not yet entered into force Google announced on 19 July 2022 that it will open up its systems to competing app stores while also lowering fees to ensure its compliance with the Regulation. Similarly, Amazon offered in its commitment to refrain from using non-publicly available data generated by independent retailers on its marketplaces. The DMA is expected to enter into force in October 2022. Following that, it will take six months to apply, taking up to April 2023. The gatekeeper designation process will be launched, which might take up to the end of summer 2023. Finally, the compliance process will begin around the first quarter of 2024. According to most recent news, the Commission is considering creating a new directorate with a staff of 80 officials.

[56] Concurrences' webinar on EU digital markets; Where do we stand? (2021)
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