Digital Markets Act - the Answer to the EU's Digital Markets Contestability and Fairness Issues or an Unenforceable Fairytale - a European Competition and Data Protection Law Overview

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Izjava o izvornosti

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Zahvala

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Također, zahvaljujem i članovima komisije na svim pitanjima, komentarima i sugestijama, te na ukazanom interesu za tematiku rada.

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Abstract

Digital markets have become one of the most prominently analysed and debated areas of the European competition law and the European data protection law in recent years, not by chance, but as a result of the rapid market power growth of a few large undertakings which are practically uncontestable in their dominance. To address these issues, the Commission has adopted the Digital Markets Act, a groundbreaking piece of competition and data protection legislation which the Commission hopes will help the European regulators keep pace with the large undertakings, referred to as the 'gatekeepers' – due to their uncontestable ability to bar their competitors from entering their market and other linked markets.

This new Regulation has received much praise, but also much ink has been spilled criticising its provisions. To help understand what the Digital Markets Act 'brings to the table', what its benefits and downsides are, this paper overviews the legislation and gives its conclusion on the potential capacity for the Regulation to deal with the aforementioned contestability and fairness issues within the digital markets.

The paper concludes how the Digital Markets Act, while providing many new benefits to the end users, is not without critique, especially as its legal basis, ability to be properly enforced, and impact of its data protection provisions, is uncertain. Ultimately, as the paper deducts from various different legal authors' viewpoints, it is too early to tell if this act offers additional benefits and helps resolve fairness and contestability issues in the digital markets.

Keywords: Digital Markets Act, DMA, gatekeepers, European competition law, digital markets

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Abbreviations

CJEU	European Court of Justice
CMA	United Kingdom's Competition and Market's Authority
CPS	Core Platform Service
DMA	Digital Markets Act
DRCF	The Digital Regulation Cooperation Forum
DSA	Digital Services Act
EDPS	European Data Protection Supervisor
EUMR	EC Merger Regulation
GDPR	General Data Protection Regulation
MI	Market Investigation
MS	Member State (of the EU)
SMB	Small and medium-sized businesses
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

The present-day world of digital technology is in a constant cycle of change. The technologies we have used yesterday, we find to suddenly be obsolete, while the new *au courant* technological advancements take their place. Thus, the traditional analogue markets are being challenged by their new digital markets rivals, and it seems as if the latter are winning. Winning by so much, in fact, that many of the digital markets have grown too big for *our* good.

Some digital platforms, held by a select few undertakings - such as GAMA,[1] are practically uncontestable in their market dominance. Meta Platforms, for example, tops the table for social commerce and owns three of the four most widely used social media platforms.[2] Google's Google search engine, as of June 2022, dominates its relevant market at an astounding 91.88% search engine market share, with there being no potential competitor in sight.[3] Additionally, the undertakings that compete in the digital markets arena benefit greatly from certain key features of the digital markets – strong network effects, economies of scope and scale, monopoly over multi-homing agents, and vast amounts of acquired personal data. These key features help establish a market position with an almost natural monopoly-like barrier to entry into market.

To keep up with the ever-evolving digital markets and the large undertakings that provide the digital services, the European legislator has decided to draft: *'A Europe fit for the digital age'*, strategy.[4] Based on this Strategy, the Commission proposed, and in July 2022 formally adopted, two legislative acts, as a part of the more broader Digital Services Act package,[5] that ought to

[1] GAMA is a nickname given to the five biggest tech companies, also refered to as the 'Big tech' - Google, Amazon, Apple, Meta and Microsoft.
[2] R. Peters, '*The Truth about Meta's Social Commerce Market Share'* (2022), simplicitydx.com/blog-posts/the-truth-about-metas-social-commerce-market-share, last accessed: 15.9.2022.
[3] Google's Market Share, 'Search Engine Market Share: Who's Leading the Race In 2022' (2022), kinsta.com/search-engine-market-share/#:~:text=Google%20dominates%20the%20search%20engine,91.88%25%20as%20of%20June%202022, last accessed: 15.9.2022.
[4] European Commission, 'Executive Vice-President for A Europe fit for Digital Age' (2019), p. 5.
[5] European Commission, 'The Digital Services Act Package' (2020), EC Policies, full text may be accessed here: digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

ensure that the EU establishes an even playing field with the Big tech – the Digital Services Act[6] and the Digital Markets Act.[7]

With the two acts now finally adopted, many in the European Commission haven't held back in expressing their view of the grandeur of the two acts, proclaiming how the EU has become the '*first jurisdiction in the world to set a comprehensive standard for regulating the digital space'* and how the '*Europe is the first single digital market in the 'free world', with clear and predictable rules*.'[8] It almost seems too perfect to be true, as the EU does indeed pilot this one-of-a-kind regulatory vehicle into the open regulatory space. Some legal authors, however, claim that the two acts are not 'all what they seem' and that there is a plethora of unresolved issues that were not confronted before their adoption.

Because of the legal uncertainty surrounding this new EU legislation, this thesis specifically touches upon the latter of the two acts – the Digital Markets Act, as it explores and attempts to answer the following research question:

Does the DMA resolve contestability and fairness issues in the digital markets, and what conclusion(s) can be drawn when observing some of its provisions – from the point of view of the European competition law and the European data protection law.

To attempt to answer the aforementioned research question, the thesis will first review the European competition law and its relation to the newly adopted Digital Markets Act; then, the digital markets, as the principal environment the DMA attempts to regulate, will be overviewed; next, the thesis will contain a summary of the DMA itself, alongside its relationship with other

[6] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final

[7] European Commission, Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1727 (Digital Markets Act), July 2022, 2020/0374 (COD)

[8] T. Breton, '*Sneak peek: how the Commission will enforce the DSA & DMA'* (2022), linkedin.com/pulse/sneak-peek-how-commission-enforce-dsa-dma-thierry-breton/?trackingId=SOGsNLATXRSWLDtfnR9okw%3D%3D, last accessed: 15.9.2022.

European legislatory acts which regulate correlative areas of law; finally, the challenges of enforcement and data protection of the new Regulation will be overviewed.

2. EU Competition Law

The peculiarities of the legislative challenges faced by the European regulators and the unique position of the Regulation on Contestable and Fair Markets in the Digital Sector within the digital markets, and - ultimately - within the competition law itself, are best observed through the lens of the objectives and principles established by the European competition law. After all, the DMA is a regulation that has been molded by the European competition law since its first proposal and up until its adoption. Thus, this chapter lays down the fundamental structure of the European competition law through the prism of primary and secondary EU law; lists the objectives of the European competition law with the emphasis on the digital markets; and, finally, overviews the interplay between the European competition law and the DMA.

2.1. In the EU Primary Law

The role of the European competition law in the development of the European Single Market was recognized to be of large importance ever since the idea of a single market was formed. This significance of the European competition law rules within the European Single Market is symbolized by the fact that the establishment of a homogenous competition law on the EU level became one of the first considerations in drafting the primary legislation of the new Union - the Treaty of the Functioning of the European Union .[9] To aid in achieving this goal, the TFEU adopted a position that, for the internal market to properly function, it was necessary for the Member states to confer upon the newly formed Union an exclusive competence in the establishment of competition rules necessary for the functioning of the internal market.[10] [11] This does not, however, exclude the MS from implementing and enforcing competition rules, as both the national courts

[9] Consolidated version of the Treaty on the Functioning of the European Union, The Official Journal of the European Union, 2012, L. 326/47-326/390.
[10] TFEU, Art. 3.
[11] This principle, refered to as the principle of conferral, has remained unchanged, albeit further expanded on by the European case law of the CJEU, ever since its adoption in 1957. Thus establishing itself as one of the fundamental EU principles and the guardian of the EU MS sovereignty.

and the national competition authorities, have a joint responsibility alongside the Commission, to ensure that the competition law rules are being followed.[12]

Alongside Art. 3. TFEU, the pillars of the European competition law, and the provisions which the European competition law is formulated upon, are Art. 101 – Art. 109 TFEU. In the order of importance, the two most prominent articles for the purpose of analysing the DMA and its interplay with the EU competition law are Art. 101 and Art. 102 TFEU.[13] Through these two sister provisions, the EU attempts to ensure that the consumer welfare and the protection of competition, tandem of key objectives of the EU competition law which are also entrenched in the DMA, are respected. It is to be noted, regarding the two aforementioned provisions, that, while some legal authors still refer to the DMA as a EU competition law tool, and as the paper's analysis will later conclude, the DMA was not proposed on the legal basis of the two TFEU articles, which is why many critics question the Regulation's legality considering its competition law provisions.[14]

Lastly, in regards to the EU primary law, the European competition law has also been entrenched in the principles found in the EU treaties. Principles relevant to the European competition law are, among others, the principle of subsidiarity,[15] the principles of effectiveness and equivalence[16], and the principle of proportionality.[17]

2.2. In the EU Secondary Law

European competition law is not only found in the EU primary law and, as is often the case with the majority of EU legal rules, the biggest chunk of the EU competition rules are found in EU secondary law. While the EU primary law sets the ground rules, with a rather broad stroke, that is, it generally fails to capture the particularities of a specific market sector, which is why the EU

[12] M. Kellerbauer, M. Klamert, J. Tomkin, '*The EU Treaties and the Charter Of Fundamental Rights: A Commentary'* (2019), Oxford University Press, p. 362.
[13] TFEU, Art. 101. and Art. 102.
[14] See:chapter 4.2.
[15] Principle of subsidiarity embraces, based on the de *minimis rules* established in the competition law, exemptions in national measures based on their scope and relevance (See: M. Kellerbauer, M. Klamert, J. Tomkin, 'The EU Treaties and the Charter Of Fundamental Rights: A Commentary' (2019), Oxford University Press, p. 75).
[16] Principle of effectiveness has its application in the keystone articles of the European competition law, those being the Art. 101 and Art. 102 TFEU. Said principle nullifies those national rules which jeopardize the effective application of the aforementioned articles. (See: *Ibid.*, p. 184).
[17] The latter principle, that of proportionality, is again given a special overview in the chapter 4.2., due to the fact that the DMA, as some authors claim, may be in breach of this fundamental EU principle.

legislator utilizes the tools of Regulations and Directives to further aid in achieving the fairness and contestability of a particular market.

Some of the more prominent pieces of secondary EU legislation within the European competition law are the Directive 1/2003,[18] which requires the NCAs to inform each other of all cases that they investigate at an early stage of the investigations under Art. 101 and 102 TFEU, and the more recent Directive 2019/1[19] which gives more power to the NCAs so as to more effectively enforce the EU competition law rules. While the two aforementioned acts have had some impact on how the DMA was formed,[20] they pale in comparison to the importance the EC Merger Regulation has had on the European regulator when 'constructing' the DMA.

2.2.3. EC Merger Regulation and its Relationship With the DMA

One of the most prominent and important EU competition law legislation, and one that the DMA borrows many of its ideas from, is the EC Merger Regulation.[21] A clear illustration of how the EUMR has served as a 'blueprint' for certain segments of the DMA becomes transparent when the scope of application of the two Regulations is observed shoulder to shoulder. Namely, both Regulations set an objective threshold criterion which serves to define which undertakings should fall under the stricter regime and be subjected to the watchful eye of the Commission, i.e. the Commission becomes the sole-enforcer. In the case of the EC Merger Regulation, the concentrations which satisfy this legal threshold are said to encompass the '*Community Dimension'*,[22] while the DMA designates such undertakings to be '*gatekeepers'*.[23] To further express this pronounced similarity between the two Regulations, it is important to note how both of these Regulations' provisions apply *ex ante*, which is unusual in the European competition law, but very fitting for the DMA and the EUMR, as both the gatekeepers and concentrations have the potential to pose a large threat to contestability and fairness in the internal market. Thus, it is of

[18] European Commission, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), OJ L 24.
[19] European Commission, Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (2019), The Official Journal of the European Union, OJ L 11.
[20] See: Judgment of 10 November 2021, *Google Shopping*, Case AT.39740, T:2021:763.
[21] European Commission, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24.
[22] EUMR, Art. 1. (1).
[23] DMA, Art. 3.

critical importance for the Commission to deal with such a potential threat before any harm is done.[24]

In addition, the DMA recognises that the concentrations may pose a very large threat in the digital markets, and so requires the undertakings to inform the Commission of any intended concentrations[25] where the merging entities or target of concentration provide CPS.[26] However, it ought to be noted how the DMA is without prejudice to the EUMR and national rules concerning merger control,[27] which means that, in practice, the DMA only requires for the Commission to be informed of these potential mergers and concentrations, but does not regulate on how the concentrations are to be dealt with, unlike the EUMR.[28] However, this is still very important, as this information may then be used by the Commission to conduct a MI which may lead to a gatekeeper designation.

2.3. Objectives of the EU Competition Law in the Digital Markets

Opinions on what constitutes the European competition law objectives, and the competition law objectives in general, seem to be divided among the legal community.[29] Some legal scholars conform to the idea of a singular objective that the competition law strives to achieve - the economic (consumer) welfare[30]- while others adopt a more broader stance in the plurality of the objectives.[31] [32] Prof. Ioannis Lianos, in his published paper "*Some Reflections on the Question of*

[24] Additionally, the DMA borrows from the ECMR the definitions for what the 'control' is and for what constitutes a 'threshold' – further expanding upon the idea that the ECMR was used in the DMA's proposal.
[25] Within the meaning of Art. 3. ECMR.
[26] DMA, Art. 14 (1).
[27] DMA, Art. 1. (6) (c)
[28] See: EUMR, Art. 14.
[29] For instance, the report by the Organisation for Economic Co-operation and Development examines the categorization of objectives and categorizes them into those that serve the public interest, those that are core competition objectives and those that fit neither of the previous two categorizations and are thus in a grey zone. However interesting, this categorization does not serve a practical enough use in the context of the digital markets. (See: OECD Secretariate, 'The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency' (2003), OECD Journal of Competition Law and Policy 7.
[30] Such stance is taken in the University of Zagreb's competition law publication in which the authors state how the sole objective of the competition law is the protection of consumers, while the goal of protection of competitors ultimately serves to aid the consumer welfare and is thus not a separate objective. (See: V. B. Malnar; J. P. Kaufman; S. Petrović; D. Akšamović; M. Liszt, *'Pravo tržišnog natjecanja i državnih potpora'* (2021), Pravni fakultet Sveučilišta u Zagrebu., p. 6.)
[31] I. Lianos, '*Some Reflections on the Question of the Goals of EU Competition Law'* (2013), CLES Working Paper Series 3/2013, p. 3.
[32] The economic welfare perspective points to the view that the goal of the competition law is to promote economic welfare. Such welfare is often portrayed in the form of consumer theory, i.e. the welfare of the consumer. The non-

the Goals of EU Competition Law",[33] described the separation of opposing views of those that follow the economic welfare perspective and those that follow the non-economic welfare perspective. He constitutes that the two approaches are "*not as dramatically different as it is usually presented*", as both views may be inspired by some form of utilitarian or welfarist argument, and either may be analysed in broader welfare or well-being terms.[34]

The choice between the two approaches has not escaped the EU institutions that deal with the European competition law, as they have also taken a stance on their idea of defining what the European competition law rules ought to strive to achieve. The European Court of Justice took the stance that the most important objective is the one of economic welfare, as was displayed in the joined case *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission,*[35] but ultimately took the position of the pluralism theory as was shown in the case *GSK Unlimited v Commission.*[36] The European Commission has also closely followed this line of thinking and their stance can be seen in, among other sources, the published '*Guidelines on the Application of Article 81(3) of the Treaty'*[37] where objectives such as efficiency are discussed, a more commonly seen 'additional' objective of the plurality of the objectives proponents. In spite of the plurality of the objectives take by the two institutions, the objective of consumer welfare seems to still be put in the limelight as the *primus inter pares*.[38]

Even if one was to subscribe to the plurality of objectives theory, the question of what the objectives of the European competition law are is still not answered. Similarly to the challenge of choosing between the plurality and/or singularity of the objectives, it is not easy to decide which objectives ought to comprise the ethos of the European competition law, due to the sheer quantity of ideas put out by different legal authors. However, as the final arbiter of what the intent behind the EU Treaties and the EU law is, it helps if the stance of the CJEU is taken as a starting point.

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economic welfare theory incorporates broader objectives of the EU competition law, such as the completion of the internal market, the principle of freedom of competition, fairness, etc. (Ibid. pp. 3-32).

[33] *Ibid.*

[34] *Ibid.*, p. 4.

[35] Judgment of 7 June 2006, Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission, T-213/01 and T-214/01, T:2006:151, para. 115.

[36] Judgment of 6 October 2009, *GlaxosmithKline Services Unlimited*, Case C-501/06 P, EU:C:2009:610.

[37] European Commission, '*Guidelines on the Application of Article 83(3) of the Treaty'* (2004), Official Journal of the European Union.

[38] *Ibid.*

Following CJEU's line of reasoning, a great summary of what the European competition law strives to achieve according to the Court is stated in the aforementioned case, *GSK Unlimited v Commission.*[39] In the case, which concerned the meaning of the term "competition" in the context of Art. 101 TFEU, the CJEU stated that the goal of the European competition law rules was to protect the interests of competitors, consumers, and '*also the structure of the market and, in so doing, competition as such*.'[40] The following idea was expanded upon by many different legal authors, such as prof. Ariel Ezrachi in his paper *'EU Competition Law Goals and The Digital Economy.*[41] Ezrachi's paper lists several key European competition law goals and values ranging from consumer well-being to fairness and market integration.[42] The following categorization, due to its simplicity and intuitivity, serves as a good outline of the common line of thinking legal professionals in this area tend to agree upon.

For this reason, without delving too deep into the legal and economic ideas of why either theory of the European competition law objectives should be chosen, and for the ease of defining the *ratio* behind the DMA, the pluralism view of the European competition law objectives as defined by Ezrachi will be taken - as to further expand the concept of objectives and their context in the digital market. Thus, according to the prof. Ezrachi's categorization, and taking into consideration their link to the DMA, the following objectives will be given an overview: consumer welfare, competition protection, innovation, market integration, fairness and reliance on data.

2.3.1. Consumer Welfare

Be it the use of the nomenclature of consumer welfare or, as the Art. 3(1) of Treaty of the European Union[43] refers to it – (consumer) well-being,[44] it is generally, albeit not without those who oppose

[39] Judgment of 6 October 2009, *GlaxosmithKline Services Unlimited,* Case C-501/06 P, EU:C:2009:610.
[40] *Ibid.*, para. 63.
[41] A. Ezrachi, '*EU Competition Law Goals and The Digital Economy'* (2018), Oxford Legal Studies Research Paper No. 17/2018.
[42] *Ibid.* pp. 3-4.
[43] European Commission, Consolidated version of the Treaty on European Union (2007), Official Journal of the European Union, 2008/C 115/01, Art. 3.
[44] Difference between the term consumer well-being and the term consumer welfare has to do with the scope. Namely, the term well-being, referred to in Art. 3(1) TEU, is deemed to be broader, and the term encompasses, among other factors, the economic welfare of the consumers. Due to its broad nature, it is often viewed as being too abstract and difficult to regulate. For this reason, the EU institutions tend to use the term consumer welfare which has more economic implications. It should be noted that neither of the terms are wrong per se, and their goals often overlap.

this view,[45] taken that the following objective represents the principal goal of what the European competition law ought to strive to achieve.[46]

Because of such significance the legal community places on this objective of European competition law, it is of primary importance for an overview to be given of the scope of consumer welfare in the context of the digital markets and its subsequent connection with the Digital Markets Act. It is to be noted, however, that the consumer welfare overview will indirectly be given through the overview of other objectives in this chapter of the thesis.

In relation to the digital economy, Ezrachi notes the following to be of importance:

a) firstly, the concept of consumer welfare 'may be used to address welfare effects on multiple groups of customers'.[47] This point touches on the multi-sided markets, an important element of the digital markets discussed in subchapter 3.1.3. In essence, the objective of consumer welfare in multi-sided markets is dependent on the type and number of users (sides) of a particular market and their interaction, both with one another and with the platform operator. (e.g. Google's Google Search is a multi-sided market that joins together the end users that 'browse' the web, as well as advertisers of Google's service of Google Ads);

b) furthermore, the digital markets may have a non-traditional approach to the consumer welfare in that the products within the digital market economy are often ostensibly free for consumers and are digital. Such features of the digital markets may make it so that the more traditional price-centric and quality-centric consumer welfare approaches become less important and other variables that impact consumer welfare, such as the privacy of the consumers, may be more pronounced in the digital markets. [48] This is due to the fact that, often enough, digital products of

[45] Some authors claim that consumer welfare is too vague of a term which generates '*more questions than it answers'*. Reasoning behind this confusion lies in several different issues. For example, to define the term consumer welfare one must first define what a consumer is and what constitutes welfare. These two terms are still not fully agreed upon, and this in turn muddies the waters of defining the term consumer welfare itself . A few other reasons why the term consumer welfare does not seem to find universal acceptance within the legal community are, for example: confusion between the economic and legal meaning of the term, varying uses of the term by the EU institutions, etc. (See: V. Daskalova, '*Consumer Welfare in EU Competition Law: What Is It (Not) About?* (2015), Competition Law Review 11(1); or K. Stylianou, M.C. Iacovides, '*The Goals of EU Competition Law: A Comprehensive Empirical Investigation'* (2022), Cambridge University Press.
[46] Ezrachi, *EU Competition Law Goals and The Digital Economy'*, p. 4.
[47] Ezrachi, *EU Competition Law Goals and The Digital Economy'*, p. 6.
[48] *Ibid.*

large undertakings take other forms of 'payment' in the form of hostile terms of use which allows for these undertakings to harvest their consumers personal information;[49]

c) another battle the EU legislators must face in guarding consumer welfare in the context of the digital markets, is the rapid advancement in technological development and change in business strategies which impacts consumers' fundamental and other rights.[50] A good example, again, is the harm to the right of consumers' privacy. Nowadays, the rise of different digital advertising methods are becoming more and more degrading towards the right to privacy, as is guaranteed under Art. 7 of The Charter of Fundamental Rights of the European Union (hereinafter: 'the Charter').[51] [52] What is noticeable is how the consumers' rights are being 'attacked' using various methods – from advertising and personal information harvesting, to tracking technology being deployed to understand how a person behaves and what he or she does.

Finally, as will be shown through an overview of other European competition law objectives, the digital markets allow consumers to trade a new type of currency– their personal data. It is no wonder then, that the data protection law and the competition law are very entwined in the digital environment, as both serve the purpose of wider consumer welfare protection.

2.3.2. Competition Protection (Contestability)

Consumer protection is often accompanied with the protection of competition and competitors. It is not rare to find the protection of competition, or the competition structure, being referred to in the legal literature as an indirect objective of the European competition law, so as to achieve the principal goal of consumer welfare. [53] In essence, competition protection means creating an environment where enterprises can compete with each other under equal and fair conditions and an environment where the competition isn't undermined or restricted in a way as to be damaging to society or the economy. It is important to add that equal conditions do not equate to an equal

[49] See: subchapter 3.1.4. for a more in-depth overview of such services.
[50] *Ibid.* pp. 6-7.
[51] Council of the European Union, The Charter of Fundamental Rights of the European Union (2007), The Official Journal of the European Union, C 303/1
[52] B. X. Chen, 'The Battle for Digital Privacy Is Reshaping the Internet' (2021), New York Times, nytimes.com/2021/09/16/technology/digital-privacy.html, last accessed: 10.9.2022.
[53] See V. B. Malnar; J. P. Kaufman; S. Petrović; D. Akšamović; M. Liszt, *'Pravo tržišnog natjecanja i državnih potpora'* (2021), Pravni fakultet Sveučilišta u Zagrebu, p. 6. – niste svuda citirali jednako; uskladite

outcome, as the former gives the enterprises a chance to compete, while the latter assures each competitor will have equal success on the market.[54] To ensure that each competitor has equal success on the market would be detrimental to the competition itself, but to ensure each competitor has a fair chance to compete is one of the fundamental aspects of the competition protection. Such a fair chance for the enterprises to compete is often molded into the term contestability, which describes a market (or part of it) where equal access is required to allow consumer choice and which can be commercially challenged by new entrants.[55]

In the context of digital markets, the following ought to be noted in regards to contestability:

a) the competition protection objective offers an independent mandate for intervention, i.e. the scope of the objective, even though it often overlaps with the consumer protection objective, offers a wider range of possibilities for the NCA's to intervene and act *ex ante* in the digital markets; [56]

b) additionally, in the context of multi-sided markets, particular problems in regards to the competition protection objective may arise, as the intermediaries, such as Google, who has frequently abused its position over certain specialized vertical providers,[57] weigh its economic self-interest with its responsibility not to distort competition. A good example of the competition protection issues in the context of multi-sided markets is Google's undermining of the competitor Yelp in the user-provided online business reviews market. In the interview that Luther Lowe, the senior vice president of public policy at Yelp, gave to Vox,[58] Lowe stated how Google uses its dominant gatekeeping position to put its own reviews on top of its own search engine, above organic Yelp search results that would have been produced by the search engine's algorithm. Lowe summarized the issue stating how: '*Yelp is a great example of the type of service that can be undermined when a gatekeeper chooses to put its hand on the scale*.'[59] The unique nature of the multi-sided markets found in the digital sector may cause significant issues for the competition

[54] *Ibid.*
[55] APEC Competition Policy and Law Group, '*Competition Law and Regulation in Digital Markets'* (2022), APEC Publications, p. 11.
[56] Ezrachi, *EU Competition Law Goals and The Digital Economy'*, p. 9.
[57] Most recent example of a lawsuit against Google because of its bad consumer protection practices is one by the US Justice Dept. (See: Bloomberg, '*DOJ Is Preparing to Sue Google Over Ad Market as Soon as September'* (2022), bloomberg.com/news/articles/2022-08-09/doj-poised-to-sue-google-over-ad-market-as-soon-as-september, last accessed: 21.08.2022.). – ngdje imate napisano accessed, negdje ne, uskladite
[58] Vox, '*How much longer can Google own the internet*?' (2022), vox.com/recode/23132580/google-antitrust-search-android-mobile-ads, last accessed: 21.08.2022.
[59] *Ibid*.

protection, as it allows the undertaking to greatly benefit from many of its key features, such as the economies of scope and scale, and the strong network effects;

c) lastly, it is not uncommon nowadays for a substantial amount of personal consumer data to be gathered by a few large corporations. This creates a twofold concern – that of an advantage over its competitors and the protection of fair competition, and as a threat to privacy and personal information of consumers. The latter concern, due to the importance of data protection within the DMA, will be given a separate overview in chapter 4.5. The former concern, that of the market access for small and medium-sized businesses that don't possess the necessary data to enter into a market, presents itself as a significant obstruction to the objective of competition protection in the context of the digital markets. The European Data Protection Supervisor stated, in his published Opinion,[60] how the harvesting of personal data presents itself as a 'proxy for price' and how the share of 'digital dividend' between the controller and data subject, trader and consumer, becomes more and more uneven exchange.[61] The EDPS goes on to add how the '*dominant platforms discriminate* (SMBs) *by combining knowledge they extract from data with monopoly power and vertical integration in the markets*.'[62] This link between monopoly of power and the monopoly of consumer data is not a novelty introduced by the digital markets, but the digital era technology certainly allows for unprecedented forms of data acquisition. Such imbalances in the amount of data certain enterprises control is often referred to as the 'data gap' and can pose a large market entry barrier for SMBs. EDPS' view of the situation seems to be shared with many other authors who analyse the 'enterprise data gap' in the competitive digital markets. An example of such an author is Wayne Eckerson who, in an interview, stated how the data divide between different enterprises is stark, and how data acquisition separates out the companies that are going to be competitive in the future.[63] Eckerson summarizes his position, opining how those '*enterprises that use data will thrive, while those that don't, won't'*.[64] Eckerson's sentiment is not shared by all authors. Some legal authors take a different, albeit not completely opposing, stance on the issue of

[60] The European Data Protection Supervisor, '*EDPS Opinion on coherent enforcement of fundamental rights in the age of big data'* (2016), EDPS Press Releases, p. 13.
[61] *Ibid.*
[62] *Ibid.*
[63] TechTarget.com, '*Enterprises that use data will thrive; those that don't, won't'* (2019), techtarget.com/searchbusinessanalytics/feature/Enterprises-that-use-data-will-thrive-those-that-dont-wont, last accessed: 23.08.2022.
[64] *Ibid.*

data and fair competition. A. Hagiu and J. Wright argue in their paper how '*in most instances people grossly overestimate the advantage that data confers*.'[65] The two authors claim data will not be of use for all undertakings equally and only data which is *'proprietory, leads to product improvements that are hard to copy, or the data-enabled learning creates network effect'* build stronger competitive positions.[66] An example of Google's Google Maps service is given in their paper, which, through data generation by its users, predicts road conditions and travel times better and thus enjoys the data-enabled network effects.[67] [68] Whichever stance is taken, it is not hard to see how many undertakings nowadays fight tooth and nail over consumer data and how data acquisition fuels the ever growing sector of data collection and consumer data sale.

2.3.3. Innovation

The objective of innovation, often closely tied to the objective of efficiency,[69] forms part of the acknowledged European competition law ethos and is rooted in the objectives of consumer and competition welfare. Due to the rapid technological development, the goal of innovation and its regulation is becoming more of a hot topic in the legal circles, as the technological innovation of large IT competitors, such as Google, Facebook and Microsoft, makes it more and more difficult for the legislators to keep up with the technological advancements.

Often, one of the most powerful competitive tools in the repertoire of Big tech is their ability to innovate and create new technologies and solutions, so as to ensure an edge over their competition. Even though the reward innovation brings to the economy and society is great, there is risk involved. Technologies, such as artificial intelligence and the internet of things, if not followed by a proper legislative framework, may be stepping stones for large IT corporations to thump fair competition and indirectly cause harm to the consumers themselves. The Commission has recognized this problematic in their paper '*Impact on EU Competition Legislation on Innovation*'[70]

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[65] A. Hagiu and J. Wright, '*When Data Creates Competitive Advantage'* (2020), Harvard Business Review
[66] *Ibid.*
[67] *Ibid.*
[68] Network effects are defined as a '*phenomenon whereby increased numbers of people or participants improve the value of a good or service*.' (C. Banton, 'Network Effect', investopedia.com/terms/n/network-effect.asp, last accessed: 25.8.2022.)
[69] Ezrachi, *EU Competition Law Goals and The Digital Economy'*, pp. 10-12.
[70] The European Commission, '*Impact of EU Competition Legislation on Innovation'* (2021), full paper can be seen here: https://ec.europa.eu/docsroom/documents/2654/attachments/1/translations/en/renditions/native

stating how the legislators must create a '*dynamic competition policy that reflects business reality and creates more legal certainty*.'[71]

The Commission isn't the only one dabbling in the question of innovation fostering within the EU competition law corpus. Discussions among the jurists that specialize in the area of European competition law have also been grounds for new ideas and takes on how to properly synergise this objective with other objectives of EU competition law. For example, when discussing innovation in the context of digital markets, Ezrachi states how '*innovation calls for cautious intervention*.'[72] Cautious intervention refers to the fact that the digitalised environment may oftentimes blur the distinction between research development that promotes consumer interest, and innovation used to develop exploitative and harmful anti-competitive exclusionary effects.[73] This fine regulatory line between the *ex ante* intervention and the *laissez-faire* stance on the issue requires in-depth market research and individual approach to each new technological development, a thought shared by many legal jurists.

2.3.4. Market Integration

Unlike the competition law of different states and organisations, the EU competition law is uniquely characterised, as is the EU law itself, due to the virtue of the EU being a supra-national organisation. Many authors see the competition law as one of the integral tools for achieving an efficient common market,[74] a goal that is prominently featured as the *ratio* behind the DMA.[75]

One of the primary reasons why the European competition law is such an important tool for achieving the objective of market integration, is its impact in resolving the problem of diverging national laws and the diverging solutions of national and sectoral market regulators in the digital market. Such diverging rules result in fragmentation of the internal market as different sector regulators and member states battle The Commission for their piece of the regulatory cake.[76] The

[71] *Ibid.* p. 1.
[72] Ezrachi, *EU Competition Law Goals and The Digital Economy'*, p. 12.
[73] *Ibid.*
[74] Ezrachi, *EU Competition Law Goals and The Digital Economy'*, p. 19.
[75] DMA, Recital 7.
[76] Example of this behaviour by MS is the Germany's, France's and Netherland's call for the DMA to allow for sufficient leeway for national rules applicable to gatekeepers, while relying on the legal basis which empowers legislators to harmonize national rules. (For more see: A. L. Pablo; N. B. Fernandez, '*Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It*' (2021))

risk regulatory fragmentation poses, and the need for approximation of MS laws, is one of the fundamental reasonings the Commission has adopted during the DMA's proposal.

However, many legal authors disagree with the reasoning behind the DMA's attempts to resolve this European competition law objective, opining that the Regulation may have the complete opposite effect, and lead to an even larger divide between the national legislations.[77]

2.3.5. Fairness

Another important objective, stated many times within the DMA alongside the objective of contestability, that ought to be given mention when discussing the European competition law in the context of the digital markets, is the objective of fairness. As the EDPS stated: '*fairness is perhaps the most fundamental criterion for lawful trading practices in consumer law',*[78] or as prof. Ezrachi opined in his paper: '*the concept of fairness echoes a moral norm embodied in the European Union competition rules*.'[79] Such statements are not misplaced, as the objective of fairness plays a large role not only in the corpus of the DMA, but also in other EU legislation which regulate the digital market.[80] Finally, fairness is also found in the two essential European competition law provisions, Art. 101[81] and Art. 102.[82] TFEU, where formulations such as '*unfair trading conditions'*[83] leave for a wider range of preventative measures and defense against the possibly exploitative illegitimate behaviours of the undertakings. In essence, fairness serves other objectives of the European competition law, but also holds distinguishing characteristics which differentiate it from the rest.

Fairness ought to primarily serve the objective of consumer welfare, but can aid in achieving other objectives of the EU competition law (e.g. the objectives of innovation and efficiency are often closely entwined with fairness). Regarding the link between fairness and innovation, Advocate General Bot expressed that competition, if it is fair, generally ensures technological progress and

[77] See subchapter 4.2.1.
[78] EDPS, Opinion 8/2016, p. 8.
[79] Ezrachi, *EU Competition Law Goals and The Digital Economy'*, p. 13.
[80] Note: European Parliament and the European Council, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (2019), Official Journal of the European Union, L 186
[81] TFEU Art. 101.
[82] TFEU Art. 102.
[83] *Ibid.*

improvement of the quality of service of products, all while reducing the costs, i.e. fair competition aids in technological innovation.[84] In the DMA, fairness is linked to contestability, and it is stated how the lack of, or weak, contestability can enable gatekeepers to engage in unfair practices.[85]

On the other hand, fairness can be distinguished from other objectives, such as the objective of protection of competition, as the latter, among other things, protects legitimate competitors, and indirectly consumers, from the outcome of less efficient undertakings being pushed out of the market, whilst the objective of fairness is not used to challenge such competition.[86]

The objective of fairness is also often considered when debating the lack of lawfulness and transparency when it comes to personal data processing.[87] While discussing the objective of consumer welfare in the context of digital markets, it has been stated how consumers in the digital environment demand not only the variable of price and quality, but require of the products, among other factors, to respect their right to privacy. This is due to the fact that a physical product, found in most other markets, generally does not collect personal information of its consumers, which, in turn, makes the factor of privacy and transparency protection less important or irrelevant for the average consumer when compared to the factors of quality and price. Modern-day tech giants very often provide their services free of charge and it is not rare to see such undertakings provide physical products, used to connect the consumers to their networks, free of cost as well, so as to 'hook' the customers into their eco-systems network.

Such was, for example, the case against Facebook Inc., in which the Federal Cartel Office in Germany investigated the corporation for their alleged abuse of the dominant position the company has in the social media market by imposing their terms of use which exploited its consumers' imbalanced negotiation position and collected vast amounts of personal information.[88] It was in their paper that the Federal Cartel Office opined how this constituted a violation on the basis of unfair business terms.[89] Such an example shows how respect for fairness plays an important role

[84] Opinion of AG Bot, Case C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International [2009] ECR I-7633, para 245
[85] DMA, Recital. 34.
[86] Ezrachi, *EU Competition Law Goals and The Digital Economy'*, p. 13.
[87] Ezrachi, *EU Competition Law Goals and The Digital Economy'*, p. 16.
[88] Bundeskartellamt, *Hintergrundinformationen zum Facebook-Verfahren des Bundeskartellamtes* (2017)
[89] *Ibid.*

in data handling, data protection and privacy violation protection that inevitabely leads to unfair exploitation of consumers.[90]

Summarized, the objective of fairness helps legislators understand the relationship between online platforms, service providers and consumers, provides an additional mandate for intervention based on unfair and/or discriminatory market practices and allows for stronger protection of unfair personal data exploitation.[91]

2.4. Interplay Between the EU Competition Law and the DMA

Ever since the DMA's proposal, questions have been brought up concerning the legal nature of the upcoming Regulation and its interplay with the EU competition law. As many authors have pointed out, the DMA is not a piece of competition law legislation, but the EU's framework of regulatory laws.[92] The *ratio* for such a declaration of this Regulation lies in the fact that, as some previous EU acts such as the General Data Protection Regulation,[93] focus on the symptoms of the market's imbalance, the DMA focuses, or at least attempts to, on the cause of the imbalance – the digital platforms.[94] Such *ex ante* regulatory law nature of the new act is visible in different provisions, such as Art. 1. (5) DMA which allows for the MS to impose obligations in parallel with the Commission, which have the right to impose such obligations under the authority the DMA confers upon it, but requires of these obligations to be *ex ante* compatible with the Union law and they must not be applicable to the gatekeepers, as they are defined under the DMA.[95]

This has led certain authors to attempt to recognise and address the possible concerns the interplay between the EU competition law and the DMA may have when practical implications of the DMA are considered. One of the issues brought up was the problem of undertakings being subjected to parallel proceedings in case their conduct breaches both the DMA rules and the competition law

[90] Ezrachi, *EU Competition Law Goals and The Digital Economy'*, p. 17.
[91] *Ibid.*
[92] Jdsupra, '*The EU Digital Markets Act – The Holy Grail of Big Tech Regulation*?' (2022), jdsupra.com/legalnews/the-eu-digital-markets-act-the-holy-5056954, last accessed: 15.9.2022.
[93] European Commission, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119.
[94] Digiday, *'WTF is the Digital Markets Act*?' (2022), digiday.com/marketing/wtf-is-the-digital-markets-act, last accessed: 15.9.2022.
[95] DMA, Art. 1 (5).

rules simultaneously.[96] In essence, if an undertaking was to be fined both by the Commission and by the national authorities, it would breach the legal principle of *ne bis in idem*. Traditionally, in the competition law, the *ne bis in idem* rule was protected by checking whether the 'legal interest' of the measures was similar to one another.[97] This may be problematic in the context of DMA, as the Recital 10 states how the DMA protects '*different legal interests than those of competition law rules and should be without prejudice to their application*'[98] – this could then lead to two different standards of 'legal interest' and, by extension, to the possibility of a double jeopadary. This issue has been alleviated to an extent through the recent CJEU caselaw[99] where the Court adopted a stance that what matters for the application of the *ne bis in idem* rule is the material facts of the case, not the 'legal interest'.[100] Additionally, the DMA contains the Recital 86 which calls for coordination between the Commission and the national authorities as to ensure that the principles of proportionality and *ne bis in idem* are respected, thereby putting in writing and reassuring that the fundamental European legal principles are respected.[101]

Ultimately, the DMA has been molded and many of its obligations are based off legacy European competition law cases in which the Commission has acted.[102] This interplay between the EU competition law and the DMA is necessary to ensure fairness and contestability of digital markets, as was recognised by the EU legislators in Art. 1 (6) DMA: *'This Regulation is without prejudice to the application of Articles 101 and 102 TFEU (…) '*[103] and the aforementioned Recital 10 DMA: *'(…) it (the Regulation) should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour (…). '*[104] Lastly, Margarethe Vestager, an EU Commissioner for Competition and one of the main actors in the DMA's proposal and adoption, touched upon the regulatory and competition

[96] Dentons, '*DMA and competition law: CJEU case law sheds light on risks of concurrent sanctions'* (2022), dentons.com/en/insights/articles/2022/june/15/cjeu-case-law-sheds-light-on-risks-of-concurrent-sanctions#:~:text=The%20DMA%20seeks%20to%20provide,ex-post%20investigations%20and%20remedies, last accessed: 15.9.2022.
[97] *Ibid.*
[98] DMA, Recital 10.
[99] Case C-117/20
[100] Dentons, '*DMA and competition law: CJEU case law sheds light on risks of concurrent sanctions'*
[101] DMA, Recital 86.
[102] Case AT.39740 *Google Search* (*Shopping*).
[103] DMA, Art. 1 (6).
[104] DMA, Recital 10.

law aspect of the DMA stating in her GCLC annual conference speech how: '(…) *the two approaches are complimentary – both will remain necessary. No one should expect the new regulatory instrument to replace Article 101 and 102 enforcement actions*.'[105]

3. The Digital Markets

Traditional brick-and-mortar activities of economic trade, production and distribution are being challenged by the free market and converted into their digital sector equivalents. Today, more than ever, the battle for economic supremacy in many market segments is fought not in the physical, but the digital world. This new economy is characterised by competition aimed towards mastery of technology, innovation, access to the global market and intangible investment – such as research and training.[106] All of this helps the digital markets prosper in the realm of innovation and efficiency, but also offers with it features the legislators struggle to regulate and control.

Due to this rapid growth of the digital markets, a few key features,[107] which differ from those of the conventional analogue two-sided markets, have started to be observed by the legal community, and ought to be given a more detailed overview in this paper.

3.1. Key Features

3.1.1. Economies of Scope and Economies of Scale in the Digital Markets

3.1.1.1. Economies of Scope

One of the first things legislators struggle with, in regards to digital markets, is to identify and define the market and to define the entity they wish to regulate. This issue is not a novelty introduced by the digital sector and it is only logical that the European competition law regulators face the same challenge in every market they wish to regulate. The difference, however, is that due to the nature of digitalization, the economies of scope and number of potential markets are widened.[108]

[105] Full speech can be viewed here: ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2079
[106] The European Commission, '*Impact of EU Competition Legislation on Innovation'* (2021).
[107] *N.b.* these key features are not disconnected aspects of the digital markets, but a linked group of characteristics that all co-exist within the digital environment. It is for this reason that these features must be observed in conjunction with one another and not as separate pieces.
[108] APEC, '*Competition Law and Regulation in Digital Markets'* (2022), p. 10.

An example of this economy of scope challenge is the multi-sided market characteristic of social media. Modern social media provide a wide array of services, from communication services to advertisements and video gaming. Meta Platforms, a multinational tech conglomerate that primarily deals in the social media and social networks industry,[109] may compete with other social media platforms, such as Twitter, but it may also compete with mobile video game publishers such as Supercell. Not only that, but Facebook, a sister company of Meta, serves a role of an intermediary for other competitor video games, such as that of the company Zynga.[110]

Many of these gatekeepers rely on economy of scope to widen their service range, which, in turn, makes it more of a challenge for regulators to define what market an enterprise competes in. In the example above, the legislator would have to separate all of the services that Facebook provides and then use the competition law rules to pinpoint which of these services belong to which relevant market.

To add to the difficulty is the challenge of interoperability and fragmentation of services and markets. For instance, Meta Platforms acquired Whatsapp back in 2014 [111] and made it, to a degree, interoperable with its other services, such as Facebook Messenger and Instagram. This interoperability creates ecosystems and makes it easier for one large enterprise to control different markets, but it also makes it easier for consumers to use one service in relation to another linked service.[112] Legislators must be aware of the interplay between different sectors of the digital market and the impact large gatekeeper-made ecosystems have on them.

On the other hand, some large enterprises, such as Apple Inc., force for fragmentation of some traditionally homogenous markets – such as the smartphone market.[113] An example of this is Apple's proprietary iOS which its devices use, along with the connected services Apple provides, such as the App Store, on one side, and the Google's open source Android operating system, which is modified to fit a range of different devices, on the other. This creates two separate business models which are dominated by Apple and Google respectively and which the United Kingdom's

[109] Wikipedia, '*Meta Platforms'* (2022), wikipedia.org/wiki/Meta_Platforms, last accessed: 1.9.2022.
[110] Seeking Alpha, 'Meta Platforms: The Competition Is Fierce' (2022), seekingalpha.com/article/4488953-meta-platforms-the-competition-is-fierce, last accessed: 1.9.2022.
[111] Forbes, 'Facebook Closes $19 Billion WhatsApp Deal' (2014), forbes.com/sites/parmyolson/2014/10/06/facebook-closes-19-billion-whatsapp-deal, last accessed: 1.9.2022.
[112] APEC, '*Competition Law and Regulation in Digital Markets'* (2022), p. 10.
[113] *Ibid.*

Competition and Market's Authority referred to as the Apple and Google duopoly in the provision of operating systems that run on mobile devices.[114]

All in all, economies of scope in the context of digital markets pose legislative and regulatory challenges that must be understood for the contestability of the digital markets to be ensured.[115]

3.1.1.2. Economies of Scale

Other than the economies of scope, another important tool the IT corporations have at their disposal is the use of economies of scale within the digital markets landscape. Similarily to what was stated in the economies of scope overview, the economies of scale are not a novelty tied exclusively to the digital markets, but, due to the specific qualities of the intangible assets of the digital world, the economies of scale can be leveraged by the undertakings at an unprecedented level.

These intangible assets, also known as the digital assets, represent one of the key reasons for the success of economies of scale in the digital markets. Though there are many different definitions of what the digital assets constitute,[116] their agreed upon essential features are the ability to be replicated instantly, an infinite number of times and at minimal or non-existent marginal cost.[117] An obvious difference to the traditional physical assets arises when the cost of production output is compared between the two. Unlike physical assets, the brunt of the cost of the digital assets generally is in their development phase, after which the output cost of each unit individual digital asset becomes marginal or non-existent.[118] Geoff Parker and Marshall Van Alstyne claim how the massive amounts of demand economies of scale (term popularized by C. Shapiro and H. R. Varian, and used here to pronounce the large consumer demand in these markets)[119] in the digital markets

[114] The Competition and Markets Authority, '*Mobile ecosystems market study: Interim Report'* (2022)
[115] APEC, '*Competition Law and Regulation in Digital Markets'* (2022), p. 10.
[116] Gartner defines them as '*anything digitally stored and uniquely identifiable which organizations can use to realize value'* (See: Gartner, '*Digital Assets*', gartner.com/en/finance/glossary/digital-assets#:~:text=A%20digital%20asset%20is%20anything,slide%20presentations%2C%20spreadsheets%20and%20websites., last accessed: 10.9.2022.).
[117] Forbes, 'Digital And Demand-Side Economies Of Scale: It's All About Leverage', forbes.com/sites/forbestechcouncil/2016/12/07/digital-and-demand-side-economies-of-scale-its-all-about-leverage/?sh=a9612534d9fa, last accessed: 10.9.2022.).
[118] An enterprise may need to only develop updates for certain software or account for the expense of server upkeep.
[119] C. Shapiro and H. R. Varian, '*Information Rules'* (1999), Harvard Business School Press

may be aggregated with a *few lines of code*.[120] Though simplified, this explanation from the two authors points to the ease at which the programs and algorithms serve their ever-growing customer base in the context of the economies of scale.

Nowadays, it is this economy of scale that takes advantage of technological improvements and gives those enterprises in the platform market a network effect advantage that is very difficult for its competitors to overcome.[121] Once established, IT enterprises can grow quickly and expand their operations to new consumers at a minimum cost.[122]

A good example of previous is the search engines market currently dominated by Google's Google Search engine.[123] Although the search engine initial cost of development is very high, the update and upkeep costs (such as server upkeep) are comparatively low in contrast to the Google's profit margines.[124] For a would-be competitor to enter into the search engine market would be very difficult, if not impossible. The scale at which Google Search operates is so great, that the barrier to entry makes this market practically uncontestable. Some authors have stated how the Google is '*as close to a natural monopoly as the Bell system was in 1956'*[125] and how anyone that wanted to compete in the search engine market would be '*out of their mind.*'[126]

Another example of the economies of scale within the digital markets is the social media and social networks sector. Similarly to the search engine market, the social media market also benefits greatly from the economies of scope and the network effect. If an undertaking was to try to enter into the social media market, it would face similar issues of the high barrier to entry produced as a result of the sheer magnitude of consumers Facebook already has.

The challenge in the two scenarios described above is the lack of *de facto* competition due to the fact that current service providers, Google and Facebook, hold a very dominant position in their

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[120] G. Parker and M. V. Alstyne, '*The Platform Revolution: Platform Revolution: How Networked Markets Are Transforming the Economy—and How to Make Them Work for You'* (2018), p. 3.
[121] *Ibid.*
[122] G. Parker, G. Petropoulos and M. V. Alstyne, '*Digital Platforms and Antitrust'* (2020), Bruegel Working Paper 06/2020, p. 6.
[123] Oberlo, '*Search Engine Market Share 2022'* (2022), oberlo.com/statistics/search-engine-market-share#:~:text=US%20Search%20Engine%20Market%20Share&text=The%20only%20difference%20comes%20in,a%20market%20share%20of%207.13%25., last accessed: 10.9.2022.
[124] CNBC, '*How Google's $150 billion advertising business works'* (2021), cnbc.com/2021/05/18/how-does-google-make-money-advertising-business-breakdown-.html, last accessed: 10.9.2022.
[125] Jonathan Taplin, '*Jonathan Taplin Promarket Interview'* (2017), promarket.org/2017/05/09/google-close-natural-monopoly-bell-system-1956/#footnote_0_5432, last accessed: 10.9.2022.
[126] *Ibid.*

respective markets because of the leverage provided by the economies of scale and the network effect. Concretely, if Facebook is observed, the platform itself could be, and has been, albeit with varying degrees of success, replicated by other enterprises such as MySpace, but what has always set Facebook's social media platforms apart from their competition isn't based exclusively on their quality of produce - it is based primarily on the sheer quantity of their consumer base.

This phenomenon, by which the value of a good or service is dependent on the number of users, is more commonly known as the network effect, and is one of the key factors of the digital markets.

3.1.2. Network Effects

Network effects present a situation where the user's network connection value lies dependant on the number of other users already connected,[127] or, as one author describes it, network effects occur when '*a company's product or service becomes more valuable as usage increases'*.[128] Put differently, a phone (network) is useful only if one can use it to communicate with other users. If no one else owns a phone, the network value is zero because you can't call anyone, but if an additional consumer owns it, then the value for both of those users, and the phone itself, grows. This allows for digital platforms to grow much quicker than providers of analogue products and services.[129]

If compared to the economies of scale, which can be described as the drop in production costs in relation to the combined volume of supplier's unit output, the network effects present the demand side counterpart of economies of scale, because they don't decrease the supplier's average production cost, but rather increase the consumer's willingness to pay due.[130]

The phone scenario described above is what the legal and economic community refers to as the direct network effect, i.e. a scenario where the attractiveness of a service grows as the number of users increases. Classic digital markets example of this is Facebook's Whatsapp or Google's

[127] K. Voropaev, '*Network Effects as a Ground for Anti-Competitive Conduct in Russia'* (2021), competitionlawblog.kluwercompetitionlaw.com/2021/02/08/network-effects-as-a-ground-for-anti-competitive-conduct-in-russia, last accessed: 15.9.2022.
[128] J. Currier, '*The Network Effects Manual: 16 Different Network Effects – 2022'* (2022), nfx.com/post/network-effects-manual, last accessed: 15.9.2022.
[129] F. Heimann, '*The Digital Markets Act – We gonna catch 'em all*?', competitionlawblog.kluwercompetitionlaw.com/2022/06/13/the-digital-markets-act-we-gonna-catch-em-all, last accessed: 15.9.2022.
[130] L. E. Blume; S. Durlauf, '*The new Palgrave dictionary of economics'* (2019), London: Palgrave Macmillan

Google Search engine. Both of these products' value increases as their user base grows. Windows Live Messenger, Microsoft's instant-messaging client and a Whatsapp competitor, may have equal quality of product as Whatsapp does, but very few consumers use it because most of their friends and family use Whatsapp or other highly popular messaging clients.

On the other hand, network effects may also be indirect. Indirect network effects arise when a platform or a service has multiple user groups, where one group's network benefits increase as the other group's user base grows.[131] A good digital markets example of this is Amazon's Amazon.com. Amazon.com serves both buyers and sellers[132] as two distinct, albeit connected, consumer groups. If more buyers join the platform, the network benefit for the sellers grows, as they have more potential consumers for their products. Indirect network effects are most strongly connected with multi-sided markets, another key feature of the digital markets.

In theory, network effects benefit the consumers, as they provide a wide range of on-demand services, lower costs, and add the benefit of one-stop-shop.[133] Amusingly summed up, as one author puts it: '*who would want to have a social network on which only one in ten friends is available?*.'[134]

The issue, however, with network effects, is their tendency to create an environment where monopolies can thrive, as they allow for companies to dominate a market with their anti-competitive practices even when their competitors have newer and better tech.[135] The stronger the network effect is in a market and the lack of other competing platforms consumers may use, i.e. the rise of single-homing,[136] the more incentives there are for the gatekeepers to levarege their position against consumers.[137] An example of how gatekeeper may levarage his dominant position

[131] T. Srobierski, '*What are network effects*?' (2020), Harvard Business School, online.hbs.edu/blog/post/what-are-networkeffects#:~:text=Indirect%20network%20effects%2C%20on%20the,receives%20a%20greater%20value%20amount., last accessed: 15.9.2022.
[132] *N.b.* Amazon.com is a multi-sided market and, other than buyer and seller consumer groups, serves other consumer groups, such as advertisers. There are examples of it being referred to as a hybrid market, due to the fact that Amazon.com also competes with other sellers with their own products.
[133] APEC, '*Competition Law and Regulation in Digital Markets'* (2022), p. 16.
[134] Heimann, '*The Digital Markets Act – We gonna catch 'em all*?'
[135] APEC, '*Competition Law and Regulation in Digital Markets'* (2022), p. 16.
[136] Single-homing is used to describe an economic agent which uses only one platform in a particular industry. If an agent uses multiple platforms, the term used is multi-homing. (For more see: N. Dryden; J. Padilla; H. Vasconcelos, '*On The Competitive Effects of Single-Homing: The Case of Hybrid Marketplaces'* (2021), CPT Antitrust Chronicle February 2021, p. 4.; also see subchapter 3.1.3.1.).
[137] Heimann, '*The Digital Markets Act – We gonna catch 'em all*?'.

that may arise from the use of network effects, is the use of exclusivity clauses that restrict merchants from engaging with competitive platforms.[138]

In essence, network effects may create a serious market entry obstacle.[139] Nowadays, it is virtually impossible for Facebook's social media to be overtaken by a new competitor, or for Google's Google Search to be dethroned by an alternative search engine – it may be argued that they have grown too big for *our* good, and thus must be more strongly regulated.

3.1.3. Multi-Sided Markets

Another important characteristic of the digital markets is its multi-sidedness, i.e. a type of market (platform) where '*one side of the market can derive an added value from its interaction with the other side of the market.* '[140] [141] The term multi-sided is used to highlight the demand a product or a service has by multiple different groups (sides) – where at least one of those sides puts a high emphasis on the involvement of the other side.[142] It is to be noted that the terminology of multi-sided markets is not consistent across the legal and economic literature, as the notion of multi-sided markets is many times used interchangeably with the notion of two-sided markets.[143]

In spite of their importance within the digital eco-system, the multi-sided markets are not a feature exclusive to the digital sector. Traditionally, there have been analogue markets, such as the print industry, which have had similar features to a multi-sided market like Amazon.com. Analogue newspaper publisher has to cater to readers, but it also has to cater to advertisers.

Multi-sided digital platforms have become typical mediators for majority of people's online experiences. Day-to-day internet browsing, as an example, is done via the Google Search engine,

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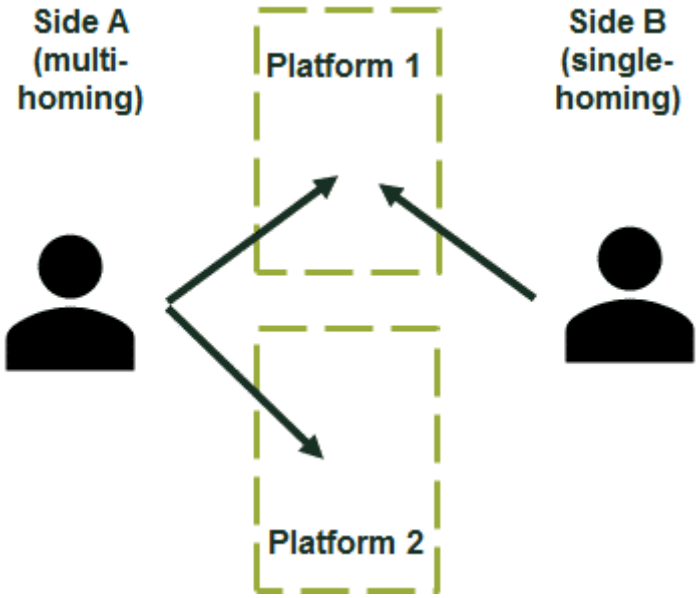
[138] APEC, '*Competition Law and Regulation in Digital Markets'* (2022), p. 18.
[139] *Ibid.*
[140] G. Parker; G. Petropoulos; M. V. Alstyne, '*Digital Platforms and Antitrust'* (2020), p. 6.
[141] Initially it would seem as if the indirect network effects were being described, as the '*sides of the market'* essentially pertains the relationship between different consumer groups – buyers, sellers, advertisers, etc. However, while the indirect network effects are strongly linked to multi-sided markets, the former describe the effects the platforms provide, while the latter describe the structure of the platforms.
[142] A. Rasek, '*Two-sided market'* (2020), concurrences.com/en/dictionary/two-sided-market#:~:text=The%20term%20'two%2Dsided%20market,indirect%20network%20effects'%20or%20'cross, last accessed: 15.9.2022.
[143] *Ibid.*

an archetypal multi-sided platform. The multi-sidedness of Google Search may be observed through different groups of clients Google caters to: from consumers that use it to find online content, sellers who want to promote their websites, to advertisers who want access to Google's consumer base.[144] Advertisers, as one of Google's customer groups, are especially interested in Google's consumers which use Google's search engine to browse the web. In this scenario advertisers are dependent on Google's platform having consumers that use the search engine to browse the web, while the vice versa scenario does not hold true, as the consumers may use different search engines, such as Mozilla Firefox, to achieve the same goal.

3.1.3.1. The Problem of 'Homing' and the Competitive Bottleneck

An important dimension worth noting when discussing the multi-sided markets is the absence or presence of homing, i.e. the extent to which platform users can use more than one platform. A multi-sided platform user may 'single-home' when he uses only one platform or he may 'multi-home' when he uses two or more platforms.[145] An example of this phenomenon is the Apple App store, where users of iPhones typically single-home (side B), as there are very few users who own both iPhone and an Android phone, while the app developers multi-home (side A), i.e. they create their apps for both iOS and Android OS.[146] [147]

[144] As was stated in the Contestability subchapter, Google Search caters to other clients as well, such as those customers which seek user-provided online business reviews.
[145] D. Geradin, '*What is a digital gatekeeper (Part 2)? The relevance of the single-homing v. multi-homing debate'* (2020), theplatformlaw.blog/2020/10/16/what-is-a-digital-gatekeeper-part-2-the-relevance-of-the-single-homing-v-multi-homing-debate, last accessed: 15.9.2022.
[146] *Ibid.*
[147] *N. b.* Though multi-sided platforms may, and often times have, more than two user groups, it is easiest to analyse the homing problem in the two-sided markets, i.e. when two agents are opposite one another and the first derives its value by interacting with the second. This leaves three possible scenarios to analyse in the two-sided markets: a) both sides single-home; b) both sides multi-home; or, c) one side single-homes, while the other side multi-homes. The last scenario is generally the one economic literature focuses on and is used in this paper.



Simplified homing illustration where one side single-homes, while the other side multi-homes (M. Johnson, '*Home advantage? Who wins in multi-sided platform competition'* (2020), oxera.com/insights/agenda/articles/home-advantage-who-wins-in-multi-sided-platform-competition)

In the above described case, where one side single-homes, while the other multi-homes, it is visible that the interaction between the two sides may only occur on one platform (Platform 1). In this case the platforms will be competing not for the multi-homing agent, but for the single-homing agent.[148] Single-homing agent is more appealing to the platforms as the multi-homing agent can only reach the single-homing agents by joining the platform that gives them the exclusive access to those users.[149] The end result of this exchange is the monopoly power of platforms that host the single-homing agents over multi-homing agents – the competitive bottleneck. In the Apple example described above, this would mean that Apple could dictate the 'rules of the game' on the App store, as the iOS developers would have no other way of reaching the single-homing iPhone user base.

[148] M. Johnson, '*Home advantage? Who wins in multi-sided platform competition'* (2020), www.oxera.com/insights/agenda/articles/home-advantage-who-wins-in-multi-sided-platform-competition, last accessed: 15.9.2022.
[149] N. Dryden; J. Padilla; H. Vasconcelos, '*On the competitive effects of single-homing: The case of hybrid marketplaces'* (2021), CPI Antitrust Chronicle: February 2021, p. 4.

Initially it may be easy to state how the multi-homing agent is in a better position because they aren't 'locked' into using one platform. However, single-homing users may have a variety of benefits tied to their position. One of the most prominent ones, and another key factor of the digital markets, is that the single-homing users generally don't have to pay for their services, as the platforms naturally compete for these users.[150] [151] Nevertheless, benefits and drawbacks of the two sides must be observed on the case by case basis.[152]

More interesting in the digital markets competition law discussion, however, is the position of the undertaking which benefits from the competitive bottleneck scenario. As will be shown later in the thesis, the DMA uses a designation of a gatekeeper as a fundamental criterion in defining which undertaking must conform to the Regulations' obligations. Thus, some authors have asked the question – does the undertaking, which benefits from its monopoly over multi-homing agents, qualify as an *ex ante* gatekeeper? Currently, under the objective threshold set by Art. 3. (2) one cannot automatically designate such an undertaking as a gatekeeper. However, reflecting on Art. 3. (1) (b) DMA, which states how an undertaking which '*provides a core platform service which is an important gateway for business users to reach end users'*, it is clear how the Commission has, through the aforementioned provision, described exactly the monopoly of this multi-homing dependency.[153] In spite of that, it is still too early to tell, but there is little doubt that this provision allows for a good argumentation for why an undertaking should be considered a gatekeeper.

3.1.4. Complimentary Services and Products

To attract a certain type of customer, be it single-homing agents or those users who offer strong network effects or some other type of user, digital platforms more often than not resort to the use of complimentary services and products. Facebook, as an example, offers almost all of their most popular services free of charge (e.g. Whatsapp, Instagram), but will charge those customers which multi-home or which cause weak network effects (e.g. advertisers).

[150] M. Johnson, '*Home advantage? Who wins in multi-sided platform competition'* (2020).
[151] *N. b.* This is not always the case. PC software platforms tend to offer their acces to multi-homing developers while charging the single-homing users.
[152] M. Johnson, '*Home advantage? Who wins in multi-sided platform competition'* (2020).
[153] DMA, Art. 3. (2) (b).

This 'big tech benevolence' and the complimentary nature of such services has been probed by different legal authors.[154] While it is difficult to claim that there is a consensus, the majority of legal authors seem to agree that this free nature of digital platform services is somewhat misleading. Google, for example, offers its search engine to users free of charge, but the users are exposed to a plethora of advertisements and their personal data is tracked[155] and sold by Google to its other customers. This unusual interaction between the 'non-paying' consumers who trade their personal information, platform, and the paying consumers, has led to some authors claiming that the traditional lines between consumers and producers have been blurred.[156]

In addition, the use of personal data within the digital markets plays a role in the use of personalised pricing. Under this pricing method, undertakings segment users into smaller groups, charging each group a share of an estimated value of their willingness to pay.[157] Users may then be discriminated based off where they live, i.e. they pay more if their data shows to undertakings that they would be more willing to.[158]

Because of this reliance on personal data, the last key feature reviewed in this paper has to do with the special role the data has in the digital markets ecosystem.

3.1.5. Reliance on Data

During his interview for the New York Times, where the topic of a company's use of users'data was discussed, Jeff Green proclaimed how: '*The internet is answering a question that it's been wrestling with for decades, which is: How is the internet going to pay for itself.'*[159] This quote perfectly summarizes how modern digital tech companies operate. Most digital markets services are not high end commodities only a few can afford to use, but rather, many of them are complementary in nature and available to anyone that can connect to the internet. This allows the

[154] P. Bergkamp, '*The Proposed Digital Markets Act's Effect On Free Internet Services'* (2020), Corporate Finance Lab, corporatefinancelab.org/2021/06/07/the-proposed-digital-markets-acts-effect-on-free-internet-services, last accessed: 15.9.2022.
[155] Reuters, '*Google faces $5 billion lawsuit in U.S. for tracking 'private' internet use'* (2020), reuters.com/article/us-alphabet-google-privacy-lawsuit-idUSKBN23933H, last accessed: 15.9.2022.
[156] I. Brown; C. Marsden, '*Regulating Code: Towards Prosumer Law*?' (2013), SSRN Electronic Journal, p. 2.
[157] OECD, '*OECD Handbook on Competition Policy in the Digital Age'* (2022),OECD Publications, p. 27.
[158] *Ibid.*
[159] New York Times, '*The Battle for Digital Privacy Is Reshaping the Internet'* (2021), nytimes.com/2021/09/16/technology/digital-privacy.html, last accessed: 15.9.2022.

digital markets end users to be more informed and connected with one another than ever before, but it is also an environment where users pay, not with money, but with their own data.

Digital markets rely on data for many services they provide. This was already touched upon when network effects were discussed, as one of the benefits of a strong network effect is also personal data which the platform accumulates, and then sells to ad companies which require this data to be able to reach their target audience and personalize their ads. It is precisely for this reason that in the last 10 years or so the European regulators have started to catch up on what is going on in the tech world, and have attempted to regulate this behaviour of the Big tech (e.g., in 2016 GDPR was introduced). As a continuation of this trend, the DMA is a regulation which, while mostly focusing on the competition law aspects of the digital markets, advances many data protection provisions as well, especially in regards to the end users' right of consent, which will be overviewed in chapter 4.5. of this paper, but also regarding some other rights of users, as well as the right to be informed about the collection and use of their personal data. This regulatory trend shows that the EU legislator has started to take on a much more proactive role in securing the EU citizens' personal data.

In summary, and as the OECD has correctly observed, nowadays, data reliance is a central element of many digital markets, it is a competitive asset, a potential entry barrier, and even a dimension of quality,[160] and it is important that we, as users of these platforms, protect our rights in the digital arena.

3.2. Concentrations and Authority of Dominant Undertakings in the Digital Markets and the Proposed Solution

One common characteristic of all the overviewed Tech sector key features is their ability to offer their beneficiaries an overwhelming market dominance that is very difficult to contest. If an undertaking is able to successfully utilise strong network effects, economies of scope and scale, single-homing user base, diversified data flows and other similar factors, they are able to exert competitive pressure that deters their competitors from competing with them. While some, such

[160] OECD Handbook, '*OECD Handbook on Competition Policy in the Digital Age'* (2022), OECD Publications, p. 25.

as the Chicago School, argue that, as there are no regulatory barriers to entry, the market is contestable, a wider range of authors finds this dominant position to be highly unchallengeable.[161]

This concentration of market power in the hands of Big tech undeniably raises contestability concerns, as can be seen in the EU Commission's caseload and their many antitrust decisions such as *Google Shopping* (concerning Google's algorithm preference to promote Google's own products),[162] *Google Android* (concerning, among others, unlawful licencing practices Google imposed on phone manufacturers)[163] and *Google AdSense* (concerning the abuse of online advertising results).[164] Member states have also realised what the danger Big tech undertakings may pose to the contestable and fair digital markets and have thus expanded the sector regulator authorities in their struggle to deal with the leveraged positions of gatekeepers.[165]

While some competition law solutions have existed to address the described challenges the digital markets face, such as the core competition law provisions 101 and 102 of the TFEU, the Commission, as is proclaimed in the Recital 5 of the DMA, found that their scope was: '*limited to certain instances of market power (…) and enforcement occurs ex post and requires an extensive investigation of often very complex facts on a case by case basis.'*[166] Not only do the TFEU provisions not seem sufficient in the digital markets, the Union law, as the Commission states in the same Recital, doesn't address, or does not do so effectively, the challenges of the effective functioning of the internal market, which is posed by the conduct of the gatekeepers that aren't necessarily dominant in the competition law sense.[167] These large Big tech undertakings pose threat to other markets as well, as they have the ability to provide '*gateways for large number of business users to reach end users everywhere in the Union'*.[168] Lastly, the current regulatory approach to combat these challenges was not harmonized at the Union level, i.e. the member states had diverging regulatory approaches which led to fragmentation of the legal approach.[169]

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[161] F. Marty, '*The Concentration of Digital Markets: How to Preserve the Conditions for Effective and Undistorted Competition?*' (2021), SSRN, p. 14.
[162] Judgment of 10 November 2021, *Google Shopping*, Case AT.39740, T:2021:763
[163] Judgment of 18 July 2018, *Google Android*, Case AT.40099, T:2022:541
[164] Judgment of 10 November 2021, *Google AdSense*, Case AT. 40411, T: 334/19.
[165] See, for example, the newly added Section 19a(1) of the German Competition Act (GWB) and the Bundeskartellamt's decision against Google in case B7-61/21.
[166] DMA, Recital 5.
[167] *Ibid.*
[168] DMA, Recital 6.
[169] DMA, Recital 8.

In view of these challenges, a new regulation was deemed a necessity. One that could tick all the digital markets regulatory boxes that the legacy competition law couldn't, and help the authorities keep the pace with the rapid developments of the digital markets. Thus, in December 2020 the Digital Markets Act, along with the Digital Services Act, was proposed[170] by the European Commission, and finally adopted on 18 July 2022.[171]

4. Overview of the Digital Markets Act

The EU's digital platforms and services legal framework hasn't changed much ever since the E-commerce Directive was adopted back in 2000.[172] In the meantime, digitalisation and rapid technological developments have made it more and more difficult for the enforcers to keep up the pace. For this reason, the European Commission proposed, as a part of the more broader *Shaping Europe's Digital Future*[173] goal, the Digital Services Act Package in December 2020, with the aim of '*creating a safer digital space where the fundamental rights of users are protected and establishing a level playing field for businesses*.'[174]

The vision of what the DMA is and what it should contain was molded on the basis of the aforementioned features of the digital markets, or better yet, the difficulties those features generate for the European competition law regulators and enforcers - in regards to contestability and fairness of the internal market. For this reason, the DMA was to recognise, among others, the beneficiaries of these key features, the digital platforms on which these beneficiaries leverage their competitive advantage and disrupt fairness and contestability of competition, sanctions for such anti-competitive behaviour and the Commission's power to tackle these challenges. The purpose of the

[170] European Commission, 'The Digital Markets Act: ensuring fair and open digital markets' (2020), Official Journal of the European Union, full text can be accessed here: ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en> accessed 30 August 2021
[171] DMA Adoption, ,*DMA: Council gives final approval to new rules for fair competition online'* (2022), consilium.europa.eu/en/press/press-releases/2022/07/18/dma-council-gives-final-approval-to-new-rules-for-fair-competition-online, last accessed: 15.9.2022.
[172] European Commission, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (2000), OJ L 178.
[173] Shaping Europe's Digital Future, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Shaping Europe's digital future (2020), full text may be accessed here: ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future_en
[174] European Commission, 'The Digital Services Act Package' (2020), EC Policies, full text may be accessed here: digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

DMA is best described in the Recital 7 of the DMA:'(…) *the purpose of this Regulation 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 in general, and for business users and end users of core platform services provided by gatekeepers in particular*.'[175]

4.1. Legislative Timeline Summary

A need for a new European regulatory framework in the digital sector was recognised back in December 2019 in the mission letter titled '*A Europe fit for the Digital Age'*[176] which contained an outline of the required changes to competition policy and rules which the Commission would strive to achieve by 2024. Following the aforementioned mission letter, the Commission conducted numerous different surveys and inquiries[177] on the digital markets which resulted in a formal regulatory proposal in December 2020 titled the Digital Services Act package, which consisted of the Digital Services Act and the Digital Markets Act.[178]

During the regulatory procedure of the DMA, which involved the cooperation between the Commission, the Parliament and the Council, different issues of the Act's proposal were addressed, and many changes put forward by the latter two institutions. Ultimately, the DMA passed the final vote in the European Parliament[179] and most recently the proposal was given a green light by the Council of Ministers on 18 July 2022,[180] which marked the final step for the legislation to 'come to life', and was thus subsequently signed on 14 September 2022 by the Presidents of the Parliament and the Council.[181] DMA will come into force 20 days after it has

[175] DMA, Recital 7.
[176] European Commission, 'Executive Vice-President for A Europe fit for Digital Age' (2019), p. 5.
[177] E.g. the European Commission's E-commerce Sector Inquiry, ec.europa.eu/commission/presscorner/detail/el/MEMO_16_2966
[178] European Commission, '*Digital Services Package'* (2020), consilium.europa.eu/en/policies/digital-services-package, last accessed: 16.9.2022.
[179] European Parliament, European Parliament legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), C9-0419/2020
[180] Council of the European Union, '*DMA: Council gives final approval to new rules for fair competition online'* (2022), consilium.europa.eu/en/press/press-releases/2022/07/18/dma-council-gives-final-approval-to-new-rules-for-fair-competition-online, last accessed 16.9.2022.
[181] Twitter, *DMA Signed Into Law* (2022), twitter.com/EP_SingleMarket/status/1570062248961363969, last accessed 16.9.2022.

been published in the Official Journal of the EU, but most of its provisions will only begin to be enforced by May 2023.

In order to avoid fragmentation and ensure a more cohesive harmonisation of the European competition law rules, the DMA was envisaged, drafted, and adopted as a Regulation, which allows the Act to be directly implemented into the MS national legislation without the need for additional transposition. This ensures that the European competition law objectives of fairness, contestability and, finally, consumer welfare, are safeguarded through steadier EU standards.

DMA is not the only act which safeguards these objectives within the digital environment and, as was previously stated, the DMA is part of a wider toolkit titled the Digital Services Package. Because of this, a short overview of the DMA – DSA relation will be given, as well as the relation between the DMA and the GDPR.

4.1.1. Digital Services Act and its Relation to the DMA

'*To create a safer digital space in which the fundamental rights of all users of digital services are protected; and to establish a level playing field to foster innovation, growth and competitiveness, both in the European Single Market and globally*'[182] - are two fundamental goals of the Digital Services Package, a packet of two intertwined legal acts which aim to modernize EU's digital markets and services legal framework. The two acts, DMA and DSA respectively, form two pillars of the digital platforms regulatory framework: firstly, the DSA should ensure trust and safety online by increasing responsibilities, obligations, and liabilities for digital services, while the DMA should then ensure *ex ante* measures at preventing market failures which result from gatekeepers' anti-competitive behaviour.[183] To ensure that the two acts work in tandem towards the same objective, both acts were proposed, developed, and adopted concurrently with one another, however, the grace period for the DMA is six months, while the DSA will become applicable after fifteen months or from 1 January 2024, whichever comes later.

[182] European Commission, '*The Digital Services Act package*' (2020), digital-strategy.ec.europa.eu/en/policies/digital-services-act-package, last accessed: 16.9.2022.
[183] European Parliament IMCO Committee, '*Digital Services Act & Digital Markets Act: Opportunities and challenges for the digital single market and consumer protection*' (2022), Collection of studies for the IMCO committee, p.1.

The *ratio* behind the proposal of the two sister acts was to ensure that the Digital Single Market could keep up with the ever changing digital markets, and to replace the now-archaic E-Commerce Directive[184] which has been the cornerstone of the Internal Market ever since its introduction back in June 2000. The digital landscape has changed much in the last 20 years and the behind-the-times regulation halted the technological developments and failed to ensure the present-day protection of fundamental rights of EU citizens.

The interplay between the two acts is well described by the European Institute of Public Administration (EIPA) in a published paper outlining the DSA, where it is stated how the DSA, rather than focusing on the significance of the gatekeepers and its obligations in the digital markets, focuses primarily on creating transparent accountability framework for online platforms, protection of users from intrusive data collection, and advertisements using profiling, i.e. DSA primarily focuses on the digital services and its users, while the DMA primarily focuses on the *ex ante* gatekeeper regulation.[185] There are similarities, which is not surprising considering the fact that the two sister acts strive toward achieving similar goals, especially concerning the data protection, as both acts envisage some form of data protection provisions (e.g., provisions on profiling).

4.1.2. General Data Protection Regulation and its Relation to the DMA

According to the DMA, the Regulation is '*without prejudice to the (GDPR), including its enforcement framework, which remains fully applicable with respect to any claims by data subjects relating to an infringement of their rights under the (GDPR)'*.[186] The following Recital gives clear indication of what the relationship between the DMA and the GDPR ought to be – one where the DMA does not replace the GDPR's provisions, but rather supplements them within the digital markets environment. The similarities between the two acts, especially in regards to how the users' consent is regulated, are overviewed in chapter 5 of the paper.

[184] European Commission, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJEU, OJ L 178

[185] EIPA, '*The Digital Services Act: creating accountability for online platforms and protecting users' rights*?' (2022), eipa.eu/blog/the-digital-services-act-creating-accountability-for-online-platforms-and-protecting-users-rights, last accessed: 16.9.2022.

[186] DMA, Recital 37.

4.2. Legal Basis

Ever since the DMA's proposal, back when the Act was referred to as the New Competition Tool, concerns have been raised over its legal basis, its lawfulness or unlawfulness in regards to the EU primary law, the principle of conferral and the principle of proportionality.

Under the principle of conferral, one of the fundamental principles of the EU law, the Union may act only within the limits of the competences conferred upon it by the MS in the Treaties, and only to attain the objectives set within the Treaties.[187] This governing EU principle is enshrined in the EU primary law through the legal requirement(s) legislative proposals must fulfill in order for the proposal to be adopted into the law, i.e. the choice of the legal basis the legislative proposal sits upon determines the legal procedure used, which, in turn, determines the requirements that must be met.

As a starting point, if one was to champion the DMA as a European competition law tool on the basis of the key features of the European competition law and its similarities with the provisions DMA adopted, it would then be most rational to advance that the DMA ought to be proposed on the basis of the Art. 103 TFEU, as this legal basis allows the Commission to invoke legal acts which would supplement Art. 101 and 102 TFEU.[188] The drawback of this legal basis, and one which the Commission is well aware of, is that the DMA would then have to be considered an antitrust law, as the principal goal of the 103 TFEU is to '*appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102'*.[189] This legal basis would then limit the Commission in formulating the DMA as an act which would allow the Commission to be an *ex ante* regulator of the gatekeepers' activities in the internal market of the EU. For this reason, the Commission has decided to sway away from framing the DMA as a European competition law tool, as can be seen in the opening Recital of the Regulation where it is stated how: *'(...) this Regulation aims to complement the enforcement of competition law, it should apply without*

[187] TEU, Art. 5(2).
[188] Art. 103. TFEU allows for issuing of directives and regulations which '*serve the purpose of implementing the principles laid down in Art. 101 and 102 TFEU in European antitrust law'*, i.e. this article enables the Commission to propose a directive or a regulation which would have as their goal further implementation of the European competition law principles into the MS national legal orders.
[189] TFEU, Art. 103.

prejudice to Articles 101 and 102 TFEU (…)',[190] thereby allowing itself the necessary wiggle room to utilize other legal basis which would give the proposal more flexibility.

Another option the Commission could have used when deciding on the legal basis of the now-adopted DMA was by using the subsidiary powers mechanism, through the Article 352 TFEU, which allows the Member States to, in the absence of a viable Treaty provision and when there is a need for a legislative action, agree to the creation of new legislative powers necessary to attain an EU objective.[191] A large downside of this legal basis is that Art. 352 TFEU requires unanimity and so all EU MS Ministers would have to vote in favour for the DMA to be adopted, which would make the adoption of the act a very uncertain event.

The Commission has alternatively enacted the DMA via Art. 114 TFEU, as this provision allows the Commission to enact proposals which regulate the internal market, while also enabling the Parliament and the Council to act as a co-legislators.[192] Another additional benefit the Commission has with the Art. 114 TFEU as the legal basis of the DMA is that it does not require unanimity among the MS, as the provision envisions the use of ordinary legislative procedure,[193] easing the requirements for its proposal and adoption even further.[194] This would then explain why the Commission has decided to use the following provision from the procedural standpoint, but the Commission, to be able to rely on Art. 114 TFEU as the legal basis, still needed to demonstrate how the DMA falls into the scope of Art. 114 TFEU, i.e. how the DMA acts as a measure which approximates provisions in MS which have as their object the establishment and functioning of the internal market.[195] This was done by emphasizing the regulatory fragmentation of the Member states in the internal market and the need for passing of a measure which would avert this fragmentation and harmonize the regulative approach towards the Big tech.[196] [197]

[190] DMA, Recital 10.
[191] TFEU, Art. 352.
[192] TFEU, Art. 114. (1)
[193] TFEU, Art. 294.
[194] TFEU, Art. 114(1)
[195] *Ibid.*
[196] E.g. the Commission asserts how the regulatory fragmentation can only be effectively averted if Member States are prevented from applying national rules which are within the DMA scope and pursue the same objectives as the DMA. (See: Recitals 8 and 9 of the DMA).
[197] One of the principal dangers regulatory fragmentation poses to the EU Internal Market in the context of the digital markets is that, due to to the discrepancy of rules in different Member States and the cross-border business nature of the Big tech, the gatekeepers may be able to 'get away' with more anti-competitive decisions in some Member States who have more lenient enforcement rules.

4.2.1. Critique of the DMA's Legal Basis

The Commission's selection of the legal basis for the DMA has been not been without critique.[198] As some authors claim, the DMA might not be legal due to two principal concerns: firstly, the DMA is not designed to prevent regulatory fragmentation, and, secondly, the DMA is in breach of the principle of proportionality.[199]

4.2.1.1. The DMA Does Not Address Regulatory Fragmentation

Regarding the first concern, it can be argued how the DMA does not primarily intend to prevent regulatory fragmentation, as it does not address existing or likely discrepancies between national laws which are liable to hinder the freedom of digital services or restrict competition.[200]

As the EU Courts have made it clear, the measure proposed by an EU institution cannot be based on the sheer conviction of the institution that proposes the measure, but must be based on '*objective factors amenable to judicial review*',[201] i.e. the Commission's view that one of the principal objectives of the DMA is to resolve the problem of regulatory fragmentation must be based on an actual objective source of possible regulatory fragmentation that the DMA attempts to resolve. The DMA does not identify the sources of regulatory fragmentation, but the Initial Impact Assessment of the Digital Markets Act, an assessment conducted by the Commission during the pre-proposal phase of the DMA, which served as an annex to the proposal, refers to the present forms of regulatory fragmentation, as well as the risk of future fragmentation in the second part of the document.[202] However, none of the examples given in the Assessment qualify as regulatory fragmentation that the DMA would be able to resolve. All of the national measures stated in the Assessment would fall under one or both of the exceptions of Art. 1 (5) DMA and 1 (6) DMA, as

[198] A. Lamadrid de Pablo; N. Bayón Fernández, , *Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It'* (2021), Journal of European Competition Law & Practice, Volume 12, Issue 7.
[199] A. Lamadrid de Pablo; N. Bayón Fernández, , *Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It'* (2021), p. 4.
[200] A. Lamadrid de Pablo; N. Bayón Fernández, , *Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It'* (2021), p. 5.
[201] Judgment of 11 June 1991, *Directive on waste from the titanium dioxide industry*, Case C-300/89, EU:C:1991:244.
[202] European Commission, '*Commission Staff Working Document Impact Assessment Report'* (2020), Part 2.

these national measures apply also to undertakings other than gateekeepers or they form part of the national competition rules, thus absolving them from the DMA's harmonisation measures.[203]

Because of this, the DMA would leave unchanged current national laws, and it would not meaningfully limit the MS ability to enact new rules that would contrast that of the DMA.[204] In an odd turn of events, the DMA could actually lead to more regulatory fragmentation, as the Regulation could create a new field of law and, because of its possible inability to deal with the regulatory fragmentation that may currently exist, create parallel national legal systems with diverging national rules.

4.2.1.1. The DMA Breaches The Principle of Proportionality

The other critique, that of the possible breach of the principle of proportionality, is grounded on the idea that the open-ended contours of the DMA obligations fail to take into consideration the potential danger many of the measures may have on the traders in regards to their assured rights and freedoms. Namely, if the DMA is to rely on Art. 114 TFEU, it must also comply with the principle of proportionality.[205] The principle of proportionality broadly dictates how '*the content and form of Union action shall not exceed what is necessary to achieve objectives of the Treaties'*,[206] which has been more 'refined' by the EU courts so-that a measure is deemed to be in breach of the principle of proportionality if it is '*manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue*.'[207]

In the DMA Proposal Explanatory Memorandum, the Commission argued how the DMA's measures do not breach the principle of proportionality, as they apply only to those providers that '*meet clearly defined criteria for being considered a gatekeeper*' and because the list of obligations

[203] A. Lamadrid de Pablo; N. Bayón Fernández, , *Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It'* (2021), p. 6.
[204] A. Lamadrid de Pablo; N. Bayón Fernández, , *Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It'* (2021), p. 7.
[205] Judgment of 3 December 2019, Czech Republic v Parliament and Council, Case C-482/17, EU:C:2018:119.
[206] TEU, Art. 5 (4).
[207] Judgment of 3 December 2019, Czech Republic v Parliament and Council, Case C-482/17, EU:C:2018:119.

is limited to certain unfair practices which the now-adopted DMA lists under Chapter III of the Regulation.[208]

The first safety-net the Commission puts forward which ought to ensure that the principle of proportionality will not be breached is based on a premise that the designation of a gatekeeper, i.e. those undertakings which the DMA's obligations are aimed towards, will be based on a clearly defined criteria. In reality, however, it seems that the DMA '*falls short of imposing the minimum necessary constraints on the exercise of the Commission's discretion*.'[209] The gatekeeper designation is done in accordance with Art. 3 (1) DMA which states how an undertaking will be designated as a gatekeeper if – (i) *it has a significant impact on the internal market*; (ii) *it provides a core platform service which is an important gateway for business users to reach end users; and* (iii) *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*.[210] These formulations are vague and very open-ended, which gives the Commission a large margin of discretion when deciding upon which undertakings qualify as gatekeepers and, as such, these subjective concepts don't give much wiggle room to legal certainty. For this reason, the DMA supplements Art. 3 (1) with Art. 3 (2) which contains a rebuttable presumption of when the undertaking shall be presumed to satisfy the aforementioned requirements, as to establish a more objective based threshold for the gatekeeper designation. The quantitative thresholds established in Art. 3 (2) DMA are based on the (i) annual Union turnover in the previous three financial years; (ii) average market capitalisation or its equivalent fair market value in the previous financial year, if it also provides the same core platform service in at least three MS; (iii) or, number of monthly active end users and business users established or located in the Union.[211] [212]Even though the criteria used in Art. 3 (2) DMA does provide for less discrepancy and higher legal certainty, the provision can still be completely circumvented by the use of Art. 3

[208] European Commission, 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), The Official Journal of the European Union, COM 842 final, p. 6.
[209] A. Lamadrid de Pablo; N. Bayón Fernández, , *Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It'* (2021), p. 10.
[210] DMA, Art. 3. (1).
[211] DMA, Art. 3. (2).
[212] This provision is a clear example of how the DMA 'borrows' from the European competition law as the objective criterium established in the Art. 3 (2) follows a very similar criterium the Commission uses in the EC Merger Regulation when regulating which concentration has the Community dimension as defined by Art. 1. of the EC Merger Regulation. It is clear how the Commission used its previous European competition law concentrations framework and applied many of its aspects when forming the DMA.

(1) DMA, as the Commission could very easily exempt from the scope of the DMA undertakings that meet the criteria from Art. 3 (2) DMA on ¸the grounds that they do not meet the subjective criteria of the Art. 3 (1) DMA, vice versa, the Commission could designate an undertaking as a gatekeeper purely using the Art. 3 (2) DMA without the objective thresholds even coming into play.[213] It then seems that the objective thresholds provide no guarantee as to if the undertaking will be designated as a gatekeeper. The end result is that a trader, even the most prudent one, cannot know if their undertaking will be subjected to the DMA.

Even before its adoption, some authors were concerned with the prohibitions proposed by the DMA, specifically their (non)proportionality aspect, as their broadness and *ex ante* nature essentially makes them a blacklist for a certain type of company practice without much due regard for the required individual assessment. The Nordic Competition Authorities on Digital Platforms opined how the detailed list of obligations and prohibitions may be harmful, as the same type of conduct could have both anticompetitive and procompetitive effects depending on the market and/or specific gatekeepers involved.[214] In spite of these comments, the DMA was adopted with a broad range of prohibitions and sanctions aimed at any ill-stared undertaking whose practices fall under one of the provisions of Chapter III DMA. In particular, one such provision is Art. 6. DMA sets '*obligations for gatekeepers susceptible of being further specified under Article 8'.*[215] This further specification is then done via Art. 8. (2) that allows the Commission to adopt implementing acts, which the gatekeepers concerned must implement in order to comply with Art. 6. and 7. DMA.[216] The end result of this framework is a very broad range of powers given to the Commission to adopt measures that could breach the principle of proportionality and create an environment of legal uncertainty for the undertakings.

Conclusively, it appears that the CJEU caseload may be considerably enlarged subsequent to the adoption of the new Regulation, as the DMA asks more questions and brings forth more legal uncertainties than it resolves, but that is the nature of each new Regulation which brings with it many legal novelties.

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[213] A. Lamadrid de Pablo; N. Bayón Fernández, , Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It' (2021), p. 10.
[214] Nordic Competition Authorities, '*Digital platforms and the potential changes to competition law at the European level The view ofthe Nordic competition authorities'* (2020), Konkurransetilsynet, p. 17.
[215] DMA, Art. 6.
[216] DMA, Art. 8. (2).

4.3. Scope of Application and the Two-Step Approach

Pursuant to Art. 1 (2) DMA, the Regulation is applicable to '*core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union (...).*'[217] Thus, the aforementioned provision establishes guiding boundaries of the new rules' application and gates the application of the DMA's provisions behind two key requirements: (i) firstly, for the DMA to be applicable, the services offered by an undertaking within the EU digital markets arena must be one of the predetermined services listed in Art. 2. DMA, which the Commission defined as 'core platform services'; (ii) secondly, even if a service was determined to be a CPS, for the DMA to apply, the undertaking providing or offering such services must receive a designation of a 'gatekeeper' pursuant to Art. 3 DMA.

Additionally, the DMA establishes certain limitations to its scope of intervention through: (i) Art. 1 (3) DMA, where it is stated how the Regulation will not apply to markets related to electronic communications networks and electronic communications services,[218] as these networks and services are already regulated through the European Electronic Communications Code, thus any further legal overlap may lead to regulatory uncertainty for market players and consumers;[219] (ii) as well as in its Art. 1. (6) DMA, which establishes further limit to its scope of application, as the Regulation is '*without prejudice to the application of Articles 101 and 102 TFEU'*, as well as certain national competition rules which help enforce the established European competition law rules and principles, such as that of the abuse of dominant positions prohibition.[220]

4.3.1. Core Platform Services

The first positive requirement for the DMA to be applicable, as is established by the Art. 1 (2) DMA, is for the platform service to be included in the exhaustive list of core platform services pursuant to Art. 2 (2) DMA. The following provision defines the CPS in a rather concrete manner, as the definition of these core platform services, according to the Art. 2. (2) DMA, varies with

[217] DMA, Art. 1 (2).
[218] DMA, Art. 1 (3).
[219] BEREC Opinion, '*For a swift, effective and future-proof regulatory intervention: BEREC Opinion on the European Commission's proposal for a Digital Markets Act'* (2021), p. 2.
[220] DMA, Art. 1 (6).

respect to each individual service listed in the Article.[221] For example, one of the services included in the definition of a CPS is an online search engine service,[222] however, the DMA does not attempt to define such service, rather it points to the definition established under the Regulation (EU) 2019/1150.[223] This lack of abstract definition of the CPS is not necessarily a negative, afterall, the digital markets and technology sector are a very fast-moving environment and new innovations and technologies are not a rarity, but the norm, so it is only understandable that the Commission decided on this open-ended approach as to allow for possible future modifications.

Because of the fact that the Commission decided to list and categorize the CPS in an exhaustive manner, as per the aforementioned presumption that future additions may be required, it was necessary to include a provision which would allow for further expanding of the Art. 2 (2) DMA list, which was done via Art. 19. DMA. According to the Art. 19. DMA, the Commission may '*conduct a market investigation for the purpose of examining whether one or more services within the digital sector should be added to the list of core platform services'*,[224] which also includes the ability of the Commission to consult third parties, including those business users and end users which are being investigated, thereby giving those who are affected most by the CPS enlargement a chance to advance their content or discontent with the Commission's argumentation.[225] The market investigation which the Commission may conduct could last anywhere up to 18 months,[226] which, in spite of the timeframe reduction proposed in the earlier versions of the DMA, still remains a sizeable amount of time if the fast-moving environment of the digital sector is taken into consideration, as this may make it difficult for the regulators to keep the pace with Big tech.

Lastly, as the Recital 15 DMA proclaims: '*the fact that a digital service qualifies as a core platform service does not in itself give rise to sufficiently serious concerns of contestability or unfair practices. It is only when a core platform service constitutes an important gateway and is operated by an undertaking* (which satisfies the gatekeeper designation) *(...)'*,[227] i.e. the qualification of a digital service as a CPS, which must fulfill the additional criteria of being an '*important gateway for business users to reach end users'*, is only a part of the requirement for the

[221] DMA, Art. 2. (2).
[222] DMA, Art. 2. (2) (b).
[223] DMA, Art. 2. (6).
[224] DMA, Art. 19. (1).
[225] DMA, Art. 19. (2).
[226] DMA, Art. 19. (3).
[227] DMA, Recital 15.

DMA to be applicable in a given situation, as the second step, in what is often referred to as the Two-step approach, is to be able to identify the gatekeeper companies.

4.3.2. Gatekeepers

4.3.2.1. Definition and the Designation Procedure

Not every undertaking which provides the CPS falls under the scope of the DMA. Rather, a second requirement is envisioned - for the undertaking to be bound by the rules set out in the DMA, it must be designated as a gatekeeper. Gatekeepers, as defined under the Art. 2 (1) DMA, are '*undertakings providing core platform services, designated pursuant to Article 3.*'[228] The following definition ought to be supplemented with the Art. 3 DMA, which defines the term more inclusively, designating as the gatekeeper any undertaking which:

(i) significantly impacts the internal market, a criterion which is presumed to be met when the undertaking has a greater than €7.5 billion turnover in the previous three financial years. Alternatively, the criterion is presumed to be met when an undertaking reaches an equivalent fair market value of at least €75 billion in the last financial year, and, additionally, it has to provide the same CPS in at least 3 MS;[229] [230]

(ii) provides a CPS which is an important gateway for business users to reach end users. Art. 3 DMA again presumes this to be the case if an undertaking has more than 45 million monthly active end users established or located in the Union and more than 10.000 yearly active business users established in the Union, in the previous financial year;[231] [232]

(iii) lastly, if the undertaking enjoys an entrenched and durable position, in its operations, or if it can be forseen that the undertaking will enjoy such a position in the near future. Again, this is presumed to be the case if, in the previous three financial years, the user number thresholds of the previous two described cases has been met.[233] [234]

[228] DMA, Art. 2. (1).
[229] DMA, Art. 3. (1) (a).
[230] DMA, Art. 3. 2. (a).
[231] DMA, Art. 3. (1) (b).
[232] DMA, Art. 3. (2) (b).
[233] DMA, Art. 3. (1) (c).
[234] DMA, Art. 3. (2) (c).

It is clear how DMA borrows much from the European competition law, specifically the EC Merger Regulation, as even some terminology, such as what is considered a 'turnover',[235] is taken from the European competition law concentration regulation. While this definition of a gatekeeper does narrow down the companies which could be designated as one, some critics claim that the definition is still set too broadly, opining that additional factors ought to be included, so as to decrease the legal uncertainty.[236]

Whatever the case may be, if the quantitative presumptions stated above are met, an undertaking must notify the Commission within two months after the thresholds are met and it must provide the relevant information.[237] The Commission then has to decide whether or not to reach for the gatekeeper label and designate an undertaking, and it must do so within fourty five working days after being notified. If the undertaking fails to notify the Commosion, the Commission has the right to designate such undertaking as a gatekeeper, based on the information is currently holds, but the potential gatekeeper has the possibility to provide 'sufficiently substantiated' arguments to demonstrate how, even though it meets the threshold requirements to be designated as a gatekeeper, it exceptionally isn't one.[238] Whether or not these arguments present a a sufficiently substantiated case, is, of course, for the Commission to decide. Even if the Commission decides that an undertaking must oblige under a certain provision of the DMA, the undertaking could request from the Commission a suspension of a specific obligation, but this is reserved in the case of endangerment, due to exceptional circumstances beyond the gatekeeper's control, of the economic viability of its operations.[239]

Additionally, the Commission has the possibility to designate as a gatekeeper an undertaking that does not satisfy the objective thresholds laid down in Art. 3. (2) DMA, by relying instead on Art. 3. (1) DMA and its qualitative elements. The critique of this has been given in the previous

[235] DMA, Art. 2. (30).
[236] D. Geradin, '*What is a digital gatekeeper (Part 2)? The relevance of the single-homing v. multi-homing debate'* (2020), theplatformlaw.blog/2020/10/16/what-is-a-digital-gatekeeper-part-2-the-relevance-of-the-single-homing-v-multi-homing-debate, last accessed: 15.9.2022.
[237] DMA, Art. 3. (3).
[238] DMA Art. 3. (5).
[239] DMA, Art. 9.

subchapter, but it is to be noted how the Commission must, if it is to commit to this route, take into consideration elements laid down in Art. 3. (8) DMA.[240] [241]

The Commission has the possibility, on its own initiative or upon request, to amend or repeal the designation decision if the facts which the designation are based upon have substantially changed or if the designation was based on incomplete, incorrect or misleading information.[242] Again, this power is given solely to the Commission.

In the end, which undertakings will find themselves with the gatekeeper label is not certain, but it has been suggested that the new Regulation's 'hit list' may capture up to 20 companies, including Google, Microsoft and Meta.[243] Whichever company does 'receive' the designation of a gatekeeper, will find itself subjected to a set of obligations imposed upon it under Art. 5, 6 and 7 DMA.

4.3.2.2. Obligations and Fines

After the designation procedure is complete and the 'unlucky winner' has been chosen, next step is to limit the practices of that undertaking which limit market contestability or are considered unfair. To limit these practices, the DMA envisages certain obligations in regards to the gatekepeers CPS. Some obligations, such as those listed under Art. 5. DMA, are immediately and strictly applicable, while others, those listed under Art. 6. And 7. DMA, are susceptible to further specification. The obligations gatekeepers must follow can be split into those obligations that force on the gatekeepers prohibition of conducted activities, and those obligations that force on the gatekeepers an active role in adapting and implementing in their CPS features which the DMA demands, i.e. affirmative obligations.

Examples of the former obligations include: use of data, such as processing, for the purpose of providing online advertising services, personal data of end users using services of third parties,

[240] DMA, Art. 3. (8) DMA.
[241] Some of the elements listed include: the undertakings size, number of business users using the CPS, number of end users, network effects and economies of scale and scope. Some of these elements have been discussed in previous chapters, but it is clear how the Commission has taken into account these important features of the digital markets and its potential impact in an undertakings growth.
[242] DMA, Art. 4 (1).
[243] Financial Times, 'EU targets Big Tech with 'hit list' facing tougher rules' (2020), ft.com/content/c8c5d5dc-cb99-4b1f-a8dd-5957b57a7783, last accessed: 25.9.2022.

that use gatekeepers CPS;[244] self-preferencing, such as treating more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper than similar services or products of a third party;[245] prohibiting users from switching and leaving their platform, such as restricting technically or otherwise the ability of end users to switch between, and subsrcibe to, different software applications and services that are accessed using the gatekeepers CPS.[246]

While some instances of the latter, affirmative obligations, include: obligation to ensure interoperability by, as an example, providing the necessary technical interfaces or similar solutions that facilitate interoperability, upon request, and free of charge;[247] obligation to ensure data access by, as an example, providing end users and third parties authorised by an end user, at their request and free of charge, with effective portability of data provided by the end user.[248]

Obligations set by the DMA, comparably to other parts of the Regulation, are competion law inspired.[249] The Commission has also taken much inspiration from the European antitrust law when deciding on the sanctions gatekeepers ought to face if they fail to comply with the Regulation's obligations. As such, similarly to Art. 14 (2) of the EC Merger Regulation, the largest fine uposed upon a gatekeeper may be up to 20% of its total worldwide turnover in the preceding financial year if the Commission finds the gatekeeper to be a 'reapeat offender',[250] otherwise, the largest fine uposed upon the gatekeeper is 10% of its total world turnover in the preceding financial year.[251] When deciding upon the fine, the Commission must take into account factors such as gravity, duration, and recurrence.[252]

A concern raised is that the legal consequences the DMA envisions and the ones found in Art. 102 TFEU may be complementary, thus potentially breaching the principle of *ne bis in idem*, as this was discussed above in subsection 2.2. of the paper it is needless to repeat it, but it bears noting.

[244] DMA, Art. 5. (2) (a).
[245] DMA, Art. 6. (5).
[246] DMA, Art. 6. (6).
[247] DMA, Art. 7. (1).
[248] DMA, Art. 6 (9).
[249] Lea Zuber on the ITIF Schumpeter Project on Competition Policy panel discussion, 'Digital Markets Act: A Triumph of Regulation Over Innovation?' (2022), the entire panel discussion may be seen here: https://www.youtube.com/watch?v=3lpMAc6hN0I
[250] DMA, Art. 30. (2).
[251] DMA, Art. 30. (1).
[252] DMA, Art. 30. (4).

4.4. Market Investigations

Chapter IV of the Regulation deals with Market Investigations. The purpose of this tool is to help the Commission acquire all the necessary information so that it may make a fully informed choice when deciding on possible adoption of a decision pursuant to several different articles of the Regulation. A MI is the Commision's main investigative tool used for: designating gatekeepers,[253] checking for systematic non-compliance,[254] adding new services and new practices to the Regulation,[255] and creating a base of information that the DMA requires of the Commission to possess in many different provisions of the Regulation (e.g. Art. 12. DMA, which requires that the delegated acts be based on a MI).

4.5. Data Protection Overview

The common feature of both the DMA and its sister act, the DSA, is that both EU Regulations acknowledge the negative byproduct of the digital markets in regards to the harmful effects many digital platforms have on users' personal data. As was previously stated during the consumer welfare overview, data protection law is very entwined with competition law in the digital markets, as the users most valuable commodity often is their personal information. For this reason, it is not unsurprising that the DMA contains provisions that complement existing European data protection law, specifically the General Data Protection Regulation.

As several authors have pointed out, the DMA provisions restrict the legal basis that the gatekeeper may rely on to process personal data to four cases – based on users' consent, based on a legal obligation, based on the protection of vital interests, or based on the performance of a task in the public interest.[256] [257] In most of the practical cases which limit the gatekeeper's ability of

[253] DMA, Art. 17.
[254] DMA, Art. 18.
[255] DMA, Art. 19.
[256] D. Cooper; C. Ahlborn; A. O. Meneses; P. Maynard; D. Valat, '*The Digital Markets Act for Privacy Professionals'* (2022), insideprivacy.com/european-union-2/the-digital-markets-act-for-privacy-professionals, last accessed: 15.9.2022.
[257] DMA, Art. 6.

data collection, undertakings will need to rely on the first basis, the end user's consent, and as such, it is important to understand how consent is regulated under the DMA.[258]

4.5.1. The Users' Consent

The DMA took much inspiration from the GDPR, especially in terms of the rules regarding consent of the user, aka. the GDPR's standard of consent.[259] [260] As such, rules regarding users' consent within the DMA are as follows: a) at the time of giving consent, the end user must be informed that not giving consent could lead to a less personalized offer, but that the CPS itself won't change and that no functionalities will be suppressed;[261] b) a less personalised alternative shouldn't, generally, be different or degraded quality compared to the CPS provided to consenting users;[262] c) the users may, in limited circumstances, be able to consent to gatekeeper's using their data to provide online advertising services through each third-party service that makes use of a gatekeeper's CPS;[263] d) the consent request, when withdrawn or refused, cannot be repeated for the same purpose more than once within a period of one year;[264] e) not giving consent should not be more difficult than giving consent, and withdrawing consent should be as easy as giving one;[265] [266]

Regarding consent, the EDPS has stated, in his Opinion, [267] the EDPS opined on the importance of a few of the DMA's data protection provisions, specifically the Art. 5 (f), Art. 6 (1) (b) and Art. 6 (1) (e) – which now, as per adopted text, correspond to Art. 5 (8), Art. 6 (3) and Art. 6 (6) respectively – stating how these provisions '*produce the effect of mutually reinforcing contestability of the market and ultimately also control by the person concerned on her or his personal data.'*[268] The following three DMA provisions regulate the gatekeepers behaviour by

[258] D. Cooper; C. Ahlborn; A. O. Meneses; P. Maynard; D. Valat, '*The Digital Markets Act for Privacy Professionals'* (2022).
[259] *Ibid.*
[260] DMA, Art. 2. (32).
[261] DMA, Recital 37.
[262] *Ibid.*
[263] *Ibid.*
[264] DMA, Art. 5.
[265] DMA, Recital 37.
[266] D. Cooper; C. Ahlborn; A. O. Meneses; P. Maynard; D. Valat, '*The Digital Markets Act for Privacy Professionals'* (2022).
[267] EDPS, '*Opinion 2/2021 on the Proposal for a Digital Markets Act*' (2021), EDPS Press Releases, p. 3.
[268] Ibid.

prohibiting the mandatory subscription by business users and end users, requiring of the gatekeeper to allow users to un-install pre-installed software applications, and prohibiting the gatekeepers restrictions of end users to switch between different software applications and services which are accessed via the gatekeepers CPS. The third provision stated by the EDPS has more to do with prohibition of a 'single-homing' environment and has less of a direct impact on the data protection law, but the former two help protect the users' right to consent.

Firstly, Art. 5. (8) DMA prohibits the gatekeeper to require of the business users and the end users to subscribe to, or register with, any further of the gatekeepers CPS, as a condition for being able to use, access, sign up for, or register with any of that gatekeeper's CPS.[269] In the data protection law terms, this provision is important as it strengthens the concern surrounding users consent or, specifically, a lack of consent. Some legal authors have already stated how this 'second consent' to a following service which a user must give to use the intended service, does not constitute a genuine choice.[270] To force a user to use another of the gatekeepers CPS leaves the door open for further data collection.

The second provision, Art. 6 (3) DMA, requires of the gatekeepers to allow for un-installing of their pre-installed software applications (e.g., Microsoft's Microsoft Edge which is pre-installed on a Windows OS).[271] At first hand, this provision has little to do with data protection and more to do with competition law, but if we consider that data collecting comes through some form of software, then any additional pre-installed software, especially one which the user does not consent to, is a cause for alarm for the users data safety.

4.5.2. Other Select Data Protection Provisions

Other more prominent data protection rules included in the DMA include: (i) the prohibition of processing of non-public data for competition purposes. This is important as the gatekeeper may act in a 'dual role', essentially offering both the CPS, as well as competing with business users which use their platforms. Thus any non-public data generated in this case by the gatekeeper could give the gatekeeper an unfair competitive advantage;[272] (ii) the obligation for the undertaking,

[269] DMA, Art. 5. (8).
[270] EDPS, '*Opinion 2/2021 on the Proposal for a Digital Markets Act*' (2021), p. 10.
[271] DMA, Art. 6 (3).
[272] DMA, Recital 46.

within a six month period after being designated as a gatekeeper, to submit an independent audit of its profiling techniques. Such an audit must include, among others, information on the purpose of the profiling, duration of the profiling, and the steps taken to ensure end users' right to give consent to profiling. The importance of this provision lies in the harmful effects of profiling, another much needed addition to the new Regulation;[273] (iii) the obligation for the gatekeepers to provide the end users with the ability to port data from their CPS to other providers', free of charge. This provision allows for ease of transfer of the end users' data from one CPS to another service provider. [274]

5. Concerns Regarding Enforcement

Prima facie, the new Regulation's provisions appear to include obligations which are self-executing, i.e. gatekeepers have to submit to DMA's provisions that govern their CPS without further involvement from a regulator. Regulatory enforcement comes into play, however, when a gatekeeper does not comply with their obligations, both fully or partially. Because of the large amount of obligations placed upon the gatekeepers, a breach of law is undoubtetly going to happen, the question then is – who enforces the new Regulation?

5.1. The Sole Enforcer

After a long interinstitutional negotiation conducted by the Parliament, the Commission and the Council, the answer to this question was given, and likely will not change with any future amendments of the DMA, for the Commission to be the sole authority in power to enforce the DMA and the only authority in power to adopt decisions, making it the sole-eforcer and a fully fledged regulator of the DMA.[275] This outcome has not gone without critique, as this puts national regulators in a backseat position.

The most prominent critic of the Commission's sole authority to enforce the DMA is Germany's anti-trust body, the Bundeskartellamt. The German regulator has, side-by-side with the German lawmakers, already attempted to ensure its position vis-à-vis the European regulator, claiming how

[273] DMA, Art. 15.
[274] DMA, Recital 59.
[275] DMA, Recital 91.

the relationship between the DMA and the German Restraints of Competition Act, which some call the 'DMA's blueprint', remained unclear and that parallel application of both EU and national laws is a possibility.[276] However, the Commission has been steadfast in how the DMA should be formulated and, in the opening Recital of the DMA, stated how the national autuhorities role is to support the Commission's enforcement by conducting investigations and reporting its findings on the possible non-compliance by gatekeepers.[277]

5.2. How are the National Authorities Involved

In the adopted version of the DMA, the NCA are practically involved, as the Belgian Competition Authority Prosecutor General, Damien Gerard opines in an interview given to Hunton Andrews Kurth, in three ways:

firstly, NCA are a first contact point for third parties, chiefly end users, but also business users. As such, they will receive complaints and alerts, with the only limitation being that they must report their findings to the Commission as regulated by Art. 38 DMA;[278] secondly, they will assist the Commission in carrying out a broad range of investigative tasks, primarily in the form of a MI, at the request of the Commission;[279] thirdly, NCA can join forces to trigger MI into the designation of the gatekeepers and systemic non-compliance with the DMA.[280]

All of this also requires not only for the national regulatory authorities and the Commission to work in a coordinated manner, but also for the national regulatory authorities and their lawmakers, as the overlap of the DMA's scope with the national competition and regulation law may cause additional problems for the NCA and other regulators. Additionally, as the DMA incorporates different areas of the EU law, primarily the antitrust law, regulation law and the data protection law, and so sectoral regulators will have to collaborate with national agencies in different

[276] Deutscher Bundestag, ‚Die Anwendbarkeit von § 19a GWB im Lichte des europäischen Gesetzgebungsverfahrens zum „Digital Markets Act' (2022), Wissenschaftliche Dienste – ovdje i na više mjesta imate polu redove pune, očito ste kopirali pa je ostalo ovako; sredite, uskladite Unterabteilung Europa

[277] DMA, Recital 91.

[278] DMA, Art. 58. (7).

[279] DMA, Art. 16. (5).

[280] Hunton Andrews Kurth interview with Damien Gerard, '*The Role of National Competition Authorities in Digital Markets Act Enforcement'* (2022), the entire discussion may be seen here: www.youtube.com/watch?v=TFko0a2KPFM

sectors.[281] This may cause friction between different national authorities, but this friction could also be subsided, as the DMA might allow for a new level of cooperation for the agencies to work together and assist one another.

5.3. The High-Level Group

Because of this hightened need for coordination between the different national agencies which will help enforce the DMA, the Regulation envisions the creation of a High-level group, which shall be composed of European bodies and networks listed in the Art. 40 (2) DMA.[282] This group, chaired by the Commission, shall meet at least once per year to advise, within the expertise of each member, matters concerning the implementation and enforcement of the DMA, as well as to promote consistent regulatory approach across different MS.[283] Additionally, the group shall submit an annual report to the Commission where their assessments are presented.[284]

The inspiration for this model of cooperation may have been adopted from the UK, as their DRCF includes all the national digital regulators where they engage in common knowledge sharing.

Ultimately, the DMA could ensure convergence across the different MS approaches and enable mutual knowledge sharing regarding enforcement of the DMA. While it is clear how some national regulators show a clear distaste for the Commissions newly acquired powers, it is too soon to tell whether this system will work, as the enforcement is best understood during its application, but the inclusion of this new communication's platform for various different regulatory agencies is certainly a good addition.

[281] Additional issue is that not every MS uses the same model of sectoral regulation. E.g. in Croatia, the data protection agency (Agencija za zaštitu osobnih podataka) is independent from the competition protection agency (Agencija za zaštitu tržišnog natjecanja), but this may not be the case in other MS which combine different sectoral regulators under 'one roof'.
[282] DMA, Art. 40 (2).
[283] DMA, Art. 40 (5).
[284] DMA, Art. 40 (6).

6. Conclusion

From the initial proposal of the DMA, up until its adoption, the Regulation has been all but uncontroversial. It is clear how the Commission envisaged, back when the DMA was originally proposed, for the Regulation to constitute a 'new competition tool', i.e. a tool that would allow for the EU's competition law regulatory tentacles to extend into the digital markets, a sector that is growing increasingly rapidly and that the European regulators have struggled to keep the pace with. The proposal, and now adopted as a fully fledged Regulation, was envisioned to harmonise the existing MS national digital markets competition law, so as to ensure that the European competition law objectives of consumer welfare, contestability, fairness, innovation and market integration are observed.

Thus, the Commission has discerned, and rightly so, the ways to deal with the digital markets features of network effects, economies of scope and scale, multi-level markets, complimentary services and its trade-off, the acquisition of personal data. The solution to these issues, as their scope goes beyond just the realm of European competition law, required a legislative tool which would bridge the gap between the competition law, regulatory law and the data protection law, and combine it into one act fit for the modern fast-paced needs of the digital markets.

The first obstacle in solving the aforementioned challenge was that of the choice of the legal basis of the new Regulation. It is here that many authors opine how the Commission fell short, as the legal basis chosen, that of Art. 114 TFEU, leaves many wondering if the DMA could have done with less legal uncertainties. If the Commission had opted to propose the DMA based on Art. 352 TFEU, or if it had better established the ways in which the new Regulation approximates the regulatory fragmentation, many critiques of the new Regulation could have been fended off, as it is still not precisely clear what the legal nature of this Regulation is. This is all presuming that the regulatory fragmentation is even an issue, as some authors claim that the current national antitrust regulation dealt with the caseload well, and that it is expected that the DMA may deal with it worse while attempting to solve an issue that does not exist.[285]

[285] Giuseppe Colangelo on the ITIF Schumpeter Project on Competition Policy panel discussion, 'Digital Markets Act: A Triumph of Regulation Over Innovation?' (2022), the entire panel discussion may be seen here: https://www.youtube.com/watch?v=3lpMAc6hN0I

When the regulatory fragmentation is discussed, one must also touch upon the national regulatory agencies and their role within the DMA, as many concerns are raised on this front as well. On one hand, NCA's claim that they have been robbed of their powers, as they have been reassigned from an enforcer to an informant. While this may be true, it is fair to see the opposite perspective as well, as some authors claim that the national authorities are not fit to handle these 'too big to care' Big tech corporations in the first place, because they lack the knowledge, staff and the expertise to deal with the gatekeepers, and so the DMA's limited powers given to the agencies is justified. The strengths and/or weaknesses of this approach cannot be determined as of right now, but will need to be watched carefully from a competition enforcement perspective.

Lastly, from the point of view of the data protection law, it seems as if the Regulation is headed in the right direction, as the DMA attempts to further protect the end users' personal data and continue in the 'footsteps' of the GDPR, albeit in a much smaller scope. Some concerns have been raised over the fact that it may be unrealistic to expect the possible gatekeepers, who cannot even be certain of their possible designation, to implement all of the DMA's data protection requirements in their software and platforms on such a short notice, but one must consider that these undertakings truly are giants in their categories and have well over thousands of employees which deal with regulatory and IT issues on a day-to-day basis, which makes this issue *nihil ad rem*.

To conclude, it is clear how the DMA is a 'pilot project' regulatory act, one that other countries may try to replicate, granted it proves to be successful, or stray away from, if it proves to be unenforceable and/or detrimental to the competition. It is an act which, because of its many unprecedented provisions, cannot be indisputably predicted, as there are too many factors at play. Rather, when all, or most, of the DMA's provisions become applicable and enforceable, then it is to be seen who the designated gatekeepers will be and how the DMA's provisions, coupled with the Commissions powers and authority, will hold water in the digital environment. What can be predicted with a certain extent of conviction, is that the CJEU will have its hands full with the DMA's case law, as the Commission, by design or accidentally, defined many of the DMA's provisions broadly and vaguely, leaving much room for interpretation. Because of everything stated above, it cannot be argued that the DMA solves the contestability and fairness challenges, nor can one claim the opposite take to be true. *It really is just too early to tell.*

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