A Paradigm Shift in the Regulation of Digital Platforms?

Ex-Ante Market Rules for Contestable and Fair Digital Markets

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Abstract

This thesis poses structural and behavioural competition problems in digital markets in terms of core platforms services provided by the gatekeepers under the proposed Digital Markets Act by the European Commission, where such problems are the most evident. This thesis analyses whether existing competition and more sector-specific legal tools are functional to address these problems. Traditional legal tools cannot capture entire competition problems in digital markets at the highest level, even if they adapt themselves in accordance with the current developments due to dynamic and unique features of digital markets and non-functionality of *ex post* interventions in most cases. Therefore, the proposed Digital Markets Act would be a better option as an *ex ante* market regulation for digital markets. It aims fair and contestable digital markets by ensuring that the digital markets provide benefits to all the stakeholders as they would in competitive market structures. This thesis analyses the proposed Digital Markets Act in terms of defitinions, obligations, fines and criticism that it has brought. *Ex ante* market regulations would be the most effective way to address competition problems in digital markets, however, there are controversial issues to be considered as well. This thesis addresses these controversial issues related to in particular the proposed Digital Markets Act and analyse whether it is adequate to ensure fair and contestable digital markets by considering potential improvements for its journey during the legislation process.

Keywords: *The Gatekeepers, Core Platform Services, Digital Markets Act, Ex Ante*.

Foreword

A year ago from now, I decided to embark on an adventure for my LL.M studies in Sweden. It was one of the best decisions that I have ever made up to the present, what is more, it was one of the most challenging decisions as well due to an ongoing outbreak (*for the future readers, this is the one that we call Covid-19, I wish that you won't be continuening to re-number it for future variants*).

First and foremost, I would like to thank Swedish Institute for making it possible for me to hold a LL.M. degree from one of the most reputable universities in the world. Tack så mycket!

This thesis is the final step of my exciting and challenging journey! I hope that the readers would treat this thesis as a work of art since it consists of many efforts by the most talented artists that I have ever known in my life.

I am very grateful that I have worked with Senior Lecturer Johan Axhamn as my supervisor, his valuable inputs and supportiveness are integral part of work.

I have met very talented and good people from several legal backgrounds, and I have learnt so much from them! I also want to thank them, who played an important role in this journey with their valuable contributions.

This is not my first journey, hopefully, will not be the last one. Some people have always been with me for all journeys from the very beginning. The most special thanks to those ones, my family, the ones that I hope having always by my side.

I know that I should refrain from repeating myself in an academic work, I have thanked her in the previous paragraph. However, it would be better to cite her for refraining plagiarism and giving the credits to the one that the most deserving. Ms. Almira Akbay, my co-counsel for life, your existence would be enough to contribute to this work, but your priceless support and legal contributions have become extra. Thank you very much for always being there, we remember some of these times as "LL.M. in Bodrum".

Abbreviations

ACCC	Australian Competition and Consumer Commission
Bundeskartellamt	Germany's competition authority, the Federal Cartel Office
CJEU	The Court of Justice of the EU
CMA	The UK’s Competition and Market Authority
DMA	The Regulation on Contestable and Fair Markets in the Digital Sector (Digital Market Act) 2020 - 842
DMAC	Digital Markets Advisory Committee
ECA	European Court of Auditors
ECHR	The EU Charter of Fundamental Rights and the European Convention of Human Rights
EU	European Union
EUMR	The EU Merger Regulation
P2B Regulation	Platform to Business Regulation 2019/1150
MCAD	The Misleading and Comparative Advertising Directive
UCPD	The Unfair Commercial Practices Directive
UCTD	The Unfair Contract Terms Directive
TFEU	The Treaty on the Functioning of the European Union
The Commission	The European Commission
The Council	Council of the European Union
The Parliament	The European Parliament

1. Introduction

1.1. Background

Digital platforms have profoundly changed the functioning of the global economy and society, and are at the center of technological developments in the 21st century. They have created products and services that people could not imagine a few decades ago with their capacity of innovation, and provided these benefits globally by eliminating borders. Digital platforms provide new products and services mostly free of charge to end users, and new market and transaction opportunities to business users by variety of services. These users would enjoy many benefits provided by marketplaces like Amazon, application stores like Apple Store, social networking sites like Facebook and search engines like Google. The COVID-19 crisis has also emphasized the importance of these products and services as people live in an online world.[1]

Some of digital platforms hold strong market power constantly entrenched by their market capitalization. There are five technology companies (*Apple, Microsoft, Alphabet, Facebook, Tencent*) and two consumer services companies (*Amazon and Ali Baba*) in top 10 global companies 2020 list by market capitalization, while there was only one in 2009 list (*Microsoft*).[2] They also serve as gateways for their business users and end users, which puts users in a dependent position on digital platforms. Such a market power puts these platforms in the gatekeeper position, which enables them to exercise the entire control over digital markets and to prevent existing and potential rivals to contest regardless of how these rivals are innovative and efficient.[3] For instance, most of the digital services are data driven and multi-sided, and these gatekeepers would unilaterally benefit from data generated by the users through network effects they solely have and control. In other words, Amazon

[1] The European Commission Staff Working Document – Impact Assessment Report Part 1, December 15 2020, p. 26, para. 95, available at: https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act, (access date: 09.06.2021).

[2] PriceWaterhouseCooper, July 2020, Global Top 100 Companies by Market Capitalization, available at: https://www.pwc.com/gx/en/audit-services/publications/assets/global-top-100-companies-june-2020-update.pdf, (access date: 09.06.2021).

[3] Impact Assessment Report Part 1, *op. cit.* p. 8, paras. 25-30.

would use data generated by its users to compete with the business users operating on Amazon's platform. Furthermore, concentration and high mark-ups (*i.e. mark-ups refer to the difference between the cost of a product and the price of a product, thus high mark-ups refer to high prices for products or services which is common in anti-competitive markets*) in digital markets have increased in the last years and there is no indication that this situation would change in the near future.[4] Such market concentration generally emerges as a result of acquisitions by the gatekeepers. These digital platforms frequently acquire nascent competitors to maintain and expand their market powers, such acquisitions are also named as "*killer acquisitions*".[5] For instance, the Federal Trade Commission of the United States ("*the FTC*") has just investigated one of Facebook's acquisitions over the last years, which is Instagram, out of nearly 100 acquisitions of Facebook.[6] Their operations are not structurally separated and/or restricted to certain lines of business, which constitutes unique and complex features for such platforms as well. For instance, Google, *as an online search engine*, is operating as the largest provider of digital advertising and a dominant mobile operating system together.[7] Therefore, there is an increasing concern about fair and contestable digital markets as a result of such structures in digital markets and behaviors of the gatekeepers. There is a possibility that digital markets cannot function as it should be and deliver the best outcomes for the consumers in terms of price, quality, choice and innovation.[8]

As a result of these concerns, anti-trust cases have been launched against these gatekeepers in several jurisdictions. For instance, the Commission has fined Google in the amount of EUR 2.42 billion for abusing dominance as search engine by giving illegal advantage to its own shopping service in 2017 (*known as also Google Shopping Case*),[9] and in the amount of EUR 1.49 billion for abusive practices in

[4] Impact Assessment Report Part 1, *op. cit.* p. 26, para. 94.

[5] Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets, October 6 2020, p. 11, available at: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519, (access date: 09.06.2021).

[6] *Ibid.*

[7] *Ibid.* p. 174.

[8] Impact Assessment Report Part 1, *op. cit.* p. 8, para. 27.

[9] The Commission's Press Corner, June 27 2017, available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1785, (access date: 09.06.2021).

online advertising in 2019.[10] The Commission has been intensively investigating these gatekeepers in several cases in the last years. The Commission has opened an investigation into Apple's App Store Rules,[11] and has recently informed Apple that it abused its dominant position for the distribution of music streaming apps through its App Store.[12]

In the context of overwhelming market domination and unfair practices of the gatekeepers, traditional anti-trust instruments – *e.g. ex-post investigations and remedies* – remain incapable to correct abusive behaviors as competition law remedies often come too late, following lengthy investigations, while digital markets are rapidly evolving at the same time. For instance, abovementioned Google Shopping Case has taken 7 years and most of the market dynamics have changed. Therefore, the debate on whether existing competition law rules – for instance Articles 101 and 102 of the Treaty on the Functioning of the European Union ("*TFEU*") for these cases – fit to deal with currently evolving anti-comptitive structures and practices in digital markets, is very important for future of fair and contestable digital markets.

On the other hand, governments have started to propose *ex ante* rules to sustain fair and contestable digital markets as well as protecting fundamental rights of users such as privacy and consumer rights.[13] These proposals were reflected in various jurisdictions, including the United States ("*the US*"), the United Kingdom ("*the UK*") and Germany, calling for a new legal framework subjecting the gatekeepers in digital markets. For instance, German anti-trust law amendment has entered into force on 19 January 2021, which enables Germany's competition authority, the

[10] The Commission's Press Corner, March 20 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770, (access date: 09.06.2021).

[11] The Commission's Press Corner, June 16 March 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073, (access date: 09.06.2021).

[12] The Commission's Press Corner, April 30 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061. (access date: 09.06.2021).

[13] Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy, Paris, June 2019, available at: https://www.ftc.gov/system/files/attachments/press-releases/ftc-chairman-supports-common-understanding-g7-competition-authorities-competition-digital economy/g7_common_understanding_7-5-19.pdf, (access date: 09.06.2021).

Federal Cartel Office ("*FCO or Bundeskartellamt*") to prohibit the gatekeepers from engaging in certain types of conduct much earlier.[14]

The Commission has initiated the reflection process about the role of competition policy in a rapidly and dramatically changing world. Platform to Business Regulation 2019/1150 ("*P2B Regulation*") has entered into force on 12 July 2020, a subset of issues related to digital platforms aiming to ensure transparency and fairness.[15]

As part of Europe's Digital Strategy, similar issues have been addressed in the Commission President von der Leyen's mission letter for Executive Vice-President Vestager. The letter tasked Executive Vice-President Vestager to ensure "*that competition policy and rules are fit for the modern economy*".[16] This mission was reiterated in the Commission's Communication Shaping Europe's Digital Future as follows "*it is important that the competition rules remain fit for a world that is changing fast, is increasingly digital and must become greener*".[17] The Commission has also stated that "*it will further explore, in the context of the DSA package, ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants*."[18]

The European Parliament ("*the Parliament*") has adopted a resolution on competition policy where it "*calls on the Commission to assess the possibility of imposing ex ante regulatory obligations where competition law is not enough to ensure contestability in these markets*."[19] The European Council also confirmed the

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[14] Bundeskartellamt, Press Release, January 19 2021, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html, (access date: 09.06.2021).

[15] 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, avaible at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN, (access date: 09.06.2021).

[16] Mission Letter to Executive Vice-President Vestager, December 1 2019, p.5, available at: https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-margrethe-vestager_2019_en.pdf, (access date: 09.06.2021).

[17] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, February 19 2020, p. 5, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0067&from=EN, (access date: 09.06.2021).

[18] *Ibid.* p.5.

[19] European Parliament's Resolution on Competition Policy – annual report 2019 (2019/2131(INI)), June 18 2020, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0158_EN.pdf, (access date: 09.06.2021).

need to act in its New Strategic Agenda 2019-2024, by stating that "*we will continue to update our European competition framework to new technological and global market developments*".[20] Council of the European Union ("*the Council*") has also stated that "*it supports the Commission intention to collect evidence of the issue and further explore ex ante rules*".[21] In the context of Digital Services Act package, the Commission has initiated an open public consultation as part of its evidence-gathering exercise, in order to identify issues that may require intervention at the European Union ("*the EU*") level between June and September 2020.

Finally, the Commission has proposed the Regulation on Contestable and Fair Markets in the Digital Sector (Digital Market Act) 2020 - 842 ("*DMA*") on 15 December 2020,[22] which brings new definitions, obligations and fines for some of these digital platforms and causes hot debates on new tools and policies in digital market. DMA would regulate the core platform services provided by the gatekeepers in digital markets by setting *ex-ante* market regulations rather than traditional *ex-post* competition law tools.

As DMA's scope of application is limited to a number of core platform services where identified problems are the most evident and prominent, this thesis focuses on these core platform services as well. These core platform services are as follows i) *online intermediation services*, ii) *online search engines*, iii) *online social networking services*, iv) *video-sharing platform services*, v) *number-independent interpersonal communication services*, vi) *operating systems*, vii) *cloud computing services* and vii) *advertising services* as per Article 2 of DMA. However, a digital service that is deemed as a core platform service does not mean that it arises such evident and prominent problems in relation to every provider of these core platform services. Rather, such problems are most likely to be seen when core platform services are provided by a gatekeeper. Article 3 of DMA sets the criteria to designate a provider of core platform services as a gatekeeper which are i*) having*

[20] European Council, A New Strategic Agenda 2019-2024, June 20 2019, available at: https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf, (access date: 09.06.2021).

[21] Council of the European Union Conclusions of 9 June 2020, responding to the Commission's Communication Shaping Europe's Digital Future, available at: https://data.consilium.europa.eu/doc/document/ST-8711-2020-INIT/en/pdf, (access date: 09.06.2021).

[22] The Commission's Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), December 15 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en, (access date: 09.06.2021).

significant impact on the internal market, ii) *operating a core platform service which serves as an important gateway for business users to reach end users* and iii) *enjoying an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future* as qualifications to be met for designation as a gatekeeper. These qualifications are explained in detail in further parts of this thesis. Therefore, this thesis mainly evaluates the matters within the scope of core platform services in digital markets provided by the gatekeepers, rather than evaluating other competition problems that are already being addressed by existing competition law regimes.

The scope of this thesis doesn't mainly cover political debates on DMA, rather it analyses matters from mainly legal perspectives supported by economic perspectives.

1.2. Aim and Research Questions

The purpose of this thesis is to analyse whether existing competition and sector-specific rules are adequate to address contemporary structural and behavioural competition problems for digital markets within the EU, and to assess whether current challenges are best solved by the *ex ante* regulations set out in the recently proposed DMA. The existing competition and sector-specific rules that will be analysed are Articles 101 and 102 TFEU, the EC Merger Control Regulation, as well as P2B Regulation, GDPR and EU consumer law.

To fulfill the purpose of the thesis, the following questions will be answered:

1. What are the main contemporary structural and behavioural competition problems for digital markets within the EU?
2. Are the existing competition rules (*Articles 101 and 102 TFEU, and the EU Merger Regulation*) and more sector specific rules (*P2B Regulation, GDPR and EU consumer law*) adequate to address all the structural and behavioural competition problems for digital markets within the EU, refered to in question 1?
3. To what extent is the recently proposed DMA adequate to address the structural and behavioural competition problems for digital markets within the EU, refered to in question 1?

1.3. Materials and Method

To fulfil the purpose of this thesis and to answer the research questions, a legal scientific method is applied, consisting of three aims which are i) describe the concerned competition problems in digital markets and existing competition and more sector-specific rules as well as DMA, ii) to prescribe how *ex ante* market regulation under DMA should be to deal with digital market specific competition problems and iii) to justify given or proposed legal solutions by testing their acceptability within the EU competition law and regulatory system.[23]

As part of such a legal scientific method, this thesis uses relevant EU competition (*Articles 101 and 102 TFEU, the EU Merger Regulation*) and more sector-specific (*P2B Regulation, GDPR and EU consumer law*) rules as the main sources as well as related case law and legal literature. In addition, other sources such as the recently proposed DMA and related EU based official documents (*mostly the ones published by the Commission*), investigation and expert reports prepared by official authorities in the EU and different jurisdictions (*such as the US, the UK, Germany and Australia*) when necessary and articles published on journals are used.

Investigation and expert reports prepared by official authorities in the EU and different jurisdictions are used to describe competition problems in digital markets supported by articles published on journals. EU competition (*Articles 101 and 102 TFEU, EU Merger Regulation*) and more sector-specific (*P2B Regulation, GDPR and EU consumer law*) rules are used to describe the existing legal tools addressing some of identified competition problems in digital markets. Relevant case law and legal literature are used to analyse these rules in detail. The recently proposed DMA and related EU based official documents published by the Commission as well as expert and impact assessment reports are used to prescribe how *ex ante* regulations should be to address contemporary competition problems in the digital markets. Relevant official documents, legal literature and articles published on journals are used to criticize and prescribe ex ante regulations in terms of the proposed DMA.

This thesis, in some parts, includes economic and empirical analyses as part of competition law impact assessments require to do so, and also implements a

[23] Jan M. Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research, Maastricht European Private Law Institute, Working Paper No. 2015/06, p. 8-11.

comparative approach by considering recent developments in different jurisdictions as well as counter-factual analyses.

1.4. Structure

This thesis consists of five sections, including this first section as follows i) introduction, ii) overview of digital markets, iii) existing competition and sector specific rules in digital markets, iv) overview of the proposed Digital Markets Act and v) summary and conclusions.

Under the first section of this thesis, background to the proposed Digital Markets Act is analysed in accordance with the evolution of the largest digital platforms and responses given by the authorities to these digital platforms within the context of contemporary competition problems in digital markets. Aim and research questions are set out as well as methodology and materials in this section.

The second section, as referred to overview of digital markets, consists of three main sub-sections concluded by a summary and conclusion. The first sub-section under the second section identifies the main features of core platform services and potential gatekeepers in digital markets. The second sub-section under the second section analyses the contemporary competition problems in digital markets divided into two parts as i) structural ones and ii) behavioural ones. The third sub-section under the second section analyses the effects and size of these competition problems in digital markets.

The third section, as referred to existing competition and sector specific rules in digital markets, consists of three sub-sections concluded by a summary and conclusion. The first sub-section under the third section describes and analyses the most relevant existing competition law tools applicable across all sectors, which are Articles 101 and 102 TFEU and EU Merger Regulation. These tools are mainly analysed in terms of digital markets. The second sub-section under third section describes and analyses the most relevant existing sector-specific rules, which are P2B Regulation, GDPR and EU consumer law. The third sub-section of the third section analyses the effects and size of fragmented regulation in digital markets.

The forth section, as referred to overview of the proposed Digital Markets Act, consists of three sub-sections concluded by summary and conclusion. The first sub-section under the forth section sets out the initial legal evaluation of the proposed Digital Markets Act in terms of its legal basis and compliance with other EU rules. The second sub-section under the forth section describes and analyses the most important provisions of the proposed Digital Markets Act in terms of definitions, obligations and fines. The third sub-section under the forth section analyses the main criticism regarding the proposed Digital Markets Act by setting out suggestions to prescribe a more functional *ex ante* market regulation for digital markets as well as including justifications.

The last section of thesis presents a summary by emphasizing the answers to be given to the research questions as a conclusion.

2. Overview of Digital Markets

Markets have always evolved in accordance with new developments and gained new characteristics in history. Beginning from traditional markets such as farmers' markets and bazaars, digital markets are at the center of modern economy now, and become more salient for the users day by day. Digital markets provide a wide range of daily services including online intermediation services, online social networking services, online search engines, operating systems or software application stores. Digital services serve to consumer choice, efficiency and competitiveness in the market and enhances civil participation in society.[24] Digital transformation in markets may also serve to consumer welfare in terms of better capability to compare prices, quality, opportunities due to large availability of information as a whole.
On the other hand, a small number of large online platforms mostly enjoy the benefits generated in digital markets even if there are thousands of enterprises operating in digital markets, most of which are SMEs. These large online platforms have gained entrenched and durable market positions by acting as gateways or gatekeepers between business users and end users. Therefore, these online platforms have significant control over access to digital markets making the users dependent on such platforms as well. This is a common market structure where core platform services provided by the gatekeepers and there is *weak contestability of platform markets* in such scenarios.[25] This situation causes *weak competition in digital markets, or risk thereof* which prevents the best outcomes for consumers in terms of price, quality, innovation and choices.

There is an evolving trend of growing market concentration and mark-ups at the industry level, and it is documented for both the US and the EU.[26] US-based Apple, Amazon, Microsoft, Google, Facebook, and China-based Alibaba and Tencent

[24] The Commission's Proposal for Digital Markets Act, *op. cit.* p. 1.

[25] Commission Staff Working Document, *op. cit*., p.8, para. 27.

[26] Matej Bajgar, Giuseppe Berlingieri, Sara Calligaris, Chiara Criscuolo, Jonathan Timmis, "Industry Concentration In Europe And North America", OECD Productivity Working Papers, No.18, January 2019, available at: https://www.oecd-ilibrary.org/docserver/2ff98246-en.pdf?expires=1618897085&id=id&accname=guest&checksum=9D0DEEB5C53DD3CFB75F0CBE973F4B86, (access date: 09.06.2021); Jason Furman, "Market Concentration Note – Hearing on Market Concentration", 07.06.2018, available at: https://one.oecd.org/document/DAF/COMP/WD(2018)67/en/pdf, (access date: 09.06.2021).

represent EUR 6 trillion valuation, which corresponds to 69% of total value of platform economy.[27]

These gatekeepers would significantly benefit from entry barriers in digital markets which intimidates the potential entrants to join the competition. For instance, strong network effects that gatekeepers enjoy would make extremely difficult to convince sufficient number of users to immigrate to a new service provided by potential entrants in social networking services, which would set a high entry barrier for potential entrants, thus lacks of contestability. Therefore, these gatekeepers would have entrenched market positions as the largest ones are actively operating across many different markets, creating extended data-driven ecosystems around their core activities and cross-subsidising one service with data or revenues from another as well as they are integrated in a single corporate structure.[28]

Moreover, most of the business users depend on the gatekeepers which cause imbalances in bargaining power and unfair gatekeeper practices against these business users. Such practices would not provide the best outcomes of free market economy in terms of fair competition.[29]

This section aims to describe and analyse main features of core platform services and gatekeepers in digital markets in the first sub-section. Secondly, it addresses the most apparent competition problems in digital markets divided into two parts as follows i) structural competition problems and ii) behavioural competition problems under the next sub-section. In the third sub-section, effects and the size of competition problems in digital markets are identified, followed by summary and conclusions in final sub-section.

[27] R. Fijneman, K. Kuperus, J. Pasman, "Unlocking the Value of the Platform Economy", KPMG report for the Dutch Transformation Forum, November 2018, p. 9, available at https://dutchitchannel.nl/612528/dutch-transformation-platform-economy-paper-kpmg.pdf, (access date: 09.06.2021).

[28] Commission Staff Working Document, *op. cit.*, para 35.

[29] Commission Staff Working Document, *op. cit.*, para.28.

2.1. Main Features of Core Platform Services and Potential Gatekeepers in Digital Markets

As the scope of this thesis is limited to where identified competition problems are the most prominent in digital markets, the core platform services are at the center of the matter. These core platform services are mostly provided by tech giants - *like Google, Amazon, Facebook, Apple* – which may be deemed as the gatekeepers. They intermediate most of the transactions between business users and end users, they also have a strong capacity to constantly restructure digital markets.

These gatekeepers share certain important and unique features such as i) the ability to create and shape new markets, ii) conducting business based on collecting, processing and editing large amounts of data, iii) operating in multi-sided markets, iv) benefiting from network effects, v) benefiting from economies of scale and scope and vi) playing a key role in digital value creation.[30]

EU competition law enforcement experience, numereous expert reports and studies and the results of Open Public Consultations ("*OPC*") have also emphasized these features.[31] The Commission has identified several digital services sharing these features as the core platform services which are i) online intermedition services, ii) online search engines, iii) operating systems, iv) cloud computing services, v) video sharing platform services, vi) number-independent electronic communication services and vii) advertising services.[32] Other evaluations on competition problems in digital markets also focus on these platform services in different jurisdictions, such as the US and the UK. It is stated that "*other categories of digital services were also considered as the core platform services, such as streaming services and B2B industrial platforms*" in the Impact Assessment Report for DMA,[33] however they were not deemed as core platform services at this point. For video streaming and video-on-demand services, they currently have less network effects and switching costs are also low at the time as subsciptions can be easily cancelled by the users. For industrial B2B platforms, they do not present a dependency on the

[30] Impact Assessment Report Part I, *op. cit*. p. 4-5, para. 14.

[31] Impact Assessment Report Part I, *op. cit.*, p. 37.

[32] The Commission's Proposal for Digital Markets Act, *op. cit*., p. 2.

[33] Impact Assessment Report Part I, *op. cit*. p. 38.

service provider for the users, as the users are mostly corporate clients that have a considerable bargaining power.[34]

Online intermediation services – *such as online marketplaces and app stores* – benefit from strong network effects (*i.e. higher number of users on one side - buyers- makes more valuable the platform for the other side –sellers- or vice-versa*), data driven advantages (*e.g. information about the preferences of the users*) and high switching costs (*e.g. there may be situation of single-homing due to consumer bias*).[35] Online intermediation services are vertically integrated with the downstream services (*e.g. app stores and apps*) and generally benefit quasi monopoly positions in the market (*e.g. Google Play*), which is a clear indication of market concentration.[36]

Online search engines are two sided platforms which provides users search of all websites for free on one side and inventory for advertisers on the other. Search engines benefit from strong economies of scale in terms of high fix costs and minimal marginal costs, network effects and data driven advantages.[37] In case pre-installation in certain devices or a default position are provided for a search engine, these platforms would be highly concentrated as these market positions are strengthened by consumer bias as well. For instance, Google has a market share over 90% worldwide.[38]

Social network services are also important gateways for business users, in particular advertisers. These platforms also enjoy strong network effects and data driven advantages. For instance, these platforms may provide improved personalised advertising services by tracking and analysing the whole data generated in the platform. They charge end users for zero costs, however, they charge business users for advertising costs and have strong power which can be unilaterally used against

[34] *Ibid.*

[35] *Ibid.* p.39.

[36] Case AT.40099 Google Android, the Commission Decision, 18 July 2018, Section 9.4, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, (access date: 09.06.2021).

[37] Impact Assessment Report Part I, *op. cit.* p. 41.

[38] See Statcounter, 2020-2021: https://gs.statcounter.com/search-engine-market-share#yearly-2020-2021, (access date: 09.06.2021).

these business users as well. These platforms also enjoy high switching costs, for instance it is mostly not possible for the users to immigrate to another platform with the whole data and network in their former social networking profiles.[39] These features enable social network services' providers to enjoy concentrated market positions. For instance, Faceebok has a market share nearly 70% worldwide (*the share of Instagram is not included*).[40]

Video sharing platform services enjoy economies of scale and strong network effects as they may become the default platform for video content. They attract business users (*advertisers*) with their large amounts of audience. These platforms may re-use a rich set of consumer data generated in the platform to improve their own products. This would be the situation in other areas as video sharing platforms may be integrated to other services provided by certain gatekeepers.[41]

Number independent messaging services have the characteristics of strong network effects, economies of scale and switching costs arisen by the consumer lock-in, meaning that a person cannot change the service provider in case his/her friends stay in an incumbent service provider. These messaging services are also tightly integrated with other core platform services, such as social networking services (*e.g. WhatsApp, Instagram and Facebook*).

Operating systems are also very important for most applications. They benefit from economies of scale (*as there are generally high development costs*) and switching cost (*as the consumers generally have bias once they use a hardware system, they tend to continue using it*). They also enjoy network effects as application developers and the users may make more attractive some operating systems for each other.[42] There are three platforms sharing 90% of total market shares which are Windows, Android and iOS.[43]

[39] Impact Assessment Report Part I, *op. cit.* p.41.

[40] See Statcounter, 2020-2021: https://gs.statcounter.com/social-media-stats#yearly-2020-2021, (access date: 09.06.2021).

[41] Impact Assessent Report Part I, *op cit.* p.41.

[42] *Ibid.*, p. 43.

[43] See Statcounter, 2020-2021: https://gs.statcounter.com/os-market-share/all/europe/#yearly-2020-2021, (access date: 09.06.2021).

Cloud services are designed to provide easy access to applications and resources without the need for internal infrastructures and hardware systems. Therefore, cloud services enable functionality in services offered by others and offer a wide range of products and services across multiple sectors at the same time. They may help especially start-ups to reduce entry barriers by providing them access to technical capabilities that might otherwise be beyond their capacity. Cloud services benefit from strong economies of scale (*e.g. high fixed costs and minimal marginal costs*) and high switching costs (*e.g. integration of business users in the cloud*).[44] Large cloud service providers have vertical integration enabling them to concentrate their market power and make the users highly dependent on these large cloud service providers.[45] For instance, Amazon Web Services ("*AWS*") market share exceeds the total market share of its two largest rivals which are Microsoft and Google.

Online advertising services are mostly provided in connection with some of the other core platform services identified above. Online advertising services correspond to monetised sides of social network services, online search engines, online intermediation services.[46] They benefit from data driven advantages as well as networking effects which enable them to concentrate their market power. For instance, Google and Facebook enjoys the significant part of total online advertising revenues.[47]

As it is explained in detail in further sections of this thesis, it is important to briefly identify the gatekeepers under this sub-section as well. A gateekepeer has a significant impact on the market, operates a core platform service deemed as a gateway for the users and enjoys an entrenched and durable position or is expected to enjoy such a position in the near future by its definition in DMA.[48] Competition

[44] Impact Assessment Report Part I, *op. cit*., p. 44.

[45] See Statista: https://www.statista.com/chart/18819/worldwide-market-share-of-leading-cloud-infrastructure-service-providers/, (access date: 09.06.2021).

[46] Impact Assessment Report Part I, *op. cit.*, p.44.

[47] United Kingdom Competition and Market Authority's (CMA) Report on Online Platforms and Digital Advertising, Section 5, available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf, (access date: 09.06.2021).

[48] The Commission's Proposal for Digital Markets Act, *op. cit*., p.2

and Markets Authority ("*CMA*") of the UK also sets very similar criteria to be designated as a gatekeeper in digital markets.[49]

GAFAM companies (*namely Google, Apple, Facebook, Amazon and Microsoft*) are deemed as the potential gateekepers by many authorities for now, therefore they are at the center of the these developments in terms of *ex ante* regulations in digital markets.[50] Google has a monopoly in online search engines and online advertising services and its dominance is protected by high entry barriers due to its click-and-query data and default positions that it has obtained across most of the world's devices and browsers.[51] A significant number of the users depend on Google for traffic as there is not a substantial alternative. Google has constantly combined search results page with advertisements and its own content by also blurring the distinction between paid advertisements and organic search results. Furthermore, Google has used contractual restrictions (*e.g. exclusivity provisions*) to extend its monopoly power from desktop to mobile after purchasing Android operating system in 2005. Google has required smartphone manufacturers to pre-install which gives a default position in mobile devices to Google's own apps. Google has extended its market power to other lines of business as well, such as Chrome (*the world's most popular browser*), Google Maps (*capturing 80% of the market for navigation mapping service*). What is more, Google Cloud is also another core platform service provided by Google, which helps Google to position itself to dominate the internet of things (*IoT*), the next phase of surveillance technologies.[52] Google has an exclusive opportunity to track real time data across the markets, which provides Google a perfect market intelligence.

Amazon, as an online retail market (*providing online intermediation services*), has a durable market position in most of the markets worldwide. It controls almost half

[49] United Kingdom Competition and Market Authority's (CMA) Advice of the Digital Task Force on A New Pro-Competition Regime for Digital Markets, p. 30, Section 4.19, available at: https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf, (access date: 09.06.2021).

[50] See European Digital SME Alliance's News, 15 December 2020, available at: https://www.digitalsme.eu/dsa-dsm-commission-proposes-rules-for-gatekeepers/, (access date: 09.06.2021).

[51] The US' Investigation of Competition in Digital Markets, *op. cit.*, p. 14.

[52] *Ibid.*

of the US online retail sales,[53] and is in the first place in Europe by online turnover.[54] As there is not a substantial alternative for SMEs to reach online customers in most cases, the dual role of Amazon in online intermediation services arises issues its relationship with the business users. There is a strong belief that Amazon sees its business users as competitors rather than partners, and it arises an issue whether Amazon applies self-preferencing strategies with its own products by tracking consumer trends (*which is related to its exclusive opportunity to reach the whole consumer real time data*).[55] Amazon has strengthened its dominant market position by acquiring its competitors, such as Diapers.com, Zappos and other companies operating in adjacent markets.[56] Moreover, Amazon also provides cloud services with AWS, which is a critical infrastructure for many competitor businesses of Amazon as well. This arises a debate on potential conflict of interest which would prevent cloud consumers to select best technology for their businesses.

Facebook has a monopoly in the social networking services. It has five primary products as follows i) Facebook, a social network platform, ii) Instagram, a social network platform, iii) Messenger, a cross platform messaging app for Facebook users, iv) WhatsApp, a cross platform messaging app and v) Oculus, a virtual reality gaming system.[57] Internal documents has shown that Facebook "*can likely always just buy any competitive start-ups*" and it has seen Instagram as a threat to Facebook.[58] Facebook competes with its own products now rather than any other competitors in the market.[59] Facebook's dominant position creates a perfect market intelligence to detect nascent competitive threats and then acquire, copy or kill these firms.[60]

Apple is primarily a hardware company earning most of its revenue from sales of devices and accessories, however, it enjoys a durable market position in mobile

[53] *Ibid.*

[54] See Europe's Ecommerce News': https://ecommercenews.eu/top-10-online-stores-in-europe/, (access date: 09.06.2021).

[55] The US' Investigation of Competition in Digital Markets, *op. cit.*, p.16.

[56] *Ibid.*

[57] The US' Investigation of Competition in Digital Markets, *op. cit.*, p. 132.

[58] Facebook's Internal Correspondence between Mark Zuckerberg and a Senior Executive: https://judiciary.house.gov/uploadedfiles/0006760000067601.pdf, (access date: 09.06.2021).

[59] The US' Investigation of Competition in Digital Markets, *op. cit.*, p. 13.

[60] *Ibid.*

operating services with Apple Store. It controls all software distribution to iOS devices. There is a concern that Apple exploits its dominance over app developers through misappropriation of competitively sensitive information and to charge them supra-competitive prices within the App Store.[61]

2.2. Competition in Digital Markets

Competition is the fundamental engine of economic activity. It creates millions of job opportunities, increases customer welfare in terms of prices, quality and innovation as well as generating a huge economic value. There is no other economic motivation that much strong to reach these beneficial outcomes for all market participants. Competition incentives the gatekeepers and new entrants to improve their economic capacities and the possibility to serve better to all stakeholders. Incumbent firms may refraing from investing in research and development, improving their capacity to serve better in the absence of competition, as they would in a competitive market structures.

Competition is especially important for digital markets due to their fast changing and growing capacity and promising benefits for future generations. Online platforms are key drivers of innovation in digital markets. However, they also raise new issues relating to fairness, transparency and market distortions. As a result of these issues, mostly experienced by the gatekeepers, digital markets do not function well or may soon function well, therefore abovementined outcomes may disappear.[62] These issues may be divided into two clusters as follows i) weak contestability due to structural competition problems and ii) behavioural competition problems in digital markets, as they are addressed in the following sub-headings respectively.

2.2.1. Weak Contestability Due to Structural Competition Problems in Digital Markets

Overview of digital markets' structure presents a winner-take all situation, meaning that the competition process shifts from competition *in* the market to the competition *for* the market. Therefore, many digital markets tip in favor of one or

[61] *Ibid*, p. 16.

[62] The Commission's Proposal for Digital Markets Act, *op. cit.* p. 8, para. 27.

two gatekeepers due to unique features that they enjoy in digital markets, such as network effects, switching costs, reinforcing advantages of data.[63] In markets with network effects, there is a tendency toward de facto standardisation as everyone uses the same platform, thus these markets are in particular prone to "*tipping*", the tendency of one platform to pull away from its rivals in popularity once it has gained an initial edge.[64]

The digital markets, where core platform services are provided, are also highly concentrated as these markets are mostly dominated by one or two gatekeepers. Such a market concentration is not just becuase of natural and successful market performances of the gatekeepers. The gatekeepers have concentrated the digital markets by high volume of acquisitions in the last ten years as well, and most of these acquisitions were not blocked by national competition authorities ("*NCAs*").[65] These acquisitions have mostly targeted nascent or potential competitors, moreover, the gatekeepers have power to detect their nascent or potential competitors due to their unique market intelligence at the beginning of the story. Venture capitalist industry (*which is important for funding innovative startups*) also supports killer acquisitions and serves to market concentration scenarios.[66] Venture capitalists tend to realize their investments through acquisitions rather than initial public offerings ("*IPOs*") as they become more time consuming and expensive in recent decades.[67] During OPC for DMA, several respondents have emphasized the positive outcomes of these gatekeepers as well. Startups, research institutes and trade associations have stated that these platforms have lowered the entry barriers and enabled companies of all size to advantage of cost and speed due to trading online, which resulted innovation and dissemination of new products.[68] On the other hand, the large majority of respondents and NCAs have agreed that concentrated markets are significantly important for certain market failures.[69]

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[63] The US' Investigation of Competition in Digital Markets, *op. cit*., p. 37.

[64] Michael L. Katz & Carl Shapiro, Systems Competition and Network Effects, Journal of Economic Perspectives, Vol. 8, Number 2, 1994, p. 106, available at: https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.8.2.93, (access date: 09.06.2021).

[65] The US' Investigation of Competition in Digital Markets, *op. cit*. p. 38.

[66] Mark Lemley & Andrew McCreary, *Exit Strategy* Stanford Law & Econs. Olin Working Paper No. 542, 2020, p. 24, available at: https://ssrn.com/abstract=3506919, (access date: 09.06.2021).

[67] *Ibid.*

[68] Impact Assessment Report Part I, *op. cit*., p. 9, para 33.

[69] *Ibid.*

There are serious concerns about exploitative acts (*e.g. imposing their own contractual terms and concessions*) by the gatekeepers due to high concenctration in digital markets. Furthermore, such acts would be arise in an anti-competitive market structure since the users are forced to see such acts as "the cost of doing business" in case the lack of substantial alternatives.[70] Gateekepers' roles determine the fate of other business users. For instance, Pinterest, a photo sharing service, has stated that changes in Google's search algorithms harm Pinterest as search engines is not under its control.[71] These gatekeepers mostly operate in adjacent lines of business which makes them direct competitors to the users as well.

The gatekeepers in digital markets enjoy entry barriers for potential competitors strengthening their entrenched and durable market positions. Such entry barriers include network effects, switching costs, accumulation of data and economies of scale and scope. Network effects would create concentration and monopolisation in digital markets and this is the current situation for core platform services such as online search engines, social networking and online intermediation services.[72] There are two types of networking effects which are direct and indirect. Direct networking effect provides that the more people use a core platform service, the more valuable that service becomes to other users. For instance Facebook gains direct network effects and becomes more valuable in case it increases the number of its users on the same side. On the other hand, indirect network effect refers that an increase in usage of a core platform services leads to an increase in the value of complementary service on the other side of the network. For instance, Amazon gains indirect network effects and becomes more valuable in case it increases the number of its users on one side – *the end users* – which also results an increase in the number of its users on the other side – *the business users* – or vice-versa.

Once a gatekeeper captures a network effect, it is very difficult to dislodge this gatekeeper, and it becomes a business strategy for such a gatekeeper in its

[70] The US' Investigation of Competition in Digital Markets, *op. cit.*, p. 39.

[71] Gerrit De Vynck, The Power of Google and Amazon Looms Over Tech IPOs, BLOOMBERG, July 1, 2019, available at: https://www.bloomberg.com/news/articles/2019-07-01/google-s-and-amazon-s-power-looms-over-procession-of-tech-ipos, (access date: 09.06.2021).

[72] Jay Shambaugh, Ryan Nunn, Audrey Breıtwıser & Patrıck Liu, Brookings Inst., The State Of Competition and Dynamism: Facts About Concentration, Start-Ups, And Related Policies, June 2018, p.10, available at: Https://Www.Brookings.Edu/Wp-Content/Uploads/2018/06/Es_Thp_20180611_Competitionfacts_20180611.Pdf, (access date: 09.06.2021).

acquisition decisions as well. This business strategy was proven in an internal correspondence between Mark Zuckerberg and CFO David Ebersman at the time as follows:

"*[T]here are network effects around social products and a finite number of different social mechanics to invent. Once someone wins at a specific mechanic, it's difficult for others to supplant them without doing something different. It's possible someone beats Instagram by building something that is better to the point that they get network migration, but this is harder as long as Instagram keeps running as a product.*"[73]

Strong network effects constitute a significant entry barrier for new entrants in digital markets and strengthens the incumbents' market positions.[74]

In most cases, it is not easy to immigrate from one platform to another for the users, especially in the cases that the platform maintains a strong market power, which may be also related to network effects. For instance, to change a social networking service provider refers to leaving connections behind in the former platform in case the connections continue to use former one. Another example is that the users need to create their profiles from the very beginning when they choose to switch their online networking service provider as they cannot transfer their profiles with all data and content generated in the former provider. Lock-in situations may occur where switching costs are high which constitute another entry barrier. Therefore, the users prefer to stay with an incumbent firm rather than switching to a firm whose service would be better in terms of consumer welfare.[75] Such switching costs may prevent new entrants to offer certain core platform services as well as reducing competition and worsening data privacy in digital markets.

The gatekeepers enjoy the accumulation of data, which is also another entry barrier in digital markets. Strong data power enables the gatekeepers to precisely target advertising, to improve their services with a better understanding of user

[73] Facebook's Internal Correspondence between Mark Zuckerberg and David Ebersman, 2012, available at: https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf, (access date: 09.06.2021).

[74] Stigler Center for the Study of Economy and the State, Stigler Committee on Digital Platforms, Final Report, 2019, p. 40, available at: https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf, (access date: 09.06.2021).

[75] The US' Investigation of Competition in Digital Markets, *op. cit*., p. 41.

engagement and preferences, and to identify new business opportunities.[76] Data-accumulation is self-reinforcing as well, meaning that the gatekeepers with exlusive access to data accumulation can use this opportunity in ways as explained above and draw more users, in turn, generate more data, which is an advantegous feedback loop that just few players may enjoy in digital markets.[77] Exclusive and superior access to data can enable the gatekeepers to exercise anti-competitive behaviours in digital markets. Anti-competitive behaviours are most likely to be seen in particular where a gatekeeper operates as a core platform service provider and a competitor to its users at the same time. For instance, online intermediation service providers may exclusively benefit from commercialy valuable information generated by its users in order to win the competition. This data advantage enables the gatekeepers to identify and acquire its rivals at the very beginning of their lifecycle. Such rivals are generally data rich but cash poor, therefore their acquisitions by the gatekeepers may be most likely to under threshold for merger controls in several jurisdictions.[78]

There is a situation of economies of scale in digital markets where the gatekeepers operate. Once they overcome fix costs and tolerate these costs by gaining a strong market power, they do not face with variable costs much. Meaning that in case an additional user is served by the gatekeeper, the cost of the service do not go up proportionately in contrast with traditional physical markets.[79] For instance, Google may update its search engine algorithms with similar fixed expenses and these expenses would not dramatically increase for each user. These gatekeepers may also enjoy the economies of scope combined with strong network effects. The development of machine learning technologies and data analysis are key drivers for economies of scale and scope that can enable the gatekeepers to reach market concentration. The gatekeepers may apply machine learning to the accumulated data that they exclusively access and improve their products and expand their activities into new lines of business as well.[80] For instance, to combine a mapping

[76] *Ibid,* p.42.

[77] Maurice E. Stucke, Should We Be Concerned About Data-opolies?, 2018, 2 GEO. L. TECH. REV. 275, 323, p. 283, available at: https://georgetownlawtechreview.org/wp-content/uploads/2018/07/2.2-Stucke-pp-275-324.pdf, (access date: 09.06.2021).

[78] The US' Investigation of Competition in Digital Markets, *op. cit*., p. 44.

[79] Stigler Report, *op. cit*., p.36.

[80] *Ibid,* p. 37.

software in a platform already offering email, allows that platform to offer a high quality restaurant recommendation product in case the platform expands its services into such a line of business.[81]

2.2.2. Behavioural Competition Problems in Digital Markets

In addition to abovementioned structural competition problems in digital markets, there are also behavioural competition problems arising from the gatekeepers' unfair market practices. As the gateekepers have a strong market power to unilaterally set the rules in digital markets, the users must obey these rules. Therefore, there may appear detrimental impacts on the business users if such rules are set in an unfair manner, for instance they may limit SMEs' online visibility and economic activities.[82] These unfair practices may occur in different forms.

Gatekeepers may impose anti-steering provisions on their business users. Anti-steering clauses prevent the business users to direct the acquired consumers to offers other than those provided on the platform regardless of such alternatives' price or quality. Gatekeepers may also oblige business users to offer same or better sales conditions as those offered on other platforms with cross-platform parity clauses (*also known as Most Favored Nation – MFN – clauses*). Parity clauses may prevent competition between the gatekeepers and other platforms in the same digital markets since the business users are prevented to enter into better contracts with other platforms providing better or cheaper core platform services in exchange of better retail prices or conditions provided by the business users.[83]

Another unfair practice is the imposition of the platform's ID service, serving as a lock-in strategy where the user is required to register with an e-mail service of the gatekeeper's core platform services when using another of its products. For instance, the users need Gmail (*Google's email service*) to create an account for YouTube (*Google's video sharing platform*).[84]

[81] *Ibid.*

[82] Impact Assessment Report Part I, *op. cit*., p. 10.

[83] *Ibid,* p. 11.

[84] *Ibid.*

Gateekepers may exercise self-preferencing practices where they have dual roles of providing core platform services to business users and competing with them at the same time. Self-preferencing refers to a practice where the gatekeepers apply better conditions for their ancillary services than the others hosted on the gatekeepers' platform.[85] For instance, an app store or an online search engine, providing a marketplace for the business users, may treat their own products or services more favorable than its business users' as they see these users as competitors as well.
Business users cannot access vast amount of data as well as appropriate interoperability to access such data generated in the gatekeepers' platforms as they restrict such options for their business users. Gatekeepers do not enable its business users to have an enhanced and continuous real-time ability to port personal or non-personal data in interoperable formats.[86]

Gatekeepers may also either limit access or set certain conditions for access to their platforms. In such circumstances, the gatekeepers may impose unfair terms of access to the business users. For instance, providers of social networking services may apply terms and conditions to their business users, making the use of their services conditional on the possibility to collect and combine data from multiple sources.[87]

There may be other behavioural competition problems arising due to other participants' actions, such as consumer bias. Gatekeepers regularly design their services to optimise users' experience, mostly by using advanced behavioural profiling and testing techniques (*e.g. A/B testing, which is a process of showing two variants of the same web page to different segments of visitors at the same time and comparing which variant drives more conversions*). They also use certain techniques (*e.g. design of choices, misdirection, social pressure, sneaking items into the users' shopping baskets, inciting urgency*) to stimulate the users into certain decisions.[88] Consumer bias may appear as escalation of commitment or availability bias. Consumers may be committed to certain platforms and would not switch it to

[85] *Ibid.*
[86] *Ibid.* p. 12.
[87] *Ibid,* p.13.
[88] *Ibid,* p. 22.

another ones even if the alternatives provide higher user utility in case of escalation of commitment. For instance, some e-commerce marketplaces offering a wide range of products would be the first and only choice for the users even if there are other alternatives specialized in certain goods or services. Thus, convenience and user habits would prevail over potential benefits of the alternative platforms.[89] Availability bias (*also known as availability heuristic*) refers to a situation where the users make their decisions based on the most recent data. For instance, the users may recall a platform that has many users, as social media would be mentioning such a platform. Social norms may play a key role in the users' choices as well, for instance people follow their friends in their preferences.[90] Such consumer bias would be strengthened by certain actions of the gatekeepers as well, such as pre-installation in the users' devices. For instance, the Commission has found that "*users that find apps pre-installed and presented to them on their smart mobile devices are likely to stick to those apps*".[91] Moreover, default positions and consumer behaviours may result high switching costs as well, which is also an entry barrier for new entrants. For instance, Microsoft has stated that "*the Windows API […] is so deeply embedded in the source code of many Windows apps that there is a high switching cost to using a different operating system instead*" in an internal document.[92] As a result of these consumer behaviours, some of the platforms tend to be single-homes for specific purposes, meaning that the users only use one platform rather than simultaneously using several platforms. For instance, once a user get used to an operating system (*e.g. iOS or Android*), it tends to be significantly loyal to its operating system, therefore, it uses either iPhone or Android as its smart mobile device.[93]

Finally, the gatekeepers would have an imbalanced bargaining power against their business users due to high degree of dependence on these gatekeepers. Therefore, unfair and discretional actions may appear in accordance with the gatekeepers' market strategies.

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[89] *Ibid.*

[90] *Ibid*, p.23.

[91] Google Android Case, *op. cit*. p. 170, para. 781.

[92] Case COMP/C-3/37.792 Microsoft, Commission Decision of 24 March 2004, p. 126, para. 463, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf, (access date: 09.06.2021).

[93] Impact Assessment Report Part I, *op. cit*., p. 23.

2.3. Effects and Size of Competition Problems in Digital Markets

Competition is the key driver of innovation, entrepreneurship and the establishment of new industries. Gatekeepers may invest in research and development for their products and services as a result of their strong resources. However, that would not be the case for other firms in digital markets, especially the ones facing abovementioned anti-competitive market structures and behaviours. Innovation may still occur at some levels without competition, but a slower level than it should be in a competitive market structure.[94]

New business formation and early stage start-up funding have been dramatically declined in recent decades, it has been emphasized that this situation is present even in the US economy, which is mostly deemed as one of the most innovative and dynamic one in the Globe.[95] Furthermore, venture capitalists are reluctant to fund entrepreneurs and start-ups directly competing with the gatekeepers in the digital markets.[96] Such tendency of venture capitalists may refer to innovation kill zones since they do not see such entrepreneurs and start-ups as valuable investments. Killer acquisitions may be another reason for reduced venture capital investment in start-ups. Some of leading economists and researchers have found that acquisitions by the gatekeepers in digital markets have decreased venture capital investments in the same sectors.[97] Economic concessions gained through the smaller companies - *relying on the gatekeepers to reach digital markets* - may also slow down innovation. For instance, David Barnett, the CEO and Founder of PopSockets, testified that his company was required to "*pay almost two million in marketing dollars in order to remove illegal product from the Amazon marketplace, the Amazon retail team frequently lowered their selling price of our product and then "expected" and "needed" us to help pay for the lost margin*".[98] Such a requirement

[94] The US' Investigation of Competition in Digital Markets, *op. cit*., p. 46.

[95] Ufuk Akcigit & Sina T. Ates, Knowledge in the Hands of the Best, Not the Rest: The Decline of U.S. Business Dynamism, VOXEU July 4, 2019, available at: https://voxeu.org/article/decline-us-business-dynamism, (access date: 09.06.2021).

[96] Stigler Report, *op. cit*., p. 9.

[97] Sai Krishna Kamepalli, Raghuram Rajan & Luigi Zingales, Kill Zone, Becker Friedman Inst.Working Paper No. 2020-19, 2020, p. 1, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3555915, (access date: 09.06.2021).

[98] Online Platforms and Market Power, Part 5: Competitors in the Digital Economy Hearing, before the House Committee on the Judiciary of the US, available at:

may correspond to a source for hiring more employees to develop more innovative products for his company.

As explained in the previous part of this thesis, data is significantly important for the gatekeepers' market power. Market power may be defined as the ability to increase prices without a loss to demand, such as less sales or customers.[99] As the gatekeepers mostly provide the core platform services free for the end users in particular, they monetise such services by the end users' attention and data, which makes more difficult to apply traditional evaluations of market power to digital markets. Gatekeepers' ability to degrade user privacy may reasonably be considered equivalent to a monopolist's decision to increase prices or decrease quality.[100] Therefore, data privacy policies may exclusively be determined by the gatekeepers without losing customers even if they would provide weaker privacy protections, in case there is no competitiveness in the digital markets. Consumers are forced to use these core platform services without strong privacy protections. The UK's CMA emphasizes that "*The collection and use of personal data by Google and Facebook for personalised advertising, in many cases with no or limited controls available to consumers, is another indication that these platforms do not face a strong enough competitive constraint*".[101] Gatekeepers enjoy the accumulation of data more in case lack of competition in the digital markets which may enable them to entrench their market power as well.

Consumers are mostly unaware of the gatekeepers' data collection practices, which are also concealed, and these practices make difficult to compare privacy costs across different services for customers.[102] Moreover, manipulative design interfaces

https://docs.house.gov/meetings/JU/JU05/20200117/110386/HHRG-116-JU05-Wstate-BarnettD-20200117.pdf, (access date: 09.06.2021).

[99] W. Kip Viscusi, John M. Vernon & Joseph E. Harrington, Jr., Economics of Regulation and Antitrust, 3rd Ed., 2000, p. 164.

[100] Katharine Kemp, Concealed Data Practices and Competition Law: Why Privacy Matters, European Competition Journal, 2020, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3432769; OECD, Big Data: Bringing Competition Policy to the Digital Era, Background Note by the Secretariat, 29-30 November 2016, available at: https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf, (access date: 09.06.2021).

[101] The UK's CMA Report on Online Platforms and Digital Advertising, *op. cit*., p. 318, para. 6.31.

[102] Maurice E. Stucke, Should We Be Concerned About Data-opolies?, 2 GEO. L. TECH. REV. 275, 311, 2018, available at: https://georgetownlawtechreview.org/wp-content/uploads/2018/07/2.2-Stucke-pp-275-324.pdf, (access date: 09.06.2021).

are also persuasive tools to raise the likelihood of users consenting to tracking.[103] Gatekeepers often use behavioural nudges (*also known as dark patterns*) in online tracking and advertising markets to enhance their market powers and maximize their profits gained through the users.[104] Consumers are rarely aware of data collection practices in case a scandal evolves, such as large scale data breaches and privacy incidents like Cambridge Analytica. Such unawareness of consumers may be misperceived as they do not care about their privacy (*i.e. privacy paradox*) since usage of the core platform services are essential for them.[105] In case lack of transparency and effective choice, there would be a race to the bottom, thus same dynamic may prevent new entrants from offering products with stronger privacy protections. As a result of these impacts, leading international antitrust enforcers have emphasized that data protection is an important dimension of competition that would be undermined by certain merger activities. For instance, Margrethe Vestager, the EU's Competition Commissioner has stated that "*the Commission has also integrated, where appropriate, data protection as a quality parameter for the assessment of merger cases*".[106]

Nowadays, there is a growing debate on some of the gatekeepers' (*especially the ones providing online search engines and social networking services*) market powers against consumers and the states in terms of the tools of a democratic society, such as free speech, free and diverse press. As the way of advertising has gone digital, online advertising has a significant share in some of the gatekeepers' revenue as explained in former sections of this thesis. News industry has faced a massive decrease in its advertising revenue, most of journals have also started to lose their effects since the main part of their revenue come from advertisements.[107]

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[103] Arvind Narayanan, Arunesh Mathur, Marshini Chetty & Mihir Kshirsagar, Dark Patterns: Past, Present, and Future, 18(2) ACM QUEUE 67, 77, 2020, available at: https://queue.acm.org/detail.cfm?id=3400901, (access date: 09.06.2021).

[104] *Ibid.*; Norwegian Consumer Council, Deceived by Design, June 27, 2018, (*describing the use of "dark patterns"*), available at: https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf, (access date: 09.06.2021).

[105] Brooke Auxier, et al., Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information, Pew Res. Ctr. November 15 2019), available at: https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/, (access date: 09.06.2021).

[106] Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition Hearing before the House Committee on the Judiciary of the US, September 6 2019, p. 4, available at: https://docs.house.gov/meetings/JU/JU05/20191018/110098/HHRG-116-JU05-20191018-SD002.pdf, (access date: 09.06.2021).

[107] The US' Investigation of Competition in Digital Markets, *op. cit*., p. 57.

News publishers have raised concerns on growing asymmetry of power between the gatekeepers and the publishers and the availability of trustworthy sources of news.[108] Gatekeepers face little financial consequence when misinformation and propaganda are provided online in case there is no competition for the core platform services provided.[109] Several concerns on the distrubution and and monetisation of news by the gatekeepers were addressed by a comprehensive inquiry by Australian Competition and Consumer Commission ("*ACCC*") as well. ACCC has released a draft code to address a fundamental bargaining power imbalance between news publishers and the gatekeepers that would force the publishers to accept less favourable terms for the inclusion of news on digital platform services.[110] Facebook and Google have strongly opposed to draft code by warning that they may no longer display news on their platforms in Australia. Google has also claimed that it has been contributing to Australia's economy as well as generating value for Australian views.[111] Australia has responded to Google's threat as it would not "*respond to coercion or heavy-handed threats wherever they come from*".[112]

Increasing competition in the digital markets would slow down the market concentrations and mark-ups, decrease prices and increase customer choice, quality and innovation.

The EU also seeks a fair and competitive digital economy, where companies of all sizes and in any sector can compete on equal terms with a frictionless single market.[113] As part of shaping Europe's digital future, the EU is committed to setting global standards for emerging technologies, which would enable the EU to become a global digital player as well. Therefore, abovementioned impacts are very important in particular Europe's internal market dynamics and European society.

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[108] *Ibid*, p. 62.

[109] Online Platforms and Market Power, Part I: The Free and Diverse Press Hearing, before the House Committee on the Judiciary of the US, June 11 2019, available at: https://docs.house.gov/meetings/JU/JU05/20190611/109616/HHRG-116-JU05-Wstate-HubbardS-20190611.pdf, (access date: 09.06.2021).

[110] ACCC's Draft on News Media Bargaining Code, available at: https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code, (access date: 09.06.2021).

[111] Google's Open Letter on ACCC's Draft on News Media Bargaining Code, January 6 2021, available at: https://about.google/google-in-australia/jan-6-letter/, (access date: 09.06.2021).

[112] Jamie Smyth & Alex Barker, Battle Lines Drawn As Australia Takes On Big Tech Over Paying For News, FIN. TIMES, September 2, 2020, available at: https://www.ft.com/content/0834d986-eece-4e66-ac55-f62e1331f7f7, (access date: 09.06.2021).

[113] See the Commission's relevant website page: https://ec.europa.eu/digital-single-market/en/content/fair-and-competitive-digital-economy, (access date: 09.06.2021).

The top 50 platforms, holding an average of 60% of traffic share across the EU, achieved worlwide revenues of almost EUR 276 billion in 2018.[114] Online platforms' role has strengthened with the widely introduced lockdowns due to Covid-19 pandemic in 2020 as well as upward e-commerce trends and changed habits more towards online.[115]

2.4. Summary and Conclusions

Digital markets are at the center of today's economy and become more and more important in time without restraint since the main drivers are innovation and development combined with their fast changing and growing characteristics. On the other hand, the core platform services are the most prominent ones in digital markets in terms of their effects as explained in this section. It is noteworthy to state that new core platform services may be added to current ones or some of these services would lose their features to be qualified as core platform services in time. Furthermore, these core platform services are provided by a few dominant tech giants, namely *the gatekeepers*.

There is a weak contestability due to structural competition problems in digital markets in terms of high level market concentration (*strengthened with killer acqusitions*), entry barriers – *such as network effects, switching costs, the accumulation of data and economies of scope and scale*. Such market features turn digital markets into winner-take-all markets by shifting competition *in* the market into competition *for* the market. There are also behavioural competition problems in digital markets mostly arising from unfair market practices of the gatekeepers, such as abuse of their dominant positions. However, there are also consumer behaviours enabling the gatekeepers to entrench their powerful market positions, such as escalation of commitment and availability bias. This section reaches a conclusion that it is self evident that arising concerns on fair and contestable digital markets have merits. It is indeed debatable whether existing competition law regimes are necessary to deal with such concerns or a new approach – *such as ex ante market rules like DMA* – is needed, as it will be addressed in detail in the

[114] The Impact Assessment Report Part I, *op. cit*., p. 17, para. 64.

[115] See Covid-19 and Online Platform Economy on Observatory on the Online Platform Economy: https://platformobservatory.eu/news/covid-19-and-online-platform-economy/, (access date: 09.06.2021).

further sections of this thesis. However, it is undeniable that these market characteristics and anti-competitive behaviours are real in today's digital markets. Moreover, these competition problems in digital markets come with their own costs in terms of innovation, entrepreneurship, economic efficiency, consumer welfare and fundamental rights and freedoms.

3. Existing Competition and Sector Specific Rules in Digital Markets

Gatekeepers are subject to two main categories of law under the EU law as follows: i) competition laws which are applicable to all markets and ii) more sector-specific EU rules such as P2B Regulation, GDPR and the EU consumer law.

The package EU competition law cover the rules on antitrust, merger control, state aid and public undertaking and services. Antitrust rules such as Article 101 and 102 TFEU may be classified as *ex post* tools since they aim to detect anti-competitive behaviours by the players causing actual or likely adverse effects on the competition. On the other hand, merger control rules assess *ex ante* whether a potential merger or acquisition would negatively affect the competition.[116] The Commission would not propose any changes to current competition law framework by the DMA, meaning that these rules continue to be applied and enforced, *in particular Article 101 and 102 of TFEU*, against the gatekeepers in digital markets in case the conditions are met.

There are also sector-specific rules such as P2B Regulation aiming fair and transparent online intermediation services – *a sort of core platform service under the DMA as well*, EU data protection legislation – *namely GDPR specifying fundamental right to the protection of personal data* and EU consumer law *addressing a range of harmful practices for consumers*.[117]

[116] Impact Assessment Report Part I, *op. cit*., p. 32, para. 115.

[117] *Ibid*, p.35-36, para. 125.

3.1. Competition Law Tools Applicable Across All Sectors

There are arising concerns on the functionality of existing competition law tools since there are preconditions set under Article 101 and 102 of TFEU, such as the existence of an anti-competitive agreement for Article 101 and of a dominant position for Article 102 TFEU. These rules are applicable in case a competition problem has already arisen, meaning that they just propose *ex post* application for anti-competitive behaviours and impacts in the markets. [118]

A recent report by the European Court of Auditors ("*ECA*") has also emphasized that:

"*Particularly in the digital economy, this may be too late to tackle a competition problem. However, outside merger control, the Commission has currently no tools in its hands that would allow it to intervene ex ante i.e. before competition problems would occur*."[119]

Competition law investigations take at least two years and usually more than that and require complex legal and economic evaluations in most cases, meaning that competition law interventions may delay to repair adverse effects in particular digital markets since such adverse effects may no longer be. Moreover, market failures and anti-competitive impacts mostly arise from market structures in the digital markets as explained in the previous chapter, and the competition problems related to market structures cannot be entirely addressed by Article 101 and 102 TFEU. Moreover, these rules cannot capture all anti-competitive behaviours by the gatekeepers as well since most of them are not identified as anti-competitive in advance from competition law perspective.[120]

Article 101 TFEU prohibits agreements and concerted practices between undertakings that may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition in EU internal

[118] *Ibid*, p. 33, para. 123.

[119] European Court of Auditors, Special Report 24/2020: EU Audit Report: Merger Control and Antitrust Proceedings, November 19 2020, para. 59, available at: https://op.europa.eu/webpub/eca/special-reports/eu-competition-24-2020/en/, (access date: 09.06.2021).

[120] Impact Assessment Report Part I, *op. cit*., p. 33, para 120-121.

market.[121] Such agreements and concerted practices include fixing purchase or selling prices, sharing markets and making obligatory for the conclusion of contracts to accept supplementary obligations which do not have connection with the subject of such contracts under Article 101 TFEU. Therefore, this provision is applicable to vertical and horizontal relations, and such agreements, decisions or practices shall automatically be void as per Article 101 TFEU. There are certain justifications for such infringements under Article 101 (3) TFEU, which are to contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefits. It is important to note that such practices may be exercised by collusion in most cases. Competition law targets such collusions through human practices, for instance it investigates companies through their directors, executives, employees. However, there are new ways to collude in digital markets such as monitoring and adjusting to each other's prices by pricing algorithms instead of expressed collusion by directors, executives and employees in smoke-filled rooms.[122] There is a risk of elusive forms of collusion under these unique circumstances in digital markets which makes it harder to detect and intervene by competition law instruments under Article 101 TFEU. Concerted practices are difficult to be proven due to emerging technological developments as well.[123] Even if such concerted practices does not constitute a form of proper agreement, they still require a form of contact and common form of conduct as a result of such contact. It is also questionable whether the burden of proof is on the competition authorities in regard to such agreements and concerted practices or the burden of proof should lie with the undertakings concerned.[124] It may be an option to reverse the burden of proof, which would possibly benefit the functionality of Article 101 TFEU,

[121] See Article 101 TFEU on: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML, (access date: 09.06.2021).

[122] Ariel Ezrachi and Maurice Stucke, Artificial intelligence & Collusion: When Computers Inhibit Competition, 2015, University of Illinois Law Review Vol. 2017, 1775, pp 1781-1782, available at: https://www.illinoislawreview.org/wp-content/uploads/2017/10/Ezrachi-Stucke.pdf, (access date: 09.06.2021).

[123] Andreas Heinemann and Aleksandra Gebicka, ‚Can Computers Form Cartels? About the Need for European Institutions to Revise the Concertation Doctrine in the Information Age, 2016, Journal of European Competition Law & Practice Vol. 7(7), 431, p. 2-3, available at: https://www.zora.uzh.ch/id/eprint/129311/1/Heinemann_Computer_Cartels.pdf, (access date: 09.06.2021).

[124] Daniel Mandrescu, ‚Applying EU Competition Law to Online Platforms: The Road Ahead, 2017, European Competition Law Review 38(8), 353, p 9, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840, (access date: 09.06.2021).

however, it is noteworthy to emphasize that the presumption of innocence must be preserved, which is one of the main principles in all areas of law.[125] This issue may be solved by broadening the concept of concerted practices.[126] In case broadening the concept of concerted practices, it would be possible to capture "*cartel softwares*" under Article 101 TFEU, however, there would be discussion whether awareness of the undertakings is required in such scenarios. Such softwares generally work with a unilateral decisions based on market monitoring at the same time, thus it would be difficult to prove the existence of concerted practices as parallel behaviour is not often sufficient.[127] However, it is also undesirable to solely focus on awareness of concerted by excluding unilateral decisions and practices which would bring harmful outcomes in digital markets. A possible approach would be to determine whether the undertakings concerned are aware of the use of such sofwares and its impact on prices in terms of competition.

Article 102 TFEU is more relevant norm in digital markets since most of the behavioural competition problems analysed in the second chapter arise from the abusive actions of the gatekeepers. This provision prohibits any abuse by one or more undertakings of dominant position in EU internal market that may affect trade between Member States.[128] Such abusive conducts include imposing unfair conditions, applying dissimilar conditions to equivalent transactions with other trading parties.

The undertakings concerned must be in dominant positions – *for instance gatekeeper positions* – for the application of Article 102 TFEU. Conducts of these dominant players are assessed in terms of their capacities for exclusionary or exploitative abuse of dominant positions. There is no special provision of justification for such conducts in Article 102 TFEU, contrary to Article 101 (3)

[125] Case C-74/14 *Eturas and others* ECLU:EU:C:2016:42, January 21 2016, paras 36-38, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=173680&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5570623, (access date: 09.06.2021).

[126] European Commission, *Commission Staff Working document – Preliminary Report on the E-Commerce Sector Inquiry* (SWD(2016) 312 final), pp 174-176, available at: https://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf, (access date: 09.06.2021).

[127] Mandrescu, *op. cit*., p. 9-10.

[128] See Article 102 TFEU on: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:HTML, (access date: 09.06.2021).

TFEU. However, it is possible to prove that such conduct being objectively justified in terms of necessity (*it may create substantial efficiencies which outhweigh anti-competitive effects on consumers, such as health or safety*) or efficiency (*it may be proven that there would be effeciences such as technical improvements in the quality of goods or a reduction in the cost of production or distubution*).[129]

Evaluation of dominance requires a two-stages process which are i) to define relevant market and ii) to assess the market power.[130] Traditional market definition concepts such as demand-side substitution complemented by supply-side substitution apply to digital markets as well. On the other hand, defining the relevant market is a complex process in digital markets since digital platforms are generally two or multi sided markets. Therefore, the first issue that should be addressed whether all sides of digital platforms as a whole or each of their separate sides should be defined as a market.[131] The existing literature proposes that this issue would be solved by considering whether the case concerns a transaction or non-transaction. In case the case concerns a transaction, then the relevant market should be defined with all sides of digital platforms as a whole.[132] Another view adopted by German competition authority, Bundeskartellamt, provides that "*in case of matching platforms where connection of the two user groups is the actual product offered by the platform it can be reasonable to define only one market*".[133] It may be required to define multiple relevant markets if transaction or specific matching function is not facilitated. Even if these approaches would likely to divide digital platforms into two types as transactional and non-transactional, it does not reflect the reality in practice. Digital platforms generally bring multiple users together and facilitate interaction on all of their sides, thus there may be transactional and non-transactional functionalities on all these sides at the same time.[134] For instance, Youtube may be deemed as transactional as it creates interaction between

[129] European Commission, Communication from the Commission – Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Excluionary Condcut by Dominant Undertakings, February 24 2009, 2009/C45/02, OJ C 45, para. 28-31, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN, (access date: 09.06.2021).

[130] Mandrescu, *op. cit*., p. 19.

[131] *Ibid.*

[132] *Ibid.*

[133] Bundeskartellamt, Working Paper- The market power of platforms and networks, executive summary 2016, pp. 5-6, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4, (access date: 09.06.2021).

[134] Mandrescu, *op. cit*., p. 20.

consumers and content uploaders and non-transactional between consumers and advertisers. Relevant market definition is also important in terms of "*the small but significant and non-transitory increase in price*" ("*SSNIP*") test referring to a tool in product market definition in which a minimal possible sub-set of products are considered for analysis of identifying relevant product market. It seeks to define smallest market within which a hypothetical monopolist could impose SSNIP, usually corresponding a price increase of 5-10%.[135] SSNIP test would apply to all sides of two or multi sided digital platforms by considering network effects, however, it is questionable how to change its application in practice, especially for zero-priced markets.[136] The role of data is also important within the context of market definition issues as per Article 102 TFEU. Digital platforms benefit from the accumulation of data as explained in previous section to improve or expand the range of their services, even if they do not sell the data generated in the platform. Therefore, it has been debated whether a separate market should be defined for data despite the absence of direct trade therein.[137]

Assessing the market power is another component for evaluations under Article 102 TFEU as stated above. Such an assessment may be based on actual competition, future competition and countervailing buying power.[138] Market shares would be a useful indication for determining the level of competition in certain markets.[139] Digital gatekeepers may hold a significant market shares in certain cases as explained in previous section, however, it would be difficult to calculate such market shares due to dynamic character of digital markets as well.[140] Moreover, digital platforms often operate in more than one market where market shares may differ, which makes difficult to compare competitors.[141] As adopted by Bundeskartellamt, all the relevant factors must be considered in the assessment of

[135] Kaushal Sharma, SSNIP Test: A Useful Tool, Not a Panacea, 2011, Competition Law Reports, Competition Commission of India, p. 189, available at: https://www.cci.gov.in/sites/default/files/presentation_document/SSNIPTestKKSharma260711.pdf, (access date: 09.06.2021).

[136] Mandrescu, *op. cit*. p. 21.

[137] *Ibid.*

[138] European Commission, Communication from the Commission – Guidance on the Commission's Enforcement Priorities, *op.cit*., para. 12.

[139] *Ibid*, para. 13.

[140] Mandrescu, *op. cit*. p. 22.

[141] *Ibid.*

market power, which mainly cover entry barriers analysed in previous chapter, such as networking effects, economies of scale and scope.[142] It is noteworthty to emphasize that new entry barriers related to market power would emerge in the future due to dynamic feature of digital markets that it is not listed in this thesis, therefore, such developments must be considered in the future assessments of market power as well. For the assessment based on countervailing buying power, there must be a buyer that can contrain price increases by the undertakings concerned which requires a credible alternative to such undertakings.[143] However, such an assessment is difficult to conduct since inherent purpose of online platforms is to facilitate interaction in between two or more parties in a way that they cannot on their own. In most cases, digital platforms provide such an interaction between consumers and relatively smaller players, which would prevent such an assessment.[144] Adaptation current practices and concepts to digital platforms is significant to ensure functionality of Article 102 TFEU even if the rationale behind the general concept of abuse is not currently challenged.

Specific competition tools (*in particular the ones criticized most in terms of digital markets)* related to abovementioned ones must be briefly evaluated in this part. Articles 7 and 9 of the Council Regulation No. 1/2003 ("*Regulation 1/2003*") constitute commissions' decisions for termination of infringement and commitments.[145] Such decisions may address individual companies for a breach of EU competition law, however, they are not suitable for addressing market failures explained in previous chapter.[146] Even if it is possible to carry out sector inquiries under Article 17 of Regulation 1/2003, as a result of suspicion for breach of EU competition law, it is not possible to impose remedies following these investigations.[147] Another tool available under Regulation 1/2003 is interim measure mechanism as per Article 8, which is granted in the case of urgency and serious and irreparable damage by showing *prima facie* finding of infringement of

[142] Bundeskartellamt, Working Paper, *op. cit*., p. 10.

[143] Mandrescu, *op. cit*., p. 23.

[144] *Ibid.*

[145] Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, December 16 2002, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=en, (access date: 09.06.2021).

[146] Impact Assessment Report, Part I, *op. cit*., p. 34, para. 122.

[147] *Ibid.*

EU competition laws. As these requirements may be difficult to be met, in particular digital markets, this would not be a permanent mechanism for competition problems in digital markets stated in previous section. The interim measures have only been used twice in the last nineteen years.[148]

Block Exemption Regulations may not address competition problems stated in previous section since it aims to help the undertakings for their self-assessments in terms of compliance their horizontal or vertical agreements under Article 101 TFEU.[149] Market Definition Notice cannot address such competition problems as well due to its very nature as a soft law document providing guidelines for the market definition and relevant parameters to be considered.[150]

Mergers and acquisitions in digital markets play key roles for concentration of markets in terms of the gatekeepers' deals (*in particular the ones called as killer acquisitions in previous section*), therefore the EU merger control regime should be evaluated as well. Council Regulation No. 139/2004 ("*EU Merger Regulation or EUMR*") gives the Commission exclusive power to review concentrations with an EU dimension, where the aggregate turnover of the undertakings concerned exceeds defined thresholds.[151] Concentrations within EU dimension which met theresholds defined under EUMR shall be notified to the Commission prior to their implementation as per Article 4 EUMR. The Commission examines such notifications and initiates relevant proceedings when necessary as per Article 6 EUMR. The Commission would find that i) the concentration notified does not fall within the scope of EUMR by means of decision, ii) the concentration notified falls within the scope of EUMR but does not raise serious doubts to its compatibility within the common market, thus no opposition needed by means of decision (*such a decision declaring that a concentration is compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration*) and iii) the concentration notified falls within the scope of EUMR

[148] *Ibid.*

[149] *Ibid.*

[150] *Ibid*, para. 123.

[151] Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings, January 20 2004, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=en, (access date: 09.06.2021).

and raises serious doubts as to its compatibility with the common market, thus initiating proceeding is needed (*such proceedings may be closed by means of decisions provided under Article 8 of EUMR*). These merger control mechanisms have played a key role to sustain competition in EU internal market for the last decade, however, their functionality is questionable for digital markets in case such thresholds are not met in terms of killer acquisitions by the gatekeepers as explained in previous chapter.

Article 22 EUMR provides for one or more Member States to request the Commission to examine any concentration that is not within EU dimension but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request. This provision is applicable to all concentrations whether they meet EU dimension or respective national jurisdictional criteria or not as it may be understood from the wording. However, the Commision has been discouraging referral requests from Member States in exercising its discretion power under Article 22 EUMR since it did not see itsfelf as an original jurisdiction over the transaction at stake due to progressive implementation of national merger control regimes in almost all Member States. In recent years, there has been appearing a gradual increase of concentrations involving the undertakings that generate little or no turnover at the moment of concentration and thus do not meet merger control thresholds within EU dimension and national jurisdictions. This scenario is more prominent in certain sectors, such as digital sectors, where innovation is the key driver of market competition.

In a speech to International Bar Association in September 2020, Commissioner Vestager has questioned whether merger control regimes based on the companies' turnover are *still right way to spot mergers that matter competition*.[152] She noted that "*these days, a company's turnover doesn't always reflect its importance in the market. In some industries, like the digital and pharmaceutical industries, competition in the future can strongly depend on new products or services that don't*

[152] Vestager's Speech in International Bar Association, The Future of EU Merger Control, September 11 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en, (access date: 09.06.2021).

yet have much in the way of sales".[153] She has stated that the Commission plans to accept referrals from national competition authorities of mergers that are worth to revieweving in EU dimension.

The Commission has published a guidance on the circumstances under which it is likely to accept referral requests from Member States on 26 March 2021. This guidance aims to provide practical guidance on the Commission's approach to the use of the referral mechanism under Article 22 EUMR and to clarify its application in certain categories of appropriate cases.[154] The Commission has concluded that merger control thresholds are generally effective in capturing transactions that may have a significant effect in EU internal market, however, certain transactions may still escape from these thresholds, in particular the ones in the digital and pharma sectors.[155] Therefore, the Commission encourages Member States to request referrals under Article 22 EUMR, which may be deemed as a paradigm shift in the Commission's approach compared with its past practices. Such referral requests are subject to the deadlines as per Article 22 EUMR, however, the fact that a transaction has already been closed does not preclude a Member State to request a referral as it is acknowledged under Article 22.4 EUMR. It is stated in the Commision's guidance that it would generally not consider a referral appropriate where more than six months has passed after the implementation of the concentration. However, such a six months period would begin from the moment when material facts about the concentrations are known in case it is not publicly available at the time of implementation.[156] Merging parties are encouraged to come forward with information about their intended transactions to seek an early indication of the Commission whether their concentration would constitute a potential for a referral under Article 22 EUMR.[157]

[153] *Ibid.*

[154] The Commission, Commission Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases, March 26 2021, p. 1, available at: https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf, (access date: 09.06.2021).

[155] *Ibid,* p.3, para. 11.

[156] *Ibid,* p. 5, para. 21.

[157] *Ibid,* p. 6, para 24.

The Commission informs the merging parties as soon as possible in case a referral request is being considered. The undertakings concerned are not obliged to take or refrain from taking an action related to the implementation of the transaction upon being made aware of such consideration. However, they may consider to take appropriate measures such as delaying the transaction's implementation.[158] The suspension obligation under Article 7 EUMR would apply to the extent the concentration has not been implemented yet at the time on which the Commission informs the undertakings concerned that a referral request has been made.[159]

There are strong competition law tools do deal with anti-competitive practices in digital markets as identified above, however, it is necessary to consistently adapt them in accordance with the latest developments in digital markets. Otherwise, there may be a possibility of non-functionality of these rules, which would be reversed in case their unique and dynamic features are considered in exercising and evaluation traditional tools related to concerted practices, abuse of power and mergers.

3.2. Sector Specific EU Rules Affecting Competition in Digital Markets

There are also more sector-specific rules that may address some of competition problems defined in previous chapter, such as P2B Regulation, GDPR and the EU consumer law. This sections mainly focus on P2B Regulation as it brings obligations more specific to digital platforms, however, GDPR and EU consumer law tools are briefly identified as well, when necessary.

P2B Regulation has entered into force on 20 June 2019 and become applicable from 12 June 2020 which is seen as a processor to DMA as well. P2B Regulation aims to set out the rules for creating a fair, transparent and predictable market for relatively smaller businesses and traders on online platforms.[160] Digital platforms within the scope of P2B Regulation may enjoy gatekeeper positions and cause

[158] *Ibid*, p. 6, para 27.

[159] *Ibid*, p. 7, para 31.

[160] See the Commission's relevant page: https://digital-strategy.ec.europa.eu/en/policies/platform-business-trading-practices, (access date: 09.06.2021).

competition problems in digital markets as explained in the previous section. Therefore, the Commission aims to tackle such competition problems which would directly harm businesses and consumers by exercising unfair contracts and trading practices in platform-to-business relations.[161] The Commission has also published guidelines addressing the main requirements for online platforms identified in the P2B Regulation.[162] These guidelines aim to provide the right information to the business users, so that they can foresee how to increase and manage their online visibility which increases the end users' welfare in terms of quality, price and innovation at the very end. P2B Regulation is applicable to online intermediation services and online search engines (*which are listed under core platform services in previous section as well*) and excludes online payment services, online advertising tools and online advertising exchanges which do not provide direct transactions under a contractual relationship with the end users as per Article 1 P2B Regulation.

P2B Regulation includes certain provisions addressing some of the problems in terms of competitiveness and the end users' welfare. For instance, Article 3 regulates the terms and conditions of online platforms as follows: terms and conditions shall i) be drafted in plain and intelligible language, ii) be easily available to the business users at all stages of commercial relationship, including pre-contractual stage and iii) include information about certain obligations such as suspension, termination and restriction the use of service, general information about the overall effects of such terms and conditions on the ownership and control of intellectual property rights. In case of non-compliance with the obligations set out under paragraph one of Article 3, terms and conditions shall be null and void as per paragraph three.

Article 5 P2B Regulation provides that terms and conditions shall include a description of the main parameters related to ranking and the reasons for the relative importance of them as opposed to other parameters. Moreover, online platforms

[161] *Ibid.*

[162] The Commission's Guidelines on Ranking Transparency Pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, December 12 2020, (2020/C 424/01), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC1208(01)&from=EN, (access date: 09.06.2021).

shall provide a description of the possibility, in case it exists, to influence ranking against any direct or indirect remuneration paid by business users or corporate website users to the online platforms and the effects of such remuneration on raking as per third paragraph of Article 5. This provision would enable the business users to adjust their business strategies by providing certainity and transparency. Thus, this would solve some of the competition problems in particular online market places detailed in previous chapter such as self-preferencing or unilateral unfair practices.

Article 6 P2B Regulation states that terms and conditions shall include a description of what ancillary goods and services are offered to consumers through the online intermediation services, either by the provider of such services or third parties, and the conditions for the business users to be allowed to offer such ancillary goods and services through the platform. This would clarify the situations related to ancillary goods or services, however, it would not solve the entire competition problems related to ancillary goods and services as this provision does not constitute a prohibition of imposing such goods and services. The lack of prohibition for such practices would be the main problem due to dominant positions of the gatekeepers as explained in the previous section.

Article 9 P2B Regulation constitutes that providers of online intermediation services provide a description of data access policies, such as technical and contractual access, or absence thereof, of business users to any personal or other data, which business users and end users provide for the use of the online intermediation services concerned or generated through such services. As the access to data generated through digital platforms would be an entry barrier and constitute a market failure explained in previous section, it would be better to know such access policies from the beginning for the users. However, the issue is not just about having such an information, it is rather mostly related to imposition of such data access policies on users by the gatekeepers. This provision does not prohibit the gatekeepers from benefiting the accumulation of data in certain ways that would be anti-competitive for digital markets.

Article 10 P2B Regulation sets out that in case a provider of online intermediation services restricts the ability of the business users to offer same goods and services to end users under different conditions through other means, it shall include the grounds for such a restriction in terms and conditions, such as economic, commercial and legal considerations for those restrictions. An internal system for handling the complaints of business users shall be provided under Article 11 P2B Regulation.

Pursuant to Article 15 P2B Regulation, each Member State shall ensure adequate and effective enforcement of it. Most of the provisions in P2B Regulation may be deemed informative rather than binding obligations since they aim to create transparency in digital platforms' terms and conditions. However, it is questionable whether such information provided in the gatekeepers' terms and conditions would be functional to prevent certain anti-competitive conducts detailed in previous section. Furthermore, P2B Regulation is mainly applicable to online search engines and online intermediation services, which excludes some of other core platform services identified in previous section. However, most of the obligations seem only applicable to online intermediation services as it may be understood by the wordings of certain provisions, such as Article 6, 9 and 10. Therefore, its scope of application do not address most of the anti-competitive conducts of the gatekeepers defined in previous section.

GDPR is significantly effective tool for addressing fundamental rights to the protection personal data and privacy. It regulates business-to-citizen and governments-to-citizen interactions in terms of data rather than platform-to-business issues, therefore certain data related competition issues cannot be solved under GDPR.[163] Article 20 GDPR would be relevant to data operability, however, it does not address entry barriers related to the accumulation of data. It is questionable how many data subjects would exercise such a right to data portability from one platform to another, therefore, technical implementation challenges matter as well.[164]

[163] Impact Assessment Report, Part I, *op. cit.*, p. 35, para 125.
[164] *Ibid.*

Lastly, EU consumer law would address certain potentially harmful practices at EU level. There are strong consumer protection tools such as the Unfair Commercial Practices Directive ("*UCPD*")[165] and the Unfair Contract Terms Directive ("*UCTD*").[166] These instruments would be effective in terms of business-to-consumer relationships as their scope is limited to such relationships. On the other hand, the Misleading and Comparative Advertising Directive ("*MCAD*")[167] includes certain types of advertising practices in terms of business-to-business relationships. However, MCAD is not specific to digital markets and cannot deal with the unfair business practices conducted by the gatekeepers in most cases.[168]

The Commission has published its New Consumer Agenda on 13 November 2020,[169] which addresses some of the issues related to consumer welfare. Two of key priority areas of the New Consumer Agenda are related to digital markets which are the digital transformation and specific needs of certain consumer groups. It is stated in the New Consumer Agenda that the consumers would be the final beneficiaries of fairer and more contestable digital markets as a result of DMA.[170]

Consumer behaviours - *like consumer bias* - would play a key role for the competition in digital markets as explained in previous section. It is stated in the New Consumer Agenda that consumer behaviours are often affected by cognitive biases, which would be exploited by the businesses. Such exploitations may disregard consumers' right to make an informed choice, arising from certain exercises such as the use of dark patterns, personalisation practices based on profiling, hidden advertising and manipulated consumer reviews. These practices and abuse of consumers would affect the competition in digital markets as well

[165] Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market, May 11 2005, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601555056590&uri=CELEX:32005L0029, (access date: 09.06.2021).

[166] Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, April 5 1993, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013#ntr3-L_1993095EN.01002901-E0003, (access date: 09.06.2021).

[167] Directive 2006/114/EC of the European Parliament and of the Council Concerning Misleading and Comparative Advertising, December 12 2006, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0114, (access date: 09.06.2021).

[168] Impact Assessment Report, Part I, *op. cit.*, p. 36, para 125.

[169] Communication from the Commission to the European Parliament and the Council, New Consumer Agenda: Strengthening Consumer Resilience for Sustainable Recovery, November 13 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2069, (access date: 09.06.2021).

[170] *Ibid*, p. 11.

since the capacity of the gatekeepers to exercise such practices is much more than the other digital players.

3.3. Effects of Fragmented Regulation in Digital Markets

There are range of EU law and national law tools addressing abovementioned competition problems, however, such a legal fragmentation would be non-functional to address evolving competition problems in digital markets. Therefore, it would be better to create a comprehensive legal tool – *like DMA* - to capture all abovementioned market failures and anti-competitive conducts.

Moreover, differentiated national rules and insufficient coordination among Member States would constitute non-functionality for addressing these problems as well.[171] For instance, there are differing legislations in regards to dependency situations in Member States, some of them (*Bulgaria, Hungary, Belgium, France, Germany, and Italy*) have relevant legislations addressing dependence issues while the remaining ones do not have such legislations.[172] Another example is related to MFN clauses as some of the Member States (*Austria, Belgium, France, and Italy*) prohibits MFN clauses such as price parity clauses, while the remaining Member States leave this issue to the EU competition law.[173]

Fragmented regulation would increase compliance costs, which also refers to a fragmentation in EU internal market.[174] Moreover, different terms and conditions in Member States would cause disparities for the competition between the users of the core platform services provided by the gatekeepers, which would adversely affect the integration within the EU internal market.

3.4. Summary and Conclusions

Competition law tools such as Article 101 and 102 TFEU and EUMR are functional to address certain market failures and anti-competitive behaviours of the gatekeepers in digital markets. However, adaptation of these competition law tools in accordance with evolving market features and anti-competitive behaviours is

[171] Impact Assessment Report, Part I, *op. cit*., p. 25, para. 89.

[172] *Ibid*, para. 90.

[173] *Ibid.*

[174] The Commission's Proposal for Digital Markets Act, *op. cit*., p. 15, para. 6.

very important to capture all the main problems explained in previous section. Therefore, new approaches must be adopted for evaluating traditional concepts such as market definition and market power by considering digital market specific features such as network effects and data. Such a progressive approach is also needed to target killer acquisitions for EU merger regime, which is the case for Article 22 EUMR recently adopted by the Commission.

More sector-specific EU rules play key roles in addressing some of the problems in previous section as well. As the most relevant sector-specific tool for digital gatekeepers, P2B Regulation brings important obligations for terms and conditions applicable to online search engine and online intermediation services. On the other hand, other core platform services are not covered by P2B Regulation. Moreover, most of the provisions are only applicable to online intermediation services. The obligations set out for terms and conditions of online platforms have an informative nature in general aiming transparency in digital markets. Therefore, they would be deemed as non-functional to address abovementioned problems in digital markets as they lack of binding prohibitions. GDPR and EU consumer law constitute certain protections for in particular consumers, the final beneficiaries of all core platform services provided by the gatekeepers. These rules are often effective to address consumer related problems, however, they mostly lack of business-to-business relationship related provisions. However, it is noteworthy that the EU tends to improve such rules for more protections necessary in accordance with developing problems in digital markets, which would also affect the competition law problems in a positive way.

These legal instruments may be efficient to catch certain types of market failures and anti-competitive behaviours, however, it is evident that there is a fragmented legal structure in EU. Such a fragmented regulation scheme would adversely affect the desired outcomes in EU internal market as well as increasing uncertainity and compliance costs for digital players. Therefore, a harmonisation is also needed while improving these tools in line with recent developments in digital markets.

4. Overview of the Proposed Digital Markets Act

On 15 December 2020, the Commission has proposed the Digital Markets Act, a long-awaited set of *ex ante* regulations for digital markets aiming to ensure a fair and contestable digital economy in the EU. The Parliament and the Council will negotiate the DMA and are expected to finalise the legislation process by 2022 with a possible application in 2023. The DMA constitutes a paragidm shift in terms of the EU regulation of digital markets and brings new obligations for the gatekeepers – *also the largest digital platforms of the world* – operating in Europe.[175]

The DMA aims to achieve three main objectives as follows i) to ensure contestable digital markets, which refers to openness of the digital markets to new entrants offering digital services, ii) to ensure fairness in the P2B relationship between the gatekeepers and the business users, which refers to a balance preventing disproportionate advantage in favour of the gatekeepers and iii) to strengthen the EU internal market by harmonising the relevant rules across the EU.[176]

The DMA is applicable to core platform services provided by the gatekeepers in digital markets as explained in the introduction part of this thesis. The DMA defines its objective as "*to allow platforms to unlock their full potential and the end users and the business users alike to reap the full benefits of the platform economy*".[177] The contestability is more related to future structure of the digital markets aiming long term efficiency, thus it is a sort of *ex ante* rules. On the other hand, the fairness objective is more likely to *ex post*, aiming a fair distribution of value generated in the digital markets.[178]

The DMA targets the structural and behavioural competition problems that cannot be addressed by the existing rules (*these problems are analysed in the second chapter of thesis)*, therefore it aims to cover the gaps of competition law. However,

[175] Central on Regulation in Europe (CERRE), the European Proposal for a Digital Markets Act: A First Assessment, January 19 2021, p. 9, available at: https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/, (access date: 09.06.2021).

[176] *Ibid.*

[177] The Commission's Proposal for Digital Markets Act, *op. cit.*, p. 2.

[178] CERRE, A First Assessment, *op. cit*., p.9.

it is not a competition law tool as such, it is rather a market regulation ensuring a level playing field by imposing *ex ante* rules.[179]

This section mainly describes and analyses the DMA under three sub-sections as follows i) initial legal evaluation of the DMA, ii) analysis of the most important provisions of the DMA – *such as important definitions, obligations, fines* and iii) main criticism regarding the DMA from different approaches.

4.1. Initial Legal Evaluation of the Proposed Digital Markets Act

A fragmented legal structure exists across the EU as analysed in previous section of this thesis. Differentiated national legal instruments are the main reason of such a fragmentation and increase compliance costs as well as undermining the functioning of the Digital Single Market within the EU. Therefore, a harmonisation at the EU level is required for addressing structural and behavioural competition problems, and Article 114 of TFEU is the legal basis of the DMA.[180]

Article 101 and 102 TFEU are the most effective existing tools to address certain anti-competitive behaviours of the gatekeepers due to abovementioned reasons and these articles' main objective is to protect undistorted competition in any given market. On the other hand, the DMA's main objective is to ensure that digital markets, where the gatekeepers exist, remain fair and contestable. Therefore, the DMA aims to protect different legal interests from Article 101 and 102 TFEU, however, it is complementary to these rules.[181]

As the EU's competences by the principle of conferral, which are used by the principles of subsidiarity and proportionality as per Article 5 of Treaty on European Union ("*TEU*"), the DMA should be evaluted in line with these principles as well.

[179] Florence G'sell, A New Ex Ante Regulation Imposed on Gatekeepers: The Digital Markets Act, SciencePo Chair Digital, Governance and Sovereignty, December 23 2020, available at: https://www.sciencespo.fr/public/chaire-numerique/en/2020/12/23/a-new-ex-ante-regulation-imposed-on-gatekeepers-the-digital-market-act/, (access date: 09.06.2021).

[180] See Article 114 TFEU: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2008.115.01.0001.01.ENG&toc=OJ%3AC%3A2008%3A115%3ATOC#C_2008115EN.01001301, (access date: 09.06.2021).

[181] The Commission's Proposal for Digital Markets Act, *op. cit.*, p. 16.

In accordance with the principle of subsidiarity, the EU does not take action (*except in the areas that fall within its exclusive competence*), unless it is more effective than actions taken at national level, while the principle of proportionality refers that the EU should not go beyond what is necessary to achieve the objectives of the Treaties.

As unfair practices of these platforms cannot be prevented by solely existing EU and national level legal instruments and initivates, and the EU internal market cannot be improved, therefore the DMA is coherent with the principle of subsidiarity. Moreover, the Commission emphasizes that there would not be over-regulation since the DMA only focuses on digital platforms, where concerns about lack of fair and contestable practices by gatekeepers raise. It also seeks strong evidences set out by the criteria in the DMA and limits certain practices while it foresees proportional measures for those digital platforms. Moreover, the DMA requires a cooperation with the gatekepeers that are within its scope of application, and it brings reasonable compliance costs for them, which is less than additional costs that may emerge due to divergent and fragmented national laws.

Regulation is preferred as the legal instrument since it is directly applicable in Member States which establishes same rights and obligations for private parties and enables the most suitable, coherent and effective application at EU level.[182]

The issue of parallel application for the DMA and existing competition tools may appear in certain cases. The Court of Justice of the EU ("*CJEU*") has previously decided that regulated conduct defence is very limited, when compliance with regulation forces the regulated companies to violate competition law.[183] The Commission has adopted a very narrow understanding of *ne bis in idem principle* (*i.e. no one shall be punished again for the same conduct with different legal tools*). For instance, the Commission has decided that competition rules may apply where sector specific legislations exists (*like DMA in digital markets*) in its Telekomunikacja Polska decision.[184] The Commission has decided that "*regulatory*

[182] *Ibid.* P.6.

[183] Case C-280/08P, Deutsche Telekom, ECLI:EU:C:2010:603, October 10 2010, para. 68, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=82938&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6219695, (access date: 09.06.2021).

[184] COMP/39.525, Telekomunikacja Polska, June 22 2011, paras. 143-145, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39525/39525_1916_7.pdf, (access date: 09.06.2021).

decisions do not satisfy the condition of the identity of legal interest protected" with regard to *ne bis in idem principle*.[185] As the proposed DMA emphasizes, it aims to protect different legal interest from existing competition law tools, therefore, such approach in regards to *ne bis in idem principle* would be adopted in this scenario as well.

The DMA is coherent with the Commission's digital strategy, and one of the three pillars of the policy orientation and objectives announced in the Communication "*Shaping Europe's Digital Future*". It does not conflict with P2B Regulation as well. The DMA complements existing EU and national competition rules, and is also aligned with other EU instruments, including with the EU Charter of Fundamental Rights and the European Convention of Human Rights ("*ECHR*"), GDPR and the EU's consumer law acquis.[186]

4.2. The Most Important Provisions of the Proposed Digital Markets Act: Definitions, Obligations and Fines

The scope of DMA is limited to core platform services provided by the gatekeepers. As a reminder, these core platform services are as follows i) online intermediation services (*like Amazon and app stores such as Apple App and Google Play Store*), ii) online search engines (*like Google or Microsoft Bing*), iii) online social networks (*like Facebook*), iv) video-sharing platform services (*like YouTube*), v) number independent interpersonal communication services (*like WhatsApp*), vi) operating systems (*like Apple iOS or Google Android*), vii) cloud computing services (*like AWS or Microsoft Azure*) and vii) advertising services offered by a provider of beforementioned seven core platform services mentioned including ad networks, ad exchanges and any ad intermediation services such as *Google AdSense*. These core platform services are at the center of *ex ante* regulations since the structural and behavioural competition problems are more evident for such services as explained in the second section of this thesis.

The definition of a gatekeeper and presumptions to be designated as a gatekeeper are essential. As a reminder, there is a three criteria test to designate a digital

[185] *Ibid.*

[186] The Commission's Proposal for Digital Markets Act, *op. cit*., pp. 3-4.

platform as a gatekeeper which are i*) having significant impact on the internal market*, ii) *operating a core platform service which serves as an important gateway for business users to reach end users* and iii) *enjoying an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future* under Article 3 DMA.

DMA sets several size thresholds in terms of turnover and the number of users which enable the Commission to presume that a core platform service provider would meet the criteria to be designated as a gatekeeper. Pursuant to Article 3.2 DMA, a provider shall be satisfied the requirement of *having significant impact on the internal market* if its turnover is equal or above EUR 6.5bn or market capitalization of at least EUR 65bn for the last three financial years and it operates in at least three Member States. Moreover, the requirement of *operating a core platform service as an important gateway for business users to reach end users* shall be satified if the provider of such a service reach more than 45 million monthly active end users and more than 10,000 active business users in the last financial year in the EU as per Article 3.2(b) DMA. Lastly, the requirement of *enjoying an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future* shall be satisfied where the second criteria was met in each of the last three financial years under Article 3.2(c) DMA.

In case a provider of a core platform service meets these thresholds, it must notify the Commission by providing all relevant information on these thresholds within three months after satisfying these thresholds as per Article 3.3 DMA. Such a notification must be updated for each core platform services that the digital platforms satisfy the thresholds to be designated as the gatekeepers. The Commission shall designate a provider of a core platform service as a gatekeeper within sixty day at the latest after receiving such a notification, unless such a provider cannot rebut the abovementioned presumptions to be designated as a gatekeeper by providing sufficiently substantiated arguments as per Article 3.4 DMA. On the other hand, a provider of a core platform service that does not satisfy abovementioned quantitative – size thresholds, may be designated as a gatekeeper by the Commission in case it meets three criteria test as per Article 3.6 DMA.

Such thresholds may be satisfied by 10 to 15 core platform service providers, even if it not possible give certain numbers and company names at the moment. Some scholars have calculated that these thresholds may be satisfied by some other digital platforms, apart from the largest digital players, namely GAFAM companies. For instance, Oracle and SAP would appear to meet such thresholds as well as AWS and Microsoft Azure. Booking.com, Spotify, Byte dance/TikTok, Salesforce, Google Cloud and IBM Cloud appear to meet some of these thresholds but not all. On the other hand, Twitter, Airbnb, Bing, LinkedIn and Zoom do not appear to meet such thresholds at the moment.[187]

A digital platform providing a core platform service and satisfying abovementioned thresholds may be designated as a gatekeepers for a certain core platform service on an individual basis. Meaning that, in case Facebook holds a gatekeeper position in social networking services, that does not mean that Facebook is designated as a gatekeepers for online intermediation services as well.[188]

In addition to pre-existing gatekeepers designated by the Commission in the future, there would be *emerging gatekeepers* that do not enjoy an entrenched and durable position but satisfy the two requirements of three criteria test (*i.e. having significant impact in the internal market and operating as an important gateway*) as per Article 15.4 DMA. However, such gatekeepers would be only subject to certain obligations under DMA, not all of them.

Articles 5 and 6 DMA set several obligations for those digital platforms designated as the gatekeepers. In contrast with previous announcements, DMA does not constitute black and grey list, therefore, all the obligations will have to be respected. On the other hand, DMA constitutes two sets of obligations as directly applicable ones (*Article 5*) and those that are susceptible of being further specified (*Article 6*).

Article 5 DMA sets directly applicable provisions prohibiting certain practices for the gatekeepers. The gatekeepers refrain from combining personal data sourced

[187] Cristina Caffarra and Fiona Scott Morton, The European Commission Digital Markets Act: A Translation, January 5 2021, available at: https://voxeu.org/article/european-commission-digital-markets-act-translation?s=09#.X_S5Rss3Eks.twitter, (access date: 09.06.2021).

[188] CERRE, A First Assessment, *op. cit*., p. 13.

from core platform services with personal data from any other services offered by the same gatekeepers or with personal data from third party services, except that the end users have been presented with the specific choice and provided consent in line with GDPR as per Article 5(a) DMA. Such practices were prohibited by national authorities, such as German competition authority, Bundeskartellamt in its Facebook case in 2019,[189] Italian Competition and Consumer Authirty in its WhatsApp decision in 2017,[190] and in its Facebook decision in 2018.[191] The gatekeepers are also prohibited from signing in end users to other services of the gatekeeper to combine personal data, unless the end user presents with the specific choice and provides consent in light of GDPR, which means that Gmail users cannot be automatically logged into YouTube.

The business users are allowed to offer same services to the end users through third party platforms af different prices and conditions than the ones offered through the gatekeeper's intermediation services as per Article 5(b) DMA. Such practices were condemned in the past by the Commission, like in Amazon e-book case.[192] In that case, the Commission has rendered legally binding commitments offered by Amazon related to concerned clauses of distribution agreements between Amazon and e-book publishers.[193]

Article 5(c) enables the business users to promote offers to the end users acquired via the core platform services and to conclude contracts with these end users regardless of why they use the gatekeeper's platform (*such a practice is defined as anti-steering in the second section of this thesis*). This is the case in the

[189] Bundeskartellamt prohibits Facebook from combining user data from different sources, please see at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html, (access date: 09.06.2021).

[190] Italian Competition and Consumer Authority has fined WhatsApp for having forced its users to share their personal data with Facebook, please see at: https://en.agcm.it/en/media/press-releases/2017/5/alias-2380, (access date: 09.06.2021).

[191] Italian Competition and Consumer Authority has fined Facebook for unfair commercial Practices for using its subscribers' data for commercial purposes, please see at: https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes, (access date: 09.06.2021).

[192] Case COMP/AT.40.153 E-book MFNs and Related Matters, May 2017, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40153, (access date: 09.06.2021).

[193] Please see press release of the Commission for brief info about Amazon E-book case at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1223, (access date: 09.06.2021).

Commission's in-depth investigation against Apple Music opened on 16 June 2020.[194]

The gatekeepers shall refrain from preventing or restricting business users from raising issues with relevant public authority relating to any practice of gatekeepers as per Article 5(d) DMA.

The gatekeepers cannot make access to their core service conditional on the use of their own identification service as per Article 5(e) DMA or on the use of other ancillary services such as payment services as per Article 5(f) DMA, which means that users cannot be forced to use the payment service offered by Apple when they wish to sell an application on the Apple Store. Such a bundling practice has been prohibited in Google Android case.[195]

Article 6 DMA sets obligations subject to further clarification, these clarifications may be resulted by a dialogue between the Commission and concerned gatekeepers. The Commission may specify in a decision the measures to be taken by relevant gatekeepers in order to comply with DMA.

Some of obligations under Article 6 DMA concern anti-competitive practices of gatekeepers. Gatekeepers shall refrain from using, in competition with business users, any data not publicly available, which is generated through activities by business users as per Article 6.1(a) DMA, which is the suspected practice in Amazon investigation.[196]

Gatekeepers shall refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or any third party belonging to the same undertaking as per Article 6.1(d), as this was the issue in Google Shopping Case.[197]

There are also obligations ensuring the freedom of choice of the end users. Gatekeepers shall allow end users to un-install any pre-installed software

[194] Please see press release of the Commission for brief info about recent developments about Apple Music case at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061, (access date: 09.06.2021).

[195] Google Android Case, *op. cit.*

[196] European Commission, "Antiturst: Commission opens investigation into possible anti-competitive conduct of Amazon", Press Corner, July 17 2019, available at: https://ec.europa.eu/commission/presscorner/detail/pl/ip_19_4291, (access date: 09.06.2021).

[197] European Commission, "Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service", Press Corner, June 27 2017, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784, (access date: 09.06.2021).

applications on its core platform service as per Article 6.1(b) DMA. The end users shall be allowed the installation and effective use of third party software applications or software application stores, unless such choices risk the integrity of the hardware or operating system provided by the gatekeepers as per Article 6.1(c) DMA. The gatekeepers shall ensure interoperability of ancillary services provided by third parties – *such as payment or digital identification services* – on the same provisions of the gatekeeper as per Article 6.1(f) DMA.

Another group of obligations are listed for the fairness of the conditions under which platforms have to collobrate with users, application providers or third parties. Gatekeepers shall apply fair and non-discriminatory general conditions of access for business users to their software application stores as per Article 6.1(k) DMA. Gatekeepers shall provide data related to searches performed by users on the gatekeepers' search engine to other online search engines on fair, reasonable and non-discrimintatory terms, upon their request as per Article 6.1(j) DMA. Gatekeepers shall provide business users, such as advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeepesr and the information they need to carry out their own evaluations as per Article 6.1(g).

Lastly, DMA sets an obligation which grants business users full and free access to data generated through their activities on the platform, such as visits, sales and customers as per Article 6.1(i).

There are also some other obligations rather than stated in Articles 5 and 6 DMA, such as obligation to inform about concentrations under Article 12 DMA. Gatekeepers shall inform the Commission of any intended concentration involving another platform or digital service provider, regardless of whether such a transaction is subject to control by the EU and national competition authorities. Although this obligation may be deemed as a response to killer acquisitions, the Commission does not have a power to prevent such a transaction, unless if the other provisions of EU competition law are applicable. However, such a notification obligation is important to evaluate the gatekeeper positions in accordance with intended mergers and acquisitions.

All these obligations will have to be respected, however, the Commission may, on a reasoned request by the gatekeepers, exceptionally suspend, in whole or in part, a specific obligation under Articles 5 and 6 DMA for a core platform service by a decision adopted in accordance with the advisory procedure in Article 32.4 as per Article 8 DMA. Such exceptional cases may endanger the economic viability of the platform concerned.

For non-compliance scenarios, the Commission may adopt a non-compliance decision in accordance with the advisory procedure in Article 32.4 DMA, if the gatekeeper refrains from complying with any of the obligation in Articles 5 and 6 DMA, or measures and interim measures ordered, or commitments made legally binding as per Article 25 DMA.

In the decision pursuant to Article 25 DMA, the Commission may impose on the gatekeepers fines not exceeding 10% of their total turnover in the previous financial year in cases of serious violations like obligations in Articles 5 and 6 as per Article 26 DMA. For instance, in case Facebook is subject to such a fine, it could be fined up to USD 8.6 bn as Facebook's total turnover is almost USD 86 billion in 2020.[198] In case of less serious infringements such as non-complying with the obligation to notify concentration in Article 12 DMA or the obligation to audit profiling techniques in Article 13 DMA, the Commission may by decision impose on the gatekeepers fines not exceeding 1% of the total turnover in the previous financial year. It is important to note that these fines may be applied where such obligations are intentionally or negligently violated.

In case a market investigation shows that a gatekeeper has systematically infringed an obligation in Articles 5 and 6 DMA, and has strengthened or extended its gatekeeper position, the Commission may by decision adopted in accordance with advisory procedure in Article 32.4 DMA impose on such a gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure the compliance with DMA as per Article 16 DMA.

[198] Facebook Investor Relations, "Facebook Reports Fourth Quarter and Full Year 2020 Results", January 27 2021, available at: https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results/default.aspx, (access date: 09.06.2021).

The role of Member States and their national authorities is more limited in terms of DMA than the other fields of EU law. Member States' representatives are grouped a Digital Markets Advisory Committee ("DMAC"), which is a new concept brought by DMA. DMAC will advise the Commission on the designation of the gatekeepers on the basis of the quantitative and qualitative indicators, suspension and exemption of obligations or condemnation for non-compliance or systematic non-compliance, however, such advising opinions of DMAC are not binding for the Commission.

4.3. Evaluations on the Proposed Digital Markets Act

DMA has a long path to travel before entering into force, it may take a few years to form last version as a regulation. In this part, pros and cons are analysed by considering main criticism regarding DMA. The concerns raised under this part would be important during the legislation process, as they address the most remarkable points. The third research question is answered under this chapter, to what extent the recently proposed DMA is adequate to address the structural and behavioural competition problems for digital markets within the EU, referred to in the first research question.

The first evaluation is based on the main objective of DMA, which is to ensure fairness and contestability for digital markets within the EU. Most of the issues raised under the second section of this thesis, such as certain market failures mainly related to entry barriers due to the dominant positions of gatekeepers, cannot be addressed under existing competition tools. Therefore, the obligations in DMA - *that may reduce such entry barriers* – are consistent with the main concerns raised by many recent reports (*e.g. the US Investigation of Competition in Digital Markets and Impact Assessment Report by the Commission*) as well as ordo-liberal economic tradition in Europe. The objective of fairness is consistent with national traditions in many Member States, however, it is relatively new at the EU level.[199] EU law has avoided from distributional issues up to the present, with competition law in particular prioritising exclusionary abuses over exploitative abuses. Therefore, homogeneity of preferences among Member States is lesser for distributional issues than for efficiency issues.[200] As the gatekeepers have changed this tendency due to

[199] CERRE, A First Assessment, *op. cit.*, p. 11.
[200] *Ibid.*

significantly unbalanced relationships with their business users and the end users, the fairness objective may be justified at the EU level as well.

The second evaluation is based on the criteria and thresholds to be designated as a gatekeeper. The three criteria test does not refer to the definion of relevant market and market power to designate a core service provider as a gatekeeper, however, the second and third criteria are related to the concept of market power. The thresholds to be satisfied to meet these criteria and indicators that may be used for rebuttal opportunity for such presumptional thresholds are also linked to market power. These theresholds and criteria may be intensively deemed in relation with the market power concepts to be used for the assessment of dominant position in competition law as well.[201] On the other hand, the rebuttal opportunity for the gatekeepers would encourage them to disloce quantitative and qualitative that they solely know better than the Commission, which would create more transparent digital platforms.

The third evaluation is based on the obligations set out under DMA. It is constructed on past and current antitrust cases where it was proven that the structural and behavioural competition problems in digital markets cannot be addressed by existing competition tools in the most effective and functional way. As DMA adopts *ex ante* approach providing rules to constrain the gatekeepers before any anti-competitive behaviour can realize instead of *ex post* approach, which is also supported by some scholars since it is seen advantageous as it provides prooceding on a case-by-case basis which is appropriate for variety of business models and prevents the imprecision of regulation.[202] Some may adopt a view that the regulation must be the second option to ensure fair and contestable digital markets, in case there are certain existing competition and more sector-specific rules to address structural and behavioural competition problems in digital markets. However, it is the author's view that the regulation, *as a tool to ensure fairness and contestability*, was not the first choice at all. For the last decade, there occured many investigations and cases against the largest digital players, however, it was very hard to capture all the anti-competitive issues in most cases, in particular in the

[201] *Ibid*, p. 15.

[202]Anderson, J. and M. Mariniello, "Regulating big tech: the Digital Markets Act", Bruegel Blog, February 16 2021, available at: https://www.bruegel.org/2021/02/regulating-big-tech-the-digital-markets-act/, (access date: 09.06.2021).

cases that they are directly related to certain market structures. Moreover, even if it is possible to prove and capture certain anti-competitive behaviours of the largest digital players, it comes too late, following long and complex proocedings. It is controversial whether previous investigations and cases against these largest players bring the best outcomes for the digital markets since their market capitalization is strong enough to cover competition law fines and their business models may be adapted in accordance with newly established competition rules, especially in cases where fragmented regulation exists.

Some may claim that there were many companies in the past as strong as these largest digital players subject to DMA, then they lost their dominant positions due to disruptive technological developments, meaning that self-corrective mechanisms would continue to work in digital markets, even if it takes time. It is the author's opposition to this view that such experiences related to the companies that were in a dominant positions in their markets once upon a time cannot be a justification ground to expect the same for the gatekeepers in the near future. It is the author's view that such assessments and expectations must be constructed on comparative analysis by considering all the structural features of today's digital markets and power of the gatekeepers in terms of a wide range entry barriers and capital powers that they hold. If there are ones claming that Nokia has lost its concentrated market power for instance, so that, it is possible for Google and Facebook as well in the future, then they need to give justifiable grounds rather than just saying "*it would be possible, it is the main feature of disruptive development in digital markets*". To rely on experiences like Nokia and expect that the same would be possible for the gatekeepers would not go beyond wishful thinking, in case these companies are compared on a realist basis. On the other hand, the author is not expecting the same for the gatekeepers, conversely, it is evident that the gatekeepers have contributed much in economy and society, however, an *ex ante* regulation is needed to sustain these contributions in the future by ensuring fair and contestable digital markets. Laslty, there is nothing new and problematic with having *ex ante* regulatory schemes for non-functional antitrust cases, which was the case in the

telecommunications sector with the regulation of international roaming charges and in the financial sector with the regulation of credit card interchange fees.[203]

DMA sets detailed obligations specifically addressing certain structural and behavioural competition problems rather than drawing a legal framework. It is also controversial whether it would be better to have more detailed or more general rules. Detailed rules may be advantageous in terms of accelerated intervention when necessary and more harmonisation by eliminating fragmentation in the legal system where it is more crucial that these rules are enforced by different national authorities with their own regulatory discreation, which is the case within the EU.[204]

On the other hand, general rules may provide flexibility, which is needed at most in particular digital markets due to their dynamic and unique features. The Commission has chosen a hybrid system consisting of directly applicable and susceptible of being further specified obligations for the gatekeepers, even if most of the rules are detailed as explained above. More flexibility would be better for DMA in terms obligations, in particular the ones directly applicable under Article 5. These obligations under Article 5 may be strictly kept limited to certain obligations which are always detrimental to fair and contestable digital markets, such as Articles 5(d) and 5(f) DMA. Therefore, the scope of Article 6 DMA may be expanded to the obligations which are more general based on certain theories of harm such as lack of transparency, envelopment through bundling and self-preferencing, lack of access to platforms and data.[205]

In case a more flexible DMA is achieved, there would be issues arising on the fragmented legal system as the Commission enforces these rules rather than national authorities of Member States.[206] Contrary to the telecommunications regime, enforcement powers are exclusively held by the Commission, even if Member States may be represented by their national authorities in Digital Markets Advisory Committee that would assist the Commission.[207] This point may be a

[203] CERRE, A First Assessment, *op. cit.*, p. 21.

[204] *Ibid.*

[205] *Ibid.*

[206] *Ibid.*

[207] Prof. Lorna Woods, "The Proposed Digital Markets Act: Overview And Analysis", EU Law Analysis, January 14 2021, available at: http://eulawanalysis.blogspot.com/2021/01/the-proposed-digital-markets-act.html, (access date: 09.06.2021).

controversial issue between the Member States during legislation process. There is a criticism about the role of the Commission, as the proposed DMA grants the Commission significant powers, including the power to amend the content of the regulation if necessary. Moreover, DMA does not create a policy-making space for Member States as it prevents them to adopt national legislation imposing further obligations on gatekeepers as per Article 1.5 DMA.

Another issue regarding the obligations is that they are applicable to all gatekeepers regardless of their individual features and business models. An individualisation is foreseen in the Advice of the CMA Digital Markets Taskforce to the UK Government.[208] For instance, certain obligations are only applicable to only some types of core platform services (*e.g. marketplaces, search engines*) and certain obligations under Article 6 DMA may be specified in accordance with the individual features and business models of the gatekeepers based on a consultation between the Commission and the gatekeepers by providing effectiveness and proportionality at the same time.[209]

As a last issue on the obligations is that the gatekeepers cannot rely on an explicit efficiency defence or objective justification against these rules. Such defences and justifications shall not remove the obligations for the gatekeepers, however, they would be useful to shape these obligations. Efficiency defences and objective justifications must be strictly limited to the obligations set out under Article 6 DMA under narrowly exercised circumstances by keeping the obligations under Article 5 DMA as they may be always deemed as detrimental to fair and contestable markets (*please consider abovementioned evaluation on the structuring of Articles 5 and 6 DMA for this part as well*). Moreover, the gatekeepers may bear the burden of proof such a defence to convince the Commission that their practices do not harm the contestability and fairness in digital markets.[210]

It is crucial to ensure a strong cohesion between DMA and beforementioned competition and more sector-specific rules. For instance, there are arising concerns about the relationship between DMA and GDPR in terms of their interests on the

[208] CMA, Digital Markets Taskforce, April 3 2020, available at: https://www.gov.uk/cma-cases/digital-markets-taskforce#taskforce-advice, (access date: 09.06.2021).

[209] CERRE, A First Assessment, *op. cit.*, p. 22.

[210] *Ibid.*

users and the users' privacy, therefore it is noteworthy to consider how these two instruments will operate together.[211] Some scholars state that it is very important to articulate the scopes and relations between DMA, anti-trust law and Digital Services Act.[212] As a reminder, the issue on *ne bis in idem principle* arisen in the second section of this thesis would be a problem as well. The principle of *ne bis in idem* would apply under the circumstances that "*the facts must be the same, the offender the same and the legal interest protected the same*" according to the CJEU.[213] Moreover, it is also noteworthy to state that Articles 101 and 102 of TFEU cannot be rendered as inapplicable by secondary legislation as they are primary laws.[214]

5. Summary and Conclusion

Core platform services provided by the potential gatekeepers are at the center of today's economic and social life. As these services are used by hundreds of millions, most of people cannot imagine a world without them. However, those may have difficulties to foresee fair and contestable digital markets as well. It is undeniable that the largest digital platforms have contributed to economic and social life much more than most of the other economic actors as explained in the first and second sections of this thesis. However, it is also undeniable that such contributions have been dissappering for the last years due to competition problems in digital markets. There are contemporary structural and behavioural competition problems in digital markets. Weak contestability due to structural competition problems in digital markets have mostly arisen as a result of entry barriers such as network effects, switching costs, the accumulation of data, economies of scale and scope. Such entry barriers have shifted the concept of competition from competition *in* the market to the competition *for* the market, which creates winner takes all situations in digital markets. These structural competition problems are combined

[211] *Ibid.*

[212] Florence G'sell, *op cit*.

[213] Centre on Regulation in Europe, "Report - Digital Markets Act: Making Economic Regulation of Platforms Fit for the Digital Age", December 2020, p. 86, available at: https://cerre.eu/wp-content/uploads/2020/11/CERRE_DMA_Making-economic-regulation-of-platforms-fit-for-the-digital-age_Full-report_December2020.pdf, (access date: 09.06.2021).

[214] *Ibid.*

with anti-competitive practices conducted by the largest digital platforms. Unfair business conditions for the business users imposed and anti-competitive practices such as self-preferencing and anti-steering conducted by these digital platforms enable these digital platforms to enjoy entrenched and durable market positions. These contemporary competition problems may remove the value that they have generated for the last decades in terms of quality, price and innovation opportunities for the users.

There are, to some extent, functional competition law tools which are Articles 101 and 102 TFEU and EUMR. However, these competition rules cannot address all structural and behavioural competition problems in digital markets. Moreover, it becomes too late to create relevant solutions that may be addressed by these tools in most cases due to their *ex-post* characters. Digital markets have unique and dynamic features requiring long and complex competition law evaluations in terms of investigations and cases against concerned digital platforms. Even if these rules may adapt themselves in accordance with the current developments in digital markets, concerned digital platforms may be one move ahead of such adaptations.

There are also more sector-specific rules such as P2B Regulation, GDPR and EU consumer law. However, the scope of GDPR and EU consumer law is very limited in terms of the relationships between the business users and the gatekeepers. P2B Regulation sets out important provisions related to platform-to-business relationships but they mostly have an informative character to pursue transparency rather than binding restrictive obligations regarding certain anti-competitive actions of the gatekeepers. It is praiseworthy that these rules try to adapt themselves with the current developments in digital markets, however, it is not possible to extend their scope of application to the legal interests that an *ex ante* regulation, such as DMA, aims to protect. Therefore, these competition and sector specific rules are not sufficient to capture all structural and behavioural competition problems in digital markets within the EU.

The proposed DMA is very welcomed at this point. Contrary to *ex post* intervention regimes in EU competition law, it proposes an *ex ante* regulation for digital markets. It is a more adequte tool to ensure fair and contestable digital markets as it does not wait until an anti-competitive behaviour conducted by digital platforms as it also

addresses well identified structural competition problems that would not be addressed by the existing rules. DMA eliminates the problems related to fragmented regulation scheme across the EU which makes difficult to cover entire competition problems in a broad range. There is no empirical evidence that the gatekeepers would not exercise anti-competitive practices based on their unilateral decisions as a result of their entrenched and durable market positions and the entry barriers would be eliminated in the near future. On the contrary, there are many evidences to justify the need for such an *ex ante* regulation.

On the other hand, the proposed DMA is not the best tool that would address all identified competition problems in this thesis. Its detailed provisions make DMA as an adequte tool to address most of the competition problems in digital markets, however, flexibility may be also considered as digital markets have significantly unique and dynamic characters. Such a flexibility would be provided by restructuring the obligations under Articles 5 and 6 DMA as explained in the forth section of this thesis. In relation to that, individualisation of these obligations may be provided in accordance with certain features and business models of the gatekeepers. There would be a space for the gatekeepers to rely on efficiency defence or objective justification to a very limited extent under certain circumstances. The burden of proof for such defences and justifications may be borne by the gatekeepers to convince the Commission. Last but not least, there must be a strong cohesion with the other existing tools addressing these competition problems in digital markets, therefore, the Commission must pursue a harmonisation in that regard as well.

As a final say, the concept of *ex ante* regulations in markets where antitrust mechanisms cannot address all anti-competitive issues is not a new and problematic one, and would be necessary. However, the legislation processes of such regulations are very important in every aspects, therefore suggestions in this thesis for DMA may be considered to create a more functional and balanced *ex ante* regulation for digital markets.

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