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The proposed Digital Markets Act

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Abstract

The market power of digital platforms and ecosystems has probably been the most discussed and concerning topic in competition policy in the last years. Some companies in the area of digital platforms have grown so rapidly that they now dominate entire industries. These firms are particularly Google, Amazon, Facebook, Apple and Microsoft (the so-called GAFAM). Besides the dominant position these organisations are the most valuable firms in the world, according to their stock market capitalisation.¹ These big tech companies even top companies in oil and financial services regarding world market capitalisation.

According to Art. 102 TFEU it is not forbidden to have a dominant position, but the abuse of it is. Apart from this it is concerning when this dominant position is no longer contestable and other companies can therefore not enter the digital market anymore. Further grew the concerns that large tech companies may abuse their market power to protect and expand their market position at the costs of their competitors and consumer welfare.²

Following the introduction of new laws regarding this issue in some member states like Germany³, the European Commission proposed in December 2020 the DMA to ‘ensure fair and open digital markets’ in the EU⁴ and to regulate the big tech companies. The DMA is therefore the reaction of the EU to potential abuses of market power in digital markets.⁵

This thesis aims to give an overview over the objectives of EU Law which are important in relation to the DMA and EU Competition Law. Furthermore provides this work an analysis of the digital market with its features and challenges and introduces the DMA as a possible solution for the problems on the digital market.

¹ Justus Haucap and Heike Schweitzer, ‘Die Begrenzung überragender Marktmacht digitaler Plattformen im deutschen und europäischen Wettbewerbsrecht’ (2021) 22/1 pp. 17 - 26 *Perspektiven der Wirtschaftspolitik* <<https://www-degruyter-com.ludwig.lub.lu.se/document/doi/10.1515/pwp-2021-0015/html>> accessed 12 August 2021.

² Georgios Petropoulos, ‘Economic and Business Dimensions – A European Union Approach to Regulating Big Tech’ (2021) 64/8 pp. 24 – 26 *Communications of the ACM* <https://dl.acm.org/doi/pdf/10.1145/3469104?casa_token=fyB2YeItK9QAAAAA:vZ_4Yk8G2S1Y1kd0Ef64qu0bMtOAFvE8GoxsicLDTgHTxoWH5G7bvbNGtwnpHnOQNbbOYjAlmNH5w> accessed 24 August 2021.

³ Bundeskartellamt, 10th Amendment to the German Competition Act, <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.html;jsessionid=9C92D502CA7D41DFEA2B6F4283024C7A.2_cid387?nn=3591568> accessed 27 August 2021.

⁴ European Commission, ‘The Digital Markets Act: ensuring fair and open digital markets’ <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en> accessed 30 August 2021.

⁵ Georgios Petropoulos, ‘Economic and Business Dimensions – A European Union Approach to Regulating Big Tech’ (2021) 64/8 pp. 24 – 26 *Communications of the ACM* <https://dl.acm.org/doi/pdf/10.1145/3469104?casa_token=fyB2YeItK9QAAAAA:vZ_4Yk8G2S1Y1kd0Ef64qu0bMtOAFvE8GoxsicLDTgHTxoWH5G7bvbNGtwnpHnOQNbbOYjAlmNH5w> accessed 24 August 2021.

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Abbreviations

AI	Artificial Intelligence
Art.	Article
CJ	Court of Justice
DMA	Digital Markets Act
DSA	Digital Services Act
ECJ	European Court of Justice
ECMR	EC Merger Regulation
EU	European Union
FCO	Federal Cartel Office
GDPR	General Data Protection Regulation
GRUR Int.	Journal of European and International IP Law
IIA	Inception Impact Assessment
NCT	New Competition Tool
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
SME	Small and medium sized enterprises
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

Digital markets are a fast moving and complex environment and through digital services we have the possibility to communicate in new ways, new shopping possibilities arise and the access of information at any time becomes easier. Since the COVID-19 pandemic, these possibilities are more important than ever. Another benefit is that the EU internal market became more efficient and digital platforms simplified cross-border trade in the Union and globally, which brought new opportunities to European businesses. Unfortunately besides these numerous benefits, new challenges arise which have big consequences on society and the economy.

One central problem is the enormous impact that these challenges pose on fundamental rights. For example, trading of illegal goods, services and content became easier through online platforms. Additionally, it increases the danger of spreading disinformation or the misuse of online services by manipulative algorithmic systems.⁶ In addition to the harm of fundamental rights online, problems in EU Competition Law matters appear. A few years ago it was common that online platforms just disappeared from the market because new ones occurred and replaced the old ones (e.g. Facebook oust Myspace). Therefore natural competition existed on these markets, but nowadays platforms do not vanish – they just get bigger, develop new features or merge with other platforms to get more market power (e.g. the merger between Facebook and WhatsApp). These mergers have the effect that some platforms become gatekeeper⁷ of online platforms. In conclusion, this means that through ‘the accelerating digitalisation of society and economy’ a situation is created ‘where a few large platforms control important ecosystems in the digital economy’. The named gatekeepers have ‘the power to act as private rule-makers’ and these rules can lead to unfair conditions for business users and ‘less choice for consumers’.

The mentioned possibilities and challenges evolve on a constant basis and the EU has to develop legislation to keep up with this repeatedly changing environment. So far, there are only a few sector-specific interventions at Union level in place and ‘there are still significant gaps and legal burdens to address’.⁸ To tackle the problems on the digital markets the Commission

⁶ European Commission, ‘The Digital Services Act package’, <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>> accessed 27 August 2021.

⁷ ‘Gatekeeper’ is a newly introduced term through the DMA. The conditions for gatekeepers are set out in Art. 3(1) DMA. A detailed information about this term follows in 4.5.1 of this thesis.

⁸ European Commission, ‘The Digital Services Act package’, <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>> accessed 27 August 2021.

set inter alia the priority ‘A Europe fit for the digital age’, which the Commission worked on from 2019 to 2024.⁹ A key point is that the new digital technologies change the lives of people in the EU and the strategy’s aim is to make this transformation work. Besides that, the Union sees the need to ‘strengthen its digital sovereignty and set standards’.¹⁰ Already in 2014 the Commission started to ‘facilitate the development of a data-agile economy’.¹¹ Part of this were for example the GDPR Regulation¹², the Cybersecurity Act¹³ and the Open Data Directive¹⁴. The Commission further presented in 2018 an AI strategy and followed this by proposing the Artificial Intelligence Act¹⁵ in April 2021.

In line of EU’s digital strategy, the Commission proposed in December 2020 two further regulations in form of a Digital Services Act package, consisting out of the DSA and the DMA. This package is a set of rules which will be applicable over the whole Union and according to the EU these two proposals have the aim (1) ‘to create a safer and more open digital space’ and (2) ‘to establish a level playing field to foster innovation, growth, and competitiveness, both in the EU Single Market and globally’. The Commission further explains that the provisions from the DSA concern mainly online intermediaries and platforms, which are inter alia ‘online marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms’. The DMA, on the other hand, contains rules regulating gatekeeper online platforms. With this package the Union intends to establish a legal framework ‘that ensure the safety of users online, established governance with the protection of fundamental rights at its forefront, and maintains fair and open online platform environment’.¹⁶

⁹ European Commission, ‘Strategy’ <https://ec.europa.eu/info/strategy_en> accessed 25 August 2021.

¹⁰ European Commission, ‘A Europe fit for the digital age’, <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en> accessed 27 August 2021.

¹¹ European Commission, ‘A Europe fit for the digital age’, <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en#actions> accessed 27 August 2021.

¹² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

¹³ Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity and repealing Regulation (EU) No 526/2013 (Cybersecurity Act) [2019] OJ L 151/15.

¹⁴ Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L 172/56.

¹⁵ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final.

¹⁶ European Commission, ‘The Digital Services Act package’, <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>> accessed 27 August 2021.

1.2 Purpose and Research Question

The main purpose of this thesis is to evaluate if the DMA is a good tool to ensure fair and contestable markets in the digital sector or in other words to bring back competition in digital markets and therefore regulate the dominant position of big tech companies. In doing so this thesis will look into some of the objectives of EU Law which are important for the digital market, and it will investigate if these goals are reflected in the DMA. Further, the challenges of EU Competition Law in Digital Markets will be examined, and the question will be answered if the DMA could help to tackle these problems. In light of the purpose of this thesis, the following research question will be addressed:

Is the DMA a good tool to ensure fair and contestable markets in the digital sector, and will it help restore competition in the digital sector through gatekeeper regulation?

1.3 Methodology and Materials

In order to answer the above-mentioned research question this work uses several methods in the individual chapters and sections.

Firstly, in order to present and describe important objectives of EU law in this context, the constitutional approach will be applied in the second chapter. The constitutional approach helps to examine ‘the values and principles that an entity possesses or should possess’.¹⁷ Further the constitutional method is used in the second chapter to examine how Internal Market objectives relate to EU Competition Law objectives.

Secondly, for the evaluation of the digital market with its special features and challenges, a descriptive method is used. This description of the digital market helps to understand the particularities of the same.

Part of the third chapter is also evaluated with a comparative approach to distinguish conventional and digital markets and to underpin the new challenges of digital markets.

Following this, in order to describe the DMA and its provisions a doctrinal legal research methodology, or also called ‘black letter’ methodology, will be employed. This methodology ‘aims to systematise, rectify and clarify the law [...] by a distinctive mode of analysis of

¹⁷ Nicholas Tsagourias, ‘Introduction – Constitutionalism: a theoretical roadmap’ in: Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives*, Cambridge University Press (2007) p. 1.

authoritative texts that consist of primary and secondary sources'¹⁸ and gives a normative framework to evaluate EU law and in this case the DMA-regulation. Further facilitates this method to give a 'descriptive and detailed analysis of legal rules'.¹⁹ Besides the doctrinal approach the fourth chapter will also be examined through a textual analysis within the light of EU Law structure, Internal Market Law and Competition Law. This analysis helps to scrutinize if the DMA is suitable and valid as well as if the interpretation is in line with EU law objectives.

Finally, in the last chapter an evaluative approach will be utilised to assess to what extend the DMA enhances the capabilities of the EU to regulate competition in the digital market and in what way the EU objectives are fulfilled by the proposal.

In addition to variation of applied methods are also different materials used in order to address the aforementioned research question. Encompassed in these materials are primary and secondary sources of EU law, like the treaties, regulations, and the jurisprudence of the Court. According to the novelty of the DMA and the fast-moving environment of digital markets, research articles, publications as well as blogposts and expert studies are used as well.

1.4 Delimitations

As mentioned above, the Digital Services package consists out of the DSA and the DMA. The focus in this thesis is on the DMA and therefore there will be no elaboration on the DSA other than in 4.2 regarding the relationship between the two proposals.

Furthermore, the paper focuses on the question whether the DMA is a good tool to ensure fair and contestable markets in the digital sector and if it will help to restore competition in the digital sector through gatekeeper regulation. Therefore, the assumption is made that the DMA is proposed on the right legal basis (Art. 114 TFEU). Consequently, it is assumed that the DMA is an instrument of the EU single market, which facilitates EU Competition Law. However, section 4.3 of this thesis will elaborate on the discussion about the DMA's legal basis. Moreover, the question whether the DMA promotes economic efficiency will not be assessed.

¹⁸ Mike McConville and Wing Hong Chui (ed), *Research Methods for Law* (2nd edn, Edinburgh University Press 2007/2017) p. 14
<https://edinburghuniversitypress.com/pub/media/resources/9781474404259_Research_Methods_for_Law_-_Introduction_and_Overview.pdf> accessed 20 May 2021.

¹⁹ Jerome Hall Law Library – Maurer School of Law, 'Legal Dissertation: Research and Writing Guide'
<<https://law.indiana.libguides.com/dissertationguide>> accessed 20 May 2021.

1.5 Outline

This thesis contains five chapters including the introductory chapter. In order to answer the aforementioned research question, the second chapter defines and evaluates on some objectives of EU law and their relevance to EU Competition Law. The third chapter explains the digital markets in the EU with their special features and current challenges. After this, chapter four of this thesis introduces the DMA as a possible new instrument of the Union to tackle problems on the digital market. Finally, chapter five gives a conclusive evaluation and answers the research question.

2 Objectives of EU Law

In addressing the question of whether the proposed DMA is a good tool to ensure fair and contestable markets in the digital sector and if it will help to bring back competition in the digital sector through the regulation of the companies which provide a core platform, it is useful to start with the objectives of EU Law which are applicable for the digital sector. This will help to understand what values of EU Law are important especially in digital markets and how the DMA may have the same objectives and can help to fulfil these goals.

According to Art. 2 TEU the Union is ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. In addition to this, the Union aims to promote ‘the well-being of its people’ (Art. 3(1) TEU), ‘to establish an internal market’, to promote ‘the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress’, (Art. 3(3) TEU) as well as to ensure ‘an open market economy with free competition’²⁰. Competition law helps to fulfil these objectives with its instruments. Inter alia states Protocol No 27 that ‘the internal market as set out in Art. 3 TEU includes a system ensuring that competition is not distorted’.²¹

Case law and official publications have clarified and interpreted EU competition rules in the last years.²² For example, competition is, according to the European Commission, protected ‘as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources’.²³ Furthermore, competition law protects ‘not only the interests of competitors or of

²⁰ Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, Art. 119, 120, 127, 170, 173.

²¹ Consolidated version of the Treaty on European Union – Protocols - Protocol No 27 on the internal market and competition [2008] OJ C 115 9.5.2008, p. 309-309.

²² Ariel Ezrachi, ‘EU Competition Law Goals and The Digital Economy’ (2018) Oxford Legal Studies Research Paper 17/2018, p. 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 30 April 2021.

²³ Ariel Ezrachi, ‘EU Competition Law Goals and The Digital Economy’ (2018) Oxford Legal Studies Research Paper 17/2018, p. 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 30 April 2021; European Commission, Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97, para. 13.

consumers, but also the structure of the market and, in so doing, competition as such'.²⁴ Worthy of note is also market integration, which is a unique goal of EU law.²⁵

These treaty-based competition rules are the core goals and have to be interpreted in accordance with broader normative values. As is laid down in Art. 7 TFEU 'the Union [shall] [...] ensure consistency between the policies and activities, taking all of its objectives into account'. Therefore inter alia following things have to be considered while applying Union policies: Consumer protection (Art. 12 TFEU), public health (Art. 168(1) TFEU, Art. 35 Charter), environmental issues and equality considerations (Art. 8 TFEU).²⁶

2.1 Discussion in the literature

Throughout the last years, a debate has arisen about the objectives of EU competition law and it is 'difficult to find a common view in the literature'.²⁷ This chapter outlines some of the key goals, but it cannot be seen as an exhaustive list. These objectives represent 'the ethos of competition law in Europe'.²⁸

For a better understanding it is useful to give a short definition of the terms 'objectives' and 'competition policy' in this context. An objective is a pursued goal and 'it is inherent in the concept of objectives that they are ideals, which are never or seldom achieved'.²⁹ There are different approaches to distinguish objectives: Some determine them into ultimate and intermediate goals and an OECD report³⁰ categorized them into public interest objectives, core competition objectives and the grey zone. The distinction between ultimate and intermediate goals can be exemplified by the protection of the competitive process being the intermediate and consumer welfare being the ultimate goal. In terms of OECD categorisation, public interest objectives that are not economic can be said to focus on 'social protection or the protection of certain strategic economical sectors'. As core competition objectives are generally 'promoting

²⁴ C-501/06 P *GlaxoSmithKline Services Unlimited v Commission and Others* [2009] ECR I-9291, para 63.

²⁵ Information Service High Authority of the European Community for Coal and Steel Luxembourg, 'The Brussels Report on the General Common Market' (Spaak Report) (1956); David J Gerber, 'The Transformation of European Community Competition Law?' (1994) *Harvard Intl LJ* 97, 102.

²⁶ Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) *Oxford Legal Studies Research Paper* 17/2018, p. 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 30 April 2021.

²⁷ Laura Parret, 'Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy' (2010) 6(2) *ECJ*, p. 345.

²⁸ Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy' (2018) *Oxford Legal Studies Research Paper* 17/2018, p. 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 30 April 2021.

²⁹ Laura Parret, 'Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy' (2010) 6(2) *ECJ*, p. 339.

³⁰ OECD Secretariate, 'The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency' (2003) 5 *OECD Journal of Competition Law and Policy* 7.

and protecting the competitive process and attaining greater economic efficiency'. And last but not least are the objectives which are not fitting in one of these two categories grey zone objectives. This is e.g. the protection of SMEs or fair competition.³¹

There is another question which arises regarding the objectives of EU competition law: 'Are the objectives of competition law a source of law or can they be considered binding?'. To answer this question it is important to look at general principles of EU law, which are similar to objectives of EU competition law, and undoubtedly can be seen as a source of EU law. Furthermore proof of existence of bindingness can be found in ECJ case law, where the Court gives immense significance to objectives which arise from the treaties. The reference by the Court to the objectives of the treaties shows that the objectives are some kinds of sources of law.³²

Another important definition to look at is the one of 'competition policy'. For example, Motta defines competition policy as 'a set of policies and laws which ensure that competition in the market place is not restricted in such a way as to reduce economic-welfare'.³³ Further, it is stated in the Annex of the TEU (Protocol No 27) that 'the internal market as set out in Article 3 of the Treaty on the European Union includes a system ensuring that competition is not distorted'. Competition policy helps to fulfil this goal.³⁴

2.1.1 Consumer Welfare

In Art. 3(1) TEU, the term 'well-being' is included, and case law refers to the term as well, which demonstrates 'abstract normative properties'. Based on this, the European Commission has used the term 'consumer welfare' and established it in European law. The terms 'well-being' and 'consumer welfare' overlap because the 'normative concept of well-being encompasses the more narrow, economically oriented, concept of consumer welfare'. Moreover the Commission discusses the role of consumer welfare in its guidelines.³⁵

³¹ Laura Parret, 'Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy' (2010) 6(2) ECJ, p. 339 f.

³² Laura Parret, 'Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy' (2010) 6(2) ECJ, p. 340.

³³ Massimo Motta, *Competition Policy, Theory and Practice* (Cambridge University Press, 2004), p. 30.

³⁴ Ariel Ezrachi, 'Discussion Paper: The goals of EU Competition Law and the Digital Economy', p. 3 <https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf> accessed 23 April 2021.

³⁵ Ariel Ezrachi, 'Discussion Paper: The goals of EU Competition Law and the Digital Economy', p. 5 <https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf> accessed 23 April 2021.

Concerning Art. 101 TFEU states that ‘[t]he aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources’.³⁶ The view regarding Art. 102 TFEU is similar, the Commission held that ‘its enforcement activity aims to prevent ‘an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.’³⁷

Consumer welfare has long been seen as the prime goal of competition law and the General Court noted following: ‘[T]he ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers [...] Competition law and competition policy [...] have an undeniable impact on the specific economic interests of final customers who purchase goods or services.’³⁸ In addition stated the CJ that consumer well-being can be damaged directly and indirectly, meaning that provisions of competition law entail ‘not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition’.³⁹

2.1.2 Economic Efficiency

In EU law, the objectives of consumer welfare and economic efficiency are in many cases mentioned together. The Commission cites consumer welfare more frequently, but economic efficiency ‘is often seen as the overall, general objective of competition policy’.

There are three different concepts of efficiency: Allocative efficiency, productive efficiency, and dynamic efficiency. Allocative efficiency means that ‘the efficient allocation of all resources’ is ensured. This differs from productive efficiency which is when ‘a particular firm or industry [is] ensuring that it exploits all economies of scale and technology and cuts unnecessary costs’. These two categories are static concepts where, on the other hand dynamic efficiency ‘also incorporates looking at the potential of the economy as a whole or of a firm or industry’.

³⁶ European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ [2004] OJ C101/97, para. 3.

³⁷ European Commission, ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ [2009] OJ C 45/02, para.19.

³⁸ Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601, para 115; Ariel Ezrachi, ‘Discussion Paper: The goals of EU Competition Law and the Digital Economy’, p. 5 <https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf> accessed 23 April 2021.

³⁹ Ariel Ezrachi, ‘Discussion Paper: The goals of EU Competition Law and the Digital Economy’, p. 5 <https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf> accessed 23 April 2021; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI, para 20; Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, para 24.

Compared to consumer welfare can allocative efficiency be seen as total welfare and a lot of economists see a potential for conflicts between the two objectives. Furthermore it is hard to name the role of efficiency because the Commission mentions it always with consumer welfare.⁴⁰ For example Commissioner Kroes said in a speech in 2005: *‘Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy [...] competition is not an end in itself but an instrument for achieving consumer welfare and efficiency’*.⁴¹

2.1.3 Protection of the Competitive Process

The Member States committed, when agreeing to the establishment of an internal market, that this internal market should be ‘a highly competitive social market economy’, which is laid down in Art. 3(3) TEU. Based on this, the European Courts elaborated on the importance of the protection of the competitive process. One example is *T-Mobile*, where the CJ stated, that European competition law ‘is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such’.⁴² Furthermore, the Court highlighted in *Kokurensverket v TeliaSonera Sverige* that competition has to be prevented ‘from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union’.⁴³

The protection of the competitive process is additionally enshrined in Art. 102 TFEU. In this article the drafters obliged ‘a special responsibility on dominant firms not to distort competition on the market, limit the buyer’s freedom as regards choice of sources of supply, or bar competitors from access to the market’.⁴⁴ For the other competition law provision in Art.

⁴⁰ Laura Parret, ‘Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy’ (2010) 6(2) ECJ, p. 349 f.

⁴¹ Commissioner Neelie Kroes, Speech at the European Consumer and Competition Day in London, ‘European Competition Policy – Delivering Better Markets and Better Choices, 15 September 2005 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512> accessed 23 April 2021.

⁴² Ariel Ezrachi, ‘Discussion Paper: The goals of EU Competition Law and the Digital Economy’, p. 7 <https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf> accessed 23 April 2021; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-452, para. 38.

⁴³ Ariel Ezrachi, ‘Discussion Paper: The goals of EU Competition Law and the Digital Economy’, p. 7 <https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf> accessed 23 April 2021; Case C-52/09 *TeliaSonera Sverige* [2011] ECR I, para. 22.

⁴⁴ Ariel Ezrachi, ‘Discussion Paper: The goals of EU Competition Law and the Digital Economy’, p. 8 <https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf> accessed 23 April 2021.

101 TFEU the view is supported that ‘in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices’.⁴⁵

Moreover, more indications can be found in Commission Guidelines or case law, which implies that ‘protection of the competitive process’ is an important objective. In the Guidelines on Enforcement Priorities the Commission wrote: ‘[...] what really matters is protecting an effective competitive process and not simply protecting competitors’.⁴⁶ Additionally, *GlaxoSmithKline* and *Intel* show that Art. 101 and 102 TFEU ‘aim to protect not only the interest of competitors or of consumers, but also the structure of the market, and, in so doing, competition as such’.⁴⁷

2.1.4 Market integration

Market integration in the contrary to other objectives ‘makes the EU competition law system unique’ and it is an objective, which is ‘very particular to the EU’.⁴⁸ Furthermore the Treaty and part of case law state that market integration is one of the key objectives of EU law.⁴⁹ This can be attributed to the fact that the internal market is fundamental for the existence of the EU and the market integration objective has ‘marked considerable the history of EU competition law’.⁵⁰

Moreover the competition rules in Art. 101 and 102 TFEU are necessary because they are complementing ‘the Treaty rules on the four freedoms’ and a combination of free movement and competition rules lead to an integration of the markets of the Member States. Next to obstacles according to state measures can agreements and abusive conduct create similar

⁴⁵ Ariel Ezrachi, ‘Discussion Paper: The goals of EU Competition Law and the Digital Economy’, p. 8 <https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf> accessed 23 April 2021; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-452, para. 39.

⁴⁶ European Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (Communication) 2009/C 45/02, para. 6.

⁴⁷ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others* [2009], ECLI:EU:C:2009:610, para 63; Case T-286/09, *Intel v Commission* [2014], ECLI:EU:T:2014:547, para 105; Andersen Emily, ‘The Role of Consumer Welfare in EU Competition Policy: How Understanding the Priority Conferred Upon Competition Policy Objectives May Shed Light on Modern Day Inconsistencies’ (Master Thesis Lund University 2020), p. 29.

⁴⁸ Laura Parret, ‘Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy’ (2010) 6(2) ECJ, p. 346.

⁴⁹ Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, para. 20; See Art. 3(3) TEU.

⁵⁰ Ioannis Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’ (2013) 3/2013 CLES Working Paper Series, p. 14.

obstacles between Member States.⁵¹ It is recognised that territorial allocation and export restrictions, irrespective if final consumers are affected, are restrictions of competition by object according to Art. 101(1) TFEU. These restrictions neither profit from the *de minimis* rule nor from the block exemption regulations because they are hardcore restrictions. Further it is unlikely that they realize the conditions of Art. 101(3) TFEU. This restrictive approach could be explained with the fact that market integration is a political objective, and it arose from ‘the idea [...] that a common market will ultimately lead to political unification’. In the last years the EU courts shifted their point of view about market integration to a more pragmatic one and introduced reasons why this objective could be in line with a welfare perspective.⁵² But the judgment also shows that ‘the Court of Justice is not willing to let go of market integration as a key element in determining how competition law should be applied’.⁵³

2.1.5 Protection of SMEs

An often-read statement in the discussion about the objectives of EU competition law is that competition law should protect competition and not competitors.⁵⁴ But despite this statement the protection of SMEs is enshrined in secondary EU legislation. An example is the Commission Notice on *de minimis* agreements⁵⁵, which shows *inter alia* the importance of SME protection.⁵⁶

To understand this objective it is helpful to define what SMEs are. Therefore the Commission has in 2003 published a recommendation ‘concerning the definition of micro, small and medium-sized enterprises’. According to Art. 1 of the Recommendation is an enterprise ‘considered to be any entity engaged in an economic activity, irrespective of its legal form’. The article further states that self-employed persons, family businesses, partnerships and associations are also included in the ambit of the definition of SMEs. Art. 2 of the Commission’s recommendation defines the SMEs further. Therefore, according to Art. 2(1) a SME is an

⁵¹ Laura Parret, ‘Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy’ (2010) 6(2) ECJ, p. 346 f.

⁵² Ioannis Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’ (2013) 3/2013 CLES Working Paper Series, p. 14; E.g. Joined Cases C-468/06 to 478/06 *Sot Lelos kai Sia v GlaxoSmithKline* [2008] ECR I-7139, para. 54.

⁵³ Laura Parret, ‘Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy’ (2010) 6(2) ECJ, p. 347.

⁵⁴ Renato Nazzini, ‘The Foundations of European Union Competition Law: The objective and principles of Article 102’ (2011) Oxford University Press, p. 24.

⁵⁵ European Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU (*De Minimis* Notice) (Communication) 2014/C 291/01.

⁵⁶ Laura Parret, ‘Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy’ (2010) 6(2) ECJ, p. 353.

enterprise which employs ‘fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million’. In Art. 2(2) and (3) are further thresholds regarding the staff headcount and financial ceilings which determine small enterprises (fewer than 50 people, EUR 10 million) and microenterprises (fewer than 10 people, EUR 2 million) included.⁵⁷

Similar to consumer welfare, the justification of protection of SMEs is based on the Union’s wish to protect the values of ‘fairness and equity’. Therefore SME protection can be seen as ‘rebalancing’ or ‘levelling the playing field’. Or in other words: The measures for SME protection should set up equal opportunities for all players in the competitive process and give SMEs the chance to compete with big companies.⁵⁸

Although SME protection is not explicitly mentioned in a lot of secondary legislation or case law, it is still relevant in EU competition law. This can be seen in the fact that the Commission mentions it in policy documents related to innovation and employment.⁵⁹

⁵⁷ European Commission, Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC.

⁵⁸ S. Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (2009), Hart Publishing, p. 33.

⁵⁹ Laura Parret, ‘Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy’ (2010) 6(2) ECJ, p. 353 f.

3 Digital Markets and EU Competition

Law

3.1 The Digital Markets

The digital economy is a key driver of future well-being which is creating innovation waves, efficiency gains, and consumer welfare. Furthermore, digitalisation has revolutionised 'business models, products, services, communication and social interaction'. Supplementary the digital economy brought a change in market dynamics and gave the origin for 'key platforms, networks and the proliferation of multi-sided markets'.⁶⁰

Digital markets bring competition enforcement challenges with them⁶¹, because the economic landscape is changing rapidly and on the other side raise the growth and evolution of the digital economy. The challenges come up on the practical level and on policy level. On the practical level have enforcement authorities to deal with the additional complexity of carrying out their assessment in a vibrant environment. Likewise this dynamic environment brings a degree of uncertainty that is inevitable in terms of the nature of competitive pressures, the self-corrective capacity of markets, probably claims, efficiencies as well as disruptive innovation. Besides, on the policy level questions arise regarding the 'normative scope of competition enforcement'. Often is it unsure if certain economic strategies, new consumer interaction tools, data accumulation and usage of big analytics are a problem in the field of competition.⁶²

This Chapter summarises the main specificities of digital markets and outlines the challenges which arise from digital markets especially in relation to EU Competition Law. In line of this digital market definition will be a differentiation to conventional markets.

3.1.1 Specificities of the Digital Market

Conventional markets have their own distinctive characteristics and can often not be applied directly to digital markets. The reason is that conventional markets consist mainly of one-sided

⁶⁰ Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy', Oxford Legal Studies Research Paper 27/2018, 10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 10 May 2021.

⁶¹ Lena Mischau, 'Market Power Assessment in Digital Markets – A German Perspective' (2020) GRUR Int. 233.

⁶² Ariel Ezrachi, 'EU Competition Law Goals and The Digital Economy', Oxford Legal Studies Research Paper 27/2018, 10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766> accessed 10 May 2021.

business models and digital markets are predominantly multi-sided platforms.⁶³ Considering these special features of digital markets the following will mention a few important ones.

3.1.1.1 Definition of multi-sided/platform markets

An essential attribute of digital markets is that they are often so-called ‘two-sided markets’, ‘multi-sided markets’, or ‘platform markets’. ‘Two-sided markets’ for example consist of a platform for consumers and sellers, whereas ‘multi-sided markets’ or ‘platforms’ have at least three sides (consumers, content suppliers, and advertisers) or even more. These three notions are often used interchangeably.

However, these terms also exist in conventional offline platforms and are not new to the digital world. Some examples for offline platforms are newspapers as a two-sided market (readers and advertisers), credit card companies with card holders, merchants, card-issuing banks and acquiring banks as multi-sided markets or shopping centres with shoppers and retailers. Even though these market forms are not new, the digital age has contributed to this type of market becoming extremely successful. Whether in terms of the classic business models of the ‘standard economy’ such as Amazon, or to new business models that are emerging as part of the concept of ‘sharing economy’ such as Uber or Airbnb.⁶⁴

The OECD defines a ‘multi-sided market’ as ‘a market in which a firm acts as a platform and sells different products to different groups of consumers, while recognising that the demand from one group of customers depends on the demand from the other group’.⁶⁵ Another institution characterizes ‘multi-sided markets’ due to two features: (1) ‘direct interaction between two different kind of users’⁶⁶ and (2) ‘indirect network effects between these user groups’.⁶⁷ The ‘direct interaction’ criterion distinguished platforms from traditional commercial relationships ‘by signifying that the platform is neither directly economically nor legally involved in the interaction between its users’.⁶⁸ It has to be noted that there are also ‘hybrid

⁶³ Monopolkommission, ‘Competition policy: The challenge of digital markets’ (2015) Special Report No 68, para 35.

⁶⁴ Lena Mischau, ‘Market Power Assessment in Digital Markets – A German Perspective’ (2020) GRUR Int. 233, 234.

⁶⁵ OECD, ‘Rethinking Antitrust Tools for Multi-Sided Platforms’ (2018) p. 10 <<https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>> accessed 01 September 2021.

⁶⁶ Lena Mischau, ‘Market Power Assessment in Digital Markets – A German Perspective’ (2020) GRUR Int. 233, 234; FCO Germany, ‘Digitale Ökonomie – Internetplattformen zwischen Wettbewerbsrecht, Privatsphäre und Verbraucherschutz, Tagung des Arbeitskreises Kartellrecht’ (2015) p.13.

⁶⁷ FCO Germany, ‘Digitale Ökonomie – Internetplattformen zwischen Wettbewerbsrecht, Privatsphäre und Verbraucherschutz, Tagung des Arbeitskreises Kartellrecht’ (2015), p. 4.

⁶⁸ Lena Mischau, ‘Market Power Assessment in Digital Markets – A German Perspective’ (2020) GRUR Int. 233, 235; FCO Germany, ‘The Market Power of Platforms and Networks’ (Working Paper) (2016) p.4

platforms', where the provider of this platform uses their own infrastructure to sell products. One example is Amazon marketplace.⁶⁹

3.1.1.2 Network effects

Another characteristic of digital markets are network effects. This term describes the interaction between the different users which are coming from different sides of a market.⁷⁰ In contrast to conventional markets is the intensity of competition in digital markets often 'determined by direct and indirect network effects'. On platform markets these favour direct and indirect network effects concentration and are therefore an important aspect of competition policy analyses.⁷¹ Moreover, direct, and indirect network effects can be classified as positive or negative.⁷²

Direct network effects refer to the size of the network and are present when the benefit a customer derives from the provision of a service increases with the number of customers using that service. In other words: A service becomes more attractive with the number of users it has. In consequence, networks which already have a large number of users are more attractive to new users. In digital markets, direct network effects are especially notable in social networks like Facebook or Instagram and communication platforms such as Skype or WhatsApp.⁷³

Indirect network effects exist when one side of the market has a lot of users, and this number of users increases the usage of another side of the market and makes the platform therefore more attractive. On the other side users benefit of one side of the market also if there is a high number of users on the same side, because this also attracts new users on the other side. An example of this is eBay because as more sellers are active on the trading platform as more products will be available and more buyers will use it. Consequently, platforms and multi-sided markets are classified as such if indirect network effects play a fundamental role.⁷⁴

<http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&Cv=4> accessed 01 September 2021.

⁶⁹ Lena Mischau, 'Market Power Assessment in Digital Markets – A German Perspective' (2020) GRUR Int. 233, 235.

⁷⁰ Lena Mischau, 'Market Power Assessment in Digital Markets – A German Perspective' (2020) GRUR Int. 233, 235.

⁷¹ Monopolkommission, 'Competition policy: The challenge of digital markets' (2015) Special Report No 68, para 36.

⁷² Lena Mischau, 'Market Power Assessment in Digital Markets – A German Perspective' (2020) GRUR Int. 233, 235.

⁷³ Monopolkommission, 'Competition policy: The challenge of digital markets' (2015) Special Report No 68, para 37.

⁷⁴ Ibid, para. 38.

The above described direct and indirect network effects are all positive network effects. The reason for this is that if on one side users increase, the number of users also increase on the other side. This can happen in between the same user group (direct network effects) or in the user group on the other side (indirect network effects). Nonetheless such co-dependence is not always necessarily positive. For example, users of one social network might be deterred by too much advertising from too many advertisers on the other market side.⁷⁵

3.1.1.3 Economies of scale

Economies of scale is a feature which is common for digital markets whereas the cost structure shows that fixed costs are high and the variable costs low.⁷⁶ An example is the development of a software platform where the fixed costs of the development are high but the marginal costs for providing that platform are low for the end users and the developers.⁷⁷ On first sight these effects do not differ much from conventional multi-sided markets but the difference is the scalability of these effects in digital markets. Offline marketplaces are often limited by external factors like capacity or transport costs, and this is not necessarily the case in digital markets. Therefore economies of scale can become virtually almost unlimited.⁷⁸ Of course there are also situations where diseconomies of scale can occur in digital markets. One example is when an update becomes more expensive because of the increasing complexity of a platform.⁷⁹

3.1.1.4 'Free' goods and services

The before explained network effects influence the prices on all market sides. If users cause strong positive network effects they normally pay a low price, and on the other side users who cause weak network effects pay a high price.⁸⁰ This has the consequence that prices on the different market sides vary drastically. One example is the search engine Google: Users pay no monetary price whereas advertisers must pay money.⁸¹ Even so the users do not pay a monetary

⁷⁵ Case Summary, B6-126/14 *Google/VG Media*, 3.

⁷⁶ Monopolkommission, 'Competition policy: The challenge of digital markets' (2015) Special Report No 68, para 46.

⁷⁷ David S Evans and Richard Schmalensee 'The Industrial Organization of Markets with Two-Sided Platforms' (2007) 3(1) *Competition Policy International* 151, 165.

⁷⁸ Lisa Hamelmann and Justus Haucap, in Thomas Apolte and others (eds), *ORDO, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, vol 67 (De Gruyter 2016) 269, 272.

⁷⁹ David S Evans and Richard Schmalensee, 'The Industrial Organization of Markets with Two-Sided Platforms' (2007) 3(1) *Competition Policy International* 151, 165.

⁸⁰ Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer 'Competition policy for the digital era, Final report' for *European Commission* (2019) p. 44.

⁸¹ Monopolkommission, 'Competition policy: The challenge of digital markets' (2015) Special Report No 68, paras 39 f.

price, the usage of the platforms cannot be seen as completely free, because users pay with the dedicated attention to the advertisements or the personal data they allow the platform to collect from them. Therefore it is misleading to advertise the platforms as such.⁸² Some may even say that the time which is required to read data privacy terms could be seen as opportunity costs which are paid by the end user.⁸³ Therefore the users do not get a ‘free’ service because they are unaware of short- and long-term consequences because they do not know who is using or will use their data and for what purpose it is used or will be used.⁸⁴ For instance, the gathered data could help companies to get more information about the financial situation of a customer or the willingness to buy a particular product.⁸⁵

3.1.1.5 The Role of Data

The collection and commercialisation of data is a typical characteristic of many companies in the digital economy.⁸⁶ As mentioned above, users pay for the service they get on platforms with their attention or data.⁸⁷ This data is a special feature of digital markets but also a great challenge of it. In this section the benefits of data collection will be pointed out.

The term ‘data’ is vague and therefore a short definition is necessary. According to Art. 4 GDPR personal data is ‘any information relating to an identified or identifiable natural person’ whereas ‘an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.’ This definition shows that even things like IP addresses, which can be only identified by third parties, are personal data.⁸⁸

As Stucke and Ezrachi mentioned a few years ago: *‘Companies are increasingly adopting business models that rely on personal data as a key input. (...) companies offer individuals free*

⁸² Rolf H Weber, ‘Information at the crossroads of competition and data protection law’ (2014) 2/2014 ZWeR, 169, 175; Ralf Dewenter, Jürgen Rösch and Anna Terschüren ‘Abgrenzung zweiseitiger Märkte am Beispiel von Internetsuchmaschinen’ (2014) NZKART 2014 387, 389.

⁸³ OECD, ‘Big data: Bringing competition policy to the digital era: Background note by the Secretariat’ (2016) para 90.

⁸⁴ Ibid, para. 91.

⁸⁵ Heike Schweitzer, ‘Neue Machtlagen in der digitalen Welt? Das Beispiel unentgeltlicher Leistungen’ in Torsten Körber and Jürgen Kühling (eds), *Regulierung – Wettbewerb – Innovation* (2017) Nomos 269, 273.

⁸⁶ Monopolkommission, ‘Competition policy: The challenge of digital markets’ (2015) Special Report No 68, para 64.

⁸⁷ Torsten Körber, ‘Is Knowledge (Market) Power? - On the Relationship between Data Protection, ‘Data Power’ and Competition Law’ (2018) NZKart 2016, 303 p. 1

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3112232> accessed 30 August 2021.

⁸⁸ Ibid, p. 2.

*services with the aim of acquiring valuable personal data to assist advertisers to better target them with behavioural advertising.*⁸⁹

This statement shows that the collection of data paves the way for innovative and inexpensive services that were not possible a few years ago. Further it makes our lives more convenient: For example, we are able to search everything at any time online or we can use a ‘free’ navigation system easily with our smartphone. Moreover, data contributes to the improvement of the quality of services provided on the platforms and it helps to directly offer innovative services. One example is the search on Google for ‘jaguar’: As an animal lover you will get completely different results than as a car enthusiast. Besides, the transfer of data such as location or interests makes it possible for users to get more targeted and personalised advertising. This increases the value of the platform to advertisers and users because they get suggestions for products they are interested in and the service they use remains ‘free’.⁹⁰

In addition to these features of data collection there are challenges that come up which will be elaborated on in the next section of this thesis.⁹¹

3.2 Challenges on the Digital Markets

Besides the above-mentioned specificities, there are also challenges that arise in the digital markets and especially in combination with EU Competition Law.

Big firms on the digital market like Google, Microsoft, and Facebook are constantly in the media because of big mergers. E.g. the merger between Facebook and WhatsApp⁹² or Microsoft and Skype⁹³ attracted the attention of competition authorities and the public. Further, the EU Commission’s antitrust decisions against *Google Shopping*⁹⁴, *Google Android*⁹⁵ and *Google AdSense*⁹⁶ generated big interest. This can be attributed to the high fines issued by the Commission and due to the ‘complex competition law issues they address’. According to this a debate appeared around the question if ‘existing competition law is capable of dealing with the

⁸⁹ Maurice E Stucke and A. Ezrachi (2016), ‘*Virtual Competition – The Promise and Perils of the Algorithm-Driven Economy*’ (2016, Harvard University Press, p. 30; OECD, ‘Big data: Bringing competition policy to the digital era: Background note by the Secretariat’ (2016) para 20.

⁹⁰ Torsten Körber, ‘Is Knowledge (Market) Power? - On the Relationship between Data Protection, ‘Data Power’ and Competition Law’ (2018) NZKart 2016, 303 p. 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3112232> accessed 30 August 2021.

⁹¹ See section 3.2 of this thesis.

⁹² Case No COMP/M.7217 *Facebook/WhatsApp*.

⁹³ Case COMP/M.6281 *Microsoft/Skype*.

⁹⁴ Case AT.39740 *Google Search (Shopping)*.

⁹⁵ Case AT.40099 *Google Android*.

⁹⁶ Case AT. 40411 *Google Search (AdSense)*.

specificities of digital markets'. For example in regard to strong network effects or business models based on offering consumers 'free' services while collecting and marketing their data.⁹⁷ Several politicians and competition authorities as well as experts⁹⁸ have elaborated on this question and concluded that existing competition law 'is still the proper tool to address these phenomena [...] [but it] needs to be adapted'.⁹⁹

Some of the great challenges in digital markets and especially in relation to EU Competition Law will be elaborated in the following section.

3.2.1 Big Data

3.1.1.5 of this thesis explained shortly what data is and also points out that the collection of data is an important characteristic of the digital market. This section in contrary will elaborate on the disadvantages of data collection. Of course it also exists on conventional markets, but since platform economy is rising, data becomes increasingly important and can be seen as the currency of the digital world.¹⁰⁰

The extensive collection, storage and linking of data which is triggered by increasing digitalisation is a topic which has received certain attention. The discussion mainly revolves around the term 'big data'. No legal definition exists but it 'refers to datasets that are so big that they can no longer be collected, stored, processed and analysed by classical database software tools'.¹⁰¹

The challenges of big data consist mainly of the handling of personal data and the 'lack of transparency for many users regarding their collection, processing and evaluation'.¹⁰² Obviously, the storage and processing of large amounts of data is a major problem in the digital market, as users are often unaware of what is happening with their data and of the risks involved. This section mentions this problem briefly and further elaboration would go beyond the scope of this paper.

⁹⁷ Lena Mischau, 'Market Power Assessment in Digital Markets – A German Perspective' (2020) GRUR Int. 233.

⁹⁸ See e.g. Monopolkommission, 'Competition policy: The challenge of digital markets' (2015) Special Report No 68, para 579; Federal Ministry for Economic Affairs and Energy, Digital Strategy 2025 (2016) de.digital, p. 47 ff.; FCO Germany, 'Paper on Platform Market Power – Results and Recommendations' (2016), p. 4 f.; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era', p. 44 <<https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>> accessed 17 May 2021.

⁹⁹ Lena Mischau, 'Market Power Assessment in Digital Markets – A German Perspective' (2020) GRUR Int. 233.

¹⁰⁰ Torsten Körber, 'Google im Fokus des Kartellrechts' (2012) WRP 761, 764.

¹⁰¹ Monopolkommission, 'Competition policy: The challenge of digital markets' (2015) Special Report No 68, para 67.

¹⁰² Ibid, para 70.

3.2.2 Market Power of dominant platforms

The business models of platforms include rapidly decreasing marginal costs, which enable extreme economies of scale, and network effects, which help the platforms to achieve a near-monopoly position once a platform successfully attracts users. Next to this are digital markets based on data collection. This combination of factors creates a ‘winner takes all-competition’ that has resulted in the emergence of digital platforms that have a near monopoly. Because they control access to their largely unrivalled user base, their services have become indispensable to many businesses and consumers. Entering the market and participating in business or social life depends on the platform being approved – ‘this is a gatekeeping situation’.

Several of these platforms created ecosystems which is build up on their core activities and most of the time they also provide services which business users offer as well on their platform. Therefore they are in competition with their own business users. But it is often no fair competition because the platforms can steer users to their own services. Further the platforms benefit from data which was generated on their platform from their users and business users (competitors). In other words it can be said that these platforms ‘set the rules on its marketplaces, play there and act as a referee at the same time’.¹⁰³

This leads to a conflict of interest and the result are practices, which are persistently opposed by the EU Commission.¹⁰⁴ The concerns about the suitability of competition law regarding digital markets grew after several investigations and record fines.¹⁰⁵ Many experts in the field said that ‘the traditional market definition failed to capture conglomerate ecosystems’.¹⁰⁶ Moreover information asymmetries between platform led operators and the EU

¹⁰³ Rupperecht Podszun, Philipp Bongartz and Sarah Langenstein, ‘The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers’ (2021) EuCML 60, 61.

¹⁰⁴ Rupperecht Podszun, Philipp Bongartz and Sarah Langenstein, ‘The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers’ (2021) EuCML 60, 61; Case COMP/AT.39740 *Google Search (Shopping)* [2017] OJ C9/11; Case COMP/AT.40099 *Google Android* [2018] OJ C402/19; Case COMP/AT.40411 *Google Search (AdSense)* [2019]; European Commission, ‘Antitrust: Commission opens investigation into Apple’s App Store rules’ (Press release) (16 June 2020).

¹⁰⁵ Rupperecht Podszun, Philipp Bongartz and Sarah Langenstein, ‘The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers’ (2021) EuCML 60, 61.

¹⁰⁶ Rupperecht Podszun, Philipp Bongartz and Sarah Langenstein, ‘The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers’ (2021) EuCML 60, 61; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, ‘Competition policy for the digital era’, p. 47-48 <<https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>> accessed 17 May 2021; Marc Bourreau and Alexandre de Stree, ‘Digital Conglomerates and EU Competition Policy’ (2019), p 23-24 <<http://www.crid.be/pdf/public/8377.pdf>> accessed 18 May 2021.

Commission to slow-moving procedures¹⁰⁷ and often it was too late after the decision was made ‘to remedy the infringement that triggered it’.¹⁰⁸

These problems on digital markets show that there is time for new rules regarding EU Competition Law in the digital sector and the EU Commission proposed a solution in December 2020 in the form of the DMA which is supposed to speed up the process and to break out of the conventional competition law regime.¹⁰⁹

¹⁰⁷ Joint Research Centre, ‘The EU Digital Markets Act – A Report from a Panel of Economic Experts’ (2021) 28.

¹⁰⁸ Rupperecht Podszun, Philipp Bongartz and Sarah Langenstein, ‘The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers’ (2021) EuCML 60, 61; See also: European Commission, ‘Competition in a Digital Age: Changing Enforcement for Changing Times’ (2020) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age-changing-enforcement-changing-times_en> accessed 31 August 2021.

¹⁰⁹ Rupperecht Podszun, Philipp Bongartz and Sarah Langenstein, ‘The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers’ (2021) EuCML 60, 61.

4 The Digital Markets Act

After the elaboration on the challenges of digital markets originate the question whether there is a solution for these problems and if the EU legislator is aware of them. One recent attempt of the EU Commission to tackle some of the issues will be introduced in the following section.

The European Commission published on 15 December 2020 the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act).¹¹⁰ The DMA is based on the European Commission's Communication 'Shaping Europe's Digital Future' which was published on 19 February 2020. In this Communication, the Commission indicates that 'additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations'. Furthermore, it is written in the Communication that 'the Commission will further explore, in the context of the Digital Services Act 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'.¹¹¹ The Digital Services Act package consists of the DSA and the DMA. This thesis is mainly focused on the DMA, but 4.2 gives a short description of the DSA.

4.1 Background of the Proposal

The President of the European Commission Dr. Ursula von der Leyen assigned Executive Vice-President Margrethe Vestager in a mission letter from the 1 December 2019 'for A Europe fit for the Digital Age' the task to make sure that 'competition policy and rules are fit for the modern economy' and to 'strengthening competition enforcement in all sectors'.¹¹²

¹¹⁰ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020), 842 final.

¹¹¹ European Data Protection Supervisor, 'Opinion 2/2021 on the Proposal for a Digital Markets Act' [2021] 10 February 2021, p. 6; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 67 final.

¹¹² Mission letter, Executive Vice-President for A Europe fit for Digital Age, 1 December 2019, p. 5 <https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-margrethe-vestager_2019_en.pdf> accessed 06 May 2021; See also: Ursula von der Leyen, 'A Union that strives for more: My agenda for Europe' (Political Guidelines for the next European Commission 2019-2024), p. 13 <https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf> accessed 06 May 2021.

Based on the outcome of expert reports¹¹³ and an E-commerce Sector Inquiry¹¹⁴, the Commission conducted from June to September 2020 an Inception Impact Assessment (hereafter, 'IIA') about the DSA and a New Competition Tool (hereafter, 'NCT'). According to the IIA is the NCT a tool, which helps to fulfil the task given by von der Leyen to Vestager. This measure aims to fulfil 'this task by addressing gaps in the current EU competition rules and allowing for timely and effective intervention enforcing the EU competition rules across a wide range of markets, as well as on the worldwide reflection process about the need for changes to the current competition law framework to allow for enforcement action preserving the competitiveness of markets'.¹¹⁵ More than 3000 stakeholders from Europe and other parts of the world were part of this consultation.¹¹⁶ The commission has not mentioned explicitly the DMA during the process, but the term of a 'New Competition Tool' was named.¹¹⁷

4.2 Relation to the proposed DSA

As already mentioned the DMA is part of the Digital Services Act package. The other part of the package is the proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act), which was also proposed on the 15 December 2020 by the Commission.¹¹⁸ Both proposals seek to improve consumer protection and the fundamental rights of consumers online. Furthermore the Digital Services package should 'lead to fairer and more open digital markets for everyone'. Besides that, the proposals pursue to 'foster innovation, growth and competitiveness, and to provide users with new, better and reliable online services'.¹¹⁹ This shows that inter alia the EU competition law objective of consumer welfare plays a big role in the Digital Services package.¹²⁰ Next to this, smaller

¹¹³ See inter alia Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' <<https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>> accessed 17 May 2021; Kommission Wettbewerbsrecht 4.0, 'Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft' (2019).

¹¹⁴ European Commission, 'Bericht der Kommission an den Rat und das Europäische Parlament – Abschlussbericht über die Sektoruntersuchung zum elektronischen Handel' [2017] COM(2017) 229 final.

¹¹⁵ European Commission, 'Single market – new complementary tool to strengthen competition enforcement' (Inception Impact Assessment) [2020] <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool>> accessed 06 May 2021.

¹¹⁶ European Commission, 'Europe fit for the Digital Age: Commission proposes new rules for digital platforms' (Press Release), 15 December 2020, IP/20/2347.

¹¹⁷ Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) 1/2021 ZWeR, p. 29.

¹¹⁸ Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC [2020] COM(2020) 825 final.

¹¹⁹ European Commission, 'Europe fit for the Digital Age: Commission proposes new rules for digital platforms' (Press release) [2020] > https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347> accessed 10 May 2021.

¹²⁰ See for more information regarding consumer welfare in section 2.1.1 of this thesis.

platforms, small and medium-sized enterprises as well as start-ups should with the help of the package be scaled up and they should be provided ‘with easy access to customers across the whole single market while lowering compliance costs’. Finally, the new rules have the goal ‘to prohibit unfair conditions imposed by online platforms that have become, or are expected to become, gatekeepers¹²¹ to the single market.’¹²² This indicates that besides consumer welfare also other European values like the protection of the competitive process, protection of small and medium sized enterprises and market integration play a role here.¹²³

The DSA entails an amending of Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). This is needed because the digital landscape changed drastically in the last 20 years¹²⁴ and the European legal framework regarding digital services has not changed since the e-commerce Directive came in place. Goals of this directive were to enable the access of digital services over the EU and the harmonisation of the main difficulties for these services. Another aim of the directive was to ‘set the liability framework for third party content hosted by intermediary services.’ These goals were achieved by the directive, but it is not able to adapt to the changes in the digital market and therefore an adjustment is necessary.¹²⁵

The DSA broadens the scope and applies to more services than the current legal framework regarding the digital market of the EU. Especially online marketplaces or collaborative economy platforms, which were developed in the last years, fall under the ambit of the DSA. As a new addition, the DSA defines illegal content as ‘any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law.’¹²⁶

¹²¹ See section 4.5.1 of this thesis for a definition of the term ‘gatekeeper’.

¹²² European Commission, ‘Europe fit for the Digital Age: Commission proposes new rules for digital platforms’ (Press release) [2020] > https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347> accessed 10 May 2021.

¹²³ See for more information regarding the objectives of EU Competition Law Chapter 2 of this thesis.

¹²⁴ European Commission, ‘Europe fit for the Digital Age: Commission proposes new rules for digital platforms’ (Press release) [2020] > https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347> accessed 10 May 2021.

¹²⁵ Patrick Van Eecke and Enrique Gallego Capdevila ‘The proposed Digital Services Act Package – what you need to know’ (2021) 21(3) Privacy & Data Protection, 13-15, 13.

¹²⁶ Ibid, 13 f.

4.3 Legal basis

According to Art. 5(2) TEU the EU is only allowed to legislate within the framework of the powers conferred on it by the Treaties. Therefore, every proposed legislative act needs a legal basis out of the Treaty and there are different provisions for different areas. Further the choice of the legal basis determines the legislative procedure as well as the scope of the proposed regulation or directive.¹²⁷ E.g. the DMA follows the legal procedure laid down in Art. 294 TFEU.

The legal basis of the proposed DMA is Art. 114 TFEU¹²⁸, which is designed to harmonise the European single market.¹²⁹ Directives and regulations which are based on Art. 114 TFEU are meant to approximate diverging national laws throughout the EU in order to achieve a better functioning of the internal market. The legislator confirms this through the recitals (8) and (9) of the DMA.¹³⁰

Currently the Member States are applying different national rules regarding to the problems related to ‘the significant degree of dependency of business users on core platform services provided by gatekeepers and the consequent problems arising from their unfair conduct vis-à-vis their business users’. This leads the current situation to regulatory fragmentation because the handling of unfair dependency relationships of the business users to the gatekeepers is different in the Member States. E.g. the conditions for intervention, the depth of this intervention and compliance costs for the companies differ. Without harmonisation in the EU, differences between Member States will widen because some countries have these issues on their agenda while other Member States do not. Considering the inherently ‘cross-border nature of the core platform services provided by gatekeepers, regulatory fragmentation will seriously undermine the functioning of the Single Market for digital services as well as the functioning of digital markets at large.’¹³¹ This also reflects the EU Competition Law goal of Market

¹²⁷ Alfonso Lamadrid, ‘The Key to Understand the Digital Markets Act: It’s the Legal Basis’ (Chilling Competition, 3 December 2020) <<https://chillingcompetition.com/2020/12/03/the-key-to-understand-the-digital-markets-act-its-the-legal-basis/>> accessed 13 May 2021.

¹²⁸ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Market Act), COM(2020) 842 final, p. 4; European Commission, Question and answers, Digital Markets Act: Ensuring fair and open digital markets <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349> accessed 11 May 2021.

¹²⁹ Catherine Barnard, *The substantive Law of the EU, The Four Freedoms*, 6th edition, Chapter 14, p. 559 ff.

¹³⁰ Daniel Zimmer and Jan-Frederick Göhsl, ‘Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper’ (2021) ZWeR 1/2021, p. 31.

¹³¹ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Market Act) [2020] COM(2020) 842 final, p. 4.

Integration, because the functioning of the European Internal Market is based on the harmonisation of certain legal fields.

In the IIA, the Commission mentioned that the NCT, which was the starting point for the DMA, will be based on Art. 114 TFEU and additionally on Art. 103 TFEU. Some voices in the literature are missing Art. 103 TFEU in the Proposal and criticise the choice to leave it out.¹³² The Commission's rejection of the plans of a NCT were probably the concerns about the viability of Art. 103 TFEU in conjunction with Art. 114 TFEU as a suitable legal basis for the mentioned tool.¹³³

To understand the criticism, it is important to know the aim of Art. 103 TFEU. With Art. 103 TFEU directives and regulations, 'that serve the purpose of implementing the principles laid down in Art. 101 and 102 TFEU in European antitrust law', can be issued.¹³⁴ Furthermore, Art. 103 TFEU can be invoked for legal acts which have supporting character in relation to Art. 101 and 102 TFEU.¹³⁵ Measures, which go beyond the mentioned ambit and widen or supplement the application of EU antitrust law cannot be based on Art. 103 TFEU. Further it is held in Art. 103 TFEU that 'appropriate regulations or directives [...] give effect to the principles set out in Articles 101 and 102'. This implies that the application to regulations supplementing or extending competences is not compatible with Art. 103 TFEU.¹³⁶ If the extension of European Antitrust Law is based on a regulation or directive Art. 352 TFEU can be used as a competence.¹³⁷

In relation to the above, the DMA would be enacted via Art. 352 TFEU as it is to be held that the gatekeeper regulation goes beyond the ambit of Art. 101 and 102 TFEU. However, the Commission chooses an alternative route in the DMA by implementing the Proposal outside European Antitrust Law and using Art. 114 TFEU as a basis.¹³⁸ Recital 10 of the DMA clarifies this: '(...) This Regulation pursues an objective that is complementary to, but different from

¹³² Jürgen Basedow, 'Das Rad neu erfunden: Zum Vorschlag für einen Digital Markets Act' (2021) 21/2 Max Planck Institute for Comparative and International Private Law, Research Paper Series, p. 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3773711> accessed 12 May 2021.

¹³³ Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) ZWeR 1/2021, p. 30.

¹³⁴ Ibid, p. 32.

¹³⁵ Ibid, p. 32; E.g. Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty is based on Art. 103 TFEU because of this reason.

¹³⁶ Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) ZWeR 1/2021, p. 32.

¹³⁷ Ibid, p. 32; See as an example the Council Regulation on the control of concentrations between undertakings (EC Merger Regulation), which facilitates the implementation of Articles 101 and 102 TFEU as well as beyond its regulatory objective (ex Art 308 EC); See also Protocol 27 on the internal market and competition, 120008M/PRO/27.

¹³⁸ Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) ZWeR 1/2021, p. 32 f.

that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper by this Regulation on competition on a given market.¹³⁹

Thus the Commission places the DMA as a legal matter outside European antitrust law that fulfils a complementary function to competition law.¹⁴⁰ With this, the Commission probably tries to prevent the need for recourse to the extension of competence clause of Art. 352 TFEU, because the recourse would have unintended consequences. One consequence is that the regular European legislative procedure out of Art. 294 TFEU is not applicable in the case of an extension of competence from Art. 352 TFEU. Art. 294 TFEU rather requires a unanimous decision of all EU Member States via the Council. It is unlikely that such unanimity could be achieved for the DMA-regulations because e.g. Ireland is profiting from large digital corporations. Therefore it can be said that the decision to choose Art. 114 TFEU as a legal basis for the DMA was primarily out of political reasons.¹⁴¹

However, the choice of the Commission to use Art. 114 TFEU as a legal basis has a decisive influence on the design of the DMA.¹⁴² Firstly, the ECJ grants the Commission a far-reaching scope for action and assessment through Art. 114 TFEU. This broad scope covers the DMA-provisions but under the condition that the rejected competition reference is considered as plausible. This rejection is fundamental for the Commission because otherwise it must use Art. 103 TFEU. And as already mentioned, the DMA exceeds the ambit of Art. 103 TFEU and therefore the Commission would have to affirm the link to competition and use Art. 103 TFEU in conjunction with Art. 352 TFEU. Secondly the choice of Art. 114 TFEU means that the Commission is unbound by designing the regulation and can create new rules for gatekeepers unattached to current antitrust law and is therefore flexible in the application of the rules. Although Art. 114 TFEU provides the Commission with a legal basis that can be applied very flexible, it is limited by a clear reference to competition. This could also be an explanation why the Commission left out the discussed NCT in the proposed DMA, because a tool which is clearly referenced to competition would not be covered by Art. 114 TFEU.

¹³⁹ Ibid, p. 33; Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, recital 10.

¹⁴⁰ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, Context of the Proposal, p. 3 f.

¹⁴¹ Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) ZWeR 1/2021, p. 33.

¹⁴² Ibid, p. 33 f.; Alfonso Lamadrid 'The Key to Understand the Digital Markets Act: It's the Legal Basis' (Chilling Competition, 2 December 2020) <<https://chillingcompetition.com/2020/12/03/the-key-to-understand-the-digital-markets-act-its-the-legal-basis/#comments>> accessed 13 May 2021.

Through Art. 114 TFEU the Commission introduces a new category of ex ante rules which are intended to ensure ‘fair and contestable markets’ without affecting competition and the competition rules. The Commission has taken a narrow path by choosing this legal basis because it could be said that the Commission tries to access the digital markets and indirectly also competition, irrespective of the competitive conditions on these markets. Following this understanding, the DMA would be dogmatic prior to competition and thus the competition rules. It may appear doubtful that the distinction between the pure creation of market access conditions by the DMA and competition in the sense of competition law is actually possible. For example, many of the prohibitions correspond in Art. 5 and 6 of the proposed DMA to the Commission’s practice in abuse control under Art. 102 TFEU and the companies behaviour in itself could trigger the competition reference. In addition is the fact that companies are not directly addressed by the DMA, instead the Proposal talks about gatekeepers. This could support the separation of market access and competition and it could enable the coexistence of the DMA and competition law.

Ultimately, in case of doubt, is the decision by the ECJ if the DMA falls in the scope of Art. 114 TFEU and the provisions relationship to EU competition law. According to political reasons the Commission’s decisions is logical but it would have been safer to supplement it with Art. 352 TFEU.¹⁴³

4.4 Objectives of the Digital Markets Act

Laura Parret asked the right question in 2010 regarding objectives of EU Competition Law: ‘Shouldn’t we know what we are protecting?’¹⁴⁴ This question arises again in connection with the approaching ‘ex-ante regulation of digital giants’, the DMA.¹⁴⁵

The first objective of the DMA can be derived from the legal basis (Art. 114 TFEU) and is the harmonisation of different rules in the EU Member States regarding the regulation of gatekeepers. According to recital 6 of the DMA, there are currently different ‘regulatory solutions and thereby fragmentation of the internal market’. Furthermore, the Commission states that this leads to ‘the risk of increased compliance costs due to different sets of national

¹⁴³ Daniel Zimmer and Jan-Frederick Göhsl ‘Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper’ (2021) ZWeR 1/2021, p. 33 f.

¹⁴⁴ Laura Parret, ‘Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy’ (2010) 6(2) ECJ.

¹⁴⁵ Zlatina Georgieva, ‘The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, infused with Competition Principles’ (2021) 6/1 European Papers, p. 25.

regulatory requirements'.¹⁴⁶ Therefore, a harmonisation of this issue 'improve[s] the proper functioning of the internal market.'¹⁴⁷

What is important in this context is that the legislator included following in Art. 1(1) DMA: The Regulation harmonises 'rules ensuring contestable and fair markets in the digital sector across the Union where gatekeepers are present.'¹⁴⁸ The emphasis here is on 'contestable and fair markets'. As mentioned above one objective of EU competition law is 'the protection of undistorted competition on the market'. According to Recital 10 of the DMA the proposed Regulation pursues 'an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms'. It differs because the DMA ensures that markets in which there are gatekeepers are and remain contestable and fair, irrespective of the actual, likely, or presumed effects of the conduct of a particular gatekeeper covered by this Regulation on competition in a particular market. It therefore aims to protect a different legal interest from those rules and should not affect their application.¹⁴⁹ The DMA sets out an ex-ante regulation to enforce this goal and a reference to the competition law concept of competition is almost completely missing. This is connected to the Commission's decision of choosing Art. 114 TFEU as legal basis for the DMA and its regulatory character, which is complementary to EU competition law. The Commission introduces completely new concepts in the DMA, instead of using the concepts of competition and dominant position, which are already developed in EU competition law and to which the ex-ante regulation is linked and developed. As a result, the traditional dogmatics of competition law cannot be directly applied to the new DMA-provisions.

In EU competition law the concentration is on a 'dominant position', whereas the DMA introduces the term 'gatekeeper' in Art. 3. Next to this novelty, the new Proposal established the phrase 'fair and contestable markets'.¹⁵⁰ This phrase takes the place of the competitive reference. Just Art. 6(1) (a) DMA mentions the term competition. However, it should be noted

¹⁴⁶ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, recital 6; Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) ZWeR 1/2021, p. 35.

¹⁴⁷ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, recital 7.

¹⁴⁸ Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) ZWeR 1/2021, p. 35; Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, recital 8.

¹⁴⁹ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, recital 10.

¹⁵⁰ Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) ZWeR 1/2021, p. 35.

that the Financial Statement of the Proposal mentions under 1.4.1. that ‘the general objective of this initiative is to ensure the proper functioning of the internal market by promoting effective competition in digital markets [...]’.¹⁵¹ The possible remaining inconsistencies of the DMA to the concept of competition are shown through this.¹⁵²

Chapter II of the DMA classifies the DMA as a regulatory instrument upstream of competition. This could be one approach to solve the tension between competition-oriented competition law and the ex-ante regulation from the Proposal. The intention of the DMA is to facilitate fair and effective market entry in markets which are occupied by gatekeepers and therefore it is the intention of the regulatory instruments of the DMA to create the possible conditions for the emergence of subsequent competition in the markets which are created or occupied by gatekeepers. In that framework it is also important to look again at the term ‘fair and contestable markets’. It could be implied that ‘fair’ in this context means that the rule of conduct intends to create the same starting conditions for competitors as which are in place for gatekeepers. ‘Contestable’ on the other side stands for ‘enabling a general contestability of the position of gatekeepers in digital markets.’ Or to describe it in other words a gatekeeper’s position in a market should not be so strong that it can no longer be challenged. Therefore, the contestability of a market should create conditions which despite the existence of a gatekeeper lead to competition.¹⁵³

4.5 Important provisions

4.5.1 Designation of Gatekeeper

The DMA is just applicable to large companies, the so-called gatekeepers. To identify these gatekeepers, the Proposal sets out objective criteria in Art. 3 DMA. According to Art. 2(1) DMA, which entails definitions, a gatekeeper is a ‘provider of core platform services designated pursuant to Art. 3 DMA’. Further, Art. 2(2) DMA gives a list of ‘core platform services’, which includes e.g. online intermediation services, online search engines, online social networking services and video-sharing platform services.

¹⁵¹ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, Legislative Financial Statement, p. 58.

¹⁵² Daniel Zimmer and Jan-Frederick Göhsl ‘Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper’ (2021) ZWeR 1/2021, p. 36.

¹⁵³ Daniel Zimmer and Jan-Frederick Göhsl ‘Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper’ (2021) ZWeR 1/2021, p. 36.

As stated in Art. 3(1) DMA a core platform service shall 'be designated as gatekeeper if it (1) has a significant impact on the internal market; (2) operates a core platform service which serves as an important gateway for business users to reach end users, and (3) enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future'.

Further, Art. 3(2) DMA entails thresholds to help identifying gatekeeper. Consequently, the designation of gatekeeper is based on a 'technically quantitative approach'. The thresholds in Art. 3(2) DMA should guarantee that the regulations of the DMA are only applicable to the largest online platforms. To identify a gatekeeper there is no need of a qualitative analysis, which is the case in competition law assessments to identify a company's market power, for example. Further there is no market definition needed. Usually the market definition in the application of abuse control under EU Competition Law causes high difficulties when multi-sided markets are concerned, so therefore this can be avoided in the DMA's approach. This leads to a simplification of application, as there is less potential for dispute with regard to the existence of the individual requirements if the quantitative thresholds in Art. 3(2) DMA are reached.

Pursuant to Art. 3(3) DMA, the potential gatekeeper is obliged to independently verify the gatekeeper requirements and to notify the Commission if the threshold values of Art. 3(2) DMA are reached. However, according to Art. 3(4) DMA, the operator of central platform services has the possibility to rebut the presumption of Art. 3(2) DMA by a substantiated factual argument and to convince the Commission that under the existing market conditions the gatekeeper requirements of Art. 3(1) DMA are not met in the individual case.

If a provider of central platform services does not meet all quantitative thresholds in Art. 3(2) DMA or if the provider was able to successfully demonstrate under Art. 3(4) DMA that it does not meet all the requirements of Art. 3(1) DMA despite meeting the quantitative thresholds, the Commission may nevertheless designate it as a gatekeeper if the requirements of Art. 3(6) DMA are met. In order to carry out a designation according to Art. 3(6) DMA, the Commission must first conduct a market investigation according to Art. 15 DMA. In this way, above all qualitative characteristics can be considered in the Commission's designation decision.¹⁵⁴

¹⁵⁴ Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) ZWeR 1/2021, p. 38 f.

4.5.2 Rules of conduct for Gatekeepers

As already described the Commission pursues with the creation of the DMA an approach to ex-ante regulation of gatekeepers in the digital economy. In Art. 5 DMA are obligations listed, which apply equally to all gatekeepers and according to the designation of gatekeeper in Art. 3 DMA affect these regulations all gatekeepers in the same way. Supplementarily, Art. 6 DMA lists rules of conduct for gatekeepers which have to be further specified by the Commission. That means the rules in Art. 6 DMA have to be gradually adapted to the individual case and the Commission has discretion in this regard.

The DMA provides no option for justification for gatekeepers and recital 23 states explicitly that any efficiency claims will be disregarded. Art. 8 DMA entails just a suspension for gatekeepers for business reasons and Art. 9 DMA is an exception-provision for ‘overriding reasons of public interest’.¹⁵⁵

4.5.3 Platform Services

As already mentioned, in Art. 2(2) DMA there is a list of core platform services provided by the Commission but there is no abstract definition of the term. The digital market is a fast-paced environment and only a list of services and not an abstract definition could lead to problems in the future, because there is no way to be flexible regarding new innovations. Currently, Art. 17 lit. a DMA provides the possibility to reform the regulation if the necessity to include additional platform services in Art. 2(2) DMA is shown after a market investigation. This market investigation should not take longer than 24 months until a proposal for an amendment of the DMA should be presented by the Commission. Afterwards would this proposal go through the ordinary legislative procedure according to Art. 294 TFEU. This indicates that a change of Art. 2(2) DMA could take up to three years and in such a long time could new platform services arise or fall out the digital market. The introduction of new platform services through Art. 18 lit. a DMA could therefore be in conflict with the objective of the DMA to act fast und uncomplicated on digital markets.¹⁵⁶

¹⁵⁵ Daniel Zimmer and Jan-Frederick Göhsl ‘Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper’ (2021) ZWeR 1/2021, p. 41.

¹⁵⁶ Ibid, p. 39.

4.5.4 Special Regulations to prevent the tipping of a market

Art. 3(6) in conjunction with Art. 15(4) DMA entails a special regulation to prevent the tipping of a market, because it authorises the Commission to take action if a central platform service fulfils all the requirements of Art. 3(1) DMA, but not yet all the quantitative requirements of Art. 3(2) DMA, and a consolidated and lasting market position is not yet achieved. To facilitate a designation of a gatekeeper in this case, a market investigation according to Art. 15 DMA is a mandatory requirement and the Commission has 12 months to conduct the investigations. After this investigation the Commission can use the measures mentioned in Art. 15(4) DMA which are necessary to prevent the tipping of a market.

Despite the requirement to carry out a market investigation in advance, the Commission should, in the majority of cases, be able to intervene in a timely manner to take action against market tipping. The market investigation helps in these cases to understand the context sufficiently to find the right solution. There are also conceivable scenarios in which the market is already tipping during the market investigation because the dynamics on the markets change in the digital economy especially due to increasing positive and negative network effects. In order to deal with these urgent cases, an extension of the scope of application of Art. 22 DMA for the adaption of interim measures should be considered.¹⁵⁷

4.5.5 Market Investigations

Art. 14 - 17 DMA are dealing with the conduct of a market investigation by the Commission. If the Commission wishes to designate a gatekeeper via the mechanism of Art. 3(6) DMA, it is obliged to conduct an investigation pursuant to Art. 15 DMA.

According to Art. 16 DMA a market investigation is also required if the Commission wants to investigate systematic non-compliance with gatekeeper rules. The market investigation helps the Commission to get necessary facts and data to make a fully informed decision. Thus, the intention of the market investigation is to ensure that ‘the Commission can react appropriately to the dynamic developments in the digital markets.’

Finally, the market investigation can be used to prepare for an extension of the prohibitions on the basis of the mechanism provided for in Arts. 10 and 17 lit. b DMA.¹⁵⁸

¹⁵⁷ Daniel Zimmer and Jan-Frederick Göhsl ‘Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper’ (2021) ZWeR 1/2021, p. 44.

¹⁵⁸ Ibid, p. 45.

4.5.6 Obligation to inform the Commission about mergers

According to Art. 12(1) DMA, the gatekeepers are obliged to inform the EU Commission about all planned mergers within the meaning of Art. 3 of the ECMR. Furthermore, the Article states that it is not important if the merger has Community dimension according to Art. 1(2) and (3) ECMR. This information to the Commission has to be done by the parties before the merger will be conducted. But it has to be noted that the Commission has no right to intervene directly in this merger, which is partly reasoned by the legal basis of Art. 114 TFEU.

Even if the Commission can not intervene in the merger process, it helps to have an overview over the digital market. Platforms often take over small companies or start-ups without that national competition authorities or the Commission notices because the mergers do not fall under the scope of Art. 1(2) and (3) ECMR and therefore the platforms are not obliged to notify the authorities. Following it is unclear how many and which companies the big tech companies have taken over and this new obligation in Art. 12 DMA can help to tackle this problem.¹⁵⁹

4.5.7 Legal consequences

Art. 16(1) and 25 – 27 DMA sets out the legal consequences of non-compliance with the gatekeeper rules. According to Art. 25(1) DMA the EU Commission can adopt a decision in all cases of non-compliance and Art. 26 DMA authorises the Commission to impose fines. These fines go up to 10% of the gatekeeper's total turnover. Art. 26(3) DMA entails a principle of proportionality for this fine. In addition to these two provisions the Commission can impose periodic penalty payments on the non-compliant gatekeeper.

The Commission acquires particularly extensive powers through Art. 16(1) DMA. Should the Commission, in the course of a market investigation, find systematic non-compliance with the rules out of Art. 5 and 6 DMA and a further strengthening of the gatekeeper's market position, it can impose both behavioural and structural remedies. In this regard has to be noted that the structural remedies are the last remedies, because the barrier to impose such remedies are high.

One concern could be that the legal consequences of the DMA and the ones of Art. 102 TFEU could be complementary, and this could have the consequence that the gatekeeper have

¹⁵⁹ Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) ZWeR 1/2021, p. 46.

to pay twice. Therefore should the legislator in the coming procedure think about changing this provision.¹⁶⁰

¹⁶⁰ Ibid, p. 48.

5 Conclusive Evaluation

5.1 Is the DMA a ‘new competition tool’?

As already mentioned, the Commission talked about the introduction of a ‘New Competition Tool’ in its IIA, and the proposed DMA was not announced at this time. The IIA dealt according to the DSA with far-reaching ex-ante rules for digital gatekeepers and in regard to the NCT with the scope of such a tool. At this time it became apparent that the Commission wanted to model the NCT’s content on the competences of the Competition & Markets Authority (hereafter, ‘CMA’) in the UK. Through this approach, the Commission would have the power to intervene directly in the market if negative effects on competition had been identified in the course of a market investigation. During the further process, the Commission went away from this plan. The decisive reason for this departure was probably the concerns about the viability of Art. 103 TFEU in conjunction with Art. 114 TFEU as suitable legal basis for an NCT.¹⁶¹

The DMA does not provide for a new competition instrument with comprehensive effect, probably also due to the general lack of reference to competition. However, the DMA does contain far-reaching regulations for conduction a market investigation and it could lay a foundation of a ‘New Competition Tool light’. To draw such a conclusion, the mode of operation of Art. 17(1) (b) DMA must be first clarified. Via Art. 17 DMA the Commission has a new instrument to conduct market investigations to find out whether there are new behaviours of the digital gatekeepers which limit the contestability of the core platform services or which are unfair and which should thus also be covered by the prohibitions of Art. 5 and 6 DMA. Art. 17 DMA represents the remnants of the announced NCT. Along the lines of existing regulations in the UK for certain markets considered the NCT initially the introduction of a type of market investigation with powers of intervention. The introduction of direct intervention could not be realised but market investigations have been retained in the Proposal. The choice of the legal basis for the DMA is probably the main reason for the lack of direct powers of intervention because Art. 114 TFEU does not permit the introduction of a far-reaching NCT. Further the clear reference to competition of a NCT with direct powers of intervention in individual markets would make it necessary to have Art. 103 in conjunction with Art. 352 TFEU as a legal basis.

¹⁶¹ Daniel Zimmer and Jan-Frederick Göhsl ‘Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper’ (2021) ZWeR 1/2021, p. 30 f.

However, when examining closer, the Commission's powers under Art. 17 DMA could be more far-reaching than it seems at first. Art. 17 lit. b in conjunction with Art. 10 DMA gives the Commission the power to adopt delegated acts according to Art. 290 TFEU. Under this provision, the Commission is empowered to independently include additional behavioural prohibitions in Arts. 5 and 6 DMA within the framework of Art. 290 TFEU in conjunction with Art. 37 DMA to the extent that a market investigation reveals a corresponding need. To determine the need for expansion, requirements can be found in Art. 10(2) DMA. Hence, the Commission can extend the DMA's scope via Art. 10 in conjunction with Art. 17 lit. b DMA. Thus, the Commission is not able to create 'concretely-individually applicable regulations' which would have been the case if market investigations with intervention powers would have been introduced following the line of the UK model. It can however issue new abstract-general regulations for all gatekeepers. Accordingly, certain gatekeeper behaviours that lead to market failure can be addressed by the Commission in the future through a simple delegated act. The delegated acts may allow the Commission to carry out an essential part of the market interventions that it could also have achieved with the NCT in the sense of a market investigation with powers of intervention in digital markets.¹⁶²

5.2 Relationship between EU Competition Law and the DMA

It is important to clarify the relationship between the DMA and EU Competition Law because the current DMA prohibitions are oriented towards conduct that constitutes or 'could constitute an abuse of a dominant position.'¹⁶³ Recital 10 helps in this case. Here, the Commission holds that the DMA 'pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims at protecting a different legal interest from those rules and should be without

¹⁶² Daniel Zimmer and Jan-Frederick Göhsl 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digital Gatekeeper' (2021) ZWeR 1/2021, p. 49.

¹⁶³ Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (2021) TILEC Discussion Paper No. 2021-04, 14 <<https://ssrn.com/abstract=3797730>> accessed 12 May 2021.

prejudice to their application.’¹⁶⁴ This Recital 10 has been codified in Art. 1(6) DMA and states that ‘[t]his Regulation is without prejudice to the application of Articles 101 and 102 TFEU’ and also according to national laws if they impose ‘additional obligations on gatekeepers’. In addition, national competition rules prohibiting forms of unilateral conduct not covered by Art. 102 TFEU may apply if they provide for ‘additional obligations on gatekeepers.’ How Art. 1(6) DMA deals with the overlaps is legally persuasive because a ‘conduct can violate both the DMA and Art. 102 TFEU, and nothing prevents parallel actions.’ This is the case because ‘primary law cannot be displaced by a Regulation.’¹⁶⁵ In this respect the legal question arises as to whether such parallel action violates the *ne bis in idem* principle.¹⁶⁶ The Court says that in order to apply this principle ‘the facts must be the same, the offender the same and the legal interest protected the same.’¹⁶⁷ As already mentioned explains Recital 10 that the protected legal interest between the DMA and EU Competition Law are different, but this will not be enough and needs to be confirmed by the Court.

There is probably some similarity, as both competition law and the DMA aim to promote competition, but sometimes the *ex-ante* framework can also be applied just to ensure fairness between contracting parties. Therefore it may depend on the challenged activity because the Commission is within its rights to apply the DMA and Art. 102 TFEU. On the other side retain national competition authorities and courts competence to act against activities ‘that infringes the DMA under national or EU Competition Law.’

The DMA can, however, be argued to be a *lex specialis*, which would force the Commission to apply only the DMA. This is pragmatically the better approach, because the design of the DMA will make the Commission’s life easier. Consequently, it is not expected that the Commission would apply Art. 102 TFEU to practices which are regulated under the DMA.¹⁶⁸

¹⁶⁴ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, recital 10.

¹⁶⁵ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, Art. 1(6); Giorgio Monti, ‘The Digital Markets Act – Institutional Design and Suggestions for Improvement’ (2021) TILEC Discussion Paper No. 2021-04, 14 <<https://ssrn.com/abstract=3797730>> accessed 12 May 2021..

¹⁶⁶ Giorgio Monti, ‘The Digital Markets Act – Institutional Design and Suggestions for Improvement’ (2021) TILEC Discussion Paper No. 2021-04, 14 <<https://ssrn.com/abstract=3797730>> accessed 12 May 2021.

¹⁶⁷ Case C-17/10 *Toshiba* EU:C:2012:72, para 97.

¹⁶⁸ Giorgio Monti, ‘The Digital Markets Act – Institutional Design and Suggestions for Improvement’ (2021) TILEC Discussion Paper No. 2021-04, 14 <<https://ssrn.com/abstract=3797730>> accessed 12 May 2021.

5.3 Suggested improvements of the DMA

The DMA is a step in the right direction to regulate the digital market more, but some amendments to the Proposal may be necessary to make the regulation more effective. These suggested improvements are summed up in the following.

Firstly, to make the role and purpose of the commitments individually and cumulatively easier, the imposed obligations on gatekeepers should be more clearly aligned with the policy ambitions of the DMA. Obligations are often set with specific objectives in mind. By making this clearer, the Council and the European Parliament can also consider whether the commitments are sufficient.

Secondly, a notification procedure should be made mandatory. Gatekeepers should therefore explain their intention to comply with Arts. 5 and 6 DMA and the Commission's task is to help the gatekeepers in being complied. In some cases, a market test may be desirable, where the opinion of third parties could be useful. The procedure according to Art. 7 DMA should be declared with a decision which makes the compliance design binding. Any such chances could be fulfilled by revising Art. 7 DMA and bringing it closer to the 'regulatory dialogue' which is mentioned in the DMA's preamble.

Besides that, it should be possible for the Commission to impose 'additional obligations on gatekeepers more quickly than provided' currently under the proposed DMA. This possibility should exist after an infringement decision, for example. On the contrary, it is recommended that a sunset clause be included to allow obsolete commitments to expire.¹⁶⁹

5.4 Final Answer of the Research Question

After the short description of some important objectives of EU Law, the analysis of the features and challenges on the digital market as well as the introduction of the new proposed DMA, it can be said that the DMA is a good and much-needed solution to tackle the problems on the digital markets. Especially the new obligation in Art. 12 DMA of the gatekeeper to inform the Commission about mergers can help to get a better overview over the digital markets and to learn more about the digital sector. However, as above mentioned the Proposal is not perfect in its current draft and some clarifications will be needed during the legislative process.¹⁷⁰

¹⁶⁹ Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (2021) TILEC Discussion Paper No. 2021-04, 17 <<https://ssrn.com/abstract=3797730>> accessed 12 May 2021.

¹⁷⁰ Michael Dietrich and Thomas Vinje, 'The European Commission's proposal for a Digital Markets Act' (2021) CRi 2/2021, 33, 37.

In conclusion and to answer the research question it can be held that the DMA in its current state, is not yet a perfect solution but definitely a step in the right direction. Therefore it can be said that the DMA can be a good tool to ensure fair and contestable markets in the digital sector, and it can help to restore competition in the digital sector through its gatekeeper regulation, if the right changes will be made.

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