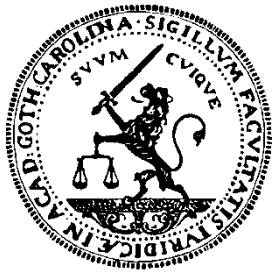

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The EU Digital Markets Act – does it provide an effective framework to bend open the gatekeeper's data and promote interoperability?

JAEM03 Master Thesis

European Business Law
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Table of Contents

Abbreviations

EU	European Union
DMA	Digital Markets Act
CJEU	Court of Justice of the European Union
OTAs	Online travel agencies
CPS	Core platform services
IAP	In-app purchase system
API	Application programming Interface
TPMs	Technical Protection Measures

Abstract

The world is creating more and more data, and the digital market is driven by data-driven business strategies, which can be detected from the large digital platforms in the world, such as Google, Apple, and Amazon, which has also created difficulties to regulate under traditional EU competition law. The large digital platforms do not share the data that they collect from business users and private users. This data is not normally covered by intellectual property rights, but there are situations where access to data might be rejected based on intellectual property rights or due to personal data aspects that are protected under the GDPR or other restricting agreements.

The large platforms can become the leaders of the data ecosystems that they create, and generally, do not provide trade or share of their data. This ”gatekeeping” of data, might then be tipped due to data-driven network effects, which create anti-competitive effects, such as lower innovation and deterred entry of new firms. The essential data is locked both due to contractual and technical standards by their platform provider. The newly enacted Digital Markets Act (DMA) provides ex-ante rules to be applied to large digital platform providers, to back up the bilateral right for business users to access the gatekeepers' data and interoperability. At the time of writing this thesis, the period of designating gatekeepers under the DMA has started, and in March 2024, the designated gatekeepers' are bound to follow the obligations laid down in the DMA.

Keywords: DMA, digital platforms, competition law, effectiveness, fairness, contestability, interoperability, access to data, GDPR, intellectual property rights

1. Introduction

1.1 Background

Many of the world's largest companies, for example, Amazon and Apple, adopt the online platform business model to bring different groups of customers and supplies, as well as customers seeking to transact with each other. A digital platform has been described by the EU Commission as *"an undertaking operating in two (or multi)sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users to generate value for at least one of the groups"*.[1]

Some of these digital platforms have also advantaged their position in the core market to expand into adjacent markets, therefore triggering complaints to the Commission and national competition authorities.[2] The platforms tends also in some situations use their gatekeeping positions to stop gateways between business users and their customers, by imposing unfair trading conditions on the ones depending on their services and forcing them to use ancillary services (such as payment solutions) offered by the platforms and charging excessive fees of it.[3] The social, economic, and political power underlying big tech, has led to a situation where different jurisdiction on different levels tries to reform and amend their competition laws to fit in the digital platform world to address the problems relating to them.[4]

[1] UNCTAD, Competition issues in the digital economy, TD/B/C.I/CLP/54, published 1 May 2019, p. 3.
[2] Commission Decision of 27 June 2017, AT.39740 – Google Search (Shopping), C(2017) 4444 final; Commission Decision of 18 July 2018, AT.40099 – Google Android, C(2018) 4761 final; European Commission Press release, "Antitrust: Commission opens investigation into Apple practices regarding Apple Pay", 16 June 2020, available online: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075;
[3] Geradin, Damien, What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act? Published 18 February 2021, p. 1-2.
[4] Akman Pinar, Competition Law, Digitalization and Platforms: Separating the Old Challenges from the New, CIGI, published 28 June 2022.

Even in the heading of the DMA two concepts are being introduced "contestability" and "fairness"[5] as the aim of the regulation, which is different than under EU competition law which the main objective is to provide that the competition is not distorted in the internal market.[6] The EU Commission has already over a decade ago identified the lack of interoperability as one of the main obstacles to digitalization, and then examined measures to encourage interoperability-focused business policy for significant market players.[7] The Digital Agenda did also promote greater interoperability. Interoperability is the possibility for different services and products to cooperate in a way where common functions can be used indifferently across them through information change.[8]

In digital markets, business users face difficulties to access and porting data on digital platforms, including data collected from both business and private users. The data is technically difficult to access, due to legal and behavioral barriers.[9] The data-driven markets tend to tip in the favor of the provider, even due to small differences in the quality and amount of data, and when the market is tipped, then it is hard to re-establish competition other than granting access to data.[10]

Within EU Competition law it has been addressed that the traditional competition rules, such as Art. 101 and 102 of the TFEU have led to a scenario where the European Commission put forward a proposal of the Digital Market Act (DMA) to tackle the issues relating to digital markets, namely, to ensure fairness and contestability on the digital markets. Now, as the date of the entry

[5] See the name of the Regulation: Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)
[6] Whish R. and Bailey D, Competition Law, Oxford University Press, 10th edition, published 2021, p.17.
[7] Bourreau M., Krämer J., Buiten M., Interoperability in Digital Markets, Centre on Regulation in Europe (CERRE), published March 2022, p. 10.
[8] Ibidem
[9] Lundqvist Björn, An access and transfer right to data—from a competition law perspective, Journal of Antitrust Enforcement, published 13 September 2022, p. 2.
[10] Prüfer Jens and Schottmüller, Competing with Big Data, Journal of Industrial Economics, Wiley Blackwell, vol. 69(4), published 2021, p. 967.

into force of the DMA was set on 1 November 2022, it will be applicable at the beginning of May 2023.[11]

1.2 Purpose and research question

Against this background, the main purpose of this Thesis is to analyze and examine how the Digital Markets Act will interoperate with other already existing legal regulations underlying the regime of digital platforms, with the focus being on the problems behind access to the gatekeepers' data and interoperability, bringing forward practical examples how the Digital Markets Act (DMA) would be applied. The research will also examine the effectiveness of the DMA, which will be conducted based on a fairness and contestability perspective, by bringing forward a comparison with the previous process of the EU Commission under Art. 101 and 102 TFEU and compare it to the DMA framework.

To achieve the objectives and goals, the following research question will be answered:

1. How does the DMA complement EU competition law and the issue to access the gatekeeper's data?
2. Does the DMA provide an effective framework to provide access to the gatekeepers' data and interoperability information when taking into consideration the fairness and contestability aims of the DMA?

1.3 Delimitations

This paper will solely focus on the DMA, leaving the Digital Service Act (DSA) outside of the focus point. The EU Commission in early June 2020 released an impact assessment including two pillars, the first pillar deals with

[11] European Commission, The Digital Markets Act: ensuring fair and open digital markets, published 12 October 2022. Available online: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

ensuring trust and safety online, with the help of increasing responsibilities, obligations, and liabilities for digital services. The second pillar focuses on the establishment of an ex-ante regulatory framework that will control the behavior of gatekeepers.[12] The DSA and the first pillar of the Digital Package will not be further addressed in this paper.

Secondly, the paper's focus point will be on the interoperability and data access issues, as well as the objectives and aims of the DMA, namely contestability and fairness, both of which will be defined and discussed throughout this Thesis. There is a broad range of Competition issues underlying the adaptation of the Digital package, which falls outside of the scope of this paper.

With regards to the application of the DMA, this Thesis will focus on the large platform's dominant position and abuse of market power, as well as the application and enforcement of the DMA, including designating a gatekeeper, obligations, and prohibitions of the DMA. The existing enforcement tools of EU competition law, such as fines, interim measures, and sector inquiries will not be included in the analysis of this paper. In addition to the DMA and TFEU, the paper will include a brief analysis of the General Data Protection Regulation (GDPR), InfoSoc, and the TPMs. P2B regulation and EU consumer law will not be addressed in this thesis, even if there are underlying competition benefits in both regulations.

1.4 Outline

This Thesis is divided into seven chapters, the first one included is an introduction. The second chapter will include an overview of the DMA and a brief comparison to the existing EU Competition framework and a summary of ex-ante enforcement. This chapter will provide insight into the relationship

[12] Broadbent Meredith, The Digital Services Act, the Digital Markets Act, and the new competition tool, Center for Strategic and International Studies, published 10 Novemeber 2020.

between the DMA and EU competition law, by bringing forward similarities and differences.

The third chapter focuses on the application and enforcement of the DMA, including the designation of the gatekeeper's process, the gatekeeper's obligations, and prohibitions and remedies. This will provide an understanding of the actual substance of the DMA, which will be later applied to the main problems that will be addressed: interoperability, access to data, and effectiveness of the DMA.

In the fourth chapter, I will give a background of interoperability issues relating to digital platforms and the DMA, including examples of case law involving interoperability factors. This chapter will bring forward the importance behind the interoperability obligations in the DMA, and discuss horizontal and vertical interoperability in the DMA, as well as how the interoperability obligations affect the effectiveness of the DMA.

The fifth chapter will include an analysis of access to the gatekeeper's data, problems involved with the legal control of data, and a brief overview of the interplay between GDPR and other regulations and the DMA. This chapter will guide how the various interests, such as intellectual property rights, data protection, and other regulations providing access to data on the digital market will cooperate.

In the sixth chapter there will be provided a brief overview of the application of the DMA, then continue with bringing forward four options on how to apply the DMA and EU competition law in competition cases involving large digital platforms relating to interoperability and access to data.

2 Overview of the DMA and Comparison to the EU Competition legal framework

2.1 Introduction

Large digital platforms have an essential role to connect user groups, by acting as an intermediary between different stakeholders and user groups, which makes the platform dependent on both the consumer and other stakeholders, which means, that as the platform gains a large user base, the bigger the influence they gain on the digital environment per se. [13] Large digital platforms might in some cases act as a "gatekeeper" position in their markets, where they enjoy characteristics of multi-sidedness, strong network effects, big access to data, and high returns to scale.[14]

This part of the paper will start with a discussion about the background leading to the DMA proposal, where also the aims and objectives of the DMA will be discussed. In section 2.3 the focus will be on the relationship between the DMA and 101 and 102 TFEU and includes a discussion about what is the goals and objectives of the two regimes. In section 2.4, the DMA will be compared to Art. 101 and 102 TFEU, which will be an important factor in answering the research question of whether the DMA is an effective tool to access the gatekeeper's data and to create interoperability, as the analysis highlights the positive and negative effects associated with EU competition law and the DMA. This chapter will be concluded with an overview of the ex-ante enforcement, which will help to understand the basic logic behind it, and how the DMA will work in an ex-ante model.

[13] Hein, A., Schreieck, M., Riasanow, T. et al. Digital platform ecosystems, Electronic Markets 30, published 2020, p. 88-89.
[14] UNCTAD, Competition issues in the digital economy, TD/B/C.I/CLP/54, published 1 May 2019, p. 3-5.

2.2 Background

Throughout the years of digitalization, some large online platforms, such as Google, Amazon, and Microsoft have started acting like gatekeepers in digital markets. The Commission's Digital Markets Act (DMA) aims to ensure that these so-called gatekeepers fairly act on the market.[15] The DMA forms together with the Digital Service Act the main tools of the European digital strategy.[16] The DMA intends to ensure competition and a fair digital market by laying out obligations on large platforms, whereas the DSA conforms to general rules on the liability of providers of online services and safeguards the diligence by adopting a layered approach and imposing more extensive obligations on online platforms and large online platforms.[17]

Digital services and especially online platforms play an important role in the economy and the internal market, enabling businesses to reach users throughout the EU, by facilitating cross-border trade and by opening new business opportunities to many companies in the EU to the benefit of consumers.[18] The Digital Markets Act was enacted in July 2022 and takes effect in May 2023 and gives the Commission tools to address digital platforms with gatekeeping capabilities, by restricting self-preferencing and other types of abuse by the gatekeepers.[19] As the Digital Package, meaning both DSA and DMA, one of its most significant changes is to avoid difficulties when defining the relevant market by setting out simple thresholds and criteria for defining who is acting as a gatekeeper.[20]

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[15] Kuenzler Adrian, Third-generation competition law, Journal of Antitrust Enforcement Vol.11, No. 1, published 2023, p. 136

[16] European Commission, The Digital Markets Act: ensuring fair and open digital markets, published 12 October 2022. Available online: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

[17] Moskal Anna, Digital Markets Act (DMA): A Consumer Protection Perspective, European Papers, Vol. 7, 2022, No. 3. Published 31 January 2023, p. 1113.

[18] Digital Markets Act (DMA) Recital 1

[19] Lundqvist Björn, The Proposed Digital Markets Act and Access to Data: a Revolution, or Not?, IIC – International Review of Intellectual Property and Competition Law 52, published 23 February 2023

[20] Nicoli Nicholas and Iosifidis, EU Digital Economy competition policy: From ex-post to ex-ante. The case of Alphabet, Amazon, Apple and Meta, Sage Journals Volume 8, Issue 1, published 13 January 2023.

Core platform services (CPS) include many characteristics that can be exploited by the undertakings providing them, for example, the extreme scale of economies, resulting from nearly zero marginal costs to add business users or end users.[21] Strong network effects are another typical characteristic, meaning, an ability to connect many business users with many end users through the variety of the service, a significant degree of dependence of both business users and end users, lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, and data driven-advantages.[22] These characteristics combined with unfair practices by undertakings providing the CPS, raise serious concerns about the contestability of digital platforms, as well as impacting the fairness of the commercial relationship between undertakings providing such services and their users.[23] The DMA will give consumers more opportunities to more and better services and more opportunities to switch their provider if wanted, direct access to services, and fairer prices.[24]

CPS acting as gatekeepers enjoy an ability to connect many business users with many end users through their services, which enables them to leverage their advantages, such as their access to large amounts of data, from one area of activity to another.[25] Gatekeepers' activities are difficult to challenge by existing or new market operators, irrespective of how innovative and efficient those market operators are.[26] Very high barrier to entry or exit, including high investment costs, which cannot be recuperated in case of exit or access to some key inputs in the digital economy, which results in adjacent markets not functioning well or soon failing to function well.[27] All features lead to serious imbalances in bargaining power and unfair practices and conditions for business users, as well as end users of CPS provided by gatekeepers, to the

[21] DMA, Recital 2
[22] Ibidem
[23] Bostoen, F., Understanding the Digital Markets Act. Antitrust Bulletin, Vol.68(2), published 2023, p. 273 & DMA, recital 15
[24] European Commission, The Digital Markets Act: ensuring fair and open digital markets (footnote 8).
[25] DMA, recital 3.
[26] Ibidem
[27] Ibidem

detriment of prices, quality, fair competition, choice, and innovation in the digital sector.[28]

The idea behind the DMA is not unfamiliar and novel, as it can be compared with two other legislative acts, the German amendment to its competition code, mainly § 19a GWB, which gives the Bundeskartellamt the competence to impose special rules of conduct on undertakings that paramount cross-market significance, as well as the UK Digital Markets Taskforce[29], which is a regulatory regime for digital platforms with strategic market status[30].

2.3 DMA and relationship to Art. 101 and 102 TFEU

The European Competition policy consists of both primary and secondary legislation, and its approach of it is mostly ex-post enforcement, which is mostly focused on antitrust, mergers, and state aid issues.[31]The ex-post approach can be seen in the Court of Justice (CJEU) and the EU Commission where they make decisions and rulings in individual cases after an infringement has taken place, where the purpose is to guarantee the effectiveness of the single economic market by protecting the EU's level-playing field for undertakings by promoting fair competition.[32] The DMA was drafted after more than a decade after the Commission's first enforcement regarding digital markets.[33]

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[28] DMA, recital 4
[29] Schweitzer Heike, The Art to Make Gatekeeper Positions Contestable and the Challenge to know what is fair: A discussion of the Digital Markets Act Proposal, published 30 April 2021, Forthcoming, ZEuP 2021, Issue 3, p. 3. Available online: https://ssrn.com/abstract=3837341
[30] CMA, UK Digital Markets Taskforce, A new pro-competition regime for digital markets, July 2021, Available online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf
[31] Nicoli Nicholas and Iosifidis, EU Digital Economy competition policy: From ex-post to ex-ante. The case of Alphabet, Amazon, Apple, and Meta.
[32] Cini Michelle and Czulno Patryk, Digital Single Market and the EU Competition Regime: An Explanation of Policy Change, p. 42.
[33] Ibid., p. 46.

Art. 101 and 102 TFEU apply to the conduct of gatekeepers, the scope of those provisions is limited to certain instances of market power, for example, dominance on specific markets and of anti-competitive behavior, and the enforcement occurs ex-post and requires an extensive investigation of complex facts on a case-by-case basis.[34] EU law does not address effectively, the challenges of the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition law terms.[35] Several regulatory solutions have already been adopted on a national level or proposed to address unfair practices and the contestability of digital services or at least regarding some of them.[36]

DMA aims to complement the enforcement of competition law, it should apply prejudice to Art. 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualized assessment of market power.[37] The application the other framework does not have an effect on the obligations imposed on gatekeepers under DMA and their uniform and effective application in the internal market.[38] Art. 101 and 102 TFEU have as their objective the protection of undistorted competition on the market, whereas the DMA pursues a complementary goal, to ensure that markets where gatekeepers are present and remain contestable and fair, independently from the actual, potential, or presumed effects of the conduct of a gatekeeper on competition on a given market.[39] DMA aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application.[40]

[34] DMA, recital 5.
[35] Ibidem
[36] DMA recital 6
[37] DMA Recital 5.
[38] DMA recital 10
[39] DMA, recital 11
[40] Ibidem

The high-profile cases, such as the Microsoft case[41] which was the first large platform case handled, and the three cases against Google in 2010 and 2018, as well as Amazon and Apple cases, were Art. 102 TFEU has been enforced[42]. The Commission has also attacked the use of parity clauses in the Amazon e-book case, basing its judgment on Art. 101 TFEU[43]. One company that has been in the headlines is Google. Google has a business strategy with diverse interests, however, most of its profits come from advertising.[44] One typical feature of an online platform is that Google's activities involve acting as a gatekeeper, meaning *"have a major impact on, (and) control the access to digital markets. It can impose take-it-or-leave-it conditions on both (...) business users and consumers"*.[45]

The effectiveness of the competition law policy has been questioned, including its enforcement approach and its remedies, where the biggest issue is the slow decision-making process, and that the investigations take a very long time to conduct.[46] For example, the investigation in the Google Shopping case beginning in 2010 took five years before a Statement of Objection was issued, and the final decision was made in June 2017, seven years after the opening of the case.[47] With the long time that it takes to investigate and issue a final decision in these cases, more harm might occur due to the delay.[48]

[41] Microsoft Corp. v EU Commission, Case T-201/04, ECLI:EU:T:2007:289.
[42] EU Commission v. Amazon Marketplace, Case AT.40562, EU Commission v Amazon Buy Box, Case AT.40703, EU Commission, v Apple App Store, Case AT.40437, EU Commission v Apple - App Store Practices, Case AT.40716; EU Commission v Apple Mobile payments, Case AT.40452.
[43] EU Commission, Decision of 4.5.2017, Case AT.40153 – E-book MFNs and related matters (Amazon)
[44] Damien Gerardin and Katsifis Dimitros, An EU competition law analysis of online display advertising in the programmatic age, TILEC Discussion Paper 2019-031, published January 2019, p. 2.
[45]European Commission, A Europe fit for the digital age: new online rules for users. Available online: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-users_en
[46] Bostoen, F., Understanding the Digital Markets Act. Antitrust Bulletin, p. 268.
[47] Ibid, p. 270.
[48] Ibid., p.268

2.3.1 Differences between DMA and Art. 102 TFEU

A major difference between the DMA and Art. 102 TFEU is that the DMA introduces a system of prohibition, as opposed to the system of control of abuse.[49] The prohibition system is a more efficient way when concerning cartels and anti-competitive agreements.[50] Under Art. 101 TFEU the rule prohibits the existence of these abusive agreements or concerted practices, while the actual behavior of the undertakings is not that relevant[51]. In the system of control of abuse, as under Art. 102 TFEU, it is not the existence of a dominant position that is prohibited, it's the abuse of it[52]. What makes the DMA different from Art. 101 and 102 TFEU is that is not a system based on control of abuse, but rather on a system of prohibition, which makes it more like Art. 101 TFEU.[53]

The DMA imposes various obligations on a limited number of online platforms, by not per se paying attention to the behavior of the gatekeepers. Under Art. 102 TEFU, two conditions must be met, firstly, any abuse by one or more firms holding a dominant position within the internal market[54], and secondly, the conduct must be capable of having exclusionary effects.[55] The DMA does not include a provision regarding the behavior of the gatekeeper in a similar sense.[56] The two main objectives pursued by the DMA are contestability and fairness.[57] However, it is not needed under the DMA to prove that such conduct has or has a likely effect on contestability and

[49] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 1.
[50] Wouter P.J. Wils, The Reform of Competition Law Enforcement – Will it Work?, The Modernization of EU Competition Law enforcement in the EU, FIDE 2004 National Reports, Cambridge University Press, published 2024, para. 204.
[51] Art. 101 TFEU
[52] Art. 102 TFEU
[53] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 2.
[54] Whish R. and Bailey D, Competition Law, Oxford University Press, 10th edition, published 2021, p. 181.
[55] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 2.
[56] Ibidem
[57] De Steel Alexander et al., Making the Digital Markts Act more reselient and effective, Recommendations Paper, Centre on Regulation in Europe, published May 2021, p. 43.

fairness.[58] The definition of unfairness and contestability is provided in recitals 32 and 33. Even if these objectives are defined in the recitals, the prescriptions of Art. 5,6 and 7 cannot be varied according to whether the behavior of the gatekeepers produces or is liable to produce unfairness or contestability, but the definitions of these might take place when conducting the proportionality test of the enforcement of the DMA provisions.[59]

Moreover, the DMA does not consider efficiencies or other objective justifications. This can be seen in Recital 23: "*Any justification on economic grounds seeking to enter into a market definition or to demonstrate efficiencies deriving from a specific type of behaviour by the undertaking providing core platform services should be discarded, as it is not relevant to the designation as a gatekeeper"*.[60] This means that the efficiencies are not considered when designating gatekeepers under Art. 3 DMA. The DMA does not provide a possibility to submit any defense, as is possible under Art. 102 TFEU for example, based on objective justifications, however Art. 10 DMA does however provide a limited list of exemptions only on grounds of public health and public security.[61]

The DMA is not based on general clauses like both Art. 101 and 102 TFEU, and the DMA rather provides an exhaustive list of per se rules that are stated as positive obligations or negative prohibitions.[62] Under Art. 101 and 102 TFEU the general clauses of the restriction of competition or abuse of a dominant position is more flexible and stated in an open-ended manner.[63] In comparison, Art. 5, 6, and 7 DMA contains numerus clausus of per se rules, which provides more legal certainty, as the gatekeepers can rely on the fact, that if they comply with the specific rules, their conduct is lawful.[64] However,

[58] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 2.
[59] Ibidem
[60] DMA Recital 23
[61] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 2.
[62] Ibidem
[63] Bostoen, F., Understanding the Digital Markets Act. Antitrust Bulletin, p. 268.
[64] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 3.

even if this seems straightforward, the other side of the coin is that without any flexibility, the DMA cannot consider the gatekeeper's different business models, incentives and conduct characteristics.[65]

According to Art. 8(2) DMA, the Commission may on its own or by a request of a gatekeeper open proceedings according to Art. 20 DMA, for adopting an implementing act specifying the measures that the gatekeeper needs to implement to fulfill the requirements in Art. 6 and 7 DMA.[66] However, the specifying process not affecting the nature of each separate rule in Art. 6 and 7, which are self-executing, but is only connected with the effective compliance measures that are required from the gatekeeper, meaning, that Art. 6 and 7 are not adjustable by themselves, only the effective required compliance is.[67] If compared with Art. 101(3) TEU, the exemption is an integral part of the provision, where practice was prohibited only if it restricts competition as stated in Art. 101(1) TFEU and the conditions under Art. 101 (3) TFEU is not fulfilled. This differs from Art. 6 and 7 DMA that applies irrespective of the discussion between the Commission and gatekeeper, and the specification process that only affects the compliance measures.[68]

2.3.2 Ex ante enforcement

The DMA differs also from the competition enforcement framework in the sense that it introduces the ex-ante approach, whereas the competition law rules in the Treaty are ex-post.[69] Some ex-ante elements are already present in the competition law enforcement, for example in Block Exemption Regulation, which guides the undertakings to structure their agreements in a certain way, as well as in merger control.[70] Competition rules are also reactive

[65] Ibidem
[66] Heimann Florian, The Digital Markets Act – We gonna catch 'em all? Kluwer Competition Law Blog, published 13 June 2022.
[67] Recital 65 DMA and Art. 8(2) DMA
[68] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 2.
[69] Larouce Pierre and De Steel Alexandre, The European Digital Markets Act: A Revolution Grounded on Traditions, Journal of European Competition Law & Practice Vol 12, No.7, published 2021, p. 546.
[70] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 5.

where they are used to respond to a certain conduct, which can also be seen in merger control where the triggering event is the notification of the concentration which the parties have control over and can decide to withdraw[71].

The ex-ante approach is based on a pre-emptive nature and aims to regulate the undertaking's conduct ab initio, and is mostly prescriptive, and the ex-ante nature is highly visible throughout the act.[72] The DMA aims to regulate ax-ante gatekeeper's conduct, and the fact is that there should not be "enforcement" involved with the DMA, as the more enforcement is involved, the less successful the DMA, however, the Commission must review the gatekeeper's compliance and where disagreement between the Commission and the gatekeeper happens, specification decision under Art. 8(2) DMA or non-compliance decisions under Art. 29 DMA will take place.[73]

2.4 Conclusion

The objectives and goals behind the EU competition law provisions and the DMA are different, but both works as complementary to each other. The need to enact an ex-ante framework is trace back to the need for more effective enforcement of the large digital platform's conduct. This section provided a discussion regarding the issues behind the application of Art. 101 and 102 TFEU, where the long investigation periods in various well-known competition was discussed. Additionally, the basic idea behind ex-ante enforcement, is the pre-emptive nature and aims to regulate the undertaking's conduct ab initio.

[71] Richter Heiko, Prospects of Merger Review in the Digital Age: A Critical Look at the EU, the United States, and Germany, IIC – International Review of Intellectual Property and Competition Law 54, published 6 February 2023. p. 225.
[72] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 5.
[73] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 5.

3 Application and Enforcement of the DMA

3.1 Introduction

This chapter will discuss the actual application and substantive part of the DMA, beginning in section 3.2 with the application of the DMA, and section 3.3 will give an overview of the designation process on how to become a gatekeeper. The qualitative and quantitative criteria laid down in the Art. 3 of the DMA will be discussed, as well as an Annex is provided at the end of this Thesis to summarize the different thresholds involved. The designation process is an important part of the DMA, as it will be the necessary part to fulfill so that the obligations and prohibitions in the DMA will become binding.

Section 3.4 will provide a discussion regarding the obligations imposed on the designated gatekeepers, which will be binding upon the gatekeepers at the latest in March 2024. This chapter then continues with a brief on the reporting duty of the gatekeeper is required to notify the Commission with relevant information, but it does not require the company to acknowledge it having the status of a gatekeeper in its notification. The chapter ends with a brief discussion about the available remedies under the DMA. The remedies are also later discussed in the analysis of the DMA, in chapter 6.

3.2 Application

Regulations, as secondary EU law, will result in EU law pre-empting national laws according to the principle of pre-emption. EU law precludes therefore the valid adoption of new national rules to the extent that they would be incompatible with EU law.[74] Art. 1(5) DMA states*:*

[74] Picht Peter Georg, Caught in the Acts: Framing Mandatory Data Access Transactions under the Data Act, further EU Digital Regulation Acts, and Competition Law, Max Planck Institute for Innovation and Competition Research Paper No. 22-12, published 20 April 2022p, 16

"In order to avoid the fragmentation of the internal market, Member States shall not impose further obligations on gatekeepers by way of laws, regulations, or administrative measures for the purpose of ensuring contestable and fair markets. Nothing in this Regulation precludes Member States from imposing obligations on undertakings, including undertakings providing core platform services, for matters falling outside the scope of this Regulation, provided that those obligations are compatible with Union law and do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation."[75]

The DMA shall therefore be applied without prejudice to Art. 101 and 102 TFEU, national competition rules that prohibits anti-competitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions, as well as national competition rules that prohibits unilateral conduct as they are applies to undertakings other than gatekeepers or if they are in accordance with the obligations on gatekeepers.[76] In this way, the DMA shuts out the Member States from introducing their own legislations to deal with gatekeepers if their aim is to ensure fair and contestable markets, and thereby the national court are obliged to set the national law aside.[77]

3.3 Designation of gatekeepers

The DMA sets out a narrowly defined qualitative objective criteria for large online platforms to be defined as gatekeeper. Which are:
"(a) it has a significant impact on the internal market;
(b) it operates a core platform service which serves as an important gateway for business users to reach end users; and
(c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future."[78]

[75] Recital 1 DMA
[76] Art. 1(6) DMA
[77] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 6.
[78] Art. 3(1) DMA

Art. 2(2) of the DMA sets out a list of core platform services, such as online intermediation services, online search engines, online social networking services, video-sharing platform services etc. CPS captures wide range of digital services and various business models.[79] The CPSs under the DMA's scope is those that include:

" i) high concentration, where usually one or very few large online platforms set the commercial conditions with considerable autonomy from their (potential) challengers, customers or consumers; (ii) dependence on a few large online platforms acting as gateways for business users to reach and have interactions with their customers; and (iii) the power by core platform service providers often being misused by means of unfair behaviour vis- à-vis economically dependent business users and customers."[80] *This list of "evidence" of CPS listed above is based on previous experience within enforcement under EU competition law on both EU and national level, as well as studies and reports.* [81]

Art. 3(2) of the DMA lays down the quantitative criteria for gatekeepers, and the criteria is presumed to be met when the thresholds are exceeded.[82] Firstly, the requirement that the CPS providing undertaking enjoys a significant impact on the internal market, and is met when it *"achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalization or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States.*"[83] It is important to note that these thresholds

[79] Komninos Assimakis, The Digital Markets Act: How does it compare with competition law, p. 11.
[80] European Commission, Proposal for a Regulation of the European Parliament And the Council on contestable and fair markets in the digital sector (Digital Markets Act) – Explanatory Memorandum, COMP(2020)842 final, published 15.12.2020, p. 5-6. Available online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en
[81] DMA Impact Assessment Report, p. 37.
[82] Van Cleynenbreugel, The Commission's digital services and markets act proposals: first steps towards tougher and more directly enforced EU rules?, Maastricht Journal of European and Comparative Law 2021, Vol. 28(5), published 2021, p. 676.
[83] Art. 3(2) DMA

needs to be met by the undertaking that the CPS is part of, and not by the CPS providers itself.[84]

Secondly, the requirement that the CPS provider is operating a CPS that serves as an important gateway for business users to reach its end users, is met when the CPS provider *"has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year."*[85] However, end users are not defined in the DMA, which might cause problems in the future, as the notion is not self-explanatory, and the meaning might vary between different kind of digital platforms.[86]

Thirdly, the requirement of the CPS provider to enjoy an entrenched and durable position within its operations or it is foreseeable in the near future, is presumed to be met when the threshold laid out in the second point, as to say, met in each of the last three financial years.[87] To make the distinction and connection between the qualitative criteria in Art. 3(1) DMA and the quantitative criteria in Art. 3(2) DMA, a summary is provided in Annex 1. It is important to note that the CPS provider has the possibility to rebut this presumption of met thresholds in exceptional circumstances when presented by sufficiently substantiated arguments which manifestly call it into question.[88]

One problem connected with Art. 3 (1) and 3 (2) DMA is that the qualitative and quantitative criteria are not combined, which means that when a CPS fulfils the quantitative criteria laid down, the qualitative criteria is also

[84] Geradin, Damien, What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act? Published 18 February 2021, p. 12. Available online: https://ssrn.com/abstract=3788152
[85] Van Cleynenbreugel, The Commission's digital services and markets act proposals: first steps towards tougher and more directly enforced EU rules?, p. 676.
[86] Geradin, Damien, What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act? Published 18 February 2021, p. 12.
[87] Art. 3(2) DMA
[88] Fasey Richard, Note on Designation of gatekeepers in the Digital Markets Act, Issue Paper Centre on Regulation in Europe CERRE, published November 2022, p. 5. Available online: https://cerre.eu/wpcontent/uploads/2022/11/NoteOnDesignationOfGatekeepersintheDMA_Final.pdf

presumed to be fulfilled.[89] The qualitative criteria assessment might take place on a later stage, when the CPS provider shows sufficiently substantiated arguments.[90] Therefore, the current gatekeeper designation process would capture a higher amount of platforms, even platforms that do not have gatekeeping activities, than if the criteria would be assessed cumulatively.[91] In addition, there is a weak causal link between the quantitative criterion in Art. 3(2) DMA and the cumulative criterion in Art. 3(1) DMA, which can be seen in the Art. 3 (1)b DMA criteria, which requires that the CPS provider's platform *"serves as an important gateway for business users to reach end users"*[92], which will be presumed to be met as in Article 3(2)(b), if the platform has "more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union."[93] As well as Art. 3 (1) c DMA that requires that the platform "*enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future".*[94] To be considered a gatekeeper, the Art. 3 (2)c DMA threshold would be met as the thresholds in Art. 3 (3)b DMA is met "*in each of the last three financial years."* Art. 3(2)b DMA threshold only looks at the number of users on the platform.[95]

The problem behind this is, that for a CPS provider to be considered an important gateway or enjoy entrenched and durable position, basing the evaluation only on the fact that it has large number of business users and end users, or has been enjoyed by many users for the past three years.[96] The market that the CPS provider operates is of great importance of the assessment of its position. For example, a platform that enjoys 80 million

[89] Geradin, Damien, What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?, p. 13.
[90] Art. 3(4) DMA
[91] Christina Caffarra and Fiona Scott Morton, The European Commission Digital Markets Act: A translation, VoxEU Column, published. 5 January 2021, Available online: https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation
[92] Art. 3(1)b DMA
[93] Art. 3(2)b DMA
[94] Art. 3(1)c DMA
[95] Geradin, Damien, What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act? p. 14
[96] Ibidem

monthly active end users where no competitor has more than 8 million active end users, compared with a platform that enjoys 80 million active end users monthly, and has two competitors, both having 40 million active end users each. The first situation indicates that the CPS provider has a strong position on the market and being an important gateway between business and end users and does not have strong competition on the market. However, the second situation is different.[97]

Perhaps a better approach would be less focus on market share, and more focus on the percentage of sales that is made on a channel, to give an example, in the market of Online Travel Agencies (OTAs), the proper question would be to see if Booking.com or Expedia are dependent on the platforms for a large percentage of their sales.[98] The quantitative criteria in Art. 3(2)(b) and Art. 3(2)(c), when referring to point (b), is that the further condition of time, referring to dependency, which makes it unclear when CPS provider is acting as an "important" gatekeeper, when lacking the assessment whether business or end users are dependent on its platform.[99] DMA requires undertakings that falls within the criteria in Art. 3 DMA and is designated a "gatekeeper" to notify themselves by September 2023 at the latest, and six months after this, in March 2024, the designated gatekeeper needs to respect the obligations set out in the DMA (Art. 3 and Art. 10).[100]

The issue of over- and under-inclusiveness is dealt with in Art. 3(4) DMA that provides that a CPS provider that fulfills the criteria laid down in Art. 3(2) DMA can escape the designation if it:

a) *"Presents sufficiently substantiated arguments to demonstrate that, in the circumstances in which the relevant core platform service*

[97] Ibidem
[98] Geradin, Damien, What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act? p. 15
[99] Ibidem
[100] Crémer J., Dinielli D., Heidhues P., Kimmelman G., Monti G., Podzun R., Schnitzer M., Scott Morton F., De Steel A., Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust. Journal of Antitrust Enforcement 2023, Vol. 00, No.0, published 5 January 2023, p. 6.

operates, and taking into account the elements listed in paragraph 6, the provider does not satisfy the requirements of paragraph 1."[101]

b) *"Where the gatekeeper presents such sufficiently substantiated arguments to demonstrate that it does not satisfy the requirements of paragraph 1, the Commission shall apply paragraph 6 to assess whether the criteria in paragraph 1 are met."*[102]

It is important to ensure that the CPS providers meeting the thresholds in Art. 3(2) DMA are given a fair chance to demonstrate that they do not meet the criteria laid down in Art. 3(1).[103] However, when analyzing the Impact Assessment, it is contradicting with this regard, as it states that "in very exceptional circumstances" a CPS provider meeting the thresholds might not act de facto as a gatekeeper.[104] This is one part that needs to be followed when the DMA starts to be effective, and after the gatekeepers has been designated, how this will work in practice.

With regards to under-inclusiveness Art. 3(6) DMA states that *"The Commission may identify as a gatekeeper ... any provider of core platform services that meets each of the requirements of paragraph 1, but does not satisfy each of the thresholds of paragraph 2 [...]*."[105]

When the gatekeeper meets the quantitative criteria but submits sufficiently substantiated arguments according to Art. 3(4), and then the Commission examines whether the CPS provider that do not meet the quantitative criteria of Art. 3(2) should be designated a gatekeeper under Art. 3(6).[106] The Commission should take all listed elements in Art. 3(6) into account when providing its assessment, and follow the procedure laid down in Art. 15 DMA, that provides that the Commission *"may conduct a market investigation for the purpose of examining whether a provider of core*

[101] Art. 3(4) DMA
[102] Art. 3(4) DMA
[103] Art. 3(2) DMA
[104] DMA Impact Assessment Report, para 389.
[105] Art. 3(6) DMA
[106] Feasey Richard, Note on Designation of gatekeepers in the Digital Markets Act, Issue Paper Centre on Regulation in Europe CERRE, p.5.

platform services should be designated as a gatekeeper pursuant to Article 3(6) [...].”[107] When the Commission decides to conduct a market analysis, then it should endeavor to reach a decision within twelve months from opening the market investigation. When the CPS provider fulfills the requirements in Art. 3(2) DMA but has put forward significantly substantiated arguments according to Art. 3(4), then the Commission should endeavor to conclude its market investigation within five months after opening the investigation process.[108]

Art. 3(6) DMA lays down the elements that the Commission needs to consider in its investigation:

“(a) the size, including turnover and market capitalisation, operations and position of the provider of core platform services; (b) the number of business users depending on the core platform service to reach end users and the number of end users; (c) entry barriers derived from network effects and data driven advantages, in particular in relation to the provider’s access to and collection of personal and non-personal data or analytics capabilities; (d) scale and scope effects the provider benefits from, including with regard to data; (e) business user or end user lock-in; (f) other structural market characteristics.”[109]

Art. 4 DMA state that once a gatekeeper has been designated, the Commission is allowed to reconsider, amend, or repeal a designation at any time.[110] There are two possible situations for this to happen: firstly, when there has been a substantial change in the facts on which the decision was made, and secondly, the decision was based on incomplete, incorrect, or misleading information.[111] The Commission must also review the designation decisions it has issued every three years, including both the designation itself as well as

[107] Art. 15 DMA
[108] Geradin, Damien, What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?, p. 16.
[109] Art. 3(6) DMA
[110] Art. 4(1) DMA
[111] Art. 4(1) DMA

each of the listed CPSs. The Commission must review every year whether there are new gatekeepers.[112]

3.4 Obligations

Once a CPS provider has been designated a gatekeeper, it has six months' time to comply with the obligations according to the DMA.[113] The gatekeeper's obligations are laid down in two provisions: Art. 5 and 6 DMA. The difference between the obligations laid down in these two provisions are that the obligations in Art. 6 DMA can be further specified, meaning in situations where the obligations lack clear identification, the Commission can add precision to the wording of Art. 6 DMA, but this is not however the case with Art. 5 DMA, which are self-executing.[114]

Once a CPS provider is designated as a gatekeeper, it is subject to the directly applicable obligations laid down in Art. 5 and 6 DMA, with respect to each of its CPS listed in the decision.[115]The obligations laid down in DMA is limited to practices

"(i) that are particularly unfair or harmful, (ii) which can be identified in a clear and unambiguous manner to provide the necessary legal certainty for gatekeepers and other interested parties, and (iii) for which there is sufficient experience"[116].

Three types of categories of obligations can be found: firstly, obligations with the objective of fairness for the relationship between the gatekeeper and business users or competitors, secondly, some obligations targets conflict of

[112] Art. 4(2) DMA + Natalia Moreno Belloso & Nicolas Petit, The EU Digital Markets Act (DMA), A Competition Han din a Regulatory Glove, pre-copyedited version of a paper forthcoming in the European Law Review, August 2023, 5 April 2023, p. 11
[113] Art. 3(10) DMA
[114] Akman Pinar, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, (2022) 47 European Law Review 85, published 10 December 2021, p. 9. Available online: https://ssrn.com/abstract=3978625
[115] European Commission, Proposal for a Regulation of the European Parliament And the Council on contestable and fair markets in the digital sector (Digital Markets Act) – Explanatory Memorandum, COMP(2020)842 final, p.10.
[116] Akman Pinar, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p.9.

interest raising between gatekeepers and their business users, in most cases where the gatekeeper is vertically integrated, thirdly, some obligations pursue contestability on the relevant markets.[117]

This part will focus on the different types of obligations contained in the DMA, as well as giving examples of EU competition cases that can be linked with the obligations. Art. 5 DMA includes seven obligations, four of them are prohibitions and three are prescriptive, whilst Art. 6 DMA includes eleven obligations, three of them are prohibitions, and eight are prescriptive in nature.[118] Art. 5 DMA contains a list of obligations from combining personal data across the gatekeeper's services, as well as obligation allowing business users to offer their products or services at prices and conditions that differs from those on the gatekeeper's platform.[119] Another self-executing obligations is to allow business users to conclude contracts and promote offers with end users that they have acquired on the platform via outside channels[120], which can be connected with Apple App Store case where the Commission was concerned of the anti-steering obligations imposed by Apple on the music streaming apps preventing developers from informing consumers of subscriptions of lower prices.[121]

Art. 5(g) DMA contains an obligation linked to contestability issues, as it obliges the gatekeeper's providing advertisers and publishers to information necessary concerning the price paid by the advertisers remuneration paid to the publisher (gatekeepers which provide advertising services), this obligation can also be connected with the Google AdTech case[122], where the

[117] Akman, Pinar, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 9.
[118] Ibid, p. 10.
[119] DMA Art. 5(a) and 5 (b)
[120] Akman, Pinar, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 10.
[121] European Commission, Antitrust: Commission sends Statement of Objections to Apple clarifying concerns over App Store rules for music streaming providers, Press Release, published 28 February 2023. Available online: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1217
[122] European Commission, Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector, Press

Commission opened investigation to evaluate whether Google has breached EU competition rules by favoring its own advertising services in the ad tech supply chain.[123] Art. 5(f) DMA aims to prevent restriction to free choice of users by withholding from the requirement of users to subscribe or register with another core platform service of the gatekeeper as a condition for the access to another CPS operated by the same gatekeeper, which can be linked with the Google Android case, as the case concerned anticompetitive agreements by tying or bundling Google applications and services on Android applications.[124]

Art. 6 (d) DMA include a prohibition of a gatekeeper treating its own offered products more favorable than others similar services or products of third parties, which is also known as "self-preferencing" prohibition and can be identified from the Google Search Shopping case.[125] In addition to the prohibition of self-preferencing, the DMA also includes a duty to apply fair and non-discriminatory conditions by gatekeepers. Art. 6(j) DMA does provide a further obligation on search engine gatekeepers that is needed to provide third party search engine providers access to data on ranking, query, click and view, on a basis of *"fair, reasonable and non-discriminatory terms"*[126] Additionally, Art. 6(k) DMA includes an obligation to apply fair and non-discriminatory general conditions on data access for business users to the gatekeeper's software application store, which can be combined with the Apple – App Store case, where the Commission is concerned with the Apple requires rival app developers to use Apple's own in-app purchase system (IAP) for any purchase that is made on their app, where Apple charges a 30% commission.[127]

Release, published 22 June 2021. Available online: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143

[123] Ibidem

[124] Akman, Pinar, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 10.

[125] Ibidem

[126] Ibid., 11.

[127] European Commission, Antitrust: Commission sends Statement of Objections to Apple clarifying concerns over App Store rules for music streaming providers, Press Release, published 28 February 2023. Available online: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1217 & Art. 6(K) DMA

Art. 6(a) DMA prohibits gatekeepers from using, in competition with its business users, data that is generated by the business users or end users, which is not publicly available. This prohibition has perhaps been inspired by the Amazon Marketplace case, where Amazon systematically relied on Amazon Retail's systems and employees on its online retail competitors' non-public data, which helps to leverage Amazon's dominant position on the markets of marketplace services into online retail markets.[128] Art. 6(b) and (e) DMA includes an obligation of allowing end users to uninstall any pre-installed software on the CPS, as well as from refraining from technically restricting the end user's ability to switch between and subscribe to different apps and services via the operating system of the gatekeeper. [129]

Art. 6(7) DMA allows service and hardware providers effective interoperability and access to the same hardware and software features, free of charge. that is controlled through the same operating system that is provided by the gatekeeper.[130] The gatekeeper shall also allow business users and alternative providers effective interoperability, for those that are provided together with, or in support of the CPSs.[131] This can relate to the Apple Mobile Payments app relating to Apple requiring app developers to use Apple's in-app system and charging a commission of 30% on all transactions.[132] Art. 6(3) DMA is also one notable obligation that allows the installation and use of third-party apps and app stores that interoperates with the same operating systems of the gatekeeper, and also allows these apps and app store to be accessed from other means than the CPS of the gatekeeper (side loading), which can be connected with the Apple App Store case, where Apple's restrictions on how app developers can distribute and market their

[128] Cases AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box, Summary of Commission Decision of 20 December 2022, para. 16.
[129] Akman, Pinar, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 11.
[130] Art. 6(7) DMA
[131] Ibid. p., 12.
[132] Press Release, European Commission, Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay, 2 May 2022: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2764

apps outside of the Apple App Store was disputed.[133] Notable is, that the DMA has limited its application of these obligations relating to contestability to providers of operating systems and ancillary services.[134]

Art. 7 DMA brings the possibility to regulatory dialogue in the context of the Art. 6 DMA obligations being further specified.[135] The regulatory dialogue is not a conditio sine qua non of the Art. 6 DMA obligations enforceability, it rather involves either the Commission's opening proceedings and by a decision that specifies the gatekeeper's measures that it shall implement, or the gatekeeper requests the Commission to open proceedings to determine the measures for achieving effective compliance of Art. 6 DMA obligations.[136] However, even if the Art. 6 DMA obligations are "susceptible of being further specified" it does not mean that the Commission needs to further specify the obligation for them to be applicable and legally enforceable for the gatekeeper.[137]

Art. 10 DMA states that the Commission has the right to update by a delegated act the gatekeeper's obligations following a market investigation, where the Commission may identify need for new obligations to address the issues with contestability or are unfair practices.[138] The practice shall be considered unfair or limitation on the contestability of the CPS in this sense where:
"(a) there is an imbalance of rights and obligations on business users and the gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the gatekeeper to business users;

[133] Akman, Pinar, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 12.
[134] Ibidem
[135] DMA recitals 33, 58
[136] European Parliament, Internal Market and Consumer Protection Committee (IMCO) Compromise Amendments, Version 18 November 2021, adopted on 23 November 2021, available online: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2021/11-22/DMA_Comrpomise_AMs_EN.pdf
[137] Akman, Pinar, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 13.
[138] Art. 10 DMA

or (b) the contestability of markets is weakened as a consequence of such a practice engaged in by gatekeepers"[139].

3.5 Reporting duty

The DMA requires the gatekeeper to notify the Commission with relevant information, but it does not require the company to acknowledge it having the status of a gatekeeper in its notification. The company can in its notification demonstrate that it does not "exceptionally" satisfy the requirements of Art. 3(1) DMA even if the thresholds under Art. 3(2) DMA is satisfied.[140]
The DMA requires all gatekeepers to comply with all obligations in respect of each of the CPSs that are listed in the designation decision. The designation decision initiates a 6 month's period for gatekeepers to achieve compliance.[141]

The gatekeepers need to prove compliance with the DMA obligations, and therefore needs to submit an annual mandatory compliance report to the Commission.[142] It depends on the quality of these reports how easy the supervisory duty on Commission will be, and the report is required to contain in-depth analysis and explanations why the gatekeeper considers that they have complied with the obligations.[143] The DMA does not include many provisions and details on the compliance report, which leaves the Commission with leeway to draft a set of requirements for the compliance reports powers and uses.[144]

[139] Art. 10(1) DMA
[140] Natalia Moreno Belloso & Nicolas Petit, The EU Digital Markets Act (DMA), A Competition Han din a Regulatory Glove, pre-copyedited version of a paper forthcoming in the European Law Review, p. 12.
[141] Ibidem
[142] Art. 11 DMA & Scott Morton F., De Steel A., Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust. Journal of Antitrust Enforcement 2023, Vol. 00, No.0, p.4.
[143] Ibid, p. 7
[144] Ibid, p.11.

3.6 Remedies

When the Commission finds that a gatekeeper does not comply with the obligations laid down in Art. 5 or 6 DMA, or with other measures in the DMA or binding commitments, then it can adopt a non-compliance decision, where the Commission shall order the gatekeeper to cease and desist and provide explanation on how the gatekeeper plans to comply with the decision.[145]

The market investigation procedure introduced in the DMA can be used by the Commission for three different purposes: firstly, it can be used to designate a platform as a gatekeeper which meets the qualitative thresholds but does not satisfy the quantitative criteria or meets all the quantitative criteria but presents "sufficiently substantiated arguments" argument that it does not meet the qualitative thresholds[146]. Secondly, the Commission has the possibility to establish systematic non-compliance of the DMA obligations by a market investigation, after which the Commission may impose behavioral and structural remedies.[147] Thirdly, to examine whether new services should be added as CPS to the DMA or to detect contestability limiting CPS services or unfair practices not effectively addressed in the DMA.[148]

The remedies in the DMA are structured as behavioral remedies, as opposed to structural. Structural remedies comprise of legal, functional, or structural separation, as well as divestiture.[149] Art. 16 of the DMA, as a last recourse in cases of systematic violations by the gatekeepers, and when *"there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the gatekeeper concerned than the actual remedy"*.[150] The DMA imposes behavioral remedies, which can be

[145] Art. 25 DMA
[146] Art. 15 DMA
[147] Art. 16 DMA
[148] Art. 17 DMA
[149] Akman, Pinar, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 15.
[150] Art. 16 (1) and (2)

complemented in the worst scenario with structural remedies in exceptional cases.[151] A similar approach to remedies can be seen in Regulation 1/2003 and is described as a matter of respecting the proportionality principle.[152] In the DMA Proposal Impact Assessment, the Commission points out that structural remedies has not been imposed in more than 15 years since the Regulation 1/2003 came into force.[153]

Fines of up to 10% of the company's total worldwide annual turnover, or up to 20% in the event of repeated infringements.[154] Periodic penalty payments of up to 5 % of the average daily turnover.[155] In case of systematic infringements if the DMA obligations by gatekeepers, there might be additional remedies imposed after market investigation, but such remedies needs to follow the principle of proportionality.[156] As a last resort, if necessary, optional non-financial remedies can be imposed, including behavioral and structural remedies, such as divestiture of a business.[157]

The DMA has received criticism regarding the remedies, as it lacks measurements of the proportionality of the imposed obligations with respect to the costs incurred for the benefit achieved, and it is left unclear is how the remedies relates to the extent of the abusive practices or consumer harm when an obligation has not been followed.[158]

[151] DMA, Recital 75
[152] Art. 5(4) TFEU
[153] DMA Proposal Impact Assessment, para 168-172
[154] Art. 30 DMA
[155] Art. 31 DMA
[156] European Commission, The Digital Markets Act: ensuring fair and open digital markets, published 12 October 2022. Available online: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en
[157] Ibidem
[158] Bauer Matthias et al, The EU Digital Markets Act: Assessing the Quality of Regulation, ECIPE Policy Brief, No. 02/2022, p. 18.

3.7 Conclusion

The main idea behind the DMA, and which is one of the key arguments behind the effectivity measurement of the act, is that that it includes a designation of whom is to be considered a gatekeeper, and whom will be bound the DMA obligations. As stated above, the designation process includes both quantitative and qualitative criteria, both of which are not combined, which means that when a CPS fulfils the quantitative criteria laid down, the qualitative criteria is also presumed to be fulfilled. The downfall with this is that the DMA will capture even large digital platforms that does not include gatekeeping characteristics. The DMA obligations are laid down in Art. 5 and 6 of the DMA, where the Art. 6 DMA obligations can be further specified, where the Commission can add precision to the wording of the provision and Art. 5 DMA which is self-executing and not possible to further specify. The DMA includes different remedy options connected with the DMA such as the structural and behavioral remedies in case of non-compliance of the binding obligations. The DMA has received criticism regarding the remedies, due to lack of proportionality of the obligations and costs incurred for the benefit achieved. It remains unclear how the remedies relates to the extent of the abusive practices or consumer harm when an obligation has not been followed.

4 Interoperability

4.1 Introduction

In this chapter one of the key point to the research of this paper, mainly to focus on the effectiveness of the DMA and how interoperability promotes fairness and contestability in the digital markets. Section 4.2 will start with a general discussion regarding interoperability, including its various definitions and meanings, as well as how interoperability affects competition on the digital markets and why it is important. The chapter will continue with an elaboration of the objective's "fairness" and "contestability" and how interoperability helps to fulfil these objectives. Next section will discuss horizontal interoperability, which occurs when similar products and services in competition work together, and vertical interoperability occurs when different products and services on different levels of a value chain work together. Both horizontal and vertical interoperability is included in the obligations of the DMA. Both vertical and horizontal interoperability serves different purposes and goals, which will also be relevant to the effectiveness of the DMA. This chapter will end with a discussion about competition cases involving interoperability issues.

4.2 Interoperability and digital platforms

As stated in the introduction to this paper, the EU Commission has identified lack of interoperability as one major obstacle to digitalization. Effective interoperability between networks, data repositories and services has become more and more important for the European Digital Agenda.[159] Significant market players shall be led to pro interoperability business models. [160] One of

[159] EU Commission, A Digital Agenda for Europe, Brussels, 19.5.2010 (COM(2010)245,published 19 May 2010, p. 15. Available online: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF

[160] EU Commission, A Digital Agenda for Europe, Brussels, 19.5.2010 (COM(2010)245,published 19 May 2010, p. 15. Available online: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF

the major difficulties of the interoperability discussion is the lack of a clear definition of interoperability, and a broad meaning of interoperability is the ability of a system, product, or service to communicate and function with other technically different systems, products, or services.[161] It can be stated as a system or components to function effectively together, while at the same time, providing or accepting services from other systems.[162] Palfrey and Gasser defines interoperability as "*the ability to transfer and render useful data and other information across systems, applications, or components"*.[163] Interoperability is defined in the DMA as: "*the ability to exchange information and mutually use the information which has been exchanged through interfaces or other solutions, so that all elements of hardware or software work with other hardware and software and with users in all the ways in which they are intended to function"*.[164]

Art. 6 (7) of the DMA imposed an obligation on the gatekeeper to "*allow providers of services and providers of hardware, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features accessed or controlled via the operating system..."*[165] as well as allow access to business users and alternative users effective interoperability.[166] Interoperability is divided into horizontal interoperability, which occurs when similar products and services in competition work together, and vertical interoperability occurs when different products and services on different levels of a value chain work together, and an example of horizontal interoperability is to send a message from one messenger service to another, and on the other hand, vertical

[161] Vishnu S, Software Interoperability and Competition Law, Journal of Intellectual Property Rights Vol 25, published November 2020, p. 180. Available online: http://op.niscpr.res.in/index.php/JIPR/article/viewFile/35239/465481102
[162] Ibidem
[163] Palfrey John and Gasser Urs, NCCR Trade Regulation Research Paper Series, Interoperability in Information Systems in the Furtherance of Trade, Research Publication No. 2012-21, published December 2021, p. 4.
[164] Art. 2 DMA
[165] Art. 6(7) DMA
[166] Ibidem

interoperability refers to a situation where different app stores run on the same operating system.[167]

Companies on a market compete with different business models and different degrees of interoperability, which means separate already existing firms competing individually on the market but also by interacting with each other, whether by contractual means or due to state compulsion.[168] Some customers might prefer a products and platforms that provides a more closed system of complementary products and services, which favors a less interoperable system.[169] Whereas some customer value more freedom to choose between different open systems, even if it bears higher risks with reliability and safety and the producers of the components or complementary producers can choose whether to develop and produce their product according to the applicable general standards, or to be a part of a closed system with specific rules. Both ways will have its own benefits and costs.[170] Effective competition leads to companies having incentive to decide on the extent of interoperability that corresponds to the consumer, suppliers, and app developers' preferences.[171]

Interoperability is required to create intended value, due to specific technology usually is not working without other technologies, and the survival of the platform is highly dependent on the complementarity of the offering, which depends on technology, features, and interoperability, which is then being unfairly "rented" out by the digital platforms.[172] The scope of copyright protection, as well as the refusal to license or disclose interoperability information have made the authorities to put more pressure

[167] Bourreau M., Krämer J., Buiten M., Interoperability in Digital Markets, Centre on Regulation in Europe (CERRE), published March 2022, p.44.
[168] Hovenkamp Herbert, Antitrust Interoperability Remedies, U of Penn, Inst for Law & Econ Research Paper No. 22-14, 123 Col. L. Rev. Forum 1 (2023), p. 5. Published 27 January 2023. Available online: https://ssrn.com/abstract=4035879
[169] Kerber Wolfgang and Schweitzer Heike, Interoperability in the Digital Economy, p. 43.
[170] Ibidem
[171] Ibidem
[172] M. Scott Morton Fiona, Crawford G., Crémer J., Dinielli D., Fletcher A., Heidhues P., Schnitzer M., Seim K., Equitable Interoperability: the "super tool" of digital platform governance, Digital Regulation Project, Policy Discussion Paper No.4, published 13 July 2021, p. 4.

on duty to disclose, however, the compulsory disclosure of interoperability information however harms the copyright holder; therefore, it is important to balance all interests involved.[173]

Lack of contestability that is caused by fundamentals of the technology and demand is important to distinguish from lack of contestability due to behavior of the platform, as an example, lack of multi-homing can be caused by users chooses to concentrate their activities on one platform, but it can also be because of contractual and technical reasons that one platform is using with the aim to reduce competition.[174] It is for this kind of situations that where the nature of the technology and demand that limit contestability, that the regulator can put forward pro-competitive interventions, for example mandated interoperability, however, the regulator can also forbid unfair practices, but this needs clarification on what is considered fair and unfair.[175] Interoperability is a tool that increases contestability and fairness of digital platforms, and from an economic perspective contestability and fairness benefits consumers. Fairness in the DMA demonstrates the fairness off opportunity for business users is enabled by equitable interoperability.[176]

Interoperability does play a key role in encouraging competition in the market by lowering the entry barriers for other companies to enter the market, and that existing companies can expand.[177] Additionally, it can also enhance competition in complementary markets, which is of huge relevance where the complementary markets are platform markets or where there is a risk of

[173] Vishnu S, Software Interoperability and Competition Law, Journal of Intellectual Property Rights Vol 25, published November 2020, p. 184.
[174] Crémer J., Crawford G., Dinielli D., Fletcher A., Heidhues P., Schnitzer M., M. Scott Morton Fiona, Seim K., Fairness and Contestability in the Digital Markets Act, Digital Regulation Project, Policy Discussion paper No.3, published 6 July 2021, p. 6.
[175] Hovenkamp Herbert, Antitrust Interoperability Remedies, U of Penn, Inst for Law & Econ Research Paper No. 22-14, 123 Col. L. Rev. Forum 1 (2023), p. 10-11.
[176] M. Scott Morton Fiona, Crawford G., Crémer J., Dinielli D., Fletcher A., Heidhues P., Schnitzer M., Seim K., Equitable Interoperability: the "super tool" of digital platform governance, p. 4.
[177] Mancini James, Data Portability, Interoperability and Digital Platform Competition: OECD Background Paper DAF/COMP(2021)5 , published 7 May 2021, para 156. Available online: https://ssrn.com/abstract=3862299

leverage of market power from core platform to a complementary business.[178] One example of this is Apple Pay, which is a wireless payment technology which Apple generally do not let third parties to interoperate, which might enable Apple to leverage from the Apple core operating system into payments.[179]

Interoperability remedies can be less intrusive of market structure than breakups or divestiture and are often more effective than prohibitory remedies and is generally more suitable to digital business models.[180] When a regulator aims to reduce market power while increasing consumer surplus should strive to use tools that involves minimal regulation of the actual product, but at the same time promoting efficient entry and expansion as much as possible.[181] Interoperability is a tool in digital platform markets that lowers entry barriers and gives existing competitor the ability to access the platform and grow their business.[182]

The goal of the DMA with regards to interoperability is to extend it to other communication tools, such as messaging application, meaning, that WhatsApp users cannot end a message to a Telegram user, nor can the owner of an iPhone send an online message to an android owner and vice versa. The DMA provides that gatekeepers' communication services, and especially messaging applications, are obliged to provide the necessary interfaces that allow interoperability among competing services, namely horizontal interoperability. The obligation extends to basic functionalities, end-to-end messaging, voice, and video calls, sharing of images etc.[183]

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[178] Ibidem
[179] M. Scott Morton Fiona, Crawford G., Crémer J., Dinielli D., Fletcher A., Heidhues P., Schnitzer M., Seim K., Equitable Interoperability: the "super tool" of digital platform governance, p. 4.
[180] Hovenkamp Herbert, Antitrust Interoperability Remedies, U of Penn, Inst for Law & Econ Research Paper No. 22-14, 123 Col. L. Rev. Forum 1 (2023), p.3.
[181] M. Scott Morton Fiona, Crawford G., Crémer J., Dinielli D., Fletcher A., Heidhues P., Schnitzer M., Seim K., Equitable Interoperability: the "super tool" of digital platform governance, p. 2.
[182] Sharma Chinmayi, Concentrated Digital Markets, Restrictive APIs, and the Fight for Internet Interoperability, University of Memphis Law Review, Vol. 50, No. 2, published 7 June 2019, p. 453.
[183] Art. 8 DMA

4.2.1 Contestability and fairness

4.2.1.1 Fairness

Consumers and small businesses renting digital technology are unfairly accruing to large platforms, instead of being distributed more equitably in accordance with each party's contribution to surplus, which leads to discontent with digital platform stems, which is due to surplus split.[184]When a platform is enjoying network effects, at the same time, an individual user or complementary business is making a very small contribution to the creation of surplus, and therefore, when the individual user or business is bargaining for a bigger portion of the surplus, its leverage is low, and the platform's leverage is high.[185] As a result, the bargain leaves the platform with most of the surplus. On the other hand, all users as a group are making a very large contribution to total surplus, because most likely most of the surplus derives from the ability to interact with each other on the platform, rather than due to one dominant platform's characteristics.[186]

The marginal impact is large of users as a group on platform profits, and therefore, if all users would together threaten to move themselves to another platform, then they could bargain for a fairer share of the surplus.[187]This is where interoperability increases fairness, as it is allowing entrants to share the same network effects as the dominant undertaking. Interoperability allows rivals to the dominant undertaking to compete on dimensions of consumers and business users value while maintaining access to the dominant firm's user base. Interoperability redefines the property rights of the network externalities on both sides of the platform and not the firm owning the dominant platform.[188]

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[184] Crémer J., Crawford G., Dinielli D., Fletcher A., Heidhues P., Schnitzer M., M. Scott Morton Fiona, Seim K., Fairness and Contestability in the Digital Markets Act,p. 8.
[185] M. Scott Morton Fiona, Crawford G., Crémer J., Dinielli D., Fletcher A., Heidhues P., Schnitzer M., Seim K., Equitable Interoperability: the "super tool" of digital platform governance, p. 4.
[186] Ibidem
[187] Ibidem
[188] Ibidem

Interoperability increases fairness, as it is allowing entrants to share the same network effects as the dominant undertaking, as well as it allows rivals to the dominant undertaking to compete on dimensions of consumers and business users value while maintaining access to the dominant firm's user base.[189]

4.2.1.2 Contestability

The network effects are raising benefit to users of a digital platform or product when many other users are also consumer of that platform or product, such as phone system and social network having strong direct network effects.[190] Indirect network effects are operating through software, content, or services on one side, which attracts the users on the other side, which attract more content. This can be demonstrated when an app store gains more developers of new apps, then it attracts more users.[191]

Interoperability does play a key role in encouraging competition in the market by lowering the entry barriers for other companies to enter the market, and that existing companies can expand.[192]Additionally, it can also enhance competition in complementary markets, which is of huge relevance where the complementary markets are platform markets or where there is a risk of leverage of market power from core platform to a complementary business, one example of this is Apple Pay, which is a wireless payment technology which Apple generally do not let third parties to interoperate, which might enable Apple to leverage from the Apple core operating system into payments.[193]

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[189] M. Scott Morton Fiona, Crawford G., Crémer J., Dinielli D., Fletcher A., Heidhues P., Schnitzer M., Seim K., Equitable Interoperability: the "super tool" of digital platform governance, p. 4.
[190] Ibidem
[191] Ibidem
[192] Mancini James, Data Portability, Interoperability and Digital Platform Competition: OECD Background Paper DAF/COMP(2021)5 , published 7 May 2021, para 156. Available online: https://ssrn.com/abstract=3862299
[193] M. Scott Morton Fiona, Crawford G., Crémer J., Dinielli D., Fletcher A., Heidhues P., Schnitzer M., Seim K., Equitable Interoperability: the "super tool" of digital platform governance, p. 4.

4.2.2 Horizontal Interoperability

Horizontal interoperability allows a company's users to interact with the user base of another company providing interoperable services or products, which means, that for example users can send messages to other users using a different app, that results in competition emerging between suppliers of the services, despite the network effects.[194] Horizontal interoperability makes the network effects aggregated into market-wide network effects, which means that it becomes a public good. Instead of competing on network benefits, the competitors compete on other factors, including quality or privacy, which is important for the users.[195] The users might experience lock-in on some markets because they will lose network effects, for example social connections, when they switch to, or multi-homing on new platforms. However, interoperability ensures communication between the platforms which allows the user to retain network effects, which helps to prevent a market from tipping into a monopoly.[196] The competition on the market is therefore sustainable, as the market cannot tip when the network effects are neutral.[197] Lack of interoperability could lead to barrier to entry in a market and prevent users from switching services, there might still be vigorous competition between closed systems on a market, especially when switching costs are low.[198] Competitive pressures may also encourage to interoperability, such as the arrangement between Microsoft and Google to improve the interoperability between Google Calendar and Microsoft Exchange.[199] Even if horizontal interoperability is efficient, large digital

[194] Bourreau M., Krämer J., Buiten M., Interoperability in Digital Markets, Centre on Regulation in Europe (CERRE), Published March 2022, p. 19.
[195] OECD, Data portability, interoperability and digital platform competition, OECD Competition Committee Discussion Paper, published 2021, p. 20. Available online: https://www.oecd.org/daf/competition/data-portability-interoperability-and-digital-platform-competition-2021.pdf
[196] Ibidem
[197] Bourreau M., Krämer J., Buiten M., Interoperability in Digital Markets, Centre on Regulation in Europe (CERRE), Published March 2022, p. 19.
[198] Bourreau M., Some Economics of Digital Ecosystems – Note by March Bourreau for Competition Committee Hearing on Competition Economics of Digital Ecosystems, published 2020, p. 6-7. Available online: https://one.oecd.org/document/DAF/COMP/WD(2020)89/en/pdf p. 6-7.
[199] Brown I., Interoperability as a Tool for Competition Regulation, published 2020, p. 23. Available online: https://doi.org/10.31228/osf.io/fbvxd

platform may resist it, while small network would push for it, therefore, mandatory interoperability might be the only course to implement it.[200]

The challenges relating to horizontal interoperability is notable, and there are guidelines provided regarding the economic criteria for considering functionality for interoperable features.[201] The interoperability functionalities need to be standardized, which is a long and complex process involving coordination between stakeholders and technical problems. However, it must be addressed that innovation for new features, products and services develops fast, and standardized interoperable features might be quickly outdated, which means that the standardization needs to be updated also.[202] In some cases, standardization exist before interoperability, where the technical costs of implementing interoperability are lower, but dominant platforms on the market might resist interoperability with smaller firms, and therefore might try to find legal and technical ways to make the standardization unsuccessful.[203]

The DMA includes horizontal interoperability obligations for messenger services and social networks. Art. 7(1) DMA provides for horizontal interoperability:

"a gatekeeper providing number-independent interpersonal communications services (...) shall make the basic functionalities of its number-independent interpersonal communications services interoperable with the number-independent interpersonal communications services of another provider (...) by providing the necessary technical interfaces or similar solutions that facilitate interoperability, upon request, and free of charge."[204]

This obligation however concerns only the "basic functionalities" of messaging service defined in Art. 7(2) DMA. Access shall be provided upon

[200] Bourreau M., Krämer J., Buiten M., Interoperability in Digital Markets, p. 19.
[201] Ibid, p. 22.
[202] Ibidem
[203] Ibidem
[204] Art. 7(1) DMA

request and free of charge.[205] The main objective behind horizontal interoperability is to improve contestability on a market, which is also one of the main goals with the DMA: *"The lack of interoperability allows gatekeepers that provide number-independent interpersonal communications services to benefit from strong network effects, which contributes to the weakening of contestability."*[206]

4.2.3 Vertical Interoperability

Vertical interoperability relates to the focus on promoting competition within digital platforms, which is important for users when competition between digital platforms is limited to lock-in effects, such as costs related to switching platforms.[207] Vertical interoperability has been the general principle behind internet, which provided modular design through access layers that interoperate with each other through interfaces. Each layer has its own functionality, such as routing, RF-access, which then can be replaced without affecting the system's functions, which allows switching between systems and complementary innovation of different layers.[208] Vertical interoperability focuses on competition policy, as it is concerned with market power being leveraged into other markets, which is especially important within digital platform markets. Vertical interoperability thus encourages switching and mix and match between complementary products from different platforms, which prevents market power form emerging.[209]

Large digital platforms usually offer multiple different services, which might be complementary to each other, or they might also be minimally related, but involve an overlapping of users. Undertakings might then also bundle the

[205] Bourreau M., DMA Horizontal and Vertical Interoperability obligations, Issue Paper, Centre on Regulation in Europe, published november 2022. p. 6.
[206] Recital 64 DMA
[207] OECD, Data portability, interoperability and digital platform competition, p. 20.
[208] Bourreau M., Krämer J., Buiten M., Interoperability in Digital Markets, Centre on Regulation in Europe (CERRE), Published March 2022, p. 26.
[209] OECD, Data portability, interoperability and digital platform competition, p. 20.

services together or interlink them in digital ecosystems.[210] The linkages might provide benefits for users, such as easy and seamless usage and convenience, and emerging innovative business models and new pricing arrangements. This might also be one reason for the platform to attract users, by leveraging existing functionality, for example sign-in solutions and account authenticators.[211] Competition concerns might arise due to digital platform acting as gatekeeper between the undertakings and users, which limits interoperability with other services provided by other undertakings, especially when the gatekeeper offers competing services. This might lead to a closed API, which is used to attract more content or features and attract more users. Closed APIs might serve as an entry barrier, where the undertaking is compelled to offer users of the ecosystem services provided by the gatekeeper to compete on the closed system.[212]

The DMA promotes selected vertical interoperability obligations, which has attracted inspiration from ongoing EU competition cases, which also will be discussed later in this chapter. The DMA goes even beyond the competition law provision, it is a system that is provided to address systematic risks of competition that results from the platform characteristics where gatekeepers are present, whereas mandatory interoperability might be considered a regulatory remedy, which differentiates the DMA from competition law.[213]

4.3 Cases involving interoperability issues

The first competition case relating to interoperability is already from 1980, when the EU Commission decided to take action to investigate IBM's behavior on the market for the supply of central processing units and

[210] Bourreau M., Some Economics of Digital Ecosystems – Note by March Bourreau for Competition Committee Hearing on Competition Economics of Digital Ecosystems, published 2020, p. 8.
[211] Riley C. Unpacking interoperability in competition, Journal on Cyber Policy, Vol. 5:1, published 2020, p. 97. 4
[212] Bourreau M., Some Economics of Digital Ecosystems – Note by March Bourreau for Competition Committee Hearing on Competition Economics of Digital Ecosystems, p. 8.
[213] OECD, Data portability, interoperability and digital platform competition, p. 44.

operating systems for its computers, the System/370. The Commission stated that IBM abused its dominant position due to failing to provide other manufacturers technical information needed to allow their products to be used with the System/370.[214] The Commission accepted in 1984 the unilateral undertaking that IBM offered relating to the interoperability provision regarding information to competitors, and the undertaking established a settlement between IBM and the Commission, no further guidance was given to the industry that how in similar circumstances a refusal to license interoperability records would be considered abuse of dominance.[215]

A high-profile case relating to interoperability issues under competition law, is the Microsoft case, where the EU Commission based its judgement on the order to license on the need for interoperability, the elimination of competition on the secondary market, low innovation, harm caused on consumers and the absence of jurisdiction.[216] The Commission might adopt commitments made by the undertakings, having the goal to render the concentration compatible with the internal market. A refusal made by the undertaking to give access to interoperability information to its competitors may be considered abuse of dominant position.[217] The EU Commission assessed in the Microsoft case, the possibility of Microsoft to reduce Skype's interoperability with other systems in competition, as well as Windows' interoperability with competing providers of communications services in the market for consumer and undertaking communications. The Commission then stated that Microsoft did not have the intention to reduce interoperability and that the concentration did not give raise to serious issues relating to the compatibility with the internal market.[218]

A dissenting judgement in the Microsoft case, is the consideration that the blocking of interoperability with other operating systems might be considered

[214] Vishnu S, Software Interoperability and Competition Law, Journal of Intellectual Property Rights Vol 25, p. 183.
[215] Ibidem
[216] COMP/C-3/37.792 Microsoft [2004] OJ L32/23.
[217] Article 102, Treaty on the Functioning of the European Union (TFEU)
[218] Case No COMP/M.6281 – Microsoft / Skype

abuse of a dominant position and violating Art. 102 TEU. In addition, discriminatory pricing might also infringe Art. 102 TFEU. When operating on a software industry, when an undertaking has increased incentive to restrict interoperability without appropriate remedies, it raises the barrier to entry, and therefore, it can also be considered abuse of a dominant position.[219]

4.4 Conclusion

This chapter provided an overview of what the concept of interoperability means, what kind of competition issues are involved with lack of interoperability and why interoperability is important for the digital markets. The terms contestability and fairness as provided in the DMA was also discussed in the interoperability setting, and why the access to interoperability information of the gatekeepers is essential to promote contestability and fairness in the market, for example, by allowing new entrants to share same network effects as the gatekeeper and encourages competition on complementary market. The division into horizontal and vertical interoperability was introduced, and the different objectives connected with them. The first competition case traces back to 1980 where the EU Commission started investigation into IBM's behaviour on the market for the supply of central processing units and operating systems of its computers, as well as the interoperability issues investigated by the EU Commission in the Microsoft I case was discussed briefly. A more in-depth analysis of the Microsoft case will be discussed in the sixth chapter.

[219] Vishnu S, Software Interoperability and Competition Law, Journal of Intellectual Property Rights Vol 25, p. 183.

5 Access to Data

5.1 Introduction

This section of the Thesis will provide a brief overview in relation to the actual problematic behind access to data and digital platforms and will seek an answer to the second research question of this thesis. At this part, it is important to highlight the differences between interoperability and actual legal access to gatekeepers' data. Access of data refers to the ability of the platforms and business users to obtain and use specific type of data that is being controlled and generated by the gatekeeper. Access to data is crucial on the point to develop innovative solutions and enhance offerings, as well as overall competition on the market.

This chapter will focus on the legal access to data and give an overview of how the DMA and GDPR, which is one of the main regulations in the field of access to data, as well as brief discussion regarding IPR and DMA, as well as the reverse engineering doctrine and Technical Protection measures (TPMs) under InfoSoc. The main reason behind this chapter is to discuss the issues behind the access to gatekeeper's data, and to analyze the already existing framework, and the possible restrictions and collusions that affects the aim and goal of the DMA, namely: fairness and contestability.

5.2 Overview

Digital platforms are competing for users and advertisers instead of targeting only one customer group. More traditional companies in the digital sector, for example Intel differs from digital platforms because they do not gain revenue by selling their technology to consumer, but benefits from the valuable information they collect from their users.[220] The collection of data from the

[220] Graef Inge, Wahyuningtyas Yuli & Valcke, Peggy. Assessing data access issues in online platforms. Telecommunications Policy 39(5), published February 2015. p. 2.

users enables them to offer more specifically targeted advertising services to advertisers who then helps fund the platform, where the digital platforms are dependent on the amount and nature of the data and the user base, the platform providers are not willing in all cases to give competitors access to the information they have gathered of their user base, for example, third-party websites are not directly allowed to acquire the user's information. [221] This means that new service providing platforms have business models that collects data from both business users and private users, and these platforms do not share the data with their clients. This kind of data is not normally covered by property rights.[222]

The infrastructure for collecting, storing, and distributing data relates to technology barriers, such as legal and behavioral barriers to access.[223] This makes the data technically difficult to access. as well as the web of intellectual property rights (IPRs) or begin protected under the General Data Protection Regulation (GDPR).[224] In addition, the storing of data on platforms or clouds can also be under restrictive agreements. Platform providers do not allow business users of their platforms access the data generated by themselves. Even if the data is not covered by property rights are generally only accessible to the platforms, which are also core of their business models. [225]

The DMA Art. 6(a), (h) and (i) states an obligation for the gatekeepers to give access and transfer data to their business users. It states that gatekeepers are not allowed to use the data that has been generated by business users and their end users on the platforms, in competition with the business users.[226] However, the Art. 6(h) and (i) lays out an obligation that business users have some right to gain access, port and re-use data generated by their action on

[221] Graef Inge, Wahyuningtyas Yuli & Valcke, Peggy. Assessing data access issues in online platforms. Telecommunications Policy 39(5), published February 2015. p. 2.
[222] Ibidem
[223] Lundqvist Björn, An access and transfer right to data—from a competition law perspective, Journal of Antitrust Enforcement, published 13 September 2022, p.2.
[224] Ibidem & General Data Protection Regulation (GDPR) Regulation 2016/676
[225] Rubinfield D., Gal M., Access Barriers to Data, Arizona Law Review Vol 59:339, published 2016, p. 360.
[226] Art. 6 (a), (h)(i) DMA

the platforms, and therefore, there is a right to receive data from the platforms, that can also be transferred to third parties.[227] This creates a compulsory access and use regime benefitting the business users, which is not yet protected under property right, to the data generated by the business user and its end users on the platform.[228]

There are open questions about the DMA, whether the gateway for business users to access data is in fact creating interoperability, or whether intellectual property rights, trade secrets or the GDPR will be a hinder to data access and its re-use.[229] The gatekeepers could claim that the obligation to give access, and for the business users to re-use the data generated on their platforms, should not be enforced because the data is protected under IPR, trade secrets or concerns personal data.[230]

5.3 Legal Control of Data

The data and the information the platforms encompass are not currently covered by property rights, regardless of how private and valuable they are, which means, that no-one owns personal data, even though the subject of the data has some rights regarding the data under the GDPR.[231] Art. 20 GDPR states a mandatory personal porting right, it is however, not financial, but it might serve as a source of competition. It works as a consumer protection rule, where individuals have the right to port data, and this right cannot be

[227] Lundqvist Björn, The Proposed Digital Markets Act and Access to Data: a Revolution, or Not? , p. 239-240.
[228] Ibidem
[228] European Commission, The Digital Markets Act: ensuring fair and open digital markets, published 12 October 2022. Available online: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en
[229] Lundqvist Björn, The Proposed Digital Markets Act and Access to Data: a Revolution, or Not? , p. 240.
[230] Ibidem
[230] European Commission, The Digital Markets Act: ensuring fair and open digital markets, published 12 October 2022.
[231] Lundqvist Björn, An access and transfer right to data—from a competition law perspective, p.2.

eroded or derogated in any way.[232] DMA requires gatekeepers to give access to data on fair, reasonable and non-discriminatory terms (FRAND -terms).[233] FRAND -term can also relate to the fairness objective underlying the DMA, which is one of the parametric that this paper is evaluating effectiveness of the DMA.

Digital Platforms can also assert that the data they collect are trade secrets[234] or in case of personal data, might be off-limits under the GDPR.[235] This refusal can also be claimed under Art. 6 of the DMA and GDPR, which means that the difference between data protection authorities and DMA approach, is that the large technology companies use GDPR offensively by limiting their sharing of data beyond the obligation of the GDPR. One explanation to this is that when the GDPR was introduced, the platform providers, when storing the gathered data in databases or in private blockchains, could provide database protection under the 1996 directive.[236]

The application of IPR read together with the obligation laid down in the DMA could be denied, it can lead to a situation where no violation is inherent in the access and re-use of data of data by business users, as IPR, the right to trade secrets and to deny access to personal data under GDPR creates an uncertainty that the gatekeepers might deny the access to data under the DMA, as such access and re-use could infringe the obligations of the gatekeepers.[237] This is also one of the main issues behind the effectiveness of the DMA, as the access to interoperability information as well as other data is not ensured in all cases.

[232] Ibid p. 8
[233] Edelson L. Graef I., Lancieri F., Access to data and algorithms: for an effective DMA and DSA implementation, Centre of Regulation in Europé (CERRE) Report, published March 2023. p.18.
[234] Art. 3 of the Trade Secret Directive & Recital 16
[235] Lundqvist Björn, An access and transfer right to data—from a competition law perspective, p.9.
[236] Ibid, p. 9.
[237] Lundqvist Björn, The Proposed Digital Markets Act and Access to Data: a Revolution, or Not? , p. 240.

There are also other options for accessing data under the IPR system. For example, the data mining regulation, used together with the DMA, could possibly open gates to allow access to the gatekeepers' data. Secondly, another option is the reverse engineering doctrine in the InfoSoc used in parallel with the DMA could also breach up the gates.[238] However, the application of these exemptions is currently uncertain and might end up in litigations.[239] Due to the uncertainties underlying the exemptions, it is important to clarify whether the DMA is capable per se to create access and portability of the gatekeeper's data unilaterally or used in combination with the exemptions of data mining and reverse engineering under the copyright regime.[240] Art. 6 of the InfoSoc requires MS to *"provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective*."[241] In addition, it states that MS shall also provide "*legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components…"*[242]

If personal or non-non personal data fulfils the requirement for IPRs, it can be covered by copyright law. Both personal and non-personal data can also be protected for the benefit of digital platform providers. Technical Protection measures (TPMs), Art. 6 of the InfoSoc can prevent access to copyright protected content and to unprotected data.[243] A breach of TPMs to gain access to unprotected data amount a violation of Art. 6 InfoSoc. Additionally, the gateways to platforms, the APIs, may be copyright-protected in EU law, and therefore also restricting access to data.[244]

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[238] Lundqvist Björn, An access and transfer right to data—from a competition law perspective, p.9.
[239] Ibidem
[240] Ibidem
[241] Art. 6 (1) InfoSoc
[242] Ibid Art. 6:2
[243] Lundqvist Björn, An access and transfer right to data—from a competition law perspective, p.8.
[244] Ibidem

The time will tell whether the DMA creates an obligation for gatekeepers to allow use and access also for data that is protected by IPR or as trade secrets. Should the DMA be understood as a reverse engineering or data mining tool that business users can use, or is it a development from the reverse engineering right and data mining regulation? Currently it seems that the gatekeepers' data are somewhat protected by IPRs and personal data under the GDPR which gives the gatekeepers the possibility to still deny access and have the matter litigated in the court.[245]

5.4 Data covered by the GDPR and the DMA

Personal data is protected by the GDPR, meaning "*any information relating to an identified or identifiable natural person"*[246]. Only personal data is within the scope of a data portability request under the GDPR, and therefore, any data that is anonymous or not concerning the actual data subject is not covered by Art. 20 GDPR.[247] There is not such a restriction under the DMA with regards to data portability. The DMA Art. 6(9) does only refer broadly to the term "data", and in other DMA obligations refer to data that is personal within the meaning of the GDPR.[248]

Art. 20(1) of the GDPR covers data that the end users have provided to a controller, and the term "provider" covers knowingly and actively provided by end users, as well as data from observations of their activities, for example, history of website usage.[249] The right to data portability under the GDPR does not cover inferred or derived data, meaning the data that is created by the data

[245] Ibid p. 10
[246] GDPR Art. 4(1)
[247] GDPR Art. 20
[248] Geradin Damien, Bania Konstantina and Karanikioti Theano, The interplay between the Digital Markets Act and the General Data Protection Regulation, published 16 September 2022, p. 4. Available online: https://ssrn.com/abstract=4203907
[249] Art. 20 (1) GDPR

controller itself.[250] The DMA does not include a provision implying that the data falling within the portability obligation should be restricted to the situations under the GDPR, and Art. 6(9) DMA does state that the gatekeepers must: *"provide [...] effective portability of data provided by the end user or generated through the activity of the end user in the context of the relevant core platform service"*[251]. This demonstrates that the DMA obligation does also cover inferred and derived data. Questions regarding proportionality of this obligation might be in place. It is arguable such obligation to ensure portability of such data does reduce the gatekeeper's incentive to innovate, due to the obligation facilitating free riders. However, the recital 29 of the DMA does also support the idea of the DMA covering inferred and derived data, by stating: a finds support in Recital 59, which lays down that the data portability obligation it establishes is *"[t]o ensure that gatekeepers do not undermine [...] the innovation potential of the dynamic digital sector"*[252].

Art. 20 (1) of the GDPR states that the right to data portability covers only data that has been processed based on a contract or consent according to Art. 6(1)(a) and (b) of the GDPR, there is therefore no obligation for the data controller to facilitate data portability requests concerning personal data that has been processed.[253] The same restriction is not included in the DMA gatekeeper's obligation to respond to a data portability request. The end user's requests to get their data ported to a third party will include a far larger dataset than under the GDPR, including personal data and non-personal data.[254]

With regarding to the issue of which law will prevail to the data portability request, it is stated that "*if it is clear from the request made by the data subject that his or her intention is not to exercise rights under the GDPR, but rather to exercise rights under sectorial legislation only, then the GDPR's data*

[250] Ibid p. 10
[251] Art. 6(9) DMA
[252] Recital 59 DMA
[253] Article 29 Data Protection Working Party, Guidelines on the right to data portability, adopted on 13 December 2016, WP 242 rev.01, p. 8.
[254] Damien Geradin, Konstantina Bania and Theano Karanikioti, The interplay between the Digital Markets Act and the General Data Protection Regulation, p. 5

portability provisions will not apply to this request"[255]. The note on "sectorial legislation" casts little doubts on whether the DMA qualifies as such, as it applies only to clearly defined services in the digital sector.[256] In addition, the DMA includes a right for the end user, due to the gatekeeper's obligation is rendered only after an end user makes a data portability request, the EU general principles of lex specialis derogati legi generali, as well as the CJEU's case-law, the fact that EU law prevails over another in case of conflict, but also when the other law regulates in a more detailed manner.[257]

5.5 Conclusion

Taking everything into account in this section, it is important to separate access to data issues and the obligation to submit interoperability information, as they include different objectives behind them, but both are contributing to the contestability and fairness of the digital markets. The DMA includes provisions relating to the access to the gatekeepers' data in Art. 5 and 6 DMA, but however, other regulations need also to be considered, the relationship between the GDPR and the DMA, as well as the inter-connection with Data Mining Regulation, TPM and reverse engineering doctrine, which by themselves creates somewhat access to certain data. The question regarding the effectiveness of the DMA with regards to access to the gatekeepers' data is weakened by the GDPR and possible IPR and trade secrets, as the gatekeeper still enjoys the possibility to deny access to their data, especially personal data as protected under GDPR, and lead to a situation where no violation of the DMA is inherent in the access and re-use of data. The time will tell how these legal frameworks will complement each other, when the gatekeepers are bound to comply with the DMA objectives.

[255] Article 29 Data Protection Working Party, Guidelines on the right to data portability, adopted on 13 December 2016, WP 242 rev.01, p. 7-8.
[256] Art. 2(2) and 2(4) DMA
[257] Damien Geradin, Konstantina Bania and Theano Karanikioti, The interplay between the Digital Markets Act and the General Data Protection Regulation, p. 7

6 The application of the DMA

6.1 Introduction

This section of the Thesis will provide a brief on the application of the DMA, as well as provide different enforcement options to analyze how the DMA and EU Competition law will complement each other. This section will also include a discussion concerning online platform and access to data case, namely, the Apple NFC Chip case[258] and Microsoft, with especially focusing on the Microsoft's refusal to provide necessary interoperability information to third parties.[259] These cases are relevant to this paper as they concern two large digital gatekeepers, both of which has led to lengthy investigations by the EU Commission, as well as specific remedial solutions.

This part of the Thesis seeks to find answers to both research questions, firstly, how does the DMA correlate with the EU Competition law, mainly Art. 102 TFEU, as well as discuss whether the DMA provide an effective framework to address access to the gatekeepers' data. To achieve this goal, this discussion includes elements on the already provided issues from the previous parts of this Thesis, as well as bringing a discussion relating to the actual enforcement of the DMA, as well as providing practical examples of the two cases mentioned above.

As discussed above in the previous chapters, for a digital platform to fall within the scope of the DMA, first it needs to be designated as a gatekeeper following the Art. 3 DMA process. If the digital platform fulfills the thresholds under Art. 3 DMA, then Art. 3 (3) DMA imposes an obligation of

[258] Case AT 40.452. European Commission, Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay (Press Release IP/22/2764, 2 May 2022).
[259] Microsoft I (Case COMP/C-3/37.792) Commission Decision of 24 March 2004.

the company to notify the Commission.[260] To designate a company as a gatekeeper, the Commission needs to adopt a decision that lists all CPSs that is provided by the gatekeeper that by themselves constitute an important gateway for business users to reach end users.[261]

6.2 Enforcement options – Art. 102 TFEU investigation or DMA enforcement?

The problem with traditional competition law structure is that it does not represent the realities of digital markets, and on highly concentrated markets, the DMA and competition law work together, depends on and collide with each other.[262] This section will begin with evaluating four options on how these two regimes co-operates.

There are four possible enforcement options for competition cases that is governed by both the DMA and Art. 102 TFEU. The analysis in this section is covered by two types of cases, the first type is cases which all elements of Art. 102 TFEU case is all covered by the DMA, and the second type includes cases that have some of the gatekeeper's conduct falling outside the scope of DMA but might constitute an abuse of a dominant position according to Art. 102 TFEU. [263] This analysis will focus on cases that is fully covered by the DMA.

The first option would be to continue the competition case that is actionable under both laws but are brought up in competition investigation and to continue the investigation under Art. 102 TFEU and proceed to an infringement decision.[264] Under the infringement position the Commission

[260] Natalia Moreno Belloso & Nicolas Petit, The EU Digital Markets Act (DMA), A Competition Han din a Regulatory Glove, pre-copyedited version of a paper forthcoming in the European Law Review, p.10.
[261] Art. 3(9) DMA
[262] Kuenzler Adrian, Third-generation competition law, Journal of Antitrust Enforcement Vol.11, No. 1, published 2023. p. 134
[263] Crémer J., Dinielli D., Heidhues P., Kimmelman G., Monti G., Podzun R., Schnitzer M., Scott Morton F., De Steel A., Enforcing the Digital Markets Act: Institutional Choices, Compliance, p. 16.
[264] Ibid p. 17.

can identify past harm and impose a fine and remedial action. The case might lead to private damage claims[265] and therefore achieving both deterrence and punishment, which also expresses public disapproval of the company's conduct.[266] The DMA is still available to be applied if the circumstances has changed or if the EU courts rules against the Commission's competition decision.[267] If the platform thinks it can successfully challenge some DMA obligations and to avoid compliance with those obligations, then it might also threaten the competition cases, which would then incentivize the platform to fight a strong Art. 102 TFEU remedy.[268]

The second option would be to continue the competition case but remain open to commitments from the platform that would also satisfy the competition problems, the Commission is not required to accept these commitments, but it is convenient as it allows it to secure compliance more quickly than by continuing with the infringement procedure.[269] This choice would require the company to offer commitments to comply with the DMA earlier than it would otherwise require, which might have been the strategy taken by Amazon in the BuyBox case when it offered commitments.[270]

The Art. 102 TFEU commitments that resolves the competition concerns would also be necessary to achieve compliance with some DMA obligations, and this overlap will make adoption more attractive to a platform that is not planning to fight the DMA obligations, as the commitments made can also be

[265] Ullrich Hanns, Private Enforcement of the EU Rules on Competition – Nullity Neglected, IIC (2021) 52:606–635, published April 2021, p. 618.
[266] Crémer J., Dinielli D., Heidhues P., Kimmelman G., Monti G., Podzun R., Schnitzer M., Scott Morton F., De Steel A., Enforcing the Digital Markets Act: Institutional Choices, Compliance, p. 17.
[267] Ibidem
[268] Ibid, p. 20.
[269] Stones, Ryan. Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law, Yearbook of European Law Advance Article, published 2019. p. 4.
[270] European Commission, CASE AT.40462 - Amazon Marketplace and AT.40703 – Amazon Buy Box, Final Commitments, Commission decision of 20.12.2022. Available online: https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40703_8990760_1533_5.pdf

used to satisfy some of DMA obligations.[271] If the commitments decision is drafted in a way that fulfills compliance with both instruments, the designated gatekeeper can also show compliance with DMA obligations by submitting the commitment documents. This way, both parties save resources as they avoid what otherwise would have been necessary in the investigation into the relevant conduct or business practice.[272]

The fact some competition cases are the reason that the DMA was created is an important factor, as the desired remedies are already reflected in the DMA rules, therefore, ongoing 102 TFEU cases might be easily closed by the commitment decisions to comply with the DMA, as the company understands that it is the remedy that the Commission requires, and whatever the outcome of the competition case would be, it would eventually still need to follow the obligations.[273] The compliance with the DMA may be costly to some companies, as it will impede the company's ability to earn monopoly profits, and therefore, companies in this situation tends to delay compliance as long as possible and not offer commitments.[274] If such a company chooses to fight against the competition enforcement and then challenge the DMA obligations rather than trying to look for a commitment decision, then it will run from litigation on the interpretation of the DMA obligations and by doing that, slowing down the regulatory process. Commission might then have both legal tools to be applied and seek a commitment that will satisfy both, it needs to be taken as an enforcement priority, because then the company would be violating two laws.[275]

The third situation would be if the Commission would give up the Commission investigation if the Commission would not see a benefit in

[271] Crémer J., Dinielli D., Heidhues P., Kimmelman G., Monti G., Podzun R., Schnitzer M., Scott Morton F., De Steel A., Enforcing the Digital Markets Act: Institutional Choices, Compliance, p. 19.
[272] Ibidem
[273] Ibidem.
[274] Crémer J., Dinielli D., Heidhues P., Kimmelman G., Monti G., Podzun R., Schnitzer M., Scott Morton F., De Steel A., Enforcing the Digital Markets Act: Institutional Choices, Compliance, p. 20.
[275] Ibidem

imposing a fine or securing compliance with the DMA obligations. This makes sense to abandon the pursuit of conduct regulated under the DMA if a competition decision adds little of value.[276] There is however an uncertainty with which gatekeepers that will be identified under the DMA, and whether the DMA will be challenged in whole or in part and the duration it will take to further specify certain obligations, and then the Commission might be giving up important tools under the Art. 102 TFEU enforcement.[277] In this way, even if the competition investigation under Art. 102 TFEU has been going on for years, the Commission can use this knowledge to enforce the DMA provisions. This option would be most favorable for cases which the infringement is relatively new so that there is no past harm to punish, and a forward-looking remedy would be enough.[278]

The fourth option would be to abandon the Art. 102 TFEU case for that part of the conduct that falls within the scope of the DMA but continuing the investigation of the conduct that falls outside of its scope.[279] It is important to address the timing of when the violation took place, as for example the third option would be most favorable for cases which the infringement is relatively new so that there is no past harm to punish, and a forward-looking remedy would be enough. On another hand the first and fourth option would be suitable when punitive measures are deemed necessary and useful to address past violating conduct.[280]

[276] I Scott Morton F., De Steel A., Enforcing the Digital Markets Act: Institutional Choices, Compliance, p. 20.
[277] Ibidem
[278] Ibidem
[279] Ibidem
[280] Crémer J., Dinielli D., Heidhues P., Kimmelman G., Monti G., Podzun R., Schnitzer M., Scott Morton F., De Steel A., Enforcing the Digital Markets Act: Institutional Choices, Compliance, p. 22.

6.3 Application to existing case-law

6.3.1 The Apple NFC Chip case

Art. 6(7) DMA requires data access and interoperability to the same features of the operating system for hardware and software. According to Art. 6(7) DMA: *"The gatekeeper shall not be prevented from taking strictly necessary and proportionate measures to ensure that interoperability does not compromise the integrity of the operating system, virtual assistant, hardware or software features provided by the gatekeeper, provided that such measures are duly justified by the gatekeeper*."[281]

This Article relates to the Apple NFC chip case, regarding the NFC chip and the digital mobile wallet, and the Statement of Objections was issued by the Commission after the DMA entered into force on 2 May 2022.[282] According to the Commission, Apple's policies impeded competition in the mobile wallets market on iOS[283]. The facts of the case were that Apple allegedly holds a dominant position in the mobile wallet market and abuses its position by limiting access to standard technology for contactless payments with mobile devices in stores (Near-Field Communication (NFC)), which favours Apple Pay and excludes competitors of mobile wallet providers. The issue in this case is clearly connected with the DMA and especially Art. 6(7) DMA.[284] When investigating and running the competition case, it requires time consuming and analysis of the impact of the refusal to give equal access to APIs to the competitors in the downstream market, especially the payment options available for end users.[285] The case might also be slowed down due to debates over the relevant market, correct legal standard for analyzing the refusal to cooperate with other companies, and if the case in fact creates anticompetitive effects. However, the DMA makes it possible for the

[281] Art. 6(7) DMA
[282] Case AT 40.452. European Commission, Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay (Press Release IP/22/2764, 2 May 2022).
[283] Ibidem
[284] Cremer J., Dinielli D, Heidhues P., et al, Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antritrust, Digital Regulation Project, Yale Tobin Center for Economic Policy, published 1 December 2022, p. 24.
[285] Ibidem

Commission to focus on the remedy that follows from the breach of DMA obligations.[286]

Apple could make commitments that it will resolve the competition issues concerned as well as fulfil its obligations in the DMA at the same time, this makes it possible for the company to avoid litigation and risk of fines, as well as reducing compliance costs by proposing commitments that also complies with the DMA.[287] One important notion is that the gatekeeper might put up requirements that the mobile wallet provider needs to fulfill, for example, certain technical criteria or testing of its services before granting the access, but it is needed show that the measures are proportional.[288]

6.3.2 Microsoft case

The Microsoft case concerns Microsoft Corporation, which is one of the world's leading companies in many different categories, such as innovative company model and creativity.[289] The "Microsoft Saga" started with a complaint made by the Sun Microsystems relating to Microsoft's dominant position in the market of operating systems for personal computers, which was lodged in December 1998. Before this complaint, Sun has made a request to get access to additional interoperability information,[290] however, the Microsoft indicated no willingness to cooperate in a manner to create better interoperability, meaning, former licensing agreements for technology compatible with older Windows versions were not renewed.[291]

[286] Cremer J., Dinielli D, Heidhues P., et al, Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antritrust, Digital Regulation Project, p. 24.
[287] Ibidem
[288] Case AT 40.452. European Commission, Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay (Press Release IP/22/2764, 2 May 2022)., p. 24-25.
[289] Economides N., The Microsoft Antitrust Case, Journal of Industry, Competition and Trade: From Theory to Policy 1(1):71-79, published 2001, p. 10.
[290] Microsoft I (Case COMP/C-3/37.792) Commission Decision of 24 March 2004. Recital 200.
[291] Ibid, Recital 215-216.

EU Commission started investigation to address the lack of interoperability for workgroup servers, as well as on other competition law matters, such as the tying of Windows Media Player with the Windows Operating system[292], but this part will solely focus on the interoperability issue. The Microsoft I case was a starting point for the discussion on the importance of interoperability information in general, and the EU Commission ordered Microsoft to submit complete and accurate specification for the protocols used by Windows work group servers to provide file, print and group and user administration services to Windows work group networks".[293] The whole market was affected by Microsoft leveraging its market power, and the EU Commission also obliged Microsoft to provide a plan on compliance with its order.[294]

Art. 6(1)(f) DMA implements the issue from the Microsoft I case, where Microsoft refused to supply interoperability information to third parties, which was essential for the third parties to access the adjacent market. Article 6(1)(f) states that gatekeepers shall allow: *"...providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used by the gatekeeper in the provision (...) of any ancillary services"*.[295] When looking back to the issue with the whole Microsoft saga is the non-compliance by the gatekeeper. The fact that the EU Commission can impose interim measures in cases of serious and irreparable damage to users[296], which has also been used in competition cases involving digital platforms.[297]

As we can see from the history of the Microsoft case saga, the gatekeeper has also the possibility to submit commitments to remedy its abusive behaviour,

[292] Microsoft I (Case COMP/C-3/37.792) Commission Decision of 24 March 2004, para. 3-5.
[293] Microsoft I, para. 1011
[294] Jennings, J., Comparing the US and EU Microsoft Antritrust Prosecutions: how level is the playing field, Erasmus Law and Economics Review 2, no. 1, published 2006,. p. 77.
[295] Art. 6(1)(f) DMA
[296] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[297] Ibid, Article 8.

as well as behavioural and structural remedies can be provided in the DMA for systematic non-compliance, this has also been available before.[298] What the DMA would add to this, is the fact that once the gatekeeper has been designated, then the company will be bound by the obligation, in this case six months after the designating period has started, in March 2024 by the latest. This differs from the competition framework, as the Commission would need to start investigations into the anti-competitive behavior and the actual conduct itself, including market definition and other examinations to find the connection between the imposed harm and consumers and harm to the market. In this way, the DMA enables a faster process, as there is no need to start a separate investigation into each anti-competitive behavior, and the most crucial thing for the EU Commission to prove, is that the digital platform fulfills the thresholds to be qualified as a gatekeeper under Art. 3 DMA.[299]

When trying to fit the Microsoft I case into our enforcement examples provided in the 6.2 section, there could be many solutions how to address the problem. One crucial part is, whether the Commission's investigation has been started or not. If the Commission would already have started its investigation, and the case is near to a decision, then the first and second option would be suitable, namely either to continue the investigation and process under Art. 102 and 101 TFEU, or to continue the competition case but remain open to commitments from the platform that would also satisfy the competition problems.

However, in the case where the EU Commission would be in the very beginning of its investigation, and Microsoft would have been already designated as a gatekeeper, the most effective way to address the anti-competitive behaviour would be to address the part of the case which falls under the scope of DMA as a breach of obligations under DMA, in this case,

[298] Ibid, Recital 12
[299] De Steel Alexander et al., Making the Digital Markts Act more resilient and effective, p. 79.

Art. 6(1)(f), and start the investigation relating to issues falling outside the DMA's scope. The possible criteria to favour DMA enforcement over competition law enforcement would be the need to act quickly or in case there is a need to monitor more closely the gatekeepers' remedies.[300] As stated previously, the DMA enables a dialogue between the EU Commission and the gatekeeper, which is not the case with Art. 101 and 102 TFEU, and according to Art. 25(2) DMA, the EU Commission needs to communicate with the gatekeeper about the measures which might be to ensure compliance with, within three months into the investigation.[301]

6.3.3 Conclusion

What can be derived from the Microsoft I case and the Apple NFC Chip Case, is that the remedy design in those cases has been incorporated partly into the DMA and has been modified into specific obligations that the designated gatekeeper needs to follow. The Microsoft I case included the anti-competitive behaviour of refusal to submit interoperability information needed for third parties to enter adjacent markets, and the Apple NFT Chip case discusses the problem to refuse access to data, where the Commission started an investigation regarding Apple holding a dominant position in the mobile wallet market and abuses its position by limiting access to standard technology for contactless payments with mobile devices in stores which favours Apple Pay and excludes competitors of mobile wallet providers. Both being investigated under EU competition law framework, the perks and coins of DMA enforcement has been highlighted, which also answers the research question on the effectivity of the access to data and interoperability information, as well as the question on the relationship between the DMA and EU competition law. To conclude this part, once a digital platform has been designated as a gatekeeper, the DMA enforcement in some cases will lead to a more effective enforcement process, as there would be no need to prove

[300] M. Motta M and M. Peitz, Intervention trigger and underlying theories of harm, Expert Study for the European Commission, October 2020, p. 31-33.
[301] Art. 25(2) DMA

abusive behaviour, conduct a market analysis, as well as the DMA making it possible to monitor compliance more closely.

7 Conclusion

The outline of the Thesis was formulated to help answer the two research questions. Firstly, how does the DMA complement EU competition law and the issue of access to data and interoperability information of the gatekeeper. It can be concluded that the DMA strengthens and complements already existing EU Competition law in the digital sector by addressing challenges relating to access to data and interoperability, by creating faster recourse to remedy in cases of non-compliance by the gatekeeper, instead of the only recourse to possible remedy being for the EU Commission to start a competition investigation, and the gatekeeper being able to continue its abusive behavior for a longer period of time, due to market investigation taking a long time to conduct to a final decision. One weakness that the DMA in comparison to traditional EU competition law, is the DMA is not as flexible in its provisions as Art. 101 and 102 TFEU are, which are drafted in more flexible and open-ended manner, however, as the obligations in the DMA are straight forward per se rules, which creates more legal certainty, as the gatekeeper can rely on the on the fact, that if they comply with the specific rules, their conduct is lawful. However, without any flexibility, the DMA cannot consider the gatekeeper's different business models, incentives and conduct characteristics in its enforcement.

The second research question that this paper sought to answer was whether the DMA provide an effective framework to provide access to the gatekeepers' data and interoperability information when taking into consideration fairness and contestability aims of the DMA. The obligation laid down in the Art. 6(7) obliges the gatekeeper to allow effective interoperability to service and hardware providers, as well as business users and alternative service providers. Interoperability enhances competition in complementary markets, by lowering the entry barriers for other companies to enter the market and to existing companies being able to expand, reducing lock-in effect to a single dominant gatekeeper which restricts user's choice.

Therefore, it can be concluded that the DMA fulfills the criteria with help of requiring interoperability in the digital markets, which also complements the contestability objective. Interoperability increases fairness on the digital market by allowing new entrants to share the same network effects as the gatekeeper and allowing rivals to the dominant undertaking to compete on dimensions of consumers and business users value while maintaining access to the dominant firm's user base.

The DMA includes provisions regarding the requirement to give access to the gatekeeper's data in Art. 5 and 6 DMA. The question regarding the effectiveness of the DMA with regards to access to the gatekeepers' data is weakened by the GDPR and possible IPR and trade secrets, as the gatekeeper still might deny access to their data, especially personal data as protected under the GDPR. The time will tell how these legal frameworks will complement each other, when the gatekeepers are bound to comply with the DMA objectives. In conclusion, once a digital platform has been designated as a gatekeeper, the DMA enforcement in some cases will lead to a more effective enforcement process, as there would be no need to prove abusive behaviour, conduct a market analysis as under TFEU, as well as the DMA making it possible to monitor compliance more closely and provide possibility for the undertaking to participate in the enforcement process.

As the DMA was enacted during this writing process of this Thesis, there are still many unanswered questions and time will tell how the application and enforcement of the gatekeepers' obligations will be handled. The DMA will be binding on the gatekeepers and are required to follow the obligations in March 2024. As stated earlier in this Thesis, the effectiveness and success of the DMA also depends on the amount of enforcement needed by the EU Commission. It will be interesting to follow the development of the application and enforcement of the DMA after the obligations has become binding on the gatekeepers next spring.

Annex 1

Qualitative Criteria Art. 3(1) DMA	Quantitative Criteria Art. 3(2) DMA
The undertaking has a significant impact on the internal market	The undertaking has either an annual turnover above 7.5 billion euros in each of the last three financial years or market capitalization OR equivalent fair market value above 75 billion euros in the last financial year AND it provides the same CPS in at least three MS of the EU
The undertaking provides a CPS that is an important gateway for business users to reach end users	The CPS enjoys at least 45 million monthly active end users AND at least 10,000 active business users located or established in the EU
The undertaking enjoys an entrenched and durable position	Met if the threshold above (2 point) is met in each of the last three financial years

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