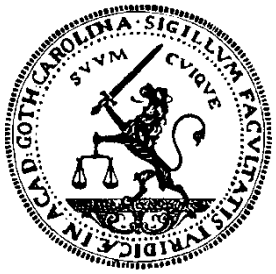

FACULTY OF LAW

LUND UNIVERSITY

Queralt Codinach i Grau

Digital Competition and Data Regulation in the EU: Analysing the Interplay between the DMA and the GDPR.

JAEM01 Master Thesis

European Business Law

15 higher education credits

Supervisor: Ana Nordberg

Term of graduation: Spring 2024

Table of contents

Summary

Since its publication in December 2020, the European Commission's Digital Markets Act (DMA) has become a cornerstone of the European legislative framework, aiming to address the dominance of the 'Big Tech' companies and promote fairness in Europe's digital platform economy. The DMA targets unfair practices and weak competition in the digital economy, focusing on data-driven dominance by imposing obligations on *gatekeepers* to share end-user-related information with business users. This comprehensive legal analysis explores the DMA's impact on two fields; the first one aims to analyse the impact of its appearance on the European Union (EU) competition law and tries to tackle on the idea that could provoke, or not, an overlapping of legislation. On the other hand, while the DMA was designed to curb the power of major tech companies, the DMA's integration with existing frameworks like the General Data Protection Regulation (GDPR) introduces regulatory and technical challenges. These challenges include ensuring GDPR compliant data sharing, which *gatekeepers* could potentially use as a justification to refrain from sharing data or favour themselves, even though the DMA was designed to tackle their dominance.

Keywords: Digital Markets Act, General Data Protection Regulation, EU competition law, gatekeeper, digital markets, data, DMA, portability obligation, 'without prejudice'.

Sammanfattning

Sedan den offentliggjordes i december 2020 har Europeiska kommissionens förordning om digitala marknader (DMA) blivit en hörnsten i det europeiska regelverket, med syftet att adressera "Big Tech"-företagens dominans och främja rättvisa i Europas digitala plattformsekonomi. DMA riktar in sig på illojala metoder och svag konkurrens i den digitala ekonomin, med fokus på datadriven dominans genom att införa skyldigheter för portvakter att dela slutanvändarrelaterad information med företagsanvändare. Denna omfattande juridiska analys undersöker DMA:s inverkan på två områden: det första syftar till att analysera vilken inverkan dess uppkomst har på Europeiska unionens (nedan kallad EU) konkurrensrätt och försöker ta itu med den idé som skulle kunna framkalla, eller inte framkalla, en överlappning av lagstiftning. Å andra sidan, medan DMA utformades för att begränsa de stora teknikföretagens makt, innebar integreringen av DMA med existerande ramverk likt den allmänna dataskyddsförordningen (GDPR) rättsliga och tekniska utmaningar. Dessa utmaningar inbegriper att säkerställa att datadelning sker i enlighet med GDPR, vilket portvakter potentiellt skulle kunna använda som ett rättfärdigande för att avstå från att dela data eller gynna sig själva, trots att DMA utformades för att hantera deras dominans.[*]

Nyckelord: Digital Markets Act, General Data Protection Regulation, EU konkurrenslagstiftning, gatekeeper, Portabilitetsskyldighet, , 'utan att det påverkar tillämpningen'

[*]Translated by Olivia Myrén. The author extends heartfelt thanks to Olivia for her dedication to ensuring the accuracy of this translation.

Preface

Foremost, I would like to express my deepest gratitude to my supervisor, Dr. Ana Nordberg, for her unwavering patience and responsiveness throughout the development of this master's thesis. Her assistance in resolving the challenges I faced during the writing process and her confidence in my choice of the thesis topic have been greatly appreciated.

Additionally, I also want to thank my partner for his constant support during this year in Sweden. His encouragement has been an integral part of my personal and academic development.

Finally, I am also grateful to all the professors who have taught me throughout my Master in the University of Lund, for their valuable contributions to my education, their passion for their subjects, and their inspiring lectures. Their knowledge, expertise, and dedication made a real impact on my academic growth.

Lund, 20th of May 2024

Queralt Codinach i Grau

Abbreviations

29WP	Article 29 Working Party
CFR	Charter of Fundamental Rights of the European
CJEU	Court of Justice of the European Union
CPS	Core Platform Services
DMA	Digital Markets Act
DSA	Digital Services Act
ECN	European Competition Network
EDPB	European Data Protection Board (ex 29WP)
EDPS	European Data Protection Supervisor
EU	European Union
GDPR	General Data Protection Regulation
NCA	National Competition Authority
TFEU	Treaty on the Functioning of the European Union
	Union

1 Introduction

1.1 Background

The Digital Markets Act (hereinafter DMA)[2] was presented as a European Commission proposal on 15 December 2020, it was adopted by the Council and by the European Parliament on the 14th of September 2022 and it has been fully applicable since the 2nd of May 2023[3]. On the 6th of September 2023, the European Commission designated six firms[4] as having *gatekeeper*[5] status which meant that fall within the scope of the DMA application. Executive Vice-President Margrethe Vestager[6] compared the Digital Markets Act with the introduction of traffic lights for regulating traffic in Cleveland, Ohio in 1914 – bringing order to a previously chaotic system[7].

Nearly three years before the DMA was proposed, Vestager stated that competition law and data protection could potentially not be efficient due to the bureaucratic, jurisprudential and theoretical burdens that were standing in the

[2] 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 (DMA) [2022] OJ L 265.

[3] Article 54 DMA

[4] Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft have been designated as digital gatekeepers by the EU Commission on the date of 6th of September. Nevertheless, the EU Commission is now investigating Microsoft and Apple for potential *gatekeeper* status in relation with Bing, Edge, … etc and IMessage and IPadOS respectively. European Commission, 'Digital Markets Act: Commission Designates Six Gatekeepers' (European Commission, September 6, 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328> Accessed 23 April 2024.; *Update: On 13 May 2024, the Commission designated Booking as a *gatekeeper*, making a total of 7 firms as *gatekeepers* to the current date. European Commission, 'Commission Designates Booking as a Gatekeeper' European Commission, May 13, 2024) <https://ec.europa.eu/commission/presscorner/detail/en/IP_24_2561>. Accessed 16 May 2024.

[5] Concept further explained in Section 2.2.2 of this thesis.

[6] Margrethe Vestager is currently serving as Executive Vice President of the European Commission for A Europe Fit for the Digital Age and as European Commissioner for Competition since 2014. See also, 'Margrethe Vestager'. The Commissioners. <https://commissioners.ec.europa.eu/margrethe-vestager_en > Accessed 14 April 2024.

[7] Margrethe Vestager, 'Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms' (15 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ STATEMENT_20_2450>. Accessed 14 April 2024.

way in the era of the digital economy.[8] In June 2022, the head of European Data Protection Supervisor (hereinafter EDPS) stated that data protection concerns fell within the purview of data protection and not competition authorities, as she acknowledged, at the same time, potential overlaps[9].

The digital economy is now lead by data-driven companies which, due to their special position in the digital information market have often a predatory and anti-competitive practices.[10] In this sense, sharing data is considered to be a potential solution for ending monopolistic situations, as it was possible to observe in some European Union (hereinafter EU) sector-specific data access regimes such as the Digital Content Directive[11], Electricity Directive [12] and Payment Service Directive[13].[14]

The DMA's main focus is to address the challenges and systematic problems by the digital platform economy or the digital markets by imposing certain obligations to the large platforms, designated as *gatekeepers* in a 'more effective approach'[15] than what the Article 102 of the Treaty on the Functioning

[8] Giovanni Buttarelli, Youth and Leaders Summit - Opening Speech (2019). <https://edps.europa.eu/sites/edp/files/publication/19-0121_speech_youth_and_leaders_en.pdf> Accessed 14 April 2024.

[9] 'However, we need to be vigilant when practices leading to greater privacy may also lead to greater concentration of power and data' Margrethe Vestager, 'Data Protection and Competition: Enforcement Synergies and Challenges' (EDPS Conference, The Future of Data Protection – Effective Enforcement in the Digital World, Brussels, 16 June 2022)

[10] Jan Kraemer, 'Personal Data Portability in the Platform Economy: Economic Implications and Policy Recommendations' (November 25, 2020) *Journal of Competition Law & Economics* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3742771>. Accessed 14 May 2024.

[11] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services *OJ L 136.*

[12] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) *OJ L 158*.

[13] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337.

[14] Inge Graef, Martin Husovec and Jasper Van Den Boom, 'Spill-Overs in Data Governance: Uncovering the Uneasy Relationship between the GDPR's Right to Data Portability and EU Sector-Specific Data Access Regimes' (*Kluwer Law Online*, February 1, 2020) <https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/9.1/EuCML2020002> . Accessed 14 May 2024

[15] In this sense, the digital sector in the EU has been called the 'wild west;' Anne Witt, 'The Digital Markets Act – Regulating the Wild West' (*Common Market Law Review*, 2023)

of the European Union (hereinafter TFEU)[16] could do. These obligations, among others, involve the processing of personal data within the behaviour of digital platforms, such as access, data operability and data sharing. Those obligations have an important impact on the interplay of certain data protection rules, such as the General Data Protection Regulation (hereinafter GDPR)[17], as indicated by the DMA.[18]

In this sense, according to Recital (36) of the DMA, the capacity to process vast amounts of data would 'allow' the *gatekeepers* to have advantage in terms of accumulation of data, which could be translated to a raise of a barrier to entry the digital market, hence, a high entry costs for the potential new entrants. Therefore, the designated *gatekeepers* could have a significant competitive advantage over other rivals due to their vast data processing capacities. [19]

According to the wording of the DMA, competition rules and the GDPR should apply 'without prejudice'[20] to each other.[21] Likewise, the GDPR and the provisions under EU competition law[22], should apply 'without prejudice' to the Regulation of the DMA. This clause serves as the foundational premise of the thesis. It prompts an in-depth analysis of its practical implications and potential consequences regarding the challenges of the data obligations and the role of the application -or interplay- of the DMA to the pre-existent legal

[16] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326.

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

[18] See Recital (72) DMA

[19] Umar Javeed, 'Data and Competition Law: Introducing Data As Non-Monetary Consideration and Competition Concerns in Data-Driven Online Platforms' (2021). <https://doi.org/10.2139/ssrn.3788178> Accessed 23 April 2024.

[20] Recital (12) DMA.

[21] Opinion of Advocate General Rantos in C-252/21 - *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* ECLI:EU:C:2022:704.

[22] Article 1(6) DMA; Recital (10) and (11) DMA.

frameworks. The analysis will be conducted in a definition manner, investigating them from both data privacy and legal competition perspectives within this thesis.

1.2 Purpose and research question.

The DMA appears as a response to a new reality; the empowerment of companies with a big market power in the digital markets, especially big tech concentration of data wealth. With the adoption of the Regulation in September 2022, the DMA establishes a practice that either falls outside the existing EU competition rules or cannot be effectively address by them.[23]

The main purpose of this thesis is to evaluate the role of the DMA regulation between the EU competition law and the GDPR, specifically aimed at the data obligations provisions under the new regulation and analyse how the challenges such as 'access of data' are regulated in the GDPR and the DMA as part, or not, of the EU competition law framework. In this sense, the Recital (12) of the DMA states that the application of the DMA will apply 'without prejudice' to, among others, competition law and the GDPR.

At the same time, the DMA states that platforms should give end users the right to effective portability of data and allow the effective interoperability[24], which could be seen as the GDPR regulatory coverage is expanded, since both regulations' objectives are the well-functioning of the internal market law.[25]

However, while some provisions of the Regulation openly refer to the GDPR, others remain completely ambiguous and could lead to some inefficiency or

[23] Philipp Bongartz, Sarah Langenstein and Rupprecht Podszun, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' (*Kluwer Law Online*, May 1, 2021) <https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/10.1/EuCML2021017> Accessed 26 April 2024.

[24] Vanessa Turner, 'The EU Digital Markets AI – A New Dawn for Digital Markets', (2022). *ABA Antitrust Magazine*, Volume 37, Issue 1, Fall.

[25] Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU DMA', (2021). *European Law Review* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978625> pp. 2–18 Accessed 30 April 2024.

lack of coherence,[26] at the same time as could be risking at a potential risk of breaching *ne bis in idem* principle.

This thesis is structured to achieve two primary objectives. The first objective is to integrate the Digital Markets Act (DMA) within the existing framework of EU competition law. The second objective is to elucidate the relationship between the DMA and the General Data Protection Regulation (GDPR). In this sense, since competition law and data protection can be seen as complementing each other, in e.g. consumer choice *vis-à-vis* dominant undertakings[27], it serves the justification to study both objectives. This exploration will involve a thorough comparative analysis of the respective provisions concerning data access, portability, and sharing obligations under both the DMA and the GDPR, with a special mention to the obligation of consent under the DMA and the GDPR as another difference between them.

To address the aforementioned objectives, the primary research question guiding this thesis is articulated as follows:

What is the role of the DMA regarding the EU competition law and the provisions of the GDPR concerning data access, portability and sharing obligations?

In order to be able to answer the question, secondary questions will be answered in the context described:

(i) What is then the role of the DMA in the legislator framework of the EU?

(ii) Is the DMA another EU competition policy tool as it seeks to protect 'fairness' and 'contestability'?

[26] Muhammed Demircan, 'The DMA and the GDPR: Making Sense of Data Accumulation, Cross-Use and Data Sharing Provisions', (2022) In IFIP International Summer School on Privacy and Identity Management (pp. 148-164). Vol. 671 Cham: *Springer Nature Switzerland*. <https://doi.org/10.1007/978-3-031-31971-6_12> . p.149. Accessed 23 April 2024.

[27] See e.g., Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, 'Competition policy for the digital era' (2019). European Commission, Directorate-General for Competition, Publications Office. <https://data.europa.eu/doi/10.2763/407537> p. 80

(iii) What are the obligations of the DMA concerning data?

(iv) What are the implications of 'without prejudice' clause?

1.3 Methodology and Materials

In order to answer the above-mentioned research question, the legal dogmatic method is the one used for this thesis. The method uses legal materials (from binding legislation to literature by legal scholars) to examine present and future legal problems.[28] In this sense, the thesis uses the method to analyse all the relevant material within the EU and the accompanying literature by legal scholars. Additionally, since the field of study is new, the different analysis and theories of legal scholars are important. This thesis also uses the legal systematic approach by doing an internal comparative within the EU framework.

Firstly, concerning the legal texts, key regulatory requirements pertinent to the thesis were identified through an analysis of the original legislative documents of the Digital Markets Act (DMA) and the General Data Protection Regulation (GDPR) as published in the Official Journal of the European Union (European Commission, 2016, 2022). Additionally, the supplementary documents accompanying the DMA were examined. These documents, issued by the relevant European institutions and authorities, are available to the public. They encompass the opinions of the European Data Protection Supervisor, deliberations by the Council of the EU, amendments proposed by the European Parliament, and the Commission's Impact Assessment. Specifically, the regulations detail the various obligations between the involved parties and establish crucial principles concerning data sharing and data privacy.

Additionally, the research question concerning the studied regulations did not necessitate a detailed analysis of specific case law. The cases mentioned

[28] Jan Kleineman, 'Rättsdogmatisk metod', in Maria Nääv & Mauro Zamboni (eds), *Juridisk metodlära* (2nd Edition, Studentlitteratur, 2018); see also Magdalena Skowron-Kadayer, 'Obligations to Consult EU Institutions on National Draft Laws: A Dogmatic Analysis' (2020) 28 European Review 343 <https://www.cambridge.org/core/journals/european-review/article/abs/obligations-to-consult-eu-institutions-on-national-draft-laws-a-dogmatic-analysis/446972D0CD90F186ACD90144784DC470>

within this thesis served primarily to clarify and illustrate the situations or issues discussed, rather than forming a core component of a legal analysis of case law.

Furthermore, since there is little case law analysis, this thesis incorporates a comprehensive literature review and employs numerous analytical articles which, like this thesis, have analysed and critiqued the regulations under study. The literature primarily consists of university papers, research papers, and publications authored by legal professionals, with a specific focus on experts in the fields of the General Data Protection Regulation (GDPR) and the Digital Markets Act (DMA). The literature review has been instrumental in gaining a deeper understanding of the insights and challenges associated with these regulations.

Finally, the web materials utilized in this research were sourced primarily from the databases provided by Lund University. These resources were instrumental in supporting the analysis and discussions presented in this thesis.

1.4 Delimitations

The DMA comes with the package of the 'Digital Services Act package'[29] which consists out also of the Digital Service Act (hereinafter DSA)[30], characterised by the provision of a specific regulation of the platforms' liability for the processing and dissemination of digital content. The scope of this thesis is exclusively concentrated on the DMA consequently, it does not extend to an examination of the provisions under the DSA.

Furthermore, this paper investigates whether the DMA can be considered integrated within the framework of EU competition law by just the legal definition of it and its characteristics. While the enforcement provisions under the

[29] "The Digital Services Act Package" (Shaping Europe's Digital Future) <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 7 May 2024.

[30] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) OJ L 277,

DMA and corresponding practices in EU competition law -e,g, Article 102 TFEU- are undoubtedly compelling topics, they fall outside the scope of this analysis and will only be discussed as necessary to understand the context

The DMA encompasses a broad array of obligations for *gatekeepers*. However, for the purposes of this thesis, the focus will be exclusively on those provisions that pertain to data obligations, such as sharing, portability and access, and specifically those that can be directly compared with provisions under the General Data Protection Regulation (GDPR), such as the concept of consent under both regulations.

While an exhaustive analysis of all characteristics of digital platforms is beyond the scope of this study, a foundational understanding remains essential for comprehending the subsequent sections. Therefore, the key characteristics will be briefly addressed, focusing specifically on the legal perspectives.

In terms of temporal delimitations, it is important to recognize that the regulations under analysis are of recent origin. Consequently, the sources utilized in this study are predominantly recent as well, primarily deriving from the Digital Markets Act proposal issued in December 2020 and subsequent developments. This thesis was submitted in May 2024, and as such, any sources published beyond this date were not included in the analysis. Additionally, while this research was underway, the enforcement of the DMA commenced on March 7, 2024, giving rise to numerous topics of interest. Despite these developments, this thesis could not incorporate all the newly emerging information from various sources, given their recency.

1.5 Outline

This paper is divided into four chapters. In Chapter 2, the thesis will elucidate the Digital Markets Act (DMA), by delineating the definition of designated gatekeepers and the associated legal framework. Additionally, this chapter will explore the interaction between EU competition law and the DMA, incorporating a review of academic debates surrounding this topic.

It could be said that the purpose-oriented part of the thesis is in Chapter 3, where the interplay between the DMA and the GDPR is taken into consideration. This part will present, at first, what is the relationship of the DMA and the GDPR provision in broad senses, followed by the provisions regarding data access, sharing and portability obligations and ending with what the expression of 'without prejudice' means at the same time as it will comprise consent under both regulations.

Lastly, the thesis will end with a conclusion in Chapter 4, which will initially present the conclusions obtained from previous chapters, followed by an answer each research question in a straightforward manner and ending by some final thought and conclusions.

2 The Digital Markets Act (DMA)

2.1 Introduction

In more recent times, market power of exceptionally large platforms that are gatekeeping intermediaries between business and consumers has been affecting the classic EU competition policy tools to deal with anti-competitive practices. Before the DMA, across Europe, from Germany[31] to the United Kingdom[32], policymakers were complementing competition law with specific acts targeting abusive platform conduct.[33] In response to this situation, the European Commission has targeted big-tech industries and platforms and in particular their alleged dominant position abuses.[34]

The DMA 'will give better protection to consumers and to fundamental rights online, establish a powerful transparency and accountability framework for online platforms and lead to fairer and more open digital markets'[35] by creating a special set of obligations for companies that act as gatekeepers in the digital economy in order to protect fairness[36] and contestability in digital markets[37]. Those *gatekeepers* provide core platform services (hereinafter CPS) such as online marketplaces, search engines, social networks, app stores or operating systems and by doing that they can control the competitive markets that have developed around the services. Gatekeepers will have to comply

[31] 'German Competition Act 2021—Unofficial Translation' (D'Kart), <https://www.d-kart.de/wp-content/ uploads/2021/01/GWB-2021-01-14-engl.pdf > Accessed 30 April 2024

[32] See e.g. Tom Smith, Full Steam Ahead for the UK Digital Markets Unit, *The Platform Law Blog* (Nov. 17, 2022), <https://theplatformlaw.blog/2022/11/17/full-steam-ahead-forthe-uk-digital-markets-unit/ on the legislative progress> Accessed 30 April 2024

[33] Friso Bostoen, 'Understanding the digital markets act.', (2023), *The Antitrust Bulletin*, 68(2), pp.263-306. <https://doi.org/10.1177/0003603X231162998> Accessed 14 April 2024.

[34] Caterina Fratea, 'Competition Law and Digital Markets: Adaptation of Traditional Categories or New Rules? Some Reflections Arising from the Amazon Cases Regarding the Access to Non-Public Data'. *European Business Law Review*, *33*(7). <https://doi.org/10.54648/eulr2022044> Accessed 14 April 2024.

[35] Questions and Answers: Digital Services Act, 20 May 2022, available at <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348> Accessed 30 April 2024.

[36] Article 12(5)(b) describes an 'unfair practice' when 'there is an imbalance between the rights and obligations of business users and the *gatekeeper* obtains an advantage […]'

[37] The aim of the DMA at improving 'fairness' and 'contestability' of digital Markets can be seen in Recitals (33) and (34) of the DMA.

with the do's (i.e. obligations) and don'ts (i.e. prohibitions) listed in the DMA with a *vis-à-vis* conduct with other businesses and end users.

The DMA provides that the Regulation will apply 'without prejudice'[38] to several instruments, including the General Data Protection Regulation (GDPR), consumer protection rules, and competition rules. This term has generated some debate[39] for its ambiguity, which will be developed in the last section of this chapter and in Chapter 3. However, the clause is aiming to establish how the legal framework, object of study of this thesis, are supposed to apply, at the same time as it establishes the theoretical relationship between the EU competition law, the GDPR and the DMA. While formally the DMA would be complementing, not substituting, existing provisions of competition *de lege lata*, such substantial extension of the rationale and instruments of competition policy is likely to have significant implications where the whole apparatus of competition law is forced to be extended to a new modality.[40]

2.2 The DMA's scope of application

To understand the impact of the DMA it is required to comprehend the nature of the legal instrument chosen to embody its provisions under the EU law. While a comprehensive and detailed exploration of all definitions and characteristics of the DMA falls outside the scope of this study, acquiring a general understanding of the definition of a *gatekeeper* is essential. This foundational knowledge is crucial to comprehending interplay with EU competition law. Additionally, the understanding of it will be crucial to elaborate the subsequent sections of this thesis.

[38] *Vid.* Recitals 10, 11 and 12 DMA

[39] Inge Graef, Thomas Tombal and Alexandre de Streel, 'Limits and Enablers of Data Sharing. An Analytical Framework for EU Competition, Data Protection and Consumer Law' (2019), TILEC Discussion Paper, 2019), <https://dx.doi.org/10.2139/ssrn.3494212> p. 30, Accessed 14 April 2024.

[40] Oles Andriychuk, 'Shaping the new modality of the digital markets: The impact of the DSA/DMA proposals on inter-platform competition.' *World Competition*, Vol. 44 Issue 3, pp. 261-286. <https://doi.org/10.54648/woco2021017> Accessed 14 April 2024.

2.2.1 Definition issues

The application of the DMA is premised upon the satisfaction of two legal conditions precedent: (i) the designation of firms with a 'gatekeeper' status;[41] (ii) made in relation to a closed list[42] of core platform services (CPS), by imposing obligations to the *gatekeepers* that prohibit certain common practices among digital platforms.[43]

Article 1(1) outlines the DMA's goal for 'ensuring fair and contestable markets in the digital sector'. DMA. However, a clear-cut and workable definition of the DMA's scope is missing according to Hoffmann et al.[44]

This idea of the proper functioning of the markets as keeping markets open and any market position contestable has always been a core goal for EU competition law.[45] However, the provisions followed by the DMA, could be distinguished[46] by the ones pursued by the EU and national competition rules, as in Section 2.3 will be developed.

2.2.2 Designation as *gatekeeper*

The scope of application would be limited '*only* to those providers that meet clearly defined criteria for being considered a *gatekeeper*'[47]. In that sense, the Commission would be ensuring the proportionality by clear criteria. [48]

[41] Article 3 (1) DMA

[42] Article 2(2) DMA provides the closed list.

[43] Article 5-7 DMA.

[44] Jörg Hoffmann, Liza Herrmann, Lukas Kestler, 'Gatekeeper's potential privilege – the need to limit DMA centralization', (2024), *Journal of Antitrust Enforcement,* 12, 126-147, <https://doi.org/10.1093/jaenfo/jnad040>. Accessed 14 May 2024.

[45] See Eleanor Fox, 'Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The U.S./E.U. Divide', (2006) *Utah Law Review,* 725 (728) <https://heinonline.org/HOL/P?h=hein.journals/utahlr2006&i=735> Accessed 14 April 2024 ; and Eleanor Fox, 'Monopolization and abuse of dominance: Why Europe is different', (2014) 59 *The Antitrust Bulletin*, 129 (133) <https://doi.org/10.1177/0003603X1405900106> Accessed 14 April 2024.

[46] See Recital (11); "This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition […]".

[47] The DMA proposal Explanatory Memorandum, COM(2020) 842 final 2020/0374(COD) p. 6

[48] In that matter, see also Nordic Competition Authorities, Joint Memorandum on Digital platforms and the potential changes to competition law at the European level (28 September 2020): '(...) regulatory intervention should rely on a clear and objective set of criteria. It needs to be clear which companies are considered digital gatekeepers, and companies must be able

To fall under the scope of the DMA, the company must be designated as a *gatekeeper* by the European Commission. According to Recital (3) DMA, a *gatekeeper* is defined by a small number of large undertaking providing CPS.[49] Article 2(1) DMA defines a 'gatekeeper' as a 'provider of core platform services pursuant to Article 3'[50] meaning that a *gatekeeper* will have to comply not *only* with the requirement of providing a CPS but also meet the requirements established in Article 3 of the DMA.

In this sense, *gatekeepers* would act as multisided platforms[51], enabling two or more customer groups to engage with each other on their platforms by acting as a midpoint in which the goods and services are offered to the end users by the business users[52].[53]

The requirements of the Article 3(1) DMA set a qualitative criterion being as (i) have a 'significant impact on the internal market'; (ii) 'operate a core platform service which serves as an important gateway for business users to reach end users[54]; (iii) must 'enjoy an entrenched and durable position on its operations or it must foreseeable that will enjoy such position in the near future'[55]

to foresee which type of regulation they will be subject.*'* <https://www.konkurrensverket.se/en/news/nordic-competition-authorities-release-joint-memorandum-on-digital-platforms-and-the-future-of-european-policy/> Accessed 8 April 2024.

[49] The full list of the core platform services can be found in Article 2(21) DMA, but basically are" those services in the digital economy that exhibit certain features and where absent regulatory intervention the identified failures would effectively remain un-addressed. Such features entail highly concentrated services, where usually one or very few large digital platforms set the commercial conditions with considerable autonomy and where few large digital platforms act as gateways for business users to reach their customers" Q&A: DMA: Ensuring fair and open digital markets. (2023, September 6). European Commission - European Commission. <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349>. Accessed April 26 2024.

[50] Article 2(1) DMA.

[51] A multisided platform (MSP) is a service, technology or product that allows two or more customer, or participant groups have direct interactions. Massachusetts Institute of Technology, 'How to Win with a Multisided Platform Business Model | MIT Sloan Management Review' (*MIT Sloan Management Review*, May 20, 2014) <https://sloanreview.mit.edu/article/how-to-win-with-a-multisided-platform-business-model/> Accessed 10 April 2024.

[52] 'Business user' is, according to Article 2(21) DMA any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of providing goods or services to end users.

[53] Massachusetts Institute of Technology, (n.51). Accessed 26 April 2024

[54] Art. 3(1)(b) DMA.

[55] Art. 3(1)(c) DMA.

At the same time, Article 3(2) DMA establishes that the undertaking 'shall be presumed to satisfy the requirements of Article 3(1) DMA'[56] by satisfying the quantitative parameters, meaning that provides size-based thresholds for establishing the presumption. The quantitative criteria are in a cumulative way, establishing criteria regarding (i) size of the company[57]; (ii) the number of end costumers[58] and (iii) number of commercial customers using basic services of the platform. [59]

In the designation process, however, the DMA provides two main avenues for designating an undertaking as a *gatekeeper*: (i) all thresholds in Article 3(2) DMA are met; (ii) not all the thresholds in Article 3(2) are met but the criteria in Article 3(1) are nevertheless satisfied.

The Commission cannot change the *qualitative* characteristics of Article 3(1) DMA but can change ad hoc the *quantitative* ones predicted in Article 3(2) DMA.[60] This is due to the proportionate limitations where the Commission has power to change the criteria without the predominant rationale under article 3(6) DMA where '[t]he Commission may identify as a gatekeeper […] any provider of core platform services that meets each of the requirements of paragraph 1 [i.e., the qualitative thresholds], but does not satisfy each of the thresholds of paragraph 2 [i.e., the quantitative thresholds]'.[61] That would mean that the subjective criteria in Article 3(1) could, in sum, prevail over the

[56] Article 3(2) DMA

[57] Article 3(2)(a) DMA establishes that the undertaking is presumed to have a significant impact on the internal market if the annual EU turnover EUR 7.5 billion in each of the last three financial years (or average market capitalisation or equivalent fair market value EUR 75 billion) and the CPS is provided in at least 3 Member States.; Article 3(1) DMA; Natalia Moreno Belloso, 'The EU Digital Markets Act (DMA): A Summary' (2022), Available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109299 >Accessed 14 April 2024.

[58] Article 3(2)(b) DMA stablishes that the CPS is presumed to be an important gateway if it meets monthly active end users in the EU 45 million and yearly active business users in the EU 10.000 in the last financial year; In this sense, it is important to note that Annex I of the DMA provides CPS-specific indicators for calculating users.; Belloso (n. 57) p. 1.

[59] Article 3(2)(c) DMA establishes that the undertaking enjoys a durable position if the threshold criteria under Article 3(2)(b) is met in each of the three financial years. Belloso (2002), p.1

[60] Andriychuk, Oles. (n. 40) p. 277.

[61] Article 3(6) DMA

objective criteria thresholds in Article 3(2), at the same time as the Commission would have a significant discretion would qualify as *gatekeepers*.[62]

In this sense, it is important to state the 'cumulative criteria' is a presumption according to the wording present in Article 3(3 DMA)[63] since it refers 'to all mentioned thresholds'.

The designation of *gatekeepers* has engendered considerable debate.[64] Although the different debates topic is undoubtedly compelling, it falls outside the scope of this thesis and will not be addressed herein.

When a provider, designated as a *gatekeeper,* falls under the DMA, it triggers obligations in relation to each of the gatekeeper's core platform services[65]; imposes an *ex-ante* obligation instead of *ex post* sanction[66], which will get developed in the subsequent section. Most of the obligations are related to competition law and contestability of digital markets regarding the creation of data access rights for business, at the same time as setting specific limitations on how data is collected, processed and shared to business and end consumers by the *gatekeepers*.[67]

2.3 Interplay between the EU competition law and the DMA

[62] Alfonso Lamadrid de Pablo, Nieves Bayón Fernández, 'Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It', *Journal of European Competition Law & Practice*, Volume 12, Issue 7, September 2021, Pages 576–589, <https://doi.org/10.1093/jeclap/lpab059> Accessed 23 April 2024.

[63] Dragos Mihail Manescu, 'Legislation Comment: Considerations on the Digital Markets Act, The Way to a Fair and Open Digital Environment.'(2024), *European Business Law Review* 35, no. 2, pp. 289-304. 2024 Kluwer Law International BV, The Netherlands. <https://doi.org/10.54648/eulr2024019> p.3. Accessed 23 April 2024.

[64] For a further debate, see Pablo Ibáñez Colomo, The Draft Digital Markets Act: A Legal and Institutional Analysis, 2021, Available at SSRN: <https://ssrn.com/abstract=3790276>

[65] This mechanism is reminiscent of the concept of 'special responsibility of dominant undertakings' under the article 102 TFEU, which can be seen in cases i.e. C- 322/81, *NV Nederlandsche Banden Industrie Michelin* [1983] or C-209/10 *Post Danmark A/S v Konkurrenceradet,*[2012].

[66] Compared to Article 102 TFEU, hence, EU competition law, which regulates *ex post.*

[67] For the purposes of this paper, it is important to clarify that not all obligations imposed on 'gatekeepers' by the DMA pertain to data. However, this paper will specifically concentrate on those obligations that are related to data, as they constitute the primary focus of this thesis.

The appearance of the Digital Markets Act has raised concerns about creating potential further fragmentation within Europe's legal framework, mainly due to potential overlaps or collusion with the EU competition law.

In the event of a potential risk of overlap between the DMA and competition law could be translated to digital companies being able to face the risk of being prosecuted in parallel cases, which would be at odds with the *ne bis in idem* principle and, at the same time, exposed to regulatory inconsistencies and fragmentation. However, as already stated in the Outline 1.6 while the consideration of the enforcement methods and its requirements is undoubtedly significant to the broader understanding of the topic, its detailed analysis falls outside the scope of this thesis and is recommended as a subject for further studies.

What is then the role of the DMA in the scenario of the EU competition law? In Recital (10) of the DMA[68] it is stated that the regulation of the DMA is meant to be complementary to the European and national anticompetition rules[69], which that would include the rules of prohibiting the abuse of the dominant positions[70] of the designated *gatekeepers.* Following this line, Recital (11) of the DMA establishes that the Regulation pursues an objective that is "*complementary* to but different from the protecting undistorted competition".[71] Taking into account the wording, it could be understood as the DMA is a sector-specific competition law or that it would protect a different 'legal interest'.

However, the relationship between the DMA and the EU competition law is subject of debate[72]. Colangelo points out that the DMA is not supposed to be

[68] According to Recital (10) of the DMA, the prescriptions and proscriptions apply 'independently from the actual, likely, or presumed effects of the conduct of the designated *gatekeeper*'.

[69] Cani Fernández, 'A new kid on the block: How will competition law get along with the DMA?' (2021) *Journal of European Competition Law & Practice*, 12(4), 271–272. <https://doi.org/10.1093/jeclap/lpab020> Accessed 23 April 2024.

[70] Jan Blockx, 'The expected impact of the DMA on the Antitrust Enforcement of Unilateral Practices.' (2023) *Journal of European Competition Law & Practice*. <https://doi.org/10.1093/jeclap/lpad028> Accessed 30 April 2024.

[71] Recital (11) of the DMA.

[72] Giuseppe Colangelo, 'The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse' (2022) *European Law Review,* <http://dx.doi.org/10.2139/ssrn.4070310> Accessed 29 April 2024.

considered as competition law as the legal basis and objectives differ from the principles that justify the regulation of competition law. [73] In this line, the DMA would not be a piece of competition law legislation, but part of the EU's framework of regulatory. The *ratio* for such declaration of this Regulation lies in the fact that, while some previous EU acts -like the GDPR - focus on the symptoms of the market's imbalance, the DMA focuses on the cause of the imbalance – the digital platforms. In this sense, the DMA provisions[74] are aimed at banning practices that are liable to increase barriers to entry or expansion the digital markets, at the same time as the DMA imposes obligations that tend to lower those barriers[75]; c.f Shweitzer, along with other authors[76], states that the DMA remains a *sensu lato* competition law[77], and that it could be described as a sector-specific competition law[78] and where the clear link is with article 102 TFEU, as both mechanisms would be focusing on dealing with market power and its issues but would have different tools for addressing it.[79]

In this sense, the DMA would function distinctly from EU competition law concerning the dominant market positions. However, in both instances, it addresses significant concentrations of market power, albeit through divergent approaches.[80]

[73] Ibid. p.3.

[74] According to the authors of the following article, the list of obligations of the DMA is a "curious game of charades". Cristina Caffarra and Fiona Scott Morton, 'The European Commission Digital Markets Act: A translation', (CEPR January 2021) <https://voxeu.org/article/european-commission-digital-markets-act-translation> Accessed 30 April 2024.

[75] *Vid.* Recital (32) DMA.

[76] See also Natalia Moreno Belloso and Nicolas Petit, 'The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove' (April 5, 2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4411743> Accessed 30 April 2024.

[77] Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal' (April 30, 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837341>.The author states that the DMA is not competition law but it is still competition policy.; Accessed 29 April 2024.

[78] Nicolas Petit, 'The proposed digital markets act (DMA): a legal and policy review,' (2021). *Journal of European Competition Law & Practice*, 12(7), 529-541. <https://doi.org/10.1093/jeclap/lpab062> Accessed 1 May 2024.

[79]Oles Andriychuk (n. 40) p.72.

[80] Dragos Mihail Manescu (n.63) p.3.

The relationship between competition law and the DMA was acknowledged by the European Competition Network (hereinafter ECN) and some EU member states as they proposed empowering national competition authorities (hereinafter NCAs) to enforce DMA obligations.[81]

However, it is know that the main objective of the EU competition law is the protection of market competition, not to protect the interests of those individual competitors, which in some way, that is what the DMA would intend to do.[82] Furthermore, it is unclear what effect the DMA's national competition law instances will have exactly in cases where the Commission brings a case against a designated *gatekeeper* under the Article 102 TFEU *and* under the DMA, especially when the Article 11(6) of the Regulation 1/2003[83] states that the competition authorities of the Member States (hereinafter referred to as MS) are relieved of their competence to apply Articles 101 and 102 of the TFEU when the Commission has initiated proceedings.[84]

It is also unclear whether if there was an overlap and the *gatekeeper*'s conduct was condemned across the single market, this could raise *ne bis in idem*[85] questions, to the extent that the latter doctrine matters of EU competition law.[86] It is worth noting that although the enforcement aspect of the DMA is important, it is beyond the scope of this thesis. Nonetheless, it was deemed necessary to acknowledge its significance in this context.

The debate between the application of EU competition law and the DMA is confirmed by the fact that the obligations that are introduced in the provisions of the DMA are essentially practices that have been used on anticompetition

[81] How National Competition Agencies Can Strengthen the DMA, EUROPEAN COMPETITION NETWORK (Jun. 22, 2021), <https://ec.europa.eu/competition/ecn/DMA_joint_EU_NCAs_paper_21.06.2021.pdf> Accessed 5 April 2024.

[82] Caterina Fratea (n.34) p. 13.

[83] 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.

[84] Council Regulation 1/2003, Art. 11 § 6, 2002 O.J. (L 1) (EC). In the same line, the DMA in the Recital (92) establishes that: "*[…]it is important to ensure that national authorities, including national courts, have all necessary information to ensure that their decisions do not run counter to a decision adopted by the Commission under this Regulation*."

[85] Article 50 of the Charter of Fundamental Rights of the European Union; C-238/99 P - *Limburgse Vinyl Maatschappij and Others v Commission*, ECLI:EU:C:2002:582, para. 59.

[86] See for instance, C-17/10, *Toshiba Corp. et al*., ECLI:EU:C:2012:72, para. 49 (Feb. 14, 2012) (applying the ne bis in idem doctrine in EU competition law, formulated as a prohibition on "the cumulation of fines").

investigations[87] linked to classic competition law concerns of exclusion or exploitation.[88] In this line, and related to data, the prohibition of combining personal data across the *gatekeeper*'s services is influenced[89] by the German Bundeskartellamt case against Facebook. [90] It can be now found in Article 5(2) DMA under the prohibition of combining personal data across a platform's services. In the Facebook case, the German Competition Authority found that Facebook's personal data policy constituted an abuse of its dominant position as there was no effective consent since such consent was a prerequisite for using the social network in the first place. Another concept based on a previous case is the obligation to refrain from requiring users to subscribe to or register with another core platform service of the *gatekeeper* as a condition of access to another core platform service operated by the same *gatekeeper* was inspired[91] by the case of Google Android[92]. In that case, Google had abused its dominant position in the market by tying Google search and Google Chrome apps to the Play Store.[93]

In an attempt to resolve the difficulties involved in determining the relevant market and dominance in digital markets, the DMA identifies *gatekeepers* on the basis of different characteristics from those used by Article 102 TFEU to establish dominance. While the DMA introduces a system of prohibition[94], the TFEU enhances the system of control of abuse.[95]

---

[87] Assimakis Komninos, 'The Digital Markets Act: How Does it Compare with Competition Law? (2022)' <https://ssrn.com/abstract=4136146> p. 1.

[88] It is stated that nothing that the DMA is built on the evidence provided by competition law cases and how the sector inquires of various European competition authorities. In this sense, the following article argues that the DMA would need a more principled approach and that there is a lack of meaningful principles and that the rules look like a random selection of theories from competition law cases: Rupprecht Podszun, Philipp Bongartz, and Sarah Langenstein, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers', (2021) 2 *Journal of European Consumer and Market Law*, Issue 2, pp. 60-67, <https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/10.2/EuCML2021017> Accessed 28 April 2024.

[89] According to Giuseppe Colangelo (n.72) p.10.

[90] Decision B6-22/16 of 6 February 2019; Faceobok *Inc. and Others v Bundeskartellamt* C-252/21.

[91] According to Colangelo, G (2022), page 10.

[92] Case AT.40099 Google Android.

[93]. Carsten Koenig, 'Obligations for Gatekeepers' (January 2024). Steinrötter / Heinze / Denga (eds), *EU Platform Regulation*, Beck Nomos Hart, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=4715163> Accessed 23 April 2024.

[94] Nicolas Petit (n. 78) p. 532.

[95] Komninos, Assimakis. (n. 87).

According to Petit, the DMA fundamentally differs from regulatory systems that control abuses of power through discretionary supervision. Unlike such systems, which activate oversight based on the evaluation of misconduct by undertakings in gatekeeping positions, the DMA operates under a clear framework of predetermined rules. These prescriptive and proscriptive norms automatically apply once a firm is designated as a *gatekeeper*. Notably, the DMA does not predicate the enforcement of its rules on the demonstration of 'improper' use of gatekeeping power. There is no requirement to establish an 'improper' intent or effect, nor is there a consideration of whether actions were taken negligently or deliberately. Consequently, the DMA functions as a 'no fault' regime, inherently built on an absolute system of stipulated mandates and prohibitions.[96]

The DMA departs from the traditional *ex-post* idea –how competition law would operate- and opts for an *ex-ante* regulation[97]. The *raison d'être* of the *ex-ante*[98] would be centred in an enforcement failure more than in a market failure.[99] In this regard, according to Recital (5) DMA, the DMA would be considering that the anticompetition tools are unfit to effectively challenge the conduct of the digital *gatekeepers.* It could be understood as the DMA is in between the *ex-post* competition rules *sensu stricto* and *ex-ante* regulation of competition *sensu lato.*[100] This mechanism of having 'both of both sides' or 'binary mode' [101] implies that the sanctions that would be imposed are *just* for being a *gatekeeper* since it does not contemplate a substantive provision of the obligations in a proportionate application regarding the size or impact of the undertaking on the digital markets – as it happens with the TFEU.

[96] Nicolas Petit (n. 78) p. 532.

[97] Oles Andriychuk (n.40), p. 272.

[98] Zlatina Georgieva, 'The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, infused with Competition Principles' (2021) 6/1 *European Papers*, <https://www.europeanpapers.eu/fr/europeanforum/digital-markets-act-proposal-european-commission-exante-regulation> p. 25

[99] Marco Cappai and Giuseppe Colangelo, 'Taming digital gatekeepers: the more regulatory approach to antitrust law', (2021) Volume 41. *Computer Law & Security Review* 1. <https://doi.org/10.1016/j.clsr.2021.105559>

[100] Ibid.p. 272.

[101] Oles Andriychuk (n. 40).

Under the DMA, as already mentioned, there is an ample discretion in practice to the Commission to designate *gatekeepers*. This kind of flexibility is more typical to an *ex-post* instrument than an *ex-ante* rule.[102]

The compliance with the DMA could be understood as the compliance with the Article 102 TFEU in the sense of if it does not meet the requirements of dominance – under the DMA, requirements of gatekeepers- it would imply the inapplicability of the Article 102 TFEU and the regulation of the DMA.

In his sense, the 'binary' mechanism[103] that designates the gatekeepers, an establishes the applicability of the regulation or not, rests on the rationale of Article 102 TFEU but shifting the designation to the *gatekeeper* status from *ex-post* case-by-case to *ex-ante* universality.[104]

Regulating digital platforms under the DMA in an *ex-ante* mechanism is in line with the regulatory evolution of the digital market since the traditional competition mechanisms – *ex-post* – are not the right tools to address the challenges of digital markets.[105]

2.3.1 The 'without prejudice' clause

The last section of the chapter analyses the expression of the DMA applying 'without prejudice' to, *inter alia,* the GDPR and competition law.[106] In section 3.2 the clause will be analysed under the scope of the GDPR, and in this section will make emphasis on the competition law issues. The clause has raised substantive questions about the interaction within the EU's complex regulatory framework.

The expression 'without prejudice' could mean that the DMA obligations would be applicable without detriment to any existing right enshrined in the

[102] Cani Fernández (n.69).

[103] Jacques Crémer, and others, 'Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust' (Yale Tobin Center for Economic Policy, 2022) <https://doi.org/10.1093/jaenfo/jnad004> pp. 20-21

[104] Marco Cappai and Giuseppe Colangelo (n.99) p. 274.

[105] Jan Krämer, Pierre Senellart, Alexandre de Streel, '*Making data Portability More Effective for The Digital Economy* (2020)', Centre on Regulation in Europe, p. 80

[106] Recital (12) DMA-

other legislations.[107] Implying the co-existance of the legal frameworks; working in harmony and complement each other when regulating large digital platforms. Under the expression, there would be the intention to regulate digital markets by a multi-level regime where multiple legal instruments would apply in parallel, to capture conduct on the market with the widest-possible scope.[108] However, Geradin et al state that applying rules that have such different variation would give rise to conflict.[109]

In certain cases, the DMA could qualify as *lex specialis* meaning that would prevail over other rules. In other cases, the DMA, following the principle of supremacy of the EU law, would override national rules that pursue different objectives. Furthermore, the implementation of the DMA could even trigger the *ne bis in idem* principle in subsequent or parallel proceedings. In all of these cases, despite the 'without prejudice' clause, the DMA would not be complementing but undermining the overall regulatory framework. [110]

The relationship between the DMA and competition law – namely Article 102 TFEU – can, one the one hand, be thought as an overlapping situation since both legal frameworks would be covering the same issues i.e large digital platforms. As already mentioned, the DMA has been inspired by the investigations that were conducted under the Article 102 TFEU.[111] However, are still applicable 'without prejudice' which might create situations of uncertainty and tension[112]

The 'without prejudice' clause would be affecting, mostly, the enforcement between the DMA and Article 102 TFEU, with a potential regulatory overlap. Even if it is outside the scope of the thesis, this author thinks that in order to

[107] Konstantina Bania. (2023) 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause, *European Competition Journal*, 19:1,116-149, <https://doi.org/10.1080/17441056.2022.2156730> , p. 14. Accessed 23 April 2024.

[108] Konstantinos Pantelidis, 'The DMA Procedure: Areas to Improve', (2024), *Kluwer Law Online*, Vol. 47, Issue 2, pp 157-192, <https://kluwerlawonline.com/journalarticle/World+Competition/47.2/WOCO2024016> Accessed 13 May 2024.

[109] Damien Geradin, Konstantina Bania and Theano Karanikioti, 'The interplay between the Digital Markets Act and the General Data Protection Regulation' (2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203907> Accessed 28 April 2024.

[110] Konstantina Bania (n. 107).

[111] Assimakis Komninos (n. 87).

[112] Inge Graef, Thomas Tombal and Alexandre de Streel (n. 39).

understand the issue better, it is important to mention how it could be resolved.

The important regulatory question is whether both frameworks could apply side-by-side, or parallel, when regulating the same conduct and without risking the *ne bis in idem* principle.

This parallel application would be possible according to the *Bpost* case.[113] The Court of Justice of the European Union (hereinafter CJEU) confirmed that a parallel application was indeed possible without breaching the *ne bis in idem* principle.

Along with this, according to Graef, competition law and the DMA have different legal interest, which would support the idea that the risk of breaching the principle of ne bis in idem invalid.[114]

To conclude this section, the role of the DMA in the legislative framework of the EU can be seen as addressing the dominance of large digital markets by being a complement to existing EU competition laws.

The DMA being a sector-specific regulation can be understood as *just* a complementary tool to the EU competition law. While it shares the main objectives of the EU competition law, such as prompting fair competition or contestability, the approach and the legal basis differ.

Would the DMA hinder the application of the EU competition law? In this sense, it should not since it is conceived as a tool to reinforce the capacity of keeping the digital markets more contestable, if it was about to appear some risk of overlapping or collusion, there should be coordination mechanisms to address it.

[113] C-117/20 - B*post*, ECLI:EU:C:2022:202, para. 58

[114] Inge Graef, *EU competition law, data protection and online platforms data as essential facility* (Kluwer Law International, 2016).

3 The interplay between the DMA and the General Data Protection Regulation (GDPR)

European legislators seem to be aware of the potential risks of the DMA, and maybe that is one of the reasons why there are so many references to the protection of personal data and full compliance with the GDPR in the legal text of the DMA. This chapter will address the risks of the potential legal differences between the DMA and the General Data Protection Regulation regarding data, more specifically data access, portability and sharing obligations. *Gatekeepers* will need to ensure that they do not weaken data protection standards below what is required by the GDPR while, at the same time, it does not affect the practical utility for competitors that use data to strengthen their competitive position. This section aims to analyse the DMA in the light of the personal data protection, which is especially crucial in an era where digital markets are led by Big Tech giants, and everything is related to data and consumers.

The main goal in this chapter is to analyse the main provisions of the DMA that are related to the principles and rights enshrined in the GDPR, namely the obligations of data portability, access and sharing, while making a special mention to the choice of consent and the role of the 'without prejudice'[115] clause.

3.1 First insights

The GDPR entered into force in May 2018 aiming to strengthen the general conditions for data processing by providing more precise definitions and enhancing processing responsibility among others.[116] It pursues two main objectives (i) guard the fundamental freedom of natural persons to the protection

[115] Recital (12) DMA.

[116] Christopher Kuner, Lee A Bygrave and Christopher Docksey, 'Background and Evolution of the EU General Data Protection Regulation (GDPR)', (2020) *Oxford University Press eBooks*, <https://academic.oup.com/book/41324/chapter/352293200 > Accessed 11 May 2024.

of their personal data and (ii) ensure the free flow of personal data within the EU. [117]

Articles 5 and 6 of the DMA set eighteen different obligations for the designated *gatekeepers* which aim to tackle issues of competition through the creation of data access rights. Both Articles apply directly, but the obligations under Article 6, unlike those under Article 5, can be further specified.[118] However, the rationale behind both Articles remains ambiguous; it is uncertain whether each DMA obligation aims to achieve the contestability or fairness goal of the DMA.[119]

Personal data protection is a fundamental right under the Article 16 of the Treaty of the Functioning of the European Union (hereinafter TFEU)[120] and Article 8 of the Charter of Fundamental Rights of the European Union (hereinafter CFR)[121], as well as the protection and promotion of fundamental rights are the main goals of the EU policies. [122] While the GDPR appears to focus on the protection of those *fundamental rights* and the personal data, the DMA seems to be centred the concept of data as a resource of economic value. [123] In this regard, the DMA would be recalibrating data relations in the EU by putting more emphasis on market objectives such as competition and contestability as a reflection of Article 16 TFEU.[124] In this sense, while the DMA would be aiming to regulate the market, the GDPR main objective would be the protection of individuals.

[117] Articles 1(1), 1(3), Recital (123) of the GDPR.

[118] Natalia Moreno Belloso (n.57).

[119] Giuseppe Colangelo, 'In Fairness We (Should Not) Trust: The Duplicity of the EU Competition Policy Mantra in Digital Markets.' (2020), *Antitrust Bulletin 618*, Available in: <https://doi.org/10.1177/0003603X231200942.> Accessed 13 May 2024.

[120] Article 16 TFEU: 'Everyone has the right to the protection of personal data concerning them'

[121] Article 8 CFR: "Everyone has the right to the protection of personal data concerning him or her'

[122] European Parliament. Directorate General for Parliamentary Research Services: Fundamental rights in the European Union: the role of the Charter after the Lisbon Treaty: in depth analysis, p. 24. Publications Office, LU (2015)

[123] Since the DMA has been called upon to address the dominance of *gatekeepers* as they can potentially abuse their power as regards data collected and derived from their use.

[124] Philipp Baschenhof,. 'The Digital Markets Act (DMA): A Procompetitive Recalibration of Data Relations?' (2022). U. Ill. JL Tech. & Pol'y, 1 <https://heinonline.org/HOL/P?h=hein.journals/jltp2022&i=1> . p. 38.

Data protection in the DMA should therefore primarily be seen as a constraint on data sharing and access where the latter would conflict with consumers rights to data protection under, i.e. GDPR.[125]

In this restrain, the DMA 'seeks to reduce' the *gatekeepers*' data power'[126] by setting obligations which restrict the gatekeeper's data processing activities[127]. However, this could enter in conflict with the GDPR since limiting processing personal data is not the objective. Simultaneously, the DMA requires gatekeepers to grant to their business users access to data.[128]

3.2 The 'without prejudice' clause

As already stated in Section 2.3.1 of this thesis, Recital (12) DMA establishes that the DMA will apply 'without prejudice'[129] to the GDPR or competition law.

The important question is whether the DMA, as a potentially more specialized legal instrument (*lex specialis*), could override broader, more general regulations like the GDPR, or competition law, in specific scenarios, or whether it is intended to coexist complementarily within the existing legislative framework, at the same time as could inadvertently undermine the coherence and efficacy of prior legislations.

In terms of the interplay within the DMA and the GDPR, according to Bania, since the DMA regulates 'more specific' subject than the GDPR, in view of the principle of *lex specialis derogat generali*, if there was to be a conflict between the DMA and the GDPR, the first legislation should prevail.[130] In this regard, the Court of Justic of the EU has stated that a provision in EU law

[125] Meredith Broadbent, 'The Digital Services Act, the Digital Markets Act, and the New Competition Tool', (2020) CTR. FOR STRATEGIC INT'L STUD., <https://www.csis.org/analysis/digital-services-actdigital-markets-act-and-new-competition-tool> Accessed 28 April 2024.

[126] Konstantina Bania. (n.107) p. 147.

[127] Article 6(1) DMA

[128] Ibid. 6(10) and 6(11).

[129] Recital (12) DMA

[130] Konstantina Bania (n.107) p. 148

prevails over another not only in cases of conflict but also when the 'regulates […] in a more detailed manner and/or being applicable to a specific sector'[131] In this case, the DMA is unsuccessful to clarify which legislation would prevail in case of conflict or divergent interpretation between the DMA and other sector legislation, as it was stated in the legal texts of the Data Act[132] or the Data Governance Act[133].

If the DMA were to take precedence over the GDPR, it would still be necessary to confirm that the data subject does not intend to utilize the right to data portability granted by the GDPR. The process for determining this remains ambiguous. For example, should users be given a choice between a DMA route and a GDPR route? And how can they be expected to make an informed decision between these options?[134]

In this regard, the Article 29 Data Protection Working Party (hereinafter referred to as WP29)[135], now replaced by the European Data Protection Board (hereinafter EDPB)[136], establish that on data portability 'it is clear from the request made by the data subject that the intention is to *not* exercise the rights under the GDPR, but rather […] under sectorial legislation only, then the GDPR's data portability provisions will not apply to this request'[137]. That

[131] Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, [2021] OJ C 526/1, p. 8 and footnote 20, referring to Joined Cases C-54/17 and C-55/17, para. 60-61.

[132] In the preamble of the Data Act proposal, which entered into force on 11 January 2024, states that 'this Regulation complements and is without prejudice to Union law on data protection and privacy, in particular Regulation (EU) 2016/679 and Directive 2002/58/EC' Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act).;

[133] In the Recital (4) of the Data Governance Act, it is stated that: "this Regulation should not be read as creating a new legal basis for the processing of personal data for any of the regulated activities, or as amending the information requirements laid down in Regulation (EU) 2016/679".Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act).

[134] See Konstantina Bania (n.107) p. 135. She formulates the same questions with yet no answer. It is indeed that this topic could serve as a valuable subject for future research.

[135] Article 29 Data Protection Working Party, 'Guidelines on the right to data portability (Article 29 WP Guidelines)'. Adopted on 13 December 2016 and last revised and adopted on 5 April 2017.

[136] The EDPB replaces the Article 29 Working Party (Art. 29 WP), from 25 May 2018. Article 94(2) GDPR.

[137] 29WP, (n.135) pp. 7-9.

could be interpreted that the right to data portability under the GDPR would not be applicable the request of the port personal data was made under the DMA. According to Gerdin et al and Bania, the DMA would not be necessarily applicable 'without prejudice' to the GDPR[138]

However, in line with what it has been mentioned, there is doubt that the DMA qualifies as 'sectorial legislation', for it only applies to clearly defined services[139] in the digital sector.

3.3 The scope of data covered by the GDPR and the DMA

The GDPR as horizontal legislation applies to all natural and legal persons that process 'personal data'.[140] Under Article 4(1) the GDPR defines 'personal data' as: […] any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier […][141]. Put differently, *only* personal data is in the scope under the GDPR and any data that does not concern the data subject or is anonymous would not fall under the GDPR. The scope is problematic due to the contextual and variable nature of personal data, which could lead to unstable ground.[142]

However, The DMA defines 'data' in Article 2(24) as 'any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording'.[143]

[138] Geradin, Bania and Karanikioti (n. 109), p.6; Bania (n. 107), p. 135.
[139] Article 2(2) DMA
[140] Article 4(7) GDPR.
[141] Article 4(1) GDPR.
[142] "EDPS Comments on a Framework for the Free-Flow of Non-Personal Data in the EU" (*European Data Protection Supervisor*, 2018) <https://www.edps.europa.eu/data-protection/our-work/publications/comments/edps-comments-framework-free-flow-non-personal-data_en>.Accessed in 7 May 2024.
[143] Article 2(24) DMA.

The DMA distinguishes between two distinct categories of data; (i) 'personal data'; (ii) 'non-personal data'. It is important to understand that the DMA's scope of application is limited to the 'core platform services provided or offered by *gatekeepers* to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service. The DMA -unlike other data regulations in the EU- is an asymmetric regulation where 'different firms in the same industry are subjected to different levels of regulatory restraint'.[144]

In this scenario, *gatekeepers* are not classified as data processors according to Article 2(8) of the GDPR, but rather as data controllers[145]. In this sense, the GDPR is in charge of regulating the joint controllership[146] under the Article 26 GDPR, which reflects the definition of Article 4(7) GDPR. However, the relationship that currently has been raised from Article 6(10) of the DMA. would not be defined as a joint controllership[147] since the *gatekeeper* has no power on how or why the business user would process the end user data. [148]

3.4 Data access, Sharing and Portability obligations.

[144] Thomas P. Lyon & Haizou Huang, *Asymmetric Regulation and Incentives for Innovation*, 4 INDUST.CORP. CHANGE 769 (1995).

[145] A *controller* is defined by Article 4(7) of the GDPR as 'the natural or legal person, […] determines the purposes and means of the processing of personal data […]'

[146] The concept is not new; it already existed under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[147] According to the EDPB: Guidelines 07/2020 on the concepts of controller and processor in the GDPR Version1.0, p. 48 (2020), the 'overarching criterion for joint controllership to exist is the joint participation of two or more entities in the determination of the purposes and means of a processing.' Available in: <https://www.edpb.europa.eu/system/files/202310/EDPB_guidelines_202007_controllerprocessor_final_en.pdf> Accessed 28 April 2024.

[148] Ibid supra.

One of the competitive advantages held by a *gatekeeper* is the capability to collect, combine, and process end users' data from a multitude of sources within its ecosystem.[149]

The GDPR introduced the right to data portability in Article 18(1) GDPR in its initial proposal, intending to allow individuals to change online services more easily.[150] The proposal progressed, and the right of data portability was consolidated in Article 20 GDPR. The right of data portability is to give power to 'move, copy and transmit' personal data between IT environments (e.g. between competitors).[151]

Both Regulations, the DMA and the GDPR, establish obligations and prohibitions regarding personal data, which should be complementary and not exclusionary from one to another. However, the DMA does not always rely on the GDPR to create the provision's framework. In this section the analysis will consist on doing a comparative on the different right's provisions regarding data protection; access, sharing and portability obligations.

Data protection could have an interaction with competition law. In this sense, by imposing restrictions of which personal data can be combined or exchanged; the GDPR could be acting as a limit restricting the potential anticompetitive effects to arise.[152] This idea appeared after the Microsoft/LinkedIn[153] merger decision where it appeared that data protection could also mean preventing anticompetitive effects.

3.4.1 Data Sharing

[149] Jan Krämer, Daniel Schnurr and Sally Broughton Micova, 'The Role of Data for Digital Markets Contestability', CERRE Report, (September 2020) <https://cerre.eu/publications/data-digital-markets-contestability-case-studies-and-data-access-remedies/> p. 55. Accessed 14 May 2024.

[150] Barbara Lazarotto, "The Right to Data Portability: A Holistic Analysis of GDPR, DMA and the Data Act", *European Journal of Law and Technology* (May 2, 2024) <https://ejlt.org/index.php/ejlt/article/view/988> . Accessed 13 May 2024.

[151] Inge Graef, ThomasTombal and Alexandre de Streel (n.39), p. 18

[152] Inge Graef, Thomas Tombal and Alexandre Streel (n.39).

[153] Case M.8124 – Microsoft/LinkedIn, 6 December 2016, para. 255

In the role of data sharing between the *gatekeeper* and the business user, according to Article 6(10) DMA, the *gatekeeper* should share with the business users only the personal data that are directly connected to the end user's use. Defining what is 'directly connected' with the use of the end user remains to be in the hand of the *gatekeepers* since they are the ones who will implicitly decide which points of data are going to be shared. The wording of this Article implies limiting the shared data to those only directed connected with end users' use. [154] This limitation can be understood as a data minimisation principle regulated under Article 5(1)(c) GDPR as it establishes that personal data must be 'adequate, relevant, and limited to what is necessary […]'[155] However, the designation of what would be directly connected with the use of the CPS is still unclear.

In this sense, weaponizing data protection rules in order to deny access to business users is openly forbidden in Recital (60) of the DMA. Recital (60) of the DMA forbids *gatekeepers* to use any 'contractual or other restrictions to prevent business users from accessing relevant data'.[156]

Article 6(10) DMA[157] imposes the obligation to transfer the dataset of end users to the business user by the gatekeeper. It rests unclear to which scope the gatekeeper can claim that data-sharing may end up violating their GDPR obligations since the business user cannot guarantee the safety of the personal data that are transferred to the business user. [158] However, in terms of transferring datasets, since it constitutes data processing by itself, the transfer shall be based on the legal obligation under Article 6 of the GDPR. [159]

It is worth considering the potential implications of the DMA's data sharing and access requirements for the *gatekeepers* and how they could rely on those

[154] Article 6(10) DMA does not make the distinction of the different layers of data processing by itself; Muhammed Demircan. (n.26).

[155] Article 5(1)(c) GDPR.

[156] Recital (60) DMA.

[157] Article 6(10) of the DMA establishes the obligation of: 'continuous and real-time access and use of [...] data'.

[158] CPIL: Bridging the DMA and the GDPR - Comments by the Centre for Information Policy Leadership on the Data Protection Implications of the Draft DMA, pp. 7–19. Centre for Information Policy Leadership (2021)

[159] Muhammed Demircan (n.26).

obligations. It is conceivable that the *gatekeepers* could emerge as the primary beneficiaries of these obligations[160], which could significantly reinforce their bargaining power *vis-à-vis* each other while also enabling them to leverage their market dominance to venture into adjacent digital markets.

3.4.2 Data Portability and Access

The right of data portability under the GDPR is composed, in itself, of three different rights (i) right to receive data concerning the data subject which he/she provided; (ii) right to transmit the data to another controller; and (iii) the right to have personal data transmitted from another controller to the other, when technically feasible.[161]

Upon initial examination, the right of data portability introduced by the DMA seems to refer to the right under the GDPR. However, DMA-induced right is limited to the activities of the *gatekeepers* while the GDPR is limited to the portability of provided personal data of data subjects. In this sense, the DMA does not introduce a new right to data portability; instead, it makes an addition to the originally introduced right by the GDPR.[162]

Along with this, based on Recital (59) DMA, it seems that the obligation to provide end users effective data portability is composed by the same elements of the GDPR. In that aspect, it could be said that the DMA 'widens this right to cover the data of business users and closes a gap which the GDPR left open, namely *how* access to data for the purposes of portability should be provided'[163]. The relationship between these two provisions can be clarified by

[160] Philipp Baschenhof (n.124). p.51

[161] Paul De Hert et al, 'The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services' (2018) Vol. 34, Issue 2, *Computer Law and Security Report/Computer Law & Security Report* pp 193-203 <https://www.sciencedirect.com/science/article/pii/S0267364917303333> .Accessed 23 April 2024.

[162] Barbara Lazarotto (n.150) p. 8

[163] See Oscar Borgogno and Giuseppe Colangelo, 'Data, Innovation and Competition in Finance: The Case of the Access to Account Rule' (*Kluwer Law Online*, August 1, 2020) <https://kluwerlawonline.com/journalarticle/European+Business+Law+Review/31.4/EULR2020023> p. 17. Accessed 26 April 2024.

the same Recital (59) DMA where it states that: 'the obligation on the gatekeeper to ensure effective portability of data […] complements the right to data portability of the GDPR'. According to the Recital (59) DMA, it could be that the intention is that the DMA and the GDPR frameworks are reciprocal.

3.4.2.1 Scope of data portability right

Data portability is present in both legislations but in a difference regarding the scope, even though in both legislations the *gatekeeper*/data controller is required to share the data with third parties. [164]

The GDPR protects and applies to 'personal data' under Article 4 (1) GDPR, as stated before in this thesis. This would mean that the scope of data portability request under the GDPR is *only* the personal data under Article 20 GDPR.

In this regard, the GDPR is providing a special framework to personal data, where, according to Crémer can be seen as a right to counter data lock-in. [165] However, the DMA does not cover such 'restriction' in the context of data portability; it covers both 'personal' and 'non-personal data' generated by the end-user while using the CPS[166] as the wording of the Article 6(9) DMA refers *only* to 'data', leading to the interpretation that makes no distinction on data. Therefore, in this case, the main difference between the GDPR and the DMA regarding the data portability is that the data portability obligation under the DMA is of a wider range than the GDPR.

Article 6(9) DMA[167] requires *gatekeepers* to provide end users with effective portability of data provided by them or generated through their CPS. On this

[164] Marco Botta and Danielle Borges, 'User Consent at the Interface of the DMA and the GDPR. A Privacy-setting Solution to Ensure Compliance with ART. 5(2) DMA' (December 1, 2023). Robert Schuman Centre for Advanced Studies Research Paper No. 2023_68, <http://dx.doi.org/10.2139/ssrn.4650373> Accessed 8 May 2024.

[165] Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer (n.27)

[166] Article 6(9) of the DMA.

[167] Article 6(9) of the DMA establishes 'real time access' data portability: 'including by the provision of continuous and real-time access'.

behalf, Article 6 of the GDPR creates a right to business-to-business data portability[168], namely compliance with a legal obligation and protection of vital interests and legitimate interest pursued by the controller or by a third party.[169]

In this sense, the appearance of the DMA makes an addition to the right of data portability, widening its coverage from personal data to all data provided by the end-user generated through their activity on a *gatekeeper* platform, including all legal basis listed on Article 6(1) GDPR.[170]

In this scenario, Article 6(9) and Article 6(10) DMA differ, also, in the way they are triggered. On the one hand, the right to data portability under Article 6(9) DMA and under Article 20 GDPR is prompted when the data subject or the end user requests it in the context of the DMA. On the other hand, Article 6(10) DMA is triggered through the request of the business user.

Another difference between the GDPR and the DMA is the legal basis on where the right of data portability is. In the sense of the GDPR, the Article 20 (1)(a) GDPR establishes that the right of data portability covers the data that has been processed on the basis of the contract[171] or consent[172]. When it comes to data processing, Article 6(1) GDPR enumerates six lawful bases for data processing, including the data subject's consent. By contrast, Art. 5(2) DMA specifies only four possible legal bases to authorize data combination by the gatekeeper, including the user's consent. [173]

In that context, designated *gatekeepers* are required to adhere to the stipulations of Article 5(2) DMA when carrying out data combination activities

[168] See Orla Lynskey 'Aligning Data Protection Rights with Competition Law Remedies: The GDPR Right to Data Portability' (2017) *European Law Review*, 42 (6). 793 - 814. ISSN 0307-5400 793. <http://eprints.lse.ac.uk/id/eprint/80859>; see also Hoffmann, J,. & Gonzalez Otero, B. 'Demystifying the Role of Data Interoperability in the Access and Sharing Debate' (2020). Max Planck Institute for Innovation & Competition Research Paper No. 20-16,: <http://dx.doi.org/10.2139/ssrn.3705217> Accessed 30 April 2024.

[169] 29WP (n.135).

[170] Barbara Lazarotto (n.150) p.8.

[171] As per article 6(1)(b) GDPR

[172] As per article 6(1)(a) GDPR

[173] Marco Botta and Danielle Borges (n. XXX) p. 13.

within their respective ecosystems. Conversely, Article 6(1) of the GDPR remains applicable to entities outside the gatekeeper designation when they elect to combine and thereby process, collected personal data. [174]

Also in the scope of the right of data portability, under the GDPR Article 20 (1) GDPR, in a joint interpretation with Recital (68) GDPR, leads to the analysis that the scope of the right covers data that end users have 'provided' to a controller[175] but it does not cover inferred or derived data – data created by the data controller.[176] However, on the other hand, in Article 6(9) DMA it is established the obligation to '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'.[177] Taking into consideration the wording of the DMA, it could be interpreted as it also would cover inferred and derived data unlike the GDPR.

In this sense, the lack of definition for the term 'provided' in the GDPR evokes different interpretations. In this sense, the EDPB establishes the definition by stating that the right *only* includes observed data, excluding inferred data.[178]

3.4.2.2 Legal obligations under data portability provisions and their potential differences.

When it comes to data portability, there are evident differences between the DMA and the GDPR. In Article 6(9) DMA it establishes that the portability of data performed by the gatekeeper should be 'free of charge'. However, the GDPR in that aspect, covered by the Article 12 GDPR establishes that the

[174] Ibid, p. 14.
[175] 29WP (n.135) p. 9.
[176] *Ibid.* Page 10.
[177] Article 6(9) DMA
[178] Daniel Gill and Jakob Metzger, 'Data Access through Data Portability: Economic and Legal Analysis of the Applicability of Art. 20 GDPR to the Data Access Problem in the Ecosystem of Connected Cars' (2022) 8 European Data Protection Law Review, pp. 221 - 237. <https://heinonline.org/HOL/P?h=hein.journals/edpl8&i=229> Accessed 15 May 2024.

data controller may charge 'a reasonable fee' where data portability requests 'are excessive, in particular because of their repetitive character'[179]

Similarly, Article 6(10) DMA constitutes an obligation on the side of the *gatekeeper* to provide business users 'access, free of charge, with effective, high-quality […] access to data, including personal data'[180]. In this sense, the DMA provision aims to force the *gatekeepers* to share the data that hold a business value[181]. To this aspect, Article 5(1)(d) of the GDPR emphasises that data should be 'accurate and, where necessary, kept up to date'[182], which can be interpreted as an obligation of an access not only in real-time but also accurate.

Furthermore, the portability obligation under the Article 20(2) GDPR is regulated as the data subject has the right to have the data 'transmitted directly from one controller to another where '*technically feasible*'[183], and Recital (68) GDPR establishes that there is no obligation for controllers to adopt or maintain processing systems which are technically compatible.[184] However, the DMA goes, again, outside the requirements of the GDPR and establishes in Recital (59) the requirement that gatekeepers should implement 'high quality technical measures, such as application programming interfaces'[185] and that gatekeepers should ensure that 'data is ported continuously and in real time'.[186] The DMA would be covering portability obligation with any data at different levels of aggregation that may be necessary to effectively enable such portability.'[187] However, in that aspect neither the DMA provides a mechanism to be used by the *gatekeepers* for the mandatory sharing of data under the DMA.

---

[179] Article 12(5) GDPR.
[180] Article 6(10) DMA
[181] Muhammed Demircan (n.26), p. 150.
[182] Article 5(1)(d) GDPR
[183] Article 20(2) GDPR.
[184] Article 29 WP Guidelines (n.135) p. 5.
[185] Recital (59) DMA
[186] See also Recital (96) where it states that: 'The implementation of some of the gat keepers' obligations, such as those related to data access, data portability or interoperability could be facilitated using technical standards. In this respect, it should be possible for the Commission, where appropriate and necessary, to request European standardisation bodies to develop them.'
[187] Philipp Baschenhof (n.124) p. 16.

Under Article 6(9) DMA *gatekeepers* must 'provide effective portability of data generated through the activity of a business user or end user and shall provide tools for end users to facilitate the exercise of data portability in line with […the GDPR], including by the provision of continuous and real time access'[188]. The GDPR reference is instructive.[189] It recognizes that consumer privacy rights take precedence: business require end user consent to access personal data.[190] In this case, Article 6(10) establishes the right to free access to data and to all type of data,[191] meaning continuous and real-time data access[192].

The main idea behind this obligation would be to encourage business users to port their data to competing operators leading to 'an increased choice for users and an incentive for gatekeepers and business users to innovate.'[193]

However, this idea could be analysed through a bigger picture; the increase of portability could encourage businesses users to switch from one g*atekeeper*'s service to another, rather than to a service that is offered by a smaller provider.[194] That could have a double impact, which from the one hand the risk of users switching to other's *gatekeepers* service would be likely to exercise pressure on gatekeepers to innovate and even to compete on price, hence, would have a good impact for competition. On the other hand, the obligation of data portability under Article 6(10)) of the DMA could potentially fail to have a significant effect on the contestability of digital markets for smaller service providers. [195]

[188] Article 6(1)(h) DMA

[189] Philipp Baschenhof (n.124) p. 14.

[190] Luis MB Cabral and others, 'The EU Digital Markets Act: A Report from a Panel of Economic Experts' (February 9, 2021) *Publications Office of the European Union, Luxembourg*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783436> p. 23.

[191] When including 'all types of data' it covers provided, generated, aggregated and non-aggregated individual busness user data.

[192] Luis MB Cabral and others (n.190).

[193] Meredith Broadbent (n.125)

[194] Gabriel, N., & Weinberg, M. (2019).' Data portability and platform competition: is user data exported from Facebook actually useful to competitors?'. *Engelberg Center on Innovation Law and Policy, New York University*.

[195] Asay, M. (2021, July 21). How DuckDuckGo makes money selling search, not privacy. TechRepublic. <https://www.techrepublic.com/article/how-duckduckgo-makes-money-selling-search-not-privacy/> Accessed 30 April 2024.

The 29WP guidelines establish that when data portability takes place, 'the data controller is not responsible for compliance of the receiving data controller […]'.[196] This would mean that the responsibility of the *gatekeeper* would end when the data set is transferred to the business user, meaning that it would prevent the *gatekeepers* to share data with the business user based on concerns over the safety of the transfer. That would be in line with the obligation of sharing datasets under the Article 6(10) DMA, meaning that even if *gatekeepers* would not have the right to sat about the capacity of the business users in terms of the safety of the personal datasets, business users would be still subject to the GDPR as independent data controllers.

3.4.2.3 Concluding Remarks

The right to data portability was introduced by the GDPR with the idea to give data subjects control over their data and potentially change the market. Nevertheless, as this section has tried to show, it is possible to build new layers to this right.[197]

The DMA and the GDPR have differences in focus, scope and application. While the GDPR is designed as a horizontal regulation aimed at protecting personal data across different sectors, the DMA is targeted specifically at promoting fairness and contestability by just focusing on the behaviour of *gatekeepers* and the competitive digital markets.

However, when it comes to the meaning of 'without prejudice' clause, it is far from clear whether data portability obligations within the meaning of the DMA (which is clearly more far-reaching than data portability under the GDPR) is *lex specialis* that prevails over the GDPR, rendering the clause of the DMA devoid of purpose. [198]

3.5 The obligation of the choice of consent as a

[196] 29WP (n.135).
[197] Barbara Lazarotto (n.150) p. 15
[198] Geradin, Bania and Karanikioti (n. 109)

legal basis for data processing between the GDPR and the DMA

End user consent has an important role under the DMA's obligations, allowing *gatekeepers* to engage in practices that in the lack of the DMA would be prohibited.

Under Article 6 GDPR it is regulated the various legal bases for personal data processing. Recital (40) of the GDPR demands that in order to be lawful, 'personal data should be processed on the basis of the consent of the data subject […]'.[199] In this line, the requirements of the validity of legal consent are under Article 7 of the GDPR[200] and Recital (32) of the GDPR while the elements of consent are enumerated in Article 4(11) GDPR. The EU regulatory choice of relying on the individual's consent can be seen as giving the citizens the control over the data, empowering them to customise their data policy choices. Since the given consent is referred as the main gate for combining or cross-using personal datasets within the legislative text itself, this section will try to analyse how consent is understood under the DMA and the GDPR.

According to Recital (43) of the GDPR, consent can be affected when there is an existence of imbalance[201] or informational asymmetry[202] between the data subject and the controller.[203]

In Article 5(2) DMA it is established that data combination is possible if the end user has provided consent in accordance with the GDPR requirements, hence, consent is defined within the meaning of Article 4(11) and Article 7

[199] Recital (40) of the GDPR.

[200] Article 7 of the GDPR are the conditions for consent.

[201] Related to this line, there is a similar interpretation in the "Press release: Advocate General's Opinion C-252/21 | Meta Platforms and Others (General terms of use of a social network")

[202] Wording from the Directorate for Competition Committee: Consumer Data Rights and Competition – Background note, p. 23. OECD (2020)

[203] Recital (43) of the GDPR states that: 'In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation'

of the GDPR. In this framework, Graef [204] suggests that the legal ground of the DMA obligations should go further on stricter grounds, like what it established under Article 6(1)(b) GDPR: processing personal data is lawful if 'necessary for the performance of a contract'[205]. Considering this, while contractual necessity is a legal base provided in the GDPR, in the DMA is only mentioned as an alternative to strict consent policy choice. [206] In this setting, consent within the scope of the DMA would be flawed in the relationship between the gatekeeper and the end-user.[207]

Article 5(2)(3) of the DMA establishes that the combination or cross-use of personal datasets by the *gatekeeper* can be performed in the light of Article 6(1)(c), Article 6(1)(d), Article 6(1)(e) of the GDPR. Within this framework, it could be seen as the obligation to *gatekeepers* to share information where it is considered necessary by authorities.

The DMA, according to Demircan could avoid referring to the consent of the end-user in both Articles 5 and 6 of the DMA and could focus more on the GDPR principles, such as data minimisation and purpose limitation in order to secure data sharing. [208]

Graef suggests that the legal ground for the DMA obligations should go beyond the consent and rely on the grounds of the Article 6(1)(b) GDPR as it establishes that the lawfulness of the data processing relies on the 'necessity for the performance of a contract'[209].[210]

In that sense, to sum up, the application of the DMA would not contradict the GDPR (even when it goes beyond it), issues are bound to arise as to how GDPR compliant consent is obtained by those gatekeeper platforms that have a track record of nudging users into extensive data processing that fails to meet the GDPR standards.

---

[204] Inge Graef.: 'Why End-User Consent Cannot Keep Markets Contestable'.(2021) <https://verfassungsblog.de/power-dsa-dma-08/> . Accessed 28 April 2024.

[205] Article 6(1)(b) GDPR

[206] Muhammed Demircan. (n.26). p.153

[207] Ibid. supra. p. 153.

[208] Ibid. supra p. 154.

[209] Article 6(1)(b) GDPR.

[210] Inge Graef. (n.204)

4 Conclusion

The Digital Markets Act has been brought up to set a new approach, which involves adopting a specific approach which is designed to tackle the inherent and established problems of the digital markets, by promoting fair competition and ensuring adequate data protection standards.

This thesis has meticulously explored the role of the DMA regarding the EU competition law framework and how the provisions would interact with specific rights under the GDPR; data access, portability and sharing obligations. Through this analysis, it has become evident that the DMA can be interpreted as a sector specific regulation that controls *gatekeepers*' behaviour, serving as a complementary tool to the EU competition law, trying to ensure fair and contestable markets in a different legal basis an approach.

Furthermore, the analysis has highlighted how the DMA extends the principles of the GDPR by setting broader obligations regarding data access, portability, and sharing rights. The extension has been considered as *lex specialis but* has also generated debate about it. This extension, however, has served as a justification to control data power that *gatekeepers* hold in order to ensure a fair competitive market. Nonetheless, the complexity of this topic suggests further investigation on how these obligations are going to be enforced and the potential conflicts arising from it.

This thesis has also identified potential areas of conflict between the DMA and existing regulatory frameworks, underscored by the foundational premise of this thesis: the 'without prejudice' clause. This clause, while intended to preserve the efficacy of concurrent legal frameworks, has raised substantial questions within legal scholars about the practical interplay and harmony between these regulations. The subtle interpretation of this clause suggests a need for careful legal and regulatory alignment to avoid unintended consequences that could undermine the overarching goals of market fairness and data protection. Nonetheless, this author believes that misunderstandings will undoubtedly appear, and it will be necessary to ascertain how are interpreted and resolved by legal enforcers.

In the light of all the aforementioned, it becomes apparent that while this thesis has tried to lay a foundational understanding of the DMA's role within the EU legal framework, the dialogue between legal theory and practice remains very much open to further scholarly exploration and debate. The continuous evolution of the digital market insists on an adaptable and forward-looking regulatory approach, one that not only addresses the current situation but also anticipates future changes and developments.

5 Bibliography

5.1 Literature

5.1.1 Books

Inge Graef, *EU competition law, data protection and online platforms data as essential facility* (Kluwer Law International, 2016)

Kleineman, J, 'Rättsdogmatisk metod', in Maria Nääv & Mauro Zamboni (eds), *Juridisk metodlära* (2nd Edition, Studentlitteratur, 2018)

Krämer, J, Senellart, P, de Streel, A '*Making data Portability More Effective for The Digital Economy* (2020)', Centre on Regulation in Europe

Lyon, P T & Huang, H *Asymmetric Regulation and Incentives for Innovation,* 4 INDUST.CORP. CHANGE 769 (1995).

5.1.2 Articles

Akman, P.: 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU DMA', (2021). *European Law Review* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978625> pp. 2–18 Accessed 30 April 2024.

Andriychuk, O. 'Shaping the new modality of the digital markets: The impact of the DSA/DMA proposals on inter-platform competition' (2021). *World Competition*, Vol. 44 Issue 3, pp-261-286, <https://doi.org/10.54648/woco2021017> Accessed 14 April 2024.

Bania, K 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice'' clause' (2023) *European Competition Journal*, 19:1,116-149, <https://doi.org/10.1080/17441056.2022.2156730>

Baschenhof, P. 'The Digital Markets Act (DMA): A Procompetitive Recalibration of Data Relations?' (2022). U. Ill. JL Tech. & Pol'y, 1. <https://heinonline.org/HOL/P?h=hein.journals/jltp2022&i=1> .

Blockx, J. 'The expected impact of the DMA on the Antitrust Enforcement of Unilateral Practices' (2023) *Journal of European Competition Law & Practice.* <https://doi.org/10.1093/jeclap/lpad028> Accessed 30 April 2024.

Bongartz, P; Langenstein, S, and Podszun,R, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' (*Kluwer Law Online,* May 1, 2021)

Borgogno O and Colangelo G, "Data, Innovation and Competition in Finance: The Case of the Access to Account Rule" (*Kluwer Law Online,* August 1, 2020) <https://kluwerlawonline.com/journalarticle/European+Business+Law+Review/31.4/EULR2020023> Accessed 26 April 2024.

Bostoen, F, 'Understanding the digital markets act.', (2023), *The Antitrust Bulletin,* 68(2), 263-306. <https://doi.org/10.1177/0003603X231162998> Accessed 14 April 2024.

Botta M and Borges D, 'User Consent at the Interface of the DMA and the GDPR. A Privacy-Setting Solution to Ensure Compliance with ART. 5(2) DMA' (2023) Robert Schuman Centre for Advanced Studies Research Paper No. 2023_68<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4650373> Accessed 8 May 2024.

Cabral LMB and others, "The EU Digital Markets Act: A Report from a Panel of Economic Experts" (February 9, 2021)) *Publications Office of the European Union, Luxembourg* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783436>

Cappai, M and Colangelo, G 'Taming digital gatekeepers: the more regulatory approach to antitrust law', (2021) Volume 41. *Computer Law & Security Review* 1. <https://doi.org/10.1016/j.clsr.2021.105559>

Colangelo, G 'In Fairness We (Should Not) Trust: The Duplicity of the EU Competition Policy Mantra in Digital Markets.' (2020), *Antitrust Bulletin 618*, Available in: <https://doi.org/10.1177/0003603X231200942.> Accessed 13 May 2024.

Colangelo, G. 'The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse' (2022) *European Law Review,* <http://dx.doi.org/10.2139/ssrn.4070310> Accessed 29 April 2024.

Crémer J and others, 'Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust' (2023) 11 Journal of Antitrust Enforcement 315 <https://academic.oup.com/antitrust/article-abstract/11/3/315/7081289>

Crémer, J, de Montjoye,Y, Schweitzer, H 'Competition policy for the digital era' (2019). European Commission, Directorate-General for Competition, Publications Office. <https://data.europa.eu/doi/10.2763/407537> <https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/10.1/EuCML2021017> Accessed 26 April 2024.

De Hert, P et al, 'The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services' (2018) Vol. 34, Issue 2, *Computer Law and Security Report/Computer Law & Security Report* pp 193-203 <https://www.sciencedirect.com/science/article/pii/S0267364917303333> Accessed 23 April 2024.

Demircan, M, 'The DMA and the GDPR: Making Sense of Data Accumulation, Cross-Use and Data Sharing Provisions', (2022), In IFIP International Summer School on Privacy and Identity Management (pp. 148-164). Vol. 671 Cham: *Springer Nature Switzerland*. <https://doi.org/10.1007/978-3-031-31971-6_12> .. Accessed 23 April 2024.

Fernandez, C, 'A new kid on the block: How will competition law get along with the DMA?' (2021) *Journal of European Competition Law & Practice,*

12(4), 271–272 <https://doi.org/10.1093/jeclap/lpab020> Accessed 23 April 2024.

Fox, E, 'Monopolization and abuse of dominance: Why Europe is different', (2014) 59 *The Antitrust Bulletin*, 129 (133) <https://doi.org/10.1177/0003603X1405900106> Accessed 14 April 2024.

Fox, E, 'Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The U.S./E.U. Divide', (2006) *Utah Law Review*, 725 (728); <https://heinonline.org/HOL/P?h=hein.journals/utahlr2006&i=735>

Fratea, C, 'Competition Law and Digital Markets: Adaptation of Traditional Categories or New Rules? Some Reflections Arising from the Amazon Cases Regarding the Access to Non-Public Data'. *European Business Law Review*, *33*(7). <https://doi.org/10.54648/eulr2022044> Accessed 14 April 2024.

Gabriel, N., & Weinberg, M. (2019).' Data portability and platform competition: is user data exported from Facebook actually useful to competitors?'. *Engelberg Center on Innovation Law and Policy, New York University*.

Georgieva, Z 'The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, infused with Competition Principles' (2021) 6/1 *European Papers,* <https://www.europeanpapers.eu/fr/europeanforum/digital-markets-act-proposal-european-commission-exante-regulation>

Geradin, D, Bania, K, and Karanikioti, T 'The interplay between the Digital Markets Act and the General Data Protection Regulation' (2022), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203907> Accessed 28 April 2024.

Gill,D and Metzger, J 'Data Access through Data Portability: Economic and Legal Analysis of the Applicability of Art. 20 GDPR to the Data Access Problem in the Ecosystem of Connected Cars' (2022) 8 European Data Protection Law Review, pp. 221 -237. <https://heinonline.org/HOL/P?h=hein.journals/edpl8&i=229> Accessed 15 May 2024.

Graef, I; Husovec, M, and Van Den Boom, J 'Spill-Overs in Data Governance: Uncovering the Uneasy Relationship between the GDPR's Right to Data Portability and EU Sector-Specific Data Access Regimes' (*Kluwer Law Online*, February 1, 2020), <https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/9.1/EuCML2020002>

Graef, I; Tombal, T, and de Streel, A 'Limits and Enablers of Data Sharing. An Analytical Framework for EU Competition, Data Protection and Consumer Law' (2019), TILEC Discussion Paper, 2019), <https://dx.doi.org/10.2139/ssrn.3494212Accessed 14 April 2024.

Hoffmann, J,. & Gonzalez Otero, B. 'Demystifying the Role of Data Interoperability in the Access and Sharing Debate'. (2020) Max Planck Institute for Innovation & Competition Research Paper No. 20-16, Available at SSRN: <http://dx.doi.org/10.2139/ssrn.3705217> Accessed 20 April 2024.

Hoffmann, J; Herrmann, L, and Kestler, L, 'Gatekeeper's potential privilege – the need to limit DMA centralization', (2024), *Journal of Antitrust Enforcement*, 12, 126-147, <https://doi.org/10.1093/jaenfo/jnad040>. Accessed 14 May 2024.

Ibáñez Colomo, P, 'The Draft Digital Markets Act: A Legal and Institutional Analysis', (2021): <https://ssrn.com/abstract=3790276>

Javeed, U, 'Data and Competition Law: Introducing Data As Non-Monetary Consideration and Competition Concerns in Data-Driven Online Platforms' (2021). <https://doi.org/10.2139/ssrn.3788178> Accessed 23 April 2024.

Koenig, C 'Obligations for Gatekeepers' (January 2024). Steinrötter / Heinze / Denga (eds), *EU Platform Regulation*, Beck Nomos Hart, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=4715163> Accessed 23 April 2024.

Komninos, A 'The Digital Markets Act: How Does it Compare with Competition Law? (2022)' <https://ssrn.com/abstract=4136146>

Kraemer, J, ‘Personal Data Portability in the Platform Economy: Economic Implications and Policy Recommendations’ (November 25, 2020) *Journal of Competition Law & Economics*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3742771>.

Krämer,J, Schnurr, D and Broughton Micova,S ‘The Role of Data for Digital Markets Contestability’, CERRE Report, (September 2020) <https://cerre.eu/publications/data-digital-markets-contestability-case-studies-and-data-access-remedies/> p. 55. Accessed 14 May 2024.

Kuner, C, Bygrave, L and Christopher Docksey, ‘Background and Evolution of the EU General Data Protection Regulation (GDPR)’, (2020) *Oxford University Press eBooks*, <https://academic.oup.com/book/41324/chapter/352293200 > Accessed 11 May 2024.

Lamadrid de Pablo, A and Bayón Fernández, N,‘Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It’(2021) *Journal of European Competition Law & Practice*, Volume 12, Issue 7, Pages 576-589, <https://doi.org/10.1093/jeclap/lpab059> Accessed 23 April 2024.

Lazarotto, B ’The Right to Data Portability: A Holistic Analysis of GDPR, DMA and the Data Act’, *European Journal of Law and Technology* (May 2, 2024) <https://ejlt.org/index.php/ejlt/article/view/988> . Accessed 13 May 2024.

Lynskey, O ‘Aligning Data Protection Rights with Competition Law Remedies: The GDPR Right to Data Portability’ (2017) *European Law Review*, 42 (6). 793 - 814. ISSN 0307-5400 793. <http://eprints.lse.ac.uk/id/eprint/80859>

Manescu, D, Legislation Comment: Considerations on the Digital Markets Act, The Way to a Fair and Open Digital Environment.’(2024) *European Business Law Review* 35, no. 2, pp. 289-304. 2024 Kluwer Law International BV, The Netherlands. <https://doi.org/10.54648/eulr2024019> Accessed 23 April 2024.

Moreno Belloso N, and Petit, N, 'The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove' (April 5, 2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4411743> Accessed 30 April 2024.

Moreno Belloso, Natalia, 'The EU Digital Markets Act (DMA): A Summary' (2022),: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109299 >

Nicolas Petit, 'The proposed digital markets act (DMA): a legal and policy review,' (2021). *Journal of European Competition Law & Practice*, 12(7), 529-541. <https://doi.org/10.1093/jeclap/lpab062> Accessed 1 May 2024.

Pantelidis, K 'The DMA Procedure: Areas to Improve', (2024), *Kluwer Law Online*, Vol. 47, Issue 2, pp 157-192, <https://kluwerlawonline.com/journalarticle/World+Competition/47.2/WOCO2024016>

Podszun, R; Bongartz, P and Langenstein, S 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers', (2021) 2 *Journal of European Consumer and Market Law*, Issue 2, pp. 60-67, <https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/10.2/EuCML2021017> Accessed 28 April 2024.

Schweitzer, H 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal' (April 30, 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837341> Accessed 29 April 2024.

Skowron-Kadayer M, "Obligations to Consult EU Institutions on National Draft Laws: A Dogmatic Analysis" (2020) 28 European Review 343 <https://www.cambridge.org/core/journals/european-review/article/abs/obligations-to-consult-eu-institutions-on-national-draft-laws-a-dogmatic-analysis/446972D0CD90F186ACD90144784DC470>

Turner, V, 'The EU Digital Markets AI – A New Dawn for Digital Markets', (2022). *ABA Antitrust Magazine*, Volume 37, Issue 1, Fall.

Witt, A, ‘The Digital Markets Act – Regulating the Wild West’ (*Common Market Law Review*, 2023)

5.1.3 Online Sources

Asay, M. (2021, July 21). How DuckDuckGo makes money selling search, not privacy. TechRepublic. <https://www.techrepublic.com/article/how-duckduckgo-makes-money-selling-search-not-privacy/> Accessed 30 April 2024.

Broadbent, M ‘The Digital Services Act, the Digital Markets Act, and the New Competition Tool’, (2020) CTR. FOR STRATEGIC INT'L STUD., <https://www.csis.org/analysis/digital-services-actdigital-markets-act-and-new-competition-tool> Accessed 28 April 2024.

Buttarelli, G, ‘Youth and Leaders Summit - Opening Speech’ (2019). <https://edps.europa.eu/sites/edp/files/publication/19-0121_speech_youth_and_leaders_en.pdf> Accessed 14 April 2024.

Caffarra, C, and Scott Morton, F ‘The European Commission Digital Markets Act: A translation’, (CEPR January 2021) <https://voxeu.org/article/european-commission-digital-markets-act-translation> Accessed 30 April 2024.

EDPS Comments on a Framework for the Free-Flow of Non-Personal Data in the EU (*European Data Protection Supervisor*, 2018) <https://www.edps.europa.eu/data-protection/our-work/publications/comments/edps-comments-framework-free-flow-non-personal-data_en> .Accessed in 7 May 2024.

European Commission, ‘Commission Designates Booking as a Gatekeeper’ European Commission, May 13, 2024) <https://ec.europa.eu/commission/presscorner/detail/en/IP_24_2561>.Accessed 16 May 2024.

European Commission, 'Digital Markets Act: Commission Designates Six Gatekeepers' (European Commission, September 6, 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328> Accessed 23 April 2024.

European Commission, 'Q&A: DMA: Ensuring fair and open digital markets' (September 6, 2023) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349>. Accessed April 26 2024.

European Commission, 'Questions and Answers: Digital Services Act, 20 May 2022, <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348> Accessed 30 April 2024.

German Competition Act 2021—Unofficial Translation' (D'Kart), <https://www.d-kart.de/wp-content/ uploads/2021/01/GWB-2021-01-14-engl.pdf > Accessed 30 April 2024

Graef, I: 'Why End-User Consent Cannot Keep Markets Contestable'.(2021) <https://verfassungsblog.de/power-dsa-dma-08/> . Accessed 28 April 2024.

Guidelines 07/2020 on the Concepts of Controller and Processor in the GDPR European Data Protection Board <https://www.edpb.europa.eu/our-work-tools/documents/public-consultations/2020/guidelines-072020-concepts-controller-and_en>

How National Competition Agencies Can Strengthen the DMA, EUROPEAN COMPETITION NETWORK (Jun. 22, 2021), <https://ec.europa.eu/competition/ecn/DMA_joint_EU_NCAs_paper_21.06.2021.pdf> Accessed 5 April 2024.

Margrethe Vestager, 'Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms' (15 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ STATEMENT_20_2450> . Accessed 14 April 2024.

Margrethe Vestager. The Commissioners. <https://commissioners.ec.europa.eu/margrethe-vestager_en > Accessed 14 April 2024.

Massachusetts Institute of Technology, 'How to Win with a Multisided Platform Business Model | MIT Sloan Management Review' (*MIT Sloan Management Review*, May 20, 2014) <https://sloanreview.mit.edu/article/how-to-win-with-a-multisided-platform-business-model/> Accessed 10 April 2024.

Nordic Competition Authorities Release Joint Memorandum on Digital Platforms and the Future of European Policy (*Swedish Competition Authority*) <https://www.konkurrensverket.se/en/news/nordic-competition-authorities-release-joint-memorandum-on-digital-platforms-and-the-future-of-european-policy/> Accessed 8 April 2024.

The Digital Services Act Package (Shaping Europe's Digital Future) <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 7 May 2024.

Tom Smith, Full Steam Ahead for the UK Digital Markets Unit, *The Platform Law Blog* (Nov. 17, 2022), <https://theplatformlaw.blog/2022/11/17/full-steam-ahead-forthe-uk-digital-markets-unit/ on the legislative progress> Accessed 30 April 2024

6 Table of legislation

6.1 EU legislation

Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

Charter of Fundamental Rights of the European Union [2012] OJ C326/391

6.2 Directives

Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337.

Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services *OJ L 136*

Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) *OJ L 158*,

6.3 Regulations

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.

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

Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act).

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 (DMA) [2022] OJ L 265,

Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) OJ L 277,

Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act).;

6.4 Table of Cases

Bpost,(C-117/20) [2022] ECLI:EU:C:2022:202

Faceobok Inc. and Others v Bundeskartellamt (C-252/21)

Google Android (AT.40099) [2018] C(2018) 4761 final.

Limburgse Vinyl Maatschappij and Others v Commission (C-238/99 P), [2002] ECLI:EU:C:2002:582

Microsoft/LinkedIn, (C-M.8124)

NV Nederlandsche Banden Industrie Michelin (C-322/81). [1983] ECLI:EU:C:1983:313

Opinion of Advocate General Rantos in C-252/21 - *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social),* ECLI:EU:C:2022:704.

Post Danmark A/S Konkurrenceradet (C-209/10) [2012] ECLI:EU:C:2012:172

Toshiba Corp. et al, (C-17/10) [2012] ECLI:EU:C:2012:72