A Europe fit for the digital age: The Digital Markets Act between sectoral regulation and competition law

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Introduction

The adoption of the Digital Markets Act ('DMA') by the European Parliament on July 5, 2022 marks a paradigm shift: whereas previously sectoral regulations were largely limited to regulating the operation of *physical* essential infrastructures, the DMA represents the realization that digital platforms have transformed - due to their huge user bases and significant scale and network effects - into *virtual* infrastructures, which are equally prone to abusive practices.[1] Although there are already provisions or proposed laws on this subject at the national level, such as section 19a of the German Law on Restraints of Competition ("Gesetz gegen Wettbewerbsbeschränkungen", 'GWB'), the DMA is the first comprehensive body of rules governing the behavior of tech giants. It is aimed at the GAFAM - Google (Alphabet), Amazon, Facebook (Meta), Apple and Microsoft - the American tech giants that dominate cyberspace with their search engines, online marketplaces and social networking services.

The markets in which these companies are active are characterized, as much as the railroad or postal network was in the past, by a monopolization trend: the value of the network increases with its size, with the number of users.[2] The DMA is based on the logic that today, a small number of large digital platforms occupy a position of gatekeepers, i.e., access points allowing user companies to reach their end users, as is the case with the online marketplace Amazon. This situation of dependence gives gatekeepers the ability to impose abusive conditions that they would not be able to negotiate in an efficient market vis-à-vis an operator of equivalent weight (see recital 4). If such operators control large closed systems, it becomes almost impossible for other firms to compete with them and challenge their market positions, regardless of

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[1] J.-L. Silicani, "Les plateformes numériques sont des infrastructures essentielles qu'il faut réguler", *Energy - Environment - Infrastructures*, No. 5, May 2021, repère 5.

[2] J. Basedow, "Das Rad neu erfunden: Zum Vorschlag für einen *Digital Markets Act*", *Zeitschrift für Europäisches Privatrecht*, 2021, p. 218; N . Gielen/S. Uphues, "Digital Markets Act und Digital Services Act. Regulierung von Markt- und Meinungsmacht durch die Europäische Union", *Europäische Zeitschrift für Wirtschaftsrecht*, 2021, pp. 627-628.

innovative solutions being proposed by the new entrant.[3] This role as access points to the downstream markets of the platform service has led gatekeepers to employ abusive practices, aimed at consolidating and strengthening their market positions and keeping potential competitors at bay.

Over the last twenty years, these behaviors of the web giants have been the subject of a series of major antitrust cases before the European Commission, such as *Microsoft*[4] and *Google Android*[5] (*tying*), *Google Shopping*[6] (self-preferencing) or the investigations opened in the *Amazon Marketplace* and *Amazon Buy Box* cases[7] regarding the anti-competitive use of data.

Predatory acquisitions further accentuate the weak contestability of digital markets, as they increase the market power of acquirers while eliminating an external element of competition. Perhaps the most high-profile deal was Facebook's USD 19 billion takeover of WhatsApp in 2014,[8] joined by other acquisitions such as *Apple/Shazam*[9] and *Google/Fitbit*.[10] However, these mergers and acquisitions fall under the merger control governed by the Merger Regulation, which cannot be changed by an internal market regulation as the DMA is designed.

The DMA - as well as this article - focuses on abusive practices employed by tech giants. All of the cases cited above in this area were conducted on the basis of Article 102 TFEU and thus show that competition law with its current content already prohibits abusive practices to a large extent. However, these cases also show shortcomings of competition law: the judgment of the Court of First Instance[11] in the *Google Shopping* case came only eleven years after the Commission had opened the investigation in 2010, in the meantime the market value of the company had increased more than sixfold.[12] Competition law suffers mainly from its *ex post* application, which - even by means of sometimes spectacular fines, such as 4.34 billion euros in *Google Android* - does not always succeed in restoring the previous state of the market. Moreover, the casuistic approach proves to be too flexible towards the GAFAM, allowing them to defend themselves through efficiency gains and the fact of the instability of digital markets, in which an innovative technology can at any time reverse market positions. These reflections

[3] F. Chirico, "Digital Markets Act: A Regulatory Perspective", *Journal of European Competition Law & Practice*, 2021, Vol. 12, No. 7, p. 494.
[4] COMP/C-3/37.792 - *Microsoft*.
[5] COMP/AT.40099 - *Google Android*.
[6] COMP/AT.39740 - *Google Search (Shopping)*.
[7] Ongoing investigations under COMP/AT.40462 - *Amazon Marketplace* and COMP/AT.40703 - *Amazon - Buy Box*.
[8] COMP/M.7217 - *Facebook/WhatsApp*.
[9] COMP/M.8788 - *Apple/Shazam.*
[10] COMP/M.9660 - *Google/Fitbit*.
[11] General Court (European Union), November 10, 2021, *Google Shopping*, T-612/17.
[12] A. Schwab, "Der Digital Markets Act: Europa ordnet digitale Plattformmärkte," *Wirtschaft und Wettbewerb*, 2022, p. 301.

have led the Commission to elaborate a conceptually new legal instrument, distinct from competition law and constituting, alongside its sister regulation of the Digital Services Act (the 'DSA'), the flagship element of its ambitious digital strategy to make 'Europe fit for the digital age'[13]: an *ex-ante* sectoral regulation of cyberspace, providing for a list of precise and *per se* behavioral obligations. These obligations are imposed on companies that have been designated by the Commission as gatekeepers.

However, the nature of the DMA is not as clear-cut as it might appear at first glance. The regulation takes over obligations from competition law, the only legal body that could serve as a model, while at the same time requiring autonomous enforcement tools to remedy the inadequacy of competition law in the digital sector. The complex position of the DMA between sectoral regulation and competition law can be explained by its genesis. The DMA was born out of a reflection on the inability of competition law to discipline the tech giants [**Section 1**]. The inadequacy of competition law for digital markets was considered as so great that it was preferred to remedy it not by an internal reform of competition law, but by a solution outside competition law [**Section 2**]. However, the sector-specific regulation that has been introduced uses obligations imposed on tech giants in abuse of dominance cases before the Commission and national competition authorities (the 'NCAs') [**Section 3**].

Section 1: The starting point: the inadequacy of competition law to ensure its objectives in the digital economy

The inadequacy of competition law to regulate the behavior of tech giants is evidenced by the growing number of cases against them before the Commission. Gatekeepers covered by the DMA continue to operate in an environment that promotes concentration trends [**§ 1**]. In this context, a mere competition law reform did not appear to be sufficient to remedy the systemic deficiencies in competition law [**§ 2**].

§ 1. An environment particularly susceptible to concentration trends

So-called "core" platform services have acquired their "essential" role largely because of two effects that characterize them (see recital 2): first, extreme economies of scale, with the marginal costs of adding a new end user or a new user company often tending towards zero. For an instant messaging service, for example, the costs are primarily fixed costs for application de-

[13] European Commission, "A Europe Fit for the Digital Age," https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en (accessed November 30, 2022).

velopment, maintenance, upkeep and updates. Secondly, core platform services are characterized by very large network effects, with the value of the service growing with the number of users.[14] An instant messaging application, no matter how well it may be designed, is only of value to the end user if it is used by his friends as well, so that he can use it to communicate with them.[15]

In addition to these two main effects, end users are highly dependent on core platform services - a young person without access to WhatsApp or Facebook Messenger is virtually excluded (since he or she is forgotten) from most social activities organized by his or her peers - but so are user companies, since a website that is not among the first search results on Google is unlikely to be visited by many people. Secondly, tech giants have often exploited their vertical integration in the past to benefit their own products in the downstream services market, such as Google[16] and Amazon[17] . In addition, a kind of "exclusivity policy" can be observed, with Apple restricting access to the iOS operating system to applications downloaded through its own app store. Finally, the tech giants have taken advantage of the vast amounts of data collected to compete with independent vendors.[18]

The result of these characteristics of digital markets, which are sometimes unfairly exploited, is that they are highly concentrated around a small number of large companies and even quasi-monopolists like Google, which accounts for 92% of online searches in Europe.[19] Even for innovative and efficient competing search engines, it is not possible to compete with Google in providing equally accurate results to end users, without having access to the vast majority of search data collected by Google. These strong market positions of the tech giants are further consolidated by the existence of very high barriers to entry (see recital 3). A search engine, for example, which is a service offered free of charge to the end user, must first invest heavily to reach a certain level of market penetration before it becomes attractive for online advertising by business customers. The tech giants, for their part, have helped to keep potential competitors at bay through unfair practices, with Amazon[20] and Booking.com[21] prohibiting sellers on the

[14] F. Marty, "La concentration des marchés numériques : caractérisation d'un problème concurrentiel et discussion des propositions de remèdes", Gazette du Palais, September 15, 2021, p. 46.
[15] Article 7 of the DMA will change this for the future.
[16] COMP/AT.39740 - *Google Search (Shopping)*.
[17] Autorità Garante della Concorrenza e del Mercato, "A528 - Italian Competition Authority: Amazon fined over € 1,128 billion for abusing its dominant position," Press release of December 9, 2021, https://en.agcm.it/en/media/press-releases/2021/12/A528 (accessed November 30, 2022).
[18] See ongoing investigations under COMP/AT.40462 - *Amazon Marketplace* and COMP/AT.40703 - *Amazon - Buy Box*.
[19] As of November 2022, see Statcounter, "Search Engine Market Share Europe," https://gs.statcounter.com/search-engine-market-share/all/europe (accessed November 30, 2022) .
[20] COMP/M.40153 - *E-book MFNs and related matters (Amazon)*.
[21] BKartA, Beschluss v. 22.12.2015, B9-121/13, confirmed by BGH, Beschluss v. 18.05.2021, KVR 54/20.

platform from offering their products at a better price on competing platforms or their own website.

Current oligopolistic structures thus tend to be static. They provide these few large firms with considerable bargaining power, which they can use to impose unfair conditions on user firms and end users "to the detriment of price, quality, fair competition, choice and innovation in the digital sector" (recital 4). It was found that "market processes are often unable to ensure fair economic outcomes for core platform services" (recital 5).

In addition to unfair behavior by large digital companies, it is also structural measures such as buyouts of innovative startups by tech giants that are likely to stifle innovation, nipping innovation in the bud ("killer acquisitions") or taking over the target with the aim of strengthening its market position in order to reduce competition. This topic was heavily debated after Facebook's USD 19 billion takeover of WhatsApp in 2014, which only reached the Commission in an almost random manner by way of a referral, as WhatsApp did not meet the turnover threshold under Regulation (EC) No. 139/2004 (the 'Merger Regulation')[22] and in the end cleared, mainly due to a sufficient number of other providers of consumer communication services as well as online advertising.[23]

§ 2. The difficulties of a simple competition law reform

It is in this context that one realized the need to provide public authorities with new tools to counter the unfair practices of tech giants, as demonstrated at the political level by the European Parliament's motion for a resolution on strengthening consumer rights in the digital single market.[24]

At the beginning, a reform of competition law was discussed, possibly purely sectoral, in order to adapt it to the challenges posed by the tech giants.[25] The aim was, *inter alia*, to speed up procedures in order to put an end to the unfair behavior of platform operators more quickly, to strengthen the expertise and personal resources of both the European Commission and the NCAs in order to be able to keep up with the increasingly complex competitive analyses submitted by these companies and to assess efficiency gains projected far into the future. The discussion also concerned the possible introduction of merger control in the digital and pharmaceutical sectors below the quantitative thresholds provided for in the Merger Regulation. In

[22] COMP/M.7217 - *Facebook/WhatsApp*, paragraph 9.
[23] COMP/M.7217 - *Facebook/WhatsApp*, paragraph 108 and paragraphs 176 to 178.
[24] European Parliament, Motion for a resolution, B8-0286/2014.
[25] As an example O. Budzinski/A. Stöhr, "Competition Policy Reform in Europe and Germany - Institutional Change in the Light of Digitization," *Ilmenau Economics Discussion Papers*, 2018, Vol. 24, No. 117, pp. 34-36; C. Crichton, "Le Digital Market Act, un cadre européen pour la concurrence en ligne", *Dalloz actualité*, January 8, 2021.

parallel to these discussions, from an institutional point of view, Member States have started to set up their own departments dedicated to the digital sector within their competition authorities.[26]

However, it has become apparent that competition law, even after adapting its tools and providing institutional support for this reform, has characteristics that make it unsuitable for addressing the challenges of the digital sector. Competition law only intervenes *ex post*, after an infringement has already occurred (recital 5).[27] In the digital sector, however, sometimes spectacularly high fines[28] have not succeeded in disciplining platform operators, and lengthy and thorough investigations into complex facts have postponed the prohibitive effect of the decision and allowed platform operators to strengthen their market positions in the meantime.[29] Secondly, the prohibition of abuse of dominance does not provide an effective tool for controlling the behavior of gatekeepers, who are not necessarily in a dominant position (see recital 5). In recent years, it looked like competition law was chasing the development of digital markets by prohibiting, on a case-by-case basis, practices deployed by the tech giants, without however proactively defining the rules of fair behavior in this sector. It is also the (remote) possibility that even dominant positions in the digital sector could be overturned at any time by rapid innovations that makes competition law too flexible towards Big Tech, driven by the fear of false positives (the wrongful condemnation of a firm).[30]

Competition law has become unable to ensure its objectives of protecting the free choice of end consumers, keeping markets open and ensuring an optimal allocation of resources. Due to the vertical integration of the tech giants, they no longer compete on equal terms with other online traders and the free play of the market no longer leads to the best outcome in terms of innovation, especially in the downstream service markets of the operation of an essential platform. Ultimately, the solution was found outside of competition law.

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[26] See for France: Autorité de la concurrence, " L'Autorité crée un service de l'économie numérique ", Press release of January 9, 2020, https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-cree-un-service-de-leconomie-numerique (accessed November 30, 2022); for Germany: Bundeskartellamt, " Schwerpunktabteilung für den Bereich E-Commerce ", Press release of May 17, 2021, https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/AktuelleMeldungen/2021/17_05_2021_Zustaendigkeit_Lebensmittelhandel.html (accessed November 30, 2022) .

[27] S. Yon-Courtin, "Encadrer le marché numérique", *L'Observateur de Bruxelles*, 2021/4, N° 126, p. 10.

[28] 4.34 billion in case COMP/AT.40099 - *Google Android*; 2.42 billion in case COMP/AT.39740 - *Google Search (Shopping)*.

[29] See A. Schwab, "Der Digital Markets Act: Europa ordnet digitale Plattformmärkte", *Wirtschaft und Wettbewerb*, 2022, p. 301 .

[30] C. Crichton, "Le Digital Market Act, un cadre européen pour la concurrence en ligne", *Dalloz actualité*, January 8, 2021; M. Malaurie-Vignal, "Une politisation du droit du marché au service de l'intérêt général", *Contrats - Concurrence - Consommation*, 2022, N° 6, repère 6, p. 1.

Section 2: The solution: an instrument distinct from competition law

The choice made by the European legislator to address the challenges of digital markets was that of an instrument distinct from competition law. With the DMA, it establishes sector-specific regulation for digital services, targeting "unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules".[31] The historical examples of sector-specific regulation in the late 1990s and early 2000s in the energy, rail, and electronic communications sectors raise the question of how the DMA fits into this series of network industry regulations [**§ 1**]. In addition to a comparison with historical examples of sectoral regulation, it is the legal basis of the DMA that reveals the European legislator's conception of its regulatory nature [**§ 2**].

§ 1. The alleged continuity of the DMA with the sectoral regulations of the network industries

The European Union has a history of adopting sectoral regulations in markets lacking competition and contestability: Directive 96/92/EC for the energy sector, Directive 2001/14/EC in the rail sector and Directive 2002/21/EC for electronic communication services.[32]

There are a number of similarities between the DMA and these sector-specific regulations in the network industries. Like the latter, the DMA is intended to ensure contestability of markets. These historical examples also identified activities that constitute an access point (the energy distribution network, the electronic communications network or the railway network), which connect user companies (electricity suppliers, railway companies, etc.) with their customers.[33] Indeed, the DMA and sectoral regulations respond to similar factual circumstances: a market that is highly concentrated around players holding a market position that is difficult to challenge, with market mechanisms that are unable to ensure fair and undistorted competition. Digital platforms can be seen as *virtual* infrastructures that are just as prone to abusive practices as physical networks, due to their huge user bases and the significant scale and network effects that characterize them.[34] Although the services offered are reproducible from a technical point

[31] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, Explanatory Memorandum, under 1. Context of the proposal, Consistency with existing policy provisions in the policy area.
[32] L. Bary, "Regulation of platforms: One size fits all? EU, UK, USA, Germany... (Demain la concurrence, June 11, 2021)", *Concurrences*, 2021, N° 4, p. 2.
[33] L. Bary, "Regulation of platforms: One size fits all? EU, UK, USA, Germany... (Demain la concurrence, June 11, 2021)", *Concurrences*, 2021, N° 4, p. 2.
[34] See J.-L. Silicani, "Les plateformes numériques sont des infrastructures essentielles qu'il faut réguler", *Energy - Environment - Infrastructure*, No. 5, May 2021, repère 5.

of view,[35] the value of the "dominant" network, resulting from its wide distribution, is hardly reproducible by competitors, once the former has acquired this position.

However, it is true that there are other reasons for the former monopolies in the network industries: they were occupied by incumbent operators who had previously held a legal monopoly[36]. These public monopolies are acquired by abnormal procedures, outside the play of competition. Platform operators, on the other hand, initially created their market positions through competition on the merits, through the development of a so-far unkown digital service.[37] Abusive practices and eviction strategies they subsequently employed only served to consolidate and strengthen their already acquired positions of power.

Market dynamics in the digital sector are more akin to natural monopolies, which are created by purely economic causes. Similar to the railway network, digital markets are often characterized by very high investment costs that an operator has to bear in order to distribute its platform service, prior to any possibility of commercialization. The digital sector is also experiencing a trend of monopolization, with[38] encouraging the gathering of end users around the most popular instant messaging service. In the historical examples, sector regulation was necessary to remove an incumbent operator, a former state-owned enterprise, and open the market to competition, whereas the DMA is guided by the desire to prevent the *tipping of* a competitive market.[39]

Thus, the DMA is situated in a competitive and legal context that is different from sector-specific regulations in the network industries, even though it is largely based on common economic justifications.

In addition to this regulatory logic of remedying market failures, it is the legal basis that reveals the autonomous character of the DMA in relation to competition law [**§ 2**].

§ 2. The legal basis of the internal market

The DMA is founded on the legal basis of Article 114(1) TFEU, concerning the approximation of national laws "which have as their object the establishment and functioning of the internal

[35] L. Bary, "Regulation of platforms: One size fits all? EU, UK, USA, Germany... (Demain la concurrence, June 11, 2021)", *Concurrences*, 2021, N° 4, p. 3.
[36] L. Bary, "Regulation of platforms: One size fits all? EU, UK, USA, Germany... (Demain la concurrence, June 11, 2021)", *Concurrences*, 2021, N° 4, p. 3.
[37] See L. Bary, "Regulation of platforms: One size fits all? EU, UK, USA, Germany... (Demain la concurrence, June 11, 2021)", *Concurrences*, 2021, N° 4, p. 3.
[38] See J. Basedow, "Das Rad neu erfunden: Zum Vorschlag für einen *Digital Markets Act*", *Zeitschrift für Europäisches Privatrecht*, 2021, p. 218; N. Gielen/S. Uphues, "Digital Markets Act und Digital Services Act. Regulierung von Markt- und Meinungsmacht durch die Europäische Union", *Europäische Zeitschrift für Wirtschaftsrecht*, 2021, pp. 627-628.
[39] L. Bary, "Regulation of platforms: One size fits all? EU, UK, USA, Germany... (Demain la concurrence, June 11, 2021)", *Concurrences*, 2021, N° 4, p. 3.

market". This basis expresses the European legislator's conception of the DMA, which is that of a sectoral regulation of the internal market.

Thus, the DMA is not only intended to compensate for the inadequacy of competition law in preserving free consumer choice and ensuring open markets in the digital sector, but goes beyond that by aiming to achieve objectives other than those of competition law. These include addressing systemic failures in digital markets, to which the simple guarantee of a system of undistorted competition has failed to provide an answer. More specifically, the European legislator has assigned to the DMA the role to "to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular" (recital 7). The DMA thus has the double purpose of ensuring contestability and fairness in digital markets.

In the literature, it is disputed whether the DMA can be regarded as a pure internal market instrument. It is argued that the regulation should have been based exclusively on Article 114 TFEU (for the objective of fairness), but cumulatively on Article 103 TFEU (for the objective of contestability).[40] Some regard the DMA as sectoral competition law[41] that specifies, with the notion of gatekeeper, the notion of dominant position in the sense of Article 102 TFEU and, with the behavioral obligations imposed, the abusive practices for the digital sector (Article 103(2)(c)).[42] If one follows this line and understands the DMA as an instrument of competition law, it would lead in its current version to an extension of the Commission's competences in the area which, according to Article 352 TFEU, would have required the unanimous approval of the Council.[43]

However, it is difficult to consider the concept of gatekeeper as a specification of dominance within the meaning of Article 102 TFEU, given that the designation of "gatekeeper" is not based on the delimitation of a relevant market on a case-by-case basis, but on the role as an access point of the service provided, presumed by quantitative thresholds (Article 3(2)). A conception

[40] J. Basedow, "Das Rad neu erfunden: Zum Vorschlag für einen *Digital Markets Act*", *Zeitschrift für Europäisches Privatrecht*, 2021, p. 221; M. Leistner, "The Commission's vision for Europe's digital future: proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act - a critical primer", *Journal of Intellectual Property Law & Practice*, 2021, Vol. 16, No. 8, p. 781 .

[41] "Droit spécial de la concurrence digitale", D. Bosco, "La Commission dévoile ses propositions pour façonner l'avenir digital de l'Europe", *Contracts - Competition - Consumer Affairs*, 2021, No. 2, p. 1; "Sector-specific competition law", N. Petit, "The Proposed Digital Markets Act (DMA): A Legal and Policy Review", *Journal of European Competition Law & Practice*, 2021, Vol. 12, No. 7, p. 529.

[42] J. Basedow, "Das Rad neu erfunden: Zum Vorschlag für einen *Digital Markets Act*", *Zeitschrift für Europäisches Privatrecht*, 2021, p. 22 2.

[43] See D. Zimmer/J.-F. Göhsl, "Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper," *Zeitschrift für Wettbewerbsrecht*, 2021, p. 31; discussed further by A. Lamidrad de Pablo/N. Bayón Fernández, "Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It," *Journal of European Competition Law & Practice*, 2021, Vol. 12, N. 7, pp. 576 et seq.

of the DMA as a sectoral clarification of Article 102 TFEU also clashes with the system of complementarity with competition law provided for by the Regulation (Article 1(6) and recital 11), which allows, in principle, a cumulative application of the DMA and Article 102 TFEU to the same facts. The double application of a single legal regime, general and sectoral competition law, to the same facts is however strictly prohibited by virtue of the *ne bis in idem* principle.[44]

Although the contestability of markets is also an objective of competition law, the latter seeks to achieve this objective by different means. Competition law does not target monopolies per se, but only their abuse. However, the obligations imposed by the DMA go beyond the prohibition of abusive practices, for example with regard to interoperability obligations (Article 7), information rights (Article 5(9), (10), Article 6(8)) as well as with regard to data protection and data portability (Article 5(2), Article 6(9)).

Of course, the European legislator could just as well have introduced sectoral competition law for digital markets, but it considered sectoral regulation to be more effective for the reasons given above (see Section 1). Contrary to what is argued, the DMA is not a new and innovative form of competition law, but a fully-fledged sectoral regulation that borrows certain requirements and objectives from traditional competition law.[45]

Section 3: Behavioral obligations derived from competition law

The proximity of the DMA to competition law, which also explains the debate on its nature (see above under Section 2, § 2), results from the fact that the regulation takes over, in its content, obligations previously imposed by competition law [**§ 1**]. In terms of its form and the procedures provided for, however, it is of regulatory character [**§ 2**].

§ 1. A content of competitive substance

In order for the obligations of Articles 5, 6 and 7 to apply to an undertaking, the Commission must first designate it as a gatekeeper (Article 3(4)). The designation decision automatically triggers the application of all the obligations prescribed by Articles 5, 6 and 7 to the gatekeeper, with regard to the so-called "core" platform services listed in the decision (see Articles 5(1), 6(1) and 7(1)). It is essentially these behavioral obligations in Articles 5, 6 and 7 that borrow from positive and negative obligations derived from competition law [**A**]. The possibility of suspending and exempting gatekeepers from some of these rules (Articles 9 and 10), as well as

[44] CJEU, March 22, 2022, *bpost*, C-117/20, point 43.
[45] P. Larouche/A. de Streel, "The European Digital Markets Act: A Revolution Grounded on Traditions", *Journal of European Competition Law & Practice*, 2021, Vol. 12, N° 7, p. 560 .

the prohibition of circumvention (Article 13), introduce a certain degree of flexibility that brings the DMA somewhat closer to competition law [**B**].

A. The rules imposed on gatekeepers

The rules imposed on gatekeepers under Articles 5, 6 and 7 are borrowed for the most part from former and current antitrust cases before the European Commission and NCAs. While the obligations imposed by Article 5 have an absolute effect on gatekeepers (*blacklist*), the obligations contained in Articles 6 and 7 are subject to further clarification by the Commission (*grey list*) according to Article 8(2).[46] According to Article 8(1), the gatekeeper has the primary responsibility to concretize these obligations and to implement measures that "shall be effective in achieving the objectives of this Regulation and of the relevant obligation ". According to Article 8(2), the Commission may, on its own initiative or at the request of a gatekeeper, adopt an implementing act specifying the measures for implementing the obligations set out in Articles 6 and 7.

Since there is no substantive difference between the obligations prescribed in the various articles, apart from the possibility of specifying the obligations contained in articles 6 and 7, they should be grouped into four groups of abusive practices referred to[47]: [**1**] practices of opaque and asymmetrical access to data and information; [**2**] obstacles to interoperability; [**3**] conditions of access to end users; and [**4**] provisions promoting the empowerment of end users. These four groups of provisions are complemented by an access to justice and redress clause (Article 5(6)).

1. Opaque and asymmetric access to data and information

A whole series of provisions target practices of opaque and asymmetric access to data and information. This is the case of Article 5(2), which requires the consent of the end user for the processing, cross-use and combination of personal data from different platform services. In this area, the German competition authority (the 'Bundeskartellamt') had forbidden Facebook, on the basis of the prohibition of abuse of a dominant position in national law,[48] to make the use of Facebook conditional on the possibility for the company to capture, without the consent of

[46] N. Gielen/S. Uphues, "Digital Markets Act und Digital Services Act. Regulierung von Markt- und Meinungsmacht durch die Europäische Union", *Europäische Zeitschrift für Wirtschaftsrecht*, 2021, p. 629; this terminology is criticized by F. Chirico, "Digital Markets Act: A Regulatory Perspective", *Journal of European Competition Law & Practice*, 2021, Vol. 12, No. 7, pp. 494-495, who argues that the term *grey list* implies that the obligations contained in Article 6 would require an analysis of the situation in question, whereas it is only the compliance mechanism that is likely to be implemented in accordance with the procedure set out in Article 8.
[47] According to F. Chirico, "Digital Markets Act: A Regulatory Perspective", *Journal of European Competition Law & Practice*, 2021, Vol. 12, No. 7, p. 495.
[48] Section 19(1) of the GWB.

the end user, data collected during the use of other services such as WhatsApp and Instagram and to combine them with data collected during the use of Facebook.[49]

Very great importance also falls on the prohibition stipulated in Article 6(2) to use, in competition with user businesses, non-public data generated or provided by user businesses or their customers in the course of their use of core platform services. Again on the basis of Article 102 TFEU, the Commission opened two investigations in July 2019 and November 2020 against Amazon, which is suspected of having used, in competition with independent sellers offering their products on the platform and in order to promote its own products under the "Amazon Basics" brand, data collected from independent sellers.[50] Again, in June 2021, the Commission opened an investigation into Facebook's behavior in using advertising data collected in particular from advertisers to compete with them in the online advertising market.[51]

In addition, Article 6(9) and (10) extends the obligation of portability and the right of access provided for in the General Data Protection Regulation ('GDPR')[52] to non-personal business data and provides, unlike the GDPR, a right of access in real time.[53] In this area of interoperability in data sharing with competitors, the Italian Competition Authority opened an investigation in July 2022 against Google on the basis of Article 20 of the GDPR and Article 102 TFEU.[54]

In addition, there are provisions granting competing companies a right of access to search engine data (Article 6(11)), mainly aimed at the undisputed market leader Google, and advertisers and publishers rights to information relating to the advertising placed online on their behalf by the gatekeeper (Article 5(9) and (10), Article 6(8)).

2. Obstacles to interoperability

Secondly, the DMA contains provisions to remove barriers to interoperability. For example, Article 5(7) prohibits the gatekeeper from requiring end users or business users to use its own

[49] BKartA, Beschluss v. 06.02.2019, B6-22/16; the application of the BKartA's order was preliminarily confirmed by BGH, Beschluss v. 23.06.2020, KVR 69/19, the main proceedings are still pending before the OLG Düsseldorf, which referred several questions of interpretation to the CJEU for a preliminary ruling (OLG Düsseldorf, Beschluss v. 24.03.2021, Kart 2/19 (V)).
[50] Ongoing investigations under COMP/AT.40462 - *Amazon Marketplace* and COMP/AT.40703 - *Amazon - Buy Box*.
[51] Case AT.40682 - *Facebook leveraging*.
[52] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC .
[53] F. Seip/M. Berberich, "Der Entwurf des Digital Markets Act", *Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgüter- und Wettbewerbsrecht*, 2021, p. 46.
[54] Autorità Garante della Concorrenza e del Mercato, "A552 - Italian Competition Authority, investigation opened against Google for abuse of dominant position in data portability," Press release July 14, 2022, https://en.agcm.it/en/media/press-releases/2022/7/A552 (accessed November 30, 2022) .

intermediary services, including its *single sign-on* service, its web browser and its payment service. This prohibition is directed at Apple, which until now forced software application developers offering their applications in the Apple App Store to use Apple's own payment system and charged them a 30% commission. This practice is the subject of several complaints filed with the European Commission against Apple[55] as well as of the litigation *Epic Games v. Apple*[56] before the US-American courts.

The Commission's proposal for a regulation did not yet contain a general interoperability obligation beyond Article 6(7), which requires the gatekeeper to enable service and hardware providers to interoperate with the same functionality that is available for services or hardware provided by the gatekeeper itself. By inserting Article 7, the Parliament reacts to a criticism expressed in literature[57] and introduces an obligation of interoperability for number-independent interpersonal communications services, i.e. any messaging service, including instant messaging via applications such as WhatsApp or Facebook Messenger, but excluding SMS. The interoperability obligation follows a staggered timetable, applying directly to messaging between two end users, then to messaging within groups of end users and finally to voice and video calls. Interoperability is achieved, at the request of another interpersonal communications service provider, through the free sharing of necessary technical interfaces or similar solutions (paragraph 1, and in more detail in paragraphs 4 to 7). The DMA requires this interoperability between two instant messaging services to be implemented without loss of security, including end-to-end encryption. However, in the digital world, the technical complexity or impossibility of maintaining end-to-end encryption for messaging between two different instant messaging services was raised.[58]

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[55] *Inter alia* investigations registered under AT.40452 - *Apple - Mobile Payments - Apple Pay* and under AT.40437 - *Apple - App Store Practices (music streaming*).

[56] See *Epic Games, Inc. v. Apple Inc.* United States District Court for the Northern District of California, September 10, 2021. The decision was predominantly in favor of *Apple*, except for one claim out of ten asserted, in which the judge prohibited *Apple from* preventing app developers from informing their end users of alternative payment methods (*anti-steering policies*) based on the California Unfair Competition Law. The ruling was appealed by both companies. On a political level, this litigation led to the introduction of the *Open App Markets Act* in the US Senate and House of Representatives.

[57] P. Larouche/A. de Streel, "The European Digital Markets Act: A Revolution Grounded on Traditions", *Journal of European Competition Law & Practice*, 2021, Vol. 12, N° 7, p. 554.

[58] For a discussion of the technical realization see the article by Firefox CTO E. Rescorla, "End-to-End Encryption and Messaging Interoperability," *Educated Guesswork*, April 7, 2022, https://educatedguesswork.org/posts/messaging-e2e/ (accessed November 30, 2022) .

3. Conditions of access to end users

A large number of provisions are intended to give user companies access to their end users on fair terms, the most important of which are a triple prohibition of *most-favored-nation clauses* (*MFNs*) (Article 5(3)), *tying* and *bundling* (Article 5(8)) and self-preferencing (Article 6(5)).

The first is the prohibition of *MFNs* in Article 5(3), also known as *price parity clauses*, which resulted from the Commission case *E-book MFNs and related matters (Amazon)*.[59] The provision allows user companies to offer the same products to end users at better conditions on other websites, including their own sales channel, and is of particular importance in the hotel booking sector.[60]

Secondly, tying practices, which are well known in the real world, are now also prohibited in the virtual world (article 5(8)), as far as the use of a core platform service is conditioned on the subscription to another core platform service is concerned (*tying*). It can be assumed that *bundling*, the combined sale of two products that cannot be purchased separately, is also covered by the provision. These practices aim at promoting the sale of a little known product by conditioning the sale of a popular product on it.

Tying strategies were, for the first time, the subject of proceedings before the European Commission in the 2004 *Microsoft* case.[61] In 2018, Google was fined € 4.34 billion in the *Google Android* case for, among other things, tying the pre-installation of its Google Play Store to the pre-installation of the Google Search application and the Google Chrome browser for device manufacturers, aiming at strengthening its dominant position as a search engine on mobile devices.[62] At the moment, the Commission is examining another complaint of anti-competitive practice in the field of work messaging platforms, for the linking of the Microsoft 365 package to the purchase of Teams.[63] With regards to tying practices, the *Facebook leveraging* case can be named as well.[64] This considerable number of cases demonstrates the importance of the new provision of Article 5(8), which presents a more effective tool to fight against these practices, by prohibiting them *ex ante*.

Thirdly, the prohibition of self-preferencing contained in Article 6(5)[65] prevents gatekeepers from favoring their own services and products in terms of ranking or indexing in search results.

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[59] COMP/M.40153 - *E-book MFNs and related matters (Amazon)*.
[60] See BKartA, Beschluss v. 22.12.2015, B9-121/13, affirmed by BGH, Beschluss v. 18.05.2021, KVR 54/20.
[61] COMP/C-3/37.792 - *Microsoft*; General Court (European Union), September 17, 2007, *Microsoft v. Commission*, T-201/04.
[62] COMP/AT.40099 - *Google Android*.
[63] See Digital Markets Act - Impact Assessment support study, p. 14.
[64] Case AT.40682 - *Facebook leveraging*.
[65] Discussed in more detail at F. Weber/A. S. Reumann, "Selbstbegünstigung im Regulierungsrecht - Verstoß gegen Art. 6 DMA?", *Neue Zeitschrift für Kartellrecht*, 2022, pp. 259 et seq.

This requirement dates back to the *Google Shopping* case,[66] in which Google favored its own price comparison service in its search results and demoted those of its competitors.

In addition to this triptych of the most frequent practices, there are provisions that prevent the linking of user companies and end users to the gatekeeper (Article 5(4) and (5), the latter concerning *multi-homing*), provisions that ensure access to software application stores on fair, reasonable and non-discriminatory ('FRAND') terms and conditions (Article 6(12)), and others that prohibit the application of disproportionate termination conditions (Article 6(13)).

4. Empowerment of end users

The DMA furthermore contains provisions aiming at giving users a more "emancipated" role in the use of digital platforms. This empowerment is attempted to be ensured by a freedom to change software (article 6(3) and (4)), including the possibility of *side-loading* applications outside the application store of the gatekeeper, aiming above all at the Apple App Store,[67] and by a flexibility to change applications (article 6(6)).

B. Suspension (Article 9), exemption (Article 10) and prohibition of circumvention (Article 13)

The provisions concerning suspension (Article 9) and exemption (Article 10), although going in another direction than the prohibition on circumvention (Article 13), which is intended on the contrary to secure the implementation of obligations, have in common that they introduce a certain flexibility into the rigid regime of obligations provided for by the DMA.

Article 9(1) allows for the temporary suspension of a specific endanger in situations where compliance with a specific obligation under Article 5, 6 or 7 would threaten the economic viability of the activities of a gatekeeper. For reasons of public health and security, the Commission may also exempt a gatekeeper from a specific obligation under Article 5, 6 or 7 (Article 10). These provisions reduce the rigidity of the *per se* obligations imposed by the DMA. In this sense, they go into the direction of competition law, which is characterized by a case-by-case application of rather abstract legal rules. However, the possibilities of suspension and exemption remain much more limited than the consideration of efficiencies in competition law, which

[66] COMP/AT.39740 - *Google Search (Shopping)*.
[67] It can be expected that *Apple*, which in the past brought forward application security as a justification for its restrictive policy, will invoke the exemption contained in paragraph 2 for the ingetrity of the hardware or operating system and the security exemption contained in paragraph 3, see A. McDaniel, "EU doubles down on new law that could force Apple to allow side-loading and more," *9to5Mac*, March 25, 2022, https://9to5mac.com/2022/03/25/eu-side-loading-law-apple-digital-markets-act/ (accessed November 30, 2022) .

can always be invoked, the former being limited to the specific circumstances of a threat to the viability of the activities (suspension) or a reason of public health or security (exemption).

Article 13, on the other hand, addresses strategies for circumventing obligations both through the artificial division of activities aimed at evading quantitative thresholds (paragraph 1) and through measures aimed at dissuading platform users from asserting their rights (paragraph 6). It attempts to prevent abusive practices employed by gatekeepers from escaping the DMA due to an overly formalistic application. However, Article 13 only concerns the exceptional case of a circumvention strategy. Like Articles 9 and 10, it does not change the regular regime of the DMA, which is characterized by specific rules.

The degree of flexibility introduced by articles 9, 10 and 13 therefore remains limited and does not affect the *roughly* regulatory regime of the DMA [**§ 2**].

§ 2. A regulatory corpus

The essentially competitive obligations set out in articles 5, 6 and 7 are embedded in a regulatory technique that makes the DMA a full-fledged sectoral regulation. This concerns the personal scope of application of the DMA [**A**] as much as the operation of the application of the DMA [**B**]. The regulatory nature of the DMA is further illustrated by the obligation to provide information on proposed mergers (Article 14), which remedies the shortcomings of competition law [**C**].

A. The personal scope: gatekeepers

The gatekeepers covered by the DMA, whether it is a search engine (Google), an online shopping platform (Amazon), a social network (Facebook), or an app store (Apple App Store) (Article 2(2)), pre-select or rank products or merchants[68] and thereby predetermine the commercial success of online merchants. Today, a website owner can hardly succeed without a placement in the first results on Google, nor an online merchant without a listing on Amazon.[69]

From a legal perspective, Article 3(1) provides three criteria for the designation of a company as a gatekeeper: it must (a) have a significant impact on the internal market; (b) provide a core platform service which is an important gateway for business users to reach end users; and (c) enjoy an - actual or potential - entrenched and durable position in its operations.

[68] N. Gielen/S. Uphues, "Digital Markets Act und Digital Services Act. Regulierung von Markt- und Meinungsmacht durch die Europäische Union", *Europäische Zeitschrift für Wirtschaftsrecht*, 2021, p. 628; M. Bourgeois, L. Badiane, J.-F. Davené, "La transformation numérique du commerce. Les nouvelles problématiques juridiques d'ajourd'hui et de demain", *La Semaine Juridique - Entreprises et Affaires*, 2021, N° 29, p. 38.
[69] N. Gielen/S. Uphues, "Digital Markets Act und Digital Services Act. Regulierung von Markt- und Meinungsmacht durch die Europäische Union", *Europäische Zeitschrift für Wirtschaftsrecht*, 2021, p. 628.

These requirements are deemed to be met (*rebuttable presumption*, see paragraph 5) if the undertaking meets the thresholds set out in paragraph 2, namely a turnover in the Union of EUR 7.5 billion and, over the last three financial years, a base of 45 million monthly active end users established or located in the Union and 10,000 yearly active business users established in the Union. Paragraph 8 sets out the possibility for the Commission to designate, after having conducted a market investigation, as gatekeepers undertakings that, although not meeting each of the quantitative thresholds set out in paragraph 2, meet the conditions laid down in paragraph 1. This provision is aimed in particular at nascent gatekeepers, which can be expected to reach the thresholds in the near future. To these nascent gatekeepers only a reduced list of obligations will apply (Article 17(4)).

The GAFAM, the American tech giants to which the regulation was dedicated, are included in the personal scope of application without discussion. On the other hand, more discussion can be expected when it comes to platforms like Booking.com, Airbnb, Expedia, Zalando and Uber,[70] which, unlike GAFAM, do not control entire platform ecosystems and are not vertically integrated either.[71]

The personal scope of application of the DMA demonstrates its autonomy from competition law. The gatekeeper concept was expressly chosen because of the unsuitability of the concept of dominance in digital markets, as not all gatekeepers are dominant in the sense of competition law (see recital 5). The concept of gatekeeper also addresses the need for procedural efficiency in the digital sector, by establishing quantitative thresholds.

B. The mechanism of application

The DMA also departs from competition law in terms of its enforcement tools, which have three main features: (i) a shift from broad, general *ex post* competition law enforcement standards to an *ex ante* regime of specific, self-enforcing rules;[72] (ii) a shift from a casuistic approach

[70] J. Basedow, "Das Rad neu erfunden: Zum Vorschlag für einen *Digital Markets Act*", *Zeitschrift für Europäisches Privatrecht*, 2021, p. 220.
[71] See, on the one hand, the proposal of the rapporteur Andreas Schwab to require the operation of at least two core platform services (European Parliament, Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on fair and competitive markets in the digital sector (Digital Markets legislation), p. 85, https://www.europarl.europa.eu/doceo/document/IMCO-PR-692792_EN.pdf (accessed November 30, 2022); on the other hand J. Basedow, "Das Rad neu erfunden: Zum Vorschlag für einen *Digital Markets Act*," *Zeitschrift für Europäisches Privatrecht*, 2021, p. 219, who claims that the rules of fair behavior should apply more generally also to smaller platform operators.
[72] H. Schweitzer considers that both competition law and the DMA contain *ex ante* rules, the difference being only the degree of *ex ante* specification, see H. Schweitzer "The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal", *Zeitschrift für Europäisches Privatrecht*, 2021, p. 530 with footnote 112.

to a *one-size-fits-all* approach; and (iii) a shift from balancing of interests to self-enforcing, *per se* rules.[73]

By introducing a system of *ex ante* behavioural obligations, the DMA remedies the shortcomings of competition law in the digital sector that "sanctions the harm already done"[74] . The precise rules provided for in the DMA are easy to comply with by companies and easy to be implemented by the Commission. Moreover, the DMA is not concerned with the concepts of the relevant market, market shares or dominance. Rather, it applies to a number of platform services considered as essential, across several distinct markets, with the scope of application defined by the uniform notion of gatekeepers. Unlike competition law, the DMA prohibits a number of pre-determined practices that are considered harmful to competition by their nature, regardless of the economic effects resulting from the conduct in question.[75] Aside from the exceptional hypotheses of suspension and exemption (sections 9 and 10), gatekeepers are required to incorporate the entirety of the obligations into their business model. This departure from a case-by-case enforcement practice with respect to digital sector contestability issues is welcomed as the DMA's greatest added value.[76]

Of course, there are also sector-specific regulations that are closely related to competition law, such as Directive (EU) 2018/1972 establishing the European Electronic Communications Code (the 'ECCC'). This directive, while pursuing objectives in addition to the protection of competition (such as 'connectivity', Article 3(2)(a) ECC), establishes an *ex ante* regulatory regime "in accordance with the principles of competition law" (Articles 64(3), 65(1) ECC). By requiring a definition of relevant markets (Article 64(1) EEA), borrowing its scope from competition law ("significant market power", Article 63(2) EEA) and requiring the intervention of the national regulatory authorities for the imposition of obligations (Article 68 EEA), the EEA comes close to competition law and differs from the enforcement tools of the DMA. It is understood as "removing remaining obstacles to (…) investment" in the electronic communications sector (Article 3(2)(c)) and to promote the transition from a sector formerly controlled by state-owned enterprises to an open and competitive market. The CCEE aims at moving progressively closer to competition law until one day merging into it. The situation is the opposite

[73] H. Schweitzer, "The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal", *Zeitschrift für Europäisches Privatrecht*, 2021, pp. 530 to 531.
[74] J.-L. Sauron, "La régulation du numérique : Les outils de la politique de la concurrence ont-ils failli ?", *Concurrences*, 2021, N°1, p. 3.
[75] F. Chirico, "Digital Markets Act: A Regulatory Perspective", *Journal of European Competition Law & Practice*, 2021, Vol. 12, No. 7, p. 496.
[76] F. Chirico, "Digital Markets Act: A Regulatory Perspective", *Journal of European Competition Law & Practice*, 2021, Vol. 12, No. 7, p. 495.

for the DMA, which comes from and departs from competition law, based on a reflection on the systemic unsuitability of competition law for digital markets.

C. The obligation to inform about concentrations (Article 14)

Article 14 of the DMA imposes an obligation on gatekeepers to inform the Commission of any proposed merger in the digital sector, whether or not the transaction is notifiable to the Commission or an NCA. Thus, the legislator is reacting to the inadequacy of competition law to digital markets, not in terms of abusive practices, but in terms of external growth of tech giants. Article 14 also demonstrates the search for tools to control the power of the GAFAM outside of competition law.

On the other hand, the *information* requirement of Article 14 does not constitute a *notification* requirement within the meaning of Article 4 of the Merger Regulation. In other words, the provision does not lower the quantitative thresholds of Article 3 of the Merger Regulation. Rather, it is intended to enable the Commission, at an early stage, to encourage NCAs to refer cases to it.[77] The full effect of Article 14 will only be achieved in combination with the Commission's new guidelines on Article 22 of the Merger Regulation, which encourages NCAs to review potentially anti-competitive mergers that do not meet the national merger control thresholds.[78]

In the digital market, there is the particular difficulty that revenue alone does not necessarily reflect the market power of the company concerned; often the establishment of a strong user base precedes any possibility of commercialization. At the same time, the predatory acquisition[79] of a competing start-up by a digital giant can be particularly harmful to competition, stifling from the outset any possibility of challenging the giant's dominant position.[80] Several national laws already provide for mechanisms to deal with predatory acquisitions, based on a

[77] M. de Drouas/É. Nachbaur, "Révolution du contrôle des concentrations au sein de l'Union européenne : le chiffre d'affaires n'est plus le seul critère", *Contrats Concurrence Consommation*, n° 5, Mai 2021, étude 5, p. 5; N. Gielen/S. Uphues, "Digital Markets Act und Digital Services Act. Regulierung von Markt- und Meinungsmacht durch die Europäische Union", *Europäische Zeitschrift für Wirtschaftsrecht*, 2021, p. 631; F. Seip/M. Berberich, "Der Entwurf des Digital Markets Act", *Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgüter- und Wettbewerbsrecht (GRUR-Prax)*, 2021, p. 46.

[78] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 31 March 2021, 2021/C 113/01; these guidelines are accompanied by a Commission Staff Working Document: EC Staff Working Document, Evaluation of procedural and jurisdictional aspects of EU Merger Control, 26 March 2021, SEC(2021) 156 final, SWD(2021) 67 final.

[79] In this article, the term "predatory acquisitions" is used in its broadest sense, as encompassing both transactions that aim at killing a potential competing start-up ("killer acquisitions") and transactions that aim to integrate the potential future competitor into the acquiring giant's own ecosystem.

[80] S. Yon-Courtin, "Framing the digital market", *L'Observateur de Bruxelles*, 2021/4, N° 126, p. 13.

significant purchase price instead of the target's turnover.[81] The introduction of a similar mechanism in EU law would be preferable, from a point of view of legal certainty, to the Commission's guidelines, which are only *soft law*. Such a tightening of merger control with respect to gatekeepers could certainly not be included in the DMA, but would require an amendment to Article 3 of the Merger Regulation, unanimously approved by the Council (Article 352 TFEU).[82]

In view of the above, the DMA can be conceived as a legal instrument with a competitive content, taking the form of a sectoral regulation. The position of the regulation between competition law and sectoral regulation is therefore not quite intermediate, but closer to the latter. This is all the more the case because once behavioral obligations have been incorporated into their own system, they will develop independently of competition law in the future and thus move away from it.

Conclusion

With the DMA, the European legislator rejects the fear of false positives in the digital sector and changes its tactics towards condemnation of the GAFAM.[83] This body of rules introduces sector-specific regulation that draws heavily on competition law obligations, while introducing new enforcement tools such as an *ex ante* regime of *per se* rules. The DMA does not constitute sector-specific competition law, but is a full-fledged sectoral regulation of the internal market, as indicated by its legal basis of Article 114 TFEU.

The DMA's clear focus on behavioral obligations also reflects the realization that the market power positions of the tech giants have become virtually unchallenged and that it is therefore necessary to strengthen competition not *for* the market, but *in* the markets that platform services constitute.[84] Thus, the behavioral obligations in Articles 5, 6 and 7 serve more as protection for users (admittedly including corporate users) than as protection for potential future competitors

[81] 400 million in Germany (Section 35(1a) GWB) and EUR 200 million in Austria (Section 9(4) Kartellgesetz).
[82] R. A. Achleitner, "Digital Markets Act beschlossen: Verhaltenspflichten und Rolle nationaler Wettbewerbsbehörden", *Neue Zeitschrift für Kartellrecht*, 2022, p. 363; N. Gielen/S. Uphues, "Digital Markets Act und Digital Services Act. Regulierung von Markt- und Meinungsmacht durch die Europäische Union", *Europäische Zeitschrift für Wirtschaftsrecht*, 2021, p. 631; D. Zimmer/J.-F. Göhsl, "Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper", *Zeitschrift für Wettbewerbsrecht*, 2021, p. 46.
[83] M. Malaurie-Vignal, "Une politisation du droit du marché au service de l'intérêt général", *Contrats - Concurrence - Consommation*, 2022, N° 6, reference 6, p. 1.
[84] P. Larouche, "Legislation of digital platform giants: The future of competition law", *Concurrences*, 2022, N° 1, p. 3.

in the platform services market. Defining contestability of digital markets as one of the two objectives of the DMA therefore seems very ambitious, provided that contestability is understood as relating to upstream markets and not downstream markets. It is hard to imagine a search engine taking over the market leading position from Google or an online retailer overtaking Amazon.[85] Rather, the goal must be to ensure contestability in downstream markets, where independent sellers compete with tech giants that tend to favor their own products in their dual role as platform operators and online merchants.

With that in mind, is the DMA a final attempt by the European legislator to break the dominant positions of GAFAM - or is it a capitulation to them? Only time will tell if any legislation will succeed in reversing the current distribution of market power in the digital field among a small number of American giants. In any case, with the DMA, the European institutions are launching a challenge against the abusive practices of these companies. Thus, the regulation will play a key role in ensuring "fairness" in digital markets, its second policy objective, in favor of user companies, but also in favor of end users, that we all are. The DMA will have a visible impact on our daily lives, by enabling communication across several instant messaging applications such as WhatsApp with competing services such as Telegram, Signal or Threema; or by enabling users of iPhones to download applications outside of the Apple App Store. The importance of this regulation for the future development of cyberspace can hardly be overestimated. This is all the more true as the DMA is beginning to serve as a impulse for proposals for regulation of the GAFAM's behavior even in their home country,[86] which tends to be regarded as economically liberal.

[85] European Commission, Digital Markets Act - Impact assessment support study", p. 8; P. Larouche, "Legislation of digital platform giants: The future of competition law," *Concurrences*, 2022, No. 1, p. 3; Monopolkommission, "Wettbewerb 2020," pp. 30 and 39, https://www.monopolkommission.de/images/HG23/HGXXIII_Gesamt.pdf (accessed November 30, 2022).
[86] 117th US Congress, 1st Session, H.R.3826 - Platform Competition and Opportunity Act of 2021 (Bill).