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Adapting the Competition Policy for the Digital Age: Assessing the EU's Approach

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Abstract: Nowadays, the use of digital services is indispensable to the daily activity of businesses or end users. Digital services and online platforms contribute to the internal market by opening new business opportunities, increasing industry competitiveness, and widening consumer choice. While digital services have contributed to boosting innovation and developing new business models, a few online platforms act as gatekeepers by controlling a large digital market, likely leading to unfair practices and conditions for business users and end users. Against this background, this paper discusses the rationale and the necessity for regulating digital technology development in the digital market. It analyses the EU's approach to adapting competition policy for the digital age. This paper argues that the Digital Markets Act will undoubtedly impact business models in the digital market and regulatory framework at the national level. However, its fundamental success will depend on whether the Commission has the appropriate tools to address the development of new technologies.

Keywords: EU competition rules; digital markets act; digital platforms; online platforms

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1. Introduction

Nowadays, the use of digital services has become indispensable in the daily activity of businesses or people and has contributed to boosting innovation and developing new business models. Notably, the proliferation of digital technologies is driving a "new global industrial revolution" (Commission 2020a, p. 1). These online platforms have increased consumer choice and shaped the competitive landscape and the nature of the competition (Akman 2019). The 2019 UNCTAD Digital Economy Report estimated that between 4.5% to 15.5% of global Gross Domestic Product accounts for the digital economy (UNCTAD 2019, p. 4). Similarly, Oxford Economics estimated the value of the digital economy to be around 15.5% of the world's GDP, or $11.5 trillion (USD) globally (Oxford Economics and Huawei 2017, p. 2). Four out of the five of the largest companies in the world by market capitalisation in 2023 were tech companies, ranked as follows: Apple (no 1), Microsoft (no 2), Alphabet (no 4), and Amazon (no 5). Taking together market capitalisation, these tech companies value at $7480.61 billion (USD) (Statista 2024). In 2018, these online platforms achieved almost €276 billion (EUR) worldwide in revenues and employed nearly 600,000 people (Commission 2020b, para. 63; Observatory on the Online Platform Economy 2024).

In the European digital economy, there are more than 10,000 online platforms. Most of these online platforms are SMEs; whereas only a small number of online platforms "capture the biggest share of the overall value generated"[1]. These large platforms act as gateways or gatekeepers between business users and end users, due to their durable position through the creation of conglomerate ecosystems around their core platform

[1] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Proposal for Digital Markets Act) [2020] COM (2020) 842 final, p. 1.

services[2]. Such behaviour has raised concerns about the potential economic harm brought about by the concentrated structure of the digital economy (Prado 2021). Firstly, these few large platforms lead many business users to depend on these gatekeepers. In certain cases, these gatekeepers have led to unfair behaviour vis-à- vis these business users, due to creating conglomerate ecosystems around their core platform services. Such a conglomerate reinforces existing entry barriers for newcomers. The main characteristics of the core platform services provided by gatekeepers are as follows: (i) nearly zero marginal costs to add business users or end users; (ii) very strong network effects (Lancieri and Sakowski 2021, p. 74); (iii) an ability to connect many business users with many end users through the multi-sidedness of these services; (iv) a significant degree of dependence of both business users and end users; (v) lock-in effects, a lack of multi-homing for the same purpose by end users; (vi) vertical integration; and (vi) data-driven advantages.[3] Secondly, because gatekeepers have created a conglomerate ecosystem around their core platform services, it has difficult for newly online platforms to enter into the market. The gatekeepers have consolidated their position in the digital market and exercise control over the whole platform ecosystem by setting the commercial conditions with considerable autonomy. As noted by the Commission in the Impact Assessment Report, the level of concentration of economic power in these large platforms is unprecedented. The top seven of the large platforms account for 69% of the total €6 trillion (EUR) valuation of the platform economy (Commission 2020b, p. 15).

Thirdly, gatekeepers typically operate on a global scale. The EU legislation and Member States' national laws are ineffective in addressing the gatekeeper-related problems identified. Although some Member States have introduced or are introducing legislative initiatives, these are still not sufficient due to the cross-border operation of the gatekeepers, which is often at a global scale. Fragmentation to address identified gatekeeper-related problems at the national level increases compliance costs for these large market players and hampers the functioning of the internal market (Commission 2020b). Therefore, an EU legislative initiative needs to be taken to increase legal certainty and to create a unified legal framework for the regulation of these gatekeepers.

This paper analyses the EU's approach to adapting competition policy for the digital age. Its main argument is that current EU competition law is not sufficient to restore effective competition due to the power wielded by big tech companies. Against this background, this paper examines the 'muscular' intervention of the Digital Markets Act (hereafter DMA) to restore competition in the digital markets. The DMA's main objective is to ensure the proper functioning of the internal market by promoting effective competition in digital markets, particularly a fair and contestable online platform environment across the EU. At the same time, the DMA aims to complement the enforcement of competition law. Irrespective of its complementary objective in terms of the enforcement of competition law, the substance and scope of the DMA intersects with the substance and scope of EU competition law (Akman 2022). The DMA has been presented as an adjustment of competition law and as a form of regulation for Big Tech (Colomo 2021).

The article is organised as follows: Section 2 discusses the rationale and the necessity for regulating digital technology development in the digital market. Section 3 analyses the DMA, outlining the main novelties it has introduced. Section 4 discusses whether the DMA is complementary to competition law or is an independent regulatory instrument. This paper concludes that DMA will certainly impact the business model in the digital market and regulatory framework at the national level. Its main success will depend on whether the Commission will have the appropriate tools to address the development of technologies.

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[2] Ibid.

[3] 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 (Text with EEA relevance) [2022] OJ L 265/1 (DMA), (Digital Markets Act), Recital 2.

2. The Rationale for Regulating Digital Market: Was It Really Needed?

Recently, the rapid development of digital technology has confronted the European Commission with a great challenge; namely, whether the existing rules are applicable or whether new legislation is needed to prevent the distortion of the internal market. Within this context, the enforcement of competition cases involving online platforms in the EU has been controversial. From 2014 to 2019, Commission leaders articulated the application of traditional competition instruments to the new digital economy and society (Laitenberger 2019). In 2016, the EU Competition Commissioner Vestager was reluctant to introduce new competition rules to the world of Big Data (Vestager 2022; Davilla 2017). The Commission's approach changed gradually (Cini and Czulno 2022). In 2019, Commissioner Vestager argued that competition policy did not have all the answers for digital technologies. In her view, "keeping the rulebook up to date" is a priority because "the challenges we are facing, at the start of this new decade, mean that we need to look again at the tools we use to enforce the competition tool" (Vestager 2019).

Moreover, in "Shaping Europe's Digital Future", published in February 2020, the Commission acknowledged that "competition alone cannot address all the systemic problems that may arise in the platform economy. Based on the single market logic, additional rules may be needed to ensure contestability, fairness and innovation, and the possibility of market entry, as well as public interests that go beyond competition or economic considerations" (Commission 2020a, p. 9). The Commission Communication 'Shaping Europe's digital future' emphasised that:

> "competition policy alone cannot address all the systemic problems that may arise in the platform economy. Based on the single market logic, additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations". (Commission 2020a)

In the same vein, the Vice-President Margrethe Vestager noted that:

> "these platforms have become gatekeepers, with enormous power over our lives. They can influence our safety–whether dangerous products and harmful content can spread widely, or whether they're quickly removed. They can affect our opportunities–whether markets respond to our needs, or whether they just work in the interests of the platforms themselves. They even have the power to guide our political debates, and to protect–or undermine–our democracy". (Vestager 2020)

The application of competition law in the digital market has been a concern for European public authorities at the EU and national levels. Several experts' studies and reports have been commissioned to explore the application of competition law in the digital market. The most well-known reports are as follows: the European Commission's report on "Competition Policy for the Digital Era" (Crémer et al. 2019); the UK Furman Report on "Unlocking Digital Competition" (Digital Competition Expert Panel 2019); and the UK Competition and Markets Authority's (the "CMA") market study on online platforms and digital advertising (Competition and Markets Authority 2022); the German "Competition Law 4.0" report (Bericht der Kommission Wettbewerbsrecht 4.0 2019); the Italian report on Big Data (AGCM and AGCGPP 2019); Franco–German reports on Big Data and competition law (Autorité de la Concurrence and Bundeskartellamt 2016); the French study on competition and e-commerce (Autorité de la Concurrence 2020a); the French report on digital economy competition challenges (Autorité de la Concurrence 2020b) and the Austrian BWB 'Proposition Paper on Digitalisation and Competition Law' (Bundeswettbewerbsberhörde 2020). According to these empirical studies, digital platforms have a tendency towards market concentrations and current competition law is unable to address the challenges raised by Big Tech. Consequently, some countries have adopted legislation to complement competition law with specific acts targeting abusive platform

conduct[4] and have established specialist digital market units or appointed specialists within national competition agencies offices to deal with the rapid development of digital markets. For instance, a Digital Market Unit in the United Kingdom has been established within the Competition and Markets Authority (Competition and Markets Authority 2024). The Australian Competition Authority set up a specialist Digital Platform Branch to deal with the digital platform markets (Klamka et al. 2023).

Furthermore, digital platforms' market power is often associated with unfair practices. This is confirmed by the recent Court of Justice's decision on the Google shopping case, in which Google developed an algorithm that penalised rival shopping search services and redirected them to Google.[5] The Commission sanctioned Google for abusive conduct favouring "its own shopping service compared to competing comparison shopping services".[6] Such conduct has caused harm to consumers by reducing their ability "to access the most relevant comparison shopping services".[7]

Acknowledging the tremendous market power and problems generated by digital technologies, the Commission commissioned a group of independent experts to explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital age. Published in April 2019, the report concluded, inter alia, that:

> "the specificities of competition in the digital world [...] make market power 'sticky', and there is legitimate fear that the market power [large platforms] have acquired will be hard to challenge. Furthermore, they have been able to build, on top of their core competencies, entire ecosystems which make it hard for new entrants to compete on the merit and which, many observers feel, face little competitive pressure". (Crémer et al. 2019)

In an interview given in December 2019, Competition Commissioner Margrethe Vestager admitted that Commission fines have been unable to restore competition between Big Tech and smaller rivals because companies had "already won the market" (Manthorpe 2019). Despite the positive track of the Commission on fining *Microsoft*, *Amazon* and *Google Search*,[8] Commission investigations showed how lengthy and ineffective competition rules can be when applied to the digital sector. In the case of *Google Search*, the investigation took over eight years before the Commission decided to fine Google for abusing its dominant position in the relevant markets for general search services positioning and displaying more favourably its own comparison shopping service compared to other shopping services.[9] Google appealed the decision to the General Court, which largely upheld the Commission's decision.[10] On 10 September 2024, the Court of Justice upheld the fine of €2.4 billion imposed on Google for abuse of its dominant position by favouring its own comparison shopping service.[11] Recently, in June 2023, the Commission initiated an investigation into Google's conduct within the advertising technology industry (adtech industry) by favouring its own online display advertising technology services (Commission 2023). Against this background, regulating Big Tech behaviour became a priority for the Commission. The goal was to

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[4] Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 [Law amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0]. Available online: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*[@attr_id='bgbl121s0002.pdf']#__bgbl__//*[@attr_id='bgbl121s0002.pdf']__1727185539515 (accessed on 10 July 2024).

[5] Judgment of the Court of Justice of 10 September 2024, *Google and Alphabet v Commission (Google Shopping), C-48/22 P, ECLI:EU:C:2024:726.*

[6] Judgment of the General Court of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, ECLI:EU:T:2021:763, para. 341.

[7] Commission decision of 27 June 2017, *Google Search (Shopping)*, Case AT 39740, para. 597.

[8] Commission decision of 24 March 2004, *Case COMP/C-3/37.792 Microsoft*, C(2004)900 final; Commission decision of 6 March 2013, *Case AT.39530–Microsoft (tying)*, C(2013) 1210 final; Commission decision of 12 December 2012, *Case COMP/39847-E-Books*, C(2012) 9288; Commission decision of 27 June 2017.

[9] Commission decision of 27 June 2017.

[10] See Note 4.

[11] See Note 3.

ensure the proper functioning of the internal market by promoting effective competition in digital markets and, in particular, a fair and contestable online platform environment.

Upon a request of Competition Commissioner Margrethe Vestager, in February 2020, the Commission launched a series of legal initiatives as part of its program "Shaping Europe's Digital Future" (Commission 2020c). The "Shaping Europe's Digital Future" report argued for the need to adopt new rules due to specific characteristics of online platforms, digital ecosystems, and competition enforcement issues. Similarly, the Commission's communication stated that "competition policy alone cannot address all the systemic problems that may arise in the platform economy". In this context, the Commission announced that it "will further explore, in the context of the DSA package, ex-ante rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers remain fair and contestable for innovators, businesses, and new market entrants". (Commission 2020c, p. 5).

The Commission started a comprehensive consultation on a broad range of online platform-related issues (Commission 2020b). As a first step, between 2 June and 8 July 2020, the Commission held two separate open public consultations on two separate Inception Impact Assessments for: (i) the Digital Services Act package: an *ex-ante* regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market; and (ii) the New Competition Tool (Commission 2021). Secondly, the Commission held another open public consultation with the stakeholders on the interim reports by the Observatory for the Online Platform Economy, supporting the initiative. Thirdly, workshops, conferences, or research activities were held to identify the problems and preliminary policy options. Finally, an e-Commerce expert group from the EU Member States participated in the public discussion[12]. Overall, the public consultations offered strong support for an intervention tackling unfair practices by gatekeepers.

In the Impact Assessment, the Commission noted two broad market failures adversely affecting the functioning of 'gatekeeper markets': (i) entry barriers of market players in the digital market (Commission 2020b, paras. 72–84); and (ii) economic dependency of business users on the gatekeepers and the imbalance of bargaining power (Commission 2020b, paras. 85–88). According to the Commission, firstly, EU competition law is not sufficient to deal with these market failures "resulting from the behaviour of gatekeepers in the absence of some preconditions, such as the existence of an anticompetitive agreement in the case of Article 101 TFEU[13] or of a dominant position in the case of Article 102 TFEU" (Commission 2020b, para. 119). Moreover, competition law enforcement requires a detailed economic and legal analysis to bring an investigation to an end. Secondly, the Commission noted that market failures arising from barriers to entry and tipping do not always involve any specific conduct that could be brought under competition law (Commission 2020b, para. 120). Thirdly, the existing EU competition rules do not necessarily capture all the unfair business practices by large digital gatekeepers (Commission 2020b, para. 121). Fourthly, the existing remedial avenues (fines, sector inquiries, and internal measures) are inadequate to address these market failures (Commission 2020b, para. 122). Finally, none of the ongoing reviews of EU competition law instruments (block exemptions, Regulations for horizontal and vertical agreement, and the Market Definition Notice) are likely to change the situation (Commission 2020b, para. 123).

To address these identified problems, in December 2020, the Commission proposed a Regulation on the contestability and fairness of Big Tech in the digital market, known as the Digital Markets Act (DMA)[14]. The DMA, considered "a revolution grounded on traditions", is the outcome of the Commission or Court of Justice antitrust enforcement experience and the common perception that existing competition rules cannot solve issues

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

[13] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/49.

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

in the digital markets (Larouche and de Streel 2021, pp. 543–45; Commission 2020b, p. 15). The Regulation was chosen as the only legislative instrument that averts internal market fragmentation. As highlighted in Recital 8:

> "by approximating diverging national laws, it is possible to eliminate obstacles to the freedom to provide and receive services, including retail services, within the internal market. A targeted set of harmonised legal obligations should therefore be established at Union level to ensure contestable and fair digital markets featuring the presence of gatekeepers within the internal market to benefit the Union's economy as a whole and ultimately of the Union's consumers".

Furthermore, as the Regulation is binding in its entirety and directly applicable in the EU Member States (TFEU, Article 288), it enables the uniform application of the rules in the inherently cross-border online intermediated trade generated in the online platform economy. Also, the regulation establishes the same level of rights and obligations for private parties. In this way, the DMA addresses the problems of "fairness" and "contestability" and prevents fragmentation of the regulatory framework for core platform services provided or offered by a gatekeeper, as stated in Recital 9 of the Regulation, without excluding the possibility of "applying to gatekeepers within the meaning of this Regulation other national rules which pursue other legitimate public interest objectives".

3. The Digital Markets Act: A Brief Legal Appraisal

On 24 March 2022, the landmark proposed EU Digital Markets Act (DMA) had officially been agreed by Parliament and Council negotiators (European Parliament 2022); it was signed into law on 14 September 2022. The Digital Markets Act entered into force on 1 November 2022 and was applicable, for the most part, on 2 May 2023.[15] As the title stipulates, the DMA amends Directive 2019/1937[16] and Directive 2020/1828[17].

3.1. Goals of the DMA

The entire DMA is built upon the premise that "a small number of large undertakings providing core platform services have emerged with considerable economic power that could qualify them to be designated as gatekeepers".[18] These gatekeepers feature the ability to connect many business users with many end users through their services, enabling them to access a large amount of data. Some of these gatekeepers exercise control over the whole platform ecosystem in the digital market. It is very difficult to challenge, irrespective of how innovative and efficient new or existing market operators may be.

The DMA is very detailed. Structured in VI Chapters, the DMA contains 109 recitals and 54 articles. Chapter I sets out the general provisions, including the subject matter, aim and scope of the Regulation (Article 1), definitions of the terms used, and the proposal's objectives (Article 2).

The main rationale of the DMA is the establishment of harmonised legal obligation at "the Union level to ensure contestable and fair digital markets featuring the presence of gatekeepers within the internal market to the benefit of the Union's economy as a whole and ultimately of the Union's consumers."[19] Thus, the general "objective" of the DMA is "to ensure a contestable and fair digital sector in general and core platform services in particular, with a view to promoting innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in

[15] Digital Markets Act, Article 54.
[16] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305/17.
[17] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance) [2020] OJ L 409/1.
[18] Digital Markets Act, Recital 3.
[19] Digital Markets Act, Recital 8.

the digital sector".[20] As can be seen, the DMA pursues three specific objectives: (i) the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses; (ii) contestable and fair markets in the digital sector across the Union where gatekeepers are present; and (iii) the benefit of business users and end users.[21]

The DMA does not define how to understand the "contestability" and "fairness" goals. From a general reading referring to Recital 32, the concept of "contestability" in the case of the DMA focuses on barriers to entry and exit, taking into account the high investment costs and the absence or reduction of access to data, which are key factors for gaining market power in the digital economy (Commission 2020d). By protecting the 'contestability' of markets, the DMA aims to protect the competition process from some undertakings which have control over the whole platform ecosystem and are extremely difficult to challenge for existing or new market operators, irrespective of how innovative and efficient they are.[22]

The DMA's "fairness" goal relates to achieving competition on merit, mainly by fostering impartial intermediation.[23] To achieve this, the DMA imposes certain obligations on "gatekeepers" to offer a neutral playing field for all undertakings that use a platform service as an intermediary to their customers.[24] These obligations are the vehicle to achieve the goal of fair economic outcomes in digital markets.

3.2. Scope and Designation of 'Gatekeepers'

The DMA is limited in scope. It applies only to "core platform services provided or offered by gatekeepers" to business users established in the Union or end users established or located in the Union.[25] As defined in Article 2 (2), "core platform service" includes: (i) online intermediation services; (ii) online search engines; (iii) online social networking services; (iv) video-sharing platform services; (v) number-independent interpersonal communications services; (vi) operating systems; (vii) web browsers; (viii) virtual assistants; (ix) cloud computing services; and (x) online advertising services.[26] As described in the explanatory memorandum, The DMA focuses on these platform types because these are noted to be the services "where the identified problems are most evident and prominent and where the presence of a limited number of large online platforms that serve as gateways for business users and end users has led or is likely to lead to weak contestability of these services and of the markets in which these intervene"[27].

As can be seen, the DMA has laid down an exhaustive list of what core platform services should be considered. Each core platform service is defined in Art 2 (5–13). The common characteristics of these "core platform services" are extreme economies of scale, very strong network effects, "an ability to connect many business users with many end users through the multi-sidedness of these services", a significant dependence of both business users and end users, lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, and data-driven advantages".[28]

While this precise list increases legal certainty to target only those platforms or services, it does not foresee the services that might change in the future and distort competition in the digital market (OECD 2021, p. 26). However, based on Article 17 of the DMA, this list can be expanded following a market investigation by the Commission "for the purpose to examine whether an undertaking providing core platform services should be designated as

[20] Digital Markets Act, Article 1 (1).
[21] Digital Markets Act, Recital 7 and Article 1 (1).
[22] Digital Markets Act, Recital 3.
[23] Digital Markets Act, Recital 33.
[24] Digital Markets Act, Articles 5 and 6.
[25] Digital Markets Act, Article 1 (2).
[26] It has to be noted that the definitions of "online intermediation services" and "online search engine" defined in Article 2 are borrowed from the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance) L186/57.
[27] See note 14.
[28] Digital Markets Act, Recital 2.

a gatekeeper pursuant to Article 3(8), or in order to identify the core platform services to be listed in the designation decision pursuant to Article 3(9)".

Once an undertaking falls under a 'core platform service' definition, its gatekeeper position is analysed. The DMA introduces a two-step test to determine the status of gatekeepers, either through clearly circumscribed and appropriate quantitative metrics or based on a case-by-case qualitative assessment through a market investigation. Firstly, Article 3 formulates the conditions under which providers of core platform services should be designated as gatekeepers by introducing quantitative and qualitative criteria. The threshold was based on a limited number of tech companies considered the leading service providers (Boeston 2023).

According to Article 3 (1), which is the base definition of a gatekeeper for the DMA, an undertaking is assigned a gatekeeping status if it fulfils the following three cumulative criteria: (i) it has a significant impact on the internal market; (ii) it provides a core platform service that is an essential gateway to the end customer; and (iii) it enjoys an entrenched and durable position in its operations, or it is foreseeable to have one in the near future.[29] The core concepts of "significant impact on the internal market", "(important) gateway", "entrenched and durable position", or "foreseeable to have one in the near future" have not been defined in the DMA. All of these concepts beg interpretation and clarification (Fernández 2021, p. 271).

As the qualitative criteria describe the general characteristics of a gatekeeper, the EU legislator introduced quantitative criteria to define the gatekeeper position based on: (i) the turnover/market capitalisation/market value; (ii) the provision of a core platform service in at least three Member States; and (iii) the number of active users. Hence, a gatekeeper is considered to have a significant impact on the internal market if "achieves an annual Union turnover equal to or above €7.5 billion (EUR) in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least €75 billion (EUR) in the last financial year, and it provides the same core platform service in at least three Member States". As far as the gatekeeper provides a "core platform service", according to Article 3 para. 2(b), a gatekeeper position is established when an undertaking "provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10,000 yearly active business users established in the Union". These numbers equal around 10% of the EU population and 1% of EU merchants selling via online platforms (Podszun et al. 2021, p. 63). If the undertaking meets all the quantitative criteria, it informs the Commission, which afterwards designates the undertaking as a gatekeeper within 45 working days.[30] Non-compliance with the notification with the time limit might trigger the Commission to impose a fine not exceeding 1% of their total worldwide turnover in the preceding financial year.[31]

The Annex to the DMA sets out the methodology for identifying and calculating the 'active end users' and the 'active business users' for each core platform service. However, the suggested methodology can lead to significant difficulties in practice. Firstly, the Annex requires the undertaking to submit collected "data about the use of core platform services from signed-in or logged-in environments".[32] In the case that core platforms services are accessed by end users outside signed-in or logged-in environments "the undertaking shall additionally submit aggregate anonymised data on the number of unique end users of the respective core platform service based on an alternate metric capturing also end users outside signed-in or logged-in environments, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags".[33] Practically, capturing "unique end users" that do not log into a platform service may not be an easy

[29] Digital Markets Act, Article 3 (1).
[30] Digital Markets Act, Articles 3 (3) and 4.
[31] Digital Markets Act, Article 30 (2).
[32] Digital Markets Act, Annex B 1a.
[33] Digital Markets Act, Annex B 1b.

task and potentially be subject to a significant margin of error. Moreover, collecting data based on IP addresses or using cookie identifiers may also raise questions from a privacy perspective (Daems 2022, p. 107). Secondly, the number of "active business users" is to be determined "at the account level with each distinct business account associated with the use of a core platform service provided by the undertaking constituting one unique business user of that respective core platform service".[34] Thus, the DMA considers each distinct business account associated with the use of a core platform service as one unique business user, "irrespective of the number of seat licences that the customer may hold, as long as the same business account is used" (Daems 2022, p. 107). Thirdly, the Annex does not clarify how to define whether a business user is "established in the Union" and an end user is "established or located in the Union". Larger companies may have a seat in the EU and multiple subsidiaries, branches, or offices within and outside the EU. This raises questions as to whether these business users should be considered based inside or outside the EU. On the other hand, defining whether an end user is "established or located in the Union" may be difficult since some platforms do not track the user's location when signing into the platform.

Secondly, where undertakings do not satisfy the quantitative thresholds, the Commission may designate an undertaking providing core platform services as gatekeepers following a market investigation and considering the different elements of a qualitative nature set out in the DMA. This occurs only when the undertaking providing core platform services meets the qualitative criteria but does not satisfy qualitative criteria. In this situation, the Commission shall consider several qualitative criteria such as: (i) the size of the provider; (ii) the number of business users; (iii) network effects and data-driven advantages; (iv) any scale and scope effects from which the undertaking benefits; (v) conglomerate corporate structure; (vi) business users and user lock-in; and (vii) other structural business or services characteristics.[35]

Article 4 stipulates the conditions under which a designation of a gatekeeper may be reconsidered and an obligation to review such a designation regularly. The review of the status of the gatekeeper may be requested or be through the Commission's own initiative only if: (i) there has been a substantial change in any of the facts on which the designation decision was based; or (ii) the designation decision was based on incomplete, incorrect, or misleading information.

3.3. The Gatekeepers' Obligations

The DMA's importance lies in the set of obligations it sets out for gatekeepers that limit contestability and fairness in the digital market. The gatekeepers' obligations list "dos and don'ts" or "positive and negative obligations"and apply to all designated gatekeepers. They are considered tools in the Commission's hand to constrain the omnipotent power of the gatekeepers (Andriychuk 2023, pp. 124–26). By doing this, the Commission triggers competition and contestability and limits the gatekeepers' power.

Articles 5 and 6 contain 18 obligations, divided into two groups. The first group contains self-executing obligations, which do not require further specification from the Commission. Gatekeepers are required to comply within 6 months of designation. For instance, Art 5(2) addresses the issue of personal data combination, which is very important for gatekeepers. According to this provision, a gatekeeper should refrain from combining personal data acquired because of its core platform service with data acquired from other services or third parties unless the end-user has been presented with a specific choice and provided full informed consent.[36] Other self-executing obligations listed in Art 5 are: (i) allowing business users to offer the same services to end users through third-party intermediation services;[37] (ii) not restricting business users from raising complaints

[34] Digital Markets Act, Annex C.
[35] Digital Markets Act, Article 3 (8).
[36] Digital Markets Act, Article 5 (2).
[37] Digital Markets Act, Article 5, para. 3.

concerning gatekeepers' practices before public authorities;[38] and (iii) not resorting to anti-competitive tying/bundling practices.[39]

The second group contains self-executing obligations that might require further specification from the Commission (Art 6–7). Article 6 of the DMA stipulates 11 self-executing obligations for the gatekeepers. For instance, Article 6 (2) prohibits the gatekeepers from using any data that is not publicly available, generated or provided by hybrid platforms. Moreover, Article 6 (6) obliges gatekeepers to "not restrict technically or otherwise the ability of end users to switch between, and subscribe to, different software applications and services that are accessed using the core platform services of the gatekeeper, including as regards the choice of Internet access services for end users." Notably, this obligation must be interpreted in light of the EU Charter provisions, respect for private and family life (Article 7) and the right to protect personal data (Article 8) (Barczentewicz 2023). Whereas, Article 7(2) of the DMA prescribes the Commission to specify the measures a 'gatekeeper' must implement to comply with Article 6 obligations.

Article 13 of the DMA explicitly prohibits gatekeepers from trying to segment, divide, subdivide, fragment or split those services through contractual, commercial, technical, or other means to circumvent the quantitative threshold.[40] Within 6 months following designation, a gatekeeper must provide the Commission with a report describing in detail and transparently the measures it has implemented to ensure compliance with the obligations set out in Articles 5, 6, and 7 of the DMA.[41] Gatekeepers must also inform the Commission of any intended concentration in the digital sector, irrespective of whether it is notifiable under EU or national merger control rules.[42] Article 15 obliges gatekeepers to submit to the Commission an independent audit of techniques for profiling consumers within 6 months following its designation.[43]

3.4. Market Investigation

Chapter IV provides rules for market investigations that the Commission can use for three different purposes. Firstly, the Commission has the right to the open a market investigation to designate as a gatekeeper a platform that meets the qualitative criteria for being a gatekeeper but does not satisfy all of the quantitative criteria or which meets all of the quantitative criteria but presents "sufficiently substantiated arguments" to prove that it does not meet the qualitative criteria.[44] Secondly, according to Article 18, the Commission can conduct a market investigation to establish systematic non-compliance with the obligations set out in the DMA, after which the Commission may impose behavioural or structural remedies on the gatekeeper. Finally, the Commission can conduct a market investigation to examine whether new services should be added to the DMA as "core platform services" or to detect "types of practices that may limit the contestability of core platform services or may be unfair and which are not effectively addressed by this Regulation.[45]

3.5. Enforcement and Judicial Review

Chapter V contains the provisions concerning implementation, enforcement, and monitoring powers. Unlike the decentralised enforcement system introduced in competition law (Regulation 1/2003), the DMA opts for a centralised enforcement system. The Commission is at the centre of enforcement systems through its monitoring of gatekeepers' conduct and their compliance with the listed obligations. According to the Impact Assessment of the Commission, the centralised enforcement system is justified by the fact that only a limited

[38] Digital Markets Act, Article 5, para. 6.
[39] Digital Markets Act, Article 5, paras 7–8.
[40] Digital Markets Act, Article 13 (1).
[41] Digital Markets Act, Article 11 (1).
[42] Digital Markets Act, Article 14 (1).
[43] Digital Markets Act, Article 15 (1).
[44] Digital Markets Act, Article 17.
[45] Digital Markets Act, Article 19.

number of undertakings will be identified as gatekeepers and, most likely, that they will be present in most EU member states (Commission 2020b, para. 192). Another advantage of the centralised approach is that it allows the Commission to address gatekeeper obligations uniformly (Monti 2021, p. 92). This centralisation system avoids the fragmentation of enforcement for DMA rules and, simultaneously, reduces coordination costs in cases of infringements in more than one Member State (Monti 2021, p. 92).

As a sole enforcer, the Commission has the power to open proceedings (Article 20). In the context of an opened proceedings, the Commission has the power: (i) to request information (Article 21); (ii) to carry out interviews and take statements (Article 22); (iii) to conduct inspections (Article 23); (iv) to adopt interim measures or commitments (Articles 24 and 25); (v) to monitor the obligations (Article 26); (vi) to impose fines up to 20% of a gatekeeper's worldwide turnover in the preceding financial year as well as periodic penalty payments (Articles 30–33). In addition, the Commission may impose behavioural or structural remedies or structural separation in cases of systematic non-compliance by a designated gatekeeper.[46]

As the DMA opted for a centralised enforcement system, the national authorities of EU Member States and NCAs have a limited role in enforcing the DMA. The national authorities of EU Member States shall have an obligation to cooperate and coordinate their actions with the Commission "to ensure coherent, effective and complementary enforcement of available legal instruments applied to gatekeepers".[47] Three or more Member States have the right to request that the Commission opens a market investigation to (i) have a potential gatekeeper designated; (ii) to add new obligations; or (iii) if the gatekeeper has engaged in systematic non-compliance.[48] The Commission examines the request and publishes the assessment result within 4 months.

The role of NCAs is limited only to coordinating their respective enforcement actions with the Commission and exchanging any kind of information, including confidential information.[49] If NCAs intend to launch an investigation on gatekeepers based on national laws referred to in Article 1(6), it shall inform the Commission immediately or after. The situation where NCAs intend to impose an obligation on gatekeepers is interesting. In this situation, the NCA has to communicate the draft measure to the Commission, stating the reasons for the measure no later than 30 days before its adoption.[50]

The role of EU Member States' national courts is limited as well. National Courts shall not give decisions running counter to the Commission's decision on the DMA issues.[51] If National courts are unsure about questions concerning the DMA application, they may ask the Commission for information or opinions.[52] In addition, the Commission may: (i) request that an EU Member State's national court transmits any documents necessary for the assessment of the case or may submit, on its own initiative, written observations to national courts.[53]

4. The DMA Compliance with EU Competition Law: Complementary or Different

There is a widespread perception that competition law enforcement in the digital sphere has been too complex and too slow (OECD 2021; Wheeler et al. 2020; Tirole 2023; Marsden and Podszun 2020). As of 2004, several of the largest online platforms have been involved in gate-keeping activities, meaning that these platforms have a major impact and control newcomers' access to digital markets. One of the prominent examples is Google, which has more than 90 per cent market shares in the national markets for general search

[46] Digital Markets Act, Article 18 (1).
[47] Digital Markets Act, Article 37 (1).
[48] Digital Markets Act, Article 42.
[49] Digital Markets Act, Article 38 (1).
[50] Digital Markets Act, Article 38 (3).
[51] Digital Markets Act, Article 39 (5).
[52] Digital Markets Act, Article 39 (1).
[53] Digital Markets Act, Article 39 (3–4).

services.[54] Since 2010, Google has been involved in three large competition cases. The Commission has fined Google €8.25 billion in three dominance position cases, the largest in the history of European competition policy (Commission 2017, 2018, 2019). The Court of Justice upheld the decision of General Court in google shopping case.[55] In another case, the General Court overturned a fine of 1.49 billion euros imposed by Commission on Google for abusing its dominance over online advertising.[56]

The DMA represents a sector-specific regime dealing only with large online platforms acting as "gatekeepers" and is not part of the EU's competition law (Vestager 2021). Built on the logic that existing competition rules are not sufficient to deal with tech companies, the DMA "aims to complement the enforcement of competition law."[57] Instead of Article 103 TFEU, which serves as a legal base for competition law, the DMA's legal base is Article 114 TFEU. This provision indicates harmonising national laws and creating a unified legal framework to remove barriers to the internal market or the distortion of competition.[58] Additionally, Recital 11 of the DMA's preamble stresses that DMA "pursues an objective that is complementary to, but different from, of protecting undistorted competition on any given market" and "aims to protect a different legal interest" from that of competition rules (Robertson 2024). Thus, the reliance on Art 114 TFEU shows the Commission's intention for the DMA to be an independent regulatory instrument and not part of EU competition law (Beems 2022).

Nevertheless, the DMA is heavily inspired and closely aligned with the overall aims of EU competition law. According to Article 1(1), the DMA pursues three objectives. The first objective is to contribute to the functioning of the internal market. The DMA aims to facilitate the functioning of the internal market by laying down harmonised rules for gatekeepers. In contrast, EU competition law contributes to integrating the internal market by "ensuring that competition is not distorted"[59]. The second objective is contestability and fairness, explained in the preamble as how these two objectives should be understood. Recital 32 of the DMA defines contestability as the ability of firms to effectively overcome entry barriers and expansion and challenge the gatekeeper on the merits of their products and services. The DMA's "contestability" objective is related to simultaneously promoting "competition for the market, competition on the market and also competition on other markets" (Schweitzer 2021). This is evident in the ECN+ Directive's preamble which stresses that the "Effective enforcement of Articles 101 and 102 TFEU is necessary to ensure fairer and more open competitive markets in the Union, in which undertakings compete more on their merits and without company-erected barriers to market entry, enabling them to generate wealth and create jobs"[60]. On the other hand, Recital 33 of the DMA defines unfairness as "the imbalance between the rights and obligations of business users where the gatekeepers obtain a disproportionate advantage".[61] The concept of unfairness is also reflected in competition law. For instance, Article 101(3) TFEU mentions 'a fair share for consumers' and Article 102(a) TFEU qualifies unfair trading conditions as a form of abusive behaviour. The third objective, the benefit of business users and end users, overlaps with consumer welfare in EU competition law.

Furthermore, the DMA obligations, to a great extent, have been inspired by past or current competition law cases and investigations at the national or EU level involving

54 Commission Decision of 27 June 2017, paras. 273–84.

55 See Note 3.

56 Judgment of 18 September 2024, *Google and Alphabet v Commission (Google AdSense for Search)*, T-334/19, ECLI:EU:T:2024:634.

57 Digital Markets Act, Recital 10.

58 Judgment of 5 October 2000, *Germany v. Parliament and Council*, C-376/98, ECLI:EU:C:2000:544.

59 Consolidated Version of the Treaty on the European Union, Protocol nr. 27 of 9 May 2005 on the internal market and competition, [2005] OJ. 115.

60 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L11/3, 2019.

61 Digital Markets Act, Recital 33.

Big Tech companies (Commission 2020b; Geradin 2020; Morton and Caffarra 2021; de Streel and Larouche 2021). For instance, the obligation stipulated in Art 5(2)(a) to not "process personal data from third parties" or Art 5(2)(b), (d) to not "combine personal data from CPS with data from third parties and other services gatekeeper" derive from settled cases by Bundeskartellamt (2019, 2022) or *Autorità Garante della Concorrenza e del Mercato* (AGCM 2017). Obligations to "not use business users' data to compete with them" (Art 6 para. 2) or "not self-preference in the ranking" (Art 6 para. 5) derives from the Commission's settled decision against Amazon, Facebook or Google (Commission 2022a, 2022b). Whereas the obligation in Article 6 (3) to "Allow un-installation and prompt default selection (search, browser, assistant)" has been inspired by the Commission decisions against Microsoft or Google.[62]

The DMA complements competition rules by addressing "unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules" because competition enforcement concerns the situation of specific markets, "inevitably intervenes after the restrictive or abusive conduct has occurred and involves investigative procedures to establish the infringement that takes time"[63]. As emphasised in Recital 11, the DMA has "an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets, where gatekeepers are present, are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper". The DMA thus seeks to address the deficits and shortcomings of competition policy to effectively deal with the challenges of digital competition.

Unlike the decentralised enforcement system introduced by Regulation 1/2003,[64] the DMA stipulates a centralised enforcement system where only the Commission is the sole enforcer. The national competition authorities have a limited role only in assisting the Commission in the investigation of conduct. This centralised enforcement system is justified by the desire to achieve "coherent, effective and complementary enforcement of available legal instruments applied to gatekeepers" across the common market.[65] Recital 5 of the DMA notes that the scope of Articles 101 and 102 TFEU is:

> "limited to certain instances of market power [. . .] and enforcement occurs ex-post and requires an extensive investigation of often *very complex facts on a case by case basis*. Moreover, existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms".

As a sole authority, the DMA empowers the Commission with strong investigative and enforcement powers to ensure effective implementation and compliance with the rules.[66] The Commission's powers, inspired to some extent by Regulation 1/2003, include some tasks related to: gatekeeper designation;[67] clarification on compliance with obligations for gatekeepers[68]; to answer requests for exemption;[69] to oversee the regulated gatekeepers;[70] to uphold the functioning or the updating of the DMA;[71] and to order interim measures and

[62] Commission Decision of 24 March 2004; Commission Decision of 6 March 2013; Commission Decision of 18 July 2018, *Google Android* (Case AT.40099).
[63] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Proposal for Digital Markets Act) [2020] COM (2020) 842 final, pp. 3–4.
[64] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
[65] Digital Markets Act, Article 37.
[66] Digital Markets Act, Recital 5.
[67] Digital Markets Act, Articles 14, 16 and 17.
[68] Digital Markets Act, Article 8.
[69] Digital Markets Act, Article 10.
[70] Digital Markets Act, Articles 11, 14, 15 and 28.
[71] Digital Markets Act, Articles 12, 16, 19, 35, 46, 47 and 53.

impose fines and periodic penalty payments.[72] The Court of Justice of the European Union has unlimited jurisdiction to review all decisions in which the Commission imposes fines or penalties.[73] The NCAs may assist the Commission with all necessary information in their possession or launch an investigation into cases of possible non-compliance. However, NCAs can take decisions based on DMA provisions. Only the Commission can take the decisions. Thus, it remains to be seen whether NCAs are willing to put their resources into investigations where they don't take decisions.[74]

The Commission chose the ex-ante regulatory system based on its own experience of ex-ante regulation in different sectors. As Vice President Vestager noted, it is "the same as we have been doing in banking, in telecoms, in energy–to realise that antitrust will have to work hand in hand with regulation. So that we have a complete set of tools" (Commission 2020e). According to Cappai and Colangelo, the ex-ante regulatory system intends to ensure fairness, contestability, transparency and innovation and to safeguard public interests before any bad behaviour is materialised (Cappai and Colangelo 2021). In the case of EU competition law, the ex-post enforcement guarantees the effectiveness of the internal market by protecting and maintaining the EU's level-playing fields for businesses through the promotion of free and fair competition (Cini and Czulno 2022, p. 42). The Commission and the EU Court of Justice take or rule on decisions in individual cases to determine whether an undertaking has infringed on EU competition law.

5. One Year of the DMA: Assessing the DMA Implementation and Enforcement

As the DMA took full effect in March 2024, by 6 September 2023, under Article 3 of the DMA, the Commission designated six gatekeepers—namely, Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft (Commission 2024c). In total, these gatekeepers provide 22 core platform services, respectively. Alphabet has eight core platform services; Amazon has two core platform services; Apple has three core platform services; ByteDance Ltd. has one core platform service; Meta has eight core platform services; and Microsoft has two core platform services (Commission 2024e). Based on the definition given in Article 2 (2) of the DMA, the Commission designated the gatekeepers' status for the following specific core platform services: (i) *social networks*—TikTok, Facebook, Instagram, and LinkedIn; (ii) *intermediation*—Google Maps, Google Play, Google Shopping, Amazon Marketplace, App Store and Meta Marketplace; (iii) *online advertising services*—Google, Amazon, and Meta; (iv) *number-independent interpersonal communication services*—WhatsApp and Messenger; (v) *video sharing*—YouTube; (vi) *searches*—Google Search; (vii) *browser*—Chrome and Safari; and (viii) *operating systems*—Google Android, iOS, and Windows PC OS. In addition, in April 2024, Booking and Apple iPadOS were designated as gatekeepers. On the other hand, Apple iMessage, Microsoft Bing, Microsoft Edge, and Microsoft Ads have not been designated gatekeepers. Except for ByteDance, no other companies appealed the Commission's designation decision before the European Court of Justice. The ECJ dismissed ByteDance's challenge, upholding the Commission's designation as justified due to ByteDance's lack of convincing arguments.[75]

Following the designation, the gatekeepers had to comply within 6 months with the "do's and don'ts" obligations set out in the DMA to ensure more choices and more freedom for end users and business users of the gatekeepers' services. In addition, the gatekeepers needed to present a detailed compliance report to the Commission describing how they have complied with each obligation in the DMA. In this context, on 7 March 2024, designated gatekeepers announced changes to their operations in Europe. The EU forced designated gatekeepers to comply with DMA provisions. Shortly after, between 18 and 26 March 2024, the Commission hosted 6 workshops allowing the designated gatekeepers to

[72] Digital Markets Act, Articles 29–31.
[73] Digital Markets Act, Article 45.
[74] Digital Markets Act, Articles 37–39 provides rules concerning cooperation and coordination of the Commission with NCA and national courts.
[75] Judgment of 17 July 2024, Bytedance Ltd. v European Commission, T-1077/23, ECLI:EU:T:2024:478.

present their compliance plans (Commission 2024d). In the meantime, on 25 March 2024, the Commission launched several investigations into non-compliance. By doing this, the Commission showed its 'muscular' power against the designated gatekeepers. With the investigations ongoing, the Commission has already indicated in its preliminary ruling that Meta and Apple have failed to meet certain DMA obligations (Commission 2024a, 2024b). On the other hand, the DMA has provided its first results, allowing some gatekeepers to deploy products and services in compliance with DMA rules. For instance, Google removed Google Search features for flights, hotels, and local businesses to comply with the DMA rules (Cohen 2024). Apple delayed the launch of three new artificial intelligence features due to concerns over DMA compliance (Chee 2024). Also, the DMA has fostered the deployment of alternative services. Under the DMA rules, Epic Games are finally available on iOS devices only in the European Union. Whereas for users outside the EU, the Fortnite and Epic Games Store for IOS is blocked by Apple (Epic 2024).

One year on, the DMA has undoubtedly significantly reshaped the digital market in the EU. It has strengthened competition in Europe, and, most importantly, the EU has become a model for regulating the digital market for other non-EU countries. Nevertheless, two main challenges remain to be addressed in the future. The first challenge concerns enforcing the DMA and applying EU or national competition rules. So far, several national competition agencies have experienced cases against gatekeepers and/or running cases jointly with the Commission against them. Also, some EU Member States have enacted domestic legislation to regulate gatekeepers[76] or amended competition law like Germany[77]. Although the DMA provides a means for cooperation with national authorities to ensure "coherent, effective and complementary enforcement of available legal instruments",[78] the DMA offers two types of exceptions to its primacy: (i) for national laws regulating digital platforms[79] and (ii) for EU and national competition laws.[80]

Article 1 (5) of the DMA states that Member States are prohibited from imposing "further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets." Also, Article 1 (5) of the DMA permits Member States to impose national obligations on digital platforms—even when they provide core platform services—"for matters falling outside the scope" of the DMA, and as long as those obligations "do not result from the fact that [they] have the status of a gatekeeper" within the meaning of the DMA. Member States' prohibition from imposing further obligations on gatekeepers entails a full harmonisation rationale aimed at preventing a fragmented internal market. It remains unclear what constitutes a further national obligation in the sense of Article 1 (5) DMA and how Article 1 (5) would be interpreted (Drexl et al. 2023). The list of obligations enshrined in the DMA stems from cases in legislation adopted by EU Member States that resemble the DMA obligations (Martínez 2024).

Article 1 (6) of the DMA deals with conflicts between the DMA and EU and national competition laws. It stipulates that the DMA is without prejudice to the application of EU competition law—namely, Articles 101 and 102 TFEU and the EU merger control rules, and to the application of national competition rules. Also, Article 1 (6) of the DMA includes "national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of additional obligations on gatekeepers." The later rules are not equivalent to those at the EU level. Recital 9 of the DMA regulates the application of DMA rules. Accordingly, Member States are only prohibited from applying "national rules which are within the

[76] "Legge annuale per il mercato e la concorrenza 2021" [2022] GU 188. Available online: https://www.gazzettaufficiale.it/eli/id/2022/08/12/22G00126/sg (accessed on 11 July 2024).

[77] Gesetz gegen Wettbewerbsbeschränkungen (GWB). 11th amendment to the GWB. Available online: https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html (accessed on 8 July 2024).

[78] Digital Markets Act, Recital 90 and Article 37.

[79] Digital Markets Act, Article 1 (5).

[80] Digital Markets Act, Article 1(6).

scope and pursue the same objectives" as the DMA. Other national rules with different objectives remain unaffected. National competition rules (both equivalent to 101 and 102 TFEU) and those that do not have an equivalent at the EU level are explicitly considered to have such a different objective. They remain applicable, therefore, as long as they do not undermine the uniform and effective application of obligations imposed under the DMA in the internal market.[81] Recital 11 of the DMA further clarifies that the DMA's objective is distinct from these national competition rules. The DMA's objective is to ensure that markets with gatekeepers remain contestable and fair. In contrast, the objective of competition law is to protect undistorted competition in the market. The Minister of Justice in Hungary recently proposed a draft proposal to regulate the "undertaking of fundamental importance". Inspired by the German model, the draft proposal introduces a new ex-ante regime enabling the Hungarian Competition Authority to impose obligations on the "undertaking of fundamental importance" without demonstrating a violation of the law (Petrányi and Szendrő 2024). Unlike the DMA, which focuses only on the gatekeepers, the draft proposal has a wider scope. It applies to all sectors of the economy that are fundamentally important to competition and consumers. The designation process is based on a non-exhaustive list of elements to determine whether the undertaking holds fundamental importance in the market. Section 40 of the draft proposal lists the obligations and prohibitions deriving from the designation. The Hungarian Competition Authority is empowered to impose obligations and prohibitions on the concerned company.

Another challenge relates to the DMA centralisation system. The EU Member States' role is marginalised, justified by the harmonisation principle that the DMA pursues. According to the DMA, the Commission is the sole enforcer of the DMA's rules. National public authorities may only assist the European Commission in enforcing the DMA.[82] National courts shall not render decisions running counter to the Commission's decision on the DMA issues. If national courts are unsure, they may ask the Commission for information or opinions.[83] This centralisation system will have negative consequences because NCAs are considered more as an auxiliary tool for the Commission to pursue DMA objectives rather than as enforcers. This option may be justified under the uniform application of DMA rules or NCAs capabilities. However, as the number of gatekeepers increases, it may become very difficult for the Commission to handle enforcement effectively. Thus, a decentralised system should be introduced to empower the NCA and the national court to apply DMA rules.

6. Conclusions

The DMA has introduced a new regulatory regime for large digital companies for the first time. Inspired by the Court of Justice of the European Union or Commission's Decision, it is the most important piece of legislation emanating from Brussels. The DMA lays down rules to ensure contestability and fairness in the digital market to benefit business users and end users.

The adoption of the DMA will, for sure, have two positive outcomes. Firstly, as a new regulatory initiative, the Digital Markets Act aims to regulate an area previously under-regulated. It introduces uniform rules for the digital 'gatekeepers' across the EU and most importantly, the DMA increases legal certainty regarding the operation of the tech giants in the internal market. Moreover, the DMA has influenced the legal systems of EU Member States or other non-EU countries to attempt to better regulate the behaviour of digital platforms.

Secondly, the gatekeepers will have basic guidelines to modify their mechanisms and business practices under the DMA. As noted by Anderson and Mariniello, "the DMA would evolve alongside markets and adapt to individual business models" (Mariniello

[81] Digital Markets Act, Recital 9.
[82] Digital Markets Act, Articles 16(5), 22(1), 27, 37 and 38.
[83] Digital Markets Act, Article 39 (1).

and Anderson 2021). As with the effects of GDPR, the DMA will positively impact tech giants' behaviour, and not harm the internal market. One year on from when DMA was entered into force, the digital market in Europe has changed significantly. Gatekeepers are complying with obligations and new business models.

Nevertheless, the success of the DMA will depend on the Commission's ability to enforce it appropriately. The DMA empowers the Commission as the sole enforcer to request all relevant information to carry out its duties, regardless of ownership, location, format, or storage medium. The Commission also has the power to conduct inspections (dawn raids), interviews, and fines. It remains to be seen whether the Commission will have the necessary tools to enforce the DMA effectively.

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