

THE POSITION AND REGULATION OF GATEKEEPERS IN THE CONTEXT OF THE NEW EUROPEAN LEGISLATION*

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ABSTRACT

Over the last two decades, a better digital transformation has fundamentally changed the global economy and society. Digital services have become new tools and their importance for our social and economic life will continue to grow. When we adopted the e-commerce directive 20 years ago, many digital services and platforms such as Google, Amazon or Booking were in their initial stage or did not yet exist. The blockades as the consequence of the COVID pandemic have now strengthened the role of online platforms. People have changed their habits towards the online world so that they can do business, shop, work, learn and socialize. COVID-19 has led to an increase in online e-commerce and an increase in fraud, unfair practices, and other illegalities of various formats. The crisis has exposed the system's existing gaps and weaknesses, which has allowed dishonest services and traders to exploit people's current insecurity.

The Commission has proposed an ambitious reform of the digital space, a comprehensive set of new rules for all digital services, including social media, online marketplaces and other online platforms operating in the European Union: The Digital Services Act and The Digital Markets Act.

In this article, we will look at the Commission's proposal for The Digital Markets Act (DMA), which was published on December 15, 2020. In the last few years, it has been concluded

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that a small number of large digital platforms act as “gatekeepers” because they are essential gateways between business users and their potential customers. This allows these platforms to take advantage of the enterprise users’ dependence on their services by imposing unfair business conditions. As this issue may not be adequately addressed in competition law, it has led the European Commission to propose a Digital Markets Act (DMA). The DMA should introduce more flexibility and adaptability in terms of imposing the “gatekeeper” obligations.

In this article, we will focus on the question of which digital platforms should be subject to ex ante regulation, and thus also the obligations contained in the DMA proposal. The methodology used to identify the “gatekeepers” cannot be separated from the problems that ex ante regulation seeks to address, as otherwise the DMA could end up regulating the wrong set of companies. The DMA proposal describes “gatekeepers” as providers of the core platform service (CPS) that meet three cumulative quality criteria. These criteria are presumed to be met if the relevant CPS provider meets the quantitative size thresholds. DMA includes a mechanism that allows CPS providers who meet these quantitative thresholds to escape labelling.

This article reveals the various provisions of the DMA and explains why the Commission has decided to regulate “gatekeepers” and how it can prevent the damage caused by large digital platforms.

Keywords: Digital Market Act, Digital platforms, Digital Service Act, Digital transformation, E-commerce, Gatekeepers

1. INTRODUCTION

Digital technologies have become a daily part of our lives, and the global situation, lasting for over two years, in connection with the ongoing COVID-19 pandemic has made it even more evident. The vast majority of our activities take place online. However, this fact has pointed out several shortcomings and legal questions related to the conduct of activities in the online environment.¹ In addition to the protection of personal data, illegal content on the Internet, geoblocking or consumer protection, a number of large platforms have recently emerged in the digital market environment, benefiting in some way from the sector in which they operate and representing a key position in today’s digital economy. As a result of gaining their status, these platforms act as intermediaries for most transactions between end-users and commercial users. These large platforms² increasingly act as

¹ Bejček, J., *On the Impact of Digitalization of Economy and Competition Law – a Storm in a Teacup?*, in: Suchoža, J.; Husár, J.; Hučková, R. (eds.), *Právo, obchod, ekonomika VIII.*, Košice: University of P.J. Šafárik in Košice, 2018, pp. 23 – 42, ŠafárikPress UPJŠ, ISSN 2453-921 X, ISBN 978-80-8152-649-7, available at: [https://poe.pravo.upjs.sk/wp-content/documents/POE_2018_zbornik.pdf], Accessed 25 May 2022

² Online platforms are generally defined as exclusive intermediaries, who stand between the direct service provider and the customer as the addressee of the service. – see more De Franceschi, A., *Uber Spain and the “Identity Crisis” of Online Platforms*, *Journal of European Consumer and Market Law*, 2018, Vol. 7, No 1, pp. 1-4, [<https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/7.1/EuCML2018001>], Accessed 26 March 2022

gateways and have a permanent position as a result of strengthening existing barriers to market entry. The European Commission argues that this anti-competitive behaviour could lead to “inefficient results in the digital sector in terms of higher prices, lower quality as well as less choice and innovation to the detriment of European consumers”.

So far, the regulation of online platforms has generally been left to the Member States. The basic regulatory framework in relation to online platforms and online services is Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, especially electronic commerce, in the internal market (Directive on electronic commerce). It should be borne in mind that this Directive on electronic commerce was adopted in 2000 and that the current period of digitalisation calls for new legislation that sufficiently reflects the dynamics and developments in this area. In Article 1 paragraph 5 point b) Directive on electronic commerce is stipulated that “This Directive shall not apply to questions relating to agreements or practices governed by cartel law”, the very wording of the Directive on electronic commerce precludes its application or its impact on competition rules. Therefore, until now, the legislation related to platforms and competition issues has been governed by primary law, starting with Article 101 Treaty on the Functioning of the EU, and the relevant secondary law. Secondary legislation completing the legal framework of competition legislation consists primarily of regulations.³ Several experts share the need for new legislation to⁴ be adopted at pan-European level, thus avoiding fragmentation of legislation and inconsistent access to and reduction of these large platforms at national level. It is therefore necessary to adapt legislation to current business models and to allow them to operate on the market for the benefit of the consumer, while guaranteeing a high level of protection of its candidates while protecting competition. The current competition and anti-trust policy is considered too slow to keep pace with this digital era. The new digital legislation was foreseen by the second priority of the current composition of the European Commission - a Europe fit for the digital age. As it states, “Europe must now strengthen its digital sovereignty and set standards instead of following the standards of others

³ Important is also - Regulation 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 [2019] OJ L 186

⁴ Rudohradská S.; Treščáková, D., *Proposals for the digital markets act and digital services act – broader considerations in context of online platforms*, in: Duić, D.; Petrašević, T. (eds.), *EU and Comparative Law Issues and Challenges Series (ECLIC)*, Vol. 5, 2021, pp. 487-500, available at: [<https://hrcak.srce.hr/ojs/index.php/eclic/article/view/18317/10025>] or Dolný, J., Mrázová, Ž., *Recent Developments in European Company Law: Harmonisation... of Restructuring and Cross-border Conversion*, in: *Evolution of Private Law: New Challenges*, Instytut Prawa Gospodarczego Sp. z o.o., 2020, pp. 63 – 71

– with a clear focus on data, technology and infrastructure.”⁵ It can therefore be concluded that DMA is one of the first initiatives of its kind to comprehensively regulate the strength of the largest digital companies. The new legal framework should therefore make it possible to guarantee the safety of users in promoting the development and competitiveness of companies in the sector. This legislative package consists of two separate proposals for regulations, on the one hand, the Digital Services Act (DSA)⁶, which concerns the regulation of digital services and their content and on the other hand already mentioned above - Digital Market Act (DMA).

2. CALL FOR THE NEW LEGISLATION

Proposal of a Regulation of the European Parliament and of the Council of 15 December 2020 on contestable and fair markets in the digital sector (COM/2020/842) final 2020/0374 (COD) can be described as *ex ante* regulation, which represents a kind of superstructure of competition law. Directly in the binding part of the Regulation it is stated that the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) is not affected by the Regulation.⁷ Traditional competition law institutes (e.g. abuse of a dominant position) have so far served as the basic legal framework for penalising the practices of “gatekeepers” of access, but such practices or conduct currently exhibit features of digital specificities which can hardly be sanctioned by standard regulatory instruments.⁸

Several online platforms have emerged in the digital markets – often as part of their own ecosystems – which have become key structural elements of today’s digital economy and mediate the vast majority of transactions between consumers and businesses. The emergence of these access platforms is accompanied by three main problems: i) insufficient possibility of competition and weak competition in platform markets; ii) unfair trading practices towards commercial users; and iii) fragmented regulation and supervision of entities operating in these markets. These problems are caused by market failures, which hinder the self-corrective

⁵ *A Europe fit for the digital age: Empowering people with a new generation of technologies*, available at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en], Accessed 27 March 2022

⁶ Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC [14124/20- COM (2020) 825 final] - Opinion on the application of the Principles of Subsidiarity and Proportionality

⁷ Art. 1 of the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final 2020/0374 (COD)

⁸ Broadbent, M., *The Digital Services Act, the Digital Markets Act, and the new competition tool*, Center for Strategic and International Studies, p. 4, 2020, available at: [<https://apo.org.au/node/309351>], Accessed 27 March 2022

process. The characteristics of the digital market may reinforce barriers to entry to the “watchdog” markets.

Trade relations are characterised by an extremely high degree of dependence and unbalanced negotiating positions. In addition, different national rules are issued in the EU as a partial response to the problems identified, leading to fragmented regulation and supervision. By weakening competition and market competitiveness problems arise, which may ultimately lead to market inefficiencies in terms of higher prices, lower quality, limited choice and lower levels of innovation to the detriment of European consumers. Addressing these challenges is particularly important given the size of the digital economy (estimated at 4.5% to 15.5% of global GDP in 2019) and the important role of platforms in digital markets.⁹

Digital market forces lead to huge efficiency gains. However, they also create a certain dynamic with a sudden radical decline in competition and a concentration of economic power around certain entities, where “the winner takes everything”. The creation of this dynamics can lead to monopolistic markets without control and harm consumers in the long term, as IT business is sometimes tied to the use of technology platforms that do not have real competition. In digital markets, this position of platforms is referred to as “gatekeepers” because it is the gateway to these markets for other participants.¹⁰

While there are more than 10,000 such online platforms in the European digital economy and most of them are small and medium-sized enterprises, a small number of very large online platform companies receive the largest share of the value. As “gatekeepers” between businesses and citizens, they benefit from strong network effects. Some of them exercise such control over entire platforms that, in principle, existing or new market players cannot compete with them, no matter

⁹ Accompanying document of the Regulation of the European Parliament and of the Council 2020/0374 of 15 December 2020 on competitive and fair markets in the digital sector (Digital Markets Act) COM (2020) 842 final 2020/0374 (COD) Note by the authors: The Commission consulted a wide range of stakeholders, whether from the private sector or users of digital services, civil society organizations, national authorities, academia, the technical community, international organizations, as well as the general public, on the preparation of this legislative package. A number of complementary consultation steps have also been taken to fully capture stakeholders’ views on issues related to digital services and platforms

¹⁰ Alison group, *Máte Apple? Toto by ste mali vedieť. Alebo máte Android? Aj pre vás je to dôležité*, 2021, [<https://www.alison-group.sk/report-bezpecnosti/mate-apple-toto-by-ste-mali-vediet-alebo-mate-android>], Accessed 25 May 2022

how innovative and beneficial they may be.¹¹ Several sources¹² have highlighted and pointed out the economic strength of large online platforms that allow many businesses and consumers to access the digital economy. These are online intermediaries that bring together people or businesses seeking information, transactions and social interaction (buyers, sellers, advertisers, software manufacturers and users, providers of ancillary services, *etc.*).¹³ Smaller businesses are increasingly reliant on a number of very large online platforms to access digital markets and consumers – the “gatekeepers” of the market. It is difficult for innovative digital firms and start-ups to compete with these very large online platforms. Their impact is amplified by the opacity and complexity of their large ecosystems and the significant information advantage they have over ordinary business users. The rapid rise of large digital platform firms creates unprecedented business models and technologies, but also tests the ability of governments and regulators to ensure fair and pro-competitive markets. Slow-moving competition policy instruments are not sufficiently equipped to fully address digital challenges.¹⁴

Accordingly, in December 2020, the European Commission adopted DMA to regulate the “gatekeepers” of the digital world by imposing direct restrictions on the behaviour of technology giants. Although the Commission did not specifically name any companies, it proposed criteria that will certainly capture, among others, e.g. Google, Facebook, Amazon, Apple, Microsoft, IBM, SAP and many others. These private undertakings have a strong intermediary position as they connect a large number of users with a large number of other undertakings.¹⁵

¹¹ As announced in March 2020 in the Digital Services Act package – an *ex ante* regulatory tool for very large online platforms acting as gatekeepers, the initial impact assessment is available at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en], Accessed 25 May 2022

¹² Cremer J. *et al.*, *Competition policy for the digital era: Report*, 2019, available at: [<https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>], Accessed 25 May 2022; Furman, J. *et al.*, *Unlocking digital competition: Report of the Digital Competition Expert Panel*, 2019, Crown copyright ISBN 978-1-912809-44-8, available at: [www.gov.uk/government/publications] or [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf], Accessed 25 May 2022; Nadler, J.; Cicilline, D. N., 2020., *Investigation of competition in digital markets: Majority staff report and recommendations*, available at: [https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519], Accessed 25 May 2022

¹³ Cabral, L.; Haucap, J.; Parker, G.; Petropoulos, G.; Valletti, T.; Van Alstyne, M., *The EU Digital Markets Act*, Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-29788-8, [doi:10.2760/139337], JRC122910

¹⁴ *Ibid.*

¹⁵ Alison group, *loc. cit.*, note 10

DMA is one of the EU's latest efforts to create protection barriers for platforms, which seeks to prevent large technology companies, gatekeepers, from abusing their market power and to allow new and smaller firms to have a fair environment. While some types of anticompetitive behaviour are well known from classic competition cases, multilateral platforms based on personal data have found new ways of tying, bundling and self-preferencing that pose new challenges.¹⁶

The EU is currently also carrying out other additional policy enforcement activities, such as launching an investigation against Apple in June 2020, in relation to the conditions under which its app store had to be used. Particularly in the area of music streaming services, Apple has imposed on developers the obligation to use their own in-app purchasing system, as well as restrictions on developers' ability to inform iPhone and iPad users about alternative, cheaper out-of-app purchasing options. On 30 April 2021, following a preliminary investigation, the Commission sent a statement of objections informing Apple of its preliminary view that it had distorted competition in the music streaming market by abusing its dominant position to distribute music streaming applications via its App Store.¹⁷

3. THE AIM OF THE DIGITAL MARKET ACT

DMA regulation is often referred to as a new competitive tool.¹⁸ The objective of this Regulation is therefore to provide a fairer business environment for commercial gateway users. Users depend on these gateways if they want to offer their services in the Single Market. Everything is aimed at protecting end-users so that they can choose from better services and access them at fairer prices. In the area of merger control, the European Commission has invited Member States to refer (digital) cases to the Commission where a merger may significantly affect competition. These clarifications must allow the European Commission to assess concentrations similar to the non-notified Facebook and Instagram merger. This resulted in the consideration of a new competition instrument that would complement the existing competition law provisions at EU level in the form of a proposal

¹⁶ Broadbent M., *Implications of the Digital Markets Act for Transatlantic Cooperation*, Center for Strategic and International Studies, 2021, available at: [<https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation>], Accessed 25 March 2022

¹⁷ An example is also the launch of an investigation against Facebook on 4 June 2021. The purpose of the investigation is to assess whether Facebook has infringed EU competition rules by using advertising data collected mainly from advertisers to compete in markets where Facebook operates, such as advertisements. According to the Commission, the formal investigation will also assess whether Facebook connects its online classified advertising service 'Facebook Marketplace' to its social network, thus infringing EU competition rules

¹⁸ Broadbent M., *op. cit.*, note 8, p. 8

for a DMA regulation. The proposal is in line with the DMS proposal and the Commission's digital strategy by contributing to ensuring a fair and competitive digital economy, one of the three main pillars of policy orientation and objectives published by the Commission in its Communication "Shaping Europe's digital future".¹⁹

As an example of sanctioning the conduct of large online platforms by standard competition law institutes, we cite the case of Facebook. The German antitrust authority (Bundeskartellamt) initiated proceedings²⁰ against the company in 2016, following a suspicion of abuse of a dominant position regarding the use of the platform's user data. The German authorities decided that Facebook abuses its dominant position on the market when collecting, linking, and using users' data, thereby violating the rules on the protection of personal data, which may also be an abuse of its dominant position by imposing unfair terms on Facebook users. The German antitrust authority did not impose a fine on the company concerned, but an obligation to incorporate defined rules into its terms of service and prohibited the company from automatically linking data on users from other sources to Facebook accounts without the users' permission. Since Facebook did not agree with the decision, it appealed to the Higher Regional Court of Düsseldorf, which ordered the suspension of the Bundeskartellamt's decision. Finally, the case was brought before the Federal Court of Justice of the Federal Republic of Germany, which referred the questions for a preliminary ruling to the EU Court of Justice (C-252/21).²¹ However, the case has not yet been finalised. The dispute is significant in terms of the further direction of regulation on the Internet and the decision is considered a milestone in the area of the right to privacy of internet users. The decision closes a three-year investigation of Facebook by the German Antitrust Authority. "*Facebook will no longer be able to force its users to agree to the virtually unrestricted collection of non-Facebook data and its assignment to Facebook users' accounts,*" said Andreas Mundt, head of the antitrust office. According to the Authority, Facebook abused its position by forcing users to allow it to collect data from other services belonging to the company, such as WhatsApp and Instagram, but also from third party websites and to associate them with Facebook

¹⁹ Regulation 2019/1150 of the European Parliament and of the Council (EU) of 20 July 2019 on the promotion of fairness and transparency for commercial users of online intermediation services, (Text with EEA relevance), [2019], OJ L 186

²⁰ Bundeskartellamt Case B6-22/16, 6 February 2019, available at: [<https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html>], Accessed 25 March 2022

²¹ Case C-252/21, Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 — Facebook Inc. and Others v Bundeskartellamt, available at: [<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62021CN0252>], Accessed 15 May 2022

accounts.²² The case in question was also analysed in more depth in the Slovak professional paper.²³

Another notable example from Austria and Germany is Amazon, which has faced an investigation of its anti-competitive behaviour since 2018. Amazon has been investigated in relation to the application of unfair terms to vendors, which included a wide range of contractual terms such as the decisive place of dispute Luxembourg, the extension of vendors' liability, the authorisation to block vendors' accounts, the conditions for returning goods and payments, the imposition of confidentiality obligations and others.²⁴ Finally, the proceeding ended with a settlement where Amazon voluntarily accepted commitments to refrain from using certain practices. The investigation itself lasted over seven months.²⁵

With reference to the examples in question, it can be hypothesised that regulation using the instruments of current competition law is not excluded, however they are relatively lengthy procedures. In addition to the problem of subsuming the modern practices of "gatekeepers" of access under standard regulatory competition instruments, a possible fragmentation of the internal market appears to be a risk, which could be caused by the inconsistent approach of Member States to penalise "gatekeepers" of access and requires close interaction between national competition authorities.

4. WHO IS A "GATEKEEPER"

A "gatekeeper" is a large online platform that has not yet been legally defined. This platform has such an impact that it controls access to digital markets and has gained a strong position in them.²⁶ For gatekeepers, DMA defines both quantitative criteria (relating to indicators such as market shares, the number of users affected by the operation of the platform, the time users remain on the platform site and the annual economic revenues of the platform) and qualitative criteria

²² Deutschlandfunk, Bundeskartellamt zu Facebook und GoogleBonn gegen Silicon Valley, 22 June 2021, available at: [<https://www.deutschlandfunk.de/bundeskartellamt-zu-facebook-und-google-bonn-gegen-silicon-100.html>], Accessed 25 March 2022

²³ Kalesná K.; Patakyová M. T., *Digital platforms: competition law versus ex ante regulation*, Právny obzor, Vol. 104, No. 1, 2021, pg. 31, available at: [<http://www.pravnyobzor.sk/12021/po12021-kalesna-patakyova-digital-platforms-competition-law-versus-ex-ante-regulation.pdf>] Accessed 25 May 2022

²⁴ Cabral, L. *et. al.*, *loc. cit.*, note 12

²⁵ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Report on Competition policy 2017, COM (2018) 482 final, 18 June 2018

²⁶ Clevinger, A., *What is a Gatekeeper in marketing: definition and tips*, 5 May 2021, available at: [<https://snov.io/glossary/gatekeeper/>], Accessed 25 March 2022

(which are more difficult to identify but could, for example, indicate the ability of the platform to control access to a large number of users). For the first time, in Article 3 paragraph 1, DMA introduces and defines a new concept, a new category of entities – “gatekeepers” of the approach. Accordingly, a provider of essential platform services shall be designated as a gatekeeper of access where: a) it has a significant impact on the internal market; b) it operates a core platform service that serves as an important gateway for commercial users to end-users; and c) it has an established and lasting position in its activities or can be expected to achieve such a position in the near future.

This status implies obligations for the data subject consisting in carrying out of certain practices, refraining from certain action or prohibiting a certain action, which are further defined in the article below. In line with the opinion of the national competition authorities on DMA, this legislation has been identified as an effective complementary instrument. Following the above, the role of the European legislative authorities is made more difficult by the fact that it is quite difficult to maintain a balance between creating an environment open to digital innovation so that it can be globally competitive, while maintaining a high level of protection for users of these platforms and protecting competition.²⁷

Defining which platforms will be designated as “gatekeepers” and therefore subject to the obligations and prohibitions of DMA is important for several reasons. Firstly, this is important for platforms that may potentially fall under the criteria set for appointment, as designated “gatekeepers” will be subject to a comprehensive set of obligations and prohibitions that will have a significant impact on their business operations. Secondly, the designation criteria must avoid the pitfalls of excessive and insufficient inclusiveness. Excessive inclusiveness may adversely affect the strength of the obligations and prohibitions imposed on designated “gatekeepers”, as some digital platforms that are not apparent “gatekeepers” (because they are not a necessary gateway between the enterprise and end-users) are nevertheless concerned that they will be designated for them (because they will meet the quantitative thresholds set out in Article 3 paragraph 2 of the Act) are likely to lobby against DMA, thereby reducing its industrial support. These conditions will be met if the company has:

- a strong economic position, a significant impact on the internal market and is active in several EU countries,
- a strong intermediary position, which means that it connects a large user base with a large number of enterprises,

²⁷ Cabral, L. *et. al.*, *loc. cit.*, note 13

- (or will soon have) a firm and lasting market position, which means that it is stable over time.²⁸

Among the duties of “gatekeepers” we include:²⁹

- a. notification obligation: e.g. when the service provider of the underlying platform meets all the thresholds of the gateway administrator, it shall inform the Commission thereof within three months;
- b. the obligation to ensure freedom for users: this includes, for example, freedom of pricing for corporate users (allowing business users to apply different prices and terms to the same products or services through third-party online intermediation services), freedom to do business outside the platform (allowing business users to promote their assortment and conclude contracts with their customers outside the gatekeeper’s platform), and others;
- c. the obligation of data portability in accordance with the GDPR;
- d. mandatory transparency provisions:
 - in online advertising: providing advertisers and publishers with information on the prices they have to pay and the remuneration to be paid to them for the advertising services of the gatekeeper, and providing them with information on the measurement tools and information necessary to enable them to carry out their own independent activities, verifying the advertisements hosted by the gatekeeper’s platform;
 - in search engines: ensuring access to other providers of online search engines under fair, reasonable and non-discriminatory conditions for the evaluation, querying, click-through and display of search data by end-users;
 - for profiling: the provision of descriptions of how consumer profiles used by the gatekeeper in their core platform services are controlled in a technologically independent manner.
- e. Equal access to app stores: fair and non-discriminatory general conditions of access for business users to the software app store.

On the other hand, “gatekeepers” are also subject to certain prohibitions.³⁰

²⁸ European Commission, *The Digital Markets Act: ensuring fair and open digital markets*, 2021 [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en], Accessed 25 March 2022

²⁹ Domokos, M.; Horvát, K.; Petrányi, D.; Szendrő, S., CMS: law, tax, future, *Digital Markets Act: a new and fair business framework for large platforms*, 2022, available at: [<https://cms.law/en/int/publication/digital-markets-act>], Accessed 15 May 2022

³⁰ *Ibid.*

- a. Prohibition of combining personal data without the consent of the GDPR: it is forbidden to combine personal data obtained from the services of the core platform with personal data from any other services offered by the gateway administrator or with personal data from third party services and from logging end-users into other services of the gatekeeper in order to combine personal data, without the consent of the GDPR.
- b. Prohibition of preventing or restricting corporate users from raising issues with any relevant public authority in connection with any practice of the gatekeeper.
- c. Prohibition of mandatory subscription to other services: users are not required to subscribe to or register for other core platform services as a condition of accessing, registering or registering for any of the core platform services.
- d. Information barrier: competition with commercial users no longer uses publicly available data generated or provided by business users of the services of the underlying platform.
- e. Non-discrimination in the evaluation: more favourable treatment of the products and services of the gatekeeper compared to similar services or products of third parties is prohibited and fair and non-discriminatory conditions must apply to such evaluations.

The regulation in question also includes penalties which, in the event of non-compliance with the DMA rules, fines up to ten percent of the company's total worldwide annual turnover or penalties of up to five percent of the average daily turnover will be imposed on the operators concerned.³¹ Consequently, in the event of a systematic breach by the “gatekeepers” of the obligations imposed by the DMA, additional remedies may be imposed on the “gatekeepers” following the market investigation. However, such remedies will have to be proportionate to the offence committed. Where necessary and as a last resort, non-financial remedies may be imposed. These may include behavioural and structural measures, e.g. the sale of a (part of a) business.³²

5. DIGITAL SERVICE ACT

Although DSA is not the subject of this article, its connection with DMA is significant, we will at least marginally approximate its main contours. Digital services cover a wide range of online services, from simple websites to Internet infrastruc-

³¹ Alison group, *loc. cit.*, note 10

³² European Commission, *The Digital Markets Act: ensuring fair and open digital markets*, *loc. cit.*, note 28

ture services and online platforms. The rules specified in the DSA apply primarily to online intermediaries and platforms (e.g. social networks, app stores and online platforms for travel and accommodation, etc.) The DSA contains rules governing online platforms of the gatekeepers. Trafficking and the exchange of illicit goods, services and online content is also a major concern. Online services are also being abused by the manipulative algorithmic systems to amplify the spread of disinformation and for other malicious purposes. Despite a number of targeted, sector-specific interventions at EU level, there are still significant gaps and legal burdens that need to be addressed. There are many discussions on aspects related to illegal content and responsibility for such content. The liability regime of online platforms under the conditions of the existing regulation was processed in a valuable article by Rózenfeldová and Sokol.³³ On the other hand, the Digital Markets Act (DMA), regulates the market behaviour of digital platforms.³⁴

The pandemic clearly demonstrated how quickly and to what extent irrationality can prevail regardless of education and age. In India, reports spread through social media have led to pogroms.³⁵ In response to the Australian radical's shooting at a mosque in Christchurch, New Zealand, which was broadcast live on social media, Microsoft's president, Brad Smith, argued that the technology sector needs to do more, including working with governments, through legal guidance and working with regulators. In response to the massacre, New Zealand's Prime Minister Jacinda Ardern called on Facebook to introduce "ethical algorithms". Facebook has indeed come up with artificial intelligence that should block live broadcasts in a similar violent case. The Cambridge Analytica case was also a big problem for this company. This was a large-scale abuse of private data for commercial policy purposes, with possible overlap into the electoral process. Until then, and even shortly after, Facebook was reluctant, and according to some statements, unable, to effectively regulate content.

At the political level, the problem, as Urmas Villmann said, is that minority votes receive extreme attention. Some politicians (Donald Trump, Luboš Blaha) have seized the opportunity to spread their agenda based on negative emotions and

³³ Rózenfeldová, L.; Sokol, P., *Liability regime of online platforms new approaches and perspectives*, in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), *EU and Comparative Law Issues and Challenges Series (ECLIC)*, Vol. 3, 2019, p. 871

³⁴ CMS: Francis Lefebvre, *Régulation des marchés numériques. La proposition de la commission est maintenant sur la table*, 2021, available at: [<https://cms.law/fr/fra/news-information/regulation-des-marches-numeriques>], Accessed 25 March 2022

³⁵ Author's note: Pogrom is a violent action against a religiously, racially, or nationally defined group of people, usually associated with murder and looting. In a broader sense, mass violent action against any group of the population

half-truths through social networks. On the other hand, research shows that most people are aware that they receive free internet services in exchange for giving up part of their privacy and that this trade suits them. Targeted advertising, however, has not only benefited consumers in the form of free services or more relevant advertising, but above all has increased the competitiveness of small and medium-sized enterprises, which have been able to start effective advertising campaigns with a minimum budget and thus compete with established players. In this way, internet platforms have managed to increase competition on the market more than all the antitrust authorities combined.

It can therefore be said that one of the main shortcomings of DMA is the very definition of “gatekeepers”. They do not really hold a dominant position within the economy as a whole. In digital services, too, there is intense competition between platforms, while at the same time their position on the market is constantly being confronted by new innovators. The only space where the gatekeepers have the ability to influence the rules of the game is on their own platform. There, they have full control over the setting of conditions for users but have no incentive to set them unfavourably. This is best seen in the various practices that the DMA proposal restricts or directly prohibits.

6. CONCLUSION

At present, the European institutions have consistently pointed out that attempting to legislate on the subject at European level is undoubtedly more effective than at national level.³⁶ According to the European Commission, DMA will address the way in which some technology companies have used their size and ingrained position to become “gatekeepers” whose control over access to digital markets gives them disproportionate power over other companies and consumers. The adoption of DMA³⁷ will increase companies’ chances of finding a foothold in digital markets and help them overcome barriers stemming from market failures or unfair trading practices of “gatekeepers”. It will offer a customized regulatory solution in

³⁶ CMS: Francis Lefebvre, *loc. cit.*, note 34

³⁷ On 25 March 2022, a so-called “fast-paced political agreement” was concluded between the European Parliament and the EU Member States on DMA. Internal Market Commissioner Thierry Breton said: “This agreement concludes the economic part of our ambitious reorganisation of our digital space in the EU internal market. We will quickly work on determining the “gatekeepers” on the basis of objective criteria. They will have to comply with their new obligations within 6 months of designation. Through effective enforcement, the new rules will bring increased competition and fairer conditions for consumers and business users, allowing more innovation and choice on the market. No company in the world can turn a blind eye to the prospect of a fine of up to 20% of its global turnover if it repeatedly breaks the rules.” European Commission, *Digital Markets Act: Commission welcomes political agreement on rules to ensure fair and open digital markets*

an environment where there is currently a gap. This will encourage the emergence of alternative platforms that could provide quality innovative products and services at affordable prices. A significant reduction in the fragmentation of the internal market is also expected, thereby unlocking the growth potential of the digital single market.³⁸ The new rules, which created a level playing field, would allow small and medium-sized enterprises (including commercial users competing with “gatekeepers”)³⁹ to grow across the internal market by removing significant barriers to market entry and expansion. It can be expected that the planned measures could also lead to greater competition between platforms for commercial users. This is expected to translate into higher quality services at more competitive prices and also in higher productivity. In addition, commercial users would have more confidence in online sales as they would be protected from unfair practices.⁴⁰ The burden on the Commission to implement this initiative (especially the redistribution of existing jobs) is low compared to the economic benefits. National authorities would have to bear some minor administrative costs.⁴¹ Ultimately, DMA gives the Commission the power to conduct market surveys to ensure that the obligations laid down in the Regulation are kept up to date in the constantly evolving reality of digital markets.

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³⁸ Accompanying document Regulation 2020/0374 of the European Parliament and of the Council of 15 December 2020 on competitive and fair digital markets (Digital Markets Act) COM (2020) 842 final 2020/0374(COD), [https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2020/0842/COM_COM(2020)0842_EN.pdf] Accessed 25 May 2022

³⁹ Schweitzer, H., *The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal*, last updated 30 April 2021, Forthcoming, ZEuP 2021, Issue 3, available at: [https://ssrn.com/abstract=3837341], Accessed 25 May 2022

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