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Review article

VARIOUS CONSEQUENCES OF DIGITAL MARKETS ACT ON GATEKEEPERS*

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ABSTRACT

On November the 1st, The European Union's new Digital Markets Act (DMA) entered into force. At present, the DMA is at its crucial implementation phase and will come into force in six months, as of 2 May 2023. After that, within two months (and at the latest by 3 July 2023), potential Gatekeepers will have to notify their core platform services to the Commission if they meet the thresholds established by the DMA.

DMA was made with the purpose of improving customers' digital lives, and part of that means reduction of the influence of Gatekeepers by several restrictions. Gatekeepers are defined by DMA as digital platforms that provide an important gateway between business users and consumers – whose position can grant them the power to act as a private rule maker, thus creating a bottleneck in the digital economy.

As the time passes, Gatekeepers should adapt to this new regulation and corresponding restrictions. DMA established a list of rules that Gatekeepers now need to implement in their habitual activities and practices. For instance, among other requirements, the DMA requires companies marked as Gatekeepers to now allow third-party apps to be installed on their devices.

In this article, we will focus on the implementations, in which specific Gatekeepers, had to make or are going to make changes, which will be in accordance with the demands of the DMA. The methodology used to identify the 'situations' cannot be separated from the problems

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that this regulation seeks to address. We will point out some of the steps that are expected by specific Gatekeepers (members of the GAFAM group) to reconcile with the DMA demands.

In this article we will also outline the role of the European Commission, as the Gatekeepers in question will notice whether they meet the thresholds established by the DMA.

This article reveals the various provisions of the DMA in relation to Gatekeepers and points out some of the consequences of these provisions.

***Keywords**: European Commission, e-commerce, Digital Markets Act, fair business, Gatekeepers*

1. INTRODUCTION

On 12th October 2022, the European Union published the final version of its new Digital Markets Act[1]. In this article we will also apply a shortened version - DMA. The legal basis for the DMA is Article 114 TFEU[2] which ensures the functioning of the single market and is the relevant legal basis for this initiative. Its aim is to ensure future competitiveness and fairness of digital services where so-called gatekeepers are present (Article 1 paragraph 1 DMA and Recital 7, 32, 33 DMA). It is a piece of legislation that regulates the business behaviour of so-called digital gatekeepers – service providers of the core platform on which businesses depend when reaching their customers. Such companies have a strong and permanent market power. Despite its proximity to competition policy, the DMA can at first sight be described as a sector-specific regulation with asymmetric applicability targeting the so-called gatekeepers within the framework of established services of the core platform.[3]

There is a widespread opinion[4] that competition law enforcement in the digital sphere has been too complex and too slow over the former decade. The Commission shares this view too (Rec. 5 DMA).[5] The DMA intends to confront this deficit by transitioning from the enforcement of ex post control (i.e., the traditional instruments of abuse control) to ex ante behavioural regulation.[6]

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1 Regulation (EU) 2022/1925 of the European parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act).

2 Treaty on the Functioning of the European Union.

3 Article 2 paragraph 2 and 3 DMA, see also section 2.2 a Recital 10 DMA.

4 Budzinski, O.; Mendelsohn, J., Regulating Big Tech: From Competition Policy to Sector Regulation? (Updated October 2022 with the Final DMA) Ilmenau Economics Discussion Papers, Vol. 27, No. 168, 2022, pp. 1- 6, Available online at: [http://dx.doi.org/10.2139/ssrn.4248116], Accessed 6 April 2023.

5 and prominently Furman *et al. Unlocking Digital Competition, Report of the digital competition expert panel*. 2019 Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf], Accessed 24 April 2023.

6 *Ibid.*

The final text of the DMA is even more stringent than its proposal was, primarily due to the European Parliament. It has played an indispensable role in expanding the list of services covered by the DMA by adding new rules of conduct and increasing sanctions. In April 2022, Cédric O, the French Minister for the Digital Economy, called the agreed legislation "the most important economic regulation in recent decades".

We presume that the DMA will largely change the way gatekeeper platforms operate in Europe and resolve the shortcomings highlighted in the UK's Furman report, the US's Stigler report and the EU's Vestager report. In particular, all three reports asserted that the core platform markets were globally dominated by one or two of the same five companies: Google, Apple, Facebook, Amazon and Microsoft (The GAFAM group). While jurisdictions such as the United States and the United Kingdom are also considering similar regulations, the EU Digital Markets Act is the first of its kind.

While the Digital Markets Act is not without its imperfections, and a number of issues we will focus on in this article remain to be addressed (such as the very definition of gatekeepers), the legislation is likely to have more potential to maintain the market power of large technologies than the Competition Act. In this article, our attention will be drawn to the issue of the very definition of who should be a gatekeeper according to the DMA (not only the GAFAM group), some introductory provisions of the DMA (for example, Recital 10, 36, 52 of the DMA and others) and, in accordance with the wording of the effective text of the DMA, the provisions of Article 5 – the obligations of access gatekeepers, pointing out some specific actions of market gatekeepers from the GAFAM group that they have carried out.

2. DMA REGULATING THE GATEKEEPERS

By the DMA the Commission reacts to challenges posed by the business practises of large online platforms by the new regulation, which applies to core platform services offered to end users and bussines users by gatekeepers, which are located or established in Euroepan Union.[7] Several authors[8] agree that the legislation in question will mainly regulate the public law aspects of online platforms. DMA

[7] Article 1 paragraph 2 DMA.

[8] Rudohradská, S.; Hučková, R.; Dobrovičová, G. *Present and Future – A Preview Study of Facebook in The Context Of The Submitted Proposal For Digital Markets Act*, in: EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 6, 2022, pp. 505-506 Available online at: [https://doi.org/10.25234/eclic/22440], Accessed 1 May 2023.

regulation is often referred to as a new instrument of economic competition.[9] The high degree of market concentration is due to an unusual combination of factors that characterise the digital platform market:

- strong network effects,
- high return on data usage,
- economies of scale and ease of utilizing the consumer biases.

These factors make markets prone to tipping in favour of one or two players, and once the market is tipped, high barriers to enter make it difficult for newcomers to compete, even if they had a more remarkable product.

The objective of DMA is twofold. Firstly, to remove barriers to entry in digital markets (to make them more open to competition) and, secondly, to make them fairer for businesses and end-users, by laying down certain basic rules on conditions of use. For this reason, the DMA subjects gatekeepers to a set of strict rules of conduct. The European Commission will first identify market gatekeepers and it is fully expected that GAFAM will be included on the list according to the Article 3 of the DMA. In order to counter the strength of these gatekeepers, a list of obligations under the Articles 5, 6, 7 of the DMA is defined, together with various measures (under the Article 8 of the DMA) for their approval. Additionally, a list of sanctions is also defined, including penalties under the Article 30 of the DMA, to punish non-compliance with the obligations.

According to the DMA defined gatekeepers are obliged to follow defined list of practices that are regarded as limit contestability or to be unfair according to Article 5 of DMA. These obligations of conduct are divided into 3 lists, one headlined "obligations for gatekeepers" (Art. 5 DMA), the second qualified by the supplement "susceptible of being further specified" (Art. 6 DMA), and the third referring to "obligations for gatekeepers on interoperability of number-independent interpersonal communication services" (Art. 7 DMA).

Art. 5 DMA prohibits designated gatekeepers to conduct sixteen strategies. To point out to some of them:

In accordance with Article 5 provision 2 are prohibited:

(a) third-party data-processing for the purpose of online advertising,

[9] Rudohradská, S.; Treščáková, D. *Proposals For The Digital Markets Act And Digital Services Act: Broader Considerations In Context Of Online Platforms.* EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 5, 2021, p. 497, Available online at: [https://doi.org/10.25234/eclic/18317], Accessed 6 April 2023.

(b) combining personalized data extracted from the core platform service with data from other services of the same company or from third parties,

(c) cross-using personalized data across the services of the gatekeeper

(d) cross-service signing of end users,

These prohibitions are closely connected to the EU's regulation - General Data Protection Regulation (2016/679, "GDPR")[10]and are giving end users a possibility of free choice of the level of providing personal information to a gatekeeper. In these provisions, DMA refers to the definitions given by the GDPR, so only on these personal data can the DMA make restrictions, not on those, which are out of scope of the definition in the GDPR. The other connection with the GDPR are criteria of giving a standard of consent of end users to gatekeeper. The DMA outlined how gatekeepers can meet the consent standard. In Recital 37, according to which:

1. when requesting consent, the gatekeeper should proactively present a user-friendly solution to the end user to provide, modify or withdraw consent in an explicit, clear and straightforward manner,
2. consent should be given by clear and free action or statement, specific, informed and unambiguous indication of agreement by the end user, as defined in the GDPR,
3. only where applicable, the end user should be informed that not giving consent can lead to a less personalized offer, but that CPS will otherwise remain unchanged. Thus, the DMA outlined how gatekeepers can meet the consent standard.)

Some of the gatekeepers are using third-party data processing for the purpose of their online marketing. However, in compliance with GDPR – for example, if the platform acquired datas based on consent, the consent should've included the possibility to transmit the data to other recipients for their own direct marketing. Simply summarized, gatekeepers are using data from end - users in order to benefit on their own services and products by using these data for other of services which they provide or third party. In the end of the day Gatekeepers cannot use their own data about consumers to compete with their business users. Giving as an example Facebook (Meta) it prevents it from harvesting personal data from Instagram and exporting that same data to Facebook so that it could target new advertising to the user in question using the same data.

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

Another range of prohibitions is connected with combining personal data – known as CPS. Following provisions are closely connected to the concept of "core platform service", also shortened as "CPS", which definition needs to meet with the definition of gatekeeper (besides other conditions), who must offer these services. CPS is defined as online intermediation services, online search engines, online social network services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services, web browsers, virtual assistant, or online advertising services. Indications of these provisions is explained in the recital 36 DMA as a concern, that gatekeepers are making unfair steps to violate the contestability of CPS.

- In accordance with Article 5 provision 3 the gatekeeper may not restrict business users in the way, price, and conditions they promote and sell their good through other online channels, which means that in certain cases, through the imposition of contractual terms and conditions, gatekeepers are able to restrict the ability of business users of their online intermediation services to offer products or services to end users under more favourable conditions, including price. In the end, where such restrictions relate to third-party online intermediation services, they limit inter-platform contestability. In the end the choice of end user is limited.
- In accordance with Article 5 provision 5 the gatekeeper may not restrict consumers in using software applications of business users through the core platform service - for example mobile phone consumers could use apps that are not approved by Google or Apple.
- In accordance with Article 5 provision 7 exclusivity of platform, i.e., requiring end users to use or business users to use, offer or interoperate with identification services, payment services (including payment systems for in-app transactions), and web browser engines in the context of the core platform service, as for example it will allow end users to install third party apps or app stores that use or interoperate with the operating system of the gatekeeper;
- In accordance with Article 5 provision 8 requiring business or end users to subscribe or register with any further core platform service, so for example Google might be forced to allow users to access some services without subscribing
- In accordance with Article 5 provision 9 and 10, where some publishers do not provide their consent to the sharing of the relevant information with the advertiser, the gatekeeper should provide the advertiser with the information about the daily average remuneration received by those publishers for the relevant advertisements. The same obligation and principles of sharing the relevant information concerning the provision of online advertising services

should apply in respect of requests by publishers. Since gatekeepers can use different pricing models for the provision of online advertising services to advertisers and publishers, for instance a price per impression, per view or any other criterion, gatekeepers should also provide the method with which each of the prices and remunerations are calculated.

- Another important provision might be Article 5 provision 9 and 10 which is associated with the conditions (which are opaque and frequently non- transparent) under which gatekeepers provide online advertising services to business users - both advertisers and publishers. Gatekeepers are obliged to provide of information regarding placed advertisements and advertising services to advertisers, i.e., withholding information about prices and fees etc.[11] The gatekeeper should provide the advertiser with the information about the daily average remuneration received by those publishers for the relevant advertisements. As a result, by providing of this information allows advertisers to receive information that has a satisfactory standard of confidentiality necessary to compare the costs of using the online advertising services of gatekeepers with the costs of alternative online advertising services.

Many of these requirements[12] interfere with the very core of big technology business models, which is why there is a legitimate concern about how the gatekeeper will tackle them. Failure to comply with the rules could lead to a significant financial sanction: a single infringement could result in a fine of up to 10% of the gatekeeper's total worldwide turnover. For repeated offenses, the fine can rise up to 20%, and the gatekeeper may further be prohibited from entering mergers and acquisitions.

3. THE GROUP 'GAFAM'

'Big Tech' or 'Tech Giants', refers to the five most dominant companies in the information technology, industry. It includes the largest American tech companies: Google, Amazon, Meta (Facebook), Apple and Microsoft. These companies are referred also to as the Big Five – GAFAM.

Our personal data threatens a new crossing of the Atlantic."[13] These companies are considered 'access gatekeepers' because their power is so great that they can block the entry of new competitors. They can also easily expand into new seg-

[11] Article 5 provision 9 and 10 DMA.

[12] More obligations and restrictions are defined in the Art. 6 and 7 as already mentioned.

[13] Halpin, P. *Ireland challenges Facebook in threat to cross-border data pac*t, 2017, Available online at: [https://www.reuters.com/article/ctech-us-eu-privacy-facebook-idCAKBN15M1K8] Accessed 23 April 2023.

ments – especially through tied sales or by taking over the competitors. The need for the specific monitoring of the established DMA is therefore a necessity. However, GAFAM group is not intended as a single objective, otherwise the legislation could be labelled as discriminatory due to its focus on only one country - America. The text of the DMA therefore sets out criteria, such as turnover or number of users, which enable to determine whom these 'access gatekeepers' are specifically to monitor. However, on the basis of the quantitative and qualitative criteria[14] established by the DMA, the provisions of the DMA will certainly apply to the GAFAM Group.[15]

Several authors were sceptical or even critical about the definition of market gatekeepers. For example, Kerber was slightly sceptical about this definition, pointing to the question of whether the concept of gatekeepers is adequate and whether it can also serve for definitions from an economic point of view, not just a legal one.[16] Another example is the group of authors Budzinski, Gaenssle & Lindstädt-Dreusicke, who dealt with the issue of services to which DMA only applies partially. These are services providing similar goods to consumers standing between each other at a horizontal level of economic competition. By that they mean video-sharing platform services such as YouTube which are on the list of services of the basic DMA platform, while other types of video sharing and streaming services are not on the list (for example, subscription-based video and audio streaming platforms, such as Netflix, Amazon Prime, Apple Music, Spotify, etc). However, in the end of the day, empirical evidence strongly suggest that services like YouTube are in competition with services like Netflix and co.[17]

Thus, a different treatment of competing services may arise based upon the business models. For now, if you run your provision of video content on demand as a video-sharing platform (advertised-financed), you may end up on the 'gatekeeper' list, if you do so by employing a retail model (subscription-based), you will not. This in turn means that special responsibilities may not always be assigned due to superior market power – as is the case in competition law – but solely based on choice of the business model. The possibility to extend the list of so-called core

14 Article 3 DMA.

15 Cabral, L. *et. al.*, *The EU Digital Markets Act*, Publications Office of the European Union, Luxembourg, 2021, p. 9, Available online at: [https://publications.jrc.ec.europa.eu/repository/handle/JRC122910], Accessed: 4 April 2023.

16 Kerber, W., *Taming Tech Giants with a Per-Se Rules Approach? The Digital Markets Act from the 'Rules vs. Standard' Perspective*, in: Concurrences No. 3, 2021, p. 28-34, Available online at: [http://dx.doi.org/10.2139/ssrn.3861706], Accessed 24 April 2023.

17 Budzinski, O., Gaenssle, S. & Lindstädt-Dreusicke, N. *The battle of YouTube, TV and Netflix: an empirical analysis of competition in audiovisual media markets.* SN Bus Econ 1, 116, [2021]. p. 19-24, Available online at: [https://doi.org/10.1007/s43546-021-00122-0], Accessed 24 April 2023.

platform services opens the scope for both correcting unfortunate service denominations and the addition of services that may be considered 'core' in the future. However, the focus on the business model 'platform' appears to be somewhat set-in stone, meaning that a dominant digital retailer (vertical) cannot become a gatekeeper, only a marketplace service provider can.[18] We believe that this fact creates a space for the possible future repair of services that will be considered basic.

Expetionally vast players, with a key position in the digital market, are the primary object for regulation. On the one hand, because of their economic strength, but also on the grounds of their power in shaping the digital environment. However, there are many more companies like Google, Apple, Facebook, Amazon and Microsoft (GAFAM) whose behaviour has a strong impact on the digital economy. While they are not (yet) dominant in their respective markets, network and tipping effects can rapidly increase their market strenght and may have better bargaining power towards large groups of customers and business partners well below the dominance threshold.

The current legal framework is less than optimal in regard to not only an extensive but also a wider spectrum of digital players. Having gained experience from the regulation currently being implemented, European legislators should extend it to a more complex regulatory framework, including, among others, companies with market power under dominance (potentially according to a context-specific interpretation of the integrated concept of 'relative' market power in the legislation of some EU Member States).[19] In line with its broader scope, such a more conventional regulatory framework should not impose compliance obligations in general as well as obligations regarding the compliance review of others that are as far-reaching as those of gatekeepers. However, it should pay particular attention to the risks of market tilting, oligopolisation and path dependences arising from the data-related activities of non-Gatekeeper companies.[20]

It is also important to note that the EU does not condemn the dominant position of these gatekeepers, but the abuse of dominant position by gatekeepers themselves.

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[18] *Ibid,* p. 2.

[19] For an overview on relative market power in EU Member State competition law, cf Eckart Bueren, Anna Wolf-Posch and Peter Georg Picht, 'Relative Marktmacht im D-A-CH-Rechtsraum' [2021] Zeitschrift für Wettbewerbsrecht 173.

[20] Picht, P.; Richter, H., *EU Digital Regulation* [*2022*]*: Data Desiderata,* GRUR International, Vol. 71, Issue 5, 2022, pp. 395–402, Available online at: [https://doi.org/10.1093/grurint/ikac021], Accessed 6 April 2023.

4. (POSSIBLE) IMPACT OF DMA ON GAFAM

Unsurprisingly, large tech corporations are actively lobbying against these regulations. In 2021, according to TechCrunch, the big five – Google Apple Facebook Amazon Microsoft – spent more than €27 million together lobbying against DMA and DSA, a sharp increase compared to previous lobbying spending.[21] The contribution of a fair European market for all players is more than welcome, especially for the reason of finding a balance between regulating illegal content and ensuring that freedom of expression is not restricted.

As stated in the DMA,[22] digital service providers will no longer be able to prioritise their own products, use personal data of consumers using services provided by a third party on their platform, use certain linking practices or restrict platform users. However, advertisers will have access to aggregated and non-aggregated data for the ads they run. They will be able to analyse the data themselves using their own set of tools. In practice, these obligations relate to default settings, sideloading, third-party applications, access to business user services, data provision, interoperability of messaging services, combating bundling and circumvention.

In regard to 'bundling' practices, the DMA preamble limits this obligation to 'ancillary services', which means identification systems, payment systems and web browser tools.

A good example of a type of behaviour that is prohibited is Amazon's use of personal data.[23] In 2020, the European Commission accused Amazon of misusing personal data about the activities of third-party vendors in its favour.[24] Executive Vice-President Margrethe Vestager, in charge of competition policy, said: "We must ensure that dual role platforms with market power, such as Amazon, do not distort competition. Data on the activity of third-party sellers should not be used

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[21] Lomas, N. *Report reveals Big Tech's last minute lobbying to weaken EU rules*, 2022, Available online at: [https://techcrunch.com/2022/04/22/google-facebook-apple-eu-lobbying-report/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAARM2od8o0qMEvhK4v6iJtzU2VloYv9ytn5bYj7fpNl2qIm5m8VxiQRngx6ClrlSqTzbMkyIrejb80l7S6m9sYr1mdCH78rAZSM0-j-xrVopjS9OU9NPy1uLj3-O4ICyoSg_ilgFKNpBpKX-GEPm1fh7RDbmKNXuNNGUxsW36xbz], Accessed 24 April 2023.

[22] Recital 51, 52 and following DMA.

[23] Petrov. P, *The European Commission Investigations Against Amazon – A Gatekeeper Saga*, 2020, Available online at: [https://competitionlawblog.kluwercompetitionlaw.com/2020/12/18/the-european-commission-investigations-against-amazon-a-gatekeeper-saga/?fbclid=IwAR1k0vqos1RLEYyVMXityHaZhmqKsyRA4vk7CQw7AxjfTlUh56Pke6weJts#_ftn4], Accessed 4 April 2023.

[24] European Comission. Antitrust: *Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices*, 2020, Available online at: [https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077], Accessed 6 April 2023.

to the benefit of Amazon when it acts as a competitor to these sellers. The conditions of competition on the Amazon platform must also be fair. Its rules should not artificially favour Amazon's own retail offers or give advantage to the offers of retailers using Amazon's logistics and delivery services. With e-commerce booming, and Amazon being the leading e-commerce platform, a fair and undistorted access to consumers online is important for all sellers."

Until now, the Commission has only sanctioned this practice on the basis of abuse of a dominant position, which has meant a long legal process without the certainty that companies will comply to the rules.[25] The summary of the Commission's final decision sets out the periods within which Amazon has to fulfil its final commitments offered to the Commission.[26]

Amazon has a dual role as a platform:

1) provides a market where independent sellers can sell products directly to consumers; and

2) sells products as a retailer in the same market in competition with those sellers.

As a market service provider, Amazon has access to non-public third-party merchant data such as the number of units of products ordered and shipped, merchant revenues on the market, the number of visits to merchant offers, shipping data, past merchant performance, and other consumer product claims, including activated warranties. Pursuant to the effective wording of the DMA, we refer to Article 5 of the DMA, according to which the access gatekeeper may not link personal data from the respective platform with personal data of any other services it provides.

The Commission's current findings show that Amazon employees have large amounts of non-public vendor data flowing directly into Amazon's automated systems, which they collect and use to facilitate Amazon's retail offerings as well as strategic business decisions. All at the expense of other vendors in the marketplace. Amazon is thus able to target its offers of the best-selling products for different

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[25] More information on the investigation will be available on the Commission's competition website, in the public case register under case number AT.40462. Available online at: [https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40462] Accessed 4 April 2023.

[26] 2023/C 87/05 Summary of Commission Decision of 20 December 2022 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Cases AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box) (notified under document C(2022) 9442 final) Available online at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2023.087.01.0007.01.ENG&toc=OJ%3AC%3A2023%3A087%3ATOC] , Accessed 6 April 2023.

product categories. It also adjusts its offers on the basis of these data, thereby favouring it over competitors.

The Commission's preliminary view outlined in its statement of objections is that the use of non-public seller data in the marketplace allows Amazon to avoid the normal risks of retail competition and to exploit its dominance in the market for the provision of market services in France and Germany – the largest markets for Amazon in the EU. If confirmed, this would be contrary to Article 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibits the abuse of a dominant position on the market.[27] With the DMA, the commitments that have been defined and the powers that have been given to the Commission, the situation will certainly evolve and be rectified more efficiently and quickly.

For example, Google, while expressing concerns about the DMA, has already started to comply with the rules and allowed Spotify to use its own payment system in its Android application in accordance with Article 5 DMA, paragraph 7.

Microsoft, along with many smaller companies, welcomed the DMA. "Open platforms are important to innovate for the future and the new European gatekeeper rules will ensure that large online intermediaries, including Microsoft, do more to adapt and make #TechFit4Europe," Microsoft vice president of European Government Affairs Casper Klynge said. In the past, Google has also had a dispute with the Commission – Google Search Shopping Case.[28]

In addition, the DMA also pays regard to the evolution of technology and the digital market by allowing the Commission to create secondary legislation to impose new obligations, add or remove legal elements after market research.

As we have stated earlier in this article, the DMA prohibits gatekeepers from prioritizing their own services over others.[29] The DMA typically includes examples such as restricting Apple's use of its own app store or certain Google data collection practices. For example, access to search engine data should be granted on fair, reasonable and non-discriminatory terms.

To date, there are no known steps to align these practices with the DMA, especially when it comes to Apple. On these issues, Global Policy Director for Spotify

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27 *Ibid,* p. 7.

28 Notified under document number C(2017) 4444 Commission Decision of 27 June 2017 in Case AT.39740, *Google Search (Shopping)*. Available online at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0112(01)&from=EN], Accessed 4 April 2023.

29 Point 52 of the introductory wording DMA.

- Gene Burrus, mentioned some key changes on the grounds of the European Commission that he believes the DMA must force Apple to comply with:

1. Enable an alternative option for in-app purchases on iOS
2. Enable developers/companies to communicate directly with consumers
3. Restrict Apple from prioritizing its own apps.

At this conference, Apple also had its representative, but it can be said that so far there have been no revolutionary changes that would be consistent with the DMA.[30]

5. IMPLEMENTATION OF THE DMA AFTER ENTERING INTO FORCE

"DMA is here to stay and will be quickly mirrored in a number of countries. The flexibility that Big Tech had will be constrained, as the regulatory 'straitjacket' will get tighter globally," said Ioannis Kokkoris, competition law professor at Queen Mary University in London.[31]The DMA - the uniformed rules of the European Union that will prevent from the fragmentation of internal market - will apply from the beginning of May 2023. Within two months, the companies providing the core platform services will have to inform the Commission and provide all relevant information. The Commission will then have two months to take a decision on the appointment of a specific gatekeeper. The designated gatekeepers will have a maximum of six months after the Commission's decision to comply with the obligations set out in the DMA.

The fact is that once the DMA enters into force, it will make national regulation impossible and leave room only for national competition rules, which require an individual assessment of market power and actual effects of behaviour in each individual case. In its final version, the DMA authorizes national agencies to initiate investigations and gather evidence. However, in the interests of a coherent approach to enforcement, only the Commission is currently competent to assess conduct under the DMA and to issue non-compliance decisions.

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[30] Potuck, M., *Spotify says Apple's DMA compliance must include these changes*. [2023] Available online at: [https://9to5mac.com/2023/03/06/spotify-says-dma-apple-compliance-must-do-this/], Accessed 23 April 2023.

[31] Euronews, reteurs and AFP. *The EU's Digital Markets Act: What is it and what will the new law mean for you and Big Tech?*, 2022, Available online at: [https://www.euronews.com/next/2022/03/25/the-eu-s-digital-markets-act-what-is-it-and-what-will-the-new-law-mean-for-you-and-big-tec], Accessed 23 April 2023.

Article 1 paragraph 6 DMA establishes that the DMA is 'without prejudice to the application of': the European competition rules – more specifically, Articles 101 and 102 TFEU and Regulation 139/2004 on merger control, corresponding national competition rules and 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 further obligations on gatekeepers. There are concerns from collective of authors (Drexl, J.,Conde, B., Begoña etc.) which include the possible overly broad blocking effects of the DMA on national rules. These rules may have the unintended consequences of privileging gatekeepers by jeopardizing future national legislative initiatives and ultimately obstructing the achievement of contestability and fairness in digital markets.[32] So in the end, the aim of the DMA in practice (harmonization goal) may result in a different way than it was and is expected. Another risk is a formulation of Article 1 paragraph 5 excluding the national obligations and national laws, which are pursuing the same aim as the DMA (as for example it may not exclude obligations connected to competition laws, contract laws etc.). For that and many other reasons, the narrow interpretation of the concepts of fairness and contestability must be vehement and collaboration of European union and member state is the main key for effective enforcement od the DMA. National antitrust laws must co-exist in harmony with the DMA in order to achieve the desired effect.[33]

On the other hand, the main advantages of the DMA as such lie in the regulator's ability to verify the behaviour of each gatekeeper in order to avoid any detrimental proceedings for the digital market. The measures put in place are intended to ensure that the behaviour of gatekeepers does not create an imbalance in bargaining power. Such imbalance could lead to unfair practices and conditions for business users as well as end-users of the core platform services provided by the gatekeepers, to the detriment of prices, quality, choice and innovation. As pointed out by international law firm Dentons, the DMA likely will become a point of reference for antitrust cases all around the globe.[34]

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32 Drexl, J., *et al.., Position Statement of the Max Planck Institute for Innovation and Competition of 2 May 2023 on the Implementation of the Digital Markets Act (DMA*). Max Planck Institute for Innovation & Competition Research Paper No. 23-11, 2023, p. 1-33, Available online at: [http://dx.doi.org/10.2139/ssrn.4437220], Accessed 10 May 2023.

33 Carugati, Ch., *The Implementation of the Digital Markets Act with National Antitrust Laws*, 2023, Available online at : [http://dx.doi.org/10.2139/ssrn.4072359], Accessed 25 May 2023.

34 Dentons, *EU Digital Markets Act: next steps and long - term outlook,* 2023, Available online at: [https://www.dentons.com/en/insights/articles/2022/december/7/eu-digital-markets-act-next-steps-and-long-term-outlook], Accessed 25 May 2023.

Currently there are a few ongoing workshops in regard with the provisions of the DMA as for example, The DMA and app store related provisions[35], The DMA and interoperability between messaging services (Article 7 of the DMA)[36], Applying the DMA's ban on self-preferencing: how to do it in practice?[37].

There is one problem to propound, defining the strategies focusing to reduce contestability may motivate gatekeepers to find different strategies to empower their products and services.

6. CAN THE DMA ACHIEVE ITS AIMS?

On 14 April 2023 the first Comissions implementing regulation of the DMA was published.[38] The DMA has a unique institutional concept and its relation to national laws as well as other laws on European level is undoubt. As we already mentioned, it might show some problems in practice (Article 1 paragraph 5 and 6 DMA)

The DMA integrates many basic concepts of the EU General Data Protection Regulation (GDPR) and requires the Commission to work closely with data protection authorities. This is a step forward because the regulation of data-driven business models requires an interdisciplinary and inter-institutional approach that has been neglected in the EU competition law prior to this time. An example is the Meta (Facebook) case, which began to be assessed by the German competition authority - the Bunderkartellamt on 2 March 2016.[39] As one of the main objectives for initiating proceedings was that user and device-related data which Facebook collects when other corporate services or third-party websites and apps are used and which it then combined with user data from the social network. The team

[35] The recording of the workshop can be accessed online here: [https://webcast.ec.europa.eu/dma-stakeholder-workshop-on-app-stores-23-03-06], Accessed 6 April 2023.

[36] The recording of the workshop can be accessed online here [https://webcast.ec.europa.eu/dma-workshop-2023-02-27], Accessed 6 April 2023.

[37] The recording of the workshop can be accessed online here [https://webcast.ec.europa.eu/dma-first-workshop-05-12-22], Accessed 6 April 2023.

[38] Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council (C/2023/2530) available online here: [http://data.europa.eu/eli/reg_impl/2023/814/oj], Accessed 25 May 2023.

[39] Case C-252/21, *Meta Platforms and Others,* Request for a preliminary ruling of 24 March 2021, Available online at:[https://curia.europa.eu/juris/showPdf.jsf?text=&docid=242143&pageIndex=0&doclang=EN&- mode=lst&dir=&occ=first&part=1&cid=1565434], Accessed 4 April 2023.

of authors Dobrovičová, Hučková and Rudohradská dealt with the hypothetical course of the proceedings in the event that the DMA was already effective.[40]

A key criticism of the DMA has been its heavy use of per se rules, i.e., legal rules that do not require proving the actual harmful effects of the investigated conduct but outlaw the conduct as such. We will point out to the some of the advantages and disadvantages:

Advantages:

- they are relatively fast paced, which means that enforcement of DMA could be much more effective than enforcement of the EU competition law - In particular, abuse of the rules of a dominant position requires in-depth economic assessments leading to average investigations of more than five years.

Disadvantages:

- they are austere: they can outlaw behaviour that does not cause any real harm in a particular case (leading to 'false positives'),
- they may not capture behaviour that causes harm ('false negatives').
- Co-existence with national laws and other European legislation
- They can be circumvented by the company - gatekeeper adjusting its business behaviour to achieve an anti-competitive result in a way that is not explicitly prohibited.

Although DMA is likely to reduce (some of) the currently known anti-competitive behaviour and measures by GAFAM-style companies, it is unlikely to fill the competition law enforcement gap against digital services for mainly two reasons. Firstly, due to its ex-ante nature, it is unable to address rapidly and effectively the new anti-competitive behaviour and measures most likely to be developed by regulated companies in response to regulatory divestment of their previous instruments. Secondly, it does not deal with the emergence of new gatekeepers and only tries to control them when they distort effective competition. Finally, there is one problem to mention, defining the strategies focusing to reduce contestability may motivate gatekeepers to find different strategies to empower their products and services.

However, in its final version, the DMA contains many corrective mechanisms that would allow the Commission to correct the rules where necessary. It is to be hoped that the Commission will closely monitor the impact of DMA on both businesses and consumers and that it will not hesitate to intervene if necessary. Some authors

[40] *Ibid*, p.3.

agree that the DMA can render the beginning of a feedback loop that will leisurely but steadily increase contestability in the digital sector.[41]

7. CONCLUSION

It should be borne in mind that the DMA is not anticipated to replace but to supplement competition law (Recital DMA 10). However, if it is true that competition policy in its current form is in fact too lenient because of the shortcomings in enforcement, which is also argued in the academic literature,[42] and too slow to effectively address anti-competitive behaviour, an accompanying reform of European law and competition policy is therefore urgently needed.

The DMA will apply from the beginning of May 2023. Within two months, the companies providing the core platform services will have to inform the Commission and provide all correlative information. The Commission will then have two months to take a decision on the appointment of a specific gatekeeper. The designated gatekeepers will have a maximum of six months after the Commission's decision to comply with the obligations set out in the DMA.

Time will tell whether the scepticism of experts, especially regarding the delineation of market gatekeepers is justified. The obligation of gatekeepers to align specific practices with the DMA will soon take on the seriousness. The actions of the GAFAM group companies and other market gatekeepers identified by the Commission under the DMA should benefit the better functioning of the market economy, the competitive environment and consumer protection. Besides, the DMA will provide end users the choice, which is fundamental for them to balance the conditions of the market. The DMA will do it by boosting their privacy, providing greater options and prices for consumers and secure more respect for them as a partners. Only the future will show us the specific gaps, advantages or disadvantages of DMA.

The impact on the GAFAM and other gatekeepers is not exposed yet, we can only make some long - term assumptions on its effect which is the adoption of new 'platform rules' in different countries. For example, in Germany the platform rules will be the part of the Competition acts or in Great Britain, where it will be adopted as a new codex. Even Australia commence work on platform rules. All of

[41] *Ibid,* p. 10.

[42] Bougette, P.; Budzinski, O.; Frédéric M., *Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses*. Forthcoming in the Antitrust Bulletin, GREDEG Working Paper No. 2022-01, 2022, p. 17-23, Available online at [http://dx.doi.org/10.2139/ssrn.4028770], Accessed 24 April 2023.

that is heading to one goal – Protection of competition, or according to the DMA – pure contestability.

One thing, however, remains unquestionable, namely the fact that the work of the European Union should be directed towards a more effective and coherent grasping and revision of competition law at the European level, adapted to modern standards.

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