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Abstract:	<p>The Digital Markets Act (DMA) brings a shift in the legal answers to the questions put forward by the amassing of power in the hands of a few digital “gatekeepers”. The DMA shall restrict this power and ensure “fairness and contestability”. Traditionally, the tools of competition law were used to set the basic rules of how to operate in markets. The shift to a different technique, regulatory law, prompts three questions: First: Why is it necessary to deviate from the path set in competition law? Secondly: What are the differences between the competition law approach and the regulatory approach of the DMA? Thirdly: What are key decision to be taken within the new regulatory framework?</p> <p>At the outset, DMA is presented. The DMA has not been passed as a binding law at the time of writing of this text. References in this text to the DMA relate to the European Commission’s draft of the DMA as put forward on 15 December 2020. While amendments will happen in the legislative process that is expected to be concluded in 2022, the key ideas and the general working mechanism of the DMA seem to stay in the pattern foreseen by the European Commission.</p>
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From competition law to platform regulation – Regulatory choices for the Digital Markets Act

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Abstract

The digital landscape is characterized by the concentration of power in the hands of a few “gatekeepers”. Europe’s legal answer, the Digital Markets Act (DMA), constitutes a new legal approach. It aims at restricting this power and ensuring “fairness and contestability”. Traditionally, the tools of competition law were used to set the basic rules of how to operate in markets. The shift to a different technique, regulatory law, prompts three questions:

First: Why is it necessary to deviate from the path set in competition law?

Secondly: What are the differences between the competition law approach and the regulatory approach of the DMA?

Thirdly: What are key decisions to be taken within the new regulatory framework?

At the outset, the Digital Markets Act is presented. It has not yet been passed as a binding law at the time of writing of this text. References in this text to the DMA relate to the European Commission’s draft of the DMA as put forward on 15 December 2020. While amendments will happen in the legislative process, that is expected to be concluded in 2022, the key ideas and the general working mechanism of the DMA seem to stay in the pattern foreseen by the European Commission.

1. The Digital Markets Act

In December 2020, the European Commission proposed the Digital Markets Act (DMA) to answer widespread concerns regarding the power and market behavior of the operators of digital platforms.¹ Should Alphabet

¹ Cf. European Commission, 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. For a more extensive analysis see de Streeck (2020); Chirico (2021); Ibáñez Colomo (2021); Podszun/Bongartz/Langenstein (2021a); Schweitzer (2021).

be allowed to use the Google search engine to place their own services in better positions than those of other firms? Can Meta require users of the Oculus virtual reality tools to sign up for a Facebook account? Can Amazon withhold transaction data from retailers on its marketplace, even if these data concern transaction of these retailers themselves? Should Apple be obliged to treat app developers fairly and in non-discriminatory way in its app store? These are just some of the questions that will be answered by the DMA.

According to the EU law-making process, the Commission needs to coordinate its position with the Member States (the Council) and the European Parliament. It is expected that the negotiations of the three parties (the trilogue)² will come to a conclusion in the first half of 2022, with the DMA entering into force as an EU regulation in 2023. While some of the details are controversial, politicians in the EU are overwhelmingly in favor of a tougher regime towards digital platforms.³

The DMA shall target “gatekeepers” that operate “core platform services” (CPS), such as online intermediation services, online search engines, networking services or operating systems (cf. Art. 1 DMA draft). In the Commission draft, gatekeepers are companies that are designated as such by the Commission since they have a significant impact on the internal market, operate a CPS which is an important gateway for business users to reach end users, and enjoy an entrenched and durable position in the operations now or in the foreseeable, near future (Art. 3 (1) DMA draft). To give the parties legal certainty, these rather vague requirements may be presumed once certain quantitative thresholds are met, for instance a certain market capitalization or a certain number of users.⁴

It is understood that designation as a gatekeeper will be certain for Google/Alphabet, Amazon, Facebook/Meta, Apple (formerly known as “GAFA”) and Microsoft. How many and which other companies will fall under the gatekeeper-regime is an open question; yet the number of companies targeted by this law will not exceed 10-20.⁵

If a company is designated as a gatekeeper it has to respect specific obligations in its business affairs. These obligations are laid out in Art. 5 and 6 DMA draft. The obligations shall be “self-executing” once the gate-

² For an explanation see <https://www.europarl.europa.eu/olp/en/interinstitutional-negotiations> (accessed 15/01/2022).

³ The European Parliament backed a DMA proposal similar to the one by the Commission with an overwhelming majority of 642 of 696 votes, cf. <https://www.europarl.europa.eu/news/en/press-room/20211210IPR19211/digital-markets-act-parliament-ready-to-start-negotiations-with-council>.

⁴ In the Commission draft the following key figures constitute the threshold: annual EEA turnover of € 6.5 bn., market capitalization of € 65 bn., 45 mio. monthly active end users, 10.000 yearly active business users, see Art. 3(2) DMA draft.

⁵ Cf. DMA Impact Assessment Report, SWD(2020) 364 final, para 14.

keeper status is reached. This means that they shall be applicable without further specification or activation and without an individual assessment by an authority. This is clear for Art. 5, while Art. 6 obligations may be subject to some further specification within a formal procedure, a regulatory dialogue (Art. 7). There may also be tougher merger control rules for gatekeepers.

As regards substance, the obligations cover different matters but mostly deal with the treatment of business users in particular. They shall have access to some data; some exclusivity clauses and other restrictions to competition are forbidden. There shall not be a mandatory use of some ancillary services such as identification services provided by the gatekeeper. Some form of interoperability needs to be established. Self-preferencing of own products or services or those of subsidiaries in rankings is not allowed. Business users need to be treated fairly in app stores. Some of provisions also deal with the treatment of end users. In particular, the combination of data from different services requires that users have a real choice and give specific consent. Also, end users need to be allowed to un-install pre-installed apps and change default settings. The provisions are detailed in their wording, some aspects may change during the on-going legislative process.

The DMA aims at ensuring “fairness and contestability”.⁶ There is an enforcement regime put into place including investigations and sanctions such as fines (cf. Art. 18 et seq.). The enforcement body (the European Commission) may make commitments given by the companies binding and may order other measures. In cases of systematic non-compliance (Art. 16) structural measures may be imposed, including the divestiture of companies.

The DMA draft also contains the possibility to update obligations in a process that is thought to be quicker than a traditional legislative procedure under EU law (Art. 10(1)). Further provisions concern the cooperation with Member States and the relationship to other laws, e.g. from the field of antitrust.

2. Attempts to use competition law in digital markets

The rise of companies operating digital platforms over the past two decades to superstar firms has prompted reactions from the antitrust enforcement community throughout the world. Antitrust or competition law is the traditional field of the law that provides a general framework for market power-related concerns in the economy. It provides for a prohibition for undertakings with a dominant position in the market to abuse this power. Companies may not strengthen their position through

⁶ Cf. Art. 10 (2) DMA draft and recitals 3-5, 79 of the DMA draft.

agreements with which they use their joint power to the detriment of customers. External growth through mergers and acquisitions is subject to a review system that shall hinder high concentration.

In all three fields, abuse of dominance, collusion, merger control, activities by digital platform companies triggered antitrust proceedings. Yet, the application of competition law came to its limits. The European Commission as the top antitrust enforcement agency in Europe was not able to react in an adequate way to the challenges for free competition posed by the GAFAs. This failure of competition law is the background for the new move to regulation.

2.1 Abuse of dominance

The hopes and challenges of digital antitrust law can be illustrated with the most prominent abuse of dominance case, decided on the basis of Art. 102 TFEU, *Google Search (Shopping)*. The European Commission took a decision against Google on 27 June 2017.⁷ Google was hit with a record fine of € 2.42 bn. for an abuse that now is often called “self-preferencing”. In the display of search results, Google privileged its own price comparison service, Google Shopping, over competitors such as Idealo that were ranked down. Thereby, Google leveraged its market power in the market for general internet search to the market of price comparison portals. The rivals that were ranked down by the Google algorithm were no longer easily found by consumers who, according to behavioral empirics, tend to look at the first search results only.

The proceedings against Google had several shortcomings.

Firstly, the European Commission failed to provide a clear-cut “theory of harm”. The term “theory of harm” in competition law stands for the economic reasoning why a certain behavior is anti-competitive. The problem in this Google case was not so much that economic evidence was missing or implausible, but the Commission shied away from putting the evidence into a new concept that would have established “self-preferencing” in rankings as a distinct new form of abuse.

To understand the relevance of this, it is important to understand how lawyers work with laws and how economics fit into this: Competition law sets broadly defined legal standards (“do not abuse a dominant position”). These standards are filled in practice over time by looking at past behavior (e.g. certain rebate strategies) and categorizing it into established types of abuse (e.g. abusive loyalty rebates). Such a categorization is necessary to satisfy the requirements of the rule of law: Market actors need to have legal certainty to be able to act in a compliant way, agencies need clear interpretations of the broad general clauses so that arbitrary decisions are impossible. Economic reasoning is used to justify firm behavior or the prohibition of it. Legal certainty depends on the establishing of robust “theories of harm” underlying the types of abuse.

⁷ *Google Search (Shopping)* (Case COMP/AT.39740) [2017] OJ C9/11.

The Commission faced a dilemma in *Google Shopping*: It saw that self-preferencing practices by the dominant search engine made market access for rivals impossible, yet the case did not fit properly into one of the established types of abuse. These types stemmed from practices in more traditional sectors. They were not apt for the digital world. Establishing a new type of abuse comes at the risk of a defeat in court if the court does not follow the argument or does not see a convincing theory of harm. Refraining from grouping the case into an established type of abuse runs the risk of a defeat in court due to missing precedent or misinterpretation of the vague words of the general clause. Not acting at all would mean to defer to the high concentration in some digital markets and the leveraging power of Google.

So, in theory, the general clauses in competition law are very open for integrating new developments, yet, in practice, it is hard to tackle new phenomena after an economic revolution such as the platform revolution with the established rules. This conceptual problem became visible in the *Google Shopping* case.

A second flaw was the inability of the European Commission to come up with suitable sanctions: Fines are not a good deterrent for companies commanding the liquid means of Google. For markets, the more important point is the remedial action taken in a decision. The Commission established certain guidelines for future rankings, yet the practical impact of the *Google Shopping* decision is seen as weak. The behavior in question was prohibited. The system replacing the old way of determining the display of search results is seen – by some – as even more favorable to Google than before.⁸

The third and most obvious flaw with antitrust enforcement in this landmark case is its duration. The Commission started investigating the case in 2010, acting upon complaints by rivals. The decision was taken no earlier than 2017. While it became immediately enforceable, it is still not fully legally valid. In 2021, the European General Court reviewed the case and sided with the Commission.⁹ The case now rests with the European Court of Justice. So, 12 years after the first procedural steps there is still no final result. Obviously, such an enforcement saga lags behind the dynamics and the spiraling effect of platform power.

2.2 Restrictive agreements

Restrictive agreements (forbidden under Art. 101 TFEU) were the subject of control for hotel portals. Booking.com had established best price clauses in its contracts with hotels, so that hotels were not able to offer better conditions on other portals or in their own distribution channels (online or offline). Several national competition authorities held some of these clauses to be anti-competitive.¹⁰ These proceedings took a long

⁸ Cf. Höppner (2020); Marsden (2020).

⁹ General Court, 10/11/2021, Case T-612/17.

¹⁰ Cf. Lamadrid (2021); Podszun/Rohner (2022).

time, again, and the different national approaches led to a European mosaic of different decisions.¹¹

In the control of collusive practices, antitrust authorities in Europe have not yet taken full issue with concerns that the GAFAs themselves restrict competition amongst them. There have been indications for such a division of markets in the digital world, and the Italian competition authority fined Apple and Amazon for colluding.¹² Investigations are burdensome, however, particularly for national enforcers facing deep-pocketed and heavily legally-manned superstar companies.

2.3 Merger control

In merger control, the lack of meaningful enforcement is particularly striking. The European Commission, for instance, rubber-stamped the acquisition of WhatsApp by Facebook with a non-opposition decision.¹³ It did not find a “significant impediment of effective competition”, and it thereby enabled Meta to build a global communication and messaging universe. Most transactions by the GAFAs were not even subject to EU merger control so that Alphabet, Meta and others were able to extend their reach to ever new markets by buying up companies.

In a turn of this enforcement policy, the European Commission scrutinized the Google acquisition of Fitbit. It did not oppose this deal outright (despite of competitive concerns for Google’s taking of the health data market), but it approved it conditionally.¹⁴ The commitments, including a ban for using Fitbit data for advertising in the European Economic Area, run for a period of ten years. It may well be questioned whether the monitoring of company activities for 10 years is feasible at all and a suitable remedy in merger control.

2.4 The role of economics

When looking at the difficulties to enforce competition law vis-à-vis digital gatekeepers, the role of mainstream competition economics is particularly interesting. European competition law had followed a “more economic approach” ever since the early 2000s. The idea was to update rules with a view to modern economic theories and to integrate economic evidence better in enforcement (“effects based approach”).¹⁵ Supported by the so-called *post-Chicago economics* movement, rules were reformed, per se prohibitions were replaced by a more sophisticated individual assessment of cases (“effects based” instead of “form

¹¹ DMA Impact Assessment Report, SWD(2020) 364 final, Annex 5.4, pp. 110 et seq.

¹² See <https://www.reuters.com/technology/italys-antitrust-fines-amazon-apple-more-than-200-mln-euros-alleged-collusion-2021-11-23/>.

¹³ *Facebook/WhatsApp* (Case COMP/M.7217) C(2014) 7239 final.

¹⁴ *Google/Fitbit* (Case COMP/M.9660) C(2020) 9105 final.

¹⁵ The more economic approach has been widely discussed, just cf. Schmidtchen et al. (2007).

based” approach). The aim of enforcement was defined as enhancing efficiencies and consumer welfare (while before the focus had been on a more structural idea of securing the competitive process). In important cases, parties and enforcers now work with economists, modelling economic effects of practices and of intervention, trying to calculate the consumer benefit in concrete monetary terms. Open notions in competition laws such as “abuse” or “significant impediment of effective competition” are now interpreted with the help of economic models and counterfactual scenarios.

This approach was needed after a period of habitual competition law enforcement that had been detached from new economic insights. The new approach to assess effects for consumers on a case by case-basis came at the cost of legal certainty. Compliance for companies became more difficult, and so did enforcement for competition agencies since they had to fulfil much tougher economic tests. The law with its ambition to set standards that can be complied with ran into trouble with the economic ambition to analyze each case individually and in deep detail.

With the new digital business models, the more economic approach became a limitation for enforcement without living up to the promises it had given.¹⁶ The models and theories introduced into the competition law arena were based on knowledge on traditional sectors and a rather traditional economic thinking.

The new business models and strategies of the Silicon Valley companies had not yet been analyzed well-enough to present results that were robust enough to introduce them in legal proceedings as economics that lawyers can rely upon (they need to base their rulings on established theories). The effects of platforms and multi-sided markets, the use of data or algorithms, the economies of scale and scope, the growing integration of markets, technological lock-in effects for users – all these aspects were not part of the toolkit that economists were able to provide to law enforcement in the 2000s. When the integration of the “more economic approach” into competition law enforcement started, it was not up to date with the parallel rise of platform markets. It also suffered from a lack of integration of behavioral economics, institutional or evolutionary economics and other strands of economic thinking.

This led to a second limitation of post-Chicago economics – the one-sided focus on a narrowly consumer welfare standard (that deviated from the previously held more normative standard of preserving a certain market structure or competition as a process). Consumer welfare was interpreted as meaning lower prices for end consumers. This led to a focus on productive efficiencies that were well calculable in models. Dynamic efficiencies, innovation, potential future developments fell out of the picture, not least for the difficulties of finding data and putting

¹⁶ Cf. Koenig (2019).

these into models. Goals going beyond an efficiency-oriented understanding of markets, e.g. consumer choice or the ability of all market actors to decide independently and sovereign, were not visible at all.

Even more so, non-economic, political or normative ideas that had been traditionally attached to antitrust rules, such as the restriction of power in society and the protection of democratic values, were completely beyond the reach of economics. New goals that nowadays are often linked to antitrust enforcement from a fundamental rights understanding (particularly free speech and data privacy) were also not an issue for the post-Chicago school. The “theories of harm” developed under this umbrella were narrower than before and made interventions by competition agencies and courts more difficult.

The “more economic approach” thus had a narrow focus. It used costly economic tests and models that were based on many assumptions. The turn to this approach by the European Commission over time made it hard to deal with new phenomena in business (such as digital platforms) and to integrate concerns in decision-making that go beyond productive efficiencies for consumers. It may well be argued that this trend from economics resulted in a severe under-enforcement of competition law.¹⁷

2.5 The failure of antitrust

In several platform markets, competition has basically collapsed, markets have “tipped” in favor of one operator. Google Search, the Android and Apple operating systems, the Meta networking and communication space or Amazon’s position as the number one retailer are proof that competition law did not live up to its promise of guaranteeing a vibrant competitive culture in markets. The list of shortcomings in EU antitrust cases highlights some of the underlying problems: Cases take far too long to decide, the very open and vague standards set in antitrust law make it difficult to decide in a quick and foreseeable manner, the requirements set in line with the “more economic approach” are hard to meet when new phenomena are at stake. The design of proper remedies is difficult.

Other problems add to this: The European Commission aims at establishing a digital single market and therefore favors an antitrust policy that levels national differences. The firms instrumental for this are large global players that tend to concentrate market power in one hand.

The focus on abuses of market power may have blinded enforcers for the dangers of monopolized markets where abuses were not clearly visible at once or first had to be identified in new groups of cases.

The institutional setting of antitrust rules and their substantive content were established for a business world where coal and steel and cars

¹⁷ Cf. Baker et al. (2018).

were the key products in the EU. The tools were not designed and trained to deal with network effects, data and digital ecosystems. Other regulatory failures, in particular far-reaching non-liability rules for platforms (that enabled them to externalize costs) and under-enforcement of data protection rules, added to the power of the gatekeepers that were able to build their digital ecosystems, locking in business users and consumers alike within a short period of time. Competition law achieved too little too late during the digital revolution of markets.¹⁸ The path of ex post analysis of company's behavior with broadly defined standards in general clauses proved to be inefficient in "taming the tech titans"¹⁹.

3. Characteristics of regulation

In reaction to this perceived failure, some national legislators, such as Germany, turned to amendments of their antitrust laws.²⁰ Germany introduced a specific competition law provision for "undertakings with paramount significance for competition across markets" that can be designated as such by the Bundeskartellamt (section 19a of the German competition act)²¹. These undertakings are hit with more detailed provisions of forbidden abuses but may still invoke an efficiency defence. In the provision's first application, Alphabet was named such an undertaking with paramount significance for competition across markets in 2021; the company abstained from challenging this assessment in court.²²

The European Commission refrained from amendments in competition law and instead drafted a completely new law, the Digital Markets Act, that leaves the realm of competition law.²³ It is a part of "regulatory law" that shall now compensate some failures of antitrust laws.²⁴ Competition law is distinct from regulatory law.²⁵ Regulation rests on the assumption that due to a natural monopoly competition cannot unfold. Therefore, the operator of the infrastructure forming the natural monopoly can extract profits above the competitive level which has to be controlled by a government agency.²⁶ Antitrust law is more indirect and

¹⁸ Schweitzer/Gutmann (2021) offer a different reading of competition law enforcement.

¹⁹ The Economist, 18.1.2018.

²⁰ On the different models to react to the digital revolution cf. Botta (2021).

²¹ The wording is available here: https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0071. Cf. Franck/Peitz (2021).

²² Cf. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/05_01_2022_Google_19a.html.

²³ On its significance cf. Andriychuk (2021). Cf. Budzinski/Mendelsohn (2021), pp. 15 ff.

²⁴ Hovenkamp (2020), Shelanski (2011) and ICN (2004) look into the other direction – antitrust as a tool to fix the failures of regulation. This will gain attraction in a few years when the deficits of the DMA become obvious and need a fix by antitrust rules.

²⁵ Dunne (2015); De Streel (2008); Akman (2022).

²⁶ Shughart II (2008), p. 458.

tries to remedy the market structure, not concrete outcomes. Turning to regulation in this sense is a disruptive step for each market concerned: The legal regime changes from general oversight with the tools of established competition law to a more specific regulation of the undertakings active in the sector.

In the DMA draft's recital 9, the Commission identifies competition law rules as rules

“that are based on an individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question.”

The quote highlights distinctive features of competition law: the individualized assessment, the look at effects, and the possibility of justification.

On a meta level, the decisive difference between the paths of competition law on the one hand and regulatory law on the other is the level of government involvement. Under competition law, the state (or in the constellation of the European Union: the sovereign public actor) provides a general framework for all undertakings in which these undertakings can act freely. The role of government agencies is reduced to curb back excesses and to guarantee a structure that enables market actors to pursue their economic aims autonomously. The practices and results of such a market understanding take everyone onto a “discovery procedure” (as Friedrich von Hayek (1968), the advocate of spontaneous market orders, put it). Freedom of market actors is only restricted to secure the freedom of others (in line with the “freedom paradox”).

Under regulatory law, a government agency acts in a much more prescriptive way. The government does not rely on the free exchange in the market once a certain structure is guaranteed but it sees the structure as so flawed (and non-correctable) that firm behaviour has to be steered and certain results aimed at by targeted intervention. The freedom of businesses is restricted, certain practices are banned or prescribed from the outset so as to achieve the preferred results. The framework is much narrower, some paths within this framework are closed, others are made mandatory for use.

With the DMA, the European Union takes a step into this kind of regulation for the digital sphere, subjecting certain platform services to a much more detailed governmental steering.

Obviously, with the various laws in place governing the economy, the distinction cannot be drawn as clear-cut as done here. The difference to other rules, e.g. requirements for product safety, working conditions or environmental standards, lies in the purpose of the rules: Competition law, and to some extent also regulatory law, serve the purpose of *making markets work*. In recital 5 of the DMA draft, the Commission states

that “the market processes are often incapable of ensuring fair economic outcomes with regards to core platform services”. Thus, just like competition law, the DMA concerns the working mechanism of supply and demand in general. Other rules serve specific non-economic purposes while competition law and DMA primarily (if not exclusively) aim at fixing market failures as understood by Pigou (1932).

In the following parts, some of the differences of a competition law path and a regulatory approach are described in more detail.²⁷

3.1 General vs. sector-specific

While competition law normally addresses all companies alike, regulatory law is typically focussing on one sector: energy, telecommunications or railways, for instance. The DMA may be seen as sector-specific too – targeting digital gatekeepers. On the other hand: There is no “digital sector” as such, even though the Commission’s DMA draft speaks of the “digital sector” in Art. 1(1).²⁸ The services provided by GAFAs cut through all sectors, and they have operations running that may well be classified as being part of sectors such as tourism (Google Flight), retail (Amazon), media (Youtube), advertising (Facebook, Google), IT (AWS) or health (Apple Health). The definition of the core platform services and the specific obligations do not only target what one may see as *basic* digital services for the economy, but also more specific ventures.

Still, it is a very limited number of undertakings that is addressed by the rules. This limited circle makes it possible to have tailor-made obligations instead of one-size-fits-all general rules as in competition law.

Traditional regulatory law is confined to sectors where the mechanisms of supply and demand do not function properly due to the dependency on natural monopolies or essential facilities that cannot be duplicated. Energy pipelines, the telephone network or the railway system are examples for this. Regulatory law starts from the deficits in competition that are the consequence of relying on such infrastructures. That is why regulatory law is usually sector-specific.

Taking a regulatory approach in the DMA leads to two observations in this regard: Firstly, the core platform services operated by the digital gatekeepers can be regarded as “akin to an essential facility”, as the European Court put it for Google Search.²⁹ That is a turn since classic infrastructures are of a brick-and-mortar structure (natural monopolies)³⁰ whereas the dominance in search or the infrastructural position of operating systems of smartphones is more virtual in nature and partly relies

²⁷ It has been argued that the DMA is a hybrid of competition law and regulatory law, cf. Chirico (2021).

²⁸ Akman (2022), 18.

²⁹ General Court, Case T-612/17, 10/11/2021 at para 224.

³⁰ Cf. on natural monopolies as the stock of regulation Posner (1999).

on network effects. It is a major breakthrough to see some of these services as no longer contestable essential facilities.

Secondly, it is striking that the Commission does not only choose platform services of the gatekeepers that are very close to monopolistic constellations (such as operating systems) or form the backbone of e-commerce and digital businesses (such as search) but also includes operations such as video sharing platforms or advertising services. All these services are treated the same in the DMA. That is an encompassing approach.

This stunning reach towards very different services provided by the gatekeepers may be justified by the nature of the digital world that is interconnected and integrated: Each platform service of the gatekeepers is connected with other services and together they form a “digital ecosystem”, or a “walled garden”, that aims at integrating more and more services.³¹ Looking at just one of these structures (as in a classic competition law style market definition) would miss the point: The use of data leads to a convergence of markets and businesses that cannot be analysed in isolation. An e-mail-account with a gatekeeper may be the key to entering a digital ecosystem that locks in users. A regulatory approach therefore needs to overcome narrow market definition and has to see operations of ecosystems as a complex network.

3.2 Standards vs. rules

The distinction between competition law and regulatory law can also be drawn along the lines of the legal distinction of standards versus rules.³²

Competition laws are closer to standards: The provisions are worded as rather broad general clauses that may need further specification through agencies and courts. For instance, Art. 102 TFEU essentially says: An undertaking that is dominant in its market may not abuse this position. This leaves a lot of room for interpretation of words and economic modelling of effects.

Regulatory law works with rules that are much more specific and prohibit or prescribe exact behavior. For example, in Art. 6(1)(d) of the DMA draft, it is stipulated that the gatekeeper shall

“refrain from treating more favorably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking”.

So, what the Commission established with a lot of effort in its *Google Search (Shopping)* decision as a case of Art. 102 TFEU is now framed in a much more precise fashion as a special duty for gatekeepers in the DMA.

³¹ Bourreau/de Streel (2019); Podszun (2019); Jacobides/Lianos (2021).

³² Cf. Kaplow (1992); Kerber (2021); Witt (2021).

This notable difference between the wording of Art. 102 TFEU and the prohibition of self-preferencing in Art. 6(1)(d) DMA draft illustrates with what degree of detail regulatory law captures firm behavior. The “extensive investigation of often very complex facts on a case by case basis”,³³ that is at the heart of competition law, is thereby turned around into a self-executing, directly applicable rule that gatekeepers have to adhere to.

Interestingly, though, while substantive rules are very specific, the sanctioning of violations remains very much aligned to competition law – with fines, commitment decisions or remedies. The structural separation of gatekeepers is possible after a market investigation in cases of systematic violations of the law.³⁴

The distinction made here is often also described as an *ex post/ex ante* dichotomy (OECD 2021). According to this view, competition law steps in retrospectively with agencies and courts assessing *ex post* whether there was a violation of the law. Regulatory law, so it is said, requires compliance *ex ante*, i.e. from the outset with laws and agencies telling companies what to do before they start their business operations. This is, however, a very idealistic modelling of both areas. Competition laws require compliance from the beginning, it is only due to the nature of the wording that this is sometimes difficult for undertakings. Furthermore, in many fields of competition law, guidelines and case practice have established clear rules to follow that can be complied with *ex ante*. In both fields, agencies often come into play with an *ex post* review of what happened in markets.

Still, the obligations in the DMA are self-executing, do not need any further activation by an agency (other than in section 19a of the reformed German competition act) and shall be precise enough for gatekeepers to know what they are allowed to do or not to do.³⁵ The mechanisms of compliance that were established in companies during the past decade rely on such detailed rules and partly supersede the more traditional system of review by a government authority.

3.3 Different goals

Competition law scholars debate at length what the purpose of competition law is.³⁶ But as stated before, the considerations remain in the realm of making markets work, be it by protecting the competitive pro-

³³ DMA draft, recital 5.

³⁴ DMA draft, Art. 16. Larouche, de Streel (2021) support the remedial catalogue.

³⁵ Akman (2022), p. 20, sees the DMA as being prescriptive and proscriptive, thereby distinguishing it from classic regulatory tools that are merely prescriptive. Cf. Botta (2021).

³⁶ Cf. Zimmer (2012).

cess or consumer welfare. In line with this, undertakings in a competition law regime are usually free to present an efficiency defence that allows them to justify an anti-competitive practice on economic grounds.

The DMA does not open the possibility to get away with a certain behavior due to efficiencies arising from it. Possibilities to justify a deviation from the obligations in Art. 5 and 6 are much more limited (cf. Art. 9 DMA draft). This is consistent with the goals of the DMA. They are broader in definition – the DMA aims at ensuring fairness and contestability.³⁷ A distortion of fairness however cannot be compensated by economic efficiencies; these are different categories, as the Commission rightly points out.³⁸

While it may be hard for competition lawyers, trained in weighing economic effects, to see rules that may prohibit efficient behavior, this is perfectly normal for other commercial laws: The value-judgments taken by legislators are not necessarily oriented towards efficiency-maximization, but take other values into consideration – and be they as airy as “fairness”.

Regulatory law is more open towards normative goals than competition law. In the field of energy regulation for instance the goals of the legal framework extend to the safe provision of environmentally friendly energy. Postal services are often regulated so that distant regions have daily postal services, despite of this being inefficient.

With this in mind, the regulatory goals pursued by the DMA are rather unspecific. The Commission could have gone even further with setting normative regulatory principles and ideas for the DMA.³⁹

There is an underlying issue with regulation’s relationship to competition: In how far does regulation aim at establishing competition or, at least, as-if-competition, and thereby make itself superfluous? Or is regulation here to stay?

Regulatory interventions become less necessary, the more competition is created. The transition of the telecommunications markets is a telling example: When the sector was opened up in the 1990s in Europe, the deregulation process was combined with close monitoring by regulators and many rules. Today, many telecommunication markets work well with only very limited sector-specific regulation and just normal competition law scrutiny.

For telecommunication, the European Commission considers a market to justify the imposition of regulatory obligations if

“high and non-transitory structural, legal or regulatory barriers to entry are present;

³⁷ Cf. Art. 10 (2) DMA draft.

³⁸ Recital 10 DMA draft.

³⁹ Podszun/Bongartz/Langenstein (2021b); Larouche/de Streel (2021).

there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry;

competition law alone is insufficient to adequately address the identified market failure(s)."⁴⁰

Applying the criteria from telecoms law, regulation is merited as long as there are high barriers to entry, a market structure that does not enable competition, and market failures that cannot be remedied through competition law. These requirements are certainly met for most digital service addressed by the DMA. For the time being, many of the markets with digital gatekeepers will fulfil the criteria.⁴¹ Yet, the idea of deregulation if these criteria are no longer fulfilled, brings up the question whether the new platform regulation has an underlying idea to transform markets so that, one day, the DMA is no longer necessary.

Such a “finality” of platform regulation, or a transitory nature of the DMA, is not visible in the proposal, even though the gatekeeper status is to be reviewed every two years (Art. 4). The obligations in the DMA do not aim at breaking up the power of the core platform services. They merely aim at a further extension of that power through leveraging to other service. The sanctioning system also refers to structural separations only as a tool of last resort. The DMA does not challenge the core monopolies of the gatekeepers.

Unless disruptive technologies evolve it will be return to a less regulatory system. This makes it all the more clear that the European Commission needs to keep markets open so that such technologies can flourish and be distributed. This may require strong measures against “killer acquisitions” (where GAF A companies buy rivals from the market) and interoperability obligations.

4. Hard regulatory choices

In part 3, the distinguishing features of a regulatory approach were explained. Within such an approach, further regulatory choices have to be made. The following part deals with their costs and trade-offs.

⁴⁰ Art. 67(1) of Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code (Recast).

⁴¹ For the differences of telecoms regulation and the DMA cf. Ibáñez Colomo (2021). It may be pointed out again that thinking in markets (as neatly separated units) does not do justice to the connected business spaces of gatekeepers.

4.1 Asymmetric regulation

The basic model of regulation foresees that there is an ex ante approach with specific rules that are to be complied with. The key question is the applicability of the Act to market actors: Who shall be bound by the special obligations? Since the Commission did not stick to a strict infrastructural approach, it has some leeway in setting the definition and the quantitative thresholds. Whether an undertaking is or is not designated as a gatekeeper makes a fundamental difference. The Commission does not subject all online intermediaries to the DMA, but only several undertakings. This is an act of asymmetric regulation.

The number of addressees changes the possible specificity of obligations. The less corporations are targeted, the more specific the obligations may be. With a growing number of gatekeepers and core platform services under the umbrella of the DMA, obligations need to be more general to capture the different business models. Thus, the level of possible intervention is determined by the number of undertakings targeted by the intervention.

The DMA is only directed at the gatekeepers. It does not address end users or business users directly, and it does not expressly confer subjective rights upon them. It does not foresee mechanisms for users to take gatekeepers to court directly in order to claim rights that may flow from the DMA.⁴²

Even though, the Commission's draft does not explicitly address the users, the whole idea of the DMA is to open up possibilities for them. One controversy in this regard is whether other gatekeepers can profit from the DMA: If gatekeepers are forced under the DMA to make data accessible or to ensure interoperability, the ones profiting most from this could be other GAFA companies. They have the resources to exploit and use data and pro-competitive loopholes in a much more strategic and efficient way than small businesses. This may mean that the DMA could strengthen some of the most powerful companies in the world and induce competition within an oligopoly of digital gatekeepers. It is questionable whether this was intended in the first place, and it is doubtful whether such competition of gatekeepers would be a regulatory success. A potential institutional answer to this would be to take asymmetric regulation even further by obliging gatekeepers, but stripping them of the rights assigned to others under the DMA.⁴³ In the present draft, this is not foreseen in the DMA.

4.2 Interference with consumer preferences

A second important decision concerns the role of consumer preferences. The companies and services that are targeted by the DMA are among

⁴² Podszun (2021).

⁴³ Cf. Andriychuk (2021).

the most-loved brands for consumers.⁴⁴ Their services are hugely popular, and this is the result of high-quality services. With new choice screens, the prohibition of pre-installed services, higher costs, consent buttons, or difficulties to offer certain integrated services out of one hand life may become more uncomfortable for consumers without clarity whether the gain lives up to the promise. The users' growing frustration regarding the necessity to agree to or decline the use of cookies on every website in the wake of the GDPR may serve as a telling example for a regulation that frustrates consumers without granting them a considerable advantage.

It needs to be born in mind that the DMA is not primarily oriented towards consumer welfare understood as short-term benefits for consumers. This is a deviation from antitrust's consumer welfare approach. For the DMA, it is necessary to interfere with some established consumer preferences.

Yet, the traditional antitrust understanding of consumer welfare is too narrow. Consumer welfare may entail consumer choice, and particularly those rules aiming at contestability of markets, i.e. the lowering of market entry barriers, may enhance consumer choice in the longer run. An approach that looks at static, momentaneous snapshots of consumer welfare are too short-sighted. Privacy or user autonomy may also be seen as aspects of consumer welfare, even if they are not easily put into an economic model. The regulatory approach of the DMA employs a longer-term perspective with broader policy aims.

The consumer preferences argument does not seem to be particularly strong in the digital sphere anyway. Many of the gatekeepers act as information intermediaries. Their key service is the exploitation of data. The necessary information for building consumer preferences are channelled and presented by the gatekeepers to the users themselves. This means that the sources of information are limited, and the building of preferences is hampered. Over time, consumers may depend more and more on the paths laid out for them by their information intermediaries. Regulating the exploitation of data by the intermediary may therefore be seen as a prerequisite for building autonomous consumer preferences, so that the interference with consumer preferences is not a major issue.

4.3 Over- and under-enforcement

Each regulatory regime faces the difficulty to get the level of enforcement right.⁴⁵ Over-enforcement may stifle innovation and efficient businesses. Under-enforcement may jeopardise the goals pursued by the regulatory act. Whether there is systematic under- or over-enforcement

⁴⁴ See for instance <https://www.statista.com/statistics/995767/consumers-most-loved-brands-us/>.

⁴⁵ Cf. Akman (2022), p. 29.

can hardly be predicted. The “more economic approach” is today seen as having led to a more cautious enforcement approach in antitrust that will partly be reversed with the DMA. A systematic analysis of the impact of the DMA for businesses and innovation, particularly with so many different obligations at play, is hardly doable in advance.

Yet, the balance of over- or underenforcement does not only depend on questions of substance, but also questions of the enforcement regime and its institutional design. Many crucial questions were left open in this regard in the initial Commission draft. The lead in enforcement will rest with the European Commission, but it is unclear how this internally organized. Also, it is an open issue, how Member States and their agencies are integrated in enforcement, and whether private may sue in courts.

For the internal organization of the European Commission, the most important question will be the number of staff that will work on DMA enforcement. Their institutional standing, the experience of case handlers, their incentives and the role of judicial review of their decisions will be decisive factors.

From the perspective of EU Member States, the questions are whether national authorities are invited to co-enforce the DMA, and in what role: Will they be able to enforce on their own account? Are they able to cooperate with the Commission in enforcement? Will they be reduced to having an auxiliary role? Or will they be barred from DMA enforcement at all? These questions are part of the negotiations, but will determine with how much power the DMA will be enforced. Another issue is what happens to national rules on competition or regulation. Will they be barred from application when overlapping with the DMA? Or will they serve as a fallback-option? Again, this is not clearly regulated in the known drafts of the DMA.

Private parties could take gatekeepers to court in private enforcement and thereby significantly raise the level of enforcement. This could take the form of claims for interim relief if there is a violation of a DMA duty that the enforcing agency cannot address, e.g. for lack of resources. It could also be that damages claims after violations of the DMA could become a pillar of sanctioning platforms.

The answer to each of these issues will determine the level of enforcement and the burden placed on the gatekeepers. Most of these matters are still unresolved despite of their importance. History is full of well-meant legislative acts that lacked the bite due to a poor enforcement regime, the latest example being the role of the Irish data protection agency for the level of privacy enforcement in Europe.⁴⁶

⁴⁶ See the report of the ICCL, 2021: <https://www-iccl-ie.translate.google/digital-data/2021-gdpr-report/>.

4.4 Speeding up regulation

A key idea of the regulatory approach is to speed up regulation, thereby having impact in a faster way. In the DMA, this policy choice is guaranteed through strict time limits for all steps in the process, easy to check assumptions for interpreting legal terms, and self-executing rules that have to be complied with without previous intervention of an enforcing body.

This policy choice comes at the cost of more differentiated, more targeted obligations for specific services and a careful individual assessment of business practices as is typical of competition law. The ex ante regulation with less possibilities for companies to steer the process speeds up the implementation.

This may have two downsides: Firstly, the quality of decisions may deteriorate since there is less time to check and double-check. Secondly, the rights of defence of gatekeepers are restricted.⁴⁷ If norm addressees have less time to put their position forward, if there are less hearings, shorter time frames, more non-rebuttable assumptions, less mechanisms of judicial control, then this means a loss in rights of defence in comparison to the current status in competition law proceedings.

On balance, it needs to be taken into account that gatekeepers usually have all the means to drum up their legal support in a short period of time. Furthermore, it may be questioned more generally whether the rights of defence have grown out of proportion. It is hard to imagine a speedier resolution of controversial cases without cutting back some of the individual, rights-based possibilities of companies to defend their actions. Speeding up regulation is a key element of the DMA, yet each reduction of individual and lengthy assessment needs to be weighed with these downsides.

4.5 Updating obligations

Each new regulation faces the problem that it needs to be future-proof. That is all the more true in an environment that the Commission itself describes as “very rapidly changing” and of “complex technological nature”.⁴⁸ How can it be ensured that the DMA is not out of tune with modern developments in the digital sector within a short period of time? How can laws keep abreast with business developments in the industries? The obligations in the DMA are modelled according to known business practices most of which found the attention of regulators.⁴⁹ But what if the digital gatekeepers come up with new practices that may harm contestability or be unfair towards business users or consumers?

⁴⁷ Cf. Ibáñez Colomo (2021).

⁴⁸ DMA draft recital 29. Cf. the instructive piece by Blockx (2021).

⁴⁹ Caffarra/Scott Morton (2021).

Traditionally, there are three answers to this:

The first solution would be a new legislative initiative with a reform of the rules. This, however, takes very long in the usual EU proceedings and is hardly conceivable.

The second solution would be to rely on general clauses that allow to capture different behaviour due to its general wording. However, this is exactly the approach taken by competition law that proved to be unsuccessful in the digital sphere.

Thirdly, the law could simply run out of relevance and be forgotten.

The Commission came up with a fourth idea to address this difficult problem of updating rules: It integrated a mechanism in Art. 10 DMA that allows the Commission to undertake market investigations into new practices and pass a “delegated act” afterwards that makes a new obligation part of the DMA. With the instrument of delegated acts, the Commission circumvents the overly complicated and long-taking legislative process at the EU level that would involve Parliament and Council. Delegated acts according to Art. 290 TFEU would put the Commission itself into the position of amending the DMA in a faster way. This is an important measure to avoid that the relevance of the DMA vanishes when new practices are established.⁵⁰

The choice in favour of some flexibility in this amendment process comes at the cost of a power shift: Once the DMA is in force, it is no longer the Member States or the European Legislative that take key decisions on new obligations in the formal legislative process. The Commission, the executive body itself, determines practices that lead to unfairness or incontestability. The executive branch is further empowered while Parliament and Member States lose some influence.

5. Conclusion

The European Commission decided in favor of a regulatory approach when proposing the DMA. The DMA represents the lessons learned from the failures of antitrust enforcement in the digital sector. The application of competition law achieved too little too late vis-à-vis the digital gatekeepers.

The regulatory approach can be distinguished from competition law through its focus on ex ante rules (not standards that are enforced ex post). It is targeted at specific companies only and includes a variety of goals that differ from competition law goals. By shifting from general competition law to a regulation for digital gatekeepers, the European Commission recognizes that gatekeepers entertain and command “core platform services” that look like an infrastructure of the Internet. Their

⁵⁰ Larouche/de Streel (2021) would still favour additional standards.

enormous relevance for more and more sectors in business and in society is acknowledged.

The decision for a regulatory approach is not the end of substantive, institutional, or procedural debates. In contrast, hard regulatory choices have to be taken, e.g. regarding the number of gatekeepers to be addressed by the DMA or the focus on business users instead of consumers. The level of state intervention in Big Tech will largely depend on enforcement – the institutional design of the sanctioning regime will decide the question whether the DMA becomes a powerful tool or not. The DMA is a model in speeding up proceedings and in providing an option for updating obligations, yet this may harm rights of others.

In this text, some of the distinctions and choices were explained that make a difference when regulating the digital world. As is often the case for the law, the devil is in the details.

The course-setting questions to be decided, though, are political in nature: What is the intended level of state intervention? What are the expectations of society vis-à-vis digital gatekeepers? How can these expectations be met with the help of a legal framework? The Digital Markets Act is the beginning of answering these questions – but probably not the end of the debate.

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