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THE DIGITAL MARKETS ACT: ENSURING MORE CONTESTABILITY AND OPENNESS IN THE EUROPEAN DIGITAL MARKET *

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ABSTRACT

The rise of digitalization has bolstered the dominance of certain enterprises that hold sway over entire ecosystems, creating significant barriers for potential competitors to penetrate. To address these concerns and foster fair competition within the internal market, the European Union has enacted a regulation aimed at ensuring accessibility and fairness in the digital sector, particularly for both business users and end users of core platform services. This regulation diverges from traditional approach by streamlining procedures to tackle potential anti-competitive practices, with specific provisions tailored for platforms identified as gatekeepers. The objective is to supplement existing competition rules and address previously overlooked scenarios, drawing insights from past competition cases and challenges. Special emphasis will be placed on analyzing specific obligations to promote a competitive and equitable digital market. These obligations reflect precedents from familiar cases and are structured on a case-by-case basis to a varying extent. However, clarification will be necessary regarding the black and grey lists to facilitate regulators and undertakings in implementing the regulation effectively.

Key words: *EU competition law, Digital Markets Act, gatekeeper.*

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1. INTRODUCTION

Digitalisation has brought numerous benefits to our society, along with certain risks. The traditional understanding of the competitive market has been challenged. Novel concepts need clarification. Understanding new markets becomes a necessity, as it is important to realize whether traditional concepts are still sufficient, or whether new ones are needed. The regulation is always lagging behind. There is constant quandary whether we should regulate new trends or leave them to market circumstances. The innovation process should not be stifled by too much regulation.

The digital market is nowadays mostly dominated by big actors, embodying the concept of the so-called 'Modern Bigness'. They usually take dual role as gatekeepers for numerous other business users, and also as service providers of their own services. The digital market has some peculiarities that distinguish it from traditional markets: the digital environment amplifies the economies of scale, the network effect, the lock-in effect allowing undertakings to offer seemingly endless opportunities for users while maintaining high entry barriers.

The classic theories have to be revised and adapted to the reality of digital markets. Nowadays, digitalisation is everywhere. Digital surroundings have become our reality where we live, shop, communicate and do business. In addition to the rapid and unpredictable changes there are other factors that have to be considered.

The network effect is a prominent phenomenon of the platform markets, and it can be manifested either directly or indirectly. Direct effect materialises as more and more users join a particular platform. For example, in the social media networks customers have many advantages in joining the network.[1] Indirect effect is characteristic for digital platforms with two or more sides. Each customer joining the platform boosts the benefits for the customers on the other side. The two sides of the platform are mutually interdependent.[2] 'Tipping' is especially obvious in two or multi-sided markets, as platforms tend to have many users. If it is possible, users have a tendency to be active on multiple platforms, depending on the homogeneity of their preferences. Switching costs, as well as platforms differentiation, are other features peculiar to digital platforms.[3] Multi-homing and switching costs are easier to manage on some platforms then others. Take for example Facebook or WhatsApp. Users will

[1] Zelger, B.: *Restrictions of EU Competition Law in the Digital Age, The Meaning of "Effects" in a Digital Economy*, Cham: Springer, 2023, p. 144.

[2] *Loc. cit.*

[3] *Ibid.*, p. 146 and 147.

unlikely switch to other platforms as all their contacts are on those platforms. The similar situation is with Google.[4] The last but not least is data as a new commodity and strategic asset. Algorithms have an important role but their effectiveness and functionality are contingent upon the data they are built upon.

This phenomenon is commonly referred to as Big Data. The key question revolves around how companies utilize the vast volume of personal information and what precisely constitutes Big Data. According to the doctrine, "four Vs" encapsulate the essence of Big Data: volume, variety, velocity, and value. Some authors also introduce two additional characteristics: veracity and valence.[5]

Considering all the aforementioned attributes of Big Data, its significance in the realm of digital markets becomes apparent. As previously noted, Big Data by itself holds little value. This is where algorithms come into play. They are responsible for processing, storing, and analyzing data to render it valuable. Companies filter essential data, thereby enhancing their market dominance and lock users in. Consumers develop familiarity with particular platforms and are unlikely to switch to alternatives. Moreover, the costs associated with distributing and producing this data are minimal. However, this does not necessarily indicate that barriers to entry in these markets are low. Smaller undertakings lack the sophisticated algorithms needed to swiftly process vast amounts of data.[6]

2. REGULATING DIGITAL MARKETS

In recent years, the European Commission has shown a strong commitment to fostering a competitive digital economy. Various initiatives have been launched, and different acts have been implemented to achieve this goal. In March 2022, the Commission introduced the Digital Markets Act[7] with the

[4] *Ibid*., p. 147.

[5] See more Pošćić, A., Martinović, A.: On the use and abuse of Big Data in competitive markets – Possible challenges for competition law, In: Šmejkal, V. (Ed.) *EU Antitrust: Hot Topics & Next Steps*, Prague: Charles University Faculty of Law, 2022, pp. 138-139, Stucke, M. E., Grunes, A. P.: *Big Data and Competition Policy*, Oxford, 2016., Petit, N.: *Big Tech and the Digital Economy, The moligopoly scenario*, Oxford: Oxford University Press, 2020.

[6] Pošćić, A., Martinović, A.: The Interplay between the Essential Facility Doctrine and the Digital Markets Act: Implications to Big Data, *Acta Universitatis Carolinae – Iuridica*, 69(2) 2023, p. 73.

[7] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), (OJ L 265 12/10/2022). The Regulation came into force on November 1st, 2022, but its application began on May 2nd, 2023. Potential

aim of addressing specific practices carried out by dominant players known as gatekeepers. This act is expected to be pivotal in regulating large technology firms that wield significant economic influence and addressing the shortcomings of the current *ex post* regulatory framework and ineffective remedies.

Digitalization has bolstered the dominance of certain enterprises that control entire ecosystems, creating formidable barriers for competitors. The digital market is characterized by substantial investment costs and high entry barriers, operating under the principle of "winner takes all." In addition to controlling platform access, tech giants have become indispensable partners for many small undertakings and consumers. Data plays a crucial role, yet access for smaller undertakings is often restricted or challenging to obtain, hindering innovation. Typically, platforms offer intermediary services to match users in the marketplace, alongside additional services that contribute to building their own closed ecosystems, limiting opportunities for alternative undertakings.

To enhance the efficacy of the internal market, the European Union has adopted a regulation aimed at fostering competition and fairness within the digital sector, particularly for business and end users of core platform services provided by gatekeepers. Departing from traditional approaches, this regulation curtails the process of addressing potential anti-competitive issues. The regulation addresses situations that have not been regulated till now. The objective is to regulate the behaviour of the big tech companies[8] or a "small set of powerful digital companies"[9] that will have to comply with certain obligations.

3. THE REGULATION AS A CHALLENGE TO TRADITIONAL COMPETITION MECHANISMS

Often, a distinction is made between the specific sector regulation and the competition law. The position of the Regulation has been questioned in the literature. The legal basis for the adoption is Article 114 TFEU,[10] as the main

gatekeepers were given until July 3rd, 2023, to register their core platform services with the European Commission. Following this registration, the Commission had 45 days to evaluate whether the specified thresholds were met to designate a gatekeeper. Subsequently, the designated gatekeeper was required to comply with the obligations outlined in the Regulation until March 6th, 2024.

[8] On possible problems in regulating Big Tech see Moore, M., Tambini, D.: *Regulating Big Tech, policy responses to digital dominance*, New Yok: Oxford University Press, 2022.

[9] Van den Boom, J.: What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws, *European Competition Journal*, 19(1) 2023, p. 60.

[10] Treaty on the Functioning of the European Union (consolidated version 2016), (OJ C 202, 07/06/2020).

tool for adopting measures in the field of internal market. The intention is to have a new legal regime rather than the one that is part of competition regime. In the latter case, Article 103 TFEU would be used as a legal basis.[11] The Commission views it as a novel instrument to tame tech giants but there are some diverging opinions that perceive it as a part of a broader competition law framework.[12]

The Regulation specifically targets undertakings with a substantial market impact and the potential to emerge as key gateways in the future. It introduces specialized regulations for platforms identified as gatekeepers. The aim is to supplement existing competition rules and address previously overlooked scenarios. Importantly, the Regulation does not contradict traditional competition mechanisms but rather draws insights from past competition cases and emerging challenges.[13]

The Regulation tries to avoid the fragmentation of the internal market and obliges member states not to impose other obligations on gatekeepers for the purpose of ensuring fair and contestable markets (Article 1). Member states can implement additional rules on the gatekeepers but always having in mind the goals of the Regulation and EU law.[14]

The Regulation explicitly mentions that it does not affect the applicability of Articles 101 and 102 TFEU (Article 1(6)). This indicates that even when an undertaking does not meet the criteria to be designated as a gatekeeper, the provisions of the Treaty Articles remain applicable.

Member states can further develop and apply their own legislative regime, provided it aligns with the EU competition law and the aim of ensuring fair and contestable markets. Stricter rules are allowed but with respect to the objectives and the spirit of the regulation. The latter tries to prevent fragmentation of the digital market and weaken the intentions of the EU.

The primary distinction between traditional competition mechanisms and those outlined in the Regulation lies in their timing. The Regulation functions as an *ex-ante* tool, whereas the traditional competition rules operate as *ex-post* safeguards. While the Treaty Articles employ an effects-based analysis with a flexible clause, the Regulation prescribes strict prohibitions in advance. The

[11] Beems, B.: The DMA in the broader regulatory landscape of the EU: an institutional perspective, *European Competition Journal*, 19(1) 2023, pp. 2-4.

[12] *Ibid*., p. 10.

[13] Pošćić, A., Martinović, A., The Interplay.... *op. cit*., p. 79.

[14] Van den Boom, J., *op. cit*., p. 58.

objective of the Regulation is to address potential competition issues, some of which still remain unresolved. [15] It is not part of the competition law, but rather a specific regime dedicated to gatekeepers of core platform services.[16]

The scope of the Regulation is quite narrow, as it attempts to address the issues which have not been tackled by the existing competition law framework. The objectives diverge, as traditional competition regime is focused on undistorted competition, the Regulation is aimed at ensuring fair and undistorted competition. The Regulation is structured on the case-by-case approach, as opposed to traditional general mechanisms. It is part of the vast regulatory regimes that govern platforms. It interacts with other EU legal acts that regulate gatekeepers that will have to co-exist and be applied in a coherent way. Possible problems with concurrent application of the acts may emerge. As Bania suggests, sometimes the Regulation can be seen as *lex specialis* and ignore the national regulations that follow other goals.[17] The author believes that although the regulation is not a competition instrument, it is complementary to competition law. It is seen as a novel instrument that is intertwined with the existing regime with the aim of securing fair and contestable digital markets.[18] The Regulation can be considered as an instrument that has learned from previous experiences and focused on the area that is still not regulated.

4. THE DEFINITION OF A "GATEKEEPER"

The Regulation encompasses eight platform services, primarily targeting four major tech companies known as GAFAs, [19] but also extending to other entities. Certain entities may hold a bottleneck position within these services. Qualitative and quantitative criteria must be met for an entity to be classified as a gatekeeper.

A gatekeeper is defined as an undertaking that offers core platform services. These services encompass ten specific services (Article 2 (2)), primarily associated with major tech companies. However, certain electronic communications networks, streaming services, and business-to-business industrial

[15] *Loc. cit.*

[16] *Ibid.*, p. 62.

[17] See more, Bania, K.: Fitting the Digital Markets Act n the existing legal framework: the myth of the "without prejudice", *European Competition Journal*, 19 (1) 2023, p. 117 and on.

[18] See Van den Boom, J., *op. cit.*, p. 64 and on.

[19] Renda, A.: Can the EU Digital Markets Act Achieve its Goals?, *The digital revolution and the new social contract series*, Centre for the Governance of Change IE University, 2022, p. 4.

platforms are excluded.[20] An undertaking providing core platform service is covered by the Regulation only if it is an important gateway or it will become one in the future.

In order to qualify as a gatekeeper, three conditions must be met: the undertaking must have a significant impact on the internal market, provide a core platform service that serves as a crucial gateway for business users to reach end users, and hold or is projected to hold a strong and lasting position in its operations (Article 3 (1)). These qualitative criteria need to be supported by quantitative criteria.

The first condition is satisfied if the undertaking achieves an annual Union turnover equal to or exceeding EUR 7.5 billion in each of the last three financial years, or if its average market capitalization or equivalent fair market value amounts to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States. Additionally, if the undertaking provides a core platform service, it must have had at least 45 million monthly active end users established or located in the Union and at least 10,000 yearly active business users established in the Union in the last financial year (Article 33 (2)).

While these thresholds are not excessively high, there is concern regarding the possibility of including entities unnecessarily, leading to what is termed as the "anxiety of overinclusion." [21]

When the quantitative thresholds are met, there is a rebuttable presumption that all three criteria for gatekeeper designation are fulfilled. However, an undertaking providing core platform services has the opportunity to present well-founded arguments to demonstrate that, despite meeting the specified thresholds, it does not meet the necessary requirements due to exceptional circumstances in which the relevant core platform service operates (Article 3 (5)).

Furthermore, the Commission is authorized to investigate and designate any undertaking providing core platform services as a gatekeeper, even if the thresholds are not met. The Commission may initiate its own market investigation to determine whether an undertaking providing core platform services should be designated as a gatekeeper or to identify the core platform services of the gatekeeper.

[20] Podszun, R., Bongartz, P., Langenstein, S.: The Digital Markets Act: moving from competition law to regulation for large gatekeepers, *Journal of European Consumer and Market Law*, 10(2) 2021, p. 63.

[21] *Ibid*., p. 64.

The Commission can designate as a gatekeeper an undertaking below the thresholds and vice-versa, an undertaking above the thresholds can claim differently. In the previous situation the undertaking must present sufficiently substantiated arguments. De Steel recommends that the same evidence should be applied in the situation where an undertaking meets the thresholds, and in the situation where an undertaking does not meet the thresholds but still can be designated as a gatekeeper.[22] The designation decision should specify that the undertaking is the gatekeeper regarding a specific service.

A gatekeeper may assume a dual role, providing core platform services to certain business users while also competing with those same users on similar or identical services for end users. This dual role enables gatekeepers to collect data from both their business and end users, including personal data, through their own searches or searches conducted on downstream platforms. The Regulation aims to prevent gatekeepers from utilizing aggregated and non-aggregated data, emphasizing the importance of fair, reasonable, and non-discriminatory access for other undertakings. This principle should apply to all practices generated by gatekeepers.

Furthermore, gatekeepers are required to ensure free and effective interoperability of the operating systems used for their services under equal conditions. The European Commission serves as the primary regulator, determining whether an undertaking providing core platform services should be designated as a gatekeeper. Following designation, gatekeepers must comply with the obligations outlined in Articles 5 and 6 of the Regulation.

Gatekeepers are obligated to adhere to these obligations within six months of the core platform service being listed in the designation decision. The Commission retains the authority to reconsider, amend, or revoke a decision, particularly if there are changes in the underlying facts or if the decision was based on incomplete or inaccurate information. Additionally, the Commission will reassess the gatekeeper's compliance with these requirements every three years and publish and update the list of core platform services subject to the Regulation's obligations (Article 4).

This regulatory framework aligns with an *ex ante* assessment approach based on market investigations. The Regulation imposes stringent obligations on gatekeepers. Commissioner Vestager likened the introduction of this Regulation to the implementation of traffic lights in certain American cities to bring

[22] De Streel, A.: Recommendations for the Effective and Proportionate DMA Implementation, In: De Streel, A, Bourreau, M., Micova, S. B, Feasey, R, Fletcher, A, Krämer, J., Monti, G., Peitz, M. (Eds.) *Effective and proportionate implementation of the DMA*, Bruxelles: Centre on Regulation in Europe, January 2023, p. 11.

order to previously chaotic traffic systems. It is intended to rein in the power of tech giants.[23]

The definition of the gatekeeper needs specification. As stated in Article 3 (1), the gatekeeper can be designated in relation to one core platform service (one singular service). Does it mean that every time when we have a designated gatekeeper the Commission has to issue a new decision to the specific core platform service, or is it enough to have one decision specifying that an undertaking has been designated as a gatekeeper regarding one service with various other services later added? The undertaking will be designated as a gatekeeper with a number of core platform services later added to the list. The Commission reviews the gatekeeper and services independently of each other and according to Article 5 and 6 the gatekeeper has to comply with the obligations in respect of each of core platform services listed in the designation decision.[24]

In September 2023, the European Commission has designated, for the first time, six gatekeepers (Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft) with 22 core platform services provided by them. The decision was followed by the review process conducted by the Commission after Alphabet, Apple, ByteDance, Meta, Microsoft and Samsung have notified their potential status as a gatekeeper. In addition, the Commission has opened other market investigations. It is interesting to note that although Gmail, Outlook.com and Samsung Internet Browser meet the thresholds to be qualified as gatekeepers, Alphabet, Microsoft and Samsung provided justified arguments showing that these services did not qualify as gatekeepers. Following that, Samsung has not been designated as a gatekeeper regarding any core platform service. The designated gatekeepers have six months to comply with the obligations. Within additional six months, they have to present a detailed compliance report.[25]

5. ENSURING CONTESTABLE AND FAIR DIGITAL MARKET

The aim of the Regulation is to ensure fairness and contestability of the digital market. Both concepts are intertwined and not defined. The Preamble clarifies that contestability is linked "to the ability of undertakings to effectively

[23] Podszun, R. Bongartz, P., Langenstein, S., *op. cit*., p. 60 and on.

[24] Feasey, R.: Note on Designation of Gatekeepers in the Digital Markets Act, In: De Streel, A, Bourreau, M., Micova, S. B, Feasey, R, Fletcher, A, Krämer, J., Monti, G., Peitz, M. (Eds.) *Effective and proportionate implementation of the DMA*, Bruxelles: Centre on Regulation in Europe, January 2023, p. 48.

[25] On October 2023 Commission has published **template for the compliance report t**hat designated gatekeepers will need to submit, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328, 02/11/2023.

overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services".[26] It adds that special characteristics of platforms such as network effects, strong economies of scale, and benefits from data have limited the contestability of those services and the related ecosystems that impact innovation generally. The principle of unfairness relates to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage.[27]

The Regulation imposes obligations on the gatekeepers to ensure both goals. Contestability ensures undistorted competition on the market, for the market and on other markets. The list of obligations provided in Article 5 and 6 supports the extensive interpretation. [28]

The Regulation centres on removing or diminishing structural barriers to new entrants. The system introduced by the Regulation is perceived as a means to address existing gaps and to depart from the traditional, outdated approach that failed to account for the significant power wielded by certain major tech companies. This new system differs from the previous approach in several key ways. Instead of a broad definition of potential abuses, it establishes very specific rules. This streamlines the Commission's work, as it no longer needs to conduct an economic assessment each time, but simply has to demonstrate that the quantitative and qualitative criteria are met.

The Regulation is structured around black and grey lists influenced by some unresolved cases, covering a wide range of practices. Some of these practices include obligations for gatekeepers, such as refraining from processing personal data of end users for online advertising purposes when third parties utilize the gatekeeper's core platform services, or from merging personal data from one core platform service with personal data from another. While the list in Article 5 is self-executing,[29] Article 6 contains a grey list of obligations which can be further specified. The Commission may adopt implementing act specifying the obligations of the gatekeeper. The reason is that they cover fast evolving technologies that need further clarification.

One can argue whether we need a list at all, as those situations are covered by Article 101 and 102 TFEU. So, maybe we do not need a cumbersome list? The problem that pushed the regulators was not the lack of rules but the slowness and inefficiency of current rules. Recalling long and sometimes difficult

[26] Preamble of the Regulation, para 32.

[27] *Ibid*., para 33.

[28] Beems, B., *op. cit*., p. 5.

[29] Podszun, R. Bongartz, P., Langenstein, S., *op. cit*., p. 61.

effect-based analysis and later procedure, we can easily see the benefits of having a Regulation.

The list of obligations is so long and there is a possibility of getting lost. Grouping them according to certain practices could help the regulators as well as undertakings in understanding and implementing obligations. De Steel proposes to group those obligations into four groups paying attention to the objectives of the Regulation. First would be obligations that aim to prevent anti-competitive leverage from one service to another, such as prohibition of tying one regulated core platform service to another regulated core platform service or tying one core platform service to identity or payment services, as well as a prohibition of discriminatory and self-referencing practices that are inspired by real cases. The second group includes the obligations that aim to make switching and multi-homing easier for business and end users, such as the prohibition of the most favoured nation, anti-steering and anti-disintermediating clause, obligations to ensure that it is easy to install applications or change defaults, as well as data portability. The next category refers to opening platforms and data such as horizontal and vertical interoperability obligations, FRAND access, search engines, data access for business users, as well as data sharing. The last category covers online advertising by imposing the transparency obligations for price and other indicators.[30] Monti further proposes classification according to the types of market failure. He distinguishes obligations relating to the lack of transparency in the advertising market, the platform envelopment, the restrained mobility of business users, and unfair practices.[31]

Two obligations try to facilitate the entry conditions of the other online intermediation service competing with the gatekeeper's distribution platforms (Article 5 (2) and (3)). According to Article 5 (2), the gatekeeper shall not process for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper or combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services; cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa; and sign in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and has given consent. The provision tends to safeguard consumers so that they have a choice that is one

[30] De Streel, A., *op. cit.*, p. 32.

[31] Monti, G., The Digital Markets Act: Improving its Institutional Design, *European Competition & Regulatory Law Review*, 5(2) 2021, p. 91.

of the ultimate goals of competition law. It is a way to limit deep profiling. It prohibits the combination of personal data so the newcomers can easily enter the market. The purpose is to limit the exploitation of consumers for targeted advertising and personalised pricing. The obligations are influenced by the Facebook case where the German Federal Cartel Office condemned Facebook for an exploitative abusive behaviour that was forcing users to give consent to merging of personal data that Facebook collects inside and outside of its social media platform. It is the first decision where the protection of privacy was considered in the context of competition law.[32]

In one case, Amazon proposed commitments to meet the Commission concerns.[33] The case involved proceedings according to Article 102 TFEU and the Commission issued a decision about the most-favoured nation clauses or parity clauses and similar provisions in agreements between Amazon and E-Book suppliers. According to the facts of the case, e-suppliers have to notify Amazon of more favourable or alternative terms and conditions they offer elsewhere and to make available to Amazon terms and conditions that directly or indirectly depend on the terms and conditions offered to another E-book retailer. Article 5 (3) states that the gatekeeper shall not prevent business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper. The gatekeepers must allow business users to offer the same product to end users, through third-party online intermediation services or their own direct online sales channel at prices that are different from those offered through the service at gatekeeper. It tries to facilitate entry conditions to other online intermediation services.

The obligation requiring the gatekeeper to allow business users to communicate and promote offers free of charge, including under different conditions, to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper (Article 5 (4)), is reminiscence of the Apple store case.[34] The proceedings concerned the term

[32] Kerber, W., Zolna, K. K.: The German Facebook case: the law and economics of the relationship between competition and data protection law, *European Journal of Law and Economics*, 54 2022, p. 217.

[33] Commission Decision of 4.5.2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement Case AT.40153 – E-book MFNs and related matters, C (2017) 2876 final.

[34] Case AT.40437 – Apple - App Store Practices (music streaming), https://competition-cases.ec.europa.eu/cases/AT.40437, 18/11/2023.

that govern the use of Apple's App Store by developers of music streaming apps and conditions under which can they distribute their apps and their music streaming services to users of devices running on the Apple mobile operating system. This practice is known as slide loading and means that undertakings can use different channels to sell their service. They required that developers with whom Apple competes via its own music streaming service have to use Apple's app purchase mechanism for the distribution of paid content. Apple distorted competition in the music streaming apps through App store. They have not informed IPhone users of cheaper purchasing possibilities. For Apple developers the App Store is the only gateway to consumers using Apple's smart mobile devices running on Apple mobile system. The Commission concluded that Apple anti-steering obligations are unfair conditions in breach of Article 102 TFEU. Apple developers prevented other developers to subscribe to streaming services at lower prices. IPhone and IPad users were not informed about alternative music subscription services. The obligation will again give consumers choice in shopping online. It requires gatekeepers to allow business users to communicate and promote offers free of charge to end users via its core platform services or through other channels, regardless whether they use the core platform service of the gatekeeper. The provision protects the freedom to conduct business, so the users can use different channels to sell their services.

The old, disputed cases of tying are also addressed by the Regulation. Article 5 (8) prohibits posing an obligation on business users or end users to subscribe or register to core platform service as a precondition to use, access, sign-up with any of the gatekeeper's core platform service listed in the designation decision. The obligation prohibits gatekeepers from tying one core platform service to another so the gatekeepers cannot impose it as a precondition for the access or register to another gatekeeper's core platform services. It is nothing else than freedom of choice.

There are also provisions addressing the advertising transparency. Article 5 (10) concerns advertising. It is influenced by the Google ADTech case, where the Commission, in June 2023, investigated whether Google had violated the EU competition rules by favouring, through the broad range of practices, its own online display advertising technology services in the so-called "ad tech" supply chain to the detriment of competing providers of advertising technology services, advertisers and online publishers.[35] The obligation requires gatekeep-

[35] On 14/06/2023, the European Commission initiated formal antitrust proceedings against Google and Alphabet for a suspected breach of EU rules, AT.40670, Antitrust Google - Adtech and Data-related practices, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207, 18/11/2023.

er to provide each publisher to which it supplies online advertising services, or third parties authorised by publishers, upon the publisher's request, with free of charge information on a daily basis, concerning each advertisement displayed on the publisher's inventory, regarding: (a) the remuneration received and the fees paid by that publisher, including any deductions and surcharges, for each of the relevant online advertising services provided by the gatekeeper; (b) the price paid by the advertiser, including any deductions and surcharges, subject to the advertiser's consent; and (c) the metrics on which each of the prices and remunerations are calculated. The Commission should clarify the definition of publisher and metrics on which prices and remuneration are calculated.

The grey list in Article 6 is also influenced by some existing practices. The Amazon Marketplace concerned the Commission's Decision from 2022, where the Commission investigated business practices relating to the use of non-publicly available data regarding third party sellers' listings and obligations.[36] It was considered to constitute an abuse of Article 102 TFEU. So, the Regulation obligates the gatekeeper not to use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the customers of those business users. The data includes aggregated and non-aggregated data that is collected through commercial activities on the relevant core platform service.

Gatekeepers have to allow end users to easily change default settings on the operating systems, virtual assistants and web browsers (Article 6 (3)). The latter case concerns the leveraging from browsers, virtual assistants and web browsers to other services. It would be advisable to establish minimum requirements for browsers to qualify as default options. These requirements would primarily focus on switching tools, ensuring that end users can seamlessly transition to any alternative browser installed on their device. This entails providing a list of installed options and facilitating easier access to switching tools. Furthermore, no fees should be charged for providers seeking higher rankings on the list.

Similarly, the gatekeeper must also allow the installation and effective use of third-party software applications and its operating system and allow them to be assessed by other means besides the relevant core platform service of that gatekeeper (Article 6 (4)). The paragraph tackles self-preferencing as a way a platform manages its ecosystem. The gatekeeper is prohibited in treating

[36] AT.40462 Case COMP/AT.40462 and Case COMP/AT.40703 – Amazon, https://competition-cases.ec.europa.eu/cases/AT.40462, 17/11/2023.

more favourably, in ranking and related indexing and crawling, the services and products it offers than similar services or products of a third party (Article 6 (5)). It is nothing else than the decision of the platform how to treat third party products and services in comparison to its own products and services. The Commission will have to decide about the meaning and the scope of self-preferencing. It would be advisable to clarify whether prohibition of a more favourable treatment of a gatekeeper's product or services compared to third – party offers applies both on the end user and the business user side.[37] It is recommended to use the broad interpretation. The narrow interpretation can result in platform providing complementary service to escape the prohibition.

As it stands now, the Commission has the discretion to decide which violations to examine. Some authors argue in favour of using economic models to distinguish between possible discriminatory practices that are legitimate and those that are biased.[38] Additionally, the gatekeeper has to remove technical restrictions that prevent an end user from switching between software services and applications other than those authorised by the platform. It means that a user can switch to other word processors. The risk of gatekeeper's leverage of market power from one service to another is reduced to a minimum.[39]

Another issue concerns the horizontal and vertical interoperability. The gatekeeper must allow providers of services and providers of hardware, free of charge, effective interoperability with interoperability to the same hardware and software features of operating system or virtual assistants. It must also allow business users or alternative providers effective interoperability with and access for the purpose to the same operating system regardless whether those features are part of the same system. The definition of vertical interoperability is quite broad. By allowing horizontal interoperability the risk of multi-homing can be minimised.

The disputed question of data portability is regulated in Article 6 (9) where it is said that the gatekeeper shall provide end users and the third party authorised by end users at their request and free of charge portability of data provided or generated through the activity of end user in the context of the use of core plat-

[37] De Streel, A., *op. cit.*, p. 20.

[38] Peitz, M.: The prohibition of self-preferencing in the DMA, In: De Streel, A, Bourreau, M., Micova, S. B, Feasey, R, Fletcher, A, Krämer, J., Monti, G., Peitz, M. (Eds.) *Effective and proportionate implementation of the DMA*, Bruxelles: Centre on Regulation in Europe, January 2023, p. 98.

[39] Fletcher, A.: DMA Switching Tools and Choice Screens, In: De Streel, A, Bourreau, M., Micova, S. B, Feasey, R, Fletcher, A, Krämer, J., Monti, G., Peitz, M. (Eds.) *Effective and proportionate implementation of the DMA*, Bruxelles: Centre on Regulation in Europe, January 2023, p. 73.

form service. The meaning of data and the process of taking consent should be given.

Obligation in Article 6 (11) is concerned with data access for search engines. The gatekeeper shall provide to any third-party undertaking providing online search engines, at its request, access on fair, reasonable and non-discriminatory terms to ranking, query and click data in relation to fee and paid search generated by end users on its online search engines. Scope of data to be shared, what is the scale of data to be shared and the timeliness of data should be specified.

The gatekeeper shall apply fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services listed in the designation decision (Article 6 (12)). For that purpose, the gatekeeper shall publish general conditions of access, including an alternative dispute settlement mechanism. Apple/Apple store case[40] concerned terms that govern the use of Apple's App store in the EU by developers offering app which are directly competing with apps or services offered by Apple.

The Commission and courts will have a difficult task in interpreting and clarifying these obligations. This will help undertakings to be prepared in advance and it will reduce the risk of possible circumvention. A clear set of obligations will certainly help in better enforcement. De Streel points to three types of possible clarifications. The first relates to material and geographical scope of application of obligation. He highlights the need to specify the publisher that benefits from the online transparency regime or issues regarding switching and default obligations as well as questions regarding data portability and beneficiaries of data access. Geographical scope should be defined, particularly search data sharing and horizontal interoperability. Further, the precise meaning of online ad metrics should be more transparent, how many access points to switch default should be offered by the gatekeeper, or which consent should be required when data are ported.[41]

The last and the most important point is the compliance with the obligations. The Commission has various ways to ensure the right assessment. The question is how to measure the success of the implemented obligations. What are qualitative and quantitative parameters of measurement? The obligations have

[40] On 16/06/2020, the Commission decided to initiate antitrust proceedings in case AT.40716 - Apple - App Store Practices within the meaning of Article 11(6) of Council Regulation No 1/2003 and Article 2(1) of Commission Regulation No 773/2004, [https://ec.europa.eu/competition/antitrust/cases/dec_docs/40716/40716_13_3.pdf, 17/11/2023.

[41] See de Streel, A., *op. cit.*, p. 12 and on.

to meet the requirement of effectiveness and proportionality. Compliance report will be crucial. Maybe a set of measurement techniques can be a good solution that will introduce a predictability and objectivity. In order to try to solve possible misunderstandings, in October 2023, the Commission published a template for the compliance report.[42]

6. CONCLUSION

The Regulation is perceived as a tool to fight against "big tech or tech giants' overwhelming power".[43] The purpose is to neutralize imbalance of power between the so-called gatekeepers and other providers that negatively influence other commercial users and consumers.[44]

The Regulation as an *ex ante* tool is perceived as a mechanism to deal with the fast developments in the digital environment. The business models are so diverse and fast-developing, so regulation has to be flexible enough to keep up with those developments. Some authors see Regulation as a highly simplified version of competition law.[45] The main achievement is that from now on there is no need to go into complex effect or object analysis of the practice under investigation.

The Regulation's list encompasses various practices, some of which are still contentious and unresolved. For instance, there are references to practices such as data combination from different sources, reminiscent of ongoing cases involving Facebook, or anti-steering rules currently under investigation. While drawing inspiration from specific cases can provide clarity, overly relying on them may limit the Regulation's applicability to future scenarios. A lengthy and overly intricate list may result in misinterpretations and misunderstandings, undermining its effectiveness.

Despite potential challenges in interpreting the Regulation, its adoption is welcomed. It eliminates the need for cumbersome processes such as defining relevant markets and determining market shares to establish dominance. Once a gatekeeper is designated, there's no requirement to demonstrate fulfilment of elements under the essential facility doctrine. However, this doctrine remains applicable to undertakings not designated as gatekeepers.

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42 https://digital-markets-act.ec.europa.eu/legislation_en#templates, 10/11/2023.

43 Massa, C.: The Digital Markets Act between the EU Economic Constitutionalism and EU Competition Policy, *Yearbook of Antitrust and Regulatory Studies*, 15(26) 2022, p. 108.

44 Chiarella, M.: Digital Markets Act (DMA) and Digital Services Act (DSA): New rules for the EU Digital Environment, *Athens Journal of Law*, 9 (1) 2023, pp. 33-58.

45 Beems, B., *op. cit*., p. 10.

The Regulation will complement competition rules that try to tackle the Big Tech position. Legal certainty will be guaranteed with possible deterrent effect. The idea is to have a tool for quick enforcement. There is always a way to intervene *ex post*, if necessary.

The Regulation can be seen as shift towards Ordoliberal theory that implies that we need to implement market regulations to ensure its true freedom and effectiveness. The undertakings designated as gatekeepers must take a proactive role. It will be interesting to follow the implementation process and the practical application of the Regulation.

LITERATURE

1. Bania, K.: Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice", *European Competition Journal*, 19(1) 2023, pp. 116-149.
   – DOI: https://doi.org/10.1080/17441056.2022.2156730
2. Beems, B.: The DMA in the broader regulatory landscape of the EU: an institutional perspective, *European Competition Journal*, 19(1) 2023, pp. 1-29.
   – DOI: https://doi.org/10.1080/17441056.2022.2129766
3. Case AT.40437, Apple - App Store Practices (music streaming), https://competition-cases.ec.europa.eu/cases/AT.40437, 18/11/2023.
4. Case AT.40670, Antitrust Google - Adtech, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207, 18/11/2023.
5. Case AT.40716 - Apple - App Store Practices, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40716/40716_13_3.pdf, 17/11/2023.
6. Case COMP/AT.40462 and Case COMP/AT.40703 – Amazon, https://competition-cases.ec.europa.eu/cases/AT.40462, 17/11/2023.
7. Chiarella, M. L.: Digital Markets Act (DMA) and Digital Services Act (DSA): New rules for the EU Digital Environment, *Athens Journal of Law*, 9(1) 2023, pp. 33-58.
   – DOI: https://doi.org/10.30958/ajl.9-1-2
8. Commission Decision of 4.5.2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement Case AT.40153 – E-book MFNs and related matters, C (2017) 2876 final
9. De Streel, A.: Recommendations for the Effective and Proportionate DMA Implementation, In: De Streel, A, Bourreau, M., Micova, S. B, Feasey, R, Fletcher, A, Krämer, J., Monti, G., Peitz, M. (Eds.) *Effective and proportionate implementation of the DMA*, Bruxelles: Centre on Regulation in Europe, January 2023, https://cerre.eu/publications/effective-and-proportionate-implementation-of-the-dma, pp. 9-26.

10. Feasey, R.: Note on designation of gatekeepers in the Digital Markets Act, In: De Streel, A., Bourreau, M., Micova, S.B., Feasey, R., Fletcher, A., Kraemer, J., Monti, G. and Peitz, M. (Eds.) *Effective and proportionate implementation of the DMA*, Bruxelles: Centre on Regulation in Europe, January 2023, https://cerre.eu/publications/effective-and-proportionate-implementation-of-the-dma, pp. 41-48.

11. Fletcher, A.: DMA Switching Tools and Choice Screens, In: De Streel, A., Bourreau, M., Micova, S.B., Feasey, R., Fletcher, A., Kraemer, J., Monti, G. and Peitz, M. (Eds.) *Effective and proportionate implementation of the DMA*, Bruxelles: Centre on Regulation in Europe, January 2023, https://cerre.eu/publications/effective-and-proportionate-implementation-of-the-dma, pp. 70-87.

12. https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328, 02/11/2023.

13. Kerber, W., Zolna, K. K.: The German Facebook case: the law and economics of the relationship between competition and data protection law, 54 2022, *European Journal of Law and Economics*, 54(2) (2022), pp. 217-250.
    – DOI: https://doi.org/10.1007/s10657-022-09727-8

14. Massa, C.: The Digital Markets Act between the EU Economic Constitutionalism and EU Competition Policy, *Yearbook of Antitrust and Regulatory Studies*, 15(26) 2022, pp. 103-130.
    – DOI: http://dx.doi.org/10.7172/1689-9024.YARS.2022.15.26.5

15. Monti, G.: The Digital Markets Act: Improving its Institutional Design, *European Competition & Regulatory Law Review*, 5(2) 2021, pp. 90-101.
    – DOI: https://doi.org/10.21552/core/2021/2/4

16. Moore, M., Tambini, D.: *Regulating Big Tech, Policy Responses to Digital Dominance*, New York: Oxford University Press, 2022.

17. Peitz, M.: The prohibition of self-preferencing in the DMA, In: De Streel, A, Bourreau, M., Micova, S. B, Feasey, R, Fletcher, A, Krämer, J., Monti, G., Peitz, M. (Eds.) *Effective and proportionate implementation of the DMA*, Bruxelles: Centre on Regulation in Europe, January 2023, https://cerre.eu/publications/effective-and-proportionate-implementation-of-the-dma, pp. 89-116.

18. Petit, N.: *Big Tech and the digital economy, the moligopoly scenario*, Oxford: Oxford University Press, 2020.

19. Podszun, R., Bongartz, P., Langenstein, S.: The Digital Markets Act: Moving from competition law to regulation for large gatekeepers, *Journal of European Consumer and Market Law*, 10(2) 2021, pp. 60-67
    – DOI: https://dx.doi.org/10.2139/ssrn.3788571

20. Pošćić, A., Martinović, A.: On the use and abuse of Big Data in competitive markets – Possible challenges for competition law, In: Šmejkal,V. (Ed.) *EU Antitrust: Hot Topics & Next Steps,* Prague: Charles University Faculty of Law, 2022, pp. 136-148.

21. Pošćić, A., Martinović, A.: The Interplay between the essential facility doctrine and the digital markets act: implications to Big Data, *Acta Universitatis Carolinae – Iuridica*, 69(2) 2023, pp. 71-82.

22. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), (OJ L 265. 12/10/2022).

23. Renda, A.: Can the EU Digital Markets Act Achieve its Goals?, *The Digital Revolution and the New Social Contract Series,* Centre for the Governance of Change, IE University, 2022, pp. 1-13.

24. Stucke, Maurice E., Grunes, Allen P.: *Big Data and competition policy*, Oxford University Press, 2016.

25. Treaty on the Functioning of the European Union (consolidated version 2016), (OJ C 202, 07/06/2020).

26. Van den Boom, J.: What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws, *European Competition Journal*, 19(1) 2023, pp. 57-85.
    – DOI: https://doi.org/10.1080/17441056.2022.2156728

27. Zelger, B.: *Restrictions of EU Competition Law in the Digital Age, The Meaning of "Effects"in a Digital Economy*, Cham: Springer, 2023.