THE DIGITAL MARKETS ACT PROPOSAL: A NEW ERA FOR DIGITAL GATEKEEPERS

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1. THE DIGITAL SERVICES ACT PACKAGE

In mid-December 2020, the European Commission (EC) has adopted its long-awaited proposals to ensure a safe digital environment for EU users and to ensure fair, open and competitive digital markets. While jurisdictions around the world are attempting to regulate digital platforms and marketplaces, the EU is a pioneer to enact rules in this fast-moving industry. These new rules, which are part of the European Digital Strategy, would include two separate acts: the Digital Services Act (DSA) and the Digital Markets Act (DMA) (together called "the Digital Services Act Package")[1]. While the DSA would regulate all online intermediaries, the DMA would only target large digital service providers which the EC has identified as "gatekeepers". Even though these acts still have to go through the EU legislative procedure, at this stage, they are already highly detailed and complex.

The EC recognises that online platforms have been beneficial to many EU consumers and businesses and that they have opened new opportunities of trading within and outside the Union[2]. Nevertheless, there is also a downside associated with these positive developments. One of the EC's core concerns is the trade and exchange of illegal goods, services and content online. The past few years have also shown that online services are being misused to spread disinformation based on intelligent algorithms by, for instance, manipulating election results. The EC warrants the impact of these challenges on fundamental rights online. Another concern is that a few large service providers (so-called "gatekeepers") have created their own online ecosystems and have emerged as private rule-makers, which allows them to act almost independently from regular market constraints. Their entrenched position allows them to control (a significant part of) access to digital services. They may sometimes impose unfair conditions for businesses, such as the unfair use of data from companies operating on these platforms. Their strong economic power may also lead to situations where users are, for instance, "locked in" a service and have no possibilities to switch to another service. These practices may ultimately harm consumer welfare. The EC does not mention any names, but they probably refer to Amazon, Google, Facebook, Apple, Microsoft and other tech giants.

The two proposals are designed to remedy these problems. The DSA, in particular, is mainly aimed at modernising the 2000 e-Commerce Directive by establishing a new framework of obligations for all digital service providers, such as social networks, online marketplaces, app stores and online booking platforms. These rules introduce enhanced responsibilities as to how certain types of goods, services and content should (not) be available to consumers online. In short, the DSA is primarily concerned with transparency, less counterfeiting, and better consumer protection. The DMA, on the other hand, aims to establish a level playing field to foster innovation and fair competition both in the EU Single Market and on a global level[3]. It is intended to address the EC's long-standing concerns that its existing enforcement powers under EU competition law (such as under Article 102 Treaty of the Functioning of the EU (TFEU)) are not sufficient to address the competition concerns in these markets. This article aims to provide a first analysis of the DMA by elaborating on the addressees, the list of obligations, the enforcement framework, and the relationship of the DMA with other EU regulation.

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1. 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 (hereinafter: DMA).

2. EUROPEAN COMMISSION, The Digital Services Act Package, available at: https://ec.europa.eu/digital-single-market/en/digital-services-act-package (accessed 12 February 2021).

3. EUROPEAN COMMISSION, The Digital Markets Act: ensuring fair and open digital markets, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (accessed 12 February 2021).

2. GATEKEEPERS: WHAT'S IN A NAME?

The DMA would complement existing EU competition rules as an *ex ante* regulatory instrument of so-called "core platform service" providers that are acting as "gatekeepers". To identify an entity as gatekeeper, the DMA has introduced a sophisticated methodology.

2.1. Designation process

First of all, only providers of "core platform services" can potentially be classified as gatekeepers. Article 2(2) of the DMA includes an exhaustive list of "core platform services": online intermediation services (e.g., online marketplaces, app stores, booking sites), online search engines, social networking services, video-sharing platforms, number-independent interpersonal electronic communication services (e.g., messaging and chat apps), operating systems, cloud computing services, and advertising services.

The responsibilities under the DMA will only be applicable to these types of core services, and not to other types of platform activities. Interestingly, the Regulatory Scrutiny Board of the EC has criticised the lack of sufficient justification for the selection of the core platform services covered by the DMA[4]. It is, for instance, unclear why other platform services, such as content streaming providers, would not be included in the list.

Next, not all providers providing a core platform service would fall within the scope of the DMA. Rather, the DMA would only be applicable to those providers which are deemed to be gatekeepers. These are very large companies with a strong economic position, and which have a lasting, large user base in multiple EU countries. The DMA establishes a set of qualitative criteria for qualifying a company as a so-called gatekeeper[5]. To additionally speed up the identification of a gatekeeper, the proposal sets out a presumption based on quantitative and objective thresholds which allows a straightforward designation process[6].

A provider shall be designated as a gatekeeper if it fulfils three cumulative conditions:

(ii.) The undertaking has a significant impact on the internal market. This condition is presumed to be fulfilled if (a) the undertaking achieved an annual turnover in the European Economic Area (EEA) (i.e., the EU, Norway and Liechtenstein) of at least EUR 6.5 billion in the last three financial years, or where it has an average market capitalisation or equivalent fair market value of at least EUR 65 billion in the last financial year, and (b) it provides a core platform service in at least three Member States.
(ii.) The undertaking operates a core platform service which serves as an important gateway for business users to reach end users creating a degree of dependency. In other words, the company has a strong intermediation position meaning that it links a large user base to a large number of businesses. This is assumed to be the case if the undertaking provides a core platform service that has more than 45 million monthly active end users established or located in the EU (corresponding to almost 10% of the population of the EU27) and more than 10,000 active business users established in the EU in the last financial year.
(iii.) The undertaking enjoys (or it is foreseeable in the near future that it will enjoy) an entrenched and durable position in the market, meaning that it is stable over time. This is presumed to be the case if the gateway presumption thresholds were met in each of the last three financial years.

Digital providers will have to self-assess whether they meet the abovementioned criteria. If that is the case, they should notify the EC within three months after the thresholds are satisfied[7]. The EC shall

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[4]. Regulatory Scrutiny Board Opinion on the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SEC(2020) 437, available at: https://ec.europa.eu/transparency/regdoc/rep/2/2020/EN/SEC-2020-437-F1-EN-MAIN-PART-1.PDF (hereinafter: Regulatory Scrutiny Board Opinion).

[5]. Article 3(1) DMA.

[6]. Ibid, Article 3(2).

[7]. Ibid, Article 3(3).

then designate the provider as a gatekeeper no later than within a period of 60 days. In other words, the designation process can be finalised very quickly. However, the Regulatory Scrutiny Board criticised that the proposal should better demonstrate why the quantitative thresholds are a robust and reliable trigger across all selected core platform services for the (quasi-automatic) designation of gatekeepers[8].

Nevertheless, providers are allowed to rebut the presumption that they are a gatekeeper by presenting substantiated arguments to demonstrate the contrary[9]. To that effect, they may rely on key market characteristics such as the size, operations and position of a company, number of business users, entry barriers due to network effects and data advantages, economies of scale, user lock-in effects, etc. Unfortunately, it is not entirely clear what the EC expects to be convincing arguments. It is submitted that precedents on abuse of dominance may be of guidance here. For instance, a company could show that, while it may have a large number of business and end users, the switching costs to switch to other operators are relatively low.

Furthermore, even if an undertaking does not meet these quantitative criteria (or if it has presented substantiated arguments to rebut the quantitative criteria), the EC may still unilaterally identify providers as gatekeepers on the basis of a qualitative assessment[10]. Indeed, in the context of a market investigation for the appointment of gatekeepers, the EC may evaluate the specific situation of a given company by looking at a number of key market characteristics such as the ones enumerated above.

In sum, the EC may designate a company as gatekeeper (a) on the basis of rebuttable presumptions, or (b) on the basis of a qualitative test within the context of a market investigation. These qualitative criteria may also serve companies to rebut the quantitative presumptions.

2.2. Flexibility, or not?

The DMA allows for flexibility by empowering the EC to regularly adjust the quantitative thresholds to market and technological developments where necessary[11]. The DMA also provides for a review clause allowing the EC to regularly (at least every two years) review the gatekeeper status, and to adjust the list of core platform services of the gatekeeper[12]. However, the EC does not have the power itself to change the list of core platform services in Article 2 of the DMA. This would require a legislative act adopted by the European Council and Parliament. This could, however, slow down the designation process of new kind of platform services in the future, which may become a weak point of the DMA. It remains to be confirmed whether the competence to designate gatekeepers would be the Directorate-General for Competition or another part of the EC.

2.3. To be or not to be a (global) gatekeeper

The quantitative presumptions are in the forefront of the DMA for the designation of *global* gatekeepers. They are intended to provide a degree of legal certainty to market players and to leave no room for discussion about plain facts. While it is almost certain that the largest big tech companies such as Amazon, Google, Facebook, Apple and Microsoft (GAFAM) meet these thresholds, some argue that they are low enough to also include other global companies. For instance, Caffara and Scott Morton suggest that, based on preliminary research and public information, Oracle, SAP, Amazon Web Services (AWS) and Microsoft Azure would meet the thresholds[13].

Companies like Booking.com, Spotify, Uber, ByteDance/TikTok, Salesforce, Google Cloud and IBM Cloud appear to meet some thresholds at this point but not all of them[14]. Conversely, Twitter, Airbnb,

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[8]. Regulatory Scrutiny Board Opinion (n. 4).

[9]. Article 3(4) DMA.

[10]. Ibid, Article 3(1) *juncto* Article 3(6).

[11]. Ibid, Article 3(5).

[12]. Ibid, Article 4(2).

[13]. C. CAFFARA / F. SCOTT MORTON, The European Commission Digital Markets Act: A translation, VOXEU, CEPR Policy Portal, available at: https://voxeu.org/article/european-commission-digital-markets-act-translation (accessed 12 February 2021).

[14]. Ibid.

Bing, LinkedIn, Netflix, Zoom and Expedia do not appear to meet the thresholds according to both authors[15]. Furthermore, there are many other platforms emerging at EU level which are not (yet) global gatekeepers, but which show the same characteristics as the global platforms. Nevertheless, it is submitted that the EC anticipated upon this by introducing the possibility to designate gatekeepers on the basis of qualitative criteria. This would allow to scrutinise smaller-scale but nonetheless influential providers. However, the qualitative test as it stands now can be criticised for its high degree of legal uncertainty. The EC would have to provide more guidance for companies to enable them to assess their level of risk.

Finally, questions are arising about how accurate the DMA will be at the end of the legislative procedure. Everyone has witnessed how some core platforms have both emerged and disappeared in 10 years (e.g., Blackberry Messenger, Yahoo Messenger, Path). It is true that some have disappeared because they were facing technical issues, yet others may effectively have been forced to shut their doors due to competing gatekeepers. Another question arises regarding platforms which are big in one Member State but not the EU as a whole (e.g., Bol.com is the largest marketplace in the Netherlands but not in other parts of the EU). It remains to be seen whether this would still be a matter relevant under the DMA.

3. BLACKLIST AND WHITELISTS FOR GATEKEEPERS

The following paragraphs will have a closer look at the obligations for gatekeepers under the DMA. Once identified as a gatekeeper, companies will "carry an extra responsibility to conduct themselves in a way that ensures an open online environment that is fair for businesses and consumers, and open to innovation by all"[16]. This wording sounds similar to the EU competition law adagio established by the CJEU that dominant companies have a special responsibility not to allow their conduct to impair effective competition on the single market[17]. In order to avoid a number of unfair practices, the responsibility under the DMA has been translated into a set of affirmative obligations (so-called "do's") and prohibitions (so-called "don'ts") gatekeepers must comply with in their daily operations. Interestingly, most of the 18 obligations and prohibitions are based on past and ongoing competition investigations in the digital sector[18].

3.1. Straightforward and "for discussion" obligations

The DMA distinguishes two categories of obligations: a list of straightforward obligations and a number of obligations "susceptible of being further specified"[19]. Both categories are self-executing – gatekeepers should comply with them without the need for an intervention by the EC (such as a decision). Unlike the second category of obligations, the straightforward obligations would not need any further implementation guidance by the EC. These primarily include restrictions on gatekeepers' commercial freedom, in particular with their business users.

Article 5 - Examples of measures gatekeepers should pursue ("dos")		
No MFN or parity clauses	Allow business users to offer the same products or services to end users through third party online	Amazon, Online

[15]. Ibid.

[16]. EUROPEAN COMMISSION, Press corner, Digital Markets Act: Ensuring fair and open digital markets, available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349 (accessed 12 February 2021).

[17]. ECJ C-322/81, *Michelin/Commission*, 09.11.1983, ECLI:EU:C:1983:313, para. 57.

[18]. Caffara and Scott Morton (n.13) have tried to establish how some of the obligations may have arisen from publicly known complaints and cases against some of the largest tech companies, in particular the "big five". The author of this article has based herself on their findings.

[19]. Articles 5 and 6 DMA.

	intermediation services at prices or conditions that are different from those offered through the gatekeeper's intermediation services. This includes an effective ban on "wide" most favoured nation (MFN) clauses in the terms and conditions of online intermediation services, such as booking platforms. For example, hotels should be able to offer their rooms outside booking platforms.	Travel Agents[20]
Promoting products and contracting outside platform	Allow business users to freely promote their offer and conclude contracts with the gatekeeper's end users (acquired via the core platform service) outside the gatekeeper's platform, whilst allowing end users to continue accessing and using content, subscriptions, features or other items through the relevant platform. This would for instance allow companies to contract with their customers without being compelled to use the platform's payment system.	Apple[21]
Transparency with advertisers and publishers	Provide advertisers and publishers to which the gatekeeper supplies advertising services with transparent information concerning prices and remuneration for each of the relevant advertising services provided by the gatekeeper.	Facebook, Google[22]
Article 5 - Examples of practices gatekeepers should refrain from ("don'ts")		
No combination of personal data unless consent	Combining personal data from their core platform services with data from any other services (offered by the gatekeeper itself or by third parties), unless the end user has had a choice and provided consent as defined in the EU General Data Protection Regulation (GDPR). This will primarily have an impact on companies active in digital advertising, such as Google and Facebook, who use data combination and accumulation to gain a competitive advantage in targeted advertising. Nevertheless, it appears that if users consent to this – it will be interesting to see how this consent requirement is interpreted – this provision might become a dead letter.	Facebook, Google[23]
No restrictions for recourse to public authority	Restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers.	/
Freedom of identification service	Requiring business users to use, offer or interoperate with any identification service of the gatekeeper itself as part of the provision of services offered to end users	Facebook, Google[24]

[20]. E.g., Amazon e-books case (Case AT.40153) and the investigations by national regulators into practices adopted by Booking.com, Expedia, etc.

[21]. E.g., current EC investigation into Apple's In-App Purchase mechanism (Case AT.40452).

[22]. E.g., current EC investigation into Google's advertising technology practices, see https://www.politico.eu/article/brussels-zeroes-in-on-googles-data/ (accessed 15 February 2021).

[23]. E.g., the decision of German Bundeskartellamt issued in 2019 against Facebook as well as the current EC investigation about Facebook's and Google's data policies.

[24]. E.g., the current EC investigation into Google's advertising technology practices (n. 22).

	via the gatekeeper's core platform services.	
No subscription as preliminary condition for access	Require business users or end users to subscribe to or register with any other core platform services as a preliminary condition to access any of the gatekeeper's core platform services. This provision prevents gatekeepers from adopting tying practices.	Facebook, Google[25]

The second category of obligations enlists several more complex "dos" and "don'ts". They are complex because they not only include practices gatekeepers should refrain from, but also measures that should ensure access to rivals. The EC leaves compliance with these obligations in the first place with the gatekeepers themselves. Only if the EC considers that the gatekeeper is failing to ensure effective compliance, it may decide to, following a market investigation, specify the exact measures the gatekeeper has to implement[26]. A gatekeeper itself may also request guidance from the EC[27]. In any event, the DMA proposal allows for a "regulatory dialogue" between the gatekeeper and the EC. The EC shall issue its decision within six months from the opening of the market investigation.

Article 6 - Examples of practices gatekeepers should pursue ("dos")		Who?
No use of non-public data	Using any data not publicly available about the activities of business users or their end users to compete with other business users. This could be the case where the owner of an online marketplace, who also happens to be a trader on that marketplace, collects data about the activities of other traders on the platform and uses that data to allegedly gain an unfair competitive advantage.	Amazon[28]
No discrimination in favour of own services	Treating the own products or services of the gatekeeper itself more favourably in ranking than similar third-party products or services offered by third parties on the gatekeeper's platform (e.g., via search algorithms).	Google, Amazon, Apple[29]
No restriction of switching	Technically restricting the ability of end users to switch between and subscribe to different software applications and services to be accessed using the gatekeeper's operating system.	Apple[30]
Article 6 - Examples of practices gatekeepers should refrain from ('don'ts')		Who?
Permit un-installing pre-installed software	Allow end users to un-install any pre-installed software applications (except if they are essential for the functioning of the operating system or	Google, Apple, Microsoft[31]

[25]. E.g., the tying practices by Google between YouTube and Google Ads.

[26]. Article 7(2) DMA.

[27]. Ibid, Article 6(7).

[28]. E.g., the EC has recently (November 2020) sent a Statement of Objections to Amazon for the use of non-public independent seller data (Case AT.40462).

[29]. E.g., the Google Search (Shopping) decision (Case AT.39740).

[30]. E.g., the current EC investigations into Apple's App Store (Case AT.40437 and Case AT.40652).

[31]. E.g., the Google Android decision (Case AT.40099).

	device).	
Permit "side loading"	Allow the installation and effective use of third-party software applications or software application stores that are interoperable with the gatekeeper's core platform services (i.e., gatekeepers have to permit "side loading" of apps from other app stores).	Apple, Google[32]
Interoperability	Give business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used by the gatekeeper itself (e.g., access to the application programming interfaces (APIs) which the gatekeeper's applications use themselves).	Facebook, Google, Apple[33]
Access to tools and information for advertisers for independent verification	Provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools and to the information necessary to carry out their own independent verification of their advertisements hosted by the gatekeeper.	Google, Facebook[34]
Data portability	Ensure effective data portability for business users and end users.	/
Access to data for business users and third parties	Provide business users and third parties free of charge with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data (including personal data, subject to the requirements of the GDPR) that is generated in the use of the gatekeeper's platform by those business users and the end users engaging with the products or services provided by those business users.	/
FRAND terms with third-party providers of search engine gatekeepers	Provide third-party providers of search engines, upon their request, with access on fair, reasonable and non-discriminatory (FRAND) terms to ranking, query, click and view data generated by the end users of the gatekeeper's search engines (subject to anonymisation of any data that constitutes personal data).	Google[35]
FRAND terms for access for business users to app store	Apply FRAND conditions for access for business users to the app store of the gatekeeper.	Apple, Google[36]

[32]. E.g., the current EC investigation into Apple's App Store (Case AT.40437 and Case AT.40652).

[33]. E.g., the current EC investigations into Facebook's data-related practices (Case AT.40628).

[34]. E.g., this is of direct relevance to the advertising businesses of Google and Facebook.

[35]. E.g., the EC Google Search (Shopping) decision (Case AT.39740). This would imply for Google to practically share all data generated by its users on its search engine, including the data about users' long-tail searches, which could have an appreciable impact on competition amongst search engines.

[36]. E.g., specific to the app stores of Apple and Google.

The DMA leaves open the possibility of a suspension of, or exemption from, certain obligations yet under very limited conditions (e.g., based on public interest)[37].

3.2. One-size-fits-(not-)all approach?

Importantly, the DMA regulates a provider's core platform service and not the provider itself, or within the words of Caffara and Scott Morton: "*the designation of gatekeeper applies not to the whole firm, but to one business within the conglomerate*"[38]. Consequently, the obligations under the DMA would only apply to that specific business or ecosystem[39]. It is possible, however, that a company exercises gatekeeping power across several related services[40]. In that case, the list of obligations would apply to all services for which the company has been designated gatekeeper. It is unclear however to what extent a gatekeeper's obligations will apply to other (ancillary) services for which a company has not been designated as a gatekeeper.

Interestingly, Caffara and Scott Morton also criticise the DMA proposal for not having enough regard to the fact that tech companies may engage in different business models for each type of service. An ad-funded digital platform (such as Google, Facebook, Twitter) will not have the same business model as a transaction platform (such as Uber, Airbnb, Amazon) or an OS ecosystem platform (i.e., operating systems and app stores such as Android, Google Play Store, Microsoft Windows, AWS). Consequently, these business models will also differ significantly in terms of economies of scale, network effects, potential for multihoming, etc. While the DMA claims to formulate rules that could be applicable uniformly across all models, this business model critique makes clear that this unifying task remains a challenging one.

Even though the writers of the DMA have attempted to generalise and abstract each case from its specific setting, Caffara and Scott Morton have demonstrated that it is nevertheless possible to link almost each obligation to one (sometimes a few) specific platform(s) of the traditional GAFAM list. Hence, it is unclear how this catalogue of obligations derived from past antitrust cases would also apply to other platforms, both within and outside the usual list of big techs. Platforms would have to second guess as to how and to what extent these obligations apply to them or not. Consequently, the EC designed a tool which is the contrary of "flexible". Instead, aforementioned authors claim that the EC should differentiate obligations according to separate business models, just like the Competition and Markets Authority proposed for the UK[41].

3.3. Killer acquisitions

Furthermore, gatekeepers will be required to annually submit independent audits regarding any techniques for profiling of consumers they apply[42]. More importantly, gatekeepers will also be obliged to notify the EC of any intended acquisition or concentration involving another provider of core platform service or of any other services provided in the digital sector, regardless of whether the transaction is notifiable under the EU Merger Regulation or under national merger control rules[43]. This means that a gatekeeper would have to inform the EC of a merger, even if it would not have met the turnover thresholds. Assumingly, this provision has arisen from the EC's fear for "killer acquisitions" where big tech companies buy out promising new players to access their data. However, the DMA provision merely requires gatekeepers to "inform" the EC, without any consequences. While it is true that there is no legal basis for the DMA to modify the EC Merger Regulation, the

[37]. Articles 8 and 9 DMA.

[38]. Caffara and Scott Morton (n. 13) note that platforms are often conglomerates which operate several related businesses. For example, Amazon.com, Inc. is the provider of Amazon.com (Amazon Marketplace), Amazon Web Services, Amazon Prime, Amazon Music, etc., which are all different services built of different business models.

[39]. E.g., the gatekeeper designation would only be in relation to Amazon.com, but not Amazon Alexa.

[40]. E.g., Facebook could be seen as a gatekeeper in relation to both social network services and advertising services.

[41]. CMA, A New Pro-Competition Regime for Digital Markets - Advice of the Digital Markets Taskforce (2020), available at: https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf (accessed 15 February 2021).

[42]. Article 13 DMA.

[43]. Ibid, Article 12.

DMA will have to be complemented by a change in the merger regime to make this provision effective.

In this context, it is submitted that the merger notification should be read in parallel with the EC's proposed policy change regarding the referral mechanism under Article 22 of the EU Merger Regulation[44]. The mechanism under this provision allows for a referral of mergers by Member States to the EC. The EC has had a long-standing policy where it would only allow referrals of cases which would fall outside the EC's jurisdiction but within the jurisdiction of national merger control rules. However, the EC recently announced that it would also review deals that would even fall outside the jurisdiction of any national antitrust authority. Nevertheless, this would be a mere change in enforcement. The substantive merger control rules (e.g., turnover thresholds) remain unchanged, so it is possible that this mechanism might not significantly increase the number of prohibited mergers.

4. ENFORCEMENT

According to the DMA, a decentralised enforcement of the act would not be possible due to the cross-border nature of gatekeepers' activities. Thus, the DMA primarily relies on the EC to investigate, enforce and monitor compliance. However, Member States will remain involved through the Digital Markets Advisory Committee, composed of representatives of the Member States.

4.1. The EC's investigative powers

To identify and designate potential gatekeepers, the EC disposes of two types of investigation tools: instruments as part of its targeted powers (incl. requests for information, on-site inspections ("dawn raids"), interviews) and overarching market investigations. The targeted powers appear to be largely identical to the competition rules, but on some occasions, they are even more stringent. For instance, the EC may request all information necessary to adopt a decision under the DMA, which means that the EC's power is "only" limited to the principle of proportionality[45]. In particular, the EC may also request access to a platform's most important assets such as data bases and algorithms. Furthermore, in the context of proceedings for non-compliance, the EC can adopt interim measures against gatekeepers if there is a serious and irreparable damage for business users or end users[46].

To keep up with the fast-moving digital markets, the DMA also empowers the EC to carry out market investigations for three purposes:

(i.) to identify gatekeepers that are not captured by the quantitative thresholds of the DMA, and to assess the qualification of presumed gatekeepers that have presented substantiated arguments to rebut the presumption[47]. This competence would in particular be useful to regulate firms which are about to tip the markets they're active in.
(ii.) to justify behavioural or structural remedies in case of systematic infringements of the DMA[48].
(iii.) to identify other services that should be added to the general list of core platform services, or to identify new practices which are likely to impair the contestability of markets or may be equally unfair and which are not yet effectively addressed by the existing list of obligations in the DMA[49]. Moreover, the DMA empowers the EC to adopt "delegated acts" to 'update' the list of do's and don'ts, following such a market investigation[50]. In effect, this means that the EC would have the competence to amend the list of obligations without having to go through the ordinary legislative procedure (the Parliament and the Council).

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44. M. VESTAGER, The future of EU merger control, (International Bar Association 24th Annual Competition Conference, 11 September 2020), available at:https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en (accessed 15 February 2021).

45. Article 19 DMA.

46. Ibid, Article 22.

47. Ibid, Article 15.

48. Ibid, Article 16.

49. Ibid, Article 17.

50. Ibid, Article 10.

In short, these market investigation provisions aim to provide for discretion and flexibility to ensure an effective enforcement of the DMA. The EC must "endeavour" to close its market investigation and issue a decision regarding the designation of a gatekeeper or regarding remedies within 12 months. However, the EC has 24 months to issue a public report on whether to expand the scope of the DMA (e.g., additional services, new types of unfair practices), and in the affirmative, to determine proposed amendments or delegated acts to do so.

4.2 .Consequences of non-compliance

In case of non-compliance of the DMA, the EC can impose fines on a gatekeeper up to 10% of the company's total worldwide annual turnover for a violation of the dos and don'ts. Fines up to 1% of the total turnover or periodic penalty payments of up to 5% of the average daily turnover can be imposed for violations of formal requirements, such as failing to supply information within the required time-limit within the context of a request for information. In case of systematic infringements, and only if necessary to achieve compliance, the EC can additionally impose behavioural or structural remedies (e.g., the divestiture of (parts of) a business) that are proportionate to the offence committed. However, as seen above, the EC would only be able to impose these remedies after a market investigation.

4.3. Role of national regulation and local authorities

Several Member States (e.g., Hungary, Poland) had already made attempts to locally deal with the rising issues in the digital world[51]. However, in the proposal the EC highlights that these national initiatives are not sufficient because gatekeepers typically operate at cross-border – even at global – level. According to the EC, national legislation and enforcement has the potential to lead to increased regulatory fragmentation. Therefore, the EC esteems it necessary to adopt a harmonised European framework and to appoint itself as primary enforcer. Interestingly, during the consultation period, the majority of stakeholders agreed with this and expressed their support for a European instrument and watchdog[52]. Consequently, the DMA prohibits Member States from imposing additional local obligations on gatekeepers or from issuing decisions which would run counter to a decision adopted by the EC[53].

Nevertheless, Member States would remain involved via the Digital Markets Advisory Committee composed of national experts of Member States[54]. The EC would be encouraged to consult the Committee and ask for its opinion prior to adopting certain important decisions (e.g., behavioural or structural remedies, fines). However, this opinion would not be binding nor mandatory to request. In addition, Member States would be able to request the EC to open a market investigation in the event they consider that a platform should be designated as gatekeeper[55]. If at least three Member States file such a request, the EC will be required to examine whether there are reasonable grounds for such an investigation. Furthermore, given its legal form, the DMA will be directly applicable in the Member States, which will also allow private enforcement of the regulation through national courts.

Apart from that, Member States remain competent in other matters regarding gatekeepers, such as antitrust investigations, consumer protection proceedings, data protection proceedings, etc. These proceedings should, however, not affect the obligations imposed on gatekeepers under the DMA.

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[51]. The Polish Competition Authority has initiated proceedings against Allegro, Poland's largest online shopping platform, for its allegedly anticompetitive practices vis-à-vis its business users (for the press release, see https://www.uokik.gov.pl/download.php?plik=24045). Similarly, the Hungarian Competition Authority has initiated an investigation against the operator of TikTok due to failure to provide users with sufficient information on time (for the press release, see https://www.gvh.hu/pfile/file?path=/en/press_room/press_releases/press-releases-documents/press-releases-2020/sk_vj_24_2020_indito_tiktok_a&inline=true).

[52]. EUROPEAN COMMISSION, Open Public Consultation on the Digital Services Act Package, Ares(2020)7629347, p. 7, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/public-consultation (accessed 15 February 2021).

[53]. Article 1 DMA.

[54]. Ibid, Article 32.

[55]. Ibid, Article 33.

Concerns arise though as to how it will remain possible to keep these national rules compatible with the harmonising DMA. Germany, for instance, introduced the new concept of "undertakings with paramount significance for competition across markets" in its competition law which sounds similar to that of a gatekeeper under the DMA[56].

Furthermore, questions arise if and to what extent the DMA would prevent Member States from applying their own rules in relation to companies not designated as global gatekeepers. It is suggested that national legislatures should remain competent for designing "their own" DMA-regulations. In addition, it is argued that national antitrust authorities or otherwise appointed local authorities should remain in the vanguard of enforcement of those regulations against those companies.

5. RELATIONSHIP WITH OTHER REGULATION

According to the EC, the DMA proposal is fully coherent with and complementary to other rules such as the Platform-to-business (P2B) Regulation, EU (and national) competition rules, data protection laws (in particular the GDPR), and other sector-specific regulation including rules applicable to electronic communication services.

5.1. Platform-to-business Regulation

The P2B Regulation applies to all online intermediation services and online search engines, regardless of their size, in their relationship with business users. The DMA, on the contrary, only targets big online "gatekeepers", but it applies to a larger range of services and with respect to the gatekeeper's relationship with both business users and consumers. Finally, the P2B Regulation introduces broad principles such as transparency and fairness, while the DMA includes more stringent and specific rules. In other words, the DMA is complementary to the P2B.

5.2. EU Competition Rules

Importantly, a gatekeeper status under the DMA does not require dominance or market power on a certain market, contrary to Article 102 of the TFEU. As said above, the quantitative criteria serve as "quasi-automatic" thresholds where you are presumed to be a gatekeeper, except for a successful rebuttal. Similarly, the qualitative criteria are independent from any assessment under antitrust rules. Nevertheless, the concepts appear to be very much derived from or closely linked to established case law on dominance under Article 102 TFEU (e.g., important gateway, entrenched and durable position, entry barriers derived from network effects, scale effects, lock-in effects, etc.). This could suggest that probably only dominant core platform service providers would be captured under a qualitative assessment. Nonetheless, it remains an open question whether and when a non-dominant platform can be a gatekeeper. This question is important because the obligations for gatekeepers under the DMA are very strict, and even for dominant firms far more rigorous than under Article 102 TFEU.

6. CONCLUSION

The DMA proposal marks a new era for very large platforms which serve as an important gateway to the European internal market. The regulation illustrates an important shift in the way the Commission usually deals with "big players" on a market. While emphasising that a firm enforcement of existing competition rules remains highly important, the Commission recognises the urgent need for complementary *ex ante* regulation of these gatekeepers[57].

That being said, the new regulatory framework for the digital sector does not remain toothless. Like the GDPR, the DMA rules would have extra-territorial reach. The obligations under the DMA are also

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[56]. See newly adopted Section 19a, German Competition Act.

[57]. M. VESTAGER, Competition in a Digital Age: Changing Enforcement for Changing Times (ASCOLA, Annual Conference, 26 June 2020), available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age-changing-enforcement-changing-times_en(accessed 16 February 2021).

far stretched and would require some platforms to fundamentally revise their business practices if not their entire business model. And finally, the regulation confers more stringent enforcement powers to the EC to ensure an effective implementation of the DMA. These should strengthen the position of three types of actors[58]. First, business users will be able to trade in a fairer business environment and have opportunities to compete against gatekeepers' own services in equal terms. Second, consumers will have more and better choices of innovative services and more possibilities to switch as they will not be 'locked in' these platforms any longer. Last, innovators and competing tech start-ups will have new opportunities to innovate and compete against large platforms.

The DMA would enable the Commission to make decisions faster and thus speed things up, in contrast with the lengthy case by case analyses under competition law. Nevertheless, questions remain as to the precarious designation of a gatekeeper, and the flexibility and scope of application of the obligations. It is also unclear what will be the impact of the DMA on the Commission's ongoing digital investigations under competition law. Notwithstanding these questions of legal uncertainty, the DMA proposal is merely a draft at this stage and will likely be subject to numerous amendments by the European Parliament and Council. The legislative procedure may take 18 months as well as several years, depending on the controversiality of the proposal. Given the unprecedented impact on the digital sector, there are likely going to be fierce lobbying attempts and countless debate before the DMA will actually become the new sharp claws of the Commission.

[58].EUROPEAN COMMISSION (n.3).