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Regulating Digital Giants – The EU's Digital Markets Act

Part One

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Cserép Andor Valér:

Regulating Digital Giants – The EU's Digital Markets Act[1]

Part One

Abstract

The purpose of this paper is to analyse the forming ex ante regulation applicable to large digital platforms. This paper focuses on the Digital Markets Act (DMA), the European Union's response to the concerns raised by the operation and market behaviour of digital platforms like those operated by Google or Facebook. The paper aims to place the DMA in the legal framework applicable to the platforms, thus the broader context of the DMA is sketched out, also describing the need for the regulation, its goals, and objectives. Subsequently the paper delves into the substantive law provisions of the DMA, by first examining the definition and designation of gatekeepers, taking into account the modifications during the legislative process.

Regulating Digital Giants – The EU's Digital Markets Act[2]

Part One

The European Commission (hereinafter referred to as 'Commission') has adopted its draft regulation on the Digital Markets Act (hereinafter referred to as 'DMA') in December 2020.[3] One year later, in December 2021, the European Parliament (hereinafter referred to as 'EP') proposed modifications.[4] On 25 March 2022, the Council and the EP have reached a provisional political agreement on the DMA,[5] with the latest version of the text being published on 11 May 2022 (hereinafter referred to as 'Fin-DMA').[6] It is expected that the text of the DMA will be adopted in September or October 2022.

This working paper focuses on the substantive law provisions of the DMA, in particular the definition and designation of digital giants (so-called gatekeepers) and the obligations that can be imposed on them, once designated. It is divided into three separate papers. In the first one, the broader context of the DMA is sketched out, finding its place in the EU legal framework

[1] Supported by the ÚNKP-21-2 New National Excellence Program of the Ministry for Innovation and Technology from the source of the National Research, Development and Innovation Fund. The research was supported by the Ministry of Innovation and Technology NRDI Office within the framework of the FK_21 Young Researcher Excellence Program (138965) and the Artificial Intelligence National Laboratory Program.
[2] Supported by the ÚNKP-21-2 New National Excellence Program of the Ministry for Innovation and Technology from the source of the National Research, Development and Innovation Fund. The research was supported by the Ministry of Innovation and Technology NRDI Office within the framework of the FK_21 Young Researcher Excellence Program (138965) and the Artificial Intelligence National Laboratory Program.
[3] 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, 15 December 2020.
[4] Amendments adopted by the European Parliament on 15 December 2021 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) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD)) TA/2021/0499. During the Parliamentary phase of the legislation, several Committees compiled draft opinions with their proposed changes on the text of the DMA: the Committee on Legal Affairs, the Committee on Economic and Monetary Affairs, the Committee on Industry, Research and Energy, the Committee on Culture and Education, the Committee on Civil Liberties, Justice and Home Affairs, the Committee on Transport and Tourism.
[5] https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/.
[6] https://www.consilium.europa.eu/media/56086/st08722-xx22.pdf.

and describing the need for the regulation, its goals, and objectives. Furthermore, this paper examines the definition and designation of gatekeepers, also analysing how these were modified during the legislative process. This is where the first paper concludes.

I. Broader context of the DMA

The need for online platform regulation has for some time been on the agenda. The antitrust cases against Google (Shopping, Android, AdSense), and even more recently Apple (App Store, Music, Apple Pay) are clear examples that the 'sector' needs some sort of intervention. One may even go as far back as Microsoft I and II in this regard, just to name the most famous examples of ex-post competition law intervention into the digital sphere. What is striking is that further regulatory steps, i.e. ex ante legislation is increasingly and universally called for (Germany, US, UK, Japan, Australia, etc.), because it is feared that the traditional *ex post* competition law tools are not best suited to tackle the challenges posed by the huge digital corporations, often referred to as 'Big Tech', as these corporations happen to have a significant stranglehold on the provision of certain digital services, and thus on certain digital markets. Whether the call for action is justified usually boils down to certain typical characteristics of the companies and services operating in this space.

1. Characteristics of big digital companies

For the purposes of this paper, those platforms are relevant, which provide for services covering a wide range of daily activities including online intermediation services, such as online marketplaces, online social networking services, online search engines, operating systems or software application stores.[7]

These large platforms usually enjoy very strong network effects, being ideally situated at the cross-road of business and end users with their own ecosystem (or at least some sort of vertical integration) to intermediate between them, while also simultaneously comprehensively tracking and profiling end users.[8] Furthermore, they benefit from extreme scale economies, which often result from nearly zero marginal costs to add business users or end users (albeit most probably a sizeable upfront investment), an ability to connect many business users with many end users through the 'multisidedness' of these services, a significant degree of dependence of both business users and end users (for the lack of alternatives to reach one another), lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, and data driven-advantages.[9] Academic literature and national competition authority produced studies delve into the specificities of these characteristics,[10] hence here it is appropriate to state that their presence can be interpreted as creating a supposedly weak contestability of the particular markets and in the view of regulators thus calls for competitive intervention.

[7] DMA Explanatory Memorandum, p. 1.
[8] DMA Explanatory Memorandum, p. 1.
[9] Fin-DMA, Recital 2.
[10] See for example the study of the CMA into Mobile Ecosystems, the interim and finals reports available at: https://www.gov.uk/cma-cases/mobile-ecosystems-market-study#final-report, or the market study into mobile app stores produced by the Dutch ACM, available at: https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf.

What in this context also requires attention is the already existing legal framework these corporations navigate in, not only looking at competition law *per se*, but rather taking on a wider perspective.

2. The regulatory framework applicable to big digital companies

Digital platforms have to operate in an increasingly regulated space. First, they have to abide by the traditional competition law rules of the EU, namely Arts 101 and 102 TFEU[11] regulating anticompetitive agreements and abuse of dominance.[12] Noteworthy is in the ambit of competition law, that several national competition authorities and the Commission have been active in the digital markets, imposing fines under national or EU competition law on several undertakings for certain conducts. Some of cases have already been closed (Microsoft), some are under review (Google) and some have just been initiated (Apple). Account should also be taken of national and foreign developments of competition law, especially in Germany,[13] the UK, and the USA, which all have been actively investigating competition issues in the digital sphere, and are in process of creating some sort of ex ante tool to address market deficiencies.

Beyond competition law, digital undertakings also have to abide by consumer protection rules and refrain from aggressive and unfair commercial practices.[14] In this sphere, several national enforcement agencies have imposed fines (e.g. on Booking, Viagogo, etc.) for conducting unfair or aggressive commercial practices.

In an even broader context, the undertakings have to carefully evaluate their every waking move to comply with the EU's data rules contained in the GDPR,[15] not to mention the Platform-to-Business Regulation.[16] Furthermore, the EU has begun forming a new regulatory environment for Artificial Intelligence, which is becoming ubiquitously used in everyday business operations. Additionally, there are some specific regulations about e.g. video-sharing platforms,[17] network and information systems[18] or online payment services,[19] which apply to some digital platforms only.

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[11] Treaty on the Functioning of the European Union ('TFEU')

[12] In case of the former this is accompanied by the additional EU rules on block exemption, both horizontal and vertical. Notably, the block exemption instruments are currently also under review, with the explicit aim to introduce new measures and guidelines accommodating the recent swift in digitalization and use of online platforms.

[13] Esp. the new rules applying to undertakings of paramount significance for competition across markets (Section 19a German Competition Act, GWB).

[14] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22–39.

[15] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, or GDPR) OJ L 119, 4.5.2016, p. 1–88.

[16] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57–79.

[17] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1–24.

[18] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, OJ L 194, 19.7.2016, p. 1–30.

On top of all these, most closely connected to competition law provisions will be the Digital Services Act, which has just been finally agreed upon by the EU legislation.[20] In this context, the Digital Markets Act will add onto the obligations undertakings have to face, however with a limited scope that only encompasses a select few digital platforms, the so-called 'gatekeepers'. How this regulation fits into the legal framework can be grasped best by a glance at its objectives and goals as well as its legal basis.

3. The DMA, its Objectives and Goals

The premise of the DMA framework, is that a few large players act as gateway between business and end users and they capture the biggest share of the overall value generated.[21] The core problem that *ex ante* regulation is aimed at resolving, therefore, is the imbalance of bargaining power resulting from the dependency of business users on the services provided by the gatekeeper controlling access to consumers and thus markets, these gatekeepers are able to impose unfair terms and conditions on business users for the lack of credible alternatives.[22]

The Commission's goal therefore with the DMA was to ensure a level playing field in the digital single market, with a view to promoting innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector. Thus, the DMA is aimed to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general.[23] What is meant by the abstract concepts of contestability and fairness must be examined through a more economical perspective as well.

Pragmatically speaking, the main goal of opting for an ex ante approach was definitely the speeding up of the antitrust proceedings against large companies active on the digital markets. The conclusion of a Commission decision already takes years, which is by far not final, as it is subject to judicial review first before the General Court, and subsequently, on points of law only, before the CJEU. In the case of Intel, for example, there is still not yet a final decision essentially after 22 years (counting from the initial AMD complaint),[24] while Google Shopping also demonstrates the same, having been initiated in 2010, the Commission decision taken in 2017 and the General Court's decision in late 2021, therefore the case already lasting for 12 years and at the moment of writing this paper, but still pending review before the CJEU. it is therefore safe to say that market failures are not corrected effectively and timely by the antitrust and if any, the results seem all too anachronistic.

The envisaged reply is an approach to adopt "pro-competitive regulations" that seek to tame market power by enabling new competitors as well as protecting business users dependant on

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[19] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 23.12.2015, p. 35–127.

[20] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2545.

[21] Pinar Akman, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act (December 1, 2021). (Forthcoming, 2022) European Law Review (Akman), p. 5.

[22] Geradin, Damien, What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act? (February 18, 2021). Available at SSRN: https://ssrn.com/abstract=3788152, (Geradin), p. 7. This can be observed as the core problem in the Furman Report, Stigler Report, the US. House Judiciary Committee 's Investigation of Competition in Digital Markets Report, the DMA Impact Assessment and the DMA Proposal. For the relevant excerpts see Geradin. pp. 4-7.

[23] FIN-DMA Recital 7.

[24] Seemingly all the more in vain, as in the last judgement, the General Court set aside the fine originally imposed by the Commission.

the platforms, and not by choosing price or quality levels.[25] The DMA thus selects a few powerful undertakings whose operation and market behaviour has already raised competition law concerns and aims to impose on them a list of obligations, so that the markets they operate in can be contestable and fair.

The main challenge for the interpretation and application of the DMA will probably arise from this dichotomy, having to distance competition law origins and concepts from those of the DMA.

4. The legal basis of the DMA

Given the global and naturally cross-border nature of the services provided by gatekeepers, regulatory fragmentation would seriously undermine the functioning of the Single Market for digital services as well as the functioning of digital markets at large.[26] This is further reinforced by the fact that the platforms typically utilize the same business model across jurisdictions.[27]

Consequently, there is a need for a unified EU legislation. Accordingly, Art 114 TFEU was chosen as a legal basis of the DMA. The COM-DMA highlights that thus, a directly applicable regulation is most suited to address the problems of fairness and contestability identified and to prevent fragmentation of the Single Market.[28] Importantly, Art 114 TFEU has as the objective of the measures adopted under it the "establishment and functioning of the internal market". At the same time, the regulation complements EU and national competition law.[29]

Many obligations imposed on gatekeepers originate from EU and national antitrust proceedings and remedies. This inevitably constitutes a close connection with certain antitrust concepts and definitions. Yet, the goal of achieving fairness and contestable markets based on Article 114 is a clearly separate objective from the protection of undistorted competition, which Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct as well as merger control have as their objective. The Fin-DMA in its Recital 11 states that the DMA ensures that markets are fair, not that competition is undistorted.[30] Sensing the lack of clarity, the Fin-DMA has definitions for contestability and fairness in its recitals.[31] A clear dividing line is however does not seem self-evident, even considering the declaration that "*the DMA is without prejudice to the application of EU and national antitrust rules*" does not provide for one either. Even if not explicitly, there is an overlap in the substance of the objectives (perfectly evidenced by the fact that ongoing investigations against companies under Art 102 TFEU can be matched with proposed obligations of the DMA).

Furthermore, the declaration that the DMA's application does not prejudice the application of competition law and national legal instruments having a separate aim than 'fairness' does not necessarily bode well with creating a unified union-wide regulation pursuant to Art 114 TFEU. Whether the DMA would actually prevent fragmentation has been thus questioned, referring to Art. 1 (5), which does not prevent national legislation pursuing different aims

[25] Cristina Caffarra, Fiona Scott Morton, The European Commission Digital Markets Act: A translation', 2021 january 5, available at: https://voxeu.org/article/european-commission-digital-markets-act-translation.
[26] COM-DMA Explanatory Memorandum, p. 4.
[27] Akman, p. 4.
[28] COM-DMA Explanatory Memorandum, p. 6.
[29] COM-DMA Recital 9.
[30] Fin-DMA Recital 11.
[31] Fin-DMA Recitals 32-33.

imposing obligations if these are unrelated to the relevant undertakings having a status of gatekeeper within the meaning of the COM-DMA.[32] The leaked version seems to shift to reply to this criticism, providing that member states can impose obligations on core platform service providers if those are out of the scope of this regulation and do not result from the gatekeeper status as per the DMA. Whether for example provisions like the GWB 19a in Germany would fall under this remains to be seen, as in its substance and aim it resembles a lot the DMA. GWB 19a, a recent addition the German competition law code, is very similar to the DMA, allowing the Bundeskartellamt to designate in quick process (based on experience 6-7 months) an undertaking as having '*paramount significance for competition across markets'* and subsequently apply certain obligations in relation to their platform services *ex ante*.

In case laws like the GWB 19a are compatible with the DMA, there could likely be an overlap in the cases and procedures initiated under them with the cases initiated under the DMA. This overlap, along with the apparent fragmentation may undermine the main objective under Art 114 TFEU and simultaneously create extra compliance costs. On the other hand, the concurrent application of competition law rules raises questions as well, potentially relating to duplication of imposing obligations, fines, and decided over the same conduct multiple times, i.e. some reconciliation with the principle of *ne bis in idem* will likely be necessary.[33]

In any case, the competition law roots and a close connection with competition law cases initiated under those rules undoubtedly has a strong correlation with the DMA, both regarding the legal objectives and goals of the regulation, as well as the interpretation of some its concepts and obligations.

II. Substantive provisions – 'Gatekeepers'

In the following section we will review the substantive legal provisions of the DMA aimed at achieving this goal, having regard to the legislative process they are being adopted in. The substantive law provisions can be grouped into two main categories: provisions regarding the new definition of gatekeepers and the obligations imposed on such gatekeepers. The next section will examine the envisaged framework of the selection of the so-called gatekeepers, while the subsequent parts of the paper will delve into the certain obligations according to which the designated companies would have to conduct their business behaviour.

1. Gatekeepers

What is a gatekeeper may very well be grasped by an archaic analogy drawn to ancient Babylon, at the time of Nebuchadnezzar. The Emperor was famous for constructing the Ishtar Gate on Babylon's wall as well as the Hanging Gardens of Semiramis for his wife. One wonder protecting the other, or from the perspective of those outside the wall, closing off access to one of the most beautiful places on Earth. How the increasing market power of certain digital companies is viewed today is very similar to how the city of Nebuchadnezzar could have been perceived. They hold vast opportunities for those inside, but the access inside is limited. Only those get to play in the garden who first pass through the gate, which is

[32] See e.g. Alfonso Lamadrid de Pablo & Nieves Bayón Fernández: Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, Journal of European Competition Law & Practice, 2021, Vol.12, No 7.
[33] Esp. in light of the recent judgements of the CJEU in bpost and Nordzucker.

subject to the approval of the gatekeepers. Be them ancient Babylonian soldiers or in a DMA-context, the likes of Amazon, Apple, Google and co.

The DMA introduces a legal framework in which the power of large companies is curbed, they will supposedly have less opportunity to distort whole markets in their own favour and thus will not be able to disadvantage their competitors, or the very least, could be challenged easier. The aim is to filter out the largest, most disruptive companies, as capturing too many companies and imposing on them a way to behave may very well also prove to be too much of an obstacle for innovation. Thus, the DMA operates with a so-called designation of 'gatekeepers', a process by which the 'right' companies can be targeted and captured, to achieve the desired outcome: contestable and fair digital markets.

2. Designation of gatekeepers

The gatekeeper designation should avoid being over-inclusive (capturing platforms that are not truly gatekeepers may reduce industry support for the legislation, it may strain enforcement, monitoring and implementation by overstretching the Commission's resources), while also avoiding being under-inclusive and thus failing to provide for enough protection against harmful practices.[34] Therefore, under the DMA, an undertaking has to satisfy two conditions in order for it to qualify as a gatekeeper. First, the company has to be a core platform service provider. Second, it has to be designated by the Commission as gatekeeper.

a) Core platform services

The DMA provides for a taxative list of core platform services (or CPS in short) is contained in Art 2(2).[35] The definition of core platform services should be technology neutral and should be understood to encompass those provided on or through various means or devices, such as connected TV or embedded digital services in vehicles.[36] CPSs are digital services that all have the capacity to affect a large number of end users and businesses, which entails a risk of unfair business practices.[37] To the original list produced by the Commission, the EP added 3 further services, out of which two, namely web browsers virtual assistants are reflected in the last version of the text as well.[38]

b) The designation process

For the DMA to be applicable, CPS providers have to be designated by the Commission. This can happen two ways: either based on a rebuttable presumption based on quantitative metrics, or based on a separate procedure when these criteria are not met or the undertaking challenges the presumption.[39]

Art 3(1) provides that the designation as gatekeeper is conditional upon whether the company in question (**a**) has a significant impact on the internal market, (**b**) provides a core platform

[34] Geradin, p. 3. D. Geradin proposes that the number of gatekeepers should remain below 10.
[35] '(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services (f) operating systems; (g) cloud computing services; (h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g);'
[36] Fin-DMA Recital 14.
[37] Fin-DMA Recital 14.
[38] EP-DMA Amendments 64-66. Connected TV was the third CPS, however it does not feature in the latest version of the text.
[39] Akman, pp. 6-7.

service which is an important gateway for business users to reach end users, and (**c**) enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future. The three criteria have to be fulfilled simultaneously. Art 3(2) then sets out certain quantitative thresholds, by satisfying which the CPS provider should be presumed to be a gatekeeper.

i) Quantitative criteria

Quantitative criteria have certain advantages: in principle objective, relatively easy to apply and able to expedite the designation process.[40] The DMA uses only these quantitative criteria as the basis of the presumption that the platform is a gatekeeper. This may result in over-inclusivity that is suggested to capture platforms which are just large but not actually true gatekeepers.[41] Furthermore, this may only be a supposedly *objective definition* of what is a gatekeeper. It still calls for interpretation and clarification, because it contains elements like 'significant impact on the internal market', '(important) gateway' and a 'current or "foreseeable" entrenched and durable position'. These three concepts are to some extent all subjective and require interpretation, which is absent from the COM-DMA.[42]

ii) Significant impact on the internal market

The concept of '*significant impact on the internal market'* diverges from the traditional competition law concepts and constitutes a new, sui generis notion.[43]

To presumptively satisfy the condition, under COM-DMA, the undertaking will have a significant impact on the internal market, where the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalization or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States. The EP-DMA raised the figures to EUR 8 billion and EUR 80 billion respectively.[44] The last available version contains EUR 7.5 billion, and EUR 75 billion respectively. These criteria will be quite easily satisfied by digital platforms like Google and Apple.

iii) Important gateway for business users to reach end users

The COM-DMA then provides that the threshold of being an important gateway depends on a pre-set minimum number of end users and business users. To be '*important'*, the service has to have more than 45 million monthly active end users established or located in the Union, and at the same time more than 10 000 yearly active business users established in the Union in the last financial year. The EP-DMA lowered the threshold, by widening the geographic area in which the same number of users have to be reached to the EEA from the Union, and deleted the condition of counting only 'active users'.[45] The latest version of the DMA text has a reference for calculating these numbers to its Annex, which is a welcome addition to the previous versions of the text.

[40] Geradin, p.13.
[41] Geradin, p. 13, see also Cafarra/Morton.
[42] Akman, p. 7.
[43] Article 101 TFEU uses the wording 'prevention, restriction or distortion of competition within the internal market', while Art 102 TFEU uses 'a dominant position within the internal market or in a substantial part of it', so long as the questioned conducts 'may affect trade between Member States'.
[44] EP-DMA Amendment 80.
[45] EP-DMA Amendments 81-82.

This condition however has a weak causal link with being an 'important gateway'.[46] What is missing from this notion is a regard to 'dependency' on the gatekeeper, which is supposed to be the core underlying problem calling for the birth of the DMA in the first place.[47]

It was suggested previously that the gatekeeper position should imply that users are dependent, based on factors relating to the level of multi-homing and switching, the incentives of the platform to prevent business and end users to communicate with one another.[48] The GWB 19a also took a similar approach, using a qualitative approach for the designation process. Such factors are however only present in case the undertaking is not designated based on a presumption.

iv) Entrenched and durable position

The gatekeeper has to possess an entrenched and durable position in its operations or it must be foreseeable that it will enjoy such a position in the near future.

According to the DMA, having an entrenched and durable position may be presumptively satisfied simply when the minimum user numbers described above are satisfied for a period of three years. The EP reduced this to two years, but the latest version opted for 3 years again.

The reason for the existence of a presumption based designation is self-explanatory, it is aimed at speeding up the designation process. However, it seems dubious whether it can achieve that effect. Firs, the presumption is rebuttable, thus the designation process may be delayed in any case, and recourse to qualitative factors will have to be had. The possibility to rebut must exist to respect the right of defence, and as long as it exists, the envisaged quick designation may only stay a vision.[49] The only limit seems to be having to bring 'sufficiently substantiated arguments' to rebut, but what is sufficiently substantiated remains unclear.[50]

During the legislative process there were changes in the text, with the EP-DMA seeming limiting the possibility to rebut, by including exceptional circumstances resonating with the DMA Impact Assessment as well and compelling rather than substantiated evidence.[51]

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[46] Geradin, pp. 13-14: „*There is, for instance, a material difference between, one the one hand, a platform enjoying 50 million monthly active end users where no rival has more than 5 million monthly active end users, and, on the other hand, a platform enjoying 50 million monthly active end users with two other platforms present in the market having each 25 million monthly active end users.*" The same can be said of the next condition of 'entrenched market position'.

[47] Geradin, p. 15.

[48] Centre on Regulation in Europe, "Recommendations Paper – Digital Markets Act: Making Economic Regulation of Platforms Fit for the Digital Age", November 2020, available at https://cerre.eu/wp-content/uploads/2020/11/CERRE_DIGITAL-MARKETS-ACT_November20.pdf.

[49] ibid., p. 8.

[50] ibid.

[51] The EP-DMA limits the possibility to rebut to '*exceptional circumstances'*, and requires the platforms to present '*sufficiently compelling arguments'* instead of 'sufficiently substantiated' ones. The shift for '*compelling evidence'* and '*exceptional circumstances'* appeared in the ECON Committee, but all the other Committees left the Recital in its meaning unchanged. Limiting this escape route to 'exceptional circumstances' resonates with the DMA Impact Assessment. The need for the evidence to be '*compelling'* is further accentuated by the inclusion of the word once more in the recital. The exclusion of economic justifications based on efficiencies in this regard, and the limit that '*the Commission should take into account only the elements which directly relate to the requirements for constituting a gatekeeper, namely whether it is an important gateway which is operated by a provider with a significant impact in the internal market with an entrenched and durable position, either actual or foreseeable'* were deleted from the text of Recital 23 in the EP-DMA version. The EP however added, that '*the Commission may require that the information provided regarding business and end users is verified by third party audience measurement providers'*, which also could be seen as another burden on the undertaking trying to rebut the presumption. See EP-DMA Recital 23, COM-DMA Recital 23, PE693.930 ECON Committee proposal Recital 23, DMA Impact Assessment Report, para 389.

However, with the latest version of the text reverting back to the use of 'substantiated' any discussion about the difference between a sufficiently '*substantiated'* and '*compelling'* argument was rendered redundant.

The Commission's decision that the arguments are not '*sufficiently substantiated'* could be subject to the review of the CJEU under Art 263 TFEU.[52] Thus, the actual speed of the designation process will only be seen in the first years of the enforcement of the DMA. In the case of the German legislation using a qualitative approach, the designatory decisions so far (two against Google and Facebook) took approximately six-seven months to conclude and were accepted by the undertakings.[53] There is however a substantial conceptual difference between the two regimes which calls for caution and signals that undertakings may not as readily accept being designated under the DMA as well: once designated, the obligations of the DMA generally automatically apply to the undertaking, while in Germany, a separate decision of the authority is needed.

v) Qualitative criteria

The elements listed in Art 3(6) DMA describe better what a gatekeeper is, as they refer to qualitative criteria and factors that signal their power and important position. These factors are those which the Commission takes into account by designation through a market investigation.

These factors are more in tune with the economics and empirics of multi-sided platforms and reliance on them is likely to generate more accurate and future-proof assessments.[54] Basing gatekeeper position will lead to a longer, and more burdensome designation process, and may thus provide less legal certainty for the platform ex ante.[55]

Overall, the designation of gatekeepers under the DMA raises questions about the effectiveness and future-proofness of the quantitative threshold, as well as whether they truly are able to address the issue at hand, namely the dependence of business users on the gatekeepers, and the importance of their channels for acquiring users. A qualitative approach has been opted for in Germany, and will probably be the course of action in the UK as well, and even under the DMA, it may very well come into play.

III. Conclusion

This marks the end of the first part of the paper. The next part will analyse a select list of the substantive obligations that will be imposed on the gatekeepers under the DMA, i.e. it will delve into the intricacies of Arts 5 and 6 of the DMA.

It was shown in this part of the paper that the DMA created a regulatory regime that shows considerable differences compared to EU antitrust law, notably Article 102. Under the DMA,

[52] Akman, p. 8, fn 42.: *„[…] if the Commission rejects the platform's arguments that it is not a gatekeeper, this may be subject to judicial review, too, because the Commission's rejection of those arguments would "produce legal effect vis-a-vis third parties", namely for the platform in question by making them subject to the rules in the DMA, thus subjecting such decisions to the review of their legality by the Court of Justice under Article 263 TFEU".*

[53] Although as a big difference to the DMA, the obligations of GWB 19a do not apply automatically after the designation, thus this comparison may not provide actual insight into what can be expected in the case of the DMA.

[54] Akman, p. 7.

[55] ibid, p. 8.

the definition of the relevant market and dominant position is substituted by a regulatory designation regime based primarily on quantitative indicators. However, suppose the quantitative conditions are not met. In that case, the Commission still has the competence to designate an undertaking based on qualitative criteria that resemble the exercise of establishing dominance under Article 102. Whether the interpretation of the conditions will be similar under competition law and the DMA is an open question, given that the legal basis of the DMA is internal market law.

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