Bundeskartellamt

open markets | fair competition

Digital Markets Act: Perspectives in (inter)national competition law

Meeting of the Working Group on Competition Law

7 October 2021

Background paper

Bundeskartellamt
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Thematic overviews

A. Introduction

The COVID-19 pandemic impressively demonstrated the welfare-enhancing effects of the digital economy. Without the use of digital products and services it would hardly have been possible to meet the (temporarily even legally imposed) requirement to work from home or hold academic conferences and university lectures by video.[1] However, the generally undisputed merits of the digital economy must not conceal the fact that academics, public authorities and lawmakers have been striving for a long time to find adequate ways to deal with the challenges to the contestability and openness of digital markets that are associated with certain phenomena, developments and practices used by undertakings.[2]

On 15 December 2020, in the context of these debates, the European Commission (COM) published a proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act, DMA)[3]. The COM's initiative was expressly welcomed by the heads of the European competition authorities organised in the European Competition Network (ECN).[4] Apart from the Commission's draft (COM-D), the draft of the rapporteur *Schwab* (Schwab-D) has now also been submitted to the lead committee, the Committee on the Internal Market and Consumer Protection of the European Parliament (IMCO).[5] It is planned that the IMCO will discuss a compromise text in November 2021 to be followed by a plenary discussion in December 2021. It is expected that the Council of Ministers will agree on a joint position also at the end of 2021. The legislative processes might therefore already be concluded in the first half of 2022 during the French presidency of the EU Council. As this process is still ongoing, the DMA represents a 'moving target' for the purposes of the meeting of the Working Group on Competition Law in October 2021 and for the purposes of this background paper.

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1 On the successes and deficits of "crisis-related digitalisation" ("*krisenbedingte Digitalisierung*") cf. *Board of Academic Advisors at the Federal Ministry for Economic Affairs and Energy (Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft und Energie)*, Digitalisierung in Deutschland – Lehren aus der Corona-Krise, 2021, pp. 6 ff.

2 Overview in *Lancieri/Sakowski*, Competition in Digital Markets, Stanford Journal of Law, Business & Finance 2021, pp. 65ff.

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) of 15 December 2020. The background paper is based on the English version of the proposal.

4 *Heads of the national competition authorities of the EU*, Joint paper: How national competition agencies can strengthen the DMA, 23 June 2021 (https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/23_06_2021_DMA.html); the Federal Government also provided a positive assessment of the initiative, see *Steinberg/L'Hoest/Käseberg,* Digitale Plattformen als Herausforderung für die Wettbewerbspolitik in der EU, Wirtschaft und Wettbewerb, WuW 2021, pp. 414 ff. (416 ff.).

5 Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector of 1 June 2021, (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD).

In the following, the background paper presents and compares provisions included in the various DMA drafts and points out substantial regulatory problems and possible difficulties of interpretation that can already be identified. The paper first looks at the norm addressees (B.) and obligations (C.) before discussing the provisions on enforcement (D.) and the future scope of action for competition law (E.). The paper concludes with a compilation of open questions that the current drafts of the DMA raise in theoretical and practical terms (F.).

The COM assumes that the DMA will protect a legal interest different from competition law.[6] An overall assessment of the analyses made in this paper leads to the conclusion that this assumption raises considerable concerns. The objective of the DMA according to Article 1(1) COM-D, which, similar to competition law, is to protect contestable and fair markets, already suggests that there are overlaps between the DMA and competition law.[7] The obligations have roots in numerous competition law proceedings and require investigative approaches that are similar to those prescribed under competition law. The proximity between the DMA and competition law is thus not only of purely theoretical interest. It calls for a critical assessment of both the provisions on enforcement and the future relationship between the two areas of regulation.

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6 Recital 10 COM-D.

7 *Haus/Weusthof*, A Gatekeeper's Nightmare, WuW 2021, pp. 318 ff. (319) identify a "striking overlap" between the DMA's objectives and those of competition law; similarly *Lamadrid/Fernández*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, p. 12 (https://chillingcompetition.com/2021/04/12/why-the-proposed-dma-might-be-illegal-under-article-114-tfeu-and-how-to-fix-it/) and *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, Zeitschrift für Europäisches Privatrecht, ZEuP 2021, pp. 503 ff. (509 ff.). The COM's opinion that there is a "different legal interest", on which the COM has not provided any further details, is viewed critically by: *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, Neue Zeitschrift für Kartellrecht (NZKart) 2021, pp. 379 ff. (381).

(Inter)National perspectives

The DMA is not the only instrument that is currently in the focus of discussions on how to address competition problems in the digital economy. In Germany, for example, the 10th amendment to the German Competition Act (GWB) with its Section 19a, which already entered into force on 19 January 2021, created a new possibility for intervention that focuses in particular on a more extensive control of (digital) undertakings with paramount significance for competition across markets.[8] A further example are considerations in the UK which aim at subjecting undertakings with "strategic market status" to a "pro-competition regime" which is to consist in particular of an enforceable, company-specific "code of conduct" and "pro-competition interventions".[9] In the United States, a group of members of the House of Representatives announced several bipartisan initiatives in June 2021 with the aim to better protect consumers against anti-competitive practices of the "Big Tech Monopolies".[10] In this vein US President Biden signed an executive order on 9 July 2021 which makes the promotion of competition a priority in his term of office and criticises the market power of large internet platforms.[11]

Although this background paper focuses on the DMA legislative proposal, the initiatives mentioned above as examples will also be considered. The most significant common features and differences between these initiatives and the DMA can provide valuable insights for the assessment of the European legislative proposal.

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8 On the origins of Section 19a GWB see *Bien/Käseberg/Klumpe/Körber/Ost*-Käseberg, Die 10. GWB-Novelle, 2021, paras. 173 ff.

9 *Digital Markets Taskforce*, A new pro-competition regime for digital markets, 2020 (https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf); *Secretary of State for Digital/for Business*, A new pro-competition regime for digital markets, July 2021 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf).

10 *Cicilline et al.*, House Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice", press release of 11 June 2021 (https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-stronger-online-economy-opportunity).

11 Executive Order on Promoting Competition in the American Economy, 9 July 2021 (https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/)

B. Addressees of the DMA

The way in which an undertaking is designated as a norm addressee is of essential importance for the assessment of the DMA legislative proposal in various respects. First of all, the personal scope of application is decisive in determining the substantive scope of the regulation that is to be created, and thus also in determining the remaining scope of other rules. The ensuing assessment of whether individual obligations are proportionate depends not least on whether these obligations are reasonably tailored to the legal entities concerned. What should be prevented is an (excessive) regulation which might subject a large number of addressees to undifferentiated, extensive obligations. In the present case, this threat is particularly acute as 'the digital economy' is not an economic sector with relatively homogeneous players, services or business models as may be the case in other regulated areas (such as the area governed by the telecommunications regulation). And finally, the rules on the definition of norm addressees should be reasonably specific and their scope should neither be too narrow nor too wide with regard to the regulation's objective.

According to Article 1(1) COM-D, the DMA is to ensure contestable and fair digital markets as far as gatekeepers are active on these markets. According to Article 2(1) COM-D, gatekeepers are providers of core platform services (CPS) designated pursuant to Article 3 COM-D. Pursuant to COM-D, the obligations of the DMA thus do not take immediate effect ex lege. A constitutive decision must first be made by an authority to establish a provider of CPS as an addressee in a designation process. Schwab-D also maintains this concept of having the addressees designated by an authority.

In comparison to an ex lege effect, the decision in favour of a constitutive decision to establish the addressee first of all involves the advantage of increased legal certainty for the gatekeeper. If an ex lege effect were realised on the basis of purely quantitative criteria, there would be the risk of CPS providers growing into (or shrinking out of) the scope of application of the obligations as a result of slow, gradual and possibly temporary changes in, for example, turnover or user numbers.[12] In addition, the formal designation of specific gatekeepers

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12 Apart from this, it would be particularly difficult to establish quantitative criteria in such a way as to ensure that they apply comprehensively to all gatekeeping providers, but solely and exclusively to this group of providers (see *Sunderland* et al., Digital Markets Act – Impact Assessment support study. Annexes, p. 59). Also, it cannot be argued in favour of exclusively using quantitative thresholds that merger control successfully applies such thresholds. The merger control thresholds must only be examined at a specific point with regard to the merger project in question, whereas the use of quantitative thresholds in the DMA without a designation decision made by an authority would make it necessary to monitor them continuously. Moreover, exceeding the merger control thresholds merely makes it necessary for a competition authority to initiate a review proceeding whereas the DMA would provide for the immediate applicability of obligations and prohibitions in this case (on this structural difference between the DMA

subsequently allows the enforcing authorities to focus their monitoring of market conduct on a clearly defined group of players in the digital economy. And finally, the designation process makes it possible for a potential gatekeeper in an individual case both to submit facts arguing against the existence of a gatekeeper position as well as to take legal action against a designation decision. In comparison to obligations applicable ex lege without a designation, this strengthens the right to be heard and the possibility of judicial review.

Even though the decision in favour of a separate designation process may be convincing, this does not give any indication as to whether the substantive requirements for designating an undertaking as a gatekeeper in such a process are reasonable. According to the wording of Article 3(1) COM-D, only CPS providers (I.) can be designated as gatekeepers. If the preconditions to be discussed are found to exist, the COM will designate the providers (II.) and can base the designation on certain presumptions (III.).

I. Providers of a core platform service (CPS)

Under both COM-D and Schwab-D only CPS providers are considered the addressees of the DMA. Article 2(2) of both drafts provides a conclusive list of CPS covered, which are legally defined in the following sections mainly by reference to already existing European law provisions. Even though these references ensure a uniform understanding of the concepts at the level of European law, this does not exclude the possibility that individual concepts might be understood differently at the level of national law.[13]

In the DMA-D, the concept of CPS is to be defined in contrast to a wider and a narrower concept of service: First of all, CPS are a subset of the more general service concept as mentioned for example in Article 5(a) COM-D.[14] The designation as a gatekeeper in turn is based on the existence of a subset of CPS, i.e. a CPS which serves as an important gateway for business users to reach end users (so-called gateway CPS, Article 3(1)(b) COM-D).

Within the framework of the Impact Assessment the COM held that competition law did not adequately address the objectives pursued by the DMA because, among other factors, interventions based on competition law could not take place fast enough.[15] Against this

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and merger control *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, pp. 379 ff. (382)).

13 For example, “online intermediation service” (Article 2(2)(a) COM-D) and “multi-sided markets and networks” (Section 18(3a) GWB) refer to similar actual phenomena, but the scope of the legal standard is different. In particular, “online intermediation service” only covers relationships between business users and consumers.

14 Apart from CPS, Article 5(a) also refers to “other services offered by the gatekeeper” and “third-party-services”.

15 *COM*, Impact Assessment Report, 15 December 2020, para. 119.

backdrop the formalised CPS concept can also be seen as an attempt to avoid lengthy investigations to define the relevant market in each individual case.[16] However, it is to be expected that some delineations between CPS will still have to be made.[17]

The CPS list in Article 2(2) COM-D defines the services with varying degrees of specificity while there is no overall definition abstracted from the individual services. This potentially results in two problems: First of all, it has to be considered whether the proposed static list of CPS might be too restrictive or too extensive at this point with regard to the legal policy objective of the DMA (1.). In view of future developments, this lack of a general-provision type of definition for the CPS also raises the question whether the DMA will be able to keep up with the developments of the dynamic digital economy (2.), which is mainly characterised by the development of innovative new services. Furthermore, practices that are problematic from a competition perspective can also emerge within the context of services which already exist today, but which are not covered by the DMA.

1. Need for adjustments to be made to the list of CPS covered

In the COM's view, the CPS covered in its draft feature a number of common characteristics that can be exploited by their providers. According to the COM, these characteristics include "extreme scale economies […] very strong network effects […] multi-sidedness […] dependence of both business users and end users, lock-in effects, a lack of multi-homing […] vertical integration, and data-driven advantages".[18] The COM states that it is only necessary to focus on those digital services that are most broadly used by business users and end users and where, based on current market conditions, concerns about weak contestability and

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16 *Botta*, Sector Regulation of Digital Platforms in Europe, JECLP 2021, pp. 500 ff. (503); *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 July 2021, p. 4; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (520); *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, Zeitschrift für Wettbewerbsrecht (ZWeR) 2021, pp. 29 ff. (38); on the relationship between the market defined by competition law and the concept of CPS see also *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 16.

17 It is feasible, for example, that an undertaking operates a specific type of CPS (e.g. an online marketplace) after adapting it in terms of language, geography and/or function to the local circumstances in different Member States, possibly by using different brand names or even by pursuing local multiple-brand strategies. This raises the question whether the user numbers of the individual local services must be analysed in total or separately for the purposes of Article 3(2)(b) COM-D. It is also not clear whether, within the meaning of Article 3(2)(a) COM-D, this would be considered a cross-border activity carried out in a minimum of three Member States or a single activity in each individual Member State which would have to be examined separately in each case.

18 Recitals 2, 12 COM-D. See also *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 14, who call into question the multi-sidedness of individual services included in the list and point out that in the case of several CPS the other side is another CPS; an ad-financed search engine could thus prima facie be regarded as multi-sided, but it is unclear whether, taken separately, the search engine (Article 2(2)(b) COM-D) and the advertising services (Article 2(2)(h) COM-D) could be found to possess this feature.

unfair practices by gatekeepers are more apparent and pressing.[19] According to these principles, streaming services (respective market is not multi-sided) and B2B industrial digital platforms (no strong asymmetry in bargaining power), in particular, would not have to be covered.[20]

From today's perspective, the list of CPS selected by the COM already appears to be extensive.[21] There are indications in the literature that for some CPS there is more substantial evidence of "a high degree of concentration and a resulting dependency of business users on access to the platform" than in the case of other CPS.[22] This is seen as acceptable as the further criteria defining a gatekeeper position in Article 3 COM-D provide an adequate corrective to the personal scope.[23] Furthermore, with regard to specific individual services, some authors suggest narrowing down[24] the CPS list while others suggest that it be extended[25]. However, proposals to extend the list should always be assessed with caution in light of the individual obligations. As some of the obligations are applicable to all of the CPS and it is not possible for undertakings to objectively justify their practices, extending the list will otherwise involve the considerable risk of unintended and/or disproportionate interventions.

2. Long-term viability of the CPS definition

COM-D shows that the COM is not aiming at a comprehensive and exhaustive rule for "contestable and fair markets in the digital sector". Recital 33, for example, expressly emphasises that the regulation should only target those practices where experience gained, for example in the enforcement of the EU competition rules, shows that they have a "particularly negative direct impact". The approach can thus be considered to target merely

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19 Recitals 12, 13 COM-D. Examples of products and services which could potentially fall under the definition of the individual CPS are listed by *Polley/Konrad*, Der Digital Markets Act, WuW 2021, pp. 198 ff. (200).

20 *COM*, Impact Assessment Report, 15 December 2020, box below para. 128.

21 *Polley/Konrad*, Der Digital Markets Act, WuW 2021, pp. 198 ff. (201); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (521).

22 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (520 f.).

23 In this respect, *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (521) refers to a "second filter".

24 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, pp. 13 f., 86 recommend that number-independent interpersonal communication services and cloud computing services within the meaning of Article 2(14) COM-D should only be considered as ancillary services and be regulated only when they are provided by a digital platform which also provides another principal CPS. The authors state that these services are "inherently single-sided" and already regulated by other European law provisions. This suggestion was adopted in Schwab-D.

25 For example, the shadow rapporteur for the DMA in the ECON committee of the European Parliament, *Yon-Courtin*, suggested adding to the CPS list inter alia voice assistants, web browsers and "enterprise software" (*MLex*, EU tech gatekeeper law should ban paying for default installations, key lawmaker proposes, 7 July 2021, https://content.mlex.com/#/content/1306768).

'the tip of the iceberg' of the competition problems in the digital sector.[26] It is consistent with this approach to limit the list of CPS in Article 2(2) COM-D to services that are expressly mentioned. At the same time, however, the COM acknowledges the fact that digital services can change quickly and to a significant extent.[27] This makes it necessary to ensure the future effectiveness of the regulation.

According to COM-D, the COM may conduct a market investigation to ensure the long-term viability of the CPS definition. Pursuant to Article 17(1), the COM is to examine in this context whether any services should be added to the list of CPS. The COM is to issue a public report on the market investigation within 24 months[28]. Pursuant to Article 17(1)(a) COM-D, the report can be accompanied by a proposal to amend the regulation accordingly. Furthermore, pursuant to Article 38(2) COM-D, the regular review of the regulation by the COM must also include statements on whether additional rules are required. These evaluations are to result in "legislative proposals".

In some of the literature the approach taken in COM-D is criticised as lacking flexibility.[29] In particular, it has been proposed that the current list of CPS be transformed into mere examples and that these be preceded by an abstract definition of a CPS as chapeau.[30] This would result in a shorter designation process than could be expected when combining a market investigation and a legislative process as set out in Article 17 COM-D.[31]

The criticism of the length of the process seems reasonable. The introduction of an abstract definition of CPS could, however, affect the nature of the DMA draft described above as an instrument tailored to specific problem areas and thus indirectly also affect its relationship to other legal areas, such as competition law. The proposals to amend the regulation would also

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26 According to Article 1(6) COM-D the remaining competition problems should continue to be addressed by competition law; on the problems this involves see pp. 41 ff. below.

27 Recital 65 COM-D.

28 In Schwab-D this period is reduced to 18 months. In all other respects, the approach developed by the COM remains unchanged with regard to updating the list of CPS.

29 *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (320); *Rodríguez de las Heras Ballell*, The Scope of the DMA, Verfassungsblog, 30 August 2021 (https://verfassungsblog.de/power-dsa-dma-02/); *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, Zeitschrift für Wettbewerbsrecht, ZWeR 2021, pp. 29 ff. (39). Different view held by *Polley/Konrad*, Der Digital Markets Act, WuW 2021, pp. 198 ff. (201).

30 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 13; *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (320); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (521); *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (39). In contrast, according to *Polley/Konrad*, Der Digital Markets Act, WuW 2021, pp. 198 ff. (201), a more abstract definition is explicitly not required.

31 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (521).

have to consider the context in which the abstract definition of CPS would have to be examined: If the examination were to be carried out in an incidental manner in each individual case within the framework of the designation process, it would be subject to the limited time periods of this process. Depending on how the provision is structured, this could make it considerably more difficult to prove the extent of the harmful effect of any practices linked to specific services, up to now defined as a precondition in Recital 33, in order to subject a service to the list of obligations. However, should the COM be empowered to extend the list of (examples of) CPS itself in an abstract and general manner based on a general provision by way of a delegated act after a market investigation has been carried out, it would have to be ensured that this is in line with the primary law provisions on the reservation of essential elements for a legislative act pursuant to Article 290 TFEU and Article 52 CFR.[32] Against this background and taking into account the broad scope the CPS list already covers, a number of arguments could be found in favour of leaving the provision of COM-D as it is.

II. Conditions defining a(n) (non-)entrenched gatekeeper position

It has already been pointed out that the finding of a gatekeeper position by an authority (so-called designation) is a precondition to be fulfilled both under COM-D and Schwab-D and serves as a starting point for the ensuing rules.[33] Even though Article 3(7) COM-D requires the COM to identify the relevant undertakings to which the designated gatekeepers belong (Article 2(22) COM-D), only the gatekeeper, i.e. a CPS provider as part of an undertaking, not the undertaking as a whole, remains the relevant subject of the obligations according to the wording of Article 5 sentence 1, Article 6(1) sentence 1 and Articles 12, 13 COM-D.[34] In contrast to competition law[35], the drafts' use of three different ways to address the subject (CPS provider, gatekeeper, undertaking) within the same legislative context and procedure not only

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32 In this context it is remarkable that in COM-D, the COM – in contrast to the provision on updating the obligations for gatekeepers under Article 10 COM-D – has not opted for a delegation of power to adopt legislative acts with regard to the extension of the CPS list, but (presumably as a clear differentiation) expressly chose the ordinary legislative procedure. The literature also includes proposals for a possible compromise between the ordinary legislative procedure and a complete delegation of legislative acts, for example the proposal to make the COM's power to identify additional CPS based on an abstract CPS definition subject to the ex-post approval of the lawmaker (*Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (320)).

33 See p. 4 above.

34 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 9; *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (321); *Polley/Konrad*, Der Digital Markets Act, WuW 2021, pp. 198 ff. (200 f.); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (528 f.); *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (40).

35 In summary on competition law *Otto*, Die wirtschaftliche Einheit und ihre Träger in der Rechtsanwendung, NZKart 2020, pp. 285 ff. and 355 ff.

leads to increased terminological and conceptual complexity, but could potentially make circumvention strategies possible.[36]

Under COM-D a CPS provider is to be designated as a gatekeeper if it has a significant impact on the internal market (Article 3(1)(a) COM-D). Furthermore, the CPS must serve as an important gateway for business users (within the meaning of Article 2(17) COM-D) to reach end users (within the meaning of Article 2(16) COM-D) (Article 3(1)(b) COM-D). Finally, the CPS provider must enjoy an entrenched and durable position in its operations or it must be foreseeable that it will enjoy such a position in the near future (Article 3(1)(c) COM-D). In Schwab-D these requirements are not modified.

COM-D emphasises the conceptual distinction between gatekeepers and dominant companies.[37] However, a number of authors point out the prima facie similarities to competition law concepts such as market dominance/unavoidable trading partner.[38]

The substantive designation criteria are practically relevant (only) where the respective criteria[39] under Article 3(2)(a)-(c) COM-D are either not presumed to be satisfied or where the CPS provider rebuts the presumptions pursuant to Article 3(4) COM-D. In this case, the COM is to conduct a market investigation pursuant to Article 15 COM-D in order to examine the substantive requirement laid down in Article 3(1) COM-D. The COM has to take into account the aspects listed in Article 3(6) COM-D. The investigation must[40] not take longer than 12

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36 For example, the literature (*Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (322); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (529); *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (40 f.)) points out that Article 5(a) prohibits the combination of personal data sourced from a CPS with "data from any other service offered by the gatekeeper". However, the authors hold that the prohibition does not seem to apply where the "other service" belongs to the same undertaking, but not to the gatekeeper. It is also pointed out that, according to the wording of Article 12 COM-D, the obligation to inform about concentrations only exists where the concentration affects a gatekeeper part of the undertaking (see below, p. 31).

37 Recital 5 COM-D: "[…] gatekeepers […] are not necessarily dominant in competition-law terms".

38 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 17; *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 July 2021, p. 5 refers to an examination "close to a market power analysis, without requiring a relevant market definition" with regard to the examination of the characteristics under Article 3(6) COM-D. *Lamadrid/Fernández*, Why the Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, JECLP Advance Article, 5 August 2021, p. 12 do not intend to make market dominance a requirement, but propose the examination of market shares (which requires market definitions). *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (523) defines "gatekeeper power" as a "specific sub-category of market dominance" and proposes to codify "the general alignment of 'gatekeeper power' and dominance with regard to the requisite threshold of power" in order to achieve an examination standard for the degree of dependency of business customers.

39 For more details in this regard see pp. 15 ff. below.

40 Article 15(1) sentence 2 COM-D: "shall endeavour to conclude its investigation […] within twelve months from the opening of the market investigation".

months. It is possible to exercise the right to legal protection pursuant to the general provisions against the ensuing decision of the COM.[41] Against this background, some authors expect that the process to establish a final designation could be lengthy.[42]

In the literature, different proposals are discussed to limit the requirements under Article 3(1) and (6) COM-D and/or make them more precise (1.). Furthermore, the concept of a gatekeeper without an entrenched position (so-called emerging gatekeeper) raises special questions (2.).

1. Proposals to limit/provide a more precise definition of the group of addressees

In its recitals, COM-D points out that some CPS providers "exercise control over whole platform ecosystems in the digital economy" and that these ecosystems are "structurally extremely difficult to challenge or contest".[43] At the same time, however, operating an ecosystem is not a necessary condition for the designation as a gatekeeper pursuant to Article 3(1) COM-D. Consequently, companies that merely provide one single gateway CPS could potentially come under the DMA's personal scope of application and thus be subject to all of the relevant obligations. Some of the literature[44] and some Member States[45] criticise the lack of an explicit restriction with regard to ecosystems. Proposals to implement such a restriction include changes to be made in Article 3(1) COM-D with varying degrees of complexity: Some merely propose that a CPS provider should control at least two CPS in order to be designated as a gatekeeper.[46] According to another proposal, only the orchestration of an ecosystem and the resulting barriers to entry should be made a condition for the

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41 Articles 263(4), 256(1) TFEU; *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, NZKart 2021, pp. 436 ff. (441).

42 *Basedow*, Das Rad neu erfunden, ZEuP 2021, pp. 217 ff. (220); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (525) expects a "highly complex process" and that many designations will be contested; *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (321) propose an "interim designation" to accelerate the procedure.

43 Recital 3 COM-D. See also Recital 14 with regard to leveraging the CPS' gatekeeper power to ancillary services provided as part of an ecosystem.

44 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 17; *Gielen/Uphues*, Digital Markets Act und Digital Services Act, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2021, pp. 627 ff. (632); *Monopolkommission (German Monopolies Commission)*, Policy Brief 8/2021, pp. 2 ff.; different view held by *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, Zeitschrift für Europäisches Privatrecht (ZEuP) 2021, pp. 503 ff. (528), who would like to maintain the wide gatekeeper definition, but wants the ecosystem characteristic to be taken into account at the level of the obligations. *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (fn. 37), also tend to take a critical view of a narrower definition of ecosystems, but are concerned about difficulties regarding differentiation.

45 *France/Germany/the Netherlands*, Strengthening the Digital Markets Act and Its Enforcement, 27 May 2021 (https://www.bmwi.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=6).

46 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, pp. 17, 86 f.

designation as a gatekeeper.[47] Irrespective of the specific formulation of such a provision, limiting the number of gatekeepers would first of all have the advantage that the resources required to enforce the DMA could be used in a more targeted way.[48] Furthermore, the appropriateness of the obligations could be more easily assessed in view of the smaller, and thus somewhat less heterogeneous group of addressees.

In some of the literature it is pointed out that Article 3(1) COM-D includes criteria that tend to be indeterminate.[49] Against this background the aspects to be taken into account under Article 3(6) COM-D in the designation of undertakings as gatekeepers play an important role.[50] However, some authors question whether the aspects listed in this Article provide much clarification.[51] In view of the fact that COM-D deliberately refrains from defining relevant markets it appears unclear why e.g.[52] subsection (6)(f) COM-D explicitly refers to *market* characteristics. In the literature it is criticised that the list in subsection (6) COM-D particularly does not include possible multi-homing.[53] According to the authors, this aspect is important above all for examining the "important gateway" characteristic of a service pursuant to

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47 *Monopolkommission*, Policy Brief 8/2021, p. 3.

48 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 17, also take into consideration, however, that "some big platforms [...] will then escape regulation".

49 Very critical view on this expressed by *Lamadrid/Fernández*, Why the Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, JECLP Advance Article, 5 August 2021, p. 7, according to whom the characteristics do not provide adequate protection against "arbitrary interference"; a more cautious view held by *Colomo*, The Draft Digital Markets Act, 5 August 21, pp. 29 f. (https://dx.doi.org/10.2139/ssrn.3790276), who still finds "substantial leeway" for the COM; with a different view *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (38), who refer to the designation process (by including the criteria of Article 3(2) COM-D) as "skilfully designed" ("*geschickt konzipiert*") with a "clear wording" ("*klaren Wortlaut*").

50 For a categorisation of the aspects mentioned in subsection (6) under the conditions of subsection (1) see *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 15. Critical view on the individual aspects held by *Geradin*, What is a digital gatekeeper?, 2 April 2021, pp. 16 ff. (https://dx.doi.org/10.2139/ssrn.3788152).

51 *de la Mano et al.*, The Digital Markets Act, 2021, para. 4.12 and *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, pp. 379 ff. (383) point out that the list merely includes characteristics which generally define digital markets, but no characteristics specifically defining "gatekeeping"; different view held by *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (518) who maintains that the aspects and the effects resulting from them "tend to raise competition concerns"; *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 July 2021, p. 6 raises the question as to what extent the aspects mentioned in subsection (6) legally limit the COM's scope of discretion.

52 *Podszun/Bongartz/Langenstein*, The Digital Markets Act, Journal of European Consumer and Market Law (EuCML) 2021, pp. 60 ff. (63) would not rule out the necessity for a market definition even in the case of "entry barriers or scope effects".

53 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 87; *Geradin*, What is a digital gatekeeper?, 2 April 2021, SSRN #3788152, pp. 17 f. (https://dx.doi.org/10.2139/ssrn.3788152); *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, pp. 379 ff. (384); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (522).

subsection (1)(b), where the gradual standard of this characteristic is not sufficiently clear either.[54] In Schwab-D multi-homing was added in subsection (6).

2. Emerging gatekeeper

Under Article 3(1)(c) COM-D, a provider of CPS can also be designated as a gatekeeper if it does not yet enjoy an entrenched and durable position in its operations, but where it is merely foreseeable that it will enjoy such a position in the near future (so-called emerging gatekeeper). Whereas the obligations under Articles 5, 6 COM-D are applicable ex lege following the designation decision for CPS providers with an entrenched position, Article 15(4) COM-D stipulates that for emerging gatekeepers the COM must issue a constitutive decision on the applicability of the obligations. Furthermore, only obligations that are explicitly mentioned in Article 15(4) COM-D can be declared to be applicable to emerging gatekeepers. The COM is obliged to exclusively provide for the applicability of obligations that are appropriate and necessary in the individual case in order to prevent a gatekeeper from obtaining an entrenched and durable position in an unfair manner. According to the recitals the obligations to be imposed in the individual case are to address the problem that undertakings could try to use certain practices in order to make the position of a CPS unassailable (so-called tipping).[55]

The fact that this allows for an earlier intervention in the DMA is criticised in the literature with regard to different aspects. On the one hand, it is pointed out that it will be difficult to make the predictive decision required with regard to the threat of tipping.[56] Other authors point out that the market investigation required for the designation of an emerging gatekeeper could take 12 months and that scenarios are possible in which a market might already tip during the market investigation phase.[57] For such situations of a heightened risk of damage some authors advocate a corresponding extension of the empowerment to order interim measures under Article 22 COM-D, i.e. allowing for an even earlier intervention threshold.[58]

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54 *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, pp. 379 ff. (384) advocates a change to “unavoidable gateway” as this wording is considered to be more precise; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (523 f.) proposes alignment with the concept of market dominance and, on pp. 526 ff., points out the special conditions for establishing inter alia whether a provider qualifies as an “important gateway” in “oligopolistic settings”.

55 Recital 26 COM-D.

56 *Petit*, The Proposed Digital Markets Act, Journal of European Competition Law & Practice (JECLP) Advance Article, 31 July 2021, p. 13.

57 *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (44 f.).

58 *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (45).

III. Presumptions of a gatekeeper position

The (qualitative) requirements in COM-D and Schwab-D (Article 3(1)(a)-(c)) correspond to the respective (quantitative) criteria that are to be satisfied for the presumption of a gatekeeper position (Article 3(2)(a)-(c) COM-D). If the thresholds for satisfying the requirements for the presumption of a gatekeeper position are exceeded (and if the presumption has not been refuted), the ensuing designation as a gatekeeper results in the gatekeeper being subject to the obligations pursuant to Articles 5, 6, 12, 13 COM-D ex lege and without any further substantive examination. It should be noted in this respect that focusing on specific threshold values follows a different logic than e.g. Article 1(2) and (3) ECMR[59] because, although exceeding the thresholds results in the applicability of the ECMR's provisions, the legal consequence of a possible prohibition of planned mergers can only become effective after a further stage of substantive examination to be carried out by the COM.

According to COM-D, a significant impact on the internal market is presumed to exist where the undertaking providing the CPS exceeds certain threshold values with regard to the annual turnover, market capitalisation or the equivalent fair market value of the undertaking, and the CPS is provided in at least three Member States (subsection (2)(a)). For the presumption of a gateway CPS, subsection (2)(b) focuses on a specific number of monthly active end users and yearly active business users established or located in the EU. For the presumption that the requirements for an entrenched and durable position are satisfied under subsection (2)(c), the user numbers pursuant to subsection (2)(b) must have been achieved in each of the last three financial years.

Pursuant to Article 3(3) COM-D, a CPS provider must[60] notify the COM within three months[61] stating that the thresholds under subsection (2) are exceeded. With this notification, pursuant to Article 3(4) sentence 2 COM-D, the CPS provider can present "sufficiently substantiated arguments" to refute the presumption. If the CPS provider has successfully presented such arguments, the COM must examine whether a gatekeeper position exists pursuant to Article 3(1), (6) COM-D. If the presumption remains effective, the COM must designate the CPS provider as a gatekeeper within 60 days.

Article 3(5) COM-D empowers the COM to adopt delegated acts to specify the methodology for determining whether the quantitative thresholds laid down in subsection (2) are met. This

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59 See fn. 12 above; similarly, *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (320 f.).

60 Non-compliance with the obligation is subject to a fine pursuant to Article 26(2)(a) COM-D. Failure by a CPS provider to notify the required information does not prevent the COM from designating these providers as gatekeepers ex officio, Article 3(3) sentence 2 COM-D.

61 In addition to the applicability of the DMA's provisions, the provisions under Article 39 COM-D regarding the entry into force and application are to be taken into account.

does not mean that the COM is empowered to adapt the thresholds itself, but it indirectly gains substantial scope for intervention, because within the context of Article 3(2)(b) COM-D the process of establishing the active users, in particular, can be carried out in various different ways depending on the service and business model to be examined in each individual case.

Schwab-D provides for a number of modifications. First of all, the thresholds in Article 3(2)(a) are to be raised so as to cover only particularly large CPS providers. The presumption in Article 3(2)(b) is narrowed down so as to become effective only for providers of at least two CPS.[62] In addition, the number of active users is to be calculated based on the indicators included in an annex to the DMA. It should also be emphasised that the draft only allows for the presumption to be refuted based on "compelling substantiated arguments"[63] (Article 3(4) Schwab-D).[64]

Although the literature welcomes the presumptions' effect of accelerating the procedure,[65] many aspects of the formulation of the requirements for the presumption in the drafts are also viewed critically. Some authors criticise that despite the legal definition of the end user criterion which is of significant importance for Article 3(2)(b), the requirement is not sufficiently clear.[66] In addition, the literature criticises in particular that the turnover or user numbers referred to in subsection (2) primarily provide an indication of the size, but not the market power of gatekeepers.[67] Although, according to the authors, the number of users is a

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62 Cf. the above discussion of the ecosystem criterion p. 12. *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, pp. 379ff. (383) assumes that under Schwab-D "most European platforms and 'bycatch' like carmakers" would be excluded from the scope of application and considers this limitation to non-European undertakings to be problematic from a constitutional law perspective.

63 Replacing "sufficiently substantiated arguments".

64 Schwab-D also notably eliminates all references to an examination of the gatekeeper position taking into account the aspects mentioned in Article 3(6) COM-D after the presumption has been refuted. As a reason for this the draft states that the "thorough analysis under Article 3(6) should not be required (nor would be justified) where undertakings meet the quantitative presumptions". However, as Schwab-D leaves the substantive standard for designating a gatekeeper position pursuant to section (1) unchanged, and as it is likely that this would have to be fully investigated ex officio after the presumption effect has been refuted, it is doubtful whether this change per se would bring about the desired effect.

65 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503ff. (525).

66 *de la Mano et al.*, The Digital Markets Act, 2021, para. 4.11 raise the question "whether end users would be employees at companies using, say, a Bloomberg terminal, the companies themselves or the clients of the financial providers whose investment information heavily relies on financial data from Bloomberg". The definition will probably have to be interpreted in light of Recital 13 (view probably shared by *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 18, fn. 64). *Geradin*, What is a digital gatekeeper?, 2 April 2021, p. 12 (https://dx.doi.org/10.2139/ssrn.3788152) raises the question whether the sweeping criticism with regard to the lack of a definition of end users can be upheld in view of Article 2(16) and Recital 13 COM-D.

67 *de la Mano et al.*, The Digital Markets Act, 2021, para. 4.9; *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 18; *Geradin*, What is a digital gatekeeper?, 2 April 2021, SSRN

potential indicator of the existence of network effects, the informative value of this indicator with regard to the fundamental competition conditions is already relativised where e.g. multi-homing practices are used.[68] In the authors' view it can be expected that the wide requirements for the presumption of a gatekeeper position, at least according to the COM-D, cover considerably more undertakings than merely those which are also referred to as "GAFA".[69]

Against this background and to avoid excessive regulation, the possibility to refute the presumptions is seen as a positive aspect.[70] However, the aspects in Article 3(6) which pursuant to the COM-D are relevant for refuting the presumptions are viewed in different ways: Whereas some authors consider the list to be useful,[71] others criticise that in their view Article 3(6) does not differentiate between aspects that speak in favour of or against a gatekeeper position.[72]

#3788152, pp. 15, 20 (https://dx.doi.org/10.2139/ssrn.3788152); *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, pp. 379 ff. (382); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (525) refers to the "purely quantitative presumption for a gatekeeper position" as a "bold move" and to the "quantitative proxies for the 'bottleneck power'" as "highly fuzzy"; different view held by *COM*, Impact Assessment Report, 15 December 2020, para. 389: "high probative value of the considered quantitative threshold".

68 *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (320); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (525). *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, pp. 379 ff. (382 f.) also criticises that identical thresholds apply to all types of CPS, irrespective of the market conditions.

69 *Haucap/Schweitzer*, Die Begrenzung überragender Marktmacht digitaler Plattformen im deutschen und europäischen Wettbewerbsrecht, Perspektiven der Wirtschaftspolitik 2021, pp. 17 ff. (22); resulting in the same conclusion also *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, pp. 60 ff. (64), although they emphasise that "[t]he anxiety of over-inclusion may be overstated".

70 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 18 criticise the wording in the Impact Assessment (para. 389) according to which a rebuttal can only be considered in "very exceptional circumstances"; *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (321); *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, pp. 379 ff. (384) criticises in this respect the proposal in Schwab-D to introduce a higher standard for a rebuttal; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (525); *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (38). A more cautious view is expressed by *Colomo*, The Draft Digital Markets Act, 5 August 2021, pp. 29 f. (https://dx.doi.org/10.2139/ssrn.3790276), who thinks it is "not immediately obvious" whether and to what extent a rebuttal will be possible at all pursuant to COM-D in view of the broad criteria in Article 3(1).

71 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 18.

72 *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, pp. 379 ff. (383).

Personal scope of application in Section 19a GWB and in the UK/US proposals

The DMA's provision regarding the addressees of the regulation shares an important feature with Section 19a GWB and the UK/US proposals insofar as all areas of regulation only 'asymmetrically' apply to certain categories of undertakings. Section 19a(1) GWB provides for a certain flexibility in making the constitutive designation decision, which is a precondition for the application of Section 19a GWB, as subsection (1) sentence 1 focuses on an undertaking's paramount significance for competition across markets within the meaning of Section 18(3a) GWB. In contrast to the wording of the COM's draft for the DMA, this makes it possible to specifically take into account a possible ecosystem character the activity might have. Another important difference between the DMA and Section 19a GWB is that the latter does not include any criteria based on which an undertaking can be assumed to be an addressee of the norm. The factors under Section 19a(1) sentence 2 which are particularly to be considered in the assessment are of a qualitative nature; based on the legislative material, however, these factors are not intended to be exhaustive or meant to be fulfilled cumulatively. Moreover, the reference point of the decision under Section 19a(1) sentence 1 GWB is the undertaking as an economic entity, whereas under Article 3(1) in the DMA drafts the designation only pertains to the operation of certain gateway CPS.[73] Contrary to the exhaustive list of CPS specified in the DMA, the criteria regarding the norm addressees under Section 19a GWB are not limited to certain areas of the digital economy.[74]

In the British proposals, the designation decision of an authority is to be based on the strategic market status of an undertaking.[75] According to the proposals of the CMA's Digital Markets taskforce, such a status exists where "the firm has substantial, entrenched market power in at least one digital activity, providing the firm with a strategic position".[76] Much like the DMA drafts, this standard for the designation relates to a specific "digital activity".[77] In deviation

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73 See *Polley/Konrad*, Der Digital Markets Act, WuW 2021, pp. 198 ff. (201).

74 *Botta*, Sector Regulation of Digital Platforms in Europe, JECLP 2021, pp. 500 ff. (503 f.).

75 *CMA*, Advice of the Digital Markets taskforce on a new pro-competition regime for digital markets. Appendix B, 8 December 2020 (https://assets.publishing.service.gov.uk/media/5fce72c58fa8f54d564aefda/Appendix_B_-_The_SMS_regime_-_designating_SMS_firms.pdf); *Secretary of State for Digital/for Business*, A new pro-competition regime for digital markets, July 2021, paras. 49 ff. (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf).

76 *CMA*, Advice of the Digital Markets taskforce on a new pro-competition regime for digital markets. Appendix B, 8 December 2020, before para. 10; *Secretary of State for Digital/for Business*, A new pro-competition regime for digital markets, July 2021, para. 60 (each URL in fn. 75).

77 *CMA*, Advice of the Digital Markets taskforce on a new pro-competition regime for digital markets. Appendix B, 8 December 2020, paras. 14 ff.; it should be possible to group products and services into a "single activity". *Secretary of State for Digital/for Business*, A new pro-competition regime for digital markets, July 2021, paras. 51 ff. (each URL in fn. 75)

from the DMA, however, the British proposal does not call for a complete removal of the (competition law) concept of market power.[78] In addition, the criterion of a "strategic position" allows for more flexibility than the DMA's concept of gateway CPS. For example, in addition to the criterion of being an "important access point to customers", the ability to leverage market power, the activity's ecosystem characteristic and the ability to set rules could also be considered.[79]

Several US bills[80] each provide for separate but in terms of content largely identical provisions for determining their respective personal scope of application.[81] For example, under Section 2(g)(4)(B) of the draft American Choice and Innovation Online Act a "covered platform" is defined as an online platform which has at least 50 million monthly active users and at least 100,000 monthly active business users based in the USA. The provision is only intended to cover platforms that are "owned or controlled by a person with net annual sales, or a market capitalization greater than $600,000,000,000". Lastly, the platform must be a "critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform". According to Section 2(g)(6), this is the case where the platform has the ability to restrict the access of a business user to its users/customers or the access of a business user to a tool or service that it needs to service its users/customers. Just like the DMA, this approach focuses on specific services (rather than undertakings) but unlike the DMA with its list of CPS, the definition of the activity associated with an online platform is more abstract (see Section 2(g)(10)). In contrast to the DMA, the largely quantitative criteria provided in the US proposals result in the bills focussing on the largest digital companies.[82] Moreover, in deviation from the DMA, no constitutive designation decision seems to be necessary for the personal scope of application to be applicable; instead, the definition of "covered platform" under Section 2(g)(4) also includes such platforms in addition to

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78 *CMA*, Advice of the Digital Markets taskforce on a new pro-competition regime for digital markets. Appendix B, 8 December 2020, Box B.1; *Secretary of State for Digital/for Business*, A new pro-competition regime for digital markets, July 2021, paras. 61 f. (each URL in fn. 75).

79 *CMA*, Advice of the Digital Markets taskforce on a new pro-competition regime for digital markets. Appendix B, 8 December 2020, paras. 36 ff.; *Secretary of State for Digital/for Business*, A new pro-competition regime for digital markets, July 2021, para. 68 (each URL in fn. 75).

80 American Choice and Innovation Act 2021; Augmenting Compatibility and Competition by Enabling Service Switching Act 2021; Ending Platform Monopolies Act 2021; Platform Competition and Opportunity Act of 2021. In August 2021, an Open App Market Act was also proposed, which sets out specific rules for large app stores. Due to the narrow scope of application, this act is not further discussed here.

81 Cf. *Schnitzer et al.*, International coherence in digital platform regulation, 6 August 2021, pp. 4 ff. (https://tobin.yale.edu/sites/default/files/Digital%20Regulation%20Project%20Papers/Regulation%20--%20Regulatory%20Coherence%20--%208-6-FINAL.pdf).

82 *Schnitzer et al.*, International coherence in digital platform regulation, 6 August 2021, p. 5 (URL in fn. 81).

designated online platforms that satisfied the criteria mentioned in certain time periods preceding the filing of a complaint.

C. Obligations

Under Articles 5, 6, 12 and 13 the drafts set out obligations for those parts of an undertaking which have been designated as gatekeepers[83]. These obligations apply immediately, directly and without a prior prohibition decision issued by an authority or a court being required.[84]

The obligations are only to a certain extent systematically structured in the drafts.[85] Whereas Articles 5 f. set out obligations with regard to CPS, Article 12 addresses special information obligations for certain concentrations between undertakings, and Article 13 provides for special information obligations with regard to the "profiling of consumers". The obligations for CPS under Articles 5 f. are neither grouped by subject matter nor by the degree of harm caused; they therefore do not constitute a type of black and grey list. Furthermore, under both provisions a gatekeeper should ensure compliance with the obligations "by design" as part of its respective activities.[86]

The drafts, however, assume that (only)[87] with regard to the obligations listed in Article 6, it may in certain cases be appropriate for the COM, following a so-called regulatory dialogue, to further specify those measures which the gatekeeper must adopt in order to effectively comply with those obligations in a proportionate manner.[88] The regulatory dialogue is therefore not about whether or not the obligations apply, but merely about the way in which the measures are to be implemented in the individual case. The procedure for the regulatory dialogue is set out in Article 7 COM-D;[89] it may[90] be initiated ex officio (Article 7(2) COM-D) or

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83 On the terms CPS provider/gatekeeper/undertaking see p. 10 above.

84 In this effect, the obligations do not differ, in particular, from the primary law prohibition of abuse of a dominant position, see MüKo – *Eilmansberger/Bien*, Article 102 TFEU, 2020, paras. 1 f. With a critical view on the necessary precision of the obligations especially under Article 6 COM-D, *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 July 2021, p. 11.

85 For considerations on grouping the obligations based on substantive aspects, see, for example, *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 July 2021, pp. 7 ff.; *Monti*, The Digital Markets Act, 22 February 2021, p. 2 (https://dx.doi.org/10.2139/ssrn.3797730); *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 51, provide an overview of which obligations are relevant to which types of CPS.

86 Recital 58 COM-D.

87 Against this backdrop, see *Gerpott*, Neue Pflichten für große Betreiber digitaler Plattformen, NZKart 2021, pp. 273 ff. (276), for a critical view on the lack of a "general logic [of] sorting" ("*allgemeinen Logik [der] Eingruppierung*") obligations under either Article 5 or Article 6. Similarly, *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 27 ("distinction is too sharp").

88 Recital 58 COM-D and Article 7(1) COM-D. On proportionality, see Recital 33 COM-D and Article 7(5) COM-D.

89 *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (43) hold that the details of the regulatory dialogue are unclear and associate this with a right to be heard that is similar to the one set out in Section 28 of the German Federal Administrative Procedure Act (*BVwVfG*).

90 With a critical view on the COM's discretion *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, NZKart 2021, pp. 436 ff. (437).

upon the gatekeeper's request (Article 7(7) COM-D) and is to be concluded within six months[91] by the COM adopting a decision specifying the measures the gatekeeper must implement (Article 7(2), (5) COM-D). With regard to certain obligations, Article 7(6) COM-D sets out an assessment standard which goes beyond the general assessment of effective compliance under Article 7(1) COM-D.

Where the COM finds that the gatekeeper has failed to ensure effective compliance with the obligations pursuant to Article 7(1) COM-D of its own accord, the question arises as to how the specification decision under Article 7(2) COM-D relates to the non-compliance decision under Article 25(1)(a) COM-D. Pursuant to Article 7(3) COM-D, the proceedings are without prejudice to one another.[92] The COM would therefore be free to combine the substantive specification of the conduct expected of the gatekeeper with a fine (Article 26(a) COM-D) for any past conduct which is deemed unlawful even without the specification decision. It is to be expected that in the context of its discretionary decision regarding a fine, the COM will take into account whether the gatekeeper has made a credible attempt to satisfy the respective obligation. However, the abstract possibility of having to pay a fine could nevertheless create strong incentives for gatekeepers to request a decision under Article 7(7) COM-D in order to gain legal certainty for numerous CPS and the relevant obligations.[93] Since the specification decision may be appealed in accordance with the general provisions,[94] this could result in a potentially significant amount of resources being absorbed at the COM and the courts.

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91 According to Article 3(8) COM-D, a gatekeeper must comply with the obligations laid down in Articles 5 and 6 within six months after having been designated, resulting in the fact that, where necessary, the gatekeeper can request a specification decision immediately after designation (i.e. without the gatekeeper already having to comply with the obligation at this point in time.) In this context, *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 28, criticise that since both deadlines are the same, the gatekeeper may only be informed of the measures that are to be implemented based on a specification decision at the same time the obligations become applicable. The authors therefore suggest, among other things, extending the deadline for the gatekeeper.

92 According to Article 23 COM-D, deleted in Schwab-D, the COM may accept commitments in non-compliance proceedings in order to ensure compliance with Articles 5 and 6. This differs from specifying the measures pursuant to Article 7(2) COM-D mainly due to the fact that in the latter case the COM sets specific substantive requirements whereas in the case of Article 23 COM-D it is the gatekeeper that submits an extensive proposal to ensure compliance with the obligations. On this matter, also see *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p.28.

93 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p.30, however, wish to create even more incentives for gatekeepers to initiate the regulatory dialogue, for example by introducing a "presumption" that a request for further specification would normally not lead to enforcement action pursuant to Articles 25 ff. COM-D even if the COM concluded that the gatekeeper's conduct prior to the specification decision had been unlawful.

94 It is not entirely clear whether legal action can be taken against the rejection of a request to initiate a regulatory dialogue. *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, pp. 27 f., argue that this would not affect the gatekeeper since the obligations under Article 6 apply irrespective of whether or not the measures have been further specified.

In the following, the CPS-related obligations are first examined in more detail. It will become clear that these obligations are rooted in individual competition law cases (I.). However, in clear contrast to the prohibition of abusive practices, the obligations under Articles 5 f. COM-D generally do not provide any possibility to justify a certain practice (II.). Just like with the CPS list set out in Article 2(2) COM-D,[95] it is a challenge to ensure the long-term viability of the comparatively specific obligations (III.). Lastly, brief consideration will be given to the obligations under Article 12 COM-D and their links to merger control (IV.).

I. From the individual competition law case to the abstract and general prohibition in the DMA

Both approaches followed in COM-D and in Schwab-D can be characterised by the fact that various individual competition law cases have served as a key source of information and inspiration for establishing abstract and general rules.[96] Article 5(a) COM-D, for example, seems to draw on the Bundeskartellamt's case against Facebook[97] due to the company's combining of user data. The prohibition of wide most-favoured-nation clauses under Article 5(b) may have been inspired by various competition law proceedings, such as the Bundeskartellamt's proceeding against Amazon[98]. Article 5(f) COM-D draws upon the COM's Android proceedings.[99] In the literature, similar links are also established for the remaining provisions.[100]

The adopted approach of primarily drawing on findings gained in previous competition law proceedings is in itself not objectionable.[101] If, however, the objective were to draft a detailed regulatory framework for conduct affecting competition in the digital sector similar to the telecommunications regulation, for example, it would in any case be a challenge to accommodate the considerably more diverse services and business models found in the digital sector. Against this background, it is understandable that both COM-D and Schwab-D do not

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95 See pp. 8 ff. above.

96 *de la Mano et al.*, The Digital Markets Act, 2021, para. 4.4; *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (319, 321); *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 July 2021, p. 7.

97 *BKartA*, decision of 6 February 2019, B6-22/16.

98 Case B6-46/12 was discontinued on 26 November 2013 after Amazon had once and for all abandoned its price parity clause.

99 COM, decision of 18 July 2018, Case AT.40099 (Google Android).

100 *Schweitzer/Gutmann*, Unilateral Practices by Digital Platforms, 1 June 2021, fn. 193 (https://dx.doi.org/10.2139/ssrn.3857751); see also *Caffarra/Scott Morton*, The European Commission Digital Markets Act, 5 January 2021 (https://voxeu.org/article/european-commission-digital-markets-act-translation).

101 *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, NZKart 2021, pp. 436 ff. (437), however, points out that not all findings are equally established since not all of the proceedings that have been taken into account have already been concluded. A critical view in this regard is also taken by *Larouche/de Streel*, The European Markets Act, JECLP 2021, pp. 542 ff. (547).

pursue a more comprehensive 'one size fits all' approach and instead merely attempt to address the 'tip of the iceberg' of practices that may potentially harm competition. In relation to competition law,[102] which pursuant to Article 1(6) COM-D continues to apply alongside the DMA, this approach allows for an increase in predictability and a simpler enforcement of the law for a subset of practices as the provisions are more detailed and neither necessitate a weighing of interests on a case-by-case basis nor an analysis of effects.[103]

The approach also has certain disadvantages. In the literature, it is especially criticised that the individual obligations are listed alongside one another in a largely unrelated manner.[104] According to some authors, the DMA lacks a superordinate "regulatory idea" of its own[105], which could be expressed normatively in the form of classifying principles, for example. They hold that without a coherent regulatory idea, it can be expected that the provisions referring to the DMA's object and purpose, for example those governing the regulatory dialogue (Article 7(1) COM-D), will cause difficulties in their application.[106] In addition, since the obligations draw on previous abuse proceedings, they are strongly rooted in the past.[107] It is seen as particularly problematic that the original competition law proceedings which are strongly focused on the individual case are used to back up abstract and general rules which may potentially affect a significantly wider group of addressees.[108] In this respect, the risk of overregulation, which could ultimately have adverse effects for competition and consumers,

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102 Regarding the relation between the DMA and competition law, see pp. 41 ff. below.

103 Cf. *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (531).

104 *de la Mano et al.*, The Digital Markets Act, 2021, para. 4.57 ("unorganised catalogue"); *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (321) ("unsystematic"); *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 July 2021, p. 7 ("random order"); *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, pp. 60 ff. (65) and *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, NZKart 2021, pp. 436 ff. (437) ("salad of obligations"). Different view held by *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (530) ("more than an unprincipled potpourri of Article 102 TFEU remedies").

105 *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, pp. 60 ff. (65): "[…] more of a competition law reform through the backdoor than being a unique piece of legislation with a regulatory idea".

106 *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 June 2021, p. 7.

107 *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, pp. 60 ff. (65).

108 *de la Mano et al.*, The Digital Markets Act, 2021, paras. 4.19, 4.57 ff. (under para. 5.2.iii it is unconvincingly argued that already the small number of "antitrust investigations" indicates that the practices are harmful only under certain circumstances; this view, however, fails to take into account that the mere number of proceedings is also limited by the competition authorities' discretionary power and resources, and that especially in the digital sector upholding the standard of the traditional prohibition of abusive practices requires considerable investigative effort on the part of competition authorities); *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, NZKart 2021, pp. 436 ff. (437); *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, pp. 60 ff. (65).

is therefore regarded as significant.[109] This applies all the more since contrary to competition law there are no possibilities for undertakings to justify their practices.[110]

Against this background, various adjustments are demanded in the literature. For example, some authors suggest opening the regulatory dialogue also for obligations set out in Article 5 and including a "presumption" to the effect that the obligations under Article 5 do not require a specification decision provided by the COM whereas such a decision is generally required for the obligations under Article 6.[111] Some authors hold that, if a DMA obligation is based on a competition law proceeding, it is preferable not to expand the scope of application of the DMA obligation to CPS other than those already addressed in the original competition law decision.[112] There is the view that established economic findings are in any case necessary for the specific rules and prohibitions.[113] Some authors suggest compensating for the lack of a unique "regulatory idea" by drawing more heavily on competition law in the DMA.[114] Some authors take the DMA's ties to previous competition law proceedings as a reason to call for Article 103 TFEU to be included as an additional legal basis of the DMA.[115]

Schwab-D contains a range of changes made to Articles 5, 6 and 7, among others; however, the structure of COM-D is essentially maintained.

II. Justifications and exemptions (inherent in the constituent elements of the provisions)

Both drafts provide only very limited legal possibilities for gatekeepers to actually challenge the appropriateness of the legal consequences associated with the obligations in the individual case. Under Article 8 in both drafts, a gatekeeper may request the suspension of specific obligations laid down in Articles 5 and 6 for a CPS where compliance with that specific obligation would endanger, due to exceptional circumstances beyond the control of the

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109 *de la Mano et al.*, The Digital Markets Act, 2021, para. 5.2.iv.; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (531); *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, NZKart 2021, pp. 436 ff. (438) sees the risk of "disproportionality by design".

110 *de la Mano et al.*, The Digital Markets Act, 2021, para. 4.36.

111 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 27. *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, NZKart 2021, pp. 436 ff. (437), in any case, argues that the provision of a specification decision should be the rule and moreover considers it appropriate to transform Article 6 into a "grey list containing obligations that are not self-executing, but made binding by a decision".

112 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 53.

113 *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (42).

114 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (517): "A recognition of the clear and strong basis of the DMA in competition policy – and nothing else – would provide a clear reference point for the interpretation and implementation of the DMA".

115 *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (319).

gatekeeper, the economic viability of the operation of the gatekeeper in the Union. Under Article 9, which is structured similarly to Article 8 in both drafts, the gatekeeper may be exempted upon request from a specific obligation where such exemption is justified on the grounds of public morality, public health or public security. No further exemptions applicable to all obligations are provided. In particular, it is generally not possible for a gatekeeper to justify any behaviour that is prima facie unlawful based on objective reasons or legitimate interest.[116] The objection that certain efficiencies are derived from a behaviour which is prima facie unlawful is also not accepted.[117]

For individual obligations, however, the drafts partly provide for exemptions inherent in the constituent elements of the provisions that limit the scope of the individual prohibitions from the outset if certain types of objective reasons exist. Under Article 6(1)(b) COM-D, for example, the gatekeeper must generally allow end users to un-install any pre-installed software applications. However, the gatekeeper is still given the possibility to rule out such un-installation where the relevant software application is essential for the functioning of the system as a whole. Moreover, under Article 6(1)(c) sentence 2 COM-D, for example, measures that ensure the integrity of the hardware or operating system in a proportionate manner are expressly exempted from the gatekeeper's obligation to allow side-loading.

In Recitals 33 ff. COM-D, the COM indicates that the proportionality of the obligations and prohibitions is to be ensured by expressing them as specifically as possible and explicitly anticipating reasonable substantive objections. The decision not to include the possibility of undertakings to bring forward general objective justification and efficiency arguments must especially also be viewed in the light of the COM's overriding objective pursued in the DMA of establishing more direct conduct control and increasing the speed of law enforcement compared to competition law.[118]

The specific way in which this approach is pursued in COM-D is, however, criticised in the literature. It is argued that it just cannot be ruled out that Articles 5 f. would also cover practices that are not harmful, especially since in some cases one and the same element constituting an obligation or prohibition could apply to very different services and business models.[119] The fact that the scope of the DMA extends to potentially harmless practices

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116 In Recital 9 COM-D, affording the "possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question" is, to a greater degree, intended as a feature differentiating the DMA from competition law.

117 Recital 23 COM-D, particularly with a view to objections raised in designation proceedings.

118 Cf. Recital 5 COM-D. The question as to whether or not these advantages will be fully realised in law enforcement proceedings is discussed on pp. 35 ff. below.

119 *de la Mano et al.*, The Digital Markets Act, 2021, para. 4.64; *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, pp. 33, 57 ff., 92; *Haucap/Schweitzer*, Die Begrenzung

interferes significantly with the undertakings' fundamental rights and therefore raises concerns as to the proportionality of the obligations and prohibitions.[120] It is held that the exemption criteria provided for in some cases with regard to safety and security or integrity are to be welcomed, but should at any rate also be extended to other matters.[121] According to the literature, the lack of exemption criteria also makes it difficult to take into account the differences between markets that are controlled by one gatekeeper alone and (in the economic sense) oligopolistic markets; in the latter case, the gatekeepers still have to compete at least to a limited extent and consequently, the potentially harmful effects of certain practices are different.[122]

Many authors therefore suggest introducing a possibility for undertakings to bring forward justification arguments. The following, partially overlapping, approaches are discussed:

- According to one approach, the gatekeeper is to be given the possibility to request an exemption from the prohibitions based on a "narrowly defined set of objective justification grounds".[123]

- Another approach suggests introducing a balancing test based on which the COM could demonstrate that the potential negative effects of a given practice outweigh any potential positive effects; the COM's decision should include the effects on business users, end users, the platform and competition.[124]

- In some cases, the need is seen to establish a "dark grey list" of rules in addition to a "black list" of per se rules; such "grey listed" rules would still take immediate effect but in this regard any anti-competitive effect associated with a given practice would merely be presumed and may be refuted.[125] Based on this, a gatekeeper could then argue and prove in the context of a "pro-competition defence" that granting an exemption from a

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überragender Marktmacht digitaler Plattformen im deutschen und europäischen Wettbewerbsrecht, Perspektiven der Wirtschaftspolitik 2021, pp. 17 ff. (23); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (535); *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (53).

120 *de la Mano et al.*, The Digital Markets Act, 2021, para. 4.89; *Lamadrid/Fernández*, Why the Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, JECLP Advance Article, 5 August 2021, p. 11; *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (53).

121 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 89.

122 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (535).

123 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, pp. 34, 92.

124 *Lamadrid/Fernández*, Why the Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, JECLP Advance Article, 5 August 2021, p. 11.

125 *Cabral et al.*, The EU Digital Markets Act, 2021, p. 13; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (536); similarly, *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (323).

"grey listed" obligation would, in the individual case, result in overall pro-competitive effects.[126]

- Others argue in favour of a general possibility for the gatekeeper to be granted an exemption from individual rules by arguing and proving the lack of negative effects.[127] They see the need for another possibility to justify a given practice based on efficiency gains in cases where the conduct results in negative effects but the overall welfare gains are nevertheless greater.[128] Any possibility for objective justification going beyond this should, in their view, be limited to "actual extreme cases" ("*tatsächliche Extremfälle*").[129]

- Another possibility under consideration is that after having been designated as a gatekeeper the undertaking should submit a list of measures based on which it intends to comply with the obligations.[130] Loosely based on the way in which merger control proceedings are conducted, the COM should then confirm the plans' compatibility with the DMA in a two-stage review process.

III. Long-term viability based on the possibility of updating the obligations, anti-circumvention provisions and/or a general provision

As with the CPS list laid down in Article 2(2) COM-D, the question whether the drafts adequately take into account the dynamic development of the digital economy also arises with regard to the obligations. To begin with, it would be possible to regularly add new abstract and general obligations to the list of already existing abstract and general obligations (updating obligations). A corresponding approach is provided for in COM-D. In this regard, Article 10(1) COM-D affords the COM the power to adopt delegated acts within the meaning of Article 34 DMA in conjunction with Article 290 TFEU. This requires that a previously conducted market investigation pursuant to Article 17 COM-D has identified a type of practice that may limit the contestability of CPS or may be unfair and which is not effectively addressed by the regulation. In addition, it is clear from Article 10(1) COM-D that the COM should not go after any unfair practice; instead, the practice must be unfair "in the same way" as the practices already addressed by the obligations laid down in Articles 5 f. COM-D are unfair. While Article 10(2)(a) COM-D legally defines criteria for unfair practices, Article 10(2)(b)

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126 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (537 f.). *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (54 ff.) propose an efficiency defence modelled after Article 101(3) TFEU.

127 *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (53 f.).

128 *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (54 f.).

129 *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (56).

130 *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, NZKart 2021, pp. 436 ff. (441).

merely establishes that weakening the contestability of CPS already suffices to assume that the contestability is limited. It is not entirely clear what changes in this regard are to be made in Schwab-D. As far as can be seen, Article 10 COM-D is not modified in Schwab-D but, at the same time, the reference to updating the obligations is deleted (without stating reasons) in Article 17 Schwab-D.

In the literature, the COM's proposal for updating the obligations based on a preceding market investigation which may take up to two years is criticised as slow.[131] Against this backdrop, some authors suggest granting the COM the possibility to take interim measures while the market investigation is being carried out.[132] It is also criticised that while COM-D provides for the possibility to add obligations, it does not include the possibility to remove obligations.[133] It is moreover pointed out that COM-D may not provide sufficient controls for the COM's legislative activity;[134] it is also regarded as questionable whether the updating of the obligations in its current form meets the requirements laid down in Article 290 TFEU, according to which the essential legislative decisions must be taken in a formal legislative act.[135] The definitions of unfairness and contestability set out in Article 10(2) COM-D, especially with regard to the updating of obligations, are considered to be insufficient by some authors.[136]

Securing long-term viability could also be achieved by way of an anti-circumvention provision. This would ensure the long-term effectiveness of the already stipulated abstract and general obligations by also addressing practices that deviate in formal, conceptual or technical terms

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131 *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (321); *Monti*, The Digital Markets Act, 22 February 2021, p. 11 (https://dx.doi.org/10.2139/ssrn.3797730); *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, pp. 60 ff. (66).

132 *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (321); *Podszun/Bongartz/Langenstein*, Proposals on how to improve the Digital Markets Act, 19 February 2021, p. 7.

133 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 35.

134 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 35; *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (50) point out that the European Court of Justice (ECJ) has so far granted the COM "a high level of discretion in the context of this fast-moving and technically complex sector" ("*im Kontext schnelllebiger und technisch komplexer Sachverhalte bisher einen weiten Entscheidungsspielraum zugestanden*") and request the introduction of a size threshold.

135 *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, pp. 60 ff. (65).

136 Given the importance of the overarching concepts of contestability and fairness throughout the proposal, these definitions are also significant. These concepts are discussed in *Crawford et al.*, Fairness and contestability in the Digital Markets Act, 6 July 2021 (https://tobin.yale.edu/sites/default/files/Digital%20Regulation%20Project%20Papers/Digital%20Regulation%20Project%20-%20Fairness%20and%20Contestability%20-%20Discussion%20Paper%20No%203.pdf); *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, pp. 42 ff.; *Krämer/Schnurr*, Big Data and Digital Markets Contestability, 18 May 21, pp. 33 f. (https://dx.doi.org/10.2139/ssrn.3789510); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (509 ff.); *Podszun/Bongartz/Langenstein*, The Digital MarketsAct,EuCML 2021, pp. 60 ff. (65).

from the prohibited practices but nevertheless have identical effects. In this regard, the anti-circumvention provision especially in Schwab-D is significantly wider compared to Article 11 COM-D; according to this wide anti-circumvention provision, a gatekeeper must refrain from any behaviour which "is able in practice to have an equivalent object or effect [to a behaviour prohibited pursuant to Articles 5 and 6]". However, it seems problematic that the concrete comparative standard could be missing for assessing the effects in the individual case.[137]

The introduction of a general clause allowing for tailor-made decisions to be issued is suggested in the literature[138] and by several Member States[139] to secure long-term viability. It is argued that compared to the updating of obligations, such a provision has the advantage of the COM being able to react more quickly to changing circumstances in the digital economy.[140] However, an originally planned general clause was not included in Schwab-D due to concerns regarding its compatibility with the legal basis of Article 114 TFEU.[141] Similarly, it would have to be taken into consideration that the lack of an "individualised assessment" of practices has so far served as a feature distinguishing COM-D from competition law.[142]

IV. Obligations relating to merger control

Under Article 12 COM-D, gatekeepers are obliged to inform the COM of any intended concentration within the meaning of Article 3 ECMR involving another provider of CPS or of any other service provided in the "digital sector" (as defined in Article 2(4) COM-D). This is to apply irrespective of whether the concentration is notifiable to the COM under the ECMR or to a competent national competition authority under national merger rules. The provision does not set out any threshold values. Various objectives are pursued with this provision:[143] It is intended to ensure the review of an undertaking's gatekeeper status and the possibility to adjust the list of CPS within the meaning of Article 3(7) COM-D. In addition, the COM believes that based on the information received it is possible to draw conclusions as to the "broader

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137 Recital 10 COM-D characterises the approach taken in the DMA as different from competition law and as independent from the actual, likely or presumed effects of a conduct.

138 *Basedow*, Das Rad neu erfunden, ZEuP 2021, pp. 217 ff. (220); *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, pp. 36, 90; *Gielen/Uphues*, Digital Markets Act und Digital Services Act, EuZW 2021, pp. 627 ff. (630); *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (321); *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (536).

139 *Germany/France/Netherlands*, Second joint position paper by the friends of an effective DMA, 8 September 2021 (https://www.bmwi.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4).

140 *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (321).

141 *Schwab* in the podcast presented by *Haucap/Podszun*, Bei Anruf Wettbewerb, 3 June 2021, at 18 minutes, 48 seconds.

142 Recital 9 COM-D.

143 Recital 31 COM-D.

contestability trends in the digital sector", which could be taken into account in the context of the DMA market investigation.

Some authors criticise that by addressing the gatekeeper, the provision fails to include such concentrations where only a part of an undertaking has been designated as a gatekeeper and the concentration does not involve the designated part.[144] It is also pointed out that the provision fails to directly address the phenomena associated with so-called killer acquisitions;[145] however, including a corresponding provision in the DMA is regarded as difficult in legal terms since the ECMR and the DMA rely on different legal bases.[146] A legal opinion is currently being prepared to assess the scope of action for merger control under Article 114 TFEU which has been chosen as the legal basis of the DMA.[147]

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144 *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (47 f.).

145 *Haucap/Schweitzer*, Die Begrenzung überragender Marktmacht digitaler Plattformen im deutschen und europäischen Wettbewerbsrecht, Perspektiven der Wirtschaftspolitik 2021, pp. 17 ff. (24 ff.). *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (46), however, think that based on the provision it is possible to conduct further empiric investigations into the matter.

146 *Gielen/Uphues*, Digital Markets Act und Digital Services Act, EuZW 2021, pp. 627 ff. (631); *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (46)

147 *Steinberg/L'Hoest/Käseberg*, Digitale Plattformen als Herausforderung für die Wettbewerbspolitik in der EU, WuW 2021, pp. 414 ff. (417).

Possible obligations under the GWB and in the UK/US proposals

In respect of the obligations, distinct structural differences between the DMA and Section 19a GWB become apparent. Unlike Articles 5 f. of the DMA drafts, Section 19a(2) GWB does not stipulate any directly applicable obligations having direct effect but instead requires an individual decision. This can result in a certain delay but at the same time ensures proportionality more reliably than the more uniform approach taken by the DMA. The criteria provided for in Section 19a(2) nos. 1-7 GWB to some degree contain examples which bear similarities to the practices prohibited under Articles 5 f. of the DMA drafts.[148] However, unlike the DMA, Section 19a(2) sentence 2 GWB provides a possibility for the company bearing the burden of demonstration and proof to objectively justify its behaviour. In addition, the combination of more abstract criteria and more specific examples is likely to create fewer problems associated with the long-term viability of the provisions than the static rules and prohibitions of the DMA drafts.

The British proposals envisage three possibilities for a Digital Markets Unit to intervene with company-specific rules.[149] First, it is to be made possible to subject companies with strategic market status to a so-called code of conduct. The rules contained in the code of conduct are to address the effects of the strategic market status and so prevent the respective company from abusing this status by for example exploiting consumers or hindering innovative competitors. Based on the causes of the respective company's market power, so-called pro-competitive interventions are to enable long-term possibilities for stronger competition and innovation. Such tailored interventions could take the form of obligations with regard to interoperability and data access. Lastly, special merger requirements for companies with strategic market status are being discussed which could set lower standard of proof requirements for a prohibition.

Similar proposals on obligations are being considered in several legislative projects in the USA. Section 2(a)(1)-(3) of the proposal for an American Choice and Innovation Online Act 2021 contains general and Section 2(b)(1)-(10) special discrimination prohibitions. In the literature, attention is drawn to the considerable parallels to the obligations in the DMA drafts.[150] It

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148 Cf. for categorisation *Gerpott*, Neue Pflichten für große Betreiber digitaler Plattformen, NZKart 2021, pp. 273 ff. (276).

149 *CMA*, Advice of the Digital Markets taskforce on a new pro-competition regime for digital markets, 8 December 2020 (https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf); *Secretary of State for Digital/for Business*, A new pro-competition regime for digital markets, July 2021, para. 23 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf).

150 See classification table *Schnitzer et al.*, International coherence in digital platform regulation, 6 August 2021, pp. 14 f. (URL in fn. 81).

should also be emphasised that the proposal provides for the possibility of an "affirmative defense" in Section 2(c) in order to justify the practice in question under very limited conditions. The platform would be burdened with the demonstration and proof that its conduct will "not result in harm to the competitive process by restricting or impeding legitimate activity by business users" or is necessary in order to adhere to legal provisions or serve the protection of personal or non-public data.[151] The prohibitions in Section 2(a) of the proposal for an Ending Platform Monopolies Act address specific forms of conflicts of interest and self-preferencing. In accordance with Sections 3 and 4 of the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act 2021 the platforms concerned are to be obliged to enable data portability and interoperability. Section 2(a) of the draft Platform Competition and Opportunity Act 2021 also restricts the possibilities for company mergers.

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151 Cf. *Schnitzer et al.*, International coherence in digital platform regulation, 6 August 2021, p. 20 (URL in fn. 81).

D. Enforcement

The starting point of the drafts is that the obligations for gatekeepers apply directly without a constitutive decision taken by an authority. The so-called regulatory dialogue already described[152] is intended to set out the concrete terms of the obligations contained in Article 6(1) of the drafts. The gatekeeper's request to initiate the regulatory dialogue has no suspensive effect. If the enforcing authority assumes that the obligations have not been complied with, it can – independently of the regulatory dialogue (Article 7(3)) – initiate a non-compliance proceeding (Article 25(1)) and order the gatekeeper to cease and desist with the non-compliance (Article 25(3)). It can also impose fines (Article 26(1) in conjunction with Article 25). Other than Schwab-D, COM-D also provides for a termination of the proceeding by making commitments offered by the gatekeeper binding on that gatekeeper (Article 23 COM-D).

In addition to these proceedings which relate to individual infringements of obligations, the drafts also allow for a market investigation to be conducted in the case of systematic non-compliance with the obligations (Article 16(1); irrebuttable presumption of systematic non-compliance in subsection (3)[153]). It is additionally required in COM-D that the gatekeeper has strengthened or extended its position within the meaning of Article 3(1) COM-D (Article 16(4) COM-D). The legal consequence of having established systematic non-compliance is the possibility to impose behavioural or structural remedies on the gatekeeper.[154] In Article 16(2) COM-D stipulates that precedence be given to behavioural remedies; this was deleted in Schwab-D.

In Chapter V both drafts stipulate that the COM is the sole enforcement authority, which is to be assisted by a Digital Markets Advisory Committee (Article 32). The role of national authorities in enforcement or of private law enforcement[155] is not regulated in the drafts. In its amendment to Article 31a, Schwab-D proposes an additional European High-Level Group of Digital Regulators, which is to have several coordination tasks and rights to make recommendations.

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152 See pp. 21 f above.

153 In COM-D the irrebuttable presumption is dependent on three non-compliance proceedings, in Schwab-D on only two proceedings.

154 COM-D demands that the remedies must be "proportionate to the infringement committed and necessary to ensure compliance with this Regulation"; in Schwab-D it is sufficient if they are "effective and necessary to ensure compliance with this Regulation".

155 As the DMA is a regulation with immediate and direct effect, it does not seem to rule out private enforcement in spite of the absence of an explicit provision to this effect (*de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, pp. 77 ff.). Nevertheless, it might be preferable to explicitly address individual issues in accordance with, for example, Articles 15 f. Regulation 1/2003.

The idea thus is to establish a strongly centralised law enforcement system not dissimilar to the earlier role played by the COM in enforcing European competition law under Regulation 17/62.[156] Based on the more specific formulation of the obligations compared with competition law, there is hope on the COM's part that the DMA will result in lower law enforcement effort because gatekeepers would comply with the obligations "by design".[157] However, this expectation of self-enforcing provisions is not fully convincing (I.). Instead, the DMA provisions on law enforcement would benefit from a stronger involvement of national competition authorities (II.).

I. The (vain?) hope for self-enforcing rules

The drafts stipulate that one of the criteria for the formulation of obligations is that it is important "[to] clearly define and circumscribe them so as to allow the gatekeeper to immediately comply with them".[158] Combined with the absence of an examination of the effects of the conduct already explained and of possibilities for undertakings to justify a certain practice,[159] this is linked to the expectation that the scope of interpretation will be limited, self-assessment will be made easier for gatekeepers and enforcement by public authorities/courts will be avoided.[160] A so-called regulatory dialogue specifying the obligations should be required only in exceptional cases and only in the context of the obligations under Article 6(1) of the drafts; the regulatory dialogue should have no suspensive effect and thus the risk of non-compliance would still remain with the gatekeeper.

However, there is reason to doubt whether the current drafts fully meet the self-imposed expectations of a consistently clear definition of the relevant criteria. In some of the literature even the direct applicability of the obligations in Article 6(1) COM-D is called into question.[161] In the case of Article 5(a) COM-D some authors argue that the wording "specific choice" and "consent" is not sufficiently clear.[162] Individual criteria also contain terms, such as e.g. "fair […] conditions" in Article 6(1)(d) and (k) COM-D, which are clearly vague. It is also unclear how the term "in competition" in Article 6(1)(a) COM-D can be of practical relevance without the market definition which the COM refused to include in the DMA.

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156 *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 July 2021, p. 11.

157 Cf. Recital 58 COM-D.

158 Recital 58 COM-D.

159 See above pp. 25 ff.

160 Based on this assumption of the COM see also *Chirico*, Digital Markets Act, JECLP 2021, pp. 493 ff. (497): "[…] ambition to introduce an ex ante instrument, which would be directly applicable without having to undergo lengthy investigations and case-by-case analyses".

161 *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 July 2021, p. 11.

162 *Podszun*, Should gatekeepers be allowed to combine data?, 4 June 2021, pp. 3 ff. (https://dx.doi.org/10.2139/ssrn.3860030).

Possibilities for interpretation are also expected to arise due to the teleologically extensive interpretation prescribed under Article 7(1) of the drafts. Accordingly, compliance by a gatekeeper is to be assessed based on whether the measures such a gatekeeper implements are "effective in achieving the objective of the relevant obligation". It should be emphasised here that a large number of obligations pursue several "objectives"[163] and that these are also not fully outlined in the recitals. Article 6a Schwab-D goes even further by requiring that a gatekeeper should not take any measures which are able to have "an equivalent object or effect" to a behaviour which is prohibited. Both provisions are commendable in their aims to ensure the effectiveness of the regulation for the future and to prevent circumvention strategies.[164] It cannot be ignored, however, that in focusing on vague terms and actual effects they are clearly removed from the main objective of Recital 58 COM-D, which among other things bases the simplified self-assessment for companies on a clear wording of the obligations.

All this does not call into question that the rules of the DMA will have a certain ex ante-controlling effect in their scope of application.[165] However, as the scope for interpretation already mentioned makes self-assessment more difficult for gatekeepers, this will inevitably also increase the law enforcement effort expected. In view of the dynamics and heterogeneity of the digital economy, it can be assumed that gatekeepers will try to use the scope of action made possible by the scope for interpretation to their own advantage.[166] This is not reprehensible because the legal system generally has to accept that a legal entity will also move within the limits of what is allowed as long as these boundaries are not exceeded. However, the consequence will be that it will not always be obvious whether every gatekeeper complies with every obligation for every CPS in every Member State, especially when circumvention strategies with effects similar to the obligations are also to be addressed. This is more likely to make a significant number of investigation proceedings necessary to clarify

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163 This is illustrated in *Podszun*, Should gatekeepers be allowed to combine data?, 4 June 2021, pp. 8 ff. (https://dx.doi.org/10.2139/ssrn.3860030) using Article 5(a) COM-D as an example.

164 With regard to ensuring the long-term viability, see pp. 8 ff. above for the list of CPS and pp. 28 ff. above for the list of obligations.

165 Cf. *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (44).

166 Different view held by *Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 2, NZKart 2021, pp. 436 ff. (438), who assumes that of several behavioural options, a gatekeeper "will choose the option that imposes the lowest risk", whereby "risk" is to be understood as the risk of deviating from the COM's legal opinion. This focus on legal compliance risks may be convincing when assessed based on its judicial expediency but must not necessarily represent a gatekeeper's obvious business decision which is relevant for evaluating the enforcement effort involved. This is all the more true as the COM's legal opinion as regards possible judicial protection does not form the only important legal standard.

the facts and assess the factual and legal circumstances of the behaviour in question.[167] Consequently, it can be assumed that the enforcement of the obligations alone will absorb significant resources at the COM and at the European courts.[168]

II. Role of competition authorities

In their current form the drafts do not envisage any independent role for (national) competition authorities. According to Articles 18 ff. competencies and enforcement powers are to lie exclusively with the COM. The drafts do not state which Directorate-General is to be specifically entrusted with these tasks.

National authorities play only a subordinate role in the drafts in the context of law enforcement[169]. For example, Article 1(7) only sets out that national authorities may not take decisions which would run counter to the regulation. The Member States are also generally required to work in close cooperation and coordination with the COM in their enforcement actions. Under Article 32 the COM is also to be assisted by a Digital Markets Advisory Committee. This will be subject to the conditions of the so-called "comitology procedure" under Article 4 Regulation 182/2011, according to which the Committee is composed of representatives of the Member States and chaired by the COM. The Committee has an advisory function as to the COM's decisions especially those regarding exemption requirements (Articles 8, 9), the designation after a market investigation (Article 15), (systematic) non-compliance (Articles 16, 25) and with regard to the provisions on implementation (Article 36). In Schwab-D most of these regulations are maintained,[170] but under the new Article 31a an additional "European High-Level Group of Digital Regulators" is

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167 *Basedow*, Das Rad neu erfunden, ZEuP 2021, pp. 217 ff. (220) expects "dispute about the admissibility of individual practices and contractual clauses" ("*Streit über die Zulässigkeit einzelner Praktiken und Vertragsklauseln*") in spite of ex-ante regulations; *Gerpott*, Neue Pflichten für große Betreiber digitaler Plattformen, NZKart 2021, pp. 273 ff. (277) points out that due to the vague formulations affected companies are likely to deny having committed any violations at all; *Petit*, The Proposed Digital Markets Act, JECLP Advance Article, 31 July 2021, p. 10 ("Gatekeepers, plaintiffs, courts and agencies risk facing discussion about whether a given practice falls outside of the formal requirements set out specifically for each obligation.").

168 In addition, there is the requirement of resources, among other things, for the gatekeeper designation processes and regulatory dialogue.

169 Article 5(d) of the drafts also introduces a substantive provision relevant to national authorities, according to which gatekeepers may not prevent their business users from raising issues with a public authority relating to any practice of the gatekeeper. Schwab-D also extends this provision to national courts.

170 The amended Article 32(1a) Schwab-D stipulates that in addition to a representative from the competent Member State an "additional representative from an authority with the relevant expertise for the issues discussed" may also assist.

to be established. This is supposed to bring together representatives of different competent authorities[171] in order to assist with the implementation of the DMA (Article 31b Schwab-D).

This very limited involvement of national authorities is discussed in the literature in view of the enforcement effort expected[172]. Advocates of a central DMA enforcement point out that the gatekeepers are active across the EU and therefore a central enforcement makes sense.[173] In their view, the involvement of national authorities would pose the risk of diverging interpretations and decisions.[174] Coordinated action by the national authorities could only be achieved through cooperation mechanisms, the establishment of which would involve additional effort.[175] There is also the difficulty that national authorities could only take decisions with a national scope of application.[176]

By contrast, however, there are also calls in the literature for a decentralised enforcement with the involvement of the national (competition) authorities.[177] It is argued that the centralistic approach runs the risk of proceedings being delayed or not even initiated due to a lack of resources.[178] It is held that enforcing the DMA with only 80 full-time equivalents, as planned by the COM,[179] cannot be ensured.[180] Diverging decisions between the national authorities could be addressed by modelling the cooperation mechanism on the example of the European Competition Network (ECN) and the risk of diverging decisions would be

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171 "competent authorities of all the Member States, the Commission, relevant Union bodies and other representatives of competent authorities in specific sectors including data protection and electronic communications".

172 See pp. 35 ff above.

173 *Monti*, The Digital Markets Act, 22 February 2021, pp. 6, 17 (https://dx.doi.org/10.2139/ssrn.3797730).

174 *Chirico*, Digital Markets Act, JECLP 2021, pp. 493 ff. (498); *de la Mano et al.*, The Digital Markets Act, 2021, para. 5.2.i; *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 75.

175 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 75.

176 *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 75.

177 *Basedow*, Das Rad neu erfunden, ZEuP 2021, pp. 217 ff. (223 f.); *Gerpott*, Wer reguliert zukünftig Betreiber großer Online-Plattformen?, WuW 2021, pp. 481 ff. (485), however, discusses various degrees of decentralised enforcement; *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (323); *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, pp. 60 ff. (67); *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (51 f.).

178 *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (323).

179 *COM*, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15 December 2020, p. 72.

180 *Geradin*, What is a digital gatekeeper?, 2 April 2021, p. 20 (https://dx.doi.org/10.2139/ssrn.3788152). Also *de Streel et al.*, Making the Digital Markets Act more resilient and effective, 2021, p. 73, who ultimately, however, (pp. 94 f.) propose a central enforcement with the greater involvement of national competition authorities.

reduced by the "rule-based approach" of the DMA.[181] It is held that decentralised law enforcement within the scope of European competition law has always proved effective.[182]

In the view of the heads of the national competition authorities represented in the ECN[183] and according to the German position in the Council Working Party,[184] the national competition authorities need to be involved in the enforcement of the DMA. In their view, the DMA drafts are based on the decision practice of the Directorate-General for Competition (DG COMP) and the national competition authorities.[185] Accordingly, the national competition authorities have demonstrated special expertise in the digital markets concerned.[186] It is therefore held that the effective and expedient enforcement of the DMA can be ensured based on the primary application of the DMA by DG COMP, a possible complementary enforcement by the national competition authorities and the establishment of a mechanism for close coordination and cooperation between these institutions.[187] In their view, failure to use existing resources and shortfalls in law enforcement could otherwise lead to inefficiencies.[188] Furthermore, it is stated that areas of friction between the application of the DMA and the application of competition law can only be prevented if both DG COMP and the national competition authorities are competent to enforce the DMA.[189]

In terms of what such a role of the national competition authorities should look like, some authors suggest aligning this with the rules of Regulation 1/2003.[190] For example, practices which only have an effect in certain Member States could be pursued by national authorities.[191] The COM would, however, always have prime responsibility if it could take up

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181 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (540).

182 *Schweitzer/Gutmann*, Unilateral Practices by Digital Platforms, 1 June 2021, p. 44 (https://dx.doi.org/10.2139/ssrn.3857751): "If we look at the interaction between competition law enforcement at the European and at the national level, the image of a highly cooperative and complementary enforcement regime emerges – including in the digital realm […] NCAs have assumed a very important role in addressing the new policy issues that have arisen in digital platforms markets".

183 *Heads of the national competition authorities of the European Union*, Joint paper: How national competition agencies can strengthen the DMA, 22 June 2021 (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/DMA_ECN_Paper.pdf).

184 Cf. *Steinberg/L'Hoest/Käseberg,* Digitale Plattformen als Herausforderung für die Wettbewerbspolitik in der EU, WuW 2021, pp. 414 ff. (416 f., fn. 14), according to which "the Federal Government submitted a complete draft to the Council in favour of the full integration of the national competition authorities in the enforcement of the DMA" ("*die Bundesregierung [hat] im Rat einen vollständigen Entwurf für eine volle Einbindung der nationalen Wettbewerbsbehörden in die Durchsetzung des DMA vorgelegt*").

185 See fn. 183, para. 14 above.

186 See fn. 183, paras. 5 ff., 18 above.

187 See fn. 183, para. 19 above.

188 See fn. 183, para. 21 above.

189 See fn. 183, para. 25 above.

190 See fn. 183, para. 30 above.

191 See fn. 183, para. 30 above.

proceedings at any time as set out in Regulation 1/2003.[192] Even in the case of decentralised law enforcement, certain competencies should remain exclusively with the COM, that is in particular decisions regarding the gatekeeper designation and exemption criteria.[193]

Law enforcement with the complementary involvement of the national competition authorities could also take the form of a referral system.[194] Germany, France and the Netherlands have submitted such a proposal.[195] Based on their own investigations the national competition authorities could demonstrate to the COM in an application for referral the initial suspicion of a DMA violation. The latter could then examine whether in the specific case the applying authority is well placed to conduct further proceedings. In doing so, the COM could in particular take its own resources, the specific practice in question, its geographical reach or the special expertise of the authority into consideration. In the case of such a model, the prime responsibility of the COM could also be ensured in that it could take up the proceedings again even after referral, if necessary. Moreover, it may be worth considering the possibility of extending the geographically limited reach of a national authority's decision by giving the COM the power to declare the decision to be constitutive and applicable to the entire internal market.

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192 See fn. 183, paras. 28, 30 above.

193 See fn. 183, para. 28 above.

194 See fn. 183, para. 29 above.

195 *Germany/France/Netherlands*, Second joint position paper by the friends of an effective DMA, 8 September 2021 (https://www.bmwi.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4).

E. Future scope of action for competition law in the digital economy

In Article 1(5) and (6) of the drafts the DMA's relationship to other areas of regulation is set out. Pursuant to subsection (5) the DMA is to have a blocking effect on national regulations the purpose of which is also to ensure "contestable and fair markets". The enforcement of other provisions pursuing public interests, such as protecting consumers or fighting against acts of unfair competition, remains possible as long as such provisions are unrelated to the relevant undertaking having the status of gatekeeper within the meaning of the DMA. In subsection (6) it is set out that the DMA is without prejudice to competition law. First, subsection (6) sentence 1 declares that the DMA as secondary EU law does not affect the application of Articles 101 f. TFEU. Following this, it is stipulated that national rules corresponding to Articles 101 f. TFEU are not blocked by the DMA (subsection (6) sentence 2). COM-D also sets out that "national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers" remain applicable. Schwab-D goes even further in stipulating that "national competition rules prohibiting other forms of unilateral conduct" are to remain unaffected without additional limitations. Lastly, under Article 1(7) national competition authorities are not allowed to take any decisions which run counter to decisions adopted by the COM under the DMA.

The differentiation between the provisions contained in Article 1(5) and (6) is explained in further detail in Recitals 9 and 10 of the drafts. Recital 9 characterises competition law provisions as being "based on an individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question". Recital 10 goes on to state that the DMA protects a legal interest that is different than the one protected by competition law provisions. Accordingly, the DMA is characterised by its objective to ensure that "markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper […] on competition on a given market".[196]

The approach taken in COM-D appears consistent in so far as the obligations of the DMA seem too inflexible, even when taking into account the possibility of updating the obligations, to make the application of competition law dispensable within the DMA's scope of application.[197] If, as suggested in Recital 33 of the drafts, the DMA merely addresses the 'tip of the iceberg'

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196 Cf. in this connection the discussion about the classification of the DMA between regulatory and competition law, see pp. 44 ff. above.

197 On the long-term viability and proposals in the literature in this context see pp. 28 ff. above.

of problematic practices, only competition law applied in parallel can fully ensure fair and contestable markets. Against this backdrop, the proposal in Schwab-D is to be welcomed to also leave other national regulations which address unilateral conduct unaffected without further restrictions.

Where competition law is applied in addition to the DMA to the same conduct, the question arises whether the prohibition of double punishment (ne bis in idem) conflicts with the imposition of fines in both areas of regulation for the same infringement. According to the previous case law of the ECJ, the prohibition of double punishment in EU competition law requires that the facts, infringement and legal interest protected are identical.[198] Based on these principles, the prohibition would probably not be applicable to decisions taken in parallel under the DMA and competition law due to the – at least in the COM's view – diverging legal interests.[199] Even if the prohibition of double punishment were not applicable, the existence of a further fining decision for the same matter and infringement should be able to have a mitigating effect on the calculation of a fine subsequently imposed.[200] Several proceedings are currently pending before the ECJ which address the requirement of protecting identical legal interests;[201] it therefore remains to be seen whether there will be further developments in this matter.

With regard to Germany, the effects Article 1(5), (6) will have especially on the applicability of Section 19a GWB by the Bundeskartellamt are also unclear.[202] As Article 1(6) of the drafts sees

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198 *ECJ*, decision of 7 January 2004 (Aalborg Portland; ECLI:EU:C:2004:6), para. 338; on the development of the case law see *Zelger*, The Principle of ne bis in idem in EU Competition Law, WuW 2021, pp. 261 ff. (264 ff.).

199 *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (324) and *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (48) each consider an explicit clarification to be necessary.

200 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (518).

201 Case no. C-117/20 (bpost), C-151/20 (Nordzucker) among others; on 2 September 2021 the Advocate General proposed a standardised, three-phase test, taking account of the legal interests protected (https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-09/cp210153de.pdf).

202 Some argue that the question of the continued application of Section 19a GWB is currently unclear (*Körber*, Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1, NZKart 2021, pp. 379 ff. (381): The continued application is "open to question"; *Podszun/Bongartz/Langenstein*, The Digital Markets Act, EuCML 2021, pp. 60 ff. (66 f.): "not entirely clear whether [Section 19a GWB] counts as a piece of competition law that remains valid"). Others assume that Section 19a GWB continues to be applicable as competition law (*Bongartz*, § 19a GWB, pp. 7 f. (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923287) and intends to interpret Article 1(6) COM-D in light of Article 3(2) sentence 2 and Recital 9 of Regulation 1/2003, according to which the European term 'competition law' could also include provisions such as Section 19a GWB which assume that adverse effects on competition exist; *Franck/Peitz*, Digital Platforms and the New 19a Tool in the German Competition Act, JECLP 2021, pp. 513 ff. (526) assume due to the case-by-case assessment required under Section 19a GWB and the justification possibility that this provision is to be classified as

"national competition rules prohibiting other forms of unilateral conduct" as unaffected by the DMA and Section 19a GWB also seems to fulfil the requirements classifying competition law set forth in Recitals 9 f., a continued application of Section 19a GWB is to be expected based on the current version of the drafts, provided that the decisions based on this provision do not run counter to those of the COM (Article 1(7) of the drafts). Conversely, an argument against classifying Section 19a GWB as a national rule within the meaning of Article 1(5) could be, in particular, that the obligations under Section 19a(2) GWB only apply by order after an individual decision has been taken and not ex lege.

"other national competition rule"; *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (324): Section 19a GWB "has more in common with existing competition law provisions and should be classified as such"; *Jovanovic/Greiner*, DMA, MMR 2021, pp. 678 ff. (679) see "overlaps" ("*Überlappungen*") between the DMA and Section 19a GWB but do not regard Section 19a GWB as an "ex-ante instrument" due to the justification possibility; *Lamadrid/Fernández*, Why the Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, JECLP Advance Article, 5 August 2021, p. 5: "the DMA Proposal would appear to have no effect on the new German rules"; *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (59): "likely to still be applicable" ("*wohl weiterhin anwendbar*"), provided that it does not contradict Articles 5 f. and its legal consequences do not go beyond Articles 5 f.). In a third opinion, however, Section 19a GWB would probably be affected by the DMA's blocking effect (*Gielen/Uphues*, Digital Markets Act und Digital Services Act, EuZW 2021, pp. 627 ff. (631 f.): Primacy of the DMA if Germany does not take steps to ensure further amendments to the DMA; *Paal/Kumkar*, Wettbewerbsschutz in der Digitalwirtschaft, NJW 2021, pp. 809 ff. (815): Section 19a GWB could not be subsumed under Article 1(6) COM-D because of dominant aspects of an ex-ante regulation; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, p. 503 ff. (518): "strong argument that the DMA should exclude parallel national legislation even within the framework of national competition law"). On the different legal consequences of Section 19a GWB's classification as falling under Article 1(5) or (6) COM-D, see *Grünwald*, Gekommen, um zu bleiben?, NZKart 2021, pp. 496 ff.).

The DMA between competition and regulatory law

The difference between the DMA and competition law in terms of the legal interest protected as stated in Recital 10 of the drafts raises the question of the DMA's legal classification between competition and regulatory law. This question can be approached from at least two perspectives: One is to consider the common features and differences between the substantive legal interests protected by the DMA and competition law. The other is to focus on the common features and differences between the regulatory technique especially compared with sector-specific regulatory law.

The COM's view that the DMA and competition law protect different legal interests is criticised in some of the literature. Some authors hold that there is no complementarity between the DMA and competition law; rather, the DMA's protective purposes represent a subset of the protective purposes of competition law.[203] This state of affairs has expounded the problem as to whether with Article 114 TFEU the correct legal basis was chosen for the DMA or whether it would have been necessary to integrate Article 103 TFEU.[204]

With regard to the regulatory technique, however, the differences between the DMA and competition law are emphasised in some of the literature.[205] Some authors, for example, welcome the fact that by distinguishing the DMA from competition law the COM manages to move away from an effects-based approach and the consumer welfare standard.[206] It is partly suggested that the DMA be characterised as "a regulatory instrument preceding competition" ("*dem Wettbewerb vorgelagertes Regulierungsinstrument*"); in the authors' view, the purpose of the DMA is to enable a "fair and factually possible entry to markets [...] that are controlled by gatekeepers" ("*fairen und tatsächlich möglichen Marktzutritts auf Märkten [...] die von Gatekeepern besetzt*"), resulting in the fact that the DMA is all about "the conditions making it possible to subsequently create competition on the markets" ("*die Möglichkeitsbedingungen für das Entsehen eines nachfolgenden Wettbewerbs auf den*

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203 *de la Mano et al.*, The Digital Markets Act, 2021, para. 4.3; *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (508): "EU competition law and the DMA essentially share the same aims".

204 *Basedow*, Das Rad neu erfunden, ZEuP 2021, pp. 217 ff. (222).

205 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (517). With regard to the DMA's regulatory technique, *Haus/Weusthof*, The Digital Markets Act, WuW 2021, pp. 318 ff. (324) point out that the difference between ex post control in competition law and ex ante regulation in the DMA ("dichotomy of ex post and ex ante") also made by the COM (Recitals 60, 62) is not convincing since competition law also allows for an "adoption of future-oriented, ex ante measures". On the immediate and direct (controlling) effect of the abstract general prohibition of abusive practices, see also fn. 84 above.

206 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (510).

Märkten").[207] When comparing the DMA with the EU telecommunications regulation, in some of the literature the "fundamental differences in terms of principle and approach" are pointed out; in particular, it is held that the DMA constitutes a long-term regulatory regime which not only serves to temporarily restore competition.[208] In this sense it is also emphasised that the DMA should not be misunderstood as a "regime of public utility regulation".[209]

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207 *Zimmer/Göhsl*, Vom New Competition Tool zum Digital Markets Act, ZWeR 2021, pp. 29 ff. (36).

208 *Colomo*, The Draft Digital Markets Act, 5 August 2021, pp. 24 f. (https://dx.doi.org/10.2139/ssrn.3790276).

209 *Schweitzer*, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair, ZEuP 2021, pp. 503 ff. (542).

F. Questions for discussion

Rules on the definition of norm addressees

- Is the proposed static list of CPS too restrictive or too extensive in relation to the DMA's legal policy objective?
- Is the procedure for updating the CPS list under Article 17 COM-D expedient? Is it necessary to add a general provision for CPS?
- Are the substantive requirements for designating an undertaking as a gatekeeper convincing? Should the circle of undertakings addressed by this regulation be further limited by, for example, introducing an ecosystem criterion?
- Is it convincing to allow for intervention at an earlier stage when it comes to emerging gatekeepers? Is it necessary to intervene even earlier in order to avoid market tipping, or is the extent of the intervention already too far-reaching?

Obligations

- Is it possible to effectively achieve the DMA's regulatory objectives and ensure the contestability and fairness of markets in the digital sector by generalising case-based findings gathered from previous competition law proceedings? Is this generalisation applicable to heterogeneous companies/business models associated with the risk of overregulation?
- Is it convincing not to include a possibility for undertakings to justify a given practice in order to accelerate proceedings?
- Is the procedure for updating the obligations under Article 10 COM-D in line with primary law and expedient in order to adjust the static list of obligations to the dynamic developments in the digital economy? Would it be useful to add a general provision?
- Should the DMA address the so-called killer acquisitions phenomenon in a way that goes beyond Article 12 COM-D?

Enforcement

- Should the presently envisaged model of centralised law enforcement by the COM be supplemented by national competition authorities taking a complementary role as decentralised enforcers?
- What should such a complementary role look like? Is a system of parallel powers along the lines of Regulation 1/2003 or a referral system preferable?
- Are there any possible reasons not to leave enforcement at EU level with DG COMP despite the DMA being close to competition law?
- How is it possible to successfully cooperate on and coordinate the application of the DMA and competition law?

Relation between the DMA and competition law

- If the DMA and competition law protect different legal interests, as explicitly stipulated in COM-D, to what extent can the DMA even have a blocking effect on national competition law?
- As far as national competition law remains applicable, how will the DMA affect national competition law in the future? Can and/or must the DMA be taken into account in an incidental manner when assessing general provisions and balancing interests under European and national competition law? Which considerations reflected in the DMA can be taken into account in a competition law assessment?

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