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Regulating BigTech

An Investigation on the Admissibility of Article 114 TFEU as the appropriate Legal Basis for the Digital Markets Act based on an Analysis of the Objectives and Regulatory Mechanisms

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List of Abbreviations

Abbreviation	Complete Designation
ARC	German Act against Restraints on Competition (*German: Gesetz gegen Wettbewerbsbeschränkungen – GWB*)
B2B	Business-to-Business
B2C	Business-to-Consumer
CFI	The European Court of First Instance
CJEU	Court of Justice of the European Union
DG CNECT	Directorate-General for Communications Networks, Content and Technology, European Commission
DG COMP	Directorate-General for Competition, European Commission
DMA	Digital Markets Act
DSA	Digital Services Act
E.g.	For example
ECN	European Competition Network
EEC	European Economic Community
EU	European Union
GC	General Court – The European Court of First Instance
GWB	German Act against Restraints on Competition (*German: Gesetz gegen Wettbewerbsbeschränkungen – GWB*)
I.e.	id est (= Latin for "that is")
NCA	National Competition Authority
NCT	New Competition Tool, the initial proposal of the DMA was called New Competition Tool
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Abstract

The purpose of this paper is to discuss whether Art. 114 TFEU was the correct legal basis for the Digital Markets Act, the EU Regulation aimed at regulating the gatekeepers in the digital economy. In recent years, increasing digitalisation and the enormous increase in data power have created a need for more far-reaching digital regulation. The EU legislator proposed a *New Competition Tool* in the summer of 2020 after many member states had already proposed or implemented legislation on the subject. However, when it was implemented at the end of 2022, this instrument was no longer recorded as competition legislation, but as internal market regulation under Art. 114 TFEU.

This thesis compares the objectives and regulatory mechanisms of traditional competition law with those of the DMA and tries to determine which legal area the DMA belongs to. Since the objectives are the same as those of competition law, it is then analysed whether Art. 114 TFEU can still be considered as a proper legal basis. In this case, however, two different competence norms come into consideration whose legislative procedures cannot be reconciled with each other (Art. 114 and Art. 352 TFEU). According to the established case law of the European Court of Justice, the Commission would have had to choose a legal basis, whereas this thesis argues that, in accordance with the ostensible motives, the legal basis of Art. 352 TFEU should have been chosen.

The concluding chapter will suggest how the revolutionary approach of the DMA could still be saved by the Commission. The Commission has the possibility to amend the European Treaties according to Art. 48 TEU or to actually present a new competition instrument based on the correct legal basis, namely Art. 103 in conjunction with 114 TFEU or only Art. 352 TFEU. This will have the added benefit of improving the integration of secondary legislation into the existing system.

A. Introduction

"The [Digital Markets Act and the Digital Services Act] serve one purpose: to make sure that we […] have access to a wide choice of safe products and services online, just as well as we do in the physical world. And that all businesses operating in Europe […] can freely and fairly compete online, just as they do offline. Because this is one world. Whether from our streets or from our screens, we should be able to do shopping in a safe manner. Whether we turn pages or scroll down, we should be able to choose and trust the news that we read. And of course, what is illegal offline is equally illegal online."[1]

As Margrethe Vestager introduced the draft of the Digital Markets Act in December 2020[2], she pointed out the daily dangers we face in today's fast-paced and digitised world. Many actions such as interactions and consumption take place on the internet. This poses unrecognised difficulties and dangers that need to be addressed. In this context, major players have now established themselves as so-called gatekeepers and are having a major impact in the digital space. The call for regulation has become louder in recent years.[3]

I. Digital Economy – The Need for Regulation

According to Adam Smith, considered as the father of modern economics, the invisible hand regulates the market.[4] It means nothing less than that the various invisible forces on the market regulate each other and thus lead to the best outcome for the economy. Competition law has taken many views with it over time, some of which have led to increased and some of which have led to decreased regulation by government intervention.[5]

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[1] Statement by Executive Vice-President *Vestager* on the European Commission's proposal on new rules for digital platforms, 15.12.2020, available at https://ec.europa.eu/commission/presscorner/detail/en/statement_20_2450.

[2] European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, 15.12.2020.

[3] European Commission, Communication, Shaping Europe's digital future, COM/2020/67 final, 19.02.2020; Bechtold/Bosch/Brinker, EU-Kartellrecht, VO (EU) 2022/1925 para. 2.

[4] *Smith*, An Inquiry into the Nature and Causes of the Wealth of Nations, 1776.

[5] There have been different theories that affected competition law over the years e.g. Ordoliberalism: market economy with strong state regulatory framework, based on private property, freedom of contract, competition and monetary stability, competitive regulatory framework in case of market failure; Harvard School: workable competition as a second best; Austrian School: free competition; Chicago School: self-healing powers of the market; Post-Chicago School: strong differentiation in individual cases, sticks to efficiency criteria; dispute over consumer welfare or overall welfare; More economic approach as a more effects-based approach to competition law; Hipster Antitrust: new, more political/normative approach to competition law, value-based, open to other areas of law.

The core of competition law is the protection of competition as the essential mechanism, i.e. as means, of the market economy, in which the individual decisions of market participants are coordinated. Free competition, secured by a legal regulatory framework, forms the indispensable basis for the success of the social market economy.[6] This is why entrepreneurial freedom, functioning competition and independent consumer decisions create growth and are the basis for prosperity.

For this to happen, certain rules must be in place to create a fair market environment.[7] In the offline sector, such rules were introduced years ago and are balancing out the strong inequality between dominant companies, competitors and consumers. In the EU, competition law is characterised by the prevention of negative effects on competition as such[8] and of consumer harm[9].[10] However, such rules must now be transferred to the digital sphere as well. This presents legislators with difficult tasks.[11]

The digital space is shaped by several factors that are not found in this form in the offline world, resulting from the coincidence of several factors which have not been encountered before.[12] On the one hand, the fast pace of the internet has a decisive impact on the market position of individual market players.[13] As a result, market entry is in some cases easier and faster than in the real world. This leads to a certain degree of unpredictability of market events. A phenomenon of many platform markets is that, as a result of network and scale effects, a single provider dominates the market ("winner-takes-it-all market").[14] This led to the fact that there are only a few large undertakings which function as a gateway for access to the internet

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[6] *Sanktjohanser*, Mehr Wohlstand durch freien Wettbewerb, available at https://www.handelsjournal.de/mehr-wohlstand-durch-freien-wettbewerb.html.
[7] *Massa* 26 YARS 2022, 103 (120).
[8] CJEU 4.6.2009 – C-8/08, ECLI:EU:C:2009:343 para. 38 – *T-Mobile Netherlands and Others*; GC 14.4.2011 – T-461/07, ECLI:EU:T:2011:181 para. 126 – *Visa Europe and Visa International Service v Commission*.
[9] European Commission, Communication on Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45/7, 24.2.2009, para. 5; on a general elaboration of the adequateness of the consumer welfare doctrine cf. *Hovenkamp*, Is Antitrust's Consumer Welfare Principle Imperiled?, 45 J. Corp. Law 2019, 101.
[10] *Crémer/de Montjoye/Schweitzer*, Competition policy for the digital era, 2019, p. 40.
[11] *Crémer/de Montjoye/Schweitzer*, Competition policy for the digital era, 2019, p. 20 ff. for a presentation of the different challenges in the platform economy.
[12] *Scott Morton et al.*, Committee for the Study of Digital Platforms: Market Structure and Antitrust Subcommittee Report, 2019, p. 11; for a compilation of expert reports on digital economy and for a good overview of the current understanding of the competitive risks and difficulties of digital markets see *Lancieri/Sakowski* 26 Stan. J.L. Bus. & Fin. 2021, 65, available at https://ssrn.com/abstract=3681322.
[13] *Hendrikse/Sial/Fernandez/Klinge*, Taming Big Technification? The European Digital Markets Act, June 2022, available at https://projects.itforchange.net/state-of-big-tech/taming-big-techification-the-european-digital-markets-act/ last accessed on 10.5.2023.
[14] *Gielen/Uphues* EuZW 2021, 627; *Hendrikse/Sial/Fernandez/Klinge*, Taming Big Technification? The European Digital Markets Act, June 2022 which speak of quasi-monopolies; *Newmann* 72 Vand L Rev 2019, 1497 (1503).

nowadays.[15] The extent of this sort of monopolies in the digital economy has a drastic effect on their behaviour, which, if found to be abusive, can prevent potential competitors from marketing more innovative services and products successfully.[16] On the other hand, while the internet and modern algorithms offer the potential for new technologies and developments, they also lead to the emergence of previously unknown problems. These problems must be addressed in order to ensure free competition and open markets in the digital world as well.[17]

The power of digital corporations is illustrated by various examples. In January 2021 Facebook, Twitter and YouTube blocked Donald Trump's accounts in the aftermath of the storming of the U.S. Capitol, depriving one of the world's most powerful politicians of his most important mouthpiece.[18] Thierry Breton, European commissioner for the internal market, impressively stated in this context, that "just as 9/11 marked a paradigm shift for global security, 20 years later we are witnessing a before-and-after in the role of digital platforms in our democracy"[19].

It is true that numerous proceedings have already been brought against companies such as Amazon and Google in recent years, some of which have been concluded with the imposition of substantial sanctions.[20] Nevertheless, the impression is omnipresent that the monopolies and oligopolies of big tech cannot be tackled with the current means of competition law alone.[21]

In recent years, the concentration of power in digital markets has assumed a magnitude that has created a need for adaptation of the antitrust regulatory regime. All over the world, in the EU as well as in various member states – almost everywhere, discussions have been taken place on how to counter the competitive dominance of big tech.[22]

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[15] *Massa* 26 YARS 2022, 103 (120); *Newmann* 72 Vand L Rev 2019, 1497 (1503 f.) naming examples; *Puric* 5 ECLIC 2021, 295 (296).
[16] *Savary*, Regulierung dominanter Internetplattformen, Eigenheiten, Herausforderungen und Lösungsansätze im Licht von Ökonomie, Innovation und Recht, 2017, p. 262.
[17] Cf. *Massa* 26 YARS 2022, 103 (122 f.) who outlines different reasons why an act like the DMA is needed to address the problems of digital markets.
[18] *Oremus*, Washington Post, 07.01.2022, Tech giants banned Trump. But did they censor him?, https://www.washingtonpost.com/technology/2022/01/07/trump-facebook-ban-censorship/ last accessed on 10.5.2023.
[19] *Breton*, Capitol Hill — the 9/11 moment of social media, Opinion of 10.1.2021, Politico, https://www.politico.eu/article/thierry-breton-social-media-capitol-hill-riot/ last accessed on 10.5.2023.
[20] European Commission, proceedings against Amazon: AT.40462 – *Amazon Marketplace*, AT.40703 – *Amazon - Buy Box*, AT.40153 – *E-book MFNs and related matters (Amazon)*; proceedings against Google: 20.3.2019 – AT.40411 – *Google Search (AdSense)*, 18.7.2018 – AT.40099 – *Google Android*, 27.6.2017 – AT.39740 – *Google Shopping*; confirmed by GC 10.11.2021 – T-612/17, ECLI:EU:T:2021:763 – *Google Shopping*, pending before the CJEU – C-48/22 P.
[21] *Gielen/Uphues* EuZW 2021, 627; *Massa* 26 YARS 2022, 103 (122).
[22] USA: *Nadler et al*. (Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary), Investigation of Competition in Digital Markets, 2020; India: *Kathuria*, Ex-ante Regulation for Digital Markets in India, 6.1.2021, https://www.orfonline.org/expert-speak/ex-ante-regulation-digital-markets-

In this context, the EU Commission submitted a proposal in December 2020 for a Digital Markets Act that specifically targets gatekeepers and aims to address the problems of the digital world.[23] According to Art. 1 the purpose of the DMA is "to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users". It should ease the entry of new market participants and prevent the abuse of the dominant positions on digital markets.[24]

II. Art. 114 TFEU as a Suitable Legal Basis?

The final DMA[25] was based on Art. 114 TFEU[26] – the internal market regulation. Due to its proximity to competition and antitrust law, this thesis examines whether this legal basis is appropriate or whether the Commission could and should have chosen a different legal basis. This is also apparent, for example, since a very similar regulation came into force in Germany in the form of Section 19a ARC[27], which was, however, declared to be competition law. It is therefore questionable whether similar regulatory instruments can fall in different areas of competence or whether this is contrary to the lawfulness of regulations.

The Commission has treated the problems of the digital economy as competition policy for years, for example in the final report on the sector inquiry into e-commerce, in which it speaks of competition concerns[28] or in an expert report on the development of the European abuse control system[29]. Moreover, in the legislative process of the current DMA, the regulation was referred to as the *New Competition Tool*.[30] The initiative has been described as "one of the measures aimed at making sure that **competition policy** and **rules** are fit for the modern

india/ last accessed on 10.5.2023; Australia: ACCC, Digital Platforms Inquiry, Final Report, 2019; UK: *Furman et al.*, Unlocking digital competition, 2019; CMA, The CMA's Digital Markets Strategy; EU: e.g. Commission Competition Law 4.0, A New Competition Framework for the Digital Economy, 2019; Germany: The 10th ARC Amendment, the "*GWB-Digitalisierungsgesetz*" (German Act on Digitalisation) introduced regulation-like features in the form of Section 19a ARC.

[23] European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, 15.12.2020.

[24] *Hendrikse/Sial/Fernandez/Klinge*, Taming Big Technification? The European Digital Markets Act, June 2022.

[25] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265/1, 12.10.2022.

[26] Treaty on the Functioning of the European Union, OJ C 326/1, 26.10.2012, hereafter TFEU.

[27] German Act against Restraints on Competition (German: *Gesetz gegen Wettbewerbsbeschränkungen – GWB*).

[28] European Commission, Final Report on the E-commerce Sector Inquiry, SWD/2017/154 final, p. 8.

[29] *Crémer/de Montjoye/Schweitzer*, Competition policy for the digital era, 2019.

[30] European Commission, Public Consultations concerning a New Competition Tool, available at https://competition-policy.ec.europa.eu/public-consultations/2020-new-comp-tool_en.

economy. It addresses gaps in the current EU rules identified on the basis of the Commission's experience with enforcing the EU competition rules in digital and other markets as well as the worldwide reflection process about the **need for changes to the current competition rules** to allow for enforcement action preserving the competitiveness of markets"[31]. This legislative initiative was listed under the topic of competition.

Past proceedings against gatekeepers, now included in the conduct catalogue of the DMA, were based at the time on Art. 102 TFEU – a competition provision. In 2020 for example, the Commission initiated abuse proceedings based on Art. 102 TFEU against Apple for its App Store rules[32] and against Amazon for the self-serving use of its users' business data[33].

For the aforementioned reasons, the fact that the DMA was based solely on Art. 114 TFEU is surprising. While the choice of this legal basis is in line with legislative practice regarding fair competition, it contradicts the common interpretation of EU competition law insofar as it is a matter of a dominant company restricting the contestability of competitive markets.[34] In order to keep markets open to such corporate practices, Articles 101 and 102 TFEU must be consulted in individual cases; the abstract rules for implementing the principles enshrined therein must be adopted in accordance with Art. 103 TFEU.

Art. 114 TFEU gives the EU legislator the competence to harmonise laws, regulations and administrative provisions which have as their object the establishment and functioning of the internal market. This means that the objectives of Art. 26 TFEU must be achieved, i.e. the realisation of the internal market as an area without internal borders in which free movement is guaranteed.

However, it is problematic that, due to the broad definition of the subject matter, almost any legislative measure can be based on Art. 114 TFEU and the necessary link to the internal market can be quickly established by argumentation. This easily leads to collisions with the protection

[31] European Commission, Single Market – new complementary tool to strengthen competition enforcement, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en, emphasis added.
[32] European Commission 16.6.2020 – IP/20/1073 – AT.40716 – *Apple - App Store Practices*.
[33] European Commission 10.11.2020 – IP/2020/2077 – AT.40462 – *Amazon Marketplace*.
[34] *Basedow*, MPI Research Paper No. 21/2, p. 4.

of the Member States' legislative competence based on the principle of conferral, Art. 5(2) TEU.[35]

III. Structure of the Thesis

This thesis addresses the question of whether Art. 114 TFEU provides an adequate legal basis for the Digital Markets Act. The first chapter provides a basic introduction to the Digital Markets Act, which introduces a new and revolutionary concept of platform regulation. The choice of the right legal basis is essential for the legitimacy of an EU act and must be based on verifiable circumstances. The second chapter thus addresses the question of whether the DMA actually serves the proper functioning of the internal market, as suggested by Art. 114 TFEU, or rather constitutes competition law. In the third chapter, the thesis then examines whether Art. 114 TFEU is nevertheless valid as the sole legal basis or whether another or a different basis was not rather needed for the authorization. The fourth chapter explores future prospects and makes suggestions for future digital regulation. The paper then summarises the findings and concludes.

[35] Treaty on European Union, OJ C 326/13, 26.10.2012, hereafter TEU; the principle of conferral of Art. 5(2) TEU implies that the EU has only those competences that have been explicitly delegated to it by the member states.

B. Background – The Digital Markets Act

The Digital Markets Act (DMA) is, according to Art. 1(1), a regulation intended to make the markets in the digital sector fairer and more contestable. Therefore, the DMA establishes a set of clearly defined objective criteria to identify so-called gatekeepers – designated undertakings according to Art. 3 providing core platform services. [36]

To understand the scope, objective and regulatory techniques of the DMA, it is important to understand the need for regulation. For this purpose, it is necessary to be aware of the system of platform markets and to understand the problems of the internet and data economy.

I. Digital Economy

Digital platforms and networks are central components of the data economy in today's age, as they are often interposed in the distribution of products and services.[37] The impressive success of in particular Alphabet, Apple, Meta, Microsoft and Amazon has made these companies gatekeepers for economic decisions made online.[38]

The increased use of so-called information intermediaries leads to the fact that providers of products or services are increasingly dependent on access to and visibility on intermediary platforms.[39]

With all the advantages of platforms, with their dynamism and the innovative solutions to problems, especially the reduction of search and other transaction costs, platforms have risen to very considerable positions of power.[40] This so-called gatekeeper and rule-setter position in the digital economy gives rise to the need for regulation of these market-powerful companies.[41]

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[36] European Commission, Competition Policy, The Digital Markets Act, https://competition-policy.ec.europa.eu/dma_en last accessed on 10.5.2023.
[37] Commission Competition Law 4.0, A New Competition Framework for the Digital Economy, 2019, p. 49; *Marsden/Podszun*, Restoring Balance to Digital Competition, 2020, p. 12.
[38] Formerly known under the acronym GAFAM (Google, Apple, Facebook, Amazon, Microsoft); *Marsden/Podszun*, Restoring Balance to Digital Competition, 2020, p. 12.
[39] *Schweitzer/Haucap/Kerber/Welker*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 2018, p. 8, executive summary in english available at https://dx.doi.org/10.2139/ssrn.3250742.
[40] *Marsden/Podszun*, Restoring Balance to Digital Competition, 2020, p. 12.
[41] Cf. *Savary*, Regulierung dominanter Internetplattformen, Eigenheiten, Herausforderungen und Lösungsansätze im Licht von Ökonomie, Innovation und Recht, 2017, p. 268 f.; cf. *Puric* 5 ECLIC 2021, 295 (296 ff.) for a summary on the challenges posed to the digital economy.

In particular, multi-sided platforms have recently gained prominence, meaning that two different user groups act together mediated by a platform, and the action of one group influences the utility of the other group through indirect network effects.[42] Consumers can use the platform mostly without monetary compensation; this system is financed by advertising, tailored to the personal profile. Thus, users nevertheless provide a service in return by consenting to the use of their personal data.[43]

The new availability of data – personal and non-personal user and usage data, location data, environmental data, etc. – and the reduced costs of storing and processing are a hallmark of the new digital economy.[44] The collection, combination and analysis of data are central components of many digital business models. They have thus become an essential competitive factor – For example, data can provide a competitive advantage by allowing the services and advertising offered to be tailored to the individual user (so-called *targeted advertising*).[45]

However, companies' access to user and consumer data is not only relevant under competition law, but also creates asymmetries of information in the relationship between companies and consumers. Detailed user profiles and the ability to predict consumer behaviour in different constellations can increase the risk of manipulation and exploitation of certain consumer groups or of consumers in certain situations.[46]

In addition, it can be observed that the major players are building up so-called new digital ecosystems.[47] The increased use of data in relation to platforms is changing value chains and economic structures.[48] This harbours the risk that companies, by expanding their offerings and creating their own ecosystems, can become gatekeepers that control access to their users,

[42] *Schweitzer/Haucap/Kerber/Welker*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 2018, p. 8.
[43] *Schweitzer/Haucap/Kerber/Welker*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 2018, p. 11.
[44] Commission Competition Law 4.0, A New Competition Framework for the Digital Economy, 2019, p. 13.
[45] Commission Competition Law 4.0, A New Competition Framework for the Digital Economy, 2019, p. 13; *Scott Morton et al.*, Committee for the Study of Digital Platforms: Market Structure and Antitrust Subcommittee Report, 2019, p. 21 f.
[46] Commission Competition Law 4.0, A New Competition Framework for the Digital Economy, 2019, p. 15.
[47] Monopolies Commission, Recommendations for an effective and efficient Digital Markets Act, Special Report 82, 2021, para. 3; on the concept of ecosystems, see, among others, Autorité de la Concurrence/CMA, The economics of open and closed systems, Dec. 2014, p. 6 ff., available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387718/The_economics_of_open_and_closed_systems.pdf last accessed on 10.5.2023; *Newmann* 72 Vand L Rev 2019, 1497 (1508).
[48] Cf. Monopolies Commission, Recommendations for an effective and efficient Digital Markets Act, Special Report 82, 2021, para. 5.

because the latter – for example due to the convenience of using bundled products – remain predominantly in one ecosystem.[49]

For those reasons (access to data, platform markets and the emergence of digital ecosystems) the digital economy poses significant difficulties and threats to competition and consumer welfare. Therefore, it is part of the legislative agenda to present regulations and techniques to continue to ensure fair competition in the markets. The goal must be to protect competition as a driver of innovation, to strengthen consumers' freedom of choice and to establish a regulatory structure that is appropriate for the digital transformation of the economy. These are the challenges that the DMA is designed to address.

Due to "extreme scale economies, [...] very strong network effects, [...] significant degree of dependence of both business users and end users, lock-in effects, a lack of multi-homing, [...] vertical integration, and data driven-advantages"[50] there is a predisposition to concentration that favours the emergence of gatekeeper positions. This threatens to create extremely difficult-to-contest platform ecosystems by existing or new market participants, so that the affected (digital) markets may no longer function (in the future).[51] Due to these powerful positions of the gatekeepers and the fact that online platforms in general and gatekeepers in particular play a prominent role for the economy and the internal market for (business) users, there is a risk of negative effects for the economy and society, so that cross-border and uniform EU regulation is indicated. In view of inconsistent national regulations that were already introduced by various member states,[52] there was otherwise a risk of "fragmentation of the internal market"[53].

II. Development History

The DMA is – together with the Digital Services Act[54] – at the heart of the European Digital Agenda[55] which was first introduced in 2020.[56] While the Digital Markets Act is aimed at

[49] Commission Competition Law 4.0, A New Competition Framework for the Digital Economy, 2019, p. 18.
[50] Rec. 2 DMA.
[51] Rec. 3 DMA.
[52] *Herbers/Savary/Gröf* GRUR-Prax 2023, 151 mention e.g. Germany, Austria, Italy and Greece.
[53] Rec. 6 DMA.
[54] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277/1, 27.10.2022.
[55] European Commission, Communication, Shaping Europe's digital future, COM/2020/67 final, 19.02.2020; see concerning the digital strategy of the EU https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future_en last accessed on 10.5.2023.
[56] *Herbers/Savary/Gröf* GRUR-Prax 2023, 151; *Quinn* 2 Dublin L & Pol Rev 2021, 2.

ensuring contestable and fair markets in the digital sector, the Digital Services Act wants to increase fairness, transparency and accountability in the provision of digital services.[57]

Already in 2014 increased vigilance against digital gatekeepers was proposed by the European Parliament.[58] The first steps towards the DMA were taken by Margrethe Vestager with a conference on 17.1.2019 ("Shaping competition policy in the era of digitisation").[59] By the time of the first draft of the DMA, a large body of expert opinion had been produced, but there was widespread agreement on the need for such a regulatory mechanism and for more far-reaching rules.[60]

A consultation process began in June 2020.[61] The document presented various regulatory options and developed the idea of a New Competition Tool to address the digital economy.[62] The proposal on the DMA was first presented by the Commission in December 2020.[63] At the same time, a Staff Working Document containing an impact assessment was published.[64] In the legislative procedure the Parliament later submitted numerous proposed amendments.[65] Although legislative acts of the Union usually have the tendency to be watered down in the legislative process, the DMA was rather tightened up.[66] However, the basic concept of a regulatory instrument with central enforcement by the Commission remained essentially untouched.[67]

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57 *Quinn* 2 Dublin L & Pol Rev 2021, 2.

58 European Parliament, Resolution of 27.11.2014 on supporting consumer rights in the digital single market, 2014/2973 (RSP), OJ C 289/65, 9.8.2016; cf. Podszun, DMA, Introduction para. 12.

59 Conference by Margrethe Vestager, Shaping competition policy in the era of digitisation, 17.1.2019, https://competition-policy.ec.europa.eu/policy/europes-digital-future/shaping-competition-policy-era-digitisation_en last accessed on 10.5.2023.

60 *Crémer/de Montjoye/Schweitzer*, Competition policy for the digital era, 2019; *Furman et al*., Unlocking digital competition, 2019; ACCC, Digital Platforms Inquiry, Final Report, 2019; *Nadler et al*. (Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary), Investigation of Competition in Digital Markets, 2020; *Marsden/Podszun*, Restoring Balance to Digital Competition, 2020; cf. Podszun, DMA, Introduction para. 12.

61 Overview of the initiative available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en last accessed on 10.5.2023.

62 European Commission, Inception Impact Assessment, Proposal for a Regulation by the Council and the European Parliament introducing a new competition tool, Ares(2020)2877634, 2.6.2020.

63 European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, 15.12.2020.

64 Commission Staff Working Document, 15.12.2020, SWD/2020/364 final.

65 European Parliament, Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act), P9_TA(2021)0499.

66 *Herbers/Savary/Gröf* GRUR-Prax 2023, 151; *Herbers* RDi 2022, 252 para. 1

67 Podszun, DMA, Introduction para. 15.

During the procedure, various positions and opinions were apparent. One focus was the discussion on the scope of the addressees, which was reflected in the trilogue negotiations and resulted in higher gatekeeper thresholds in Art. 3(2) and calls for an efficiency defence that was still missing.[68] It was also discussed whether merger control amendments based on Art. 114 TFEU are possible.[69] Finally, there were calls from various member states for national authorities to be more involved in the enforcement process.[70]

In real record speed the legislative procedure was run through and already on 25.3.2022, a little more than 15 months after the first proposal, the EU institutions agreed on a common view.[71]

The Digital Markets Act was published in the Official Journal on 12.10.2022, entered into force on 1.11.2022 and applies since 2.5.2023.

III. Digital Market Power

The DMA shifts away from the concept of market power as one of the central pillars of competition law by establishing criteria that lead to a gatekeeper designation rather than a market dominance determination. However, it is crucial for the comparison between competition law and the DMA that the fundamental concept of market power analysis is understood, especially in a digital environment.

Market power is described as the ability of a company to control prices in a particular industry.[72] According to the European Court of Justice, market power consists in the ability of the company to behave independently vis-à-vis its competitors, suppliers and customers.[73] This is a fundamental concept of competition law and policy and particularly important in a digital environment. Starting from the assessment of market power the competent authorities can

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[68] Podszun, DMA, Introduction para. 15.

[69] *Franck/Monti/De Streel*, Article 114 TFEU as a Legal Basis für Strengthened Control of Acquisitions by Digital Gatekeepers, 2021, available at https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/article-114-tfeu-as-a-legal-basis-for-strengthened-control-of-acquisitions-by-digital-gatekeepers.pdf?__blob=publicationFile&v=5.

[70] ECN, Joint paper of the heads of the national competition authorities of the European Union - How national competition agencies can strengthen the DMA available at https://ec.europa.eu/competition/ecn/DMA_joint_EU_NCAs_paper_21.06.2021.pdf; Friends of an effective Digital Markets Act (Governments of the Netherlands, France and Germany), Strengthening the Digital Markets Act and Its Enforcement, Paper No. 1 of 27.5.2021 and No. 2 of 9.9.2021.

[71] European Commission, Competition Policy, The Digital Markets Act, https://competition-policy.ec.europa.eu/dma_en last accessed on 10.5.2023.

[72] Cambridge Dictionary, market power, last accessed on 10.5.2023.

[73] CJEU 13.02.1979 – C-85/76, ECLI:EU:C:1979:36 para. 38 – *Hoffmann-La Roche.*

determine whether a merger has pro-competitive effects, or if a firm's behaviour is rather harmful than it has positive effects on the market.[74]

In the offline world the authorities have identified certain criteria to determine a company's value, standing and market power. Those ones include for example its market share, its financial strength, its access to data relevant to competition, its access to procurement or sales markets, interrelationships with other companies, legal or actual barriers to market entry by other companies, actual or potential competition, the ability to switch its supply or demand to other goods or commercial services and the ability of the market counterpart to switch to other enterprises.[75]

However, on the internet and in the digital economy, certain other factors must also be considered. After all, the market dynamics there differ from those in the non-digital world. However, the main contributors to market power identified in digital sector cases remain generally the same.[76] At the core, it is still a matter of discussing barriers to market entry and the substitutability of the products and services offered.[77] Nevertheless, the assessment of market power in times of digitalisation is slightly different than the one in the non-digital world. Hence, new criteria must be applied in the analysis.

One problem is the determination of market shares, which in some cases can change much faster than without digitisation.[78] In addition, these shares are less meaningful. They do not take into account network effects and cannot fully reflect the turning of markets.

This is compounded by the multi-sidedness of certain platform markets, which generally requires a new perspective, as the reciprocal market forces there are different on different sides. As an example, this raises the question of whether the ability to control the price independently must be present on only one platform side or on all platform sides for a dominant position to exist.[79] The U.S. Supreme Court called for such platform-wide market power in *Ohio v.*

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[74] OECD, The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, 2022, p. 5, available at www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf.
[75] The examples are taken from Section 18(3) ARC.
[76] OECD, The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, 2022, p. 7.
[77] OECD, The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, 2022, p. 7.
[78] OECD, The Evolving Concept of Market Power in the Digital Economy, OECD Competition Policy Roundtable Background Note, 2022, p. 7.
[79] *Volmar*, Digitale Marktmacht, 2019, p. 225.

American Express.[80] The case involved the credit card company and its contractual relationships with the merchants who accepted the credit cards. The Supreme Court delineated a single market around the credit card system that included both the merchant side and the credit cardholder side. It was not enough, it said, for American Express merely to be able to independently set prices vis-à-vis merchants. The company must also be able to do so vis-à-vis credit cardholders.

The case is just one example of how in today's world several difficulties with the market definition arise and – consequently – with market power.[81] It is thus clear that more far-reaching standards and new types of concepts are needed in order to meet the challenges of digital competition.

The German competition law has codified innovative concepts and criteria through the 10th ARC amendment, which addressed the special features of internet markets. According to Section 18(3a) ARC, the assessment of a company's market position must also take into account direct and indirect network effects, the parallel use of multiple services and switching costs for users, its economies of scale in connection with network effects, its access to competitively relevant data and also innovation-driven competitive pressure.

The regulation of markets on the internet poses new problems for competition authorities every day. It is therefore clear that there is a great need for a modern competition law and new approaches that can dynamically address these difficulties.

IV. Gatekeepers as the Object of Regulation

The term gatekeeper plays an important role in the current discourse on keeping digital markets open. The business model of online platforms to operate on two- or multi-sided connected markets is no longer a rarity in the networked and digital economy.[82] Especially in the digital sector, the platform model has become increasingly prevalent. Therefore, the DMA addresses gatekeepers and subjects them to its behavioural guidelines. In doing so, it no longer differentiates according to the conventional concept of market dominance but relies on quantitative criteria to determine a gatekeeper's position.

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[80] US Supreme Court, Ohio v. American Express Co., 585 U.S. ___ (2018).
[81] For a detailed break-down of the different challenges concerning the market definition and market power see *Newmann* 72 Vand L Rev 2019, 1497 and *Puric* 5 ECLIC 2021, 295 (300 ff.).
[82] *Burchardi* NZKart 2022, 610 (611).

Gatekeepers are understood as large digital undertakings providing core platform services, such as for example online search engines or messenger services.[83] The DMA addresses one of the central problems of competition in digital markets: A few companies - especially the digital giants known as Alphabet, Amazon, Microsoft, Meta and Apple - have benefited in particular ways from the characteristic features of the platform economy in the past. They have gained permanently consolidated market positions in the intermediary markets and are now often able to control the access of commercial users to their customers.[84] Such gatekeeper platforms have considerable influence on market events – not only can they lead to a one-sided dependence of commercial users, but they can also cause negative effects on the contestability of these platform markets.[85]

The DMA represents a revolutionary turning point in terms of regulating platform markets. The term 'gatekeeper' is used to address undertakings providing core platform services that offer access options for users and carry out pre-selection and ranking in the process. A prime example of this is Google Search. Approximately 85% of search queries worldwide are made via the search service.[86]

The DMA does not apply to all digital services, but the regulation covers ten core platform services according to Art. 2(2): Online intermediation services (e.g. Amazon Marketplace, Appstore), online search engines (e.g. Google), online social network services (e.g. Facebook/Meta), video sharing platform services (e.g. YouTube), number-independent interpersonal communications services (e.g. WhatsApp), operating systems (e.g. Android, iOS), web browsers (e.g. Chrome), virtual assistants (e.g. Amazon Alexa, Siri, Google Assistant), cloud computing services (e.g. Amazon Web Services) and online advertising services (e.g. Google Ads).

[83] European Commission, Competition Policy, The Digital Markets Act, https://competition-policy.ec.europa.eu/dma_en last accessed on 10.5.2023.
[84] Rec. 1, 2 DMA; *Podszun/Bongartz/Langenstein* EuCML 2021, 60 (61).
[85] *Brauneck* RDi 2023 (27 f.).
[86] Statista, Market shares of the most-used search engines on the desktop by page views worldwide from January 2016 to December 2022, 2.1.2023, https://de.statista.com/statistik/daten/studie/225953/umfrage/die-weltweit-meistgenutzten-suchmaschinen/. In the global desktop search engine market, Google was the market leader in December 2022 with a market share of 84.08 percent, measured in terms of page views. It was followed by Bing, Microsoft's search engine, which achieved a market share of around 8.95 percent. At that time, Yahoo! accounted for around 2.6 percent of search queries via desktop PCs.

V. Content of the DMA

Art. 1(1) contains the primary objective of the regulation, which is to ensure contestable and fair digital markets across the Union in which gatekeepers operate. The regulation sets limits on the business practices of digital platforms. The DMA understands the relationship between platforms and users as characterised by power imbalances and is therefore particularly susceptible to unfair practices.[87]

Two catalogues with over 20 conduct obligations apply to gatekeepers under the DMA. In addition, there is an interoperability obligation for communications services and an obligation to inform the Commission about mergers.

Art. 5 contains, among other things, prohibitions regarding the combination of data (para. 2), the use of most favoured nation clauses (para. 3), the limitation of legal remedies of users (para. 6), the tying with other services (para. 7) and the prohibition to require registration with other core platform services (para. 8). Obligations under Art. 6 DMA, which may still need to be specified, include prohibitions regarding the use of data in competition (para. 2), self-preferential treatment (para. 5), the restriction of switching possibilities (para. 6) and the imposition of disproportionate conditions for the termination of the core platform service (para. 13).

However, gatekeepers must also follow certain commandments. In this regard, Art. 5 DMA stipulates that the gatekeeper must allow end users to access services of business users (para. 5) and must provide advertisers (para. 9) and publishers (para. 10) with information on advertising prices. In addition, Art. 6 DMA requires the gatekeeper to allow sideloading of apps (para. 4), to ensure interoperability (para. 7), to provide users with access to platform service data (paras. 9 and 10) and to ensure that FRAND (Fair, Reasonable and Non-Discriminatory) terms are granted (paras. 11 and 12).

Art. 7 DMA standardises an interoperability obligation for messenger services. According to this, the service of a gatekeeper must offer an interoperability interface to another messenger service, leading to the possibility to use different messenger services with each other. The network effects, which have become a key criterion in the choice of messenger service, could be significantly reduced and even eliminated. The dependence risk of consumers should be

[87] *Podszun/Bongartz/Kirk* NJW 2022, 3249.

reduced, so that Art. 7 can and should ultimately lead to more consumer protection and more competition.[88]

The designated gatekeepers must then demonstrate compliance with the conduct prescribed for them (Art. 8) and establish a compliance function within their company that is responsible for complying with and monitoring the obligations under the DMA (Art. 28). In addition, there is a detailed reporting obligation under Art. 11, according to which gatekeepers must submit a report within six months of designation, describing in detail and transparently what measures have been taken to ensure compliance with the obligations under Articles 5, 6 and 7.

VI. Interplay with EU Competition Law and National Regulation

The DMA is intended to supplement the rules on the enforcement of competition law and is thus explicitly classified as regulatory law. In this context, the European legislator emphasises that the DMA should apply without prejudice to European and national competition rules.[89] With regard to the primary-law Articles 101 and 102 TFEU this is self-evident since they must be applied before the secondary-law DMA anyway. This declaration therefore applies from the outset only to the national regulations.[90]

This assessment is based by the legislator on the assumption that Articles 101 and 102 TFEU and the corresponding national competition laws relating to multi- and unilateral anticompetitive conduct and merger control are intended to protect undistorted competition in the market.[91] The DMA shall pursue an objective that complements, but should also be distinct from, the objective defined in competition law of protecting undistorted competition in certain markets.[92] The DMA is intended to ensure that markets in which gatekeepers operate are and remain contestable and fair – it is therefore intended to protect a different legal interest and is without prejudice to its application.[93] In principle, therefore, national competition rules are applicable alongside the DMA.

[88] *Becker/Holznagel/Müller*, Interoperability of Messenger Services – Possibilities for a Consumer-Friendly Approach, pp. 120, 124, 128; Verbraucherzentrale Bundesverband, Interoperabilität bei Messengerdiensten, Diskussionspapier des Verbraucherzentrale Bundesverbandes eV, May 2021, pp. 16 ff., 24 ff.
[89] Rec. 10 DMA.
[90] *Brauneck* RDi 2023, 27 (30).
[91] Rec. 11 DMA.
[92] Rec. 11 DMA.
[93] Rec. 11 DMA.

C. Internal Market Regulation or Competition Law?

As a starting point for addressing the question of whether Art. 114 TFEU is the correct legal basis for the DMA, it is necessary to discuss the extent to which the DMA is an internal market regulation or whether a competition motive prevails. The distinction depends to a large extent on how the DMA is presented to the outside world, i.e. how it is enforced, and what its actual objective is.

In order to understand the scope of Art. 114 TFEU, the express criteria must be interpreted narrowly and unwritten criteria must be applied. With the first *tobacco advertising*[94] judgment and the *British American Tobacco*[95] judgment, the Court of Justice began to concretise the requirements of Art. 114 TFEU and to develop generally applicable criteria.

Whether a proposed approximation measure serves the realisation of the internal market and can consequently be based on Art. 114 TFEU must be determined by an interpretation based on "objective factors which are amenable to judicial review"[96]. This includes the objective and content of the measure.[97]

I. The Regulatory Techniques

The regulation of fast-changing markets such as digital markets requires a modern approach by the competent authorities. Therefore, the regulatory mechanisms of today's competition law and the DMA need to be compared.

1. The Regulatory Techniques of Competition Law

Competition law is generally characterised by abstract general clauses and retroactive effect. There are essentially general provisions that apply to a wide range of different situations. In essence, they describe a certain type of behaviour which is considered to distort competition and is therefore prohibited. It is not particularly addressed to certain undertakings that have

[94] CJEU 5.10.2000 – C-376/98, ECLI:EU:C:2000:544 – *Advertising and sponsorship of tobacco products*.
[95] CJEU 10.12.2002 – C-491/01, ECLI:EU:C:2002:741 – *British American Tobacco*.
[96] CJEU 5.10.2000 – C-376/98, ECLI:EU:C:2000:544 para. 59 – *Advertising and sponsorship of tobacco products*.
[97] CJEU 5.10.2000 – C-376/98, ECLI:EU:C:2000:544 para. 59 – *Advertising and sponsorship of tobacco products*.

been identified before but rather addresses the concern that the behaviour as such occurs on the market.

The law on abusive practices is neutral with regard to the market power of a particular company, provided that no infringement of the law has been committed.[98] However, because of its position, the company concerned has a responsibility for its market conduct.[99] This is reflected in the prohibition of abuse of market power but does not lead to a comprehensive control of behaviour.[100]

As its name suggests, the prohibition of abuse of market power is aimed at dominant companies. In digital markets in particular, there are various qualitative criteria for measuring market dominance, such as the density of network effects or the switching costs for users.[101]

When the competition authorities discover certain prohibited conduct, an investigation is launched. These proceedings may ultimately lead to the prohibition of the conduct and the imposition of sanctions on the company concerned. Competition law therefore does not take effect per se, but only through a decision by the authorities - i.e. *ex post* and based on a *case-by-case analysis*. However, there are also some ex-ante measures in competition law. In particular, it should be recalled that the sanctions imposed by the competition authorities are aimed at influencing future behaviour and that the Commission may also impose permanent and even structural measures pursuant to Art. 7(1) of Regulation 1/2003.[102] In addition, merger control is predominantly an ex-ante regulation, requiring a general ex-ante review of mergers above certain thresholds.

This process takes an enormous amount of time - sometimes up to several years before a decision is made. During this time, the company can continue to operate as before.

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[98] Immenga/Mestmäcker/*Fuchs*, § 19 GWB para. 7; KK-KartellR/*Busche*, § 19 GWB para. 4.
[99] KK-KartellR/*Busche*, § 18 GWB para. 46.
[100] Immenga/Mestmäcker/*Fuchs*, § 19 GWB para. 15.
[101] Examples taken from the German Section 18(3a) ARC.
[102] *Haus/Weusthof* WuW 2021, 318 (324); OECD, Competition Enforcement and Regulatory Alternatives, OECD Competition Committee Discussion Paper, 2021, p. 8 available at http://oe.cd/cera.

2. The Regulatory Techniques of the DMA

The intention of the DMA is to close holes in the existent regulatory framework, especially the ones in competition law. Therefore, it presents itself with a new approach on taming the digital gatekeepers.

The platform regulation sets out a range of obligations for undertakings designated to be gatekeepers. The designation of a gatekeeper is based mainly on technical-quantitative criteria set out in Art. 3.[103] The Regulation lists and prohibits certain acts that are considered unfair in relation to platforms, regardless of whether these acts directly affect consumer welfare.[104] However, the Regulation does not only impose prohibitions. It also imposes a number of obligations designed to ensure fairness and contestability in the market. This type of obligation is a novel instrument. Up to now, competition law has tended to focus on negatively worded prohibitions rather than actual obligations with regard to certain practices.

The DMA, as a European regulation, is endowed with automatic validity, whereby the obligations – in particular Art. 5 – are *self-executing*.[105] The regulation allows for the identification of certain market players (the gatekeepers), who are then subject to the code of conduct. The criteria for designating a gatekeeper are quantitative.[106] For example, annual sales, average market capitalisation, market value or the amount of active end users are taken into account.[107] The company is then automatically required to comply with the behavioural obligations. This leads to a new type of *ex-ante* regime, where a prohibition decision by the authority is no longer necessary.[108]

The list of commitments appears to be a catalogue, which was inspired from past and current antitrust cases involving the usual large technology platforms.[109] While in those cases the

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[103] *Zimmer/Göhsl* ZWeR 2021, 29 (35).
[104] *Kim*, The Digital Markets Act and the Illusion of 'Future-Proof' Tech Regulation, p. 3, available at https://ssrn.com/abstract=4165714.
[105] *Podszun/Bongartz/Kirk* NJW 2022, 3249 para. 16.
[106] *Scott Morton/Caffarra*, The European Commission Digital Markets Act: A translation, 5.1.2021, available at https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation last accessed on 10.5.2023.
[107] Art. 3 DMA.
[108] European Commission, Directorate-General for Communications Networks, Content and Technology, *Sunderland/Herrera/Esteves et al.*, Digital Markets Act: impact assessment support study: executive summary and synthesis report, Publications Office, 2020, https://data.europa.eu/doi/10.2759/791349, p. 12; Bechtold/Bosch/Brinker, EU-Kartellrecht, VO (EU) 2022/1925 para. 4.
[109] *Scott Morton/Caffarra*, The European Commission Digital Markets Act: A translation, 5.1.2021; for an overview of the link between former antitrust cases and the obligations imposed under the DMA see *Petterssen*, Sector-Specific Ex Ante Regulation in Digital Markets - A Complement or Substitute to Antitrust Enforcement?, pp. 4 f. available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4222013.

determination of an anti-competitive conduct was based on a case-by-case basis, the rules concerning the behaviour of gatekeepers in the DMA now have an abstract-general dimension.

The DMA will allow the Commission to challenge the same practices that it has already challenged in ongoing cases, but to do so more quickly. It is hoped that this will lead to faster enforcement and a more rapid positive impact on the market. [110] There is no need to define markets, show potential negative effects on competition, deal with ambiguities or bear the burden of proof. [111]

Under the DMA, the Commission is the sole enforcement authority. However, following numerous requests during the legislative process, the Member States have been granted certain investigative powers.[112] However, they are not allowed to take actual measures.

3. Comparison and Conclusion

The DMA has an undeniable closely connected approach to competition law.[113] However, there are differences, particularly in the regulatory technique, which distinguish the DMA from traditional competition law, because the DMA is intended to fill gaps that have existed to date, thereby contributing to improved contestability of the markets and a higher standard of fairness.[114]

The DMA has a *per se effect*, which does not require any further executive action apart from a designation decision. In competition law, which the DMA takes as a model on the one hand, but which it is also intended to overcome on the other, general clauses apply which are often only filled in by competition authorities and courts.[115]

The mechanisms of the two regulatory instruments are different. In particular, the DMA rejects the consumer welfare test, which has gained importance in the Commission's enforcement

[110] *Massa* 26 YARS 2022, 103 (122).
[111] *Lamadrid,* 10 Comments on the Commission's DMA Proposal, Chillin'Competition, 17.12.2020, available at https://chillingcompetition.com/2020/12/17/10-comments-on-the-commissions-dma-proposal/ last accessed on 10.5.2023.
[112] *Herbers/Savary/Gröf* GRUR-Prax 2023, 185.
[113] *Akman*, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 2 available at https://ssrn.com/abstract=3978625*; Leistner*, The Commission's vision for Europe's Digital Future, 2021, p.3, available at https://ssrn.com/abstract=3789041.
[114] Rec. 5, 7 DMA.
[115] *Podszun/Bongartz/Kirk* NJW 2022, 3249 para. 16.

practice under Art. 102 TFEU.[116] In addition, the DMA departs from established methods of competition law. It lacks the necessary market definition and replaces market dominance with a gatekeeper provision. Whereas in competition law qualitative criteria are decisive for the determination of a dominant position, technical-quantitative thresholds in the DMA determine the designation of a gatekeeper.

In addition, there is no longer an assessment of the effects on competition through a balancing of interests, but only individual conduct requirements for companies. [117] The possibilities for gatekeepers to be exempted from the behavioural obligations are very limited. Unlike competition law, the DMA does not provide for an efficiency defence – companies cannot justify their conduct on the grounds that it increases consumer welfare.[118]

The DMA aims for a faster and more effective enforcement by introducing *self-executing* rules to designated gatekeepers. The pinpricks of antitrust law have proved insufficient to effectively eliminate the disadvantages of these concentration tendencies because the proceedings lasted a long time and achieved hardly any effect as a result.[119] Such a fast enforcement and adequate reactions to market failures are especially important in digital markets which are characterised by strong network effects.[120] However, the enforcement of the DMA will probably still lead to difficulties. The authorities, whether the EU Commission or national authorities, will have to seek in-depth investigations to be able to determine a gatekeeper position and then also to be able to prove a violation of the DMA.[121] Those market investigations – based on economic and empirical elements – also require a lot of resources of the Commission, will take longer and leave the gatekeeper with legal uncertainty ex ante.[122] However, given the requirement of designation within 45 days after receiving all the necessary information, faster and more effective enforcement seems possible.

[116] *Hendrikse/Sial/Fernandez/Klinge*, Taming Big Technification? The European Digital Markets Act, June 2022; Concerning the consumer welfare test cf. European Commission, Communication (fn. 9).
[117] *Schweitzer* ZEuP 2021, 503 (507); explaining the procedure in competition law *Ibáñez Colomo*, 12 JECLAP 2021, 566.
[118] *De Streel/Liebhaberg/Fletcher/Feasey/Krämer/Monti*, CERRE Assessment Paper, The European Proposal for a Digital Markets Act, January 2021, p. 22; *Schweitzer* ZEuP 2021, 503 (537).
[119] *Akman*, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 17; *Massa* 26 YARS 2022, 103 (122); *Podszun/Bongartz/Kirk* NJW 2022, 3249 (3250).
[120] Cf. *Akman*, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 17.
[121] ECN, Joint paper of the heads of the national competition authorities of the European Union - How national competition agencies can strengthen the DMA, para. 17.
[122] *Akman*, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 8.

In addition, the Commission has exclusive enforcement powers.[123] This could be justified by the fact that enforcement by the individual member states could lead to the feared fragmentation of the internal market, which the DMA aims to prevent.[124] The idea itself is not questionable, but this decision could ultimately lead to a setback. Lessons have been learned from the early days of antitrust enforcement that sole enforcement by the Commission can lead to a hampered enforcement process due to its limited resources.[125] A division of powers between national authorities may be advisable to ensure effective enforcement at all. It is therefore surprising that the EU's new instrument for digital regulation now has this feature, even though it is designed to respond more quickly to new problems.

Moreover, the enforcement mechanisms are modelled after those of antitrust law.[126] If a violation of the DMA is identified by the Commission, it can use the familiar investigative measures of competition law – requests for information, questioning of witnesses, dawn raids.[127] This is consistent with the powers of national competition authorities to investigate certain behaviours of designated gatekeepers.

In summary, the DMA represents a fundamentally new approach to digital regulation. The ex-ante approach, with self-executing and automatically applicable conduct obligations, can lead to faster enforcement of the regulatory instrument and more effective legal protection. This differs from the previous regulatory approach in competition law, which, due to its ex-post regulation and thus lengthy procedures, can react rather laboriously to the rapidly changing framework conditions of the digital sector. However, it remains to be seen to what extent the enforcement measures will actually lead to faster enforcement if the Commission is the only enforcement authority and has to carry out market investigations and similar measures with its limited resources.

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[123] Rec. 91 DMA.
[124] *Herbers/Savary/Gröf* GRUR-Prax 2023, 185; this experience was also made, for example, with the enforcement of the GDPR; advocating centralised enforcement, e.g., *De Streel/Liebhaberg/Fletcher/Feasey/Krämer/Monti*, CERRE Assessment Paper, The European Proposal for a Digital Markets Act, January 2021, p. 24 f.
[125] Excessive administrative burden on the European Commission and solving the problem through decentralised enforcement of European antitrust law and the principle of self-assessment under Regulation (EC) No. 1/2003; cf. also *Falce* Eur J Privacy L & Tech 2021, 9 (16 ff.) which outlines the potential risk represented by the disintegration of the antitrust enforcement regime in the DMA.
[126] Cf. *Akman*, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 14.
[127] *Herbers* RDi 2022, 252 para. 15; *Herbers/Savary/Gröf* GRUR-Prax 2023, 151 (152).

II. The Protective Purpose

The protective purpose of Art. 114 TFEU is the establishment and functioning of the internal market. According to Art. 26 TFEU the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

The legislative decision was based on an approximation of the internal market. However, it is crucial to determine whether this is actually the primary objective of the DMA and thus meets the criteria of the legal basis, or whether it is not rather an actually divergent objective that requires a more specific legal basis.[128]

1. Protective Purpose of Competition Law

The European Court of Justice has held that competition rules are "fundamental provision[s] which [are] essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market"[129]. The internal market includes a system ensuring that competition is not distorted.[130] Hence, the ensuring of the internal market is a competition law objective.[131] The link between competition rules and the creation of the internal market was present when the EEC Treaty[132] was signed and is still valid today: without the objective of creating a single market, the EU competition rules would not have existed.[133] A system of fair competition forms an integral part of the internal market as set out in Art. 3(3) TEU.[134]

The object of protection of competition is competition in itself and more precisely the protection of undistorted competition on the market.[135] Reflectively, this also involves the individual protection of the market participants' freedom of competition. In this context, the task of the

[128] Cf. *Falce* Eur J Privacy L & Tech 2021, 9 (15).
[129] CJEU 1.6.1999 – C-126/97, ECLI:EU:C:1999:269 para. 36 – *Eco Swiss*.
[130] Protocol 27 on the internal market and competition, annexed to the Treaty of Lisbon, OJ C 115/309, 9.5.2008.
[131] Cf. European Parliament, Competition Policy, available at https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.6.12.pdf.
[132] Treaty establishing the European Economic Community (EEC Treaty) also referred to as the Treaty of Rome, signed 25.3.1957 in Rome.
[133] Bunte/*Käseberg*, Kartellrecht, Einl. zum EU-Kartellrecht para. 5; MüKoEuWettbR/*Säcker*, 1. Teil Grundlagen para. 13; *Laitenberger* NZKart 2017, 89.
[134] European Parliament, Competition Policy, available at https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.6.12.pdf.
[135] MüKoEuWettbR/*Säcker*, 1. Teil Grundlagen para. 3; Rec. 11 DMA.

prohibition of abuse of market power is to preserve the residual competition which has already been weakened as a result of the presence of the dominant company.[136]

EU competition policy aims to protect and promote competition. The rules that give effect to this policy are based on the principle that the process of competition in a market is the best mechanism for the efficient allocation of resources.[137] Competition is generally considered to have a positive impact on consumer welfare and, by increasing productivity, on the overall welfare of society.[138]

2. Protective Purpose of the DMA

The DMA purports to pursue an objective that is complementary to, but distinct from the competition law objective of protecting undistorted competition in any market.[139] It seeks to ensure that "markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market"[140]. The DMA was therefore intended to protect a legal interest other than that protected by Articles 101 and 102 TFEU and the corresponding national provisions.[141]

The regulation aims to achieve several objectives, while the basic idea of the DMA is not so much to control the power of a monopolist. Rather, it prohibits conduct that has either the intention or the effect of preventing a competitor from entering the market (or raising its costs) where entry would otherwise be possible.[142] This is often referred to as the ensuring of the **contestability** of digital markets.[143] The impact of gatekeepers on digital markets leads to significant dependency of business users as well as unfair behaviour vis-à-vis them, as gatekeepers have significant control over access to platform markets.[144] This is said to have a negative impact on the mentioned contestability. For the purpose of keeping markets open to

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[136] Immenga/Mestmäcker/*Fuchs*, § 19 GWB para. 25; KK-KartellR/*Busche*, § 19 GWB para. 4.
[137] *Bailey/John,* Bellamy & Child, European Union Law of Competition para. 1.016.
[138] *Bailey/John,* Bellamy & Child, European Union Law of Competition para. 1.016; MüKoEuWettbR/*Säcker*, 1. Teil Grundlagen para. 4.
[139] Rec. 11 DMA.
[140] Rec. 11 DMA.
[141] *Brauneck* RDi 2023, 27 (29) para. 6.
[142] *Scott Morton/Caffarra*, The European Commission Digital Markets Act: A translation, 5.1.2021; as *Newmann* 72 Vand L Rev 2019, 1497 (1512 f.) pointed out, high barriers to entry are a crucial characteristic of digital markets nowadays.
[143] Art. 1 (1) DMA.
[144] Monopolies Commission, Recommendations for an effective and efficient Digital Markets Act, Special Report 82, 2021, para. 13.

new entrants and innovators offering substitutable or complementary services or products, the DMA introduces rules to ensure contestability.[145]

Another objective is to ensure **fairness** in B2B relationships between the gatekeepers and business users.[146] The DMA aims to contribute to this in the digital economy by prohibiting conduct that disadvantages, exploits, or weakens parties dependent on gatekeepers.[147]

According to the wording of the DMA the overall purpose is to strengthen the internal market by providing harmonised rules across the EU.[148] Thus, the DMA has an almost ordoliberal orientation.[149] Ordoliberalism sees the state as indispensable for the smooth functioning of the market. The theory envisions a market economy with a strong state regulatory framework – in case of market failure, there is a competitive regulatory framework.[150] The DMA takes this ordoliberal direction, for example, in that it only addresses the largest digital players, and smaller platform companies that may act similarly are hardly considered.[151]

However, these fundamental objectives serve an overarching goal. The implementation of the DMA should help to maintain and promote innovation and the quality of digital products and services, keep prices fair and competitive, and keep quality or choice high for business customers and end users.[152]

3. Comparison and Conclusion

According to the official presentation, the DMA is thus intended to serve a different goal than European competition law. There has been a lot of controversial discussion as to whether this is actually the case.[153] This statement is considered surprising to say the least given the DMA's

[145] *De Streel/Liebhaberg/Fletcher/Feasey/Krämer/Monti*, CERRE Assessment Paper, The European Proposal for a Digital Markets Act, January 2021, p. 9.
[146] Art. 6 (2), rec. 33 DMA.
[147] *Scott Morton/Caffarra*, The European Commission Digital Markets Act: A translation, 5.1.2021.
[148] Art. 1 (1) DMA.
[149] Ordoliberalism is an economic policy approach developed by Walter Eucken and colleagues at Freiburg University; *Hendrikse/Sial/Fernandez/Klinge*, Taming Big Technification? The European Digital Markets Act, June 2022.
[150] For a detailed breakdown of the details of the ordoliberal understanding, see *Beck/Kotz*, Ordoliberalism: A German oddity?, 2017.
[151] *Hendrikse/Sial/Fernandez/Klinge*, Taming Big Technification? The European Digital Markets Act, June 2022; cf. Podszun, DMA, Introduction para. 1 emphasizing the shift away from the more economic approach.
[152] Rec. 23 DMA.
[153] With a short summary of the different views *Kerber*, Taming tech giants with a per-se rules approach? The Digital Markets Act from the "rules vs. standard" perspective, 2021, p. 5. available at https://ssrn.com/abstract=3861706.

goals of contestability and fairness of markets in the digital sector in general and for commercial users and end users of core platform services provided by gatekeepers.[154]

The fairness and contestability purpose of the DMA and the objective of EU competition law both serve the proper functioning of the internal market and therefore, undistorted competition. A core goal of European competition law has always been to keep markets open and any market position contestable.[155] Hence, the total lack of reference to both competition as well as consumers in the DMA is astonishing.[156]

The DMA does not define the term contestability itself as it is understood in the context of the regulation.[157] Moreover, the Inception Impact Assessment, setting out the background of the initiative as well as its purpose and scope,[158] also indicated that "the **general objective** of this initiative is to ensure fair and undistorted competition in the internal market"[159]. Hence, there is little to suggest that the two regulatory mechanisms actually differ in their objectives.

According to the DMA's proposal, the Regulation is intended to address market failures in order to ensure contestable and competitive digital markets for increased innovation and consumer choice.[160] Competition law has no lesser objective. Market failures are to be addressed in order to ensure competition. Moreover, the very purpose of competition law is to make markets competitive.

The contestability objective is nothing more than protecting competition in the market from being impaired.[161] As laid down by *de Streel et al.* the contestability of the markets "should ensure good functioning of the markets in the long run and favours long-term **competition** over short-term efficiencies, thereby promoting the diversity and probably the rate of innovation"[162].

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[154] *Brauneck* RDi 2023, 27 (29) para. 6; *Westermann* ZHR 186 (2022), 325 (327).
[155] *Petterssen*, Sector-Specific Ex Ante Regulation in Digital Markets - A Complement or Substitute to Antitrust Enforcement?, p. 2; *Schweitzer* ZEuP 2021, 503 (509).
[156] Cf. *Akman*, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 13.
[157] Also observed by *de Streel/Feasey/Krämer/Monti*, Making the Digital Markets Act more resilient and effective, CERRE Recommendations Paper, May 2021, p. 43.
[158] European Commission, Commission Staff Working Document, Impact Assessment Report, Annex 1, SWD/2020/363 final, Part 2/2, p. 1.
[159] European Commission, Inception Impact Assessment, Proposal for a Regulation by the Council and the European Parliament introducing a new competition tool, Ares(2020)2877634, 2.6.2020, p. 2, emphasis added.
[160] European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, 15.12.2020, p. 65.
[161] *Schweitzer* ZEuP 2021, 503 (511 f.).
[162] *De Streel/Liebhaberg/Fletcher/Feasey/Krämer/Monti*, CERRE Assessment Paper, The European Proposal for a Digital Markets Act, January 2021, p. 11, emphasis added.

The goal of fairness is harder to determine. With regard to competition law, fairness has various manifestations: Market success should be based on fair competitive behaviour, not market power, and this market success should be brought about by a free and considered consumer choice.[163] This emphasis on a fair competitive process is also reflected in the DMA's rules of conduct, for example in Art. 5 and 6, which aim at ensuring equal competitive conditions in the European Union.[164] However, this catalogue of behaviours is based on old competition cases – precisely being about maintaining, restoring and protecting fairness in the market. The fact that the very same conduct that was prohibited in earlier competition cases has now been codified in the DMA speaks to the same goal of fairness on the market that prevails in competition law.[165]

An illustrative example can be found in Art. 5(6) DMA - the prohibition of self-preferential treatment. This behaviour was codified in German law as competition law in Section 19a(2) No. 1 ARC.[166] This competitive behaviour, which can be objected to as unfair, was countered in the *Google Shopping*[167] case by Art. 102 TFEU – i.e. competition law. There is no meaningful reason why precisely this conduct, which is derived from an old competition case and which is also understood as competition law in another jurisdiction, should now be included in the DMA under the objective of internal market regulation rather than competition law. In addition, the list of practices defines the central concept of abuse in Art. 102 TFEU - the obligations and prohibitions are directed at nothing less than exploitative and obstructive abuses.[168]

The Commission has been dealing with the challenges of the digital economy as competition policy for years. Creating a level playing field for digital networks and innovative services, and maximising the growth potential of the digital economy, has already been addressed by the Commission in the context of competition policy in 2015.[169]

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[163] *Schweitzer* ZEuP 2021, 503 (512 f.).
[164] Monopolies Commission, Recommendations for an effective and efficient Digital Markets Act, Special Report 82, 2021, para. 24.
[165] Competition law recognises fairness under the law on abuse of the conduct of dominant undertakings specifically in exploitative situations cf. CJEU 14.2.1978 – C-27/76, ECLI:EU:C:1978:22 paras. 252 f. – *United Brands*; Monopolies Commission, Recommendations for an effective and efficient Digital Markets Act, Special Report 82, 2021, para. 25.
[166] For an analysis that Section 19a ARC is competition law, see *Haus/Weusthof* WuW 2021, 318 (324); *Bongartz* WuW 2022, 72.
[167] European Commission 27.6.2017 – AT.39740 – *Google Search (Shopping)*.
[168] *Basedow*, MPI Research Paper No. 21/2, p. 5.
[169] European Commission, Communication, A Digital Single Market Strategy for Europe, COM/2015/192 final, 6.5.2015; *Vestager*, Speech Competition policy for the Digital Single Market: Focus on e-commerce, 26.3.2015.

Several countries such as Germany[170], Austria[171], Greece[172] and Italy[173] have introduced or are considering in addition to Art. 102 TFEU and national competition laws legislative changes in their national **competition laws** that apply specifically to the digital sector and digital competition.[174] This suggests that the goal of regulating the digital market is generally perceived as being part of competition law and policy.

Moreover, there is no evidence that the goal of contestability and fairness of digital markets goes beyond that of competition law, as implied by the DMA.[175] The harmonisation of rules in the EU is also provided for in Art. 101 and 102 TFEU. It also does not go beyond general competition law in terms of the group of addressees. There may be stricter and more explicit rules than before for the large digital companies. However, unlike competition law, it does not address smaller companies or conduct away from core platform services. Behaviour by smaller players can also lead to foreclosure of digital markets, because the crucial characterisation of harmful behaviour in this area is based on network effects and access to data – qualitative, not quantitative, characteristics. While it is true that large digital companies are more likely to distort competition through their behaviour, it is still likely that smaller companies can also foreclose a digital market through smart management and innovative ideas. This means that, in this respect at least, the DMA cannot go beyond competition law with its open market analysis in terms of broad competition.

In addition to the obvious goals of the DMA, there is also no denying that the DMA is fundamentally designed to effectively protect consumers online and preserve their rights.[176] This is evident in several of its provisions. However, even if competition law is not explicitly designed to protect consumers, it does so in an indirect manner as well. This overlapping of protected interests is clearly reflected, for example, in the prohibition of the abusive conduct of tying and bundling under Art. 5(7) and (8). The understanding that this practice is not to be

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[170] Section 19a ARC, 10th ARC amendment, January 2021.
[171] Bundeswettbewerbsbehörde, Thesenpapier Digitalisierung und Wettbewerb, June 2020, available at https://www.bwb.gv.at/fileadmin/user_upload/Digitalisierung_und_Wettbewerbsrecht_Thesenpapier.pdf.
[172] Draft Greek Competition Bill, 6.8.2021, available at http://www.opengov.gr/ypoian/?p=12356.
[173] Annual Law on Market and Competition, Law No. 118/2022, 27.8.2022, available at https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2022;118.
[174] ECN, Joint paper of the heads of the national competition authorities of the European Union - How national competition agencies can strengthen the DMA, para. 13.
[175] Rec. 11 DMA.
[176] *Massa* 26 YARS 2022, 103 (126).

tolerated in the sense of a fair course of events on the market was first captured in the landmark *Microsoft*[177] case - an extremely impressive case of competition law.

The fact that DG Comp was instrumental in preparing and finalizing the regulation also speaks in favour of a competition background of the DMA. The final enforcement power will also be held by DG Comp, where even a separate department for "Markets and Cases VI: Digital Platforms" (COMP.J) has been created (together with DG CNECT).[178] The heads of the national competition authorities organised in the European Competition Network have also expressed their support for application by the Directorate-General for Competition.[179] Moreover, the enforcement mechanisms are similar to those of competition law.[180] Hence, the enforcement of the DMA will be carried out by the EU competition authority through competition law mechanisms leading to the interpretation of the DMA as serving a competition objective.

The fact that the Commission published the DMA initiative as the creation of a *New Competition Tool* also supports this understanding. The individual regulatory scenarios were put out for public consultation in a so-called Inception Impact Assessment.[181] In this proposal the Commission laid down its view, that the NCT is “one of the measures [making sure that competition policy and rules are fit for the modern economy as well as strengthening competition enforcement in all sectors] by addressing gaps in the current EU competition rules and allowing for timely and effective intervention against structural competition problems across markets”[182]. Accordingly, the proposed rules were based on the Commission's experience in enforcing EU competition rules and are intended to allow for measures “preserving the **competitiveness** of markets”[183].

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[177] European Commission 24.3.2004 – COMP/C-3.37.792, OJ L 32/23, 6.2.2007 – *Microsoft*; followed by GC 17.9.2007 – T-201/04, ECLI:EU:T:2007:289 – *Microsoft Corp. v Commission*.
[178] *Herbers/Savary/Gröf* GRUR-Prax 2023, 151 (153).
[179] ECN, Joint paper of the heads of the national competition authorities of the European Union - How national competition agencies can strengthen the DMA, p. 1.
[180] *Akman*, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 14.
[181] European Commission, Inception Impact Assessment, Proposal for a Regulation by the Council and the European Parliament introducing a new competition tool, Ares(2020)2877634, 2.6.2020.
[182] European Commission, Inception Impact Assessment, Proposal for a Regulation by the Council and the European Parliament introducing a new competition tool, Ares(2020)2877634, 2.6.2020, p. 1.
[183] European Commission, Inception Impact Assessment, Proposal for a Regulation by the Council and the European Parliament introducing a new competition tool, Ares(2020)2877634, 2.6.2020, p. 1, emphasis added.

As outlined above, the establishment and functioning of the internal market is also inextricably linked to undisturbed competition.[184] With regard to merger control, *Franck et al.* argue that a non-harmonised control of acquisitions of gatekeepers by member states creates the risk of severe distortion of competition, which in turn runs counter to the proper functioning of the internal market.[185]

Another point of contact between these two regulatory systems is that pursuant to Art. 18(2) DMA, in cases where systematic non-compliance leads to an impairment of fairness and contestability, the Commission has the power to prohibit the undertakings designated as gatekeepers from concentrations within the meaning of the Merger Regulation for a limited period. However, if the DMA was not fundamentally intended to protect competition on the market, or if it pursued a different objective, it would be difficult to demonstrate why non-compliance with the behavioural requirements should be countered with an instrument of competition law.[186] It seems more likely that the two regimes are linked and work towards the same goal: the DMA is intended to ensure contestability and fairness of markets as part of competition protection in the EU.

In the overall picture, the overarching goal of the DMA appears to be more akin to that of European competition law than of another.[187] Consequently, the DMA cannot comprehensibly argue that it is actually pursuing a different objective than competition law[188] – rather, it appears that the DMA pursues the same regulatory goal as competition law.

[184] Protocol 27 on the internal market and competition; Bunte/*Käseberg*, Kartellrecht, Einl. zum EU-Kartellrecht para. 5; *Larouche/De Streel* 12 JECLAP 2021, 542 (543); MüKoEuWettbR/*Säcker*, 1. Teil Grundlagen para. 13; *Laitenberger* NZKart 2017, 89.
[185] *Franck/Montil/de Streel,* Art. 114 TFEU as a legal basis for strengthened control of acquisitions by digital gatekeepers, p. 46.
[186] The DMA even explicitly recognises in rec. 11 that merger control protects undistorted competition.
[187] *Lamadrid/Bayón,* Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 12 and fn. 71 available at https://antitrustlair.files.wordpress.com/2021/04/why-the-proposed-dma-might-be-illegal-under-article-114-tfeu-and-how-to-fix-it-3.pdf which also question the differentiating between the objectives.
[188] Similar *Haus/Weusthof* WuW 2021, 318 (319).

D. The Adequate Legal Basis: Art. 114, Art. 103 or Art. 352 TFEU?

Based on the foregoing analysis, it is questionable to what extent Art. 114 TFEU was appropriate as a competence norm for the adoption of the DMA.

The DMA identifies Art. 114 TFEU as the legal basis which serves as a harmonisation standard for the European internal market.[189] Art. 103 TFEU, on the other hand, constitutes the adequate legal basis for a Union act aimed at enforcing competition law[190], while recurrence must be made to Art. 352 TFEU for a competence exceeding regulation. As explained above, the objectives of the DMA are almost identical to those of European competition law, while the regulatory mechanisms are slightly different. This analysis focuses on whether Art. 114 TFEU was indeed the correct legal basis for the Platform Regulation, or whether it would have been better to base the DMA on Art. 103/352 TFEU or even on two provisions.

I. Requirements of the Correct Legal Basis

Based on the principle of conferral according to Art. 5(1), (2) TEU, the correct legal basis (competence standard) for the respective EU legal act must be determined. This is derived from the relevant provisions of the TFEU on the individual policy areas pursuant to Art. 2(6) TFEU.

1. Competence Type

The relevant competence standard in each case is determined by the focus of the measure. This depends in particular on the objective and content of the legal act.[191]

Art. 114 TFEU belongs to the competence for the internal market under Art. 4(2)(a) TFEU, which is shared between the Union and the Member States.[192] However, as mentioned above, the DMA serves a competition law objective. According to Art. 3(1)(b) TFEU, the Union has exclusive competence to establish the competition rules necessary for the functioning of the internal market. Therefore, there is a separate competence regime for competition rules in the internal market, which does not exist in the context of Art. 114 TFEU.

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[189] Calliess/Ruffert/*Korte* AEUV, Art. 114 paras. 2, 23.
[190] CJEU 15.7.1970 – C-41/69, ECLI:EU:C:1970:71 para. 60/62 – *ACF Chemiefarma NV/Commission.*
[191] CJEU 6.11.2008 – C-155/07, ECLI:EU:C:2008:605 para. 34 with further references – *Parliament/Council.*
[192] CJEU 10.12.2002 – C-491/01, ECLI:EU:C:2002:741 para. 179 – *British American Tobacco*; Calliess/Ruffert/*Korte* AEUV, Art. 114 para. 8 with reference to *Terhechte* EuR 2008, 143 (156).

Thus, it is necessary to examine which competence would have been the adequate one to examine the correct legal basis of the DMA.

2. The Standard: Necessity of Several Legal Bases?

In principle, the Union institutions can only act on the basis of a single legal basis.

According to the European Court of Justice, where more than one legal basis is possible, it must first be determined whether one of the objectives or elements is predominant.[193] If this is the case, the legal act must be based on the legal basis of the predominant objective or subject matter of the act. If the objectives or components are of equal importance and inseparably linked, then the acting institution must base the legal act on all relevant legal bases and cite them.[194]

In the case of the DMA, there are two possible bases of competence - the internal market competence (Art. 4(2)(a) TFEU) and the competence to adopt competition rules in the Union (Art. 3(1)(b) TFEU).

3. Prevalence of Internal Market Regulation or Competition Law?

The internal market is defined in Art. 26(2) TFEU as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. The internal market is characterised by its reference to basically any form of economic transactions.[195] The contestability and fairness of the market as the objectives of the DMA are thus an inherent part of the internal market.

In this respect, it has been argued that the regulation of gatekeepers, irrespective of their market power, is central and that the objectives of Art. 114 TFEU and the internal market harmonisation thus prevail.[196] As shown above, the basic objectives of the DMA are literally spoken different from those of competition law, but essentially the same. Although, the DMA follows a different regulatory approach than competition law, the competence rule is not based

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[193] CJEU 6.11.2008 – C-155/07, ECLI:EU:C:2008:605 para. 35 with further references – *Parliament/Council.*
[194] CJEU 6.11.2008 – C-155/07, ECLI:EU:C:2008:605 para. 36 with further references – *Parliament/Council.*
[195] Calliess/Ruffert/*Korte* AEUV, Art. 26 para. 28.
[196] *De Petris/Gasparotti/Harta/Kullas/Warhem*, The Digital Markets Act, The Commission's Plan to Revamp Competition Law for Digital Markets, cepInput, 24.11.2020, p. 15.

on regulatory considerations but on the purpose of the legislative act.[197] Where this coincides with that of competition law, the competition law competence applies.

This overlap makes it difficult to justify that the DMA merely falls within the internal market competence of Art. 4(2)(a) TFEU when, on the contrary, there is another competence provision in Art. 3(1)(b) TFEU.

This perception is also supported by the fact that in the Inception Impact Assessment the Commission named as a "legal basis for such a New Competition Tool […] Article 103 TFEU in combination with Article 114 TFEU"[198]. This was justified by the fact that "intervention at national level would not effectively address the cross-border dimension of **competition** related issues. This would likely lead to diverging rules, thus creating legal uncertainty for companies operating in the internal market, whether at national or on a pan-European basis"[199]. Thus, when considering this regulatory instrument, the Commission already understood the measures to be those of competition law within the internal market and proposed an appropriate legal basis accordingly. The fact that the final DMA now deviates from this cannot be reasonably justified.

The regulation of the digital sector is a Union-wide concern. The internal market and competition within it are inextricably linked.[200] It is therefore difficult to separate the two competences in relation to the DMA, so that both bases of competence must be considered appropriate and necessary in this case.

Therefore, only Art. 114 TFEU, which is based on the competence of Art. 4(2)(a) TFEU lacks the necessary legitimacy.[201] Based on this understanding, the Union legislator should have chosen a legal basis in accordance with both the competence for the internal market and the competence for the establishment of competition rules. It follows from the above that the Union legislator should have based the DMA on two legal bases in accordance with its two applicable competences.

[197] CJEU 6.11.2008 – C-155/07, ECLI:EU:C:2008:605 para. 34 with further references – *Parliament/Council.*
[198] European Commission, Inception Impact Assessment, Proposal for a Regulation by the Council and the European Parliament introducing a new competition tool, Ares(2020)2877634, 2.6.2020, p. 2.
[199] European Commission, Inception Impact Assessment, Proposal for a Regulation by the Council and the European Parliament introducing a new competition tool, Ares(2020)2877634, 2.6.2020, p. 2, emphasis added.
[200] Cf. *Falce* Eur J Privacy L & Tech 2021, 9 (10) which stresses that regulation and competition have an inseparable relationship.
[201] Cf. *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 4.

However, there is an exception to this principle. The CJEU has consistently held that such a combination is excluded if the two procedures of the respective relevant legal bases cannot be combined.[202] For this, however, the legal bases in question must first be identified.

II. The Objective of the Proper Functioning of the Internal Market – Art. 114 TFEU

The competence for establishing the rules for the proper functioning of the internal market according to Art. 4(2)(a) TFEU can result in the application of the legal basis of Art. 114 TFEU.

Art. 114 TFEU is sectoral in nature. In this context, the approximation of laws serves the realisation of the internal market, because it has been shown there that the instrument of approximation of laws is of enormous importance for the realisation of this internal market objective.[203] The competence basis originates from the fact that different national regulations could lead to formal barriers preventing the free movement of goods and services from Member States in the internal market of the EU.[204] However, Art. 114 TFEU is not to be overused as an universal legal basis,[205] therefore, the DMA must meet the requirements developed by the European Court of Justice.

1. Sector Specific Regulatory Approach and the Principle of Proportionality

According to the principle of proportionality, excessive regulations and laws should not be adopted. In this respect, the DMA approach, as a novel approach enforced through a regulation, must be necessary in the first place.

The DMA is intended to regulate the markets in the digital sector. However, it is questionable whether there was a need for a completely new regulatory regime, or whether there are already regulatory concepts in place that merely need to be adapted to digital markets. Markets selected for regulation should be those where competition law would be inefficient to solve possible problems.[206]

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[202] CJEU 11.6.1991 – C-300/89, ECLI:EU:C:1991:244 paras. 17 ff. – *Titanium Dioxide*; 6.11.2008 – C-155/07, ECLI:EU:C:2008:605, para. 37 with further references – *Parliament/Council*.
[203] Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV/*Terhechte* AEUV, Art. 114 para. 11.
[204] Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV/*Terhechte* AEUV, Art. 114 para. 11.
[205] *Blazo*, The Digital Markets acts: Between market regulation, competition rules and unfair trade practices rules, Strani pravni život, 66 (1), p. 120.
[206] *De Streel* XLVII Reflets et perspectives de la vie économique 2008, 55 (63).

In principle, competition law is considered flexible enough to cover and regulate the changes in the economy, including in the digital sector.[207] On the contrary, it has even been said that competition law is more flexible than regulation.[208] Moreover, as recent antitrust and competition law cases show, the Commission and national competition authorities have already taken action against Big Tech companies by applying or amending of competition law.[209]

As can be seen from these cases, competition law is well placed to deal with the problems of the digital economy. This is also supported by the fact that the DMA's catalogue of conduct is mainly based on older competition cases.[210] It is true that the DMA in Art. 12 offers the possibility to adapt this catalogue, but this will probably only happen if a new problematic constellation is identified.

Thus, almost all of the cases now covered by the DMA have already been challenged under competition law in various Member States or by the Commission. It cannot therefore be argued that competition law has not been adequate to address the problems. This is important with regard to the question of proportionality, which the EU legislator is obliged to observe when adopting rules, e.g. in the context of Art. 114 TFEU.[211] There may not have been legislation specifically tailored to this area, but existing legislation has been applied and has successfully restricted certain behaviour in the digital sector. In general, a more proportionate measure should be preferred to a per se and ex ante regulation.[212]

In this context, the problems arising from the fact that the DMA does not fit into the framework of competition law should be noted.[213] For example, the difficulties that arise when enforcement is carried out solely by the Commission have been addressed in competition law first by block exemptions and then by decentralisation through Regulation 1/2003.[214] These facilitating

[207] *Blazo*, Bypassing Competition Law, Bypassing through Competition Law, January 2022, p. 373; *Ezrachi*, EU Competition Law Goals and The Digital Economy, Oxford Legal Studies Research Paper No. 17/2018, p. 21; *Crémer/de Montjoye/Schweitzer*, Competition policy for the digital era, 2019, pp. 14, 39.
[208] Cf. OECD, Competition Enforcement and Regulatory Alternatives, OECD Competition Committee Discussion Paper, 2021, p. 8 available at http://oe.cd/cera.
[209] E.g., European Commission 27.6.2017 – AT.39740 – *Google Search (Shopping)*; 17.7.2019 – AT.40462 – *Amazon Marketplace*; 4.6.2021 – AT.40684 – *Facebook Marketplace*; Bundeskartellamt (German competition authority) 6.2.2019 – B6-22/16 – *Facebook*; 10th Amendment of the German Competition Act implementing Section 19a ACR concerning abusive conduct of undertakings of paramount significance for competition across markets.
[210] Cf. a.o. *de la Mano/Meunier/Stenimachitis/Hegyesi*, The Digital Markets Act - back to the "form-based" future?, Report May 2021, p. 37 para. 4.35.
[211] CJEU 3.12.2019 – C-482/17, ECLI:EU:C:2019:1035 para. 37 with further reference – *Czech Republic v Parliament and Council.*
[212] *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 12.
[213] *Massa* 26 YARS 2022, 103 (125 f.).
[214] *Basedow*, MPI Research Paper No. 21/2, p. 6.

frameworks cannot be applied to the DMA, as it has been officially classified as regulatory and not competition law.[215] Such enforcement problems may not be serious at the moment, but they may soon become a more significant problem as network effects intensify.[216]

Competition law can therefore address the difficulties of the digital sector.[217] In principle, there would be no need for sector-specific regulation, if basic principles already exist, as is the case with competition law. It is reasonable to assume that these rules should be adapted to create a single regulatory approach, rather than creating a completely new regulatory framework.

However, the DMA also correctly points out that the competition law framework is currently limited.[218] This is mainly due to the required market investigation and definition, ex-post enforcement, and the extensive investigation of complex facts on a case-by-case basis. Based on this, a new regulatory system is proposed.

It might be assumed that a new approach was needed in view of the new regulatory approach. Nevertheless, there is no denying that competition law has provided a framework that has already shown that it can deal with the problems of the digital economy. In spite of all this, this demarcation has to be understood as rather complementary. To base an act solely on Art. 114 TFEU seems rather far-fetched in this context.

2. Relevant Thresholds in the Context of Art. 114 TFEU

In order to be able to rely on Art. 114 TFEU as a legal basis, even if only in addition, several conditions must be met. The European Court of Justice has established certain thresholds to ensure the possibility of proper judicial review of legislative acts. Firstly, the measure must be aimed at improving the conditions for the establishment and functioning of the internal market and, secondly, the measure must do so by means of an approximation of laws.

a. Improvement of the Conditions on the Internal Market

The measure "must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market"[219]. The mere identification of differences

[215] Cf. *Falce* Eur J Privacy L & Tech 2021, 9 (16).
[216] *Basedow*, MPI Research Paper No. 21/2, p. 6.
[217] Different *Massa* 26 YARS 2022, 103 (125).
[218] Rec. 5 DMA; cf. Podszun, DMA, Introduction paras. 10 ff.
[219] CJEU 5.10.2000 – C-376/98, ECLI:EU:C:2000:544 para. 84 – *Advertising and sponsorship of tobacco products*.

between national provisions and the abstract risk of impairment of fundamental freedoms or of distortions of competition possibly arising therefrom are not sufficient.[220] However, this is not the case where there are differences between the laws, regulations and administrative provisions of the Member States which are likely to affect the fundamental freedoms and thus have a direct impact on the functioning of the internal market.[221] Moreover, Art. 114 TFEU serves as a legal basis if the differences in national laws lead to a significant distortion of competition.[222]

The DMA is intended to ensure contestable and fair markets which is an intention to ensure undistorted competition on the market. Moreover, it's object is the establishment and the contribution to the proper functioning of the internal market and to eliminate existing or likely emerging fragmentation.[223] The DMA thus also serves to ensure the free movement of goods/services within the EU and the internal market. The products in question, core platform services provided by gatekeepers, can in principle move freely within the EU. Different national regulatory regimes could conflict with this, as it would create a barrier to trade if services were restricted in certain Member States. The DMA aims to address this issue by establishing harmonised rules across the European Union.[224]

b. Harmonisation

The background to the design of the DMA and the basing of the Platform Regulation on Art. 114 TFEU was the intention to create a harmonised regime. The aim of this article is not so much the approximation of laws, but rather the realisation of the objectives of Art. 3(3)(1) TEU with the help of secondary law in order to reduce all kinds of obstacles resulting from the diversity of national rules.[225] In the light of the DMA, this is questionable with regard to Art. 1(5) and (6) DMA.

By approximating diverging national laws, the goal of the DMA is to eliminate obstacles to the freedom to provide and receive services within the internal market.[226] However, according to

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[220] Cf. CJEU 5.10.2000 – C-376/98, ECLI:EU:C:2000:544 para. 84 – *Advertising and sponsorship of tobacco products*.
[221] CJEU 4.5.2016 – C-358/14, ECLI:EU:C:2016:323 para. 32 – *Poland/Parliament and Council*; 5.10.2000 – C-376/98, ECLI:EU:C:2000:544 paras. 84, 95 – *Advertising and sponsorship of tobacco products*; 10.12.2002 – C-491/01, ECLI:EU:C:2002:741 paras. 59, 60 – *British American Tobacco*; 8.6.2010 – C-58/08, ECLI:EU:C:2010:321 para. 32 – *Vodafone and Others*.
[222] CJEU 8.6.2010 – C-58/08, ECLI:EU:C:2010:321 para. 32 – *Vodafone and Others*; 5.10.2000 – C-376/98, ECLI:EU:C:2000:544 paras. 84, 106 – *Advertising and sponsorship of tobacco products*.
[223] Rec. 7 DMA.
[224] Cf. *Akman*, Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act, p. 4.
[225] CJEU 9.12.1981 – C-193/80, ECLI:EU:C:1981:298 para. 17 – *Commission/Italy*.
[226] Rec. 8 DMA.

Art. 1(6) DMA the Regulation does not affect national and EU competition law. National competition law remains without prejudice to the extent that it applies to companies other than gatekeepers or imposes additional obligations on gatekeepers. This is circular in the sense that the reasons why a harmonisation is needed, i.e. divergent national regulations, nevertheless remain applicable because they fall under one of the exceptions in Art. 1(5) or (6).[227] However, the fact that national legislation can now also be enacted and applied in this area means that there is no real standardisation of the rules, but rather a very diverse catalogue of rules.[228]

Moreover, the Impact Assessment, in fact, observes that some Member States may even adopt additional parallel rules ("[a]lthough some national administrations such as those in France and Germany, have taken steps to implement national measures, these may be seen as supportive of and potentially complementary to EU solutions"[229]).[230]

The example of the German Section 19a ARC also illustrates this. Although the provision loses its main scope of application – the regulation of large players in the digital sector[231] –, it goes beyond the scope of application of the DMA due to its open wording.[232]

The rules that the Federal Cartel Office (the *Bundeskartellamt*) in Germany can prescribe can apply to other companies than gatekeepers within the meaning of Art. 3 DMA and are also possible without reference to core platform services within the meaning of Art. 2 No. 2 DMA.[233] In addition, Section 19a(2) Nos. 1, 2 and 3 ARC (except for the regulatory examples) and the regulatory examples of Section 19a (2) No. 7 ARC have broader language than the requirements of Art. 5, 6 and 7 DMA.[234] Consequently, in any case, there is no total alignment of the rules and in the worst case the exercise of these powers could even lead to a fragmented regulatory landscape and distortions in the markets.[235] This is also supported by the fact that some Member

[227] *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 5 f.
[228] Cf. *de la Mano/Meunier/Stenimachitis/Hegyesi*, The Digital Markets Act - back to the "form-based" future?, Report May 2021, p. 39 paras. 4.41 ff. which consider that different regulatory regimes could cause disparities in treatment.
[229] European Commission, Directorate-General for Communications Networks, Content and Technology, *Sunderland*/*Herrera*/*Esteves et al.*, Digital Markets Act: impact assessment support study: executive summary and synthesis report, Publications Office, 2020, p. 21.
[230] *Lamadrid*, 10 Comments on the Commission's DMA Proposal, Chillin'Competition, 17.12.2020.
[231] Bechtold/Bosch/*Bechtold/Bosch*, GWB, § 19a para. 1; MüKoEuWettbR/*Wolf*, GWB, § 19a para. 1.
[232] *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 6 f.
[233] Monopolies Commission Germany, Wettbewerb 2022 – XXIV. Hauptgutachten, p. 239.
[234] Monopolies Commission Germany, Wettbewerb 2022 – XXIV. Hauptgutachten, p. 239.
[235] *de la Mano/Meunier/Stenimachitis/Hegyesi*, The Digital Markets Act - back to the "form-based" future?, Report May 2021, p. 40 para. 4.42; *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 8.

States, like Sweden, are even relying on the DMA to justify the adoption of supplementary national rules on digital gatekeepers.[236]

This basic idea is not in itself objectionable. It is conceivable that competition concerns may also arise in relation to platforms that are not classified as gatekeepers, or that a gatekeeper may behave in accordance with the code of conduct, but this behaviour may nevertheless harm competition on the market. There may be national idiosyncrasies in different situations, as the digital economy is complex and multi-faceted.[237] Moreover, the DMA also has an ex-ante effect, so that, as a logical consequence of compliance, there should be fewer competition cases involving gatekeepers.[238]

However, if there is no harmonisation in the EU, relying solely on Art. 114 TFEU is hardly justifiable. The Union legislator repeatedly speaks of harmonised rules.[239] This is also supported by the blocking clause in Art. 1(5) DMA. However, the opening clause in Art. 1(6) DMA confirms that national and EU competition law remain unaffected. It will often be the case that an infringement of the DMA also constitutes an infringement of Art. 102 TFEU. Furthermore, Art. 114 TFEU falls within the competence shared between the Union and the Member States. Accordingly, there is no general primacy of application of the DMA over the competition law of the Member States. The latter therefore remains applicable in accordance with the principle of conferral where there is no factual overlap with the DMA.[240]

In the case of Section 19a ARC, this may be the case, for example, in the application of an efficiency defence.[241] The DMA explicitly excludes this. Although this makes the regulatory instrument more flexible, it can hardly be said that actual harmonisation will then take place in the Union. Since the efficiency defence, for example, leads to a reduced application of the DMA, it even undermines a minimum standard – if one is intended at all.

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[236] *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 8 and fn. 45 referring to the Swedish Competition Authority, The competition on digital platform markets in Sweden, English Summary of Report 2021:1, available at https://www.konkurrensverket.se/globalassets/dokument/informationsmaterial/rapporter-och-broschyrer/rapportserie/rapport_2021-1_summary.pdf last accessed on 10.5.2023.
[237] Friends of an effective Digital Markets Act, Strengthening the Digital Markets Act and Its Enforcement, Paper No. 1 of 27.5.2021, p. 1.
[238] *Geradin*, What will be the role of EU competition law in a post-DMA environment?, The Platform Law Blog, 2.2.2021 available at https://theplatformlaw.blog/2021/02/02/what-will-be-the-role-of-eu-competition-law-in-a-post-dma-environment/ last accessed on 10.5.2023.
[239] Art. 1 I, rec. 8, 15, 31, 92 DMA.
[240] Art. 5 (2) 1 TEU.
[241] *Brauneck* RDi 2023, 27 (33).

To this end, double jeopardy under the DMA and national law also appears possible, if the objectives are to be classified as distinct.[242] This cannot be intended in the sense of a constitutional interpretation of rules of conduct and violates fundamental principles of international law.[243]

The intended harmonisation, as set out in the legal basis of Art. 114 TFEU and in the DMA, is based on the understanding that the DMA and national competition law have different objectives. As this is not the case, there is no actual harmonisation. If national rules can exist or even be introduced which serve the same purpose as the DMA, it cannot be said to be a harmonisation measure.

Therefore, the DMA cannot really be seen as an act of harmonisation, provided that there are already national rules that have the same regulatory purpose but are not affected by the DMA.[244]

3. Conclusion

In conclusion, competition law is considered to be flexible enough to deal with the new issues that arise, including in the digital sector. Therefore, it would have been preferable to adapt and modernise existing competition law in order to possibly develop new approaches to the challenges of the digital age or to introduce a new competition tool, as originally intended. This would also offer the possibility of a more proportionate measure, as more targeted and nuanced remedies are preferable to the blanket prohibitions of the DMA's catalogue of obligations.[245]

However, as the DMA introduces a new concept for taming the digital gatekeepers, it is also reasonable to assume that the need for a new instrument has been established. This is consistent with the introduction of several different national approaches to regulating this sector. Moreover, sector-specific regulation is preferable in this case because it can intervene through an ex-ante approach before a market failure has been identified, whereas competition law traditionally only acts ex-post.[246]

[242] Cf. *Falce* Eur J Privacy L & Tech 2021, 9 (14); *Harta*, Marktmachtmissbrauch und Digital Markets Act, Big-Tech-Unternehmen droht Doppelverfolgung, cepInput, 28.9.2021; *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 8; *Puric* 5 ECLIC 2021, 295 (310).
[243] See also *Haus/Weusthof* WuW 2021, 318 (324) who advocate that there should be clarification in the DMA regarding the possibility of double jeopardy.
[244] *Eifert/Metzger/Schweitzer/Wagner* 58 CML Rev 2021, 987.
[245] *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 12 and fn. 72.
[246] *Petterssen*, Sector-Specific Ex Ante Regulation in Digital Markets - A Complement or Substitute to Antitrust Enforcement?, p. 3.

Since digitisation and BigTech companies have an overall impact on the EU as a whole and not only on individual Member States, it is plausible and even recommendable to address this problem at Union level by means of a harmonisation measure pursuant to Art. 114 TFEU.[247] It can therefore be assumed that Art. 114 TFEU is a suitable legal basis for the DMA to the extent that it provides for a Union-wide regulation of digital business models that have certain characteristics that are intended to ensure the proper functioning of the internal market.[248] However, the mere recourse to Art. 114 TFEU alone is not sufficient in the absence of actual harmonisation. [249]

III. The Objective of Ensuring Undistorted Competition on the Market

A sector-specific regulation does not exclude the possibility that this sector may also be affected by competition law. It is reasonable to assume that a sector-specific instrument should be introduced according to Art. 114 TFEU, however if it has a competition objective the legal competence basis must be adapted. This is also supported by the fact that, in contrast to a regular sector-specific approach, the DMA allows ex-post enforcement under Art. 18 – just like competition law.[250]

Hence, Art. 103 TFEU could be considered which serves as the antitrust-related regulatory authorisation according to the competence of Art. 3(1)(b) TFEU.[251] This authorisation allows the adoption of secondary legislation to implement the principles of Art. 101 and Art. 102 TFEU in European competition law.[252] Based on the previous remarks on the actual objective of the DMA as ensuring undistorted competition on the market, some have expected to find a reference to Art. 103 TFEU in the DMA.[253]

Art. 103 TFEU has certain parallels with Art. 114 TFEU. Art. 114 authorises the adoption of harmonising acts for the establishment and functioning of the internal market whereas an act under Art. 103 is not aimed at harmonising national law, but at enforcing the existing Union

[247] Cf. also *Haus/Weusthof* WuW 2021, 318 (319).
[248] Similar *Haus/Weusthof* WuW 2021, 318 (319).
[249] Cf. *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 4.
[250] *Petterssen*, Sector-Specific Ex Ante Regulation in Digital Markets - A Complement or Substitute to Antitrust Enforcement?, p. 3.
[251] In strong favour of Art. 103 TFEU as the appropriate legal basis for the DMA *Haus/Weusthof* WuW 2021, 318 (319).
[252] MüKoEuWettbR/*Korte*, AEUV, Art. 103 para. 1.
[253] *Basedow*, MPI Research Paper No. 21/2, pp. 4 f.; *Grünwald* MMR 2020, 822 (826); Monopolies Commission Germany, Wettbewerb 2020 – XXIII. Hauptgutachten, p. 50.

competition law.[254] Therefore, an overlap with Art. 114 is only possible where a regulation implementing European competition law is also aimed at the establishment or functioning of the internal market.[255]

If, however, secondary legislation is to be adopted to extend competences, recourse must be made to the supplementary competence clause in Art. 352 TFEU.[256] According to the European Court of Justice, Art. 352 TFEU applies in cases where the Community institutions do not have powers expressly or implicitly conferred on them by specific provisions of the Treaty and where such powers nevertheless appear necessary to enable the Community to carry out its tasks with a view to achieving one of the objectives laid down by the Treaty.[257] Protocol No. 27 expressly states that Art. 352 TFEU is to be applied when measures need to be taken to establish a system to protect competition against distortions. With regard to the competence under Art. 3(1)(b) TFEU, there is no adequate legal basis that actually allows the introduction of new competition rules. However, in order to exercise their competence in a meaningful way, the EU institutions are entitled to such a possibility.

The DMA goes beyond the basic principles regulated in Articles 101 and 102 TFEU.[258] It introduces a new per se and ex-ante approach to competition regulation and thus does not constitute an enforcement of existing competition law.[259] In this sense, it is an expanding legislative act of the EU and Art. 352 TFEU should have been applied.[260]

IV. Reverse Exception

It must be noted that both Art. 352 and Art. 114 TFEU can be considered as legal bases and that the Regulation should have been based on these two legal bases, as no objective is

[254] MüKoEuWettbR/*Korte*, AEUV, Art. 103 para. 11.
[255] MüKoEuWettbR/*Korte*, AEUV, Art. 103 para. 11.
[256] For a detailed analysis of the so-called flexibility clause of Art. 352 TEU see *Konstadinides*, Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause, 31 Oxford Yearbook of European Law 2012, 227.
[257] CJEU 28.3.1996 – Opinion 2/94, ECLI:EU:C:1996:140 para. 29 concerning Art. 235 EC Treaty.
[258] Cf. *Polley/Konrad* WuW 2021, 198 (199); *Haus/Weusthof* WuW 2021, 318 (319); *Zimmer/Göhsl* ZWeR 2021, 29 (32).
[259] *Lamadrid*, The Key to Understand the Digital Markets Act: It's the Legal Basis, Chillin'Competition, 3.12.2020, available at https://chillingcompetition.com/2020/12/03/the-key-to-understand-the-digital-markets-act-its-the-legal-basis/ last accessed on 10.5.2023.
[260] *Lamadrid*, The Key to Understand the Digital Markets Act: It's the Legal Basis, Chillin'Competition, 3.12.2020; *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 16; cf. Podszun/*Käseberg/Gappa*, DMA, Art. 1 para. 2 which advocate that Art. 103 TFEU would not constitute an adequate legal basis for the DMA; *Zimmer/Göhsl* ZWeR 2021, 29 (31); different opinion *Haus/Weusthof* WuW 2021, 318 (319).

dominant. In this respect, the question arises whether the procedures are compatible with each other.

Art. 352 TFEU provides for two procedural forms: the ordinary legislative procedure (Art. 289(1), 294 TFEU) or the special legislative procedure (Art. 289(2) TFEU). In any case, measures based on Art. 352 TFEU must be adopted unanimously in the Council. This restriction is a balance to the broad scope of the provision.[261] In addition, the Parliament must give its consent.

Legislation under Art. 114(1) TFEU is adopted through the ordinary legislative procedure (Art. 294 TFEU). The Council can therefore act by qualified majority (Art. 16(3) TEU). The European Parliament participates in the legislative procedure on an equal footing and can, for example, initiate substantive amendments to the Commission's proposal.[262]

As a result, the procedures are not compatible and a decision on a single legal basis is needed.

In this context, the question arises as to which legal basis should be given preference. It could be argued that the internal market competence of Art. 114 TFEU as an all-encompassing competence norm also includes the rules on competition and therefore serves as the adequate legal basis. Thus, this basis could be given preference since it aims at harmonisation in the internal market as well as regulating competition there in a harmonising manner.

However, this would ignore the fact that there is a more specific provision in the Treaty and would even circumvent the stricter requirements of the more specific legal basis. This cannot be desirable in terms of the rule of law. It is also pointed out in the literature that, following various amendments to the Treaties, there are now numerous special competences, including those relating to the internal market, with differentiated specifications. As a result, the general, cross-cutting competence for the creation of the internal market in Art. 114(1) TFEU has become dispensable and could be abolished.[263] In the event of an approximation of laws in the EU, recourse should then be made precisely to Art. 352 TFEU. Such a procedure would also avoid the questionable compatibility of the procedures in this case.

Art. 352 TFEU - the preference for stricter procedural rules would also lead to an increased legitimacy of the EU act. This is also in line with the reduced degree of legitimacy inherent in

[261] Grabitz/Hilf/Nettesheim/*Winkler*, AEUV, Art. 352 para. 100.
[262] Streinz/*M. Schröder*, AEUV, Art. 114 para. 70.
[263] *Calliess*, Rechtsangleichung in der EU – wie weit reicht die Einzelermächtigung zur Binnenmarktharmonisierung?, König/Uwer, Grenzen europäischer Normgebung, 2015, p. 58.

a general competence, especially in the context of the EU as a supranational union of states, which is based on the principle of conferral and does not have a competence-competence. A general competence can lead to the possibility of overstepping the conferred competences – it must therefore be interpreted narrowly.

V. Conclusion

Art. 114 TFEU could serve as a valid legal basis for the new approach in the DMA. However, the mere recourse to Art. 114 TFEU as a sole legal basis is not sufficient as the necessary harmonisation requirement is not achieved. As the Platform Regulation serves a competition law objective, Art. 103 and 352 TFEU as the competition law related competence provisions of the treaty are to be considered as well.

That this idea is not innovative is shown by the fact that the original proposal for the New Competition Tool was based on Art. 114 in conjunction with Art. 103 TFEU. The Regulation wants to concretise European competition law while at the same time it's aim is the establishment and proper functioning of the internal market.

Art. 114 TFEU refers to the objective of the internal market, which also includes a system of undistorted competition in the Member States.[264] However, insofar as restrictions of competition occur privately by companies, Art. 114 TFEU cannot be considered a sufficient legal basis, because Protocol No. 27 explicitly mentions Art. 352 TFEU.[265] The DMA does exactly this – it addresses the problem that competition is distorted by the behaviour of individual powerful digital companies. Moreover, the DMA in its current form does not achieve the degree of harmonisation required by Art. 114 TFEU. In this respect, it cannot be considered as the sole legal basis.

The Commission argues that competition law is unsuitable for regulating digital markets due to the ex-post power of intervention and the lengthy investigation procedures.[266] However, there is no evidence of unsuccessful competition proceedings by the Commission, particularly since some of the codified practices are based on old competition cases.

[264] Cf. Protocol 27 on the internal market and competition.
[265] *Basedow*, MPI Research Paper No. 21/2, p. 4.
[266] Rec. 5 DMA.

However, it seems that by not choosing Art. 352 TFEU as an extension of competence clause, the Commission rather pursues other objectives. If Art. 352 TFEU is the legal basis of a Union act, the regular European legislative procedure of Art. 294 TFEU does not apply.[267] Rather, according to Art. 352 TFEU, unanimity of the Member States is required. Whether this consensus would have been achieved seems highly questionable, considering that Ireland is in a special position as many of the major digital companies are headquartered there.[268] It is possible that the EU has therefore refrained from using this legal basis.

The applicable competence basis and the resulting legislative procedure in the treaties may not be circumvented by basing a regulation on another legal basis, so that corresponding requirements and complications are avoided.[269] The European Union and its institutions are based on the delegation of powers by the Member States and cannot therefore go beyond the limits and laws delegated to it.[270]

When an institution's competence is based on two Treaty provisions, it is obliged to adopt the relevant act based on those two provisions. As the Inception Impact Assessment and the previous analysis has shown, this was originally planned and was reasoned – by way of double proof.[271]

In conclusion, the Commission could base the DMA on Art. 114 TFEU but was also obliged to base it on Art. 352 TFEU. As the procedures of these legal bases are not compatible, a reverse exception has to be made, so that the necessary and appropriate legal basis for the platform regulation would have been Art. 352 TFEU. The DMA therefore lacks the necessary legal basis and the associated legitimacy and therefore cannot validly exist and can be declared invalid by the European Court of Justice.

[267] Measures may be adopted based on a qualified majority decision in the Council and after approval by the European Parliament; cf. concerning a description of the process under Art. 294 TFEU Calliess/Ruffert/*Kluth*, AEUV, Art. 294 paras. 5 ff.
[268] Cf. *Zimmer/Göhsl* ZWeR 2021, 29 (33); Podszun/*Käseberg/Gappa*, DMA, Art. 1 para. 2 speak of a political hurdle.
[269] Cf. CJEU 5.10.2000 – C-376/98, ECLI:EU:C:2000:544 para. 79 – *Advertising and sponsorship of tobacco products*.
[270] Principles of conferral and subsidiarity, Art. 5 TEU.
[271] Grabitz/Hilf/Nettesheim/*Ludwigs*, AEUV Art. 103 para. 4; this was done e.g., concerning the ECN+-Directive (Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11/3, 14.1.2019).

E. Consequences and Prospects

The choice of the wrong legal basis results in the unlawfulness of the legal act.[272] The DMA can be challenged with an action for annulment pursuant to Art. 263 TFEU and declared null and void by the CJEU pursuant to Art. 264(1) TFEU. Provided that the Commission will now take measures based on the DMA, these will then also not be valid.

Nevertheless, the DMA's approach is not in doubt. The huge differences, especially in the regulatory mechanisms, deserve to be called revolutionary. In recent years, various authorities have tried to cope with the digital sector and the rapid changes in the economy. It has become clear that a new approach is needed to meet the challenges. However, it is questionable to what extent the good approach of the DMA will now disappear as a result of an illegal legal basis, or what options are available to the Commission to usher in a new era of the digital revolution.

The Commission has several options to continue to pursue the approach of the DMA. However, it is important to consider the initial objective sought by the EU legislator with the Platform Regulation.

I. The Intended Harmonisation

From the Commission's point of view„[c]ommon rules across the single market will foster innovation, growth and competitiveness, and facilitate the scaling up of smaller platforms, small and medium-sized enterprises and start-ups who will have a single, clear framework at EU level"[273].

Therefore, the DMA provides for harmonisation in order to create a uniform legal framework in digital markets.[274] The need for harmonisation is based on the assumption that the inherently transnational nature of the services provided by the major online platforms means that no single Member State can effectively regulate them on its own.[275] Therefore, the DMA does not see

[272] The situation is only different if the legislative procedures have the same prerequisites, since then it is merely a matter of a formal error cf. CJEU 27.9.1988 – C-165/87, ECLI:EU:C:1988:458 para. 19 – *Commission/Council*. However, this is not the case here.
[273] European Commission, Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets, available at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349 last accessed on 10.5.2023.
[274] Art. 1 I, rec. 8, 15, 31, 92 DMA.
[275] European Commission, Directorate-General for Communications Networks, Content and Technology, *Sunderland/Herrera/Esteves et al.,* Digital Markets Act: impact assessment support study: executive summary and synthesis report, Publications Office, 2020, p. 21.

itself as part of antitrust law, but rather as a sector-specific regulation and, in the interest of legal uniformity, seeks to prevent member states from creating comparable regulations of their own, even if this seems questionable with regard to Art. 1(5) and (6).

As the harmonisation of rules in the Union is a major concern of the DMA, this need for harmonisation must be taken into account when trying to propose a new regulatory approach. This will give the Commission the opportunity to develop a genuine approach to harmonisation in the future.

II. The Amendment of the Treaty – Art. 48 TEU

One way to take a step towards digital regulation is to amend the Treaties of the European Union in accordance with Art. 48 TEU.[276] The new approach of the DMA could be incorporated into the Treaties within the framework of competition law and in particular the concentration of market power, Art. 102 TFEU.

The revolutionary mechanism adopted by the DMA is particularly emphasised by its ex-ante and per se rulemaking approach, which distinguishes the platform regulation from competition law.[277] A similar approach in the Treaties could bring about a revolutionary change in the whole of competition law. Art. 48 TFEU explicitly provides for such an amendment of the Treaties in order to adapt the framework of EU law and policy to the new challenges facing the EU.[278] This would be particularly advisable in view of the fact that, due to digitalisation and the rapid changes in market conditions, a modern and flexible competition law as a whole would be helpful. So far, the DMA is a very sector-specific regulation that cannot be extended to other areas. A forward-looking approach towards a real revolution would require the creation of an open-ended regulation that can be flexibly applied to a wide range of areas.

This would also have the effect of making the rules directly applicable to inter-state situations, and of making the rules European primary law and thus uniformly applicable. Therefore, harmonisation could be achieved in the EU, as the digital sphere is most likely to have cross-

[276] Subject to any special provisions, amendments to the treaties shall only be possible by way of the amendment procedure cf. CJEU 8.4.1976 – C-43/75, ECLI:EU:C:1976:56 para. 56/58 – *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*.
[277] Cf. *Kerber*, Taming tech giants with a per-se rules approach? The Digital Markets Act from the "rules vs. standard" perspective, 2021, p. 5; *Massa* 26 YARS 2022, 103 (127).
[278] However, the treaties are characterised by a certain degree of statism, which is reflected in the double reservation of consent within the framework of Art. 48 TEU cf. Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV/*Franzius*, EUV, Art. 48 para. 2.

border relevance.[279] However, insofar as the Commission is currently advocating a harmonised approach, it should be noted that the DMA as it stands provides for a harmonised standard to apply. The DMA provides for harmonised rules in Art. 1(5) and (6). However, this approach is likely to lead to fragmentation as different regulatory approaches will be enforced both by the Commission and by national competition authorities. Two authorities enforcing two sets of rules that essentially have the same objective will lead to opacity and the risk of inconsistencies. On the other hand, national authorities and the Commission would be enforcing the same provision if such a provision were included in the Treaties. If the Commission were to publish corresponding guidelines, for example, the risk of divergent interpretations would also be reduced. After all, this approach has already been successfully applied in competition law.

It would also leave the way open for stricter national competition law, so that digital regulation remains possible at national level. Given the difficulties of digital regulation and the fast pace of the Internet, it is clear that an effective legal instrument is needed. To the extent that stricter rules are possible at national level, as in the context of Art. 102 TFEU, this can lead to a more effective limitation of distortions of competition and thus to greater contestability and fairness in the market. Where Member States provide for a stricter regime, they tend to protect the market and competition from risks to a greater extent than is already provided for by primary European law.[280]

However, it could prove extremely difficult to achieve the necessary unanimity in the Council or to get the amendment ratified by the Member States, as required by Art. 48 TEU. The higher threshold for approval of an amendment to the Treaties is also understandable in view of the chain of legitimacy and the fact that the Member States are the "*Guardians of the Treaties*".[281] In this respect, it is questionable whether such a procedure would be an appropriate option for the Commission.

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[279] ACCC, Digital Platforms Inquiry, Final Report, 2019, pp. 4, 44.

[280] According to Art. 3 (2) sentence 2 of Regulation 1/2003, national law may be stricter than Union law in the context of unilateral restrictions of competition. This has been reflected, for example, in Section 20 ARC, which extends the prohibition of Art. 102 TFEU to companies with relative and superior market power.

[281] Cf. The German Federal Constitutional Court (German: *Bundesverfassungsgericht*) 8.4.1987 – 2 BvR 687/85, BVerfGE 75, 223 (242); 30.6.2009 – 2 BvE 2/08 et. al., BVerfGE 123, 267, paras. 231, 235, 271.

III. Proposing a New “New Competition Tool” – Art. 352 TFEU

The great revolution that the DMA was intended to bring about in the form of a new competition tool has failed to materialise. In the absence of any reference to competition law, the draft does not provide for a new competition tool that can fully meet the challenges of the digital age.[282]

The idea behind the DMA and its new approach, on the other hand, is revolutionary. The possibility of conducting a market investigation with a view to possibly updating the list of core platform services and the possibility of adding new practices to the catalogue of Art. 5 and 6 are an excellent starting point for an effective and modern competition law.[283] It has also been evident for some time that more regulatory approaches are being introduced into competition law[284] – this can be continued with a new competition tool.

Moreover, a closer examination has shown that the objectives of the DMA and competition are nearly identical. This literal distinction was the basis for qualifying the DMA as regulatory law and thus for basing it on Art. 114 TFEU, which is not a sufficient legal basis. Moreover, as already mentioned in the Inception Impact Assessment, one of the aims of the DMA was to counteract increasing market concentration – an essential pillar of competition law.[285] Even in the absence of individual market power, “increasingly concentrated markets can allow companies to monitor the behaviour of their competitors and create incentives to compete less vigorously without any direct coordination (so-called tacit collusion)”[286]. A new competition tool that fits into the framework of competition law is therefore possible and necessary.

However, the DMA has now introduced a new system to counter digital regulation with new approaches. At first glance, these new, revolutionary approaches seem very promising. The problem is that the regulatory and enforcement mechanisms do not fit into the existing system of competition law. This leads to relatively vague statements in Art. 1(5) and (6) DMA on the relationship between competition law and other provisions of the DMA. However, the DMA

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282 *Zimmer/Göhsl* ZWeR 2021, 29 (49).
283 Cf. *Massa* 26 YARS 2022, 103 (122) who advocates that the competition in digital markets could greatly benefit from a tool like the DMA with certain adjustments.
284 OECD, Competition Enforcement and Regulatory Alternatives, OECD Competition Committee Discussion Paper, 2021, p. 38.
285 European Commission, Inception Impact Assessment, Proposal for a Regulation by the Council and the European Parliament introducing a new competition tool, Ares(2020)2877634, 2.6.2020, p. 1 with a reference to the European Commission Staff Working Document, Single Market Performance Report 2019, 17.12.2019, SWD/2019/444 final.
286 European Commission, Inception Impact Assessment, Proposal for a Regulation by the Council and the European Parliament introducing a new competition tool, Ares(2020)2877634, 2.6.2020, p. 1.

explicitly aims to create a single regulatory system in the Union – a contradiction in itself, as national competition law can continue to apply.

Furthermore, an attempt to integrate the existing system of the DMA into competition law would be desirable. It can generally be assumed that competition law is more flexible in dealing with unexpected circumstances and problems due to open facts. The rigid regulatory model is inferior to this. Thus, if the new approach were to be combined with the existing general clauses of competition law, there would be more possibilities to act flexibly and quickly. This would also work in favour of faster enforcement.

For the aforementioned reasons, it would be advisable for the Commission to correct its mistake by actually proposing a new *New Competition Tool* by implementing the regulatory techniques proposed in the DMA and transferring them into a new competition law instrument. As originally planned, the Commission should create a new digital competition law mechanism and develop a harmonised regulatory approach, based on Art. 352 TFEU.[287] This would result in the tool being integrated into existing, established competition law and would address the competition policy tensions created by the increasing digitalisation of society and the economy.[288]

The benefits are obvious. The DMA protects competitive interests – it must therefore be implemented in the competition law system. The proximity to competition law is undeniable: the designation of gatekeepers by means of thresholds does not concretise anything other than a certain degree of market dominance, and the catalogue of conduct does not concretise anything other than the abuse of this position.[289] With the current distinction, the Commission is denying itself access to important competition tools.

The creation of a new competition instrument would also make it possible to benefit from the experience of the antitrust mechanism. Years of enforcement by the Commission and individual national authorities have built up a wealth of experience and the necessary resources are already in place and ready to be used. These include human resources, technical equipment and expertise, and access to communication networks such as the European Competition Network

[287] *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 16.
[288] Cf. European Commission, Inception Impact Assessment, Proposal for a Regulation by the Council and the European Parliament introducing a new competition tool, Ares(2020)2877634, 2.6.2020, p. 1.
[289] Cf. *Basedow*, MPI Research Paper No. 21/2, p. 5

(ECN).[290] At present, there may not be many gatekeepers, but it is very likely that, especially in view of extreme network effects, many new companies providing platform services will soon exceed the thresholds. The Commission will then quickly reach the limits of its capacity. To counteract these capacity limits of the Commission, the antitrust regulation 1/2003 introduced a decentralisation of competition law enforcement. In view of the Community impact and the expansion of the digital sector, it does not seem advisable not to make use of this possibility now.

Moreover, the fact that the DMA is outside the scope of competition law means that the automatic invalidity clause of Art. 101(2) TFEU does not apply either. If a contractual clause violates the DMA, it is not automatically null and void, but its validity will be determined by national courts in accordance with national law.[291] This means that the DMA is only effective to the extent that national law provides that a breach of EU law renders the clause null and void. Embedding the instrument in competition law would avoid this uncertainty and detour.

Furthermore, the choice of a legal basis for competition and the associated creation of a competition instrument would open up the possibility of granting the Commission direct powers of intervention.[292] The introduction of a far-reaching New Competition Tool was not possible in view of Art. 114 TFEU.

Ultimately, this could also resolve the debate on the relationship between the DMA and competition law. Concerns have been raised in the literature about the compatibility of measures and sanctions under national competition law with the DMA: Do decisions already taken remain valid? Do gatekeepers face double jeopardy? Does this violate existing international law? All these questions could be resolved by structuring the DMA as competition law, so that a clear allocation is possible..

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[290] Therefore, many competition authorities have also supported the creation of a mechanism of close cooperation like the one under competition law rules which has proven to work efficiently in recent years, cf. ECN, Joint paper of the heads of the national competition authorities of the European Union - How national competition agencies can strengthen the DMA.
[291] *Basedow*, MPI Research Paper No. 21/2, p. 6.
[292] *Zimmer/Göhsl* ZWeR 2021, 29 (49).

IV. The DMA … But Different – Art. 103 and 114 TFEU

A final alternative would be to introduce the DMA on the basis of Art. 103 in conjunction with Art. 114 TFEU as originally planned for the *New Competition Tool*. This would have the same advantages as mentioned above.

However, in order to base the DMA on Art. 103 and 114 TFEU in a meaningful way, some changes would have to be made. In order to achieve real harmonisation, Art. 1(5) and (6) DMA would have to be amended. Undertakings or services designated as gatekeepers under the DMA should not be subject to additional obligations under national laws that have the same main objectives as the DMA. This would lead to fragmentation. To take account of the desire of national competition authorities to be involved in the enforcement process, they could be given a role in the designation process – conceivably, national gatekeepers could be designated in individual Member States.[293]

In addition, certain changes would have to be introduced to ensure proportionality. This can only be done by integrating it into existing competition law. As the legal basis of Art. 103 TFEU already presupposes, existing competition law must be enforced. Accordingly, this regulatory regime would have to be approximated by, for example, including the possibility of an efficiency defence in the proposal and amending the list of obligations to be exhaustive.[294]

Moreover, the necessary enforcement of the principles of Art. 101 and 102 TFEU could be justified by the fact that the designation of the gatekeeper is essentially a concretisation of the market dominance of Art. 102 TFEU, and the conduct obligations are a concretisation of the abuse.[295] It would be advisable, however, for this clarification to be included in the recitals and the text of the Regulation. This would ensure the integration of the DMA into competition law and as a result, the Platform Regulation would constitute an enforcement of the existing competition law.

[293] *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 17.
[294] Cf. *Lamadrid/Bayón*, Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It, 2021, p. 17.
[295] *Basedow*, MPI Research Paper No. 21/2, p. 5.

F. Conclusion

The DMA is a completely new regulatory instrument in the system of regulation of the digital sector. It addresses the difficulties of the digital economy with an ex-ante approach and clearly written do's and don'ts. Once designated as a gatekeeper, the rules have direct effect and do not require further enforcement. This approach is intended to make regulation more effective, faster and more modern, and differs in this respect from the traditional methods of European competition law.

However, the legal basis of Art. 114 TFEU requires that secondary legislation be directed towards the establishment and functioning of the internal market. This legislative task is measured by the content and objectives of the regulation. It cannot be claimed that the DMA fulfils these requirements. Rather, the DMA has, at least ostensibly, a competitive objective and is designed to protect the digital market from distortions of competition.

The mechanism of the DMA, with its per se rules and ex-ante effect, differs from that of competition law, with its essentially abstract general rules and ex-post intervention. Nevertheless, certain ex-ante measures can also be found in competition law, for example in the context of merger control. In principle, however, the DMA has the advantage over competition law of being able to intervene more quickly. This is mainly due to the fact that there is no need to carry out a market analysis, but that the DMA intervenes automatically after the designation of a gatekeeper, without the need to establish distortions of competition. Moreover, the decision to refrain from using the tried and tested instrument of competition law is questionable. It is precisely the competition law framework of cooperation, EU regulations and primary law as well as human and technical resources that provides an excellent external framework for market protection. The lack of embedding in this system seems just as risky in terms of effective enforcement as the creation of a completely new regulatory framework.

However, there is also a striking degree of overlap in the regulatory frameworks with regard to the objectives. Officially, the DMA appears to be aimed only at ensuring market contestability and fairness, thus ensuring the proper functioning of the internal market. However, these objectives are inextricably linked to the protection of competition from distortion. Keeping markets open and any market position contestable has always been a key objective of competition law. Therefore, both frameworks address market failures to ensure contestable and competitive digital markets for greater consumer choice and innovation.

On the basis of the above overall analysis, the Commission cannot convincingly demonstrate that the Digital Markets Act is **not** aimed at protecting competition. The objectives of contestability and fairness of digital markets demonstrate the intention to establish a regulatory framework that protects competition from distortion. The link to competition law is inherent in the DMA.

The absolute rejection of the competition link, which clearly exists, has led to the regulation being based solely on Art. 114 TFEU, whereas the DMA represents an extension of European competition law. This extension required the competence extension clause of Art. 352 TFEU. By referring only to Art. 114 TFEU, it was possible to circumvent the requirement of unanimity laid down in Art. 352 TFEU. However, if a secondary act refers to several treaty provisions, it must be based on all of them, according to the established case law of the European Court of Justice. Due to the incompatibility of the procedures, however, a reverse exception to this principle must be made. In this respect, only Art. 352 TFEU is the only legal basis that can be considered as appropriate. The protection of undistorted competition takes precedence over the establishment of the internal market, in particular in view of the fact that fair competition is inherent in the functioning of the internal market. Therefore, the Union legislator has not chosen an appropriate or sufficient legal basis for the DMA.

It must therefore be concluded that the DMA is insufficiently founded on an inadequate legal basis and is therefore invalid. In this respect, the European Court of Justice can declare the Regulation null and void.

However, there are a number of ways in which the Commission can still achieve consistent rules across the Union in order to implement the revolutionary approaches to platform regulation in the Union. In particular, it should be noted that one of the main objectives of the DMA is to create a harmonised approach to digital regulation in the Union. On this basis, the Union legislator has three main options.

On the one hand, a concept of ex ante regulation could be introduced into the Union's competition law by amending the Treaties in accordance with Art. 48 TEU. This would lead to the automatic harmonisation of rules as European primary law. However, it seems unlikely that the Commission would take this step and that the unanimity requirement for amending the Treaties would be met.

Another possibility is the actual introduction of a new competition tool. As originally intended by the Commission, the rules should be introduced as new competition law, but on the basis of Art. 352 TFEU. However, the strict requirements of Art. 352 TFEU would also have to be met, but this would also ensure greater legitimacy. This approach would make it possible to propose a single regulatory approach and would also eliminate the problem of conflicting concepts that currently exists under the DMA. The distinction between competition law and internal market law gives rise to various complications which could be avoided by a single regulatory instrument. As a real new competition law, the Platform Regulation based on Art. 352 TFEU could be embedded in the existing framework of competition law.

The last possible option to maintain the DMA mechanism is to base the Regulation on Art. 103 in conjunction with 114 TFEU. In this respect, however, certain changes have to be made to the system in order to be able to reasonably rely on these provisions and to avoid the need to rely on Art. 352 TFEU. These include, for example, the creation of an actual harmonisation measure and the modification of the regulatory techniques in order to fit them into the existing system of competition law. There may be certain departures from traditional competition law, but the overall aim is to create a single set of rules with a focus on faster and more harmonised enforcement across the EU.

The Commission's approach in the DMA to the regulation of BigTech and the ongoing digitalisation of markets and products can be seen as positive and revolutionary. All necessary steps must be taken to ensure that the digital economy is effectively regulated. In this respect, an effective, safe and legally adequate approach to this problem must be presented, as the DMA is not suitable for this purpose due to its inadequate legal basis.

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