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The Digital Markets Act

The Commission's Plan to Revamp Competition Law for Digital Markets

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The Commission is to release the Digital Markets Act, a legislative proposal aimed at ensuring competition in digital markets. It will consist of two pillars:

- The "new competition tool" shall allow the Commission to intervene in digital markets which display "structural competition problems that prevent markets from functioning properly". The tool shall apply to undertakings regardless of whether they are dominant or non-dominant.
- The "ex-ante instrument" shall establish obligations for digital platforms acting as "gatekeepers".

In light of two consultations and a speech by Executive Vice-President Margrethe Vestager, the Centres for European Policy Network raises the following points:

- To avoid legal uncertainty, the Commission needs to define properly "structural competition problems".
- The Commission should strive to ensure that the Digital Markets Act only applies to undertakings whose market power is very unlikely to be contestable and could be leveraged into adjacent markets, with a serious risk of hindering competition in those adjacent markets.
- The Act interferes with fundamental rights: the freedom to conduct a business and the right to property. Therefore, the undertakings must have the right to challenge these measures before a court.

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1 Introduction

On 29 October, Executive Vice-President Margrethe Vestager delivered a speech[1] in which she discussed an upcoming regulatory proposal on how to revamp EU competition law in the digital markets and specifically regulate certain large online platforms. Vestager's upcoming proposal can be traced back to the mission letter[2] in which Commission President von der Leyen tasked Executive Vice-President Vestager with ensuring that "competition policy and rules are fit for the modern economy" and with "strengthening competition enforcement in all sectors".[3]

There is, in fact, a broad discussion currently underway among academics and policy makers on whether EU competition rules are fit for the modern economy or contain some regulatory gaps, especially regarding digital markets.[4] According to the Commission, there are gaps and they appear because digital markets possess a combination of characteristics that makes them different from other markets. This combination consists of:

- significant economies of scale, i.e. cost advantages because an increased output reduces the average costs,
- significant economies of scope, i.e. cost advantages from using infrastructure and data that are already available when providing a new service,
- significant network effects, i.e. the incremental benefit to all existing users which comes from a new user joining the network,
- zero pricing, i.e. the significantly greater demand for a good or service at a price of exactly zero, compared to a price even slightly greater than zero, and
- data dependency, i.e. dependence on the access to data in order to offer products and services.

The Commission states that there are four regulatory gaps in EU competition law as it stands, notably when applied to digital markets.

Firstly, in digital markets, a non-dominant undertaking can sometimes very quickly tip a market in its favour. Tipping happens when a market characterized by strong positive network effects with several providers transforms into a monopolistic market. According to the Commission, once a digital market has tipped in favour of one undertaking, the market power of that undertaking can hardly be contested. Furthermore, in digital markets, non-dominant undertakings too can exercise market power detrimental to competition, without forcing the market to tip in their favour, e.g. by making switching to a competitor difficult. Art. 102 TFEU prohibits undertakings from abusing a dominant position. As it only covers dominant undertakings, there is currently no way to intervene in order to prevent a market from tipping or to prevent a non-dominant undertaking from restricting competition.

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1 European Commission (2020), Speech by Executive Vice-President Margrethe Vestager: Building trust in technology.

2 European Commission (2019), Mission letter to Margrethe Vestager, Executive Vice-President for a Europe fit for the Digital Age of 01 December 2019.

3 Ibid, p. 5.

4 Cf. e.g. Crémer, J./de Montjoye, Y.-A./Schweitzer, H. (2019), Competition policy for the digital era; University of Chicago Booth School of Business (2019), Stigler Committee on Digital Platforms: final report; Marsden, P. / Podszun, R. (2020), Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement; Schweitzer, H./ Haucap, J./Kerber, W./Welker, R. (2018), Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen; Monopolkommission (2020), Wettbewerb 2020; Autorité de la concurrence / Bundeskartellamt (2019), Algorithms and Competition.

Secondly, once a market has tipped in favour of one undertaking, this undertaking can leverage its market power into an adjacent market – i.e. a vertical or horizontal integration – with the risk of tipping this market as well. The undertaking may do so, for instance, by using the data that it has gathered in the tipped market to provide a new product or service. Such leveraging might not necessarily constitute an abuse within the meaning of Art. 102 TFEU.

Thirdly, due to the aforementioned combinations of characteristics in digital markets, certain online platforms operate as gatekeepers, i.e. they control and restrict access to their platforms. Furthermore, as gatekeepers platform providers can determine the conditions which have to be accepted by undertakings that want to access the platform.[5] Gatekeepers can do this because business users rely on access to such platforms in order to reach prospective customers, e.g. through a listing in an online marketplace ("intermediary power"). This gives platform providers the power to impose trading practices on their users which hinder or even prevent the emergence or growth of other competing platforms. Examples of such practices are best-price clauses that prohibit undertakings from offering their products more cheaply through other distribution channels. Furthermore, as gatekeepers, such platform providers can exploit their business users by imposing commercial conditions that heavily favour the platform provider.

Fourthly, if the provider of an online platform is itself commercially active on its own platform and therefore competing with other business users on its platform, it can e.g. self-preference its own products or services, prohibit powerful competitors from entering the platform, or impose discriminatory conditions on them. Such behaviour distorts competition on the platform in favour of the provider. This cannot be adequately tackled by means of the existing competition law notably due to the long duration of competition proceedings. For example, in 2010, the Commission opened an investigation against Google based on the accusation that Google was self-preferencing its own Google Shopping, by displaying it more favourably in its general search results pages. In 2017, the Commission imposed a fine on Google, which took the case to court. To this day, there has not even been a decision from the EU's General Court, let alone from the European Court of Justice. Consequently, enforcement takes too long for remedies to be fully effective. Additionally, there is still a lack of clarity about the circumstances under which self-preferencing might constitute an abuse.

In order to tackle these four problems, and because some Member States have introduced legislative changes at national level, which take different approaches,[6] the Commission will release a regulatory proposal for a Digital Markets Act (hereinafter: "DMA"). Section 2 below introduces the DMA and its possible content. Section 3 provides an overview of the existing and proposed national legislation on the matter in France, Germany, and Italy. Finally, Section 4 gives an economic and legal assessment of the envisaged DMA.

2 The Digital Markets Act (DMA)

According to Executive Vice-President Vestager[7], the upcoming DMA – which aims to tackle the regulatory gaps highlighted in Section 1 – will consist of two pillars. Pillar 1 will create a "new

[5] European Commission (2020), Inception Impact Assessment ARES(2020)2877647 of 02 June 2020, Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers, p. 1.

[6] European Commission (2020), Inception Impact Assessment ARES(2020)2877647 of 02 June 2020, Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers, p. 1.

[7] European Commission (2020), Speech by Executive Vice-President Margrethe Vestager: Building trust in technology.

competition tool" (hereinafter: "NCT"),[8] while pillar 2 will establish an "ex-ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers" (hereinafter: "EAT")[9].

2.1 Pillar 1: New Competition Tool (NCT)

The NCT[10] aims to tackle the problem of non-dominant undertakings restricting competition or even tipping a market in their favour and the problem of undertakings in tipped markets leveraging their market power into an adjacent market with the risk of tipping this market as well. Therefore, according to Vestager, the NCT will enable the Commission *"to tackle market failures (..) in digital markets and prevent new ones from emerging."*[11]

The NCT shall apply to undertakings operating in digital markets. In contrast to Art. 102 TFEU, it is not relevant whether an undertaking is dominant or non-dominant for it to fall under the NCT. Instead, the Commission intends to apply the NCT to undertakings operating in a digital market where a "structural risk for competition or a structural lack of competition prevents the market from functioning properly" [12]. The existence of such structural issues might be established by the Commission if, for instance:

- a market is highly concentrated,
- entry barriers exist,
- consumers are locked into e.g. a certain platform,
- one undertaking operating in the market has accumulated a vast amount of data, or
- undertakings operating in the market lack access to data.

It is not yet clear which undertakings operating in such a market will be subject to the NCT. However, it is likely that it will apply first and foremost to undertakings with at least some degree of market power. The Commission envisions the possibility of imposing tailor-made remedies aimed at certain large online platforms on a case-by-case basis where necessary and justified.[13] This seems to suggest that the NCT might have a fairly limited scope of application.

If the NCT targets an undertaking, the Commission shall be allowed to impose behavioural and structural remedies, tailored according to the market or the undertaking in question. The Commission does not state which behavioural and structural remedies it has in mind, but if it follows EU merger law, behavioural remedies might include prohibitions to bundle products, obligations to supply, obligations to licence key technology or to provide access to infrastructure and key assets.[14]

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[8] European Commission (2020), Inception Impact Assessment ARES(2020)2877634 of 02 June 2020, New Competition Tool.

[9] European Commission (2020), Inception Impact Assessment ARES(2020)2877647 of 02 June 2020, Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers.

[10] European Commission (2020), Inception Impact Assessment ARES(2020)2877634 of 02 June 2020, New Competition Tool.

[11] European Commission (2020), Speech by Executive Vice-President Margrethe Vestager: Building trust in technology.

[12] European Commission (2020), Inception Impact Assessment ARES(2020)2877634 of 02 June 2020, New Competition Tool, p. 2.

[13] European Commission (2020), Inception Impact Assessment ARES(2020)2877647 of 02 June 2020, Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers, p. 4.

[14] Ezrachi, A., Under (and Over) Prescribing of Behavioural Remedies, The University of Oxford Centre for Competition Law and Policy Working Paper (L) 13/05; European Commission (2008), Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 of 22 October 2008, OJ 2008/C 267/01, para. 69; Wilson, T., Merger remedies – is it time to go more behavioural? <

Structural remedies usually take the form of a divesture, e.g. selling a business unit or the removal of links with competitors.[15] As the Commission assured that it will not declare the existence of an infringement of EU competition law, fines will not be imposed.[16]

2.2 Pillar 2: Ex-Ante Instrument (EAT)

The ex-ante instrument[17] aims to tackle the problems of gatekeepers preventing the emergence or growth of other competing platforms and limiting competition on their own platform, e.g. by self-preferencing their own products or services. It has the goal of ensuring that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, and new market entrants.[18]

The ex-ante instrument will apply to undertakings operating in digital markets. Specifically, it will apply to a subset of undertakings identified on the basis of a set of criteria such as: [19]

- significant network effects,
- the size of the user base, or
- the ability to leverage data across markets.

Undertakings to which the ex-ante instrument applies will have to abide by a clear list of obligations and prohibited practices, which might include e.g.: [20]

- obligations to provide specified information,
- a ban on certain types of self-preferencing, and
- a ban on leveraging data acquired from a business user, that relies on the gatekeeper's platform, for the purpose of competing against the same business user in its own market.

A precise list of obligations and prohibited practices is not currently available.[21] Also, it is not clear how the Commission will enforce compliance with the rules set out in the ex-ante instrument. However, it is likely that enforcing these obligations will be swifter and easier than currently possible. Under Art. 102 TFEU, the Commission must prove dominance and an abuse, both of which are very vague terms and may be difficult to establish. By contrast, under the ex-ante instrument, the Commission would merely have to prove that an undertaking already defined as a gatekeeper[22] has carried out one of the actions included on the "blacklist". This will provide for easier and swifter enforcement.

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http://competitionlawblog.kluwercompetitionlaw.com/2020/02/21/merger-remedies-is-it-time-to-go-more-behavioural/ > (last access: 19 October 2020).

15 Commission notice on remedies, para. 15, 17, 22 ff.

16 European Commission (2020), Inception Impact Assessment ARES(2020)2877634 of 02 June 2020, New Competition Tool, p. 3.

17 European Commission (2020), Inception Impact Assessment ARES(2020)2877647 of 02 June 2020, Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers.

18 European Commission (2020), Communication COM(2020) 67 of 19 February 2020, Shaping Europe's digital future., p. 10.

19 European Commission (2020), Inception Impact Assessment ARES(2020)2877647 of 02 June 2020, Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers, p. 4.

20 European Commission (2020), Speech by Executive Vice-President Margrethe Vestager: Building trust in technology.

21 A leaked document listing potentially unfair practices was published by Politico.

22 This assessment necessarily takes place prior to any enforcement proceedings since the list of dos and don'ts only applies to undertakings that have been found to be gatekeepers.

3 Existing Legislation in Selected EU Member States

3.1 France

The chief legal foundation for French domestic competition law is Book IV of the Commercial Code.[23] Art. L420-1 of the Code – like Art. 101 TFEU – prohibits agreements which restrict competition. Art. L420-2 states – similar to Art. 102 TFEU – that the abuse of a dominant position by one or several undertakings is prohibited. Unlike EU law, the French legislation (Article L420-2) also prohibits the abuse of "economic dependence".[24]

In 2015, the French Constitutional Council rejected an article of the law on "economic growth, activity and equal opportunities" of 6 August 2015 which gave the French Competition Authority (*Autorité de la Concurrence*) the power to issue structural injunctions modifying mergers and acquisitions of undertakings that have market shares of over 50% as well as demand prices and have margins regarded as high compared to the rest of the sector. The Constitutional Council invoked the rights to free enterprise and property to reject this provision.[25] This decision should not, however, prevent further changes to competition law aimed at adapting it to the new economic competition parameters. Nevertheless, no French legislative project has yet been initiated which, like the planned German revision of the GWB[26], would allow the French Competition Authority to impose ex-ante remedies in respect of anti-competitive behaviour by undertakings operating on multiple markets.

And yet, in its contribution to the public debate on competition and the digital economy,[27] the French Competition Authority made a number of propositions: Firstly, it proposed a definition for "structuring platforms": A "structuring platform" is a platform that fulfils the following three criteria:

- it acts as an online intermediary;
- its position is "structuring" for the market(s) on which it is active, i.e. it can control access to or the functioning of the market; and
- it represents an unavoidable actor for undertakings wishing to enter a market.

According to the Authority, this definition should be complemented by guidelines that support the assessment of the structuring nature of the platform with respect to its size, financial capacity, and user/data pools.

Secondly, the Competition Authority proposed a non-exhaustive list of anti-competitive practices that applies to structuring platforms. This list contains the following practices:

- discriminating between competing products or services that use services of the structuring platform;
- impeding access to markets on which the structuring platform is not dominant or structuring;
- using data on a dominated market to hamper access to this market;
- hampering product and service interoperability;
- hampering data portability;

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[23] Code Commercial de la liberté des prix et de la concurrence, articles L410-1 à 470-8.
[24] Code de commerce, Livre IV : de la liberté des prix et de la concurrence.
[25] Conseil Constitutionnel, décision n°2015-715 du 5 aout 2015.
[26] See section 3.2.
[27] Autorité de la Concurrence, Contribution de l'Autorité de la concurrence au débat sur la politique de concurrence et les enjeux numériques, 19.02.2020. This reference holds for the rest of the section.

- hindering multihoming.

If such practices by a structuring platform are discovered, the competent authority could accept binding commitments from the platform to cease and desist from such practices in the future, or order platforms to modify their practices, subject to a penalty payment if necessary. It could also forbid these practices in the future. Platforms may justify such practices by claiming efficiency gains but would bear the burden of proof.

The French Competition Authority would prefer to see such regulation adopted at EU level. Failing that, it will call for national legislation.

3.2 Germany

The chief legal foundation for German domestic competition law is the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, hereinafter: "GWB").[28] § 1 of the Act – like Art. 101 TFEU – prohibits agreements which restrict competition. § 19 states – similar to Art. 102 TFEU – that the abuse of a dominant position by one or several undertakings is prohibited. In that regard, it is crucial to define what the relevant product and geographic market is, whether an undertaking is dominant on this market, and whether this undertaking has abused its dominant market position.

Unlike EU law, the German legislation (§ 20 GWB) also addresses the conduct of undertakings that have relative or superior market power, i.e. less than a dominant position.[29] They are subject to some restrictions on their transactions with SMEs but these are less stringent than those faced by dominant undertakings.

The most recent amendment in 2017 introduced § 18 (3a), which lists several criteria, e.g. network effects, economies of scale, and access to data relevant for competition, that must be taken into account in assessing the market position of an undertaking in the case of multi-sided markets and networks [cf. cep**Study** Competition Challenges in the Consumer Internet Industry].

The German government is now planning to amend the GWB once again, in response to challenges arising from digitalisation, notably in the platform economy.[30] Among other measures, a new § 19a GWB is to be introduced, according to which the Federal Cartel Office (*Bundeskartellamt*) may declare that an undertaking which is active to a substantial extent on multi-sided markets or networks has paramount significance for competition across markets *(Unternehmen mit überragender marktübergreifender Bedeutung für den Wettbewerb*). The criteria for such a declaration include

- the undertaking's dominant position in one or more markets,
- its financial strength,
- its vertical integration or activity on otherwise related markets, and
- its access to data relevant for competition, and its intermediary power.

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[28] Available at https://www.gesetze-im-internet.de/gwb/BJNR252110998.html .

[29] See Loewenheim, U. in: Loewenheim, U. et al. (2020), Kartellrecht, 4th ed. 2020, § 20 GWB para. 3.

[30] Available at https://www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf?__blob=publicationFile&v=6. On a very similar previous draft see e.g. Körber, T. (2020), "Digitalisierung" der Missbrauchsaufsicht durch die 10. GWB-Novelle, Multimedia und Recht, Vol. 23, pp. 290-295.

Not all of these criteria have to be fulfilled. If the Federal Cartel Office issues such a declaration, it may impose a number of behavioural remedies, all of which are prohibitions. These include

- bans on making the interoperability of products or services, or the portability of data, more difficult,
- giving preferential treatment to one's own services, and
- unfairly hindering competitors on a market where the undertaking concerned can rapidly expand its position even without being dominant.

According to the Explanatory Memorandum to the bill, § 19a GWB shall target a small group of digital undertakings.[31] The aim is to prevent these undertakings from using their position and resources from one market to restrict competition in another.[32]

Furthermore, according to the draft version, it will constitute an abuse if an undertaking with superior market power on a multi-sided market impedes the independent attainment of network effects by competitors and thereby creates a serious risk that competition will be significantly restricted [§ 20 (3a)]. This provision aims to prevent the tipping of markets.[33] Tipping refers to "the transformation of a market, characterized by strong positive network effects with several providers, into a monopolistic or highly concentrated market".[34] The proposed provision is intended to make intervention possible at an early stage because once a market has tipped, it can rarely be reversed.[35]

3.3 Italy

The chief legal foundation for Italian domestic competition law is Law 287 of 10 October 1990.[36] Art. 2 of Law 287/1990 – like Art. 101 TFEU – prohibits agreements that "have as their object or effect the prevention, restriction or significant distortion of competition". Art. 3 of Law 287/1990 states – similar to Art. 102 TFEU – that the abuse of a dominant position by one or several undertakings is prohibited. Unlike EU law, the Italian legislation (Art. 9 of Law 192 of 18 June 1998[37]) also prohibits the abuse of "economic dependence".[38]

Although there has long been talk in Italy of the need for legislation that ensures competition even in the "platform economy", Italian institutions have not yet developed specific regulatory proposals on this issue.

[31] Draft proposal p. 85 f.
[32] Draft proposal p. 85.
[33] Draft proposal p. 95 f.
[34] Draft proposal p. 95.
[35] Draft proposal p. 96.
[36] Available at https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato.
[37] Available at: https://www.agcm.it/competenze/tutela-della-concorrenza/dettaglio?id=58e16284-f1d9-4712-9db9-cfcf13959ec4&parent=Normativa&parentUrl=/competenze/tutela-della-concorrenza/normativa.
[38] Economic dependence is considered to be a situation in which a company is able to determine, in commercial relations with another company, an excessive imbalance of rights and obligations.

4 Assessment

4.1 Economic Assessment

4.1.1 Characteristics of Digital Markets

The goal of preserving competition in the internal market is appropriate, and the focus on digital markets is indeed justified due to the specific features of those markets. As described in Section 1, undertakings operating in digital markets can take advantage of certain phenomena, such as significant economies of scale and significant network effects, zero pricing and data dependency that while also existing in other markets, are stronger and reinforce each other in digital ones.

Economies of scale. As the Commission states, digital undertakings can benefit from positive economies of scale. Hence, a digital undertaking that is able to produce and distribute more of its goods or provide more of its services – for instance connecting two platform users – can do so more cheaply. As this attracts additional users the digital undertaking can expand its offer of goods or services and reduce its price even further. Hence, this price-reducing effect is self-reinforcing.

Although economies of scale can also be achieved in various non-digital markets, digital undertakings have two special features that amplify this phenomenon: Firstly, the production and distribution of an additional good creates virtually no additional costs for many digital undertakings. This is usually not the case for undertakings operating in non-digital markets. Therefore, positive economies of scale are greater for digital undertakings than for undertakings operating in non-digital markets. Secondly, in non-digital markets, positive economies of scale are often – at least partially – offset by the fact that expanding production usually requires significant investment, such as the acquisition of new machineries. This does not usually apply to digital undertakings which is another indication that economies of scale are greater for digital than for non-digital undertakings.

The significant economies of scale favour a high market concentration in digital markets. Furthermore, they have a strong deterrent effect on potential competitors, as a new entrant can only be successful if a specific sales volume is achieved within a short time.[39]

Network effects. Besides significant positive economies of scale, digital undertakings – and most importantly online platforms – can benefit from significant positive network effects: An additional network user increases the benefit for all existing users. This will in turn attract further new users. Positive network effects are therefore self-reinforcing and, hence, favour a high market concentration. Furthermore, network effects can act as a deterrent to new market entrants if a platform with a big network already exists. This is because the incumbent can make it difficult for a new platform to build up its own network by deterring its users from switching to the new platform, e.g. by limiting interoperability, or from using more than one platform, e.g. by means of best price clauses.

Network effects and economies of scale reinforce each other: A new user means lower prices, because of the economies of scale, and more benefit for existing users of the platform, due to the positive network effect. Since the increased benefit and lower price will attract new users, the prices will decrease further which will in turn attract even more users. Thus, there is a positive feedback

[39] Bundeskartellamt (2016), The Market Power of Platforms and Networks, working paper, p. 14.

loop between economies of scale and network effects, which is another reason why there are often only a few platforms active in a digital market.

Zero-pricing. Many digital undertakings supply their services at a price of zero. If the price for a good is zero, the demand often increases disproportionately. This has positive repercussions for the network effect. This third feature is a further reason why there are often only a few undertakings active in a market. The reason why often digital undertakings can supply their services for free is their specific business model: They collect and sell user data and also make a profit by selling advertising space on their platforms.

Data dependency. The final characteristic of digital markets listed by the Commission is data dependency.[40] Digital undertakings often gather vast amounts of data about their users. This helps them to offer their service in a more efficient way, which has positive repercussions on the economies of scale and the network effects. Furthermore, market entrants will face high entry barriers as the data necessary to compete is hard to obtain in a swift and cost-effective manner.[41] Data dependency will often facilitate the expansion of an already established undertaking with access to data.

Additionally, with access to a vast amount of personal data, a digital undertaking can use the data to leverage its market power into adjacent markets. It does so by developing a new service, based on the user preference data it has collected, or by using its access to many potential customers – i.e. its current user base – as a lever for its new service. In this way, a single undertaking can establish an ecosystem of services offered across markets. If an established digital undertaking has created such an ecosystem – e.g. offering an email service that allows users to send documents directly from a word processor offered by the same undertaking – a market entrant will have difficulties in contesting the market power of the incumbent if its service is not fully interoperable with the services offered in the ecosystem, e.g. if a competing email service provider cannot seamlessly integrate the incumbent's word-processor.[42] A new digital undertaking therefore needs not only to offer better quality or a lower price than the incumbent but also to convince the users of the incumbent's services to coordinate their migration to its own service. The size of this "incumbency advantage" depends inter alia on interoperability, data portability, and the possibility of multi-homing.

The combination of these four characteristics, as well as the fact that they are both self-reinforcing and cross-reinforcing, can enable an undertaking to first tip a market in its favour and subsequently leverage this powerful market position into adjacent markets. As a consequence, market concentration across the single market increases. However, this does not necessarily mean that without an adaptation of competition law the powerful position of digital undertakings could not be contested. Examples such as Twitch, Zoom or Tiktok show that the market power of an established platform can at times be contested and that digital markets are innovative and dynamic. Nevertheless, as instances of market power being contested are fairly limited, it is understandable that the Commission wants to address the problematic features of digital markets by way of the Digital Markets Act.

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[40] See Section 1.
[41] University of Chicago Booth School of Business (2019), Stigler Committee on Digital Platforms: final report, p. 7-8.
[42] Crémer, J./de Montjoye, Y.-A./Schweitzer, H. (2019), Competition policy for the digital era, p. 36.

4.1.2 The Upcoming Digital Markets Act (DMA)

4.1.2.1 The New Competition Tool (NCT)

The first pillar of the upcoming Digital Markets Act (DMA), the NCT, may enable the Commission to tackle competition issues more swiftly than is currently possible, as the Commission will not need to establish a breach of competition law under Art. 102 TFEU. Such swiftness can provide for more efficient remedies and help to keep a market contestable. As investigations under Art. 102 TFEU are very lengthy, by the time the Commission imposes remedies it might be too late to prevent harm, e.g. because competitors might have already exited the market.

In order to avoid legal uncertainty, the Commission needs to provide a proper definition of the "structural issues" that will fall under the NCT, as the listed criteria are all very common features of most digital markets. Furthermore, once the Commission has established the existence of "structural issues", it should clarify which undertakings will be subject to the NCT. As the concept of "dominance" is too narrow to capture the behaviour that the Commission wants to address, a new concept similar to the German "superior market power" (§ 20 GWB), i.e. less than a dominant position, could be used to define which undertakings are subject to the NCT. Nevertheless, an overly broad application of the NCT could discourage investment and innovation across digital markets, as any undertaking that successfully scales up could potentially be caught by it. To minimize this effect, it may therefore be appropriate for the Commission to define a clear set of criteria that narrowly restricts the scope of the NCT. As all undertakings that do not fall under that set would be outside the scope of the NCT, there would be no disincentive for them to invest and innovate.

Furthermore, the Commission should strive to substantiate that the market power of undertakings which fall under the NCT is very unlikely to be contestable and/or that the market power of those undertakings could be leveraged into adjacent markets, with a serious risk of hindering competition in those markets. Limiting the Commission's action to situations where such issues are very likely to materialize will minimize the risk of inadvertently interfering in a market that could correct itself.

4.1.2.2 The Ex-Ante Instrument (EAT)

The second pillar of the DMA, the EAT, is supposed to entail a list of obligations for gatekeepers. Currently, the Commission can only operate via ad-hoc investigations into the conduct of dominant undertakings. However, where a behaviour detrimental to competition is recurrent across undertakings and markets, addressing it ex-ante via such a list of obligations, instead of relying on multiple lengthy investigations to prohibit the same behaviour, would be more efficient.

It is appropriate that the list of obligations will only apply to large undertakings acting as gatekeepers, as they are most prone to restricting competition. This is because practices such as certain forms of self-preferencing can be successfully employed only if competing undertakings are dependent on access to the platform operated by the gatekeeper, which allows the latter to exploit its intermediary power. Furthermore, limiting the scope of the obligations to certain undertakings as defined by clear criteria will guarantee legal certainty in that all undertakings operating in digital markets will know if the ex-ante instrument applies to them and what behaviour they must avoid in order not to infringe the law.

While it is still unknown what obligations will be included in the ex-ante instrument, it is important that they address precise issues that are always detrimental to competition. As such obligations will

immediately apply to undertakings falling under the scope of the ex-ante instrument, this will guarantee legal certainty and swift enforceability. Further issues arising from the specific behaviour or business model of certain undertakings will be addressed separately, via the NCT.

Finally, to remain relevant and proportionate, the Commission should review the list of undertakings defined as gatekeepers and the list of obligations on a regular basis, e.g. every three years. That way new practices could be included or excluded from the list, without suddenly imposing new burdens on undertakings. A precise timeframe for revision of the ex-ante instrument will offer all undertakings a certain degree of legal certainty.

4.2 The Legal Basis for the DMA

According to the Commission "the legal basis for such an NCT would be Art. 103 TFEU in combination with Art. 114 TFEU."[43] Concerning the EAT, the commission states that "the legal basis of this initiative is likely to be Article 114 TFEU, possibly to be complemented by other legal bases, depending on the exact type of measures to be proposed".[44] In the absence of an actual legislative proposal, the question of competence cannot be assessed conclusively. Nevertheless, some considerations in this regard can be pointed out. As the NCT and the EAT will be jointly proposed in one single legislative act, the DMA, the legal basis in question is either the combination of Art. 103 and Art. 114 TFEU or Art. 114 TFEU alone.

4.2.1 Art. 103 TFEU as Legal Basis?

Art. 103 TFEU provides the legal basis for legislation "to give effect to the principles set out in Articles 101 and 102". Therefore, the DMA can only be based on Art. 103 TFEU if its content falls within the scope of Art. 101 or 102 TFEU. Art. 101 TFEU prohibits collusive behaviour between undertakings, Art. 102 TFEU prohibits the abuse of a dominant position. For some elements of the DMA, this is the case. Even though neither pillar – NCT or EAT – requires the establishment of dominance in order to apply, a market in which one player has a dominant position is certainly a market with structural competition problems in the sense of the NCT. Likewise, while the definition of gatekeepers under the EAT is not yet clear, it is likely that at least some of them will have a dominant position in the sense of Art. 102 TFEU. Furthermore, among the competition problems that the Commission wants to address are a lack of access to data and consumer lock-ins. Such lock-in effects may be created by a lack of interoperability and data portability.[45] Obstructing interoperability and data portability may, in turn, constitute an abuse of dominance according to Art. 102 TFEU.[46]

Other elements, however, go beyond the principles of Art. 101 and 102 TFEU, notably, in the case of the DMA's key feature under both the NCT and the EAT: the possibility to intervene without the need to establish a violation of either Art. 101 or 102 TFEU. This is a novelty which cannot be considered to give effect to the principles of Art. 101 and 102 TFEU. Consequently, it is not possible to base the

[43] European Commission (2020), Inception Impact Assessment ARES(2020)2877634 of 02 June 2020, New Competition Tool, p. 2.

[44] European Commission (2020), Inception Impact Assessment ARES(2020)2877647 of 02 June 2020, Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers, p. 3.

[45] C.f. Obara-Martins, J. / Sahandi, R. / Tian, F. (2016), Critical analysis of vendor lock-in and its impact on cloud computing migration: a business perspective, Journal of Cloud Computing: Advances, Systems and Applications, Vol. 5.

[46] Monopolkommission (2020), Wettbewerb 2020, p. 36; CJEU, Case T-201/04 (Microsoft/Commission), judgment of 17 September 2007, ECLI:EU:T:2007:289 (concerning interoperability).

entire NCT on Art. 103 alone. It is for this reason that the Commission also invokes Art. 114 as a legal basis.

4.2.2 Art. 114 TFEU as Legal Basis?

Art. 114 TFEU allows for the approximation of the provisions in Member States that have as their object the establishment and functioning of the internal market. Thus, firstly, in order to be based on Art. 114 TFEU, a proposal must have the internal market as its object. This is unproblematic for the DMA because the concept of the internal market also encompasses the protection of competition from distortions brought about by private undertakings.[47]

Secondly, there must either be legal provisions in the Member States that impair the internal market or it must be likely that such provisions will be enacted.[48] As shown above, France, Germany, and Italy have instruments for intervention beyond the threshold of dominance. France and Italy prohibit the abuse of economic dependence, Germany regulates the conduct of undertakings with relative or superior market power. In addition, both France and Germany are considering legislative initiatives that would go even further. Germany's plan to introduce a provision that enables the authorities to prevent a market from tipping [§ 20 (3a) GWB] is comparable to the NCT. The plan to introduce a provision that is intended to address undertakings with paramount significance for competition across markets (§ 19a GWB), in turn, has some similarities to the envisaged ex-ante instrument. In France, the Competition Authority (*Autorité de la Concurrence*) has suggested that structuring platforms be subject to stricter regulation, which goes in the same general direction as the German draft. Yet, both the definition of a structuring platform and the obligations that this status entails differ from the respective concepts of the German draft. Italy, meanwhile, does not seem to plan such provisions. Thus, it is likely that differences between the legal orders of the Member States will emerge.

However, the mere existence of differences between the national legal systems does not in itself justify an approximation of laws.[49] EU legislation must in fact be aimed at eliminating market barriers that go beyond the burdens that legal diversity automatically brings with it.[50] In this context, the Commission rightly points out that the services provided by large online platforms are intrinsically and systematically of a cross-border nature. Varying legislation in the Member States is liable to produce conflicting outcomes if applied to online platforms operating across the EU. For such national laws are highly unlikely to contain a country of origin clause as e.g. the E-Commerce Directive[51] does. Therefore, undertakings could not choose the Member State with the most favourable legislation and operate under this legal framework in the entire EU. Rather, they have to comply with the domestic legislation of each and every Member State. This, in turn, could lead to a fragmentation of the single market. Undertakings might refrain from operating in those national

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47 C.f. Bast, J., in: Grabitz, E. /Hilf, M. / Nettesheim, M. (eds.), Das Recht der Europäischen Union, 58th supplement 2016, Art. 26 TFEU, para. 12a; Schröder, M., in: Streinz, R. (ed), EUV/AEUV, 3rd ed. 2018, Art. 26 TFEU, para. 24; Voet van Vormizeele, P., in: von der Groeben, H. / Schwarze, J. / Hatje, A. (eds.), Europäisches Unionsrecht, 7th ed. 2015, Art. 26, para. 28.

48 Korte, S., in: Calliess, C. / Ruffert, M. (eds.), EUV/AEUV, 5th ed. 2016, Art. 114 TFEU, para. 34 ff.

49 CJEU, Case C-376/98 (Germany/ Parliament and Council), judgment of 5 October 2000, ECLI:EU:C:2000:544, para. 84.

50 Classen, C. D. in: von der Groeben, H. / Schwarze, J. / Hatje, A. (eds.), Europäisches Unionsrecht, 7th ed. 2015, Art. 114, para. 52.

51 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, ELI: http://data.europa.eu/eli/dir/2000/31/oj, Art. 3.

markets whose rules they consider too burdensome. Therefore, as far as can be ascertained, Art. 114 TFEU appears to be the right legal basis.

Under EU law, joint legal bases – like Art. 103 in combination with 114 TFEU – should only be employed as an exception, i.e. if the proposal in question pursues more than one purpose or has more than one component and if none of these purposes or components is predominant over the other(s).[52] In the present context, the purpose of regulating powerful digital undertakings regardless of dominance and of a possible abuse thereof outweighs the purpose of giving effect to the principles of competition law. The fact that the DMA would, to some extent, also follow the lines of Art. 102 TFEU appears to be merely incidental. Consequently, while the competence question cannot be answered conclusively based on the information available, it appears appropriate to base the DMA on Art. 114 TFEU alone.

4.3 Fundamental Rights

The envisaged DMA also touches upon fundamental rights as established in the Charter of Fundamental Rights of the European Union (CFR): Firstly, it would interfere with the freedom to conduct a business (Art. 16 CFR) because the DMA would enable the Commission to impose behavioural remedies (NCT) and include a list of forbidden business practices (EAT).[53] Secondly, the DMA may interfere with the right to property (Art. 17 CFR) because the Commission envisages that the NCT will include the option to impose "structural remedies", which usually take the form of a divesture.[54] Given these interferences with fundamental rights, the undertakings must have the right to challenge these measures before a court (Art. 47 CFR).[55]

[52] CJEU, Case C-338/01 (Commission/Council), judgment of 29 April 2004, ECLI:EU:C:2004:253, para. 55 f.

[53] C.f. Jarass, H. (2016), Charta der Grundrechte der Europäischen Union, 3rd ed., Art. 16, para. 9.

[54] C.f. (in the context of the energy market) Baur, J. / Pritzsche, K. / Pooschke, S. (2008), „Ownership Unbundling" von Energienetzen und der europäische Schutz des Eigentums, Deutsches Verwaltungsblatt, Vol. 135, pp. 483-492 (486).

[55] C.f. Jarass, H. (2016), Charta der Grundrechte der Europäischen Union, 3rd ed., Art. 47, para. 16; Kröll, T. (2019), in: Holoubek, M. / Lienbacher, G. (eds.), GRC-Kommentar, 2nd ed., Art. 47, para. 12.

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