DeutscherAnwaltVerein

Position Paper

of the German Bar Association by the Committee on European Affairs

on the Proposal of the European Commission for an EU Digital Markets Act COM(2020) 842

Position Paper No.: 36/2021 Berlin/Brussels, May 2021

Members of the Committee

- Rechtsanwältin Dr. Claudia Seibel, Frankfurt am Main (chair and rapporteur)
- Rechtsanwältin Béatrice Deshayes, Paris
- Rechtsanwalt Prof. Dr. Christian Duve, Frankfurt am Main
- Rechtsanwalt Prof. Dr. Thomas Gasteyer, LL.M., Frankfurt am Main
- Rechtsanwalt Prof. Dr. Hans-Jürgen Hellwig, Frankfurt am Main
- Rechtsanwalt Dr. Ulrich Karpenstein, Berlin
- Rechtsanwältin Gül Pinar, Hamburg
- Rechtsanwalt Prof. Dr. Dirk Uwer, Düsseldorf
- Rechtsanwalt Michael Jürgen Werner, Brüssel (rapporteur)
- Rechtsanwalt Dr. Thorsten Mäger, Düsseldorf (guest)

In charge in the Berlin office

- Anja Wyrobek

Contact in Brussels:

- Anja Wyrobek

Deutscher Anwaltverein
Littenstraße 11, 10179 Berlin
Tel.: +49 30 726152-0
Fax: +49 30 726152-190
E-Mail: dav@anwaltverein.de

Büro Brüssel
Rue Joseph II 40, Boîte 7B
1000 Brüssel, Belgien
Tel.: +32 2 28028-12
Fax: +32 2 28028-13
E-Mail: bruessel@eu.anwaltverein.de
EU-Transparency Register ID number:
87980341522-66

www.anwaltverein.de

Mailing List

Europe

European Commission
- Directorate-General on Communication Networks, Content and Technology
- Directorate-General on Justice and Consumers
- Directorate-General on Internal Market, Industry, Entrepreneurship and SMEs

European Parliament
- Committee on Civil Liberties, Justice and Home Affairs
- Committee on Legal Affairs
- Committee on Internal Market and Consumer Protection
- Committee on Industry, Research and Energy
- Committee on Economic and Monetary Affairs
- Special Committee on Artificial Intelligence in a Digital Age

Council of the European Union
Permanent Representation of the Federal Republic of Germany to the European Union
Justizreferenten der Landesvertretungen
Council of Bars and Law Societies of Europe (CCBE)
German Federal Association of Liberal Professions (BFB) – Brussels office
Deutscher Industrie- und Handelskammertag (DIHK) – Brussels office
Bundesverband der deutschen Industrie e.V. (BDI) – Brussels office

Germany

Bundesministerium des Innern, für Bau und Heimat
Bundesministerium der Justiz und für Verbraucherschutz
Bundesministerium für Wirtschaft und Energie
Bundeskanzleramt
Ausschuss für Recht und Verbraucherschutz im Deutschen Bundestag
Ausschuss für Wirtschaft und Energie im Deutschen Bundestag
Ausschuss Digitale Agenda im Deutschen Bundestag
Ausschuss für Angelegenheiten der Europäischen Union
Der Bundesbeauftragte für den Datenschutz und die Informationsfreiheit
Justizministerien und Justizverwaltungen der Bundesländer der Bundesrepublik Deutschland
Die Datenschutzbeauftragten der Bundesländer
Europäische Kommission – Vertretung in Deutschland
Bundesrechtsanwaltskammer (BRAK)
Bundesnotarkammer
Bundesverband der Freien Berufe (BFB)
Deutscher Richterbund (DRB)
Deutscher Notarverein e.V.
Deutscher Steuerberaterverband (DStV)
Bundesverband der Deutschen Industrie (BDI)
Deutscher Industrie- und Handelskammertag (DIHK)
Max-Planck-Institut für Innovation und Wettbewerb
Bundesverband Musikindustrie e.V. (BVMI)
Deutscher Journalisten-Verband e.V. (DJV)

Bundesverband Informationswirtschaft, Telekommunikation und neue Medien e. V. (BITKOM)
Deutsche Gesellschaft für Recht und Informatik e.V. (DGRI)
Ver.di, Abteilung Richterinnen und Richter
DAV-Vorstand und Geschäftsführung
Vorsitzende der DAV-Gesetzgebungsausschüsse
Vorsitzende der DAV-Arbeitsgemeinschaften
Vorsitzende der DAV-Landesverbände
Vorsitzende des FORUMs Junge Anwaltschaft

Presse

Frankfurter Allgemeine Zeitung
Süddeutsche Zeitung GmbH
Berliner Verlag GmbH
Die Welt
NJW
Juve-Verlag
Verlag C.H. Beck
Anwaltsblatt
Juris
MultiMedia und Recht (MMR)
Zeitschrift für Datenschutz ZD
heise online
Monatsschrift für Deutsches Recht (MDR)
Zeitschrift für die anwaltliche Praxis (ZAP)
Juristenzeitung (JZ)
Bundesrechtsanwaltskammer-Mitteilungen / BRAK-Mitteilungen
Legal Tribune Online
Zeitschrift Gewerblicher Rechtsschutz und Urheberrecht (GRUR)
Zeitschrift „Mitteilungen der deutschen Patentanwälte“
Zeitschrift „ZEuP“
Agence Europe

The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 62.000 German lawyers and lawyer-notaries in 252 local bar associations in Germany and abroad. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession on German, European and international level.

Brief introduction

The German Bar Association ("**DAV**") is happy to share its position on the Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act, "**DMA**").

The DAV welcomes the creation of an EU-wide framework for digital markets. A uniform set of rules across the EU can contribute more effectively to legal certainty than national regulations.

The draft DMA, however, has been designed as a completely new instrument of market regulation. This raises a number of fundamental questions. In the following, we first of all comment on the basic conceptual approach of the DMA, including the relationship to antitrust law (I.). We then comment on specific aspects of the DMA itself, i.e. the designation of the norm addressees ("**Gatekeepers**"), the scope of Gatekeeper obligations and the question of justification of a specific market behaviour by a Gatekeeper (II.). Finally, we comment on certain procedural aspects (III.) and the judicial review (IV.)

I. Basic conceptual approach of the draft DMA and relationship between the DMA and antitrust law

In recent years, developments in digital markets have triggered a global debate on how to deal with powerful internet companies. In particular, the question has been raised whether the existing legal instruments are sufficient to protect competition in digital

markets. These markets are typically characterised by specific aspects including network effects, economies of scale, low marginal costs, tipping and lock-in effects.

A number of expert reports[1] have called for a new legal framework for digital markets. This shall enable stricter and faster control of abusive behaviour, the imposition of clear rules of conduct on platform services and the strengthening of innovation and competitiveness in the digital economy. More specifically, reference is made to so-called Gatekeepers, which are characterised by the fact that they hold key positions in digital markets. These Gatekeepers are not necessarily dominant in antitrust law terms.

However, there was (and still is) a controversial discussion about whether the new legal framework for digital markets and for Gatekeepers should either be situated in the antitrust law framework (involving an *ex post* case-by-case analysis) or be established in the form of an *ex ante* regulation, as is, for example, the case in certain telecommunications markets.

The European Commission ("**Commission**") initially proposed introducing a "New Competition Tool" but subsequently adopted the draft DMA,[2] which is a sector-specific regulation that imposes *ex ante* behavioural obligations on Gatekeepers.[3]

The draft DMA states that it is not rooted in antitrust law. The Commission detaches the DMA from the framework provided by antitrust law, in particular Art 101 and 102 Treaty on the Functioning of the European Union ("**TFEU**"), and aims to create an independent regulatory regime. Art. 1(5) and (6) DMA, as well as recital (10) DMA, characterise it as a sector-specific regulation that protects other interests which are deemed to be complementary to antitrust law. This completely new design of the draft DMA gives rise to a number of fundamental questions. First, it is necessary to establish which concrete and specific interests will be protected by the DMA (1.). Second, the relationship between the DMA and antitrust law needs to be clarified (2.).

---

[1] *Crémer/de Montjoye/Schweitzer*, Competition Policy for the digital era, Brussels, 2019 (commissioned by the European Commission); *Schallbruch/Schweitzer/Wambach*, Report by the German Commission 'Competition Law 4.0', A new competition framework for the digital economy, September 2019 (commissioned by the German Government); see also: German Monopoly Commission, Special Report 68: Competition policy: The challenge of digital markets, June 2015.

[2] Together with the Draft DMA, the Commission submitted a proposal for a Regulation of the European Parliament and the Council on a Single Market for Digital Services (Digital Services Act, "**DSA**").

[3] In contrast, the German legislator adopted an antitrust law based approach by inserting new provisions prohibiting certain types of abusive behaviour in the digital space into the German Act Against Restraints of Competition ("**ARC**"), "ARC-Digitalization Act", BT-Drucks. 19/25868.

1. Specific interests protected by the DMA

Recital (10) DMA states the following:

> *"Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct as well as merger control have as their objective the protection of undistorted competition on the market. This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims at protecting a different legal interest from those rules and should be without prejudice to their application."*[4]

This statement makes clear that a case-by-case analysis of the effects of the specific conduct of a Gatekeeper, which would be typically carried out in the context of an antitrust law assessment, is not a prerequisite of the DMA. However, while the draft DMA states what will not form part of the assessment, it is far less clear with regard to the question which core interests will be protected by the DMA. The DMA refers to the unfairness test and the aspect of limiting the contestability of core platform services.[5]

As far as the unfairness test is concerned, Art. 10(2)(a) draft DMA specifies that a practice is unfair "*where there is an imbalance of rights and obligations on business users and the Gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the Gatekeeper to business users*". As far as the contestability of markets-test is concerned, the DMA does not contain any definition at all. This raises a concern because it is by no means self-evident what the notion of contestability of markets means precisely. The contestability of markets is an aspect, which is also discussed in antitrust economics as a structural feature that describes the

[4] Emphasis added.

[5] These criteria are addressed in Art. 10 DMA, which concerns the power of the Commission to update the obligations laid down in Articles 5 and 6 DMA. In contrast, these criteria are not referred to in Art. 5 and Art. 6, which list the specific obligations of Gatekeepers. However, it is clear that the aim of ensuring that markets where Gatekeepers are present are and remain contestable and fair is the basic aim of the entire DMA, see recital (10).

effect of new entrants on market players depending on barriers to entry and exit, such as *inter alia* sunk costs (potential competition). Therefore, there is no clear distinction between the interests protected by the DMA and the interest protected by antitrust law.

It is, however, important to define precisely the interests protected by the DMA. Only then is it possible to establish whether the obligations imposed on Gatekeepers (i) are justified by compelling public interests and (ii) meet the proportionality test of Art. 5(4) Treaty on European Union ("**TEU**"). The principle of proportionality is the test for assessing the legality of legislative measures taken by EU institutions. The obligations of the draft DMA result in restrictions of the Gatekeeper's fundamental freedoms guaranteed by the TEU. In order for such restrictions to be permissible, the measure must be justified by compelling public interests and must not impose an obligation which goes further than is appropriate, necessary and proportionate in order to attain the aim pursued by that measure. This requires that, first of all, the objective of the regulation and the interests to be protected are precisely specified.

It is necessary to specify precisely the interests, which shall be protected by the DMA, i.e. the protection of contestable and fair markets. This is of particular importance if the position in recital (10) DMA is to be retained, i.e. that these interests are different from the objective of antitrust law in protecting undistorted competition on the market.

2. Legal Basis of draft DMA

The legal basis referred to by the Commission in support of the draft DMA, i.e. Art. 114 TFEU, has drawn some criticism from commentators and we agree that it is questionable.

The Commission has initiated a number of proceedings concerning the digital economy (see investigations, for example, into the Apple App Store, certain practices of Google or into Amazon's Marketplace). These are based on antitrust law. However, in the context of the draft DMA, the Commission has expressed the opinion that, given the intrinsic cross-border nature of the core platform services provided by Gatekeepers, any regulatory fragmentation would undermine the functioning of the Single Market for digital services, as well as the functioning of digital markets at large. On that basis, the

Commission considers the initiative to be one seeking harmonisation at EU level, which (purportedly) warrants using the internal market provision (Art. 114 TFEU) as the relevant legal basis.

It is true that some Member States are already considering adopting national rules addressing the perceived issues involving big tech and platform services. This may well create regulatory fragmentation, which would also result in increasing compliance costs for companies operating in the internal market. Such arguments support the use of Art. 114 TFEU as legal basis for the DMA.

However, the draft DMA draws vastly from antitrust law discourse, rationale and methodology. While the Gatekeeper concept significantly differs from the concept of market power, many of the new obligations of these Gatekeepers under the draft DMA address potentially anti-competitive behaviour, which is covered by Artt. 101 and 102 TFEU (albeit requiring a case-by-case analysis, which is so far not envisaged in the draft DMA). In addition, the specific obligations imposed on Gatekeepers are similar to the obligations introduced by the German legislator in the new § 19a German Act Against Restraints of Competition ("**ARC**")[6], which is still perceived as an antitrust law regime.

This suggests that the draft DMA should (also) be based on Art. 103 TFEU. As a matter of fact, the combination of Artt. 103 and 114 TFEU was the legal basis indicated in the inception impact assessment of the 'New Competition Tool', i.e. the tool that the Commission considered before adopting the draft DMA instead.

Otherwise, i.e. if the DMA were entirely disconnected from antitrust law principles, the established conceptual framework of reference would be lost.[7] It is by no means a purely academic question whether the concept of the DMA constitutes a further development of antitrust law or represents a completely new concept. In the latter case, the Commission would disregard case-law, which has been established over decades, creating unnecessary legal uncertainty. It is for good reason that the German

[6] "ARC-Digitalisation Act", BT-Drucks. 19/25868.

[7] See article published by the members of the German Competition Commission 4.0 established by the German Government (Schallbruch, Schweitzer, Wambach) in the FAZ, Europa stutzt die Datenmacht der Digitalkonzerne, 22 January 2021, p. 16.

Commission "Competition Law 4.0" has recommended linking the platform regulation to antitrust law categories.[8]

It is unclear why the Commission chose to rely solely on Article 114 TFEU as the legal basis for the draft DMA. The DAV recommends referring to Article 103 TFEU as well. If the draft DMA were kept strictly separate from antitrust law, it would be necessary to define precisely a genuine independent interest protected by the draft DMA, which does not overlap with that of antitrust law. This seems difficult as both regimes aim at ensuring the competitiveness of markets (see I. 1. above).

3. Relationship between the DMA and European and National Antitrust Law

On a similar note, the relationship between the draft DMA and European and national (antitrust) law is unclear.

Art. 1(6) draft DMA states that the regulation is without prejudice to the application of Artt. 101 and 102 TFEU and national rules prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions. However, Art. 1(7) draft DMA states that national authorities shall not take decisions which would run counter to a decision adopted by the Commission under the draft DMA. It is unclear whether this provision represents a reference to the general principle of sincere cooperation (Art. 4(3) TEU) or is actually intended to have a restrictive effect. Since the draft DMA is intended to be a regime complementing antitrust law, a substantive restriction would raise concerns. Such a restriction is likely to fail, at least with regard to the application of EU antitrust law by national authorities. This follows from the hierarchy of norms. The DMA as a regulation will not be able to limit the application of EU primary law, i.e. Artt. 101 and 102 TFEU.

As far as national antitrust law is concerned, the issue concerning the hierarchy of norms does not apply. The DMA may restrict national (antitrust) law. However, it is difficult to see how the complementary function of the draft DMA would play out in practice. As already mentioned, there is a considerable overlap between the two areas.

[8] *Schallbruch/Schweitzer/Wambach*, Report by the Commission "Competition Law 4.0", A new competition framework for the digital economy, September 2019, p. 51.

The Commission argues that regulation and competition enforcement already co-exist in other sectors, such as energy, telecoms or financial services[9]. However, in these areas there is a clear split of competences and regulators are in charge of specific areas (e.g. by setting tariffs), which can be easily distinguished.

This is not possible as far as the scope of the draft DMA is concerned, as illustrated by the fact that the obligations imposed on Gatekeepers by the draft DMA are similar to those obligations set out in § 19a ARC. It is unclear whether § 19a ARC is covered by Art. 1(5) draft DMA, which precludes Member States from imposing further obligations on Gatekeepers by way of laws, regulations or administrative action for the purposes of ensuring contestable and fair markets. The opening clause in Art. 1(6) draft DMA stipulates that the draft DMA is without prejudice "*to national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than Gatekeepers or amount to imposing additional obligations on Gatekeepers*". It is likely that the Commission had in particular § 19a ARC in mind. However, the application of Art. 1(6) draft DMA depends on the classification of § 19a ARC as antitrust law from the point of view of EU law. Even though § 19a ARC contains some regulatory aspects, it is still a provision rooted in antitrust law concepts of market power and abuse. Therefore, § 19a ARC would still be applicable. However, this should be clarified.

It is necessary to clarify the relationship between the DMA, on the one hand, and European and national antitrust law, on the other hand. Given that both areas overlap (undistorted competition vs. contestability of markets), it is not sufficient simply to state that the DMA will be without prejudice to antitrust law.

[9] Commission, Digital Markets Act: Ensuring fair and open digital markets, Questions and answers, 15 December 2020, p.3

II. Specific aspects of the draft DMA

We now comment on specific aspects of the draft DMA itself. These concern the designation of the norm addressees (1.), the Gatekeeper obligations (2.) and the aspect of justification (3.).

1. Designation of Norm Addressees

A company will be designated by the Commission as a Gatekeeper on the basis of the definition set out in Art. 3(1) draft DMA. This requires that the potential addressee provides a central platform service included in the exhaustive list in Art. 2(2) draft DMA (e.g., search engines, social networks, advertising services), has a significant impact on the internal market, serves as an important access gateway for commercial users and has (or will have) an established permanent position with regard to its activities. Pursuant to Art. 3(2) draft DMA, this is presumed to be the case if certain thresholds are reached (minimum turnover / market capitalisation) and the potential addressee had a certain minimum number of retail and commercial customers in the last three years.

The quantitative approach (which does not require markets to be defined and market power to be assessed) facilitates the application of the draft DMA. In addition, pursuant to Art. 3(3) draft DMA, the potential Gatekeeper is obliged to notify the Commission if the thresholds in Art. 3(2) draft DMA are met. All this makes the application of the DMA simple and easy for the Commission. However, some of the criteria of Art. 3 draft DMA are unclear and open to interpretation.

a) When does a Gatekeeper have a "significant impact"?

The use of either the sales or the market capitalisation of the entire undertaking (in the sense of a single economic entity) and not only the Gatekeeper activity (which may only be part of an undertaking) is presumably intended to reflect the resources potentially available to the Gatekeeper. However, it also extends the application of the regulation to Gatekeepers simply because they are part of larger companies. This seems inconsistent with the specific Gatekeeper approach of the draft DMA.

Moreover, it is uncertain how the requirement for existing "*operations in three member states*" should be understood in the context of the presumption of a significant impact

on the internal market. If narrowly interpreted, a single user in the second or third Member State could be sufficient.

Finally, if the thresholds in Art. 3(2) draft DMA are not met, or the presumption has been successfully rebutted, the Commission may conduct a market investigation to determine a Gatekeeper position based on a case-by-case qualitative assessment. Remarkably, in this case, there is no requirement that the Gatekeeper offers its core platform service in at least three Member States in order to have "a significant impact". This seems inconsistent.

The DAV recommends that only the activities of the Gatekeeper (and not those of affiliated companies, if any) be taken into account when assessing whether a Gatekeeper has a significant impact on the internal market. Moreover, a significant impact on the internal market should only be assumed if the Gatekeeper has operations in three Member States, which reach a certain materiality threshold (in each Member State). Finally, the designation by the Commission of a Gatekeeper based on qualitative criteria should also require a minimum number of affected Member States.

b) Point of reference for the "core platform service" threshold

The user-number threshold in Art. 3(2)(b) draft DMA, which is intended to indicate the importance of a core platform service as a gateway for business users to consumers, has attracted some criticism. We believe that the threshold should be upheld. The threshold requires that the number of monthly active end-users of the core platform service in the EU exceeds 45 million and that the number of active business users exceeds 10,000 on a yearly basis. The point of reference is the particular core platform service and not the entire undertaking. The number of end-users of the respective platform service is an appropriate proxy to indicate the relevance of a market player and its characteristics as a core platform and Gatekeeper. While critics of this criterion point to the fact that digital services and products are becoming increasingly intertwined and cannot be assessed separately, this argument does not hold. As, for example, the launch of the Google+ service in 2011 made clear, users and relevance cannot easily be transferred from one service to another. Google did not succeed in transferring its success as a search engine to the social network market. Therefore, the entire

population of all users of a company is not a suitable proxy for the relevance of a platform service.

While we endorse the basic concept of Art. 3(2)(b) draft DMA, the term "business users" is unclear. For example, as far as hotel booking platforms are concerned, would several hotels belonging to the same hotel chain count as several business users or just one? Likewise, would private individuals providing services qualify as business users when they rent out living spaces or provide transportation or delivery services?

It needs to be clarified which undertakings qualify as Gatekeepers. Therefore, the term "business users" should be defined more precisely.

c) Guidelines on "substantiated arguments"

The presumption in Art. 3(2) draft DMA can be rebutted with "*sufficiently substantiated arguments*" pursuant to Art. 3(4) draft DMA. It is unclear which arguments may be raised by Gatekeepers. A reverse conclusion from Art. 3(6) draft DMA suggests that these arguments may not be congruent with those in Art. 3(6)(2) draft DMA.

The Commission should be obligated to publish guidelines that shed light on the arguments and market constellations that are suitable for rebutting the presumption.

2. Gatekeeper obligations

We now comment on specific Gatekeeper obligations.

a) Obligations according to Art. 5, 6 draft DMA

Art. 5 and 6 draft DMA contain *per s*e obligations for Gatekeepers, whereas the obligations in Art. 6 draft DMA can be specified by the Commission in its discretion (see Art. 7 (2) draft DMA). The specification of obligations is to be preceded by a regulatory dialogue in which the Commission can review the undertaking's measures to comply with Art. 6 draft DMA, upon request of the undertaking or at the Commission's discretion. The Commission may, by decision pursuant to Art. 7 draft DMA, specify the measures that the Gatekeeper concerned shall implement, if it finds that the measures

that the Gatekeeper intends to implement or has implemented, do not ensure effective compliance with the relevant obligations laid down in Art. 6 draft DMA.

Pursuant to recital (33) draft DMA, the regulatory dialogue is required to ensure the effectiveness and proportionality of individual implementing measures of Art. 6 draft DMA. We welcome the possibility of an individualised approach. Even though Art. 6 draft DMA already contains specific obligations, the tools required may vary from platform service to platform service. In this dialogue, the consideration of a justification would be possible and appropriate (see below II.3).

Compliance with *per se* rules is easy to monitor, but this approach runs counter to the more economic approach applied in antitrust law and bears the risk of over-enforcement (see below II.2. b)).

The obligations have to be based on a clear economic theory of harm. The economic findings need to indicate that the behaviour of a Gatekeeper makes it more difficult for competitors to enter the market or that the behaviour has other negative effects on at least one affected side of the market, which is thereby exposed to unfair conditions.

Per se rules are only justified and proportionate if the scope of the regulatory framework is clearly tailored to conduct and players who pose an urgent competitive threat that can be effectively combated by the obligations. The criteria for Gatekeeper platforms, however, lack such a clear and economics-based foundation. This is because the quantitative criteria (turnover, market capitalisation, number of users) are arbitrary by their very nature. It cannot be argued that a platform slightly above the threshold poses a problem for the market and a platform just below the threshold does not. It seems appropriate to introduce clear cut thresholds in order to facilitate the assessment as to whether an undertaking qualifies as a norm addressee (see also II.1. b) above). This is also the typical approach of most merger control regimes which established turnover thresholds which can be applied easily (as opposed to establishing thresholds - e.g. market share thresholds - which on the one hand can better capture the critical cases but which on the other hand require a more complex assessment so it is difficult to identify the norm addressees). Also, the obligations in Art. 5, 6 draft DMA are not based on established economic theory (in contrast to the typical merger control test which

basically looks at the creation or strengthening of market power). Therefore, neither the definition of a Gatekeeper nor the obligations in Art 5,6 are drafted in a way which ensures that the fundamental rights of the norm addresses are restricted only in a scenario where such restriction is justified and proportionate. Against this background. Therefore, i.e. it is very important to introduce at least the possibility of Gatekeepers to put forward justifications for their behaviour in individual cases (see below II.3.).

b) Scope of Art. 5(c) draft DMA

Some of the obligations included in Art. 5 draft DMA seem too broad. This applies, for example, to Art. 5 lit(c) draft DMA.

The provision imposes an obligation on Gatekeepers to allow business users and end users to use their platform under certain conditions. In addition, the Gatekeeper must allow business users to use effectively a distribution channel that is external to the platform for the conclusion of contracts. The business model of the platforms is to receive a share of the transaction between the parties mediated on the platform. By shifting the conclusion of the contract to a channel outside the platform, the provider benefits from the mediation service without having to pay for it. Such free-riding can hinder the platform's business model as it would be no longer be possible to charge success-based fees for brokered transactions. Therefore, Art. 5(c) draft DMA would force online marketplaces to change their business model into advertising platforms or search engines. This calls their business model into question. Consequently, an adjustment of the monetisation would be necessary and may lower the incentive for European e-commerce platforms to invest.

In contrast, the Commission takes the view that, from the antitrust law perspective, free-riding may be prevented, even by way of fixed and minimum prices, depending on the case at hand. In addition, in one of the hotel booking platform cases (involving so-called best price clauses) the free-riding aspect is being taken into account.[10] This illustrates that the issue addressed by Art. 5(c) draft DMA is complex, which suggests that it would be more appropriate to move the provision to Art. 6 draft DMA, which allows for a specification by the Commission.

[10] See OLG Düsseldorf, 4 June 2019 − VI-Kart 2/16 (V) – Enge Bestpreisklausel II.

The transactions covered by Art. 5(c) draft DMA are so diverse that we recommend locating the provision in Art. 6 draft DMA in order to be able to specify the conditions applicable in concrete terms, in individual cases. It could thereby be ensured that unfair free-riding is prevented in specific cases.

c) Obligations according to Art. 6 draft DMA

The obligations in Art. 6 draft DMA, even without specification by the Commission, provide precise behavioural requirements for Gatekeepers. The individual prohibitions obviously originate from the Commission's antitrust practice under Art. 102 TFEU. The assessment under Art. 102 TFEU, however, always involves the possibility of putting forward a justification for the behaviour in question. This possibility should also be introduced into the DMA; all the more so since the obligations apply regardless of the specific segment where the Gatekeeper is active (see below under II.3.).

Moreover, the Commission should be required to publish its behavioural requirements. This would provide guidance to the Gatekeepers, increasing legal certainty. In addition, this transparency would allow both business and end-users of the central platform to report violations (subject to confidentiality restrictions).

The Commission should be required to publish the behavioural requirements that it specifies for individual Gatekeepers. This transparency must not, however, extend to business secrets or confidential information inherent to the business model of the Gatekeepers.

d) Scope of Art. 6 (1)(a) draft DMA

The prohibition of data use stipulated in Art. 6 (1)(a) draft DMA seems too broad. The regulation prohibits the use of data of commercial platform users and their end users. This provision is too broad when applied to all platform services listed in Art. 2(2) draft DMA. It should be noted that the end users of the commercial users are also users of the platform service. Art. 6(1)(a) draft DMA states that the Gatekeeper should refrain from using data generated "*by the end users of these business users*". This requirement not only leads to delimitation issues when the data are generated through activities of the business user. It also does not seem compelling to prohibit a Gatekeeper competing

with business users from using the data collected on an end user in each and every case, provided that the business user himself is provided with the collected data to a sufficient extent. While it is true that there may be a legitimate interest in creating a level playing field with regard to market access, this goal is in our view already achieved by Art. 6 (1)(i) draft DMA.

Art. 6 (1)(a) draft DMA seems too broad. It should be deleted in its entirety or at least limited to prohibiting the Gatekeeper from using data that is generated in the user relationship between business users and end users, and that is not also available to the business user itself.

e) Updating Obligations for Gatekeepers, Art. 10 draft DMA

The Commission can issue new *per se* prohibitions in the event that the Gatekeeper causes "*an imbalance of rights and obligations on business users*" when the Gatekeeper is obtaining a disproportionate advantage from such imbalance. It may make sense for the Commission to be able to develop further the catalogue of rules if a market investigation reveals gaps in protection. Art. 10 draft DMA, however, lacks a materiality clause. The trigger for new obligations can thus be a marginal imbalance. Nevertheless, the consequence of the Commission's decision is an obligation that applies to all Gatekeepers. Furthermore, neither Art. 10 nor Art. 3 draft DMA contain a transition period for the Gatekeepers to adapt their structures.

A materiality threshold and a transition period should be implemented in Art. 10 draft DMA.

f) Information about concentrations, Art. 12 draft DMA

Art. 12 draft DMA provides for certain reporting obligations. It requires that all Gatekeepers notify to the Commission all mergers and acquisitions involving another provider of core platform services or of any other service provided in the digital sector, irrespective of whether it is notifiable under merger control law. However, the draft DMA does not in any way specify the consequences of such notifications. It is unclear why the Commission requests the information and for what purpose the informationwill be used.

More specifically, it is unclear whether the Commission may use the information to initiate merger control proceedings based on the Regulation (EC) No 139/2004 (European Merger Regulation, "**EUMR**"). It is disputed to what extent national merger control authorities may refer a transaction to the Commission pursuant to Art. 22 EUMR in a scenario where the transaction does not meet the merger control thresholds of the respective national regime. The new Commission Guidance[11] on Art. 22 EUMR emphasises the Commission's intention of accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level. The Guidance considers deals at risk of referral where a target's revenues are not reflective of its actual or future competitive potential and where the transaction potentially raises substantive issues, and explicitly names the digital economy as an example of a sector where Art. 22 referrals may occur. This suggests that the information reported pursuant to the obligation in Art. 12 draft DMA may be used by the Commission in the context of Art. 22 EUMR. This should be clarified.

The underlying rationale of the reporting obligation in Art. 12 draft DMA should be clarified. Clarification is also required of whether the Commission may use the information to initiate a referral under Art. 22 EUMR.

3. Justifications

If the position in recital (10) DMA is to be retained, i.e. that the interests protected by the DMA are regarded as independent and separate and in particular different from the objective of antitrust law (see I.1. above), then the restrictions of fundamental rights imposed by the DMA requires the Commission to investigate whether specific aspects may justify the market behaviour of a norm addressee's market behaviour prohibited by the obligations of the DMA. The same issue arises if the DMA were to be regarded as the antitrust law regime. The antitrust law assessment requires an effects-based analysis of the individual case. Companies may also put forward a justification for the respective behaviour (see the efficiency defence in Art. 101(3) TFEU[12] and the

[11] Available at https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

[12] As far as efficiency defense is concerned, the undertaking concerned bears the burden to present and prove the underlying facts.

unfairness test in Art. 102 TFEU[13]). This approach is mandatory for the preservation of justice in the individual case. The German Commission 4.0 explicitly requested the possibility to justify behaviour that generates a benefit for consumers, which outweighs any predatory effects in relation to competitors.[14]

In contrast, the preamble to the draft DMA explicitly states that the obligations under Art. 5 and 6 draft DMA do not depend on the effects on competition in a particular market, as the draft DMA is designed as a one-size-fits-all approach. The legislative proposal does not provide Gatekeepers with an opportunity to challenge their regulatory obligations on the grounds that their conduct cannot, or is not likely to, be unfair or hinder the contestability of the markets.

Moreover, the draft DMA contains two exemptions from the obligations of Art. 5 and 6. These apply if exceptional and external factors are present that endanger the economic viability of the Gatekeeper or if an overriding public interest is present (Art. 8 and 9 draft DMA).These exemptions, however, only constitute a hardship provision and do not serve the purpose of taking into account a justification for a specific behaviour.

However, the provisions of the draft DMA need to be proportionate and therefore need to take into account the legitimate interests of the Gatekeeper. This already follows from Art. 5(4) TEU, which contains the principle of proportionality. The prohibition of conduct, which has no negative effects on the market, or which is justified for other relevant reasons, is not necessary and thus not proportionate.

a) Non-application of individual regulations in the absence of negative effects

A Gatekeeper should not be prohibited from any market behaviour that has no negative effects in the specific market environment.

This aspect is reflected in Art. 15(4) draft DMA. However, this provision only has a narrow scope of application. To prevent market-tipping, a core platform provider could be designated as a Gatekeeper following a market investigation, even though he does

[13] Depending on the individual scenario, either the Commission or the undertaking concerned may bear the burden to examine aspects concerning the justification of a specific market behaviour.

[14] German Commission 'Competition Law 4.0', A new competition framework for the digital economy, September 2019, p. 51.

not fulfil all of the quantitative requirements of Art. 3(2) draft DMA and does not yet enjoy an entrenched and durable position. In this case, Art. 1 (4) draft DMA states that the Commission shall only declare applicable those obligations that are appropriate and necessary to prevent that the Gatekeeper concerned from achieving such position by unfair means. It therefore seems perfectly possible and reasonable for the Commission to assess the effectiveness of certain measures on a case-by-case basis. This provision should be extended to all Commission decisions under the draft DMA, provided that the Gatekeeper can prove that the individual conduct has no negative impact on the affected markets.

b) Justification possibilities

The draft DMA does not provide for the possibility of an objective justification, except for Art. 8 and 9 draft DMA, or an efficiency defence. This restriction of the Gatekeepers' defence options appears questionable. Crémer/de Montjoye/Schweitzer stated in their report to the Commission in 2019 that, in the digital economy, the type of services offered, as well as the related nature of competition is very diverse and, therefore, a case-by-case analysis has to be carried out. The possibility of an objective justification is also demanded by the German Commission 4.0.[15]

The regulatory objective of the draft DMA does not preclude the possibility of an efficiency defence. The introduction of the draft DMA aims at ensuring the possibility for faster intervention in digital markets shaped by Gatekeepers. This is intended to ensure that digital markets remain contestable and fair. The burden of proof with regard to justification would lie with the respective Gatekeeper. The prohibitions of the draft DMA would be directly applicable to the Gatekeeper until either the Commission or a court upheld the efficiency defence with regard to individual provisions of the draft DMA. Therefore, there would be no risk that the efficiency defence would jeopardise the enforcement of the draft DMA. It can therefore be concluded that the possibility of an efficiency defence does not conflict with the relevant regulatory objective of the draft DMA.

[15] German Commission 'Competition Law 4.0', A new competition framework for the digital economy, September 2019, p. 51.

The same applies to the concept of the regulatory dialogue. As far as Art. 6 draft DMA is concerned, the Commission can specify the behavioural obligations after dialogue with the relevant company concerned. It is not clear why an efficiency defence could be explicitly discussed at this point.

A Gatekeeper is being designated on purely quantitative criteria, which are by their very nature arbitrary (it cannot be argued that a platform slightly above the threshold poses a problem for the market and a platform just below the threshold does not.). The obligations under Art. 5 and 6 draft DMA result in a situation where the affected undertakings are subject to a set of very strict behavioural requirements, which severely restrict their freedom to innovate, create business models and respond to consumer demand. In order for such restrictions of fundamental freedoms to comply with EU law, they must (i) be justified by compelling public interests and (ii) must not go further than is appropriate, necessary and proportionate in order to attain the aim pursued by the DMA. This test is not met by prohibitions, which apply irrespective of whether the market behaviour in question has any negative effect, and which ignore any justification. The DMA therefore needs to provide for effects and justifications to be taken into account.

III. Procedural aspects

1. Rights of Defence

It should be clarified that legal privilege/confidentiality applies in the context of investigative measures under Chapter V, at least to the extent recognized for antitrust law proceedings by the CJEU.

Moreover, while Art. 30 draft DMA grants the right to be heard and access to file before the adoption of all decisions these rights are not granted as far as the designation of a Gatekeeper pursuant to Art. 3 draft DMA is concerned. Even if the quantitative approach in Art. 3 draft DMA, and therefore the decision, is largely automatic, it is not clear why these rights of defence should be explicitly denied.

It should be clarified that legal privilege/confidentiality applies in the context of investigative measures under Chapter V and it should be clarified that the right to be heard and access to file also apply as far as the designation of a Gatekeeper is concerned.

2. Information inadmissible in antitrust proceedings

The draft DMA emphasizes that it constitutes an independent instrument, which is separate from antitrust law. We do not agree with this assessment because, as explained above, both areas overlap. However, if a separate regime were to be established then the regimes should be kept separate from a procedural point of view.

It should be clarified that findings and information collected pursuant to Art. 3, 8, 12, 13, 19, 20 and 21 draft DMA in the regulatory procedure cannot be used to the detriment of Gatekeepers in antitrust proceedings, which the Commission may carry out in parallel or initiate at a later stage.

3. Sanctions Regime

The sanctions regime of the draft DMA comprises behavioural and structural remedies (Art. 16 draft DMA), fines of up to 10 percent of the Gatekeepers total annual worldwide turnover (i.e. not limited to the turnover related to the core platform services) (Art. 26 draft DMA), and periodic penalty payments of up to 5 percent of the average daily turnover in the preceding financial year per day (Art. 27 draft DMA). It is unclear whether the provisions concern the group's turnovers, as in the case of antitrust law, or just the Gatekeeper's turnover. In contrast to Art. 3(2)(a) draft DMA, which refers to the turnover of the undertaking to which the Gatekeeper belongs, Art. 26 draft DMA only mentions the Gatekeeper's turnover.

It should be clarified that Art. 26 draft DMA only refers to the Gatekeeper's turnover (excluding the turnover of affiliated companies, if any).

The sanctions regime is comparable to sanction provisions in antitrust law. This is remarkable in that fines in the antitrust regime are based on case-by-case decisions, also taking into account the actual effects.

If the legislator does not follow our recommendation to introduce an effects-based assessment and a possibility for justification (see above II.3.), the regime for setting fines need to be adjusted (i.e. the fines need to be significantly lower) in order to reflect this fundamental difference to fines in the context of antitrust law violations involving a case-by-case analysis.

As an ultima ratio, structural remedies may be imposed by the Commission in the case of systematic infringements of the obligations laid down in Art. 5 and 6 draft DMA, in combination with a further strengthened or extended Gatekeeper position, pursuant to Art. 16 draft DMA. In this regard, Art. 16 draft DMA contains both a presumption for systematic non-compliance and for the further strengthening or extension of the Gatekeeper position. Art. 16 (3) draft DMA states that the Gatekeeper shall be deemed systematically non-compliant where the Commission has issued three non-compliance or fining decisions pursuant to Art. 25, 26 draft DMA, with regard to any of its core platform services. Taking into account the uncertainties surrounding the obligations of Gatekeepers, such an assumption seems problematic. In addition, in order to justify a far-reaching structural remedy the Commission should be required to show that a causal link exists between the systematic non-compliance on the one hand and the strengthening of the Gatekeeper position on the other hand. Even though recital (64) of the draft DMA states that changes to the structure of an undertaking as it existed before the systematic non-compliance was established, would only be proportionate where there is a substantial risk that this systematic non-compliance results from the very structure of the undertaking concerned, this new remedy requires stricter guidelines in view of the far-reaching consequences.

Given the ultima ratio nature of structural remedies, such measures should only be available to the Commission in very exceptional circumstances. In particular, it should be necessary for the Commission to show a causal link between the systematic non-compliance and the strengthening of the Gatekeeper position. In addition, the Commission should be required to show that the Gatekeeper position will be significantly strengthened.

The Commission takes the view that the legal consequences of the draft DMA are complementary to the potential legal consequences of a violation of Art. 102 TFEU

under Art. 7, 23, 24 of Regulation (EC) No. 1/2003. However, as pointed out, both areas overlap. Therefore, a violation of Gatekeeper obligations pursuant to Art. 5 and 6 draft DMA may also constitute a violation of Art. 102 TFEU, meaning that both fining regimes may be applied in parallel.

If the relationship between the DMA, on the one hand, and the antitrust law regimes, on the other hand, is not sufficiently clarified (see above I. 3.), there needs at least to be a mechanism in place which prevents a Gatekeeper from receiving several fines from the Commission or national authorities for the same behaviour (ne bis in idem).

4. Public and private enforcement

The draft DMA contains no provisions on enforcement by national competition authorities or other national institutions.

The competence of national authorities in the context of the DMA is unclear. Established cooperation mechanisms do not apply as the draft DMA is considered to fall outside antitrust law. Depending on the clarification of the relationship between the DMA, on the one hand, and antitrust law, on the other hand (see above II.3.), the question arises whether it is efficient to involve national authorities in the enforcement of the DMA[16].

The DMA constitutes a new concept. By virtue of its very nature, a multitude of new legal and practical issues will arise when enforcing the DMA. If the DMA could be also invoked by market participants in private litigation, this would make it almost impossible to ensure a coherent enforcement practice and the necessary level of legal certainty for the undertakings concerned. For this reason, the German legislator has taken the conscious decision that the new § 19a ARC will only be enforced by the German Federal Cartel Office and cannot be invoked in private litigation.

It should be made clear that the obligation of the DMA cannot be invoked in private litigation.

[16] The Commission has advocated for Member States requesting that the Commission open investigations but that they should not be involved in the enforcement of the DMA, Commission, Digital Markets Act: Ensuring fair and open digital markets, Questions and answers, 15 December 2020, p.3

IV. Judicial Review

As drafted, obligations and restrictions under the DMA as such cannot be challenged before the courts by the Gatekeepers. They may only institute proceedings against a decision of the Commission based on the DMA, pursuant to Art. 263(4) TFEU. However, this possibility does not represent sufficient relief. This is because the Gatekeeper would, first of all, have to violate the DMA, thereby triggering the risk of the Commission imposing a fine before seeking clarification before the courts. This violates Art. 47 Charter of Fundamental Rights of the European Union („**CFR**“). Art. 47 CFR provides that everyone whose rights and freedoms are guaranteed by the law of the Union but have been violated has the right to an effective remedy before a tribunal. This right is not protected by the draft DMA because the draft DMA does not provide for the possibility to challenge the application of the DMA without, at the same time, running the risk of fines being imposed.

The integrity of legal protection against Union acts guaranteed by Art. 47 CFR cannot be compensated for by national legal action, since actions before the courts of the Member States ("decentralised" legal protection) are not possible in the absence of national enforcement (see above).

The DMA needs to provide for a mechanism which allows an (alleged) Gatekeeper to challenge the application of the DMA without first of all triggering a decision by the Commission, which may even impose a fine.