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Digital Markets Act – Opinion of BRAK

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The German Federal Bar (Bundesrechtsanwaltskammer, BRAK) is the umbrella organisation of the self-regulatory bodies of the German *Rechtsanwälte*. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 166,000 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

Opinion

A. Introduction

The German Federal Bar (Bundesrechtsanwaltskammer, BRAK) is the umbrella organisation of the self-regulatory bodies of the German Rechtsanwälte. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 166,000 lawyers, vis-à-vis authorities, courts, and organisations at national, European, and international level.

During the past year, the Commission has undertaken an evaluation of the existing European competition rules regarding competitive concerns relating to the digital sector. As a result, the Commission inter alia invited public comment on the need for a new competition tool to facilitate effective interventions in digital markets. The German Federal Bar submitted its position on this proposal in its response to the Commission's questionnaire in September 2020. Subsequently, the Commission replaced the antitrust by a regulatory approach leading to the proposal of the Digital Markets Act in December 2020. The German Federal Bar's comments are submitted in this statement.

B. General Comments

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)[1] ("**Proposal**") suffers from its unclear position in between competition and fair trading law.

The Proposal aims to ensure contestability of the digital markets and, hence, follows an ex ante approach.[2] "To safeguard the fairness and contestability of core platform services" the Proposal contains a set of harmonised obligations with regard to those services.[3] If a gatekeeper infringes one of these rules the Commission has the power to sanction the gatekeeper, the undertaking to which it belongs or the association of undertakings concerned. However, such an infringement could also be considered as an unfair conduct under national law and/or as an infringement of competition law. Especially, the close connection between the status as a gatekeeper and a dominant position under competition law is likely to trigger an investigation by

[1] 15.12.2020, COM(2020) 842 final, 2020/0374 (COD).
[2] Page 3 of the Proposal.
[3] Recital 32 of the Proposal.

the competent competition authority as well as an investigation by the competent authority under the Digital Markets Act ("**DMA**"). For instance obliges Article 12 DMA gatekeepers

> "*to inform the Commission of any intended concentration […] involving another […] services provide[r] in the digital sector irrespective of whether it is notifiable to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules.*"

While a double burden is expectable, the Proposal does not contain a workable coordination between both regimes.

In addition, the Proposal does not specify which Directorate-General ("**DG**") is the competent EU authority to ensure the enforcement of the DMA. Even though the Proposal is designed by three leading DGs (DG Competition, DG Connect and DG Grow)[4] the practices addressed by the DMA should be investigated by only one agency to ensure legal certainty.

C. Chapter I – Subject matter, scope and definitions

I. Article 1 DMA – Subject-matter and scope

1. Paragraph 5 – Impact on national law

Article 1 paragraph 5 DMA forbids Member States to

> "*impose on gatekeepers further obligations by way of laws, regulations or administrative action for the purpose of ensuring contestable and fair markets.*"

In addition, Article 39 paragraph 3 DMA clarifies that

> "*this Regulation shall be binding in its entirety and directly applicable in all Member States*".

Therefore, existing national law which is imposed on gatekeepers to ensure contestable and fair markets is inapplicable within the scope of application of the DMA. However, the Proposal does not determine whether national law still applies to purely national cases. Furthermore,

> "*nothing in this Regulation precludes Member States from imposing obligations […] on undertakings […] where these obligations are unrelated to the relevant undertakings having a status of gatekeeper within the meaning of this Regulation in order to protect consumers or to fight against acts of unfair competition.*"

Thus, Member States are allowed to impose obligations on undertakings as long as it is unrelated to their status as a gatekeeper under the DMA. In conclusion, as long as an undertaking is not considered as a gatekeeper (e.g. the offered service has not been listed as 'core platform service') national law may apply. On the other hand, as soon as an undertaking is considered as a gatekeeper under the DMA (e.g. the Commission declares a service as a 'core platform service') national law is inapplicable. Hence, undertakings in the digital sector would be forced to ensure compliance with national and with European law to avoid infringement

[4] Page 80 of the Proposal and page 2 of the Impact Assessment Report, Part 2/2.

procedures.

In order to make the distinction between competition law and fair trading law clearer, the term '*unfair competition*' in paragraph 5 should be replaced by the term '*unfair conduct*'.

2. Paragraph 6 – Impact on competition law

The Proposal states that the DMA should be

> "*without prejudice to the application of Articles 101 and 102 TFEU*"

and

> "*without prejudice to the application of: national rules prohibiting […] abuses of dominant positions*"

As soon as a gatekeeper is suspected of a practice which is considered to be limiting contestability or unfair according to chapter III of the Proposal, it is also likely that the gatekeeper abused a dominant position. Hence, the gatekeeper could face an investigation under the DMA as well as an investigation under the Council Regulation (EC) No 1/2003[5] or national competition law. That could lead to a double prosecution for only one practice. The double burden would be increased by the fact that the gatekeeper would need to comply with two different regimes.

In addition, difficulties arise if a Member State considers the position a provider of core platform services holds as a dominant position according to competition law. For instance, the 10th amendment to the German Act against Restraints of Competition ("**ARC**")[6] extends the scope of national competition law to providers of core platform services. § 18 (3a) ARC clarifies that, e.g., network effects as well as access to data must be taken into account for the assessment of a dominant position. Furthermore, § 19a ARC empowers the national competition authority to prohibit undertakings from taking measures which could enhance their dominant position. Therefore, it remains questionable if the DMA is with prejudice to such a national competition law.

3. Paragraph 7 – Impact on national enforcement

With paragraph 7 the Proposal addresses the relation between the competent EU authority and the national authorities ("**NAs**").

> "*National authorities shall not take decisions which would run counter to a decision adopted by the Commission under this Regulation.*"

According to the wording, NAs are inhibited from taking decisions after the Commission has already adopted a decision pursuant to the DMA. Thus, it remains questionable how NAs should react if they have started a proceeding before the Commission started. In addition, it is not yet regulated if the Commission can overrule a decision adopted by a NA.

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[5] Of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

[6] GWB-Digitalisierungsgesetz, 18.1.2021, BGBl. I S. 2.

The Proposal also contains the following goal:

> "*The Commission and Member States shall work in close cooperation and coordination in their enforcement actions"*

However, the Proposal does not contain rules which clarify the relation between the Commission and NAs or regulates the cooperation and coordination between them. Implementing acts pursuant to Article 36 paragraph 2 DMA are likely to come into force after the DMA came into force.

Furthermore, it is unregulated whether the European Competition Network (ECN) could be used to ensure an effective cooperation between the Commission and national authorities.

II. Article 2 DMA – Definitions

Although the Proposal defines in Article 2 DMA some of the terms used in the DMA in accordance with other EU regulations and directives, it would be useful to include the referred definitions directly into Article 2 DMA and, thereby, establish a regulation which is self-explanatory.

1. Points 16 and 17 – 'Business and end users'

The definitions in points 16 and 17 of Article 2 DMA would lead to legal uncertainty in a situation of the supply of goods or services to businesses on a different level of the economy for resale to business or end users. It remains unclear what an 'end user' and what a 'business user' under the DMA is in such a situation.

According to point 16 of Article 2 DMA, an 'end user' is every person who is not a 'business user'. On the other hand, pursuant to point 17 of Article 2 DMA, a 'business user' is someone who provides goods or services to end users. According to Recital 13:

> "*In certain circumstances, the notion of end users should encompass users that are traditionally considered business users, but in a given situation do not use the core platform services to provide goods or services to other end users, such as for example businesses relying on cloud computing services for their own purposes.*"

These 'certain circumstances' would, pursuant to point 17 of Article 2 DMA, always be given if the person does not use core platform services to provide goods or services. As a result, any person acting in a commercial or professional capacity which provides services or goods in the analogue world would be considered as an 'end user'. It is questionable if the Commission intended such a large scope of application.

In addition, any

> "*person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services*"[7]

to a business which on its own uses core platform services to provide goods or services would

[7] Point 17 of Article 2 DMA.

not be considered as a ‘business user’.

To avoid this uncertainty, we suggest the following wording:

> ‘’*End user’ means any natural or legal person who uses the core platform services not in a commercial or professional way. In addition, an ‘end user’ is also a person who does not resell goods or services to another party.*’

2. Point 22 – ‘Undertaking’

In point 22 of Article 2 DMA ‘undertaking’ is defined as

> “*linked enterprises or connected undertakings that form a group through the direct or indirect control of an enterprise or undertaking by another and that are engaged in an economic activity, regardless of their legal status and the way in which they are financed.*”

According to this wording, an enterprise or undertaking which is not controlled by another would, regardless of its size, not be considered as an undertaking. Although it is likely that the Commission just intended to include controlling entities it should first define undertaking as:

> ‘*Any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed’*”[8].

As a second step, the DMA may extend the definition to:

> ‘*Undertakings are also linked enterprises or connected undertakings that form a group through the direct or indirect control of an enterprise or undertaking by another.’*

3. Point 23 – ‘Control’

Point 23 of Article 2 DMA defines ‘control’ of an undertaking in accordance with the EC Merger Regulation ((EC) No 139/2004). An identical definition of ‘control’ under EU competition law as well as under the DMA allows a uniform application of EU law. Nevertheless, a less formal definition like under the EC Merger Regulation complicates the determination of factual ‘control’.

D. Chapter II – Gatekeepers

I. Article 3 DMA – Designation of gatekeepers

1. Paragraph 1 – ‘near future’

Pursuant to Article 3 paragraph 1 (c) DMA, a provider of core platform services shall be designated as gatekeeper if inter alia

> “*it is foreseeable that it will enjoy [an entrenched and durable position in its operations] in the near future*”.

[8] E.g. ECJ,14 March 2019, C-724/17, ECLI:EU:C:2019:204, Paragraph 36.

So far it is not determined what period of time should be considered as “the near future”.

2. Paragraph 2 – ‘belongs’

According to Article 3 paragraph 2 (a) DMA, the turnover threshold needs to be reached by

> “*the undertaking to which [the provider] belongs*”.

Unlike ‘control’, the term ‘to which it belongs’ is not defined in the Proposal. Therefore, it remains unclear if the undertaking needs to control the provider in the meaning of point 23 of Article 2 DMA. The same problem arises under Article 3 paragraph 7 DMA which obliges the Commission to

> “*identify the relevant undertaking to which [the provider] belongs*”.

3. Paragraph 2 – ‘active users’

Pursuant to Article 3 paragraph 2 (b) DMA, a provider of core platform services shall be presumed to satisfy

> “*the requirement in paragraph 1 point (b) where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year*”.

However, the Proposal does not define ‘active user’. Hence, an active user could be any registered person or any person who used the platform at least once.

4. Paragraph 4 – ‘does not satisfy the requirements of paragraph 1’

To allow a more efficient proceeding the Proposal should give examples for ‘sufficiently substantiated arguments’ which would prevent providers from automatically being designated as gatekeepers and, thus, would trigger Article 3 paragraph 6 DMA.

5. Paragraph 6 – identification as a gatekeeper

Article 3 paragraph 6 DMA allows the Commission to designate providers as gatekeepers even though they do

> “*not satisfy each of the thresholds of paragraph 2*”.

Thus, it is not determined if a provider can be designated as a gatekeeper even though it only satisfies one or no threshold.

a) Turnover

It appears contradictory if Article 3 paragraph 6 (a) DMA includes the turnover as another element to consider. If the threshold of Article 3 paragraph 2 (a) DMA is met, it seems to be natural to take into account the turnover. On the other hand, if Article 3 paragraph 2 (a) DMA is not satisfied, the turnover should not be an indication for or against the designation as a gatekeeper. Article 3 paragraph 6 DMA puts into question the binding character of the quantitative thresholds in Article 3 paragraph 2 DMA. For the legal profession this means uncertainty when it comes to advising clients on whether they qualify as a gatekeeper.

b) Users

Pursuant to Article 3 paragraph 6 (b) DMA, the Commission should take into account:

> "*the number of business users depending on the core platform service to reach end users and the number of end users*".

Hence, the Proposal undermines the thresholds of Article 3 paragraph 2 DMA again.

In addition, Article 3 paragraph 6 (b) DMA does not require 'active users'.[9] It is questionable whether the inclusion of inactive users has been intended.

c) 'Entry barriers'

Article 3 paragraph 6 (c) DMA mentions

> "*entry barriers derived from network effects and data driven advantages*"

as one of the elements to consider for the identification of a gatekeeper. According to this wording, every obstacle which may hamper market access could indicate a gatekeeper position in the meaning of Article 3 paragraph 1. Hence, the DMA should focus only on 'significant entry barriers'.

d) 'Foreseeable developments'

Article 3 paragraph 6 DMA obliges the Commission to

> "*take into account foreseeable developments of [the mentioned] elements.*"

It should be determined under which circumstances and until when developments are foreseeable.

e) Failure to comply

The Proposal contains further legal terms which are not precisely defined. Article 3 paragraph 6 subparagraphs 3 and 4 DMA entitle the Commission to designate a provider as gatekeeper based on the facts available if the provider

> "*fails to comply with the investigative measures ordered by the Commission in a significant manner and the failure persists after the provider has been invited to comply within a reasonable time-limit*".

It remains open if a failure to comply is always significant after the Commission has invited to comply or if a failure to comply must itself be significant. In other words, it is open whether submitting "*incomplete, incorrect or misleading information*" is always considered as a significant failure to comply when the Commission demanded complete and correct information. According to Article 26 paragraph 2 DMA, fines may be imposed for such a failure.

To ensure legal certainty it is recommended to specify "*a reasonable time-limit*". E.g. it could be

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[9] In contrast to Article 3 paragraph 2 (b) DMA.

added that

> *'the time-limit shall not be less than 14 days[10] and not more than […] months*.'

II. Article 4 DMA – Review of the status of gatekeepers

Article 4 paragraph 1 DMA gives the Commission the power to

> "*reconsider, amend or repeal at any moment a decision adopted pursuant to Article 3*".

Even though the review of a decision can be triggered by request, it is not determined by whom and how such a request can be made. In addition, the Commission is not obliged to review its decision after such a request has been made.

Pursuant to Article 4 paragraph 2 DMA, the Commission is obliged to

> "*at least every 2 years, review whether the designated gatekeepers continue to satisfy the requirements laid down in Article 3(1), or whether new providers of core platform services satisfy those requirements*".

Thus, a provider which is designated as a gatekeeper could stay a gatekeeper for up to two years without the opportunity to trigger a compulsory review by the Commission. To avoid an unjustifiable burden the DMA should install a proceeding for designated gatekeepers to trigger a compulsory review if Article 4 paragraph 1 (a) DMA is fulfilled.

Furthermore, Article 4 paragraph 2 DMA could in reality lead to a situation where providers, which were not yet designated as a gatekeeper, face a two year period of uncertainty. To minimize that uncertainty the Commission should be obliged to review every year whether new providers of core platform services satisfy those requirements. In a fast developing and changing sector like the digital sector it is crucial to review changes and developments in a short period.[11]

E. Chapter III – Practices of gatekeepers that limit contestability or are unfair

I. Article 5 – Obligations for gatekeepers / Article 6 – Obligations for gatekeepers susceptible of being further specified

1. Concerns about Article 114 TFEU as legal basis

We question the suitability of Article 114 TFEU as the legal basis for the proposed rules in Articles 5 and 6 DMA. Both rules appear to have the nature of market dominance abuse rules, yet they are not categorized as competition law. This could amount to a circumvention of the two bases for introducing new competition rules, namely Articles 103 and 352 TFEU, which impose specific legal requirements for adopting such new rules:

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10 As determined in Article 30 paragraph 2 DMA.

11 Recital 65 DMA: "The services and practices in core platform services and markets in which these intervene can change quickly and to a significant extent".

- Article 103 TFEU permits the adoption of regulations and directives in the field of competition law only if they further the principles laid down in Articles 101 and 102 TFEU. The prohibitions ("blacklists") proposed here extend beyond the scope of Articles 101 and 102 TFEU, as they require neither a concerted practice nor an abuse of a dominant position.

- Article 352 TFEU is explicitly named in Protocol No. 27 of the TFEU as a legal basis for European Union acts necessary to protect competition and ensure the functioning of the internal market. By way of example, the merger regulation (Regulation 139/2004) was based on the combination of both Articles 103 and 352 TFEU. Since Articles 5 and 6 DMA are meant to fill a current enforcement gap, just like the merger regulation did, the combination of the Articles 103 and 352 TFEU provides a legal basis envisaged precisely for such measures. However, Article 352 TFEU requires a unanimous vote among Member States and the Parliament does not act as co-legislator which may be difficult to reach in a controversial project like this.

2. Choice of legal instrument / National agency jurisdiction to enforce

A regulation appears to be an unusual instrument to pursue an approximation of member state laws under Article 114 TFEU. Approximation does not mean uniform member state laws, but harmonization of national legal rules. This goal can best be achieved by directives instead of regulations as they leave room to adapt the path towards a harmonized goal in keeping with member state legal traditions. However, if a regulation, i.e. unified sectorial prohibitions, is the goal then we should provide member states authorities with jurisdiction to enforce the "harmonizing" rules, as has been the case in other sectorial regulations (telecoms, energy).

3. Duplication of existing enforcement powers instead of facilitating the implementation of EU Antitrust Rules

The similarities the proposed rules of both Article 5 and Article 6 DMA share with decision practice under competition rules are noteworthy – in fact the rules clearly take their inspiration from prior and ongoing competition cases, pursued either by the Commission or a national competition authority. By way of example, the prohibition of combining user data from different sources as proposed under Article 5(a) DMA seems to have been inspired by the theory of harm forming the legal basis of the German Facebook case.[12] The proposed prohibition of price parity clauses in the context of intermediation services under Article 5(b) is known to competition practitioners from several hotel booking platform cases around Europe (HRS, booking.com) which have been pursued on the domestic and European level.[13] Commentators have identified

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12 See https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf.

13 For an EU-wide overview, see https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf. For an example of enforcement on member state level, see, e.g., https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.pdf.

further examples.[14]

The number of examples for existing competition law enforcement tackling the very same issues now addressed in the Proposal challenge the need for such additional rules. It appears likely that most potential addressees of the DMA's obligations would also qualify as undertakings holding a dominant position pursuant to Article 102 TFEU.

Where the enforcement on the basis of Article 102 TEFEU appears to be too slow to be effective, we find it preferable to ease the adoption of preliminary decisions and potentially shift burden of proof to the addressees on certain issues such as efficiency defences. These approaches have been taken in Germany, when the threshold for the German Federal Cartel Office to impose preliminary obligations on undertakings in abuse of dominance cases was substantially lowered.

4. Lack of individual theory of harm within a specific market context

In contrast to the similarities that some of the proposed rules share with existing decision practice of European competition law, there is one significant difference: the Proposal's obligations do not define the respective underlying theories of harm, to be demonstrated in a specific market context. Even if a theory of harm could be identified by referring to the Proposal's recitals, there is no legal or economic test defining (and thereby limiting) its application to the individual case, within a given set of legal and economic conditions, as has always been the requirement for competition law enforcement. Instead, the obligations are imposed on all potential addressees based on a (de facto non-rebuttable) presumption that they result in disadvantages for competitors or customers.[15]

This is especially true in view of the fact that the addressees' possibilities to invoke a defence (justification for the relevant behaviour) are practically limited. An alternative that should be considered would be to introduce clearly defined theories of harm as well as efficiency defences, which could be reviewed in a fast-track procedure and potentially support the authorities' cases by shifting the burden of proof.

This would better explain decisions, also to the wider community of market participants, and allow addressees to defend behaviours on grounds of competition on the merits, and thus foster overall acceptance of the Proposal. Given the expected intervention in business models under the proposed DMA, it is important to base prohibitions on solid evidence of specific digital markets' malfunctioning, as a matter or structural deficits, and of behaviour that creates or cements such deficits (as originally proposed within the context of the New Competition Tool proposal).

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14 CERRE, The European proposal for a Digital Markets Act: A first assessment, January 2021, available at: https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf.

15 See Pablo Ibáñez Colomo, The Draft Digital Markets Act: a legal and institutional analysis, p. 19, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276: "[…] the Draft DMA appears to allow the Commission to challenge dominance as such, and not merely the abuse of a position of market power."

5. Introduce dynamic perspective and sun-set clause

Key characteristics of digital markets are their dynamism, the speed and disruptive nature of innovations taking place. Accordingly, it appears challenging to identify ahead of time all behaviour that might bring harm to contestability and fairness of digital markets.

In European competition law, even behaviour that may harm competition in specific cases may be competition on the merits in other cases – such as price fixing in joint marketing or customer restrictions in certain distribution systems. That is why the European Courts found that no behaviour should generally be excluded from a potential exemption under Article 101(3) TFEU[16]. The same perspective should apply to blacklists. This also corresponds to the recommendations made by an economic expert panel which reviewed the Proposal on behalf of the Commission.[17]

In this regard, the DMA Proposal does not compare well with the sector regulations in energy or telecommunication. In the latter cases, regulation was considered necessary because the relevant infrastructure were previously state-owned monopolies. Furthermore, costs for duplication of the required infrastructure were prohibitive. Neither of these applies to the digital markets, which have been developed organically by private parties and are subject to disruptive innovation competition. Furthermore, these regulatory regimes focus on achieving effective competition on the markets they address, at which point they yield to general competition law. By contrast, the Proposal does not pursue market effectiveness, but contestability and fairness – and it does not specify under which circumstances these would be achieved, and markets could therefore be released from application.[18]

Given the stringent character of the rules, the lack of theory of harm, and of efficiency defences, at the very least a sun-set clause should be adopted that defines such a release from application, once contestability and fairness has arguably been achieved in any particular market.

6. "One size fits all" approach instead of considering legal and economic conditions of each relevant market – and then introduce some "bandwith" (flexibility)

We suggest that the one-size fits all approach does not do justice to the differences in legal and economic conditions in each of the many different digital markets. For instance, investigations focusing on Facebook must always take into consideration the specific role that social networks play in society. It appears debatable whether an approach that may be required to reign in social networks can be transferred to, for example, marketplace-type services, or more generally from B2C to B2B. That is, however, how the rules of the Proposal have been designed to work. Only some of the rules, e.g. Article 5(g) DMA, attach to specific services. And even then, this may

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16 See case T-17/93, Matra Hachette, ECLI:EU:T:1994:89.

17 Cabral et al., The EU Digital Markets Act - A Report from a Panel of Economic Experts, p. 10 et seq., available at: https://publications.jrc.ec.europa.eu/repository/bitstream/JRC122910/jrc122910_external_study_report_-_the_eu_digital_markets_acts.pdf).

18 This, as well as further differences between EU telecoms regime and the Proposal, has been also highlighted by See Pablo Ibáñez Colomo, The Draft Digital Markets Act: a legal and institutional analysis, p. 24 et seqq., available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276.

cover very different markets. When Article 5(g) DMA refers to "advertising services", the relevant underlying facts may differ substantially between mobile advertising, display advertising, video advertising, search advertising etc. This problem is aggravated by the fact that the prohibitions do not rely on individual theories of harm. And under the proposed self-executing character of these rules, not even the Commission will have any discretion to disapply or soften any of these rules – which appears undesirable, very likely disproportionate in many cases, and therefore not in line with good administration.

A proportionality requirement should be added that introduces "bandwidth" to the rules in Art 5 (and 6) allowing to adapt the regulatory response, where needed.

7. Risk of over-enforcement and "over-compliance"

The risk of over-enforcement, including over-compliance, is a further worrying aspect. In the absence of defined theories of harm, there is good reason to believe that the proposed rules will not be limited to what is necessary and indispensable to reach contestability and fairness. This is crucial as the proposed rules will harshly intervene in existing business models and future business planning. Such intervention requires a measured approach (see at (f) above), which must be justified in each particular case against the perceived threat to contestability and fairness. The recitals cannot provide sufficient justification as they are generic and do not account for specific cases or market settings.

Furthermore, there is a substantial risk of over-compliance which further increases the Act's impact. As the rules in Articles 5 and 6 DMA require the addressees to self-assess their compliance response, there is an inherent risk that they will opt for the safest option when in doubt to avoid enforcement and fines.[19] The draft DMA provides the Commission with the same fining powers as under competition rules, i.e. fines may amount to up to 10 % of the concerned undertakings group-wide turnover in the last financial year. Accordingly, undertakings, especially listed companies, will be motivated to stay clear of non-compliance, which will likely invite over-compliance in present business models and careful steering away from any problematic future business models – by a margin. Welfare losses of this type won't be measured, nor could they be measured – which underscores the need for a sun-set clause.

8. Overlap between Articles 5, 6 DMA and § 19a German Act against Restraints of Competition (ARC) threatens "over-regulation"

In addition, we consider the future interplay between national regulations like the newly introduced German § 19a ARC and Articles 5 and 6 DMA to constitute an appreciable threat of "over-regulation". Legal uncertainty will forcibly arise in the face of similar but incongruent regulations enforced by different authorities, the Federal Cartel Office on the one side and the Commission on the other, in this case.

The list of addressees appears to be rather similar, undertakings with paramount cross-market significance with a presence in more than one market ("eco-system") and a gatekeeper providing core platform services, both without a need to be dominant in the conventional

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19 See Pablo Ibáñez Colomo, The Draft Digital Markets Act: a legal and institutional analysis, p. 28, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276.

competition sense.

However, contrary to the Proposal, the Federal Cartel Office will have to determine both the addressees and the relevant behavioral obligations under § 19a ARC. Furthermore, the addressees of §19a ARC can raise the defense that their behavior is materially justified.[20] This more moderate, and adaptable approach offers the opportunity to collect experience in digital sector enforcement. The Commission may be well advised to reflect any learnings in future amendments to the Proposal.

II. Article 7 – Compliance with obligations for gatekeepers

According to Article 7 paragraph 1 DMA,

> *"[t]he measures implemented by the gatekeeper to ensure compliance with the obligations laid down in Articles 5 and 6 shall be effective in achieving the objective of the relevant obligation."*

This definition for when compliance may be achieved highlights some of the critical shortcomings of the Proposal's design.

First, there appears to be a difference between the mere obligation itself and its objective. This raises the question why the objective, likely the remedy of an underlying theory of harm, is not the focus of the respective obligations or prohibitions in the first place. Why are the addressees obliged to deduce the underlying objective for each obligation or prohibition that may apply to them? This appears to introduce a kind of "dual compliance", with the obligation and the underlying objective, where the EU Commission however dispenses with a clear statement re the underlying objectives (or theories of harm).[21] This adds further legal uncertainty burdened on the addressees – where it should be upon the authority to define objectives and adapt the rules to the relevant addressee and market conditions.

Next, Article 7 paragraph 2 DMA speaks of

> *"[…] effective compliance with the relevant obligations […]".*

It remains unclear whether there is a difference between "compliance" as in para. 1 and "effective compliance" in para. 2. The wording needs clarification.

The Proposal speaks of a "dialogue" with the Commission regarding implementation of Article 6 (which is supposedly nevertheless self-executing) – this dialogue as an interim step towards implementation (and compliance) needs procedural clarification, probably best aligned with the procedure proposed for notices to the EU Commission under Article 3, and it should be extended to Article 5. Given that the number of addressees is presumably low, this should be feasible and will not harm the effectiveness of the provisions. This is especially true since according to Article 7 paragraph 2 DMA the Commission will in any case need to examine the effectiveness of the gatekeeper's measures and

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20 § 19a paragraph 2 sentence 3ARC; see more below at our comments on Articles 8 and 9.

21 See See Pablo Ibáñez Colomo, The Draft Digital Markets Act: a legal and institutional analysis, p. 30, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276.

> *"[…] it may by decision specify the measures that the gatekeeper concerned shall implement."*

Against the above-described background, an interactive process under which the addressees propose compliance measures to the EU Commission and receive a response within a short time frame (as under Article 3) would seem more appropriate. In paragraph 7, the Proposal does provide the option to request the opening of proceedings by the Commission in order to assess the effectiveness of the intended measures - there seems to be no obligation for the Commission to comply with such a request.

Finally, situations may arise where effective measures are not available which could also be deemed proportionate – as required under Article 7 paragraph 5 DMA. For example, there might be situations where a shutdown of the entire service might be the only way to ensure compliance with the obligations of Articles 5 and 6 DMA. The narrow suspension rules in Articles 8 and 9 DMA may not apply. Therefore, a defence based on lack of proportionality should be included in Article 7 DMA.[22] Article 8 DMA clearly has other cases in mind (threats to the economic viability not of a particular platform service but of the entire "operation").

III. Article 8 – Suspension

1. Paragraph 1

Given the stringent, self-executing character of the rules, an exemption, as foreseen in Article 8, from the obligations and prohibitions of Articles 5 and 6 DMA would seem a necessary addition in order to address the individual circumstances of a specific gatekeeper and its unique business model.

Article 8 DMA, however, only provides for an exemption

> *"[…] where the gatekeeper demonstrates that compliance with that specific obligation would endanger, due to exceptional circumstances beyond the control of the gatekeeper, the economic viability of the operation of the gatekeeper in the Union, and only to the extent necessary to address such threat to its viability."*

As already stated above (2.3(g)), the suspension's rather narrow scope does not sufficiently address the many scenarios in which the relevant conduct may be justified, because it creates efficiencies and thus constitutes competition on the merits. Digital markets continuously innovate and offer new types of services. Accordingly, as expressed above, the DMA should allow the Commission to consider, and weigh, the individual circumstances of each case. As the list of addressees will be rather small in view of the definitions in chapter 2, and since the EU Commission will have to monitor compliance in any case (see above, re Article 7), the additional administrative burden appears acceptable.

Moreover, the conditions of economic viability should be linked to the respective core platform service, not to the entire "operation". Otherwise, this provision discriminates against addressees

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22 The lack of a proportionality check in Article 7 was also discussed by See Pablo Ibáñez Colomo, The Draft Digital Markets Act: a legal and institutional analysis, p. 27 et seq., available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276.

with diversified business activities compared to those undertakings whose entire business operation consists of the provision of a single core platform service.

In order to ensure an effective application of the three-month deadline, the information to be supplied in order to render a request for suspension "complete", must be more closely defined to ensure that requests start the clock running.

2. Paragraph 2

The Proposal obliges the Commission to review whether the conditions for suspension continue to be fulfilled year after year. Given the resources such a review process requires on both ends, i.e. for the Commission as well as the respective addressees, the validity of such a suspension once taken could be extended. In addition, the period available for the investigation should be aligned with the timeframe stipulated in para. 1 in order to speed up the review process and thus legal certainty for the addressee.

3. Paragraph 3

Given that the economic viability of an addressee must be at stake for Article 8 to apply, an interim suspension as provided for under paragraph 3 would seem to be a necessary addition. We suggest to include a review and decision-making deadline as applicable under paragraph 1. This deadline should be no longer than one month in order to ensure the effectiveness of an interim application. On the fast-moving platform markets, a swift decision would seem important to protect the addressees from substantial harm to their operations.

IV. Article 9 – Exemption for overriding reasons of public interest

We welcome the fact that Article 9 DMA adds further grounds for exemptions to the cases already covered under Article 8 DMA. To align this with the procedural rules of Article 8 DMA, a deadline for review and decision-making should be included in Article 9 DMA as well, preferably not extending any longer than the three-month period suggested under Article 8 DMA.

V. Article 10 – Updating obligations for gatekeepers

Pursuant to Article 10 (1) of the Proposal, the Commission will be competent

> *"to adopt delegated acts in accordance with Article 34 to update the obligations laid down in Articles 5 and 6 where, based on a market investigation pursuant to Article 17, it has identified the need for new obligations addressing practices that limit the contestability of core platform services or are unfair in the same way as the practices addressed by the obligations laid down in Articles 5 and 6."*

The regulatory flexibility which this provision affords aligns well with the dynamism of digital markets in general. Nonetheless, we propose further revision to optimize this approach.

First, the reference to Article 34 DMA appears to require further explanation. This provision concerns the publication of decisions by the Commission:

> *"1. The Commission shall publish the decisions which it takes pursuant to Articles 3, 7, 8, 9, 15, 16, 17, 22, 23(1), 25, 26 and 27. Such publication shall state the names of the parties and the main content of the decision, including any penalties imposed.*

> *2. The publication shall have regard to the legitimate interest of gatekeepers or third parties in the protection of their confidential information."*

Article 10 is not mentioned in Article 34. The power under Article 10 is apparently not a "decision" within the meaning of Article 34 but the (delegated) enactment of regulation. This raises concerns regarding the distribution of powers. According to Article 290 (1) TFEU, the power to adopt non-legislative acts of widespread application may be delegated to the Commission by a legislative act adopted by the European Parliament. This delegation, however, should only concern non-essential non-operative parts of the respective legislative acts. The rules laid down in the Articles 5 and 6 DMA, however, are at the very core of the Proposal, next to the gatekeeper definition, and define the scope of rules – de facto – neutralizing gatekeepers' competitive advantages (i.e. business successes).[23] The Commission as an executive body should therefore not be able to change, and in particular, widen the scope of these rules without a renewed involvement of the European Parliament. Thus, at least a condition based on Article 290 paragraph 2 TFEU should be included in Article 10 DMA. According to Article 290 paragraph 2 TFEU, a delegated act from the Commission may enter into force only if no objection has been expressed by the European Parliament or the Council of the EU.

In addition, Article 10 DMA does not refer to the harmonization objective as a requirement to widen the scope under Article 10 paragraph 2 DMA. Even if Article 114 TFEU could generally be considered as a suitable legal basis for the Proposal (see above at 2.2(a)), it appears questionable whether Article 10 DMA in its present layout may be covered by Article 114 TFEU.

Moreover, the requirements set out in Article 10 paragraph 1 appear to be somewhat vague and overly broad. Even though Article 10 paragraph 2 DMA provides a definition for what must be understood conduct harming contestability and fairness of markets,[24] this provision still leaves wide discretion as regards updating the obligations and prohibitions in Articles 5 and 6 DMA. We suggest to introduce a materiality threshold, i.e. a clarification on what scale (ideally quantifiable) an impact on the digital sector must be harmful before the Commission may add new obligations or prohibitions. Here again, the absence of specific theories of harm, contemplated by the Act, is problematic as it does not limit the discretion to widen the scope of these rules.

VI. Article 11 – Anti-circumvention

Article 11 paragraph 1 DMA states, that

> *"A gatekeeper shall ensure that the obligations of Articles 5 and 6 are fully and effectively complied with. While the obligations of Articles 5 and 6 apply in respect of core platform services designated pursuant to Article 3, their implementation shall not be undermined by any behaviour of the undertaking to which the gatekeeper belongs, regardless of whether this behaviour is of a contractual, commercial, technical or any other nature."*

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23 Pablo Ibáñez Colomo, The Draft Digital Markets Act: a legal and institutional analysis, p. 20, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276.

24 An attempt to narrow down the definition of these terms was made by Pablo Ibáñez Colomo, The Draft Digital Markets Act: a legal and institutional analysis, p. 20, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276

Contrary to the summary on page 13 of the Proposal, Article 11 DMA does not merely clarify that the obligations laid down in the Regulation apply regardless of the nature of the relevant conduct, but extends liability to the entire economic unit: Article 11 paragraph 1 DMA not only affirms the gatekeeper's own duty to ensure that the obligations of Articles 5 and 6 DMA are complied with, but adds an extensive supervision obligation as Article 2 paragraph 22 of the Proposal defines 'undertaking' as:

> *"all linked enterprises or connected undertakings that form a group through the direct or indirect control of an enterprise or undertaking by another and that are engaged in an economic activity, regardless of their legal status and the way in which they are financed;".*

The wording suggests that the gatekeeper will be held responsible for the conduct of any company of the same group. This would also apply where the gatekeeper cannot exercise control over the relevant undertaking under principles of company law (in particular concerning corporations which may have to afford the C-suite a certain amount of independence under member state laws). In those cases, it remains somewhat unclear how the gatekeeper can ensure compliance with Article 10 paragraph 1 DMA. We propose to add further clarification (and limitations).

The provisions about handling personal data (Article 11 paragraph 2 DMA) and discriminating against users who avail themselves of the rights or choices laid down in Articles 5 and 6 (Article 11 paragraph 3 DMA) should be explained in more detail.

VII. Article 12 – Obligation to inform about concentrations

Article 12 introduces an obligation to communicate any anticipated concentrations to the EU Commission. As per Article 12 paragraph 1 DMA,

> *"[a] gatekeeper shall inform the Commission of any intended concentration […] involving another provider of core platform services or of any other services provided in the digital sector irrespective of whether it is notifiable to a Union competition authority […] or to a competent national competition authority under national merger rules."*

It follows that, for the purposes of Article 12 DMA, it is irrelevant whether such an anticipated acquisition will trigger a notification requirement under the EU (or national) merger control rules.

In order to meet the DMA's goal of ex-ante regulations, paragraph 2 further stipulates that,

> *"[a] gatekeeper shall inform the Commission of such a concentration prior to its implementation […]."*

Article 12 apparently seeks to warrant systematic monitoring of all M&A activity and in particular so-called *killer acquisitions*. This threatens to limit important incentives for the founding of innovative start-ups as, for many founders, selling the company is the desired exit strategy. This is one of the reasons why the German legislator decided to introduce a review of such acquisitions even below the normal merger notification thresholds, as part of the recently introduced 10th amendment to the ARC, but only once a sector investigation has been conducted offering a thorough understanding of the relevant market(s).

Under the Proposal, the obligation to inform under Article 12 DMA appears open-ended: it is not clear what follows after an M&A project has been communicated. Without amending the merger regime, the EU Commission will in many cases not be able to follow up. The Competition

Commission 4.0 had suggested changes to the EC Merger Regulation to ensure an effective merger review complement next to the DMA.[25] Of course, the DMA's legal basis (Article 114 TFEU) does not offer the power to alter the EC Merger Regulation. In this regard, the otherwise so stringent Proposal appears incomplete.

VIII. Article 13 – Obligation of an audit

According to recital 61,

> *"[…] gatekeepers should at least provide a description of the basis upon which profiling is performed, including whether personal data and data derived from user activity is relied on, the processing applied, the purpose for which the profile is prepared and eventually used, the impact of such profiling on the gatekeeper's services, and the steps taken to enable end users to be aware of the relevant use of such profiling, as well as to seek their consent."*

The actual obligation in Article 13, however, extends beyond these general requirements, as the gatekeeper is obliged to

> *"[...] submit to the Commission an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services […]."*

The required report should be better aligned with the recital. Moreover, the Commission should provide better justification why such a far-reaching report should be necessary in the first place. Given the investigation powers included in chapter IV, we question the proportionality of a requirement to self-assess (or self-audit) and report in such detail, and, what's more, year after year.

The timeframe imposed for the initial report should be revised. The rather tight deadline of six month for providing the initial report and its subsequent annual updates appear ill-conceived given the complexity and long list of the reportable facts.

Further, assuming that such wide-reaching reporting requirements are proportionate (which we have called into question), the more effective (and more proportionate) approach would be to lengthen the intervals between each report to two or three years (assuming that the underlying facts will not change that fast) and in exchange, introduce a power for the Commission to request additional information on a case-by-case basis. In this way, the Commission will be able to better steer the reporting breadth and depth to its requirements, without overburdening the addressees.

Finally, needless to state that the reporting requirement can only extend to the EEA, not further – it appears unclear how the geographic scope can be adequately limited where core platform services are offered worldwide, as will often be the case.

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25 A new competition framework for the digital economy - Report by the Commission 'Competition Law 4.0', p. 61-68.

F. Chapter IV – Market investigation

I. Article 14 DMA – Opening of a market investigation

Pursuant to Article 14 paragraph 3 (b) DMA, the Commission is empowered to reopen a closed market investigation if

> "*the decision was based on incomplete, incorrect or misleading information provided by the undertakings concerned.*"

According to the wording, the Commission would not be entitled to reopen a closed market investigation if an association of undertakings provided the incomplete, incorrect or misleading information. Although, it is more likely that the Proposal accidentally did not include associations of undertakings it shows the incoherent approach regarding associations of undertakings.

II. Article 15 DMA – Market investigation for designating gatekeepers

Article 15 paragraphs 1, 2 and 3 DMA determine time limits in which the Commission

> "*shall endeavour"*

to communicate its preliminary findings to the provider concerned and to conclude its investigation by adopting a decision. The Proposal does not determine under which circumstances the Commission may extend the time limits. In addition, the Proposal does not limit the total duration of any extension or extensions pursuant to this article. To ensure a quick Commission decision the DMA should in accordance with Article 16 paragraph 6 DMA state:

> '*The total duration of any extension or extensions pursuant to this article should not exceed six months.*'

Furthermore, instead of using the indeterminate term 'endeavour' the DMA should define under which circumstances the Commission may extend the time limit.

Article 15 paragraph 4 DMA limits the Commission's power to impose obligations on gatekeepers which in accordance to Article 3 paragraph 1 (c) DMA will enjoy an entrenched and durable position in its operations in the near future. Hence, this paragraph is detached from the previous paragraphs and should be included in Chapter III.

III. Article 16 DMA – Market investigation into systematic non-compliance

Pursuant to Article 16 DMA, the Commission is entitled to impose on a gatekeeper who

> "*has systematically infringed the obligations laid down in Articles 5 and 6 and has further strengthened or extended its gatekeeper position in relation to the characteristics under Article 3(1),[…] any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with this Regulation.*"

The Proposal does not determine which behavioural or structural remedies the Commission may impose. Only recital 64 DMA states:

> "*Structural remedies, such as legal, functional or structural separation, including the divestiture of a business, or parts of it*".

To ensure legal certainty the DMA should determine which categories of behavioural or structural remedies could be imposed.

According to Article 16 paragraph 6 DMA,

> "*The Commission may at any time during the market investigation extend its duration where the extension is justified on objective grounds and proportionate.*"

It remains unclear under which circumstances an "extension is justified on objective grounds and proportionate." In addition, the Proposal does not regulate whether the Commission needs to publish or to justify an extension. As a consequence providers concerned have no legal remedies against an extension.

IV. Article 17 DMA – Market investigation into new services and new practices

Pursuant to Article 17 DMA the Commission

> "*shall issue a public report at the latest within 24 months from the opening of the market investigation [into new services and new practices].*"

It is questionable whether such a duration is in accordance with the overall goal of the Proposal to ensure

> "*the ex ante effect of this Regulation on contestability and fairness in the digital sector*".[26]

Especially in a fast developing and changing sector like the digital sector it is crucial to review changes and developments in a short period.

Furthermore, the long time limit puts into question whether the proposed DMA is a suitable (and thus proportionate) means to achieve the goals defined for it. Such a suitability is a precondition for the proportionality of any investigative and other restricting measures taken under the DMA (information requests etc.).

G. Chapter V – Investigative, enforcement and monitoring powers

I. Article 19 DMA – Requests for information

Article 19 DMA authorises the Commission to require information from 'associations of undertakings'. Unfortunately, the Proposal neither defines 'associations of undertakings' nor does it specify in which relation the 'associations of undertakings' need to be with the gatekeeper concerned. Thus, it remains unclear whether 'associations of undertakings' should be defined as under Article 101 TFEU or not. Furthermore, Article 19 DMA would entitle the Commission to require information from any 'association of undertakings' in the EU, including associations which are not active in the digital sector.

According to Article 19 paragraphs 3 and 4 DMA, the Commission is obliged to

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26 Recital 62 DMA.

> "*fix the time-limit within which the information is to be provided*".

Thus, the Proposal does not determine which minimum or maximum time-limit is appropriate.

In addition, recital 69 DMA states:

> "*The Commission should be empowered to request information necessary for the purpose of this Regulation, throughout the Union […] irrespective of who possesses the documents, data or information in question*".

Although recital 75 DMA states:

> "*under certain conditions certain business records, such as communication between lawyers and their clients, may be considered confidential if the relevant conditions are met*"

it remains unclear which conditions need to be met that the communication between a lawyer and its client may be considered confidential.

Furthermore, recital 70 DMA shows the attitude of the Proposal as prior to other interests. According to recital 70 DMA,

> "*the Commission should be able to request any relevant information from any public authority, body or agency within the Member State*".

Thus, other interests as for instance effective criminal prosecution or data protection are not equally addressed.

II. Article 20 DMA – Power to carry out interviews and take statements

Pursuant to Article 20 DMA, the Commission may interview any natural or legal person. Recital 71 DMA states more specifically:

> "*the Commission should also be empowered […] to interview any persons who may be in possession of useful information and to record the statements made*".

Accordingly, the Proposal does not consider whether other interests should be protected. For instance could the Commission interview active or former lawyers of an investigated undertaking.

III. Article 21 DMA – On-site inspections

It is striking that the Proposal is less precise about investigation proceedings than for instance Article 20, 21 Regulation (EC) No 1/2003 as well as Article 13 EC Merger Regulation.

The Proposal remains vague in respect of the power of the Commission. While e.g. Article 13 paragraph 2 EC Merger Regulation gives the Commission the

> "*power to enter any premises*"

the Proposal states:

> "*the Commission may conduct on-site inspections at the premises*".

Hence, under the Proposal it is unclear whether the Commission has the power to enter regardless of a contrary will of the undertaking concerned. In addition, the Proposal does not oblige the Commission, as Article 13 paragraph 4 EC Merger Regulation, to consult the competent authority of the Member State in whose territory the inspection is to be conducted before the investigation is executed. Furthermore, the Proposal remains silent regarding the role of national authorities during an investigation.

On the other hand, the Proposal states in recital 68 DMA:

> "*the Commission should have strong investigative and enforcement powers, to allow it to investigate, enforce and monitor the rules laid down in this Regulation*".

In addition:

> "*the Commission should dispose of these investigative powers also for the purpose of carrying out market investigations for the purpose of updating and reviewing this Regulation.*"

Nevertheless, especially on-site inspections are measures which should be only allowed under specific circumstances. As long as the Proposal does not explicitly determine the preconditions for conducting on-site inspections the Proposal does not provide a sufficient legal basis for on-site inspections.

IV. Article 22 DMA – Interim measures

Article 22 DMA entitles the Commission to

> "*order interim measures […] on the basis of a prima facie finding of an infringement of Articles 5 or 6.*"

The Proposal does neither specify which interim measures can be taken nor does it lay down indications for a prima facie finding. To ensure legal certainty it would be recommended to specify the possible interim measures as well as lay down indications for a prima facie finding.

V. Article 24 DMA – Monitoring of obligations and measures

Article 24 DMA does not determine what are

> "*necessary actions to monitor the effective implementation and compliance with the obligations laid down in Articles 5 and 6 and the decisions taken*".

Pursuant to Articles 19 and 20, the Commission may request information or interview to effectively monitor. In contrast, Article 21 DMA does not name monitoring as a reason to conduct inspections. Recital 68 DMA indicates that the Commission should have the power laid down in Article 21 DMA for monitoring, too. Notwithstanding, recitals only have an interpretative value and are not legally binding.

VI. Article 25 DMA – Non-compliance

Pursuant to Article 25 paragraph 3 DMA

> "*in the non-compliance decision adopted pursuant to paragraph 1, the Commission shall*

order the gatekeeper to cease and desist with the non-compliance within an appropriate deadline".

Again it is not determined what minimum and what maximum period of time is considered as an appropriate deadline.

VII. Article 26 DMA – Fines

Article 26 paragraph 1 DMA entitles the Commission to

"*impose on a gatekeeper fines not exceeding 10% of its total turnover*".

Hence, the fines are limited by the turnover of the gatekeeper concerned which is according to Article 2 paragraph 1 DMA the provider of core platform services and, thus, not the controlling undertaking. This approach allows an easier determination of the relevant turnover. Difficulties could arise by determining the turnover of the undertaking to impose fines according to Article 26 paragraph 2 DMA.

With Article 26 paragraph 4 DMA the Proposal copies mainly Article 23 paragraph 4 Regulation (EC) No 1/2003. It is questionable if it is appropriate to establish liability of members of an association of undertakings and to treat associations of undertakings like controlling undertakings. Unlike in the field of competition law, associations of undertakings do not seem to have the power or influence to play an important role in the behaviour of gatekeepers.

VIII. Article 27 DMA – Periodic penalty payments

The Proposal does not determine whether or not periodic penalty payments can be imposed in addition to fines pursuant to Article 26 DMA.

IX. Article 28 DMA – Limitation periods for the imposition of penalties

Article 28 paragraph 2 sentence 2 DMA states:

"*in the case of […] repeated infringements, time shall begin to run on the day on which the infringement ceases*".

According to the wording, limitation periods for the imposition of penalties would start again with each new infringement also for earlier infringements. There is no clear definition of what is considered a "repeated" infringement in contrast to a "new" infringement. In absence of such a definition, a new infringement could reopen the limitation period for earlier infringements if it is treated by the respective authority as a repeat infringement. This deprives gatekeepers of the legal certainty with regard to their past behaviour which is the purpose of limitation periods.

X. Article 30 DMA – Right to be heard and access to the file

Only before the Commission is

"*adopting a decision pursuant to Article 7, Article 8(1), Article 9(1), Articles 15, 16, 22, 23, 25 and 26 and Article 27(2)*"

the provider or undertaking or association of undertakings concerned has the right to be heard and will gain access to the file. According to Article 3 paragraph 6 and Article 15 DMA, the

designation as a gatekeeper “may” be based on a market investigation. Therefore, the Commission could designate a provider according to Article 3 paragraph 6 DMA as a gatekeeper without conducting a market investigation and, thus, without being obliged to give the entity concerned the opportunity of being heard or to offer access.

Taking into consideration that the designation as a gatekeeper has already a negative impact on a provider and the undertaking to which it belongs, providers and undertakings concerned should get the right to be heard and to gain access to the file as soon as a proceeding pursuant to Article 3 paragraph 6 DMA begins.

Therefore, if the Commission is designating a provider as a gatekeeper pursuant to Article 3 paragraph 6 DMA without conducting a market investigation, a legislative gap arises. This legislative gap could be avoided by an obligation to base every designation as a gatekeeper on a market investigation or by giving providers and undertakings the right to be heard before the final designation as gatekeeper.

H. Chapter VI – General provisions

I. Article 36 DMA – Implementing provisions

It is welcomed that pursuant to Article 36 paragraph 2 DMA, the Commission may implement

> “*practical arrangements for the cooperation and coordination between the Commission and Member States provided for in Article 1(7)*.”