ROBIN HOOD 2.0

An Assessment of the New Competition Approach Drawn by The Digital Market Act from an Ordoliberal Lens

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Robin Hood 2.0: An Assessment of the New Competition Approach Drawn by The Digital Market Act from an Ordoliberal Lens

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HayatAkademi

Muhammedali Aktas is a research assistant at Fatih Sultan Mehmet University in Istanbul. He has two LLM degrees, one in Legal History at Marmara University and the other in EU Economic Law at Europa-Institut / Saarland University. He is currently a PhD. candidate in Istanbul University with a thesis titled "Redesigning the Relationship Between Administrations: The Phenomenon of Contractualisation". His academic field covers administrative law, competition law, EU law, and legal history.

Acknowledgment

This book is a result of my workings at Europa-Institut / Saarland University. In this study, I strived to give theoretical clarity to the position of the DMA by handling the technical specialties of the legislation intertwined with the concepts and competition approach embraced by it. It was an effort to investigate the legal continuity of the DMA with the classic competition enforcement in the EU and examine the allegations that the DMA exhibits ordoliberal characteristics. This study would not be in presence in the absence of Mr. Dr. Manuel Kellerbauer, who honored me by accepting the supervision and writing a foreword to this book. Thanks also to my PhD. Supervisor Prof. Dr. Meliksah Yasin made this study possible by paving the way for me with his broad perspective on academic development. I've also had kindly support of my dear friends in Saarbrücken and Istanbul, whose names are Enes Bayrak, Yusuf Sinan Canatar, Enes Ozkan, Emirhan Başol, and Anıl Toros. I owe my gratitude also to the Toğru family and Tahsin Saygılı for their sincere friendship and support. Finally, this book is a result of the visionary and science-loving approach of Hayat Akademi Press. Thanks for turning this academic effort into an open-access book.

Foreword

Digitalization has had an evolutionary effect on our economic systems and the legal challenges of today are inextricably linked with our digital world. Accordingly, competition law and competition law related regulatory instruments, as points where economy and law meet, emerge as an area that needs to be adapted to the information age. This adaption needs to be consistent with the theories that have successfully guided law enforcement in the past.

The EU is at the forefront of addressing the digital challenges in the economy, such as the rise of digital platforms, data-driven business models, and the concentration of market power in the hands of a few tech giants. The Digital Markets Act (DMA) is a key instrument in this endeavor. A wealth of literature addressing the DMA has emerged in a relatively short period. However, much of this literature focuses on the DMA's technical details and practical implications rather than shedding light on the DMA against the backdrop of the economic theories that have shaped our understanding of economic law enforcement in the last century.

Muhammedali Aktas has elaborated a unique approach to the theoretical aspects of the DMA, which combines legal analysis with economic theory. His work analyses to what extent the DMA points to a re-emergence of the ordoliberal approach. The author outlines the key features of the digital economy and presents the main features and legal issues related to the DMA. Next, the concepts of the ordoliberal approach to competition policy are explained. Finally, a thorough investigation is conducted by comparing the features of the DMA with the main concepts of ordoliberal thinking.

Mr Aktas' work contributes significantly to the expanding literature on the EU digital competition law. The author provides us with noteworthy

insights, some of which merit further exploration. He consolidates parts of the slightly scattered literature into a cohesive narrative. In addition to examining the DMA's legal continuity regarding the current EU competition law framework and prevailing economic theories, he delves deeper into the concepts underlying the DMA and identifies inconsistencies with ordoliberal concepts.

I commend the painstaking scholarly effort demonstrated in Mr Aktas' work and recommend his text to everybody that wants to gain a deeper insight into the DMA without neglecting the economic theories that are required to understand its foundations.

Dr. Manuel Kellerbauer

Table of Content

This book is dedicated to my family, who constantly and selflessly supported me.

Abbreviations

AER	American Economic Review
AEJM	American Economic Journal: Microeconomics
AJCL	American Journal of Comparative Law
CBLR	Columbia Bussiness Law Review
CCLR	Concurrences Competition Law Review
CLES	Center for Law, Economics, and Society
CLR	California Law Review
CLS	Columbia Law School
CMA	UK Competition and Markets Authority
CPS	Core Platform Services
DMA	Digital Market Act
EC	European Commission
ECJ	European Court of Justice
ECoJ	European Competition Journal
EHR	The Economic History Review
ELJ	European Law Journal
ELR.	European Law Review
EP	European Parliament
EU	European Union
EuCML	Journal of European Consumer and Market Law
FLR	Fordham Law Review
GDPR	General Data Protection Regulation
GLJO	Georgetown Law Journal Online
HBR	Harvard Business Review
HIO	Handbook of Industrial Organisation
ICTs	Information and Communication Technologies

IJCL	International Journal of Constitutional Law
IJIO	International Journal of Industrial Organization
IRS	International Review of Sociology
JAE	Journal of Antitrust Enforcement
JECLP	Journal of European Competition Law & Practice
JEP	Journal of Economic Perspectives
JIBP	Journal of International Business Policy
JLEO	Journal of Law, Economics, & Organization
LS	Legal Studies
MLR	The Modern Law Review
MS	European Union Member State
NCAs	National Competition Authorities
NDLR	Notre Dame Law Review
SJLBF	Standford Journal of Law, Bussiness & Finance
TLR	Touro Law Review
TFEU	The Treaty on the Functioning of the European Union
TEU	The Treaty on European Union
UPLR	University of Pennsylvania Law Review
VJIL	Virginia Journal of International Law
VLR.	Villanova Law Review
WLLR	Washington and Lee Law Review
ZEuP	Zeitschrift für Europäisches Privatrecht

Abstract

The digital giants have dominated the economy during the last two decades with a transformative effect. Besides their financial bigness, they have the power to transform the cornerstones of the existing economy and markets. The distinctive features of the digital giants enabled them to infiltrate from the loopholes of the classical competition law enforcement both in the EU and the US. The first systematic response came from the EU via the adoption of the Digital Market Act (DMA). Following the issuance of the draft DMA, it has been argued that it reflects ordoliberal features. Therefore, examining the DMA from an ordoliberal competition perspective and displaying the extent to which the first is compatible with the latter would be invaluable in contributing to the creation of a good digital competition law theory. To accomplish this mission, section B handles the basics of the digital economy by defining the core notions and trying to place them into a systematic concept. On this basis, it shows the features and challenges of the digital economy. Section C gives an overview of the classical competition law by explaining the fundamental features and main tools of this economy instrument. In addition, it will display the enforcement loopholes stemming from the digital challenges. Section D comprehensively examines the DMA, starting from a briefly narrated historical background. It focuses on the fundamental features, the enforcement structures, and the main tools of the DMA in turn. Section E describes the Ordoliberal competition law approach based on its mental framework, instrumental requirements, objectives, and actual situation. The assessment of the DMA from an ordoliberal lens tops the section by giving the final answers for the concern above. Section F concludes the book by making an analogy between DMA and Robinhood. The final finding of the book is as such: The features of the DMA regarding the enforcement

structure and instruments are partially compatible with the ordoliberal requirements. However, the position of fairness in the DMA doesn't overlap with its exceptional role as an interim objective in Ordoliberalism. What is more unfortunate is the uncertainties exhibited by the DMA concerning its legal basis, objectives, and nature. These are entirely contrary to the constitutional economy understanding of Ordoliberals, where individuals can use their economic rights free from arbitrary interventions in an 'ordnungspolitik'. Against the challenges of the imbalanced social structure of techno-feudalism, the DMA emerged as an updated second version of Robinhood, neither completely inside nor entirely outside the EU competition law and economic framework, to ensure an undistorted internal market where the European people play and share fairly amongst them. However, there is no place for a Robinhood, who has many paradoxes in his character, within the Ordoliberal competition understanding whose primary concern is the establishment of 'ordnungspolitik' based on the economic constitution.

A. Introduction

As succinctly stated by Fritz Fleiner who was the famous Swiss constitutional and administrative law professor "*There is nothing more practical in jurisprudence than a good theory (Es in der Jurisprudenz nichts Praktischeres gibt, als eine gute theorie)*".[1] This laconic means a lot given the fact that the Digital Market Act (hereinafter "DMA") is deja started to be implemented and the compliance with obligations covered by art. 5 and 6 DMA has been required for the designated gatekeepers from the 7 March 2024.[2] Because a good theory will render a consistent application of this legislation and provide appropriate and mature answers to legal questions that may arise in the future, deepening legal thought and establishing a solid foundation.

As is increasingly evident, the digital giants have dominated the economy during the last two decades with a transformative effect. The four of the biggest five companies all around the world by market capitalization are digital giants in 2023.[3] Besides their financial bigness, they have the power to transform the cornerstones of the existing economy and markets.

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[1] See Fritz Fleiner, 'Schweizerisches Bundesstaatsrecht', Tübingen 1923, p. VII; and 'Ausgewählte Schriften und Reden', Zurich, 1941, p. 420.

[2] For the application timeline see European Parlament, 'Digital Market Act: Application Timeline, https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/739226/EPRS-AaG-739226-DMA-Application-timeline-FINAL.pdf, (last accessed on 19/11/2023); For the press release on the starting of the compliance obligation see https://ec.europa.eu/commission/presscorner/detail/en/IP_24_1342 (last accessed on 04/04/2024)

[3] The only exception is Aramco-Saudi Arabia which constitutes a state monopoly see 'The 100 largest companies in the World by market capitalization in 2023', Statista, https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/#:~:text=With%20a%20market%20capitalization%20of,parent%20company%20Alphabet%2C%20and%20Amazon, (last accessed on 19/11/2023)

Naturally this digital storm resulted in competitive challenges. The distinctive features of the digital giants enabled them to infiltrate from the loopholes of the classical competition law enforcement both in the EU and the US. The first systematic response came from the EU via the adoption of the DMA. It was a result of the increasing success of the competition law against the antitrust law,[4] which have been articulated for a while.[5] The DMA can be seen as the flag raised for this success. The patterns of the flag have been shaped among the discourses that ordoliberalism can offer a solution-oriented new regulatory framework to digital challenges.[6] Following the issuance of the draft DMA, it has been also argued that it reflects ordoliberal features.[7] Therefore, examining the DMA from an ordoliberal competition perspective and displaying the extent to which the first is compatible with the latter will be invaluable in contributing to the creation of a good digital competition law theory.

The questions of the book are that: Were the challenges of the digital economy that desperate the classical competition law tried to be solved via the adoption of the DMA based on the ordoliberal competition law approach? If so, to what extent the DMA is compatible with Ordoliberalism? The effort to answer these questions throughout the study follows

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[4] Unless otherwise stated throughout the text, the term "Competition Law" will refer to the EU Competition Law and the term "Antitrust law" will refer to the US Competition Law.

[5] See Germán Gutiérrez / Thomas Philippon, 'How European Markets Became Free: A Study Of Institutional Drift', NBER Working Paper Series, No 24700, 2018; Anu Bradford / Adam S. Chilton / Katerina Linos / Alex Weaver, 'The Global Dominance of European Competition Law Over American Antitrust Law', Colombia Law School, Faculty Publications, 2019; Anu Bradford, 'The Brussels Effect: How The European Union Rules The World', Oxford, 2020, see particularly pp. 99-170; Kati Suominen, 'On the Rise Europe's Competition Policy Challenges to Technology Companies', Center for Strategic and International Studies, Report, October 2020.

[6] Streel, Concurrence / 2020, p. 2, 4; Wörsdörfer, Philosophy of Menagement / 2020, p. 191, 211; See also Isabel Oakes / Anselm Küsters, 'Lessons from the Past? How Ordoliberal Competition Theory Can Address Market Power in the Digital Age', 14 November 2021, https://www.promarket.org/2021/11/14/ordoliberal-lessons-competition-tech-platforms-antitrust-germany/, (last accessed on 20/11/2023)

[7] Larouche / Streel, CCLR / 2021, p. 46, 55; Larouche / Streel, JECLP / 2021, p. 542, p. 552.

the same line as the first question. Accordingly, section B will handle the basics of the digital economy by defining the core notions and trying to place them into a systematic concept. On this basis, it will show the features and challenges of the digital economy. Section C will give an overview of the classical competition law by explaining the fundamental features and main tools of this economy instrument. In addition, it will display the enforcement loopholes stemming from the digital challenges. Section D will comprehensively examine the DMA, starting from a briefly narrated historical background. It will focus on the fundamental features, the enforcement structures, and the main tools of the DMA in turn. Section E will describe the Ordoliberal competition law approach based on its mental framework, instrumental requirements, objectives, and actual situation. The assessment of the DMA from an ordoliberal lens will top the section by giving the final answers for the questions above. Section F will conclude the book by making an analogy between DMA and Robinhood and caricaturing it. This section will include also the final findings.

In terms of the procedure, we tried to make a good selection of sources in a current field on which much has been written. In addition, we made our references by going to the primary sources as much as possible and examining them in their context. It was very important not to miss out the differences between the Proposal of the DMA and the final enacted version of it. We took such instances into consideration.

B. The Basics of the Digital Economy and Markets

I. The Structure of the Digital Economy and Markets

1. The Requirement of Definition and Conceptualization

The Digital Economy is a phenomenon we have been witnessing since the millennium. According to one stream of Western economists, there are three types of economic systems constituting coordinating mechanisms: Traditional economic systems based on custom, market economic systems based on contract and free will, and command economic systems based on directive.[8] Even though the actual economies rarely embrace a pure type of them,[9] the current economy model is mainly based on the market system and has been ubiquitous everywhere for a long time.[10] The Digital economy is a version emerging in this system. Thus, the concept of digital markets became common usage among today's academics.

If one desires to investigate the notion of the digital market, as it seems to us, it should start by disclosing the market concept. Afterward, each concept element should be assessed under the specificities of the digital economy. Only this way could it be possible to observe the effect of the adjective "digital".

The market is a concept that is defined as "*an arena in which buyers and sellers exchange goods and services, usually for money. It does not have to have a physical location.*"[11] But as an economic exchange system, a "free market" also includes an understanding, dominating all transactions and

8 Grossman, pp. 18-20; Porket, p. 3.

9 Porket, p. 4.

10 Dunne, p. 1.

11 "Market", Dictionary of Finance and Banking, p. 277.

functioning of the organization, based on free will and thus contract between suppliers and demanders with ideally no or, in reality, minimal state intervention.[12] It is supposed that it works in itself towards competitive solutions and reaches the common goods through productivity.[13] It should be indicated that being "free" doesn't mean total independence from all structures. Because the existence and operation of a market can be possible by building on a legal framework as in the freedom of contract. So, the market is not a part of the natural order; it contrarily constitutes a legal structure.[14]

There are four main elements within the definition of market: the activity, which is the exchange of goods and services; the instruments, which are goods, services, payment with usually money and contract creating the interchange between the first two and the latter; the aim, which is collecting money; and the actors those are buyers/demanders and sellers/suppliers.

The digital economy is a concept known under different designations based on different focuses and scopes such as "network economy", "platform economy", "information economy", and "sharing economy" etc.[15] It has also been given several definitions which contain the effect of the times and streams from which they emerged.[16] Two common features could be extracted from these definitions: the first is differentiation into components, and the second is an implicit confirmation of vague boundaries of the digital economy.[17] Here, we should conceptualize the digital economy term to clarify the boundaries. There are two other terms concerning

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[12] Orlitzky, "Free Market", https://www.britannica.com/money/free-market (Last accessed on 29/09/2023)

[13] Hovenkamp, CBLR/2001, p. 257, 266; Tomasi, p. 9; Kirchner/Ehmke, in: Merkel/Kollmorgen/Wagener(eds.), p. 379, 389.

[14] Sunstein, p. 5; Dunne, pp. 2-3.

[15] Øverby / Audestad, p. 13.

[16] Bukht / Heeks, p. 4. For the table of different definitions which shows the focus of each definition see ibid, pp. 6-10.

[17] Ibid, p. 5.

the digital economy: the digital sector and the digitalized economy. The Digital sector covers the production of digital technologies and the related foundational services such as hardware manufacture, software and IT consulting, information services, and telecommunications, constituting the core and infrastructure of the digital economy.[18] Digitalized economy has the broadest scope and includes all economic activities that existed before Information and Communication Technologies (ICTs), thus can also arise due to other than ICTs. These are e-business, e-commerce, industry 4.0, precision agriculture, and algorithmic economy. However, the economic activities stemming only from the use of ICTs and didn't exist before, such as digital services, platform economy, sharing economy, and gig economy, constitute the scope of the Digital economy along with the digital sector.[19] (See Table 1) Based on these explanations the digital economy can be defined as "*that part of economic output derived solely or primarily from digital technologies with a business model based on digital goods and services*".[20]

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[18] Ibid, p. 11; Another conceptualization of the digital economy was made by OECD by dividing the digital economy into five tiers: "core measure", "narrow measure", "broad measure", "digital society", and "economic activity, digitally ordered and/or digitally delivered" see OECD, 'A roadmap toward a common framework for measuring the Digital Economy', Report for the G20 Digital Economy Task Force, Saudi Arabia, 2020, pp. 40-46. (Hereinafter 'OECD 2020')

[19] Bukht / Heeks, p. 12; UNCTAD, (Digital Economy Report 2019) Value Creation and Capture: Implications For Developping Countries, pp. 4-5 (hereinafter UNCTAD 2019); The classification of the economic activities here depends on the difference between extensive and intensive use of the ICTs. For the explanation of this distinction see Heeks, p. 168; According to the three tiers of digital economy concept dranw by OECD if an economic activity is reliant on digital inputs it will enter into scope of narrow measure section, if an economic activity is enhanced by digital inputs it will enter into the scope of broad measure see OECD 2020, p. 40.

[20] Bukht / Heeks, p. 13; For a definition embracing a broad approach in the sense of the digitalized economy see Srnicek, p. 11.

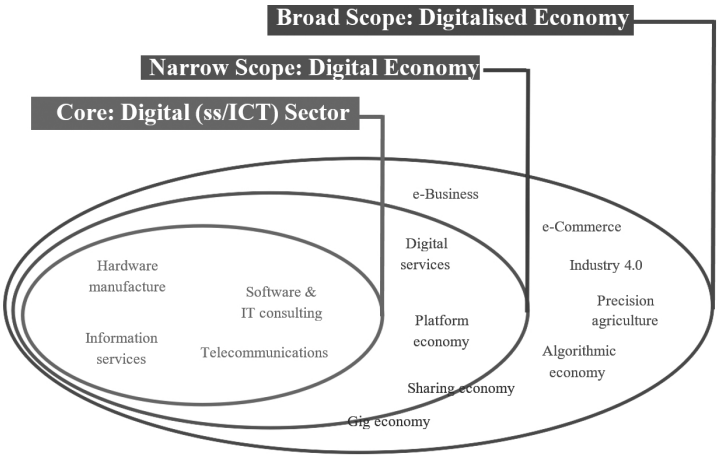

Table 1: Scoping the digital economy.[21]

The digital market can be identified as *"a mechanism for online trading of both digital goods and digital services and tangible goods or non-digital services"*.[22] There are various market types within the digital economy in the broad sense -digitalized market-. These can be classified under three main headings: Network access markets, information service markets, and e-commerce markets.[23]

Network access constitutes the core of the digital economy by offering customers fundamental services (foundational technologies) such as access to broadband connections, wi-fi, public mobile networks, telephone services, and messaging services. The providers in these markets are network providers and internet service providers.[24] Thus, it covers the digital sector except for information services.

Information services have a narrow and broad sense in the literature. In the broad sense, it covers digital content and applications from simple apps to complex software such as social media services, music streaming

[21] Bukht / Heeks, p. 13.

[22] Øverby / Audestad, p. 244.

[23] Ibid, p. 245.

[24] Ibid, p. 251.

services, web browser services, and messaging services, etc.[25] In the narrow sense, it means the infrastructural tools as information systems such as cloud computing, data storage and management systems, and internet connection, etc.[26]

The last type of market is e-commerce. It covers "*the online trading of tangible goods and digital goods and services with some sort of financial activity.*"[27] It falls within the scope of the digitalized economy due to being enhanced by using ICTs.

Before passing the assessment of the digital economy based on classical market structure, we should display the structural features of the digital economy.

2. Structural Features of The Digital Economy and Markets

a) Extreme Returns to Scale

As an efficiency matter, "returns to scale/economies of scale" is one of the most prominent features of the digital economy. It means that the more units produced, the less the proportion of the cost of production of goods or services per unit becomes.[28] Despite being an old phenomenon of the economy, this feature reaches an extreme point within the digital economy. Because, in the digital economy, marginal cost is zero, and infinitely many products can be produced with the same level of fixed cost. Hence, the production cost per unit will drop to almost zero.[29]

b) Network effect

One of the features of the digital economy is the network effect, which is also referred to by different denominations such as 'network externalities'

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[25] Ibid, p. 254; For an understanding of information services existed in an intermediate position see OECD 2020, p. 43.

[26] Bukht / Heeks, p. 11; UNCTAD 2019, p. 4.

[27] Øverby / Audestad, p. 248; UNCTAD 2019, p. 15.

[28] Crémer / Montjoye / Schweitzer, 'Competition Policy for the Digital Era Final Report', European Commission, 2019, p. 2. (hereinafter 'Special Advisers Report 2019')

[29] Øverby / Audestad, pp. 79-80.

and 'demand-side economies of scale'. One of the economic characteristics of a network is that the more the number of other people already connected to the network, the more the value of connecting to it.[30] Thus, the value of a digital service will increase with the increase of the number of users or amount of usage of it (positive network effect), or the value of a digital service will decrease with the decrease of the number of users or amount of usage of it (negative network effect).[31] It should be indicated that the network effect is totally different from the notion of supply-side economies of scale. The first focuses on the value of having many users, while the latter focuses on the cost advantage of being large.[32]

c) Constituting a Data-driven System

Placing data at the economy's center is the digital economy's primary feature.[33] Even though data collection and analysis is not new in the economic system, technological progress facilitated the collection, processing, and analysis of data through the way of digitization.[34] Thus, data shifted from being a mere side activity within the production process of goods and services to becoming the primary concern of the digital economy.[35] In the absence of assets owned by digital platforms,[36] data emerge to fill the gaps and link the sides of the economic transactions.

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[30] Shapiro / Varian, p. 173; Srnicek, p. 52. The Concept of the network externalities is not totally new. For some examples of network externalities before 1990s see, Shapiro / Varian, p. 175.

[31] For the division of possitive and negative network effect see Øverby / Audestad, pp. 124-129.

[32] Ibid, p. 124.

[33] It is described as oxygen of digital life see http://www.governancenow.com/news/regular-story/data-oxygen-digital-life-mukesh-ambani, 16 February 2017, (last accessed on 9/10/2023) and as oil for the digital economy see for a criticism of this analogy Scholz, Tennessee Law Review / 2020-85, Available at SSRN: https://ssrn.com/abstract=3252543 or http://dx.doi.org/10.2139/ssrn.3252543 (last accessed on 9/10/2023)

[34] UNCTAD 2019, p. 27; Øverby / Audestad, p. 9.

[35] UNCTAD 2019, p. 27.

[36] Mcafee / Brynjolfsson, p. 11.

Data has a complex character in the digital economy, which cannot be defined based on only one role within or facet of the economy. It has several roles, such as raw material, capital, currency, goods, and infrastructure for digital services.[37] Data can be collected from public fields or personal spaces. However, a considerable amount of the current database stems from personal spaces; thus, there is a rising concern about privacy issues. Most digital services are offered free in exchange for sharing personal data, based on a take-it-or-leave-it approach.[38] Here, the role of data transforms the person from being a customer to being a product, or rather to being a laborer, of the related service offerers. Thus, the companies who pay for data become the actual customers.[39]

As an economic resource, the property nature of data should be determined. If it is a common property, it should be accessible to all the entitled people, communities, and businesses. If it is private property as an economic right, the basis of it should be specified. It is also possible to embrace a mixed approach based on different data types.[40]

Although constituting an economic resource, data, as raw material, is not suitable to be directly used by data producers to generate monetary value. So, it doesn't constitute a market in itself. It should be processed and gain the structure of information or knowledge to create an economic value, thus forming a market.[41]

d) Path Dependency

The law of "diminishing returns" constitutes the base of the conventional economic theory. It means that if additional units of production factor are used, there would be negative feedback; thus, the output stemming from each additional unit would diminish, and a new predictable equilibrium would be reached based on the balance between supply and

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37 Aaronson, p. 7; Krafft / Kumar, Journal of Retailing / 2021, p. 133, 133.

38 UNCTAD 2019, p. 28.

39 Rushkoof, 'You Are Not Facebook's Customer', https://rushkoff.com/you-are-not-facebooks-customer/ (last accessed on 9/10/2023)

40 UNCTAD 2019, 32.

41 Ibid, p. 30. For the difference of data from information and knowledge see Dalkir, p. 7.

demand.[42] But Brian Arthur showed that this approach doesn't always comply with reality.[43] If one market includes a network effect, so there is positive feedback, when a platform draws interest from users, the cost of switching to an alternative platform will increase.[44] Because, for example, the creation of a profile and personalizing the services requires spending a lot of time; changing the platform may result in the loss of previous data such as messages, photos, and posts; in addition using a new platform may necessitate a learning and familiarizing process.[45] Furthermore the abundant of users would keep people from changing, rather incent them to buy more, due to the vast interaction opportunity stemming from those using it already.[46] So the usage history has a significant effect on the creation of new equilibriums and "*the different paths may end up in different equilibrium states*".[47]

e) The Domination of Platforms

The type of firm that dominates the digital economy is platforms.[48] It is described as "*a business based on enabling value-creating interactions between external producers and consumers… [by] provid[ing] an open, participative infrastructure for these interactions and sets governance conditions for them*".[49] Digital Platforms are moving these functions online and appears in two roles as intermediaries and infrastructures.[50] Associated with these two roles, there are mainly two types of platforms that constitute the form of most of the current digital giants.[51]

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[42] Arthur, p. 1; Øverby / Audestad, p. 166.

[43] Arthur, p. 1;

[44] UNCTAD 2019, p. 84; for a detailed analysis of the relationship of switching cost and network effect with competition see Farrell / Klemperer, in: Armstrong / Porter (eds.), pp. 1967-2072.

[45] UNCTAD 2019, p. 84.

[46] Arthur, p. 4.

[47] Øverby / Audestad, p. 167; "*The use of path dependence in economics is, for the most part,(…): Allocations chosen today exhibit memory; they are conditioned on past decisions*" see Liebowitz / Margolis, JLEO / 1995, p. 205, 210.

[48] Srnicek, p. 50.

[49] Parker / Alstyne / Choudary, p. 415.

[50] UNCTAD, p. 25.

[51] Koskinen / Bonina / Eaton, p. 3; Evans / Gawer, p. 4.

The first is transaction platforms, so-called two-sided / multi-sided platforms or markets, which aim at facilitating the exchange between two or more different parties by directly connecting buyers with sellers, advertisers with customers, drivers with passengers, etc.[52] Some examples could be listed as Amazon, Google, Facebook, WhatsApp, Uber, and Airbnb.[53]

The second is innovation platforms, also referred to as "technology platforms"[54], consisting of technological building blocks that serve as infrastructures enabling a myriad of innovators to develop complementary services and products.[55] Some examples can be listed as Android, Linux OS, and iPhone OS.[56]

It is essential to state that this distinction is not absolute, and many platforms bear and integrate the functions of both types. The integration/ integrated platforms, as the third type, includes firms, such as Apple mobile operating system, which is functioning, on the one hand, as a platform for third-party developers to innovate, on the other hand, as a platform enabling developers to transact with users by selling their applications.[57]

3. Behavioral Features of the Digital Economy and Markets

a) From the Platform Side

The structure of the digital economy offers platforms the opportunity to act anticompetitively. Certain economic behaviors are frequently

[52] Gawer, in: Gawer (ed.), p. 45, 57; Koskinen / Bonina / Eaton, p. 4; Evans / Gawer, p. 5; Hagiu / Wright, IJIO / 2015, p. 162, 163; There is a strong link between the two-sided markets and network effects illustrated within the literature. Even it is said that the literature about the first could be seen as a subset of the literature on the latter, with a different focus see Rysman, JEP / 2009, p. 125, 127.

[53] Koskinen / Bonina / Eaton, pp. 4-6; Evans / Gawer, p. 5; UNCTAD, p. 25.

[54] Baldwin / Woodard, in: Gawer (ed.), p. 19, 25; For an usage example see Melissa A. Schilling, 'Protecting or Diffusing a Technology Platform: Tradeoffs in Appropriability, Network Externalities, and Architectural Control', in: Gawer (ed.), Platforms, Markets and Innovation, Edward Edgar, 2009, pp. 192-218; For subtypes of technology platforms see Nicholas Economides / Evangelos Katsamakas, 'Two-Sided Competition of Proprietary vs. Open Source Technology Platforms and the Implications for the Software Industry', Menagement Science, 2006, V. 52, No.7, 2006. pp. 1057-1071.

[55] Evans / Gawer, p. 6.

[56] Ibid, p. 6; Koskinen / Bonina / Eaton, p. 4; UNCTAD 2019, p. 25.

[57] Evans / Gawer, p. 9; Koskinen / Bonina / Eaton, p. 9.

adopted by platforms, so they can be seen as behavioral features of the digital economy from the platform side.

aa) Pricing Strategies

Price is placed in a more complex and dynamic position within the digital economy. Because it doesn't reflect only the cost and profit but also the externalities stemming from the participation of users who are constituting "input" as well as being "users" due to the network effects.[58] Some of the strategies adopted by the digital giants could be articulated as "Discriminatory pricing" and "Cross-substitution".[59] It is worth indicating that even though these pricing strategies are not new phenomena, the development of information technology transformed them by providing new mechanisms.[60]

bb) Non-Pricing Strategies

The complexity of the structure of the digital economy and the intertwining of actors' roles facilitate the platforms to engage in non-pricing strategies, many of which have been used before, to increase their dominancy within the related digital economic area. These strategies can be listed as "Most favored nations", "Anti-steering provisions", "Tying and bundling", "Log-in", "Refusal / Difficilitating to access to data or digital infrastructure", and "Weakening of privacy protection".[61]

b) From the User Side

Consumers of digital platforms are not entirely innocent of the anti-competitive challenges stemming from the digital economy.[62] Behavioral

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[58] Jullien, AEJM / 2011, p. 186, 186; Jullien / Pavan / Rysman, HIO / 2021, p. 485, 488.

[59] Fudenberg / Villas-Boas, in: Peitz / Waldfogel (eds.), p. 1; Suarez / Cusumano, in: Gawer (ed.), p. 77, 83; "Cross-substitution" is adopted by digital platforms frequently within the scope of "divide and conquer strategies see Jullien / Pavan / Rysman, HIO / 2021, p. 485, 508.

[60] Fudenberg / Villas-Boas, in: Peitz / Waldfogel (eds.), p. 1; Srnicek, pp. 54-55.

61 EC, Impact Assessement Report for the Proposal for the DMA, Staff Working Document, 15.12.2020, part I, pp. 10-14. (hereinafter "DMA Proposal Impact Assessement Report"); Lancieri / Sakowski, SJLBF / 2021, p. 65, 95-101.

[62] Stigler Centre, Stigler Comittee on Digital Platforms: Final Report, 2019, p. 41. (hereinafter "Stigler Report 2020")

economics shows that they make predictable errors by exhibiting "bounded rationalities" due to their behavioral biases.[63] The increase in the technological opportunities facilitating information sharing turned human behavior into a factor hampering effective competition.[64] Because, while these behavioral biases directly impinge new entrants from entering the related market, the digital platforms that already exist use these biases in favor of them to obtain more market power.[65] The Consumer behaviors leading to restriction of competition can be listed as "salient effects", "confirmation bias", "status-quo bias", "psychological myopia/impatience", and "lack of self-control".[66]

II. Assessment of Digital Economy and Market

1. Platforms: Beyond Constituting a Market

Platforms provide the infrastructure to facilitate the mediation between different parties and the innovation of new digital goods and services. So, its scope is broader than a simple market. Even, in terms of transaction role, the platforms exhibit a more complex structure compared with the markets that have a more stable structure while being interventionist on the conditions of the transactions carried out on them. Because the two-sided platforms have a dynamic character through which the platform itself can change its role by expanding to and operating within the sector for which it mediates. Furthermore, it allows the parties to determine the price and key terms of the transactions to varying extents.[67] On the other side, the consumer of a platform also constitutes an "input" for it. Therefore, in the platform economy, the consumer has three roles: operator, consumer, and input. This complex

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[63] Thaler, AER / 2018, pp. 1266-1267.

[64] Lancieri / Sakowski, SJLBF / 2021, p.65, 89; Stigler Report 2020, p. 42; CMA, 'Online Platforms and Digital Advertising: Market Study Final Report', 2020, p. 194. (hereinafter "CMA's Report 2020")

[65] Stigler Report 2020, p. 41, 60.

[66] Stigler Report 2020, p. 58; US' House of Representatives, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, 2022, p. 297. (hereinafter "Majority Staff Report"); CMA's Report 2020, P. 194.

[67] Hagiu / Wright, IJIO-2015, p. 162, 163.

and intertwined structure of the digital economy renders the tools and concepts of the classical free market useless.[68]

In addition, there are only a handful of financial actors within the market of platform offerers. So, as stated within the World Economic Forum, being "near-monopoly distributors" of information makes their domain of activity more than a market by constituting "public utilities".[69] Furthermore, the ownership of data is a blurred area within the digital economy based on the question of whether it has a private or public property nature. Generally, both approaches are valid; some data are considered private, while others are considered public.[70] This deviation from the private area and expansion towards the common/public field take the digital economy beyond the market structure.

2. Being Inclined to Form a Monopoly

While the dominant market pattern was oligopoly within the industrial economy, monopolies populate the digital economy and markets.[71] The features listed above cause such a market structure and enable behavioral tendencies towards concentration. Even an analogy was made with the natural monopolies such as electricity distribution or water supply. It is argued that the two-sided platforms, despite not being necessary, can constitute natural digital monopolies when accompanied by other determinants.[72] These determinants can be listed as network effects, supply-side economies of scale, and the advantages of being a data-driven system.[73]

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[68] Crémer / Montjoye / Schweitzer, p. 3; Lancieri / Sakowski, SJLBF / 2021, p.65, 80; Ducci, p. 8;

[69] *"They claim they are merely distributing information. But the fact that they are near-monopoly distributors makes them public utilities…"* See for the statements of George Soros, "Remarks delivered at the World Economic Forum", Davos, January 2018.

[70] UNCTAD 2019, p. 32.

[71] Shapiro / Varian, p. 173; The authors suggested 'temporary monopolies' as the dominant form of information economy. However, as indicated in the following paragraph, the distinctive features of the digital economy break the disruptive effect of start-ups.

[72] Ducci, pp. 5-6.

[73] Ibid, p. 87.

As a result of these determinants, there emerges a virtuous cycle, and the dominant dynamic in the platform economies, particularly transaction ones, appears as the winner-take-all scenario (monopoly equilibrium[74]).[75]

Furthermore, the digital economy's structure makes market power already obtained more sustainable and less fragile. The network externalities, extreme return to scale, barriers to entry to data, and behavioral biases in the digital economy constitute barriers to entry, even completely blockaded rather than deterred.[76]

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[74] The natural and predictable result of the competition amongst symetric platforms is symetric market structure (win-win scenario). But there is a transition of stable market structure from the win-win scenario to the winner-take-most scenario (asymetric equilibrium), and finally to the winner-take-all scenario (monopoly equilibrium), as network effects scale up. see Chiu Yu Ko / Bo Shen, 'From Win-Win to Winner-Take-All', https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676452 , (Last accessed on 16.10.2023).

[75] Eisenmann / Parker / Alstyne, HBR / 2006, p. 3, 7; Koskinen / Bonina / Eaton, p. 5; Gawer, Research Policy / 2014, p. 1239, 1241; Srnicek, p. 52; Srnicek, 'The Challenges of Platform Capitalism: Understanding the Logic of a New Business Model', IPPR, https://www.ippr.org/juncture-item/the-challenges-of-platform-capitalism (Last accessed on 16.10.2023).

[76] Stigler Report 2020, pp. 40-41; Ezrachi, Oxford Legal Studies Research Paper, No: 17, 2018, p. 9; Crémer and others, Digital Regulation Project Policy Discussion Paper no: 3/2021, p. 6.

C. Inadequacy of the Classic Competition Approach Against Anti-Competitive Menaces within the Digital Markets

I. The Basics of the Classic Competition Approach

1. The Fundamental Features

a) Objective

As stated by Robert H. Bork, placing competition policy on a rational base requires to answer firmly the question of "*What is the point of the law-what are its goals?*".[77] The answer will clarify whether the goals of the competition law comprise the current ongoing competition-linked problems, mainly caused by digital transformation; thus, the competition law constitutes the appropriate tool to deal with them.[78] Some goals may even be legitimate from the perspective of EU law, but the requirement of this goal may have to be fulfilled via legal instruments other than competition law.[79]

There are two main approaches within the USA related to the scope of the antitrust law. The first is the narrow approach relying on the Chicago School, which says that only economic goals, such as aggregate surplus welfare, should be followed by the Antitrust law.[80] The second is

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[77] Bork, p. 50; For a counter argument about the importance of the goals by arguing that "The goals of antitrust are often stated, and even more often presumed, but rarely used as deciding factors in real-world implementation." See Ayal, p. 25.

[78] Stylianou / Iacovides, LS / 2022, p. 620, 621.

[79] Van den Bergh, p. 113.

[80] Baker, FLR / 2013, p. 2175, 2176.

the extended approach, the so-called Neo-Brandeisian antitrust[81], which embraces that the antitrust should go beyond the antirust and address the concerns stemming from the socio-economic consequences of concentration such as fairness, wealth distribution, labor share of income, the concentration of political power, and data security breaches, etc.[82] Even though both Democrat and Republican sides recently expressed the necessity of the extended approach and Biden administration is handing in glove with Neo-Brandeisian scholars, such as Tim Wu, Lina Khan and Jonathan Kanter, the dominant approach in the USA is still the first. The current discussions revolve only around the applicability of total or consumer welfare standards.[83]

Unlike the situation within the antitrust law, we encounter a multitude of goals historically in the EU competition law, covering both economic and non-economic aims. There has been a simultaneity between them, and they came to the fore between them by fluctuating over time.[84] The goals that are articulated within the literature and the practice and decisions of the EU institutions can be listed as efficiency, welfare, commercial freedom/freedom to compete, market structure, fairness, European integration/realization of the internal market, the competition process, and others.[85]

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[81] For the New/Neo Brandeism school and the opinions of Louis Brandeis aiming at a democratic distribution of power and opportunity in the political economy and the update of the USA antimonopoly regime see Khan, JECLP / 2018, p. 131, 131; Elzinga / Weber, TLR / 2017, pp. 277-321.

[82] Stylianou / Iacovides, LS / 2022, p. 620, 621; Botta / Solidoro, European University Institute: Florance Competition Programme / 2020, p. 2; For a critic of the extended antitrust approach see Timothy J. Brennan, 'Should Antitrust Go Beyond "Antitrust"?', The Antitrust Bulletin / 2018, V. 63/1, pp. 49-64.

[83] Van den Bergh, pp. 101-105; Brennan, The Antitrust Bulletin / 2018, p. 49, 60; Fox, JAE / 2023, p. 179, 179; The economic approach has been embraced by the modern Supreme Court in the USA, rejecting social and political goals see Baker / Salop, GLJO / 2015, p. 1, 15.

[84] Stylianou / Iacovides, LS / 2022, p. 620, 623; Van den Bergh, p. 105.

[85] Stylianou / Iacovides, LS / 2022, p. 620, 626, 637; Ezrachi proposes a similar list centered around consumer welfare see Ezrachi, Oxford Legal Studies Research Paper, No: 17, 2018, p. 2; For another list based on the distinction between "economic goals" and "European integration goals" see Geradin / Layne-Farrar / Petit, pr. 1.60-1.80.

Efficiency and consumer welfare are the goals the most referred to among scholars.[86] These goals, belonging to the economic approach based on the Chicago school and focusing on the outcome, are accepted as proper goals of EU competition law by certain scholars.[87] However, the empirical investigation shows, relying on the practice of EU institutions, that the EU Competition law prioritizes the process rather than the outcome by referring more frequently to the goal of the competition process and market structure.[88]

Protecting the competition process and market structure are two essential goals. Even though they didn't collect the supporters by literature as much as the efficiency and welfare did[89], these goals are referred to more frequently by EU institutions in practice.[90] It is worth indicating that the economic approach behind these goals is ordoliberalism. Because ordoliberals embrace that the market is not entirely a self-regulating mechanism, public or private powers may threaten the market process, then the government should intervene to protect the market structure, thus the competitive process rather than the outcome of competition (efficiency and welfare).[91]

The third bunch of goals consisted of 'economic freedom/freedom to compete' and 'the realization of the internal market'.[92] Even though

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[86] Stylianou / Iacovides, LS / 2022, p. 620, 625-626.

[87] For "efficiency" as proper goal see Odudu, OJLS / 2010, p. 599, pp. 601-602; For "welfare" as proper goal see Motta, p. 21, 28; Nazzini, p. 153.

[88] Stylianou / Iacovides, LS / 2022, p. 620, 639.

[89] For the goal of protection of market structure that is a prerequisite for the protection of competition see Ezrachi, Oxford Legal Studies Research Paper, No: 17, 2018, p. 2, 7; For the goal of protecting the competitive process see Marty, Revista Prolegómenos / 2021, p. 55, 59, 70, 72; As an indirect referrence to "competition process" see Andrychuk, ECJ / 2010, p. 575, p. 575, 610; for an article about the preservation of competition in the USA see Wu, CLS / 2018, p. 1, 8.

[90] Stylianou / Iacovides, LS / 2022, p. 620, 639.

[91] Marty, Revista Prolegómenos / 2021, p. 55, 59; Andriychuk, ECoJ / 2010, p. 575, pp. 581-583.

[92] Hawk handles the integration of seperate markets to a unified common market and promotion and protection of competition as underlying principle of the EU competition law see Hawk, FLR / 1972, p. 229, 231.

there is a stable line in terms of the reference of the European Commission, these goals are on the rise within the decisions of the Court of Justice.[93] There is a strong link between them because the first is closely related to creating a level-playing field whose European version is the internal market. Furthermore, Monti indicated that they constituted the more pursued core values of the EU competition policy in the past and are substantiated by economic efficiency and consumer welfare under a more economic approach.[94] It shows that the ordoliberal political philosophy has a significant effect on both goals. The economic freedom/freedom to compete finds its roots in ordoliberalism, while the European integration through the common market has also been significantly shaped by Ordoliberal ideas.[95]

The last and mediatic goal is "fairness", which is frequently referred to by relatively recent studies in the literature.[96] It is generally cited together with other goals.[97] However, it is the goal that the EU institutions least refer to except the speeches of the Commissioners, mainly by Commissioner Vestager. So, it can be inferred that it is not a determining goal in practice.[98] Even in the cases where the term "fair" took part textually, the Court of Justice tends to interpret it under the more economic approach.[99]

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93 Stylianou / Iacovides, LS / 2022, p. 620, 639, 644, 645.

94 Monti, p. 21, 51-52.

95 Ibid, p. 23; Gerber, pp. 263-264; Lianos, in: Lianos / Geradin (eds.), p. 1, pp. 32-34.

96 Stylianou / Iacovides, LS / 2022, p. 620, 629; However it is not a competely new concept, it has been mentioned within the textual framework since the treaty of Rome and has been a consideration within the EU competition law see Dunne, MLR / 2020, p. 1, 3.

97 Ayal, pp. 26-29; Ezrachi, Oxford Legal Studies Research Paper, No 17, 2018, p. 4, 13; for the concept of fairness-driven competition law see Lianos, CLES Research Paper Series, 2/2018, p. 16.

98 Stylianou / Iacovides, LS / 2022, p. 620, pp. 639-642.

99 Dunne, MLR / 2020, p. 1, 17; For the economic-based interpretation around Art. 101(3) TFEU see ECJ, Judgement of 23 November 2006, C-238/05, Asnef-Equifax, ECLI:EU:C:2006:734, pr. 65-70; for the economic-based interpretation around Art. 102(a) TFEU see ECJ, 14 February 1978, Case 27/76, United Brands-Commission, ECLI:EU:C:1978:22, pr. 250-253.

The problem with the goal of "fairness" is its ambiguity in meaning and scope. Because it has a multifaceted nature.[100] The discourse related to the fairness mantra, led mainly by Commissioner Vestager, is also wide-ranging and exhibits inconsistency.[101] Nonetheless, there are some efforts to conceptualize "fairness" within the competition context. Ayal handles the objectives of the competition law under two sections. The first is 'societal goals', which include efficiency as an economic goal and the problem of bigness as a non-economic goal, focusing on *aggregate* concerns. The second is "fairness goals" which aim to protect the rights of consumers, competitors, small businesses, etc., which are suffered *individually* by monopolistic practices.[102] Ducci and Trebilcock handle the concept of fairness as an overarching concept under four distinct notions regarding market power: *"vertical fairness (between producers and consumers), horizontal fairness on the demand side (between consumers), horizontal fairness on the supply side (between producers), and procedural fairness (due process and private enforcement)."*[103] But this conceptualization is related to the subject of the obligation of the incumbent market actors to be "fair". Each of the notions of "fairness" causes embracement of different approaches. Nevertheless, it doesn't answer the question of what is "unfair".[104]

We also encounter the tendency to generalize the concept of fairness in Ezrachi. He says that fairness is often embraced as a guide interwoven into the competition process rather than constituting a concrete enforcement criterion.[105] It is indicated also by Commissioner Vestager and DG COMP Director General Laidenberger saying that the fairness is not about the application in individual cases, and it is not an operational objective.[106] Thus,

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[100] Ducci / Trebilcock, The Antitrust Bulletin / 2019, p. 79, 80; Gerber, Prepared Presentation for a Conference in Kyoto / 2004, p. 2.

[101] Dunne, MLR / 2020, p. 1, 15.

[102] Ayal, pp. 5-8.

[103] Ducci / Trebilcock, The Antitrust Bulletin / 2019, p. 79, 80; for a similar classification see Gerber, Prepared Presentation for a Conference in Kyoto / 2004, p. 2.

[104] Akman, p. 149.

[105] Ezrachi, Oxford Legal Studies Research Paper, No: 17, 2018, p. 15.

[106] Gerard, JECLP / 2018, p. 211, 211.

the concept of fairness formed the rationale behind the effort to place the European Union competition law on the social market economy basis aiming at reprioritizing the social aspect of Europe to meet the current rhetoric of 'economic and social phenomena are intertwined and greatly influence each other'.[107] Accordingly, "fairness" emerges as an all-compassing concept associated with both the competition process and its outcomes.[108]

Actually, the increasing emphasis on fairness in markets by EU authorities in their speech and legislations shows that they share the same concerns with their counterpart in the US who called the Neo-Brandeisians. The concern is taking the market from serving elites to serving consumers, thus ensuring a more equal society.[109] The equity requires to facilitate the business users' participation to the market by offering equal opportunities, and fair distribution of outcomes in favor of end-users.[110]

The discussions around the concern of 'the market for consumers' have been fevered by two current factors: growth of big tech and populist governments. The second embraces the social fairness discourse against the first who took the reins pretty much especially after Covid-19 Pandemic.[111] Hence, the fairness concept should be placed in a sound foundation when used, and its function and components should be clarified. Otherwise, there is a risk of opening the market to the interventions of illiberal governments which have an anti-establishment orientation and an opposing stance against liberal economics and globalization[112], while trying to protect it from private powers. Furthermore, a well-founded concept of fairness to emphasis the importance of the society would head off the populist tendencies, eliminating their justifications.[113]

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[107] Pablo, JECLP / 2017, p. 147, 148; Gerard, JECLP / 2018, p. 211, 212; Dunne, MLR / 2020, p. 1, 31.

[108] Dunne, MLR / 2020, p. 1, 10.

[109] Fox, in: Andrychuk (ed.), p. 25, 27.

[110] Fox, The Antitrust Bulletin / 2018, p. 3, 4.

[111] Bernatt, pp. 3-4, 99; Fox, in: Andrychuk (ed.), p. 25, pp. 27-28.

[112] Rodrik, JIBP / 2018, p. 12, 12.

[113] Pablo, JECLP / 2017, p. 147, 148.

b) Ex-Post Control (Legal Basis, and ex-post structure)

The competition law, in the broad sense, consists of three primary columns. The first is the competition law, in the narrow sense, concludes art. 101 and 102 TFEU.[114] As is evident, their legal bases are primary law. The second column is merger control, whose legal basis is the EC Merger Regulation[115], adopted based on Art. 103 and 352 TFEU; thus, it is a secondary legislation. The third column is state aid, whose legal basis is art. 107 TFEU, therefore, is a primary legislation.[116]

The Competition law, in the narrow sense, is dedicated to impeding the restriction, prevention, or distortion of the competition within the EU internal market via the bilateral practices (art. 101 TFEU) and the unilaterally abusive practices of the undertakings with a dominant position (art. 102 TFEU). As discussed below, these articles are prohibitive and require ex-post control of such anticompetitive conduct by interpreting the standards stated in the articles. Only the merger control is carried out within the form of ex-ante control.[117]

2. The Main Tools

The Competition law enforcement has a procedure adopted within the Regulation 2003.[118] This procedure can be triggered upon receiving a complaint or through opening an ex officio investigation or a sector

[114] For detailed informations about art. 101 TFEU see Meeßen, in: Kellerbauer / Klamert / Tomkin (eds.), pp. 998-1036; about art. 102 TFEU see Kellerbauer, in: Kellerbauer / Klamert / Tomkin (eds.), pp. 1037-1058.

[115] Regulation (EC) 139/2004, 20 January 2004 on the control of concentrations between undertakings (hereinafter "The EU Merger Regulation 2004"); for a detailed informations see Kellerbauer/Meeßen, in: Kellerbauer / Klamert / Tomkin (eds.), pp. 1059-1085.

[116] For detailed informations about art. 107 TFEU see Rusche, in: Kellerbauer / Klamert / Tomkin (eds.), pp. 1111-1166.

[117] For the detailed discussions see the title "b) What is the Nature of The Digital Market Act: Regulation vs. Competition Law", below p. 58.

[118] Regulation (EC) 1/2003, 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. (hereinafter "Regulation 1/2003")

inquiry.[119] The burden of proof is upon the Commission or the related NCAs alleging the infringement.[120] Hence, the Commission has many instruments to collect the required information, such as 'request for information from undertakings' and 'inspection of undertakings'.[121]

A finding of infringement at the end of the procedure provides the Commission to impose on the undertakings "*behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end*". However, there is a gradualization between the types of remedies. "*The structural remedies can only be imposed either where there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural remedy*".[122] The Commission can also fine each undertaking or association of undertakings up to 10% of the total turnover in the preceding business year.[123]

II. The Enforcement Loopholes in Digital Markets Caused by The Inadequacy of The Classic Competition Approach

Two primary sources of loopholes have emerged during the last decade. The first relates to the material inadequacy of the competition law, while the second relates to the procedural inadequacy of the competition law.[124]

The material side was articulated loosely in the DMA preamble, indicating "*the scope of [art. 101, 102 TFEU] is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behavior (…)*"[125] However, the material inadequacies were

[119] Regulation 1/2003, art. 5.

[120] Regulation 1/2003, art. 2.

[121] See the chapter V of Regulation 1/2003, arts. 17-22.

[122] Regulation 1/2003, art. 7.

[123] Regulation 1/2003, art. 23(2).

[124] See Monti, TILEC Discussion Paper / 2021, p. 1.

[125] Regulation (EU) 2022/1925, 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), L 265/1, 12.10.2022, recital 5. (hereinafter "DMA, (EU) 2022/1925, 14 September 2022")

listed and detailed as part of the assessment of policy options by the EC within the Impact Assessment Report. There are two main reasons behind them, stemming from the features of the digital economy: (i) entry barriers to gatekeeper markets and (ii)extreme economic dependence and imbalanced market power.[126] The material inadequacies can be summarized as (i) Art. 101 and 102 TFEU requires a precondition such as the existence of an anticompetitive agreement or the dominant position, so these tools cannot tackle the behaviors of gatekeepers if one of these preconditions is not meet.[127] (ii) market failures associated with tipping markets cannot be tackled based on the existing competition rules, particularly if the tipping is caused primarily by the market structure and not by any specific conduct.[128] (iii) Both articles function with an effect-based assessment, so if there is no impact on competition on a clearly identifiable market, all unfair practices will not be captured necessarily by these articles.[129]

However, these findings of material inadequacies are criticized within the literature. It is alleged that the Commission decision practice and ECJ case law embrace a flexible interpretation, and it shows that the concerns of the Commission as such the conducts of the gatekeepers might bypass competition law due to their absence of concrete anti-competitive effect are exaggerated.[130]

The procedural inadequacies also were articulated loosely in the preamble of the Draft DMA, indicating that "*(…) enforcement occurs ex-post and requires an extensive investigation of often very complex facts on a case-by-case basis*"[131] It is mainly related to the phrase "Justice delayed is justice denied". Because even if the EU competition rules may catch and address anticompetitive behavior, it would be ineffective due to its ex-post nature. When we also consider the detailed and complex economic

[126] DMA Proposal Impact Assessement Report, part I, pr. 71-90.

[127] Ibid, pr. 119.

[128] Ibid, pr. 120.

[129] Ibid, pr. 121.

[130] Larouche / Streel, JECLP / 2021, p. 542, pp. 545-546.

[131] DMA, (EU) 2022/1925, 14 September 2022, pr. 5.

and legal analysis as requirements of Competition law and the dynamic structure of the digital economy, such as powerful network effects and economies of scope, the Competition law interventions most probably result in delay and may cause competitive problems up to the market failures.[132] This concern of the Commission was found convincing amongst the scholars.[133] However, it is indicated that the detailed reading of the DMA proposal shows that the primary concern of the Commission here is related to the duration of the competition procedures and its running behind the developments in digital markets rather than directly the timing of analysis and the intervention based on the distinction between ex-ante and ex-post.[134]

[132] DMA Proposal Impact Assessement Report, part I, pr. 119.

[133] Larouche / Streel, JECLP / 2021, p. 542, 546.

[134] Larouche / Streel, JECLP / 2021, p. 542, 546.

D. Seeking a Solution: The Digital Market Act

I. Background: The Road to the Digital Market Act

1. Institutional and Judicial Struggle

The institutional initiatives to cope with the digital challenges against competition law constitute the main part of the struggle. Because particularly in the EU, more decisively than the US[135], both EU institutions and NCAs engaged in investigations with the market failures stemming from digital threats as much as competition law tools allow. However, the technical difficulties and longness of the investigation processes and the inadequacy of the available legal tools impeded and delayed the Commission to bring the cases to the ECJ. Therefore, there hasn't already been an ECJ decision related to the anti-competitive conduct of gatekeepers except for the court's recent judgment upon the request of the Düsseldorf Higher Regional Court for a preliminary ruling. The judgment ensures NCAs detect the infringement of GDPR as abusive conduct if the related tech company has a dominant position.[136]

The EU commission's endeavor to investigate the business conduct of tech companies stared in 1990s. However, it gained intensity in the 2010s.[137] This period started in 2010 with the investigation of Google due to its use of searching service to promote the Google's own shopping

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[135] For the undecisive attitute, the effect of policy on it, and the changing approach after 2019 see Wörsdörfer, Philosophy and Technology / 2022, p. 1, pp. 7-10.

[136] ECJ, Judgement of 4 July 2023, C-252/21, Meta Platforms Inc and Others v Bundeskartellamt, ECLI:EU:C:2023:537, pr. 48.

[137] Wörsdörfer, Philosophy and Technology / 2022, p. 1, pp. 10-13; see also EC Cases & Judgments (Information Communication Technologies ICT), https://competition-policy.ec.europa.eu/sectors/ict/cases_en (last accessed on 29.11.2023).

service, the decision was reached in 2017.[138] It is followed by the investigations against Google the Android Probe in 2015 and against Google's AdSense's ad system in 2016. The first is concluded in 2018[139], while the second in 2019[140] with records fines. The Commission launched an investigation, in 2020, against Amazon due to self-preferencing based on its dual role as marketplace and retailer.[141] In 2020, the conducts of Apple became the subject of investigation of the Commission. This was related to the unfair conditions set by Apple in its App Store based on its dual role as ruler and app-provider.[142] In 2021and 2022, the conducts of Facebook/ Meta were set in investigation by the Commission based on the allegations of illegal tying and distorting competition for ad services.[143]

2. Academic Struggles

The challenges of the digital economy for competition and the weakness of the current competition structure came out during the last two decades. In parallel the institutional and judicial initiatives, theoretical efforts emerged in the form of expert reports and articles. Some of the reports that are prepared and issued by research centers, EU Institutions or NCAs can be listed as such: (i) 'Sub-committee on Market Structure and Antitrust Report' issued by the Stigler Committee on Digital Platforms

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[138] EC, Case AT.39740, Google Shopping, 27.06.2017, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf (last accessed on 29.11.2023).

[139] EC, Case AT.40099, Google Android, 18.07.2018, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf (last accessed on 29.11.2023).

[140] EC, Case AT.40411Google Search (AdSense), 20.03.2019, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40411/40411_1619_11.pdf (last accessed on 29.11.2023).

[141] EC, Press Release, 10 November 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077, (last accessed on 29.11.2023).

[142] EC, Press Release, 16 June 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073 (last accessed on 29.11.2023).

[143] EC, Press Release, 4 June 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848 (last accessed on 29.11.2023); EC, Press Release, 19 December 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7728 (last accessed on 29.11.2023)

conveyed by the Stigler center at the University of Chicago.[144] (ii) 'Competition Policy for the Digital Era' issued by an expert panel organized by the Directorate-General of Competition of the European Commission.[145] (iii) 'Competition Law and Data' a joint study prepared by the French Autorité de la Concurrence and the German Bundeskartellamt.[146]

The academia didn't stand idly by the matter, and they produced many academic writings determining the digital challenges against the competition law and advising for adequate solutions. This endeavor has also continued following the issuance of the Draft and Final version of the DMA to assess it, indicate its shortcomings, and make suggestions.[147]

II. The Fundamental Features

1. Objective

The DMA determined "*the contribution to the proper functioning of the internal market*" as its objective. It states two subgoals through which the main objective would be reached: "*ensur[ing] contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform… in particular.*"[148] Even though these concepts were used for the first time in such a manner within the secondary legislations of the EU concerning the competition law, the DMA doesn't give any direct definition for them. However, it seems that these blurrinesses will result in flexibility and narrow down the filters of enforcement against digital platforms, creating fewer constraints on the EC than the EU competition system.[149]

To clarify the Legislative authorities' intention in referring to "contestability" and "fairness" we can examine the context in which these concepts are used in the preamble of the DMA. The first result drawn

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144 Stigler Report 2020 (ft 60).

145 Crémer / Montjoye / Schweitzer, 'Special Advisers Report 2019', (ft. 26).

146 Autorité de la Concurrence / the German Bundeskartellamt, 'Competition Law and Data', 10 May 2016; For a detailed assessment of the expert reports related to the digital economy and competition law relationship see Lancieri / Sakowski, SJLBF / 2021.

147 Due to the large number of academic works, we have indicated the relevant works in the bibliography by placing a '*' sign at their ends.

148 DMA, (EU) 2022/1925, 14 September 2022, recital 7.

149 Colomo, JECLP / 2021, P. 561, 568.

from this examination is that these goals are not to set a higher target but to eliminate the deficiency arising from the current structure and bring the relevant markets to a minimum adequate standard. Because the preamble first determines the lack of contestability and fairness within the digital markets.[150] Furthermore, it indicates that the aim of the regulation is, unlike the competition law whose aim is *"protecting undistorted competition", "to ensure that markets where gatekeepers are present are and remain contestable and fair"*.[151] Hence, it can be argued that the mission of the DMA based on the stated goals is ensuring the appropriate circumstances in which a competitive economy will operate without being structurally distorted.

However, it is argued that the new system introduced in the Draft DMA shares the same legal interests with the EU competition law, whose interests are open markets and a fair and undistorted competitive process.[152] Furthermore, it is asserted that the final version of the DMA is more identical to the EU competition law in terms of aimed interests.[153] Because the beneficiaries of the obligations were clarified by adding the phrase *"to the benefit of business users and end users"* to Art. 1(1) DMA. Thus, the scope of DMA encompasses the vertical relationship of the gatekeeper and the (end)consumer, as well as the horizontal relationship between competitors similar to the interests stated within the GlaxoSmithKline[154] decision.[155]

a) Contestable Market

An indirect definition was made within the preamble to indicate the limits of the concept of contestability with respect to the DMA: *"Contestability should relate to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their*

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[150] DMA, (EU) 2022/1925, 14 September 2022, recital 6.

[151] DMA, (EU) 2022/1925, 14 September 2022, recital 11.

[152] Schweitzer, Forthcoming ZEuP / 2021, p. 1, 12.

[153] Beems, ECoJ / 2023, P. 1, 7.

[154] *"(…) Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such."* see the ECJ, Judgement of 6 October 2009, Joined Cases C501/06 P, C-513/06 P, C-515/06 P, C519/06 P, GlaxoSmithKline Services Unlimited v. Commission, ECLI:EU:C:2009:610, pr. 63.

[155] Beems, ECoJ / 2023, P. 1, 7.

products and services."[156] The other references to contestability throughout the preamble of the DMA link it with the challenges of very high barriers to entry and expansion stemming from the features of the core platform services in the digital economy, which are mainly network effects, extreme economy of scale, and the benefits of data.[157] It can be inferred from the usage of "contestability" within the preamble that this concept is more related to the structural openness of the digital markets to be contested the incumbents by its new or currents rivals. There is an effort to ensure the minimum structural conditions in which the rivals can take the role of competitors against the incumbent; thus, the competition can start to function. Because it focuses primarily on establishing contestability before its protection and promotion through the facilitation of competitive attacks against the entrenched position of gatekeepers.[158]

b) Fair Market

Fairness is a broad concept and constitutes a "black box"[159]. Similar to "contestability", an indirect definition is made in the preamble to indicate the limits of the concept of fairness with respect to the DMA: *"Unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage."*[160] The other references to fairness throughout the preamble follow the same line. The emphasis concentrated on setting unilaterally unbalanced conditions by the incumbents for the use of their core platform service or the services carried out through these core platform services, aiming at excluding or discriminating against business users; and engaging in behaviors that impede others from collecting entirely the benefits of their own contributions.[161] So, the fairness in the DMA has a broad scope by comprising exclusionary abuses in the B2B relationship and exploitative abuses in the

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[156] DMA, (EU) 2022/1925, 14 September 2022, recital 32.

[157] DMA, (EU) 2022/1925, 14 September 2022, recital 3, 51, 59, 61, 64.

[158] Schweitzer, Forthcoming ZEuP / 2021, p. 1, 7.

[159] Ibid, p. 8.

[160] DMA, (EU) 2022/1925, 14 September 2022, recital 33.

[161] DMA, (EU) 2022/1925, 14 September 2022, recital 2, 4, 7, 33, 62; For a definiton which is in the same line see Crémer and others, Digital Regulation Project Policy Discussion Paper no: 3/2021, p. 6.

B2C relationship.[162] It encompasses both a procedural function by facilitating fair participation in core platform services and a distributive function by ensuring a fair sharing of economic benefits.[163]

However, it is criticized that the DMA didn't bring certainty to the term "fairness" from an economic perspective, using terms that are not fully recognizable economically when defining unfair conducts.[164] Akman stated that this uncertainty and the subjectivity embedded in the fair-driven conduct rules will make it unlikely to determine what is lawful and what is unlawful.[165] Also, when we take into consideration that the obligations imposed by the DMA pertain the bilateral relationship between gatekeepers and business users,[166] as horizontally between competitors and vertically between gatekeepers and (end)customers,[167] the type of fairness here is inter partes fairness, so most likely to be ended up in legal disputes. Thus, the speed advantage of ex-ante regulation will be lost, and the cost of doing business and following the rules will increase.[168]

c) Assessment

Based on the explanations above, as indicated also by Akman, generally, the contestability pertains to the structure of the digital markets, while the fairness pertains to the behaviors of the incumbents against the business users and end users.[169] However, there is no explicit differentiation of these goals throughout the preamble for analytical purposes.[170] Rather, it is stated that these goals are intertwined. Because "*the lack of, or weak, contestability for a certain service can enable a gatekeeper to engage in unfair practices. Similarly, unfair practices by a gatekeeper can reduce the*

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[162] Hoffmann / Herrmann / Kestler, JAE / 2023, p. 1, 16.

[163] Petit, JECLP / 2021, p. 529, 540.

[164] Monopolkommission, Special Report 82 / 2021, p. 15, pr. 23.

[165] Akman, ELR / 2022, p. 85, pp. 109-101.

[166] Monopolkommission, Special Report 82 / 2021, p. 15, pr. 23.

[167] Beems, ECoJ / 2023, P. 1, 7.

[168] Akman, ELR / 2022, p. 85, pp. 109-101.

[169] Ibid, p. 107.

[170] Crémer and others, Digital Regulation Project Policy Discussion Paper no: 3/2021, p. 4.

possibility of business users or others to contest the gatekeeper's position.".[171] So, as indicated in the preamble, one obligation within the DMA may address the problems coming from the scope of both goals.[172] This 'one medicine against all diseases' approach was criticized by Akman as follows: "*The DMA is trying to achieve two distinct objectives (…) with one legal instrument, an approach which raises the question of the extent to which different objectives can be (equally) effectively achieved with a single instrument.".*[173] It may be asserted here that fairness is not an operational goal but a guiding and policy-showing goal, and there is already only one operational objective, which is the contestable market, under the overarching fairness policy. Then, the goal underlying the obligations prescribed within the articles 5 and 6 DMA regulating B2C relationships to impede exploitative conducts will be absent except for the indirect connection with the contestable market objective. Actually, even though it is argued that the DMA ensures only indirect protection for end-users based on the preamble 33 of DMA[174], there are lots of obligations prescribed in Art. 5 and 6 DMA to protect the end-users directly.[175] These obligations are intended to ensure the autonomy of end-users by preserving the right of choice and to distribute the data, as currency, collected from them.

To conclude, when it hits reality via adopting the DMA, the Fairness mantra exhibits uncertainties concerning its position as an objective and its components. It's apparent that the digital injustice leads the EU administrators to lean towards giving importance to the rights of the EU citizens against private power interventions. However, the lack of a sound theoretical foundation and an unequivocal definition in the usage of the fairness concept shows that, even if not an intended political populism[176], they fall into instrumental populism. Even, the concentration of the enforcement

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[171] DMA, (EU) 2022/1925, 14 September 2022, recital 34.

[172] Ibid.

[173] Akman, ELR / 2022, p. 85, 107.

[174] Podszun / Bongartz / Langenstein, EuCML / 2021, p. 60, 62; D Zimmer and N Nittenwilm, ZEuP / 2022, p. 820, 828, cited by Hoffmann / Herrmann / Kestler, JAE / 2023, p. 1, 13, ft. 69.

[175] These obligations can be listed art. 5/2, 5, 7, 8 and art. 6/3, 6, 9 see Hoffmann / Herrmann / Kestler, JAE / 2023, p. 1, 13.

[176] Bernatt, p. 204.

power within the hand of the Commission can be interpreted as a deliberate choice of the legislators to abstain from opening the way for populism for MSs by giving them the relatively interventionist competences of the DMA. The prohibition of the NCAs from acting with the same objectives as the DMA concerning gatekeepers maximizes this effort.[177]

2. Ex-Ante Regulation (Legal Basis, and Ex-Ante Structure)

a) Legal Basis

aa) Whether Art. 114 TFEU Provide Making Such a Sector-Specific Regulation

The DMA is a regulation that is a new link of a regulatory chain pertaining to the tech and platform law within the context of "EU's digital market strategy"[178] launched in 2015.[179] The DMA was even seen as a new piece of "Europe's digital constitution" aiming at "*form[ing] a normative and principled foundation for a digital economy and society*".[180] The so-called "digital constitution" comprises three main areas of digital regulation: competition law, digital taxation, and employment protection for platform workers.[181] Some of the pieces of this constitution pertaining to the competition law can be exemplified as "the European Electronic Communications Code"[182], "the Digital Services Act"[183] and "the Regulation on promoting fairness and transparency for business users of online intermediation services"[184]. The EC embraced art. 114 TFEU

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177 See below pp. 66-68.

178 EC, 'A Digital Single Market Strategy for Europe, COM(2015) 192, Brussel, 6.5.2015.

179 Larouche / Streel, JECLP / 2021, p. 542, 542; Crichton, 'Le Digital Market Act, un cadre européen pour la concurrence en ligne', https://www.dalloz-actualite.fr/flash/digital-market-act-un-cadre-europeen-pour-concurrence-en-ligne, (last accessed on 01.11.2023).

180 Bradford, VJIL / 2023, p. 1, 8.

181 Ibid, p. 32.

182 Directive (EU) 2018/1972, 11 December 2018, establishing the European Electronic Communications Code.

183 Regulation (EU) 2022/2065, 19 October 2022, on a Single Market for Digital Services and Amending Directive 2000/31/EC (The Digital Services Act).

184 Regulation (EU) 2019/1150, 20 June 2019, on promoting fairness and transparency for business users of online intermediation services.

as the legal basis for these legislations. The legal basis of the DMA was determined as art. 114 TFEU as well. However, there are questions on the legality of such a determination and suggested alternative legal bases such as art. 352 TFEU and art. 103 TFEU within the literature.

Art. 114 TFEU constitutes the core legal basis within EU primary legislation for the harmonization/approximation of MS's national laws.[185] As indicated in art. 114(1) TFEU, the competence here is conferred on the Council and European Parliament (EP) under the ordinary legislative procedure and after consulting the Economic and Social Committee. The condition for the Council and the EP to recourse art. 114 is that the harmonization provisions should have the establishment and functioning of the internal market as their object. However, this competence shouldn't be considered an open-ended general regulatory power. It is not sufficient for the legislators only to articulate that the objective of the provisions is the approximation of laws in the related area.[186] Accordingly, the ECJ set the standards of the appropriate determination of objective in its judgments. Hereof, "*a measure (…) must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.*"[187] So "*the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure.*"[188] Therewithal, the concretely stated objective should be direct and not be in a secondary position. ECJ indicated that recourse to art. 114 is unjustified if the measure only has an incidental effect on harmonization.[189] In addition, a measure can have multiple aims, but the objective of approximation should not fall into a secondary position, having merely an ancillary role beside other objectives.[190]

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[185] Kellerbauer, in: Kellerbauer / Klamert / Tomkin (eds.), p. 1231, 1232.

[186] Davies, ELJ / 2015, p. 2, 8; Kellerbauer, in: Kellerbauer / Klamert / Tomkin (eds.), p. 1231, 1242.

[187] ECJ, Judgement of 5 October 2000, C-376/98, Germany v. EP and Council, ECLI:EU:C:2000:544, pr. 84.

[188] ECJ, Judgement of 29 April 2004, C-338/01, Commission v. Council, ECLI:EU:C:2004:253, pr. 54.

[189] ECJ, Judgement of 18 November 1999, Case C-209/97, Commission v. Council, ECLI:EU:C:1999:559, pr. 35.

[190] ECJ, Judgement of 9 November 1995, C-426/93, *Germany v Council*, ECLI:EU:C:1995:367, pr. 33; ECJ, Judgement of 29 April 2004, C-338/01, Commission v. Council, ECLI:EU:C:2004:253, pr. 55-56.

Art. 352 TFEU ensures the EU adopts the necessary measures to reach the objectives set out in the Treaties, where there is no specific legal basis within the Treaties. It brings flexibility to the Union's legal structure with such a filling-in-the-blanks mission when there is an absence of conferral.[191] The clause provides a general regulatory competence, so there are certain limitations to balance it. The first two limitations relate to the legislative process: (i) the Council should act unanimously on a proposal from the Commission, (ii) after obtaining the consent of the European Parliament. Others relate to the material elements of the legislation: (i) the usage of Art. 352 shouldn't circumvent the prohibition of harmonization, (ii) and result in the adoption of provisions whose effect would, in substance, be to amend the Treaties.[192]

Art. 103 TFEU is a clause designed to ensure the effective implementation of art. 101 and 102 TFEU that provide the legal basis for competition law via issuing regulations or directives constituting secondary legislation.[193] The regulations and directives are made "*by Council, on a proposal from the Commission and after consulting the European Parliament*".[194] The essential components of the competition law regulatory framework, such as Antitrust Regulation 1/2003[195] and the EU Merger Regulation[196], were envisaged based on this article. It is worth indicating that if the aim or content of an introduced secondary legislation goes beyond what is expected from art. 101 and 102, Art. 103 will not suffice as the legal basis of such legislation. So, if the excessed part of the legislation cannot be separated from the other part, another legal basis should be added.[197] The Damage Directive is an example of this situation, having dual legal basis art. 103 and 114 TFEU.[198]

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[191] Kellerbauer / Klamert, in: Kellerbauer / Klamert / Tomkin (eds.), p. 2072, pp. 2073-2074.

[192] Ibid, pp. 2073-2074.

[193] Kellerbauer / Meeßen, in: Kellerbauer / Klamert / Tomkin (eds.), p. 1059, 1060.

[194] TFEU, Art. 103(1).

[195] Regulation (EC) 1/2003, 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[196] The EU Merger Regulation 2004.

[197] Kellerbauer / Meeßen, in: Kellerbauer / Klamert / Tomkin (eds.), p. 1059, 1061.

[198] Directive, 2014/104/EU of the European Parliament and of the Council, 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, recital 8.

The first suspicion on the legality of the DMA is stemming from the objective. It is indicated that the main aim of the DMA is to promote the establishment and effective functioning of the internal market by ensuring fair and contestable markets. The Commission also asserted the DMA is necessary "*to eliminate the existing and likely emerging fragmentations in the specific areas covered by this Regulation.*"[199] However, as indicated above, "*the measures must rest on objective factors amenable to judicial review which include in particular the aim and the content of the measure.*"[200] So, only the articulation is not sufficient. Also, unlike the detailed explanations within the Impact Assessment of the DMA[201], there is no detailed examination within the DMA showing the risk of fragmentation in related markets. Furthermore, a close examination of the current national legislations shows that most of them would be out of any harmonizing effect by entering the scope of art. 1(5) and 1(6) DMA.[202] According to art. 1(5) DMA, a MS can impose further obligations on undertakings not designated as gatekeepers pursuing the same objectives as the DMA, and obligations on all undertakings including gatekeepers falling outside the scope of the DMA. In addition, national applications related to art. 101, 102 TFEU and the Merger Regulation are completely independent of the DMA as per art. 1(6) DMA.

Even though the legislator seemingly tried to cut the relevance between the DMA and the Competition law, it is indicated that most obligations stated in the DMA find their roots in the competition policy debates and practice.[203] On the other hand, this effort to escape from the scope of competition law forced the legislator to open a protected application area in art. 1(6) DMA for MSs. This paradox originates from the effort of the legislator to abstain from having Art. 103 or 352 TFEU as legal bases. Because they know that the policy selection behind the DMA goes beyond the effective application of art. 101 and 102 TFEU. So, art. 103 TFEU would not be an adequate legal basis for them. In another respect, art.

[199] DMA, (EU) 2022/1925, 14 September 2022, recital 6, 7, 9.

[200] ECJ, Judgement of 29 April 2004, C-338/01, Commission v. Council, ECLI:EU:C:2004:253, pr. 54.

[201] DMA Proposal Impact Assessement Report, part II, pp. 108-117.

[202] Pablo / Fernández, JECLP / 2021, p. 576, 579.

[203] Larouche / Streel, JECLP / 2021, p. 542, 546. for a table showing the obligations with concrete examples and underlying evindeces see DMA Proposal Impact Assessement Report, part I, pp. 53-60.

352 TFEU provides an opportunity to constitute a separate legal framework to cope with the digital challenges. However, its application requires unanimity of the members of the Council within the adoption period. It would bear a burden similar to changing the primary law.[204]

Under these circumstances, there is no doubt a directly applicable regulation setting obligations on undertakings and prohibiting them from engaging in certain unfair conducts could have a harmonizing effect to a certain extent.[205] However, this harmonizing effect would be in ancillary status[206], or, in the best scenario, would introduce one of the parts of a dual legal basis. In the first case, as indicated above, having the harmonization as an aim is not sufficient on its own to take Art. 114 TFEU as the legal basis. Regarding the second case, if they are separable aims, there should be two distinct legal acts; if not, two legal bases should be embraced. Considering the two aims of the DMA, one can argue that the aim of the contestable market is directly related to the competition law concerns and there is a myriad of national laws related to the matter, so the legal basis for it should be art. 103 and/or 114 TFEU similar to the Damage Directive, while the fair market aim, which mainly pertains to the unfair conducts of the undertakings against business users and the behavioral biases, requires to be envisaged a new separate legal act due to going beyond only the competition concerns, so its legal basis could be art. 352 TFEU. It can also be argued that these aims cannot be separated from each other. In this possibility, too, articles 103 and/or 114 and 352 TFEU could be taken together as legal bases.

Based on all these explanations, we argue that the DMA should have been designed as three columns: (i) the column that comprises the field where the competition law is substantively sufficient to control the operations of gatekeepers, but requires arrangements via secondary legislation, (ii) the new national competition tools that started to be applied by MSs in parallel with articles 101 and 102 TFEU against the challenges of digital platforms (iii) the column that comprises the field where competition law is substantively insufficient to control unfair conducts of gatekeepers. In such a determination, the first column requires art. 103 TFEU as the

[204] Larouche / Streel, JECLP / 2021, p. 542, 545.

[205] Pablo / Fernández, JECLP / 2021, p. 576, 581.

[206] Ibid, p. 581.

legal basis, while the second column requires art. 114, and the third column requires Art. 352.[207] Given that these columns cannot separate from each other, normally, all three articles should have formed the legal basis of the DMA. However, if we assess the new national regulations against the digital platforms within the scope of competition law, Art. 114 will be absorbed by art. 103 TFEU. Also, if we assess the new national regulations against the digital platforms whose application is in parallel with art. 101 and 102 TFEU, art. 114 TFEU will be absorbed by art. 352 TFEU. So, in any case, the embracement of art. 103 and 352 TFEU as legal bases will be sufficient. Nevertheless, it is stated that it is unlikely the EU Commission and EP would desire to resort to art. 352 TFEU as a legal basis due to its procedural disadvantages, such as the requirement of unanimity and the disabling of the EP from the legislative process.[208] Therefore, the rearrangement of the DMA within the framework of the harmonization objective by more fully meeting its requirements and the embracement of Art. 114 TFEU as a legal basis is asserted as a more feasible option.[209]

It should be pointed out that, in each possible legal basis, the DMA might be detected as unlawful based on the principle of proportionality. It is crucial, particularly given that the DMA enlarged the commission's power of intervention.[210] As indicated within Art. 5(4) TEU "*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*" Accordingly, the DMA tries to reveal the importance it attaches to the principle

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[207] For a similar legislative structure and considerations of having the article 103 and 352 together as legal basis see The EU Merger Regulation 2004, recital 7; for the relationship between articles 103 and 114 see Directive (EU) 2019/1 of The European Parliament And of The Council, 11 December 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, recital 9. (hereinafter "ECN+ Directive").

[208] Pablo / Fernández, JECLP / 2021, p. 576, 587; Pablo, 'The Key to Understand the Digital Markets Act: It's the Legal Basis', https://chillingcompetition.com/2020/12/03/the-key-to-understand-the-digital-markets-act-its-the-legal-basis/, (last accessed on 5.11.2023). (hereinafter 'The Key to Understand the Digital Markets Act')

[209] Pablo / Fernández, JECLP / 2021, p. 576, 587; Pablo, 'The Key to Understand the Digital Markets Act', (last accessed on 5.11.2023).

[210] Nordic Competition Authorities, 'Digital Platforms And The Potential Changes To Competition Law At The European Level', 2020, p. 19.

of proportionality throughout its recitals.[211] However, it is argued that the DMA might be acknowledged as unproportionate based on mainly two reasons.[212] The first relates to the addressees of the obligations: the DMA leaves the criteria of determination as a gatekeeper unforeseeable by giving broad discretion to the commission.[213] The second directly relates to the contents of the obligations: (i) the absolute prohibitions stated in Art. 5 DMA is not sufficiently proved that the prohibited actions are really 'clearly unfair and harmful' which is the criterion justifying ex-ante approach, and (ii) The obligations within Art. 6 DMA enabled interaction bilaterally between gatekeepers and the commission; however, there is no clarity on the factors that will guide the Commission's assessment and limit its discretion.[214]

b) What is the Nature of The Digital Market Act: Regulation vs. Competition Law

Traditionally, economic policy has been shaped based on polarization between market-directed economy policy, which assumes that the market would ensure the most efficient distribution of welfare, and state-directed economy policy, which assumes that there might be some cases where the market itself ends up in market failure whose addressing requires state intervention.[215] Competition law and regulation constitute economic policy instruments, taking a position closer to the state-directed economy.[216]

Competition law functions as a remover of blockage where the 'visible hand' of the competitive process flamed out based on a market failure stemming from the anticompetitive behaviors of market actors. 'Economic regulation' is a concept enabling the state to intervene where the market mechanism falls into failure mainly due to its structural deficiencies.[217]

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[211] DMA, (EU) 2022/1925, 14 September 2022, recitals 27, 29, 65, 66, 75, 86, 107.

[212] Pablo / Fernández, JECLP / 2021, p. 576, pp. 582; Lamadrid, 'The Key to Understand the Digital Markets Act' (last accessed on 5.11.2023).

[213] Pablo / Fernández, JECLP / 2021, p. 576, pp. 582-584; See DMA, (EU) 2022/1925, 14 September 2022, articles 3(5), 3(7).

[214] Pablo / Fernández, JECLP / 2021, p. 576, pp. 584-586.

[215] Dunne, p. 9.

[216] Ibid, p. 9.

[217] Ibid, p. 3.

It should be indicated that the relationship between these two economic instruments is mainly antipodal, and they have been widely seen as substitutable between them in the USA.[218] However, Europe embraced a more transitional approach and saw the regulation as complementary to the competition law, instead of a substitute.[219] These tools constitute different level of state intervention. So, as a requirement of the principle of proportionality, behavioral measures should be first applied. Only if it does not suffice should the structural measures come to the agenda. Accordingly, the Commission explained that if the power of the competition law to tackle adequately the market failure is insufficient and given that the market failure requires immediate and timely intervention, ex-ante regulation should be considered a complementary legal tool.[220] Thus, the competition law has been embraced as the first option to tackle market failures within the EU, while the regulation is secondary and complementary.[221]

DMA came into force under the form of regulation. The examination of DMA within the scope of the relationship between regulation and competition law requires getting into the deep of the articulated features of both instruments.

The first feature is that the regulations in the EU have traditionally been designed to intervene in a specific sector, while the competition law embraces a more general approach beyond any sector.[222] Actually, being sector-specific is not an inherent feature of the instrument of regulation,

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[218] Larouche / Streel, JECLP / 2021, p. 542, 543; Some of the scholars and leading case-law in the US stated the antitrust law as a possible substitutable tool for regulation, or vice-versa, under certain conditions see Breyer, p. 161; Breyer, CLR / 1987, p. 1005, 1007; Shelanski, MLR / 2011, p. 683, 719, 721, 727-729.

[219] Tapia / Mantzari, in: Lianos / Geradin (eds.), p. 588, 589; Larouche / Streel, JECLP / 2021, p. 542, 543.

[220] Commission Recommendation (EU) 2020/2245, 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code, pr. 17.

[221] Pettersson, SSRN /2022, 'Sector-Specific Ex Ante Regulation in Digital Market-A Complement or Substitute to Antitrust Enforcement', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4222013, p. 3.

[222] Podszun, Economics / 2023, p. 1, p. 6.

which can also cover several sectors at once.[223] However, we know that the regulation is a direct intervention tool that takes action if there is a structural competitive problem.[224] The structural problems in Europe have generally stemmed from the competitive problems within the natural monopolies forming separate sectors such as telecommunication, railways, and energy distribution. Hence, the regulations have set concrete and detailed *rules* within the sectoral dimension, unlike the competition law, whose mission has been to command competitive provisions reminiscent of *standards* that should be specified by agencies and courts.[225] The DMA referred several times to the concept of the "digital sector" in its recitals and articles. It also says, "*'digital sector' means the sector of products and services provided by means of, or through, information society services.*"[226] When we look at the definition of the concept of 'information society services' Art. 2(3) DMA directs us to Art. 1(1)-b of Directive (EU) 2015/1535, which says that "*'service' means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*"[227] Obviously, both the "digital sector" definition and the material scope of the DMA exceeds the bound of a single sector in the classical sense by comprising several

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[223] For the examples of national regulations that are not limited to a specific sector see OECD, 'Ex ante regulation in digital markets – Background Note', DAF/COMP(2021)15, p. 22.

[224] Dunne, 3.

[225] Podszun, Economics / 2023, p. 1, p. 7; for the sector specific regulation within the telecommunication sector see Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code; for the regulative efforts in the railway sector see EU Competition Policy: Rail Transport, https://competition-policy.ec.europa.eu/sectors/transport-tourism/rail-transport_en, (last accessed 07.11.2023); for the regulative efforts within the energy sector aiming at the separation of energy supply and generation from the operation of transmission networks see EU Third Energy Packet, https://energy.ec.europa.eu/topics/markets-and-consumers/market-legislation/third-energy-package_en, (last acccessed on 07.11.2023)

[226] DMA, (EU) 2022/1925, 14 September 2022, art. 2(4).

[227] Directive (EU) 2015/1535, 9 September 2015, laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, art. 1(1)-b.

of them.[228] It is also incompatible with the content of the "digital sector" as conceptualized above.[229] The reason is that the DMA focuses on the problems stemming from the digital platform economy which cut through many sectors.[230]

It should be indicated that the Antitrust law experienced a transition from the rule-based approach toward standard-based following the mid-1970s under the effect of the economic approach triggered by the Chicago school.[231] Indeed it was in parallel with a deeper transition of the antitrust law from the structuralist school to the Chicago school. The structuralist school dominated the antitrust law until the 1970s. They mainly focused on the structural features of markets through the consideration of two terms, 'market concentration' and 'barrier to entry'.[232] They shared the understanding of the economic institutionalists as such: "*Markets are frail, that they differ from one another, and that they require significant State intervention*".[233] Accordingly, they argued that a highly concentrated market inevitably causes anticompetitive behaviors of firms, and such behaviors inevitably cause low market performance, so the state should directly target concentrated market structures without regarding related conducts.[234] This approach collapsed in the face of critics of the Chicago school arguing that the structuralist school gave exaggerated importance to the link between high concentration and high prices. The Chicago school focused on the firms' behaviors and identified the mission of the antitrust as preventing firms from adopting practices that would collude with the market.[235]

According to a well-known saying that 'history repeats itself'. Accordingly, as stated by Crane, "*Whatever the perceived advantages of standards over rules in antitrust, the disadvantages of standards will probably induce a*

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228 Akman, ELR / 2022, p. 85, p. 103, 104.

229 See above pp. 22-25.

230 Podszun, Economics / 2023, p. 1, p. 7.

231 Crane, WLLR / 2007, p. 49, 50.

232 Mueller, VLR / 1967, p. 764, 783; Crane, in: Crane / Hovenkamp (eds.), p. 318, 318.

233 Hovenkamp, p. 212.

234 Crane, in: Crane / Hovenkamp (eds.), p. 318, pp. 318-319.

235 Hovenkamp, in: Crane / Hovenkamp (eds.), p. 390, 391.

counter-movement back toward rules once the current movement has run its course."[236] The digitalization of the economy has become the factor calling off the movement towards standards. Although it boarded the train to Chicago late and started to adopt the economic approach to the competition law only after 2000,[237] Europe responded to this change more quickly than the antitrust law. Besides embracing a more aggressive stance against the anticompetitive behaviors of the digital giants than the US,[238] EU introduced a turn back towards the rule-based approach via the legislation process of the DMA, preferring a regulatory enforcement line aiming at struggling the high barrier to entry causing entrenchment of market power in digital platform markets.[239] The broad standards, such as 'abuse of a dominant position', were supplanted by detailed specific rules.[240] However, the pure preference of rules over standards, or vice versa, will not promote competitive, thus efficient markets.[241] Indeed, even though the DMA is mainly construed on detailed rules imposing obligations and prohibitions, it didn't leave the standards altogether and embraced a moderate position by keeping the door of specification open for some cases.[242]

Another stated feature of the regulation is being prescriptive, while the competition law is described as proscriptive.[243] It means that, at large, the regulation prescribes certain rules to addressees about what they should do, while the competition law proscribes certain behaviors that should not be done. The first imposes positive obligations while the latter imposes negative.[244] In our opinion when the competition law imposes proscriptive measures by nature, prescriptiveness is not an

[236] Crane, WLLR / 2007, p. 49, 52.

[237] Witt, p. 7.

[238] Bradford / and others, p. 2.

[239] Podszun, Economics / 2023, p. 1, p. 7; Witt, JCLE / 2022, p. 670, 682; Chirico, JECLP / 2021, p. 493, 493.

[240] Podszun / Bongartz / Langenstein, EuCML / 2021, p. 60, 61.

[241] Crane, WLLR / 2007, p. 49, 52.

[242] Larouche / Streel, JECLP / 2021, p. 542, 556; DMA, (EU) 2022/1925, 14 September 2022, recital 22, 65.

[243] Dunne, p. 45.

[244] Hellwig, in: Vives (ed.), p. 203, 211; Dunne, p. 45; Akman, ELR / 2022, p. 85, p. 101; Podszun, Economics / 2023, p. 1, p. 6.

inherent feature of the regulation. Because there is no reasonable theoretical obstacle to imposing negative obligations through regulations. Accordingly, DMA includes many prohibitions as well as positive obligations. It is also stated that the fact that the majority of the obligations imposed are negative conducts taken from the competition law applications based on art. 101 and 102 TFEU shouldn't lead to think that the DMA is a turbocharged application of the competition law with a simple tweak.[245]

The last disputed feature of the regulation that has been attributed traditionally is being ex-ante, while the competition law constitutes principally an ex-post system.[246] The supervision of a proscriptive obligation demands primarily an ex-post intervention because it moves in if a breach takes place. If, despite ex-post control, a transaction produces anticompetitive effects, it shows that there is a structural problem and the control of such a transaction might be supported by ax-ante procedures.[247] Hence, the competition law in the narrow sense (only art. 101 and 102 TFEU) forms inherently an ex-post system. However, the merger regulation's incorporation diversified the competition law's uniform structure by containing the ex-ante processes, such as prior notification, besides ex-post ones, to ensure effective control.[248] Thus, the EU sprinkled a regulatory approach on the merger control. Indeed, the ex-post control of the competition law hasn't been able to prevent the anticompetitive structural effects of the mergers above certain thresholds as a behavior once they occur. Besides, the merger transactions were convenient to be controlled ex-ante, because the number of the mergers which most probably caused the structural anticompetitive effect was limited due to the thresholds set. As a matter of fact, the transactions within the scope of art. 101 and 102 TFEU are not convenient to be

[245] Monti, TILEC Discussion Paper / 2021, p. 1, 14; Colomo, JECLP / 2021, P. 561, 568; Pettersson, SSRN /2022, p. 4.

[246] Dunne, p. 44; Podszun, Economics / 2023, p. 1, p. 7.

[247] Akman, ELR / 2022, p. 85, p. 101; See also OECD, 'Ex ante regulation in digital markets – Background Note', DAF/COMP(2021)15, p. 11, pr. 30.

[248] The EU Merger Regulation 2004, recital 34; see also Council Regulation, (EEC) No 4064/89, 21 December 1989 on the control of concentrations between undertakings, recital p. 2; there are other legislations complamentory to competition law which embraced ex-ante approach such as block exceptions see Larouche / Streel, JECLP / 2021, p. 542, 546.

controlled ex-ante. Because they are diverse and intensely practiced, and they generally couldn't go beyond containing behavioral risks until the blossoming of the digital platform economy.

In our opinion, the first distinctive feature of regulation is taking direct structural intervention and adopting a casuistic rule-based method in terms of the conducts/behaviors of addressees. The second is the ability to cover a broader concern spectrum than competition law, such as distributional justice and protection of rights, besides simply addressing market failure.[249] Contrary to the competition law in the narrow sense, a regulation could introduce ex-ante and/or ex-post systems.[250] So, being an ex-ante system is only a matter of wide practice rather than an inherent feature of regulations. Accordingly, DMA substantively codified ex-ante rules to "*minimize the detrimental structural effects of unfair practices*" while leaving the possibility of ex-post intervention by EU and national institutions open.[251]

As indicated above, the relationship between the competition law and regulation in the USA is mainly antipodal, and they have been widely seen as substitutable between them.[252] However, Europe embraced a more transitional approach. They saw the regulations tackling specific sectors or issues as complementary to the competition law instead of a substitute.[253] Indeed, it is a result that the EU economic regulation framework has been shaped within the framework of overarching objectives as listed in Art. 3. TFEU. So, all legal instruments should be understood as parts of a coherent

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[249] OECD, 'Ex ante regulation in digital markets – Background Note', DAF/COMP(2021)15, p. 13.

[250] Tapia / Mantzari, in: Lianos / Geradin (eds.), p. 588, 589, fn. 8.

[251] Commission COM(2020) 842, 15.12.2020, Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act), Explanatory Memorandum, p. 4. (hereinafter "Proposal DMA Com(2020)")

[252] Larouche / Streel, JECLP / 2021, p. 542, 543; The scholars in the US stated that the antitrust law as a possible substitutable tool for regulation, or vice-versa, under certain conditions see Breyer, p. 161; Breyer, CLR / 1987, p. 1005, 1007; Shelanski, MLR / 2011, p. 683, 719, 721, 727-729.

[253] Tapia / Mantzari, in: Lianos / Geradin (eds.), p. 588, 589; Larouche, pp. 402-403; Larouche / Streel, JECLP / 2021, p. 542, 543.

whole.[254] According to the statement of the DMA, it follows the same tradition, aiming to complement the enforcement of competition law.[255] In this direction, the DMA tries to protect the application area of the Competition law where the two instruments overlap.[256]

As a matter of fact, the primary law prevails over the secondary law enacted based on art. 103 and 114 TFEU. Secondary legislations formed by EU Institutions cannot put aside the application of art. 101 and 102 TFEU.[257] Consequently, considering the current and alternative legal basis for the DMA, it cannot be substitutable *de jure*.

However, it is indicated that the DMA, as a regulation, exhibits distinctive features from previous sector-specific regulations. As explained above, it does not include only ex-ante measures, adopted proscriptive obligations besides prescriptive ones, and is not sector-specific. As a reply to an innovative/dynamic but disruptive digital economy, the DMA forms an innovative and new regulation by avoiding operational concepts of the competition law while modeling prohibitions substantially relying on art. 102 TFEU.[258] This situation in limbo, neither inside nor outside the competition law, makes the function and structure of the DMA unclear and difficult to locate epistemologically.[259] So, given that the Commission is the competent authority in both procedure and the conduct of a gatekeeper that breached a negative obligation is included in the scope of both instruments, how an enforcement preference would be made by the Commission is blurred. Monti argued that, by seeing the DMA as lex specialis or due to the practical advantage of the DMA of being accelerated and eased, the Commission would most probably apply the DMA to address the related problem.[260] In addition, when considering the heavy and slow procedures of the competition law, the DMA

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254 Larouche / Streel, JECLP / 2021, p. 542, 543.

255 DMA, (EU) 2022/1925, 14 September 2022, recital 10, 11.

256 DMA, (EU) 2022/1925, 14 September 2022, recital 10, 11.

257 Tapia / Mantzari, in: Lianos / Geradin (eds.), p. 588, 605.

258 Colomo, JECLP / 2021, P. 561, 562; Monti, TILEC Discussion Paper / 2021, p. 1, 14; Chirico, JECLP / 2021, p. 493, 499.

259 Larouche / Streel, JECLP / 2021, p. 542, 545, 547.

260 Monti, TILEC Discussion Paper / 2021, p. 1, 15.

could solve the problem while the competition law processes are just getting started. Considering all these possibilities, even if it is not *de jure*, the DMA could have a substitutive effect *de facto*. Besides, the approach embraced within the faster enforcement of the DMA will likely affect the assessment in the second process that follows from behind. Thus, the DMA would have a guiding effect in the short term and a transformative effect in the long term on the competition law enforcement.

III. The Enforcement Structure

When the competition law enforcement has been carried out by DJ Com and National Competition Authorities (NCAs), the DMA gave the enforcement duty only to the Commission.[261] It is the DG COMP who will carry out the process.[262] Furthermore, the DMA forbids the NCAs to apply national provisions, under the competition law or regulation instruments, aiming the same objectives as the DMA to the gatekeepers.[263] NCAs can only assist the enforcement of the Commission.[264] Actually, when we consider the design of the multi-level enforcement institutions of the EU, the DMA presents the most concentrated power to the Commission that is effective EU-wide (see table 2). Scholars criticized this extreme one-headed form for centralized the enforcement structure.[265]

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[261] DMA, (EU) 2022/1925, 14 September 2022, art. 38(7) and recital 91.

[262] For a criticism expressing the separation of DMA enforcement from competition law would ensure a fruitful dialectic between the two institutions; however, the current situation may cause paralysis see Toledano / Cattan, 'Will the Digital Markets Act allow Europe to regain power over the Big Tech? Probably not', December 2021, https://geopolitique.eu/en/articles/will-the-digital-markets-act-allow-europe-to-regain-power-over-the-big-tech-probably-not-right-away/, (last accessed on 13.12.2023)

[263] DMA, (EU) 2022/1925, 14 September 2022, art. 1(5) and recital 9.

[264] DMA, (EU) 2022/1925, 14 September 2022, art. 23(3) and (8); It is argued that the small number of firms as gatekeepers is not enough to require the assistance of NCAs. See Monti, TILEC Discussion Paper / 2021, p. 1, 5.

[265] Hoffmann / Herrmann / Kestler, JAE / 2023, p. 1, 3.

	EU Competition Law	General Data Protection Regulation GDPR	EU Consumer Law	Electronic Communications	DMA
1. EU level	Commission – full powers			Commission – in part	Commission – full powers
2. Networks	European Competition Network	European Data Protection Board	Consumer Protection Cooperation network	BEREC	
3. National level	National Competition Authority (NCA)	National Data protection authority (DPA)	National Consumer Protection Authority (CPA)	National Regulatory Authority (NRA)	
4. Effect ofdecision	Commission:EU-wide NCA: national	EU-wide by 'lead' authority.	Cross-borderif collaborative decision	national	EU-wide

Table 2: Multi-level institutions[266]

Furthermore, this centralization is reinforced by giving the commission a broad discretion field. The commission can revise the thresholds for designation as gatekeepers through delegated acts.[267] It can designate an undertaking as gatekeeper even if it doesn't meet the related thresholds.[268] the Commission can also designate new fields of digital economic

[266] Monti, TILEC Discussion Paper / 2021, p. 1, 4.

[267] DMA, (EU) 2022/1925, 14 September 2022, art. 3(6).

[268] DMA, (EU) 2022/1925, 14 September 2022, art. 3(8).

activities as core platform services.[269] Here, the point open to criticism is the wide scope of stipulated criteria that direct and bound the discretion of the Commission rather than granting these powers themselves.[270] Indeed, such a power to revise the current schemes and thresholds is necessary if we consider the inherent dynamism of the digital economy. Because the casuistic method embraced by the DMA causes a lack of flexibility. However, the protection of the property rights of the gatekeepers requires a sufficient level of certainty.[271]

Another matter of enforcement is the ex-ante and ex-post control of conducts. As explained above, the DMA contains prescriptive and proscriptive measures. Naturally, the prescriptive measures would require ex-ante enforcement, while proscriptive measures would require ex-post one.

IV. The Main Tools

Art. 5 and 6 DMA are dedicated to list do's and don'ts. It includes ex-ante obligations as well as ex-post prohibitions. The most prominent obligations are listed exemplarily as such: (i) allow third parties to inter-operate with the gatekeeper's own services in certain specific situations (for ensuring interoperability); (ii) allow their business users to access the data that they generate in their use of the gatekeeper's platform(for ensuring data portability); (iii) provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper (for ensuring interoperability and data portability); (iv) allow their business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform(for impeding the self-preference).[272] The most prominent prohibitions are listed exemplarily as such: (i) treat services and products offered by the

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[269] DMA, (EU) 2022/1925, 14 September 2022, art. 4(3);

[270] For a similar criticism see Podszun / Bongartz / Langenstein, EuCML / 2021, p. 60, 65.

[271] See Chirico, JECLP / 2021, p. 493, 496.

[272] The EC, 'About the Digital Market Act', https://digital-markets-act.ec.europa.eu/about-dma_en, (last accessed on 17/11/2023)

gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform (for impeding the Most favoured nation clauses); (ii) prevent consumers from linking up to businesses outside their platforms (for impeding the anti-steering and self-preferencing); (iii) prevent users from uninstalling any pre-installed software or app if they wish so (for impeding the tying and bundling and lock-in); (iv) track end-users outside of the gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted (for impeding the exploitative abuses based on data collection).[273]

An important matter about the tools is the types of remedies that can be applied by the Commission when the articulated obligations within Art. 5 and 6 DMA are violated. Here is the point where we blazingly witness the uncertain character of the DMA between the competition law and regulation. Based on Art. 18(1) and (2), the DMA mainly embraces the competition law approach regarding the behavioral and structural remedies.[274] Accordingly, in the case of systematic non-compliance determined based on art. 18(3), the Commission can impose "*any behavioral or structural remedies which are proportionate and necessary to ensure effective compliance with this Regulation*".[275] On the other hand, the obligations adopted in Art. 5 and 6 DMA have actually brought behavioral remedies for opening the digital markets to competition under its regulatory guise, similar to the liberalization movement within the natural monopoly sectors in Europe.[276] However, while the ultimate policy aims of the liberalization regulations have been mainly to ensure intra-infrastructure competition in the first stage and inter-infrastructures competition in the final stage, the DMA contented itself aiming at intra-platform (intra-infrastructure) competition.[277]

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[273] Ibid.

[274] Larouche / Streel, JECLP / 2021, p. 542, 552.

[275] DMA, (EU) 2022/1925, 14 September 2022, art. 18(1).

[276] Larouche / Streel, JECLP / 2021, p. 542, 552.

[277] Ibid, p. 553.

The current scene is that the DMA brings behavioral obligations; if these measures are ineffective by failing to prevent systematic non-compliance, the DMA makes it possible to adopt additional behavioral and structural remedies.[278] Even though the DMA doesn't bring the gradual implementation structure between types of remedies similar to the Proposal DMA[279], it is clear that the behavioral remedies will mainly suffice for the policy objective of intra-platform competition. Actually, there are underlying reasons behind this selection. They all stem from the platform economy's distinct nature from natural monopolies. The first is that the digital platforms are the results of innovative and competitive success of undertakings contrary to natural monopolies such as the electronic communication and railway infrastructure. Furthermore, despite becoming everyday habits of modern life, the core platform services have never constituted the services of general economic interest. Thus, a regulation of platform economy should be less interventionist than the regulations aiming for liberalization to ensure proportionality by balancing the freedom of enterprise and the right to property against the economic public interest. In addition, despite seeming quite difficult considering the characteristics of the digital economy, it is argued that the innovative nature of the platform markets makes it possible for platform operators to break the monopoly of a gatekeeper through disruption of the current platform by pulling its activity onto a newer ground via innovation.[280]

278 Ibid, p. 552.

279 Proposal DMA Com(2020), art. 16(2).

280 Larouche / Streel, JECLP / 2021, p. 542, 553.

E. Looking at The Competition Law from An Ordoliberal Lens

I. The Ordoliberal Competition Approach: Mental Framework, The Instrumental Requirements, Objectives, and The Actual Situation

Seeing the past and current appearances of the Ordoliberal approach and investigating its possible links with the DMA firstly requires examination of the fundamentals of this school of thought, secondly displaying the adventure of Ordoliberalism intertwined with EU law, thirdly examining the instrumental requirements of the ordoliberal competition law, fourthly to explain its objectives based on the previous narrative, and lastly glancing at the actual situation.

There are determinations in the related literature about the elements that make up the competition understanding of the Ordoliberal school of thought. According to the determinations of Gerber, which allegedly partially misled the following studies in the English-speaking world,[281] these elements can be listed as such: the transaction economy, competitive order, the concept of the economic constitution, 'ordnungspolitik' as the soul of ordoliberalism, the principle of indirect regulation, and the requirement of a strong state.[282] Mestmäcker provided a summary framework of the ordoliberal competition law understanding in his article related to the development of German and EU competition law, where he showed the certain misunderstandings Gerber fell into. Before passing to the considerations of Mestmäcker, certain issues should be pointed out:

[281] Mestmäcker, in: Federico Pace (ed.), p. 25, 39.

[282] Gerber, pp. 242-249.

(i) despite sharing a common general framework and principles, not all the ordoliberal thinkers have a uniform understanding.[283] (ii) ordoliberalism emerged and bloomed in certain political and sociological conditions, just like the economic approach of the Chicago school, so it shouldn't be evaluated apart from its historical context.[284]

Starting from the historical context, the emergence of the ordoliberal thoughts coincided with the time between the two World Wars. It was an ominous period where the Weimar Republic, the Great Depression, and the rise of totalitarianism by, particularly, the Nazi regime had been experienced.[285] During this period, on the one hand, they observed the disadvantages of the weak state, which is fragile against the interests of private economic powers, and the unregulated market based on laissez-faire liberalism. On the other hand, they suffered from the pervasive cartel organization structure of German industry, which later served as a suitable infrastructure for the Nazi regime to embrace central economic planning.[286] Hence, in their economic theory, they tried to abstain from both the fundamental incompatibility of the market economy with a centrally planned economy and the inherently fragile nature of the competition process of the market economy.[287]

Based on such a background, they principally embraced the transaction economy (market economy) approach. The essence of the transaction economy was economic competition.[288] However, this competition should be 'complete', far from being distorted by abuse of public or private

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[283] Mestmäcker, in: Federico Pace (ed.), p. 25, 42; Indeed, Gerber was also aware of this varieties see Gerber, pp. 236-237.

[284] For an assessement of the effect of ordoliberalim on the competition law based on historical circumstances see Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, p. 133; Gerber also didn't completely overlook in its study the social and politic circumstances as historical factors.

[285] Ahlborn / Padilla, in: Ehlermann / Marquis (eds.), p. 55, 64.

[286] Gerber, pp. 249-250; Ahlborn / Padilla, in: Ehlermann / Marquis (eds.), p. 55, 64; Mestmäcker, in: Federico Pace (ed.), p. 25, 36; Joliet, p. 12.

[287] Ahlborn / Padilla, in: Ehlermann / Marquis (eds.), p. 55, 64.

[288] Gerber, p. 244, 246.

powers.[289] People should not be impeded from using their economic freedom. Even on the contrary, economic liberties should be protected.[290] The mission of competition law was enforcing such competitive conditions and open markets through an '*ordnungspolitik*' (order-based policy).[291] The ordoliberal school placed all these elements within the concept of 'economic constitution' as parts of a whole. The ordoliberals allocated this concept to grant individual economic rights a constitutional liberty position. With this concept, although they regulated the framework of economic policy and appeared somewhat interventionist, they actually aimed to make it easier for the economy to operate with its own dynamics by drawing the limits of state intervention at the level of constitutional rights.[292] Thus, they restricted the administration's discretionary power by substituting constitutional implementation for governmental intervention.[293] Under the Constitutional implementation, governments don't engage in directly regulating the processes of the economy but instead focus on forming structures enabling these processes to function effectively.[294]

The ordoliberal school of thought that came to the fore in post-war thinking in Germany was the first factor that significantly affected the drafting and meaning of the EU competition provisions.[295] Because Germany surpassed the proposal of the French side. The components, especially art. 102, and the structure divided into two separate articles of the competition rules within the Treaty of Rome were largely shaped by Germany's proposal.[296] In addition, Germany was the only state that already had a structured competition law implementation at the time of enactment of the

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289 Mestmäcker, in: Federico Pace (ed.), p. 25, 42; Gerber, 235, 240, 247, 252.

290 Mestmäcker, in: Federico Pace (ed.), p. 25, 40; Venit, in: Ehlermann / Marquis (eds.), p. 165, 172.

291 Mestmäcker, in: Federico Pace (ed.), p. 25, 41, 42; O'Donoghue / Padilla, pp. 77.

292 Mestmäcker, in: Federico Pace (ed.), p. 25, pp. 40-41; Lyons, in: Vives (ed.), p. 133, 137.

293 Gerber, p. 247.

294 Ibid, p. 248; Mestmäcker, in: Federico Pace (ed.), p. 25, 41.

295 O'Donoghue / Padilla, pp. 76-77; Gerber, AJCL / 1994, p. 25, 73.

296 Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, p. 132; Mestmäcker, in: Federico Pace (ed.), p. 25, 30; Gerber, AJCL / 1994, p. 25, 73.

Treaty.[297] Consequently, Europeans resorted to the German experience when they interpreted the related provisions, particularly article 102(ex 82).[298]

The examination of the components of Art. 101 (ex 81) and 102 (ex 82) TFEU, as they were enacted, would ensure understanding of the instrumental requirements of competition law in the eyes of Ordoliberals. A closer look at the provisions shows that the discussions on the structures of monopoly shaped the components of the EU competition law. Here there are two ways of monopoly: contractual and non-contractual. If a monopoly is formed through the way of agreements whose best-known example is cartels, Ordoliberals rejected such formations *per se* based on the experiences of the cartelized structure of the economy of the Weimar period, where the considerations focused only on abuse of cartels as a legal formation, and the following Nazi regime.[299] Regarding the non-contractual monopolies or single firm dominance, generally, there was no uniform attitude towards rejection *per se*. However, the concerns mainly focused on the types of abuses: exclusionary and exploitative.

The EU competition law has been seen as embedded in the internal market concept.[300] Because each article of the TFEU should follow the overarching aims stated in Art. 3(3) TEU "*establish an internal market (…) shall work (…) based on highly competitive social market*" and Art. 3(1)-b TFEU "*the establishing of the competition rules necessary for the functioning of the internal market*". As explained within the Protocol 27 annex to TEU, this internal market should ensure a system where the competition is not distorted.[301] So, competition is a means that facilitates an internal market whose essential objective is the improvement of living conditions of EU people, which is stated within the preamble of TEU. From such a mental

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[297] Mestmäcker, in: Federico Pace (ed.), p. 25, 34; Korah, in: Federico Pace (ed.), p. 8, 9; "*Without this battle [for the Gesetz gegen Wettbewerbsbeschrankungen-GWB enacted in 1956] there probably never would have been the prohibition of cartels or the abuse supervision in the EC treaty*" see Gerber, AJCL / 1994, p. 25, 73, fn. 191.

[298] Korah, in: Federico Pace (ed.), p. 8, 9.

[299] Gerber, p. 251; Mestmäcker, in: Federico Pace (ed.), p. 25, pp. 35-36.

[300] Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, 123.

[301] See Behrens, in: Di Porto / Podszun (eds.), p. 5, 5

background that is rooted in ordoliberalism as well, the abuse of dominance primarily meant exclusionary abuse for ordoliberals.[302] Because the exclusionary conducts such as predatory pricing and refusal to deal concerning essential facilities cause structural market problems which likely distort the competition. Notwithstanding, the abuse theory of Ordoliberals didn't exclude exploitative abuse. Some authors even argued, by tracing back to the effect of ordoliberalism on Art. 102(ex 82) TFEU, the article covers merely exploitative abuses based on the fairness concept, which aims to preserve consumers and small and medium-sized competitors.[303] Hence, they stigmatized the ordoliberal competition understanding as interventionist and heavily regulated.[304] Whereas the real trend was in the opposite direction. What mattered to the ordoliberals were structures and forms. So, they abstained from direct regulation in the case of exploitative conduct, waiting until the market corrected itself. Only if the monopoly or dominance appears unavoidable, such as natural monopolies, in the absence of the possibility for the market to correct itself, exploitation seemed to them as abuse, thus requiring exceptionally the regulation Eucken referred to with the "as if" theory.[305] Although less frequently, the EU institutions have also followed this line. There have been only four formal decisions adopted by the Commission charging excessive prices. Similarly, the ECJ jurisdiction has confirmed in several cases that Art. 102 TFEU comprises exploitative abuses.[306] However, it took the threshold to determine excessive prices quite high.[307] The only case the ECJ found an

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[302] Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, 145.

[303] Ibid, p. 121, 143; see Gal, The Antitrust Bulletin / 2004, p. 343, 363; Ahlborn and Padilla handled the "exploitative abuses" and "harm to existing commercial relationship" as types of "fairness abuses" see Ahlborn / Padilla, in: Ehlermann / Marquis (eds.), p. 55, pp. 73-74.

[304] Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, 121, 143; see Fox, NDLR / 1986, p. 981, 983;

[305] Mestmäcker, in: Federico Pace (ed.), p. 25, p. 43; Ahlborn / Padilla, in: Ehlermann / Marquis (eds.), p. 55, 63; Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, pp. 133-134; Behrens, in: Di Porto / Podszun (eds.), p. 5, 20.

[306] For a prominent case see ECJ, Judgement of 13 November 1975, C-26/75, GM v. Commission, ECLI:EU:C:1975:150, summary and pr. 9.

[307] Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, p. 145.

exploitative abuse of dominant position based on excessive prices was related to the British Leyland which was a public enterprise that was granted an administrative monopoly.[308]

All these explanations show that the ultimate goal of EU competition law is to ensure an internal market without frontiers between MSs. The internal market aims for "*economic prosperity and contributing to 'an ever closer union among the peoples of Europe' [social and cultural prosperity]*".[309] The ordoliberal approach shaped the EU competition provisions focused firstly on keeping the competition undistorted by impeding the dominant powers from structurally damaging the competition by abusing exclusionarily. Even though this tendency was interpreted as the goal of ordoliberalism is protecting competitors rather than competition,[310] indeed, the ordoliberals saw the protection of competitors as more conducive to ensuring competition than monopoly.[311] Hence, protecting the competition process constituted only an interim goal to increase efficiency and consumer welfare as a "meta objective".[312] The importance given by the ordoliberals to efficiency within the application of art. 102 TFEU indicates it as well. For example, in the case of exclusionary abuse, if the conduct of the dominant firm caused an exclusionary effect, the ECJ will examine whether the related conduct is economically justified, thus the advantages of efficiency would prevail over the disadvantages of exclusionary effect provided that

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[308] ECJ, Judgement of 11 November 1986, C-226/84, BL v. Commission, ECLI:EU:C:1986:421, pr. 27, 30.

[309] EU Parliament, 'The Internal Market: General Principles' / 2023, p. 1 available at https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.1.1.pdf, (last accessed on 16.11.2023)

[310] Wurmnest, in: Mackenrodt / Gallego / Enchelmaier (eds.), p. 1, 10.

[311] Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, p. 142.

[312] For a similar determination related to the relationship between the protection of competition process and social welfare as "meta objective" see Ahlborn / Padilla, in: Ehlermann / Marquis (eds.), p. 55, p. 76; In the US, the Sherman Act pointed a turning point from the concern of maintaining market structure where small and medium-sized undertakings could servive towards consumer welfare and efficiency in convenient with economic principles highlighted by Chicago school see Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, 123.

there is a proportionality between the advantages and disadvantages.[313] In the case of exploitative abuse, the attitude embraced by ordoliberalism is waiting for the market to self-correct in the short or medium term. It is also a proof showing that the ordoliberals embrace 'the undistorted competition' as a primary way of ensuring the welfare goal of the internal market. However, if an exploitative abuse occurs in an unavoidable monopoly (natural monopoly or newly liberalized market), there is no structural risk that would distort the competition by impeding the rivals from entering the market. But, as indicated above, some of the ordoliberals offer regulation as a tool to protect consumers from such abusive behavior.[314] Only this part may be seen as a result of direct concerns based on fairness.[315] Nevertheless, it can be argued that the role of fairness here is also instrumental as an interim objective rather than an objective in itself.[316] Because the ultimate goal in this situation is to ensure general conformity with the right-based understanding of ordoliberalism, where individual economic rights are seen as constitutional liberties.

It should be indicated that the ordo-effect on the EU Competition law didn't exhibit a uniform and monotonous line vertically and horizontally. Not all the EU competition law structures were adopted directly based on an ordoliberal approach. For example, the Treaty of Rome embraced much broader exceptions to the general prohibition of cartels compared to the proposal of the German side. It didn't include also the rules for merger control.[317] Furthermore, the effect of the Ordoliberal school fluctuated on the EU competition law, even mainly following a downward trend during the historical cruise. Accordingly, the influencer role of Germany shifted to adopt its statutes autonomously to the community standards.[318]

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313 Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, p. 142.

314 Mestmäcker, in: Federico Pace (ed.), p. 25, p. 43; Ahlborn / Padilla, in: Ehlermann / Marquis (eds.), p. 55, 63; Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, pp. 133-134; Behrens, in: Di Porto / Podszun (eds.), p. 5, 20.

315 For a similar determination on the exceptionally direct role of fairness see Behrens, in: Di Porto / Podszun (eds.), p. 5, 25.

316 See Ahlborn / Padilla, in: Ehlermann / Marquis (eds.), p. 55, p. 76.

317 Schweitzer, in: Ehlermann / Marquis (eds.), p. 119, p. 133.

318 Mestmäcker, in: Federico Pace (ed.), p. 25, 30.

Particularly, the embracement of 'the economic approach' against a more 'formalistic approach' at the beginning of the millennium symbolized a turning point. In this context, it is stated that ordoliberal thought's role is probably to decrease further.[319] However, the supporters of the ordoliberal approach continue across Europe and, considering the case law feature of the EU law, the ECJ's controlling approach prevents a sharp turn.[320] Moreover, it can be argued that the fact that Germany has already taken the lead in matters related to the latest EU legislations, such as the DMA and the Proposal of a Directive on Corporate Sustainability Due Diligence[321], at the national level has increased its influence on these legal regulations, and this may provide an opportunity for the ordoliberal approach to rise again at the EU level, assuming that the Germans have not completely abandoned the ordoliberal approach.

II. An Ordoliberal Assessment of The Digital Market Act

1. Assessment by Objectives and Nature

The internal market as a social welfare area is the overarching objective of the EU, whose philosophical background is rooted mainly in ordoliberalism. The DMA embraced it as an overarching goal. The interim objectives whose attainment would ensure the internal market are 'contestability' and 'fairness' of the digital markets.

The protection of rivalry and, thus, the competition process by impeding exclusionary abuses coincide with the objective of 'contestable market'. Because both aim to prevent structural market failures that likely distort the competition processes. Hence, in this respect, the DMA exhibits a harmony with Ordoliberalism.

When we look at the position of fairness in the ordoliberal competition law theory, it doesn't matter unless some additional conditions have been met. Only if there is a natural monopoly in the related market or the market is just newly liberalized, that is, in a situation where we don't

[319] O'Donoghue / Padilla, pp. 79-80.

[320] Crane, in: Crane / Hovenkamp (eds.), p. 252, 254

[321] Directive (EC) 71/2022, 23 February 2022 on Corporate Sustainability Due Diligence and Amending Directive (EU 2019/1937.

expect any benefit from market dynamics, there may be an efficiency gain through fairness. Hence, the regulation will come into play to meet the need to protect individual economic rights as a component of the economic constitution against an exploitative abuse. Here, 'fairness' appears as an intermediate objective to ensure the protection of individual rights, which is also concluded by the social internal market phenomenon.[322]

As indicated above, fairness within the scope of the DMA is a broad notion comprising exclusionary abuses in the B2B relationship, horizontally between gatekeepers and business users as competitors, and exploitative abuses in the B2C relationship, vertically between gatekeepers and (end)customers. Unfairness indications within the DMA contains the conducts excluding or discriminating against business users and impeding others to collect fully the benefits of their contributions. Hence, the fairness concerns may infiltrate into the exclusionary abuses as well as the entire exploitative abuses.[323] Furthermore, using 'fairness' frequently side by side with 'contestable market' in the form of equal objectives within the DMA doesn't make it possible to give the first an intermediary role. Thus, the fairness objective in the DMA doesn't coincide with the exceptional and intermediary position of fairness in ordoliberalism.

The uncertainty within the nature of the DMA constitutes the main inconsistency regarding the Ordoliberal competition law. Because Ordoliberals designed their competition law understanding within the framework of an economic constitution. It was crucial for them, because they desired to reach a well-structured systematic competition law enforcement where the rule of law and transparency were embraced against arbitrariness and uncertainty.[324] They restricted the administration's discretionary power by substituting constitutional implementation for governmental intervention to protect the individual economic rights that were considered constitutional liberty. Given that the DMA has a limbo nature with respect to its improper legal basis[325], the ambiguity of the meanings of its

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322 See above p. 77.

323 See above pp. 49-51.

324 Lianos, in: Lianos / Geradin (eds.), p. 1, p. 36; Sally, Government and Opposition / 1994, p. 461, pp. 475-476; James, in: Beck / Kotz (eds.), p. 24, pp. 27-28.

325 See above pp. 52-58.

objectives, and its intertwining character between the regulation and competition instruments[326], apart from its incompatibility to a certain extent in terms of the ordoliberal contents of enforcement structure and tools, this situation contradicts the idea of the economic constitution, which is the basis of the ordoliberal economy understanding.

2. Assessment by Enforcement Structures

Ordoliberal competition approach considers an enforcement structure that doesn't exceed the requirements of the Constitutional economy. This is possible with an effective enforcement mechanism that is closed to be politized and uncontrolled external intervention of interest groups.

The best solution to abstain from being politicized is decentralization of decision-making. This can be ensured firstly by creating a separate EU Cartel Office independent of policy making and incorporating the NCAs into the enforcement structure. Only in this way we can be protected from political influences that infiltrate the enforcement institutions through lobbying activities that incite the institutions to intervene in process policy instead of structures and forms.[327] For this sake, Eucken identified limiting the power of pressure groups as one of the principles of economic policy.[328] As indicated above, the enforcement competence is centralized within the DMA. The Commission, which also has a policy-making mission, is entrusted with enforcing the DMA, leaving out NCAs altogether. Considering the huge and increasing budgets and professionals the Big Techs allocate to lobbying[329], this concentrated form of enforcement doesn't meet the concern of Ordoliberalism. Although the Institutional

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[326] See above p. 65-66.

[327] Wörsdörfer, Philosophy and Technology / 2022, p. 1, pp. 20-21.

[328] Wörsdörfer, Philosophy of Menagement / 2020, p. 191, 202.

[329] The tech companies spent over € 97 million and employed 1452 lobbyists in 2021 see Bank and others, 'The Lobby Network: Big Tech's Web of Influence in the EU, CEO and Lobby Control, Brussel, 2021, p. 10; and these numbers have increased until 2023 see Euronews, 'Tech companies spend more than €100 million a year on EU digital lobbying', https://www.euronews.com/my-europe/2023/09/11/tech-companies-spend-more-than-100-million-a-year-on-eu-digital-lobbying, (last accessed on 05.12.2023)

Agreement on mandatory transparency register[330] makes lobbying transparent for three main institutions, it seems far from fully meeting the ordoliberal expectations.

In addition, the broad discretion of the Commission within the scope of DMA increases the disharmony with the order-based constitutional approach of Ordoliberals. Because it creates a legal uncertainty. The related competences should be detailed to comply with the rule of law.

As for an effective enforcement, given the inadequacy of the alone ex-post system, a complete enforcement system should resort to ex-ante monitoring, enforcement, and sanctioning besides ex-post instruments to ensure a strong deterrent effect.[331] Accordingly, the DMA mainly embraced the ex-ante system without leaving ex-post ones.

3. Assessment by Tools

Effective enforcement also requires inherently equipping the competent authority with adequate investigation and enforcement tools. The DMA provides the Commission investigation tools, such as the power to request information, conduct inspections, and, if necessary, take interim measures.[332]

If we evaluate in terms of enforcement tools: The ordoliberal competition law approach prescribes preventing dominant undertakings from exclusionary and exploitative abuses such as increasing market-entry barriers, predatory pricing, tying and bundling, self-preferencing, and ensuring market-entry, platform neutrality, and data portability and interoperability. The DMA brought necessary measures to deal with the articulated abusive practices.[333] However, as indicated above, the DMA aims to improve

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[330] Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register, 11.06.2021, L. 207/1.

[331] Furman Report, 'Unlocking digital competition Report of the Digital Competition Expert Panel', 2019, p. 58, 62-63; Wörsdörfer, Philosophy and Technology / 2022, p. 1, 27.

[332] DMA, (EU) 2022/1925, 14 September 2022, art. 21, 23, 24.

[333] Wörsdörfer, Philosophy and Technology / 2022, p. 1, pp. 28-29.

the intra-platform competition.[334] It is indicated that the measures set in Art. 5 and 6 DMA are insufficient in ensuring data portability and interoperability for a level where inter-platforms competition would be enabled. So, the DMA should push harder gatekeepers to provide interconnection and interoperability to competing CPS providers.[335]

Another issue related to the enforcement tools is fines and remedies. A systematic competition law framework requires sanctioning besides monitoring and enforcement. Accordingly, the DMA provides fining opportunities. In addition, it ensures the Commission resorts to behavioral and structural remedies.[336] These remedies were recommended by Eucken in the 1940s and may include the breakup of the big techs as a means of last resort.[337] However, it should be indicated that some behavioral remedies and most structural remedies constitute a risk of interference with the use of fundamental rights of the owners of undertakings. Thus, such a competence should be used proportionately. The DMA also indicates the requirement of proportionality. Even, it complicates the application of these remedies compared to the Competition law by linking them with the condition of systematic non-compliance. This approach is in the same line with the Ordoliberalism. Because it avoids directly regulating the market until the other less interventionist instruments have failed.

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[334] See above p. 69.

[335] Larouche / Streel, JECLP / 2021, p. 542, 554.

[336] See above pp. 70.

[337] Wörsdörfer, Philosophy and Technology / 2022, p. 1, 27, 31; Wörsdörfer, Philosophy of Menagement / 2020, p. 191, 209.

F. Conclusion

In Europe's medieval age, the ballads narrated the story of Robinhood as a man, real or myth, who existed between nature and culture.[338] He lived allegedly in the 13th or 14th century of England[339], where the dominant social order was still feudalism.[340] The society was stratified vertically and decentralized, to different extents, horizontally. The estates were infeudated to lords as tenants-in-chief by the King and afterward to knights as sub-tenants by the first.[341] The peasants and serfs were working in the fief of their master, the parcel of land given to knights in return for their services.[342] The wealth was collected by the upper classes of the society, [343] while the social and geographical mobility of the peasants and serfs was limited.[344] Robinhood was seizing the wealth of the king, knights, and monks as a collection of a dept. However, he was not completely outside

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[338] Hilton, Past & Present / 1958, p. 30, 31; Almond / Pollard, Past & Present / 2001, p. 52, pp. 53-54; Nagy, Folklore / 1980, p. 198, 198.

[339] Hilton, Past & Present / 1958, p. 30, 31, 40.

[340] The emergence of feudalism in England is dated to the Norman Conquest in 1066 see Brown, p. 93; The first century of English feudalism ended in 1166. However it continued to exist following 12th century with some changes as 'bastard feudalism' see Carpenter, Past & Present / 2000, p. 30, 32, 71; see also Crouch / Carpenter, Past & Present / 1991, p. 165, 177.

[341] Douglas, EHR / 1939, p. 128, 130.

[342] Brown, pp. 43-46; Bloch, 'Feudal Society 2', p. 446.

[343] Bloch, 'Feudal Society 1', p. 71.

[344] Cantor, 294; Kotkin, p. 13; Social mobility means "*the movement -usually ofindividuals but sometimes of whole groups- between different positions within the system of social stratification in any society. It is conventional to distinguish upward and downward mobility (that is, movement up or down a hierarchy of privilege)…"* see Schott / Marchall, p. 477.

the social order of his time.[345] He insisted on fair play and sharing amongst the people who meet in the greenwood.[346] The various illegalities he performed revolved around the concept of fairness as justification.[347]

The feudal age exhibited a hybridization of public and private fields, resulting in subservience to and rule by men holding financial facilities.[348] These types of fields started to be separated from each other by the late medieval age.[349] However, western scholars have articulated the dissolving of the distinction of public-private law for a long time. Under globalization, Western countries started to undermine the *res publica*, which ensures governance with the rule of law, by privatizing legal rules. Weakening of the organization of powers emptied the deterrence of the administrations and infeudalised the individuals as elements of a network society under the governance of big corporates.[350] This social structure was conceptualized as 'neo-feudalism' where the wage earners who have diminishing positional or countervailing power in the economy against the private capital owners as masters resemble feudal servants.[351] The emergence of the digital economy took this situation to an extreme level. The imbalances between capital powers and individuals have increased, while the deterrence of the administration, whose enforcement criteria have been already shaped according to market demands, has dramatically diminished. Thus, discourses containing feudalism analogies such as 'techno-feudalism' and 'high-tech feudalism' peaked.[352] It is a feudal order where the platforms as

[345] Nagy, Folklore / 1980, p. 198, 206.

[346] Ibid, p. 205.

[347] Ibid, p. 206.

[348] Supiot, IJCL / 2013, p. 129, 130.

[349] Horwitz, UPLR / 1982, p. 1423, pp. 1423-1424.

[350] Supiot, IJCL / 2013, p. 129, 130, 134; see François Ost / Michel van de Kerchove, De la pyramide au réseau?
Pour une théorie dialectique du droit', l'Université Saint-Louis, 2010.

[351] Zafirovski, IRS / 2007, p. 393, 401, 414.

[352] See Yanis Varoufakis, 'Techno-Feudalism: What Killed Capitalism', Penguin Random House, 2023; Cédric Durand, 'Techno-féodalisme Critique de l'économie numérique', Zone, 2020; Joel Kotkin, The Coming of Neo-Feudalism: A Warning to the Global Middle Class', Encounter Books, 2020, p. 27; Jaron Lanier, 'Who Owns the Future', Simon & Schuster, 2013, p. 137.

tenant-in-chief infeudalized the business-users as sub-tenants, and both infeudalized the end-users. Under the distinct features of digital economy, the platforms restrict social and digi-geographical mobility of their customers, resorting exclusionary and exploitative methods. However, under the information regime, they encourage intra-platform activity mobility by incentivizing free interconnection between users. They exploit the data of the users rather than their body and energy. The more connections, the more data. Thus, the consumers turn into "*laboring cattle*" that provide data.[353]

The DMA was adopted amongst the fairness mantra to equalize the imbalances resulting from the excessive power of digital stars. It was an effort to fill the lack of deterrence of the classical competition law approach. It aimed to ensure inter-platform and intra-platform social and spatial mobility by impeding the gatekeepers from abusing their powers and providing the business-users and end-users access to essential facilities and data. However, the DMA exhibits a paradoxical character concerning its legal basis, objectives, and nature. As for the legal basis, Art. 114 TFEU doesn't constitute the proper legal basis for the DMA. As for the objective, the role of fairness in the DMA doesn't overlap with the discourse of the commissioners and the literature about the fairness concept in competition law. It performs neither a fully operational nor a fully guiding role, while, sometimes, it is intertwined with the contestable market objective. As for the nature, the DMA constitutes a new form of regulation. However, the fact that it modeled prohibitions substantially relying on art. 102 TFEU while avoiding operational concepts of the competition law makes its character unclear and difficult to locate epistemologically. Besides having a complementary nature as a regulation, it could be *de facto* substitutive while probably having a guiding effect in the short term and a transformative effect in the long term on competition law.

The ordoliberal attribution has been frequently made for the draft and final version of the DMA. However, the determinations are general and superficial. Even, there is a tendency to draw similarities between ordoliberal and Neo-Brandeisian competition approach without considering in sufficient depth the conditions of their emergence and their ideological

[353] Han, pp. 8-12.

foundations.[354] Considering the observation of Wittgenstein as such '*One keeps forgetting to go right down to the foundations. One doesn't put the question marks deep enough down*'[355], this study took the investigation more deeply into the foundation, comparing the objective, nature, structure, and instruments of the DMA with Ordoliberal competition understanding. The conclusion of the investigation can be summarized as such: The structural and instrumental features of the DMA seem partially compatible with the ordoliberal requirements. However, the position of fairness in the DMA doesn't overlap with its exceptional role as an interim objective in the Ordoliberalism. What is more unfortunate is the uncertainties exhibited by the DMA concerning its legal basis, objectives, and nature. These are entirely contrary to the constitutional economy understanding of Ordoliberals, where individuals can use their economic rights free from arbitrary interventions in an '*ordnungspolitik*'. It is not sufficient the DMA may show a consistency with the other pieces of 'the digital constitution' to meet the requirement of Ordoliberalism. Rather, the DMA should have been designed in a way compatible with the legal and economic structure into which it was born, and in a way that would develop this structure to respond to digital challenges, without leaving room for ambiguities.

Against the challenges of the imbalanced social structure of the techno-feudalism, the DMA emerged as an updated second version of Robinhood, neither completely inside nor entirely outside the EU competition law and economic framework, to ensure an undistorted internal market where the European people play and share fairly amongst them. However, there is no place for a Robinhood, who has many paradoxes in his character, within the Ordoliberal competition understanding whose primary concern is the establishment of '*ordnungspolitik*' based on the economic constitution.

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[354] See Wörsdörfer, 'The Shared Roots of (Neo-)Brandeisianism and Ordoliberalism Suggest How To Regulate Big Tech', 23.10.2023, https://www.promarket.org/2023/10/23/the-shared-roots-of-neo-brandeisianism-and-ordoliberalism-suggest-how-to-regulate-big-tech/, (last accessed on 10.12.2023)

[355] '*Man vergißt immer wieder, auf den Grund zu gehen. Mann setzt die Fragezeichen nicht tief genug.*' see Ludwig Wittgenstein, 'Culture and Value', Wright / Nyman (eds.), translated by Peter Winch, Basil Blackwell, 1980, p. 62, 62e.

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