VOLUME 8 ISSUE 1 ARTICLES & ESSAYS

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/16923

Received: 12 Sept. 2022 | Accepted: 13 Oct. 2022 | Published: 5 June 2023

An Overview on the Scope of the Digital Markets Act: Fair Practices Versus Ex-Ante Competition Law

GHEORGHE-SORIN LODOABA

Lodoabă Gheorghe-Sorin obtained an LLM in Private Law Institutions and one in International and Comparative Business Law at Babeș-Bolyai University of Cluj-Napoca (Romania). He is a lawyer in Cluj-Napoca (Romania), working with SMEs and corporations on domestic and European compliance, competition law and corporate governance. His research interests revolve around business law, antitrust law, compliance with European legal frameworks, and central authorities' role in shaping legal policies.

@ lodoaba.sorin@gmail.com

0000-0002-0686-4737

ABSTRACT

The proposed Digital Market Act has been under severe scrutiny in the past couple of years. While it received mostly positive feedback, there were numerous authors and scholars arguing that the new legislation does not provide anything useful or new. The common denominator of most of the analyses is that the Digital Markets Act is an *ex-ante* antitrust legislation and that the obligations tackle the (abusive) dominance of the gatekeepers to be designated. In this article, I try to deconstruct the requirements for determining whether an undertaking is a gatekeeper and to assess whether the proposal fits into a regulatory compliance type of legislation or *ex-ante* competition law. In addition to the analytical approach, I will take the example of the Intel and Microsoft cases and the intricacies that arose from them. I will further assess possible implications that the regulation might have for innovation and other aspects of the market.

KEYWORDS

Digital Markets Act; Digital Platforms; Compliance; Innovation; Competition Policy

CC BY

TABLE OF CONTENTS

INTRODUCTION

The Digital Markets Act [hereinafter the proposal or the D.M.A.], proposed by the European Commission on 16th of December 2020, is now approaching its final moments.

This somewhat new piece of legislation has been under scrutiny from the moment of public consultation, with most of the "tech giants" calling for more clarity and better understanding of its provisions, whilst also underlining the potential damage thereof.[1]

The overall feedback provided was overwhelmingly positive: showing support for the initiative of the European Commission, consisting of reviews done by some large business organisations[2] and many other (un-targeted parties') submissions. They not only welcomed the initiative and the proposed Act, but at the same time added keynotes to what should also be envisioned by the proposed Regulation. The need for transparent communication and access to data has been stressed in the advertising environment.[3] There was also a plea to add operating systems [hereinafter O.S.s] of connected T.V.s and digital voice assistant platforms to the list of services included in the D.M.A. .[4]

On the other hand, there was a concealed disagreement about the utility of an *ex-ante* regulation and the challenges brought forward by some of the Big Tech enterprises (Alphabet, Amazon, Apple, Meta, and Microsoft). For example, Apple stressed the need for recognition of the diversity of platforms' business models, proportionality and (supposed lack of) necessity of a regulatory framework.[5] At the same time, the comments made by

[1] *See* Mark Perves, *Feedback from: Apple*, European Commision (Jun. 30, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535696_en.

[2] *See* Karl Cox, *Feedback from: Oracle*, European Commision (Jun. 30, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535636_en; *see* Carel Maske, *Feedback from: Microsoft Corporation*, European Commision (Jun. 30, 2020) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535589_en; *see* Konstantinos Rossoglou, *Feedback from: YELP*, European Commision (Jun. 30, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535343_en.

[3] *See* Gabrielle Robitaille, *Feedback from: World Federation of Advertisers*, European Commision(May 05, 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F2256853_en.

[4] *See* Carolina Lorenzon, *Feedback from Mediaset S.p.A*, European Commision (May 05, 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F2256891_en.

[5] Mark Perves, *supra* note 1.

future gatekeepers, for example, Facebook,[6] or Google,[7] elicited the same feelings as with the hearing held by the U.S. Congress:[8] a nice sugar-coated speech that tries to deem these companies as having been nothing but competition advocates and promoters. This is in high contrast with the numerous current and upcoming cases on antitrust at the level of the European Commission or the United States state attorney generals.

1. THE ROLE AND POSITION OF THE D.M.A. IN THE CURRENT EUROPEAN LEGISLATION

The European Commission stated that the proposal *complements existing E.U. (and national) competition rules,*[9] and it tackles issues that are either outside the scope of current antitrust rules or are almost impossible to deal with in a timely manner.[10] The European Commission even states that this is an *ex-ante* approach to the *detrimental structural effects of unfair practices.*[11]

This raised a lot of issues ranging from economic impact to possible legal issues infringing the *ne bis in idem* principle.[12] Amongst these is the possibility of affecting innovation: either in the form of the gatekeepers lacking incentive to pursue it further (due to possible constraints in the market); or for the lack of a buy-out possibility in

[6] *See* Phillip Malloch, *Feedback from: Facebook (Ireland)*, European Commision (Jun. 30, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535672_en.

[7] *See* Sylwia Giepmans-Stepien, *Feedback from: Google*, European Commision (Jun. 30, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535552_e.

[8] *See* Laura Feiner, *Facebook's Zuckerberg went before Congress a year ago – here's what has (and has not) changed since*, Cnbc (Apr. 09, 2019, 7:04 AM), https://www.cnbc.com/2019/04/09/facebooks-evolving-public-response-one-year-post-zuckerberg-testimony.html.

[9] *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, at 4, COM (2020) 842 final (Dec. 15, 2020).

[10] European Parliament and Councl Regulation 2022/1925 of Sept. 14, 2022, Contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance), recital 5, 2022 O.J. (L 265) 1-66.

[11] *Id.*

[12] *See* Aurelien Portuese, *The Digital Markets Act: European Precautionary Antitrust*, Information Technology And Innovation Foundation (May 24, 2021), https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust.

some situations.[13] Additionally, some authors queried the need for antitrust legislation in some of the emerging fields.[14]

A great deal of the previous arguments emanate from one important point: the D.M.A. is competition law. Whilst most of the authors seem to agree that the proposal is complementary to current competition law, the analysis follows antitrust rules.[15] I think a crucial aspect that needs to be determined before addressing the fallacies, or lack thereof, in the Digital Markets Act proposal is the nature of this legislation: Is it a veritable competition law document? Or, is it rather a new set of compliance rules like the General Data Protection Regulation [hereinafter G.D.P.R.], Business-to-Business [hereinafter B2B] or Business-to-Consumer [hereinafter B2C] regulations?

The first thing that stands out is the European Commission's arguments that, in some respects, revolve around the inability of the current competition rules to tackle some of the issues that arose in the past effectively. That does not mean that the current proposal is, *per se,* an instrument enforcing competition law. The same motivation can be found in the aforementioned Regulations that, along with compliance provisions, have a powerful (secondary) impact in ensuring a fair internal market.[16] The link between the scope of the regulation and competition law should be an indicator but not an argument in itself.

[13] *See* Colin Wall, Eugenia Lostri, *The European Union's Digital Markets Act: A Primer*, Center For Strategic & International Studies (Feb. 08, 2022), https://www.csis.org/analysis/european-unions-digital-markets-act-primer.

[14] *See* Aurelian Portuese, *Antitrust and the Internet of Things: Addressing the Market-Tipping Fallacy*, Information Technology And Innovation Foundation (Sept. 15, 2021), https://itif.org/publications/2021/09/15/antitrust-and-internet-things-addressing-market-tipping-fallacy.

[15] *See* Matthias Bauer, Fredrik Erixon, Oscar Guinea, Erik van der Marel, Vanika Sharma, *The E.U. Digital Markets Act: Assessing the Quality of Regulation,* European Centre For International Political Economy (Feb., 2022), https://ecipe.org/publications/the-eu-digital-markets-act/#_ftn5.

[16] We can observe that protection of the internal market is one of the main purposes of some of the compliance-type legislation issued by the European legislator. This can be found in both competition-oriented provisions and consumer-oriented as such. For example: Regulation (EU) 2019/1150, of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, recitals (1), (6), (7), (51) and art. 1, 2019 O.J. (L 186) 57; Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications [hereinafter B.E.R.E.C.] and the Agency for Support for B.E.R.E.C. (B.E.R.E.C. Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, Recitals (1), (4), 2018 O.J. (L 321) 1; Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), Recitals (3), (12), (23), 2018 O.J. (L 321) 36; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Recitals (2), (5), (13), 2016 O.J. (L 119) 1.

Therefore, it is needed to analyse the provisions further, along with the material benchmarks set, within the proposal to be able to qualify it as competition law or ancillary compliance law. This first step needs to be done in order to scrutinise the D.M.A. further on grounds that are not merely arbitrary.

1.1. RIPPLE EFFECT: A (NEW) FORM OF MARKET FAILURE IN THE DIGITAL ENVIRONMENT

One of the main arguments put forward by Microsoft, while defending its anti-competitive behaviour and its dominant position in the market, was the Moore's law application.[17] In essence, Microsoft argued that the traditional antitrust analysis of tech industries is not efficient, and the idea of monopoly should be treated modestly given the fact that digital revolutions happen frequently.[18] Furthermore, it was stated that these new innovations might negatively impact Microsoft's market power.

While I side with the Commission's point of view and I do not think that a possibility might render competition law ineffective, there is a valuable point to be taken from Microsoft's statement. The digital market's interconnectivity and rapid growth make the effects of dominance greater and more destructive for the internal market.

The ripple effect related to closed interconnectivity means that the more a system is integrated within itself (as Windows O.S. was with its browser and media player), the more it can benefit from one service being dominant. It can further rely on that dominance to attract customers (consumers) that would not usually choose the ancillary services from the same provider. Creating a "closed space" that does not allow interoperability forces the consumer to remain in that sector even if some of the services are not as favourable as the ones offered by competitors.

Another important aspect of the ripple effect is the possibility of different markets influencing each-other even though only a part of them is ubiquitous and sealed off. As I am going to demonstrate further on, Intel was able to enter and, additionally, dominate the server central processing unit [hereinafter C.P.U.s] market by using both its anti-competitive behaviour and Microsoft's simultaneous takeover of the server O.S. market. Windows Media Player [hereinafter W.M.P.] and Internet Explorer, however,

[17] *See* Britannica, T. Editors of Encyclopaedia, *Moore's law*, Encyclopedia Britannica (Nov. 18, 2022), https://www.britannica.com/technology/Moores-law (last visited Jan. 22, 2023).

[18] *See* Commission Decision of May 24, 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/ 37.792 — Microsoft), point 5.2.1.4., 2007 O.J. (L 32) 23.

were able to compete in the market by using the entrenched position of the O.S. and the lack of interconnectivity.

The examples of Microsoft,[19] and Intel,[20] can fully demonstrate that. Whilst the *Intel* case is not over yet (Case T-286/09 RENV is under appeal), and the solution might not change due to procedural shortcomings on the Commission's part, it can still be argued that an infringement existed in the behaviour examined.[21]

This particular example requires special attention because it portrays how the indirect market effect flowed from one case to another. In order to understand the analysis made better, it is important to underline a few characteristics and particularities of the digital environment.

The C.P.U.s used in computers were divided into two categories: those built on x86 architecture and the non-x86 infrastructure. Furthermore, it is needed to divide the market into personal and business/server computers.[22] Regarding personal computers [hereinafter P.C.s], the Microsoft O.S. was targeting primarily "*Intel-compatible" hardware* (*client P.C.s or servers*).[23] This did not happen; however, with Windows NT 3.1 in the case of commercial software (workstations and servers).

Windows NT 3.1 was developed as a multi-architecture operating system (meaning that it would work also on non-x86 infrastructure), supporting different C.P.U.s, with the main goal of portability and interoperability.[24]

Before I go into the analysis of the commercial software relationship between Intel and Microsoft, it is important to point out the situation that existed from 1975 onwards regarding personal computer O.S.s. While in 1983 the market share of Personal Computing Platforms by Operating System Shipments was 25% for Windows and Intel, in the years that followed they grew and maintained a market share of over 90%.[25]

---

[19] *Id.*

[20] *See* Commission Decision of May 13, 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel), 2009 O.J. (C 227) 13.

[21] Both the Federal Trade Commission [hereinafter F.T.C.] of the United States and the Fair Trade Commission in Japan have ruled that Intel Corporation violated the country's antitrust (anti-monopoly) laws by limiting purchases of microprocessors from Intel's rivals. Both cases ended, however, in settlements. *See* Todd Zaun, *Japan Says Intel Violated Antimonopoly Law*, N.Y. Times (Mar. 9, 2005), w.htmlhttps://www.nytimes.com/2005/03/09/technology/japan-says-intel-violated-antimonopoly-law.html; *Settles Charges of Anticompetitive Conduct Against Intel*, Ftc (Aug. 04, 2010), https://www.ftc.gov/news-events/news/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel.

[22] For a more comprehensive approach of the market definition, see Commission, *supra* note 18, § 5.1.

[23] *Id.* at 88-130.

[24] *See* Pascal G. Zachary, Showstopper! The Breakneck race to create Windows NT and the Next Generation at Microsoft (Open Road Media, 2009).

[25] *See* Derek Thompson, *The 11 Most Fascination Charts From Mary Meeker's Epic Slideshow of Internet Trends*, The Atlantic (May 29, 2013), https://www.theatlantic.com/business/archive/2013/05/the-11-most-fascinating-charts-from-mary-meekers-epic-slideshow-of-internet-trends/276350/.

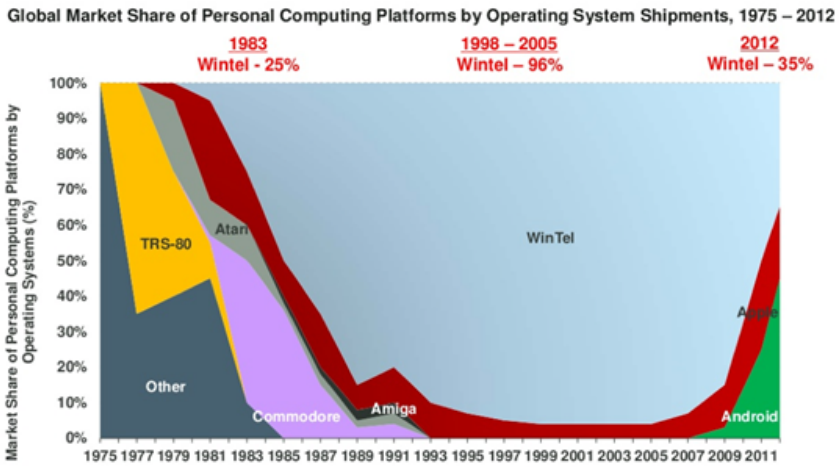

Figure 1: Global Market Share of Personal Computing Platforms by Operating System Shipments.[26]

It is clear from this chart that the collaboration between Microsoft and Intel, being premeditated or just a stroke of luck, was indeed very lucrative; and hence, put them both in a powerful position in the digital market. If you add the share of International Business Machine [hereinafter I.B.M.] P.C.s (and clones) in the personal computer market,[27] which grew steadily towards a position of monopoly, you will have a full picture of the indirect network effects in the tech industry, or as I like to call it: the ripple effect.

What we know so far: Microsoft used its dominant position on the P.C. market in order to enter the business computer market with workstations and servers. At the same time, Intel used its dominant position in the C.P.U. market in order to keep that position and to limit the possibility for other undertakings to compete. I.B.M. P.C.s (and clones) which were used either by choice or by agreements with Intel, being mostly Intel technology and Microsoft's Windows operating system, had been compatible with x86 infrastructure.

As stated before at the beginning, Microsoft O.S. for business computers was not created specifically for x86 architecture as it needed to be to enter the market. Only with the arrival of Windows NT 4.0 and Windows 2000 did Microsoft shift its view from interoperability to exclusivity (and, supposedly, full internal integration). It is important to underline the fact that Windows 2000 was released in February 2000 when Microsoft already had a market share of more than 50% in business operating systems. At the same time of launching Windows 2000, support for all the previous business operations was

[26] *Id.*

[27] *See* Jeremy Reimer, *Total share: 30 years of personal computer market share figures*, ARSTECHNICA (Dec. 15, 2005, 6:00 AM), https://arstechnica.com/features/2005/12/total-share/.

terminated within one year.[28] Enjoying an entrenched position in the market of personal computers: Microsoft uses that to push its own O.S. further into the market and cuts all ties (and interoperability) with other server operating systems; thus, creating even higher barriers to entry.

One could argue that this would not have been possible if it were not for the ripple effects created by the markets' specificity, as described below (Fig. 2) in an overly simplified version.

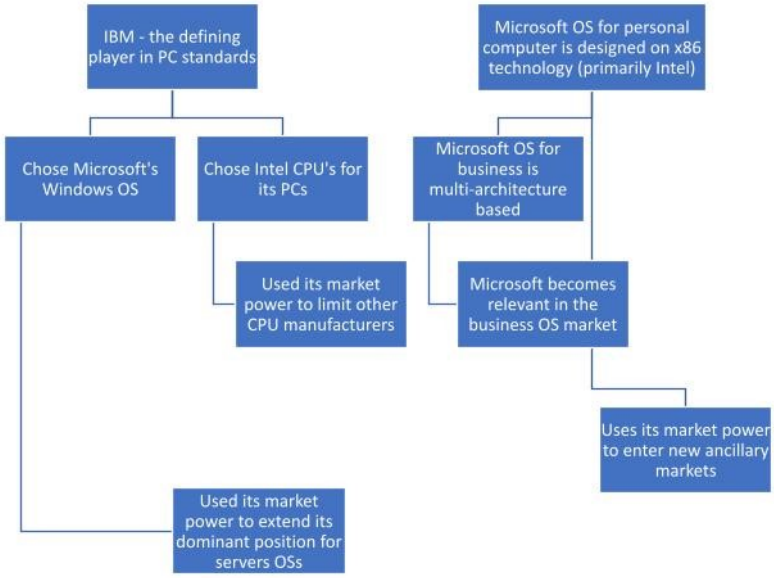

Figure 2: Interrelation Between I.B.M., Microsoft and Intel.

The relationship between the undertakings is clear: by targeting Intel x86 infrastructure in P.C.s, Microsoft ensures that it will keep a dominant position in the market; whilst Intel keeps the dominant position in the C.P.U. manufacturing market. Moreover, by switching its O.S. for servers (and increasing its market share) to a closed circuit, Microsoft creates a higher demand for x86 infrastructure in that market; thus, improving demand for Intel C.P.U.s.

In this scenario, both Intel and Microsoft can further utilise their market power to maintain and extend their position in ancillary markets. This can be observed, for example, in the tying of Windows Explorer and W.M.P. Both Microsoft and Intel helped each other, indirectly, in preserving their market dominance and the effects of this behaviour still produce consequences today.

[28] *See* Internet Archive, https://web.archive.org/web/20040611115848/http://support.microsoft.com/default.aspx?scid=fh;%5bln%5d;LifeWin (last visited Jan. 22, 2023).

The market share graph of C.P.U.s reveals an ongoing position of dominance for Intel throughout the years[29] with 60% - 80% being Intel's market share in the years 2004 – 2017. This has to take into account the established market position of Intel in the previous years, between 1997(8) and 2004, which amounted to around 80% for overall x86 C.P.U.s.[30] Intel's dominance was retained regardless of the fact that Advanced Micro Devices' [hereinafter A.M.D.] C.P.U.s were, on average, cheaper and, in some cases, more performant than Intel ones.[31] A small (and optimistic) presentation done by the Department of Agricultural & Resource Economics of the University of California, Berkeley,[32] shows a projected consumer benefit of $80 billion over the following decade starting from 2008-2009.

Moving forward, another aspect that needs to be considered is the innovation segment. Looking at the general release of C.P.U.s,[33] two main aspects can be observed: in the period 1996 – 2003, both Intel and A.M.D. have fought and innovated to push their product forward. And, in the years that followed, between 2003 – 2006 and 2011 – (the beginning of) 2017, A.M.D. was the only one creating new products. There was a small period between 2007 – 2010 in which Intel re-entered the market, which could, very well, be a response to the innovation brought forward by A.M.D. It is also important to note the "innovation stall" in the period 2014 – 2017 in which neither came up with any new product.

If we compare that innovation with its market share, we see that there was no difference: A.M.D. did not get better market share when it was "better" than Intel, and; consequently, we can argue that Intel did not innovate unless it was necessary. This can be outlined by the 2017 A.M.D. "boom" with the Ryzen 5 and Ryzen 7 processors which gave them both market recognition and a rapid growth in market share.[34] In the past

[29] *See* Odysseus Pyrinis, *Intel and AMD Market Competition*, Berkeley Economic Review (Feb. 27, 2019), https://econreview.berkeley.edu/intel-and-amd-market-competition/.

[30] *See* Commission, *supra* note 20, § 852.

[31] For example, the case of Athlon "Thunderbird" which outperformed Intel C.P.U.s at the time. This is in concordance with the information from the COMP/37.990 Intel case which shows that Intel was, at least, extremely cautious not to lose market share when this AMD C.P.U. was launched. – *See* Anand Lal Shimpi, *AMD Athlon "Thunderbird" 1GHz/800MHz*, Anandtech (Jun. 4, 2000, 10:10 PM), https://www.anandtech.com/show/557/3.

[32] *See AMD vs. Intel – Antitrust Case,* https://are.berkeley.edu/ sberto/AMDIntel.pdf.

[33] *See Computer processor history*(updated Dec. 12, 2022), https://www.computerhope.com/history/processor.htm.

[34] *See* Usman Pirzada, *AMD Outselling Intel By More Than Double – Analyzing 5-Year Historical Sales Act Mindfactory.de*, Wccftech (Sept. 23, 2019, 04:00 AM), https://wccftech.com/amd-outselling-intel-by-more-than-double-analyzing-5-year-historical-sales-at-mindfactory-de/; *see* Hassan Mujtaba, *AMD Ryzen and Intel Coffee Lake CPU Market Share at 50% Each in July – Strong Ryzen Sales, Intel CPUs Still Report Higher Revenue*, Wccftech (Aug. 02, 2018, 06:10 AM), https://wccftech.com/intel-coffee-lake-amd-ryzen-cpu-market-share-july-2018/; *see Mindfactory: AMS's average CPU prices have already surpassed Intel*, Tekdeeps (Jan. 11, 2021), https://tekdeeps.com/mindfactory-amds-average-cpu-prices-have-already-surpassed-intel/.

three years, A.M.D.'s market share grew to almost 40%. At the moment, the proportions are 63.5% Intel and 36.4% A.M.D.[35]

If we further investigate laptop and server market shares, we can observe that Intel still holds over 80% of the market.[36] This is astounding - especially in the case of high end server C.P.U.s where A.M.D. dominates in both benchmark and price performance.[37]

The same market strategy was used by Microsoft while promoting its own browser,[38] and media player.[39] However, it did not prove fruitful in the long run. During the period between 1998 and2002, W.M.P. increased its usage constantly due to tying the software with the O.S.,[40] and now it holds less than 0.01% of the market share.[41]

A similar development happened in the case of Internet Explorer which, due to the same tying method, enjoyed an 80 – 90% market share from 1999 to 2007. In this latter case, there were several factors that amounted to the ultimate failure of the Windows browser. First, we have the ruling on tying in U.S. antitrust law and, second, the existence of several security and privacy flaws over the years.[42] This led to a downwards trend for I.E. with 2012 as the breaking point at which Google Chrome browser became the market leader. Now Microsoft Edge has a market share of only 10%.[43]

The market has its means, sometimes, to self-regulate, and the example of Microsoft is self-evident. But, in the case of Intel, the adjustment has just begun. Therefore, it can be said that competition on those merits only started in the past three years. This shows that the market is slow and ineffective without some support from regulators: it is important to take note of the fact that Microsoft was sanctioned both in

[35] *See Distribution of Intel and AMD x86 computer central processing units (CPUs) worldwide from 2012 to 2022, by quarter*, Statista (Apr., 2011), https://www.statista.com/statistics/735904/worldwide-x86-intel-amd-market-share/.

[36] *See AMD vs Intel Market share*, Passmark Software (updated Feb. 12, 2023) https://www.cpubenchmark.net/market_share.html.

[37] *See High End CPUs - Intel vs AMD*, Passmark Software ((updated Feb. 12, 2023)), https://www.cpubenchmark.net/high_end_cpus.html.

[38] *See* U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), https://law.justia.com/cases/federal/appellate-courts/F3/253/34/576095/.

[39] *See* Commission, *supra* note 18.

[40] From approx. 6.000 users in 1998 to 45.000 users in 2002. – *see id.*, § 5.3.2.1.4.3.1. Player Usage.

[41] *See Microsoft Windows Media Player*, Microsoft, https://www.datanyze.com/market-share/other-audio-video-graphics-software–419/microsoft-windows-media-player-market-share (last visited Feb. 02, 2023).

[42] *See* Charles Arthur, *Internet Explorer flaw being exploited by ad companies, analytics firm warms*, The Guardian (Dec. 13, 2012, 10:50 PM), https://www.theguardian.com/technology/blog/2012/dec/13/internet-explorer-flaw-exploit-companies; *see* Dan Goodin, *Internet Explorer info leak festers for 2 years*, The Register (Nov. 01, 2010, 10:30 PM), https://www.theregister.com/2010/11/01/internet_explorer_600_day_bug/; *see* Dan Goodin, *Researchers bypass Internet Explorer Protected Mode*, The Register (Dec. 02, 2010, 9:52 PM), https://www.theregister.com/2010/12/03/protected_mode_bypass/.

[43] *See Desktop Market Share Worldwide*, Statcounter, https://gs.statcounter.com/browser-market-share/desktop/worldwide/#monthly-200901-202204 (last visited Feb. 02, 2023).

the United States and in the E.U., while Intel remains unsanctioned in the E.U. (for now), whilst the case is already settled in the United States.

Moore's law, which I talked about at the beginning, is equally applicable in quantifying the ripple effects of digital markets. Growth in one sector, if channelled correctly, brings (potential) entry into another and amplifies the rate of growth in ancillary ones. It also allows for increased growth into other ancillary services, or main ones (since the effect can be bidirectional), as the undertaking develops more products. This is what happened both in the *Intel* case (regarding server C.P.U.s) and in the *Windows* case (regarding web browser and media player). As (closed) interconnectivity grows,[44] this effect will only become more powerful, and will, if used in an anti-competitive manner, prevent other players from entering the market.

1.2. THE UNDERTAKING(S) CONCERNED

Whilst the term "gatekeeper" is not new in competition law,[45] it had; however, remained undefined until recently. By the same token, the usage of this locution was not related to an undertaking that (might have) infringed competition law, but with one that had a say in "setting the trend" for consumers,[46] which, in turn, can influence the natural behaviour of the (internal) market. This is not, however, a synonym for "dominant" which I will further inspect.

The first (and only) moment in which the term gatekeeper had been used was in the *Intel* decision. Usage of the novel adjective was associated with Original Equipment Manufacturers [hereinafter O.E.M.s] and not with Intel nor Microsoft which had a

[44] For example, Metaverse which aims to interconnect socializing, learning, business space and entertainment, https://about.facebook.com/meta/ (last visited Feb. 02, 2023).

[45] *See* Commission, *supra* note 20, § 1594. Arguably you could find the same idea (though not directly expressed) in the *Microsoft* case where the European Commission states that: "[T]he issue at stake in this case is ultimately the question whether . . . Microsoft provides to its competitors in the work group server operating system market the interoperability information that it has a special responsibility to provide". This is not defined *per se* as a gatekeeper obligation (or position), but it can be seen as having the same idea behind it: the superior position that can provide a great deal of influence on other gatekeepers. – *see* Commission, *supra* note 18, § 33.

[46] For example, Intel states that the "[S.O.] appears to base its argument that [A.M.D.] would have performed better during the exclusionary period in part on the claim that [A.M.D.] was excluded from key [O.E.M.s], [H.P.] and Dell, which the [S.O.] portrays as essential gatekeepers that could have conferred instant credibility upon [A.M.D.]". Similarly, Intel refers to "the [S.O.]'s position that Dell and [H.P.] uniquely possess the ability to propel [A.M.D.] forward" and "the [S.O.]'s theory that [H.P.] and Dell serve as unique gatekeepers". However, the conclusion that those two [O.E.M.s] are found to be "*strategically more important* than other [O.E.M.s]" does not equate to Intel's absolute assertions that the Commission had claimed that those two [O.E.M.s] were "*essential gatekeepers*", *"unique gatekeepers*" or *"uniquely possess[ed] the ability to propel [A.M.D.] forward"*(emphasis added).
– *see* Commission, *supra* note 20, §§ 1594-1595.

monopolistic position. Dell and H.P., as key O.E.M.s, were "designated" as gatekeepers. However, if we look at the market share for 2005, neither Dell nor H.P. enjoyed a monopolistic position:[47] Dell – 16.8%; H.P. – 14.5%; Lenovo – 6.9%; Acer – 4.6%; Fujitsu – 3.8%; and others – 53.3%.

One thing that stands out regarding H.P. and Dell is the fact that they were created in the United States; thus having an easy entry into Europe – especially for H.P.. These had been old, entrenched companies having already established an important customer base. Longevity was the case for Lenovo, Acer, and Fujitsu, even though they did not occupy a significant part of the market at that moment. No further discussion can be made around H.P. and Dell having an important position within the internal market.

If we look at the market share of O.E.M.s in 2005, we can observe that the situation is still quite similar today with minor growth variations: Dell kept its 16-19% market share, H.P. remained an important player amounting to around 20-25%, whilst others remained with the same approximative levels of 4-6%. The only significant growth is in the case of Lenovo which now occupies around 20% of the market. These figures vary from year to year by 5%.[48]

In 2021, for example, total computer sales passed 250 billion dollars worldwide. If we look at the European, the Middle Eastern, and African [hereinafter E.M.E.A.] market, we can observe that the market share of O.E.M.s is quite similar. There is a slight increase for H.P. (3%) and a slight decrease for Lenovo and Dell (3%).[49] For this practical example, I will use the global figures and then roughly correct them to represent the European market. I am, however, aware that this method has its limitations, and I am just using it for demonstration purposes and not as a legitimate analysis.

If the global revenue of personal computers amounted to approx. 250 billion dollars, that would mean that Lenovo had $60bn revenue; H.P. – $50bn; Dell – $54bn; Apple – $20bn; Acer – $17.5bn; and other O.E.M.s amounted to $57.5bn.[50]

[47] *See* Martyn Williams, Stacy Cowley & I.D.G. News Service, *PC Market Achieved Double-digit Growth in 2005,* Macworld (Jan. 19, 2006), https://www.macworld.com/article/178529/pcmarket-2.html.

[48] *See* I. Mitic, *Laptops by the Numbers: Market Share and More*, Fortunly (Mar. 25, 2022), https://fortunly.com/articles/lap-top-market-share; *see also Global PC Shipments Pass 340 million in 2021 and 2022 is Set to Be even Stronger,* Canalys (Jan. 12, 2022), https://www.canalys.com/newsroom/global-pc-market-Q4-2021.

[49] *See EMEA PC Market Maintains Growth in 2021Q3, Despite Lower Consumer Spending and Continued Supply Issues, Says IDC*, Idc (Oct. 26, 2021), https://www.idc.com/getdoc.jsp?containerId=prEUR148333421.

[50] For this calculation I used rounded percentages as follows: 24% for Lenovo, 20% for H.P., 18% for Dell, 8% for Apple, 7% for Acer and the remaining 23% for others.

Firstly, I will compare global shipments to E.M.E.A. ones to obtain the revenue that corresponds with the European market.[51] Then I will adjust shipments to the European Economic Area [hereinafter E.E.A.] and calculate the 2021 revenue for this market.[52] By having used this method of calculation, I will have arrived at the following E.E.A. revenue figures for the undertakings: HP $12bn; Lenovo $12bn; Dell $7bn and Acer 4bn.[53]

From the market analysis of the year 2021, we can surely say that neither H.P. nor Lenovo enjoy a dominant position. However, if we analyse the undertakings from the proposal's perspective, we see that they are both gatekeepers (for argument's sake, I will only take into consideration the market power and not the element regarded by art. 3(1(b)).

They have a significant, but not dominant, impact on the internal market translating into around a 20% share each, and over 8bn euros turnover in the last three financial years. They both enjoy an entrenched and durable position in the O.E.M.s manufacturers market. This position started from 1939 for H.P. and 1983 for Lenovo - both having significant market presence at least from 2000 to 2005.

This brings us to the main question: what is a gatekeeper? Following the European Commission's description in the *Intel* case and the current definition, one can conclude that a gatekeeper is an undertaking that has significant market power,[54] enjoys an entrenched and durable position in the market,[55] and can use both market power and

[51] I was not able to find any public statistics regarding the market share and unit shipments corresponding to the E.E.A., so I used E.M.E.A. instead. If we look at the Middle East & Africa P.C. market vendor shares for 2021 we can observe that the percentage is roughly the same, with a 1% increase for H.P., *see* Lenovo and Dell, https://www.idc.com/ getdoc.jsp ?containerId=prMETA48387521 (last visited Feb. 03, 2023). Therefore, I believe we can use a comparison between 2021 Q3 shipments for both areas and subtract from the total amount the corresponding value for Middle East & Africa, in order to arrive to a rough approximation of the value in the E.E.A.

[52] 2021 Q3 shipments for the E.M.E.A. totalled 24.448 thousand units and 6.2 million units in Middle East and Africa, thus providing us a total of 18.248 thousand units for the E.E.A. market. If we compare global shipments with the E.E.A. market, we can observe that the Europe amounts to around 20% of the global market. This translates into an approximative $50 billion total revenue from P.C. shipments (desktops, notebooks, and workstations).

[53] In order to obtain these numbers, I used two methods. The first one consists in comparing the percentage between worldwide shipments and E.E.A. shipments and extracting the corresponding market power of the E.E.A. area. I used this percentage to calculate the equivalent revenue for the E.E.A. market. Therefore, as an example, in the case of H.P. O.E.M.s, the E.M.E.A. shipments accounted for 32.64% of global shipment, with E.E.A. consisting of 74.64% of the total E.M.E.A. market. This translates into a (rounded) 12bn dollars in revenue obtained in the E.E.A. market from the world-wide total of $50bn. The second method involved converting the global revenue into E.E.A. revenue. The ratio between worldwide shipments and the E.E.A. shipments is approx. 20%, therefore the E.E.A. total revenue is around 50bn dollars. I used this value to further calculate E.E.A. revenues of each undertaking. In the case of H.P., 24% of 50bn dollars amounted to 12bn dollars. For both methods I rounded the percentages.

[54] Not necessarily dominant, as it can be seen from the example with O.E.M. manufacturers.

[55] Meaning that it gained both consumer recognition and stability. Therefore, it is somewhat unreasonable to think that it might be easily replaced by any co-competitors or novel undertakings that want to enter that market.

brand recognition to set future trends.[56]

1.3. GATEKEEPER AND THE CONCEPT OF DOMINANCE

One main point, when arguing about the usefulness of the proposal, is that existing competition law is sufficient to cover the actions of the so-called gatekeepers.[57] However, others argue that it should not be a competition issue whatsoever.[58] This fallacy is primarily based on the confusion between the concepts: gatekeeper and dominant undertaking. There is a clear distinction between the definition of a gatekeeper and the rules set in Article 102 of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.].[59]

As shown before, from a quantitative criterion, the D.M.A. could be applied to selected O.E.M.s even though none meet the required thresholds to be considered dominant. The fact that some of the (to be designated) gatekeepers also happen to have a dominant position in their respective market is nothing more than a coincidence. Furthermore, it is often quite hard to assess where one (service) area of the digital market stops and where another begins. This was beautifully underlined by the example of multi-side platforms that serve consumers, content creators and advertisers.[60] The same applies to services offered at no price where the "Small but Significant and Non-transitory Increase in Prices" test [hereinafter S.S.N.I.P. test] is rendered useless.[61]

Take, for example, the case of Spotify. Spotify is an audio streaming service founded in 2006. It can be used in both free and premium versions by consumers. The premium version has four different plans: individual – $9.99/month; duo – $12.99/month for two

[56] As we can observe in the *Intel* case (COMP/37.990 - Intel), where I.B.M., H.P. and Dell propelled both Windows and Intel by adopting their O.S.s and C.P.U.s.

[57] *See* Jan Büchel & Christian Rusche, *Competition in the Digital Economy: An Analysis of Gatekeepers and Regulations*, (Institut der deutschen Wirtschaft (IW), Köln (Ger.), IW-Policy Paper, No. 26/2020); *see* Portuese, *supra* note 14; *see also* Michael G. Jacobides, *What Drives and Defines Digital Platform Power? A Framework, with an Illustration of App Dynamics in the Apple Ecosystem*, Evolution Ltd (Apr. 19, 2021), https://events.concurrences.com/IMG/pdf/jacobides_platform_dominance.pdf; *see* Francesco Ducci, *Gatekeepers and Platform Regulation: is the EU Moving in the Right Direction?*, Sciencespo (Mar. 2021) (Fr.), https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2021/04/GATEKEEPERS-AND-PLATFORM-REGULATION-Is-the-EU-moving-in-the-Right-Direction-Francesco-DUCCI-March-2021-2.pdf.

[58] *See* Ashley Johnson & Aurelien Portuese, *Why Antitrust Should Be off the Table for Content Moderation on Social Media Platforms,* Itif (Mar. 26, 2022), https://itif.org/publications/2022/03/26/why-antitrust-should-be-table-content-moderation-social-media-platforms.

[59] *See* Lodewick Prompers, *Digital Platforms – The Gatekeepers Under the EU's New Digital Markets Act*, Linklaters (Jan. 14, 2021), https://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/january/digital-platforms-the-gatekeepers-under-the-eus-new-digital-markets-act.

[60] *See*, *e.g.*, Daniel Mandrescu, *Applying (EU) competition law to online platforms: Reflections on the definition of the relevant market(s)'*, 41 World Competition: Law And Economics Review (2018), https://ssrn.com/abstract=3271624.

[61] *See* Daniel Mandrescu, *The SSNIP Test and Zero-Pricing Strategies: Considerations for Online Platforms*, 2 Eur. Competition & Regul. L. Rev. 244 (2018).

users; family – $15.99/month for six users; and student – $4.99 for one account. Each type of account offers almost the same service, with some nuanced features such as parental control and a Spotify kids for family version and tailored functionalities for the student version.[62] The free version offers the same functionality, but with the inclusion of advertisements.

If we consider the free version, we can find two distinct markets: one for audio streaming services and the other for advertising. If we look into the paid version, we only remain with the audio streaming service. This creates two distinct markets for a single service and, furthermore, two distinct markets for the same service. It is improbable that a free-version user will easily switch to the paid version and vice-versa.

How would one analyse the streaming music subscription market changes? The first problem is that we should identify in which market it enjoys a dominant position: is it one of free or subscription-based services? For the sake of the first example, let us assume that Spotify enjoys a dominant position both in the free and subscription-based market[63] The first problem is that we should identify in which market it enjoys a dominant position: is it the one of free or subscription-based service? For the first example we will assume it has dominance in both.

One way Spotify could abuse that position is by increasing the number of advertisements that are played between songs. If it becomes too annoying for its customers, they have two options: either move to a different platform or buy the premium version. If users decide to move to the premium version, it will be extremely difficult to prove that it happened because of the dominant position. If they decide to switch platforms, then it would be self-evident that increasing the number of ads can be used as an alternative of the S.S.N.I.P. test in this scenario.

If we regard the premium version, the S.S.N.I.P. test would work very well when we analyse possible increases in the price. However, what if Spotify decides to add another layer of "premium" or simply decides to add advertisements regardless of the type of subscription? Whilst in the latter example we could use the same analogy as with the free version of the service, in the situation of adding more layers it will be troublesome to identify price discrepancies. And even more so, it will be harder to define the market. If there is no other service that provides both paid subscription and advertisements (in a newly defined premium version where the end-user will still have

[62] *Spotify premium*, Spotify, https://www.spotify.com/us/premium/#plans (last visited Feb. 03, 2023).

[63] At this point it has 31% of the subscriber market share. *See* Jon Porter, *Streaming Music Report Sheds Light on Battle Between Spotify, Amazon, Apple, and Google*, TheVerge (Jan. 20, 2022), https://www.theverge.com/2022/1/20/22892939/music-streaming-services-market-share-q2-2021-spotify-apple-amazon-tencent-youtube (last visited Feb. 03, 2023).

ads, but at a lower frequency than in the free version), could we fully state that the market comprises all the different types of subscriptions?

One possible solution is the "Small but Significant Non-transitory Decrease in Quality" test [hereinafter S.S.N.D.Q. test][64] which considers quality and performance parameters. However, whilst in some cases benchmarks could be easily attained (video cards and C.P.U.s for example), in others it might prove extremely difficult. Could an increase in advertisement or a different pricing structure be considered lower quality? Even defining what quality means in some services might be cumbersome. If we take music streamers as an example, the S.S.N.D.Q. test can be related to user experience, security, speed, search options, audio quality and other ancillary features. While there are objective tools to measure some of these features, such as security and audio quality, others remain subjective.[65]

The second example becomes even more complicated. Assuming Spotify is dominant in only one service, be it a free or paid version, it would create a similitude with what happened in the *Microsoft* case.[66] In the case of streaming music, the subscription market revenue comes from both advertisement fees and subscriptions. While realising that one side of the market might be more profitable (for example, revenues from advertisements might prove to be higher than the ones from subscriptions), Spotify might choose to direct its own customers to the former (implying that it has a dominant position in the subscription-based market). This might be detrimental to consumer welfare and could affect the internal market.

The question that arises is how would one quantify the behaviour of Spotify and what test should be used to prove an abusive conduct? I am not talking about tying and bundling, but something as simple as actively redirecting (new) consumers to the service in which Spotify has a smaller market share.

It is proving to be a real challenge, now and even more so in the future, to identify the corresponding market to which each service is provided, as well as to identify dominance or abusive conduct of one product that can cover multiple similar market types. Such a problem might arise in the case of Meta Corporation, which offers more than fifty-one products and services[67] designed to interconnect seamlessly.[68] The

[64] *See* Mandrescu, *supra* note 61.

[65] Some users like the simplicity of use in case of iPhones, while others prefer the customisation properties in android O.s. phones. – *see* Jordan Palmer, *iPhone vs. Android: Which is better for you?*, Tom's Guide (Mar. 29, 2022), https://www.tomsguide.com/face-off/iphone-vs-android.

[66] *See* Commission, *supra* note 18.

[67] *See* Mahesh Mohan, *Over 61 Facebook Products & Services You Probably Don't Know*, Maheshone (Jan. 09, 2021), https://www.matrics360.com/facebook-products-and-services/.

[68] *See Technologies That Bring the World Closer Together,* Meta, https://about.facebook.com/technologies/ (last visited Feb. 02, 2023).

solution brought up by the Digital Markets Act proposal overcomes this issue and ties the gatekeeper definition to service usage and turnover/market value thresholds. Having a predefined list of services that define the market and the possibility of expanding that list, pursuant to a market investigation, shifts the market definition, at least for the digital sector, from a substitutability (traditional) approach to a service definition approach.

1.4. EX-ANTE COMPETITION LAW OR FAIR PRACTICES?

In the past years, the antitrust legislation shifted from protecting the internal market towards a more consumer welfare approach.[69] The importance (and sometimes ignorance)[70] of consumers as key players in competition law has been underlined by various legislative actions.[71]

Therefore, it is important to look into the obligations described by the proposal in order to assess whether these can be treated as a form of *ex-ante* competition law, or a new set of compliance rules that ensure fair practices.

Before I analyse the status of these obligations, it is important to assess whether they are correlated with other existing European provisions.[72] I was able to identify, beyond competition law, three other legal acts of the European Union that contain similar obligations: Regulation (EU) 2019/1150,[73] Regulation (EU) 2016/679,[74] and Directive (EU) 2018/1972.[75]

[69] *See* Emily Andersen, *The Role of Consumer Welfare in EU Competition Policy: How Understanding the Priority Conferred Upon Competition Policy Objectives May Shed Light on Modern Day Inconsistencies* (2020) (unpublished MEB20 Master Thesis, European Business Law), https://konkurransetilsynet.no/wp-content/uploads/2021/03/2020_0073-13-Emily-Andersen-Master-Thesis.pdf.

[70] *See* Daniel J Walters & Hal E Hershfield, *Consumers Make Different Inferences and Choices When Product Uncertainty Is Attributed to Forgetting Rather than Ignorance*, 47 J. Consumer Rsch. 56 (2022).

[71] As an example, the General Data Protection Regulation, supra note 16, highlights the importance of informing the consumers (natural persons) about the processing of their data. Furthermore, the rights described by General Data Protection Regulation are given the status of fundamental rights.

[72] In the *Explanatory Memorandum,* the European Commission already links to possible connections, in the subsection regarding *consistency with other Union policies.* I would argue that the complementing role of the D.M.A. sometimes is exceeded and brings forth an unwanted overlap.

[73] *See* Regulation (EU) 2019/1150, *supra* note 16.

[74] See General Data Protection Regulation, *supra* note 16.

[75] *See* Recast, *supra* note 16.

1.4.1. REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 APRIL 2016 ON THE PROTECTION OF NATURAL PERSONS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND ON THE FREE MOVEMENT OF SUCH DATA

The obligations that fall under the General Data Protection Regulation [hereinafter G.D.P.R.] are those described by art. 5.2 and art. 5.2 and 6.9 of the D.M.A. I will further argue that these provisions need to already be implemented by the controller and/or processor.

The actions prohibited in art.5.2 of the D.M.A. are already prohibited by the G.D.P.R.. The exemption specified in the latter part of that G.D.P.R., *unless the end-user has been presented with the specific choice in an explicit and clear manner and has provided consent in the sense of Regulation (EU) 2016/679*), is simply a reiteration of the already existing obligations in the referenced regulation.

Both combining and cross-using personal data is qualified as *processing* in the G.D.P.R. and needs approval by the person targeted. The action of using personal data from third-party services means, by default, a transfer of personal data from one undertaking to another and needs the consent of the data subject and an appropriate implementation of safeguards regarding the transfer. Lastly, signing in end-users (automatically) to other services of the gatekeeper means transferring personal data from one service to another, and implies a lack of consent from the subject of the processing.

Art. 5.2 falls under the same conclusion as art. 5.2 as it deals with combining personal data without explicit and clear consent.

Whilst art. 6 does not explicitly mention the *right to be forgotten*, obstructing the end-user form unsubscribing from a service (including a core platform service) means that the personal data that he/she has provided will continue to be collected (and/or kept) for as long as the end-user is using the service. Therefore, this provision also falls under the G.D.P.R. and can be interpreted in the same, yet broader, way as the possibility of the data subject unsubscribing from any form of communication (e.g., spam mail).

Finally, art. 6.9 brings about only one distinction from the equivalent provision existing in Regulation (EU) 2016/679: the fact that access and portability must be provided free of charge. It is hardly a notable mention, given the fact that art. 20 of G.D.P.R. did not mention anything regarding price and, if analysed in the context of the whole G.D.P.R., data portability should have already been interpreted as a “free-of-charge” service.

The "new" *ex-ante* obligations have, in our opinion, no place in the Digital Markets Act as they would most likely lead to a double incrimination and a violation of the *ne bis in idem* principle. Both legislative acts provide an *ex-ante* review with the possibility of sanctioning the undertaking that does not respect and implement its provisions.

The argument provided by the European Commission in the explanatory memorandum falls short.[76] The G.D.P.R. had already imposed rules for the undertakings and there was no debate as to whether these gatekeepers should or should not comply with the obligations laid down by it. Saying that the proposal clarifies this aspect raises a serious question about the legitimacy of the G.D.P.R. Reiterating the obligations does not solve a compliance issue (if there is one). Instead, a better enforcement procedure or an E.U. level Supervisory authority, similar to the one in competition law, could provide for better compliance.

1.4.2. REGULATION (EU) 2019/1150 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 JUNE 2019 ON PROMOTING FAIRNESS AND TRANSPARENCY FOR BUSINESS USERS OF ONLINE INTERMEDIATION SERVICES

When comparing the Digital Markets Act provisions with the ones in the Regulation (EU) 2019/1150 we notice a few interesting aspects. Some of the practices that are banned by the D.M.A. appear to be permitted by the aforementioned Regulation. At the same time, we can see that the same practices were or are likely to be sanctioned from a competition law perspective by the European Commission.

[76] The proposal complements the data protection laws. Transparency obligations on deep consumer profiling will help inform General Data Protection Regulation [G.D.P.R.] enforcement, whereas mandatory opt-out for data combination across core platform services supplements the existing level of protection under the [G.D.P.R.]. The proposal clarifies that it is for the gatekeepers to ensure that compliance with the obligations laid down in the Regulation should be done in full compliance with other [E.U.] law, such as protection of personal data and privacy or consumer protection.
– *See* Digital Markets Act, *supra* note 10, § 4.

Digital Markets Act	Regulation (EU) 2019/1150
Article 5.3	Article 6; Article 10
Article 5.4	Article 10
Article 6.5	Article 5
Article 6.10	Article 9
Article 6.11	Article 5; Article 9

Figure 3: Differentiated Treatment of Conduct Under the D.M.A. and Regulation (EU) 2019/1150.

One keynote that is to be taken into account is that Regulation (EU) 2019/1150 deals mostly with the principles of fairness and transparency.[77] At the same time, in the explanatory memorandum, another accent is put on consumer welfare and competition issues.

Another important aspect is the apparent permission of limitations with regard to restriction, suspension or termination, in full or in part, of the services provided by the online intermediary, with the sole obligation of giving the business user prior notice about the decision being taken.[78]

Furthermore, the phrasing of the obligations set out from art. 5 to art. 10 show that Regulation (EU) 2019/1150 does not prohibit any kind of differentiated treatment, with the best example being art. 7 that is also titled *"differentiated treatment"*. And, it places an obligation upon the provider of online intermediation services and/or online search engines to describe the differentiated treatment simply and with the reason behind it.

These provisions are in stark contrast with the provisions of the proposed Digital Markets Act – in which the same conduct is strictly prohibited. To reconcile the two pieces of legislation one can only interpret them in a way that Regulation (EU) 2019/1150 establishes the obligation of transparency and fairness with regard to the rules applied, whilst the Digital Markets Act banishes any anti-competitive rule that might be found.

Continuing the same idea proves that micro, small or medium-sized enterprises will not be subject to the prohibition of the differentiated treatment,[79] but they will still have an obligation to inform the business-users regarding the existence of such treatment and to be transparent about it.

[77] This can be seen from the key notes existing in the *Recital* of Regulation (EU) 2019/1150, showing that the main focus is on providing a trustworthy environment for undertakings that bind themselves contractually to online intermediation services (*Recital 2*). Transparency (*Recital 3*), accessibility (*Recital 5*) and the need for a Union-wide set of rules (*Recitals 7-8*) are the cornerstones of the Regulation.

[78] *See* Regulation (EU) 2019/1150, *supra* note 16, at recital 22.

[79] *See* Digital Markets Act, supra note 10, at art. 3, para. 6, subpara. 1.

However, the conduct of the provider that has been designated as a gatekeeper must firstly be transparent, according to Regulation (EU) 2019/1150 and, at the same time, compliant with the Digital Markets Act. Moreover, if, by some extraordinary circumstances,[80] it does have any kind of differentiated treatment, the obligation of transparency subsides.

Taking into account this point of view, the two provisions are not exclusionary, but complementary as they work together in order to protect both business users (and the fairness in treatment of the services to which they opted-in), and end-users (by ensuring a fair and competitive landscape).

Last, but not least, it is important to take note of the fact that Regulation (EU) 2019/1150 does not provide the European Commission with power to apply a fine, since such powers are set by each Member State [hereinafter M.S.] according to their own implementation rules. At the same time, there is a pillar for private enforcement of the aforementioned rules in the context of private civil law in each state. This is/will be without prejudice to any competition law rules applicable (depending on the level of the restriction – M.S. or E.U. level) or any Digital Markets Act rules.

1.4.3. OBLIGATIONS SIMILAR TO THOSE IN DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 DECEMBER 2018 ESTABLISHING THE EUROPEAN ELECTRONIC COMMUNICATIONS CODE

Directive (EU) 2018/1972 is aimed at ensuring a competitive framework for the internal market in electronic communications networks and services. From the enumeration of core platform services present in the Digital Markets Act we can only identify one that could fall under Directive (EU) 2018/1972: number-independent interpersonal communication service.

An important mention that needs to be made is that none of the core platform services can fall under Directive (EU) 2018/1972 by themselves.[81] In order for the aforementioned directive to apply, the undertaking must provide an electronic communications service. This includes the number-independent interpersonal communications service, but it has additional requirements: the undertaking must also provide a service of internet access.

[80] This could be only justified based only on grounds of public morality, public health, or public security pursuant to article 9 of the proposal. The Digital Markets Act does not provide for efficiency exemptions as provided by the Consolidated Version of the Treaty on the Functioning of the European Union art. 101(3), May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter TFEU].

[81] *See* Digital Markets Act, *supra* note 10, at art. 2(2).

Taking this into account, a gatekeeper might fall under the scope of the European Electronic Communications Code, but only if its services include providing internet access to business and/or end-users. If a gatekeeper would satisfy both requirements, it is without any doubt that it will also qualify as an undertaking with significant market power pursuant to art. 63(2) of Directive (EU) 2018/1972.

Digital Markets Act	Directive (EU) 2018/1972
Art. 6.7	Art. 61(2 (c)) and art. 73 of Directive (EU) 2018/1972
Art. 6.7	Art. 61(2 (c)) and art. 73 of Directive (EU) 2018/1972
Art. 6.12	Art. 70 of Directive (EU) 2018/1972

Figure 4: Obligations in the D.M.A. and Directive (EU) 2018/1972.

Mentioning these limitations in the applicability of Directive (EU) 2018/1972, we are able to identify several obligations set by the Digital Markets Act that are similar to the provisions of the aforementioned legislation, or already mentioned by it.

While number-independent interpersonal services providers benefit from a lot of exemptions in Directive (EU) 2018/1972, interoperability,[82] transparency, and fairness rules are still applicable. These obligations include non-discrimination in relation with other providers of equivalent services,[83] and obligation of access to, and use of, specific

[82] *See* Recast, *supra* note 16, at art. 15(2(a));

> Where such undertakings provide electronic communications networks or services to the public, the general authorisation shall give them the right to: (a) negotiate interconnection with and, where applicable, obtain access to, or interconnection from, other providers of public electronic communications networks or publicly available electronic communications services covered by a general authorisation in the Union in accordance with this Directive.

Directive (EU) 2018/1972 of the European parliament and of the council of 11 December 2018 establishing the European Electronic Communications Code.

[83] *Id.* at art. 70:

> Obligations of non-discrimination shall ensure, in particular, that the undertaking applies equivalent conditions in equivalent circumstances to other providers of equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.

network elements in favour of third parties.[84]

1.4.4. THE SCOPE AND STATUS OF THE DIGITAL MARKETS ACT

If we analyse the European legislation that is connected with the proposal, we can have a starting point into defining whether the D.M.A. is part of *ex-ante* competition law or a form of defining fair practices.

Consumer welfare and (internal) market protection are co-dependent. Protection of one leads to protection for the other: ensuring that consumer decision is free, informed and unaffected leads, at least in theory,[85] to better competition and market structure. On the other hand, better competition leads to better consumer welfare.[86] I propose a functional-approach analysis of the obligations pursuant to the Digital Markets Act in order to decide on the type of regulation.

In the initial proposal, there were ten positive obligations and eight negative ones. A clear distinction between these provisions is visible: the positive obligations were targeted mostly at products and services, provided by business users (and/or third parties), and interoperability of such services,[87] whilst the negative ones are targeted at anti-competitive behaviour of the gatekeeper.[88]

---

[84] *Id.* at art. 73, para. 1, subpara. 2:

> National regulatory authorities may require undertakings inter alia: (a) to give third parties access to, and use of, specific physical network elements and associated facilities, as appropriate, including unbundled access to the local loop and sub-loop; (b) to give third parties access to specific active or virtual network elements and services; (c) to negotiate in good faith with undertakings requesting access; (d) not to withdraw access to facilities already granted; (e) to provide specific services on a wholesale basis for resale by third parties; (f) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services; (g) to provide co-location or other forms of associated facilities sharing; (h) to provide specific services needed to ensure interoperability of end-to-end services to users, or roaming on mobile networks; (i) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services; (j) to interconnect networks or network facilities; (k) to provide access to associated services such as identity, location and presence service.

[85] *See Better Choices: Better Deals. Consumers Powering Growth*, Department For Business Innovation & Skills (2011), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/294798/bis-11-749-better-choices-better-deals-consumers-powering-growth.pdf.

[86] *See Competition Counts: How consumers win when businesses compete*, Federal Trade Commission, https://www.ftc.gov/sites/default/files/attachments/competition-counts/zgen01.pdf (last visited Apr. 20, 2022).

[87] This can be observed from the content of Digital Markets Act, *supra* note 10, at art. 5 (b) and (c), art. 6 (c), (f) and (j), 2022 O.J. (L 265)1. Other positive obligations serve the same purpose, as for example art. 6 (b) which tackles bundling and mandates un-installation of pre-installed software, in order to give the opportunity of other software manufacturer to enter the market.

[88] Most of the negative obligations are referring to forms of barriers to entry or abuse of monopolistic position. These provisions are a response to the monopolistic behaviour already observed by the European Commission in previous cases (such as Microsoft, Apple, or Google).

Furthermore, in the case of the party protected from a total of eighteen obligations,[89] fourteen were aimed directly at protecting business users (or advertisers), whilst the other four were either data-protection related or have an indirect effect on competition. This finding is consistent with the reasons described in the proposal.[90]

In the amended form, after the European Parliament's first reading, we can observe that not much has changed regarding the positive to negative ratio. And there are now twenty-three obligations: (two have been excluded and seven others have been added), from which fourteen are positive and nine are negative - increasing the percentage of positive obligations by 5%.

The new "table of obligations" now shows an even more contrasting effect to the phrasing regarding whether the conduct applies that of the gatekeeper or to the relationship with the products and services provided to business users.

Oblig.	Article (5)								Article (6)									
Act.	2	3	4	5	6	7	8	9;10	2	3	4	5	6	7	8	9	10	11	12
Business-user		•	•		•	•	•		•			•		•			•		•
End-user	•			•	•		•			•	•		•			•			
Adv. & publisher									•						•				
Other types											•	•		•			•	•	

Figure 5: Types of Obligations and Parties Protected.

The ratio between the types of obligations did not change much, with twelve being business-user (or publisher) oriented, eight being end-user oriented, and five that I put in a different category, because they are either data-protection related or regard possible indirect competition issues (such as bundling, refusal to supply and self preferencing).

[89] Proposal for a Digital Markets Act, *supra* note 9.

[90] These gatekeepers have a major impact on, have substantial control over the access to, and are entrenched in digital markets, leading to significant dependencies of many business users on these gatekeepers, which leads, in certain cases, to unfair behaviour vis-à-vis these business users. It also leads to negative effects on the contestability of the core platform services concerned. *See* Digital Markets Act, *supra* note 10, at 1.

Furthermore, from a competition perspective, business-users and end-users are both, though on different levels, consumers. Competition law would intervene only in specific cases in the situation of business users. As long as the gatekeeper does not operate in the market in which it does not provide information nor interoperability, competition law will not apply. As an example, if Apple were not to have its own music player, it would be highly debatable that requiring Spotify (only) to use its Apple store as a gateway is anti-competitive. This is one important aspect that eluded most authors when talking about the obligations in the proposal and analysing its provisions.

The aforementioned distinction is of high importance because once we observe the true nature of the D.M.A., we can further analyse the structure of its obligations. From a total of twenty-three obligations, we have only five of them that could, to some extent, be targeted by traditional competition law.

Therefore, it is difficult to say that the proposal is a veritable *ex-ante* competition law mechanism. In my opinion, the proposed D.M.A., as amended by the European Parliament, proves itself to be a set of compliance rules that ensures the existence of fair-practices in the digital market. These rules have a close relationship with competition law, but, at their core, they are nothing more than G.D.P.R.-type rules that offer protection and predictability to business and end-users.

2. LOOSENING THE GORDIAN KNOT: RELATIONSHIP WITH COMPETITION LAW

In the previous sections of this article, we observed the differences between the D.M.A. and the traditional European competition law whilst adopting the position of a clear difference between these two. Using the example of O.E.M.s associated with Microsoft and Intel, I tried to clarify the distinction between gatekeeper and dominant undertaking, as well as the difference that it provides in analysing whether the D.M.A. is a sub-part of the competition-law architecture. I attempted to distinguish each obligation specified by the D.M.A. and to evaluate its appropriateness for inclusion in the regulation, considering both the rationale for and against its inclusion. At the same time, I observed the shortcomings of the current competition legislation and described the specific role that the D.M.A. must play. In this part, I will use the analysis previously made to shed some light on the concepts used by the D.M.A.; primarily the interests protected, their overlap with current competition rules and, finally the risk of double,

triple or quadruple jeopardy as envisioned by the recent papers regarding of the recent Germanexit.[91]

2.1 THE OVERLAP WITH CURRENT COMPETITION RULES

Looking closely at the obligations laid out in the D.M.A., a simple statement can be made: the main inspiration for most of the obligations defined by Articles 5 and 6 is currently tackled by traditional E.U. competition law. From a total of twenty-three obligations, only ten have not been under the Commission's scrutiny and a remainder of three could easily be tackled by current competition rules - leaving only seven that are completely outside the scope of the traditional competition infrastructure.

All competition restrictions, to some extent, trigger the application of Article 102(b) of the T.F.E.U. in the form of restricting technological advancement to the prejudice of consumers, which is inherent to the service. Simply put, almost any anti-competitive behaviour in the tech industry will, automatically, limit technical development to the prejudice of consumers.

Obligation	E.U. Legislation and Type of Treatment Prohibited Treatment	Case Law
Art. 5		
.2	Art. 102 (b), (c) T.F.E.U.	AT.40462; AT.40684; AT.40703
.3	Art. 102 (c) T.F.E.U.	AT.40652; AT.40716
.4	Art. 102 (b), (c) T.F.E.U.	AT.40652;AT.40716
.5	Art. 102 (c) T.F.E.U.	AT.40652; AT.40716
.6	Art. 102 (d) T.F.E.U.	AT.40099
.7	Art. 102 (d) T.F.E.U.	AT.40099; AT.40716
Art. 6		
.2	Art. 102 (b), (c) T.F.E.U.	AT.40684; AT.40703
.3	Art. 102 (a), (b) T.F.E.U.	AT.40099
.4	Art. 102 (b), (c) T.F.E.U.	AT.40099; AT.40716
.5	Art. 102 (c) T.F.E.U.	AT.39740; AT.40462
.6	Art. 102 (d) T.F.E.U.	AT.40652; AT.40716
.7	Art. 102 (b), (c) T.F.E.U.	AT.40099
.8	Art. 102 (b) T.F.E.U.	
.12	Art. 102 (b), (c) T.F.E.U.	AT.40099; AT.40462 AT.40716

Figure 6: Connections Between the D.M.A. and Other E.U. Legislation. Case Law.

Taking these points into account, it can be easily concluded that the D.M.A. is nothing more than a part of the competition law environment, providing an ex-ante regulatory

[91] *See* Giuseppe Colangelo, *The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse*, 5 European Law Review 597 (2022).

system in order to preserve the competitive process.[92] However, I will further argue that this is a secondary objective and a result that derives from attaining a fair and contestable market.

This objective is primarily linked with the possibility of the undertakings concerned (gatekeepers) to exploit their presence in the market both against end-users and business users or competitors. The D.M.A. does not act as a tool to regulate positions of abuse or market imbalances, but it creates a *de minimis* set of rules that, in theory, should allow a fair and equitable playing field for all actors involved (including the end-user). The main issue regarding the digital sector is that it does not consist of traditional means, but encompasses mainly online intermediaries which can (easily) create artificial barriers to entry or "exclusivity-only" conditions.[93] Such an example is the Apple vs Android (Google) store, MacOS vs Windows or the lack of interconnectivity between messaging applications. These brute examples illustrate only a small part of the ocean of barriers that the online environment encompasses.

The D.M.A. does not tackle, in my opinion, true competition issues, but rather accessibility issues from both the viewpoint of end-users and business users. For example, a dominant undertaking may decide not to sell a product based on personal or business rationales. However, under Article 6(4), a gatekeeper is forbidden from refusing to list an app on its store or operating system without supplying an explanation that is limited solely to the "*integrity of the hardware or operating system provided by the gatekeeper, provided that such measures are duly justified by the gatekeeper*" or public safety concerns. The argument, in analysing the D.M.A., should be put on the "*important gateway*" characteristic of the gatekeeper as being the central piece.

Observing the D.M.A. through the gateway lenses provides an output that differs from traditional competition rules and brings meaning to the aims of the regulation: a fair and contestable market. The safeguards provided seek a general balance of the downstream market and (often) have an indirect effect on the products also offered by the gatekeeper. This is the case of Apple and Spotify, which would not have been, necessarily, a competition issue if Apple did not have its own music app. The same is true for Google and its add services and; furthermore, with the other cases that have been presented in Fig. 6. The competition law issue appears only when the gatekeeper is

[92] *See* Nicolas Petit, *The Proposed Digital Markets Act (DMA): A Legal and Policy Review*, 12 Journal Of European Competition Law & Practice 529 (2021).

[93] *See* Michael Y.Yuan, T*he effects of barriers to entry on monopolistic intermediary online services: The case of a digital library*, 42 Socio-Economic Planning Sciences 56 (2008). *See also* Leah Taylor Kelley, Jamie Fujioka, Kyle Liang, Madeline Cooper, Trevor Jamieson, Laura Desveaux, *Barriers to Creating Scalable Business Models for Digital Health Innovation in Public Systems: Qualitative Case Study*, Jmir Public Health Surveill (2020), https://publichealth.jmir.org/2020/4/e20579. *See also* Eric Schmidt & Jared Cohen, *The Digital Disruption: Connectivity and the Diffusion of Power*, 89 Foreign Aff. 75 (2010).

activated in the downstream market as well and, further, leverages its power to gain market power for ancillary services.

Such a difference can be observed from the analysis made in Section 1 of this article where, as stated, the O.E.M.s did not engage in anti-competitive behaviour. But due to the lack of interconnectivity, it virtually blocked other actors from entering or expanding in ancillary markets. While in the case of hardware, it is much harder to provide interoperability and interconnectivity – unlike in the software "world" which is not that closed off considering most of the barriers are artificially created. We can think of it as the "*Intra-E.U. calls*" Regulation[94] for gateway services which does not cap the retail price, but sets the minimum level of accessibility for (all) business users inside the European Union.

Therefore, the D.M.A. creates a fair market providing all businesses indiscriminate access to the same platforms, and the possibility for these business-users to contest anyentrenched position that the gatekeeper has in the ancillary market.

2.2 NE BIS IN IDEM. THE GERMANEXIT ISSUE.

A bigger concern voiced by scholars is the possibility of double jeopardy claims. Such a situation might arise from two different causes: the same conduct is being sanctioned both as competition law and D.M.A. infringement or, as in the situation of the German Competition Act [hereinafter G.W.B.] Digitalization Act, pursuant to national and E.U. rules.

In the first scenario, it is important to note that the European Court of Justice [hereinafter E.C.J.] has always taken into consideration previous fines or infringements when setting a new one. Therefore, such situations, however improbable, could be solved by similar solutions. Furthermore, I will argue that a situation of double incrimination is highly improbable at the level of the E.U..

First of all, the D.M.A. has a different scope and timeline of applicability. The main distinction: D.M.A. sanctions future non-compliance and not past antitrust behaviour. This makes it virtually impossible for an undertaking that could fall under both provisions to be sanctioned twice for the same action. Moreover, as stated before, the D.M.A. establishes rules, *in abstracto*, without taking into account the existence of an abuse of power against a specific person(s). In a scenario where a gatekeeper (who is also a dominant undertaking) refuses to comply with the obligations set by the D.M.A., the

[94] *See* Regulation (EU) 2018/1971, *supra* note 16.

fine will represent non-compliance - without taking into account actual damages that have or could have been inflicted upon competitors and/or the whole market. This is because the D.M.A. primarily protects a public interest, and only incidentally a private one, as opposed to the competition rules where, in order to start an investigation, a breach of a private interest must be observed first.[95] And only after determining such an infringement, might the public effect appear. Therefore, I could argue that, because of the different scope that these legislations have, there should not be a plea for *ne bis in idem*. However, even if we consider that the overall context is similar, the subsequent fine will take into account the fine previously set and will be adjusted accordingly.

The other issue is the moment of the imposition of the fine. As stated before, the D.M.A. applies for future situations, whereas competition law sanctions (mostly) previous infringements. The Commission, when dealing with the latter case, can easily take into account the period of time which had already been taken into account pursuant to the obligations described in the D.M.A.. This is further amplified by the full centralisation of the D.M.A. infrastructure and its enforcement only at E.U. level.

The second scenario, of national and European level sanctions, raises other issues that stem from a division of powers between the Member States and the European Union. Theoretically, this should not pose an issue as the D.M.A. clearly states that "Member States shall not impose further obligations on gatekeepers" – with the exception of matters strictly pertaining to competition law. It can be observed that enforcement and fines are the sole attribute of the Commission and the Member States cannot create forum administrative bodies for these purposes.

However, the new G.W.B. Digitalization Act seems to have already breached the balance between the competences of Member States and the European Union. In this regard, it is important to note that the amendment works only in direct correlation with competition law principles and serves as a directive and clarification to antitrust issues and does not maintain the same rules as the D.M.A. . Furthermore, this provision does not provide, in itself, any sanctions or behavioural rules – serving merely as a tool for attaining a proper definition of market dominance. The other traditional competition rules will still apply.

[95] This can be either in form of the damage inflicted upon customers or other competitors. In the Digital Markets Act there is no need to prove actual damage inflicted, creating a possibility where the simple act of not respecting the rule suffices, as opposed to competition law where, even in the situation of object restriction, there needs to be an effect on the E.U. market (Case C-226/11, Expedia Inc. v. Autorité de la concurrence and Others, ECLI:EU:C:2012:795, Dec. 13 (2012)).

Given these aspects, the principles set out in the first part remain valid and create a clear distinction between the two areas of applicability. If we were to consider that such a situation was not the case and that, in fact, the *Gesetz gegen Wettbewerbsbeschränkungen* (G.W.B.) contains provisions that are similar or observe the same aims as the D.M.A., those provisions would become inapplicable and parties could seek annulment of the decision. Such issues will probably arise regardless of scholastic interpretation and they will, most likely, be solved by the European Court of Justice. Another possible solution is the one observed in the *Amazon* case[96] where the Commission simply excluded the state in question from its territorial scope.

In conclusion, I consider the possibility of multiple jeopardy to be significantly lower than previsioned for the reasons detailed before. The difference in scope between competition law and the D.M.A. provides a clear line in application and enforcement. It is important to note also that the German legislation did not derail antitrust principles and requirements, but just added new criteria in order to determine market dominance and abuse without eliminating nor replacing the applicability of the existing ones. Therefore, the complementary nature of the D.M.A. remains and the differences in conditions, scope and effect remain.

3. INNOVATION AND OTHER INDIRECT EFFECTS

Having analysed the substantive structure of the D.M.A., another question arises: will the regulation have a negative impact on the market and if so, what will that impact be? Several critics of the D.M.A. have argued that the regulation is discriminatory,[97] and will have negative downstream effects on marketers and consumers,[98] and will deter

[96] *See* Case T-19/21, Amazon.com Inc. and Others v. Comm'n, ECLI:EU:T:2021:730 (Oct. 14, 2021).

[97] A paper written by Copenhagen Economics argued, among other things, that the proposal might have discriminatory effects, leaving out some of the companies that essentially compete for the same customers. I cannot agree with this argument, and I consider that comparing, for example, online marketplaces (like Amazon) with grocery stores (as Lidl) shows little understanding of the term "digital", the relevant market and the customers that are targeted by the online market. *See* Sigurd Næss-Schmidt, Bruno Basalisco, Signe Rølmer, Katrine Poulsgaard, Morten May Hansen, Laurids Leo Münier, Laura Virtanen, Jasper Lutz, Signe Bech, *The Implications Of The Dma For External Trade And Eu Firms*, Copenhagen Economics (2021), https://copenhageneconomics.com/wp-content/uploads/2021/12/copenhagen-economics-study-of-dma-implications-on-eu-external-trade.pdf.

[98] *See* Kim Davis, *The Digital Markets Act will have downstream effects on marketers and consumers*, Martech (2022), https://martech.org/the-digital-markets-act-will-have-downstream-effects-on-marketers-and-consumers/.

innovation.[99] Before going into further investigation of these critics, it is important to note that these do not represent the predominant view.[100]

I will start with the most stringent one: innovation. Deterring innovation can manifest in multiple ways. So I will limit the discussion to two main aspects: incentive to innovate from the gatekeeper's position (also as a *possible* dominant player), and incentive to innovate for start-ups and other small players.

One good example, in order to observe the incentive to innovate from a gatekeeper's position, is the Intel vs A.M.D. case presented before. I chose this one because it is one of the few where there is any competition and whose market had already been clearly defined.[101]

In 2008, a paper analysing the Intel – A.M.D. relationship concluded that "the monopolist innovates more than the duopoly, as its market power enables it to better extract the potential gains to trade resulting from innovations".[102] This seems to be one of the main arguments of the D.M.A. critics when addressing the innovation issue.[103]

However, another article, published in 2010, found that a "monopolist has fewer incentives to introduce products compared to an oligopolist and when he does introduce

[99] *See* Kif Leswing, *Apple CEO Tim Cook criticizes European law that would break App Store hold,* Cnbc (Jun. 16, 2021), https://www.cnbc.com/2021/06/16/apple-ceo-tim-cook-rips-eus-proposed-digital-markets-act.html; *see* Portuese, *supra* note 12; *see* Jennyfer Chrétien & Henri Isaac, *Digital Markets Act: A Revolution Or A Legal Contradiction?,* Renaissance Numérique (2021), https://www.renaissancenumerique.org/en/publications/digital-markets-act-a-revolution-or-a-legal-contradiction/.

[100] *See* Wall & Lostri, *supra* note 13.

[101] Even though neither Intel or A.m.d. would qualify as gatekeepers from a service approach, trying to do the innovation test on actual gatekeepers might prove cumbersome as we do not have relevant case law and competitors to compare with. I was able to identify six relevant (digital) competition cases that went through E.c.j. scrutiny: Summary of Commission Decision of 4 July 2007 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/38.784 — Wanadoo España v Telefónica), 2008 O.J. (C83) 6; Commission Decision of 19 december 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/34.579 — MasterCard, Case COMP/36.518 — EuroCommerce, Case COMP/38.580 — Commercial Cards), 2009 O.J. (C264) 04; Commission Decision of 30 October 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega — Nintendo), 2002 O.J. (L255); Commission, *supra* note 18; Summary of Commission Decision of 18 July 2019 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39711 — Qualcomm (predation)), 2019 O.J. (C375) 25; Commission, *supra* note 20. Some of these cases are only bordering the digital market and others do not offer the effects of that position of power. In case of Microsoft tying and bundling, neither Windows Media Player nor Internet Explorer attained enough market power to be able to analyse the output of innovation from a dominant (or entrenched) position. MasterCard case could also be used as a valuable example, though I chose not to use it as I lack even basic knowledge of the characteristics of the product.

[102] Ronald Goettler & Brett Gordon, *Competition and innovation in the microprocessor industry: Does AMD spur Intel to innovate more*, 119 Journal Of Political Economy 1141 (2011).

[103] *See* Portuese, *supra* note 12.

products, they tend to be clustered at the high end. . . In a monopoly, the incentive to steal business is not present and so strategic quality choices play much less of a role".[104]

If we compare these findings to the history of C.P.U.s and look at the dates when new C.P.U.s have been introduced in the market,[105] we can observe that Intel was acting more as a responsive player to A.M.D.'s better products. Having a better market position and using that position to limit A.M.D.'s market share, provided Intel with the possibility of a reactive response.[106] Simply responding[107] to your competitor should not be called innovation and, ultimately, should not be attributed to the position of dominance.

The same logic applies in the case of gatekeepers that can, given their market power (which might not necessarily be equivalent to a dominant position), only respond to potential competitors and not innovate for the sake of innovation. If we take a more practical approach, the following question arises: who would invest millions (or even more) in research & development if there is no return? Innovation is a means to an end from a business perspective – not an end in itself. When there is little or no competition, the incentive for innovation will naturally be lower as there is no substitutability, and so monopoly profits work just fine.[108] However, it is worthwhile to mention that there is no consensus as to whether competition or monopoly produces more innovation.[109]

The next prospective issue that will be analysed is the impact on start-ups.[110] It has been argued that the exit strategies applied by some of the start-ups will be affected: specifically with the buy-out option. First, it is needed to separate the market into two different segments: start-ups that operate in the same area as the gatekeepers; and those who offer (possible) ancillary services.

[104] Chris Nosko, *Competition and Quality Choice in the CPU Market*, Semantic Scholar (2011) https://www.semanticscholar.org/paper/Competition-and-Quality-Choice-in-the-CPU-Market-%E2%88%97-Nosko/b1b1758112d0fe132064f7a61a80ad4f3763719d.

[105] Computer processor history, www.computerhope.com (last visited Mar. 12, 2022), https://www.computerhope.com/history/processor.htm (last visited Feb. 03, 2023).

[106] *See* Nosko, *supra* note 104. In his paper (Chris Nosko, 2011) calls this response a "result of an exogenous innovative process". The author here refers to the fact that "the project that led to the Core 2 Duo [. . .] began at least as early as 2001 to develop a CPU for laptops".

[107] *See* Ian King, *How Israel saved Intel*, The Seattle Times (Apr. 9, 2007), https://www.seattletimes.com/business/how-israel-saved-intel/; *see also* Keyanoush Razavidinani, *For Years, Intel Sat On Its CPU Monopoly And Now The Tide Turns Against Them*, Seeking Alpha (Oct. 1, 2020), https://seekingalpha.com/article/4377146-for-years-intel-sat-on-cpu-monopoly-and-now-tide-turns-against.

[108] *See New Economic Study Finds Intel Extracted Monopoly Profits of $60 Billion Since 1996*, Investor Relations (Aug. 2, 2007), https://ir.amd.com/news-events/press-releases/detail/114/new-economic-study-finds-intel-extracted-monopoly-profits.

[109] *See* Tyler Sayles, *Is competition or monopoly more innovative?*, http://www.hopesandfears.com/hopes/now/question/216743-is-competition-or-monopoly-more-innovative (last visited Feb. 03, 2023).

[110] *See* Pietro Lombardi, *The unintended consequences of Vestager's tougher take on 'killer acquisitions'*, Politico (Oct. 14, 2021, 6:38 PM), https://www.politico.eu/article/margrethe-vestager-tougher-take-boost-small-companies/#: :text= Entrepreneurs%2C%20venture%20capitalists%20and%20others,competition%20%E2%80%94%20actually%20threatens%20to%20dampen.

In the first scenario, the solution is, in my opinion, simple: if an undertaking buys a start-up that offers the same service, it is usually done to shut it down. This is in no way an innovative solution or a positive scenario for either consumers or the market.[111] This tactic is known and widely used,[112] and raises several competition issues.[113]

In the second scenario, there will still be a need to appraise the existence of concentration and, pursuant to Article 2 of Regulation (EC) No. 139/2004, to analyse whether the companies retain activities in the same market. The obligation is to simply notify the merger intention. This does not lead to a consequent interdiction – as the D.M.A. has no provision that could enforce that. The only means that can (still) be used are the ones described by the Merger Regulation; therefore, the *status quo* does not change. The only thing that changes is the possibility of the Commission to intervene, either *ex-officio* or after being notified by member states, but only through the powers conferred by Regulation (EC) No. 139/2004.

There has yet to be an academic consensus as to which market would be better from an innovation point of view. While, as indicated by past examples, competition brings more innovation than monopoly, it is not sufficient to rely solely on such a statement. This rationale works both ways: authors that are assured that creating compliance rules will hinder innovation should take a step back and reassess the situation. Probably, the answer should be searched on a case-by-case scenario, whilst considering the business model of each undertaking concerned.

[111] While the article focuses on the pharmaceutical sector, the same reasoning can be used for other markets that have acquisitions as a viable exit form for start-ups. – *See* Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 Journal Of Political Economy 649 (2021).

[112] *See* Richard Waters, *Big Tech's 'buy and kill' tactics come under scrutiny*, Financial Times (Feb. 13, 2020), https://www.ft.com/content/39b5c3a8-4e1a-11ea-95a0-43d18ec715f5; *see also* Killed by Google, https://killedbygoogle.com/ (last visited Feb. 03, 2023); *see* Killed by Microsoft, https://killedbymicrosoft.info/ (last visited Feb. 03, 2023).

[113] *See* Mark Glick and Catherine Ruetschlin, *Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook*, (Institute for New Economic Thinking, Working Paper Series No. 104, 2019), https://ssrn.com/abstract=3482213.

CONCLUSION

Fitting the D.M.A. into either the *ex-ante* competition law or compliance rules box will undoubtedly be a continuous debate in the following years. The public discourse and part of the reasoning put forth by the European Commission show arguments in favour of both parties. Analysing the position of the gatekeeper in the context of European Competition Law and the clarity of their current definition will provide for further discussions.

Tackling a diverse and complex market, that is characterised by interchangeability and overlapping, will pose multiple challenges in the future. The rapid growth of the structure and number of services provided will add to that complexity. As market boundaries become fuzzier, a service-oriented approach can only be welcomed. The trick will be in keeping up with the changes that might happen in the future. As Moore's law applied to C.P.U.s, it has a notable impact on (other) technological advances nowadays.

Compliance rules should be welcomed in order to ensure a fair environment for the tri-party system in the digital world: end-users, business users and competitors. A set of rules that ensure a minimum level of power balance is hard to make but is necessary. The internet, whether we like it or not, can be, due to indirect market effects, as powerful as a state. Therefore, a form of "Separation of powers" or "Checks and balances" between the main parties should be attained.

The D.M.A. is the first step in order to obtain a level of clarity and to further provisions better. While sometimes the market (and I use it in a broad sense) might regulate itself, in most of the cases this is not the norm, especially in digital markets, where power can be obtained and preserved much easier, without any regulatory provisions.

Traditional competition law is slow and most of the times will activate only after damage has been done or has become irrelevant.[114] This shortcoming should not, however, be solved by *ex-ante* competition enforcement, but with a clear set of rules that define a European standard.

Upon reflection, one may conclude that the D.M.A. is not without shortcomings but heads off in the right direction. Being a fair-practice type set of rules, it does not need to rely on traditional competition rules. The gatekeeper is not defined by dominance, but market power and reputation. Furthermore, the conducts sanctioned are not primarily competitor-oriented, but come in aid of end-users (consumers) and

[114] *See Innovation Kills Monopolies Faster Than Governments Can*, Old Gigaom (Jan 11, 2011), https://old.gigaom.com/2011/01/11/innovation-kills-monopolies-faster-than-governments-can/.

business-users (including advertisers and publishers) – wishing to establish an equal position for all parties involved. This follows, in my opinion, the natural direction of the G.D.P.R. .