ABUSE OF DOMINANCE AND THE DMA – DIFFERING OBJECTIVES OR PREVAILING CONTINUITY?[1]

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Abstract: A new EU regulation called the Digital Markets Act aims to keep digital markets open and fair in the face of the power of the so-called internet gatekeepers. Although the DMA has, at the first sight, much in common with Article 102 TFEU, which prohibits abuse of dominant positions, it declares itself to be a different instrument pursuing different objectives and protecting different legal interests. This text seeks to identify the similarities and differences in the values and objectives pursued between Article 102 TFEU and the DMA. Both are tools in the toolbox of the European Commission's DG Competition and their complementarity is desirable in theory and practice if competition-incompatible regulation of selected online platforms is not to occur, possibly leading to their unwanted double punishment for the same thing. The analysis carried out leads to the conclusion that, despite the insistence on their separate nature and on differences in their objectives, a value consensus prevails between the two instruments.

Keywords: Digital Markets Act; Article 102 TFEU; process of competition; welfare; efficiency; consumers; contestability; fairness; modernisation of EU competition law; internet gatekeepers; online platforms

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INTRODUCTION

"A small number of large undertakings providing core platform services have emerged with considerable economic power that could qualify them to be designated as gatekeepers…" one can read in the opening recitals of the Digital Markets Act (DMA).[2] In the same place there are listed characteristics of core online platforms services provided by these gatekeepers. Most of these in one way or another tempt one to think that the new EU regulation will go for the issue of monopolization and its negatives for undistorted competition: extreme scale economies, very strong network effects, a significant degree of dependence of both business users and end users, lock-in

[1] This paper has been written as part of the 2023 Cooperatio/LAWS project of the Faculty of Law, Charles University.

[2] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), recitals 3–6 of the Preamble.

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effects, vertical integration, and data-driven advantage…, while it is pointed out that these characteristics can be exploited by gatekeepers to harm business users and end users by decreasing their choice through unfair practices.

Although all of the above sounds familiar to anyone who deals with competition law and specifically its prohibition on abuse of dominance (i.e., with Article 102 TFEU), the EU regulation on contestable and fair markets in the digital sector, as the Digital Markets Act (DMA) is actually called, also emphasises that it aims to protect a different legal interest from that protected by classical competition rules, and it should apply without prejudice to their application.[3] Terms such as protection of competition, or undistorted competition, do not appear in the text of the DMA. Internet gatekeepers are not necessarily the dominant players in their relevant markets and the designation of their status (in Article 3 of DMA) is quite different from the determination of market dominance of an undertaking. While the application of Article 102 TFEU rests on an ex-post assessment of the individual behaviour of the dominant player, the DMA ex-ante prohibits some and imposes other conduct uniformly on all recognised gatekeepers. The legal basis of the DMA does not indicate as its legal basis any of the provisions of Chapter 1 of Title VII of TFEU (Rules of Competition), but the Article 114 TFEU, which belongs to Chapter 3 of the same Title and allows the EU institutions to adopt the measures for the approximation of the provisions… which have as their object the establishment and functioning of the EU internal market.

On the other hand, it should be noted that this new instrument will not be enforced by the European Commission's DG Internal Market, Industry, Entrepreneurship and SMEs, nor by its DG for Communications Networks, Content and Technology, but by DG Competition, in parallel with the enforcement of classical EU competition law. The above-mentioned difference regarding the anchoring in EU primary law does not separate the DMA from competition law in any significant way. *"A system ensuring that competition is not distorted"* is an integral part of the internal market under EU primary law,[4] and EU competition law has also always had as its specific objective to help build and operate the EU internal market.[5] The debate that led to the DMA proposal itself began with the notion of a *"new competition tool"*,[6] and even Competition Com-

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[3] Article 1(6) DMA reads as follows: This Regulation is without prejudice to the application of Articles 101 and 102 TFEU. It is also without prejudice to the application of: (a) national competition rules prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions; (b) national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers; and (c) Council Regulation (EC) No 139/2004 and national rules concerning merger control.

[4] Consolidated version of the Treaty on European Union – Protocol (No 27) on the internal market and competition. OJ C 115, 9 May 2007, pp. 309–309.

[5] Sauter for instance, maintains that the internal market is *"the pre-eminent objective"* of EU competition law. See in SAUTER W. *Coherence in EU Competition Law*. Oxford: Oxford University Press, 2016. The Factsheet of the European Parliament opens its chapter on Competition policy by stating: *"The main objective of the EU competition rules is to enable the proper functioning of the EU's internal market…"* (Competition policy. In: *European Parliament: Fact Sheets on the European Union* [online]. 2022 [cit. 2023-10-01]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy).

[6] European Commission, Directorate-General for Competition – SCHWEITZER, H. *The New Competition Tool: its institutional set up and procedural design* [online]. Publications Office, 2020 [cit. 2023-10-01].

missioner M. Vestager did not shy away from the notion of competition in her speeches on the new regulation of large online platforms, presenting the DMA as a new tool of EU competition policy,[7] that is *"to complement vigilance in competition law enforcement"*.[8] In the text of a DG Competition expert, it is possible to read that the DMA is aimed at *"restricting competition in access to digital markets"*.[9] The DMA is clearly inspired by the practice of competition law application not only in Articles 5–7, which impose obligations and prohibitions on gatekeepers, but also in its Chapter V regulating the investigative, enforcement and monitoring powers of the European Commission.[10]

The question therefore arises as to how exactly to understand Commissioner Vestager's words that DMA is a new tool to the Commission's toolbox, alongside merger control, and antitrust action under Articles 101 or 102.[11] Certainly, DMA is typologically a sectoral *ex ante* regulation, the key method of achieving the desired result of which will be inherently different from *ex post* enforcement of Article 102 TFEU in individual cases of abuse of dominance. Because of the possibilities presented by the different nature of the market intervention mechanism, the EU eventually resorted to the DMA solution. At the same time, starting from the simplest definition of complementarity as *"the state of working usefully together"*,[12] it is clear that old and new tools in the toolbox of the same enforcer should have rather similar value anchoring and targeting if they are not to conflict with each other.

This study therefore asks the question of whether the values targeted by the DMA are the same or different from those according to which competition law interprets and applies Article 102 TFEU, which is also intended to prevent the largest market players from abusing their position to exploit others and foreclose the market. The following analysis seeks to establish, as its title states, whether there is a prevailing continuity or difference of objectives between Article 102 TFEU and the DMA. The research question posed in this way is undoubtedly very theoretical in part, as it aims at the doctrinal foundations of one or another legal regulation, asking about their value anchoring and

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Available at: https://op.europa.eu/en/publication-detail/-/publication/1851d6bb-14d8-11eb-b57e-01aa75ed71a1.

7 VESTAGER, M. *Address to the 6th conference of the Technical University of Denmark "The road to a better digital future"*. Copenhagen, 23 September 2022, speech/22/5763.

8 VESTAGER, M. *On the Commission proposal on new rules for digital platforms*. Brussels, 15 December 2020, statement/20/2450.

9 MUSIL, A. Legislativní návrhy aktu o digitálních trzích a aktu o digitálních službách, společná historie, rozdílné dopady [Legislative proposals for the Digital Markets Act and the Digital Services Act – Common history, different impacts]. *Antitrust*. 2021, Vol. 13, No. 2, p. 36.

10 The similarity between the concepts of competition law and the Commission's enforcement powers on the one hand, and the regulation introduced by the DMA on the other, is frequently mentioned in commentaries. See for instance: KOMNINOS, A. The Digital Markets Act (DMA) goes live. In: *White & Case* [online]. 12.10.2022 [cit. 2023-10-01]. Available at: https://www.whitecase.com/insight-alert/digital-markets-act-dma-goes-live; KOMNINOS, A. The Digital Markets Act: How Does it Compare with Competition Law? In: *SSRN* [online]. 14.6.2022 [cit. 2023-10-01]. Available at: https://ssrn.com/abstract=4136146; NERSESJAN, R. Akt o digitálních trzích vstoupil v platnost [The Digital Markets Act entered into force]. *Antitrust*. 2022, Vol. 14, No. 4, pp. 116–117.

11 VESTAGER, M. *Speech at the Fordham's 49th Annual Conference on International Antitrust Law and Policy "Antitrust for the digital age"*. New York, 16 September 2022, speech/22/5590.

12 See in *Cambridge Dictionary* [online]. Cambridge: Cambridge University Press, 2023 [cit. 2023-10-01]. Available at: https://dictionary.cambridge.org/dictionary/english/complementarity.

the resulting implications for the policies pursued in the situations of enforcement of legal rules. At the same time, however, the author is convinced that such research also has practical implications for predicting, in particular, how differently the Commission will approach the application of Article 102 TFEU to undertakings also regulated by the DMA and, more broadly, across the sector of digital economy. The apparently declared "different legal interest" that is protected by DMA and Article 102 TFEU immediately raises the question of the possibility of double jeopardy, which has been addressed quite extensively in the commentary literature since the CJEU judgment in *bpost* (C-117/20).[13] While this study does not directly extend this debate, it seeks to answer the related question of whether competition protected by Article 102 TFEU is seen in principle in the same way as that protected by the DMA, in other words, whether there are doctrinal guarantees of complementarity between the two instruments in the hands of DG Competition.

The method of finding an answer to the research question formulated in this way will consist in the comparison of two key documents from the European Commission: the Guidance of the enforcement priorities in applying Article 82 from 2009[14] and the DMA and the texts accompanying them, in particular the opinions on the issue highlighted in the speeches of the senior representatives of DG Competition of the European Commission on both documents. The basic characteristics of competition, the objectives of its protection, and the related criteria for its distortion will be selected from both sets of sources. Both obvious correspondences and possible connections will then be sought between them, as well as clear differences. On this basis, a conclusion will then be offered as to whether or not the DMA and Article 102 TFEU can be integrated into a coherent framework of protected interests and values.

1. MODERNISATION OF COMPETITION LAW IN THE COMMISSION GUIDANCE ON ARTICLE 82 ENFORCEMENT

The preparation of the Commission's Guidance on Article 82 enforcement priorities (the EC's Guidance) falls at the height of the modernisation of EU competition law that the Commission has been pursuing since the turn of the millennium. In terms of values and objectives, the essence of this modernisation was succinctly summarised in 2007 by the then Director General of DG Competition, P. Lowe: *"Consumer welfare and efficiency became the new guiding principles of EU Competition policy."*[15]

[13] RIBERA MARTÍNEZ, A. An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement. *European Competition Journal* [online]. 15.12.2022 [cit. 2023-10-01]. Available at: https://doi.org/10.1080/17441056.2022.2156729; KATSIFIS, D. Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I, Part II. In: *The Platform Law Blog* [online]. 28.3.2022, 29.3.22022 [cit. 2023-10-01]. Available at: https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/; NERSESJAN, *c. d.*, pp. 116–117.

[14] European Commission. Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, (2009/C 45/02) OJ C 45/7, 24 February 2009.

[15] LOWE, P. *Consumer welfare and efficiency – New guiding principles of Competition Policy*? Munich 13th International Conference on Competition Policy, 27 March 2007.

Protection of competition, originally understood as a freedom to compete, should not be any more an aim in itself, it must be a means of the enhancing consumer welfare and of ensuring an efficient allocation of resources. Enforcers should therefore focus not on the characteristics of the competition process, but on its effects – hence the well-known *"effect-based approach"* – which, in line with the then dominant neoliberal ideology, should be quantifiable, especially in terms of price indicators, as impacts on efficiency, and hence on consumer welfare. Competition protection was to get rid of formalism, a certain arbitrariness resulting from the application of soft aspects of better or worse functioning competition, and thus to reduce the so-called type I errors (over-enforcement). This opened the way for firms, even dominant ones, to justify their behaviour on the basis of efficiency defence, i.e., winning by better performance, in short *"competition on the merits"*,[16] which included superior efficiency, higher quality of products, or significant innovation from which the consumer could benefit.[17]

Specifically for the prohibition of abuse of dominance under Article 82 TEC (now 102 TFEU), this approach emerged from the EC's Guidance and accompanying statements by DG Competition officials[18] as follows:

a) *Priority targeting of protection*: the Commission has promised to focus on those types of conduct that are most harmful to consumers. At the same time, it stressed that it would not protect competitors as a matter of principle, although the shift in focus from process to outcome was never absolute: consumer interests were, even in the Commission's view at the time, best protected by the competitive process in the EC single market (reflected, *inter alia*, in the choice of the as efficient competitor test to distinguish abuses from competition on the merits, as will be shown below). The key concern, however, is to achieve greater efficiency through competitive pressure, not fairness of the process, hence the shift in focus was also summarised as *"from fairness to welfare"*.

b) *Beneficiaries of protection and their pursued interests*: The Commission has included all customers among consumers, either at the intermediate level or at the level of final consumers or at both levels at the same time. If the declared ultimate aim was to avoid consumer harm, this therefore concerned the interest of all actors on the buyer-customer side, and not only in buying at a better price. The Commission even

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16 Competition on the merits was a key criterion in justifying the prohibition of abuse of a dominant position both before the modernisation of competition law (see judgment of the Court of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v. Commission*, 322/81 EU:C:1983:313 paras 30 and 57, as well as during its course (Judgment of the General Court of 1 July 2010, *AstraZeneca AB and AstraZeneca plc v European Commission*, T-321/05. EU:T:2010:266, para. 355) and it remains so (Judgment of the General Court of 10 November 2021, *Google Inc. and Alphabet, Inc. v. European Commission (Google Search-Shopping)*, T-612/17, para. 144).

17 For an overview of the EC's Competition policy modernisation focus on consumers and their interests, see for instance STUYCK, J. EC Competition Law After Modernisation: More Than Ever in the Interest of Consumers. *Journal of Consumer Policy*. 2005, Vol. 28, pp. 1–30.

18 In addition to the Commission's Guidance (ref. 13), it is drawn from LOWE, *Consumer welfare and efficiency*; LOWE, P. *The Commission's current thinking on Article 82*. London, BIICL Annual Trans-Atlantic Antitrust Dialogue, 15 May 2008; KROES, N. *Preliminary thoughts on policy review of article 82*. New York, Fordham Corporate Law Institute, 23 September 2005, speech/05/537; KROES, N. *Exclusionary abuses of dominance – the European Commission's enforcement priorities*. New York, Fordham University Symposium, 25 September 2008, speech/08/457.

stressed that the term "prices", or impact on prices, also included other parameters of competition, i.e., besides prices also output, innovation, the variety or quality speech of goods and services; although price indicators of efficient or inefficient behaviour by the dominant party held a privileged position. Even here, therefore, the shift towards welfare as understood by welfare economics was not absolute, since even highly efficient and price-friendly behaviour by a dominant player that appreciably restricted consumer choice could be prohibited (as in the key case of those years T-201/04 concerning the free provision of Windows Media Player when buying Windows from Microsoft).[19]

c) *Temporal aspect of anticompetitive effects*: Although it is mainly the short-term price effects of a market practice that are certain and quantifiable in microeconomic terms, the Commission has not (as the above also shows) in principle abandoned the assessment of long-term effects. Only with such an approach could it sanction dominant players for predatory pricing or rebates with a foreclosure effect, i.e., for practices which in the short term can have a positive impact on the prices paid by the customer and the final consumer. The belief that a dominant will not remain efficient, innovative, consumer-friendly and choice-friendly in the long run unless it is continuously exposed to competitive challenges has been maintained even after the EC's Guidance on Art 82 was issued.

d) *Definition of the main types of anticompetitive conduct*: It was already apparent from the title of the EC's Guidance that the focus should be on exclusionary conduct, i.e., practices that may have a foreclosure effect. Dominant undertakings were therefore in particular prohibited from impairing effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare. Exclusive purchasing, conditional rebates, tying and bundling, predation, refusal to supply and margin squeeze were explicitly identified in the EC's Guidance as practices of a dominant undertaking which usually lead to foreclosure.

e) *The standard for determining abuse and proving it*: In this field the change should have been the most substantial, because according to all the above-mentioned aspects it could only be a change of emphasis within sufficiently broad and soft categories. Although the focus was no longer to be on the process so much as on the outcome of the competition, distinguishing one from the other was not easy even here. The Commission promised to intervene where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. The negative effect was therefore bound to be negative, the question remained whether for competition or for consumers, or which came first. Given that this is a case of exclusionary practices leading to foreclosure, it is the competitors, their competitive pressure, and therefore competition that come first. The Commission has explained the bridge to consumers by its approach to a dominant party's conduct that will have both an efficiency enhancing as well as a foreclosure effect. The balance should have been on whether conduct with a likely foreclosure effect is at the same time likely to harm consumers. The Commission introduced the label consumer welfare balancing test for this, which

[19] Judgment of the Court of First Instance of 17 September 2007, *Microsoft Corp. v. Commission*, T-201/04, EU:T:2007:289.

was to be a uniform standard for abuses of dominance, and also for agreements and for mergers.

Rather, the progress of the evidence confirmed the weight of the competition process. If the Commission does not capture direct evidence of a strategy to exclude competitors (for instance in a dominant party's internal documents) it will have to rely on a counterfactual analysis showing that as efficient competitor would survive without the dominant party's problematic conduct, and conversely will be foreclosed if the dominant party's problematic conduct is in place for a sufficient period of time. Moreover, the effect-based approach thus conceived was extended by taking into account likely effects not only on prices but also on quality, choice, and innovation. This was especially in the long term, allowing a discussion of the degree of likelihood of these effects and, at the same time, whether competition as a process of ongoing and open competition was not being protected in the name of this distant outcome. At the very least, this approach opened up greater scope for efficiency defences of dominant firms.

Here too, however, the Commission has retained a "back door" in the form of certain naked restrictions for which, according to the Commission, it was not necessary to carry out a detailed assessment of effects, and whose anti-competitive impact (automatically also on consumer welfare) could have been inferred. As examples, the Commission cited conduct by which a dominant party prevents its customers to test products of competitors or pays a distributor or a customer to delay introduction of a competitor's product. Again, therefore, these are practices that infer subsequent consumer harm through the prior harm to the competitive process by removing competitive constraints.

2. EFFICIENCY AND CONSUMER WELFARE ALWAYS AND EVERYWHERE, OR NOT QUITE?

It is clear from the above summary of the Commission's still valid approach to assessing abuse of dominance that, even in the modernisation period, the Commission has not consistently moved to the neoliberal canon of the Chicago School of anti-trust and has been prepared to look beyond microeconomic efficiency in terms of consumer welfare gains.[20] Consumer welfare as a criterion has never been defined in any legally binding competition law instrument and similarly has never been narrowed down to an economically quantifiable consumer surplus.[21]

A detailed empirical study carried out by Stylianou and Iacovides[22] in 2021 documented that the Commission, even after issuing its Guidance, did not abandon the multitude of objectives and never shifted to one constant priority, i.e., never consistently

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[20] See for instance PAGE, W. H. The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency. *Virginia Law Review*. 1989, Vol. 75, No. 7, pp. 1221–1308; KRABEC, T. *Teoretická východiska soutěžní politiky* [Theoretical foundations of competition policy]. Studie Národohospodářského ústavu Josefa Hlávky No. 1/2006. Praha, 2006.

[21] For the thorough discussion of these issues see in DASKALOVA, V. Consumer Welfare in EU Competition Law: What Is It (Not) About? *The Competition Law Review*. 2015, Vol. 11, No. 1, pp. 133–162.

[22] STYLIANOU, K. – IACOVIDES, M. C. The Goals of EU Competition Law: a Comprehensive Empirical Investigation. *Konkurrensverket* [online]. 28.1.2021, Dnr. 407/2019 [cit. 2023-10-01]. Available at: https://

shifted its focus from the process of competition to the outcome of competition, and did not consistently apply everything it emphasized in speeches and soft law in its decision-making.[23] There are also well-known decisions of the CJEU in which this Court has rejected the primacy of consumer welfare, even after the EC's Guidance was issued (e.g., *GlaxoSmithKline* or *T-Mobile Netherlands*, both from 2009).[24]

Thus, the concern for consumers emphasized in the speeches was manifested in practical terms by greater attention to consumer organizations (creation of the Consumer Liaison Officer position), prioritization and media emphasis of cases with clear impact on consumer interests, support for private enforcement (compensation for injured consumers), and possibly selection of remedies with a preference for those that were also relevant to consumers.[25] Some economization of EU competition law in the sense of seeking economically demonstrable effects of firms' conduct on competition has indeed taken place, although not in the sense of analytically calculating the effects on users or final consumers.[26] The latter were considered to have been shown to benefit from the maintenance of effective competition.

Perhaps the best example that EU competition law, despite its announced emphasis on consumer welfare, has never adopted consumer surplus as its key criterion and has not followed the US example[27] even in the years of peak modernisation is the approach of the Commission and the EU Courts to predatory pricing by dominant undertakings. Preserving as efficient competitors in the competition process has remained the main target value, hence abusive conduct has always been derived from the dominant party's prices being reduced below its average variable costs (the so-called AKZO-test)[28]

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www.konkurrensverket.se/globalassets/dokument/kunskap-och-forskning/forskningsprojekt/19-0407_the-goals-of-eu-competition-law.pdf.

[23] In the same vein Woźniak-Cichuta showed in her statistically oriented research that specifically consumer welfare was referred to only very seldom in the Commission's (merger) decisions, and CJEU during reviewing those decisions has never referred to this goal or value. See WOŹNIAK-CICHUTA, M. Teleological Perspective of EU Merger Control and its interplay with Killer Acquisitions on Digital Markets. In: ŠMEJKAL, V. (ed.). *EU Antitrust: Hot Topics & Next Steps, Proceedings of the International Conference held in Prague on January 24–25, 2022*. Prague: Faculty of Law of the Charles University, 2022, p. 157.

[24] Judgment of the Court of 6 October 2009, *GlaxoSmithKline Services Unlimited v. Commission of the European Communities*, C-501/06 P and *Commission v. GlaxoSmithKline Services Unlimited*, C-513/06 P and *European Association of Euro Pharmaceutical Companies (EAEPC) v. Commission*, C-515/06 P and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v. Commission*, C-519/06 P, EU:C:2009:610; Judgment of the Court of 4 June 2009, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, EU:C:2009:343.

[25] MADILL, J. – MEXIS, A. Consumers at the heart of EU competition policy. *Competition Policy Newsletter*. 2009, No 1, pp. 27–28.

[26] In 2003, the Chief Economist and his team started to work in DG Competition; the ratio between lawyers and economists, originally 7:1, was balanced to 1:1, and the economic side of the Commission's decisions became not only more extensive but also much better. For the changes in competition policy and law during the period of its modernisation, see ŠMEJKAL, V. *Soutěžní politika a právo Evropské unie 1950–2015* [EU Competition policy and law 1950–2015]. Praha: Linde, 2016, chapters VI.–VII., pp. 156–158, 188–206.

[27] This is despite the fact that at the time of modernisation there was an attempt at some convergence with US antitrust on the part of the Commission, see e.g., MONTI, M. *Antitrust in the USA and Europe: a history of convergence*. Washington, 14 November 2001, speech/01/540.

[28] See for details DE LA MANO, M. – DURAND, B. A. *Three-Step Structured Rule of Reason to Assess Predation under Article 82* [online]. DG Competition, European Commission Office of the Chief

and has never required the recoupment of losses proof, which is mandatory in the US. However, only a sharp increase in prices after a price war has been won is an interference by the dominant party with consumer surplus, since consumers benefit from artificially low prices throughout the price war and their surplus increases as a result. However, it cannot be said that such an approach was inconsistent with what the Commission stated in its modernisation Guidance on Article 82. Indeed, even there it emphasised the monitoring of the long-term effects on consumer welfare, which included the variety of choice that in most cases will suffer by driving the losers of a price war out of the market.

Highlighting this inconsistency of practical EU competition policy with what might have been implied by some of the rather radical formulations used by DG Competition officials in the years of modernisation, is important to appreciate the debate that has developed following the massive emergence of digitalization and online platforms. On the face of it, the vocabulary of DG Competition officials had once again been radically transformed in the years leading up to the taming of the major online platforms. In the four speeches analysed above from 2005–2008, the term consumer was used 56 times and welfare 10 times. In contrast, Commissioner M. Vestager, in four speeches on anti-trust in the digital age and the DMA proposal (2019–2022),[29] mentioned consumer 11 times and welfare not once, but emphasised fairness, which was neglected in the modernisation process at the beginning of the century, 9 times. The term fairness, trailing behind contestability, is also the most frequent target term not only of the DMA but also of its dedicated "predecessor", Regulation 2019/1150 on fairness in online intermediation services.[30] The new glossary, which can be traced from documents on DG Competition's website dedicated to digital antitrust, does not discard the terms consumer and efficiency, but associates them far more often with the term's innovation, choice and fairness than with the term welfare.

Expert analyses and commentaries on digital antitrust do not always agree on whether it is necessary to move straight to "Competition Law 4.0"[31] or just to creatively adapt

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Economist Discussion Paper, 12.12.2005 [cit. 2023-10-01]. Available at: https://ec.europa.eu/dgs/competition/economist/pred_art82.pdf.

29 VESTAGER, M. *Digital Power and the service of humanity*. Copenhagen, Conference on Competition and Digitalization, 29 November 2019; VESTAGER, M. *On the Commission's proposal on new rules for digital platforms*. Brussels, statement/20/2450; VESTAGER, M. *Competition in a digital age*. European Internet Forum, 17 March 2021; VESTAGER, M. *Defending competition in a digital age*. Florence Competition Summer Conference, 24 June 2021.

30 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. OJ L 186/57, 11 July 2019.

31 A term borrowed from an extensive study of the German Federal Ministry for Economic Affairs and Energy (BMWi) titled *A new competition framework for the digital economy. Report by the Commission 'Competition Law 4.0'*. Berlin, September 2019. The debate on the necessity or futility of changing EU competition law due to the new characteristics of the digital environment is very extensive, see e.g., CREMER, J. – DE MONTJOYE, Y.-A. – SCHWEITZER, H. *Competition Policy for the digital era: final report*. EC Directorate-General for Competition, European Union, 2019; JENNY, F. Competition Law Enforcement and regulation for digital ecosystems. Understanding the issues, facing the challenges and moving forward. *Concurrences*. 2021, No. 3, pp. 38–62; ALEXIADIS, P. – DE STREEL, A. Designing an EU Intervention Standard for Digital Platforms. *EUI Working Paper RSCAS*. 2020/14; FUNTA, R. – HORVÁTH, M. Peculiarities of Abuse Control in the Platform Economy. *Online Journal Modelling the New Europe*. 2022, No. 40, pp. 98–110.

the existing toolbox based on the stable provisions of the TFEU, but they generally agree that some of the target values and approaches associated with EU competition law at the time of its modernisation are quite fundamentally unsuited to the digital environment. And it is far from being the case that some markets for key online services such as internet search or social networks do not compete on price, and thus it is difficult to include the impact on price in a competition analysis. What is probably most important in terms of competition law objectives is that efficiency gains and consumer surplus have ceased to coincide with functioning competition, at least in the short- and medium-term. And not just in exceptional cases, as this is a rather dominant feature of digital business. Extreme economies of scale, extraordinary network effects, vertical integration within platform ecosystems and Big Data mining are undoubtedly highly efficient for the enterprise as well as for its clients – if we traditionally calculate their total surplus or user surplus. Moreover, large online platforms with global reach are inherently more efficient than small ones.

What suffers, on the contrary, is the openness or contestability of (i.e., fair access to) these online eco-systems by other market players and, in the long run, consumer choice and very probably the pace of innovation. Thus, in the spirit of competition law modernisation, focusing on the outcome rather than the process of competition ceases to make sense in online markets. This is because the outcome may remain micro-economically efficient and attractive to consumers long after these tipped into closed ecosystems under the control of the creators and operators of some of the core platform services. Moreover, there was a legitimate concern that the spontaneous play of market forces (or market self-regulation) could not cope with this control by the largest players. The Internet gatekeepers are not guided by any neoliberal-invoked, invisible hand of the market; on the contrary, they themselves have become regulators of well-fenced markets and shapers of consumer preferences,[32] so they themselves are guiding this hand. The consequence is that *"the digitalised hand of the market alone will not ensure consumer welfare"*.[33] The question therefore arises as to whether there is not an urgent need to return fully to protecting the process of competition, if not creating it, by opening up markets to new competition, ensuring their contestability (through fair access and treatment) and, as a consequence, allowing alternatives and their unbiased choice.

3. THE DMA VALUE VECTOR

DG Competition was initially reticent to *ex ante* regulation of unfair practices, as demonstrated by its approach to Directive 2019/633, which defined and *ex ante* prohibited such practices in business-to-business relationships in the agricultural and

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[32] See in VESTAGER, M. *Digital power at the service of humanity*. Copenhagen, Conference on Competition and Digitalization, 29 November 2019.

[33] BEJČEK, J. "Digitalizace antitrustu" – móda, nebo revoluce? ["Digitization of antitrust" – fashion or revolution?]. *Antitrust*. 2018, Vol. 10, No. 3, p. VIII.

food supply chain.[34] However, the increasing digitalization of the traditional economy and the resulting call for national regulation of the largest online platforms, not least the procedural and evidentiary complexity, and thus the slowness, of the *ex post* application of competition prohibitions in this sector, have forced a somewhat paradoxical reversal of DG Competition's approach. Unfair practices, which previously should not have been a European competition problem, have now become supporting reasons for the introduction of a new *ex ante* protection instrument in the online platform sector.[35] Hence the aforementioned rise of fairness among the most frequent words in current DG Competition documents.

If, as was the case with the Commission's 2009 Guidance, we subject the text of the DMA and the Commissioner's four speeches on the digital economy and large online platforms from 2019–2022[36] to a structured analysis, we get the following picture:

a) *Priority targeting of protection*: The very name of the DMA states that its mission is contestable and fair markets and its preamble is rich with related concepts such as fairness of commercial relationship, fair economic outcomes, access to markets. It is perhaps not surprising that this extensive preamble (109 recitals) and the Commissioner's speeches are brimming with value and objective concepts, while the actual operative text of the regulation is understandably much poorer in using them. As mentioned above, the DMA's operative text consistently avoids the concepts of competition, undistorted competition, and consumer welfare or efficiency. As expected, the concepts of market power, exclusion, foreclosure, so typical of the EC's Guidance on Article 82, are also absent. However, especially from Chapter III of the DMA, titled "Practices of gatekeepers that limit contestability or are unfair", something can be deduced. Indeed, all obligations and prohibitions imposed on gatekeepers, be it the prohibition of self-preferencing, the obligation to ensure access and interoperability, the ability to uninstall pre-installed software, the ability to offer the same products and services outside the gatekeeper platform, to mine data obtained from third party sales, etc., have a common denominator, which is access to the market (i.e., its contestability) for other service providers and the users' (both business and end users') choice.

Complementing this overview of the targets with a look at Commissioner Vestager's speeches on the digital economy and the regulation of online platforms from 2019–2022, we see that we need to stop the big tech companies from wiping out competition, restore competition, recreate a competitive market, and keep markets open and competitive in the future, keeping the digital world open and fair. Business users and end users of online platforms should have access to a wide choice, they must be able to choose between tools, applications, providers and their services. This brings us from the parameters of online markets and online competition, which should therefore be open, fair and contestable, to the desired effects of such markets and their new regulation on users. And therefore it cannot be written that, by its nature, the DMA is exclusively deontological

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[34] MUSIL, *c. d.*, p. 37.

[35] Ibid.

[36] VESTAGER, *Digital power at the service of humanity*; VESTAGER, *On the Commission's proposal on new rules for digital platforms*; VESTAGER, *Competition in a digital age*; VESTAGER, *Defending competition in a digital age*.

and not at all consequentialist. Its emphasis on both processes and outcomes is already underlined in the preamble, which states that the DMA aims to *"ensure a competitive and fair digital sector in general and core platform services in particular, with a view to promoting innovation, high quality digital products and services, fair and competitive prices, and high quality and choice for end users in the digital sector"* (Recital 107).

b) *Beneficiaries of protection and their pursued interests*: Despite the above emphasis on the characteristics of competition (and no doubt also on the basis of criticism of the proposal by European consumer organisations)[37] the DMA clearly names its beneficiaries and the benefits that it will bring to them, and places end users at the forefront. Key Articles 5–7 of the DMA, containing the obligations and prohibitions imposed on gatekeepers, refer to business users 21 times, end users 43 times; in the full text of the DMA the same ratio is 171:216. Although it may have appeared from the Commissioner's speeches preceding the finalization of the DMA text that the primary mission would be for platforms to treat their business customers fairly, the order of beneficiaries has subsequently reversed and *"digital markets must be open and fair for consumers and for businesses of all sizes"*.[38]

The DMA is therefore targeting the interest of competitors and gatekeepers' business clients as well as end users, among whom real consumers are massively represented. Their interests, however, are not defined in economic terms of welfare, surplus, lower or better price or profit, but in terms such as promote access, interoperability, non-discrimination, multi-homing, and freedom (no prevention) to offer, provide, communicate, choose, use, download etc. Similarly, protection concerns their security, personal data or business secrets, not their welfare or efficiency. In the words of Commissioner Vestager: DMAs (as well as its twin DSA[39]) have one purpose: to make sure that we, as users, as customers, as businesses, have access to a wide choice of safe products and services online.[40]

c) *Temporal aspect of anticompetitive effects*: the DMA makes no mention of short- or long-term perspective, impact or interests. Of course, an ex-ante regulation prohibiting and imposing certain conduct on selected entities does not need to explicitly specify whether it is concerned with the short- or long-term effects of the regulated conduct, because what it imposes is intended to apply permanently, always, and everywhere. After all, if one wanted to be more specific, one could start from the premise that the DMA operates by analogy with naked restrictions, the always (*per se*) prohibited practices of gatekeepers which, in the words of the Commissioner, experience has shown to be *"bad for fair and open markets"*.[41] Given that Commissioner Vestager speaks in this context

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37 BEUC criticised the original DMA proposal for not focusing sufficiently on consumers' interests compared with those of business users. See BEUC. *Factsheet Proposal for an EU Digital Markets Act* [online]. April 2021 [cit. 2023-10-01]. Available at: https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-031_proposal_for_an_eu_digital_markets_act.pdf.

38 VESTAGER, *Competition in a Digital Age*.

39 The Digital Services Act (DSA) is the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services in EU law which updates the Electronic Commerce Directive of 2000 regarding illegal content, transparent advertising, and disinformation.

40 VESTAGER, *On the Commission's proposal on new rules for digital platforms*.

41 VESTAGER, *Competition in a Digital Age*.

of maintaining competition, restoring or even recreating it, there is no doubt that this is a long-term effort for long-term effects, or for the enduring quality of the competitive environment or process. Even the aforementioned values that the DMA wants to promote, i.e., innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector, are more indicative of the pursuit of a long-term or permanent benefits of the online environment.

d) *Definition of the main types of problematic conduct*: The vast majority of the DMA's ordered or prohibited gatekeepers' conduct has a competitive content, is based on the previous practice of the Commission and the EU Courts (possibly also some national competition authorities) and could be interpreted with reference to exploitative and exclusionary practices known from the application of Article 102 TFEU. These are in particular cases where gatekeepers are prohibited from enforcing exclusivity by preventing the use of other platforms, payment systems, or un-installation of their pre-installed applications, furthermore by locking-in their users and preventing their multi-homing or switching (transfer of data and profiles) to competitors, and of course so-called self-preferencing, whether by setting up a ranking algorithm, enforcing a most favoured treatment clause, combining user data generated from different sources, or mining competitors' sales data through the gatekeeper platform. For example, Nersesjan's analysis of the DMA aptly showed how many of the practices regulated therein are based on the past experience of competition authorities with cases involving members of the proverbial GAFAM (Google-Apple-Facebook-Amazon-Microsoft) quartet.[42] Critically minded authors openly insist that EU competition law has already been well up to the task and it has never been convincingly demonstrated that its existing flexible framework could not scrutinize several practices described as new and peculiar to app stores.[43]

However, for some gatekeepers' obligations, such as the obligation of automatic and extensive interoperability (eliminating incompatibility of applications), combining and sharing of accumulated data, providing tools and information necessary to conduct business efficiently via the gatekeeper's platform, it may be questioned whether competition law with its current toolbox (except in specific situations leading to exclusivity and to liquidating exclusion from the market) would be sufficient. Although even in these obligations imposed by the DMA on internet gatekeepers it is possible to find a pro-competitive purpose, it is quite likely that such conduct on such a scale and terms

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[42] NERSESJAN, *c. d.*, pp. 114–115. The author shows that Article 5(3) of the DMA corresponds to one of the commitments made by the Commission in the *Amazon* case (2017); Article 6(3) of the DMA corresponds to the prohibition in the Commission's decision in *Google Android* (2018); Article 6(4) of the DMA has a parallel in the statement of objections addressed to *Apple* (2021); Article 6(5) of the DMA reflects the *Google Shopping* case decision (2017); Article 6(7) relates to the Commission's decision in *Microsoft Corp*. (2004) and a parallel can be found in the 2019 decision of the German Competition Authority in the *Facebook* case with the obligation imposed in Article 5(2)(c) DMA.

[43] RADIC, R. Final DMA: Now We Know Where We're Going, but We Still Don't Know Why. In: *The Truth of the Market* [online]. 25.3.2022 [cit. 2023-10-01]. Available at: https://truthonthemarket.com/2022/03/25/final-dma-now-we-know-where-were-going-but-we-still-dont-know-why/. In particular, the author demonstrates that various forms of self-preferencing by potential gatekeepers are already sanctioned at the European and national level under Article 102 TFEU.

requires *ex ante* sectoral regulation with all its specificities.[44] What all practices have in common (as has already been and will be pointed out) is that they are prohibited *per se*, i.e., without further qualification and of course without the need to prove their anti-competitive impact.

The common denominator of many practices is the so-called self-preferencing (although the term does not appear as such in the text of the DMA), which, as Colangelo states, *"has come to embody the zeitgeist of competition policy in digital markets"*.[45] For the behaviour of the gatekeeper, who is the creator of the core platform service (search engine, marketplace, social network…), its administrator and at the same time tries to monetise its goods or services through it in competition with others, it is a situation not dissimilar to that of a company that controls an essential facility or a standard essential patent (SEP). It must also share what it controls with its competitors on fair, reasonable, and non-discriminatory terms, so that it does not gain an automatic competitive advantage over them.[46] However, the similarity does not go far enough for the Commission to decide to suppress self-preferencing by gatekeepers under the same rules as competition law provides for abuse of essential facilities or SEPs by their holder. The general neutrality of conduct imposed on gatekeepers is actually "extra-competitive" in light of the standards invoked by the EC's Guidance on Article 82. It is not related to any qualified and demonstrated harm to competition or to consumers, it is not measured by any exclusionary effect, it is essentially a universal rule of conduct by gatekeepers towards business users of their platforms.

If one were to look for an analogy with the special responsibility of a dominant party in competition law, it would be an obligation *ad absurdum*, since the dominant party could not, under any circumstances, prioritize its own competitive advantage and pursue its own benefit.[47] With the DMA, then, to use Reyna's phrase, the parallel *"what is legal offline should also be legal online"* cannot be held.[48] Here, then, the difference between

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[44] For instance, in order to find a compatible existence with the GDPR, the DMA (Article 5(2)) allows for the relaxation of certain prohibitions on the handling of client data. If an internet gatekeeper gives an end user a choice, it can obtain their consent to process, combine and cross-use their personal data. The consent of the other party to certain conduct is irrelevant in competition law for determining liability for a competition offence.

[45] This is only inaccurately and remotely the so-called leveraging abuse, the terms of which were set out by the General Court in its decision in *Google Search Shopping*, see Judgment of the General Court of 10 November 2021, *Google Inc. and Alphabet, Inc. v. European Commission (Google Search- Shopping)*, T-612/17, EU:T:2021:763.

[46] DMA also imposes the *"fair, reasonable, and non-discriminatory"* conditions/terms – see its Article 6 (paras 11, 12) that deals with the ranking of online search services and access to software application stores.

[47] This does not mean, however, that the concept of special responsiveness of the dominant undertaking *"not to allow its conduct to impair genuine undistorted competition on the common market"* cannot facilitate the application of Article 102 TFEU to cases of abuse in the digital economy, as suggested, for example, by F. Marty. Here it is only to say that, as an interpretative concept of the DMA, special responsibility would already go far beyond the meaning it has in the application of Article 102 TFEU. See for the concept itself the judgment of the Court of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin v. Commission*, 322/81, EU:C:1983:313 and for its modern interpretation: MARTY, F. Is Consumer welfare obsolete? A European Union Competition Perspective. *Prolegómenos*. 2022, Vol. 24, No. 47, pp. 55–78.

[48] REYNA, A. How to ensure Consumers get a fair share of the benefits of the digital economy? In: ŠMEJKAL, V. (ed.). *EU Antitrust: Hot Topics & Next Steps, Proceedings of the International Conference held in Prague on January 24–25, 2022*. Prague: Faculty of Law of the Charles University, 2022, p. 36.

the environment of large online platforms and competing sectors of the economy – at least in the DMA's understanding – shows up very markedly, or comes very close to the broader regulation of public utilities.

e) *The standard of the infringement and its proof*: Given the nature of *ex ante* regulation, which the DMA clearly and purposefully distinguishes from the *ex post* application of Article 102 TFEU, it is obviously a case of preferring rules over standards. In the application of Article 102, the Commission, or more definitively the Court of Justice, derived from general prohibition clauses certain standards (of predatory pricing, of rebates leading to exclusionary etc.) which they calibrated so that in specific cases the likeliness of exclusionary effect, i.e., a negative impact on competition and ultimately perhaps on consumers, could be demonstrated with sufficient probability. The DMA's divergence from such an approach is not surprising, however, as the need to "do it differently" vis-à-vis internet gatekeepers was a motive for its initiation and adoption from the outset.

DMA is not based on the general clause approach, it is about putting *per se* harmful actions in front of a bracket, or creating in advance specific content of commanded and forbidden behaviour of key players.[49] EU competition law also works in some cases with the prohibition of *per se* harmful conduct (cases of hardcore cartels, certain types of abuse of dominance, but ultimately also of prohibited mergers), but it always does so with regard to the specific circumstances of the case, it's at least reasonably foreseeable negative effects on competition, and not without exception. Unlike the application of Article 102 TFEU, the anticompetitive effect of DMA-regulated conduct, whether exploitative or exclusionary, is neither required nor demonstrated. Certain gatekeepers' conduct is presumed to be always detrimental to the fairness and contestability of markets, i.e., without further qualification, calibration, and case-specific proof.

Under the DMA, if a gatekeeper can cite mitigating circumstances that would suspend the application of an obligation against it or allow it to avoid a penalty for non-compliance, they do not consist of evidence of greater efficiency or, more generally, a clearly outweighing economic benefit to society. A gatekeeper may cite in its defence only the need not to endanger the integrity, security, and privacy of its services, the economic viability of its operation in the Union and reasons grounded in public health or public security. The Commission itself may suspend certain obligations of a gatekeeper in view of their potentially problematic impact on third parties, in particular SMEs and consumers (Articles 9–10 DMA).

4. THE POSSIBILITY OF RECONCILING BOTH APPROACHES IN THE NAME OF COHERENCE AND CONTINUITY

In view of the differences in the method of regulation, manifested most notably in the standards for proving breaches inherent in Article 102 TFEU and the DMA, the DMA is a genuinely new and different instrument, unprecedented in the application

[49] For a more detailed comparative analysis of the general clauses of competition law and the per se prohibitions of the DMA cf.: KOMNINOS, *The Digital Markets Act (DMA) goes live*; KOMNINOS, *The Digital Markets Act: How Does it Compare with Competition Law?*.

of competition law to date. It is more akin to the regulation known from the energy, telecommunications, or banking sectors than to competition protection (a similarity often mentioned in speeches by DG Competition officials). The finding of such a difference on the basis of a comparative analysis of the EC' Guidance on Article 82 and the DMA is not surprising, so the real benefit of this analysis must lie specifically in determining whether the value and target anchoring of the two instruments can bridge this gap and make the two instruments compatible in practice.

This bridging may arise from the following findings, for which support can be found in the above characteristics of the Commission's approach to the application of Article 102 TFEU and the regulation of large online platforms through the DMA:

a) Neither in the modernisation of EU competition law in the first decade of the 21st century, nor since, has a consistently consequentialist approach focused on consumer welfare prevailed in the application of Article 102 TFEU. The preservation of competitive pressures on the dominant undertaking that can be exercised by its as efficient competitors has always been present in decision-making, and the preservation of efficient competition has therefore preceded what the consumer could derive from it. The *preservation of competition as a process* based on rivalry and peer competitive pressures is also inherent in the DMA, although it calls this the contestability of markets.

b) The *fairness* of the competition process, somewhat overlooked in the modernisation of EU competition law in the wake of its effects, is back among the core values with the DMA's emphasis on the neutrality of gatekeepers' actions towards their business users and competitors. But fairness considerations have never entirely disappeared from the application of Article 102 TFEU either. The consistently invoked *competition on the merits* has always had a fairness component to it,[50] emphasising that what is not a victory based on better performance is suspect for competition law – although unlike the DMA (which identifies the ability of a competitor to challenge the gatekeeper on the *merits* of their products and services as a feature of contestability) it has yet to be shown that such an unfair victory also has anticompetitive effects.

c) Consumer interests in EU competition law have never been narrowed down to consumer welfare in the welfare economics' sense of the word, but rather to consumer well-being as a category encompassing both good price and sufficient choice from alternative offers, preservation of quality and incentives to innovate in these offers.[51] A consumer has also always meant any buyer, customer, or user, so that the intermediate addressees of the protection have always included business users. If the CJEU declared in 2011 about competition rules that *"*[t]*he function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest,*

[50] As a general benchmark of whether or not a dominant undertaking is competing in accordance with competition law, the competition on the merits is also referred to extensively in both of the General Court's judgments in *Google,* see Judgment of the General Court of 10 November 2021, *Google Inc. and Alphabet, Inc. v. European Commission (Google Search- Shopping)*, T-612/17, EU:T:2021:763 and Judgment of the General Court of 14 September 2022, *Google and Alphabet v. Commission (Google Android)*, T-604/18 EU:T:2022:541.

[51] See for instance in ERZACHI, A. *EU Competition law and the digital economy*. Brussels: BEUC, 2018.

individual undertakings, and consumers, thereby ensuring the well-being of the European Union",[52] it gave them a definition that could apply without change to the regulation introduced by the DMA.

d) Even most of the practices, for the time being (the regulation is open to continuous updating) specified in the DMA, have a clear link to the previous application of Article 102 TFEU to online platforms. The DMA therefore does not aim at something fundamentally different from the foreclosure of markets and the exploitation of its participants by the arbitrary behaviour of its largest market players than Article 102 TFEU. But it does so by different methods and instruments, which the EU hopes will be easier to apply and more comprehensive, whereas the application of Article 102 TFEU would take a long time and affect fewer cases, sometimes only exceptionally and still with an uncertain outcome. As Reyna sums it up: the DMA shares similar objectives as competition law, but the way of achieving these objectives is different… which makes the DMA in its very essence and nature different from competition law.[53]

One can therefore agree with Musil that the DMA is based on the twin objectives of promoting competition and fairness[54] and add that almost ideally the DMA would be consistent in values and objectives with the concept of competition protection that prevailed in the EU before its modernisation, but even after it is not fundamentally at odds with it. On the contrary, the overlaps are considerable and, if interpreted sympathetically, should not lead to a fundamentally different understanding of what and why Article 102 TFEU and the DMA protect. This is without having to go back to the pre-modernisation and pre-EC's Guidance on Article 82 days for the interpretation and application of Article 102 TFEU. In essence, it would be enough to rid the language of EU competition law (i.e., in particular the values and objectives emphasised in the explanations) of the references and terminology that welfare economics, with its emphasis on outcomes to be examined through the efficiency of the micro-level of the individual undertaking's conduct, has tried to impose on it. In fact, if the welfarist approach is followed consistently, the fairness of the competitive process would be completely irrelevant if the result is greater efficiency and its product in the form of surplus, which will eventually be enjoyed by the consumer. And this would, of course, be in stark contradiction to the DMA, which mentions efficiency neither as an objective, nor as a criterion, nor as a justification.

An interpretation of the competition law approach to Article 102 TFEU that is not revisionist, but only critical of the influence of welfare economics, and at the same time fully compatible with the values and objectives of the DMA, was offered by Behrens as

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[52] Judgment of the Court of 17 February 2011, *Konkurrensverket v. TeliaSonera Sverige AB*, C-52/09 EU:C:2011:83, para. 22.

[53] REYNA, A. Why the DMA is much nore than competition law (and should be treated as such). In: *Chillin' Competition* [online]. 16.6.2021 [cit. 2023-10-01]. Available at: https://chillingcompetition.com/2021/06/16/why-the-dma-is-much-more-than-competition-law-and-should-not-be-treated-as-such-by-agustin-reyna/.

[54] MUSIL, *c. d.*, p. 39. And e.g., Komninos directly claims that the *"DNA of the DMA is competition law"* and the proclaimed goals of one and the other are inextricably linked. See in KOMNINOS, *The Digital Markets Act: How Does it Compare with Competition Law?*, pp. 6–7.

early as 2015[55] (i.e., completely unrelated to the new instrument of regulation of internet gatekeepers). As a supporter of German ordoliberalism and its modern interpretation for the needs of contemporary economy and competition, his recommendations are based on the conviction that a restraint of competition is characterized by a limitation of consumers' choice which depends on the rivalry among a sufficient number of producers. Hence, from an ordoliberal point of view, a restraint of competition may be found wherever (1) the number of freely competing producers is artificially reduced in ways that do not result from the normal process of competition itself, and (2) where this reduces the scope of alternatives among which consumers may freely choose.

For Behrens, it is precisely *"the scope of alternatives among which consumers may freely choose"* that is the link between allocative and dynamic efficiencies and the protection of the process of effective competition, which must not be restricted by exclusionary behaviour. Efficiencies cannot in practice be reliably measured for each case and undertaking, so they must be understood as the result of effective competition, measurable through the freedom and breadth of consumer choice. The process of competition is therefore primary, not its outcome, although the process is best viewed through the outcome in the form of consumer choice. If the process is based on rivalry and remains open to new competition, then we get at the macro-level a system of competition where consumers can really and freely decide what they want, which will also ensure the maintenance of allocative and dynamic efficiency.

Thus, by rejecting welfare economics, to which EU competition law has not fully adhered even in the modernisation era, it is possible to formulate a basis of values and objectives common to the application of Article 102 TFEU and the DMA. Both instruments in the hands of DG Competition can protect the process of competition viewed through the lens of freedom of consumer choice. In the digital economy, this of course includes both the choice of multiple search results, purchase offers or payment options, as in the brick 'n' mortar economy, but also no lock-in, free multi-homing, data portability, and un-installation of pre-installed applications. Both targeting the anti-competitive effect of individual behaviour on the one hand and maintaining fair and contestable markets on the other can meet on this value base. They can remain complementary even if the former is enforced by methods and instruments inherent in the ex-post enforcement of legal standards and the latter in the ex-ante prohibition of certain categories of behaviour.

CONCLUSION

Going beyond what has already been written in the previous Chapter 4, it can be summarised that there is much more to be said for the value continuity of Article 102 TFEU and the DMA than for the conclusion of their different objectives.

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[55] BEHRENS, P. *"Consumer choice" or "consumer welfare"? Ordoliberlism as the normative basis of EU competition law* [online]. [Speech at Svatomartinská conference]. Brno: ÚOHS, 2015 [cit. 2023-10-01]. Available at: https://www.uohs.cz/cs/informacni-centrum/konference-a-seminare/uskutecnene-akce/svatomartinska-konference-2015/predstaveni-prednasejicich-a-jejich-prezentace.html.

The language of speeches and legal documents should not obscure what they have in common in terms of their target values. Nor is the proposed default value of preserving the process of open competition, of which free consumer choice is the product and benchmark, to be seen as some entirely new approach. Rather, it is just a more solid, ideologically more clearly anchored interpretive underpinning, which recalls something that has long been there and still is… in the name of the public interest, for individual undertakings and consumers, and overall, for the well-being of the European Union. Among other things, implicit in this conclusion is that, for cases of *ne bis in idem* litigation, the conviction of the identity of protected interests between this new regulation of internet gatekeepers and Article 102 TFEU should – notwithstanding the DMA's own assertion – prevail in the future. For the sake of maintaining coherence in the use of DG Competition's toolbox and orienting businesses as to what is required of them, this would certainly be appropriate.

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