EFFICIENCIES UNDER THE DIGITAL MARKETS ACT – IS THERE SPACE FOR *THE RULE OF REASON*?[1]

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Abstract: The aim of this paper is to evaluate, if competition-like efficiencies of European-style *rule of reason* shall apply also in the context of the *ex-ante* regulation by the DMA. The rationale of such consideration lies in the concept of proportionality of the EU regulation and the assumption that EU law cannot proscribe behaviour with beneficial outcomes and effects that does not have negative consequences on the internal market outweighing the positive effects.
The analysis is divided into three parts in this paper: position of the *rule of law* and the *per se* prohibition in the legal development of the EU competition law, the relationship between the DMA and competition law, including competition-based efficiencies brought in digital market cases and finally the *per se* prohibition included in the DMA.
The analysis of the development of the case law showed that in the EU competition law the principle of *per se* prohibitions was never accepted and the CJEU accepted justifications outside the text of the statutory exemptions. Even though the aim of the DMA may be the introduction of a *per se* prohibition in order to facilitate the Commission's enforcement, it cannot be surprising if the CJ EU will, in some case in the future, follow the path of the EU-style *rule of reason* in the framework of the DMA as well on the basis of proportionality principle. The lesson learned from application of *rule of reason* in the context of agreements restricting competition or as a specific form of *objective justification* in the context of abuse of dominant position does not undermine effectiveness of competition law. The *quasi per se* concept can satisfy both: it shows that it is not probable that such a behaviour will be allowed and at the same time it dodges proportionality objections because the prohibition is not, at least theoretically, absolutely, *per se*.

Keywords: digital markets; European Union law; Digital Markets Act; *per se* prohibition; economic efficiencies; *rule of reason*

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1. INTRODUCTION

In 2022, the Digital Markets Act (DMA)[2] was adopted as a political compromise between the European Union's (EU) legislatures and its final wording was significantly changed comparing to the Draft DMA[3] published in 2020 by the European Commission. The preparation and adoption of the DMA not only caught the attention of politicians, practitioners, and prospective addressees of the regulation, but was also broadly discussed in academia.[4] Not only the substantive content of the Draft DMA

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[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) OJ L 265, 12.10.2022, pp. 1–66.

[3] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (Text with EEA relevance) {SEC(2020) 437 final} – {SWD(2020) 363 final} – {SWD(2020) 364 final}, 15.12.2020, COM(2020) 842 final, 2020/0374(COD).

[4] PETIT, N. The Proposed Digital Markets Act (DMA): a Legal and Policy Review. *Journal of European Competition Law and Practice* [online]. 2021, Vol. 12, No. 7, pp. 529–541 [cit. 2023-03-09]. Available at: https://academic.oup.com/jeclap/article/12/7/529/6333059; e.g., BUDZINSKI, O. – MENDELSOHN, J. *Regulating Big Tech: from Competition Policy to Sector Regulation ?* [online]. Ilmenau Economics Discussion Papers [cit. 2023-03-09]. Available at: https://www.db-thueringen.de/servlets/MCRFile NodeServlet/dbt_derivate_00054484/Diskussionspapier_Nr_154.pdf; CABRAL, L. et al. *The EU digital markets act: a report from a panel of economic experts* [online]. Luxembourg: Publications Office of the European Union, 2021 [cit. 2023-03-09]. Available at: https://publications.jrc.ec.europa.eu/repository /handle/JRC122910; KERBER, W. Taming Tech Giants with a Per-Se Rules Approach? The Digital Markets Act from the 'Rules vs. Standard' Perspective. In: *SSRN* [online]. 2.6.2021 [cit. 2023-03-09]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861706; DI PORTO, F. et al. "I see something you don't see": a computational analysis of the Digital Services Act and the Digital Markets Act. *Stanford Journal of Computational Antitrust* [online]. 2021, Vol. 6, No. 1, pp. 84–116 [cit. 2023-03-09]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3780938; CENNAMO, C. – SANTALÓ, J. Value in Digital Platforms: the Choice of Tradeoffs in the Digital Markets Act. In: *SSRN* [online]. 1.7.2022, pp. 1–9 [cit. 2023-03-09]. Available at: https://papers.ssrn.com/sol3 /papers.cfm?abstract_id=4152113; COLANGELO, G. The European Digital Markets Act and Antitrust Enforcement: a Liaison Dangereuse. *European Law Review*. 2022, Vol. 47, No. 5, pp. 597–621; GEORGIEVA, Z. The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, Infused with Competition Principles. *European Papers* [online]. 2021, Vol. 6, No. 1, pp. 25–28 [cit. 2023-03-09]. Available at: https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2021_I_003 _Zlatina_Georgieva_00448.pdf; BANIA, K. Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause. *European Competition Journal* [online]. 2022, pp. 1–34 [cit. 2023-03-09]. Available at: https://www.tandfonline.com/doi/full/10.1080/17441056.2022.2156730; BLAŽO, O. The Digital Markets acts: between market regulation, competition rules and unfair trade practices rules. *Strani pravni zivot* [online]. 2022, Vol. 66, No. 1, pp. 117–136 [cit. 2023-03-09]. Available at: https://doi.org/10.5937/spz66-34993; LAMADRID DE PABLO, A. – BAYÓN FERNÁNDEZ, N. Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It. *Journal of European Competition Law and Practice* [online]. 2021, Vol. 12, No. 7, pp. 576–589 [cit. 2023-03-09]. Available at: https://academic.oup.com/jeclap/article/12/7/576/6340860; BENDIEK, A. The Impact of the Digital Service Act (DSA) and Digital Markets Act (DMA) on European Integration Policy Digital market regulation as one of five major digital policy projects of the EU 1 Annegret Bendiek Content. *Research Division*. 2021, Vol. 2, No. 2, pp. 1–15; VAN DEN BOOM, J. What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws. *European Competition Journal* [online]. 2022, pp. 1–29 [cit. 2023-03-09]. Available at: https://www.tandfonline.com/doi/full /10.1080/17441056.2022.2156728; LAROUCHE, P. – DE STREEL, A. The European Digital Markets Act: a Revolution Grounded on Traditions. *Journal of European Competition Law and Practice* [online]. 2021, Vol. 12, No. 7, pp. 542–560 [cit. 2023-03-09]. Available at: https://academic.oup.com /jeclap/article/12/7/542/6357796; https://doi.org/10.1093/jeclap/lpab066; ROBERTSON, V. Delineating Digital Markets under EU Competition Law: Challenging or Futile? *The Competition Law Review*. 2017,

underwent academic scrutiny but also the more theoretical implication of the legal basis of the DMA, relation to competition rules, allegiance to the *ne bis in idem* principle, as well as rigidity of the framework of the *ex-ante* regulation.

In the context of competition law, the DMA is understood as a complement to current regulatory framework set by competition rules. Under the DMA, Article 114 of the Treaty on the Functioning of the European Union (TFEU) is its only legal basis and therefore it does not rely on the possibility to expand enforcement of competition rules under Articles 103 and 352 TFEU. Comparing to directive on B2B unfair trade practices, the concept and notion of the DMA refer to concepts of protection of competition (the title refers to "contestable and fair markets"). On the other hand, the concept of "gatekeeper" under the DMA resembles network operators under sector regulations,[5] i.e., regulation of sector is failing or still non-existing.

The aim of this paper is to evaluate, if competition-like efficiencies of European-style *rule of reason* shall apply also in the context of the *ex-ante* regulation by the DMA. The rationale of such consideration lies in the concept of proportionality of the EU regulation and the assumption that the EU law cannot proscribe behaviour with beneficial outcomes and effects that does not have negative consequences on the internal market outweighing the positive effects.

The analysis is divided into three parts in this paper: position of the *rule of law* and *per se* prohibition in the legal development of the EU competition law, the relationship between the DMA and competition law, including competition-based efficiencies brought in digital market cases, and finally the *per se* prohibition included in the DMA.

Vol. 12, No. 2, pp. 131–151; PODSZUN, R. – BONGARTZ, P. – LANGENSTEIN, S. Proposals on how to improve the Digital Markets Act. In: *SSRN* [online]. 18.2.2021 [cit. 2023-03-09]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788571; IBÁÑEZ COLOMO, P. The Draft Digital Markets Act: a Legal and Institutional Analysis. *Journal of European Competition Law & Practice* [online]. 2021, Vol. 12, No. 7, pp. 561–575 [cit. 2023-03-09]. Available at: https://academic.oup.com/jeclap/article/12/7/561/6357803; CHIRICO, F. Digital Markets Act: a Regulatory Perspective. *Journal of European Competition Law and Practice* [online]. 2021, Vol. 12, No. 7, pp. 493–499 [cit. 2023-03-09]. Available at: https://academic.oup.com/jeclap/article-abstract/12/7/493/6328829; DE STREEL, A. et al. Making the digital markets act more resilient and effective. In: *Centre on Regulation in Europe* [online]. 26.5.2021 [cit. 2023-03-09]. Available at: https://cerre.eu/publications/european-parliament-digital-markets-act-dma-resilient-effective/.

[5] LAROUCHE – DE STREEL, *c. d.*, p. 544.

2. THE *RULE OF LAW* IN COMPETITION LAW AS A CONCEPT IN COMPETITION LAW AND *PER SE* PROHIBITION[6]

2.1 THE PRE-HISTORY AND HISTORY OF *RULE OF LAW* AND *PER SE* PROHIBITION IN THE ASSESSMENT OF AGREEMENTS RESTRICTING COMPETITION

The *rule of reason* in competition law can be traced back to United States antitrust law based on § 1 of the Sherman Act. The rule of reason appeared in American case law in 1911 in the *Standard Oil Co. of New Jersey* case.[7] According to the Supreme Court, Congress did not intend by enacting the Sherman Act to make all agreements that might worsen competition illegal, because many ordinary commercial agreements have a similar effect. The procompetitive and anticompetitive assessment of an agreement was articulated by the Supreme Court in 1918 in the *Chicago Board of Trade* case,[8] where the test of the legality of an agreement is whether the restraint merely regulates and perhaps thereby improves competition, or whether it may stifle or even destroy competition. In order to resolve this question, the court must consider: (1) the facts inherent in the type of trade to which the restraint relates; (2) the conditions prior to and after the restraint was applied; (3) the nature of the restraint and its effect, actual or potential; (4) the history of the restraint; (5) the harmful effect; (6) the reason for adopting the legal instrument; and (7) the objective or purpose pursued. However, some agreements, because of their content or nature, cannot be examined in light of the rule of reason. A clear division of agreements was made by the Supreme Court in *National Soc. of Professional Engineers*,[9] according to which the first category of agreements consists of those that are so clearly anticompetitive by their nature and their inevitable consequences that it is not necessary to scrutinize the industry in question to determine their unconscionability – they are illegal *per se*. The second group consists of those agreements whose effect on competition can be determined only by examining the facts inherent in the type of trade in question, the history of the restraint and the reasons for the restraint in question. Thus, case law in American competition law has established the doctrine of the *rule of reason* as a method of assessing each agreement in its context by balancing the anticompetitive and procompetitive effects.

The situation for European competition law is different from the US regime because, while § 1 the Sherman Act does not provide any legal exception and therefore the courts have been forced to find some rules of interpretation that would allow a less strict interpretation of the prohibition, European law does contain a legal exception to the prohibition by Article 101(1) TFEU in Article101(3) TFEU.

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6 This part is partially benefiting from publication in Slovak BLAŽO, O. Rule of Reason, pridružené obmedzenia a systém výnimiek v príprade dohôd obmedzujúcich súťaž v európskom a slovenskom práve [Rule of Reason, associated restrictions and the system of exceptions to restrictive agreements in European and Slovak law]. *Acta Facultatis Iuridicae Universitatis Comenianae*. 2012, Vol. 12, No. 1, pp. 17–81.

7 221 U.S. 1 (1910); *Standard Oil Co. of New Jersey v. United States*.

8 246 U.S. 231 (1918); *Chicago Board of Trade v. United States*.

9 135 U.S. 679 (1978); *National Soc. of Professional Engineers v. United States*.

The existence and scope of the *rule of reason* has been the subject of controversy in European competition law, both among theorists and in individual proceedings before the European institutions.

If the *rule of reason* is regarded as a principle which is the opposite of prohibition *per se*, there is no other conclusion than that the rule of reason applies in European competition law. Therefore, if the *per se* prohibition does not apply to all agreements which have the object or effect of endangering competition, that fact is itself a manifestation of the rule of reason, since it considers the rationality of sanctioning the agreement in relation to the rationality of the restrictive agreement. Providing exemption from the application of Article 101(1) TFEU in Article 101(3) TFEU by an economic assessment of the harmfulness of agreements rather than a formal assessment of the conduct of undertakings, can be regarded as a manifestation of *the rule of reason* in European law. However, directly linking the concepts of the US antitrust regime to EU competition law can be misleading and several commentators pointed to these divergences, e.g., the difference between the US *rule of reason* and the application of Article 101(3) TFEU is that the US rule of reason allows agreements that are not prohibited *per se* to be justified, whereas Article 101(3) TFEU allows all agreements, even those that are anticompetitive, to be exempted from the prohibition (Waelbroeck),[10] Article 101(3) TFEU refers to the preservation of residual competition, it also permits a substantial degree of restraint, thus falling outside the categories of the Sherman Act (McLachlan and Swann),[11] the existence of block exemptions issued to facilitate the application of Article101(3) TFEU, whereby the *rule of reason* is always applied on a case-by-case basis (Fejø).[12]

Indeed, the above arguments support the conclusion that the US *rule of reason* established by case law is not identical to the procedure envisaged by Article 101(3) TFEU. However, that fact cannot alter the postulation that, if the *rule of reason* is regarded as a general principle of law and not as a specific legal practice, the *rule of reason* as a requirement to assess an agreement according to its actual or potential consequences or its purpose, applies in European law and Article 101(3) TFEU is one of its manifestations. Most importantly, by not applying the *per se* prohibition in European law as it does in US law, the scope of the *rule of reason* is wider than in US law.

Even by not applying *ex lege* an unconditional *per se* prohibition to any category of agreements, and this is not apparent from the case law either, it can be said that European competition law is governed exclusively by the *rule of reason* principle.

First, it does not follow from the wording of Article 101 TFEU that certain acts are *per se* prohibited. All conduct must equally satisfy the conditions of Article 101(1) TFEU, and the fact that some of the most common conduct is given as an example and the alternative in the part of the sentence defining the prohibition of agreements: 'for an object or effect' do not alter that. At the same time, an agreement prohibited *per se*

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[10] FEJØ, J. *Monopoly law and market: studies of EC Competition Law with US American Antitrust Law as a frame of reference and supported by basic market economics*. Deventer, Boston: Kluwer Law and Taxation Publishers, 1990, p. 119.

[11] Ibid., p. 119.

[12] Ibid., p. 119.

would not be eligible for the exemption under Article 101(3) TFEU. However, the conditions of Article101(3) TFEU are given in general terms and apply to all agreements.

Second, there is no provision of secondary legislation which determines the category of agreements which are subject to the prohibition under Article101(1) TFEU in all circumstances.

Third, the existence of a *per se* prohibition has not been confirmed by the case law of the courts. In the *Société Technique Minière* case[13] the Court held that agreements under which a manufacturer entrusts a single distributor with the sale of its products in a specified territory are not automatically covered by the prohibition in [now Article 101(1) TFEU] and the German version having used the term *per se*.

Although it can be concluded from the above analysis that European law does not recognise *per se* prohibited practices, *hard core* cartels are almost always prohibited. Hard core restrictions:

1. are exempted from the *de minimis* doctrine and are therefore prohibited regardless of the market shares of the undertakings involved;
2. they have the object of restricting competition and therefore there is no need to examine their effect; and
3. they are grounds for withdrawal of the block exemption or for non-application of the block exemption.

While the Commission states in its Notice[14] that no agreements are a priori exempted from the scope of Article101(3) TFEU and thus rejects the existence of a *per se* prohibition rule, it further acknowledges that severe restrictions such as those blacklisted and identified as hard-core restrictions in the Commission's Communications and Guidelines are unlikely to qualify under Article 101(3) TFEU. Hard core restrictions by their very nature generally do not satisfy the first two conditions of Article101(3) TFEU and thus neither confer an economic benefit nor benefit customers and are usually not even necessary.

Summing up, considering a category of hard-core restrictions which may be considered *quasi per se* prohibited is not a manifestation of the limitation of the *rule of reason*, but of its application, since such agreements are not *per se* prohibited, but only barely justifiable.

However, this discussion seems superfluous from a practical point of view, since the US rule of reason constitutes an exemption from the prohibition despite the absence of a legal exception *expressis verbis* stated in the legislation, but EU law contains a direct exception in Article 101(3) TFEU. More important, both from a theoretical point of view and from a practical point of view, appears to be the assessment of the agreement under Article 101(1) TFEU and whether the rule of reason is also at play in this analysis. Moreover, similar analysis is relevant for Article 102 TFEU that does not contain any derogation.

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[13] Judgment of 30 June 1966, *Société Technique Minière v. Maschinenbau Ulm*, C-56/65, EU:C:1966:38.
[14] Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, pp. 97–118).

2.2 THE JUDICIAL BATTLE OVER THE RULE OF REASON IN THE ASSESSMENT OF AGREEMENT RESTRICTING COMPETITION

Proponents[15] of the application of the rule of reason concede that such a rule has never been explicitly adjudicated, but its features can be found in particular in the judgments of *Société Technique Minière*, *Metro*,[16] *Nungesser*,[17] *Pronuptia*.[18] Opponents[19] of the application of a principle similar to the US *rule of reason* point in particular to the *Consten and Grundig*[20] judgment and, in particular, to the *Métropole*[21] judgment, in which the Court expressly rejected the existence of a rule of reason in European competition law.

In *Pronuptia*, the Court compared the effect of strengthening inter-brand competition as the franchisor expands the supply of its goods or services without additional investment, thereby increasing competition, and the effect of suppressing intra-brand competition, which is nevertheless justified and counterbalanced by an increase in inter-brand competition, provided that it is only aimed at protecting the franchisor's know-how and the support provided and does not entail market sharing. Similarly in *Nungesser*, the Court confirmed that restriction of intra-brand competition can be outweighed by an increase in inter-brand competition as long as there is no territorial division of markets. In *Remia*, the Court held that non-compete clauses between the seller and the buyer of an undertaking may have a positive effect on competition because they increase the number of undertakings on the market, but in order not to be prohibited under [now Article 101(1) TFEU] they must contain only the measures necessary to effect the transfer and their duration must also be limited to that purpose.

In *Gøttrup-Klim*,[22] the Court recognises that, in a market where the price of goods depends on the quantity demanded, the activities of a purchasing association, depending on the number of its members, may constitute a counterweight to the purchasing power of large producers and thus pave the way for more effective competition; this may, however, be jeopardised by the membership of a member of the purchasing association in question in another competing purchasing association, since this will jeopardise the very functioning of the association and weaken its purchasing power. The prohibition of dual membership does not therefore necessarily imply a restriction of competition

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15 E.g., VOGELAAR, F. O. W. – STUYCK, J. – REEKEN, B. L. P. VAN. *Competition law in the EU, its member states and Switzerland*. The Hague, Deventer: Kluwer Law International, W. E. J. Tjeenk Willin, 2002, p. 30; NAZZINI, R. Article 81 EC between time present and time past: a normative critique of "restriction of competition" in EU law. *Common Market Law Review* [online]. 2006, Vol. 43, No. 2, pp. 497–536 [cit. 2023-03-09]. Available at: https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/43.2/COLA2006005.

16 Judgment of 25 October 1977, *Metro v. Commission*, C-26/76, EU:C:1977:167.

17 Judgment of 8 June 1982, *Nungesser v. Commission*, C-258/78, EU:C:1982:211.

18 Judgment of 28 January 1986, *Pronuptia*, C-161/84, EU:C:1986:41.

19 E.g., FEJØ, Monopoly law and market: studies of EC Competition Law with US American Antitrust Law as a frame of reference and supported by basic market economics, p. 115; WHISH, R. *Competition Law*. London: LexisNexis, 2003, pp. 125–126.

20 Judgment of 13 July 1966, *Consten and Grundig v. Commission of the EEC*, C-56/64, EU:C:1966:41.

21 Judgment of 18 September 2001, *M6 and Others v. Commission*, T-112/99, EU:T:2001:215.

22 Judgment of 15 December 1994, *Gøttrup-Klim and Others Grovvareforeninger v. Dansk Landbrugs Grovvareselskab*, C-250/92, EU:C:1994:413.

within the meaning of [now Article 101(1) TFEU] and can even have a positive effect on competition. Obviously, the restrictions imposed on the members of an association by its statutes must be limited to what is necessary to ensure the proper functioning of the cooperative function and the maintenance of purchasing power vis-à-vis producers.

In all of the above cases, the legality of the agreement was assessed not on the basis of the exemption under [now] Article 101(3) TFEU, but only on the basis of an assessment of whether the conditions of [now] Article101(1) TFEU were met in conjunction with the objectives and aims of the [now] Union. While in the case of Article 101(3) TFEU the net negative effect of the agreement is outweighed by the technological efficiencies from which consumers partly benefit and residual competition is preserved, in the abovementioned cases there was a net positive effect of the agreement itself where competition or net consumer welfare was ultimately increased and therefore the agreement did not fall under the prohibition of Article 101(1) TFEU at all and there was no need to justify it on the basis of Article 101(3) TFEU. The *European Night Services*[23] synthetized abovementioned approaches: *"*[…] *it must be borne in mind that in assessing an agreement under Article 85(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned* […]*, unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets* […]*. In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1).*"[24]

In *Métropole* the Court of the First Instance (CFI) put to the end any further discussion on weighting positive and negative effects of an agreement within the scope of [now] Article 101(1) TFEU and out of the reach of [now] Article 101(3) TFEU: *"[72]* […] *in various judgments the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful … [74]* […] *It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed* […]*. Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article 85(1) of the Treaty.* […] *[107] As regards the objective necessity of a restriction, it must be observed that inasmuch as,* […] *the existence of a rule of reason in Community competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of Article 85(3) of the Treaty."*

Although the CFI rejected *rule of reason* assessment within [now] Article 101(1) TFEU it accepted the concept of *ancillary restraints* that linked to the main operation or transaction and thus their legality is assessed together with that main operation, provided they are necessary and proportionate to that main operation. The type of the

[23] Judgment of 15 September 1998, *European Night Services and Others v. Commission*, T-374/94, EU:T:1998:198.

[24] *European Night Services*, para. 136.

ancillary restrains can be identified in the block exemption regulations and merger regulation and their accompanying notices and guidelines as well as in the case law. It can be noticed that assessment of the *ancillary restrains* resembles the proportionality test described in the *Cassis de Dijon* case.[25] However, the suitability or facilitating character of a measure are not sufficient or confirming the *ancillary* character of a restriction but *"*[it] *is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question*. […] *the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary."*[26]

Thus, even adverse effects for the functioning of an undertaking in case of non-application of the restriction in issue does mean that the restraint is indispensable and "objective necessary" if the transaction can pursue without that restriction.[27]

The concept of the *ancillary restraints* can be expanded through *"regulatory ancillary restraints"*, i.e., restraints of competition that are necessary to pursue objectives stemming from other policies that competition law and are linked to protection of legal interests covered by other legal regulation. This concept was introduced in the *Wouters* case where restrictions found inherent to pursuing the integrity of legal professions.[28]

2.3 *RULE OF REASON* AND ABUSE OF DOMINANT POSITION

The legal regulation of the prohibition of abuse of a dominant position (Article 102 TFEU) is in a different situation compared to the prohibition of agreements restricting competition. Compared to agreements restricting competition, no exemption is directly provided in the wording of Article 102 TFEU. However, the concept of *"objective justification"* can allow the behaviour of a dominant firm to escape from consequences of violation of Article 102 TFEU. On the other hand, this concept was more volatile[29] than the concepts related to the agreements restricting competition until the European Commission cemented it in its Communication of 2009.[30] In fact, the European Commission mirrored Article 101(3) TFEU *mutatis mutandis* in the terms of abuse of a dominant position. Finally, the conditions for *objective justification* were summarized by the CJ EU in *Post Danmark: "[40]* […] *it is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article 82 EC* […]. *[41] In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary* […], *or that the exclusionary*

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[25] Judgment of 20 February 1979, *Rewe v. Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42.

[26] Judgment of 11 September 2014, *MasterCard and Others v. Commission*, C-382/12 P, EU:C:2014:220, para. 91.

[27] *MasterCard*, para. 94.

[28] Judgment of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, para. 97.

[29] ROUSSEVA, E. The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC? *Competition Law Review*. 2006, Vol. 2, No. 2, p. 27.

[30] 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 (OJ C 45, 24.2.2009, pp. 7–20).

effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers […]. *[42] In that last regard, it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely."*[31]

Thus, the *objective justification* mirrors the content of the exemption by Article 101(3) TFEU but resemble legal techniques of the *rule of reason* based on Article 101(1) TFEU, i.e., if criteria for *objective justification* are met, the practice does not fall into the scope of the prohibition by Article 102 TFEU.

2.4 LESSONS LEARNED FROM THE *RULE OF REASON* STORY

The evaluation of possible exemptions from the prohibitions imposed by competition law as well as the identification of practices that do not fall into the scope of prohibitions themselves is linked with the overall concept of competition law and its purpose. The EU model of competition law was not developed into the form of a rigid market regulation or social engineering but accepts market players with different market power and also accepts *reasonable* restrictions of freedom of other participants of market, including customers (in broader sense).

The discussion on application of the US-style *rule of reason* within the context of agreements restricting competition entailed in its partial refusal in the terms of Article 101(1) TFEU and confirmation of the effectiveness and broad interpretation of Article 101(3) TFEU, but at the same time of confirmation of the concept of ancillary restraints, including *regulatory ancillary restraints*. These latter concepts allow practices restricting competition to escaping from prohibition if they are indispensably attached to the legal operation or enforcement of legitimated interest recognized by law.

On the other hand, the *rule of reason* out of the scope of any exemption stipulated by law was fully introduced in the context of abuse of dominant position.

The system of legal (statutory) exceptions and *rule of reason (objective)* justification in EU competition law is coherent with the whole system of the rules set for the functioning of the internal market of the EU where statutory exceptions, or more precisely allowed restrictions, are complemented by justified proportionate restrictions necessary to achieve mandatory requirements.

The DMA as a form of regulation on the internal market should not outflow from this *rule of reason* framework in order not to be challenged due to the test of proportionality of the EU regulation. This requirement is much more compelling owing to the legal basis of the DMA: Article 114 TFEU, i.e., harmonization of laws on the internal market and removing obstacles of. Therefore, a quite lengthy storyline of the consideration of the principle of *rule of reason* and rebuttal of any *per se* prohibition principle can give a lesson for the application of the DMA. The history of considering the *rule of reason* concept and tackling the *per se* concept shows that the Commission as well the CJ EU

[31] Judgment of 27 March 2012, *Post Danmark*, C209/10, EU:C:2012:172.

were not only reluctant to accept existence of the *per se* prohibitions in EU competition law, but they directly refused its application.

3. IS THE DMA A COMPETITION RULE?[32]

In general, the relation of the DMA to competition rules is crucial for several reasons. First, the internal market, in general, is the shared competence of the EU and the Member States, while protection of competition on the internal market is subject to the exclusive competence of the EU. Secondly, possible sanctions under the DMA and sanctions for infringements of competition rules can raise the question of violation of *ne bis in idem* safeguard as embedded in Article 50 of the Charter of Fundamental Rights of the European Union. Thirdly, full compliance with the DMA requirements can create a safe harbour for gatekeepers, or they can still face investigation and sanctions for violation of competition rules. For the purposes of the analysis presented by this paper, the relationship between the DMA and competition law is relevant also for the transfer of the principles of the EU-style *rule of reason*.

The DMA proposal was one of the answers to an insufficient legal framework created by the EU competition rules to tackle the market strength of digital platforms on the one hand and support the innovation, on the other.[33] This approach of tackling competition issues by "non-competition" law was also underlined by the Commission in its Communication "A competition policy fit for new challenges"[34] The Commission refers to its ongoing investigations on gatekeepers and competitive concerns regarding possible abuse of a dominant position committed by those undertaking. The proposal of the DMA was described as one of the solutions of these competition concerns: *"Once adopted, the Digital Markets Act and competition enforcement will work in tandem: the Digital Markets Act will set ex ante rules applicable to designated gatekeepers to ensure contestable and fair digital markets, while competition rules will continue to be enforceable ex post on a case-by-case basis."* Thus, the solution based on the DMA is enshrined in the topic of the Commission's Communication labelled "Keeping the market power of dominant platforms in check".

3.1 THE LEGAL BASIS FOR THE DMA AND THE LEGAL HIERARCHY

Although the DMA resembles competition rules in too many instances, including procedural rules or level of fine for infringement are drafted based on Regulation 1/2003 and obligations of gatekeepers reflect the main antitrust investigations

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[32] This part is partially based and benefitting from BLAŽO, *The Digital Markets acts…*

[33] KALESNÁ, K. – PATAKYOVÁ, M. T. Digitálne platformy: súťažné právo verzus regulácia ex ante [Digital platforms: competition law versus ex ante regulation]. *Právny obzor*. 2021, Vol. 104, No. 1, p. 37; LAROUCHE – DE STREEL, *c. d.*, p. 545.

[34] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A competition policy fit for new challenges. COM/2021/713 final.

vis-à-vis digital platforms during the recent years.[35] The necessity of ex-ante regulation (comparing to ex-post evaluation of Article 101 and 102 TFEU) is not a convincing argument for removing the DMA from the scope of competition rules because merger control is also an ex-ante competition measure. Nevertheless, the Commission chose Article 114 TFEU as a sole legal basis and co-legislatures accepted it.

Article 114 TFEU cannot be used as a legal basis for harmonisation if there is a specific tool stipulated in the treaties ("Save where otherwise provided in the Treaties…" para. 1 thereof). Although the Damages Directive[36] is based on the dual legal basis, as for coherence of public enforcement (Article 101 et seq. TFEU) and private enforcement (based primarily on private law of the Member States), using Article 114 TFEU as a single legal basis simply out manoeuvres EU competition rules as a legal basis for the DMA. Article 114 TFEU is inapplicable in the areas of the EU's exclusive competence since it presupposes at least the possibility of the existence of national rules. Moreover, the provisions of EU competition law (Article 101 to 103 TFEU) are not even mentioned as a legal basis for the DMA and Larouche and De Streel stress that the Commission put the DMA outside of the competition law framework on substantive reasons, although being rather unconvincing and the substantive gap between competition law and the DMA is narrower than the Commission tries to show.[37] There can be seen a link with several aspects of competition law: previous decision-making practices of the Commission at digital markets where the Commission had no difficulty to define markets and dominant position at those markets,[38] aim to achieve openness and a competitive market and measures against foreclosure of a market. Also, the structure of remedies, interim measures as well as fines seem to be copied from competition rules (Article 18 et seq. DMA).[39]

The question, whether the DMA shall be an instrument of competition law or not is not purely theoretical, and it is relevant in the context of *ne bis in idem* safeguard and also regarding the question, whether fulfilment all obligations stipulated in the DMA provides a safe harbour for the gatekeeper.

The final text of the DMA in its Recital 10 tries to be clear that the DMA is no competition rule: *"*[…] *this Regulation aims to complement the enforcement of competition law…"* Recital 11 is even much more explicit: *"This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition*

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35 BOTTA, M. Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila. *Journal of European Competition Law and Practice* [online]. 2021, Vol. 12, No. 7, p. 504 [cit. 2023-03-09]. Available at: https://academic.oup.com/jeclap/article-abstract/12/7/500/6295374?redirectedFrom=fulltext.

36 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, pp. 1–19).

37 LAROUCHE – DE STREEL, *c. d.*, pp. 545–549.

38 Microsoft (Case COMP/AT.37792) Commission Decision of 24 March 2004; Microsoft (Tying) (Case COMP/AT.39530) Commission Decision of 16 December 2009; Google Search (Shopping) (Case COMP/AT.39740) Commission Decision of 27 June 2017; Google Android (Case COMP/AT.40099) Commission Decision of 18 July 2018.

39 Compare Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pp. 1–25).

on any given market, as defined in competition-law terms, […] *This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application."*

This "separation" from competition law envisaged in the preamble was reflected in Article 1(6) DMA, since the DMA should be applied without prejudice to the application:

a) Articles 101 and 102 TFEU;
b) national rules prohibiting anticompetitive agreements, decisions by associations of undertakings, concerted practices, and abuses of dominant positions;
c) national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers; and
d) Council Regulation (EC) No 139/2004[40] and national rules concerning merger control.

While Article 6(1) DMA left the EU competition rules legally untouched, it outmanoeuvred any national competition rules covering unilateral practices that can be more lenient than *ex-ante* regulation by the DMA [contrary, Article 1(5) DMA prohibits more strict *ex-ante* national regulation of gatekeepers).

The implication for the existence of a "safe harbour" appears to be obvious. Even the fulfilment of all obligations under DMA does not absolve a gatekeeper from due respect to competition rules under Article 101 and 102 TFEU. The DMA cannot serve as a "block exemption" to Article 101 or 102 TFEU since it is not based on Article 103 TFEU that provides legal basis for such an exemption and enforcement rules for Article 101 TFEU. On the other hand, following one legal rule cannot constitute a violation of another rule. In the sphere of competition law, the judgment in the *CIF* case[41] consolidates this contradiction based on the principle of rule of law. Indeed, the *CIF* case dealt with the contradiction between national and Community competition rules. However, its conclusions[42] may be useful in the DMA case as well as *mutatis mutandis*: *"Where* [gatekeeper] *engage in conduct contrary to* [Article 101 or 102 TFEU] *and where that conduct is required or facilitated by* [the DMA] [the Commission]*, one of whose responsibilities is to ensure that* [Article 101 or 102 TFEU] *is observed:*

- *has a duty to disapply the* [DMA];

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40 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

41 Judgment of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430.

42 *"Where undertakings engage in conduct contrary to Article 81(1) EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority, one of whose responsibilities is to ensure that Article 81 EC is observed:*
- *has a duty to disapply the national legislation;*
- *may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was required by the national legislation;*
- *may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard;*
- *may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted;* […]*"*

- *may not impose penalties in respect of past conduct on the* [gatekeeper] *concerned when the conduct was required by the* [DMA];
- *may impose penalties on the* [gatekeeper] *concerned in respect of conduct subsequent to the decision to disapply the* [DMA]*, once the decision has become definitive in their regard;*
- *may impose penalties on the* [gatekeeper] *concerned in respect of past conduct where the conduct was merely facilitated or promoted by the* [DMA]*, whilst taking due account of the specific features of the legislative framework in which the undertakings acted."* [the text in brackets replaces the text of *CIF* ruling]

Hence, in this particular case, a possible violation of Article 101 or 102 TFEU can lead to misapplication of the provision of the DMA on obligations of a gatekeeper on the one hand, and to the impossibility to impose a fine according to Regulation (EC) No 1/2003. This imaginable outcome also flows from the "constitutional" hierarchy between Article 101 and 102 TFEU (primary law) and the DMA (secondary law). It must be admitted that the situation described above is more theoretical compared to a situation when a violation of the DMA constitutes, at the same time, an infringement of Article 101 or 102 TFEU. This paper will not tackle the *ne bis in idem* issue, that can be partially solved by case law in *Slovak Telekom*,[43] *Toshiba*,[44] *Showa Denko*,[45] *Powszechny Zakład Ubezpieczeń na Życie*,[46] *Nordzucker and Others*,[47] and *bpost*.[48]

The CJ EU had to deal with the hierarchy of competition rules and sectoral regulation[49] in several cases. In the *Telefónica* case, it rejected any consideration of previous regulatory decision of national authority since *"*[…] *the Commission's implementation of Article 102 TFEU is not subject to any prior consideration of action taken by national authorities"*.[50] The previous intervention of national regulatory authority is definitely irrelevant in cases when the authority merely encourages an undertaking to engage in still autonomous behaviour that leads to infringement of EU competition rules,[51] since the undertaking in dominant position *"have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market"*.[52] However, in *Deutsche Telekom* cases[53] the CJ EU confirmed the relevance of the prior regulatory decision and tis different approach was confirmed in *DB Station & Service*[54] case in

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43 Judgment of 25 February 2021, *Slovak Telekom*, C-857/19, EU:C:2021:139, para. 41.
44 Judgment of 14 February 2012, *Toshiba Corporation and Others*, C 17/10, EU:C:2012:72, para. 97.
45 Judgment of 29 June 2006, *Showa Denko v. Commission*, C-289/04 P, EU:C:2006:431.
46 Judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283.
47 Judgment of 22 March 2022, *Nordzucker and Others*, C-151/20, EU:C:2022:203.
48 Judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202.
49 However, there were differencies form competition law identified: BEEMS, B. The DMA in the broader regulatory landscape of the EU: an institutional perspective. *European Competition Journal* [online]. 2022, p. 14 [cit. 2023-03-09]. Available at: https://www.tandfonline.com/doi/full/10.1080/17441056.2022.2129766; IBÁÑEZ COLOMO, *c. d.*, p. 569.
50 Judgment of 10 July 2014, *Telefónica and Telefónica de España v. Commission*, C-295/12 P, EU:C:2014:2062, para. 135.
51 Judgment of 14 October 2010, *Deutsche Telekom v. Commission*, C-280/08 P, EU:C:2010:603, para. 83.
52 Judgment of 9 November 1983, *Michelin v. Commission*, 322/81, EU:C:1983:313, para. 57.
53 Judgment of 14 October 2010, *Deutsche Telekom v. Commission*, C280/08 P, EU:C:2010:603, judgment of 25 March 2021, *Deutsche Telekom v. Commission*, C-152/19 P, EU:C:2021:238.
54 Judgment of 27 October 2022, *DB Station & Service*, C-721/20, EU:C:2022:832.

which the court required prior evaluation of the case by the regulatory body in order to pursue private enforcement of competition law.

3.2 WHAT IF THE DMA WAS A COMPETITION RULE?

As in some of its prohibitions the DMA mirrors previous or envisaged practice of the Commission in the field of abuse of dominance, the question is whether it also included the Commission's efficiency test employed in antitrust enforcement.

The self-preferencing ban enshrined in Article 6(5) DMA[55] apparently followed *Google Search (Shopping)* case.[56] Google suggested five justifications of its behaviour. The Commission refused all five possible justifications, however, some of them refused to accept as such and some of them refused on the basis that Google failed to prove its claims.

In *Google Search (Shopping)* case the Commission accepted, that an undertaking can apply adjustment mechanisms (para. 661) categories of specialised search results, such as shopping results, in its general search results pages when it determines that they are likely to be relevant or useful to a query (para. 662) but these practices cannot be discriminatory vis-à-vis non-platform products. However, regarding the expectations of consumers, the Commission concluded that *"*[…] *Google has provided no evidence to demonstrate that users do not expect search services to provide results from others…"* (para. 663). Since the wording is different from the previous *quasi per se* statements, does it mean that if Google succeeded in proving of the requests of the consumers, the Commission was ready on the basis that *"a requirement on Google to treat competing comparison shopping services no less favourably than its own comparison shopping service within its general search services does not generally prevent it from monetising its general search results pages"* (para. 664). Thus, contrary to this conclusion, would be the restriction non-abusive if it was the only way for monetising its general search results? And finally, the Commission argued that Google had failed to demonstrate that it cannot use the same underlying processes and methods in deciding the positioning and display of the results of its own comparison shopping service and for those of a competing comparison shopping services (these are technically feasible (para. 671). Again, on contrary, could be the technical unfeasibility a possible justification?

The obligation not to restrict, technically or otherwise, the ability of end users to switch between, and subscribe to, different software applications and services that are accessed using the core platform services of the gatekeeper, including as regards the choice of Internet access services for end users [Article 6(5) DMA] was inspired by the *Google Android* case.[57] In the part on tying relating to its proprietary mobile apps, the Commission rejected objective justifications by Google on following grounds: (1) Google had not demonstrated that the tying of the Google Search app with the Play

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[55] *"The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking."*

[56] Google Search (Shopping) (Case COMP/AT.39740) Commission Decision of 27 June 2017.

[57] Google Android (Case COMP/AT.40099) Commission Decision of 18 July 2018.

Store and the tying of Google Chrome with the Play Store and the Google Search app is necessary to monetise its investment in Android and its non-revenue generating apps (para. 995); (2) Google had not demonstrated that the tying of the Google Search app with the Play Store and the tying of Google Chrome with the Play Store and the Google Search app is necessary in order to provide a consistent out-of-the-box experience for users (para. 1000); and (3) Google had not demonstrated that the tying of the Google Search app with the Play Store and the tying of Google Chrome with the Play Store and the Google Search app is necessary to avoid the need for Google to charge OEMs a fee for the Play Store (para. 1004). Hence, similarly to previous analysis regarding *Google Search (Shopping)*, in the contrary situation described in decision, would it be possible for Google to escape from prohibition if it had proved the necessity of tying (1) to monetise its investment in Android and its non-revenue generating apps; (2) to provide a consistent out-of-the-box experience for users; or (3) to avoid the need for Google to charge OEMs a fee for the Play Store?

Based of aforementioned notes, its apparent that the Commission, at least theoretically, accepted the possibility that also "gatekeeper" can escape from prohibition of abuse of dominance in the case of proving *objective justification,* even in the practices corresponding to the DMA's prohibitions.

4. THE DMA AND *PER SE* PROHIBITION

Recital 10 made it clear that the DMA regime will not accept any competition-based justification due to efficiency or objective necessity of restrictions: *"*[I]*t should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and* ***which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question,*** *and to national rules concerning merger control. However, the application of* ***those rules should not affect the obligations imposed on gatekeepers*** *under this Regulation and their uniform and effective application in the internal market."* [emphasis added]

Thus, the DMA is planned not to be applied completely "without prejudice" to the application of the EU or national competition rules since it aims to limit possible justifications that can be contrary to the rules of the DMA and would have been normally accepted within the application of competition law. Hence the DMA introduces a true *per se*[58] regime.

The only exceptions can be found in Article 6(4) and (7) DMA that allow gatekeepers to protect the integrity of their hardware and operation systems and to ensure that interoperability does not compromise the integrity of the operating system, virtual

[58] KERBER, *c. d.*

assistant, hardware, or software features. These measures shall be duly justified by the gatekeeper and shall be proportionate. Moreover, in the case of protection of security in relation to third-party software applications or software application stores the measures and settings cannot be default [Article 6(4) DMA]. Hoverer, these justifications are more technical justification than economic justification and can be, in fact, linked to security obligations imposed on gatekeepers.

The completely different types of exemptions can be found in Article 9 and 10 DMA. The suspension due to *"to exceptional circumstances beyond the gatekeeper's control"* allow the Commission to lift duties of a particular gatekeeper if those circumstances *"would endanger* […] *the economic viability of its operation in the Union* [Article 9(1) DMA]. *Although the suspension can resemble an individual exemption, but the necessity cannot be 'within the control of a gatekeeper'."* Nevertheless, the concept of "beyond control" is broader than *force majeure* because it can cover behaviour of other persons as well, including the behaviour of a gatekeeper's competitors. Exceptions for grounds of public health and public security (Article 10 DMA) do not have any link to the position or behaviour of a gatekeeper, as well. Both, suspension and exceptions under the DMA have to satisfy the division of powers between the EU and its Member States and principle of proportionality of EU law than considering possible justification by a gatekeeper.

Finally, the separation form the concepts of competition law was promulgated by mouthpiece of Recital 23 DMA: *"Any justification on economic grounds seeking to enter into market definition or to demonstrate efficiencies deriving from a specific type of behaviour by the undertaking providing core platform services should be discarded, as it is not relevant to the designation as a gatekeeper."*

5. CONCLUSIONS

The DMA was adopted after quite a lengthy legislative procedure when the European Parliament and the Council in several aspects changed the Commission's proposal. However, the final text of the DMA did not depart form the *per se* framework of the prohibitions as they were proposed by the Commission.

Although the aim of the DMA is to maintain "competitiveness", the legislatures stressed several times that the DMA is not a competition rules, notwithstanding that it is based on the previous competition enforcement practice, procedural rules and remedies resemble competition rules, and also the institutional framework is linked to the competition authorities. The analysis of the development of the case law showed that in EU competition law the principle of *per se* prohibitions was never accepted and the CJEU accepted justifications outside the text of the statutory exemptions. Even though the aim of the DMA may be introduction of a *per se* prohibition in order to facilitate the Commission's enforcement, it cannot be surprising if the CJ EU will, in some case in the future, follow the path of the EU-style *rule of reason* in the framework of the DMA as well. The principle of proportionality as a crucial principle of EU law may,

in some circumstance, erode the *per se* monolith of the DMA. In particular in those cases that will target behaviour similar to cases previously handled in the competition law regime.

The lesson learned from application of *rule of reason* in the context of agreements restricting competition or as is specific form of *objective justification* in the context of abuse of a dominant position does not undermine effectiveness of competition law. The *quasi per se* concept can satisfy both: it shows that it is not probable that such a behaviour will be allowed and at the same time it dodges proportionality objections because the prohibition is not, at least theoretically, absolute and *per se*.

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