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The DMA in the broader regulatory landscape of the EU: an institutional perspective

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ABSTRACT

The recently adopted Digital Markets Act (henceforth: DMA) addresses the behaviour of so-called gatekeepers by imposing a list of prohibitions and obligations on these platforms. Despite the potential of the initiative, it remains questionable how the DMA fits in the regulatory landscape. The DMA is – at least formally – not a competition law instrument but also differs from sector-specific regulation. This begs the question of how the DMA fits in the broader regulatory context. This paper aims to address this issue by assessing to what extent the DMA is different from "traditional" competition law and sector-specific regulation respectively. The unclarities regarding the position of the DMA in the broader regulatory context result in various difficulties, amongst others relating to the institutional set-up. The second part of this paper addresses these institutional difficulties resulting from the concurrent application of the DMA and "traditional" EU competition law.

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Introduction

On 15 December 2020 the European Commission (henceforth: Commission or EC) published a Proposal for a Digital Service Act Package, which aims to facilitate "an ambitious reform of the digital space".[1] The Package aims to create a safer digital space and to establish a level playing field on digital markets. It consists of two proposals for Regulations, namely the Digital Service Act (henceforth: DSA) and

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[1]Press Release European Commission 15 December 2020, Europe fit for the Digital Age: Commission proposes new rules for digital platforms, IP/20/2347, 1.

the Digital Markets Act (henceforth: DMA). Where the former focusses on rules to safeguard responsible and diligent behaviour of providers of online intermediary services,[2] the latter concerns the position of so-called "gatekeeper" platforms.[3] The DMA aims to "ensure contestable and fair digital markets" on markets where gatekeepers are present by imposing a number of obligations and prohibitions on those platforms.[4]

The DMA is an ambitious initiative of an *ex-ante* nature and will most likely have a significant impact on the digital world. However, and despite the relevance of the initiative, it is not yet clear how the DMA fits in the broader regulatory context. There are various mechanisms to address market failures.[5] Traditionally, a distinction is made between (i) economic, or sector-specific regulation,[6] and (ii) competition law. It is unclear in which category – if any – the DMA would fit. Therefore, the position of the DMA in the broader regulatory context is not self-evident. The *first objective* of this paper is to discuss and explore the (difficult) position of the DMA in the broader regulatory landscape.

The relationship between the DMA and competition law is a contentious issue. This results in difficulties of a substantive, enforcement and institutional nature. Although all aspects are relevant, this contribution mainly aims to address *institutional* questions. In this light, the *second objective* of this paper is to analyse the institutional framework of the DMA. I aim to assess to what extent the institutional design of the DMA matches with the framework of traditional competition law. To this end, the second part of the paper focusses mainly on institutional questions by taking into account potentially overlapping competences, as well as mechanisms to deal with such overlaps.

In sum, this paper thus aims to identify and analyse the relationship between the DMA and competition law in order to assess to what extent the institutional framework of the respective instruments is

[2]Proposal for a Regulation of the European Parliament and the Council on a Single Market For Digital Services (Digital Service Act) and amending Directive 2000/31/EC, COM(2020)825 final.

[3]Proposal for a Regulation of the European Parliament and the Council on Contestable and Fair Markets in the Digital Sector, COM(2020)824 final (henceforth: DMA, DMA Proposal or Proposal).

[4]Article 1(1) Regulation 202/ … of the European Parliament and of the Council on contestable and fair markets in the digital sector, 2020/0374(COD) <www.consilium.europa.eu/media/56086/st08722-xx22.pdf>. Unless otherwise indicated, this paper refers to this (final) text of the DMA.

[5]N Dunne, *Competition Law and Economic Regulation* (Cambridge University Press 2015) 14.

[6]This paper relies on Dunne's definition of economic regulation. Economic regulation entails "any State-imposed, positive, coercive alteration of or derogation from the operation of the free market in a sector, traditionally undertaking in order to correct market defects of an economic nature, and to be distinguished from regulation that pursues a predominantly 'social' aim". See: ibid 40.

coherent.[7] To this end, I will focus on the final version of the DMA, which is recently approved by the Council and is expected to be published in the Official Journal of the European Union soon.[8] In order to shed light on the developments of the DMA throughout the legislative procedure, previous versions of the DMA, including the initial Proposal of the Commission[9] and the Amended Version of the Parliament,[10] will be taken into account to show how the Regulation developed over time. In terms of scope, it is important to highlight that the emphasis of the paper lies on the EU framework, i.e. the DMA and EU competition law. Considerations with regards to national regulatory initiatives and national competition laws are not the focus of this paper, but will be touched upon insofar also relevant for the European framework.

In order to make my analysis, I firstly dwell upon the place of the DMA in the broader regulatory context. It is important to explore the conceptual position of the DMA in order to properly understand the institutional implications. It is explained to what extent the DMA is comparable with and/or different from (i) traditional competition law and (ii) economic regulation. The DMA is compared with traditional competition law and economic regulation in an attempt to clarify its conceptual nature. If similarities can be identified, potential parallels with the DMA can be established. Next, the institutional framework is considered. To this end, the respective roles of the European Commission and the Member States in the enforcement of the DMA and EU competition law are described and analysed. Particular attention is given to the framework for cooperation between the various authorities.

The DMA and competition law

The EU legislator does not consider the DMA as part of the "traditional" competition law framework. In one of her speeches, Commissioner

[7] In the context of this work, coherence is – largely in line with Sauter – understood as the extent to which a framework is "(i) logically consistent, and (ii) part of, or in itself constituting a unified systemic (or in other words functional) whole […] and (iii) the former two factors should serve a clearly identifiable objective and/or set of principles", see: W Sauter, *Coherence in EU Competition Law* (Oxford Scholarship Online 2016) 9.

[8] European Commission, *Sneak Peak: How the Commission Will Enforce the DSA & DMA – Blog of Commissioner Thierry Breton, STATEMENT/22/4327* (2022).

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

[10] Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020.

Vestager highlights that the DMA is "not a competition law instrument".[11] Similarly, the preamble of the DMA clarifies that its objectives are "complementary" to competition law. The DMA is considered as a "novel regulatory instrument", rather than as a new subset of the existing framework of competition law.[12] This approach is confirmed by the choice of the legal basis of the DMA. The DMA is adopted based on Article 114 TFEU, which serves as a legal basis for EU instruments to safeguard the functioning of the internal market. Although the choice of the legal basis is subject to criticism,[13] it seems to confirm that the Commission aims at introducing a new legal regime. If the DMA were to be considered as part of the "traditional" competition law framework, an instrument based on Article 103 TFEU would have been more logical.

Although the DMA is formally considered as an independent regulatory instrument, in reality the DMA reveals certain overlaps with competition law. These overlaps reveal themselves in terms of (i) objectives, (ii) substantive obligations and prohibitions and (iii) enforcement mechanisms. These different categories will be addressed in turn.

Objectives

Although the European legislator sets the DMA's objectives of "contestability" and "fairness" and the goals of competition law apart, the aims are arguably less divergent than portrayed. Competition law has various objectives, ranging from the protection of consumer welfare, to the integration of the internal market and achieving a standard of "workable competition".[14] The objectives of competition law are subject to an ongoing debate. While some argue that the goals should be interpreted narrowly, others take a broader approach by including considerations on e.g. sustainability and data protection.[15] It goes beyond the scope of this contribution to provide an exhaustive and self-standing discussion on the (development of) the goals of EU competition law. Rather, the

[11] Speech Margrethe Vestager, 'Competition in a Digital Age' (European Internet Forum, 17 March 2021).
[12] O Budzinski and J Mendelsohn, 'Regulating Big Tech: From Competition Policy to Sector Regulation?' (2021) 27 Ilmenau Economics Discussion Paper 17.
[13] ibid; H Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion on the Digital Markets Act Proposal' SSRN 2021 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837341>.
[14] J Van de Gronden and C Rusu, *Competition Law in the EU. Principles, Substance, Enforcement* (Edward Elgar 2021) 9–13.
[15] See e.g. R Claassen and A Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12 Utrecht Law Review; D Zimmer, *The Goals of Competition Law* (Edward Elgar 2012).

objectives of the DMA will be compared with and discussed in the light of these goals.

Firstly, the preamble to the DMA distinguishes its aim, i.e. "to ensure that markets where gatekeepers are present are and remain contestable and fair" from the objective of competition law, namely "the protection of undistorted competition on the market".[16] The DMA thus has a dual objective and aims to protect both (i) contestability and (ii) fairness on gatekeeper markets. Despite the fact that both aims entail rather broad notions, the concepts are not clearly defined in the DMA. This begs the question of how both objectives should be interpreted, and how they relate to the (potentially overlapping) goals of competition law.

In the context of the DMA, contestability "should relate to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services" (Preamble DMA, recital 32). Yet, the exact meaning of the concept of contestability does not become apparent from the DMA. This results in significant uncertainties, since contestability can be interpreted in various ways. Contestability can be understood narrowly by linking the principle to competition *on* the market. In this case, contestability relates to the threat of short-term entry.[17] Alternatively, a broader interpretation may entail both competition *on* and *for* the market, as well as competition on *other* markets.[18] Read in conjunction with the obligations of Articles 5 and 6 DMA, the objective of "contestability" seems to be interpreted broadly. The prohibition to use non-publicly available data to compete with business users on the platform for example seems to relate to competition *on* the platform itself. Furthermore, the prohibition to self-preferencing targets leveraging market power to other (adjacent) markets. In this light, the objective of contestability seems "a proxy for the goal to ensure and promote competition […] in all its relevant aspects".[19] However, although the obligations in the DMA seem to hint towards a broader interpretation, no clarity on this matter is provided. It is thus impossible to provide an exact definition of the principle of contestability in the context of the DMA. Furthermore, The DMA seems to put the contestability principle in a peculiar context. Contestability – as enshrined in the DMA – is arguably linked to

[16]Preamble DMA, para 10.
[17]Schweitzer (n 13) 17.
[18]Budzinski and Mendelsohn (n 12) 17.
[19]Schweitzer (n 13) 7–9.

decreasing *entry barriers on digital markets* and to creating a level-laying field for gatekeepers and (potential) competitors.[20]

The DMA thus aims to remove entry barriers on markets where gatekeepers are present by imposing a series of obligations and prohibitions. In addition to this, the DMA establishes a set of behavioural rules in order to facilitate competition between the gatekeeper and *existing* competitors. Arguably, keeping markets open and contestable has always been part of the aims of "traditional" competition law. The preamble of the ECN+ Directive for example stresses that the "effective enforcement of Articles 101 and 102 TFEU is necessary to ensure […] *more open competitive* markets in the Union, in which undertakings compete more on their merits and without company-erected barriers to market entry".[21] The objective of contestability thus fits within this broader goal of (EU) competition law.

Similarly, the second objective of the DMA, i.e. fairness, is no stranger to competition law.[22] The notion of fairness is explicitly mentioned in Article 101(3) TFEU which refers to "a fair share for consumers". Moreover, Article 102(a) TFEU refers to *unfair* trading conditions as potential abusive behaviour. Additionally, in the preamble of the ECN+ Directive, effective enforcement of EU competition law is linked to *fairer* markets.[23] The concept of fairness thus seems to be relevant for both the DMA and the traditional competition law framework. This begs the question of whether the notion is interpreted similarly in the respected fields of law.

Fairness is a broad concept that may have a different meaning to different people. In competition law fairness seems to be centred around *the process.* Rivalry on the market should be determined on the merits and not by the degree of market power. In this light, open markets and opportunities of competitive entry are key. This idea of fair rivalry can be traced back to the importance of individual economic rights (including consumer choice), efficiency and innovation. Furthermore, the fairness standard in competition law seems to entail elements of distributional fairness as well. This notion of distributional fairness is

[20]Budzinski and Mendelsohn (n 12) 17.

[21]Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, L 11/3, preamble para 1 (henceforth: ECN+ Directive).

[22]L Hummel, L Lalikova and V Morozovaite, 'De Digital Markets Act en het spectrum van eindgebruikbescherming' [2021] Markt & Mededinging 146, 148.

[23]Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, L 11/3, para 1.

for example clearly reflected in the "fair share for consumers" as mentioned in Article 101(3) TFEU.[24]

As stated previously, the concept of fairness is not clearly defined in the DMA. This makes the notion a "black box".[25] Recital 33 of the Preamble of the DMA stresses that "unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage". Read in conjunction with the obligations as set out in Articles 5 and 6 DMA, some parallels with the notion as defined in competition law seem apparent. Despite the relevance of the fairness principle for both competition law and the DMA, the notion of fairness is potentially understood broader in the context of the DMA. A fairness analysis under the DMA is arguably decoupled from practices having an anti-competitive effect.[26] Yet, the exact meaning of the concept in the context of the DMA remains speculative, since no clear definition is provided.

The final version of the DMA seems to provide some more clarity on the types of relationships that are to be covered by the principles of fairness and contestability. Article 1(1) DMA clarifies that the DMA pursues its aims "to the benefit of business users and end users". The initial Proposal of the Commission did not contain this phrase and therefore did not address the issue *to whom* an outcome should be fair. According to the latest text, the concept of fairness is thus not limited to the horizontal relationship between competitors, but also encompasses the vertical relationship of the gatekeeper and the (end)consumer. Arguably, this addition shifted the DMA even closer to the realm of competition law. In *GlaxoSmithKline*,[27] the CJEU for example recognized the protection of the interest of competitors and consumers and the structure of the market and competition as such as objectives of competition law. By explicitly addressing the vertical relationship between the gatekeeper and the end consumer, the interpretation of the concepts of contestability and fairness thus seems to align (closer) with the meaning of such principles in a "traditional" competition law context. Admittedly, the Amended Version of the European Parliament even went a step further in this regard, by mentioning *consumer welfare* as an explicit objective

[24]Schweitzer (n 13) 8–9.
[25]ibid 8.
[26]P Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12 Journal of European Competition Law & Practice 561f, 568.
[27]Case C-501/06P GlaxoSmithKline v Commission [2009] ECR 1-9291, paras 47–48.

of the DMA.[28] In the final version of the DMA the consumer welfare objective is not included as such.

Lastly, the integration of the *internal market* constitutes an objective of the DMA. This is not surprising, given the legal basis (i.e. Article 114 TFEU) that is used for the adoption of the instrument. Naturally, the integration of the internal market also constitutes a well-established objective of European competition law.[29] Therefore, also in terms of the protection of the internal market, the DMA and "traditional" competition law align in their objectives.

Consequently, the objectives of the DMA entail broad notions that are also relevant for competition law. The objectives of the DMA and competition law thus overlap, at least to a certain extent. Since the DMA provides no clear definition on either of these concepts, it is impossible to determine the exact degree of overlaps between the areas. These uncertainties may result in various problems, which will be addressed later in this paper.

Substantive obligations

The DMA's obligations and prohibitions to a certain extent "mirror" or "echo" ongoing antitrust cases and investigations.[30] The prohibition to self-preferencing (Article 6(1)(d) DMA) for example closely aligns with the *Google Shopping* decision.[31] In its recent judgement, the General Court confirmed that Google abused its dominance by favouring its own comparison shopping services by positioning and displaying those services in a more eye-catching manner.[32] Moreover, the prohibition for gatekeepers to use non-publicly available data generated from business users to compete with these business users (Article 6(1)(a) DMA), reflects the Amazon investigations. In November 2020, the European Commission sent a statement of objections to Amazon for the alleged abusive use of non-publicly available independent seller

[28] Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020.

[29] Case C-56/64 Consten and Grundig v Commission [1966] 429; Article 3(3) TFEU; Consolidated version of the Treaty on the European Union, Protocol nr 27 of 9 May 2005 on the internal market and competition, OJ 115, 0309; JW van de Gronden and CS Rusu, *Competition Law in the EU. Principles, Substance, Enforcement* (Edward Elgar 2021) 11.

[30] D Geradin, 'The EU Digital Markets Act in 10 Points' (*The Platform Blog*, 16 December 2020) accessed 1 December 2021.

[31] European Commission 27 June 2017, Case AT3970 (Google Shopping).

[32] General Court T-612/17 Google and Alphabet v Commission (Google Shopping) not yet published, para 287.

data.[33] The resemblance between the DMA and competition law is unsurprising, since past difficulties in the application of competition law to digital markets have initiated and informed the development of the DMA.[34]

Admittedly, and despite the similarities of the legal substantive obligations, the methodology of the new regime is significantly different from a traditional 102 TFEU assessment: there is no need to prove an anti-competitive object or effect on a case-by-case basis. Rather, the DMA establishes a pre-defined list with obligations and prohibitions in Articles 5, 6 and 7 DMA. The duties imposed by this list do not necessarily depend on the impact on competition in a given market.[35] In this light, the application of the DMA is – in a way – decoupled from the protection of the competitive process. Contrary to the effect-based approach in traditional competition law, it is not necessary to prove the anti-competitive effects of a conduct in order to apply the DMA successfully. In a way, this seems to shift away from the consumer welfare standard and process of modernization.[36] Subsequently, the obligations of the DMA and "traditional" competition law rely on a different methodology. Yet, despite these methodological differences, the obligations are to a large extent similar in terms of substance.

Enforcement and sanctions

The procedures enshrined in the DMA are visibly modelled after Regulation 1/2003, which, amongst others, lays down the Commission's enforcement powers in competition law cases.[37] The Commission's power to carry out market investigations (Articles 16–19 DMA) for example closely resembles Article 17 Regulation 1/2003. Similarly, the competences for collecting evidence, such as requests for information (Article 21 DMA), performing interviews (Article 22 DMA), and conduct inspections (Article 23 DMA) are rather similar to their competition law counterparts (Articles 18, 19 and 20 Regulation 1/2003). Also in terms of sanctions, the DMA draws inspiration from competition law. The Commission has the

[33]European Commission, *Press Release, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-public Independent Seller Data and Opens Second Investigation into Its E-commerce Business Practices*, IP/20/2077 (2020).
[34]Budzinski and Mendelsohn (n 12) 15.
[35]Ibáñez Colomo (n 26) 568.
[36]Schweitzer (n 13) 3.
[37]S Broos and J Ramos, 'Google, Google Shopping and Amazon: The Importance of Competing Business Models and Two-Sided Intermediaries in Defining Relevant Markets' (2017) 62 The Antitrust Bulletin.

possibility to adopt interim measures – albeit under very strict conditions (Article 24 DMA). Moreover, the Commission may impose non-compliance decisions, fines and penalty payments (articles 29, 30 and 31 DMA). These provisions closely resemble Articles 10, 23, and 24 of Regulation 1/2003. Also in terms of the enforcement framework, the DMA and competition law thus show parallels. The DMA clearly "borrows" from the field of existing competition law for the procedural set-up.

The relationship

Formally the DMA cannot be considered as integral part of the competition law framework. Yet, there seem to be more similarities between the legal instruments than becomes apparent from the Commission's official statements. Although the preamble of the DMA hints that the objective of the DMA and competition law are clearly distinct, it is questionable whether the aims are indeed as divergent as is indicated.[38] On top of this, there are clear parallels between the substantive and enforcement provisions of both instruments. This results in significant unclarities and intense debate on the relationship between the two instruments.

The different opinions on this manner can roughly be divided in two categories, i.e. (i) those who adhere to the approach of the European Commission, and consider the instrument as a novel and self-standing regulatory instrument, and (ii) those who focus on the similarities and view the DMA as an integral part of the broader competition law framework. Cioffi, who sees the DMA as a "distinct and ancillary body of regulation"[39] and Ibáñez Colomo, who argues that the DMA Proposal was "more than a simple tweak of competition law"[40] for example represent the former category. By contrast, Schweitzer describes the new instrument as "a highly simplified version of competition law",[41] and Schroeter and Hoyng consider the DMA as an *ex ante* instrument of competition law.[42] This shows that there is no consensus on the relationship between the frameworks. In line with the arguments set out above, I am inclined to side with the latter approach. In my

[38]P Larouche and A De Streel, 'The European Digital Market: A Revolution Grounded on Traditions' (2021) 12 Journal of European Competition Law & Practice 542, 545.
[39]J Cioffi, *Beyond Competition: The Regulatory Turn & the Emerging Era of Intervention in Platform Firms & Markets* (Policy Brief in Research Project Governing Work in the Digital Age, 2021) 7 <https://digitalageberlin/wp-content/uploads/2021/09/Brief-2_Cioffi_finalpdf>.
[40]Ibáñez Colomo (n 26) 568.
[41]Schweitzer (n 13) 4.
[42]B Schroeter and A Hoyng, 'De Digital Markets Act als instrument voor het mededingingsbeleid in perspectief' [2021] Markt & Mededinging 163, 165.

opinion, the DMA could have become "part of EU competition law, as a special branch containing rules for gatekeepers".[43] The main benefit of such an approach is that the DMA can rely on past experience from competition law and can develop alongside this framework. Given the significant similarities between the instruments, in terms of objectives, substantive obligations and enforcement procedures, a certain degree of coherence and consistency is necessary to safeguard legal certainty. Considering the DMA as part of competition law can contribute to such a coherent approach.

These divergent opinions on the relationship between the DMA and competition law show that the intersection between the legal fields is far from clear. Overlapping obligations and prohibitions may result in tensions between the DMA and competition law, since it is difficult to determine the endpoint and limitations of the DMA.[44] This begs the question of how the application of both instruments should be facilitated, and how the mentioned overlaps should be streamlined.

Lessons from the past: the DMA as regulation?

Although the relationship between the DMA and competition law is subject to debate, the DMA is formally not part of the competition law framework. Therefore, the DMA and competition law are – formally – two separate instruments that are applied to gatekeepers in parallel. Such a simultaneous application of EU competition law and another legal framework is not a novelty of the DMA. The approach mirrors the relationship between competition law and sector-specific regulation, which – in line with *Deutsche Telekom*[45] – does also not preclude the application of competition law.[46] This paragraph dwells upon the (complex) relationship between competition law and economic regulation in order to find out whether we can learn valuable lessons from this field that are also relevant for the intersection between competition law and the DMA.

The complementary relationship between regulation and competition law has been long established in EU economic law.[47] Yet, this relationship

[43] B Beems, J Van de Gronden and C Rusu, 'Gatekeepers and EU Competition Law: Exploring New Enforcement Avenues' in P Wolters and others (eds), *Digitalisering en Conflictoplossing* (Serie Onderneming en Recht 2021) 277.
[44] Budzinski and Mendelsohn (n 12) 17.
[45] CJEU C-280/08P Deutsche Telekom v Commission [2010] ECR 1-9555.
[46] Beems, Van de Gronden and Rusu (n 43) 267.
[47] Larouche and De Streel (n 38) 1.

is complex and at times even contradictory. As stated above, in regulated sectors, competition law and sector-specific regulation apply simultaneously. Competition law and regulation are presumed to impose different obligations on economic actors. Competition law imposes economy-wide broad prohibitions on undertakings and utilizes the process of competition on the market.[48] Regulation addresses specific and identified market failures on specific markets by imposing sector-specific obligations. Telecommunication rules can for example impose mandatory interconnectivity requirements in order to remove barriers to competition.[49] Rather than facilitating competition, regulation generally "oversteps the market mechanism entirely".[50] These fundamental differences justify the parallel application of both fields. Yet, the exact relationship between the two fields is disputed.

Theoretically speaking, there are different ways to conceptualize the interface between competition law and regulation. Dunne distinguishes two ways to consider the relationship, namely (i) as separate and divergent market mechanisms or (ii) as varying manifestations of the same phenomenon, namely market intervention.[51] Under the first conception, competition law is the general and residual mechanism and regulation provides the primary mechanism by which regulated sectors are supervised. Competition law serves as fallback option in the event of deregulation.[52] The main problem with this conceptualization is its binary nature. It is presumed that a sector is either fully competitive or not at all. However, in reality seemingly competitive industries are – at least to a certain degree – subject to regulation. This makes the binary approach unhelpful and perhaps even unrealistic.[53] The second conceptualization portrays the relationship between competition law and regulation as complements, namely different types of state intervention in the free market. According to this approach, the government has several mechanisms to intervene in the market. These mechanisms have different strengths and degrees in terms of the extent of intervention but are substantially similar. Regulation and competition law entail different degrees of market intervention: the latter represent a weaker degree of interference. From this perspective, competition law would be the option of first resort, since it represents a weaker form of intervention.[54]

[48]Dunne (n 5) 42.
[49]H McCarthy Tétrault, *Telecommunications Regulation Handbook* (World Bank Publishers 2000) 12.
[50]Dunne (n 5) 45.
[51]ibid 48.
[52]ibid 52.
[53]ibid 53.

Although the described dichotomy is helpful to conceptualize the relationship between competition law and regulation, reality is – as often – more nuanced. Markets can be subject to de- and reregulation, and competition law may be relevant for certain regulated markets, but its application can be excluded in others. This makes the actual relationship between competition law and regulation complex and context dependent.

In practice, the EU legal framework tends towards the concurrent application of competition law and regulation. There are various examples of cases where the Commission applies EU competition law to regulated sectors. In *Deutsche Telekom* the European Commission applies EU competition law in the highly regulated telecommunications sector.[55] The EC takes a similar approach in *Télefonica.*[56] In *Telekomunikacja Polska*, the Commission even goes further and shows a conglomerate approach: the failure to comply with regulatory duties is considered as a breach of Article 102 TFEU.[57]

There are various justifications for this concurrent application. Firstly, the superiority of EU primary law can explain this approach. Article 101 and 102 TFEU are Treaty provisions and thereby hierarchically superior to national law or regulation enshrined in EU secondary regulation. This means that – formally speaking – the competition law provisions take precedence in the event of a conflict.[58] Yet, this does not mean that the existence of regulation is entirely irrelevant for a competition law analysis, and its presence can be regarded as a relevant factor. Secondly, considerations of effectiveness and the benefits of regulatory complementarity may justify concurrent application. Concurrent application reduces the risk that regulators inadvertently or arbitrarily curb the scope of application of competition law. Moreover, joint application facilitates "the realization of competition policy and alternative regulatory goals in tandem".[59] Insofar the objectives of regulation and competition law are complementary, and joint application can contribute the objectives of both frameworks.

[54]ibid 55.
[55]CJEU C-280/08P Deutsche Telekom v Commission [2010] ECR 1-9555.
[56]CJEU C-274/12P Telefónica v Commission [2013] ECLI:EU:C:2013:852.
[57]CJEU C-123/16P Orange Polska (former Telekomunikacja Polska) [2018] ECLI:EU:C:2018:590.
[58]Dunne (n 5) 213.
[59]N Dunne, 'The Role of Regulation in EU Competition Law Assessment' (2021) [44] 3 World Competition 290.

The DMA as economic regulation?

If we apply the mentioned conceptualizations of the interface between regulation and the competition law to the DMA, it appears that the qualification as "varying manifestations of the same phenomenon, namely market intervention" is most fit.[60] The DMA itself clarifies that the application of the new instrument does not preclude the application of competition law. This means that both instruments apply in parallel. Furthermore, the preamble of the DMA seems to hint towards a complementary approach. The preamble clarifies that the market processes on markets where gatekeepers are present are often incapable of ensuring fair economic outcomes with regard to platform services. It acknowledges that Articles 101 and 102 TFEU are applicable to gatekeeper behaviour.

Yet, it is stressed that the traditional framework of competition law is (i) limited to certain instances of market power and (ii) occurs *ex post* and depends on extensive investigations of complex facts on a case-by-case basis. Furthermore, the existing framework would not effectively address the conduct of gatekeepers without a dominant position.[61] The DMA aims to fill these gaps by providing an *ex ante* framework for gatekeepers. The preamble furthermore provides that the objective of the regulation is "complementary to, but different from" the objectives of competition law.[62]

As explained previously, the concurrent application of competition law and sector-specific regulation is well established in EU law. At first sight, the DMA could benefit from this framework, and in particular from the conceptualization as complements. However, it appears that the DMA reveals significant differences with traditional modes of *ex ante* regulation.[63] It is therefore questionable whether the DMA indeed can be qualified as regulation in the "traditional" sense.

Some of the main distinctive features of sector-specific regulations and competition law, do not apply to the DMA. First, competition law applies to the entire economy and is not limited to a specific sector.[64] Regulation – on the contrary – is designed to be applied on a sector-specific basis. Regulation is for example designed to be applicable to the railway or postal sector. It is questionable whether the DMA has such a sector-

[60]Dunne (n 5) 48.
[61]Preamble DMA Proposal, paras 4 and 5.
[62]Preamble DMA Proposal, para 10.
[63]P Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022) forthcoming European Law Review 18.
[64]Competition law is applicable to all sectors, unless a sector is explicitly exempted. See Dunne (n 5) 43.

specific focus. The Regulation applies to "core platform services" that hold a "gatekeeper" position. "Core platform services" encompass various online services, ranging from, search engines to app store providers. In my view, gatekeepers or "the digital" cannot be considered as a sector. Rather, those core platform services affect various sectors, including the more traditional ones such as agriculture, transport and health. The DMA thus arguably lacks sectorial focus, since "gatekeepers" cannot be considered as a sector.[65]

Secondly, the nature of the obligations at hand can distinguish competition law and regulation. According to the conventional view on the distinction between both instruments, the obligation imposed by the respective fields are qualitatively and quantitatively different. Regulation is generally considered to dictate a certain outcome and is therefore *prescriptive*. Competition law lays down broad categories of general prohibitions and is *proscriptive* in nature. In this light, regulatory obligations tend to be positive or pro-active, where competition law obligations are likely to be negative or reactive.[66] Articles 5 and 6 DMA seem to fall somewhere in the middle. On the one hand, the Articles lay down very specific rules. From this perspective, the DMA contains prescriptive obligations. However, some of the obligations are positive in nature. Gatekeepers are for example obliged to allow business users to offer the same products or services to end users through third party online intermediation services at prices and conditions that are different from those offered through the online intermediation services of the gatekeeper (Article 5(b) DMA). On the other hand, some of the obligations in the DMA are framed negatively. Articles 5 and 6 DMA also list types of behaviour that the gatekeeper should *refrain* from. Gatekeepers should for example refrain from combining personal data sources from their core platform services with personal data from other services offered by the gatekeeper (Article 5(a) DMA). The DMA thus not only contains prescriptive *do's*, but also proscriptive *don'ts*.[67] In this light, the DMA looks differently than traditional regulatory instruments.

Consequently, the DMA should be seen as an instrument that is complementary to the framework of competition law. Conceptually speaking, there are parallels between the DMA and existing regulatory instruments. Yet, there are significant differences between the DMA and existing frameworks of regulation as well. The DMA does not easily fit in one of the existing categories, since it is – formally speaking – not a competition law

[65]Larouche and De Streel (n 38) 545.
[66]Dunne (n 5) 45.
[67]Akman (n 63) 20.

instrument, nor a straightforward *ex ante* regulatory instrument. This makes it difficult to put the initiative in either of the categories, which sets the DMA in a "difficult epistemological position".[68]

This difficult position could be clarified in different ways. The DMA could for example be considered as an "inherent novelty" in the regulatory landscape.[69] This would explain why the DMA Proposal fits neither of the existing categories. However, alternatively, the difficult position of the Proposal could also point "to a closer relationship with competition law than claimed in the proposal".[70] Although Vestager clearly points in another direction, I would plea that the DMA indeed has a closer relationship with competition law than portrayed. In a way, the European Parliament also seemed to point in this direction. In its Amended Version it expressly referred to consumer welfare and the internal market as objectives of the DMA.[71] Although the objective of consumer welfare is not ultimately included in the DMA, it shows that the Parliament also acknowledged the close proximity of the DMA and competition law. Moreover, and as stated previously, there are significant overlaps and similarities between the DMA and competition law. The objectives, obligations, and regulatory toolbox are to a very large extent similar. Since the DMA is visibly based on competition law experience, it would make sense to consider the framework as a special branch of competition law. The new branch would contain rules for gatekeepers in order to safeguard fair and contestable markets in the digital sector. Such an approach would not only clarify the epistemological nature of the instrument but can also facilitate a coherent development of both frameworks. In such an approach, the DMA could benefit from the experience of "traditional" competition law.[72] This allows for synergies between both instruments, which – in my opinion – would benefit the effective application of the respective instruments.

The concurrent application of the DMA and competition law

The exact relationship between the DMA and the framework of competition law is complicated and disputed, as explained in the previous paragraphs. This may result in potential difficulties in the application of both

[68] Larouche and De Streel (n 38) 542.
[69] ibid 545.
[70] ibid 6.
[71] Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020.
[72] Beems, Van de Gronden and Rusu (n 43) 277.

instruments. If the legal fields are not clearly separated, yet simultaneously applicable, it becomes unclear how the fields relate in practice. This unclarity may be detrimental to legal certainty, and can ultimately also affect the effective application of both instruments, which may result in practical problems.[73] In this paragraph, the concurrent application of the DMA and competition law is further explored.

The application of the DMA does not preclude the application of competition law. The Proposal is "without prejudice" to the application of EU and national competition law (Article 1(6) DMA Proposal). This means that gatekeepers are subject to both (i) the DMA and (ii) traditional competition law.

The allegedly divergent objectives of both instruments are used to justify the simultaneous application of the two frameworks.[74] However, as argued above, it is not certain whether the objectives of the respective frameworks are indeed as divergent as portrayed in the official documents. Given the proximity of the instruments, the CJEU should ultimately confirm whether the legal instruments overlap. In this regard, the outcome of the cases *Nordzucker*[75] and *bpost*[76] – in which the CJEU assessed to what extent EU competition law, and sector-specific and national competition law can apply in parallel – are highly relevant.

The *ne bis in idem* principle, which is laid down in Article 50 of the Charter of Fundamental Rights of the European Union (henceforth: Charter) and in Article 4 of Protocol No 7 to the European Convention on Human Rights (henceforth: ECHR), is a fundamental principle of EU law.[77] According to this principle, duplication of both proceedings and penalties of a criminal nature for the same act against the same person are prohibited.[78] Over the years, the application of the *ne bis in idem* principle in the competition law context, has been subject to debate and the principle has not been used uniformly in the context of EU law. According to the *Menci* test,[79] based on *idem factum*, the *ne bis in idem* principle can be invoked if two sets of proceedings concern the same person, and

[73]Budzinski and Mendelsohn (n 12) 17–18.
[74]M Botta, 'Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila' (2021) 12 Journal of European Competition Law & Practice 500, 509.
[75]CJEU C-151/20 Nordzucker [2022] ECLI:EU:C:2022:203.
[76]CJEU C-117/20 bpost [2022] ECLI:EU:C:2022:202.
[77]CJEU C-238/99P, C-244/99P, C-245/99P, C-247/99P, C-250/99P and C-251/99P Limburgse Vinyl Maatschappij v Commission [2002] ECR I-8375, par. 59; CJEU C-117/20 bpost [2022] ECLI:EU:C:2022:202, para 22.
[78]Opinion AG Bobek in CJEU 22 March 2022 CJEU C-117/20 bpost [2021] ECLI:EU:C:2021:680 ; CJEU C-524/15 Menci [2018] ECLI:EU:C:2018:197, para 25.
[79]CJEU C-524/15 Menci [2018] ECLI:EU:C:2018:197, para 25.

the same facts. However, in EU competition law, the case law on *ne bis in idem* used to apply a three-fold test. Not only the identity of the offender and the facts of the case are taken into account, but the identity of the protected legal interest also constitutes a relevant factor.[80] This third criteria is, as explained, absent in other fields of EU law.[81] This diverging approach has been subject to a lot of criticism in the past.[82]

In *bpost*, the CJEU was confronted with the question which approach should be adopted in case of concurrent procedures under competition law and sectoral regulation. The CJEU had to determine which *ne bis in idem* test (i.e. (i) the three fold test of competition law, or (ii) the *Menci* test) is to be applied in such circumstances. Although the CJEU still seemed to rely on the triple identity test in the recent *Slovak Telekom* case,[83] in *bpost* it endorses a two-fold focussing on a prior final decision (the *bis* condition) and the requirement that both decisions must concern the same facts (the *idem* condition).[84] The identity of the legal interest is thus no longer mentioned as separate criterion for the application of the *ne bis in idem* principle. In *Nordzucker*, a case on the application of the *ne bis in idem* principle to the application of competition law by different NCAs, the CJEU takes a similar approach. This means that the CJEU seems to shift towards a more uniform application of the *ne bis in idem* principle in EU law. Although the CJEU moved away from the three-fold test, the protected legal interest remains relevant for the assessment of *ne bis in idem*. The CJEU highlights that a limitation of the *ne bis in idem* principle may be justified under Article 52(1) TFEU provided that the limitation is provided for by the law, respects the essence of the rights and freedoms at hand and is proportionate. Against this backdrop, a violation can only be justified if "the two sets of legislation at issue pursue distinct legitimate objectives".[85] In *bpost*, the CJEU concludes that postal regulation and EU competition law pursue different objectives. Where postal regulation has the purpose to facilitate the liberalization of the postal sector, competition law aims (amongst others) to ensure that competition is not distorted in the

[80]CJEU Case C-17/10 Toshiba [2012] ECL:EU:C:2012:72; See also B Van Bockel, *Ne Bis in Idem in EU Law* (Cambridge University Press 2018).
[81]Opinion AG Bobek in CJEU C-151/20 Nordzucker [2021] ECLI:EU:C:2021:681, para 36 and case law cited.
[82]M Veenbrink, 'Bringing Back Unity: Modernizing the Application of the Non Bis in Idem Principle' (2019) [42] 1 World Competition 86.
[83]CJEU C-857/19 Slovak Telekom [2021] ECLI:EU:C:2021:139, para 43.
[84]CJEU C-117/20 bpost [2022] ECLI:EU:C:2022:202, para 28.
[85]ibid para 44.

market.[86] This means that both areas of law may be applied subsequently or in parallel. Similar questions may arise with regard to the concurrent application of competition law and the DMA. Although the CJEU, in *bpost*, seems to leave room for the parallel application of competition law and sectoral regulation,[87] it is questionable whether the same line of reasoning can be applied to the DMA and competition law. As stated previously, the DMA explicitly mentions that the objective of the DMA is different from (but complementary to) the aims of competition law.[88] However, is questionable whether these objectives in reality pursue a sufficiently distinct objective to justify a potential violation of the *ne bis in idem* test. It will ultimately be up to the CJEU to decide on this matter.

With regards to the principle of proportionality in a *ne bis in idem* assessment, the CJEU also highlights that public authorities can choose complementary responses through "different procedures forming a coherent whole so as to address the societal problem involved".[89] To this end, it is necessary to (i) provide clear and precise rules to predict which acts may lead to duplications of proceedings, (ii) there must be coordination between different authorities and (iii) the two sets of proceedings must have been conducted within a sufficiently coordinated manner with a proximate timeframe.[90] In *bpost*, the CJEU leaves it to the national court to determine whether these criteria are met.[91]

Similar issues may arise in the context of the DMA. The initial Proposal of the European Commission did not contain any mechanisms to facilitate coordination between the NCAs and the Commission in case of parallel proceedings under the DMA and competition law frameworks. However, in the final version of the DMA – which has been adopted after the publication of the *bpost* and *Nordzucker* cases – the ECN may serve as a forum to facilitate cooperation in the areas of competition law and the DMA. This is a positive development, which is – in my view – necessary to make dual enforcement of the DMA and competition law possible without violating *ne bis in idem* (insofar the CJEU will accept that the respective frameworks pursue sufficiently different objectives, which is not self-evident). It should also be noted that, practically speaking,

[86] ibid paras 45–46.
[87] A De Streel and G Monti, *Improving EU Institutional Design to Better Supervise Digital Platforms* (CERRE Report 2022, 2022) 24 <https://papersssrncom/sol3/paperscfm?abstract_id=4015703>.
[88] DMA Proposal, preamble para 10; Amended Proposal, preamble para 10.
[89] CJEU C-117/20 bpost [2022] ECLI:EU:C:2022:202, para 49.
[90] ibid para 58.
[91] ibid paras 51–54.

solid coordination may prevent *ne bis in idem* issues all together. If coordination is indeed effectively effectuated in the ECN, troublesome parallel proceedings may be prevented in an early stage. This way *ne bis in idem* issue could arguably be resolved. Against this backdrop, it is to be welcomed that the ECN is relied upon to facilitate coordination of the DMA and competition law. However, the fact that coordination of the DMA and competition law is realized in a *competition law* forum, in my view once again confirms that the DMA and competition law are very closely related, and that the DMA should be considered as a competition law instrument.

If both instruments will indeed apply simultaneously, various difficult legal questions may arise, also beyond the application of the *ne bis in idem* principle. National authorities may have the aspiration to "achieve more ambitious results" under national or EU competition law than the Commission under the DMA.[92] This begs the question whether regulatory clearance under the DMA by the EC pre-empts the application of EU competition law. The fact that the DMA could be considered as a *lex specialis* to competition law, could arguably support this.[93] On the other hand there are also arguments *against* such an approach. First, the hierarchy of norms and the DMA's application "without prejudice" to competition law very clearly indicate parallel application of both instruments. The *lex specialis* principle should be applied in absence of priority clauses or a hierarchy of norms.[94] However, in this case the reference to "without prejudice" in Article 1(6) DMA constitutes a clear priority clause. Furthermore, we can also rely on a *hierarchy of norms*, since Articles 101 and 102 TFEU are Treaty provisions and thus superior to secondary legislation, including the DMA.[95] On top of these arguments, there are also substantive indicators that may justify parallel application. The closed-shop list of Articles 5, 6 and 7 facilitates speedy intervention but compromises flexibility to a certain extent.[96] This may also plea in favour of the "application of a more robust competition law".[97]

Consequently, it is very difficult to determine the relationship between the DMA and the framework of competition law. The DMA sits in a

[92]G Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' [2021] TILEC Discussion Paper 15.
[93]ibid 15.
[94]E Hancox, 'Judicial Approaches to Norm Overlaps in EU Law: A Case Study on the Free Movement of Workers' (2021) 58 Common Market Law Review 1057, 1062.
[95]ibid 1065.
[96]Beems, Van de Gronden and Rusu (n 43) 269.
[97]Monti (n 92) 17.

difficult conceptual position, which makes it questionable to what extend existing concepts can be used to shape the interaction between the respective fields. At this point, it remains uncertain how the interaction between the two fields will exactly be shaped. The lack of clarity on the relationship between the two instruments is problematic, especially given the proximity of the fields. For the DMA to be applied effectively, it is important to place the new tool in its right context. This can only be done if the relationship with the existing framework is clarified. Hopefully, the enforcement practice of the Commission and the future case law of the CJEU will provide clarity on the matter.

The institutional dimension

The conceptual relationship between the DMA and competition law is thus unclear and subject to debate. This does not only result in substantive difficulties but also leads to institutional questions. Where the European Commission – as will be explained in this paragraph – takes the lead in the enforcement of the DMA, competition law is enforced by both the Commission and national competition authorities. As explained previously, the application of the DMA does not preclude the application of competition law. As far as gatekeepers are concerned, we are thus potentially dealing with overlapping competences. It is questionable how such competences should be streamlined. In this paragraph, the enforcement frameworks of the fields of competition law and the DMA are set out. Additionally, attention is given to the (potential lack of) cooperation and coordination mechanisms between the two authorities.

The DMA Proposal: enforcement and the institutional framework

In the DMA the EU legislator opted for centralized enforcement. Initially, NCAs had a very limited role in the enforcement of the DMA. Rather, the European Commission was entirely in the driver's seat.[98] Eventually, the role of the NCAs is reinforced in the final version of the DMA. Yet, the Commission remains the "sole enforcer" of the DMA and therefore the enforcement framework remains highly centralized.[99] Such a system of centralized enforcement system is not a novelty. Rather, the system resembles the centralized system of competition law enforcement

[98]Beems, Van de Gronden and Rusu (n 43) 276.
[99]See e.g. Article 38(7) DMA.

before Regulation 1/2003. Moreover, similar systems can be found in EU Merger Control, where the Commission is exclusively competent to assess concentrations with an EU dimension.[100] In other areas of EU law, similar systems are present. Under the Single Supervisory Mechanisms, the European Central Bank has the sole competence to supervise systemically significant banks.[101] There are various arguments that potentially justify central enforcement of the DMA. Monti provides a clear overview of such arguments.[102] He clarifies that (i) the global operation of gatekeepers, (ii) their similar operation across the EU and even the world (iii) the costs of ensuring compliance (iv) the deep pockets of Big Tech and (v) the fact that the DMA is targeted at a relatively small number of firms may justify such choices. These are all valid arguments, and the fact that large platforms act throughout the entire EU justifies a firm role of the European Commission in the enforcement of the proposed instrument.[103]

Even in a centralized enforcement system, issues relating to coherent enforcement may arise. Within the Commission, the enforcement of EU competition and antitrust law is the responsibility of Directorate-General COMP. However, the dedicated teams that will be responsible for the enforcement of the DMA will most likely be embedded in DG CONNECT, which is responsible for Communication Networks, Content and Technology.[104] Given the similarities between both legal frameworks, a uniform approach seems inevitable for the effective enforcement of the respective rules. At this point, it is uncertain how the cooperation between the different teams will be coordinated. Admittedly, Commissioner Breton stresses that the "new DG CONNECT teams dedicated to the DSA/DMA implementation, *together with DG COMP* […] will make a powerful new digital regulator".[105] This seems to imply that there is some kind of role envisioned for DG COMP, which may help to facilitate a streamlined application of the DMA and competition law. However, how this institutional cooperation will play out in practice remains to be seen.

[100]Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation), L 24/3.
[101]Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, L 287/63.
[102]Monti (n 92) 6.
[103]Beems, Van de Gronden and Rusu (n 43) 277.
[104]Commission (n 8).
[105]ibid.

A system of centralized enforcement may thus contribute to the coherent application and interpretation of the DMA, which seems positive at first sight. However, the DMA cannot be considered in isolation, especially given the proximity of the DMA and competition law. Therefore, the position of NCAs cannot be overlooked. Over the years the NCAs have gained vast experience on digital markets. Digital markets are high on the agendas of various national competition authorities and there are several examples of national intervention on markets where gatekeepers are present, for example in Germany and The Netherlands.[106] NCAs have thus shown to have an appetite to go after Big Tech, and it seems unlikely that national enforcers will no longer intervene in markets where gatekeepers are present.[107] Therefore, denying the position of NCAs may have an adverse effect on the coherence between competition law and the DMA. Since NCAs will remain capable to impose decisions and sanctions on gatekeepers (with a dominant position) under competition law, it is important to acknowledge their position and provide proper mechanisms for coordination and cooperation. This is not only beneficial from the perspective of coherence but may also have practical benefits. It could for example be questioned whether the Commission has sufficient staff to guarantee the effective enforcement of the DMA. In the DMA Proposal, the Commission reserved 80 FTEs for the enforcement of the DMA.[108] More recently, Commissioner Breton stressed that a team of 100 staff members will be responsible for both the enforcement of the DMA and the DSA.[109] According to some academics and government officials, including Martijn Snoep, chairman of the Dutch NCA, 80 FTE is far too little to legally combat gatekeepers, especially considering the deep pockets of Big Tech.[110] Similarly, Andreas Schwab – Member of the European Parliament and rapporteur on the DMA – stated that at least 150 FTEs are required to enforce the DMA effectively.[111] Against this backdrop, the capacity of the NCAs may be necessary to achieve effective enforcement of the DMA. Furthermore,

[106]Bundesartellamt 15 February 2019 B6-22/16 Facebook (Case Summary); ACM 24 August 2021 Summary of decision of ACM in ACM/19/035630 Apple.
[107]M Snoep, 'De rol van nationale toezichthouders bij handhaving van de Digital Markets Act' [2021] Markt & Mededinging 203.
[108]DMA Proposal, 1.
[109]Commission (n 8).
[110]Snoep (n 107) 204.
[111]European Parliament, *Press Conference by Christel Schaldemose and Andreas Schwab on the Outcome of the Final Vote of the Digital Service Act (DSA) and the Digital Markets Act (DMA)* (2022) <https://multimedia.europarl.europa.eu/en/webstreaming/press-conference-by-christel-schaldemose-and-andreas-schwab-rapporteurs-on-outcome-of-final-vote-of_20220705-1400-SPECIAL-PRESSER>.

national regulators may be better placed to receive complaints.[112] It may be easier for national competitors of big platforms to find their way to national enforcers. These national authorities are probably better accessible, and the complexity of the proceedings in Brussels may constitute a hurdle to submit a complaint or to provide information.[113]

Consequently, it is to be welcomed that the final version of the DMA does address the relationship between the Commission and national authorities. According to Article 37 DMA, the Commission and Member States "shall work in close cooperation and coordinate their enforcement action". Article 38(1) DMA stresses that the Commission and NCAs "shall cooperate with each other and inform each other […] through the European Competition Network". The NCAs get a role in the investigative stage of DMA procedures. In order to realize this cooperation, the DMA establishes (amongst others) mechanisms for the exchange of (confidential) information (e.g. Article 21(5) DMA), stresses the possibility to ask NCAs for support in market investigations (Article 38(6) DMA) and allows officials from NCAs to assist the Commission to conduct interviews (Article 22 DMA) and to be appointed as independent external experts (Article 26(5) DMA). Furthermore, NCAs may (jointly) request the Commission to open a market investigation (Article 41 DMA). On top of this, NCAs may – insofar they have the competences and powers to do so under national law – conduct an investigation into non-compliance with the substantive obligations and prohibitions of the DMA. However, once the Commission opens proceedings, NCAs are relieved of this competence (Article 38 (7) DMA). NCAs are thus merely competent to facilitate the investigative stage of DMA enforcement. They cannot impose any decisions or fines on gatekeepers for violating the DMA. However, this investigative power may still be relevant in practice, since starting investigations may impact the agenda setting of the European Commission.

In the final version of the DMA, the role of the NCAs is thus strengthened and improved. The European legislator acknowledges the relevance of NCAs in the regulation of Big Tech and grants them with several competences. Yet, it is important to stress that the Commission remains the "sole enforcer" of the DMA. On top of this, the DMA also – to a certain extent – curbs the position of NCAs. If competent NCAs for example start an investigation involving a gatekeeper under national competition

[112]Monti (n 92) 6.
[113]Snoep (n 107) 204.

law, they have the obligation to inform the Commission of their investigative measures (Article 38(2) DMA). Moreover, where an NCA intends to impose obligations on gatekeepers it should communicate the draft measure to the European Commission. It remains to be seen how this will work out in practice. Experience with Regulation 1/2003 shows that coordination between the Commission and the NCAs can be rather effective in practice.[114] However, as set out before, the relationship between the DMA and competition law is not fully crystalized. This may result in difficulties in terms of coordination and cooperation. Therefore, it remains to be seen how effective these streamlining mechanisms will be in practice. Since the DMA did not yet take into force, it is too early to provide any conclusion on this matter at this point. However, some interesting developments can be expected once the Commission will actually start with the enforcement of the DMA.

Furthermore, the DMA looks beyond the cooperation between competition law authorities by introducing a "High-Level Group of Regulators" (henceforth: the High-Level Group or Group) (Article 40 DMA). This group will consist of regulators in the digital sectors, and in particular representatives of the European Commission, NCAs, and representatives in the area of data protection, consumer protection and telecommunication law and shall meet at least once a year (Article 40(4) DMA). The Group can provide the Commission with advice and expertise, e.g. on general matters relating to the enforcement of the DMA or to promote a "consistent regulatory approach across different regulatory instruments". The Group may in particular "identify and assess the current and potential interactions between the DMA and other rules". Furthermore, the Group can provide expertise to the Commission in the context of market studies (Article 40(5)(6)(7) DMA).

In this light, it is interesting to see that the European legislator looks beyond the field of traditional competition law. Various online business models thrive by the monetization of personal data, and therefore simultaneously trigger the application of the fields of competition, consumer and data protection law. This results in questions on the relationship between these legal fields, also in terms of the institutional framework. By proposing the establishment of the High-Level Group, the EU legislator seems to acknowledge this increasing overlap, as well as the consequences in terms of overlapping competences of different enforcers. The

[114] W Wils, 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 Journal of European Competition Law & Practice 293.

DMA does not only consider the enforcement of competition law and the DMA, but takes a broader perspective and also includes regulators in the fields of, amongst others, consumer and data protection law.

This broader perspective is interesting, particularly in light of the process of digitalization.[115] On digital markets, online platforms often deploy a business model that is data-driven, and centres around the collection of personal data. Many online business models offer their services free of charge, at least for one side of the platform.[116] However, platforms are earning their money somehow, for example by a revenue model focused on targeted advertisement.[117] Platforms show particular and specific ads to online users, based on their online behaviour. Advertisers are willing to pay the platform to have their advertisement exposed to the targeted groups. This means that personal data is monetized. In other words, personal data is becoming an asset with a monetary value. This may lead to various (economic) concerns and market failures, for example with regards to the presence of market concentrations and entry barriers, a lack of privacy friendly options and transparent obligations, externalities, customer lock-ins and rationality problems.[118] Such concerns may traditionally trigger the application of competition law, which can correct certain market failures, and market concentration in particular. At the same time other fields of law may be triggered, most notably consumer and data protection law. Due to the monetization of personal data, the boundaries between legal branches are becoming blurred. The processing of personal data is subject to data protection law (Article 2 GDPR), and at the same time this data determines the economic position of the controller/processor. This also triggers the field of competition law. Moreover, online consumers are – just as any consumer – protected by (European) consumer laws. On top of this, the recent DMA Proposal will apply to certain online platforms in the future. The various legal domains are applied and enforced by different authorities at the EU and national level. This begs the question of how the competences of the different enforces relates to each other. As argued before, in case of overlapping competences it can be necessary to provide certain mechanisms to streamline overlapping competences. In

[115] I Graef, 'Blurring Boundaries of Consumer Welfare: How to Create Synergies between Competition, Consumer and Data Protection Law in Digital Market' SSRN 2016 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881969>.

[116] J Newman, 'Regulating Attention Markets' (2019) University of Miami Legal Studies Research Paper 1 and 7.

[117] J Furman and others, *Unlocking Digital Competition. Report of the Digital Competition Expert Panel* (Crown copyright 2019) 89 <https://assetspublishingservicegovuk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_webpdf>.

[118] A Ezrachi and M Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard Univerity Press 2016) 242.

this light, it is positive that the European legislator acknowledges the increasing interaction between competition law, consumer law, data protection law and the DMA by providing a forum for cooperation. This can be very important for the effectiveness of the DMA, but also gives broader insights on the position of the EU legislator vis-à-vis Big Tech and reflects the need to look beyond the traditional boundaries between legal branches.

Conclusion

This paper aimed to identify and analyse the relationship between competition law and the DMA in order to assess to what extent the institutional frameworks of the respective fields are coherent. It appeared rather difficult to identify the exact conceptual relationship between the two fields. Although the DMA is not considered as competition law by the EU legislator, the objectives, obligations and enforcement mechanisms are to a significant extent similar to the existing frameworks of competition law. Regardless of the unclarities relating to this conceptual position, it does seem clear that both frameworks will apply simultaneously. This begs the question of *how* both fields will apply in parallel.

Existing experience with the concurrent application of competition law and regulation may provide useful insights for the relationship between the DMA and "traditional" competition law. However, when one takes a closer look, it appears that the DMA and other areas of economic regulation reveal significant differences as well. This makes it questionable whether the DMA can indeed be qualified as economic regulation, and sets the initiative in a "difficult epistemological position".[119]

If the DMA cannot be considered as economic regulation indeed, it remains unclear how the instrument should be qualified. It could be an "inherent novelty" in the regulatory landscape.[120] This would mean that the DMA entails a new type or kind of economic regulation. Alternatively, the DMA could be closer related to competition law than was portrayed by the EU legislator. By adding consumer welfare and the internal market as explicit objectives, the European Parliament seemed to point in this direction. In my view, it could be desirable to qualify the DMA as a specific branch of competition law that applies to gatekeepers. By embedding the new Regulation in the existing structure, the coherence between the instruments can be guaranteed. Given the

[119]Larouche and De Streel (n 38) 542.
[120]ibid 545.

similarities between the instrument, the DMA can benefit greatly from experience in the area of competition law. Such cross-fertilization could not only be beneficial for the application of the DMA but also allows for synergies between both instruments, which will ultimately lead to a more efficient regulatory outcome.

Furthermore, such an approach could strengthen the coherence of the institutional framework. The current unclarities relating to the position of the DMA in the broader regulatory landscape result in institutional questions as well. In this light, it is important to define the relationship between the Commission's team that is responsible for the enforcement of the DMA and the authorities responsible for the enforcement of competition law, i.e. the Commission and the NCAs. At first sight, and considering the DMA as such, a system of centralized enforcement seems desirable to realize a uniform approach in adopting the DMA. Yet, potential difficulties may arise. Where DG CONNECT is mainly responsible for the enforcement of the DMA, DG COMP takes the lead in competition law enforcement. DG COMP will most likely play a role in the enforcement of the DMA as well, but it remains to be seen how this cooperation will play out in practice. The position of the NCAs may cause further institutional troubles.

On top of this, the DMA cannot be considered in isolation. As stated previously, the instrument has a very close relatedness, if not overlap, with the traditional framework of competition law. It is not yet entirely clear how the instruments interrelate, and how the application of the DMA affects competition law and *vice versa*. However, it is apparent that the DMA does not preclude NCAs from applying EU (and national) competition law. Over the last years, various national authorities showed an appetite to go after Big Tech, and digital markets are prioritized by several national authorities.[121] It seems unlikely that national regulators are willing to abolish their enforcement activities on markets where gatekeepers are present, nor that they will allow the Commission to entirely takeover the regulatory oversight on such market.[122] This makes it probable that NCAs will continue to use the traditional competition law framework to address the power of Big Tech. It is thus a likely scenario that the DMA and traditional competition law will be applied simultaneously by multiple authorities.

The parallel application of the DMA and competition law may result in various issues. It is unlikely that the NCAs will be prevented from the

[121]See e.g. *Facebook Inc.* Bundeskartellamt, 6 February 2019, B6-22/16; Autorité de la Concurrence 17 March 2021 Decision 21-D-07.
[122]Snoep (n 107) 204.

application of competition law to address the behaviour of gatekeepers. Therefore, their role in the regulation of Big Tech cannot be ignored. In the initial DMA Proposal the importance of the role of NCAs was largely neglected. Therefore, it is a welcome development that the final version of the DMA takes the NCAs on board, albeit only to a certain extent. It remains to be seen whether the relationship between the NCAs and the Commission can effectively be streamlined in the ECN. In the past, the ECN has proven to be a successful forum. However, it is too early to say whether it will also be suitable for coordination of the DMA and competition law.

Consequently, the position of the DMA in the broader regulatory framework, as well as the institutional framework, are highly relevant for the ultimate success of the DMA. It is a missed opportunity that the Commission did not pay sufficient attention to these issues in its initial Proposal. In the final text, the institutional framework seems to have gotten more attention. Yet, and despite the similarities of the legal frameworks, the DMA is formally not considered as competition law. This curbs the possibility of effective cross-fertilization between the two frameworks. On top of this, potential *ne bis in idem* issues may arise. It remains to be seen how the parallel application of the frameworks will be realized in practice. If the Commission and NCAs will cooperate effectively in practices, problems of dual jeopardy may be prevented. However, only time will tell how this relationship will play out in the future.

In general, I would argue that in order to effectively regulate Big Tech, it is of the utmost importance to look at the interplay between different frameworks. At this point, various promising and ambitious initiatives are adopted. However, the relationship between the different instrument is not always sufficiently addressed. The lack of attention for the interplay between the DMA and competition law is a good example in this regard. On top of this, the institutional implications do not always receive sufficient attention. It is a missed opportunity that the European Commission did not touch upon the position of NCAs in the enforcement of the DMA. In order to regulate Big Tech effectively, regulatory initiatives cannot be considered in isolation. On top of this, it is not sufficient to adopt substantive rules, since the ultimate success of these rules will to a large extent depend on effective enforcement by well-equipped authorities.

Disclosure statement

No potential conflict of interest was reported by the author(s).