Chapter V

Is there a need for further regulation with regard to the problem of non-contestable digital ecosystems?

Summary

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With the Digital Markets Act (DMA), the EU is introducing a new type of regulation for operators of large platforms and digital ecosystems. In this respect, the EU has indeed placed itself at the forefront of a global development. Being a hybrid between conventional competition law and a regulatory instrument, the DMA fulfills a **filtering function** by providing a set of rules that largely does not require official intervention in individual cases.

The **German legislator** can support the enforcement of the DMA in particular with rules to facilitate **private actions for injunctive relief and damages**. As an accompanying regulatory measure, it could foresee **administrative restitution orders** according to which gatekeepers must reimburse the profits gained from DMA violations to the damaged market participants – potentially on a lump-sum basis. In addition, the introduction of a **fine or criminal liability of the responsible management** should be examined.

In procedural terms, the DMA provides for a **concentration of responsibility at the European Commission**. In this respect, it is to be interlinked with national competition supervision in the digital markets. If the German legislature authorizes the Federal Cartel Office (FCO) to conduct preliminary investigations into violations of the DMA's conduct obligations and the FCO uses this power, the public impression that the companies concerned are already accused of such a violation must be avoided. The conduct of formal investigations under the DMA and their disclosure is the sole task of the European Commission. This being said, **German abuse control will also retain its own scope** of application alongside the DMA. The Monopolies Commission recommends that the authorization of the FCO in Section 19a GWB be used in the event of cross-market competition problems and that interim measures be used in the event of imminent threats to competition in individual markets. At the same time, the FCO should examine in the relevant cases whether the problem may arise beyond individual cases and whether measures should therefore be taken under Articles 12, 16 and 19 of the DMA. In this case, the European Commission should be informed accordingly about the ECN in accordance with Art. 38 DMA.

The new special regulations on digital markets and the DMA in particular are unlikely to change the fact that the traditional European **abuse control pursuant to Art. 102 TFEU remains necessary**. This will be the case – potentially in parallel with German abuse law – where Gatekeepers have a dominant position in individual markets and also the EU single market is affected. Art. 102 TFEU remains relevant, for example, if the Gatekeepers in question behave abusively without the behavior relating to a designated “core platform service” and/or being regarded as circumventing the behavioral requirements of the DMA. Here, interim measures would also be desirable at the EU level. However, the traditional abuse control under Art. 102 TFEU is also likely to remain relevant if non-compliance with the requirements of the DMA also constitutes an infringement of Art. 102 TFEU and if serious damage to the market structure in the EU single market can be ascertained or is imminent.

Indeed, in cases of **persistent effects** of abuses on competitive conditions, the competition authorities remain competent, according to the European Court of Justice, to act **to eliminate or neutralize these effects**. The Monopolies Commission uses an FTC action against Facebook over its acquisition of WhatsApp as a hypothetical example to illustrate the scope of existing regulatory powers. These have not yet been fully exploited in the digital markets. Therefore, further application practice should first be awaited. Under these circumstances, an **abuse-independent divestiture instrument is not needed at EU level** for the time being.

1 Introduction

1. The continually growing significance of the digital economy, and the establishment of positions of immense economic power on the part of the operators of digital ecosystems, have sparked a readjustment of economic policy in the period under report since the XXIII Biennial Report. Operators of digital ecosystems in the Western world are in particular undertakings such as Google, Amazon, Meta, Microsoft or Apple (GAMMA). It has proven difficult to apply classical competition law vis-à-vis these digital ecosystems. In particular, the procedures take too long, and the remedies ordered where infringements are identified fall short of being effective in the dynamic setting of the digital economy.

2. In light of this, there is a growing willingness to intervene in digital markets with regulatory instruments. Whilst this applies all over the world, the EU has taken on a leading role in this development with the Digital Markets Act (DMA). According to the related Impact Assessment, the DMA is intended to counter the lack of functionality of some of the relevant markets on which the operators of particularly large digital platforms and ecosystems are operating, and increasing market failures[1]. In this Biennial Report, the Monopolies Commission refers to the updated trilogue version of the DMA dated May 11, 2022.[2] The final version of the DMA is expected to come into force in the second half of 2022. It is embedded in a comprehensive legal framework which is being continuously expanded and includes, or is to include, further provisions to protect platform users (General Data Protection Regulation, P2B Regulation, Digital Services Act, et al.), and to facilitate access to and the division of data (Proposals for a Data Act and for a Data Governance Act). The Monopolies Commission has already submitted comments on the DMA in its Special Report 82, and in a Policy Brief[3].

3. The developments at EU level come in addition to measures which had already been taken at national level in Germany, or are currently being discussed at national level. In particular, German competition law was toughened up with the Competition Act Digitalisation Act (*GWB-Digitalisierungsgesetz*) in order to address economic power in the digital economy, which created a separate competition supervision mechanism for digital markets. The Federal Cartel Office (FCO) furthermore its own proceedings against Google, Amazon, Meta and Apple in accordance with the new section 19a of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB) in order to identify any paramount significance attaching to these undertakings for competition across markets, and to impose any obligations on the undertakings that might be necessary in order to rule out abusive behaviour. The Federal Ministry for Economic Affairs and Climate Action has furthermore presented a strategy paper with ten points for sustainable competition in its competition policy agenda up to 2025[4]. The agenda provides for private enforcement to be enhanced, in particular in the digital field. A divestiture instrument at European level, regardless of abuse, is furthermore to be aimed for in the long term as a last resort on consolidated markets.

4. A coherent regulatory system requires measures at EU and national levels to be interconnected, and gradually refined as experience grows. The starting point here is that the DMA can assume the role of a filter which makes sense in terms of competition policy with regard to specific problems, so that there is no need to apply the existing competition tools in the relevant cases (section 2). The German legislature can flank the DMA with national provisions in this regard in order to support the effective enforcement of the new

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1 Departments of the European Commission, Commission Staff Working Document, Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363 final, Part 1/2, 15 December 2020 (below: impact assessment), paras. 68 et seqq., 89 et seq., 99 and 106 with Footnote 119.

2 See Secrétariat général du Conseil, Note of 11 May 20322, 8722/22, Annexe Compet2.2 FR/EN.

3 Monopolies Commission, Special Report 82, Recommendations for an effective and efficient Digital Markets Act, Baden-Baden, 2021; see previously already the same publisher, Policy Brief, Issue 8, Align the DMA more closely with ecosystems acting across markets!, July 2021.

4 Federal Ministry for Economic Affairs and Climate Action, *Wettbewerbspolitische Agenda des BMWK bis 2025*, 21 February 2022.

act (section 3). Competition supervision of digital markets, which has been refined in Germany, can also be linked with the DMA (section 4).

5. In the interplay of the new special regulations for digital markets with abuse control under Art. 102 TFEU, it must be assumed that this Article will continue to be relevant at EU level in practical terms. The further application practice regarding Art. 102 TFEU in this regard should therefore be awaited before additional measures are considered, such as in particular the introduction of a divestiture instrument regardless of abuse (section 5).

2 On the filter function of the DMA

6. The DMA was intended as a regulatory instrument that is open for further development. The DMA thus builds on experience in the practice of the competition authorities to a considerable degree. Moreover, it provides for provisions for the problem constellations in question independently of individual cases, in place of the previous intervention based on individual cases under Art. 102 TFEU.

7. The operation of large platforms and of digital ecosystems appears initially advantageous from a macroeconomic point of view. The economies of scale associated with the operation of large platforms, and the simultaneous network effects which make the platforms attractive for their users, constitute economically-desirable efficiencies. If the market permanently tips in favour of a platform operator, this however means that the platform operator gains market power. It can use this power to its own advantage, and to the detriment of other market participants. The additional economies of scale and scope connected with the operation of the ecosystem also constitute economic efficiencies. Ecosystem operators are however able at the same time to combine their platform power on individual markets, as well as their exclusive data access and the possibility to use data across markets. These advantages enable ecosystem operators to restrict competition. They can do so, firstly, by raising the barriers to entry on the markets for their core services. As soon as it has become impossible to overcome the barriers, the ecosystem operators can unfairly restrict commercial users' access to their services or data, and exploit commercial users and consumers. A second restriction of competition may come about if the operators of platform ecosystems expand their market power to other markets in order to eliminate competition there.

8. The ambivalence of large platforms and of digital ecosystems has the effect that it is always necessary to find a compromise between the advantages ensuing from the existence of the relevant structures, and the advantages linked to competition for new and better level of service on individual markets. The DMA creates a legislative solution to this problem by defining its addressees – known as "gatekeepers" – in accordance with formal criteria, regardless of any determination of market power or cross-market importance[5]. It refers to the provision of platform services, but not to ecosystem criteria. With regard to the conduct obligations and duties of transparency to which gatekeepers are subjected, the DMA includes highly concrete provisions.[6] The obligations in question specifically relate to individual "core platform services" that have been identified as being in need of regulation[7]. The ecosystem aspect is only indirectly addressed by virtue of the fact that the behavioural provisions set out in the DMA need to be satisfied in parallel, with regard both to each core platform service, and to the entirety of all core platform services. The obligations must furthermore be satisfied independently of the impact of the regulated behaviour on individual markets. In the event that the competition authorities identify additional addressees and behaviour in need of regulation in their future case practice, the DMA makes a set of procedural tools available to expand the existing provisions[8].

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5 Art. 3(1), (2) and (8) DMA.

6 Art. 5-7, 12 et seq. DMA.

7 Art. 2 DMA.

8 Art. 12 DMA.

9. The DMA is thus a hybrid between traditional competition law and a regulatory instrument, as is for instance known from the regulated network industries. In particular, when it comes to identifying regulated behaviour, it is very closely orientated to the competition case-law of the European Commission and of the national authorities. That having been said, it converts the remedies that were previously ordered in individual rulings into generally-binding statutory behavioural provisions[9]. Moreover, the DMA also contains some novel provisions aimed at covering behaviour that contributes towards markets being permanently tipped, and at regulating non-discriminatory access to gatekeepers' data and services, as well as at regulating the fees payable for this and improving market transparency[10]. These provisions provide for a "regulatory dialogue" with the gatekeepers in order to avoid inexpedient regulation.

10. The DMA thus provides a set of rules for cases in which an overriding competitive harm has been shown in the past or in which such a competitive harm can be suspected, largely without intervention by the authorities in individual cases.. An ad hoc intervention on the part of public authorities on the basis of Art. 102 TFEU will only be necessary in future in cases for which the DMA does not contain any provisions, and to which it also cannot be easily expanded (see section 5 below for greater detail).

3 National enhancements to support the effective enforcement of the DMA

11. The DMA has primacy of application before German law. The German legislature nonetheless reserves competence to issue supplementary rules outside the provisions of the DMA in order to support the enforcement of the DMA (Art. 4(1) and Art. 5(2), second sentence, TEU). The principle of sincere cooperation of Art. 4(3) TEU, and the principle of openness to European law enshrined in the German Constitution (Art. 23(1) of the Basic Law [*Grundgesetz* – GG]), in fact give rise to an obligation to contribute at national level to the effective, non-discriminatory implementation of the DMA. The Member States must furthermore refrain from taking measures that run counter to the goals of the DMA.

12. The German legislature may not provide for any official penalties vis-à-vis the undertakings that are to be designated as gatekeepers because of Art. 29-30 DMA, which is final in this regard. This however does not rule out provisions on private liability for damages, on the official ordering of restitution, or on the liability of the responsible management. Unlike supplementary national behavioural obligations, provisions on liability in case of non-compliance with behavioural provisions under EU law are unproblematic. The national legislature benefits in this regard from the principle of conferred powers (Art. 4(1) in conjunction with Art. 5(1), first sentence, and (2) TEU). Supplementing the DMA to include additional regulations on liability regarding the above aspects also only increases the pressure on undertakings designated as gatekeepers to comply with the provisions in accordance with the DMA, but does not deter them from engaging in behaviour that is not covered by the DMA itself. Details are provided below on the recommendation for introducing supplementary provisions on private compensation and individual liability (sections 3.3, 3.1 and 3.3).

3.1 Simplifying private actions for an injunction and for compensation

13. The German legislature retains the competence to introduce provisions to simplify the enforcement of private injunction and compensation claims in the event of violations of the DMA. In can be assumed that injunctions and claims for data access, in particular, may gain significance in practice. An interest in bringing proceedings is especially likely to exist with regard to commercial market participants who wish to avoid the risk of being exploited (cf. Art. 1(1)DMA: the goal of fairness), foreclosed from the market, or prevented from entering the market with innovative products (cf. Art. 1(1) DMA: the goal of contestability). When it comes to actions for damages, by contrast, the problem arises at the level of competing platform operators and commercial platform users that it is likely to be hard to assess any damage. This is the case particularly

[9] Art. 5 DMA; on this also impact assessment, pp. 53 et seqq.

[10] Art. 6-7 and 14-15 DMA, and once more impact assessment, pp. 53 et seqq.

when it comes to preventing innovations where the damage is not reflected in higher prices in a manner that can be directly ascertained (such as in cartel damages). At the level of commercial platform users and end users, an additional problem is that damage is frequently likely to occur in the shape of dispersed damage.

14. In accordance with the law as it stands, it may already be possible to base the claims in question in the case of preventive actions on section 1004 of the Civil Code (analogously), and in the case of compensation claims on section 3a of the German Unfair Competition Act (UWG), and where appropriate on section 823 subsection (2) of the German Civil Code (BGB).[11] In the future, claims for data access are likely to arise directly from the DMA.[12] With regard to claims for damages, however, a legal clarification would be desirable in view of the fundamentally public objective of the DMA, which is detached from individual damage (Art. 1(1) DMA) to bring about a legal clarification such that the provisions contained in the DMA are also protective norms within the meaning of section 823 subsection (2) of the Civil Code. Furthermore, a separate ground for claims could be developed in accordance with the model of for instance section 69 of the German Telecommunications Act (section 44 of the Telecommunications Act, old version), and section 38 of the German Postal Act (PostG). Section 69 of the Telecommunications Act goes further than does section 823 subsection (2) of the Civil Code, particularly in that the provision also covers orders of the competent authority, and furthermore the requirements as to protective legislation within the meaning of section 823 subsection (2) of the Civil Code do not necessarily have to be satisfied. Sections 1004, 823 and 826 of the Civil Code are applicable, in addition to section 69 of the Telecommunications Act[13]. The law applying in accordance with section 38 of the Postal Act is likely to be largely comparable to that in accordance with the Telecommunications Act. True, one should bear in mind when drafting a provision to supplement the DMA in the interest of legal clarity and practicability that individual provisions such as those contained in postal and telecommunications law are not necessarily amenable to enforcement under civil law because of the scope of official assessment and discretion (esp. Art. 6 DMA).

15. Apart from this, it appears to make sense with regard to imminent or actual violations of the behavioural provisions contained in Art. 5, 6 and 7 DMA to create further-reaching preconditions for the effective enforcement of injunctions under civil law. The German legislature could take sections 33 et seqq. of the Competition Act as an orientation in this context. This is supported by the fact that violations of the DMA which are countered with an injunction may coincide with violations of the competition rules, so that the individual damage done to the damaged parties is then the same. The decisions of the European Commission on non-compliance with the DMA should therefore have binding effect vis-à-vis the courts (cf. section 33b of the Competition Act). Additionally, a legal right to the surrender of items of evidence and to obtain information might be expedient in order to make it easier to file compensation claims and injunctions in the case of violations of the DMA (cf. section 33g of the Competition Act).

16. With regard to compensation claims, the legislature could provide for a relaxation of the preconditions for the claims assessment. It could take as an orientation here, firstly, the presumption provision of section 33a subsection (2) of the Competition Act. Secondly, just as in cartel compensation cases, there is an interest in terms of procedural economy in permitting an estimation of damage in accordance with section 287 of the German Code of Criminal Procedure (ZPO), and in directly providing by law for interest to be applied (cf. section 33a subsections (3) and (4) of the Competition Act).

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[11] At least in view of the fact that the behavioral requirements in Art. 5, 6 and 7 DMA can be assumed to be sufficiently defined.

[12] Art. 6 (8)-(11) DMA.

[13] Cf. Ditscheid/Rudloff, in Geppert/Schütz, *Beck'scher TKG-Kommentar*, 4th ed., Munich, 2013, section 44, para. 54. In cases falling under section 69 of the German Telecommunications Act (TKG), public-law action is possible in addition to a private action; see on this section 202 of the Telecommunications Act as a general clause (in addition to other more specific legal bases).

17. If the legislature considers supplementary provisions for private actions in respect of infringements of the DMA, one would also need to take questions of court jurisdiction into consideration. In view of the distinction from competition law as it stands, one could therefore consider in this regard allocating jurisdiction for violations of the DMA to the chambers and senates that have jurisdiction for the law of torts, as is the case in telecommunications law, and not to the competition law chambers and senates[14]. That having been said, it should be taken into account here too that the violations of the DMA may be accompanied by violations of the competition rules, and the individual damage of the damaged parties is then the same. The courts which have jurisdiction in accordance with sections 87 et seqq. of the Competition Act are more familiar with the questions that arise in practice than are the chambers and senates with jurisdiction for the law of torts[15]. Given this familiarity with the relevant questions in comparable competition cases, the Monopolies Commission recommends that jurisdiction be allocated to the competition law chambers and senates.

3.2 Restitution and/or skimming off of the economic advantage

18. Furthermore, the national authorities to be designated could be empowered to order the relevant market participants to refund the profit facilitated by the infringement of other market participants, or to see to it that the economic advantage is disgorged to the state. Regardless of which of these two tools were to be chosen, it would help to ensure that the uncertainties occurring in assessing damage did not benefit the designated gatekeepers and motivate the latter to act in breach of provisions of the DMA to the disadvantage of other market participants. An arrangement for restitution or disgorgement to be officially ordered is provided for instance in the Draft American Choice and Online Innovation Act[16]. Corresponding provisions also exist in German law in the Telecommunications Act – albeit not relevant in the market failure-related context of the DMA – for breaches of competition in the Act against Restraints of Competition[17].

19. The ordering of restitution of profit facilitated by the violation would have the character of an officially-ordered compensation payment for damage done. The DMA does not rule out empowering national authorities to issue such orders. In order to simplify the procedure, the legislature could provide in advance for lump-sum restitution, in the same way as is customary in the private sector to simplify the settlement of compensation claims. Lump-sum restitution could for instance be provided as a percentage of the profit made by the undertaking, as shown in the balance sheet. Such a lump sumwould ensure that the uncertainties encountered in determining the amount of the compensation payment are to the disadvantage of any gatekeeper acting unlawfully. The gatekeeper should however be given the opportunity to prove that the profits to be restituted do not emanate from damage to other market participants in the amount to which the order refers.

20. In contrast, empowering the national authorities to skim off the economic advantage might clash with the provisions contained in Art. 30 DMA on the setting of fines. Officially-ordered fines are intended as penalties against breaches of legal provisions, and may thus also serve to deprive the undertakings in question of economic advantages associated with such violations. Both cases however do not relate to establishing compensation for market participants who have suffered damage. Orders to skim off the economic advantage also require the amount of this advantage to be officially determined. That said, experience shows

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14 Rugullis in Säcker, TKG, 3rd ed. 2013, Frankfurt/M., § 44 para. 32. The provision formed the basis for today's section 69 of the Telecommunications Act (cf. para. 14 above).

15 Cf. Karbaum/Schulz, NZKart 2022, 107 (112).

16 H.R. 3816 section 2(f)(2)(A) and (B).

17 Section 208 of the Telecommunications Act and sections 32 subsection (2a) and 34 of the Competition Act.

that such arrangements are extremely difficult to make[18]. These aspects speak against introducing provisions empowering the national authorities to skim off the economic advantage.

3.3 Recommendation to introduce individual liability

21. The liability of the responsible management for anti-competitive behaviour is recognised in Germany, and is also regarded as being particularly effective in the USA for creating compliance.[19] The reason for this is that the immanent individual liability creates major pressure on the individuals in question to act in a manner that is in conformity with the law. A bonus system for efforts to engage in behaviour in observance of the law makes sense at best when determining the amount of a penalty, that is if it can be presumed that violations will occur despite an immanent penalty, and there is a need to create motivations for compliance measures under these conditions.[20] Liability of the responsible management also exists in Germany in cases where the markets in question are regulated because of market failures, and penalties are imposed on violations against the regulation. The German legislature can take as a structural orientation for instance section 228 subsection (2) of the Telecommunications Act and/or sections 81 et seqq. of the Competition Act (also in conjunction with sections 9 and 130 of the Act on Regulatory Offences), in accordance with which the Federal Network Agency may set fines in the event of violations of behavioural obligations in telecommunications law and the FCO may do so in competition matters. Similar provisions on fines can also be found in other national provisions concerned with dealing with market failure in regulated network industries (esp. section 28 of the German General Rail Act [AEG], section 86 of the German Renewable Energy Sources Act [EEG], section 95 of the German Energy Industry Act [EnWG], and section 49 of the German Postal Act), or telemedia (section 11 of the German Telemedia Act [TMG]).

22. The German legislature could furthermore also provide for criminal provisions, as also exist in some instances in the law on regulated network industries (cf. sections 95a and 95b of the Energy Industry Act), and when it comes to dealing with data that are secured against unauthorised access (cf. sections 202a-202d of the Criminal Code [StGB]). The problem that arises for instance in cartel prosecution, namely that punitive fines undermine existing leniency programmes, does not apply to violations of the behavioural provisions of the DMA.

4 Interlinking the DMA with national competition supervision on digital markets

23. Competition supervision on digital markets primarily consists of supervision on the part of a public authority. The European Commission will be competent at EU level for the enforcement of the DMA. At national level, the legislature enacting the Competition Act Digitalisation Act has empowered the FCO, in particular via section 19a of the Competition Act, to impose official behavioural provisions on the operators of digital ecosystems. Coherent control requires avoiding the impression of the duplication of powers in the application of the DMA and of section 19a of the Competition (section 4.1), and minimising the risk of fragmenting the EU internal market when applying section 19a of the Competition Act (section 4.2).

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[18] On this in place of all Emmerich in: Immenga/Mestmäcker, *Wettbewerbsrecht*, Vol. 2, 6th ed., Munich, 2020, § 34 GWB paras. 4, 7 (“practical significance ‘tending towards zero’”) and para. 17.

[19] See for greater detail Monopolies Commission, XX Biennial Report, loc. cit., paras. 155 and 167 et seqq. on experience in the USA and other EU Member States; furthermore Special Report 72, Criminal sanctions for cartel infringements, Baden-Baden, 2015, paras. 191 et seqq., on the recommendations of the Monopolies Commission with regard to cartel infringements.

[20] Cf. section 81d subsection (1), second sentence, No. 5 of the Competition Act (“precautions taken subsequent to the infringement”); Steger/Schwabach, WuW 2021, 138 (144).

4.1 On the relationship between the national authorities and the European Commission under the DMA

24. The relationship of the national authorities with the European Commission under the DMA is measured by whether it relates to the enforcement of the provisions of the DMA or to the application of provisions outside the DMA. It may be necessary for the European Commission to work together with the authorities in the Member States to enforce the provisions of the DMA. The DMA leaves the existing national authorities' competences untouched with regard to provisions outside the DMA.

25. The European Commission will have sole competence within the scope of the DMA when it comes to complying with the obligations in the procedure for designation as a gatekeeper, as well as subsequently for the designated gatekeepers[21]. In the event of non-compliance, the European Commission will have to decide whether to proceed against undertakings on the basis of the DMA or of Regulation 1/2003[22]. It will be important here whether the procedure is to be used to guarantee adherence to the behavioural provisions of the DMA for the future, or whether penalties are to be imposed for damage to competition within the meaning of Art. 101 and Art. 102 TFEU, and this damage is to be remedied. In cases in which systematic non-compliance leads to (further) detriment to fairness and contestability, the European Commission will furthermore be empowered in accordance with the DMA to prohibit mergers between undertakings designated as gatekeepers within the meaning of the Merger Control Regulation for a restricted period[23]. This power exists regardless of whether the prohibition is meant to sustain the existing fairness and contestability, or to restore the status quo that existed prior to the systematic non-compliance. A further-reaching restoration order is only possible within proceedings to enforce Art. 102 TFEU.

26. Despite the general obligation of cooperation contained in Art. 37 DMA, the competition authorities in the Member States have no competence of their own to enforce the DMA. They are nonetheless empowered, along with the European Commission, to accept information on the behaviour of gatekeepers falling within the scope of the DMA.[24] The authorities must inform the European Commission if they find that there is a non-compliance problem.[25] Apart from this, Art. 38(7) DMA empowers the Member States' competition authorities to carry out preliminary investigations on the basis of an empowerment in accordance with national law regarding possible cases of non-compliance with the provisions contained in Art. 5, 6 or 7 DMA. The European Commission must be informed in writing accordingly prior to the initiation of formal investigation measures. The Member States' investigations must be discontinued if the European Commission initiates its own investigations subsequent to a communication from the Member States' authorities. The European Commission may however also request the Member States' authorities to support it in its own investigations, in order to put all resources to the best possible use[26]. The DMA does not contain any provision for the event of the European Commission not carrying out any investigations of its own subsequent to a communication on the part of the Member States' authorities. In this case, the procedure may be continued because of a violation of a national rule within the meaning of Art. 1(6) DMA. It is otherwise to be discontinued in accordance with national procedural rules, since the procedure may not lead to any further measures vis-à-vis the undertakings in question, as the Member States' authorities are not competent for the enforcement of the DMA.

27. The competences and powers of the competition authorities outside the DMA in future will be determined by Art. 1(6) in conjunction with Art. 38(1-6) DMA and the existing law. Under Art. 1(6) DMA, national

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21 Art. 3-4, 8, 26 and recital 91 DMA.

22 Art. 18, 24-25, 29 et seqq. DMA; Art. 4 in conjunction with Art. 7 et seqq. Regulation 1/2003.

23 Art. 18(2) DMA.

24 Art. 27(1) DMA.

25 Art. 27 (3) DMA.

26 Art. 38 (6) DMA.

competition rules remain unaffected insofar as they are applied to undertakings other than gatekeepers, or amount to imposing additional obligations on gatekeepers. Art. 38(1) DMA requires the European Commission to cooperate with the Member States' competition authorities via the network of European competition authorities (European Competition Network – ECN).[27] This also relates to proceedings which the Member States' authorities intend to initiate against the designated gatekeepers in accordance with national law.[28] If they wish to make provisions vis-à-vis gatekeepers' competition law behaviour in addition to the provisions of the DMA, they need to transmit a draft of these measures to the European Commission 30 days prior to issuing them.[29] The Commission does not have a veto, but is at least enabled to point to potential conflicts with the DMA.

28. The provisions mentioned unambiguously distinguish in legal terms with regard to the competences and powers of the authorities between those under the DMA, and those under national law. The public may nonetheless gain the impression of a duplication of powers. This is possible, firstly, if it is not clear to the public that the national authorities do not have the power to carry out formal calculations and to adopt decisions in potential cases of non-compliance with the provisions from Art. 5, 6 or 7 DMA. On the other hand, it may be the case, especially in Germany, that the relevant conduct within the meaning of Articles 5, 6 or 7 of the DMA is simultaneously covered by one of the categories of cases under Section 19a (2) of the Competition Act. It cannot be anticipated in both instances that the public will be familiar with the concentration of competences of the DMA with the European Commission. This can be all the more problematic if a pressure to act arises for the European Commission, which would not exist if the European Commission already had the relevant information without prior notification pursuant to Art. 38(7) DMA38. The role of the European Commission as a *one-stop shop* for the enforcement of the DMA is undermined in this case.

29. If the FCO were to be empowered by a newly-created national provision to carry out preliminary investigations into potential cases of non-compliance with the provisions from Art. 5, 6 or 7 DMA, the law should make it clear with regard to the burden on the undertakings in question that this would entail not informing the public about these preliminary investigations. With regard to section 19a of the Competition Act, the FCO should make it clear in its public relations why the respective official intervention is carried out not on the basis of the DMA, but exclusively on the basis of section 19a of the Competition Act.

30. Moreover, the designated gatekeepers may apply for a finding that there is no reason for the FCO to act since section 32c subsection (1) of the Competition Act refers amongst other things to section 19a of the Competition Act[30]. The notices on such applications are likely to be able to make an important contribution towards legal clarity and legal certainty in the overlapping area between the DMA and section 19a of the Competition Act. Decisions of the FCO in the relevant cases should therefore always be published.

4.2 On the relationship between the substantive provisions of section 19a of the Competition Act and the DMA

31. The DMA does not preclude the retention of section 19a of the Competition Act, but is likely to render the provision largely devoid of function in terms of its main scope. As was mentioned in the previous section 4.1, the content of the behavioural provisions in Art. 5, 6 and 7 DMA for gatekeepers overlaps with the provisions that the FCO is able to impose on "undertakings with paramount cross-market significance" in accordance with section 19a subsection (2) of the Competition Act. The primacy of application of European

[27] Art. 38 (1) DMA.

[28] Art. 38 (2) DMA.

[29] Art. 38 Abs. 3 DMA.

[30] Grünwald in: Jaeger/Kokott/Pohlmann/Schroeder, *Frankfurter Kommentar zum Kartellrecht*, Loseblatt, Frankfurt, section 19a para. 141 (re section 19a subsection (1) of the Competition Act). The applicability of section 32c of the Competition Act is not free from doubt within the framework of section 19a of the Competition Act, since section 19a of the Competition Act refers to sections 32a and 32b, but not to section 32c of the Competition Act.

law is valid in this overlapping area.[31] The directly-applicable statutory provisions of the DMA (when they are complied with) therefore rule out behaviour with regard to which the FCO may adopt an official order in accordance with national law. The primacy of application of the provisions of the DMA however also exists with regard to any remedies (in case of non-compliance). The consequence of the primacy of application is that behavioural provisions of national law which are not compatible with Art. 5, 6 and 7 DMA are not applicable, and that rulings enforcing these provisions are not binding[32].

32. Section 19a subsection (2) of the Competition Act however goes beyond Art. 5, 6 and 7 DMA in the following respect:

- In accordance with section 19a subsection (2) of the Competition Act, provisions are also possible for undertakings other than gatekeepers designated in accordance with Art. 3 DMA, as are provisions without a reference to "core platform services" within the meaning of Art. 2 No. 2 DMA. The same applies to provisions which, whilst they refer to core platform services offered by gatekeepers, these services do not carry out any function as an "important gateway" within the meaning of Art. 3(1) lit. b DMA.
- Furthermore, as far as can be ascertained, the language contained in section 19a subsection (2) Nos. 1, 2 and 3 of the Competition Act (in each case apart from the standard examples), and the standard examples of section 19a subsection (2) No. 7 of the Competition Act, is broader than the provisions contained in Art. 5, 6 and 7 DMA.
- In cases of non-compliance with the DMA, the FCO may hand down an order to eliminate the impact of behaviour in breach of the DMA on the market in accordance with section 19a of the Competition Act, since the DMA does not say anything about market impact.

33. Section 19a of the Competition Act may be permanently used within its remaining scope in order to tackle behaviour on the part of undertakings which is not covered by the DMA, but where a corresponding expansion of the scope of the DMA in accordance with Art. 12, 16 and 19 DMA might be required. In this regard, section 19a of the Competition Act carries out a function which supplements the DMA. The associated benefit is also not restricted to Germany. The provision is applicable to platform operators of undertakings with paramount cross-market significance, and hence above all to undertakings which pursue a uniform business strategy across Europe, or indeed worldwide.

34. That having been said, section 19a of the Competition Act hence simultaneously entails the risk of fragmenting the EU internal market. By passing this provision into law, the German legislature has only made use of its competences with regard to competition law. This risk of fragmenting the EU internal market as such is therefore unlikely to constitute a violation of the principle of sincere cooperation in Art. 4(3) TEU. That having been said, the same principle of sincere cooperation is likely to require a weighing up to be carried out in the application of section 19a of the Competition Act in individual cases between the advantages that it entails for protection of competition (or for consumers) in Germany, and the disadvantages which this might cause in terms of fragmenting the EU internal market. In cases in which one may definitely anticipate the EU internal market to become fragmented, whilst any advantages for competition and/or for consumers in Germany are uncertain, no measures should be taken in accordance with section 19a subsection (2) of the Competition Act.

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[31] ECJ, Judgment of 5 February 1963, 26/62 – Van Gend en Loos, Slg. 1963, 1, 24-27, ECLI:EU:C:1963:1; Judgment of 15 July 1964, 6/64 – Costa Enel, Slg. 1964, 585, 1269, ECLI:EU:C:1964:66; open on this matter Monopolies Commission, Policy Brief, Issue 4, Amendment to the Competition Act – Meeting challenges in digital and regional markets!, January 2020.

[32] ECJ, Judgment of 29 April 1999, C-224/97 - Ciola, 1999, I-2517, ECLI:EU:C:1999:212, paras. 32 et seq.; Ruffert in: Calliess/Ruffert, TEU/TFEU, 6th ed. 2022, Art. 1 TFEU para. 21 with Footnote 69.

35. Disadvantageous consequences of fragmentation may involve inefficiencies to the disadvantage of consumers. Fragmentation may lead to gatekeepers incurring higher costs if they, e.g., need to deal with different legal standards and commit greater resources. These costs are likely to primarily be accounted for by fixed costs which do not have any direct impact on the efficiency of the commercial activities. A disadvantage may certainly also exist if the gatekeepers are unable to offer individual services or products on the entire internal market, and the sales market thus becomes smaller. This could weaken economies of scale, thus making it more difficult for individual investments and innovations to pay off. This risk is to be regarded as slight with gatekeepers generally operating worldwide, and it is virtually unimaginable that innovations would be refrained from altogether because individual markets cannot be adequately served. Disadvantages may however harm consumers on individual markets should they be denied preferred services on these markets as a result. Both the risk of and the damage ensuing from fragmentation can however be regarded as low from an economic perspective.

36. A further problem emerges with a view – relating to Germany only – that section 19a of the Competition Act benefits from legal certainty only to a limited degree, given the requirements for a competition rule within the meaning of Art. 1(6) DMA. The lack of determination of the provision has a one-sided disadvantage for the regulated undertakings, and a one-sided advantage for the FCO. This entails legal risks (= costs) for the undertakings, and may also be problematic in constitutional terms:

- In accordance with its wording, section 19a of the Competition Act does not contain any explicit prerequisites for the FCO to designate a company in accordance with subsection (1), or to impose behavioural obligations on undertakings in accordance with subsection (2) (specific conditions). The provision only regulates the designation as "undertakings with paramount cross-market significance", and the possible behavioural obligations (legal consequence). One might argue that the provision can be understood in such a way that it is typically contingent on a danger or at least the suspicion of a danger with regard to specific behaviour[33]. The extent of the danger is however not determined[34].
- In contradistinction to the recommendations that the members of the Monopolies Commission made at the hearings on the Competition Act Digitalisation Act, the behavioural provisions of section 19a subsection (2) of the Competition Act also do not require a reference to be made to competition in all cases within the meaning of Protocol No 27 to the Union Treaties. Notably, no such reference is necessary with regard to orders in accordance with section 19a subsections (1), (6) and (7) of the Competition Act.

There is an added factor of legal uncertainty outside Art. 1(6) DMA in the sense that section 19a of the Competition Act does not need to be examined in accordance with national law together with section 19 of the Competition Act, but provides for a limitation of court appeals. The FCO is thus able to decide at its own discretion, including after initiation of proceedings, on which provisions it bases the procedure, and what legal protection is then available to the undertakings in question.

37. The aspects mentioned in the previous paragraph all favour a strict interpretation of section 19a of the Competition Act. From a point of view of competition policy – in harmony with the previous position of the Monopolies Commission – it can be particularly recommended that the FCO exercises its procedural discretion (section 40 in conjunction with section 10 of the German Administrative Procedure Act [VwVfG]) in this manner in practice, and only initiates proceedings against undertakings if there is an unambiguous connection with competition within the meaning of Art. 1(6) DMA.[35] This requirement should be understood within

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[33] In this sense Nothdurft in: Bunte, *Kartellrecht – Kommentar*, Vol. 1, 14th ed., Cologne, 2022, § 19a GWB para. 132 with reference to the explanatory notes to the Act; but different Lettl, WRP 2021, 413 (418).

[34] Cf. on this Federal Constitutional Court (BVerfG), Order of 24 January 2012, 1 BvR 1299/05, para. 177; on purely final mandatory rules also MVVerfG, LKV 2000, 149 (UA S. 22 et seqq.); Mahlmann, LKV 2001, 102 et seq.

[35] Cf. Monopolies Commission, Policy Brief, Issue 4, 10th amendment to the Competition Act – Meeting challenges in digital and regional markets!, January 2020, p. 3. This might in any case also be legally required in accordance with the case-law

the meaning of Protocol No 27 to the Union Treaties[36]. The FCO should as a matter of principle only initiate proceedings aiming to bring about behavioural orders on the basis of section 19a of the Competition Act if there are at least indications of a breach of competition to the disadvantage of other market participants on relevant individual markets (suspicion of danger).

38. In cases in which such a suspicion of abuse exists on individual markets, the FCO could however as an alternative waive main proceedings in accordance with section 19a of the Competition Act and order interim measures in accordance with section 32a in conjunction with section 32 subsection (1) of the Competition Act. The French Autorité de la concurrence regards the tool of interim measures in many years of practice as an effective tool to protect competition in the digital economy[37]. The legislature passing the Competition Act Digitalisation Act has also relaxed the preconditions for making such an order.

39. Finally, it must also be noted in the scope of application of Section 19a ARC that an examination of Art. 102 TFEU always takes place insofar as this provision is applicable in parallel. At present, Article 102 TFEU is no longer being examined with regard to undertakings within the meaning of Section 19a (1) ARC in Germany – as far as can be seen from the press releases of the FCO. This non-application of Art. 102 TFEU however helps establish separate case-law regarding section 19a of the Competition Act on the fragmentation of the EU internal market. It is doubtful here whether an isolated application of section 19a of the Competition Act is permissible at all under EU law. True, Art. 1(6) DMA contains an opening clause in favour of national provisions such as section 19a of the Competition Act. That said, Art. 3(1), second sentence, of Regulation 1/2003 also needs to be adhered to, in accordance with which the Member States' competition authorities and courts must also apply Art. 102 TFEU if they "apply national competition law to any abuse prohibited by Article [102 TFEU]."[38] However, in questions concerning the scope of Article 3 (1) sentence 2 of Regulation (EC) No. 1/2003, German authorities cannot make their own interpretation, but rather the overriding Union law with the European Court of Justice as the ultimately binding interpreter according to Article 267 (1), (3) TFEU must be observed. In cases of doubt, the competent national courts must therefore seek the interpretation of the European Court of Justice.[39]

40. The Monopolies Commission considers that section 19a of the Competition Act should be used in cross-market competition problems, and interim measures in accordance with section 32a in conjunction with section 32 subsection (1) of the Competition Act in the case of directly immanent endangerment to competition on individual markets, in order to remedy problems outside the scope of the DMA in individual cases. At the same time, the FCO should however examine in the cases at hand whether the problem may occur over and above individual cases, and hence measures should be taken in accordance with Art. 12, 16 and 19 DMA. In this case, the European Commission should be informed accordingly via the ECN in accordance with Art. 38 DMA.

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of the European Court of Justice; see ECJ, Judgment of 31 January 1978, 94/77 – Zerbone, 1978, 99, ECLI:EU:C:1978:17, para. 22/27; Judgment of 7 November 1972, 20/72 – Belgium/NV Cobelex, 1972, 1055, ECLI:EU:C:1972:94, para. 12/17.

36 Protocol No 27 to the Treaties, Consolidated version, OJ C 202 of 7 June 2016, first sentence.

37 See e.g. Autorité de la concurrence, ruling of 30 June 2010, Navx 10-MC-01 – Google AdWords; rulings of 12 July 2021, 21-D-17, and 9 April 2020, 20-MC-01 – Google/SEPM; press release of 21 January 2019 (regarding Google Ads).

38 See on this already Monopolies Commission, XXIII Biennial Report, Competition 2020, Baden-Baden, 2020, paras. 414 et seqq.

39 Cf. ECJ, Judgment of 10 October 1973, 34/73 – Fratelli Variola Spa/Amministrazione delle finanze dello Stato, 1973, 981, E-CLI:EU:C:1973:101, paras. 10 et seq., according to which the Member States are under an obligation not to introduce "any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of [Union] law or the validity of an act of the Institutions of the [Union]". Derogating: Notification by the Federal Government, Twenty-Third Biennial Report of the Monopolies Commission, Competition 2020 – printed paper (*Drucksache*) 19/21540 –, Statement by the Federal Government, Bundestag printed paper 20/760, para. 37.

5 The interplay with abuse control in accordance with Art. 102 TFEU – no current need for further divestiture instruments

41. The Federal Ministry for Economic Affairs and Climate Action is considering expanding the existing legal framework to include a divestiture instrument at European level regardless of abuse. This is to be given a cautious appraisal in the long term. From a competition-policy point of view, the introduction of divestiture instruments particularly requires a more detailed review if instruments regardless of abuse are not available, or if their application does not guarantee effective protection of competition. In the latter case, however, obstacles to application should be eliminated for the existing instruments as a matter of priority before introducing new ones.

42. The new special regulations regarding the digital markets, and the DMA in particular, may not change anything as to the need for abuse control in accordance with Art. 102 TFEU. Art. 102 TFEU remains applicable for instance in cases in which gatekeepers in a dominant position conduct themselves in an abusive manner without the behaviour relating to a core platform service that is designated as such and/or being regarded as circumventing the behavioural provisions of the DMA (Art. 13 DMA). It would be merely desirable in such cases for the European Commission to order interim measures in accordance with Art. 8 Regulation 1/2003 more often than has been the case so far, as abusive behaviour on the part of designated gatekeepers may be specifically linked with the risk of a further worsening of the contestability of markets and the fairness of the relations with the platform users.

43. It is however also likely to be imperative to take recourse to Art. 102 TFEU if non-compliance with provisions of the DMA simultaneously constitutes a violation of Art. 102 TFEU, and if at the same time major damage to the market structure on the EU internal market has been ascertained or is immanent. The reason why abuse control is needed in these cases is that the DMA only makes behavioural provisions (Art. 5, 6 and 7 DMA), and transparency provisions (Art. 14-15 DMA). In accordance with the wording and goals of the relevant provisions, the consequences of the behaviour in individual cases are not material. The same applies with regard to cases of non-compliance. The DMA only authorises measures to discontinue non-compliance and to bring about behaviour that is in conformity with the law for the future. This enables the European Commission to adopt a decision because of non-compliance containing a request to desist in accordance with Art. 29(1)(a), (5) DMA if it finds that a gatekeeper does not comply with one of the obligations in Art. 5, 6 or 7. Moreover, in accordance with Art. 18 DMA, it can impose behavioural or structural remedies on the gatekeeper under the preconditions designated there in cases where a gatekeeper "systematically infringed the obligations laid down in Articles 5, 6 or 7" (including a time-limited preventive ban on future mergers).[40] The DMA, by contrast, does not empower the European Commission to adopt orders to the end that the gatekeeper reverses any consequences of its behaviour that may have already occurred, and remedies the damage on individual markets which has occurred as a result of its breach of the law. In the same manner, section 19a of the Competition Act only constitutes an empowerment with regard to behavioural provisions. It is only where behavioural obligations imposed by the FCO pursuant to section 19a subsection (2) Nos. 2-5 of the Competition Act are violated that the remedies determined in a separate step may also include remedying any damage to competition that has already been caused (section 19a subsection (2), fourth sentence, in conjunction with section 32 subsection (2) of the Competition Act). This is however contingent on official proceedings having been previously carried out in which, in accordance with section 19a subsection (1) of the Competition Act, the paramount significance for competition across markets has been determined and the behaviour in question was prohibited in accordance with section 19a subsection (2) of the Competition Act.

44. Art. 102 TFEU goes further with a view to remedying the consequences of breaches of the law in terms of competition. Art. 102 TFEU contains provisions for all cases in which a dominant company damages competition by abusively exercising its market power. The remedies can also include eliminating the impact of

[40] Art. 18(1-2) DMA.

the abuse on competition in these cases. The range of measures that are possible in accordance with Art. 102 TFEU (in conjunction with Regulation 1/2003) is to be illustrated below using a case example in which the potential abusive behaviour of a dominant undertaking inflicts direct damage on the market structure (i.e. independently of the reactions of other market participants), and a remedy also consequently needs to eliminate precisely this structural impact. The Monopolies Commission selects the takeover of WhatsApp by Facebook as the case example. This takeover is currently being challenged in the USA in an action by the Federal Trade Commission (FTC) on the basis of the law on abuse applicable there – section 2 of the Sherman Act (15 U.S.C section 2)[41][42]. It has so far only been examined in the EU purely in terms of the law on merger control, so that the study below is also only hypothetical in nature. An investigation on the basis of Art. 102 TFEU is however not ruled out per se in the cases in question.

45. The economic problem is first of all presented below (section 5.1). The case example is then evaluated in terms of the law on abuse in accordance with Art. 102 TFEU (section 5.2). Finally, competition policy recommendations are derived from the case example with a view to the further application practice of Art. 102 TFEU and the doubtful need for a divestiture instrument regardless of abuse (section 5.3).

5.1 The economic problem

46. Starting from the original core business of the social network, Facebook – as other undertakings on the digital markets – has constantly expanded its portfolio of products and services to become a digital ecosystem. The umbrella of Meta Platforms Inc. today hosts, along with the social network Facebook, amongst others the image platform Instagram, the Messenger services WhatsApp and Messenger, as well as the virtual reality technology manufacturer Oculus. The respective platforms operate on multilateral markets in the ecosystem, and in doing so target different groups of customers. These primarily include end users, software application developers, and advertising customers. The different sides of the market are interrelated via network effects and effects of scope[43].

47. Network effects and effects of scope, on the one hand, constitute economic efficiencies which may increase the benefit gained from consuming the services[44]. On the other hand, they favour tendencies towards concentration on digital markets, as they constitute at the same time considerable barriers to market entry for potential competitors which are no longer able to benefit from these efficiencies to the same degree. This may ultimately cause markets to tip. As soon as the barriers have become insuperable, the ecosystem operators are able to unfairly restrict commercial users' access to their services or data, and to exploit commercial users and consumers. A further restriction of competition may arise if the operators of platform ecosystems expand their market power to other markets in order to eliminate competition there. Both are within the subject-matter of the FTC's action. Facebook is accused of having enforced anti-competitive conditions for access to the platform vis-à-vis commercial providers in order to shore up the monopolistic position of the social network vis-à-vis potential competitors[45].

48. Whether the market entry barriers are insuperable depends both on the network advantages and on the advantages of scope of further, contradictory factors. These particularly include the possibility to use

41 In the concrete case in conjunction with section 5 FTC Act (15 U.S.C. section 45).

42 State of New York v. Facebook, Inc., 1:20-cv-03589, and Federal Trade Commission v. Meta Platforms, Inc. 1:20-cv-03590 (D.D.C. 2020).

43 Monopolies Commission, Competition policy: The challenge of digital markets, Special Report 68, Baden-Baden, 2015, para. 35.

44 Ebenda, para. 45 et seqq.

45 FTC, loc. cit., Footnote 130 et seqq.

several services in parallel (*multihoming*), as well as to distinguish between competitors' products and innovations[46]. The degree to which these are suited in the final analysis to weaken or even offset the tendencies towards concentration can only be decided in the respective individual case. The FTC considered precisely this potential to exist in the phase of the migration from desktop-based services to mobile services[47]. These mobile services also included WhatsApp, which enabled users to interact in a new, simpler manner by for instance making it simpler to share photos and engage in group chats. The FTC considered these innovations and this product differentiation to constitute a serious threat to the Facebook blue social network, which had been developed for desktop computers[48].

49. This threat was quickly shown by the rapidly increasing numbers of users. According to the FTC, the number of WhatsApp users was rising by more than one million per year in February 2014[49], so that WhatsApp in turn benefitted from strong direct network effects. It is left open in the written action whether this was to the disadvantage of Facebook, and weakened its network effects, or whether users were using both platforms in parallel (*multihoming*). The FTC tends to suppose the existence of substitution effects here. According to the FTC, there was a risk of WhatsApp competing with Facebook on the market for social networks for private users by introducing elements of social networks (such as group functions) or establishing a social network itself[50]. The FTC's theory of harm on the users' market side is hence based on Facebook having eliminated the competition in innovation for better services and functions to the disadvantage of consumers by taking over WhatsApp[51]. This was said to furthermore place advertisers at a disadvantage, who were said to be denied greater choice and more favourable advertising prices[52]. The FTC thus reaches the conclusion that the takeover of WhatsApp by Facebook was anti-competitive.

50. The European Commission approved the takeover without ancillary conditions in 2014[53]. The FTC also did not raise any objections that were substantiated under competition law when carrying out its own review at that time[54]. The European Commission found in its investigation that WhatsApp could already be regarded as a social network, but that the two undertakings "are, if anything, distant competitors in this area."[55] What is more, the respective apps tended to be used in parallel, so that the European Commission's ruling presumed multihoming. There were also sufficient alternative providers of communication apps post-transaction to which users could switch, so that this exercised pressure on the merged undertakings to be competitive[56]. The European Commission therefore continued to presume at that time that competition on the market for messenger services was still functioning.

51. The Digital Markets Act, by contrast, includes messenger services as core platform services. The European Commission hence no longer presumes today that competition is functioning. In addition to the behavioural obligations of Art. 5 and 6 DMA, gatekeepers' interoperability obligations emerging from Art. 7 DMA are to apply to number-independent interpersonal communication services (messenger services), and therefore to WhatsApp in particular. Providers of messenger services are to maintain, on request and free

46 Evans, D. S./Schmalensee, R., The Industrial Organization of Markets with Two-Sided Platforms, Competition Policy International 3 (1), 2007, pp. 51–179.

47 FTC, loc. cit., para. 54.

48 FTC, loc. cit., para. 57.

49 FTC, loc. cit., para. 113.

50 FTC, loc. cit., para. 107.

51 FTC, loc. cit., para. 78.

52 FTC, loc. cit., para. 228.

53 European Commission, Decision of 3 October 2014, M.7217 – Facebook/ WhatsApp.

54 Cf. FTC, press release of 10 April 2014.

55 https://ec.europa.eu/commission/presscorner/detail/de/IP_14_1088.

56 European Commission, Decision of 3 October 2014, M.7217 – Facebook/ WhatsApp, para. 108.

of charge interoperability regarding the basic functions (end-to-end text communication, image and video exchange), and later also relating to gatekeepers' functions that are to be expanded (including group communication, video telephony). The European Commission reasons this with strong network effects which were no longer weakened by multihoming on the part of users, thus leading to high switching costs for users[57]. This assessment contrasts with the approval decision of the Facebook/WhatsApp merger, in which the European Commission still assumed adequate multihoming and low switching costs. It is quite conceivable that the European Commission would no longer reach such an assessment today. The question arises not lastly as to whether its approval decision in particular (parallel to the non-intervention of the FTC) might have contributed to the market failures that have been diagnosed today.

52. Whether such a failure exists on the market for messenger services requires analysis. The Monopolies Commission concluded in the Sector Report Telecommunications 2021 that no such failure is currently recognisable on the market for messenger services, that users are deliberately using several services in parallel, and that they switch services depending on their preferences[58]. The Federal Network Agency also found at the beginning of 2022 that 75 percent of users in Germany use several services in parallel, and that multihoming was developing increasingly strongly to become the standard case[59]. The fact that the services of WhatsApp and Instagram continue to be marketed as separate brands indicates that users are using several services with different functions in parallel.

53. The European Commission also reached different assessments at that time than the FTC today with regard to the advertising markets. It stated that there also continued to be sufficient other providers of targeted advertising after the merger and sufficient data that were relevant for advertising purposes that were not within Facebook's exclusive control[60]. What was more, whilst Facebook could theoretically merge data from WhatsApp with its own data, and thus enhance its position on the online advertising market, this was however unlikely since WhatsApp would have to amend the conditions for use in order to do so, whereupon users might switch to other providers such as Telegram and Threema. This is said to be likely since the switching costs were not onerous. This might weaken the network effects, which would then have a negative impact on advertising revenues since advertisers would have fewer sales opportunities[61]. The European Commission therefore concluded that the merger would probably not substantially impede effective competition on the advertising markets[62].

54. Here too, the European Commission therefore presumed in 2014 that the markets were still functioning. They however estimated that the network effects on the users were now so strong that the advertising markets were also no longer subject to functioning competition. The DMA also counts advertising services are as core platform services. The Monopolies Commission already pointed in 2015 to a concentration of advertising-relevant data as a result of the merger that was objectionable in terms of competition[63]. The FCO also makes it clear that Facebook has advertising-relevant data which cannot be provided by other online advertising providers[64]. There is hence a need to question at this juncture whether the approval decision is able to explain a part of the presumed market failure.

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57 Recital 64 Draft Agreement DMA.

58 Monopolies Commission, 12th Sector Report Telecommunications: Competition in transition, Baden-Baden, 2021, paras. 203 et seqq.

59 https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2022/20220127_Onlinekommunikation.html.

60 European Commission, Decision of 3 October 2014, M.7217 – Facebook/ WhatsApp, para. 189.

61 European Commission, Decision of 3 October 2014, M.7217 – Facebook/ WhatsApp, para. 186.

62 European Commission, Decision of 3 October 2014, M.7217 – Facebook/ WhatsApp, para. 189.

63 Monopolies Commission, Special Report 82, loc. cit., paras. 161 et seqq.

64 FCO, Order of 6 February 2019, B6-22/16, para. 499.

55. All sides of the market and their interrelations must hence be examined in order to analyse platform markets in terms of competition. This means in the concrete case of Facebook/WhatsApp that the user and the advertising sides must be looked at together. Initial assessments show a different level of competition on both sides of the market. Users may select between several alternative messenger services and use them in parallel. On the other hand, however, the advertising industry is highly dependent on Facebook, and this is a result of Facebook's unique data trove. These different results on both sides of the market make it complex to reach an assessment on any position of Facebook with considerable market power.

56. Competition on the user side however does not appear to exert adequate competition pressure on the advertising side. The position of Facebook, based on user data, appears to be largely unassailable despite competition between messenger services. This is particularly a result of the fact that most messenger services do not operate advertising – or only to a very limited extent –, and hence do not constitute an alternative for the advertising industry. The value of the user data of WhatsApp does not emerge in an isolated view for Facebook, but only in connection with the existing data, so that an offer can be made to advertisers that is very closely tailored to the target group. Other platform operators do not have such a possibility to the same degree. It is therefore not possible to rule out when taking an overall view that Facebook has a position with considerable market power as a platform operator.

5.2 Legal attribution

57. The allegations of the FTC can be used in a comparison with the approval decision of the European Commission in terms of merger control law in the case of Facebook/WhatsApp[65] in order to demonstrate by way of example why Art. 102 TFEU will retain its own scope in future alongside the DMA vis-à-vis the undertakings addressed by the DMA. As was already stressed in the introduction, the information below is hypothetical and based on publicly-available data. In particular, regardless of the finality of the European Commission's approval decision in terms of merger control law, it is to be presumed for the purpose of this statement that Facebook may have had a dominant position in the EU, in accordance with Art. 102 TFEU in the takeover of WhatsApp (2014), on the national market for social network services for private users, or may have at least had such a position on another relevant market in the period when the FCO's abuse proceedings were pending (2016-2019)[66]. If Facebook did not have a dominant position prior to 2016, at best the national law on abuse (section 20 of the Competition Act) could be applied to the events related to WhatsApp. This is not to be explored further in the comments below.

58. If Facebook has had a dominant position in accordance with Art. 102 TFEU within the takeover of WhatsApp on the national market for social network services for private users in Germany from the outset, then the takeover might have been abusive. A condition for this would be that the "*degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one"* at the time of the takeover. Furthermore, Facebook would have to have practically eliminated all competition by means of an "*alteration to the supply structure which seriously endangers the consumer's freedom of action in the market*"[67]. It would have to be examined in individual cases whether these preconditions were actually satisfied. Were this to be the case, one would have to affirm abusive exclusionary behaviour in the shape of "abuse of market structure".

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65 European Commission, Decision of 3 October 2014, M.7217 – Facebook/ WhatsApp.

66 The FCO affirmed a dominant position on the national market for social networks for private users, but left it open in other respects; see FCO, Decision of 6 February 2019, B6-22/16, paras. 374 et seq. An appeal is currently still pending against the ruling; the proceedings have been discontinued in the main action because of a submission to the European Court of Justice; see Düsseldorf Higher Regional Court, Order of 24 March 2021, Kart 2/19 (V); ECJ, C-252/21 – Meta Platforms et al.

67 ECJ, Judgment of 21 February 1973, 6/72 – Europemballage Corporation and Continental Can Company, 1973, 215, ECLI:EU:C:1973:22, para. 26 at the end, 29; on this already Monopolies Commission, XXIII Biennial Report, Competition 2020, Baden-Baden, 2020, para. 87 with further references.

59. If Facebook were to have also used the Terms of Service complained of in the FTC's action in Germany, thus placing other market participants at a disadvantage, this behaviour could also be abusive in accordance with Art. 102 TFEU. It may remain unanswered here whether the use of the Terms of Service complained of by the FTC would have been suited by its very nature to restrict competition[68]. It is sufficient for the purpose of the case example that it cannot be ruled out on the basis of the available information that the Terms of Service would have been at all liable to lead to a restriction of competition (abusive behaviour towards competitors).

60. If the behaviour of which the FTC is complaining were also to be relevant to the European market and satisfy the elements of abuse in accordance with Art. 102 TFEU, there would be a need to review in the next step as to whether the remedies which the FTC proposes can also be fundamentally considered on the legal consequences side in accordance with European or German law. The FTC requires the following on the basis of section 2 of the Sherman Act, where relevant here:

- divestiture of assets, divestiture or reconstruction of businesses (including, but not limited to, Instagram and/or WhatsApp), and such other relief sufficient to restore the competition that would exist absent the conduct alleged in the Complaint, including, to the extent reasonably necessary, the provision of ongoing support or services from Facebook to one or more viable and independent business(es);
- any other equitable relief necessary to restore competition and remedy the harm to competition caused by Facebook's anticompetitive conduct described above;
- that Facebook is permanently enjoined from reaching anticompetitive agreements governing, or imposing anticompetitive conditions on, developers' access to APIs and data;
- that Facebook is permanently enjoined from engaging in the unlawful conduct described herein;
- that Facebook is permanently enjoined from engaging in similar or related conduct in the future[69].

This demand for structural remedies is not an isolated case in sets of US proceedings against undertakings that can be considered as gatekeepers. The DOJ and the Federal States filing suit have also applied in several actions against Google for the court to order a structural remedy to eliminate any anti-competitive damage[70]. The same applies to the District of Columbia in its action against Amazon[71].

61. The material prohibitions in abuse cases, and the structure of remedies on the legal consequence side, are to be regarded in conjunction in accordance with Art. 102 TFEU. This connection emerges from the fact that the group of addressees is limited to undertakings which have a market-dominant position. Art. 102 TFEU therefore does not begin to apply until the market has tipped in favour of a specific company. The behaviour prohibited under the law on abuse then additionally tightens up the market conditions for the remaining market participants, and may lead to permanently displacing competitors. It is therefore not necessarily sufficient in cases of abuse within the meaning of Art. 102 TFEU, as with coordinated behaviour which is in breach of Art. 101 TFEU, to merely prohibit the behaviour or impose a fine with the aim in mind

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68 Cf. in this regard ECJ, Judgment of 6 September 2017, C-413/14 P – Intel, ECLI:EU:C:2017:632, para. 14; and additionally: CFI, Judgment of 26 January 2022, T-286/09 RENV – Intel, ECLI:EU:T:2022:19, paras. 148 et seq.

69 Federal Trade Commission v. Meta Platforms, Inc. 1:20-cv-03590 (D.D.C. 2020), refiled complaint, 8 September 2021, p. 79 section XI.B, X, E F and G.

70 United States of America v. Google LLC, 1:20-cv-03010-APM (DC Cir.), Complaint, Document 1, Filed 10/20/20, para. 194(b); The State of Texas v. Google, LLC, 4:20-cv-00957-SDJ (E.D. Texas), Complaint, Document 1, Filed 12/16/20, para. 357(f); State of Colorado v. Google LLC, 1:20-cv-03715-APM (D.C. Cir.), Complaint, Document 3, Filed 12/17/20, para. 233(c).

71 District of Columbia v. Amazon.com, Inc., 2021-CA-001775-B (D.C. Super. 2021), Complaint, para. 97(d).

of imposing a penalty on it. It may be that the damage to the market structure which is the subject-matter of the abusive behaviour can only be compensated for with additional measures.

62. The European Court of Justice has clearly detailed the connection between market power and the impact of abusive behaviour in its case-law for European law, which is the focus of attention here (Art. 102 TFEU). According to the Court

"The dominant position […] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."[72]

The term "abusive exploitation" then includes

"behaviour […] which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[73] (emphasis only here)

63. The remedies for violations of Art. 102 TFEU cannot be directly concluded from this provision itself, but are regulated in the second-tier law. In accordance with Art. 7(1), first sentence, and (2) of Regulation 1/2003, the European Commission may, by a decision, require the undertakings in question, if it finds that there is an infringement of Art. 102 TFEU, to bring such infringement to an end, and may prescribe any necessary remedies. In accordance with Art. 7(1), third sentence, of Regulation 1/2003, however, structural remedies "*can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy*". The structural remedies also include unbundling (contingent on abuse).

64. The European Court of Justice has found with regard to Art. 7 Regulation 1/2003 that the European Commission may impose on the undertakings concerned *"any"* structural or behavioural remedies which are proportionate to the infringement committed and "*necessary to bring the infringement effectively to an end*"[74]. It ruled in another context that the *"provision must be applied in relation to the infringement which has been established and may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty."*[75]

65. The European Court of Justice has created case-law on additional obligations for the European Commission which help to guarantee that infringements of Art. 102 TFEU are effectively brought to an end. Specifically with regard to cases in which abusive behaviour also exerts an impact after the specific behaviour has been brought to an end, in accordance with the case-law of the European Court of Justice, *"the Commission is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are. That obligation means in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the [EU]. If anti-competitive effects continue after the practices which caused them have ceased, the Commission […] remains competent […] to act with a view to eliminating or neutralising them."*[76] One may likely conclude

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[72] ECJ, Judgment of 13 February 1979, 85/76 – Hoffmann-La Roche, 1979, 461, ECLI:EU:C:1979:36, Ls. 4 and para. 38; Judgment of 14 February 1978, 27/76 – United Brands, 1978, 207, ECLI:EU:C:1978:22, para. 65 (constant line of rulings).

[73] ECJ, Judgment of 13 February 1979, 85/76 – Hoffmann-La Roche, 1979, 461, ECLI:EU:C:1979:36, para. 91.

[74] ECJ, Judgment of 29 June 2010, C-441/07 P – Alrosa, 2010, I-5949, ECLI:EU:C:2010:377, para. 39.

[75] ECJ, Judgment of 6 March 1974, 6 and 7/73 – Istituto Chemioterapico Italiano and Commercial Solvents, 1974, 223, ECLI:EU:C:1974:18, para. 45.

[76] ECJ, Judgment of 4 March 1999, C-119/97 P – Ufex, 1999, I-1341, ECLI:EU:C:1999:116, paras. 93 et seq.

from this that the European Commission has the power within the requirements of the principle of proportionality to enact remedies as long as and to the extent that these are suited to bring the infringements in question to an end, and meet the minimum requirements as to the necessary means.

66. The European Commission is however obliged at the same time for reasons of proportionality not to go beyond the necessary extent when setting remedies. In accordance with the case-law of the Court, the undertakings in question are therefore to be involved in the decision on such measures where there are several as-effective remedies[77]. The European Commission hence acts in practice in such a manner that it instructs the undertaking in question, where abuse is still being carried out, to discontinue the abuse that has been identified, and to this end to make a proposal to the Commission with regard to detailed remedies within a specific period[78]. The remedies are adjudged and approved by the European Commission in exercise of its powers of investigation, and their implementation is monitored[79].

67. This practice is not without its problems, particularly with operators of digital ecosystems. An investigation in terms of the law on abuse with regard to the behaviour forming the subject-matter of the FTC's action against Facebook has not yet taken place in the EU on the basis of Art. 102 TFEU. That having been said, it is possible to refer to the rulings to date against Google with regard to the procedure habitually followed in this regard. In the cases of *Google Android* and *Shopping*, the European Commission instructed Google to refrain from specific behaviour, Google having also been given positive obligations in the latter case to guarantee that competitors would be treated equally[80]. It was submitted in the case of *Google AdSense* that Google itself had already discontinued any infringement. In this case, the Commission nonetheless also imposed additional prohibitions for specific behaviour which it considered would also be anti-competitive in the future[81]. The remedies that were restricted to behavioural provisions can probably be explained by the dynamic nature of the digital economy making it particularly difficult to estimate whether remedies continue to be necessary, or whether they overshoot the goal, and what disadvantageous consequences might be caused by such excess. Foregoing further measures was also understandable in terms of procedural economy because it reduced vulnerabilities for any appeals. The European Commission was thus able to reduce its procedural risks, and at the same time improve prospects for concluding the cases mentioned in the near future and in a manner that was legally secure.

68. True, more incisive measures such as structurally disconnecting individual platform services from Google's ecosystem could have been considered in the cases mentioned (e.g. disconnecting Google's Playstore or Android's operating system in the case of *Android*, or disconnecting the price comparison service in the *Shopping* case). Unbundling may however entail economic risks or disadvantages, as this may mean losing advantages of scale and scope. This can make the entire ecosystem less attractive for consumers, and also weaken dynamic efficiencies which are desirable in the long term if operators are able to generate less benefit from the efficiencies. This contrasts with protection of competition at the individual value-

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77 GC, Judgment of 18 November 2020, T-814/17 – Lietuvos geležinkeliai, ECLI:EU:T:2020:545, para. 312; Judgment of 18 September 1992, T-24/90 – Automec/Commission, EU:T:1992:97, para. 52; regarding the requirement of proportionality also already ECJ, Judgment of 6 April 1995, C-241/91 P and C-242/91 P - RTE and ITP, 1995, I-743, ECLI:EU:C:1995:98, para. 93.

78 See in this regard by way of example European Commission, Decision of 18 July 2018, AT.40099 – Google Android, paras. 1390 et seqq., esp. paras. 1404-1407. The European Commission referred in each case in this context to the passage quoted in para. 65 in its rulings on Google; see European Commission, Decision of 18 July 2018, AT.40099 – Google Android, Footnote 1445; Decision of 27 June 2017, AT.39740 – Google Search (Shopping), para. Footnote 811; Order of 20 March 2019, AT.40411 – Google Search (AdSense), Footnote 809.

79 Cf. by way of example European Commission, Decision of 18 July 2018, AT.40099 – Google Android, paras. 1404 et seqq.; Decision of 27 June 2017, AT.39740 – Google Search (Shopping), paras. 697-699 et seqq., 701 et seqq.

80 European Commission, Decision of 18 July 2018, AT.40099 – Google Android, paras. 1394-1403; Decision of 27 June 2017, AT.39740 - Google Search (Shopping), paras. 699 et seq.

81 European Commission, Decision of 20 March 2019, AT.40411 – Google Search (AdSense), paras. 658 et seqq.

added levels. This weighing up between efficiencies and protection of competition is much more complex in the ecosystem context than it is in undertakings with purely vertical integration.

69. The fact that only behavioural remedies were selected from in all of the cases mentioned however also meant failing to consider that, in accordance with the case-law of the European Court of Justice, a connection exists between the market-dominant position and the impact of the abusive behaviour, and this needs to be taken into account when formulating the remedies. It was thus not taken into consideration that – as a result of the abuse that had been identified and of the increased barriers to market access to which this led – Google had to implement the remedies on markets which were no longer structured competitively. The advantages which had already accrued to Google by effectively eliminating competition were not neutralised[82]. The fine that was imposed in each case, in addition to the remedies described, was also unsuited to do this, since Google was able to pay the amount due in each case without endangering its market position as a result of the consolidation of the ecosystem that had taken place in the meantime.

70. German procedural law is structured in a parallel manner to Art. 7 Regulation 1/2003 in terms of remedies, and is also interpreted accordingly[83]. Added to this is merely a power for the cartel authorities to order the advantage to be skimmed off, or the advantages generated from behaviour that is in breach of competition law to be restituted to the damaged party[84]. As a matter of principle, the FCO proceeds in the same manner as the European Commission in its application practice on abuses of market power in the context of digital ecosystems, and makes sure to avoid excessive measures. Accordingly, it has only prohibited Facebook from using specific Terms of Service and made provisions for re-wording the Terms of Service[85]. By contrast, it has not taken any measures in order to neutralise the advantages which had already accrued to Facebook by effectively eliminating competition. In particular, no skimming off or restitution of advantages was ordered in the case in question.

71. The comments so far permit one to conclude that, in the hypothetical scenario, the behaviour complained of by the FTC was to be viewed as abuse in accordance with Art. 102 TFEU, and that the remedies called for by the FTC could where necessary also be ordered by the European Commission on the basis of Art. 7 Regulation 1/2003, or by the FCO on the basis of German law. The enforcement of such structural remedies is indeed likely to require close coordination with the US authorities with regard to a US company.

5.3 Competition policy conclusions with a view to structural measures

72. The statements above have shown that Art. 102 TFEU retains scope with undertakings designated as gatekeepers. In cases in which non-compliance with provisions of the DMA simultaneously constitutes an infringement of Art. 102 TFEU, and major damage to the market structure on the EU's internal market can be identified or is impending, it is also possible to order structural measures where necessary in order to neutralise or eliminate the impact of the infringement of competition.

73. European law is hence in a different tradition to some degree than for instance US law, where specifically concluding merger control law proceedings does not rule out the possibility that the authorities might reopen a case in accordance with the general rules if the prognosis of developments in competition after a merger turns out to be incorrect[86]. By contrast, mere prognosis errors in the interest of legal certainty are to the disadvantage of the authority in European merger control. Apart from this, however, both legal systems as a matter of principle do not permit any further official measures to be taken if a company has gained

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82 See critically on the case of Android: Monopolies Commission, XXIII Biennial Report, Competition 2020, paras. 409 et seqq.

83 Section 32 subsection (2) of the Competition Act. On this also Art. 10(1) of Directive (EU) 2019/1; Jaeger in: Frankfurter Kommentar zum Kartellrecht, Loseblatt, Frankfurt/M., section 32 of the Competition Act paras. 2-3a.

84 See once more sections 32 subsection (2a) and 34 of the Competition Act.

85 FCO, Decision of 6 February 2019, B6-22/16 – Facebook, Operative part Nos. 1-3.

86 Section 7 subsection (5) and section 7 a(i)(1) of the Clayton Act (15 U.S.C. sections 18 and 18a(i)(1)).

market power through better products or in a permissible manner via mergers. The risk would otherwise exist that economically-successful undertakings would be dissuaded from investing in their continued growth. An exception from this principle only exists where undertakings with market power act in an abusive manner (Art. 102 TFEU, sections 19 et seqq. of the Competition Act), or monopolise markets (section 2 of the Sherman Act). The DMA is now supplementing the system of European rules by adding additional behavioural rules, and this in turn is supplemented at national level (including by means of section 19a of the Competition Act).

74. In the interaction of the new special regulations for digital markets with Art. 102 TFEU, it should first be waited to see whether the European regulatory system proves its effectiveness. In place of a political initiative to introduce a possibility for divestiture at EU level that is independent of abuse, it would hence be initially preferable for the Federal Government to push vis-à-vis the European Commission for more far-reaching remedies in cases of major damage to the market structure on the EU internal market. Should structural remedies be ordered vis-à-vis undertakings domiciled in non-European legal systems, it is likely to be recommended to coordinate with the authorities there.

6 Summary of the recommendations

75. The DMA leaves the German legislature with the possibility to enact supplementary provisions in order to support effective enforcement of the DMA. The German legislature could in particular enact provisions for the simplified enforcement of private injunctions and actions for damages, and in doing so on the following specific questions:

- It would be first of all desirable to clarify in statutory terms that the provisions of the DMA are also protective norms within the meaning of section 823 subsection (2) of the Civil Code. Furthermore, one could consider introducing a provision in accordance with the model of section 69 of the Telecommunications Act and section 38 of the Postal Act.
- The legislature could furthermore provide for a presumption of damage, and for regulations estimating compensation, in accordance with section 287 of the Code of Criminal Procedure, and provide for interest to be payable (cf. section 33a of the Competition Act).
- It furthermore appears expedient for the legislature to make the rulings of the European Commission on violations of the DMA binding vis-à-vis the courts (cf. section 33b of the Competition Act).
- Moreover, it could make sense for a statutory claim to exist to the surrender of items of evidence and information in order to facilitate actions for compensation in case of violations of the DMA (cf. section 33g of the Competition Act).
- Jurisdiction for civil actions should be assigned to the competition chambers or senates in view of their particular familiarity with the calculation of damage in comparable competition cases.

76. As a tool flanking civil actions, similarly to section 208 of the Telecommunications Act or section 32(2a) of the Competition Act, the German legislature could provide for an official order according to which gatekeepers must restitute the profit facilitated by the violation to the disadvantage of other market participants to these very market participants. Restitution could be on a flat-rate basis, for instance as a percentage of the profit made by the undertaking, as shown on the gatekeeper's balance sheet.

77. The German legislature should furthermore examine introducing a fine or criminal liability of the responsible management for violations of the behavioural obligations and transparency provisions of the DMA. As to the details, it could take as an orientation for instance section 228 subsection (2) of the Telecommunications Act and/or sections 81 et seqq. of the Competition Act (also in conjunction with sections 9 and 130 of the Act on Regulatory Offences), and where appropriate also sections 95a and 95b of the Energy Industry Act and sections 202a et seqq. of the Criminal Code.

78. If the FCO were to be empowered via the creation of a new national provision to carry out preliminary investigations regarding cases of possible non-compliance with provisions from Art. 5, 6 or 7 DMA, the law should make it clear to the undertakings in question with regard to the burden involved that no information will be made public with regard to these preliminary investigations. With a view to proceedings in accordance with section 19a of the Competition Act, the FCO should explain in its public relations work why the respective official intervention takes place not on the basis of the DMA, but exclusively on the basis of section 19a of the Competition Act. Decisions in accordance with section 32c of the Competition Act vis-à-vis gatekeepers as to whether there is occasion to take action in accordance with section 19a of the Competition Act should always be published.

79. In content terms, section 19a of the Competition Act should be used when problems arise in competition across markets, and interim measures should be taken in accordance with section 32a in conjunction with section 32 subsection (1) of the Competition Act where risks to competition are directly immanent on individual markets in order to remedy problems outside of the scope of the DMA in individual cases. At the same time, the FCO should however review in the cases in question whether the problem can occur over and above individual cases, and hence measures should be taken in accordance with Art. 12, 16 and 19 DMA. The European Commission should be informed accordingly in accordance with Art. 38 DMA via the ECN in such cases.

80. In the interplay between the new special regulations for digital markets and Art. 102 TFEU, it should be initially awaited whether the system of European rules proves its worth. It would hence be initially preferable – in place of a political initiative to introduce a possibility for divestiture at EU level independently of abuse – for the Federal Government to push vis-à-vis the European Commission for more far-reaching remedies in cases of major damage to the market structure on the EU internal market. Should structural remedies be ordered vis-à-vis undertakings domiciled in non-European legal systems, it is likely to be recommended to coordinate with the authorities there.