

Recommendations for an effective and efficient Digital Markets Act

Special Report 82

Report by the Monopolies Commission
pursuant to section 44 subsection (1), sentence 4, of the German Act
against Restraints of Competition

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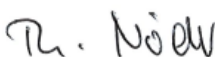

Preamble

The reason for this Special Report of the Monopolies Commission is the European Commission's Proposal for a Digital Markets Act of December 2020, which is intended to supplement the existing protection of competition on digital markets. The Monopolies Commission prepared this report at its own discretion and deals with selected aspects of the Proposal for a Regulation, and makes recommendations for tightening up the provisions. The Monopolies Commission has already commented on competition in the digital sector in various statements, in particular in Special Report 68, in the XXIII Biennial Report, and most recently in the eighth Policy Brief.

Discussions were held with employees of individual undertakings and associations in connection with the preparation of this report. In addition, there were many contacts and discussions between the responsible staff of the Monopolies Commission and staff of the Federal Ministry for Economic Affairs and Energy. The Monopolies Commission would like to thank all those involved for the part that they have played.

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Summary

K1. In addition to individual platform services, entire ecosystems have now formed in the digital economy in which – for instance through the joint use of data from different markets – each further service or product offered generates additional complementarities within the digital ecosystem, and at the same time reinforces the position of the provider in question. Structural economic effects favouring market concentrations, in combination with exclusionary practices on the services side, as well as exploitative practices on the payments side, cause significant competition problems that can sustainably jeopardize the openness of digital markets. However, the evaluation of these competition problems under the existing EU competition rules is particularly complex regarding ecosystems acting across markets, and it is particularly difficult to identify the right time to take action. The fact that it is precisely the formation of digital ecosystems that enables conduct which permanently harms competition argues for supplementing the provisions on the enforcement of competition rules specifically with regard to the special characteristics of digital ecosystems.

K2. The objectives of the DMA consist of ensuring contestable and fair digital markets on which gatekeeper companies operate. From an economic perspective, the contestability of digital markets is endangered if there are barriers to entry to existing services and/or barriers to entry to future services. From a legal perspective, contestability is no longer given if competition is “eliminated” within the meaning of European case-law. The Monopolies Commission therefore recommends orientating the objective of contestability in such a way that the contestability of the position of the gatekeeper on digital markets is guaranteed independently of whether competition is “emerging”, or is taking place “in the market” or “for the market”. The Monopolies Commission recommends that the objective of contestability should be understood in such a way that undertakings which are not gatekeepers are able to overcome barriers to entry and expansion in digital markets. The objective of fairness is to address cases in which gatekeeper companies can impose conditions that could not be enforced were markets to be open and functioning. Fairness is thus to refer to the bilateral relationship between the gatekeeper and its business users. From an economic perspective, this concept leaves it unclear which benchmark is applied for measuring the objective of fairness. From a legal view, fairness points to the fact of business users being particularly vulnerable vis-à-vis gatekeepers given their dependence, but does not depend on particular reasons for such dependence. The Monopolies Commission therefore recommends that the objective of fairness should address the economic dependence of business users vis-à-vis a gatekeeper, and thus the asymmetric bargaining power in favour of the gatekeeper. In the view of the Monopolies Commission, the objective of fairness should therefore be understood in such a way that a gatekeeper’s business users are not placed at a disadvantage by the gatekeeper. The objectives of the DMA should thus address contestability in the sense of exclusionary problems, and fairness in the sense of exploitation problems with regard to business users.

K3. The addressees of the norms of the DMA are undertakings (gatekeepers) which are active as operators of core platform services, and thereby have a significant impact on the internal market, serve as an important gateway for business users to reach end users, and enjoy an entrenched and durable position, or are likely to obtain one in the foreseeable future. However, this approach risks covering too few or too many businesses, and possibly the wrong ones, as it focuses only on sheer size and reach, and not on gatekeeper power. Such a gatekeeper company links the digital value chain via platform services, which may exercise control over key components of an ecosystem, such as app stores, operating systems, voice assistants, search engines and web browsers. The focus should therefore be on multi-platform integration, in which an ecosystem consists of several platform services of the same operator that are thus linked or interrelated and complementary – also via databases – to each other, and the dual role of a platform ecosystem operator. Significant complementarities are created in both groups of cases, that is between the platform services and/or the actors of the ecosystem – and the operator when it comes to combining and further processing data – as well as in the (further) development of (new) products and services. This makes it possible to leverage economic power into other business areas and to expand the ecosystem. The Monopolies Commission therefore recommends including an ecosystem criterion whereby an operator of core platform services is designated as a gatekeeper if it orchestrates a product and/or actor-based ecosystem with the ability to raise barriers to entry and/or expand its ecosystem into new areas. This criterion is fulfilled, if there is a multi-

platform integration with at least two core platform services or a dual role by the provider. The consequence of including such an ecosystem criterion would be to limit the group of addressees of the DMA to undertakings from which particularly significant dangers emanate for competition. It would furthermore enable a more effective use of the resources for the enforcement of the DMA.

K4. In contrast to general antitrust law, the DMA relies on per se rules for the rules of conduct contained in Articles 5 and 6. The provisions describe the conduct that is prohibited or required, as the case may be, in comparatively concrete terms, and also dispense with an examination of the effects of the corresponding conduct on competition in individual cases. One may therefore presume, on the one hand, greater observance of the law on the part of the addressees of the norms, and on the other that, in the event of proceedings nonetheless being initiated in respect of a violation, these can be concluded more expeditiously. In particular, because of the mechanism provided for in the DMA for updating the rules of conduct following a market investigation, the DMA also appears flexible with regard to additional, currently unforeseeable practices that might run counter to its objectives. The regulatory dialogue provided for in the DMA should be extended to cover all the rules of conduct of the DMA. Even in the case of the rules of conduct of Art. 5 DMA, there may be uncertainties in the interpretation of the rules in individual cases. In addition, this and the introduction of an efficiency defence – see K9 below – could compensate for any problems in the implementation of the rules of conduct resulting from the fact that they apply to all types of platform services addressed by the DMA. One can then dispense with an individualisation of the rules of conduct themselves, orientated towards the individual business models. Accordingly, an Article 5 (new) DMA should be created with a uniform structure containing per se rules all of which are amenable to the dialogue procedure, as well as to an efficiency defence. In view of the balance between flexibility and enforcement efficiency, the present proposals are preferable in terms of their combination for supplementing the DMA in comparison to the proposal of the “Friends of an effective Digital Markets Act” when it comes to supplementing the DMA with a possibility for the adoption of tailor-made provisions.

K5. Ecosystem operators provide a number of efficiencies, which benefit end users. In particular, existing offerings can be further improved by combining data from different services, and new services can be developed according to end-user preferences. However, close ties between end users and business users and the entire ecosystem counter the ecosystem-specific efficiencies. This increases the costs of using other services outside the ecosystem in parallel (lock-in), and multihoming becomes more complicated.

K6. This enables platform service operators to also make it more difficult for potential competitors to enter the market in many areas of the ecosystem, and/or enables them to drive out competitors who are already operating on these markets. The Monopolies Commission considers that the DMA should address these ecosystem-specific problems and weigh up potential efficiency advantages against potential harm to competition.

K7. In particular, the DMA should be supplemented with a more comprehensive prohibition of self-preferencing. Self-preferencing of one’s own services is a core tool of ecosystem operators when it comes to expanding their economic power in the entire ecosystem and increasingly closing the entire ecosystem. The DMA already addresses various forms of self-preferencing, such as the tying and bundling of core platform services, or self-preferencing with regard to ranking practices. However, the Monopolies Commission advocates for extending the prohibition of self-preferencing to other services – subject to an efficiency defence (see K9 below) – which are not yet covered by the list of core platform services. For example, tying a music streaming service or premium content (e.g. sports rights) to core platform services of the ecosystem operator may be likely to foreclose the entire ecosystem. Market foreclosure effects could thus be prevented more quickly.

K8. The Monopolies Commission also welcomes the rules of conduct on data portability and interoperability, and considers these as potentially important instruments for increasing end users’ incentives to switch and to facilitate multihoming. However, it still sees a need for clarification with regard to technical, economic and legal questions. There is a particular need to clarify which data and interfaces should be covered by the rules of conduct in order to maintain a balance between the interests of those seeking access, on the one hand, and gatekeepers’ incentives

to innovate, on the other. Therefore, the DMA should limit itself to ecosystem-specific problems for the time being until these questions have been clarified.

K9. The DMA does not contain any possibility for undertakings to justify practices that violate the rules of conduct in Art. 5 and 6 DMA even though it generates sufficient efficiency advantages for consumers in individual cases. This can lead to losses of welfare. Competition law, on the other hand, does provide for such an efficiency defence. The rules from EU competition law can as a matter of principle also be used to develop an efficiency defence in the DMA. That having been said, some peculiarities have to be taken into account, in terms of both substantive and procedural law. For example, the question of which types of efficiency are eligible for consideration would depend on the durability of a consumer benefit. Possible product innovations in particular could lead to such potentially lasting improvements for consumers on digital markets. In line with the objectives of the DMA to protect the contestability and fairness of digital markets, it should also be ruled out that the behaviour of undertakings can lead to a lasting centralisation of power on these markets. Unlike in competition law, where undertakings largely assess for themselves whether their conduct is sufficiently efficient and therefore permissible, the efficiency defence in the DMA should require an exemption by the European Commission. Undertakings would have to explicitly apply for such an exemption, and in so doing would have to demonstrate that their conduct leads to clear benefits for consumers without significantly limiting the contestability and fairness of digital markets. The undertakings would remain bound by the rules of conduct in Articles 5 and 6 of the DMA until a decision is taken on an exemption. In addition, a fiction of rejection should be applied to the effect that an exemption request that is not expressly granted within a review period of six months is deemed to have been rejected. With the aim in mind of reducing the burden on the European Commission, this would provide an incentive for undertakings to only submit those exemption requests that actually have a chance of success.

Chapter 1

Introduction and overview

1. The present Special Report addresses the Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act – DMA), which the European Commission presented on 15 December 2020.¹ The Proposal for a Regulation is a consequence of problems which have emerged in the digital economy with the implementation of the EU competition rules, and of Art. 102 TFEU in particular. A widespread perception is that the procedures are coming too late, are taking too long as a matter of principle, and have also not so far helped to (re)stimulate competition appreciably. These enforcement-related problems are caused by characteristics of the digital economy, in which digital platforms operators have established entire “ecosystems”.

2. Digital platforms act as intermediaries between different groups of users, and enable the respective users to interact, communicate and implement transactions directly between one another. Digital markets may tend towards concentration², and platform operators may gain permanent market power.³ This may be the case if users are highly dependent on a platform service, and if potential competitors cannot challenge the position of the platform.⁴ The factors conducive to concentration include positive and significant network effects, the provision of various services for the same relevant groups of users, and exclusive access to relevant data.

3. In addition to digital platform services, entire ecosystems have emerged, which are composed of two or more complementary services, and which are successful for several reasons: Economies of scope are significant on the supply side when it comes to developing different services and functionalities requiring relatively homogeneous input factors. For instance, data-driven economies of scope may be generated by combining data on users and utilisation from different sources, and using them across markets. On the demand side, economies of scope are also found to apply to end users, and these can be achieved and increased, respectively, by different services and products both being offered and used by the same supplier. Each further service or product offered by the same supplier, thus, supports its position and generates additional complementarities within the digital ecosystem. Complementarity in this sense means that the use of several products or services provides an added value. In order to complement one another in terms of the benefit, these products and/or services therefore need to be inter-coordinated since there is joint user demand for them. It is therefore possible that a digital ecosystem develops once the same operator is offering several platform services.

4. The Monopolies Commission ascertained in its XXIII Biennial Report that the problems arising in the implementation of the existing competition rules largely stem from two characteristics of the business models that are common in the digital economy. One characteristic is that platform companies – depending on network effects and other factors – may establish market power, which they can use to cause markets to tip. This can enable them to prevent access to the markets on which they are operating, and they can use this to leverage their market power on other markets.⁵ Another characteristic of platform business models is that the undertakings gain informational advantages vis-à-vis the public authorities and other market participants since they bring together the data

¹ European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SEC (2020) 437 final, 15 December 2020 (hereinafter: DMA - Digital Markets Act).

² cf. Evans, D. S./Schmalensee, R., *The Industrial Organization of Markets with Two-Sided Platforms*, Competition Policy International 3 (1), 2007, pp. 151-179.

³ ECJ, judgment of 13 February 1979, 85/76 - Hoffmann-La Roche, 1979, 461, para. 91 (constant line of rulings); on this Monopolies Commission, Special Report 68, Wettbewerbspolitik: Herausforderung digitale Märkte, Baden-Baden 2015, para. 493.

⁴ Monopolies Commission, XXIII Biennial Report, Wettbewerb 2020, Baden-Baden 2020, para. 55 with reference to Federal Court of Justice, judgment of 8 October 2019, KZR 73/17 - Werbeblocker III, headnote b and paras. 23 et seqq. as well as 28 et seqq.; along the same lines Schweitzer/Haucap/Kerber/Welker *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen*, final report of 29 August 2018, pp. 42 et seq.

⁵ cf. European Commission, Decision of 18 July 2018, AT.40099 - Google Android; on this Monopolies Commission, XXIII Biennial Report, loc. cit., paras. 382 et seqq.

of the users of several platform sites, enabling undertakings to build up superior knowledge of the market conditions.⁶

5. An undertaking is able to change (digital) value chains by operating different platform services, and possibly additional services in which the data from various markets are combined, thus enabling it to develop and continually refine a digital ecosystem. Undertakings of this kind include corporate groups such as Alibaba, Amazon, Apple, Alphabet (Google), Facebook, Microsoft and Tencent. These groups have been expanding for years from different core businesses into new sectors which, on the face of it, have little to do with one another. However, they do have in common that the accumulation of large and varied volumes of data opens up ever greater opportunities for diversification and expansion. This allows for links to be established in the digital value chain via individual services which exercise control of key components of an ecosystem, e.g. app stores, authentication services, operating systems, voice assistants, search engines and web browsers. Moreover, strategically occupying new areas at an early stage may not only make it possible to secure one's own position in the long run, but that a superior information base also makes it easier to identify such options more quickly.

6. It is true that the business practices relevant here may be judged positively from a competition law perspective to the extent that they benefit end users. However, it is difficult to distinguish between beneficial and damaging business practices. Many of the relevant modes of conduct reveal a pattern that can be characterised as follows: Structural economic effects favouring market concentrations lead to significant competition impediments in combination with exclusionary practices on the services side (problem of contestability), in conjunction with exploitative practices on the payment side (problem of fairness). In fact, this may put the openness of digital markets effectively at risk. In the ecosystem context, in particular, the undertakings in question enjoy incentives to tie end users ever closer to their core services at the expense of (partly competing) business users.

7. The European Commission examined in 2019 and 2020 whether to alter the burden of proof in competition procedures in order to, first of all, overcome the abovementioned informational disadvantages from which public authorities suffer.⁷ It also considered a new legal act that would have been meant to counter the monopolisation strategies in the digital economy better, and to subject platform companies, as operators of ecosystems ("gatekeepers"), to unambiguous prohibitions and obligations.⁸ It initiated public consultations on a New Competition Tool, and on a new legislative package for digital services, in the summer of 2020.⁹ Finally, the European Commission's prior considerations, finally, were integrated into the Digital Markets Act (DMA) with the aim to ensure contestability and fairness in digital markets.

8. The DMA is to specifically address the problems that are related to ecosystems. The European Commission thus justifies the DMA with the fact that, in the digital sector,

"Large platforms have emerged benefitting from characteristics of the sector such as strong network effects, often embedded in their own platform ecosystems [...] A few large platforms increasingly act as gateways or gatekeepers between business users and end users and enjoy an entrenched and durable position, often as a

⁶ Monopolies Commission, XXIII Biennial Report, loc. cit., paras. 51 et seqq.; Commission Competition law 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, Abschlussbericht, 9 September 2019, pp. 17 et seqq.; Monopolies Commission, XXIII Biennial Report, loc. cit., para. 57 with footnote 25 and para. 382 with footnote 179; ECJ, judgment of 13 February 1979, 85/76 - Hoffmann-La Roche, 1979, 461, para. 91 (constant line of rulings); on this Monopolies Commission, Special Report 68, 1st ed. 2015, para. 493.

⁷ Espinoza/Fleming, Margrethe Vestager eyes toughening 'burden of proof' for Big Tech, Financial Times of 30 October 2019; Crofts/Hirst, Vestager pledges to tame tech's 'dark side' in second EU mandate, MLex of 27 November 2019.

⁸ Crofts, "Tipping" tech markets warrant new antitrust tool, Vestager says, MLex of 24 April 2020.

⁹ European Commission, Proposal for a regulation: New competition tool, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool>; Proposal for a regulation: Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers>, Both retrieved on 4 June 2020.

result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers. [...] ... leading to significant dependencies of many business users on these gatekeepers, which leads, in certain cases, to unfair behaviour vis-à-vis these business users. It also leads to negative effects on the contestability of the core platform services concerned.”¹⁰

9. In order to resolve the enforcement problems of Art. 101/102 TFEU, in particular to accelerate proceedings, the proposal of the DMA envisages it without a market definition, establishing a market-dominant position, and examining the impact of the addressed modes of conduct in individual cases, as well as the possibility of the efficiency defence, and thus appears to be consistent at the outset. On the basis of established criteria, the DMA defines so-called “gatekeepers” as its addressees. These gatekeepers are then subject to defined conduct obligations. Only the European Commission will be empowered to decide on exceptions from the rules contained in the DMA for individual cases. This not only relaxes the burden of proof in comparison with existing competition law when it comes to establishing the addressees of the norms, but it also brings about a relatively large shift in the responsibility for action with regard to the legal obligations. The European Commission no longer needs to prove that there has been a violation in individual cases in order for the DMA to apply, but instead the gatekeepers must ensure that they continually comply with the full set of statutory stipulations independently of the individual case.

10. The content of the conduct obligations of the DMA is largely identical with the conduct obligations that can be derived from the existing Art. 101/102 TFEU, which are worded as prohibitions. However, the DMA provides neither for any examination of the market impact, nor for a weighing up of negative and positive effects of the conduct obligations. An exception to the provisions contained in the DMA on the basis of the individual case is, furthermore, to be possible exclusively via a decision of the European Commission, in which the Commission has broad discretion regarding the question of whether or not to grant an exception. The available exceptions are restrictively worded with regard to the question of the conditions under which any exception may be considered (cf. Art. 8 et seq. DMA). Hence, the DMA not only makes the procedure simpler than under the existing competition rules, but given its inflexibility, it also entails the risk of over-regulation. It will hence be vital to see how the DMA is implemented in practice.

11. Given the function of the DMA, namely to supplement the implementation of the existing competition rules, the DMA is closely aligned to the decision practice so far, even though the latter has been relatively ineffective. The Monopolies Commission considers an important reason for the frequently-lamented low level of effectiveness of the decision practice to lie in the fact that the European Commission has previously looked at individual platform services in isolation, and in particular not in the context of the respective ecosystem. The evaluation is particularly complex with regard to ecosystems operating across markets and it is particularly difficult to identify the right time to take action. When assessing the conduct of platform companies in ecosystems, there is a greater need than was previously the case to take into account the factors leading to end users becoming increasingly tied to the core platform services at the expense of (partly competing) business users. Incentives will otherwise remain in place for the platform companies targeted by the DMA to continue to conduct themselves in an anti-competitive manner. Even if the European Commission terminates such conduct on individual platform sites, the platform companies retain the advantages accrued by virtue of prior anti-competitive conduct for their entire businesses in the ecosystem. Apart from this, both the situation within an ecosystem (intra-ecosystem perspective) and the situation between ecosystems (inter-ecosystem perspective) need to be examined in order to obtain an overall view and to reach suitable solutions.¹¹ It is therefore a matter of focussing on the areas in which gatekeeper platform services play a central role, but in particular also on adjacent areas.

¹⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SEC (2020) 437 final, 15 December 2020, p. 1.

¹¹ Autorité de la Concurrence/Consumer and Markets Authority, The Economics of Open and Closed Systems, December 2014, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/387718/The_economics_of_open_and_closed_systems.pdf.

12. The fact that particularly the formation of ecosystems facilitates conduct which causes permanent damage to competition also favours supplementing the rules for the implementation of Art. 102 TFEU with a specific view to the special characteristics of ecosystems. The Monopolies Commission is investigating in detail in this Report whether the DMA should be tightened up in this regard within the currently pending legislative proceedings. In the next sections, the Monopolies Commission will therefore be dealing with the objectives and with gatekeepers as the addressees of the provisions contained in the DMA. First of all, it analyses what role accrues to the objectives of the DMA, in particular contestability and fairness on digital markets (Chapter 2). It will then go on to explain what a gatekeeper is as an addressee of the DMA, and whether the scope of the DMA should be restricted by introducing an ecosystem criterion focussing on problems related to ecosystems (Chapter 3). The Special Report furthermore deals with the classification of the rules of conduct for gatekeepers provided for in the DMA (Chapter 4), selected rules of conduct (Chapter 5), and the question of supplementing the DMA to include an efficiency defence (Chapter 6), before the report concludes with recommendations (Chapter 7).

Chapter 2

The objectives pursued by the DMA

13. The objectives of the proposed amendment are set out in Art. 1(1) DMA, and consist of ensuring contestable and fair digital markets where gatekeepers are present. This objective is fleshed out in the Explanatory Memorandum of the legislative Proposal. Accordingly, gatekeepers have a major impact on digital markets, and through their activities have substantial control over access to the latter.¹² This is said to lead to significant dependencies of business users on these gatekeepers, as well as to unfair behaviour vis-à-vis business users on the part of gatekeepers. This in turn is said to have negative effects on the contestability of the core platform services. The explanation of the framework of the Proposal says the following with regard to the multiannual strategic objectives of the Proposal for a Regulation:¹³

“The general objective of this initiative is to ensure the proper functioning of the internal market by promoting effective competition in digital markets, in particular a contestable and fair online platform environment. This objective feeds into the strategic course set out in the Communication ‘Shaping Europe’s digital future.’”

The individual objectives here are as follows:

“To address market failures to ensure contestable and competitive digital markets for increased innovation and consumer choice; To address gatekeepers’ unfair practices; To enhance coherence and legal certainty to preserve the internal market.”

14. “Contestability” and “fairness” on digital markets are consequently the two primary objectives of the Proposal for a Regulation in order to safeguard coherence and legal certainty as well as a functioning digital internal market. Thus, the DMA is intended to address economic imbalances between gatekeepers operating cross-border, and other platform companies, as well as gatekeepers’ unfair business practices, in order to prevent or reduce negative consequences such as weakened contestability of digital markets.

15. Large platform companies, which operate an ecosystem or are part of it, can cause various competition problems, which may impair the openness of digital markets permanently. They may harm competitors by foreclosing the markets on which they operate, for instance through closed systems, and via incompatibilities with services, applications and devices of other suppliers. They may reap a competitive advantage from their exclusive access to relevant resources and technologies, enabling them to leverage their economic power into additional areas and to cause the new markets to tip, e.g. from a search engine service to a voice assistant service. They can engage in bundling and tying practices in order to reduce users’ multihoming and switching and expand their own positions, for instance, by being the exclusive supplier of a product bundle consisting of hardware and software. They can foreclose markets by acting preferentially towards themselves, for instance by preinstalling their own services and setting them as default. They can use their considerable financial power to forego profits for a prolonged period in order to occupy new business areas as quickly as possible, thus driving competitors out, for instance with voice assistant services. They may use their reviewing, recommendation and ranking systems to influence end users’ selections to their own advantage, for instance by preferentially showing their own apps in the App Store. As the rule makers, they may enforce their disproportionately strong negotiating position vis-à-vis the (dependent) groups of users as part of adjusting their terms and conditions to their own advantage, and hence bring about a distortion of competition on the platform, for instance with regard to commissions, liability, data collection and data use.

¹² European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SEC (2020) 437 final, 15 December 2020, pp. 1-3.

¹³ European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SEC (2020) 437 final, 15 December 2020, p. 65.

2.1 Contestability of digital markets

16. The objective of the DMA of protecting the contestability of digital markets is to ensure lower prices, greater choice for end users, productivity gains, and innovation.¹⁴ This is to take place via an adaptable framework in which gatekeepers' obligations can be modified, or new ones can be created where appropriate. The barriers to market entry may consist of (1) barriers to entry to existing services and (2) entry barriers to future services (disruptive innovation).

17. In economic terms, barriers to entry to existing services may exist by virtue of economies of scale and of scope, as well as externalities and network effects spanning whole groups of users, given that more users on a site of the platform service will tend to lead to more users on the other site, and vice versa. These positive network effects are frequently the most important access barriers to digital markets.¹⁵ Collecting and exploiting (personal) data enables a user feedback loop, and also a monetisation feedback loop, thus raising the entry barriers for third parties.¹⁶ Furthermore, data-driven network effects may make it possible to identify new markets and expand into other business areas, whilst at the same time establishing one's own position in the core business.¹⁷ Many platform services on digital markets are offered at a price of zero, for instance, search engine services, social network services, voice assistant services and web browser services. Therefore, the entry strategies are more heavily restricted in these free platform services. They can focus on product and quality differentiation, but not on price differentiation strategies.

18. In addition, entry barriers to future services may also play an important role with regard to innovativeness from an economic point of view. Innovativeness in the digital economy largely depends on data collection and data use, large amounts of computing power and investing venture capital. The types of innovativeness and their role in product innovation are nonetheless complex and uncertain, in particular when the process of innovation is not clearly structured. It is, hence, decisive which platform services control the innovation capacities, and how high the barriers are for entering innovative markets and areas.

19. From a legal perspective, the objective of protecting the contestability of digital markets is a secondary objective to the general protective objective of EU law, namely to protect the internal market as a system ensuring that competition is not distorted.¹⁸ Accordingly, contestability is no longer provided if competition is "eliminated" within the meaning of the European case-law.¹⁹ The safeguarding of contestability is in particular important in the digital economy in order to prevent markets from tipping in favour of one platform operator. In the ecosystem context, the ecosystem operator furthermore coordinates and bundles several offers, which may have an impact on the contestability of several individual markets at once. Unlike competition law, the DMA however protects the

¹⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SEC (2020) 437 final, 15 December 2020, p. 66.

¹⁵ Shapiro/Varian *"precisely because various users find it so difficult to coordinate to switch to an incompatible technology, control over a large installed base of users can be the greatest asset (a platform) can have"*, 1999, p. 185.

¹⁶ Lerner, The Role of 'Big Data' in Online Platform Competition, 2014, available at SSRN: <https://ssrn.com/abstract=2482780>.

¹⁷ Eisenmann/Parker/Van Alstyne, Platform Envelopment, Strategic Management Journal 32(12), 2011, pp. 1270-1285.

¹⁸ Art. 3(3), first sentence, and Art. 51 TEU in conjunction with Protocol (No 27) to the Treaties; cf. on this ECJ, judgment of 13 December 1991, 18/88 -RTT/GB-Inno-BM, 1991, I-5941, ECLI:EU:C:1991:474, para. 25, in accordance with which *"A system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators."*

¹⁹ ECJ, judgment of 21 February 1973, 6/72 - Europemballage Corporation and Continental Can Company, 1973, 215, ECLI:EU:C:1973:22, para. 29; see also European Commission, Communication – Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ C 45 of 24 February 2009, p. 7, para. 29 competition is eliminated: *"by removing all or most existing sources of actual or potential competition."*

contestability of digital markets per se, and independently of the evaluation of the market conditions applying in individual cases.²⁰

20. The Monopolies Commission recommends describing the contestability objective more clearly in recital 79 or in a new recital 80.²¹ The objective should be orientated towards the contestability of the position of the gatekeeper being guaranteed on digital markets independently of whether competition is “emerging”, “in the market” or is taking place “for the market”.²² The Monopolies Commission therefore recommends describing the objective of contestability in recital 79 or 80 (new) DMA as follows:

“Contestability is to mean that undertakings which are not gatekeepers are able to overcome barriers to entry and expansion in digital markets.”

2.2 Fairness of digital markets

21. With the objective of fairness, the DMA goes beyond the original considerations of the European Commission which aimed to counter potential harm to competition, or a lack of competition. The European Commission already referred to the aspect of fairness in its first impact assessments on these considerations.²³ With the fairness objective, the DMA thus appears to link to a concept which is significant in the Platform-to-Business Regulation which already is in force.²⁴ Accordingly

“a competitive, fair, and transparent online ecosystem where companies behave responsibly is also essential for consumer welfare. Ensuring the transparency of, and trust in, the online platform economy in business-to-business relations could also indirectly help to improve consumer trust in the online platform economy.”²⁵

22. However, this concept leaves it unclear in economic terms, which benchmark is applied for measuring fairness. As a matter of principle, fairness can be equated with considerations of distribution or justice.²⁶ The different ideas of fairness include exogenous rights (e.g. one person = one vote), compensation (e.g. provision of a replacement piece of land because of the need for a train line), and a reward in relation to the contribution (e.g. application of the Shapley value).²⁷ According to the European Commission, fair conditions are to lead to a more even distribu-

²⁰ cf. also recital 10 of the DMA: *“This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market.”*

²¹ Rules of conduct intended to serve contestability on digital markets are in particular Art. 5(b) DMA, as well as Art 6(1)(b), (c), (e) and (j) DMA.

²² cf. Crawford/Cremer/Dinielli/Fletcher/Heidhues/Schnitzer/Scott-Morton/Seim, Fairness and Contestability in the Digital Markets Act, Yale Tobin Center for Economic Policy, Digital Regulation Project Policy Discussion Paper No. 3, July 2021.

²³ See the respective Inception Impact Assessments. The New Competition Tool – NCT was developed in order to close gaps identified in the EU’s current competition rules which were determined on the basis of the Commission’s experience with the implementation of the EU’s competition rules on digital (and other) markets. Accordingly, the NCT is to help to ensure “fair and undistorted competition in the internal market”. It is thus to complement the Digital Services Act package, and for its part protect “fair and contestable markets”.

²⁴ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186 of 11 July 2019, p. 57.

²⁵ Recital 3 of Regulation (EU) 2019/1150.

²⁶ Considerations of justice are explicitly recognised in the European Commission’s “Better Regulation Guidelines” as a reason for regulatory action. cf. European Commission. “Better Regulation Guidelines”, https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en.

²⁷ Moulin, Fair Division and Collective Welfare, 2004, MIT Press, Cambridge.

tion of revenues, profits and cash-flows among platform services, and thus increase innovation and consumer welfare.²⁸

23. Fairness in the Proposal for the DMA addresses cases in which the economic dependence of business users vis-à-vis a gatekeeper, and an asymmetric negotiating power, favouring the gatekeeper, enable the latter to set conditions in an economically-relevant manner which could not be enforced were the markets to be open and functioning. The imposition of an obligation to ensure fairness hence relates to the bilateral relationship between gatekeepers and business users. From an economic perspective, the DMA can be criticised as it remains vague with regard to the term “fairness”, and defines modes of conduct as unfair which lack recognisable economic underpinning and exploit the imbalance existing in the bilateral relationship, and which afford the gatekeepers an advantage vis-à-vis business users said to be “disproportionate” to the service provided by the gatekeeper to business users (cf. Art. 10(2)(a) DMA, Art. 7(6) DMA). Alternatively, restrictions on contestability are also said to be unfair (Art. 10(2)(b) DMA). In legal terms, fairness is added to the “special responsibility” of platform companies where the latter have a dominant position. Hence, fairness is to serve consumers’ welfare indirectly when platform companies behave in a manner that is responsible and trustworthy.

24. It can furthermore be found in economic terms that the per se rules of Art. 5 and 6 DMA recognisably aim to prevent damaging and inefficient business practices on the part of gatekeeper platform services, and hence to ensure equal competitive conditions in the EU. It would nonetheless be problematic in economic terms for the regulation of business practices in the DMA to be consequently orientated towards steering the distribution of profits along the value chain.²⁹ What constitutes a fair price also depends on the perspective, e.g. business users, end users, gatekeepers and providers of complementary services. With the fairness objective, however, the DMA appears to focus on vertical “Platform-to-Business” business relationships in order to put an end to low remunerations, the imposition of disproportionate contractual terms, or indeed the threat of arbitrary unilateral termination. Indeed, such a vertical fairness concept may make sense in the context of ecosystems, as long as it is correctly defined and applied.

25. Competition law recognises fairness for the evaluation, under the law on abuse, of the conduct of dominant undertakings specifically in exploitative situations.³⁰ Here, the term “fairness” opens a scope for assessment to the competition authority. The assessment on the part of the authority can only be reviewed by a court to a limited degree within such scope.³¹ Thus, the fairness benchmark expands the scope available to the authority for taking action in the proceedings in relations with the undertakings concerned. Particularly in the ecosystem context, the fairness objective may be further related to the fact that gatekeepers are not to exploit the dependences existing on individual platform sites in bilateral relations to users’ disadvantage. In the fairness assessment it would be crucial whether the business users are in particular need of protection given their dependence, but not what are the reasons for the dependence. The dependence could be caused by the ecosystem operator having informational advantages, or by network effects and further platform-specific factors becoming more closely tied to core platform services and to the ecosystem. Evaluations of dependence might however differ, in light of the reasons.

26. The Monopolies Commission considers that “fairness” should address the economic independence of business users vis-à-vis a gatekeeper, and hence the asymmetric negotiating power favouring the gatekeeper. The objective pursued by fairness should be described more clearly in recital 79, or in a new recital 80 DMA. The Monopolies Commission therefore recommends describing the objective of fairness in recital 79 or 80 (new) DMA as follows:

“Fairness is to mean that a gatekeeper’s business users are not placed at a disadvantage by the gatekeeper.”

²⁸ European Commission, Digital Markets Act Impact Assessment Support Study – Annexes, 14 December 2020, p. 74.

²⁹ Conduct obligations intended to promote fairness on digital markets are in particular Art. 5(a) and (b) DMA, as well as Art. 6(1)(a), (h), (j) and (k) DMA.

³⁰ ECJ, judgment of 14 February 1978, 27/76 - United Brands, 1978, 207, ECLI:EU:C:1978:22, paras. 252-253.

³¹ CFI, judgment of 21 April 2005, T-28/03 - Holcim, ECLI:EU:T:2005:139, para. 95.

27. In terms of competition policy, the European Commission should align the application of the DMA to specifically intervening when problems related to ecosystems occur. The objectives pursued by the DMA should therefore be understood in such a way that only ecosystem-related questions of contestability are addressed by the DMA in the sense of problems of exclusion, and fairness in the sense of exploitation problems with regard to business users. Such an objective may require tightening up the provisions in the DMA in the legislative procedure regarding gatekeepers as the addressees of the new provision and on the rules of conduct with which gatekeepers must comply. The Monopolies Commission takes up a position on the individual aspects in the following sections of the present Special Report.

Chapter 3

Gatekeepers as addressees of the norms

28. The addressees of the DMA are digital platforms which have a gatekeeper position as providers of core platform services (“core platform services”). As gatekeepers, undertakings are classified under Art. 2(1) DMA as “provider[s] of core platform services”, and these are listed enumeratively in the legislative Proposal (Art. 2(2) DMA).³² The Proposal defines “gatekeepers” on the basis of Art. 3(1) DMA, such that a gatekeeper a) has a significant impact on the internal market, b) operates a core platform service which serves as an important gateway for business users to reach end users, and c) enjoys an entrenched and durable position, or will obtain one in the foreseeable future. To this end, specific quantitative criteria (Art. 3(2) DMA) or qualitative criteria (Art. 3(6) DMA) would have to be met.³³ However, this approach risks covering too few or too many undertakings, and possibly the wrong ones, on the basis of the thresholds for presumption contained in Art. 3(2) DMA, since the only benchmark applied is the sheer size and scope.³⁴ What is more, ecosystems pose particular risks for competition, over and above those occurring with single digital platform services.³⁵ The question thus arises of whether this risk can be reduced by means of an additional criterion tackling the particularities of ecosystems.

3.1 Gatekeepers

29. According to the economic literature, a “gatekeeper” is a player who controls information flows and access to information and users, and structures the digital environment.³⁶ Accordingly, a digital platform may be a gatekeeper platform service for example if it manages to control access to end users and are thus without any alternative for business users in the absence of multihoming or switching on the part of relevant groups of end users, if they would like to reach these end users. Hence, the degree of control depends on the incentives and on the ability of the groups of users (business users and end users of the platform service) to engage in multihoming and switching behaviour, and increases with the number of users who engage in Singlehoming.³⁷ Thus, a gatekeeper position does not necessarily require a large market share, but only a high degree of control over access to a relevant group of users and hence becomes relevant not only in the monopoly case, but already in the oligopoly case.

30. Gatekeeper platform services may be understood in such a way that the relevant undertakings have structural or systemic control in ecosystems over access to information and services, as well as functionality and positioning in ranking and recommendation systems. In competition terms, gatekeepers become problematic if they

³² Core platform services are therefore online intermediation services, online search engines, social networks, video sharing platform services, number-independent interpersonal telecommunication services, operating systems, cloud computing services, and advertising services.

³³ The quantitative criteria of Art. 3(2) DMA for an operator of core platform services include a) an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or an average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounting to at least EUR 65 billion in the last financial year, and it providing a core platform service in at least three Member States; b) where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10,000 yearly active business users established in the Union in the last financial year; c) where the thresholds in point (b) were reached in each of the last three financial years.

The qualitative criteria of Art. 3(6) DMA for an operator of core platform services are a) the size of the provider of core platform services; b) the number of business users; c) entry barriers; d) scale and scope effects; e) business user or end user lock-in; f) other structural market characteristics.

³⁴ The difference might lie for instance in the (non-)inclusion of simple digital platform services such as hotel booking portal services, music streaming services, etc.

³⁵ According to the report of the European Parliament’s Rapporteur Andreas Schwab on the DMA (cf. https://www.europarl.europa.eu/doceo/document/IMCO-PR-692792_EN.pdf), undertakings are to have to operate “two or more core platform services” with more than 45 million monthly active end users in order to be regarded as gatekeepers.

³⁶ Lynskey, *Regulating Platform Power* LSE Law, Society and Economy Working Papers 1/2017, 2017, pp. 9-10.

³⁷ Armstrong/Wright, *Two-sided Markets, Competitive Bottlenecks and Exclusive Contracts*, *Economic Theory* 32(2), 2007, pp. 353-380.

a) generate enduring economic power via a gatekeeper function with core services, products, content, input and/or assets; b) establish considerable information asymmetries between the platform service and the groups of users as well as (potential) competitors; and c) create (potentially) irreversible effects for competition through strong direct and indirect network effects on the demand side, and through significant economies of scale and of scope, high barriers to access and expansion, as well as significant data-driven effects on the supply side; which as a result d) facilitate and favour the expansion of the ecosystem by leveraging economic power in other business areas.

3.2 Designing an ecosystem criterion

31. Regardless of the statutory definition in the DMA, gatekeeper platform services and ecosystems show characteristics that can be narrowed down. In particular, undertakings which are diversified (known as conglomerates) may manage to establish a digital ecosystem. This may be traced back to factors such as organic growth, overcapacities³⁸, modularity³⁹, reuse of digital resources, multimarket contacts, cross-subsidies, and start-up funding or takeover activities. Hardware, software and/or services of the undertakings concerned are in a compatible, complementary relationship with one another, and are also interlinked via databases, so that they may be offered across products, services, markets or sectors.

32. Platform competition comes about via distinguishing between the core functionalities of a platform service and customers' experience, and therefore by means of the different manner in which the system is orchestrated. Thus, the operator (orchestrator) of an ecosystem derives its competitive advantage either from the manner in which the products or services interact, and/or from the manner in which the data are combined, which may enable it to lock in platform users. From an economic perspective, product-based and actor-based ecosystems can be distinguished:⁴⁰

- “Multi-product ecosystems”: This involves offering a number of inter-compatible products or services which enhance one another and together constitute a (novel) package or an attractive solution, e.g., operating system + app store + web browser + voice assistant;
- “Multi-actor ecosystems”: This involves providing a platform for a number of partners and providers of complementary services, and hence generates complementarities⁴¹ in order to create an added value for end users, e.g. interplay between the app store provider and developers of apps.

33. Major Internet companies frequently combine both types of ecosystem. Data are used, on the one hand, as input, enabling economies of scale to be generated in product developments, but, on the other hand, also as input and output, enabling several complementarities to be generated as data are processed further. This accumulation and further processing of large, varied quantities of data continually opens up further possibilities for diversification and expansion. This also corresponds to the observation of the linking of the digital value chain by gatekeeper platform services which may exercise control over key components of an ecosystem, such as app-stores, authentication services, operating systems, voice assistants, search engines and web browsers.

34. Platform services within an ecosystem may take up a gatekeeper position of this type. As ecosystem providers, Alphabet (Google) and Apple, for instance, offer several products and services which are compatible with and

³⁸ Overcapacity means in this context that fluctuations in demand, as well as any structural change in the use of the service, are countered by retaining additional capacity in order to ensure entrepreneurial flexibility for strategic expansion.

³⁹ Modularity means here that a platform is linked with other components (e.g. applications, services, platforms) via interfaces (e.g. APIs), and that this technical architecture generates synergies with regards to development and scaling, which in turn favour the establishment and expansion of an ecosystem.

⁴⁰ Jacobides/Cennamo/Gawer, Towards a theory of ecosystems, *Strategic Management Journal* 39(8), 2018, pp. 2255-2276.

⁴¹ Complementarity means that at least two players or products/services must act jointly in order to obtain a benefit or to add value. In order to complement one another in terms of the benefit, these players or products/services must therefore be intercoordinated as they are taken up by users jointly.

complement one another (e.g., operating system, app-store, web browsers, voice assistant, mapping service), and that may also constitute a gatekeeper platform service (within the ecosystem) in individual cases (e.g., Apple AppStore/Google PlayStore; Apple iOS/Google Android). Control of access to information, content, products, services, inputs, assets and functionality, as well as positioning in rankings, may lead to a platform service having a gatekeeper position (cf. Art. 3(1)(b) DMA). Platform services (e.g. operating system, app-store, web browser, app) may become gatekeeper platform services in economic terms whenever they have a large number of users among all groups of users of the core platform service (cf. Art. 3(1)(a) DMA), as well as enduring economic power of the platform service (cf. Art. 3(1)(c) DMA), and if a relevant group of users can only be reached via this platform service due to singlehoming (cf. Art. 3(1)(b) DMA).⁴²

35. Under Art. 3(2) and (4) DMA, several quantitative and qualitative indicators are used to determine and assess such a gatekeeper, e.g. number of registered and monthly active users ; number of visits to the platform; time spent on the platform; quantity of data collected; geographical scope; main source of income; number of transactions; third-party turnover via the platform; growth drivers; innovative power. However, it remains unclear how the European Commission will use and evaluate these indicators.

36. When comparing gatekeeper platform services vis-à-vis other digital platform services with a large number of users in economic terms, a particularity of gatekeeper platform services is that they are part of an ecosystem, and can therefore also be characterised using the following two delimitable features on the basis of the distinction between multi-product ecosystems and multi-actor ecosystems:

- “multi-platform integration”, i.e. an ecosystem is made up of several linked, connected or complementary platform services of the same operator – also via databases –; or
- “dual role” of the platform service operator, i.e. creating a platform ecosystem.

One example of the first group of cases is the integration of an operating system, an app-store, a web browser, and an app. Examples of the second group of cases are a) an operator of a digital marketplace, which is at the same time also a provider of goods/services (part of a group of users of the platform service), and hence competes with third parties; b) an operator of an app-store, which is at the same time also a developer or provider of apps (part of a group of users of the platform service), and hence competes with third parties; c) a developer of an operating system, which is at the same time also a manufacturer of devices (part of a group of users of the platform service), and hence competes with third parties.⁴³

37. Significant complementarities arise in both groups of cases, both between the platform services and/or the players of the ecosystem, and in terms of the operators when it comes to combining and further processing data, and in the (further) development of (new) products and services making it possible to leverage economic power into other areas, hence expanding the ecosystem (platform envelopment).⁴⁴ At the same time, this raises the entry barriers to these areas for third parties.

3.3 Restricting the DMA to ecosystem-specific problems

38. It would therefore be purposeful to include an ecosystem criterion in the DMA on the basis of the “multi-platform integration” of ecosystems, and of the “dual role” of platform ecosystems. This would ensure that only those platform services are able to attain gatekeeper status within the meaning of Art. 3 DMA where conglomerate effects of the ecosystem are properly taken into account. This would also ensure that the ability of the core platform services covered by the DMA to restrict access to specific applications and services on other levels of the digital value chain can be addressed. Applying the DMA to ecosystem-specific problems would more clearly delimit

⁴² Easley/Guo/Krämer, From Net Neutrality to Data Neutrality: A Techno-Economic Framework and Research Agenda, *Information Systems Research* 29(2), 2018, pp. 253-272.

⁴³ cf. recitals 43 and 52 of the DMA. A problematic dual role may also entail a multiple role in individual cases.

⁴⁴ Eisenmann/Parker/Van Alstyne, Platform Envelopment, *Strategic Management Journal* 32(12), 2011, pp. 1270-1285.

tate the group of addressees of the norms and, thus, also make the complementarity of the DMA to competition law, in particular Art. 102 TFEU, comprehensible.

39. Against this background, the Monopolies Commission advocates the inclusion of an ecosystem criterion in a new Art. 3(1)(d) DMA as a fourth cumulatively necessary condition, which should be defined as follows:

A provider of core platform services shall be designated as gatekeeper if...

“d) it orchestrates a product and/or actor-based ecosystem with the ability to raise barriers to entry and/or expand its ecosystem into new areas.”

Then, the two indicators of multi-platform integration and dual role should be inserted into a new Art. 3(2)(d) DMA as follows:

It is assumed that a provider of core platform services...

“d) meets the criterion in paragraph (1)(d) if it meets the thresholds in subparagraphs (a) and (b) and subparagraph (c) and there is a multi-platform integration with at least two core platform services or a dual role by the provider.”

40. As a consequence of such an ecosystem criterion, an undertaking that offers, e.g., an online intermediation service, would no longer be covered by the DMA unless it offers at least one additional core platform service (within an ecosystem) or has a dual role. The inclusion of such an ecosystem criterion would have the effect of limiting the group of addressees of the DMA to companies that pose particularly serious threats to competition. This ecosystem criterion would also allow for a more effective use of resources⁴⁵ to enforce the DMA.

41. Furthermore, the Monopolies Commission considers the list of core platform services in Art. 2(2) DMA to be inconsistent and incomplete, so that it should be adjusted as follows:

- (1) expansion to include web browser services: These are core platform services (within ecosystems), and can take on a gatekeeper role (in economic terms), since they enable it to control all functions, rights and configurations of the web applications used via a web browser service; and
- (2) explicit designation of the online intermediation services of Art. 2(2)(a) DMA: In accordance with Art. 2(2) of Regulation (EU) 2019/1150, these form a very broad (collective) category. In the interest of legal certainty for undertakings, as well as taking into account the fact that all other core platform services are explicitly designated, this should also apply to this “category”, e.g. explicit listing of “e-commerce market places” and “voice assistant services”.

⁴⁵ Given the (limited) resources to enforce the DMA, the “Friends of an effective Digital Markets Act” have also expressed their views in two position papers, in which the Ministers of Economic Affairs of Germany, France, and the Netherlands propose, among other things, that the European Commission should be supported by national authorities: Friends of an effective Digital Markets Act, Strengthening the Digital Markets Act and its Enforcement, First position paper of 27 May 2021, <https://www.bmwi.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.html>, retrieved on 17 September 2021; Second position paper of 9 September 2021, <https://www.permanentrepresentations.nl/permanent-representations/pr-eu-brussels/documents/publications/2021/09/9/strengthening-the-digital-markets-act-and-its-enforcement>, retrieved on 17 September 2021.

Chapter 4

The system followed in Articles 5 and 6 DMA

42. In the sections below, the Monopolies Commission would like to address the system followed in Art. 5 and 6 DMA. In doing so, it will evaluate the structure of the provisions as concrete per se rules (section 4.1), the fundamental differences when it comes to applying the obligations in Art. 5 DMA, on the one hand, and in Art. 6 DMA on the other (section 4.2), the potential to individualise the requirements and prohibitions for specific platform types (section 4.3), and the extent to which a uniform system in economic terms can appropriately address the core problems in the ecosystem context (section 4.4).

4.1 Structure as concrete per se rules

43. Art. 5 and 6 of the DMA contain a total of 18 individual obligations prohibiting the addressees of the norms to engage in specific conduct, or obliging them to engage in such conduct, regardless of its effects in individual cases (“per se rules”).⁴⁶ Art. 5 and 6 DMA are very largely based on antitrust case-law regarding Art. 101 and 102 TFEU, and insofar lend concrete shape to the abstract obligations and prohibitions contained in these provisions. The two general differences between Art. 5 and 6 DMA, and Art. 101 and 102 TFEU, are as follows. Firstly, the application of Art. 101 and 102 TFEU requires, as a matter of principle, the finding of a negative effect on competition in individual cases.⁴⁷ It is true that there are relaxations regarding the obligation to provide proof for an violation when it comes to conduct that is regarded as particularly harmful, and which has as its object a restriction of competition, instead of merely effecting it (Art. 101 TFEU), or are abusive prima facie (Art. 102 TFEU). This however only applies to conduct which is anti-competitive by nature. The corresponding groups of cases tend to be interpreted narrowly⁴⁸, which is likely to particularly also apply with regard to more novel conduct in the context of digital markets. It should furthermore be considered that Art. 101 and 102 TFEU each contain a catch-all clause which is supplemented by examples of rules. Their general wording enables the catch-all clauses to cover a large number of different conduct.⁴⁹

44. As part of the 10th Amendment to the German Act against Restraints of Competition (10. GWB-Novelle), which came into force in January of this year, section 19a of the Act against Restraints of Competition (“ARC”) introduced a provision supplementing the general prohibition of abusive conduct into German antitrust law which – like the DMA – also specifically addresses competition problems in the digital economy. Section 19a ARC targets platform companies to which the Federal Cartel Office attributes “paramount significance for competition across markets”. With regard to the structure of its obligations, the provision strikes a balance between Art. 101 and 102 TFEU, on the one hand, and Art. 5 and 6 DMA, on the other: Section 19a subsection (2), first sentence, ARC contains seven groups of cases with obligations which largely each consist of a prohibition worded in a rather general manner as well as of clarifying examples of rules (with the exception of numbers 5 and 6), and require an (imminent) restriction of competition. The latter already partly emerges from the wording of the provision (num-

⁴⁶ recital 10 of the DMA: “[This Regulation] is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market.”

⁴⁷ Added to this is the possibility for undertakings to justify conduct covered by the scope of Art. 101 and 102 TFEU, in particular because it creates efficiencies counterbalancing the restriction of competition. Cf. also recital 9 of the DMA. Adding an efficiency defence to the DMA with regard to practices which – looked at in isolation – violate the obligations of Art. 5 and 6 DMA is not to be discussed until Chapter 6. The position of the addressees of the norms, which uses as a basis not market dominance (Art. 102 TFEU), but *gatekeeper* status, was covered back in Chapter 3.

⁴⁸ Re Art. 101 TFEU: ECJ, judgment of 2 April 2020, C-228/18 - Budapest Bank, ECLI:EU:C:2020:265, paras. 51 et seqq.; judgment of 11 September 2014, C-67/13 P - Cartes Bancaires, ECLI:EU:C:2014:2204, para. 58. Regarding Art. 102 TFEU: ECJ, judgment of 6 September 2017, C-413/14 P - Intel, ECLI:EU:C:2017:632, paras. 133 et seqq.

⁴⁹ In contrast to this, the obligations of Art. 5 and 6 DMA are referred to in the present Report as “per se rules”, although it is proposed to make all the obligations and prohibitions there available in a dialogue procedure for specification (see on this also section 4.2 below), as well as to make them amenable to the efficiency defence (more on this in Chapter 6).

bers 2 to 5), and in other respects at least from the fact that the obligations contained in section 19a subsection (2), first sentence, ARC do not apply directly, but have to be separately “activated” by the Federal Cartel Office in individual cases.⁵⁰

45. The fundamental option of the DMA to introduce per se rules – which are more concrete when compared to Art. 101 and 102 TFEU – is welcome. The examination of the effects of conduct in individual cases provided for in antitrust law may make its enforcement much more difficult. The pursuance of abusive conduct in the platform economy has repeatedly proven to be relatively laborious and complex in the past⁵¹, which is however also likely to be a result of the requirements under procedural law when it comes to proving a violation.⁵² That having been said, concrete per se rules are likely to make it simpler to enforce the law. The addressees of the norms hence are given not only greater certainty in terms of what conduct is required and prohibited, but it is also simpler to prove any violation of the obligations. One may therefore presume, on the one hand, that this results in greater observance of the law on the part of the addressees of the norms, and on the other that, in the event of proceedings nonetheless being necessary in respect of a violation, these can be concluded more expeditiously.⁵³

46. The distinction made between an ex-ante rule (Art. 5 and 6 DMA) and ex-post control (Art. 101 and 102 TFEU), of which one reads in some parts⁵⁴, is however incorrect when put in such general terms. The addressees of the norms do not have to have specific conduct approved in advance, either in accordance with Art. 5 and 6 DMA or with Art. 101 and 102 TFEU.⁵⁵ Both cases however relate to more (DMA) or less (antitrust law) concrete rules constituting an ex-ante obligation to engage in specific conduct, and which in the event of a (presumed) violation may lead ex post to the opening of official proceedings, as well as to its termination and/or sanctioning.⁵⁶

47. Foregoing the examination of the effects in individual cases may naturally entail the risk of overenforcement since the addressees of the norms may be prohibited from engaging in conduct which is not harmful, or obliged to engage in conduct which is not necessary. The structure of Art. 5 and 6 DMA as per se rules nonetheless appears to be justified. A (slight) overenforcement of the law is justifiable in the light of the partly insufficient enforcement of antitrust law in the digital economy, and of the centralisation of power on digital markets which has already taken place in some cases, or which is at least impending. By contrast, the added value of the fleshed-out obligations would be partially lost in comparison to the catch-all clauses of Art. 101 and 102 TFEU if an ad hoc verification of the impact were to be necessary.⁵⁷ It should also be taken into consideration here that the obligations of Art. 5 and 6 DMA very largely stem from the case-law regarding Art. 101 and 102 TFEU⁵⁸, so that they have already been trialled in practice, and in this regard are suited to rules which have comparably small scope for interpreta-

⁵⁰ On this paras. 57 et seq. below

⁵¹ On this paras. 1 and 9 et seqq. above. Recital 5 of the DMA: “*enforcement [of Articles 101 and 102 TFEU] occurs ex post and requires an extensive investigation of often very complex facts on a case by case basis.*”

⁵² For details on this see Monopolies Commission, XXIII Biennial Report, loc. cit., paras. 97 et seqq.

⁵³ cf. also de Streel A., et al., The European proposal for a Digital Markets Act: A first assessment, January 2021, p. 21, retrievable at <https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/>, retrieved on 10 May 2021; Schweitzer, H., ZEuP 2021, 503, 531. In general terms on the advantages and disadvantages of concrete per se rules and catch-all clauses (standards) with regard to the digital economy cf. Commission Competition law 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft. The Commission Competition law 4.0 has advocated the introduction of a platform regulation with per se rules; loc. cit., pp. 25 and 49 et seqq.

⁵⁴ recital 5 of the DMA; cf. the quote in footnote 52. cf. also Gielen, N./Uphues, S., EuZW 2021, 627, 629.

⁵⁵ The European Commission may however instruct the addressee of the norms in accordance with Art. 7(2) DMA to implement the obligations in Art. 6 DMA in as effective a manner as possible; see on this paras. 51s et seq. below

⁵⁶ cf. also Schweitzer, H., ZEuP 2021, 503, 531 with footnote 112.

⁵⁷ But critical Zimmer, D./Göhl, J.-F., ZWeR 2021, 29, 53 et seq.

⁵⁸ On this para. 43. below

tion.⁵⁹ What is more, any unfair results can be avoided by creating a possibility for the addressees of the norms to justify their conduct.⁶⁰

48. Despite the concrete obligations, which are exhaustively listed in Art. 5 and 6, the DMA is also likely not to lack the requisite flexibility with regard to additional conduct which runs counter to the objectives of the DMA. Art. 11(1) DMA, first of all, contains a prohibition of circumvention – the scope of which is however somewhat unclear – with regard to the obligations already provided for in Art. 5 and 6 DMA. Accordingly, the gatekeeper must carry out the obligations set out there “fully and effectively”, and their implementation may not be “undermined” by any behaviour of the undertaking to which the gatekeeper belongs. Above all, however, the European Commission may update the obligations and prohibitions of Art. 5 and 6 DMA pursuant to Art. 10, 17 and 37 DMA by means of delegated acts within the meaning of Art. 290 TFEU, and hence react to future harmful practices on the part of large digital platforms which cannot yet be anticipated. One might object that the procedure for updating Art. 5 and 6 DMA is laborious. In particular, for instance, a prior market investigation must be carried out by the European Commission, and this may take up to 24 months, Art. 10 and 17 DMA.⁶¹ The consequence of this might be that not only the obligations themselves⁶², but also their updating, simply lags behind the digital economy, which tends to be rapid in pace, with its frequent changes in business models. However, the delegation of the competence to update Art. 5 and 6 DMA, provided for in Art. 10 DMA, from the legislature handing down the Regulation to the European Commission is somewhat comprehensive.⁶³ It therefore suggests itself for the adoption of a delegated act by the European Commission to be conditional on adherence to specific procedural steps, and that the pros and cons of supplementary provisions should be carefully weighed up.⁶⁴

49. There has also been discussion of adding a catch-all clause as well as of examples of rules.⁶⁵ A catch-all clause could be used as a standard element where conduct does not fall within the scope of a specific requirement or

⁵⁹ Critical Körber, T., NZKart 2021, 436 and 437, pointing out that this frequently refers to cases which are pending or have yet to be ruled on in a legally binding manner.

⁶⁰ On this Chapter 6 below.

⁶¹ Therefore critical Haus, F./Weusthof, A.-L., WuW 2021, 318, 321; Podszun, R./Bongartz, P./Langenstein, S., EuCML 2021, 60, 66. It is unclear according to the report on the Proposal for a DMA of the European Commission by the Rapporteur for the European Parliament, Andreas Schwab, whether a prior market investigation is to be waived. Whilst there is provision to delete the updating of the obligations pursuant to Art. 10 in Art. 17, no such deletion is provided for with regard to the requirement for a market investigation in accordance with Art. 17 in Art. 10; cf. Draft Report on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020/0374(COD), 1 June 2021 (“Report for the European Parliament”), p. 59, retrievable at https://www.europarl.europa.eu/doceo/document/IMCO-PR-692792_EN.pdf, retrieved on 7 June 2021. As a matter of principle, the Report for the European Parliament however provides for the period of the market investigation to be conducted, which is also relevant with regard to updating the list of addressees of the norms, to be shortened from 24 months to 18; loc. cit., p. 59.

⁶² De Streel, A. et al., The European proposal for a Digital Markets Act: A first assessment, January 2021, p. 21, loc. cit.

⁶³ cf. also Haus, F./Weusthof, A.-L., WuW 2021, 318, 321; Zimmer, D./Göhl, J.-F., ZWeR 2021, 29, 49 et seq. Art. 290(1) TFEU restricts the possibility of a delegation to the European Commission to adjust a basic legal act to its non-essential provisions. It is however questionable whether Art. 5 and 6 DMA constitute such non-essential provisions of the DMA. The ECJ applies a narrow definition to the term ‘essential’ as a matter of principle; cf. only Gellermann in: Streinz, TEU/TFEU, 3rd ed., Munich 2018, Art. 290 TFEU para. 7. Regarding the objections nonetheless brought up in this context with regard to Art. 10 DMA, cf. Podszun, R./Bongartz, P./Langenstein, S., EuCML 2021, 60, 65; Ukrow, J., Die Vorschläge der EU-Kommission für einen Digital Services Act und einen Digital Markets Act, 2021, p. 43, retrievable at https://emr-sb.de/wp-content/uploads/2021/01/Impulse-aus-the-EMR_DMA-and-DSA.pdf, retrieved on 27 May 2021.

⁶⁴ These considerations, as well as the requirement to introduce an appropriate catch-all clause (more on this below) also speak against the suggestion that the European Commission is to be able to ban by way of interim measures “novel” conduct, at least temporarily, until the market investigation is completed; but Podszun, R./Bongartz, P./Langenstein, S., EuCML 2021, 60, 66; similar Haus, F./Weusthof, A.-L., WuW 2021, 318, 321.

⁶⁵ See on this – with different considerations – Basedow, J., ZEuP 2021, 217; Gielen, N./Uphues, S., EuZW 2021, 627, 630; Haucap, J./Schweitzer, H., Die Fesselung der Tech-Giganten: Die deutsche GWB-Novelle und der Vorschlag der Europäischen Kommission für einen „Digital Markets Act“ im Vergleich, böll.brief - Grüne Ordnungspolitik, May 2021, pp. 11 et seq., 16, retrievable at <https://www.boell.de/de/2021/05/21/die-fesselung-der-tech-giganten>, retrieved on 9 August 2021; Haus, F./Weusthof, A.-L., WuW 2021, 318, 321.

prohibition, and could equally help bring about flexible handling of the DMA. It would however above all appear to be expedient in addition to the examples of rules lending greater clarity to such a provision⁶⁶, but not in addition to per se rules. The per se rules of the DMA would therefore be largely superfluous if the corresponding conduct were always also to be covered by a catch-all clause. In contrast, as described above, the DMA is deliberately based on a list of concrete obligations. Examples of rules do also lend concrete form to the scope of a catch-all clause. They would however only have an indicative effect for the realisation of a specific provision so that – in line with general principles – the conditions of the basic rule would always have to be satisfied, and would have to be verified on each application.⁶⁷ Consequently, the validity of the respective obligation or prohibition – independently of individual cases –, as well as the legal certainty for the addressees of the norms of the DMA associated with this, would tend to be weakened by the insertion of a catch-all clause and of examples of rules.

50. The Monopolies Commission consequently welcomes the structuring of the conduct obligations of Art. 5 and 6 as provided for in the DMA, namely as (comparatively concrete) per se rules.

4.2 Expansion of the regulatory dialogue to all obligations of Art. 5 and Art. 6 DMA

51. Both Art. 5 and 6 DMA are directly-applicable provisions (self-executing). Unlike for instance in section 19a ARC, there is particularly no need for prior separate activation via the order of the authority. Rather, Art. 7(1) DMA provides that the addressee of the norms is to implement measures which ensure compliance with the obligations laid down in Articles 5 and 6. This must take place within six months after the proceedings for designation as a gatekeeper are concluded, Art. 3(8) DMA.⁶⁸ It is true that the DMA provides for a so-called regulatory dialogue between the European Commission and the addressee of the norms in the framework of which the implementation of the obligations of Art. 6 DMA, but not those of Art. 5 DMA, can be specified, Art. 7(2) DMA. It is however not possible to agree in this regard as to “whether” implementation is effected, but only on “how”. It hence suggests itself to also refer to the current structure of the lists of obligations of both Art. 5 and Art. 6 DMA as black lists – in contradistinction to grey lists.⁶⁹

52. Pursuant to Art. 7(2) in conjunction with Art. 18 DMA, the dialogue procedure is initiated at the initiative of the European Commission, or in accordance with Art. 7(7) DMA at the request of an addressee of the norms.⁷⁰ The European Commission examines in the procedure whether the addressee of the norms has effectively complied with the obligations of Art. 6 DMA, and otherwise orders concrete implementation measures. The European Commission is to communicate its preliminary findings, as well as the measures likely to be taken in this regard, within three months from the opening of the proceedings, Art. 7(4) DMA.⁷¹ Such a decision is to be adopted by the European Commission within six months from the opening of the proceedings, Art. 7(2) DMA.⁷² The initiation of the regulatory dialogue does not have any suspensory effect; the addressees of the norms are hence obliged to

⁶⁶ See also the structure of Art. 101 and 102 TFEU, sections 19 and 19a ARC.

⁶⁷ cf. ECJ, judgment of 2 April 2009, C-260/07 - *Pedro IV Servicios*, ECLI:EU:C:2009:215, para. 82 (re Art. 101 TFEU). The view is put forward in places that, where an example of rules is triggered with regard to section 19 subsection (2) ARC, this therefore always constitutes abuse within the meaning of the catch-all clause of subsection (1); cf. Weyer in: *Frankfurter Kommentar zum Kartellrecht*, Vol. IV, 99th supplement 03/2021, section 19 ARC paras. 64 and 81.

⁶⁸ The Report for the European Parliament provides for this period to be reduced from six months to four; loc. cit., p. 38.

⁶⁹ Podszun, R./Bongartz, P./Langenstein, S., *EuCML* 2021, 60, 64. diverging view de Streel, A. et al., *The European proposal for a Digital Markets Act: A first assessment*, January 2021, pp. 6 and 16 et seq., 19 and 21, loc. cit.; Gielen, N./Uphues, S., *EuZW* 2021, 627, 629.

⁷⁰ The Report for the European Parliament provides for an obligation to provide reasoning for the addressees of the norms with regard to the degree to which the measures which they intend to adopt ensure that the obligations of Art. 6 DMA are implemented; loc. cit., p. 50.

⁷¹ The Report for the European Parliament provides for the period to be reduced from three months to two, as well as for a market test in connection with the communication of the preliminary assessment by the European Commission; loc. cit., p. 49.

⁷² According to the Report for the European Parliament, this period should be reduced from six months to four; loc. cit., pp. 48 et seq.

already implement the obligations prior to and during the dialogue procedure. The decision terminating the procedure may however instruct the addressees of the norms to engage in a specific form of implementation.

53. A distinction between Art. 5 and 6 DMA such that the possibility of specification exists exclusively for the obligations of Art. 6 DMA should be renounced. The European Commission does not itself indicate in the DMA why it should not be possible to also implement a regulatory dialogue in cases falling under Art. 5 DMA. It refers in its impact assessment on the DMA to the requirement of fleshing out the cases, as regulated in Art. 6 DMA. Whilst the obligations of Art. 5 DMA are said to be so sufficiently concrete that they could be applied without any further interpretation, there could be various possibilities for the addressees of the norms to implement the obligations of Art. 6 DMA.⁷³ It could consequently be ensured as part of the regulatory dialogue that implementation is effected in as effective a manner as possible. This might be contradicted by the fact that difficulties could also arise when implementing Art. 5 DMA when it comes to the interpretation of the requirements and prohibitions.⁷⁴ This is all the more so given that all obligations of Art. 5 and 6 DMA apply to each addressee of the norms of the DMA, and hence to different platform services.⁷⁵ It therefore appears to be justified to also open up the dialogue procedure to the obligations of Art. 5 DMA as a matter of principle.⁷⁶ This would ultimately be harmless, given that the dialogue procedure, firstly, would not have to be used where the obligations of Art. 5 DMA were to prove to be sufficiently concrete in terms of their practical application. Secondly, the dialogue procedure has no suspensory effect, so that it would at least not delay the enforcement of the obligations were it to be used.

54. One might theoretically still argue in favour of restricting the regulatory dialogue to the obligations of Art. 6 DMA – alternatively or cumulatively – that the obligations of Art. 5 DMA address conduct which is generally regarded as being particularly harmful. By contrast, there might tend to be outweighing efficiencies in the cases regulated in Art. 6 DMA. It would then however seem to rather suggest itself to make not only the “how”, but also the “whether” of the implementation of an obligation the subject of the dialogue procedure for cases falling into the latter category. The view held here is in any case that the DMA should be supplemented to include the possibility of an efficiency justification for all obligations.⁷⁷ It is put forward in some cases that the efficiency defence is only to apply to those obligations which address less intrusive conduct in which counterbalancing efficiencies suggest themselves more strongly.⁷⁸ This would be favoured by the fact that the European Commission would incur lower costs for the review of the efficiency defence.⁷⁹ However, it is hardly possible in economic terms to distinguish a clear manner that is independent of the individual case between more (black list) and less intrusive

⁷³ European Commission, Digital Markets Act - Impact Assessment support study: Annexes, 14 December 2020, pp. 57 et seqq. and 59, retrievable at <https://op.europa.eu/en/publication-detail/-/publication/2a69fd2a-3e8a-11eb-b27b-01aa75ed71a1/language-en>; retrieved on 12 May 2021; Commission Staff Working Document, Impact Assessment Report, Accompanying the document Proposal for a Digital Markets Act, SWD(2020) 363 final, Part 1/2, 15 December 2020, para. 399. cf. also Haucap, J./Schweitzer, H., *Perspektiven der Wirtschaftspolitik* 2021, 17, 23; Podszun, R./Bongartz, P./Langenstein, S., *EuCML* 2021, 60, 64; Zimmer, D./Göhl, J.-F., *ZWeR* 2021, 29, 41, 44.

⁷⁴ Basedow, J., *ZEuP* 2021, 217, 220; Körber, T., *NZKart* 2021, 436, 437 et seq.; Podszun, R./Bongartz, P./Langenstein, S., *EuCML* 2021, 60, 65; Schweitzer, H., *ZEuP* 2021, 503, 531. The Report for the European Parliament however proposes to attribute several obligations which are contained in Art. 6 in accordance with the DMA of the European Commission to Art. 5, reasoning that the respective obligation does not appear to require fleshing out; loc. cit., pp. 43 et seq.

⁷⁵ On this para. 56 below.

⁷⁶ See also Schweitzer, H., *ZEuP* 2021, 503, 531; similar Podszun, R./Bongartz, P./Langenstein, S., *EuCML* 2021, 60, 65 (“a very quick and less formal Art. 7 procedure”).

⁷⁷ See Chapter 6 below on this.

⁷⁸ Cabral L. u. a., *The EU Digital Markets Act – A Report from a Panel of Economic Experts*, 2021, p. 10 f., loc. cit. More reserved de Streel A. et al., *The European proposal for a Digital Markets Act: A first assessment*, January 2021, p. 22, loc. cit.: “Such defence should only be possible for the grey list obligations provided that the black list only contains obligations which are always harmful.” Zimmer, D./Göhl, J.-F., *ZWeR* 2021, 29, 55 (original in German): “It is only with regard to those modes of conduct where one can ascertain with certainty from an economic point of view that it would have an overwhelmingly negative impact on welfare in all cases in which it is applied that one could consider generally ruling out the efficiency defence.”

⁷⁹ On this para. 154 below.

(grey list) conduct. Higher costs for the review should hence be accepted in view of greater justice in individual cases, and an efficiency objection should be admitted with regard to all obligations.

55. The Monopolies Commission recommends providing for a possibility to specify in the dialogue procedure also for the obligations currently regulated in Art. 5 DMA.

4.3 Individualisation of the requirements and prohibitions for specific platform services?

56. All obligations apply as a matter of principle to each addressee of the norms of the DMA. This means in some cases that highly-varied types of platform which, pursuant to Art. 2 number 2 DMA, fall under the term “core platform service”⁸⁰ must comply with the universal requirements and prohibitions of Art. 5 and 6 DMA. Pursuant to Art. 7 DMA, it is possible for a regulatory dialogue to take place between the European Commission and the addressee of the norms regarding the implementation of an obligation. As stated in the previous section, this dialogue procedure is however (1) restricted to the “how” of implementation, (2) the obligation is nonetheless directly applicable, and (3) (as currently provided for) it only applies to the obligations of Art. 6 DMA.

57. By contrast, the new provision contained in section 19a ARC is more specific in the sense that the Federal Cartel Office is able or indeed obliged to individually instruct the addressees of the norms as defined therein with regard to which provisions of section 19a subsection (2), first sentence, ARC apply to them. The prohibition order of the Federal Cartel Office, which can already contain remedies with effect for the future, always links here to specific actual conduct on the part of an undertaking. Taking action on the part of the Federal Cartel Office is at its due discretion, and is contingent as a matter of principle on a risk of a first or a repeated offence, unless it is necessary to intervene earlier by way of exception.⁸¹ This would enable the order provided for in section 19a subsection (2), first sentence, ARC to ensure a high degree of legal certainty for the undertakings in question, whilst the universal approach of the DMA might lead to additional effort for the addressees of the norms. They would first of all have to identify those among the obligations contained in the lists in Art. 5 and 6 DMA which are (or may be) relevant to their activities at all. What is more, and this appears to be even more important, conduct addressed in Art. 5 and 6 DMA would be sometimes more and sometimes less harmful, depending on the individual type of core platform service.⁸²

58. The lack of individualisation of the obligations of Art. 5 and 6 DMA is nonetheless likely not to be onerous, but is indeed likely to be beneficial in many ways in comparison to alternative provisions. First of all, the additional effort incumbent on undertakings as described above appears to be reasonable. The addressees of the norms of the DMA are large undertakings which can be expected to identify those obligations in the lists contained in Art. 5 and 6 DMA that may be relevant to them. At any rate, most obligations are likely to apply to all core platform services. The obligations only partly address conduct of specific platform services, and/or the limited group of addressees can only be seen from their wording by way of exception.⁸³ What is more, the rules of the DMA are in any case at least similarly clear, as a result of their largely precise wording, in comparison to for instance the obligations contained in section 19a subsection (2), first sentence, ARC, the activation of which furthermore depends on the exercise of discretion on the part of the Federal Cartel Office. The approach of applying per se rules universally with regard to the addressees of the norms as a matter of principle also matches the objective of the European

⁸⁰ These include: a) online intermediation services, b) online search engines, c) online social networking services, d) video-sharing platform services, e) number-independent interpersonal communication services, f) operating systems, g) cloud computing services, h) advertising services.

⁸¹ Federal Government, *Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (GWB-Digitalisierungsgesetz)*, Bundestag printed paper [BT-Drs.] 19/23492 of 19 October 2020, p. 75.

⁸² Altogether critical vis-à-vis the “one size fits all” approach adopted by the DMA Körber, T., NZKart 2021, 436, 438; Schweitzer, H., ZEuP 2021, 503, 534 et seqq.

⁸³ Art. 6(1)(c) and (e) (= operating systems), (j) (= online search engines) and (k) (= online intermediation services) DMA.

Commission, namely of expediting the enforcement of the law in the digital economy by means of the DMA.⁸⁴ Separately activating individual provisions would however be more resource intensive for the public authorities, and would then possibly only lag behind the activities of the addressees of the norms to some degree if, as is the case in section 19a ARC, the order referred to specific actual conduct on the part of the undertakings, and might have to be updated.

59. This might perhaps be avoided, and greater individualisation of the obligations in the DMA nonetheless achieved, were groups to be created for the individual platform types with the per se rules that are relevant for them.⁸⁵ The addressees of the norms would then only need to align their conduct on the one hand towards a small(er) number of rules. On the other hand, the obligations might have differing effects so that conduct in which a certain platform service is rightly prohibited from engaging – because as a rule it leads to harmful effects – has largely beneficial effects in the case of another platform type. The possibility for the Federal Cartel Office to activate individual provisions of section 19a subsection (2), first sentence, ARC, by contrast, permits targeted action only vis-à-vis those platforms with regard to which the conduct in question is regarded as being harmful in individual cases.⁸⁶

60. The added value of such group formation is however likely to be limited. It is for instance initially problematic that the platforms may “grow into” new areas of business, and hence (potentially) in any case fall under the obligations of Art. 5 and 6 DMA to a large degree. It is particularly a characteristic of the digital economy that the undertakings continually adjust their business models, and expand the services that they offer comparatively quickly. Where the conduct addressed may have differing effects depending on the individual platform types, any unfair results might tend to be compensated for in the dialogue procedure in accordance with Art. 7 DMA by reaching an agreement between the European Commission and the undertaking on implementation in line with the respective business model.⁸⁷ Also in this regard, it would be helpful to expand the regulatory dialogue to cover cases under Art. 5 DMA.⁸⁸ In addition, the DMA should be supplemented to include the possibility of an efficiency justification. This could lead to an exemption for modes of conduct engaged in by specific platforms which, looked at in isolation, violate a per se rule, but have largely positive effects in individual cases.⁸⁹

61. Against this background, the Monopolies Commission does not consider a need to exist for any platform-specific individualisation of the obligations of Art. 5 and 6 DMA.

4.4 A uniform system to address the core problems in ecosystems makes sense

62. The Proposal for a Regulation at times addresses a business model (e.g. Art. 5(g) and 6(1)(g) DMA), at times a specific platform service (e.g. Art. 6(1)(c) and (j) DMA), and at other times a conduct (e.g. Art. 5a and 6(1)(e) DMA). It is more expedient if uniform rules of conduct address gatekeepers’ business practices, which are particularly problematic in the ecosystem context. This can be understood to include problems, which arise in conjunction with multi-platform integration and/or with a dual role of the provider (see also section 3.2). These core problems arise, firstly, in connection with conduct which may lead to increasing entry barriers (in the ecosystem), and secondly with conduct that may cause economic power to be leveraged into new areas (expansion of the ecosystem). These include self-preferencing, including tying and bundling, as well as data combination and prevention

⁸⁴ On this para. 9 above.

⁸⁵ cf. on this for instance the comparison of the obligations and the overview of cases with antitrust procedures against individual (platform) companies in Caffarra, C./Scott Morton, F., The European Commission Digital Markets Act: A translation, 2021, retrievable at <https://voxeu.org/article/european-commission-digital-markets-act-translation>, retrieved on 14 May 2021.

⁸⁶ cf. also - with a reference to the possibility open to the Federal Cartel Office to issue tailor-made remedies (*maßgeschneiderte Auflagen*) in accordance with section 19a ARC - Haucap, J./Schweitzer, H., Perspektiven der Wirtschaftspolitik 2021, 17 and 23.

⁸⁷ cf. also – but with further proposals on the structure of the dialogue procedure – de Streel, A. et al., The European proposal for a Digital Markets Act: A first assessment, January 2021, p. 22, loc. cit.

⁸⁸ On this paras. 53 et seq. above, but cf. para. 56 on the other limitations of the dialogue procedure.

⁸⁹ cf. on this Chapter 6 below.

and complication of access to data, data portability, vertical interoperability (compatibility) and multihoming and/or switching. A uniform system in terms of a new Art. 5 DMA should bring together the previous rules of Art. 5 and 6 DMA and contain per se rules, which are provided with a dialogue procedure and with the possibility of an efficiency defence in order to avoid as many circumvention strategies on the part of gatekeepers as possible, and to be able to realise an expedited procedure.

63. Practices of self-preferencing are beneficial for gatekeepers' turnover if they engage in horizontal or vertical integration of several products or services within an ecosystem. It is incentive-compatible for them to offer their own products and services on a preferential basis. This can distort competition in the long term (e.g. with a dual role), or as in the case of tying and bundling, can even eliminate competition in the entire ecosystem (e.g. when it comes to multi-platform integration). For instance, specific operating systems are delivered with preinstalled software such as a web browser, a voice assistant and a search engine. On the one hand, this creates economies of scope on both the provider side and on the demand side. On the other hand, this prevents or hampers the use of alternative third-party services and applications and thus leads to a distortion of competition. If gatekeepers use such practices, there are cases in which end users may benefit from such practices on the part of core platform services. Bundling important functionalities within an ecosystem may therefore be efficient. However, third-party providers and providers of complementary services may be excluded or made difficult to reach. Self-preferencing may also take place within ranking and recommendation systems, or with own services being set as default at the expense of disadvantaged third parties. This may constitute a form of impediment, which should be prohibited per se, in particular with gatekeepers because of their economic power.

64. Practices of merging data by gatekeepers are, firstly, an integral element of digital platform services – both in the case of multi-platform integration, and also with regard to the dual role – since data are created by operating own services, and can be collected and further processed via third-party services. On the other hand, many complementarities in the combination of data lead to an increase in the entry barriers for third-party services, and can exert a foreclosure effect. A permanent combination of large, varied volumes of data continually opens up possibilities for diversification and expansion, and may not only lead to competitive advantages in the (further) development of (new) products and services for gatekeepers, but may also favour the leveraging of economic power into other areas and hence an expansion of the ecosystem. For instance, it may be efficient for a social network service provider to combine data centrally if this enables, on the basis of voluntary and informed user consent, improved matching and individualised platform services in the interest of the groups of users. However, it is possible, for instance, for online marketplaces to use non-publicly-accessible data that are generated or made available via activities of business users in competition with these business users, which may in turn lead to a systematic disadvantage. Obligations should therefore per se enable competitors to make joint use of combined data from gatekeepers' core platform services.

65. Gatekeeper practices to prevent others from gaining access to data, or from making such access more difficult, may be justified on the one hand if these are proprietary data, for instance, from research and development. On the other hand, specific data may be essential in order to effectively provide a digital platform service (e.g. training data to improve algorithms), and may generate an irredeemable discrepancy in quality between a core platform service – both with multi-platform-integration and with a dual role – and third-party services if no data access is granted. In order to maintain effective horizontal and vertical competition in such cases, it may therefore be necessary to share relevant data. It should be taken into account here whether the relevant data are only created in collaboration with third-party services and applications, so that participation in the jointly-generated data within the ecosystem may be appropriate in any case. For instance, this might involve online search engines or voice assistant services to enable business users to have permanent real-time access to relevant application programming interfaces (APIs), and hence facilitate the use of aggregated or non-aggregated data. Given the complexity of the topic of data access, real-time access should first be granted to user accounts (i.e. user and usage data) of the gatekeepers' core platform services per se. It would subsequently be possible to decide in individual cases on access to further relevant data such as via interfaces.

66. Gatekeeper practices to prevent and complicate data portability constitute a core problem in ecosystems because they may impair switching and the parallel use of several platform services by business users as well as end users since by definition their core platform services are needed by business users in order to be able to reach end users. An unsolved problem therefore lies in the fact that, whilst the General Data Protection Regulation (EU) 2016/679 enables the portability of personal data, and for instance social network services provide data export possibilities, there are no generally-binding standards on data types and machine-readable data formats. The possibility to import data is then frequently not offered to other platform services, or it is limited to data types and data formats, which are not compatible with the data that have already been exported. Gatekeepers benefit extensively from such frictions due to their economic power. Obligations should therefore prescribe user-friendly functions for the effective portability of (personal) data per se.

67. Gatekeeper practices to prevent and complicate vertical interoperability (compatibility) constitute a core problem because they impair the cross-system compatibility of applications and services, and hence may place competitors and providers of complementary services at significant disadvantage within an ecosystem. For instance, refusing access to the NFC (Near Field Communications) interface of smartphones for third-party providers of digital payment services might lead to a situation in which only the gatekeeper's payment service gains access to the end users, and such conduct exerts a foreclosure effect. At the same time, security and data protection considerations may justify such conduct. It should furthermore not only be possible to install third-party services and applications on mobile devices such as smartphones and tablets via the gatekeeper's store for software applications integrated into the operating system, but they should also be downloadable and installable via other channels such as web browsers. In the interest of such vertical interoperability between the operating system and the store for software applications and mobile apps as well as desktop web applications, it should therefore be possible to install and effectively use third-party applications and services via all channels in order to safeguard openness on digital markets. Thus, such gatekeeper practices should be prohibited per se as a matter of principle because of their economic power.

68. Gatekeeper practices aimed at preventing or complicating multihoming and switching constitute a core problem in ecosystems in both cases of multi-platform-integration as well as the dual role. This is because a situation of singlehoming in the group of end users leads to business users depending heavily on a gatekeeper, and to asymmetric negotiating power vis-à-vis the gatekeeper, if business users aim to reach these end users. For instance, in the case of voice assistant services, business users are in need of protection vis-à-vis gatekeepers because switching and multihoming between different services by end users are central to maintaining competitive pressure. For this reason, gatekeepers should not use technical means in order to restrict the possibilities of end users to switch between different applications and services, both within an ecosystem and between ecosystems, or to use them in parallel. Due to their economic power, a corresponding obligation should per se prohibit gatekeepers from limiting multihoming and switching.

69. Overall, it is revealed that the core problems in ecosystems justify per se rules given gatekeepers' particularly strong position and it makes sense to enact uniform obligations, which address these core problems. In this regard, the obligations should cover all core platform services independently of the business model. As a result, it also appears appropriate to expand the dialogue procedure, including the possibility of an efficiency defence, to all obligations. The Monopolies Commission hence considers it to be appropriate to create an Article 5 (new) DMA with a uniform structure containing per se rules which are amenable to the dialogue procedure, as well as to an efficiency defence. The advantage of this is that all obligations equally apply directly, and at the same time an adjustment of or an exemption from a specific obligation is possible in individual cases in order to be able to limit any collateral damage.

70. Under the name "Friends of an effective Digital Markets Act", the Ministers of Economic Affairs of Germany, France, and the Netherlands have recently published a second joint position paper with proposals for adapting the

DMA.⁹⁰ Among other things, the paper proposes a provision that would enable the adoption of tailor-made remedies to safeguard contestability and fairness of digital markets (Art. 16a DMA-E - Market investigation into tailor-made remedies to safeguard markets' contestability and fairness).⁹¹ The European Commission should be able to impose in individual cases on the addressees of the norms any appropriate and necessary implementation of the following principles-based obligations: a) platform access, b) data-related interventions, c) fair commercial relations, and d) end users' and business users' open choices. The adoption of the remedy should require that the conduct at issue cannot adequately and timely be addressed by the obligations of Art. 5 and 6 DMA or by EU competition law. A corresponding need for a remedy is to be established in a prior market investigation, which is concluded within twelve months, but can be extended by up to six months.

71. The Monopolies Commission agrees with the "Friends of an effective Digital Markets Act" that the obligations of Art. 5 and 6 DMA alone may not be sufficient to cover all conceivable practices that jeopardize contestability and fairness of digital markets. Moreover, the proposed possibility to adopt tailor-made remedies aligned to the principles-based obligations ensures a high degree of flexibility, similar to EU competition law. In contrast, the approach chosen by the DMA with the *per se* rules has, in addition to better predictability for the addressees of the norms, in particular the advantage of rapid as well as less resource-intensive public enforcement.⁹² The DMA should also be quite flexible or "future-proof" with the possibility to update the obligations after conducting a market investigation, lasting a maximum of 24 months, that is already provided for in Art. 10 DMA.⁹³ A platform-specific implementation of the obligations is also possible within the framework of the six-month regulatory dialog pursuant to Art. 7 DMA; however, this should be made accessible for all obligations.⁹⁴ In view of the risk of innovations being jeopardized by obligations that are too far-reaching in individual cases, which is also mentioned in the second position paper⁹⁵, the introduction of an efficiency defense appears preferable.⁹⁶

⁹⁰ The first joint position paper of 27 May 2021 already includes different considerations of which, besides the following proposal for tailor-made remedies, also proposes an additional competence for national competition authorities when enforcing the DMA (see second joint position paper). On this see also footnote 45 above.

⁹¹ Friends of an effective DMA, Second position paper, loc. cit. p. 3 et seq.

⁹² On this para. 45 above.

⁹³ On this para. 48 above.

⁹⁴ On this para. 60 above.

⁹⁵ Friends of an effective DMA, Second position paper, loc. cit., p. 1.

⁹⁶ On this para. 47 above and comprehensively Chapter 6 below.

Chapter 5

Evaluation of selected rules of conduct in Articles 5 and 6 DMA

72. Rules of conduct with regard to core platform services are imposed in Art. 5 DMA and Art. 6 DMA on gatekeepers designated in accordance with Art. 3 DMA. The DMA includes, firstly, rules of conduct aiming to keep competition open in and for digital markets. These particularly include obligations regarding access to data by means of data portability and interoperability. It however, secondly, encompasses a number of rules of conduct specifically addressing ecosystem-specific problems. These are caused in particular by the fact that platform service operators are enabled by virtue of the complementarities in processing data and (further) developing (new) products and services to leverage their economic power from one core platform service into other, and/or new areas (platform envelopment), and to foreclose these. The DMA takes up such strategies aimed at shoring up and expanding one's own economic position in several provisions. These include prohibiting strategies of self-preferencing, as well as tying and bundling core platform services with other services.

73. The DMA hence mixes platform- and ecosystem-specific problems and rules of conduct. In most cases, however, platform-specific rules of conduct exert an impact on the ecosystem since core platform services and other services within the ecosystem are interlinked via different complementarities.⁹⁷ What is more, it is unlikely in practice to be possible to distinguish whether gatekeepers' economic power emerges from individual core platform services, or from the ecosystem (or parts thereof). In this regard, mixing platform- and ecosystem-specific problems and rules of conduct seem to be in line with the goal of the DMA to protect the contestability and fairness of digital markets as comprehensively as possible.

74. The rules of conduct are to be subject to an economic analysis below in order to investigate their impact on the envisaged goals of the DMA. On the one hand, the approach followed in the DMA might accelerate the enforcement of the law with the rules of conduct structured as *per se* rules. On the other hand, it might run counter to gatekeepers behaving in an unproblematic or efficient manner. The theories of harm implicitly underlying the rules of conduct should therefore be so reliable as to outweigh potential economic efficiencies. Overregulation might otherwise lead to economic inefficiencies and hamper incentives to innovate.

75. A key element of gatekeepers' business models is based on collecting, aggregating and commercially exploiting data.⁹⁸ The more end users use a platform service, the more data can be collected in order to train and improve algorithms, for instance in order to increase the relevance of the search results of a search engine or to improve a voice assistant's response quality, thereby in turn attracting more end users (user feedback effect). This also impacts the other market sides of multi-sided platforms, in turn enabling advertising customers to place their ads more targetedly so that platform operators can achieve greater advertising revenue. These funds can then be invested in order to improve the platform service, hence further amplifying the data-driven network effects (monetisation feedback effect).⁹⁹

76. Platform service operators who have been established on the market for longer particularly benefit from these data-driven network effects, given that they have a larger number of end users, and hence more data, than their competitors. If there are pronounced data-driven network effects, the established platform service operators benefit from the fact that they started earlier ("first-mover advantage"), and are able to continually increase their market shares over time, so that the market may "tip" in favour of the established undertakings ("tipping markets"). These monopolisation trends come into play if smaller undertakings are unable to create a sufficiently large mass of user-generated data in order to train their own algorithms and catch up with established undertakings. The data-driven network effects may hence constitute an entry barrier, therefore making the markets less contest-

⁹⁷ See Chapter 3.2 on the ecosystem criterion.

⁹⁸ Stucke, M.E./Grunes, A.P., *Big Data and Competition Policy*, Oxford University Press, 2016.

⁹⁹ Krämer, J./Schnurr, D./Broughten Micova, S., *The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies*, CERRE Report, September 2020.

able. Network effects have a multiple impact on several platform services in an ecosystem context, thus consolidating the position of the ecosystem operator as a whole.

77. If the user-generated data obtained on a market are also valuable on other markets¹⁰⁰, platform service operators may transfer these network effects from which they benefit, and hence also the economic power, to other areas along an ecosystem (leveraging). This may enable platform service operators to gain more end users who were not yet using the previous service. The breadth of the data increases, thus further enhancing data-driven network effects.

78. If ecosystem operators can furthermore record the conduct of end users beyond the services and contexts, the depth of data also increases.¹⁰¹ In particular, combining data from different platform services may enable information to be obtained which can be used not only to improve and personalise existing products and services, but also to develop new ones. The platforms benefit from economies of scope since the data generated in the original platform service can be used to develop multiple services. This leads to the development and generation of several products or services within one undertaking being cheaper than in separate undertakings. Data that were generated in a service may reduce the marginal costs of innovations in other platform services.¹⁰² The data-driven network effects hence lead to efficiency gains for gatekeepers which impact in several areas of the ecosystem.

79. If these offers can be personalised to an ever increasing degree on the basis of the enhanced depth of detail of the data, and if various offers within the ecosystem can be accessed via a user account, then on the one hand the transaction costs are reduced. These ecosystem-specific efficiencies, and any other efficiencies, contrast with the ever greater tying of end users to the offers of the ecosystem operator. This increases the costs of using other services outside the ecosystem in parallel (lock-in), and multihoming is complicated. This enables platform service operators to also make it more difficult for potential competitors to enter other markets of the ecosystem, and/or enables them to force out competitors who are already operating on these markets.¹⁰³ In this regard, the DMA needs to weigh up ecosystem-specific competition problems in comparison to potential efficiencies.

80. The DMA applies a number of rules of conduct which may have the potential to halt the lock-in effects and make multihoming easier, both for end users and for business users. These rules of conduct contain, on the one hand, prohibitions of strategies aiming to shore up and expand one's own position in the ecosystem (Art. 5(c) DMA, Art. 6(1)(a)-(d) and (k) DMA), and on the other hand stipulations to guarantee access to data through data portability (Art. 6(1)(h) and (i) DMA) and interoperability (Art. 6(1)(c) and (f) DMA).

81. These rules of conduct will be subject to an economic evaluation below. This will involve comparing competitive theories of harm in an ecosystem context to any economic efficiencies in order to derive from this recommendations to adjust the DMA.

5.1 Effectively putting an end to self-preferencing

82. After gatekeepers have consolidated their economic position on a core platform service, the danger exists that they will also consolidate, expand or extend this position into other areas through means that do not constitute competition along performance lines. Strategies known from antitrust abuse proceedings are in particular various forms of self-preferencing. The potential for self-preferencing emerges from ecosystem operators' dual role, and from their multi-platform integration.¹⁰⁴ Gatekeepers frequently not only operate several complementary platform

¹⁰⁰ Prüfer and Schottmüller refer to these as connected markets; cf. Prüfer, J./Schottmüller, C., *Competing with Big Data*, appearing in: *Journal of Industrial Economics*.

¹⁰¹ Krämer, J./Schnurr, D./Broughten Micova, S., *The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies*, CERRE Report, September 2020.

¹⁰² Prüfer, J./Schottmüller, C., *Competing with Big Data*, appearing in: *Journal of Industrial Economics*.

¹⁰³ Commission Competition law 4.0, *Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft*, loc. cit., p. 19.

¹⁰⁴ see paras. 36 et seqq. for a definition of the dual role and multi-platform integration.

services, but are often also active in a dual role as the rule-setter in a single platform service (platform service operator), and as a business user of the core platform service. For instance, Amazon itself operates as a trader on its own Marketplace. Apple and Google operate both mobile operating systems (Apple iOS and Google Android), as well as their own software applications and AppStores (Google Play Store and Apple App Store), on the operating systems.

83. These vertical or hybrid structures may on the one hand lead to efficiency gains. If pronounced economies of scope ensue from data use, it may be cost-efficient for an undertaking to expand to become an ecosystem.¹⁰⁵ It is also customary as a matter of principle for undertakings to promote their own products and prioritise them over those of their competitors. In many cases, self-preferencing may be a suitable means of using effects of scale and scope, in particular if there are strong network effects, and undertakings first of all still need to obtain a critical mass of end users. An integrated offer may also lead to savings in transaction costs for end users if they receive an offer from a one-stop shop where the functions are coordinated in such a way as to complement one another.

84. On the other hand, the vertical or hybrid structures offer different potentials to obstruct competitors, which the DMA addresses in several provisions. Ecosystem operators frequently take up a gatekeeper role with regard to access to end users. If they prefer their own products or services vis-à-vis third-party providers on downstream markets, or on other markets of the ecosystem, they may do major harm to competition there.

85. The analysis below addresses several forms of self-preferencing from completed and pending proceedings. These strategies emerge from ecosystem operators' dual role, and from their multi-platform integration. In the dual role, ecosystem operators are able to obstruct competitors on the product markets by placing their own offers more prominently.¹⁰⁶ As operators of several platform services, ecosystem operators can also pre-set their own platform services in other platform services¹⁰⁷, and tie and bundle them with other platform services.¹⁰⁸

5.1.1 Putting an end to self-preferencing in dual roles

86. Gatekeepers can practice self-preferencing by steering end users to their own offers. Search engines, app stores or marketplace operators, for instance, are able to program their algorithms in such a way that their own services and products, or those monetarised by them, are listed more prominently than those of third-party providers.¹⁰⁹ The DMA addresses this form of self-preferencing in Art. 6(1)(d) DMA by prohibiting gatekeepers *“from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party”*, and obliging them to *“apply fair and non-discriminatory conditions to such ranking.”*¹¹⁰

87. Gatekeepers can furthermore engage in self-preferencing in their dual role by restricting third-party access to user data and reserving these for their own advantage. This is the subject-matter of two sets of pending abuse proceedings against Amazon and Google. The European Commission objects that Amazon systematically relies on

¹⁰⁵ See para. 72. see Bourreau, M./de Streel, A., Digital Conglomerates and EU Competition Policy, SSRN Working Paper, 2019 on further efficiency gains of conglomerates on digital markets.

¹⁰⁶ See for instance European Commission, Decision of 27 June 2017, AT.39740 - Google Search (Shopping) and the formal antitrust investigation of the European Commission against Amazon (AT.40462), Press release of 20 November 2020, IP/20/2077, retrievable at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077, retrieved on 14 July 2021.

¹⁰⁷ See for instance European Commission, Decision of 18 July 2018, AT.40099 - Google Android.

¹⁰⁸ See for instance the formal antitrust investigation the European Commission against Apple (AT.40437), Press release of 30 April 2021, IP/21/2061, retrievable at https://ec.europa.eu/commission/presscorner/detail/de/ip_21_2061, retrieved on 12 August 2021.

¹⁰⁹ It was for instance found in the European Commission's Google Shopping case that Google acted more favourably towards its shopping-tool compared to tools of its competitors; cf. European Commission, Decision of 27 June 2017, AT.39740 - Google Search (Shopping).

¹¹⁰ “Ranking” is understood in accordance with recital 49 of the DMA as “all forms of relative prominence, including display, rating, linking or voice results.”

non-public business data of independent sellers who sell on its marketplace to the advantage of its own retail business, which competes with these third-party sellers directly. The European Commission has furthermore initiated an investigation related to the possible preferential treatment of Amazon's own retail offers and those of marketplace sellers who use Amazon's logistics and delivery services.¹¹¹ The European Commission is examining in another set of proceedings whether Google is restricting the possibilities open to advertisers, publishers and competing online advertising intermediaries to gain access to user identity or user conduct data, whilst Google's own advertising intermediation services have these data at their disposal.¹¹²

88. The DMA takes up this potential for self-preferencing in Art. 6(1)(a) DMA, which prohibits gatekeepers *“from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users [...]”* Self-preferencing strategies are significant for competition as a whole, as they are suited to leverage the economic power of core platform services in other areas and distort competition there. What is more, complementarities emerge on digital markets with regard to data collection, combination and exploitation. Data on the conduct of end users may be recorded in various contexts across platform services, which further amplify gatekeepers' data-driven network effects, and hence their economic power.¹¹³

89. If end users are systematically steered to gatekeepers' offers, this obstructs competition in these areas. Ecosystem operators have a gatekeeper function with regard to access to end users, so that it is made more difficult for competitors to gain access to them. In the case of Google Shopping, the European Commission found for instance that end users tend to click on links which are particularly visible on the general search result page.¹¹⁴ This makes it more expensive for competitors to reach customers, so that self-preferencing has both a competition-distorting effect here as well as an additional “raising rivals' cost” effect.¹¹⁵

90. Impediments to effective competition also occur when platform service operators with a dual role use non-public data on the activities of third-party sellers to their own advantage. Their privileged overview of the market enables gatekeepers to reduce market uncertainties on their side, so that conditions are no longer equal in competition (level playing field). If competitors furthermore fear that their high-sales products will be imitated, this will disincentivise innovation and investment. This in turn reduces gatekeepers' pressure to innovate, so that the overall incentives to innovate on the markets, and the quality of the products, will fall. The evaluation of user data is furthermore an important tool when it comes to taking advantage of data-driven network effects.¹¹⁶ If competitors are denied user data in order to obtain an advantage, they will be unable to improve their algorithms and technologies to the same degree as gatekeepers, thus distorting competition.

91. Self-preferencing in the dual role can however also cause efficiencies, for instance because ecosystem operators have a better overview of the market and can react quickly to changes on the market.¹¹⁷ A marketplace opera-

¹¹¹ Cf. European Commission, Press release of 20 November 2020, IP/20/2077, retrievable at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077, retrieved on 14 July 2021.

¹¹² Cf. European Commission, Press release of 22 June 2021, IP/21/3143, retrievable at https://ec.europa.eu/commission/presscorner/detail/de/ip_21_3143, retrieved on 12 August 2021.

¹¹³ See para. 76.

¹¹⁴ European Commission, Decision of 27 June 2017, AT.39740 - Google Search (Shopping). The Commission also finds in its press release on the European Commission's recently-initiated abuse proceedings against Amazon (AT.40703) that it is crucial to marketplace sellers to be displayed in the “buy box”, as this is where the vast majority of all sales are generated; see European Commission, Press release of 20 November 2020, IP/20/2077, loc. cit.

¹¹⁵ cf. Salop, S./Scheffman, D., Raising Rivals' Costs, *American Economic Review* 73(2), Papers and Proceedings, 1983, pp. 267-271; Salop, S./Scheffman, D., Cost-Raising strategies, *Journal of Industrial Economics* 36(1), 1987, pp. 19-34.

¹¹⁶ See para. 44.

¹¹⁷ Commission Competition law 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, loc. cit., p. 53.

tor can for instance recognise trends using the turnover figures that it has collected, and adjust its own offer on the marketplace in line with demand. Furthermore, it may also be beneficial for end users to have an integrated offer of services and products presented by the ecosystem operator which are coordinated to complement one another.

92. These efficiency gains may also be enjoyed without self-preferencing in most cases, so that there is little reason to hinder competitors in the dual role. The Monopolies Commission therefore considers that the rules of conduct contained in Art. 6(1)(a) and (d) DMA are suited to create a level playing field.

5.1.2 Prohibiting self-preferencing by setting core platform services as the default

93. Gatekeepers frequently select their own core platform services as the default on other core platform services. Operators of operating systems for instance select their own app stores as the default on the operating system, or set their own search engine as the default in web browsers. Gatekeepers furthermore use exclusive agreements to set their own services as the default on platform services of other providers.¹¹⁸ Whilst Art. 6(1)(b) DMA grants the possibility to end users to un-install any pre-installed software applications if they are not technically necessary, it does not provide for a prohibition of default settings. On the one hand, default settings may save users transaction costs, since they do not have to actively select the preferred services. On the other hand, default settings restrict users' ability to take an informed decision at all¹¹⁹, and guide them towards the interests of the core platform service (nudging). Studies show that consumers seldom change default settings.¹²⁰ This particularly applies if they use the default services in several contexts of the ecosystem, so that the defaults would have to be changed several times.

94. Default settings are hence suited to leverage gatekeepers' economic power in the default areas, and to eliminate competition there. This erects significant barriers to entry for competitors, and access to consumers is made more difficult. Competitors can hence only benefit to an inadequate extent from data-driven network effects, and correspondingly have few opportunities when it comes to improving and expanding their applications.¹²¹ This enables gatekeepers to reduce competition and pressure to innovate in these areas by setting defaults in their own core platform services. As a result, the quality of the services and products falls in the long term, and end users are placed at a disadvantage through fewer options being available.

95. Network effects and default settings furthermore may lead to a form of path dependence if consumers use the default software applications on several devices or services of the ecosystem operator. This could enable ecosystem operators to generate more data via default services, so that both the breadth and the level of depth of the data increase, thus further amplifying the data-driven network effects and consolidating ecosystem operators' economic power¹²².

96. The Monopolies Commission recommends against this background prohibiting default settings in favour of core platform services as a matter of principle. Art. 5 DMA should therefore be supplemented to include the following conduct obligation:

"In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall refrain from setting its core platform services as default."

¹¹⁸ According to Bonatti et al., Google pays between USD 8 and 10 billion per year to Apple to be the default search engine on the iOS operating system. See Bonatti et al., More competitive search through regulation, Policy Discussion Paper No. 2, Yale Tobin Center for Economic Policy, 2021.

¹¹⁹ Jachimowicz, J. et al., When and why defaults influence decision: A meta-analysis of default effects, Behavioural Public Policy, 3(2), 2019, pp. 159-186.

¹²⁰ See Bonatti et al., More competitive search through regulation, Policy Discussion Paper No. 2, Yale Tobin Center for Economic Policy, 2021.

¹²¹ See para. 74.

¹²² See para. 77.

This provision would be complied with for instance if an operator of core platform services provides for a large number of options for end users when it comes to setting web browsers and search engines instead of a default setting.¹²³

5.1.3 Discontinuing tying and bundling on operating systems and in app stores

97. Some gatekeepers make the use of a core platform service (e.g. of an App Store) conditional on using another core platform service (e.g. an operating system) or other platform services of the gatekeeper (e.g. a web browser).¹²⁴ The DMA generally prohibits this kind of tying and bundling of several core platform services of a gatekeeper in Art. 5(f) DMA. It additionally focusses in Art. 6(1)(c) on tying and bundling strategies of operating systems and of app stores, as they have a particular intermediary role to play between different groups of users.¹²⁵ The following explanations investigate potentially anti-competitive effects arising from this role. Section 5.1.4 will explore the general prohibition of tying and bundling, also of other core platform services.

98. Operating systems have a gatekeeper function when it comes to access to software applications, whilst app stores have a gatekeeper function in access to mobile software applications on mobile devices. Here, app stores assume the role of an intermediary between end users, on the one hand, and app developers on the other. Vertically-integrated ecosystem operators themselves act there as app providers, and compete with third-party providers on the operating system and in the app stores, and charge them access prices for the use of app stores and other services.¹²⁶

99. As soon as end users have opted for a device, they are locked into an operating system and an app store.¹²⁷¹²⁸ These lock-in effects also operate on the developer side, who must in each case be present on both operating systems (Apple iOS and Google Android) and in both app stores (Apple App Store and Google Play Store) in order to reach end customers.¹²⁹ This creates further obstructive potential via tying and bundling strategies.

100. The DMA addresses this obstructive potential in Art. 6(1)(c) DMA, which obliges gatekeepers to “*allow the installation and effective use of third party software applications or software application stores using, or interopera-*

¹²³ The restriction to core platform services primarily serves the implementation of the DMA. If anti-competitive effects of defaults are also predominant with other services, these may be included in the list of core platform services in a market investigation in accordance with Art. 17 DMA. As part of a remedy in terms of antitrust law, the European Commission for instance required Google to offer a choice of standard search providers by showing a selection screen on first installation with various different search providers. cf. European Commission, Decision of 18 July 2018, AT.40099 - Google Android.

¹²⁴ See on this European Commission, Decision of 18 July 2018, AT.40099 - Google Android.

¹²⁵ The Monopolies Commission advocates in section 4,3 the application of the rules of conduct of the DMA across the board, and not only to specific platform services.

¹²⁶ The transaction price for all purchases in the Google Play Store (apps and in-app purchases) is 30 percent of the price paid by the customer (see <https://support.google.com/paymentscenter/answer/7159343?hl=en>, retrieved on 14 July 2021). Apple also charges a price of 30 percent for app and in app purchases, which it reduces to 15 percent for small developers (who make less than USD 1 million per year) (see <https://www.apple.com/newsroom/2020/11/apple-announces-app-store-small-business-program/>, retrieved on 14 July 2021).

¹²⁷ This applies to Apple devices, since Apple uses technical means to prevent apps being downloaded outside the Apple app store (side-loading) on its iOS operating system, and does not permit any alternative app stores on its operating system. Other app stores are permitted on Android devices (such as the Samsung Galaxy app store and the Amazon app store), but Google transacts more than 90 percent of all Android apps via its Play Store; see https://ec.europa.eu/commission/presscorner/detail/de/IP_18_4581, retrieved on 14 July 2021. Side-loading is not prevented by technical means, but it is made much more difficult. End users are shown warnings that downloading files outside the Play Store may damage the device. They need to first change the security settings on their device in order to enable such downloads.

¹²⁸ The lock-in effects are caused both by the financial costs when it comes to switching devices, and by the lock-in to the ecosystem of the operating system operator. See on this para. 74.

¹²⁹ Apps written for Apple iOS cannot be run on an Android device, and vice versa. The operating systems are written in different programming languages, and each app must be written separately in order to be compatible with the underlying operating system. This means that most popular apps need to be developed for both operating systems. This particularly applies to apps enabling interaction between end users such as social media, dating or online gaming apps.

ating with, operating systems of that gatekeeper and allow these software applications or software application stores to be accessed by means other than the core platform services of that gatekeeper.” In accordance with Art. 6(1)(k) DMA, business users must have access to gatekeepers’ App Stores under fair and non-discriminatory general conditions.

101. As soon as end users have acquired apps via an app store, further lock-in effects may arise with “in-app purchases”. This may involve activating additional content (amongst other things further levels within a computer game), or subscriptions (including monthly subscriptions to a music streaming service), on payment of a fee after the app has been installed. App store operators contractually oblige app developers to use in-house payment systems, thus tying app developers and end users closer still to the app store, and restricting app developers’ options to inform end users of cheaper alternatives.¹³⁰

102. In accordance with Art. 5(c) DMA, commercial providers may also promote their services and products outside the channels of the gatekeeper and engage in transactions with end customers acquired via the core platform service of the gatekeeper outside the gatekeeper’s core platform services. It is possible for app payments to circumvent the gatekeeper and be carried out directly via the provider of the app, even if end customers acquired these apps via the gatekeeper’s AppStore. Tying and bundling products and services may lead to efficiency gains as a matter of principle. Users save transaction costs if they are already offered a portfolio of products and services. These are frequently in a complementary relationship with one another so that further efficiencies arise from economies of scope, such as when the ecosystem operator’s payment service may be used for a variety of services. Furthermore, linking the data of the bundled and tied services may amplify data-driven network effects, thus enhancing the refinement of existing services and products and the development of new ones.¹³¹

103. Tying and bundling strategies are however also suited to bind users to the ecosystem in the long term, making access to the areas of the ecosystem ever more difficult. The DMA particularly addresses these market-closing effects with regard to operating systems and app stores, which is where different groups of users are at risk of harm as a result of tying and bundling practices.

104. Vertically-integrated app store operators can exploit the lock-in effects vis-à-vis third-party app providers, and charge higher access prices (for app and in-app purchases) than would be possible in competition. This reduces third-party providers’ revenues if they cannot completely pass these access prices on to consumers, and if the latter refrain from purchasing in some cases due to the higher price.

105. Alternative providers of app stores and of other software applications suffer damage given that the ecosystem operators leverage their economic power to the core platform services in these areas by bundling their services and products, and obstruct competition there. Finally, commercial providers of alternative payment transactions for in-app purchases are also harmed. App developers are locked into the app store operators’ payment services by virtue of contractual tying, so that alternative providers are denied access to the markets.

106. The resultant weaker competition pressure may cause fewer innovations to be made in developing new apps or refining existing ones, thus reducing consumer choice in comparison to the situation under more intensive competition. Consumers are denied potentially more cost-effective sales channels outside the app stores. On the one hand, the prices for software applications and apps might fall as more intensive competition leads to lower prices (for app and in-app purchases) and these are passed on to consumers.

107. On the other hand, gatekeepers thus lose revenue on the secondary market, and may seek to compensate for this by imposing higher access prices on the primary market, or by charging a higher price for the use of the operating system for original equipment manufacturers (OEM).¹³² The degree to which OEMs are able to pass these

¹³⁰ See on this the European Commission’s pending antitrust proceedings against Apple (AT.40716, AT.40437, AT.40652).

¹³¹ See para. 76

¹³² This is referred to in economic theory as the waterbed effect, see for instance Genakos, C./Valletti, T., Testing the waterbed effect in mobile telecommunications, *Journal of the European Economic Association* 9(6), 2011, pp. 1114-1142.

costs on to end customers in the shape of higher prices for the devices depends on competition on the product market. If competition is intensive, they will be less able to effect price increases, so that one may primarily expect OEMs to suffer a drop in revenue. If, by contrast, competition is less intensive, end users may be placed at a disadvantage via higher prices for devices.

108. The opportunities to compensate in the shape of higher app prices furthermore depend on whether consumers can also acquire apps via other channels than gatekeepers' app stores ("side-loading"). The more options there are, the less gatekeepers are able to enforce high prices for app developers, and hence high prices for end users, since app developers will offer their apps in stores with lower access prices.

109. Apple's iOS operating system uses technical means to prevent the side-loading of apps, and Google Android uses such means to make it more difficult.¹³³ They seek to justify this via by security precautions put in place by an app store operator before approving an app. This is said to considerably reduce the danger of malware and of third-party apps gaining unauthorised access to device functions (for instance camera or microphone).¹³⁴ Since this kind of protection is also in the consumer's interest, these security precautions are welcome as a matter of principle. It is however not convincing that the security precautions are allegedly only possible by imposing technical means which prevent all side-loading alternatives. Alternative app store providers could also take such security precautions, and gatekeepers could accordingly only authorise those providers with high standards on their systems.

110. The conduct obligation of Art. 6(1)(c) DMA to oblige gatekeepers as a matter of principle to permit access to applications via other channels than those of the gatekeeper is hence welcome. This facilitates more intensive price competition. An additional regulation of conditions of access in accordance with Art. 6(1)(k) DMA may be necessary. It should be possible as a matter of principle to exclude providers, but this should take place according to proper criteria. In accordance with Art. 24(2) DMA, the European Commission may also appoint independent external experts and auditors to monitor the rules of conduct under Art. 5 and 6 DMA. They should judge in cases of doubt whether such an exclusion is justifiable in terms of security. The Monopolies Commission welcomes for the above reasons the provision contained in Art. 5(c) DMA, which prohibits contractually tying in-app purchases on reserve of an efficiency defence.

5.1.4 More comprehensive prohibition of self-preferencing

111. The DMA already addresses major forms of self-preferencing of the ecosystem operators in the dual role and with regard to multi-platform integration. In the dual role, Art. 6(1)(d) DMA prohibits the ecosystem operators treating more favourably services and products in ranking. "Ranking" is to include all forms of "relative prominence". What is more, in order to "[...] ensure that this obligation is effective and cannot be circumvented it [the prohibition] should also apply to any measure that may have an equivalent effect to the differentiated or preferential treatment in ranking."¹³⁵ The DMA hence additionally contains a prohibition of circumvention by also banning modes of conduct which have the same effect on competition as self-preferencing in the ranking. In this regard, the DMA additionally points to the fact that the Guidelines which the European Commission has adopted in connection with Art. 5 Regulation (EU) 2019/1150¹³⁶ are also intended to facilitate the implementation and enforcement of Art. 6(1)(d) DMA.¹³⁷

¹³³ Cf. footnote 127.

¹³⁴ See https://www.apple.com/privacy/docs/Building_a_Trusted_Ecosystem_for_Millions_of_Apps.pdf, retrieved on 14 July 2021.

¹³⁵ See recital 49 of the DMA.

¹³⁶ European Commission, Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424 of 8 December 2020, p. 1.

¹³⁷ Recital 49 of the DMA. In Art. 2 No. 8 of Regulation (EU) 2019/1150 in turn defines "ranking" for the purposes of this Regulation as "the relative prominence given to the goods or services offered through online intermediation services, or the relevance given to search results by online search engines, as presented, organised or communicated by the providers of online intermediation ser-

112. The DMA hence already contains a comprehensive prohibition of self-preferencing for ecosystem operators in their dual role in Art. 6(1)(d). This emerges from the broad interpretation of the term “ranking”, and from the prohibition of circumvention of self-preferencing in recital 49 DMA. Should it nonetheless emerge in practice that self-preferencing is also possible in terms of the dual role via other forms which do not fall under the prohibition of self-preferencing of Art. 6(1)(d) DMA, the European Commission can include these in the list of rules of conduct in accordance with Art. 10(1) DMA. In this regard, the Monopolies Commission regards the provisions concerning self-preferencing in the dual role as suited to achieve the goals of the DMA. There appears to be a need for a supplement regarding self-preferencing via multi-platform integration.

113. As to multi-platform integration, the DMA addresses an across-the-board prohibition of tying several core platform services in Art. 5(f), which is welcome as a matter of principle for the reasons explained in section 5.1.3. Having said that, major anti-competitive effects may also occur if other services are tied and bundled than core platform services, to which Art. 5(f) DMA is restricted.

114. Tying a music streaming service to the ecosystem is for instance not covered by the current provision of the DMA, since music streaming services do not form part of the list of the core platform services of Art. 2(2) DMA. As a matter of principle, other services may be included in the list of core platform services via the updating procedure contained in Art. 17 DMA. Having said that, market-closing effects may have impacted by then, so that the effect of the conduct obligation of Art. 5(f) DMA is then only weak, and end customers are locked in still more closely to the overall ecosystem. The same considerations also apply with regard to the possibility to update the rules of conduct.¹³⁸

115. Self-preferencing of one’s own services is a core tool of ecosystem operators when it comes to expanding their economic power in the entire ecosystem and increasingly closing the entire ecosystem. The Monopolies Commission is therefore advocating a comprehensive prohibition of self-preferencing here, whilst considering concrete wording to be preferable at other junctures. The DMA should therefore be supplemented to include the following behavioural obligation:

“In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall refrain from treating more favourably services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third parties.”

A comparable provision can be found in section 19a subsection (2), first sentence, number 1 ARC, on the basis of which the Federal Cartel Office is able to prohibit undertakings “of paramount significance for competition across markets” from favouring their own offers vis-à-vis those of competitors. In this regard, the proposed adjustment of the prohibition of self-preferencing in the DMA could help harmonise the respective obligations of conduct.

116. With the exception of the expansion of the prohibition of tying to other services, a comprehensive prohibition of self-preferencing would encompass the individual forms of self-preferencing explained in the previous sections. Should a comprehensive prohibition of self-preferencing be implemented, the respective individual provisions contained in Art. 5(f) DMA, Art. 6(1)(c) and Art. 6(1)(d), and the prohibition of defaults proposed in para. 91, could be dropped. This comprehensive prohibition may be excessive in some cases, and may obstruct any efficiencies in self-preferencing. On the other hand, it may however prevent market-closing effects ex ante, and thus preserve the contestability of the entire ecosystem. If ecosystem operators consider efficiency gains to be predominant in individual services, they are left with the possibility of asserting the efficiency defence.¹³⁹

vices or by providers of online search engines, respectively, irrespective of the technological means used for such presentation, organisation or communication[.]” Regulation (EU) 2019/1150 does not itself contain a prohibition of self-preferencing in ranking, but obliges providers of online intermediation services to reveal their ranking parameters, Art. 5 of Regulation (EU) 2019/1150, and to describe any “differentiated treatment” of their own (group) offers, on the one hand, and offers by third-party business users on the other, Art. 7 of Regulation (EU) 2019/1150.

¹³⁸ On this para. 48 above.

¹³⁹ See Chapter 6 on this.

5.2 Guaranteeing data access via data portability and interoperability

117. As stated in section 5.1, access to data constitutes an important competition parameter and input to the development of new services and products, as well as refining existing ones, on the digital markets. Competition-relevant data are frequently subject to exclusive gatekeeper control. The latter are able to use data to train algorithms, and hence offer their services at a higher quality, whilst competitors do not have such opportunities, or only to an insufficient degree. It is moreover possible to collect personal data in an ecosystem across several contexts. This enables the services to be more and more personalised, so that both end users and business users are locked in to the ecosystem, and the markets are closed to an ever greater extent.

118. What is more, data may be used by a core platform service in order to offer complementary services on markets neighbouring the ecosystem. This concerns above all gatekeepers with a dual role. For instance, app store operators can therefore use the data that are generated there in order to gain an overview of the market and develop promising apps themselves. They can also use these and other data in order to offer ancillary services themselves to the core platform services (e.g. identification and payment services).

119. If, however, there are also positive direct network effects in addition to the data-driven network effects, the benefit of the consumption of a service or product increases directly in line with the number of other end users. This is the case in particular with social networks and interpersonal communication services. It is therefore frequently insufficient for new or existing competitors of the gatekeepers to offer higher quality or better conditions.

120. On the one hand, end users therefore benefit from direct and data-driven network effects. On the other hand, however, they constitute considerable switching costs, and hence a major entry barrier for competitors. This gives rise to the fundamental question of whether and how exclusive control of the data by the gatekeepers can be restricted, and what forms of data access competitors need in order to ensure that markets are contestable.¹⁴⁰

121. It is possible to broadly distinguish between three essential data access rights regimes.¹⁴¹ Firstly, end users as well as business users are themselves involved in generating data via their own activities in the gatekeepers' ecosystem. The DMA takes this up via data access rights in the shape of data portability in Art. 6(1)(h) and (i) DMA. Secondly, business users are not themselves involved in generating the data, but need access to gatekeepers' data in order to offer services on the gatekeepers' operating system. The DMA addresses this by imposing vertical interoperability obligations in Art. 6(1)(c) and (f) DMA. Finally, specific data may be so essential and exclusive that competitors need to have access to these gatekeepers' data in order to train their algorithms to enable them to make an offer that is competitive to the gatekeepers' offers. This is addressed by the DMA in Art. 6(1)(j) DMA, but only for the core platform services of online search engines.¹⁴²

122. Competition between platform services is to be promoted via a right to data portability. Access entitlements of end users and business users to those data that have been generated via own activities are defined in Art. 6(1)(h) DMA. Business users, as well as third parties approved by a business user in accordance with Art. 6(1)(i) DMA, are to be provided, *“free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users”*. Access to the data generated by own use is to be granted here in a structured, commonly used and machine-readable format, so that the data can be ported in real time through high quality

¹⁴⁰ See for more detail on this Commission Competition law 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, loc. cit., p. 35.

¹⁴¹ See on this also Schweitzer, H. et al., Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, final report of 29 August 2018, p. 130.

¹⁴² This obliges operators of online search engines to grant access to data on ranking, search, click and query data concerning unpaid and paid search results.

application programming interfaces (API).¹⁴³ Business users can carry out porting in such instances either directly, e.g. by downloading and uploading the data, or via third parties.

123. Competition for core platform services in particular is to be promoted by vertical interoperability with the functions of the core platform services. Art. 6(1)(c) DMA places gatekeepers under an obligation to create interoperability between software applications or app stores of third parties and gatekeepers' operating systems, as long as this does not endanger the integrity of the operating system. Art. 6(1)(f) DMA places gatekeepers under a vertical interoperability obligation with the same operating systems, hardware or software features that are available to the gatekeeper or are used by it when providing of any ancillary services. Guaranteeing the vertical interoperability of competitors' services with gatekeepers' operating systems in Art. 6(1)(c) and (f) DMA is connected with the prohibition of locking gatekeepers' services in to operating systems. Art. 6(1)(f) DMA places gatekeepers under an obligation to grant to alternative suppliers of ancillary services¹⁴⁴ (e.g. payment providers or providers of identification services) access to the same operating systems, hardware or software features that are available to the gatekeeper or are used by it in the provision of any ancillary services.¹⁴⁵ The Monopolies Commission considers a vertical interoperability obligation to be a suitable instrument to promote competition on core platform markets. The current proposal of Art. 6(1)(c) DMA however leaves it open whether an obligation of vertical interoperability with the operating system also applies if a gatekeeper does not itself operate a comparable service on its operating system. Anti-competitive conduct on the part of gatekeepers will be less likely to occur in this case.

124. The conduct obligations on data portability (Art. 6(1)(h) and (i) DMA) aim to ensure more competition between core platform services.¹⁴⁶ If end users and business users port their data to gatekeepers' competitors, the former can benefit from data-driven network effects and direct network effects. Since business users may in each case only port the data generated by their own activity to the respective core platform services, the question remains open as to what competitive value data porting under Art. 6(1)(i) of the DMA will have in practice, since the value of the data is often context specific, and only emerges from the evaluation.¹⁴⁷

125. Competitors benefiting from data-driven and direct network effects is conditional on there being sufficient incentives for end users to switch to a competitor of the gatekeeper. The DMA addresses these incentives by virtue of the fact that it imposes measures in order to reduce switching costs. It should be possible to export data in real time in a "structured, commonly used and machine-readable format."¹⁴⁸ This is furthermore conditional on interfaces with competitors which also facilitate simple, standardised data importing. The switching costs can be further reduced if third parties can also carry out data porting in accordance with Art. 6(1)(i) DMA. All in all, the

¹⁴³ See recital 54 of the DMA.

¹⁴⁴ Ancillary services are specified in Art. 2 Nos. 14 and 15 DMA.

¹⁴⁵ See on this the European Commission's pending antitrust procedures against Apple in connection with Apple Pay (AT.40452); see footnote 130 above.

¹⁴⁶ A right to the interportability of personal data which a person has provided to a controller is already provided for in Art. 20 GDPR. Art. 6(1)(h) DMA goes beyond this, and in particular requires real time porting. Gatekeepers are to ensure this by means of appropriate technical measures, such as putting in place high quality application programming interfaces (recital 55 of the DMA). cf. also recommendation 11 of Commission Competition law 4.0 for an obligation incumbent on market-dominant platforms "to ensure their end users portability of user and data on utilisation in real time and in an interoperable data format and guarantee interoperability with complementary services"; Commission Competition law 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, a. a. O., p. 55.

¹⁴⁷ See on this also Krämer, J./Senellart, P./de Streel, A., Making data portability more effective for the digital economy, Cerre report, Brussels, 2020. Cabral et al. (2021) and Krämer et al. (2020) discuss a role of a data trust in this regard. Third parties could port their algorithm to analyse the data to the data trust, which then executes the algorithm on their behalf on gatekeepers' raw data. The third-party provider would receive the trained algorithm back, but would never see the raw data. This could solve part of the problem, since the data would remain in their context, but technical questions would still remain unresolved; cf. Cabral et al., The EU Digital Markets Act, Publications Office of the European Union, Luxembourg, 2021, p. 22.

¹⁴⁸ See recital 54 of the DMA.

provisions of the DMA are regarded as being suited to facilitate data portability, to reduce users' switching costs, and hence promote competition for core platform markets.¹⁴⁹

126. Real-time access to data as provided for in Art. 6(1)(h) DMA in the currently-proposed DMA however implies that end users still need to have a user account with the gatekeeper from which the data are ported to competitors in real time. The incentives to switch would be even greater in the case of horizontal interoperability. That would permit competitors to use interfaces (APIs) on behalf of end users in order to access the gatekeepers' systems without the former having to have a user account with the gatekeepers. The currently-proposed DMA only provides for such horizontal interoperability with ancillary services (Art. 6(1)(f) DMA), but not with core platform services.¹⁵⁰

127. It remains to be clarified in all data access-related questions what data and what interfaces (APIs) are to be covered by the mandatory conduct measures. There is a need to weigh up here between the interests of those seeking access, and gatekeepers' incentives to innovate.¹⁵¹ Where there is an obligation covering all data and APIs of core platform services, gatekeepers' incentives to innovate may be reduced if these data need to be shared with competitors. The data should be so essential in nature that a competitive offer is impossible without access to these data. The DMA specifies this essential character only in the case of click-and-query data with online search engines (Art. 6(1)(j) DMA), but not in connection with data portability or interoperability obligations. It will only be possible to answer the question in individual cases as to what data have such an essential character with other core platform services.

128. It remains to be decided whether such obligations are to be addressed in individual cases by the DMA or by a sector-specific regulation. Also with regard to implementation, the Monopolies Commission considers that there is still a need to clarify, so that an obligation to provide horizontal interoperability could only be reconsidered in a subsequent step when technical, economic and legal issues had been resolved.

129. The DMA should be initially limited to addressing ecosystem-specific problems. The Monopolies Commission recommends here in particular a comprehensive prohibition of self-preferencing with regard to ecosystem operators. This entails a prohibition of the relative prominence of own services, setting own services as a default on core platform services, and the prohibition of tying and bundling core platform services with gatekeepers' other services and products.

¹⁴⁹ Issues of implementation still also remain with regard to the detail since amongst other things data ownership rights may be affected if personal data have been uploaded by third parties, for instance the telephone number of a third person. See on this <https://www.eff.org/deeplinks/2020/07/legislative-path-interoperable-internet>, retrieved on 14 July 2021.

¹⁵⁰ Potential application cases might arise with social networks and number-independent interpersonal communication services. The strong direct network effects cause users to be locked in to the established core platform services if they do not reach their network also via competitors' services. All in all, application cases outside social networks and interpersonal communication services however appear to be very limited, see also Krämer, J./Schnurr, D./Broughten Micova, S., *The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies*, CERRE Report, September 2020, pp. 98 et seqq.

¹⁵¹ There is furthermore a need to clarify further questions related to data security and protection. Core platform services might be subject to risks if they were obliged to provide interoperability with suppliers who have poorer security standards. Art. 6(1)(c) DMA recognises these security objections against the background of the obligation to provide access to third-party software or app stores on the gatekeepers' operating systems. The degree to which this might also apply to an interoperability obligation appears open. What is more, interoperability requires platforms to exchange large amounts of (personal) data, so that conflicts might arise between interoperability obligations and data protection, in particular when it comes to interoperability of providers with different data protection standards.

Chapter 6

The need for an efficiency defence

130. The Monopolies Commission analyses in this chapter whether an efficiency defence should be added to the DMA, and how this should be structured. This will entail first of all discussing the need for an efficiency defence (section 6.1), before an overview is provided of the possibilities under antitrust law to justify a conduct (section 6.2), and concrete proposals are then put forward for a corresponding provision to be included in the DMA (sections 6.3 and 6.4).

6.1 Fundamental considerations on the need for an efficiency defence in the DMA

131. The DMA addresses conduct on the part of specific core platform services which may have anti-competitive effects due to their gatekeeper position.¹⁵² A major difference between the provisions on conduct contained in the DMA vis-à-vis the provisions of general antitrust law is that the DMA contains per se rules on more or less concretely-described conduct the effects of which is not examined in individual cases. Most conduct addressed in the DMA can however in fact theoretically trigger both anti-competitive effects and economic advantages. The potential individual advantages are also referred to as (positive) efficiencies from time to time. As was stated in Chapter 5 when it came to analysing individual obligations of the DMA, these may be numerous different effects, some of which may be ecosystem specific.¹⁵³ One example of efficiencies in ecosystems that comes up frequently is constituted by advantages in transaction costs which arise by virtue of the fact that users receive an integrated product via several services without needing to make a selection or take interim steps. It would hence be presumed as part of a per se prohibition of individual conduct without any review of efficiencies that the negative effects of the conduct covered by the prohibition prevail as a matter of principle. It would no longer be examined whether a prohibited conduct might trigger more advantages than disadvantages, at least in individual cases (and hence would be referred to as “efficient” overall).

132. The proposal of the European Commission for a DMA is hence conceived in such a way that a situation may theoretically occur in which the provision also prohibits conduct the advantages of which would prevail on the users’ side. According to the proposal as it stands, an addressee of the norms acting in violation of the obligations of Art. 5 and 6 DMA can hardly exculpate itself by arguing that its conduct is efficient. In connection with the designation of an undertaking as a gatekeeper, and hence as an addressee of the norms of the DMA, it in fact becomes explicitly ruled out to take efficiency gains into account.¹⁵⁴ The DMA merely provides for the suspension of an obligation laid down in Art. 5 and 6 DMA if the viability of the operation of the addressee of the norms in the Union would otherwise be endangered (Art. 8 DMA), or provides to exempt it from such an obligation for overriding reasons of public interest (Art. 9 DMA). The Report for the European Parliament does not recommend any fundamental adjustments in this regard.¹⁵⁵

133. This also appears to be consistent at first sight, given that the DMA is above all seeking to achieve more comprehensive, more rapid enforcement of the law by structuring the conduct provisions in the form of per se

¹⁵² See Chapter 3 on the role of a gatekeeper and on the question of when we are talking of a (cross-market) ecosystem.

¹⁵³ See on efficiencies: effects and need for weighing up in ecosystems due to a more comprehensive use of data: paras. 76 and 77; on efficiencies with self-preferencing in general terms: para. 81, with the dual role: para. 89; with defaults: para. 91; with tying and bundling: para. 100, with access to data: paras. 116 et seqq.

¹⁵⁴ Recital 23 of the DMA: “Any justification on economic grounds seeking to demonstrate efficiencies deriving from a specific type of behaviour by the provider of core platform services should be discarded, as it is not relevant to the designation as a gatekeeper.” Cf. also recital 9 of the DMA on the relationship between the DMA and antitrust law.

¹⁵⁵ Only Art. 8(2), first sentence, DMA provides for clarification of the fact that the European Commission may lift the suspension wholly or partly as a result of its review of the suspension of an obligation; cf. Report for the European Parliament, loc. cit., pp. 50 et seq.

rules.¹⁵⁶ Dealing with efficiency gains in the case of a violation of Art. 5 and 6 DMA might give rise to fears that it could be made much more difficult to implement the DMA. It would suggest itself that the frequently difficult coverage and legal classification of smaller and larger efficiency effects would generate a major workload for the public authorities and courts, and hence considerably delay or indeed level out any hoped-for protective effect for new and smaller digital competitors that is greater when compared with the protective effect currently achieved via antitrust law. In its impact assessment on the DMA, the European Commission relatively concisely justifies foregoing an efficiency defence, largely by referring to negative experience with this tool in other legal areas.¹⁵⁷

134. A large number of articles on the DMA, by contrast, criticise the lack of an efficiency defence.¹⁵⁸ In its recommendation for a platform regulation at EU level, the Commission Competition law 4.0 also subjected the introduction of per se rules to the proviso of an objective justification.¹⁵⁹ In fact, the at best limited opportunity to justify conduct regarded as harmful in accordance with Art. 5 and 6 DMA might lead to losses of welfare. The undertakings could hence (be obliged to) distance themselves from conduct which has negative impact on the contestability and fairness of markets, but at the same time bring about innovations the advantages of which counterbalance or even outweigh the negative impact. Whilst the structure of the individual requirements and prohibitions is likely to already be based on a general weighing up of their impact on the part of the European Commission, supplementing the DMA to include an efficiency defence might hence ensure greater justice in individual cases.

135. When it comes to answering the question as to whether an efficiency defence should be included in the DMA, there is a need to examine various possibilities for structuring the DMA. These permit one to draw conclusions as to the weight to be attached in practice to the objections that have been put forward. It is first and foremost relevant in this context what potential is created by the obligations contained in the DMA for the (unwelcome) prohibition of efficient conduct without an efficiency defence. The more such situations one may anticipate, the greater is the need to address this situation by means of a concrete efficiency arrangement.

136. It can be observed in this regard first and foremost that, in the form taken on by the European Commission's Proposal for a Regulation, the DMA does without highly-generalising provisions, and instead takes up comparatively concrete conduct on the part of specific core platform services. The obligations are furthermore largely based on sets of antitrust proceedings in which the harmful impacts on competition have already been discussed, and at least partly also confirmed by an authority. Having said that, it cannot be concluded from this that the transfer to new future cases will always be sufficiently accurate, particularly since the definition of the conduct in the DMA opens up many questions of interpretation, which might also lead to broader application to situations which had not yet been fully taken into account, or which were not yet foreseeable. A possible advance effect of the prohibitions on new or modified digital business models which also require a re-evaluation to be carried out with regard

¹⁵⁶ On this para. 9 above.

¹⁵⁷ *"Finally, it is therefore worth noting that gatekeepers frequently raise arguments concerning the efficiencies that their practices bring about as a way to counterbalance and justify their potential negative effects. These arguments – raised not only in the OPC [Open Public Consultation] but therefore in numerous past and ongoing investigations (in fields such as antitrust, consumer protection or privacy) – are often one-sided and do not seem to match the evidence underlying this Impact Assessment including the calls for regulation raised by an overwhelming majority of respondents to the OPCs. Such efficiency-related defenses have therefore been rejected by the Courts as being unfounded [reference to CFI, judgment of 17 September 2007, T-201/04 – Microsoft, ECLI:EU:T:2007:289, paras. 1091 et seqq.]"* cf. European Commission, Commission Staff Working Document, Impact Assessment Report, Accompanying the document Proposal for a Digital Markets Act, loc. cit., para. 158.

¹⁵⁸ Cabral, L. et al., The EU Digital Markets Act - A Report from a Panel of Economic Experts, 2021, pp. 10 et seq., loc. cit.; de Streel, A. et al., The European proposal for a Digital Markets Act: A first assessment, January 2021, pp. 22 et seq., loc. cit.; Haucap, J./Schweitzer, H., Perspektiven der Wirtschaftspolitik 2021, 17, 23; Haus, F./Weusthof, A.-L., WuW 2021, 318, 323; Polley, R./Konrad, F. A., WuW 2021, 198, 204 et seq.; Schweitzer, H., ZEuP 2021, 503, 537 et seq.; Zimmer, D./Göhl, J.-F., ZWeR 2021, 29, 54 et seqq. In contrast Reyna, A., Why the DMA is much more than competition law (and should not be treated as such), 16 June 2021; retrievable at <https://chillingcompetition.com/2021/06/16/why-the-dma-is-much-more-than-competition-law-and-should-not-be-treated-as-such-by-agustin-reyna/>, retrieved on 17 June 2021.

¹⁵⁹ Commission Competition Law 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, loc. cit., pp. 25 and 51.

to efficiency, particularly suggests itself. It is furthermore found in Chapter 5 that the obligations concentrating on individual known situations do not yet go far enough in order to do justice to the objective, namely to protect contestability and fairness of the markets against the background of competition-related problems in connection with ecosystems. Were the protective effect to be further enhanced, as proposed by the Monopolies Commission in section 5.1.4, for instance by expanding the scope with regard to the prohibition of self-preferencing, the (largely positive) more comprehensive protective effect would also lead to an increase in the risk that the rules might overreach in individual cases, thus preventing efficient conduct. This could however be countered with the possibility of an efficiency defence.

137. Instead of an efficiency defence on a case-by-case basis, the danger of unwelcome prohibitions of efficient conduct could also be reduced by adjusting the structure of the obligations investigated in Chapter 4. Alternatives within the system of the DMA having an impact on the potential of unwelcome prohibitions might particularly be found in modifying the rules that define when these are applied. That said, the Monopolies Commission does not find these possibilities of adjusting the application system to be convincing. It might be possible to limit the applicability of individual obligations more clearly to individual core platform services. The analysis in section 4.4 however also shows that this would at the same time entail a reduction in the protective impact. Another systematic approach is also pursued by the provision that has recently been included in German antitrust law, namely in section 19a ARC, according to which the Federal Cartel Office may in a targeted manner prohibit the addressees of the norms from engaging in individual conduct among that regulated by section 19a subsection (2), first sentence, ARC. The approach of the DMA however deviates from that of section 19a ARC in that this provision is conditional on separate action being taken by the authority.¹⁶⁰

138. Against this background, the Monopolies Commission considers that there are weighty reasons to supplement the DMA to include an efficiency defence on a case-by-case basis. One would however have to examine how such an efficiency defence can be implemented, and what impact this might have on achieving the objectives of the DMA. The main point here is for the efficiency defence not to be diametrically opposed to the objective of protecting the contestability and fairness of digital markets by means of expedited enforcement of the law.

6.2 Provisions on objective justification under antitrust law

139. Antitrust law provides as a matter of principle for an objective justification which indeed permits conduct that is prohibited when taken in isolation. The debate on the DMA among the specialist public does partly refer to antitrust law in connection with adding an efficiency defence, either affirming or rejecting an orientation towards the rules of antitrust law.¹⁶¹ This also suggests itself in the sense that the DMA is a regulation supplementing antitrust law the obligations of which are largely modelled on antitrust case-law regarding Art. 101 and 102 TFEU. Antitrust law contains a large number of tried-and-tested provisions on which it is possible to fall back when designing an efficiency defence in the DMA.

140. The basic characteristics of the possibility of a justification in antitrust law are therefore put forward first of all in order to derive from this recommendations for an efficiency defence in the DMA. This particularly relates in detail to the provisions of Union law on the ban on cartels, on the prohibition of abuse of dominance, as well as on merger control. In the interest of further clarification of the law, and for the purposes of subsequent reference, the overview of EU law on competition is supplemented by individual provisions of German antitrust law.

141. A violation of the ban on cartels under Art. 101(1) TFEU is exempt pursuant to para. 3 of this article if an anti-competitive agreement is counterbalanced by efficiencies. The following four conditions need to be realised for this: (1) The agreement contributes to improving the production or distribution of goods or to promoting technical

¹⁶⁰ On this para. 58 above

¹⁶¹ Cabral, L. et al., *The EU Digital Markets Act - A Report from a Panel of Economic Experts*, 2021, pp. 10 et seq., loc. cit.; de Streel, A. et al., *The European proposal for a Digital Markets Act: A first assessment*, January 2021, pp. 22 et seq., loc. cit.; Schweitzer, H., *ZEuP* 2021, 503, 537; Zimmer, D./Göhl, J.-F., *ZWeR* 2021, 29, 55 et seq. "exempt"

or economic progress, (2) Consumers are allowed a fair share of the resulting benefit¹⁶², (3) No restrictions are imposed on the undertakings concerned which are not indispensable to the attainment of the objectives, and (4) No possibilities are afforded of eliminating competition in respect of a substantial part of the products in question. German law contains such a provision for violations of the ban on cartels pursuant to section 1 ARC in section 2 subsection (1) ARC. The possible (individual) exemptions in accordance with Art. 101(3) TFEU are fleshed out by means of a number of Block Exemption Regulations of the European Commission, in accordance with which individual categories of agreements are universally exempt. It is presumed in this regard that the corresponding agreements are typically sufficiently efficient.

142. The principle of legal exception has applied at EU level since Regulation (EC) No 1/2003 came into force, and has also applied in German law since the 7th Amendment to the ARC. Accordingly, a violation of Art. 101 TFEU/section 1 ARC is exempted by law if the conditions of Art. 101(3) TFEU apply without there being a need for any prior individual exemption on the part of the competition authority, Art. 1(2) of Regulation (EC) No 1/2003.¹⁶³ The principle of legal exception is complemented by the principle of self-assessment, i.e. undertakings must largely assess themselves in terms of whether their cooperation triggers Art. 101(1) TFEU, or enjoys an (individual or group) exemption in accordance with Art. 101(3) TFEU. Whilst the burden of proof for a factual infringement of the ban on cartels is on the cartel authorities, the undertakings bear the burden of stating and proving that the conditions for an exemption are fulfilled, Art. 2 Regulation (EC) No 1/2003.

143. A decision on the part of the European Commission finding that the ban of cartels does not apply is now only provided for in Art. 10, first sentence, of Regulation (EC) No 1/2003, and only for exceptional cases.¹⁶⁴ Accordingly, the European Commission may find ex officio that the conditions of Art. 101(1) TFEU are not fulfilled, or that the conditions for an exemption of Art. 101(3) TFEU are fulfilled. Decisions on inapplicability on the basis of Art. 10 of Regulation (EC) No 1/2003 are however insignificant in practice. So-called comfort letters have now become more common, but still do not have considerable scope.¹⁶⁵ The European Commission informs undertakings in such informal advisory letters that the intended cooperation – on the basis of its preliminary review – is unobjectionable under competition law.

144. Under German law, the cartel authority may inform undertakings that there is no reason to act since the information at its disposal does not indicate a violation of antitrust law, section 32c subsection (1) ARC. Pursuant to section 32c subsection (1), third sentence ARC, the decision does not entail an exemption of any violation of antitrust law; such a finding is reserved for the European Commission. Decisions of the Federal Cartel Office pursuant to section 32c subsection (1) ARC have tended to be rare so far, but might take on greater practical significance in future. Section 32c ARC was supplemented in the 10th Amendment to the ARC to include an entitlement accruing to undertakings to a decision being taken on the part of the Federal Cartel Office that there are no grounds to take action, section 32c subsection (4), second sentence, ARC. The Federal Cartel Office shall decide on undertakings' applications within six months, section 32c subsection (4), second sentence, ARC. The Federal Cartel Office is furthermore able to deliberate informally via "chairperson's communications" (Vorsitzendenschreiben), which have also been codified in section 32c subsection (2) ARC since the 10th Amendment to the ARC.

¹⁶² It should be borne in mind in this regard that (1) a broad definition of 'consumer' applies which is not restricted to end customers, and (2) the advantages for consumers must as a matter of principle arise on the market affected by the restriction of competition; cf. European Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101 of 27 January 2004, p. 97, para. 84 (re (1)) and 43 and 85 (re (2)).

¹⁶³ The change from the principle of administrative exemption to the principle of legal exception took place in order to relieve the European Commission of the fundamental need of an individual exemption in accordance with Regulation No 17 of 6 February 1962.

¹⁶⁴ Recital 14 of Regulation (EC) No 1/2003.

¹⁶⁵ European Commission, Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases, OJ C 101 of 27 April 2004, p. 78.

145. Neither the wording of the prohibition of abuse of dominance pursuant to Art. 102 TFEU, nor that of sections 19 et seqq. ARC, explicitly provide for an efficiency defence. The possibility to justify conduct falling within the scope of Art. 102 TFEU is, however, accepted. Abusive conduct may be justified, firstly, because it is objectively necessary, and secondly because it creates efficiency gains which counterbalance or even outweigh the restriction of competition.¹⁶⁶ The justification because of an objective necessity for instance relates to technical or security-relevant aspects¹⁶⁷, and is to remain unconsidered in the following.¹⁶⁸ The conditions under substantive law for an efficiency defence within Art. 102 TFEU correspond as a matter of principle with those for an exemption of Art. 101 TFEU after para. 3 of that Article.¹⁶⁹ The justification of an abuse of dominance is however likely to be dealt with much more restrictively than that of a anti-competitive agreement, and may only be considered in exceptional cases.¹⁷⁰ Under Art. 102 TFEU, the burden for proving that such conditions are fulfilled also lies with the undertakings.¹⁷¹

146. German law on abuse of dominance also provides for the possibility of an objective justification, including the efficiency defence. The distribution of the burden of stating and proving however takes on a more nuanced form, and has not yet been finally clarified in some regards. Whilst the authority must also investigate the facts ex officio as a matter of principle at least with regard to the existence of an objective justification, at least section 19 subsection (2) number 1 alt. 2, numbers 3 and 4 ARC, as well as section 20 subsection (3), second sentence, ARC, provide in this respect for a reversal of the substantive burden of proof, with the consequence that remaining doubts as to the existence of an adequate justification are at the expense of the undertakings (non liquet).¹⁷² When it comes to the new provision contained in section 19a ARC, which addresses abusive conduct on the part of undertakings with paramount cross-market significance for competition, subsection (2), second sentence, of this section of the ARC goes so far as to provide that the burden of statement and proof for the objective justification of the conduct according to subsection (2), first sentence, is on the undertakings. This is a reversal of the burden of proof in substantive and formal terms.¹⁷³ In other respects, the current law on the prohibition of abuse of dominance is largely identical to that concerning the ban on cartels. Both under EU and German law, undertakings

¹⁶⁶ ECJ, judgment of 17 February 2011, C-52/09 - TeliaSonera Sverige, ECLI:EU:C:2011:83, para. 76; judgment of 15 March 2007, C-95/04 P - British Airways, ECLI:EU:C:2007:166, para. 86.

¹⁶⁷ cf. only M. Scholz in: Wiedemann, Handbuch des Kartellrechts, 4th ed., Munich 2020, § 22 paras. 75 et seq.

¹⁶⁸ cf. however Zimmer, D./Göhl, J.-F., ZWeR 2021, 29, 56, who propose that the DMA be expanded to include a possibility, restricted to "extreme cases", of objective justification (for instance risk to the security of the platform or of business secrets if Art. 5 and 6 DMA are complied with).

¹⁶⁹ ECJ, judgment of 6 October 2015, C-23/14 - Post Danmark II, ECLI:EU:C:2015:651, para. 49; judgment of 27 March 2012, C-209/10 - Post Danmark I, ECLI:EU:C:2012:172, para. 42. cf. also European Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ C 45 of 24 February 2009, p. 7, para. 30. On the conditions of Art. 101(3) TFEU cf. para. 139 above.

¹⁷⁰ Brand in: Frankfurter Kommentar zum Kartellrecht, Vol. III, 99th supplement 03/2021, Art. 102 paras. 159, 168 and 170; Fuchs in: Immenga/Mestmäcker, Wettbewerbsrecht, Vol. 1, 6th ed. 2019, Art. 102 TFEU para. 163. Cf. on this by way of example the rejection of Google's efficiency defence by the European Commission in the abuse proceedings against the undertaking: European Commission, decision of 20 March 2019, AT.40411 - Google Search (AdSense), paras. 437 et seqq., 553 et seqq. and 615 et seqq.; decision of 18 July 2018, AT.40099 - Google Android, paras. 993 et seqq., 1155 et seqq. and 1323 et seqq.; decision of 27 June 2017, AT.39740 - Google Search (Shopping), paras. 653 et seqq.

¹⁷¹ ECJ, judgment of 6 October 2015, C-23/14 - Post Danmark II, ECLI:EU:C:2015:651, paras. 48 et seq.; judgment of 27 March 2012, C-209/10 - Post Danmark I, ECLI:EU:C:2012:172, para. 42; CFI, judgment of 17 September 2007, T-201/04 - Microsoft, ECLI:EU:T:2007:289, paras. 688 and 1144.

¹⁷² Bechtold/Bosch, GWB, 9th ed. 2018, section 20 ARC para. 39; Weyer in: Frankfurter Kommentar zum Kartellrecht, Vol. IV, 99th supplement 03/2021, section 19 ARC para. 375 (on section 19 subsection (2) number 1 alt. 2 ARC); Wolf/Westermann in: Münchener Kommentar zum Kartellrecht, Vol. 2, 3rd ed. 2018, section 19 ARC paras. 37 et seq., 143 (on section 19 subsection (2) number 3 ARC) and 172 (on section 19 subsection (2) number 4 ARC). In particular regarding the obligation on undertakings to cooperate in the proceedings of the antitrust authorities cf. also Monopolies Commission, 7. Sektorgutachten Energie: Wettbewerb mit neuer Energie, Baden-Baden 2019, para. 70.

¹⁷³ Federal Government, Entwurf GWB-Digitalisierungsgesetz, loc. cit., pp. 77 et seq.

must as a matter of principle assess themselves regarding whether their conduct falls within the scope of the prohibition of abuse of dominance, or is justified.¹⁷⁴

147. An efficiency defence is explicitly regulated in EU merger control. Art. 2(1), second sentence, (b) of Regulation (EC) No 139/2004 provides that the European Commission is to take into account when appraising intended concentrations amongst other things “the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition”.¹⁷⁵ The conditions contained in the provision are similar to those contained in Art. 101(3) TFEU. The European Commission additionally points out in its two sets of Guidelines on the assessment of mergers that only those efficiency gains are considered which (1) benefit consumers, (2) are merger-specific, and (3) are verifiable.¹⁷⁶ With regard to consumer participation in the profits arising from such a merger ((1) above), the European Commission requires in turn that the efficiency gains (a) are substantial, (b) timely, and (c) benefit consumers on the markets affected by the restriction of competition.¹⁷⁷ The efficiency gains must be proven by the parties to the concentration. The requirements as to the assertion of efficiency gains are stringent. This is frequently a matter of possible costs, and less frequently of quality advantages of the combined entity. Although the European Commission has recently tended to review efficiency gains in greater detail, the efficiency defence has virtually never been material to a decision so far.¹⁷⁸

148. It remains largely unclear whether German merger control is also amenable to an efficiency defence in individual cases.¹⁷⁹ The Federal Cartel Office has repeatedly indicated that, where appropriate, it would take as an orientation the corresponding prerequisites of EU merger control, whilst in the past leaving open the fundamental question of whether taking efficiency gains into account.¹⁸⁰ That said, improvements in competition conditions on a market other than that affected by the concentration can be taken into account within the balancing-test clause (Abwägungsklausel) contained in section 36 subsection (1), second sentence, number 1 ARC. What is more, the Federal Minister for Economic Affairs and Energy may grant approval of a concentration that has been prohibited by the Federal Cartel Office if the restriction of competition is balanced out by macroeconomic advantages offered by the concentration, or the concentration is justified by an overriding public interest, section 42 subsection (1), first sentence, ARC (Ministererlaubnis). Unlike with the efficiency defence, the advantages ensuing from the concentration must therefore not primarily benefit the consumers on the market affected by the restriction of competition. Efficiency gains may also be included among the eligible reasons of the public good with regard to the approval given by the Minister.¹⁸¹

¹⁷⁴ See on this for details paras. 140 et seqq. above

¹⁷⁵ For details on the background of the efficiency defence in merger control see recital 29 of Regulation (EC) No. 139/2004.

¹⁷⁶ European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 5 February 2004, p. 5, paras. 76 et seqq., esp. 78; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265 of 18 October 2008, p. 6, paras. 21 et seqq., 52 et seqq., esp. 53, 115 et seqq.

¹⁷⁷ European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, loc. cit., para. 79.

¹⁷⁸ cf. on this Monopolies Commission, XXIII Biennial Report, loc. cit., para. 160.

¹⁷⁹ Critical vis-à-vis the introduction of a general efficiency defence in German merger control Monopolies Commission, Special Report 63, Die 8. GWB-Novelle aus wettbewerbspolitischer Sicht, 2012, paras. 33 et seqq.; but cf. specifically on concentrations in the hospital sector XXIII Biennial Report, loc. cit., paras. 158 et seqq.

¹⁸⁰ cf. for instance Federal Cartel Office, Decision of 20 July 2020, B3-33/20 – Malteser/Diakonissen Flensburg, paras. 402 et seqq.; Decision of 17 December 2019, B9-80/19 – Loomis/Ziemann, paras. 458 et seqq.; Decision of 17 January 2019, B5-29/18 – MiBa/Zollern, paras. 364 et seqq.

¹⁸¹ Monopolies Commission, Special Report 45, Zusammenschlussvorhaben der Rhön-Klinikum AG mit dem Landkreis Rhön-Grabfeld, 2006, para. 172 (original in German): “*Summing up, the Monopolies Commission considers efficiency gains to constitute grounds of the common good which are suited as a matter of principle to be included in the weighing up if the anticipated efficiencies are above average and benefit the public.*” cf. also Monopolies Commission, Special Report 63, loc. cit., para. 35.

6.3 Designing an efficiency defence in the DMA

149. It will be clarified below to what extent the provisions of antitrust law described can be made to bear fruit with regard to supplementing the DMA to include an efficiency defence, or whether derogating rules are needed with regard to both the conditions under substantive law for asserting advantages of efficiency (section 6.3.1), and to aspects of procedural law (section 6.3.2). It appears to suggest itself here in both respects to plan the efficiency defence as a mechanism for isolated exceptional cases which does not tangibly reduce the impact of the obligations. This emerges directly from competition-policy objective of the DMA, namely to effectively improve the contestability and fairness of the markets, and from the fact that, in its Proposal for the DMA, the European Commission favours per se rules in this regard in order to expedite the enforcement of the law. Were efficiency gains to be taken into account against this background, there would be a need to ensure that the markets in question remained contestable and fair in individual cases.

6.3.1 Conditions under substantive law for asserting efficiency gains

150. The provisions of antitrust law could be appropriately used with regard to the substantive conditions when putting forward efficiency gains. As was explained in the previous section, the conditions needing to be met for an efficiency defence in the three pillars of antitrust law – ban on cartels, prohibition of abuse of dominance and merger control – are very largely identical. Accordingly, conduct must at least (1) promote technical development or the economic progress, and (2) involve consumers in this, whilst (3) it may not completely eliminate competition. The following should be noted in this regard for an efficiency defence in the DMA.

- (1) The benchmark to be applied when it comes to the question of what efficiency gains are considered when weighing up the positive and negative effects of the conduct is a consideration of the lasting nature of the advantages achieved, whilst at the same time only paying attention by way of exception to efficiency gains that one may only expect to occur temporarily.¹⁸² In this vein, for instance achieving a temporary reduction in the variable costs is unlikely to suffice as a justification in terms of efficiency, given that one may presume under certain circumstances that undertakings with considerable market power do not pass on these cost advantages. In contrast, efficiency gains in the shape of innovations, which are generally part and parcel of the business models of the major digital undertakings, may be considered. It is possible for instance that combining different offers from the same undertaking may lead to lock in effects, but also to better-coordinated offers and services for consumers. Given that the DMA purposely provides for requirements or prohibitions for certain conduct after examining the advantages and disadvantages, the efficiency gains must however constitute an unambiguously high added value in the individual case. The general advantages of a conduct – for instance linking different offers from the same undertaking – are already internalised in the structure of Art. 5 and 6 DMA, and have as a rule been considered by the European Commission as being less relevant when weighing up against the disadvantageous effect of this conduct. One should also pay attention to where the efficiency gains actually come from: If they are (only) general advantages of a specific business model which are not, or at least not directly, related to an independent violation of the obligations contained in Art. 5 and 6 DMA, they should not be regarded as relevant efficiency gains.¹⁸³ There is

¹⁸² cf. also de Streel, A., The European proposal for a Digital Markets Act: A first assessment, January 2021, pp. 22 et seq., loc. cit.; Schweitzer, H., ZEuP 2021, 503, 537; Zimmer, D./Göhl, J.-F., ZWeR 2021, 29, 55 et seq.

¹⁸³ Cf. Federal Cartel Office, Decision of 22 December 2015, B9-121/13 – Booking.com, paras. 261 et seqq. on distinguishing between the general advantages of using hotel booking portals (for instance broader coverage for the hotels, and lower search costs for end customers) on the one hand, and the best price clauses giving rise to an agreement restricting competition on the other. On this also Federal Court of Justice, Decision of 18 May 2021, KVR 54/20 – Booking.com, ECLI:DE:BGH:2021:180521BKVR54.20.0, para. 59 (cited from Juris; original in German): “The Federal Cartel Office explicitly acknowledges these efficiency gains of the hotel booking platforms. However, it rightly questions the causality of the strict best price clause for these efficiency gains because they do not emerge directly from the use of the best price clause, and it is possible to operate the platform in the long term in an economically-successful manner without agreeing on strict best price clauses.”

therefore a need to clarify in particular whether the violation is needed at all in order to achieve the efficiency gains.¹⁸⁴

- (2) Only those advantages should also be considered when it comes to the efficiency defence in the DMA which involve consumers affected by the violation of the rules of conduct of Art. 5 and 6 DMA. Antitrust law focuses to a considerable degree on the consumers on the market affected by the restriction of competition.¹⁸⁵ In contrast to antitrust law, there is no definition of ‘market’ in the application of the DMA as part of identifying a violation. As is revealed at various passages, a market-related view is however not fundamentally alien to the DMA.¹⁸⁶ Moreover, it would be possible to approach the identification of the consumers affected by the violation in the efficiency defence in the DMA flexibly in the sense that it is possible to forego an exact market definition where the addressees of the norms demonstrate that especially the consumers affected by the conduct in question also benefit from the efficiency gains.
- (3) According to the condition to which the antitrust efficiency defence is subject, namely that competition may not be completely eliminated, the rule should apply in the DMA to an efficiency defence that it may not lead to a situation in which the digital markets become incontestable or unfair as a result of a violation of the obligations of Art. 5 and 6 DMA. As mentioned above, it appears particularly important in this regard to take a long-term view when it comes to the efficiency defence.¹⁸⁷ This ultimately concerns monitoring the market structure, which as a rule suffers greater damage the less competition there is. The particular significance attaching to preserving the remaining competition is emphasised with regard to the antitrust efficiency defence, in particular in abuse and merger control, with reference being made to competition that is already weakened in these areas. This relates to abusive conduct, or a significant impediment of effective competition following a merger.¹⁸⁸ The same thing is likely to apply to an efficiency defence in the DMA. The European Commission should therefore only permit such a defence if it can be ruled out that the conduct of the addressee of the norms leads to a sustained concentration of power.

151. That an efficiency defence in the DMA may only take on limited scope in view of the stringent requirements applied to the consideration of efficiency gains appears reconcilable with the objective of the DMA, namely to protect the contestability and fairness of digital markets. In fact, the reserve exercised when acknowledging the efficiency defence in antitrust law¹⁸⁹ particularly shows that the objectives of the law are not renounced recklessly, but in fact that a careful weighing up of the conflicting interests takes place.¹⁹⁰ What is more, the mere possibility of not being obliged to comply with the obligations of the DMA in well-founded individual cases might lead to them being better accepted by the addressees of the norms. This especially applies when it comes to designing Art. 5 and 6 DMA as per se rules, i.e. unlike in antitrust law where there is nonetheless an efficiency defence, without examining the effects of the addressed conduct in individual cases. The discussion of the efficiency defence of an addressee of the norms in individual cases might ultimately help the European Commission to further

¹⁸⁴ Similarly also the condition of Art. 101(3) TFEU that the restriction of competition may not be indispensable for achieving the efficiency gains; on this para. 139 above. Similar to this – referring to EU merger control and its condition that the efficiency gains have to be “merger specific” – Körber, T., NZKart 2021, 436, 439.

¹⁸⁵ On this footnote 162 and para. 1 above.

¹⁸⁶ In particular Art. 3(6) and Art. 26(4) number 3 DMA.

¹⁸⁷ cf. European Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101 of 27 January 2004, p. 97, para. 105: “The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process. When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses [...]”

¹⁸⁸ Brand in: Frankfurter Kommentar zum Kartellrecht, Vol. III, 99th supplement 03/2021, Art. 102 pa. 170.

¹⁸⁹ On this para. 143 above, 1.

¹⁹⁰ cf. in contrast the Explanatory Memorandum of the European Commission on foregoing an efficiency defence in the DMA in footnote 157.

improve its understanding of digital markets. It could benefit from this for instance when it comes to updating the obligations of Art. 5 and 6 DMA.¹⁹¹

152. Potential alternatives to the efficiency defence, which would correspond to the balancing-test clause, or to the approval to be granted by the Minister, as used in German merger control law¹⁹², appear to be less well suited to justify a violation of the obligations contained in Art. 5 and 6 DMA. It should be taken into account in this regard first and foremost that these are tools that are untried at EU level. When it comes to the approval to be granted by the Minister, the question would furthermore arise as to what institutional position this might assume if, given its economic-policy nature, one wished to keep it separated from the authority actually responsible for the enforcement of the law, as is the case in German law. However, it is much more significant that the substantive conditions would also be hard to reconcile with the approach adopted by the DMA. This approach is intended to protect contestability and fairness of digital markets in particular. This does not appear to make it expedient to weigh the disadvantages there against any structural improvements on other markets (balancing-test clause), or in the economy as a whole (approval to be granted by the Minister). In fact, it rather suggests itself to look at the consumers affected by the violation as the relevant benchmark (efficiency defence).¹⁹³

6.3.2 Aspects of procedural law

153. The structure given to the procedure to assert efficiency gains faces the challenge that the implementation of the DMA is to be impaired by an efficiency defence as little as possible. As will be argued below, this can ultimately only be achieved with an individual decision on an exemption on the part of the European Commission. The per se rules of Art. 5 and 6 DMA are to apply unrestrictedly to the addressee of the norms until such decision is handed down.

6.3.2.1 No self-assessment by the addressees of the norms

154. It does not appear to be expedient to transfer the principle of the self-assessment of undertakings as applies in antitrust law.¹⁹⁴ It is true that a self-assessment might minimise the effort to be undertaken by the European Commission, given that it would only have to act in the event of a violation of an obligation of Art. 5 and 6 DMA were doubts to exist as to the lack of an objective justification. The examination costs would then be internalised within the undertakings, which would no longer incur the bureaucratic costs involved in applying for an exemption.¹⁹⁵ However, the effort expended by the European Commission would in turn increase were it to actually pursue proceedings against the undertakings in question, for instance because it reached the conclusion, in conflict with the assessment by the undertaking, that certain conduct was not justified.

155. Negative points against self-assessment include the lack of legal certainty for undertakings regarding the existence of an objective justification. It is unlikely that the lack of legal certainty could initially be countered by creating a Block Exemption Regulation – as with the prohibition of cartels.¹⁹⁶ It therefore does not appear expedient from the start to identify specific categories of conduct which are typically less harmful than others or which tend to generate compensating efficiency gains.¹⁹⁷ What is more, the Block Exemption Regulations under antitrust

¹⁹¹ On this para. 48 above. cf. also Commission Competition law 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, loc. cit., pp. 25 and 51.

¹⁹² On this para. 146 above.

¹⁹³ cf. footnote 162, para. 1.

¹⁹⁴ On this paras. 140 and 1 above.

¹⁹⁵ cf. Federal Government, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, Bundestag printed paper 15/3640 of 12 August 2004, pp. 2, 28, 43. On the cost of an efficiency defence in merger control cf. also Monopolies Commission, Special Report 63, loc. cit., para. 40.

¹⁹⁶ On this para. 139 above.

¹⁹⁷ On this para. 149 above.

law only aim to bring about an exception to the prohibition of cartels. Their applicability is contingent amongst other things on the undertakings party to the agreement not exceeding certain market share thresholds. This contradicts the approach of the DMA, consisting of addressing individual conduct on the part of smaller numbers of core platform services.

156. A further possibility to improve legal certainty for the addressees of the norms, whilst at the same time allowing self-assessment, would be to additionally apply (formal) exemption decisions and (informal) guidance on the part of the European Commission. This is in line with existing antitrust law.¹⁹⁸ Even when applying the DMA, the European Commission could where appropriate inform an undertaking which requested this for reasons of legal certainty that its conduct is exempt from the requirements and prohibitions of Art. 5 and 6 DMA because of (supposed) counterbalancing efficiencies, or at least that no violation is being pursued by the authority.

157. There are however fundamental reservations with regard to a self-assessment on the part of the undertakings when it comes to the DMA. A major reason for this is that the addressees of the norms might overestimate the existence of counterbalancing efficiency gains, with the consequence that they might not consider themselves to be bound by the obligations of Art. 5 and 6 DMA until receiving an official statement to the contrary (underenforcement). This might jeopardise the expedited enforcement of the law which the DMA – and the design of the obligations as per se rules opted for in this Act – aims to bring about. This risk might at best be reduced slightly by making more detailed stipulations regarding the substantive conditions for an efficiency defence.¹⁹⁹ The risk does also exist in antitrust law, but the principle of self-assessment nonetheless continues to apply there. The situation is however distinct from that underlying the DMA in the sense that antitrust law has many more application scenarios given the larger number of addressees and the use of catch-all clauses. The general requirement for an antitrust exemption decision would therefore be – and has been – burdensome in terms of resources.²⁰⁰ Such reservations are conversely less obvious with a view to the DMA, given that the efficiency defence was conceived to be limited to a relatively small number of exceptional cases in which it would be applied; this is certainly also valid for the group of addressees of the DMA.

6.3.2.2 The need for an individual exemption decision

158. There is hence much to suggest permitting an efficiency defence in the DMA exclusively as part of an individual exemption decision of the European Commission. The following should apply in this regard.

159. The addressees of the norms would have to assert the efficiency defence vis-à-vis the European Commission by applying for an exception to the application of the rules of obligations of Art. 5 and 6 DMA. Unlike the situation applying under antitrust law subsequent to the introduction of the principle of legal exception, the addressees of the norms would have a right independently of proceedings of the European Commission in respect of a violation to have their efficiency defence reviewed and – assuming sufficient efficiency gains – indeed granted. The addressees of the norms would have to state, and where appropriate prove, the efficiency gains to the European Commission in the above sense. The European Commission would examine the alleged efficiency gains, and in particular would carry out a weighing up with the negative impact of the violation in question. Remaining doubts as to the existence of counterbalancing efficiency gains would be borne by the addressees of the norms.²⁰¹

160. Since the obligations of Art. 5 and 6 DMA are designed as per se rules, and as such are not contingent on proof of negative effects of a violation in individual cases, the European Commission would firstly address such effects as part of the weighing up described above. In order to keep the effort that this would cause to the Euro-

¹⁹⁸ On this paras. 141 et seq. and 1 above.

¹⁹⁹ On this paras. 148 et seqq. above.

²⁰⁰ On this para. 140 above.

²⁰¹ cf. also Körber, T., NZKart 2021, 436, 439; Schweitzer, H., ., ZEuP 2021, 503, 537 f.; Zimmer, D./Göhl, J.-F., ZWeR 2021, 29, 55. Such a spread of the burden of statement and proof is not alien to the objective justification in antitrust law; on this paras. 140, 143-145

pean Commission as small as possible, and to minimise conflicts with the approach of the DMA for the introduction of *per se* rules, the result of the weighing up should as a rule depend on the significance of the efficiency gains put forward by the addressees of the norms. Indications of particularly onerous or slight negative effects of conduct on the part of the addressees of the norms should nonetheless be examined by the European Commission. The Commission is likely to also be able to do so without a detailed review, not only on the basis of its experience from the many antitrust proceedings which it has pursued in the digital sector in recent years (some of which are still pending), and which have partly served as a model for the obligations of Art. 5 and 6 DMA. The aspects outlined in Art. 3(6) DMA in connection with the designation of an addressee of the norms furthermore make it clear that the European Commission as a matter of principle also deals with the respective market conditions when applying the DMA.²⁰²

161. In order to avoid any delays occurring in the implementation of the DMA caused by an efficiency defence, which after all might be applied for strategic reasons²⁰³, there would be a need for the addressees of the norms to implement the obligations until such time as a (final) exemption decision was handed down by the European Commission.²⁰⁴ There would therefore be no provisional exemption from the application of Art. 5 and 6 DMA; the rules would continue to be directly applicable. The Proposal for the DMA already applies something similar, in that the addressees of the norms must implement the obligations of Art. 6 DMA despite any pending dialogue proceedings.²⁰⁵ The imposition of specific implementation measures pursuant to Art. 7(2) DMA in the event that an addressee of the norms fails to comply with the obligations of Art. 6 DMA should also remain unaffected by the efficiency defence, and should be possible until such time as an exemption decision has been handed down. This would hardly increase the level of difficulty in implementation when it came to adding an efficiency defence to the DMA designed as suggested here.

162. A major aspect of the proposal, namely to include the efficiency defence in the DMA in the shape of an individual exemption decision by the European Commission, is the question of how the procedures can be made both efficient and at the same time legally certain. Undertakings should be able, firstly, to expect a decision to be taken expeditiously on conduct and the efficiencies submitted, whilst secondly the proposed efficiency defence may not be permitted to overburden the European Commission. The latter aspect might provide an incentive to overload the procedures in a targeted manner in order to obtain authorisation to be given or to weaken the obligations. It is therefore proposed, first of all, to set a fixed review period in the European Commission's efficiency defence review procedures in order to expeditiously provide the addressees of the norms with legal certainty. One might consider aligning this with the deadline of the regulatory dialogue already provided for in Art. 7(2) DMA. This requires the European Commission to decide within six months of proceedings being initiated pursuant to Art. 18 DMA how the obligations of Art. 6 DMA are to be implemented.²⁰⁶ It should not be possible to extend or suspend the deadline in efficiency defence proceedings, since experience in for instance merger control has shown that the deadlines provided by law may be considerably extended by such provisions in practice.²⁰⁷

163. One might however consider making the commencement of the period contingent on undertakings' applications for an exemption meeting specific minimum requirements. This admittedly poses a certain risk of leading to

²⁰² In particular Art. 3(6)(c) (entry barriers), (e) (business user or end user lock-in) and (f) (other structural market characteristics) DMA. cf. also Zimmer, D./Göhl, J.-F., ZWeR 2021, 29, 53 et seq. on the non-application of individual provisions where conduct has no negative effects.

²⁰³ On this para. 155 above.

²⁰⁴ cf. also Cabral, L. et al., The EU Digital Markets Act - A Report from a Panel of Economic Experts, 2021, p. 11, loc. cit.; Körber, T., NZKart 2021, 436, 439; Schweitzer, H., ZEuP 2021, 503, 537; Zimmer, D./Göhl, J.-F., ZWeR 2021, 29, 55.

²⁰⁵ On this para. 51 above.

²⁰⁶ On this para. 51 above.

²⁰⁷ cf. only Kuhn in: Frankfurter Kommentar zum Kartellrecht, Vol. III, 99th supplement 03/2021, Art. 10 FKVO paras. 62 et seqq. There should also be a fixed deadline in the interest of acceleration, and not for instance a period that should be complied with where possible – such as in section 32c subsection (4), second sentence ARC (on this para. 142 above).

extensive informal preliminary proceedings. One observes particularly in EU merger control that the draft of the notification of a proposed concentration is first of all coordinated for such a long period between the European Commission and the undertakings until the authority considers the notification to be complete. The application for an efficiency defence proposed here is however as a rule likely to require less information to be provided in comparison to notifying a proposed concentration – particularly using the Form CO.²⁰⁸ This should also make any informal preliminary proceedings shorter, whilst the latter could nonetheless ensure that the European Commission would not be obliged to deal with unsubstantiated applications during the ongoing review period.

164. The Monopolies Commission considers a provision to be even more effective according to which a fiction of rejection would be applied once the review period had elapsed such that the corresponding conduct is automatically regarded as “not exempt”. This would entail an exemption application being automatically turned down if the European Commission had not taken a decision on the efficiency defence within six months. This mechanism would hence operate in exactly the opposite manner than merger control, where the notified concentration is fictitiously cleared once the period has elapsed.²⁰⁹ The fiction of rejection proposed here also stems from the fact that the number and scope of applications for an exemption in connection with the DMA are much easier for undertakings to control than notifications of proposed concentrations, where the review is subject to unambiguous criteria for taking up such cases. The fiction of the rejection of an application after six months incentivises undertakings to only lodge such applications as actually have prospects for success. This would enable the European Commission to focus its resources on complex cases, whilst manifestly unsubstantiated or ill-founded exemption applications would have to be reviewed less intensively.²¹⁰ The provision thus underlines the exceptional nature that the efficiency defence is intended to assume in the DMA, and which distinguishes it from the clearance of proposed concentrations.

165. A fictitious rejection might be regarded as legally problematic insofar as the (fictitious) decision would not be reasoned, in contradiction of Art. 296(2) TFEU. What is more, the possibility of subsequently remedying the lack of reasoning by providing a subsequent reasoning or by submitting additional reasons is handled restrictively under EU law.²¹¹ Merger control does however have a provision similar to the fictitious rejection proposed here, according to which a fictitious clearance is brought about if no decision has been handed down on the part of the authority within the review period.²¹² With a view to lodging an action for annulment pursuant to Art. 263 TFEU, it is unclear against this background whether the lack of reasoning would already lead to the (fictitious) decision being challengeable, or whether the decision would have to also contain errors in this regard, so that the application for an exemption should have been granted because of the existence of adequate efficiencies.²¹³ The proposed fictitious rejection would above all need to trigger the incentives described above for undertakings in terms of their not lodging any obviously unsubstantiated or ill-founded applications for an exemption. By contrast, the provision – as also the fictitious clearance in EU merger control – is likely to only be actually applied in exceptional cases. All in all, there are hence weighty reasons in favour of the concept of a fictitious rejection compared to alternative possibilities of implementing an efficiency defence.

²⁰⁸ Annex I to implementing regulation (EU) No 1269/2013.

²⁰⁹ Art. 10(6) of Regulation (EC) No 139/2004 and section 40 subsection (1), first sentence, as well as subsection (2), second sentence ARC.

²¹⁰ The procedural rights of undertakings, as well as their entitlement to a legal hearing and the right to inspection of files under Art. 41 of the EU Charter of Fundamental Rights (cf. also Art. 30 DMA), remain unaffected by this.

²¹¹ ECJ, judgment of 22 January 2004, C-353/01 P – Mattila, ECLI:EU:C:2004:42, paras. 31 et seq.; CFI, judgment of 7 June 2006, T-613/97 – Ufex et al., ECLI:EU:T:2006:150, paras. 67 et seq.; Krajewski/Rösslein in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, Vol. III, 73th supplement 05/2021, Art. 296 TFEU para. 43.

²¹² cf. footnote 218..

²¹³ cf. accordingly on third-party challenges in merger control ECJ, judgment of 10 July 2008, C-413/06 P – Impala, ECLI:EU:C:2008:392, paras. 171 et seqq., Körber in: Immenga/Mestmäcker, Wettbewerbsrecht, Vol. 3, 6th ed. 2020, Art. 10 FKVO para. 43.

166. The exemption decision should only take effect for the future in order to avoid retroactively legalising the violation, where this were to be possible at all, for instance with regard to civil law disputes.²¹⁴ What is more, it should be examined at regular intervals whether efficiency gains that have been presumed to exist continue to outweigh a violation of the obligations of Art. 5 and 6 DMA. As with the actual efficiency defence, the burden of statement and proof would be on the addressees of the norms for the continued existence of the conditions for an exemption. When the European Commission weighs up the efficiency gains and the impact of a violation, there would be the possibility to fall back amongst other things on the interim developments on the digital markets in question. Also with regard to gatekeeper status, Art. 4(2) DMA provides for a review to be carried out by the European Commission at least once every two years; a review of the efficiency gains could be aligned to this timing.

6.4 Proposed wording of a provision on the efficiency defence

167. The Monopolies Commission would like to propose adding a provision for an efficiency defence to the DMA on the basis of the foregoing. This might read as follows:²¹⁵

- (1) *The conduct of a gatekeeper which fails to comply with one or more of the obligations designated in Article 5 [currently: Articles 5 and 6] shall be exempt with effect for the future from the obligations insofar as the gatekeeper demonstrates that the conduct*
 - a) *promotes technical development or economic progress, and*
 - b) *allows consumers a fair share therefrom,*
 - c) *without thereby considerably jeopardising the contestability and fairness of digital markets.*
- (2) *The exemption shall be granted on application by the gatekeeper. The Commission shall decide on the exemption by decision within six months of the application being lodged. If the Commission has failed to issue a decision within this period, the application shall be deemed to have been rejected.*
- (3) *The gatekeeper shall regularly demonstrate to the Commission, at least every two years, that the exempted conduct continues to comply with the criteria designated in paragraph 1.*

²¹⁴ On the enforcement of the DMA under civil law cf. Körber, T., NZKart 2021, 436 and 442 et seq.

²¹⁵ The recommendation to create a new, uniform Article 5, as made in Chapter 4, has already been taken into account in the wording of the provision below in its paragraph 1; cf. para. 69

Chapter 7

Conclusion and recommendations

168. There is a widespread perception that previous competition law proceedings have often come too late, have taken too long as a matter of principle, and have also not so far helped to bring about any tangible (re)stimulation of competition on digital markets. The enforcement-related problems are primarily caused by particularities of the digital economy, in which undertakings (known as gatekeepers), which operate digital platforms, have established entire ecosystems. An ecosystem provider controls information flows and access to information and users, and structures the digital environment. A digital ecosystem operated by a provider comes with many advantages, but it can also cause significant competition problems that sustainably jeopardises the openness of digital markets. They can establish significant economic power, which they can use to cause markets to tip. This can enable them to permanently make it difficult to gain access to the markets on which they are operating, and they can leverage their economic power into other markets. It is therefore important to focus on both, on the business areas in which gatekeeper platform services play a central role, and in particular on adjacent business areas. The Monopolies Commission therefore recommends that the DMA should be orientated towards such ecosystem-specific problems in order to be able to continue to ensure the openness of digital markets.

169. The Monopolies Commission recommends the following adjustments for an effective and efficient Digital Markets Act:

- The objective pursued by contestability should be orientated towards the contestability of the position of the gatekeeper being guaranteed on digital markets independently of whether competition is “emerging”, or is taking place “in the market” or “for the market”. The objective of contestability should be described in recital 79 or 80 (new) DMA as follows: *“Contestability is to mean that undertakings which are not gatekeepers are able to overcome barriers to entry and expansion in digital markets.”*
- The objective pursued by fairness should address the economic dependence of business users vis-à-vis a gatekeeper, and hence the asymmetric negotiating power favouring the gatekeeper. The objective pursued by fairness should be described in recital 79 or 80 (new) DMA as follows: *“Fairness is to mean that a gatekeeper’s business users are not placed at a disadvantage by the gatekeeper.”*
- The DMA should therefore address contestability in the sense of exclusionary problems, and fairness in the sense of exploitation problems with regard to business users.
- The current approach taken in the DMA for identifying the addressee of the norms risks covering too few or too many businesses, and possibly the wrong ones, since the only benchmark applied is the sheer size and reach, and not gatekeeper power. The consequence of the ecosystem criterion would be to limit the group of addressees of the DMA to undertakings from which particularly significant dangers emanate for competition. What is more, it enables a more effective use of resources for the enforcement of the DMA. A new Art. 3(1)(d) DMA should therefore include an ecosystem criterion as a fourth cumulatively necessary condition, which should be defined as follows: A provider of core platform services shall be designated as gatekeeper if... *“d) it orchestrates a product and/or actor-based ecosystem with the ability to raise barriers to entry and/or expand its ecosystem into new areas.”* The two indicators of multi-platform integration and of the dual role should then be inserted into a new Art. 3(2)(d) DMA as follows: It is assumed that a provider of core platform services... *“d) meets the criterion in paragraph (1)(d) if it meets the thresholds in subparagraphs (a) and (b) and sub-paragraph (c) and there is a multi-platform integration with at least two core platform services or a dual role by the provider.”*
- An Article 5 (new) DMA with a uniform structure should be created which – as already provided in the Proposal for a DMA – contains per se rules that are all amenable to the dialogue procedure (more on this below), as well as to an efficiency defence. The advantage of this is that all rules of conduct equally apply

directly, and at the same time an adjustment of or an exemption to a specific conduct obligation is possible in individual cases in order to be able to limit any collateral damage.

- The existing prohibition of self-preferencing of the DMA should also be extended – subject to an efficiency defence – to other services that are not yet covered by the list of core platform services. Pre-installations, default settings, as well as tying and bundling in favour of these services, are also likely to foreclose the ecosystem. The following provision on conduct should therefore be added to the DMA: *“In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall refrain from treating more favourably services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third parties.”*
- Data porting to competitors should be further simplified in order to further reduce switching costs for end users. In addition to the existent, commendable provisions of the DMA, third-party providers should also be able to port data on behalf of end users.
- The DMA should be supplemented to include an efficiency defence that is narrowly defined in terms of both substantive and procedural law. An exceptional exemption from the rules of conduct contained in Articles 5 and 6 of the DMA should only be granted by the European Commission at the request of the undertakings. In this context, the undertakings should have to demonstrate that their conduct promotes technical development or economic progress, and that consumers appropriately benefit from this, without thereby considerably jeopardising the contestability and fairness of digital markets. Undertakings should remain bound by the rules of conduct set out in Articles 5 and 6 of the DMA until an exemption decision has been handed down. There should also be a fiction that an exemption request that is not expressly granted within a review period of six months is deemed to have been rejected.