MASTER 2 DISTRIBUTION CONCURRENCE

The problem of implementing the Digital Market Act

Research report

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2021-2022 M2 DISCO

I would like to thank Pr. David BOSCO for this interesting subject, for having accepted to be my report director and for his help during this semester.

I wanted also to thank him as co-director of the Master, with M. Claude-Albéric Maetz, for this enriching year, and for all the interesting courses I was able to follow in my last final year of study.

Thank you also to all the people with whom I had the opportunity to discuss this research report, including Frédéric Marty, Marie Malaurie-Vignal, Marc Mossé, Rafael Amaro, and Laurence Barry. I enjoyed discussing and exchanging with you all and I thank you sincerely for your kindness.

I would especially like to thank PhD student Maya-Salomé Garnier with whom I had the pleasure of exchanging several times on this subject and many others, thank you for your advice and for your considerable care.

Finally, I would like to thank PhD student Maria Tawk for the recommendation of books and for her valuable encouragement and precious advice.

To my parents, who have supported me throughout all my years of studies.

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DMA : Digital Market Act

GK : Gatekeeper

EC : European Commission

EU : European Union

EEA : European Economic Area

TFEU : Treaty on the Functioning of the European Union

GAFAM : Google, Apple, Facebook, Amazon, Microsoft

ADLC : Autorité de la Concurrence

FTC: Federal Trade Commission

ECHR : European Court of Human Rights

CJEU : Court of Justice of the European Union

DSA : Digital Service Act

P2B : Platform to Business

GDPR: General Data Protection Regulation

DGA : Data Governance Act

DA : Data Act

DPO : Data Protection Officer

Summary

Introduction

« *The gatekeepers will now have to comply with a well-defined set of obligations and prohibitions. This regulation, together with strong competition law enforcement, will bring fairer conditions to consumers and businesses for many digital services across the EU* » as M.Vestager, Competition Commissioner in the European Commission and emblematic figure of the Digital Market act, proudly stated on 25 March 2022, after that a political agreement was reached, a year after the proposal of the text[1].

The DMA aims to ensure the consistency and fairness of digital markets. Proposed on 15 December 2020, it is intended to be an effective response to the various issues raised by digital in recent years. Because of the importance of the decisions taken in this sector, the EC wanted to react in a sufficiently strong manner to remedy the shortcomings of competition law. Indeed, competition law was encountering numerous practical difficulties, firstly, in that the repression of anti-competitive practices is carried out *ex post*, and very often too late. Indeed, it is because of the slowness of the antitrust procedures, as shown in particular by the latest Google Shopping judgment, handed down by the General Court of the European Union, more than ten years after the start of the incriminated practices. But also, this competition law would not be repressive enough, even if the sanctions can go up to 10% of the world turnover, this remains little dissuasive for companies of gigantic size. The DMA therefore proposes an *ex ante* approach, i.e. before any infringement, by imposing obligations to do and not to do on companies considered as GKs by the text. Moreover, according to M. Vestager's statement mentioned above, this regulation will have to be articulated with competition law, and as a result, the tools of competition law will complement the DMA, in order to achieve an optimal degree of regulation.

The objectives of contestability and fairness will make it possible to limit the practices deemed unfair, which are established by certain companies on the market, and to allow small

[1] European Commission, press release, "Digital Markets Act : Commission welcomes political agreement on rules to ensure fair and open digital markets", 25 March 2022.

and medium-sized companies to be able to enter the market, and perhaps have a chance to compete with the larger companies. Behind these objectives, there is a dual desire on the part of the EC, in addition to opening the markets and making them fairer: to limit the unfair or even anti-competitive practices of the GAFAMs and to create European giants that can compete with the GAFAMs.

By the way, and concerning this acronym, it is true that some practitioners now use the acronym "MAAMA" (for Meta, Alphabet, Amazon, Microsoft and Apple) due to the fact that Facebook has become "Meta" and that Google belongs to the company Alphabet, and even other authors use the acronym "MAGMA" (for Meta, Amazon, Google, Microsoft, Apple). However, and due to the fact that a large majority of the doctrine still refers to the term "GAFAM", this expression will be used in the following developments.

The policy objectives previously introduced are assumed by the EC and must be taken into account in order to comprehend this regulation. However, having set out the various issues of the EC, this report aims to identify the difficulties of the Regulation itself. More specifically, the difficulties in the implementation of the Regulation.

This report deals with the "problem of implementing the DMA". In fact, one should say "the problems" because there are, unfortunately, several of them and in different areas. However, it should be made clear that this report does not aim to draw up an exhaustive list of all the problems that the DMA may raise, but rather to indicate the most important difficulties in implementing this regulation, in other words, the consequences of putting such a regulation into practice. But also, the problems in bringing this regulation into force and the major difficulties that could hinder its full effectiveness. Moreover, given that this regulation has not yet entered into force, these problems are only prospective; we will have to wait for the entry into force of the DMA and its application in order to see whether these problems are proven, and whether others may emerge, for example, during litigation relating to this text.

The term "problem" refers to all legal, economic, social, and financial difficulties. This report will focus on the legal and economic problems that the DMA and its implementation may raise. The implementation of the DMA means firstly its entry into force, but also its practical application. Firstly, its application by the companies concerned, i.e., the GKs, which are subject to various (and important) sets of *do's* and *don'ts*. But also, the application

by the bodies responsible for implementing the DMA, mainly the EC, which will be faced with many practical difficulties because it is responsible for determining which companies have the status of GKs, providing for the obligations to which they will be subject, monitoring their proper application, providing for sanctions and applying them. Finally, it will also have to ensure that the sanctions are respected. Furthermore, it will be necessary to ensure that the application of the DMA is not compromised by the application of other regulations, and that there are no contrary obligations or redundancies in other European regulations that the same companies will apply. Or it will be necessary to ensure that this DMA can be properly articulated with, in addition to other European regulations with similar objectives and actors, national and European provisions in competition law. All these questions are crucial and will have to be answered in order to ensure the effectiveness of this regulation.

Therefore, all these issues will be addressed and will aim to answer the following question: what are the substantial and procedural difficulties of the Digital Market Act that may prevent its implementation?

The DMA is a new, original tool both in its aim and structure. It has the advantage of arming the European authorities against the so far unreachable gatekeepers. However, at first glance, the DMA seems to leave more questions unanswered than resolved, thus making its implementation an uncertain task. It is therefore crucial to pinpoint the main problems that surround the implementing of the DMA, both on a substantial level (Part I), as well as from an enforcement perspective (Part II).

Indeed, this report will focus on two main sets of difficulties relating to the implementation of the DMA, substantive difficulties, and procedural difficulties.

As far as the substantive difficulties are concerned, these are all issues related to the advent of this text, its justification or purpose. But also, on the very substance of the text, on the formulations, the definitions it contains and the obligations. This part will analyze the writing of the regulation itself and the difficulties it raises (of understanding or interpretation), but also the objectives of this text (objectives of contestability, equity, and political objectives of the text). In addition, this section will analyze the different mechanisms provided for in

the text, the designation of the status of GK, the asymmetry of regulation provided for in the text, the *ex ante* approach, as well as the obligations of GKs and their effectiveness, or otherwise, in the face of the various business models of the companies concerned. In other words, this section will highlight the legal but also economic problems of such provisions which may hinder or even prevent the correct implementation of this regulation.

As for the procedural aspect, the aim here is to address all the difficulties that may hinder the practical application of the DMA. One of the greatest difficulties lies in the prerogatives that the EC grants itself. Indeed, the EC has too much power within the DMA, which can hinder its implementation, since it is the EC that can define who the GKs are, define the obligations incumbent on them, provide for sanctions in the event of non-compliance and ensure that these sanctions are respected (by monitoring). This hyper-power of the EC is more than questionable from a legal point of view, but also this concentration of powers can have important practical consequences. The EC, in trying to multi-task, will end up being overwhelmed, and the application of this regulation will be compromised. Consequently, one of the challenges of the DMA is to provide for coordination with, for example, the national competition authorities, which could accompany the EC in these various tasks, in order to ensure the effectiveness of this text. Here again, this is a real problem because the DMA is rather silent on this linkage. Moreover, many of the provisions and mechanisms provided for in the text infringe important fundamental principles and rights, such as legal certainty or the principle of proportionality, and we can already envisage many disputes on this subject. Moreover, there is no provision in the DMA on private enforcement or on dispute resolution methods, thus making the application of the text even more limited. Of course, some might say that the absence of provisions on private enforcement is justified by the fact that the DMA is not competition law, as the EC or some authors repeatedly state. However, it will also be the task of this report to discuss this assertion, because although the EC claims this, the mechanisms provided for in the text resemble classic competition law tools, just as certain notions are based on key competition law concepts, as we shall return to. Whatever the answer to this question, competition law or "simple" regulatory tool, the question of the articulation of the regulation with national and European competition law provisions will have to be raised, as will the question of the articulation of the DMA with other regulations such as the DSA, the P2B regulation and the GDPR.

PART I – THE IMPLEMENTATION PROBLEMS FROM A SUBSTANTIAL APPROACH

The DMA is presented, by the European Commission, as a solution to the anticompetitive practices of the biggest platforms (GAFAMs) in the digital sector. But the DMA contains several problems towards its drafting because of the imprecision of the terms but also due to the incompleteness of the regulation (Chapter I). Besides, the method used by the EC, for instance to define the GK, or the obligations listed in Articles 5 and 6 of the DMA, seems unappropriated towards the digital sector (Chapter II).

CHAPTER I - UNCLEAR TERMS AND QUESTIONABLE OBJECTIVES OF THE DMA

How is it possible to implement a text that is unclear? The unclarity of the DMA is seen by the majority of scholars, professionals and even authorities or national agencies as one of the most important problems of the DMA. This uncertainty prevents its application and is contrary towards important principles, for instance legal certainty (Section I). Furthermore, it's not just the drafting of the DMA that seems vague, but also its objectives. Indeed, the main objective of the DMA is to guarantee contestability and fairness in the digital market, but there is other important objectives, not hidden from the EC, among them the importance of enabling the creation of European giants that can compete with GAFAMs (Section II)

SECTION I – IMPRECISION AND BREACH OF LEGAL CERTAINTY

The DMA is strongly criticized towards its drafting, indeed, and from a legal point of view, it is crucial that a text, especially a regulation (that is immediately applicable) must be crystal clear. But it is, unfortunately, not the case here. Instead, the EC draft a regulation containing vague definitions, unclear information (Paragraph I) but also incomprehensible mechanisms. The EC gives itself mechanisms without clearly explaining them, and whose legitimacy is difficult to understand, in particular the possibility of being able to change the obligations or the fact of referring certain provisions to other regulations so as not to have to define them (Paragraph II).

§ I – Imprecisions in the text leading to misunderstanding

The unclarity of the DMA leads to legal infringements, especially towards legal certainty. But also, unclarity of the terms leads to misunderstanding, and how could the GKs fulfill their obligations if they cannot clearly understand this regulation? It is one of the many paradoxes of the DMA, from a substantial point of view (A). Besides, the EC will use several mechanisms which are quite vague and, in some ways, increases this lack of legal certainty and predictability within the DMA (B).

A) A difficult understanding of the text

The DMA's drafting is questionable. Indeed, in this regulation many dispositions are ambiguous, for instance the obligations specified in the DMA are neither clear nor sufficiently precise, leading to an important lack of visibility and difficulties to understand this text. As a matter of act, the French National Assembly's Rapporteur made recommendations about this regulation, because of its *"imprecise, sometimes confusing (...) both in the definition of fundamental concepts, procedures, and substantive obligations"*[2]. Therefore, the European Affairs Committee of the French National assembly, represented by Mrs Christine Hennon, deputy suggested multiple recommendations to modify the text to preserve its clarity.

It is pointed out by this Committee and a large part of the doctrine that this regulation suffers also of an incorrect translation, leading sometimes to many difficulties to understand the text, for instance, the notion of *"business user"*. The DMA[3] distinguish the notion of *"business user"* and *"end user"* but the two definitions refer to each other, making their understanding unclear. The report of the French National Assembly explains that the problem is also that the translation of different terms like *"business user" (in French, entreprise utilisatrice)* must be clarified. There is also no precision for some platforms services, for instance cloud services, publicity services or message services, nor about search engines, like Siri or Alexa, as for the web navigators.

B) Referral mechanisms and vagueness

How to implement a text that is unclear? The EC has chosen not to detail different notions and obligations in order to ensure a wide interpretation and, maybe, to cover several situations and actors, perhaps thinking that these imprecisions will be covered later by jurisprudence. But, and

[2] National Assembly report on the Digital Market Act, July 22th 2021.
[3] Article 2 « Definitions » of the Digital Market Act, §16 and §17.

we'll see it further in the developments, the aim of the DMA is to preserve contestable and fair markets by using an *ex ante* regulation. This approach was conceived to avoid recourse to the courts by imposing, through this regulation, obligations preventing abuse by platforms. Therefore, it seems unreasonable and *contra legem (in the sense that is contrary to the spirit of the text)* to wait for case law to clarify certain provisions of the Regulation.

In the article 2 of the DMA, intitled "definitions" the EC uses referral mechanisms and do not define many obligations, for instance the notion of *"information society service"* by reference of the article 1 (b) of Directive (EU) 2015/1535[4]; but also, the important notion of *"online intermediation services"* refers to the Article 2 (point 2) of the Regulation (EU) 2019/1150 (Platform to business[5]) to name a few. To ensure efficiency and legal certainty, the Commission must take the time to define the terms mentioned in the text, to ensure the understanding of the text and its application. Otherwise, this would also be contrary to the cardinal adage *"leges ad omnibus intelligi deben*".

§ II - Questionable mechanisms provided by the text far from the classical approach of competition law

Besides being ambiguous, the EC allows itself several mechanisms that are questionable, for instance the possibility of the Commission to modify the list of obligations of the GKs (A). Indeed, this text contains many problems towards its drafting and it's even more problematic by the fact that it's a regulation and, therefore, it is immediately applicable (B).

A) Possibility of modifying obligations and damage to legal security

In addition to not clearly defining certain notions within this regulation, the EC grants itself important mechanisms that are highly questionable from a legal point of view, in particular the fact that the EC can modify certain provisions after the implementation of the text (which is also still uncertain...). This is the result of Article 10 of the Regulation entitled *"updating obligations for gatekeepers" (see Chapter II below for the definition of gatekeepers)*. According to this disposition, the EC is invested by the power to *"adopt delegated acts in accordance with Article 34 to update the obligations laid down in Articles 5 and 6 where, based on a market investigation pursuant to Article 17, it has identified the need for new*

[4] Directive (EU) 2015/1535 on "laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services", 9 September 2015.
[5] Regulation (EU) 2019/1150 on "promoting fairness and transparency for business users of online intermediation services", 20 June 2019

obligations addressing practices that limit the contestability of core platform services or are unfair in the same way as the practices addressed by the obligations laid down in Articles 5 and 6."[6] However, the Commission must demonstrate the existence of practices limiting the contestability of the markets concerned or an imbalance between the players. A large part of the doctrine contests this mechanism and considers it to be contrary to legal certainty; this is the case in particular of Professor of economics P. Bentata, who considers that *" the fact that the Commission could change the thresholds used to define a ``gatekeeper'' may be a source of uncertainty and ultimately of economic inefficiency, because firms need to know the obligations they will be subject to in order to adopt long-run welfare enhancing strategies"*[7]. Indeed, it is important for legal certainty that the obligations imposed on gatekeepers remains the same, but also on an economic point of view, how should companies behave if they are presented with new obligations every time? The question is worth asking.

B) A text which is however immediately applicable

The EC presented to the European Parliament and Conseil on December 15th, 2020, two proposals, including the Digital Market Act. However, the date of entry into force of the text is still uncertain *(especially due to the fact that European politicians are more concerned about the war between Ukraine and Russia…).*

This proposal is a regulation, it has a general scope and is fully binding on all members of the EU. In other terms, that it would be enforced immediately without any national and legislative transposition (contrary to a directive)[8]. It is not the first time that the Commission prefers to use the instrument of the regulation rather than the directive, other instruments close to the DMA exist as regulations, in particular the P2B regulation; but also the GDPR. On the latter point, it should be reminded that, as regards personal data, this text is the result of an 1995 directive [9] which has become a regulation because it is a much more powerful harmonization tool. Thus, this instrument can be implemented in the different countries, members of the Union, without the Member States being able to change the provisions, particularly the definitions.

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[6] Article 10 of the DMA « Updating obligations for gatekeepers

[7] P. BENTATA, Competition Forum, n°0031

[8] L. Daziano , « Digital Market Act : pour une régulation numérique effiace », 17th June 2021.

[9] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

But then, how can a text containing such poorly detailed and ambiguous dispositions, with notions that refer to other regulations and whose obligations are not certain in that they can be modified afterwards, immediately applicable ? Isn't it the purpose of the DMA to avoid recourse to the judge by ensuring efficiency and rapidity in order to make up for the shortcomings of competition law?

The DMA seeks to overcome the difficulties of classical competition law by proposing an *ex ante* approach *(see Section II - I b below).* But the end doesn't justify the means. Although these difficulties exist and need to be resolved, this text is not the most suitable solution. It will have to be clarified and improved before its entry into force to facilitate its comprehension and implementation.

SECTION II – THE UNDERLYING POLITICAL ASPECT OF THE DMA

There is two underlying political goals of the DMA : regulating the activities of the GAFAMs and permitting the emergence of "European champions" in the digital sector (Paragraph I). Unfortunately for the EC, many dispositions of this regulation are counter-productive and could enhance the ascension of European undertakings (Paragraph II).

§ I – Regulation of digital platforms at the core of European policy

It is not a secret that the EC's most important objective and priority for these last years is to solve the problems linked to the GAFAMs (A) and shows, especially in the DMA, that the classical competition law isn't enough to deal with these giants (B).

A) The new European policy

The European Commission is clear on this, it wants to do everything possible to regulate the digital market and digital platforms, the Internet *"cannot remain a Wild West"* according to the European Commissioner for the Internal Market Thierry Breton[10]. This desire has been reflected in two fundamental texts, as mentioned above, and among them the DMA.

[10] Le Monde, GAFA : Bruxelles dévoile son plan pour mieux lutter contre les abus des géants du numérique

But if this objective has increased due to the importance of anti-competitive practices carried out by large companies such as GAFAMs, the Commission has been working to regulate the online services sector for about twenty years[11].

There have been attempts to regulate these platforms, particularly in terms of data protection, which were very briefly withdrawn[12], as well as highly questionable draft regulations such as the New Competition Tool, which has been heavily criticized by legal scholars because it did not contain the conditions for prohibiting sanctioned practices[13].

The DMA should, therefore, make up for these previous shortcomings and pursue the European Commission's core objective, which is to prevent any infringement of competition law by the largest digital platforms (especially the GAFAMs). It is finally to solve structural problems caused by these biggest digital platforms which have acquired a quasi-monopoly on a global scale and an important amount of market power.

B) The desire to fill the gaps in current competition law

As euro-deputy Andreas Schwab said, the *"current competition rules are insufficient*"[14] and the DMA is intended to overcome important difficulties: slowness of competition law, the lack of dissuasive nature of sanctions, new practices occur during the procedure but also the possibility for the author of an anticompetitive practice to conclude a transaction…

From this point, it is understandable that the classic tools of competition law are seen as insufficient, particularly because the procedures are "too slow" and unsuited to the digital sector, with sanctions that are not dissuasive enough. But on this last point several questions deserve to be asked. Does competition law really aim at efficiency and speed? Competition law is, above all, "law" and the aim of law is justice. Reading this regulation, we may have the impression that justice takes second place to the requirements of speed and efficiency. Admittedly, inefficient justice is of little interest, but competition law, insofar as it makes it possible to punish anti-competitive practices, remains legitimate, which is why the DMA is not intended to replace the "classic" competition law rules that will always be applicable to the digital sector, and applicable *ex post*. The DMA will "simply" make it possible to prevent infringements due to the *ex ante*

[11] See for instance EC. Directive on electronic commerce 2000/31/EC, on "certain legal aspects of information society services, in particular electronic commerce, in the Internal Market", 8 June 2000
[12] Regulation ePrivacy concerning "the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC"?
[13] MS. Garnier, "The New Competition Tool: A Trojan Horse to win the war against liberty", *Competition Forum,* 2020, n° 0005
[14] European Parliamant News, Andreas Schwab, "Digital Markets Act: ending unfair of big online platforms"

approach, but perhaps this political will to regulate digital platforms also hides other underlying political issues.

§ II – The Commission's regulation: contrary to “competition on the merits”?

It seems that many dispositions of the DMA targets biggest companies of the digital sector : GAFAMs. But this approach is against an important vision of competition law, the notion of competition on the merits. It this par, It will be interesting to balance the need of a regulation of these GK with the importance of respecting this concept of competition on the merits (A). However, there is another important issue here that the DMA raises. There is an important risk : this regulation may have a perverse effect which is to curb the emergence of large European companies which will rather have an interest in staying below the thresholds provided for the designation of GKs. As a result, these companies will not be able to compete with the GAFAMs in that they will be afraid of being forced to do and not do obligations, provided by the text (B).

A) The neglect of competition on the merits in favor of a preventive regulation

It is clear from the letter of the regulation that the companies concerned, because of the high thresholds *(see Chapter II Section I below),* are mainly large American companies that dominate the digital market: the GAFAMs (Google, Apple, Facebook, Amazon, and Microsoft). These are companies that, although often condemned for anti-competitive practices, are still very much in the forefront of the digital economy.

These companies, all dominant in different markets (Google dominating the online search market, Apple the smartphone market, Meta the social media market, Amazon the online commerce and cloud market with Microsoft) have become dominant because of their investments, this may be the merit effect of *"{their} strategic choices in a competitive market, not an unfair advantage"*[15].

In a way, the DMA punishes dominance and not abuse because it intervenes only *ex ante* and not after an abuse of the gatekeeper firm has been characterized. In this respect, the DMA punishes a "simple" dominant position, but is this not contrary to "competition on the merits"? European competition law has a particular vision of dominant companies, as the excellent E. Mckaay underlines in his book *"Economic Analysis of Law"*. He explains that the dominant firm, because of its position, has a special form of responsibility and that it must not behave *"in a way that*

[15] Aymeric Belaud, « Le Digital Market Act va couper le marché européen du reste du monde », 14th december 2020.

would undermine competition law to the extent that competition remains". The author adds that the company must *"compete on the merits and refrain from other forms of competition"*[16]. In other words, the company in a dominant position has a certain responsibility and must not abuse this dominant position. But the DMA goes beyond this analysis by imposing so-called "preventives" obligations, Professor P. Bentata explains that *"from a law and economics perspective, the DMA can be defined as an ex ante differentiated regulation that only targets the largest platforms, according to their turnover and their number of users*"[17].

B) The rise of "European giants" hampered by the DMA

As outlined above, the primary policy objective of the EC's implementation of the DMA is to regulate overly large digital platforms that may abuse their dominant position. Indeed, anti-competitive effects may arise, as *" the economic literature has mostly focused on the potential adverse effects that large platforms may have on the competition. Indirect networks effects have been presented as barriers to entry, that could be used by the largest platforms for anticompetitive purposes.*[18]*"* This text could be seen as an assault on the GAFAMs, which are US companies, and which would have significant obligations imposed on them in contrast to other companies established in the markets, but not meeting the thresholds. Although, this asymmetrical regulation is necessary to prevent anti-competitive behaviors that these companies had made (in line with the latest decisions on GAFAM since 2010)[19].

However, and for several years now, the Commission have another unconcealed desire, which is to encourage the emergence of European innovative startups, capable of becoming "European giants" to compete with the GAFAMs. In line with the objective of regulating GAFAMs, the French presidency's aim, at the European Consul, is to fight for the emergence of important European startup (the French President Emmanuel Macron is a strong defender of a "startup nation").

Indeed, the main digital platforms targeted by the text are American, although we could mention the possible exception of Booking platform (which is a Dutch company) and could, perhaps, meet the thresholds *(see Chapter II Section I below).* At a time when European companies are struggling to establish themselves in markets controlled and structured by these American and Asian platforms, this text could be seen as counter-productive, since the

[16] E.Mckaay, Analyse économique du droit, 3e édition DALLOZ, 2021.
[17] Op.cit 7.
[18] Idem.
[19] Op.cit 8.

DMA is in a way repressing the dominant position of the GAFAMs by providing for thresholds that could discourage companies from growing and competing with these American giants. These thresholds would be a form of "signal" not to grow too much, at the risk of being imposed specific rules that the DMA introduces, including a change of business model. This would appear to be contradictory to the desire for European digital platforms to emerge to compete with the infinitely larger Chinese and American platforms."[20]

CHAPTER II – A PROBLEMATIC BALANCING OF SPEED AND EFFICIENCY

The obligations listed in the DMA are based on an asymmetrical approach, meaning that only the GKs, who're core platform services which meet specific thresholds, echoing a structuralist approach, are subject to these obligations. This asymmetry is far from inconsequential, and the question here is the relevance of this approach (Section I). Besides, the DMA is also based on a unique model, meaning that all the obligations are supposed to apply to all the GK, and therefore, to all the different business models of these platforms. But this approach could be inefficient and unadapted toward the digital sector, due to the fact that it's a fast-moving sector and because all the companies concerned are based on different business models (Section II).

SECTION I - OBLIGATIONS OF « GATEKEEPERS »: THE QUESTIONNABLE ASYMMETRICAL REGULATION

Many possibilities could be thought to regulate the activities of important digital platforms as the GAFAMs, but the EC chosen a solution that seems quite disputable. The EC chose to define the GKs by using a structuralist approach (Paragraph I). Therefore, when a platform is defined as a GK, this platform will be subject to an important list of obligations, whereas other companies present on the market will not have to comply with these rules, the DMA thus advocating asymmetric regulation (Section II).

§ I – Definition of "gatekeepers": the use of a structuralist approach

[20] Renaissance numérique, « Digital markets act : révolution ou contradiction juridique ? », march 2021.

The GK is the core notion of the DMA, and, therefore, everyone expected a clear definition of this notion. But it's not the case, for many reasons. First, the definition of GK includes a list of services deemed to be exhaustive, whereas this is not the case; not all services have been listed. This notion of GK deserves to be more precise, and better defined, and this is what this part will try to highlight (A). Moreover, the definition of GK is based on a structural approach, which can be highly questionable because, in a certain way, the EC represses the dominant position of these GKs and not the abusive nature of their practices (B).

A) Definition of gatekeeper : the core notion of the DMA

This notion of GK is new, as Pr. David Bosco underlines, indeed, until now "we used to talk about platforms, aggregators or ecosystems". Therefore, it would be important for the DMA to clearly explain this new notion[21].

Article 2 of the DMA contains several definitions, including the "definition of a GK". What is a GK? According to the first paragraph, it is a *"core platform service provider designated in accordance with Article 3"*. Paragraph 2 specifies that the core platform service refers to eight different services, listed as online intermediation services; online search engines; online social networking services. However, this list is heavily criticized and may be modified to include other services such as connected TV, voice assistants for example. Most interestingly, Article 3 sets out three cumulative conditions for being designated as a gatekeeper: it has a significant impact on the internal market; it operates a core platform service which serves as an important gateway for business users to reach end users; and it has a well-established and sustainable position in its operations or is likely to have such a position in the near future. In addition, a presumption mechanism is provided for in Article 3(2) to complement or compensate for the rather general nature of the criteria set out:

Regarding the first condition, the original version of the DMA stated that the criteria of significant impact is presumed to be fulfilled if the supplier meets certain quantitative thresholds: the company must have an annual turnover in the EEA equal to or exceeding 6.5 billion euros over the last three financial years or demonstrate an equivalent capitalization of at least 65 billion euros over the last financial year. The recent agreement between the Council and the Parliament indicates that this figure has increased to €7.5 billion concerning

[21] Pr. David Bosco, intervention lors du colloque portant sur le « Digital Markets Act », Université Paris-Nanterre, 1er avril 2022.

the annual turnover and €75 billion concerning the market valuation[22]. It is clear from these criteria that the interest is in targeting the largest digital companies because of the importance of these figures. As for the second condition, there is also a presumption when the platform has more than 45 million end users who are monthly active and established in the EU, as well as more than 10,000 active commercial users annually in the EU during the last financial year. Finally, concerning the stable and sustainable position, or established in the near future, there is also a presumption where in each of the last three financial years the platform has had more than 45 million monthly active end-users and more than 10,000 annually active business users. The article takes into account the *"position established in the foreseeable future"*, in this respect the hypothesis of tipping-market is targeted, showing once again the EC's will to overcome the difficulties of classical competition law, where for example, according to Article 102 TFEU, it is imperative to demonstrate an established dominant position.

This concept of GK is new, and it is therefore not possible to truly measure the consequences of a new concept. It would be necessary to wait for the entry into force of the DMA to truly measure it. However, for the sake of legal certainty, it is important to try to estimate the impact of such a definition and the criticisms that can be made of it.

B) The use of a structuralist approach and its negative consequences

As Frédéric Marty well explained, these criteria are structural, echoing a structuralist approach of antitrust law highlighted by the Woodstock Antitrust doctrine which *"considers market concentration and firm size as a problem in itself"*[23] This structuralist vision is highlighted by the authors of the Harvard School. This school of thought advocates the need for *"structural government action through the implementation of competition policy"*. Through this approach, the largest companies, seen as problematic, should be subjected to *"structural corrective measures"* such as asset disposals. This is what L. Khan, Chair of the Federal Trade Commission (FTC), had proposed with regard to the GAFAMs. But the Commission did not choose this solution, although the definition of GK is based on this approach. What is surprising about the presumption mechanism mentioned above is that it reverses the perspective of competition law. Indeed, competition law starts from a finding of market failure and then proposes a remedy, whereas the regulation starts from the strength

[22] Conseil européen, Conseil de l'Union Européenne, « Législation sur les marchés numériques (DMA): accord entre le Conseil et le Parlement Européen.", 25 March 2022.
[23] Frédéric Marty, « Digital Market Act : l'Europe se tire-t'elle une balle dans le pied en croyant viser celui des Gafam ? », Atlantico, 16 décembre 2020.

of the entity concerned, GK, to indicate that it constitutes a market failure in itself. In other words*, "the higher the market concentration, the greater the risk of anti-competitive behavior in the market"*[24]. Here again, we come back to the idea that the DMA "punishes" the hyperpower of specific companies, the GAFAMs, by qualifying them as GKs (and therefore by imposing a series of obligations on them), because of the importance of the thresholds mentioned above which target these large companies. However, and on this last point, there is another criticism that can be made about these criteria: a company, such as Amazon, which perfectly meets the above-mentioned thresholds for its online service activity but not for its premium video activity, for example, would have the status of GK for one activity but not for the other, and would only have obligations imposed on one activity[25]. If confirmed in practice, this would show that this definition of GKs and these thresholds have an important limitation, which is that they do not cover all the activities of GAFAMs, which are the target companies of the EC. This problem was highlighted by the National Assembly's information report on the DMA. The Rapporteur proposes a solution to this problem: *"target those GK services that represent an essential gateway for users" and "take into account all the services offered by the GK and the synergies between these services within the ecosystem"*[26].

In addition, the EC has the possibility to change the above-mentioned thresholds found in Article 3(5)[27]. This prerogative has important negative consequences, firstly from a legal point of view but also from an economic point of view. Indeed, this option would lead to significant legal uncertainty because the EC leaves a large room for interpretation. This is particularly the case when it allows any undertaking meeting the thresholds to demonstrate by means of sufficiently substantiated arguments, in circumstances in which *"the relevant core platform service operates, and taking into account the elements listed in paragraph 6, the provider does not satisfy the requirements of paragraph 1"*.[28] The EC does not specify what these "circumstances" are. The definition of a GK would be based on a quantitative approach, but, given the fact that the EC leaves itself the possibility of changing the

[24] Hicham Mohamed Bouayad, « Politique de concurrence entre théorie et pragmatisme », Economia
[25] David Bosco, "Who are you, Gatekeeper?", colloque "The DMA: inside and beyond", 8 mars 2022 Faculté de Droit d'Aix-en-Provence.
[26] Op.cit. 2.
[27] Article 3§5 of the DMA: "The Commission is empowered to adopt delegated acts in accordance with Article 37 to specify the methodology for determining whether the quantitative thresholds laid down in paragraph 2 are met, and to regularly adjust it to market and technological developments where necessary, in particular as regards the threshold in paragraph 2, point (a)."
[28] Article 3§4 of the DMA.

thresholds, of considering that a company is a GK even though it does not have a solid and sustainable position at present (by indicating the taking into account of *"any likelihood of such a position"*) and finally of leaving the possibility, according to unspecified circumstances, of allowing companies to escape the status of GK, it can be considered that there is a real qualitative approach to this notion of GK[29]. Finally, and on a purely economic level, this possibility of changing the thresholds would lead to an economic inefficiency, as underlines P. Bentata, *"because firms need to know the obligations, they will be subject to in order to adopt long-run welfare enhancing strategies."*[30]

§ II - Gatekeepers' obligations and asymmetric regulation: a justified difference of treatment?

The asymmetric regulation provided in the DMA can be understood by the fact that GKs, because of their importance on the market, must be subject to additional obligations. This vision was already advocated by some authors in competition law but also recalled in some decisions, with an idea of particular responsibility. Nevertheless, this asymmetric regulation entails binding obligations for GKs, thus having important practical consequences (A). Moreover, the obligations laid down in Articles 5 and 6 of the DMA are quite important and very detailed, thus making their understanding but also their application complex (B).

A) Asymmetrical regulation and its consequences

The regulation imposes a several number of constraints both in terms of positive obligations and in terms of prohibited practices on GK in Articles 5 and 6 of the Regulation. More specifically, these articles respectively provide for lists of prohibited or potentially prohibited behaviors[31]. The obligations set out in Article 5 are self-executing whereas those in Article 6 are not. Self-executing means that the obligations are considered sufficiently clear, without the need for any further act to interpret them and make them mandatory, while the other obligations, set out in Article 6, mean that the company will enter into a regulatory dialogue with the EC in order to clarify how the provisions are to be implemented, in accordance with Article 7 of the DMA. The DMA is based on an asymmetrical regulation, which means that once a company qualifies as a GK it will be subject to obligations to do or

[29] Op.cit 20.
[30] Op.cit 7.
[31] D.Bosco, « La Comission dévoile ses propositions pour façonner l'avenir digital de l'Europe », Contrats, Concurrence, Consommation, N°2-février 2021.

not to do, in accordance with the articles mentioned above, while other companies, not having this status, will not have any obligations imposed. Here again, the legal and economic issues are important. This asymmetry of regulation could be considered discriminatory and would lead to a breach of equality before the law.

Moreover, and on a purely economic level, this asymmetry could lead to market distortions, reducing the incentives for the development of GK companies and the competitiveness of players, as P. Bentata points out. Furthermore, and this idea will be developed further in the next section, this mode of reasoning is absolutely not adapted to the digital economy and the fact of providing for detailed lists of behaviors is counterproductive for the EC because it will have to update its list as new practices appear. This asymmetric regulation is also questionable in that the obligations are applicable to all GK companies even though they are fundamentally different and based on different development models[32].

A) Over-detailed obligations

The obligations imposed on GKs are drawn from specific situations, aimed exclusively at GAFAMs, which has important practical consequences: firstly, this list of obligations is both too precise and too broad. Indeed, they target certain types of behavior, which have already been condemned *ex ante* by the competition authorities or the EC. These are important disputes, in particular the *Facebook v. Germany* judgement regarding data combination[33] but also *Google Shopping's case*[34]. However, even if one understands the EC's desire to counter those anti-competitive practices that have already been condemned, given that these decisions only have a relative effect of *res judicata*, this objective faces several limits. Firstly, these practices have been condemned in certain specific circumstances, and concerning specific structures. In other words, this list of obligations is not adapted to all the structures targeted, nor does it take into account the different business models of the companies concerned. Moreover, due to the fluctuating nature of digital economy, these obligations will quickly become obsolete, leading to constant changes in these lists and, *ipso facto*, to significant legal uncertainty. When new practices appear, this list will become increasingly extensive, leading to a significant burden for these GKs, which may, in addition, lead to a perverse effect of circumventing practices (due to the overly precise nature of these

[32] Op.cit 7.

[33] Décision KVR 69/19 du 23 juin 2020.

[34] Trib. UE, 10 nov. 2021, aff. T-612/17

obligations)[35]. The fact that certain decisions are specifically listed in a list of obligations does not necessarily create a clear list, on the contrary. Article 5 of the DMA, which is, as mentioned above, self-executing, lists 7 prohibited conducts or obligations to do. The prohibited conduct is the one resulting from Article 5 a) on the combination of personal data without the user's consent, and therefore, contrary to Regulation 2016/679, this hypothesis concerns the decision *Facebook v. Germany*, Facebook had been condemned for abuse of a dominant position on that basis, but this obligation is not sufficiently clear. The article mentions the hypothesis of combining data *"(...) from these core platform services with personal data preventing any other service offered by the GK (...) or (...) from third party services"*. Would it not have been more appropriate to refer to the hypothesis of data combined with other services? By trying to be too precise, the EC makes it difficult to understand these obligations, which are essential for GKs. Concerning the obligations in Article 6 that may be specified. This article states that these obligations *"may be specified"*. Here again, there is uncertainty and insecurity. If we analyze the paragraph a)[36], in practice this would mean, for example, that Amazon would not be able to use the data of the merchants on its platform in order, understandably, to misuse it for its own benefit by favoring its own products to the detriment of those of independent sellers, which is what results from the EC's statement of objections addressed to Amazon[37]. However, it seems difficult to require from Amazon not to use these data, it is important that the EC clarifies these obligations because, even if it is possible that Amazon or other companies are misappropriating data from retailers selling on their site, the text is so broad that the GK refrains from using any type of data and for any purpose whatsoever.

SECTION II - THE DMA'S PARADOX: A UNIQUE MODEL'S REGULATION UNAPPROPRIATED TO DIGITAL SECTOR

The DMA is based on a unique model's regulation : same obligations for all the GKs, without taking into account the differences between the economic models of the actors concerned.

[35] Op.cit 7.

[36] Article 6 a) of the DMA « refrain 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."

[37] EC, press release, 10 November 2020.

This approach is problematic, and especially unsuitable from a purely economic point of view because the digital sector, is a sector that is also constantly expanding, thus, the activities of these different actors evolve considerably over the years (Paragraph I). Moreover, this idea of a single model's regulation of the DMA has several consequences, especially, it can enhance innovation and competitiveness of GKs (Paragraph II).

§ I – The inadequacy with a fast-paced digital economy

The list of obligations set out in Articles 5 and 6 of the DMA is unsuitable toward a fast-moving sector like the digital, therefore, in this part we will highlight the incompatibility with the methods used by the EC to deal with GKs (A). Especially, the EC doesn't take into consideration the variousness of business models of the GKs and the fact that these obligations mentioned doesn't apply to every GK, but beyond that, some obligations may limit the economic activities of these entities and thus reduce their competitiveness (B).

A) Digital economy: a fast-moving sector

The digital economy sector is in perpetual expansion. Law, and in particular competition law, has been seeking answers to the problems raised by the digital economy for years, and day after day questions arise due to the emergence of new practices that challenge our traditional methods of reasoning. Indeed, competition law has been overtaken by all these issues, and the EC has been looking for a way to respond effectively. This is why the DMA was adopted. But the provisions within this regulation seem not to take into consideration the digital sector, a sector in constant flux. According to several scholars, the regulation is inadequate and does not sufficiently take into account the mechanisms of this sector. Specifically, and concerning the obligations of GK, obligations to do and not to do, this method of reasoning and this "listing" is inadequate because this list should be constantly revised, due to the emergence of innumerable practices. The EC's approach appears counterproductive in that it will specify and readjust the obligations of the GKs every two years. As a result, the more years go by, the more newer practices will emerge and the longer the list of obligations will be, making the understanding of the text even more complex than it already is. Especially since the companies that qualify as GKs today will not necessarily be the same as tomorrow. It is more than important that the EC takes into account the challenges of digital technology and the pace of innovation and development of the entities targeted, such as the GAFAMs, because at present this text is inappropriate, far too rigid and centralized for a sector that does not have these characteristics[38]

[38] Op.cit. 7.

B) A « unique model's approach » unsuitable towards various digital sectors

The DMA is based on a single model: *ex-ante* regulation, definitions that apply to all companies involved, asymmetric regulation and the same obligations for all companies classified as GKs. But is this "single model" relevant given that the actors concerned all have different business models? Indeed, as mentioned above, this economic model is not adapted to a digital economy that is constantly changing and developing. Moreover, the obligations imposed on GKs are derived, as mentioned above, from detailed solutions concerning specific facts and specific actors. Imposing such a list of obligations when the companies concerned are all different in terms of their sector of activity and the fact that they do not carry out these activities on the same market seems rather critical and would give rise to numerous risks. First of all, there is the risk that a provision which has been designed for a certain type of company may unintentionally affect other players because of the overly general wording of these provisions. The most important risk for the EC is also the fact that these provisions could be applied to European companies that would have to compete with the GAFAMs, as the EC wishes[39]. Thus, the robustness of these provisions and definitions does not take into account the specificities of each actor, nor does it understand the different business models involved.

Even more seriously, there is a risk that by imposing such obligations, the EC will lead to profound changes in the different business models. For example, Article 6a, in that it prevents the use of data in competition with companies that use the GK company's platform services, would significantly limit Amazon's business. How can GK companies take on these obligations and comply with them when it would mean substantially changing their business? Again, the EC does not sufficiently consider the economic stakes behind all these obligations, nor the business model of these entities.

§ II - A regulation that can lead to significant restraints

An asymmetric regulation, as the one set up in the DMA, could have various negatives consequences. Some actors, here the GKs, will face significant obligations, and from a financial perspective, significant burdens. First, this asymmetrical regulation could enhance competitiveness and innovation of these GKs (A). There is an important issue with the DMA, that shows the will of the EC to get away from a classical approach of competition law, there is no balancing effects here. Indeed, the EC doesn't permit GKs to prove that one of the

[39] Idem.

practices that is targeted in the list of obligations could have pro-competitive effects towards competition in general, but also toward end-users welfare (B).

A) DMA : hampering competitivity and innovation ?

As mentioned above, the DMA has two objectives: contestability and fairness. In order to achieve these two goals, the EC has provided various mechanisms which, to a certain extent, limit the freedom of GK companies in their activities. Indeed, the various obligations set out in Articles 5 and 6 of the DMA limits, or even modify as we said earlier, the business models of GKs. This will not be without impact, and the fact that these GKs will have to readjust their activities and ensure compliance with these obligations constitutes an obstacle to the competitiveness of these companies. Firstly, it must be recalled that this regulation is asymmetrical, *i.e.* only a few undertakings will be subject to a list of binding obligations due to their status of GKs, but their competitors in the market and new entrants will not be subject to these obligations. Therefore, and as also indicated, this list of obligations is firstly a signal to SMEs *"not to grow"*[40] in order not to be subject to these obligations, but secondly and because of this asymmetry of regulation, there may be distortions in the different markets concerned as some economists point out. Moreover, these GK's obligations could, in addition of limiting the freedom these actors and changing their business model, slow down the competitiveness of these players because of the possibility for the EC to readjust the obligations every two years. Hence, GKs would have to be flexible and always attentive to new obligations or new regulations that would reduce their competitiveness.

Besides, what are the consequences of the DMA's regulation on innovation? Firstly, it is necessary to recall that the main companies targeted by the DMA (and in the line of fire of the EC) are the GAFAMs. These giants are particularly active in research and development, demonstrating their willingness to improve the quality of their services and to study new issues that interest the digital world[41]. Examples include Alphabet (Google) and Apple, which are the two largest investors in research and development, and the Meta group (Facebook), which is particularly active, especially recently in the metaverse. What we can already fear is that the obligations weighing on the GKs may discourage these companies from innovating and developing further, and this would be detrimental towards competitiveness, particularly as this research may benefit not only to consumers, but also to other companies present in the market concerned or wishing to enter it. For others, such as Marc Mossé, this regulation will not hinder

[40] Op.cit 20.
[41] Op.cit 7.

innovation but will, on the contrary, *"open the market and ensure genuine contestability"* [42]. It remains to be seen in practice whether the DMA will have an impact on the incentives for GKs to innovate or not, but in any case, as F. Marty points out, care must be taken to ensure that this regulation does not discourage these operators, who are important on the market, from innovating, unless these innovations are predatory, which are, in turn, detrimental to competitiveness[43].

In fine, the DMA could reduce, in a certain way, the competitiveness and innovation of the GKs on the market and it is more than important that EC preserves *the "vitality of digital ecosystems"*, which is, as F. Marty underlines an essential condition for *"the development of the firms that use them"*[44].

B) Effects balances and end-users welfare

What about consumer's welfare? In the explanatory memorandum of the DMA, the EC underlines the importance of digital services, they *"increase consumer choice, improve efficiency and competitiveness of industry and can enhance civil participation in society."*[45] Indeed, digital platforms, specially GAFAMs, are important for end-users who profit from *"an integrated bundle of complementary services"* for free, *"with zero transaction costs"* because of the system of combining personal data that the DMA want to prohibited[46].There are many reasons why consumers uses digital platforms like Google for instance and no other competing sites like Bing or Qwant, it is linked to many factors for instance network effects but also feedback loops (but the objective here is not to develop this economic analysis, which would require more in-depth demonstrations). Besides it is also linked to the idea of single-homing for instance because consumers save times and *"do not need to sign-in every time they use another service from the same ecosystem"*[47]. As a result, and as mentioned above, the EC's injunction of certain obligations may lead to the modification of the business model of these GK companies and thus some services that were previously free due to the use of data may become chargeable to the detriment of end-users. However, as some authors point out, due to the *"innovative and dynamic nature of the digital world, and because its economics are not yet completely understood, it is extremely*

[42] Discussion on the DMA with Marc Mossé, Director of Legal Affairs at Microsoft France and President of the French Association of Company Lawyers (AFJE).
[43] Op.cit 23, but also T.Shchrepel « L'innovation prédatrice en droit de la concurrence ».
[44] Idem.
[45] Explanatory memorandum of the DMA.
[46] Article 5 a) of the DMA.
[47] Op.cit 7.

difficult to estimate consumer welfare effects of specific practices"[48]. However, the question is worth asking.

Furthermore, unlike antitrust law, the DMA does not take into consideration possible pro-competitive effects and efficiencies at all. Indeed, although the practices referred to in the list of obligations incumbent on GKs may have anti-competitive effects, no balancing of effects is foreseen due to the *ex ante* approach of the regulation. As a result, even if a practice could have pro-competitive effects, particularly regarding consumers, the practice will in any case be prohibited, as F. Marty points out[49].

[48] J. Crémer, Y-A de Montjoye and H. Schweitze, Competition policy for the digital era, European Commission, 2019, p.71.
[49] Op.cit 23.

PART II - THE IMPLEMENTATION PROBLEMS FROM A PROCESSUAL STANDPOINT

To insure the implementation of the DMA, several objectives must be fulfilled. Firstly, it is important to include a plurality of competent authorities that will ensure that the provisions of the DMA are implemented and enforced. These bodies will have to play a decisive role, and their effective coordination must be ensured (Chapter I). Furthermore, in order to avoid a problem of non-compliance with other European regulations, it will be necessary to ensure that the DMA is articulated with these other texts in order to guarantee its effectiveness and to ensure that there are no conflicting provisions between the regulations (Chapter II).

CHAPTER I – PROCESSUAL APPROACH: NEED FOR COORDINATION BETWEEN COMPETENT AUTHORITIES

How can we guarantee the effective application of a regulation if we do not provide for competent bodies to ensure that the text is implemented? The EC alone cannot assume this role and needs national authorities to assist it in this objective of regulating GKs (Section I). In addition, and always from a procedural point of view, it is important to ensure that important principles are respected within the DMA in order to maintain a balance and ensure compliance with the Rule of Law (Section II).

SECTION I – A CONTESTABLE CONCENTRATION OF POWER IN THE HANDS OF THE EUROPEAN COMMISSION

If we can see from the DMA that the EC has important prerogatives, justified by the need to regulate the activities of the GKs, we can also understand that this exclusive allocation of powers is not without consequences from a legal point of view. Without going into a study of the theory of separation of powers, it will be discussed here to emphasize the importance of deconcentrating the important prerogatives granted by the EC itself in order to guarantee the effective implementation of the DMA (Paragraph I). In order to do so, it is important to ensure that national competition authorities have a role to play in this regulation, including special procedures. Finally, we must not forget the other stakeholders, especially those wishing to seek compensation for the damages suffered by GKs (Paragraph II).

§ I - The absence of separation of powers

To deal with the GKs, the EC concentrates many important powers in the DMA in a questionable way. Indeed, the EC concentrates in its hands legislative, executive and judicial powers, but also other many important tools (A). It is necessary to separate these powers in order to respect the Rule of law, but also to guaranty an effective implementation of the DMA (B).

A) The concentration of powers of the EC

The EC grants itself several powers within the DMA to deal with anti-competitive practices made by the GAFAMs. The EC is intervening *ex ante* in order to prevent any abuse, draws up a list of criteria to define GKs and provides for thresholds, which may be readjusted, but it also provides *do's* and *don'ts* obligations, which may be specified. Furthermore, the same Commission provides strong sanctions in the event of non-compliance with the obligations *(sanctions which we will analyze later).* Can this concentration of powers in the hands of the EC be challenged? In other words, it is a single body who defines the GKs, lays down obligations, monitors compliance with them and imposes sanctions in the event of infringement. There would, therefore, be a concentration of several powers, all equally important, in the hands of the EC: legislative, executive, and judicial power.

In order to answer this question, it is important, as a preliminary step, to consider another relevant question: is the non-separation of the investigating and decision-making bodies contrary to the right to a fair trial set out in Article 6 of the ECHR? Firstly, it should be recalled that the *Menarini v. Italy judgment* [50] states that competition law belongs to criminal law because of its repressive nature. Therefore, Article 6 on the right to a fair trial in competition matters can be applied. However, on numerous occasions, the CJEU has indicated that the non-separation of the functions of investigation and judgement within the EC was not contrary to the right to a fair trial because the Commission could not be qualified as a court, but also because its decisions *"imposing a fine for infringement of the competition rules are not of a criminal nature and are subject to the review of an impartial and independent judicial body"*[51]. This is, however, problematic in some countries such as France where the separation of the investigating and adjudicating departments is a constitutional requirement. This principle of separation of the investigating and adjudicating bodies exists

[50] CEDH, Menarini Diagnostics c/ Italie, 27th September 2011, n° 43509/08
[51] Vogel & Vogel, « Séparation des fonctions d'instruction et de jugement – EU ».

within the Competition Authority (separation of the investigating and adjudicating departments, which is manifested by the fact that when the general Rapporteur and the rapporteur are both present at the deliberation, this principle of separation was not respected. Therefore, the presence of the Rapporteur in the deliberation *"even without a deliberative vote constitutes a cause for annulment of the decision*[52]) however this seems rather illusory in practice in the eyes of many practitioners. But then, is it the same thing here? Are we only talking about a separation of the functions of investigation and judgment? The answer is rather negative. Indeed, here the problem is bigger, the EC concentrates within itself, in addition to the power of instruction and decision, a real legislative power because it is itself which provides for obligations and sanctions. It is one thing to investigate and decide, but what about the fact that the EC also lays down obligations and sanctions as a legislator would? The question deserves to be raised.

B) Need of a separation of powers

The EC concentrates, in a way, too many prerogatives and this may have legal impacts. As seen above, and in order to avoid any infringement of legal certainty and the right to a fair trial, it would be necessary to " deconcentrate " the powers of the EC regarding the DMA.

This concentration of powers was justified by the Council of the EU in a press release by the desire *« to ensure a high level of harmonization in the internal market, the European Commission is the only body empowered to enforce the regulation »*[53]. Meaning, for the Council that the end could justify the means? But again, this concentration of powers is risky and could be inefficient. First, and we will come back to this point in subsequent developments, the EC budget is not unlimited, moreover, it was not mentioned in the DMA a specific budget to ensure the proper application of these DMA, Therefore, one may wonder whether the EC would not need other entities to help it, and thus separation of powers would allow a better implementation of the text. In addition, this concentration of powers could give rise to a form of arbitrariness that would be difficult to justify on a legal level. If we take the example of Article 10 of the DMA, it allows the EC to empower for a renewable period of five years to *"add new obligations to those listed in Articles 5 and 6"*[54] by means of delegated acts, as the PhD doctorant Maya-Salomé Garnier underlines in her speech about

[52] Vogel & Vogel, « Séparation des fonctions d'instruction et de jugement – FR ».
[53] Council of the EU, "Digital Markets Act: agreement between the Council and the European Parliament", press release n°313/22, March 25 2022.
[54] Article 10 of the DMA.

the DMA and the Rule of Law[55]. She adds that delegated acts are defined as *"non-legislative acts of general application to supplement certain non-essential elements of the legislative act"*[56]. But are the obligations of the DMA *"non-essentials"*? On the contrary, and as underlines MS. Garnier, these obligations form the *"core element of the DMA"*[57], so how is it possible that the EC uses this tool? It could be, in my opinion, quite arbitratory that the EC allows itself the competence of the legislator with this tool of "delegated acts" which, in this case, does not even seem to meet the conditions. It is very important to remedy this absence of separation of powers, which is a major obstacle to legal certainty.

§ II – The necessary articulation with national authorities

National agencies have a role to play in the implementation of the DMA due to their experience in the matter of digital sector, but also because they benefit from many interesting means (A). Besides, the EC not only forgets to foresee the role to be played by the national authorities in this DMA, but it also forgot to mention the procedures of private enforcement, which could be monitored and set up by these same national authorities in order to ensure the effectiveness of the DMA (B).

A) The role of national agencies in the DMA

The concentration of powers of the EC mentioned above poses many problems, in terms of legal certainty and the effectiveness of justice. One of the very objectives of this DMA is to overcome the procedural delays and shortcomings of competition law. Therefore, there is a possibility of overcoming this concentration of powers which would weaken the implementation of this text: that of allowing the national authorities to participate in the implementation of the provisions of the DMA. It will be discussed here to question the articulation of the EC with the national authorities. As Professors A. De Streel and P. Larrouche rightly point out, we need *"more involvement of the national authorities then currently foreseen (...) to support centralized enforcement by the Commission"*[58]. Indeed, national *authorities "may be particularly helpful for the following tasks for which they may*

[55] Maya-Salomé Garnier, « DMA and Rule of Law », colloque « The DMA : inside and beyond », 8 mars 2022 Faculté de Droit d'Aix-en-Provence.
[56] Article 290 of the TFEU.
[57] Op.cit 55.
[58]Concurrences review, Alexandre de Streel, Professor of EU law in Namur university and Pierre Larrouche, Professor of law and innovation, Montreal university, "The European DMA proposal : how to improve a regulatory revolution?", n°2-2021, p.60

have a comparative advantage compare to the Commission."[59]. This is also highlighted by the National Assembly's report on the DMA, which recommends this linkage between the EC and national competition authorities, which would be reflected, in particular, in the establishment of a *"European network of digital regulation"*[60]. How would that work in practice? The Rapporteur of the National Assembly stresses the importance of allowing the authorities to have a permanent role in the analysis of GKs practices, but also in *« the collection of complaints {of parties or end users} »*[61]. Indeed, on this last point, it is very surprising to see that, unlike other regulations such as the P2B *(which we will see more in the last section of this report)* there is no provision for dispute settlement, even though we suspect that complaints, on the basis of the DMA, will necessarily see the light of day. In any case, the Rapporteur here recommends that certain shortcomings of the DMA should be overcome with the help of the national authorities, who will be able to use various means to the benefit of the EC. Much of the doctrine, EU Member States and competition authorities agree on this point[62]. This is explained by the fact that acting at the national level seems more appropriate in order to *« follow the evolution of the markets, check the effectiveness of the measures put in place and escalate the information or anomalies »*[63]. The national competition authorities have many means at their disposal which may be of interest to the EC, but also have developed expertise in anti-competitive practices related to the digital field, as we can see from the importance of the decisions that have been made over the past ten years on GAFAMS. Moreover, the French ADLC and the Bundeskartellamt are very active in this field and have made important decisions concerning these companies (for instance ADLC's decision about Google[64], *but also the Bundeskartellamt in the Facebook's case*[65]). The experience of the national authorities can be useful to the EC, which should enable them to play an active role in the regulation of GKs.

B) The absence of private enforcement in the DMA

Most of the omissions in the EC concern the procedure. For instance, there is no mention of private enforcement in the DMA. As the brilliant Professor Rupprecht Podzun underlines,

[59] Idem.
[60] Op. cit. n°2.
[61] Idem.
[62] For instance Concurrences review, Professor Christophe Carugati, "The role of national authorities in the DMA", n° 1-2022.
[63] Op.cit 2.
[64] ADLC, décision Google relative à des pratiques mises en œuvre dans le secteur de la publicité sur Internet, n° 21-D-11, 7 juin 2021.
[65] Op.cit 34.

"without explicit rules on (...) "private enforcement" the high ambitions of the DMA are likely to remain unfulfilled"[66]. Indeed, how to (correctly) implement a text that is incomplete, from a processual standpoint? R. Podzun adds that *"private power needs to be cured with private empowerment. This should, ideally, be reflected in the procedural"*[67]. Besides, private enforcement is important to ensure the full effectiveness of the DMA, as the doctrine regarding private enforcement does it towards Articles 101 and 102 of the TFEU[68]. But again, some scholars and the EC itself will say that the DMA isn't competition law and therefore the rules of private enforcement don't belong here. But this is not the opinion of some authors like Pr. R. Podzun or Pr. Raphaël Amaro emphasizes the importance to provide dispositions relating to private enforcement, if only so that victims of practices targeted by the DMA can ask for reparation. R. Amaro explains that the provisions concerning private enforcement, set out in competition law, should also apply to the DMA[69].

In addition, and in line with the above-mentioned remarks concerning the importance of integrating national authorities as genuine active actors in this regulation, the national authorities have underlined, in a joint project, the importance of private enforcement provisions within the DMA, explaining that *"enforcement powers should in specific instances be shared with national competition authorities on a voluntary basis"*[70]. Indeed, *« this restraint towards private enforcement and the participation of competitors or customers in DMA proceedings is a mistake: The Commission will not be able to deal with gatekeeper »*[71]. There is almost a total lack of involvement of third parties, making the implementation of the DMA more cumbersome, even though this tool was precisely intended to address the cumbersome procedures in competition law. Moreover, the EC is certain that its provisions in the DMA are clear and that the GKs will automatically respect their obligation, as R. Podzun points out. But as he says*, "that is a confident expectation: will some of the most powerful undertakings in the world really subject themselves automatically*

[66] Verfassungsblog, Rupprecht Podszun, "Private enforcement and the Digital Markets Act", 1st September 2021.
[67] Idem.
[68] CJEU Courage's case, "*The full effectiveness of Article 85 of the Treaty (now Article 81 EC) and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition.*" September 20 2001.
[69] Raphaël Amaro, « Private enforcement and the DMA », colloque « The DMA : inside and beyond », 8 mars 2022 Faculté de Droit d'Aix-en-Provence.
[70] European Commission Network (ECN), Joint paper of the heads of the national competition authorities of the European Union, "How national competition agencies can strengthen the DMA", 22 June 2021.
[71] Op.cit 70..

to obligations set in the DMA? Will the Commission detect problems that may arise from a different understanding of the words – or blatant non-compliance?"[72]. These questions are important, and indeed, the EC will have to answer and, maybe, to take into consideration that the procedural provisions of the DMA need to be refined in order to ensure its correct implementation.

SECTION II - INFRINGEMENTS OF FUNDAMENTAL RIGHTS

As the Venice Commission points out on March 2016[73], many principles must be respected in different legal systems, and in the EU institutions. Among these important principles upholding the Rule of Law[74], there are three main principles that we will focus on in this part (the principle of separation of powers has already been addressed in the previous reasoning).. It will be discussed here the principle of legal certainty in the DMA (Paragraph I) as well as the respect for the principle of prohibition of arbitrariness and proportionality (Paragraph II).

§ I - Repeated violations regarding the principle of legal certainty

Many provisions in the DMA are detrimental toward the major principle of legal security. This insecurity lies in the letter of the text, because of the vagueness of the definitions or even the obligations (A) but also in the mechanisms granted by the EC which only guarantee short-term security (B).

A) Need for legal security in the DMA

Legal security is an important principle and shall be respected in the DMA. Unfortunately, this is far from the case because of many points. First of all, as already mentioned at the beginning of this report, the DMA contains many vague and imprecise notions, especially concerning the definitions of GKs or core platforms. More troublesome still, there are many references to other regulations, EC does not bother to clearly define certain terms, which are important for the understanding of the text. These many inaccuracies can lead to difficulties in understanding the text but also in applying the provisions by the main actors that are GKs, In addition, and assuming that national authorities eventually have a clear role in this

[72] Op.cit 66.
[73] European Commission for Democracy Through Law (Venice Commission), 18th March 2016, Study nº 711/2013
[74] Op. cit. 55.

implementation of the Regulation, by those authorities. Indeed, the principle of legal certainty includes the need for clear, precise texts that can be understood by all. In this case, and we already understand the risk, too many uncertainties could lead to a major dispute, only on the understanding of the text, and in particular on the obligations of the DMA. As for these obligations, they themselves are neither sufficiently clear nor adapted to the various undertakings concerned. Moreover, this is what the report of the National Assembly stresses[75], the Rapporteur asks that the EC clarify the scope of the obligations of Article 6 in order to gain both efficiency (time savings) and legal certainty (obligations specified *in concreto*). With the possibility of *"tailor-made remedies",* the companies concerned would know directly how such an obligation should be applied, preventing the risks of circumvention, and reducing the need for additional interventions that would pose legal security difficulties and litigation risks. The Rapporteur adds that *"the general idea of the report is to say that legal uncertainty is mainly due to the actual drafting of the text, insufficient work on definitions, and poorly adapted procedures"* [76]. Indeed, few provisions concerning the procedure for implementing the DMA are foreseen in this text, and as already explained, this could lead to a significant dispute.

B) Insecurity regarding the mechanisms of the text

In addition to all the infringements towards legal security mentioned above, legal uncertainty resides in the main mechanisms of the EC. Indeed, Article 10 of the DMA gives the EC the possibility to adapt certain obligations in order to clarify them or even to add new ones. Legal security is not assured here, GKs will be gradually imposed new obligations, which will make the text even more cumbersome and binding for these companies, and questionable in terms of this principle but more generally, toward the Rule of Law, as Maya-Salomé Garnier well explained. According to her, the rule of law *"symbolizes the reign of liberty protected by legal guarantees and the fight against arbitrariness"*[77] Here, the fact that EC grants itself to questionable mechanisms like the one provided by Article 10 would raise questions about its arbitrariness. This is even more questionable when referring to Article 3§5 on delegated acts that the Commission may take regarding the quantitative thresholds used to designate GKs. Indeed, the EC allows itself the possibility to specify, after the entry into force of the text and through delegated acts, these quantitative criteria. This is

[75] Op.cit 2.
[76] Idem.
[77] Op.cit 55.

again a major uncertainty resulting from this provision since companies will not be able to know *ab initio* the thresholds that may or may not designate them as GK[78]. In fine, the DMA only offers a *"short-term security"*[79], which is very disappointing from a legal point of view and will pose many questions in the context of litigation.

§ II - Potential violations towards principles of prohibition of arbitrariness and principle of proportionality

In addition to infringements towards legal security, it has been noted that the DMA could hinder the important principle of prohibition of arbitrary due to the amount of prerogatives that EC grant itself that aren't, necessary, justified (A). Besides, and it would have been possible to start there, one must always keep in mind an important principle in law, namely the principle of proportionality. Here, it will be discussed the proportionality of the sanctions imposed on GKs by the EC (B).

A) The prohibition of arbitrariness: principle respected in the DMA?

First, it is important to recall that discretion and arbitrary powers are two terms of a different nature. Arbitrary power is not sitting on any rule or norm (from the Latin *arbitrum*, the will) contrary to the discretionary power meaning that a decision is left to the free appreciation of a person (from the Latin *discretio*, discernment). Why mentioning these two terms? Can we really talk about arbitrary power within the DMA? The aim here is to compare certain mechanisms provided for by the DMA with the important principle of the prohibition of arbitrariness. Indeed, some provisions It is once again the brilliant PhD doctorant Maya-Salomé Garnier who evokes this principle and confronts it with the DMA[80]. It is not necessary to recall yet again that Article 10 of the DMA, which allows the EC to adjust the obligations provided for in Articles 5 and 6 of the Regulation, may be challenged in the light of this principle, although it should be said that discretion should be used in this case. However, the line between discretion and arbitrary power is rather thin, and the objective is to ensure that one does not lead to the other. Another equally interesting provision is section 11 of the DMA[81] which explains that, in addition to the obligations set out in the aforementioned Articles, the GK must refrain from behaving in such a way as to interfere

[78] Op.cit 2.
[79] Idem.
[80] Op. cit 55.
[81] Article 11 of the DMA.

with these obligations and prevent their effective application. As Maya said, *"this Article leaves way too much room to the discretion of the Commission, not to say to its arbitrariness, and thus undermines legal security*"[82].

Furthermore, Article 9 can be mentioned to highlight the importance of the flexibility granted to the EC. Indeed, this article deals with exemptions that can be granted by the EC for public health, public morality, and public security. What is interesting in this article is that, like several provisions of the DMA, its drafting is very broad, thus allowing the EC to have a large margin of appreciation. On the contrary, some professors are more in favour of this, because the exemptions concern relatively rare cases, which are a kind of *"regal public order"*[83], these exemptions may never be granted. In all cases, the EC enjoys a significant margin of appreciation, and could thus lead to arbitrary power, contrary to the principle of prohibition of arbitrary.

B) What about proportionality in the DMA?

This principle of proportionality is cardinal in law, particularly in European law, as evidenced by Article 5 of the TFEU. This principle requires the EU to *"limit itself to the measures strictly necessary to achieve its objectives"*[84]. Is this principle respected in the DMA ? As Maya-Salomé points out[85], One may wonder about the sanctions provided for against the GKs in case of non-compliance with the obligations derived from Articles 5 and 6 of the DMA. Article 25 of the DMA deals with the *"non-compliance"* of the GKs concerning the obligations and Article 26 more specifically concerns the number of fines, the flagship penalties in digital matters. In the new version of the DMA, and as indicated in the latest press release of the EU Council on DMA, "*if an access controller breaks the rules laid down by the legislation, he risks a fine of up to 10% of his total global turnover. In case of recurrence, a fine of up to 20% of global turnover may be imposed"* [86]. In other words, the EC is breaking the maximum amount of fine of competition law: 10% of the annual turnover of the undertaking. As Maya illustrates, for instance, if Amazon has a fine of up to 20% of its 2021 turnover, this fine would amount to 94 billion euros[87]. This would be unprecedented and would still have consequences for a company of this size, but it would

[82] Op.cit 55.
[83] Professor David Bosco, "Abuse of dominant position", course.
[84] European Commission, glossary, « proportionality »
[85] Op.cit 55.
[86] Op.cit 55.
[87] Idem.

be explained by the fact that the greater its size on the market, the greater the damage it would cause. This remains highly questionable, especially since these sanctions will be imposed whether the GK acted intentionally or unintentionally, and given that several provisions of the text, including the obligations, are rather vague and inappropriate, this type of sanction is even more questionable. Let us once again hope that the EC does not have to go so far as to impose a fine of up to 20% of the turnover, but it is true that this type of provision raises questions about the Commission's compliance with the principle of proportionality.

Moreover, following the provisional political agreement on the DMA between the Council and the Parliament on 25 March 2022, it will be possible, when a GK engages in *"systematic non-compliance with the DMA, {i.e. it} breaches the rules at least 3 times in 8 years, the EC may open a market investigation, and if necessary, impose behavioral or structural remedies"*[88]. As a result, GKs that repeatedly fail to comply with the DMA obligations may be subject to behavioral or structural remedies, the latter of which could include asset divestitures or even dismantling. Could this be the ultimate solution envisaged by the European institutions to combat non-compliant GKs? This idea of dismantling has already been proposed by some opponents of the GAFAMs, notably Lina Khan who wrote in 2017 that Amazon's activities should be dismantled[89]. It remains to be seen whether this provision will be retained in the final version of the DMA.

CHAPTER II – THE UNCERTAIN INTERACTION OF THE DMA WITH THE EXISTING LAWS

While it is important to ensure that the DMA can be properly articulated with existing competition law tools, in particular at national level (Section I), it is equally important that it can be articulated with existing and future European regulations with similar objectives, and of interest to the same companies (Section II).

[88] Conseil européen, Conseil de l'Union Européenne, communiqué de presse, « Législation sur les marché numériques (DMA): accord entre le Conseil et le Parlement Européen.", 25 March 2022.

[89] The Yale Law Journal, Lina M. Khan, "Amazon's Antitrust Paradox", January 2017.

SECTION I – THE NEW EX ANTE APPROACH AND THE DIFFICULT ARTICULATION WITH COMMON COMPETITION'S TOOLS

The particularity of the DMA is that it is based on an ex ante approach, thus showing that it is part of a new approach that is not similar to classical competition law (except for merger law, which we will not analyze here). The main point of divergence on this DMA is the fact of knowing whether it can be considered as competition law (§1). This question, which is more than crucial, raises other important issues. If the DMA is not, as the EC states on several occasions, competition law, questions will have to be asked about its articulation with the tools of competition law. In particular, the possibility of combining the ex-ante approach of the DMA with the ex-post approach of anti-competitive practices law, for example (§2).

§ I – An unclear articulation with competition law

How does DMA relate to competition law? This question alone could have been the subject the whole report, and not surprisingly, there is no clear answer to this question. While it is true that the EC says that the DMA is not competition law, it is doubtful whether this information is given because the regulation is indisputably based on several rules and tools of competition law (A). De facto, this line between regulation and competition law is rather thin here, and it is, in my opinion, complex to answer that question. However, it will be necessary to ensure that this DMA can be linked with the tools of competition law in order to avoid certain problems in its application (B).

A) The main problem: is the DMA competition law?

It is important to stress that this may be the main issue of this report. Therefore, there will be no question here of giving a clear answer or of delimiting precisely this question, but simply to try to confront the DMA with competition law in order to understand if this DMA could be articulated with the rules of competition law. This question could also arise in a number of ways: is the DMA's objective to replace competition law? Is this DMA, as explained Professor D.Bosco, a *«special digital competition law»*[90]*?* And if that is the case, would we apply the *adage « speciala generalibus derogant »*, which would have the consequence of favoring the application of DMA over the rules of competition law in digital matters? Let us go over each question again so that we can ask ourselves whether it is

[90] Op.cit 31.

possible to link it to the rules of competition law. First of all, on the first question concerning the fact that the DMA would have the objective of replacing the scope of competition law: the answer, rather unanimously, is no. First, because the DMA is constituted as an *ex ante* approach, whereas, for example, the law of anticompetitive practices in Articles 101 and 102 of the TFEU is ex post. Therefore, competition will *"remain useful to control and punish, ex post, anticompetitive behaviors of the entities concerned"*[91]. On the second question concerning the fact that the DMA would be a *"special competition law",* it is true that on many occasions the EC stresses the fact that the DMA was proposed in order to alleviate the difficulties of competition law and thus, in a certain way, that it would "complement" the provisions already established in competition law because they would not be adapted to the digital economy[92]. Therefore, the traditional competition law rules would be set aside, in digital matters, and DMA would have to be applied. But is it possible to combine the two approaches, *ex ante* and *ex post*? Would there not be a problem regarding the ne bis in idem principle? This principle, provided for in Article 4 of the ECHR, states the prohibition of being punished twice for the same acts. Are we talking here about the same acts? The conditions for applying this principle are that both proceedings must be "criminal" in nature, must involve the same offence, and there must be a repetition of prosecutions[93]. This question of the application of the principle non bis in idem in the case *of "two infringements of different legal regimes: regulation and competition law"* has been asked before the CJEU in the *Bpost* SA v. Belgium National competition authority's case. Indeed, the authority asks the CJEU two important questions in linked to this idea[94]. General Advocate Bobek stated that *"the ne bis in idem principle (...) does not prevent the competent administrative authority of a Member State from imposing a fine for infringement of national and Union competition law, provided that the subsequent proceedings before that authority are different from those that took place previously, either because of the identity of the offender*

[91] See A.EBNELHAJ, Competition Forum, « French National Assembly's report on ex ante regulation: objectives and difficulties of the DMA", n° 0020, January 20, 2022.
[92] Idem.
[93] ECHR, "guide on Article 4 of Protocol 7 to the European Convention on Human Rights – right not to be tried or punished twice", September 30 2021. See also ECHR Mihalache v/ Romania, §49, July 8 2019.
[94] Among them, "*Must the principle non bis in idem, as guaranteed by Article 50 of the Charter, be interpreted as not precluding the competent administrative authority of a Member State from imposing a fine for infringing EU competition law, in a situation such as that of the present case, where the same legal person has already been finally acquitted of an offence for which an administrative fine had been imposed on it by the national postal regulator for an alleged infringement of postal legislation, on the basis of the same or similar facts, in so far as the criterion that the legal interest protected must be the same is not satisfied because the case at issue relates to two different infringements of different legislation applicable in two separate fields of law?", CJEU,* Case C-117/20, September 2 2021.

or because of the relevant facts, and the protected legal interest that the respective legislative instruments at issue in the respective procedures are intended to safeguard"[95]. Since the DMA does not, strictly speaking, punish the same facts as those alleged by Articles 101 and 102 TFEU, it would not be possible to invoke this principle, however, the possibility of combining sanctions on various grounds (DMA, anti-competitive practices, or even restrictive competition practices) remains disturbing. This is what Professor Martine Behar-Touchais underlines when she points out that the articulation between these rules constitutes an *"ideal contest of offences"* in the criminal sense, and as a result, the strongest sanction should be retained and not the cumulation of different sanctions[96].

B) An unclear articulation

According to the EC, DMA is not competition law, some scholars share the same view [97]. Then what is it? And above all, if the DMA is purely a text of administrative regulation, why would the EC use so many provisions and tools of competition law?

First, the DMA is an administrative regulatory tool, based on Article 114 of the TFEU which guarantees harmonization of the rules of single market and therefore a single market regulation[98]. It is not competition law but intern market law. However, it is rather questionable, and as we have seen in all the previous developments, that the EC relies on the rules of competition law but considers that DMA does not fall into this category. Indeed, it is possible to discuss this argument because this regulation is based, rather paradoxically, on its instruments. For example, the fact that the EC can initiate "market investigations"[99] or the consideration of "indications of competitive pressure"[100]. Besides, in the very objectives of the DMA there is a marked imprint of competition law, *" the DMA Proposal proclaims that the "Regulation […] aims at protecting a different legal interest from [the competition] rules" (Recital 10), both of the DMA Proposal's two proclaimed objectives, fairness and contestability, are inextricably linked with competition law"*[101]. The authors add that *"fairness is specifically mentioned in the text of Article 102(a) TFEU, a provision that has*

[95] Idem.
[96] Pr. Martine Behar-Touchais, intervention au colloque sur le « Digital Markets Act », Université Paris Nanterre, 1er avril 2022.
[97] For instance Pr. Rupprecht Podzun.
[98] Discussion with Rupprecht Podzun, in a course about "Abuse of dominant position".
[99] Article 14 of the DMA.
[100] Op.cit 20, p.17, but also N.Petit "Big Tech & The Digital Economy", The moligopoly scenario, Oxford University Pres, 2020, pp 227-237.
[101] SSRN, Giuseppe Colangelo, Marco Cappai, « A unified test for the European ne bis in idem principle: the case study of Digital Markets regulation", 27th October 2021.

been applied by the EU case law to both exclusionary (mostly in the distant past) and exploitative cases"[102]. Similarly, with respect to the notion of contestability found in the DMA, it's a "key economic concept in competition law and industrial organization". So, would the DMA be a competition law tool that does not say its name? The answer is still uncertain at this point...

§ II - Possibility to combine the *ex ante* approach with national instruments?

Is it possible to articulate national tools, used ex post with the DMA provisions, provided for in the text that are ex ante? Here, we will focus on French and German competition law to see if it's possible (A). Also, there is an important, firstly national, tool that can be used instead of, or with the combination of the DMA, because in the regulation this process is also mentioned because of its effectiveness: interim measures (B).

A) National provisions and DMA

Since it was seen that it was probably possible to link the DMA with the provisions of Articles 101 and 102 of the TFEU, what about national provisions on competition law?

Indeed, Article 1§5 of the DMA states that *« this Regulation is without prejudice to the application of Articles 101 and 102 TFEU. It is also without prejudice to the application of: national rules prohibiting anticompetitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions; national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers; Council Regulation (EC) No 139/200 and national rules concerning merger control; Regulation (EU) 2019/1150 (...) of the European Parliament and of the Council »*[103]. Concerning French national law, Articles L420-1 and L420-2 of the French Commercial Code represses agreements and abuse of a dominant position (as well as abuse of economic dependence). Indeed, anticompetitive practices intervene *ex post*, not *ex ante*, as in the case of merger law, and it is therefore entirely possible for an undertaking, which is classified as GK by the DMA, or punished *ex post* for acts of agreement or abuse of position, whether the practices are based on separate facts from those stated in the DMA, or, according to the text, that the companies aren't qualified as "GK". As regards the restrictive

[102] Idem.
[103] Article 1§5 of the DMA.

practices of Articles L442-1 et seq. of the French Commercial Code, it is highly likely that their application will not be diminished as a result of the DMA because it will always be of interest to a trading partner, a victim, or the Minister of the Economy to raise for instance the benefit without consideration, the significant imbalance or the brutal break of the established commercial relations because neither the law of anticompetitive practices nor the DMA raises, in principle, these assumptions. In my view, it would be regrettable not to be able to repress large companies such as GAFAMs based on restrictive competition practices anymore, but in principle this should not be the case. However, there is a pragmatic element to consider regarding the articulation between the provisions that repress anti-competitive practices and the DMA. Competition law procedures have a cost, and the procedures to implement the DMA will also have an additional blow, therefore a budget has been planned and announced within the DMA. However, because the EC has the opportunity to prosecute, it will have to make choices and prioritize certain files over others. There is then reason to fear that there will be fewer cases relating to the law of anticompetitive practices under Articles 101 and 102 before the Commission.

Alongside French competition law, there is also German law, which has been very active in the field of competition and the suppression of anti-competitive practices for several years. Indeed, the German legislator has been trying for some years to adopt effective provisions to combat these practices, but also against GAFAMs. Germany decided indeed to *"strengthen {its} antitrust enforcement tools, adapting (its) national competition provisions to the digital scenario"*[104]. One of the many examples is the new Section 19a of the German Competition Act – GWB. This article "sets specific standards of behavior for undertakings of "paramount significance for competition across markets" providing a list of abusive practices which is similar and functionally equivalent to the DMA"[105]. As Pr. D. Bosco says, it could be possible that this notion of *"paramount significance for competition across markets"* could be a translation for the notion of GK found in the DMA[106]. What does this notion mean? First, and as R. Podzun said, it means that the undertaking doesn't have necessary to be dominant to be condemned, contrary to article 102 for instance where the dominant position is required. Therefore, even in markets where is no dominance, this text would apply[107], so for instance if a GAFAMs isn't in a dominant position in a market, it

[104] Op.cit 101.
[105] Idem.
[106] Op.cit 83.
[107] Op.cit.98.

could be condemned on this basis. What is interesting here is that the DMA also applies to undertakings that aren't necessarily in dominant position but would have a *"position established in the foreseeable future"*[108]. Contrary to the obligations in the DMA that are self-executed, the obligations in the Article 19a has to be activated by the German authority and most important, the undertaking could put forward an objective justification on the ground of efficiency contrary to the DMA (and that is why R.Podzun for instance thinks that 19a is competition law and the DMA isn't), besides, the obligations in 19a cannot be updated, contrary to the DMA. There are indeed similarities between these two instruments, and, in my opinion, it will be complex to articulate these two texts, especially since *« the Bundeskartellamt has already initiated proceedings against Amazon[109], Apple[110], Facebook[111], and Google[112] on this basis »*[113].

B) Interim measures: an alternative solution?

There is a very interesting solution which is a particularity of the French ADLC: interim measures. Certainly, the DMA mentions these measures within Article 22[114] but does not specify that these measures may be implemented by the national authorities. These conservatory measures are very interesting and could be, according to some practitioners, an alternative to DMA. This procedure is widely used in France and works very well. It is an urgent, contradictory procedure (between the complainant and the respondent) allowing the rapid intervention of the French ADLC in key sectors, in particular the digital sector[115]. What is the practical use of these precautionary measures? In a way, they allow for a "level playing field" in proceedings before the ADLC in order to act, subject to certain conditions, during a proceeding and thus take interim measures that are ancillary to the referral on the merits. In order to implement these measures, however, certain conditions must be met: a prima facie infringement (a condition found in Article 22 of the DMA), a serious attack on the complainant, the market concerned, the economy or consumers. Once the conditions are met, it is possible for the complaining party to request precautionary measures, but also the ADLC can be self-supporting. This prevents the situation from becoming irreversible during the

[108] Article 3.1 c) of the DMA.
[109] Bundeskartellamt, "Proceedings against Amazon based on new rules for large digital companies", 8th May, 2021
[110] Bundeskartellamt, "Proceeding against Apple based on new rules for large digital companies", 21 June 2021
[111] Bundeskartellamt, "First proceeding based on new rules for digital companies",28th January 2021
[112] Bundeskartellamt, "Proceeding against Google based on new rules for large digital players", 25th May 2021
[113] Op.cit. 101.
[114] Article 22 of the DMA.
[115] Discussion with Laurence BARY, French attorney in the law firm DECHERT, course on « The litigation procedure before the ADLC ».

duration of the investigation[116]. In addition, the decision ordering this precautionary measure does not constitute a finding of infringement of competition law (depending on the decision of the substantive investigation procedure)[117]. This measure is therefore very useful and effective, it was launched against Google in 2019[118]. As a result, one might think that this tool could be useful in order to act more quickly and overcome the slowness of competition law proceedings. These precautionary measures are adapted to the digital sector, since they can be taken quickly, do not require a decision establishing an anti-competitive offence. It is also very interesting to see that the EC has considered, in a way, the importance of this tool because it provides for this mechanism in the DMA, However, it would have been preferable to provide within this Article for an articulation with the national authorities.

SECTION II – AN UNCERTAIN ARTICULATION WITH OTHER EXISTING REGULATIONS

The question of the articulation of the DMA with other regulations is important. First of all, we have in mind the DSA, which was proposed on the same day as the DMA and deals with similar questions (§1), but also other regulations, firstly because the DMA refers to these regulations on several occasions. But also, because of the obligations of the companies covered by the DMA, it will be necessary to consider the burden imposed on companies by the DMA and by these other regulations and the impact of these numerous texts in practice for such undertakings (§2).

§ I - The required articulation of the DMA with the Digital Service Act

The DMA and the DSA are very similar and are both proposed on the same day, however, although these two texts use common mechanisms and have many similarities (A), the obligations contained in these regulations are different and, ultimately, the question of the articulation of these two regulations will have to be addressed (B).

A) DMA and DSA : two regulations for the same prepuce?

[116] Autorité de la concurrence, « les mesures conservatoires ».
[117] Op.cit.115.
[118] ADLC, Google ads's case, 19-MC-01, January 31 2019.

On 15 December 2020, the EC proposed the adoption of two texts: the DMA and the DSA, in order to regulate activities in the digital world. Margareth Vestager, Executive Vice President for a Digital Europe, said that *"both proposals serve the same purpose: to ensure that we, as users, have access to a wide choice of products and services online, in complete security. And that businesses operating in Europe can compete freely and fairly online just as they do offline. These are two sides of the same coin. We should be able to shop safely and trust the information we read. Because what is illegal offline is also illegal online"*[119]. However, these two regulations, although broadly pursuing a regulatory objective for the digital economy, must be distinguished. Firstly, it should be pointed out that the DMA and the DSA do not, strictly speaking, regulate the same players (one regulates the activities of GKs, companies that meet important thresholds), the other all companies that offer intermediary services to European users {in other words, those with their place of establishment or residence in the EU}[120]). However, without even mentioning them directly, as with the DMA, the EC is seeking to crack down on GAFAMs, precisely because the DSA regulates the activities of companies offering intermediary services such as social networks or search engines, and the larger the platforms, the greater the obligations. This immediately recalls the GAFAMs that are concerned by this text, with Facebook as a social network, Google as a search engine and Amazon as a marketplace.

In addition, the DMA seeks to limit the *"many advantages by which {GKs} can maintain a dominant position (...) {including through} unfair practices {such as} favoring their own services and products over those of the companies that use them, or {exploiting} the latter's data to compete with them"* [121]. While the DSA has a different objective, *"to curb the dissemination of illegal content {such as} incitement to hatred, harassment, child pornography, terrorist {content}..."*[122]. The DSA is, moreover, in line with the 2000 e-Commerce directive[123] . The penalties are also not the same, previously we looked at the penalties imposed for non-compliance by a GK in relation to the DMA, here in relation to the DSA *"each Member State would determine the applicable penalties up to a limit of 6% of the company's annual income or turnover"*[124], especially as for large platforms, the

[119] EC, press release, "Europe fit for the Digital Age: Commission proposes new rules for digital platforms", 15th December 2020.
[120] Article 1 of the DSA.
[121] Toutel'Europe.eu, Vincent Lequeux, « Numérique : que sont le DMA et le DSA, les projets européens de régulation d'internet ? », 2 février 2022.
[122] Idem.
[123] Op.cit. 11.
[124] Op.cit 121.

"Commission could itself monitor compliance with the legislation"[125], as it does for the DMA.

Once again, and through this text, the EC grants itself important prerogatives, notably *"through delegated acts {to adapt} and shape, as it sees fit, the scope of application of these two texts"*[126], in order to cover as many situations as possible. Furthermore, the DSA is based on an approach that would be unsuitable for the digital sector, like the DMA, in that the DSA, or rather the EC, does not take into account that the various activities that are repressed are fundamentally different and that it is not appropriate to apply the same rules to different business models. For example, a social networking service such as TikTok or Snapchat is not based on the same business model as Amazon's Marketplace and so there should be specific obligations tailored to each business, as for example the UK does. Indeed, the Digital Market Unit (DMU) only applies to the most powerful companies, with a *"strategic market status"*, "{these companies will be subject to legally binding codes of conduct, adapted to the activity of each company and intended to frame its *ex ante* behavior towards its competitors and users[127]. Although the DMA and DSA are ambitious texts, attempting to address important digital issues, it is regrettable that these texts face significant difficulties, both substantive and procedural.

B) Coordination between these regulations

Given that the DMA and the DSA do not, *a priori*, target the same actors, or at least do not have the same objectives, it should be possible to "combine" these two texts. How would this work in practice ?

We have already seen, in the previous sections, the various obligations imposed on GKs. The DSA here sets out various obligations regarding illegal content or transparency obligations. What is also interesting is that intermediation services will not be able to *"promote their own services on their devices or their search engine, for example, or exploit the data of business customers in order to compete more easily with them later on"*[128], this brings to mind Articles 6 1 a) and 6 1 d) of the DMA which prohibit GKs from *"using non-*

[125] Idem.
[126] Concurrences review, « DMA/DSA : l'Europe s'est-elle vraiment donné les moyens de ses ambitions ? », « Propos introductifs – DMA/DSA : Bien mais peut mieux faire », Pr. Daniel Fasquelle, n°2-2021.
[127] DG Trésor, « La régulation des grandes plate-formes numériques au Royaume-Uni », 25 janvier 2021.

[128] BDM, Estelle Raffin, « DMA, DSA : voici comment l'Europe va réguler les géants de la tech », 16 décembre 2020.

publicly available data generated by professional users" but also "to treat their services and products more favorably in the various rankings available"[129]. However, despite the similarities between these two texts, because the objective pursued is different, it is quite possible that a company such as Amazon, which would be qualified, for a specific activity, as a GK, would be subject to the obligations of the DMA but also of the DSA because it offers an intermediary service or has a marketplace used by a considerable number of European users.

§ II - Interaction and cross-referencing with other EU regulations due to the incompleteness of the DMA

The DMA refers, on several occasions, to other European regulations such as the P2B or the GDPR, thus showing the EC's desire to be able to place the DMA in a continuum with these regulations (A). The aims of these regulations, with the new DA for instance, are deeply linked and therefore companies that are subject to these regulations must pay attention to their articulation and to the respect of the various obligations referred to (B).

A) References to other regulation

Within the DMA, the EC has taken the opportunity to use a cross-referencing mechanism on several occasions. First of all, within Article 2 of the DMA on definitions, there are various references to other regulations *(see Part 1, Chapter I, Section I, §1 b)*, thus indicating the fact that this regulation must be able to be articulated with other European regulations, which are equally important, such as the P2B, for instance the notion of "online intermediation services" refers to the Article 2 (point 2) of the Regulation (EU) 2019/1150 (P2B). But also referral mechanisms is used towards regulation GDPR, for instance for the notion of "personal data" or "non-personal data" by reference of Article 4 of Regulation (EU) 2016/679, not to mention other references to other regulations. In addition to leading to a form of illegibility of the text, which is questionable from a legal point of view, these reference mechanisms are quite cumbersome. Thus, simply to read DMA one must have other regulations at hand and try to understand how all these regulations fit together, as they refer to each other.

B) A difficult articulation between regulations

[129] NextInpact, Marc Reese, « Le Digital Markets Act expliqué ligne par ligne ».

Over the last few years, a multitude of European regulations have been issued that relate, in one way or another, to the digital sector. For example, recently, the EC has proposed a new important text on data protection, after the GDPR or the DGA, the DA. Vestager said, on data control that *"it is a key digital principle that will help create a robust and fair data economy and guide the digital transformation by 2030"*[130]. The GAFAMs, which are the primary target companies of the DMA, are also dominant companies in the data market.

Besides, and still in the interests of transparency and fairness, the P2B regulation governing online intermediation service providers is also of considerable importance in this sector. There are also other regulations that could apply here, but the aim is not to draw up an exhaustive list, but to ask how to articulate these provisions? How can a company manage to comply with all these texts, respect all these obligations, without losing competitiveness or without changing its business model? Of course, from a legal point of view, the desire to regulate players in order to allow new companies to enter the market or to have a chance to compete with large companies is important. Moreover, all these instruments are the result of studies, and respond to important objectives, for example the DMA and DSA propose a solution for the protection of digital markets and services in order to ensure contestability and fairness or the possibility for the consumer to have access to a wide choice of products and services. Regarding the GDPR and the future DA, the former protects personal data of users and the latter industrial data of SMEs, or more precisely, *"{for} harmonis{ed} rules on fair access to and use of data*[131]*. Finally, the P2B Regulation promotes "fairness and transparency for professional users of online intermediation services"*[132].

In addition, the new DA will use the core concept of the DMA: the notion of GK. Indeed, the DA explains that *"it also complements the proposed {DMA}, which will require certain core platform service providers identified as 'gatekeepers' to ensure, among other things, more effective portability of data generated by business and end-user activities"*[133]. Indeed, in this regulation, the DMA is mentioned several times, but more importantly, there are specific obligations for undertakings designated as GKs under the DMA. Article 5 of the DA states, inter alia, that *"any undertaking providing core platform services for which one or more such services have been designated as a gatekeeper in accordance with Article [...] of*

[130] EC, press release, "Data Act: Commission proposes measures for a fair and innovative data", Brussels, 23 February 2022.
[131] EC, Data Act, 23 February 2022
[132] 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
[133] Op.cit. 131.

the [DMA], is not an eligible third party under this section and shall not therefore {for example} solicit or commercially induce a user in any way (...) to make available to any of its services data which the user has obtained (...)"[134]. There are three prohibitions for a GK in this article, but also Article 6 of the DA gives another obligation not to do: *"the third party shall not (...) make data available in receivers to an undertaking providing basic services in respect of which one or more such services have been designated as a {GK} in accordance with Article (...) of the {DMA}"*[135]. In other words, undertakings designated as GKs in the DMA will have to comply with other obligations in other regulations, as for instance the DA. There is now a plethora of regulatory instruments concerning digital, and companies will have to be increasingly careful (*especially DPOs*) to articulate at least all the obligations incumbent on them. All these regulations should be analyzed *as "a set aimed at defining a new order of constraint in the digital markets"*[136]. However, one may wonder whether so many directly applicable instruments (regulations) are useful? Is there not a risk that this pluralism of regulations and rules will make their coordination and understanding complex? As the DMA has not yet entered into force, its articulation with the regulations mentioned remains to be seen...

[134] Article 5 of the DA.
[135] Article 6 of the DA.
[136] Dalloz, Maître Fayrouze Masmi-Dazi, « Droits voisins, DSA, DMA : innovant, le nouvel ordre de contrainte européen sera-t'il efficace ? », 8 janvier 2021.

Conclusion

This regulation, which was intended to be an effective solution to the problems that have been emerging for several years in the digital markets, is in fact causing major difficulties that will inexorably affect the implementation of this text. The ambitious objective of ensuring contestability and fairness within these markets, the desire to prevent the abuses of GKs and to overcome the difficulties of competition law, or the desire to allow the emergence of large European companies that can compete with the GAFAMs... All these noble objectives could hardly be achieved in the light of the DMA.

From a legal and economic point of view, and as most of the doctrine underlines it, this regulation would not be up to its requirements and cannot be an effective solution to the problems it aims at. On the contrary, it raises numerous problems, both on a substantive and procedural level, as analyzed throughout this report. The very construction of the text is problematic, in that it lacks of "*backbone and substance*"[137], the concepts are not well explained, the notions are not clear, leaving a lot of room for interpretation, and on this one particular point, this text should lead to major litigation (especially on the criteria for the qualification of GK). Also, the obligations drawn from detailed solutions will surely be redefined and readapted during case law, thus making the text even more complex to understand, and the burden of obligations on the GKs even greater.

Moreover, these same obligations and more generally this single model proposed by the DMA, with an asymmetrical approach, is not adapted, as explained during the developments, to the various economic models. This is what some of the players targeted by this regulation deplore, in particular Apple, which is "*concerned about certain provisions that will create unnecessary privacy and security vulnerabilities for our users, while others will prohibit us from charging for the intellectual property in which we invest heavily*". But also, Google, as one of the company's spokespersons put it: "*while we support many of the DMA's ambitions*

[137] Pr. D.Bosco, op.cit. 21.

on consumer choice and interoperability, we remain concerned about the potential risks to innovation and choice for Europeans"[138].

Finally, the numerous problems on a processual aspect will limit the implementation of the DMA, or even prevent it, notably by the fact that the EC concentrates far too many prerogatives on the basis of this text and will be very quickly overwhelmed. Besides, there is a real issue of articulation of the DMA with the other instruments and regulations mentioned, which also raise other important questions concerning the cumulation of sanctions and the infringement of fundamental rights.

Of course, as mentioned in the introduction, this report has not exhaustively listed all current and future problems related to the DMA. Article 12 of the DMA concerning the obligation for GKs to notify any concentration (or intention to do so) could have been mentioned, and it would have been interesting to compare this article with the new interpretation of Article 22 of Regulation 1/2003. Although this new interpretation is not unanimously supported by the doctrine. Indeed, the EC, by providing for this Article 12, is also trying to provide a response to a very important and topical problem, namely that of killer-acquisitions. Here again, it is a question of providing for an articulation with the pre-existing rules in European law as well as in national law.

When the DMA comes into force, it remains to be ascertained whether these issues will actually prevent its effective implementation. Moreover, the date of its entry into force remains uncertain. Furthermore, due to the current political context (war in Ukraine), it is feared that the entry into force of the DMA will be delayed, even though this was the primary objective of the French Presidency within the Council. After the recent political agreement of 25 March between the Council and the Parliament, all that remains is to wait for the adoption of the text, "*the party {will be soon} over*" for the GKs[139].

[138] Le Monde et AFP, « L'Union européenne va mieux encadrer les géants du numérique », 25 mars 2022.
[139] Op.cit. 21.

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