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Table of Contents

List of Abbreviations

BKartA	German Competition Authority
CALERA	'Competition and Antitrust Law Enforcement Reform Act'
CJEU / ECJ	Court of Justice of the European Union
CMA	Competition and Markets Authority (UK)
DMA	Digital Markets Act
DMU	Digital Markets Unit (UK)
DOJ	Department of Justice (US)
EC	European Commission
EU	European Union
FTC	Federal Trade Commission (US)
GDPR	General Data Protection Regulation
GMS	Google Mobile Services
GWB	German Competition Act
G7	Group of 7
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
R&D	Research and Development
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States of America

Introduction

The European Union (EU) is an economic and monetary union with the essential elements of a single integrated market across 27 States cultivated by the four freedoms of movement. Due to this factor, a significant focus of the EU legislator and the European Commission is the protection of consumers from competition-related issues that may potentially have harmful effects through competition law. In recent years, European competition policy has transformed, and this focus has shifted from the 'physical' market to the 'digital' market, with the notable introduction of Regulation 2022/1925, also called the 'Digital Markets Act' (hereinafter referred to as DMA or the Regulation) in September 2022.[1] The digital economy plays a significant role as being an innovative and dynamic sector with high rates of growth.[2] The introduction of this *sui generis* competition law tool comes during a period where 'big tech giants' such as Amazon, Meta, Google, Apple and Microsoft are dominating the digital market which creates new threats for consumers.[3]

The EU has had the increasing realisation that the traditional competition Articles 101 and 102 in the Treaty on the Functioning of the European Union (TFEU) are insufficient tools to tackle these new competition issues.[4] A crucial reason for this is their '*ex-post*' nature, which required harmful competitive practices to have already taken place for them to be legally triggered. However, due to the niche characteristics and nature of the digital market, it became clear that a more modern '*ex-ante'* tool could be more appropriate to ensure fairness and contestability.[5] Notwithstanding this, the DMA introduces a regime with self-executing obligations and prohibitions, that can in itself cause economic and market damages due to a lack of economic considerations. In connection with this, an issue that could greatly impact the effect and efficiency of this legislation is its lack of consideration for pro-competitive effects and

[1] Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 202/1828 (Digital Markets Act) [2022] OJ L265/1; Dietrich Michael and Vinje Thomas, 'The European Commission's Proposal for a Digital Markets Act — In Search of a 'golden Standard' for Appropriate Ex Ante Regulation of Large Digital Players' (2021) 22 33, 33.

[2] Gianluca, *'Antitrust Law in Digital Markets'* in Maria Rosaria Mauro and Federico Pernazza (eds), State and Enterprise (Springer International Publishing 2023), 308.

[3] Stylianou Konstantinos and Iacovides Marios, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42 Legal Studies 620, 621; Nicoli Nicholas and Iosifidis Petro, 'EU Digital Economy Competition Policy: From Ex-Post to Ex-Ante. The Case of Alphabet, Amazon, Apple, and Meta' (2023) 8 Global Media and China 24

[4] Ibáñez Colomo Pablo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12 Journal of European Competition Law & Practice 561, 561; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1 (TFEU), Arts 101-102.

[5] Deutscher Elias, 'Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust' (2022) 67 The Antitrust Bulletin 302, 302-303; Dietrich et al (n1) 33.

countervailing efficiency justifications.[6] While the scope of the regulation is limited in the sense that it only applies to identified 'gatekeepers' it can contribute to completely transforming business models, structure and organisation of the digital economy.

The purpose of this thesis is to analyse the DMA in the context of its new approach, more specifically, the shift from an effects-based approach through the removal of the 'efficiency defence' as the regulation no longer allows for a pro-competitive effects analysis - a change that can bring about its own impacts. Therefore, this thesis investigates the principal research question of *'To what extent will the exclusion of objective justifications in the Digital Markets Act impact the structure of competition in the digital economy in the European Union?'*. Further sub-questions that are addressed pertain to the role of the efficiency defence in competition law, the analysis of jurisprudence and approach of the Court of Justice of the European Union (CJEU), the approach of other jurisdictions, the economic weakness of the regime and costs of shifting from an effects-based analysis as well as recommendations for improvement. The thesis will be structured accordingly, focusing on addressing the principal legal question through the listed sub-questions which will identify the potential factors that this new regulation could impact. There will be extensive focus placed on the 'efficiency defence' in the context of innovation, consumer welfare and market efficiency, by analysing the legal aspects from an economic lens.

The methodology executed for this thesis was research based on a doctrinal research methodology combined with a legal positivist approach and a critical perspective towards the legal issue. These research methods have been chosen as there are two sides to the research topic - the creation of a new legal system to govern digital competition law, alongside the practical applications of the law and the failures a lack of an 'efficiency defence' might induce. A variety of sources were consulted regarding this topic, such as reports of national and EU competition authorities, existing relevant case law and legislation from national and the European legal system. Furthermore, academic journal articles and books are consulted to provide a more balanced perspective and aid in interpreting laws. Additionally, a minor legal comparative aspect was also conducted, as by looking at the interpretation and application of laws in other jurisdictions, the legal issues and solutions are more identifiable in the EU context.

[6] Colangelo Giuseppe, 'DMA Begins' (2023) 00 Journal of Antitrust Enforcement 1, 7.

As the DMA is a new officially published piece of legislation, it is currently a novel topic in the field of competition law in the digital market. It is essentially an area that the European Union itself is still currently trying to legislate adequately and properly. Therefore, it is considered to be an area where there is a gap in extensive research and analysis, especially in the consideration of the possible 'defences' allowed under the new legal regime. The hypothesis discussed in this thesis is that the removal of an efficiency justification will provide for greater problems for competition in the digital market due to the nuances of the digital market. Careful consideration is required when introducing legislation, otherwise, it can lead to larger error costs and to misregulation. If no efficiency defence or pro-competition effects are included in the DMA regime, then the 'catch-all' regulation will have difficulty reaching its desired success. It is expected that the results of the research, comparative analysis and critical review of past jurisprudence will prove to show the vital role that the consideration of efficiencies plays in competition law in the digital market.

Section 1 - Competition Law in the Digital Market

This section serves as a foundation for analysing the role of competition law in the EU digital market, the peculiarities of which the traditional competition law tools were not developed to adequately deal with. Therefore, the role that legislation plays in this field is different from the 'physical' market. The section will look at the traditional competition law tools, the role of the efficiency defence and the new regime established under the Digital Markets Act.

Section 1.1 Digital Economy Context

In the context of the internal market, competition law exists in theory to protect the four freedoms of movement.[7] However, there are no clear statutory objectives for EU competition law, besides Art 3§3 TEU which enumerates the objectives of "*sustainable development, economic growth, price stability, competitive market economy"*.[8] Title VII of the TFEU governs competition law, with Articles 101-102 TFEU being the base legal tools available to deal with anti-competitive behaviour, such as prohibited practices and abuse of dominant positions on the market.[9] Through reverse engineering, it can be deduced from the existing jurisprudence, that competition law has several aims such as consumer protection, the efficient

[7] Stylianou and Iacovides (n3) 622.
[8] Consolidated version of the Treaty on European Union [2012] OJ C326/13, Art 3(3).
[9] TFEU (n4) Title VII.

use of resources, overall welfare protection as well as maintaining fair competition in the internal market for businesses.[10]

On the other hand, these goals can operate in parallel or be in conflict with each other, especially in the digital market. This is a rapidly changing and innovative world, which constantly creates new business opportunities for companies to compete and reach consumers. However, the rise of technology companies' dominance in the digital market has called for a reevaluation of the role of competition law, where many academics have concluded that in the digital framework, existing competition rules are unable to operate.[11] For example, situations can arise where competition law would seek to protect smaller - but inefficient - firms which can hamper innovation and be a misuse of resources. Due to the special characteristics of the environment, the European Union and thereby also national competition authorities, do not have the most adequate tools available to create a fair market. Hence, the conclusion can be drawn that a priority needs to be established in terms of the goals of fair competition in the digital market.

To be able to understand the relationship between competition and digitisation, it is important to assess the key qualities of the digital economy. Firstly, the digital market provides excessive returns for undertakings, as the costs of producing online platforms or digital services in relation to the number of consumers that are reached are significantly low.[12] These returns to scale are done on an extreme level in the digital world which offers increasingly advantageous positions for dominant firms.[13] For example, one of the advantages is that they can further invest and develop the quality of their products which will continue to attract users and raise the barriers to entry for newer firms.[14] In connection to this, another key characteristic is the existence of positive network externalities that stem from the 'network effect'.[15] This essentially refers to the benefits in quality of a platform or service with relation to the increase

[10] Stylianou and Iacovides (n3) 621; Nicoli and Iosifidis (n3) 26.
[11] Crémer Jacques, Montjoye Yves-Alexandre and Schweitzer Heike, 'Competition Policy for the Digital Era.' (European Commission Directorate General for Competition 2019) <https://data.europa.eu/doi/10.2763/407537> accessed 11 March 2023, 2.
[12] Crémer et al (n11) 2; Bentata Pierre 'Regulating "Gatekeepers": Predictable "Unintended Consequences" of the DMA for Users' Welfare' [2021] Social Science Research Network 1,1.
[13] Contaldi Gianluca, 'Antitrust Law in Digital Markets' in Maria Rosaria Mauro and Federico Pernazza (eds), State and Enterprise (Springer International Publishing 2023) 309.
[14] Crémer et al (n11) 19-20.
[15] Contaldi (n13) 309

in its users due to the intuitive system of the digital world.[16] The more consumers use a service the more valuable it becomes, which means that platforms can link together all of the services that they offer and gain market power.[17] This is a significant competitive advantage, as new firms cannot simply introduce a 'better and cheaper' product onto the digital market - its value will be decided by the number of users it acquires.[18] In terms of the consumers, this introduces another key factor in the digital economy, which is data as an 'economic resource'. The General Data Protection Regulation (GDPR) has identified the personal data of consumers as an economic legitimate interest.[19] This indicates that firms/platforms with access to large data pools can store and use them to develop their products and services, which thereby establishes data as a significant barrier to entry and solidifies the undertaking's position on the market.

To put these characteristics into perspective, Google can be taken as an example of benefitting from these advantages in the digital economy, as it is one of the primary platforms used by consumers on the internet.[20] Google is a company with multiple different services and product markets, such as Google Chrome, Google Drive, and Google Search, which are linked to each other and hence help to develop the services. Advancements made on one market of Google, due to the high number of users, transfer into progress on another market of the company as they exchange data obtained from users. The personal data of users is a shared resource across the 'Google Ecosystem', which can be utilised to improve their products from the high levels of returns that they obtain in relation to their costs.[21] This continues to support and increase the market power of Google in the digital economy and continues to benefit from its key characteristics.

Therefore, from a competition law lens, the characteristics of the digital economy have transformed the market into an oligopolistic structure with a handful of key and large players.[22] The existence of these companies across various markets constitutes as barriers to entry for

[16] Crémer et al (n11) 2; Bentata (n12) 2.
[17] Contaldi (n13) 309.
[18] Peter J van de Waerdt, 'From Monocle to Spectacles: Competition for Data and "Data Ecosystem Building"' [2023] European Competition Journal 1, 2.
[19] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1, Art 6(f); Crémer et al (n11) 2.
[20] van de Waerdt (n18) 7.
[21] ibid.
[22] Contaldi (n13) 309-310.

smaller firms, particularly with the presence of ecosystems and multi-sided platforms.[23] The EU has identified this sector as a market where contestability needs to be improved, as the current structure contributes to slowing down technological innovation by deterring smaller businesses.[24] Section 5.5 will further discuss the role that ecosystems play within the new framework of the DMA.

Section 1.2 Issues with Arts 101-102 TFEU

'Traditional' competition law brings about its challenges in the digital economy, as that is not a market with 'traditional competition', as explained in the previous section.[25] This indicates that a different genre of market failures materialize in the digital economy.[26] In light of this, it should be established who are the most 'vulnerable' stakeholders in the digital internal market as it is a different playing field. This doesn't necessarily indicate that the fundamental values of competition law need to be reconsidered, instead that they need to be adapted to the different needs of the market. As this is an area widely characterised by dominant firms that control a large percentage of internet traffic, it can be concluded that consumers are generally at risk.[27] While dominance in itself is not necessarily an 'abuse' of market position, it creates an environment that can give rise to exploitation. Traditional abuse of dominance can generally be done through pricing strategies, however, the digital world is a 'zero-price market', instead consumers potentially 'pay' with their data or by losing out on having a range of choices as platforms will attempt to maintain a sphere of exclusivity.[28] On the other hand, this introduces another vulnerable party, which is smaller businesses that attempt to enter or operate on the digital market.[29] As large platforms try to introduce new business strategies to expand their reach to consumers, other businesses face exclusionary abuse which in turn limits the competition in the market.[30] Therefore, not only are consumers facing the adverse effects of

[23] Deutscher (n5) 312.
[24] Contaldi (n13) 310.
[25] Crémer et al (n11) 19.
[26] Botta Marco, 'Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila' (2021) 12 Journal of European Competition Law & Practice 500, 501.
[27] Dietrich Michael and Vinje Thomas, 'The European Commission's Proposal for a Digital Markets Act — In Search of a 'golden Standard' for Appropriate Ex Ante Regulation of Large Digital Players' (2021) 22 33, 34 ; 'Competition Law and Regulation in Digital Markets' (APEC Competition Policy and Law Group 2022) <https://www.apec.org/docs/default-source/publications/2022/3/competition-law-and-regulation-in-digital-markets/222_cplg_competition-law-and-regulation-in-digital-markets.pdf?sfvrsn=6b8748de_2>, 31.
[28] European Commission, Directorate-General for Communications Networks, Content and Technology, Sunderland, J., Herrera, F., Esteves, S.et al., 'Digital Markets Act – Impact assessment support study: executive summary and synthesis report'(2020) Publications Office, 8; Contaldi (n13) 314; Nicoli and Iosifidis (n3) 28.
[29] Botta (n26) 502.
[30] Impact Assessment Study (n28) 8.

high levels of dominance but so are other undertakings that are blocked from operating fairly. In the digital economy, competition between undertakings occurs on the basis of the quality of services/goods offered which is guaranteed by the number of users, thereby diverging from traditional markets.[31] Considering these factors, it is evident that the existing competition law tools need to be modified in the EU for the digital internal market.

There has been an extensive amount of case law concerning the EU enforcing competition law standards in the digital field against big tech companies such as Microsoft and Google.[32] Nonetheless, a main issue has been the wording and functioning of Articles 101-102 have created a system whereby competition authorities can act *ex-post* on anti-competitive behaviour following an assessment of the case at hand.[33] This represents a unique challenge in the digital world, as *ex-post* remedies can be rendered relatively futile due to their fast-paced operation.[34] The *ex-post* nature of traditional competition law creates an environment where the law and the market are operating on completely distinct timelines leaving a vacuum for consumer protection.[35] Essentially, even if the European Commission or the Court of Justice concluded that there has been an abuse of dominance, it could be too late to undo the damage that has already been done. These reasons have been taken into consideration when arguing for the need for a more appropriate legislative tool to tackle competition in the digital economy, perhaps by a sector regulation.[36]

Another important factor that limits their efficient functioning is the identification of the 'relevant markets' in which large and diversified companies operate, especially in the context of multi-sided online platforms like Google.[37] In defining the relevant markets, the Commission has generally implemented the practice of analysing either the upstream or the downstream markets of these companies, which can lead to an incomplete image of the

[31] Contaldi (n13) 314.
[32] Case T-612/17 *Google and Alphabet v Commission* [2021] OJ C 369 (Google Shopping); Case T-201/04 *Microsoft Corp. v Commission of the European Communitie*s [2007] ECR II-03601 (Microsoft).
[33] Eifert Martin and others, 'Taming the Giants: The DMA/DSA Package' [2021] Common Market Law Review 987, 1003; Colangelo (n6) 1; Ibañez Colomo Draft DMA (n4) 566; Antel Joseph and others, 'Effective Competition in Digital Platform Markets: Legislative and Enforcement Trends in the EU and US' (2022) 6 European Competition and Regulatory Law Review (CoRe) 35.
[34] Crémer et al (n11) 3-4; APEC (n27) 35; Colangelo (n6) 6.
[35] Cabral Luis MB and others, 'The EU Digital Markets Act: A Report from a Panel of Economic Experts' (2021) European Commission, Joint Research Centre 3783436 <https://papers.ssrn.com/abstract=3783436> accessed 8 March 2023, 6; Botta (n26) 501; Contaldi (n13) 315.
[36] Botta (n26) 501; Ibañez Colomo Draft DMA (n4) 562.
[37] Botta (n26) 503.

competitive field of the platform.[38] For example, Facebook may be a social media service, but it also operates in the advertising market - therefore, simply analysing the impacts of its advertising conduct disregards important factors as it is a dominant social media platform as well. Online platforms by definition operate on more than one market, hence in terms of past attempts at Platform-to-Business regulation, there have been instances of misjudgement which have the potential to increase the scope of influence of undertakings. This indicates that market definition should entail less emphasis, rather the focus should be on where anti-competitive strategies are being introduced.[39]

These presented issues serve to demonstrate some key areas which have led to the conclusion that a competition policy for the digital era needs to be developed on an EU level to address these deficits.[40] There are other factors to consider with regard to Articles 101-102 TFEU in the digital economy, but that is outside the scope of this thesis. The following section will introduce the EU's response to dealing with the competitive challenges of the digital economy, which is the Digital Markets Act.

Section 1.3 Digital Markets Act

In light of these identified challenges, the Digital Markets Act was introduced by the EU legislators to regulate the behaviour of online platforms in a manner to ensure a level playing field for smaller businesses and thereby also protect consumers. This is a regulation introduced based on Article 114 TFEU, therefore it is not 'competition law' in the strict sense, but rather sector-specific legislation aiming to regulate the internal market.[41] It entered into force in November 2022, however, its full applicability is set to be from March 2024 to allow for a period of transition for companies that fall within its scope. When looking at the Recitals of the Regulation, it is stated that it was introduced with the aims of fairness and contestability, which are objectives that differ from the traditional safeguarding of the competitive process.[42]

[38] Crémer et al (n11) 3-4.
[39] ibid.
[40] Eifert et al (n33) 1003.
[41] Contaldi (n13) 316; TFEU (n4) Art 114; Dietrich et al (n1) 34; Diez Fernanda Estella, 'The DMA: A New Regulation for – or Against – Digital Markets in the EU?' [2023] SSRN Electronic Journal <https://www.ssrn.com/abstract=4321589> accessed 18 April 2023, 6.
[42] Ibáñez Colomo Pablo, 'New Times for Competition Policy in Europe: The Challenge of Digital Markets' (2021) 12 Journal of European Competition Law & Practice 491, 491; Eifert et al (n33) 1003; Contaldi (n13) 317.

The main objective, as cited in the DMA's proposal, is to address the *"inefficient outcomes in the digital sector in terms of higher prices, lower quality, as well as less choice and innovation to the detriment of European consumers"*.[43] While the EU recognised the developments made in efficiency and effectiveness in the digital economy, it was also acknowledged that a handful of large platform companies dominated the digital market.[44] These undertakings have 'entrenched and durable' positions on the market that raise the barriers to entry and prevent new firms from competing, regardless if their product is more innovative.[45] Furthermore, as digital competition law case law has been developing across member states with their National Competition Law Authorities, there has been fragmentation across the internal market. These are divergences that the DMA aims to resolve by introducing harmonised rules for the digital market.[46]

In the legal sphere, Article 1 defines the scope of the Regulation with regard to other competition law tools, stating for example that it is without prejudice to the application of Articles 101 and 102 TFEU.[47] To expand upon this, it is stated that while the DMA operates in a complementary manner to existing competition law, it aims to 'protect a different legal interest' which entails maintaining fair competition in markets where gatekeepers are present.[48] Hence, while Articles 101-102 TFEU are still functional for the digital market when it comes to gatekeepers the DMA will be the primary legal instrument.[49]

Section 1.3.1 New Legal Category - 'Gatekeepers'

The DMA completely changes the approach of competition law to digital markets by introducing a new regime based on the category of 'gatekeepers' that must comply with harmonised rules and obligations. Article 2 in conjunction with Article 3 of the DMA defines the parameters of this category, explaining that a gatekeeper is essentially an 'influential' company that provides a 'core platform service' with a significant impact on the digital market. Article 2(2) contains the exhaustive list of core platform services such as search engines and

[43] Proposal 2020/0374(COD) for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM/2020/842 (DMA Proposal), Section 1.
[44] Ibañez Colomo Draft DMA (n4) 561; Dietrich et al (n1) 34.
[45] Chirico Filomena, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 Journal of European Competition Law & Practice 493, 494.
[46] Digital Markets Act (n1) Art 1(5).
[47] ibid Art 1(6) .
[48] ibid Recital 11; Chirico (n45) 495; Eifert et al (n33) 1003.
[49] Ibañez Colomo Draft DMA (n4) 566-567.

web browsers, with definitions stemming from existing EU legislation but also newly created within the DMA. An undertaking can fall under this category without the need to establish a 'dominant position' as it is decided based on turnover, end-user and durability thresholds in Article 3(1-2) DMA. While the Commission has not yet identified which companies will be captured, as per this broad definition, this Regulation seems to regulate the big-tech companies such as Google, Amazon, Meta and Microsoft due to their large control over platforms and increasingly dominant positions which prevent new competitors from entering the market.

This thereby removes the previous approach of the EC centred around market definition and market power tests on a case-by-case basis, as conduct would already be prohibited simply based on the undertaking's status as a gatekeeper.[50] This element significantly reduces the time factor in deciding competition law cases under the traditional Arts 101-102 TFEU scheme, as it accelerates the process of enforcement.[51] Under the new framework, the gatekeeper status is a rebuttable assumption, hence companies that fall under the quantitative thresholds can attempt to argue against this label. However, the Commission is also empowered to identify companies as gatekeepers who do not meet the thresholds set and can identify new core platform services besides the ones defined.[52] This indicates a large margin of discretion available to the Commission within the DMA framework, which can also potentially raise questions in terms of the principle of proportionality, as will be discussed throughout the thesis.

Section 1.3.2 Prohibited Conduct and Obligations

Once an undertaking is designated as a gatekeeper, Articles 5 and 6 of the DMA deal with the new applicable obligations and prohibited conduct, containing positive and negative obligations. There are newly introduced interoperability obligations for communication applications in Article 7, however, that is outside the scope of this thesis.

Scholars have grouped these obligations into a range of classifications, such as general unfair conduct in the digital market, transparency in data access and interoperability, and the role of

[50] Petit Nicolas, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12 Journal of European Competition Law & Practice 529, 530-532; Colangelo (n6) 1; Cremer Jacques, Dinielli David, Paul Heidhues, Gene Kimmelman, Monti Giorgio, Podszun Rupprecht, Schnitzer Monika, Morton Fiona Scott, Alexandre de Streel, 'Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust' 1, 6.
[51] Botta (n26) 503.
[52] Digital Markets Act (n1) Art 19.

gatekeepers in providing platforms and services.[53] The obligations contained in Article 5 are self-executing and are *de facto* prohibited. Hence, there is no consideration of the effects of the provisions, as it is presupposed that the defined conduct has significant costs that reduce the fairness and contestability in digital markets.[54] On the other hand, the provisions contained in Article 6 are also directly applicable but 'subject to further specification'. This is done according to a 'regulatory dialogue' described in Article 8, indicating that these obligations have the possibility to be addressed more specifically on a case-by-case basis for the conduct of individual gatekeepers. However, it is important to note that this mechanism does not offer much flexibility in itself, as it is at the discretion of the Commission whether to engage in such a dialogue with gatekeepers.[55] In light of the EC's discretion, Article 10 is also of relevance, as it allows the Commission to introduce new obligations for gatekeepers should there be conduct that is identified as going against the objectives of the Regulation. This indicates that if the Commission comes to the conclusion that certain practices threaten the contestability of markets or create an imbalance of power *vis-a-vis* end-users, that conduct may be identified as being prohibited.

The functioning of Article 102 TFEU allowed the Commission to spread its application to new digital abuses such as 'tying and bundling' and 'favouring and demoting'. However, through the negative obligations, the DMA directly codifies types of abuses that have been identified as 'harmful' through the culmination of cases brought before the Court of Justice.[56] This includes, among others, the prohibition of self-preferencing identified as 'favouring and demoting' in the *Google Shopping* case, the prohibition of the usage of 'most favoured nation' clauses stemming from the case of *Booking.com* and the obligation to allow consumers to remove pre-installed apps originating from the *Google Android* case.[57] In Section 2 of this thesis, these prohibited conduct will be analysed more in-depth, particularly against their pro-competitive effects as assessed by the CJEU.

[53] Chirico (n45) 495.
[54] Petit DMA review (n50) 538; Cabral et al (n35) 10.
[55] Alexiadis Peter and de Streel Alexandre, 'The EU's Digital Markets Act: Opportunities and Challenges Ahead' (2022) 23 40, 181-182.
[56] Petit DMA review (n50) 532 ; Chirico (n45) 495 ; Eifert et al (n33) 996.
[57] Google Shopping Case (n32); *Google Android* (Case AT.4009) Commission Decision 2019/C 402/08 [2018] OJ C 402/19 (Google Android); Case C-59/19 *Wikingerhof GmbH & Co. KG v Booking.com BV* [2020] ECLI:EU:C:2020:950; Botta (n26) 504.

Section 1.3.3 Exemptions allowed under the new regime

In terms of exemptions, Articles 9 and 10 of the DMA provide conditions under which a gatekeeper can have certain obligations suspended or exempted in whole or in part. Firstly, Article 9 states that a gatekeeper may provide a *reasoned* request for the suspension of an obligation contained in Articles 5-6. Such a suspension is possible when a gatekeeper can demonstrate that following a certain obligation would jeopardise the economic viability of the undertaking's operation within the EU. Therefore, the Commission may grant a suspension decision for a certain obligation, to deal with the threat to the undertaking's viability.[58] However, this provision has a limited scope, as it applies to threats that are 'exceptional circumstances' beyond the gatekeeper's control, hence it is not considered on a purely economic basis. This is classified as being, for example, an 'external shock' which removes a large portion of consumers for a certain gatekeeper, and therefore following a certain obligation endangers their 'survival' in the market.[59]

The second exception is covered in Article 10, which is linked to "overriding reasons of public interest" that may provide for an exemption from a specific obligation upon request or upon the initiative of the Commission itself. The exhaustive list of public interest grounds is provided in Article 10(3), citing public health and security. This is introduced in circumstances where these public interests are negatively impacted by certain obligations, thereby leading to a situation where compliance would have excessive costs to society and would therefore be disproportionate.[60]

Hence, in the new framework established by the Digital Markets Act, there are only public interest and limited economic viability justifications allowed for undertakings to engage in certain conduct, thereby removing the role of an 'efficiency defence'.[61] As stated in Recitals 66-67 of the DMA, these exceptions are included to comply with the principle of proportionality and are assessed to maintain a balance between the private interest and the objectives of the Regulation. However, it can be argued that the lack of an ability to provide economic and pro-competitive justifications is a violation of the principle of proportionality

[58] Alexiadis and de Streel (n55) 184.
[59] Digital Markets Act (n1) Recital 66.
[60] ibid Recital 60; Alexiadis and de Streel (n55) 184.
[61] Colangelo (n6) 2.

itself. The next section of this thesis aims to analyse the significance of considering an additional exemption in terms of 'pro-competitive effects' or an 'efficiency defence'.

Section 2 - Analysis of Jurisprudence

Based on the established qualitative and quantitative thresholds established for gatekeeper status, it is clear that significant companies such as Google, Meta, Microsoft, Amazon and potentially Apple will be impacted. Hence, this section serves to analyse past CJEU jurisprudence dealing with newly-prohibited conduct and the role of efficiency considerations. This is crucial to better understand the practical effects of the shift to *ex-ante* 'one-size-fits-all' obligations can have on the digital market.

Section 2.1 Consideration and assessment of pro-competitive effects

In the context of competition law, pro-competitive effects are a significant aspect of this legal field, as they refer to the positive outcomes that result from certain competitive practices, such as lower costs, increased efficiency in the use of resources and greater choice for consumers. Many scholars have identified the concepts of consumer welfare and efficiency to be synonymous terms, connecting the two standards as a joined goal of competition law.[62] As mentioned in Art 3§3 TEU, in the context of the internal market, it is also important to "*promote scientific and technological advancement"* which also presupposes the protection of innovation. These effects work in parallel with the goals of competition law and are important to take into account to balance potential harms to competition with the potential benefits that a certain business practice may bring.[63] Therefore, as can be seen in the case law of the Court of Justice and national competition authorities, these effects are considered to assess mergers, the conduct of dominant firms and certain business agreements to determine the extent of their anti-competitive nature.[64] By conducting these 'balancing tests', it ensures an appropriate application of competition law, as it prevents the over-restriction of legitimate business practices which can lead to growth, innovation and benefits to consumers.[65]

[62] Stylianou and Iacovides (n3) 624.
[63] Schneider Henrique, 'Digital Markets Act: Regulating Competition Regardless of Effects' [2022] 25 Jahre Kartellgesetz–ein kritischer Ausblick 157, 173; Ezrachi Ariel, 'The Goals of EU Competition Law and the Digital Economy' (The European Consumer Organisation 2018) 3191766 <https://www.beuc.eu/sites/default/files/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf>, 9-10.
[64] Ezrachi (n63) 9-10.
[65] ibid; Schneider (n63) 173.

In light of this, when looking at past EU case law dealing with digital companies, there is a visible trend in companies attempting to justify behaviour in the name of innovation through the possibility of 'objective justifications'. However, the DMA removes this system, as it introduces a general list of prohibitions, thereby moving from an effects-based approach to *per se* rules of conduct.[66] This can be found in Recital 11 of the DMA, which states that the rules of the regulation apply regardless of the "*actual, likely or presumed effects of the conduct".*[67] Therefore, there will be no case-by-case analysis or opportunities to defend conduct, as companies who are designated as gatekeepers must alter their business models to integrate the obligations listed in the DMA and comply with the rules therein.[68]

While this can be considered a valuable characteristic of this new regime, it is simultaneously an issue that could greatly impact the effect and efficiency of this legislation in its lack of consideration for countervailing efficiency justifications. This can prove to be problematic in future competition-law cases based on the DMA, as the regulation aims to 're-establish' contestability in the market but this disregards the nuance of the digital sector through its lack of flexibility.[69] It can be argued that providing the benefits of innovation in the digital market for consumers should be an important goal of competition law, therefore there should be a place for rules of reason to more efficiently identify pro-innovative and competitive conduct.[70] The rest of the section aims to present the importance of an 'efficiency defence' in the new digital competition law regime, through past jurisprudence, as it disregards the significance of innovation and the differentiation between harmful and potentially beneficial conduct.

Section 2.2 Role of pro-competitive effects in past case law

As mentioned, this section will focus on the role of pro-competitive effects, efficiencies and countervailing effects in past competition law jurisprudence. It is significant to assess, even on a general level, a cost-benefit analysis on the trade-off between the pursued aims of the DMA and the pursued aims of competition law. The analysis focuses on the potential opportunity cost and missed benefits of the prohibitions contained in the Digital Markets Act, such as innovation, consumer safety and product development.

[66] Petit DMA review (n50) 530; Eifert et al (n33) 996.
[67] Digital Markets Act (n1) Recital 11.
[68] Chirico (n45) 495.
[69] Eifert et al (n33) 996; Schneider (n63) 173.
[70] Portuese Aurelien, 'The Digital Markets Act: A Triumph of Regulation Over Innovation' [2022] INFORMATION TECHNOLOGY 1, 7; Schneider (n63) 174.

Section 2.2.1 Google Shopping case - Self-Preferencing

An obligation that may have repercussions is Article 6(5) of the DMA, which prohibits a gatekeeper from favouring their own services and products in rankings with similar services of a third party.[71] However, such conduct can lead to pro-competitive effects on the digital market such as benefits to consumers, increasing innovation and urging competition with other services on the market.[72] This can be analysed through the lens of the *Google Shopping* case, where the issue at hand was an update to Google Search that introduced the concept of self-favouring into EU competition law.[73]

Through the development of Google Search, when looking for certain articles, a Google Shopping tab - its own comparison shopping service - would appear at the top of the search results, followed by the rest of the results. The Commission issued a decision that found this conduct to be 'favouring' Google Shopping and 'demoting' other price comparison websites, thereby introducing a new type of abuse under Article 102 TFEU.[74] It was further clarified as an 'intrinsic' exclusionary practice and a discrimination in the access to the Google Search service.[75] Google attempted to defend this conduct with the justification of pro-competitive effects, namely an improvement of the product and increasing the reliability of results which benefits consumers.[76] This represents the existing effects-based approach in Article 102, which required the Commission to prove the negative effects of conduct for it to be termed 'abusive'.[77] In November 2021, the CJEU delivered their judgement on the Commission's decision, where they upheld the anti-competitive and abuse classification of Google's conduct.[78] However, this followed the theory that certain conduct can only be deemed abusive based on actual or potential effects on competition, which would impact the scope of application of Article 102

[71] Davies John and others, 'A Missed Opportunity: The European Union's New Powers over Digital Platforms' (2022) 67 The Antitrust Bulletin 504, 515; Digital Markets Act (n1) Art 6(5).
[72] Portuese (n70) 8; Cennamo Carmelo and others, 'Digital Platforms Regulation: An Innovation-Centric View of the EU's Digital Markets Act' [2022] Journal of European Competition Law & Practice 44, 44.
[73] Lindeboom Justin, 'Rules, Discretion, and Reasoning According to Law: A Dynamic-Positivist Perspective on Google Shopping' (2022) 13 Journal of European Competition Law & Practice 63, 63; Kontosakou Athena, 'European Antitrust Enforcement in the Digital Era: How It Started, How It's Going, and the Risks Lying Ahead' (2022) 67 The Antitrust Bulletin 522, 529.
[74] Lindeboom (n73) 64.
[75] Google Shopping Case (n32) 222-232; Lindeboom (n73) 66.
[76] Google Shopping Case (n32)518.
[77] Lindeboom (n73) 66.
[78] Ibáñez Colomo Pablo, 'Google Shopping: A Major Landmark in EU Competition Law and Policy' (2022) 13 Journal of European Competition Law & Practice 61, 61.

TFEU.[79] As this judgement was based on conduct not previously identified as potentially abusive, the assessment of the conduct was conducted based on traditional competition law merits-based reasoning.[80]

The judgement further emphasises the essential need to look at the economic rationale of this conduct to identify whether it would be breaching Article 102.[81] This indicates that while self-preferencing can be an abuse of dominance and affect the contestability of digital markets, such a determination is dependent on the consideration of the impacts on consumers as well as competition.[82] Furthermore, the EC bears the burden of proof to produce evidence that the conduct constitutes an infringement and violates the standard in Article 102 TFEU.[83] This approach would no longer be included in the DMA framework, as the conduct is pre-considered to be harmful, which shifts the burden of proof, therefore there would be no opportunity to introduce countervailing effects. However, there might be instances where gatekeepers are present in a dual role, as they may be intermediaries through their platforms but also provide goods and services as sellers. In such a situation, gatekeepers are competing with other market players and therefore would engage in preferential treatment of their own products.[84] It can be argued that the self-preferencing of gatekeepers should be subject to an assessment that takes into account the benefits to competition as well as innovation dynamics.[85] While prohibiting the favouring of gatekeeper services over smaller platforms can contribute to increased choice and contestability on the digital market, the non-discriminatory application of the rules removes the case-by-case effects analysis and bans conduct on a *prima facie* basis. Practices related to self-preferencing should instead be assessed, with opportunities to justify such conduct based on proven efficiencies, rather than treating it outright as a violation.[86]

Section 2.2.2 Microsoft - Tying and Bundling

Undertakings and gatekeepers integrate their services through 'tying and bundling', which is a method of either making the sale of one product conditional upon the purchase of another

[79] Ibañez Colomo Google Shopping (n78) 61.
[80] Lindeboom (n73) 70.
[81] Davies et al (n71) 507.
[82] ibid 508; Cennamo et al (n72) 44; Google Shopping Case (n32) paras 177–180.
[83] Lindeboom (n73) 66.
[84] Colangelo (n6) 2.
[85] Daviest et al (n71) 508.
[86] Lancieri Filippo and Pereira Neto Caio Mario S, 'Designing Remedies for Digital Markets: The Interplay Between Antitrust and Regulation' (2022) 18 Journal of Competition Law & Economics 613, 633.

product or where multiple products are offered together at a special rate.[87] Articles 5(7) and 5(8) of the DMA deal with the prohibitions upon gatekeepers to impose such requirements on end-users.

By imposing such a prohibition, the framework neglects the benefits to consumers from the integration of services and pro-competitive effects, such as the innovation produced by gatekeepers to improve their products.[88] This creates risks in the sense of ignoring all elements of the value creation system and business model that is utilised when linking together different products and services.[89] The prohibition of such conduct will arguably have severe impacts on innovation and the functioning of the digital economy, as it removes the benefits brought by the linking of services. For example, from an innovation perspective, tying together services provides methods where platforms can develop products and services by combining different markets. This also induces innovation spillovers, which provides opportunities for other developers or platforms to learn from these models and develop their own products accordingly.[90] Additionally, prohibiting such conduct will also block the 'attention spillovers' whereby one service creates engagement from consumers or businesses for another product, which creates additional engagements, interactions and business opportunities in the market.[91]

A landmark case relevant to this topic is the vertical leveraging of Microsoft tying its Windows operating system with the pre-installed Windows Media Player which was deemed as abusive conduct.[92] Microsoft put forward a variety of efficiency gains to objectively justify its conduct as outweighing the anti-competitive effects.[93] These arguments include - among others - distribution efficiencies and reduced transaction costs, improving the quality and coherence of the Windows operating system through product differentiation.[94] However, these were rejected by both the Commission and the Court mainly due to the high barriers for other competing media players to gain access to consumers. To look at the practical application of this prohibition in the DMA, many popular services including Microsoft can be considered. For example, Microsoft has a wide range of services that it provides in conjunction with each other

[87] Davies et al (n71) 507.
[88] Cennamo et al (n72) 2.
[89] ibid 3.
[90] ibid 5-6.
[91] ibid.
[92] Microsoft case (n32).
[93] *Microsoft* (Case COMP/C-3/37.792) Commission Decision 2007/53/EC [2004] OJ L 32/23, paras 955-970.
[94] ibid paras 955-970.

through its 'Office Suite', a cross-platform application used by consumers such as students and workplaces.[95] The integration of services in this suite contributes to adding value, supporting innovation and improving the quality of the services provided. Therefore, when Microsoft introduced Teams to their suite, from the perspective of the DMA this would constitute prohibited bundling.[96] It would be considered leveraging of market power and the benefits of such conduct would not even be taken into consideration, which threatens the viability of these digital platforms.[97]

A panel of economic experts produced a report analysing the Digital Markets Act within which they concluded that tying and bundling should be considered as conduct for which gatekeepers are able to present an efficiency defence.[98] The overall blunt prohibition of 'tying and bundling' removes the functioning of ecosystems in the digital market and removes significant opportunities for innovation and for value-creation.[99] Such a prohibition will artificially alter the market for such office suites, and will unfairly limit the gatekeepers while allowing smaller undertakings to do the same thereby reducing incentives to compete on merits.[100] Many existing markets and undertakings are dependent on the business model that integrates and links together services, thereby benefiting from the operation of the gatekeeper and its ecosystem.[101] The application of the relevant articles from the DMA without considering these efficiencies and pro-competitive factors is not in the best interest of consumers, businesses and developers.[102]

Section 2.2.3 Google Android Case - Tying and Bundling (pre-installed apps)

The effects of the obligations contained in Articles 6(3) and 6(5), but also of the DMA can be further analysed through the lens of the *Google Android* saga. This case essentially deals with Google's agreements in several markets where it enjoyed a dominant position relating to tying and exclusivity.[103] The Commission issued a decision, after years of conducting investigations,

[95] Davies et al (n71) 508.
[96] ibid.
[97] ibid.
[98] Cabral et al (n35) 3.
[99] Bentata (n12) 17.
[100] Davies et al (n71) 508.
[101] Cennamo et al (n72) 8.
[102] ibid 5-6; Colangelo (n6) 3.
[103] Höppner Thomas and Westerhoff Philipp, 'EU General Court Confirms Landmark Google Android Decision with Strong Signal for Tougher Antitrust Enforcement in Digital Ecosystems' [2022] SSRN Electronic Journal <https://www.ssrn.com/abstract=4219920> accessed 20 February 2023, 1.

that these agreements were anti-competitive and entrenched Google's position in the market.[104] While a range of abuses was identified, an important one from the perspective of the DMA is the 'Mobile Application Distribution Agreements' deal with mandatory pre-installed apps.[105] As mentioned before, Article 6(5) relates to the prohibition on self-favouring while Article 6(3) deals with allowing consumers to uninstall pre-installed applications on operating systems, such as Android and Google Mobile Services (GMS).

Google is the owner and main developer of Android, with applications such as Google Search, Google Chrome and Gmail being preinstalled on phones equipped with this operating system through these agreements. From the perspective of innovation and development, which are significant pro-competitive factors, such investments into the development of Android are incentivized by the promotion of GMS products.[106] This contributes to bringing significant returns as well as increased data collection which allows for further investment and improvement of the products, thereby providing better products for consumers.[107] However, these benefits to competition would be generally prohibited under Articles 6(3) and 6(5) of the DMA, as the scope of the provisions can be applied in conjunction with 'favouring' pre-installed apps and the obligation to allow users to remove GMS services from their devices by switching to alternative third-party products.[108] As Google will most likely be identified as a gatekeeper, these obligations will be applicable to its business model under the presumption of protecting digital markets by offering consumers more choices with increased contestability. Nonetheless, this clearly disregards the economic and efficiency benefits that would fail to exist should GMS services no longer be linked to Android. As these obligations will affect the operation of Google's ecosystem and revenue, there will be repercussions in terms of the incentive to further develop and invest in Android which can create a lower quality and less competitive product.[109]

In September 2022 the CJEU confirmed the Commission's findings regarding the anti-competitive impacts of such conduct from Google.[110] The purpose of this thesis is not to argue

[104] Google Android (n57).
[105] Höppner et al (n103) 2.
[106] Davies et al (n71) 515.
[107] Cabral et al (n35) 12.
[108] Davies et al (n71) 515.
[109] Schneider (n63) 171.
[110] Höppner et al (n103) 1; Case T-604/18 *Google and Alphabet v Commission* [2022] ECLI:EU:T:2022:541.

that the conduct was pro-competitive, instead, it is to recognize that changing a fundamental structure of the GMS business model will ultimately impact the level of innovation in this field. As the DMA does not allow for efficiency justifications, there will be consequences for all gatekeepers, since there is not even an opportunity to assess whether the benefits of such conduct outweigh the costs to competition. This case analysis represents the need for its inclusion, as a strict application of the obligations can decrease the quality of products, and decrease investment and development in the digital market.

Section 2.2.4 Booking.com - Parity Clauses

An additional obligation relating to parity clauses can be found in article 5(3) of the DMA relating to parity clauses, which details that gatekeepers have to allow business users to offer their services and products on alternative sales channels at different prices or conditions. In recent years, multiple national competition authorities (NCA) have looked into the controversial parity clauses in the hotel industry, which were present in both narrow and wide forms.[111] In instances with wide parity clauses, hotels are prohibited from providing lower room rates or more availability on any other sales channel. With a narrow parity clause, hotels are permitted to provide more affordable room rates through other channels such as offline sales but forbid the posting of more affordable rates on their own websites. The legal issue arises in situations with wide parity clauses, as their broad reach imposes high limits to competition and can significantly harm other platforms. The practical application of the clauses and relevant competition law can be examined in the EU through the *Booking.com* case.[112]

Booking.com was largely targeted by competition authorities in the EU, but mainly from the German Competition Authority (BKartA) which brought forward cases in German Competition Courts.[113] Up until 2015, Booking.com was using wide parity clauses, which prompted an empirical investigation from the BKartA into the market and effects on competition from such clauses, which was largely conducted under the cap of Art 101 TFEU. This investigation concluded an array of negative effects and market foreclosure from the use of wide clauses, arguing for its lack of necessity and lack of benefits for the platform itself -

[111] Podszun Rupprecht and Rohner Tristan, 'Narrow Price Parity Clauses: Beyond Booking.Com (Germany)' (2022) 13 Journal of European Competition Law & Practice 558, 558-559; Mantovani Andrea, Piga Claudio A and Reggiani Carlo, 'Online Platform Price Parity Clauses: Evidence from the EU Booking.Com Case' (2021) 131 European Economic Review 103625, 4.
[112] *Booking.com* case (n57); Mantovani (n111) 1.
[113] BGH, 18 May 2021, Case KVR 54/20—Booking.com; BKartA, 22 December 2015, Case B9–121/13.

which this thesis does not aim to negate. However, there is a lack of the same level of evidence regarding the use and effects of narrow clauses, as different studies come to different conclusions.[114] The use of narrow price parity clauses can be beneficial for consumers in terms of low search costs, as they can efficiently find the best rates on platforms that have such agreements in place.[115] Furthermore, it leads to greater transparency on the platform market and adds value to Booking.com's services.[116] While they may also have negative effects by contributing to limiting price differentiation in the market, it can be concluded that the effects of narrow clauses are not conclusive with absolute certainty, as they can bring potential benefits.[117] The negative effects cannot be properly identified in the case of narrow clauses as they only affect the relationship between a single platform and a single hotel, which has less intrusive restrictive effects in comparison to broad clauses on the overall market. The development of case law has indicated permission for the use of narrow clauses, which was accepted by NCAs from various Member States such as Sweden and Italy.[118] Platforms such as Booking.com and Expedia entered into binding agreements to comply with these decisions.[119] The rationale behind these agreements was that narrow parity clauses should increase incentives to innovate at these platforms and that it will lead to the creation of lower rates and better services for consumers.[120] The United Kingdom also investigated similar cases and dealt with issues regarding MFN clauses through the introduction of remedies consisting of transparency measures that present the methods of ranking results and increased disclosure obligations for platforms.[121] These approaches continue to represent a more balanced method of dealing with MFN clauses, which unfortunately is lacking in the EU's approach.

Through Article 5(3) of the DMA gatekeepers will be prohibited from using *both* narrow and wide parity clauses or similar measures on their platforms. Such a prohibition is arguably an overreach and is clearly designed to benefit platform-to-platform competition by removing certain barriers; however, this is not necessarily a benefit for consumer welfare or

[114] Podszun et al (n111) 563.
[115] Ennis Sean, Ivaldi Marfc and Lagos Vicente, 'Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change' (Toulouse School of Economics 2022) 1106 .<https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2020/wp_tse_1106.pdf>, 2.
[116] Podszun et al (n111) 561; Booking.com case (n113) para 58.
[117] Ennis et al (n115) 4; Mantovani (n111) 2.
[118] Mantovani (n111) 4.
[119] Ennis et al (n115) 2-3.
[120] ibid 8.
[121] Lancieri (n86) 636.

competition.[122] The complete prohibition of using parity clauses also removes the guarantee from consumers that they are being offered the lowest possible price on certain platforms.[123] While this conduct may have anti-competitive effects, its strict prohibition contributes to putting consumers in a more vulnerable position when conducting online purchases. There is arguably a need to consider pro-competitive or efficiency factors when applying this prohibition, specifically due to its application to wide and narrow clauses.

Section 2.2.5 Epic Games vs Apple Case (US) - Anti-Steering and App Stores

Articles 5(4) and 5(5) of the DMA deal with prohibitions relating to anti-steering measures, which relates to conduct that prohibit businesses from directing consumers to a lower-cost platform. This is a concept that can be analysed through the lens of the *Epic Games v Apple* case in 2021, to see potential impacts on consumers in the internal market, as Apple's operation outside of the will also have repercussions in the EU.[124] The American doctrine of 'Rule of Reason' has been employed in the United States to determine whether certain conduct can be viewed as 'anti-competitive' according to the Sherman Antitrust Act.[125] This is essentially a test to establish the effects of certain agreements or conduct on competition, thereby balancing procompetitive justifications against anticompetitive effects, similar to the CJEU.[126]

The case concerned the restriction of app stores besides the Apple Store on the iOS operating system, which was challenged by Epic Games in an attempt to establish their own store and to allow consumers to purchase content through their own platform. This was based on the conditions that Apple has set for its own App Store, including taking a 30% share of app sales as well as a 30% share of in-app purchases, which also must be conducted through the App Store.[127] Therefore, Epic Games filed a claim that this conduct is a violation of the Sherman Act, more specifically Section 2 which prohibits *'monopolising any part of trade or commerce'*, as Apple has a monopoly on iPhones through the App Store. This is comparable

[122] Mantovani (n111) 16.
[123] Schneider (n63) 165.
[124] Epic Games, Inc. v. Apple Inc. 2021 (United States District Court for the Northern District of California) September 10, Case No. 4:20-cv-05640-YGR.
[125] Act of July 2, 1890 (Sherman Anti-Trust Act).
[126] 'Rule of Reason | Practical Law' (*Thomson Reuters Practical Law*) <https://uk.practicallaw.thomsonreuters.com/4-383-7924?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 28 March 2023.
[127] Marsden Christopher T and Brown Ian, 'App Stores, Antitrust and Their Links to Net Neutrality: A Review of the European Policy and Academic Debate Leading to the EU Digital Markets Act' (2023) 12 Internet Policy Review 2, 4.

to Article 102 TFEU in the sense of the 'dominant' component, as simply being a monopoly is already considered a violation of US antitrust law, however, in the EU an abuse of dominance is required for the article to be triggered. Nonetheless, US judicial practice has established that abusive conduct is required in some form and that the 'monopolising' threshold is higher than the threshold for 'dominance' in the EU.

Section V of the judgement demonstrates the Court's consideration of anti-competitive effects, wherein Epic Games claimed that due to Apple's practices, they have foreclosed the market for app distribution services as well as in-app purchase services. This claim in EU terms can be identified as a 'margin squeeze' alongside 'anti-steering', as it reduces the profitability of app developers by forcing them to use the distribution system of Apple. On the other hand, Apple put forward the argument that the use of only the App Store increases security by contributing to malware prevention and fraud prevention for consumers, for example, because all purchases go through the verified Apple system; this is a safeguard that can only be offered with control over the process. The Court reached the conclusion on Count 5 of the judgement that while claiming a 30% share of sales can be anti-competitive, this is a cost that is outweighed by pro-competitive effects. These effects are namely the increased security on the App Store that differentiates it from other distributors such as Google Playstore, thereby also giving consumers more choice in terms of these platforms.

To analyse this from an EU law perspective, Apple has been able to successfully use and defend an 'objective justification' on the grounds of countervailing efficiencies. Within the framework of the DMA, however, this conduct would have been prohibited outright due to the gatekeeper status allocated to Apple on the basis of Articles 5(4), 5(5), 5(7) and 6(7). This indicates that consumers will not be able to simply use Apple Pay when paying on their iPhones, but there could be separate requirements on an app-by-app basis and also fragmentation in the app-store market as they will not only have access to the Apple Store. Apple invests in the development and quality of their app store, and this has proven to contribute a 'premium product' in the general market for app stores from their current business model.[128] This is done through the rigorous removal of harmful apps, which provides incentives for app developers to innovate and create better-quality products that will eventually be made available to consumers.[129] The

[128] Marsden et al (n127) 8.
[129] ibid 9.

design of the new strict prohibitions is put in place to over-ride previous economic efficiency justifications or considerations when placing obligations upon the app store, as these articles will ultimately force Apple to allow consumers to download and access apps from competing app stores and use competing payment services for in-app sales.[130] When putting this into context with other gatekeepers, such as Google with Android, potential impacts of this could include decreased security, increased vulnerability for consumers and also decreased quality of products. It is important to state again that this thesis recognizes the potentially harmful effects of the current app-store business models leading to abuse of power, monopolising of competition and the lack of remedies available to address these issues.[131] However, these are impacts on the market structure but there is no proven harm to consumers themselves from this conduct and there has been no need demonstrated to increase protection for consumers.[132] These are effects that directly contradict the discussed traditional competition law aims and objectives, as it follows the aim of 'contestability' on the digital market, further demonstrating the need to consider benefits to competition.

Section 2.2.6 New Intel Judgement - 'as efficient competitor'

The Court of Justice delivered a new judgement in 2022, stemming from the *Intel* saga originating in 2009, which can potentially change the way that dominance is looked at in EU competition law.[133] Intel has been the subject of lengthy proceedings concerning their rebate scheme that was deemed anti-competitive (abuse of dominance) by the European Commission in 2009, which resulted in a €1.06 billion fine.[134] The multiple assessments of their conduct included the 'as efficient competitor' test, which has so far been applied to cases with abuse of dominance in terms of an undertaking's pricing practices.[135] This test is used as a form of assessing conduct, indicating that firms are allowed to compete on the merits and that only when a firm that is equally as efficient as the dominant company is excluded is when conduct can be abusive.[136] The notion of 'as efficient' can be analysed in terms of choice, quality,

[130] Marsden et al (n127) 2.
[131] ibid 3.
[132] ibid 9.
[133]Case T-286/09 *Intel v Commission* [2014] ECLI:EU:T:2014:547; Marinova Miroslava, 'The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga' (2022) 2022 7 European Papers - A Journal on Law and Integration 627.
[134] Case C-413/14 *Intel v Commission* [2017] ECLI:EU:C:2017:632.
[135] Marinova (n133) 627-628.
[136] ibid 630.

innovation factors or price. However, the general approach of the Court to abusive conduct can also be applied by analogy to the regulation of digital platforms.

In the 2022 judgement, the Court overturned the previous decisions for many reasons, the main one being the improper application of the 'as efficient competitor test' under Article 102 TFEU. The Court is seemingly supporting an empirical approach to addressing the conduct of dominant firms that assesses the relevant economic effects, which essentially supports the notion that less efficient competitors can be lawfully excluded.[137] While the specifics of the *Intel* saga differ from that of digital platforms which have zero-price business models, it has been concluded by scholars that the competitor test can be considered as an 'effects-based approach' in markets where price-cost tests cannot be applied.[138]

This is the same approach that is missing from the DMA, as it does not contain a method of testing the anticompetitive effects of conduct. The as efficient competitor notion has been applied to see whether exclusion is capable of harming consumers, and it supports the theory that a dominant firm is competing on the merits if less efficient firms exit the market due to their conduct.[139] The DMA clearly distinguishes itself from competition law and it makes a distinction between gatekeepers and other smaller firms, therefore it regulates conduct between competitors that are not as efficient in terms of innovation or market power. However, it could be worth considering that if the CJEU is continuously supporting an effects-based assessment under traditional competition law tools, this approach should also have a space in the regulation of digital markets. Particularly as the DMA follows the aims of 'fairness' and 'contestability', the conduct influencing the entry and exit of undertakings on the market should not be decided merely on a 'gatekeeper' status, but should also consider the efficiency and countervailing benefits of the entry or exit of inefficient competitors. These decisions should be backed by economic and effects-based analysis that is adapted to the unique characteristics of the digital economy, and not only on presumptions of harm - which is the precise method followed in a regime with *ex-ante* and *per se* rules.

[137] Petit Nicolas, 'Competition Cases Involving Platforms: Lessons from Europe' [2018] SSRN Electronic Journal 1,4.
[138] Marinova (n133) 636
[139] ibid.

Section 2.3 Synthesis

It can be deduced from the analysed jurisprudence that the role of pro-competitive effects and countervailing efficiencies should not be underestimated in the field of competition law in the digital market. There can be benefits promoted to consumers and to other market stakeholders through self-preferencing acts on search engines, tying and bundling on software, parity clauses on price comparison sites and app-store requirements. Additionally, it should also be considered that the targeted gatekeepers, such as Facebook and Google, operate in multi-sided business models. The newly applicable obligations will undoubtedly lead to changes in core business models, and as the systems are connected, this will lead to side effects which will increase the burden on consumers and end-users.[140]

The aim of this thesis is not to demonstrate that the conduct regulated by the DMA should not be prohibited, as there are also significant potential negative consequences, instead, it is to demonstrate that these conclusions need to be made on a case-by-case basis. The Impact Assessment conducted for the DMA did not consider relevant economic factors of specific prohibitions and obligations contained therein, which has been demonstrated by the case law to bring about potential benefits.[141] It can therefore also be concluded that the provisions of the DMA favour promoting competition with a business-oriented mindset rather than a market or consumer-oriented approach.[142] This demonstrates a lack of a balanced approach to the targets of the DMA and its actual effects on the market, stemming from a fixed set of assumptions made about the digital market that the Regulation aims to correct. However, the analysed case law clearly demonstrates that a more well-rounded analysis is required rather than a strict application of ex-ante prohibitions. Hence, in the digital environment, the one-size-fits-all approach of the prohibitions and obligations can have the impact of nullifying innovation, investment, and the development of the digital market.[143] The current provisions in Articles 5-6 can be viewed as far-reaching 'remedies', but it is important to consider whether they will really solve the problems of the digital market or just intensify and introduce novel ones.[144]

[140] Teece David J and Kahwaty Henry J, 'Is the Proposed Digital Markets Act the Cure for Europe's Platform Ills? Evidence from the European Commission's Impact Assessment' (BRG Institute 2021), 39; Nicoli and Iosifidis (n3) 31.
[141] Impact Assessment Study (n28); Teece et al (n140) 2.
[142] Teece et al (n140) 2.
[143] APEC (n27) 34.
[144] Teece et al (n140) 4.

The benefits of innovation are supported by economic theories, even in the context of consumer welfare, as it promotes cost efficiencies, improvement and development of products and services which thereby increases quality and choice on the market. Furthermore, innovation in digital business models is vital in a digital and globalised society that has increasingly higher consumer demand levels.[145] However, it can be seen from the Impact Assessment and the structure of the DMA, that there has been no significant economic analysis or theories provided to justify whether or not this new framework will be beneficial for the EU economy.[146] While there are aspects that are identified to be improved - such as the situation for smaller digital companies - the overall 'net' gain or losses have not been analysed. In light of this, the subsequent section will broadly analyse other jurisdictions' attempts at regulating the digital market in order to have a clearer perspective on the EU's approach.

Section 3 - Comparative Perspective in Digital Market Regulation

The growth of 'big tech' companies and the challenges they may pose to competition in the digital economy is not limited to the European Union alone. This section will focus on a narrow comparative perspective on various jurisdictions' approaches to regulating the digital market (namely digital gatekeepers), looking more in-depth at the United States (US), the United Kingdom (UK) and Germany (although it is a Member State it has had a different approach). However, the legal solution to specific aspects of digital market regulation will also be analysed briefly, allowing for better comparison between jurisdictions. The purpose of this is to analyse other methods of regulating 'gatekeepers' and identify differences that can be used to look at the DMA through a different lens which can aid in identifying improvements. The scope of comparison is limited, serving the purpose of providing an understanding for the underlying approaches in the varying jurisdictions in terms of which undertakings are targeted, what conduct is regulated and the manner in which it is done.

Section 3.1 Regulatory and Policy Approaches

In 2022 the 'Group of 7' (G7) published a report titled *"G7 Inventory of new rules for digital markets"* wherein the Organisation for Economic Co-operation and Development (OECD) compiled the regulatory trends in digital markets across five jurisdictions, namely Germany,

[145] Teece et al (n140) 5.
[146] ibid 30.

the EU, Japan, UK and the US.[147] The report analyses the status, scope and content of proposed or newly introduced legislation aiming to correct the market failures of the digital economy.[148] Referring to the status of these legal reforms, they have been enacted and are in force in the EU, Germany, and Japan and are under preliminary stages in the United Kingdom and the United States.[149] These can be analysed and compared to present a bigger picture of the policy approaches and therefore also identify where the EU and DMA deviate.

In terms of the identified regulated entity, all jurisdictions share the common factor of identifying digital undertakings with a defined threshold of market power, similar to the 'gatekeeper' definition contained in the DMA.[150] The legislators share the concern of the market power wielded by certain undertakings and the novel enforcement challenges these market structures and business models introduce.[151] In Japan the designation is called 'specified digital platform providers' while in the UK they are referred to as firms with 'strategic market status', Germany identifies firms with 'paramount significance for competition across markets' and the US refers to them as 'covered platform operators'.[152] It is evident that all jurisdictions refer to a form of market power that diverges from the traditional notion of 'dominance' and focuses on how their power manifests in the digital economy. [153]However, some jurisdictions do include the notion of dominance, such as Germany and the UK, but also factors such as intermediation power and financial strength thereby also removing the need to define relevant markets.[154] The criteria used to designate whether a firm falls under these categories differs

[147] Organisation for Economic Co-operation and Development (OECD), 'G7 Inventory of New Rules for Digital Markets' (G7 Germany 2022) <https://www.oecd.org/competition/g7-inventory-of-new-rules-for-digital-markets-2022.pdf> (hereinafter referred to as OECD Report).
[148] Competition Act in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 2 of the Act of 19 July 2022 (Federal Law Gazette I, p. 1214) (Gesetz gegen Wettbewerbsbeschränkungen - GWB) Section 19a; DMA (n1); 特定デジタルプラットフォームの透明性及び公正性の向上に関する法律 (Act on Improving Transparency and Fairness of Digital Platforms (TFDPA)) Act No. 38 of 2020; H.R.3816 - 117th Congress (2021-2022): American Innovation and Choice Online Act, https://www.congress.gov/bill/117th-congress/house-bill/3816; UK Competition and Market Authority 'A New Pro-Competition Regime for Digital Markets. Advice of the Digital Markets Taskforce' (2020) <https://www.gov.uk/cma-cases/digital-markets-taskforce> (accessed 29 March 2023) (CMA Advice).
[149] OECD report (n147) 2.
[150] ibid 3; Deutscher (n5) 306.
[151] Organisation for Economic Co-operation and Development (OECD), 'Analytical Note on the G7 Inventory of New Rules for Digital Markets' (2022) (Hereinafter referred to as OECD Analytical Note) <https://www.oecd.org/competition/analytical-note-on-the-g7-inventory-of-new-rules-for-digital-markets.pdf> , 7.
[152] OECD report (n147) 3.
[153] Deutscher (n5) 306.
[154] OECD Analytical Note (n151) 7-8.

amongst the jurisdictions, as some use both qualitative and quantitative criteria, while some rely solely on qualitative factors.[155] All of the reported jurisdictions have both, except Germany, as it refers to non-exhaustive qualitative criteria exclusively.[156]

Moving on from the scope to the types of reforms proposed, the jurisdictions have identified the need for *ex-ante* regulation, however, have approached this form of intervention in different ways.[157] This is particularly clear in terms of the level of detail that is included in the content of the new prohibitions and obligations, which is particularly interesting to compare to the strict detailed provisions of the DMA.[158] A clear deviation from the trends can be seen in the UK, which does not introduce rules-based regulation for all affected companies, but instead will operate with codes of conduct and obligations that are adapted to firms on a case-by-case basis. The relevant authority will follow a principles-based approach with broad categories of requirements that will be enforced according to the specific situation at hand.[159] The regulations of the other jurisdictions lay down lists of specific unlawful conducts with defined rules, thereby implementing a less flexible system that is applicable to all affected firms, rather than tailor-made solutions.[160] For example, in the proposals for ex-ante legislation, Germany, the US and the EU have excluded the principles-based approach and instead have lists of conduct that can be applied to specific platform service providers.[161] However, Japan has also introduced a unique element into their regulatory regime by implementing both rules-based and principles-based approaches. The dual regime represents a combination of the rigid and flexible elements from the other jurisdictions, which can be considered more appropriate for the digital environment.[162]

A significant factor where the DMA deviates from all of the jurisdictions is the possibility for firms to submit objective justifications for their conduct, such as efficiency defences. The new regimes in Germany, Japan, the UK and the US allow for firms to submit arguments to justify exemptions from the rules by showing countervailing benefits such as efficiency and

[155] Deutscher (n5) 306.
[156] OECD report (n147) 3; OECD Analytical Note (n151) 9.
[157] Deutscher (n5) 307
[158] OECD Analytical Note (n151) 10.
[159] ibid ; OECD report (n147) 7.
[160] ibid.
[161] OECD Analytical Note (n151) 10.
[162] ibid 11.

innovation considerations.[163] The Japanese legislation calls for exchanges between the designated firms and the competition authority prior to issuing fines or prohibiting conduct, in the event of objective justifications.[164] The United Kingdom allows for exemptions to their principles-based approach, where the targeted firms can present evidence that the presumed 'harmful' conduct brings benefits to consumers or introduces countervailing effects based on efficiency, innovation or other benefits to competition.[165] Germany and the United States also allow for firms or operators to prove that their conduct can be objectively justified and do not result in harm to competition.[166] These are clearly diverging from the '*per se'* approach of the DMA where there is no possibility to present arguments to objectively justify conduct.

To gain more insight, the following sections contain a selection of jurisdictions that have been chosen to look at more closely in comparison to the DMA, namely the approach of the United States, the United Kingdom and Germany.

Section 3.2 The United States

The United States is the host of the world's largest platforms, especially those that are the most 'controversial' from a regulation standpoint - Amazon, Microsoft, Meta, Google and Facebook.[167] The main piece of legislation assessing the 'monopolisation' of digital markets is the Sherman Act, as mentioned in Section 2.2.5 The US system of antitrust law maintains the foundations of liberalism in the market, indicating that the legislator does not intend to legislate all aspects of competition and leaves room for economic market forces.[168] It follows the Chicago school, thereby considering consumer welfare and efficiencies in the market.[169] Currently, US antitrust law has been applied similarly to the EU, in an ex-post manner, which also gave rise to issues in not adapting to the characteristics of the digital market; a matter that was emphasised by the high evidence thresholds under the Sherman Act.[170]

[163] OECD report (n147) 7; OECD Analytical Note (n151) 9-11.
[164] OECD report (n147) 7.
[165] ibid.
[166] ibid.
[167] Mueller Milton L and Farhat Karim, 'Regulation of Platform Market Access by the United States and China: Neo-Mercantilism in Digital Services' (2022) 14 Policy & Internet 348, 349.
[168] Contaldi (n13) 322.
[169] Singh Vedant, 'Digital Markets: Upcoming Changes in Global and Domestic Jurisprudence' [2022] SSRN Electronic Journal <https://www.ssrn.com/abstract=4135233> accessed 20 April 2023, 4.
[170] ibid 4.

The approach of the EU is considered to be more systematic than that of the US, as it is characterised by a series of regulations each with a specific purpose.[171] Possibly due to the 'Brussels Effect', which refers to the influence of EU regulations and standards on a global scale, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have strived to further regulate the digital economy through antitrust laws.[172] These legislative proposals concern areas regarding mergers, anti-competitive and unfair conduct, much like the DMA, further developing existing antitrust acts to increase the enforceability of digital platforms.[173] There are a variety of bills brought before the Senate relating to digital markets, one of which is the '*American Innovation and Choice Online Act*', which is a key piece of legislation to tackle the digital economy.[174] This bill would prohibit certain conduct for large online platforms, such as self-preferencing and leveraging data obtained between services.

In addition to this, the '*Open App Markets Act'* is also pending that is focused on the conduct of app stores, such as preventing the requirement to use the in-app payment system, fairer pricing conditions across app stores, and punitive action for differentiated pricing terms when using another in-app or app store payment system.[175] Similarities can clearly be identified between these bills and the conduct regulated by the DMA in Articles 5-6, demonstrating similar identifications of harmful conduct. The justification of such conduct or the opportunity to provide an efficiency defence is not explicitly available but is given in a narrow scope, as discussed in Section 3.1, firms may provide an 'affirmative defence' to contest the prohibition of their conduct.[176]

What remains in question, is how the DOJ and FTC would enforce these bills, as they have not yet been voted on, introduced or brought into force by the Senate. A bill that can shed some light on 'how' the rules would be applied is the '*Competition and Antitrust Law Enforcement Reform Act*' (CALERA), which would remove the general requirement for antitrust authorities to define relevant markets, which is especially important in the digital sector where

[171] Contaldi (n13) 322.
[172] Singh (n169) 1.
[173] Paul George L, Sokol Daniel D and Baca Gabriela, 'Key Developments in the United States' [2022] *Global Competition Review* <https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/key-developments-in-the-united-states> accessed 20 April 2023 ; Deutscher (n5) 306.
[174] Paul et al (n173); American Innovation and Choice Online Act (n148).
[175] Paul et al (n173); S.2710 - 117th Congress (2021-2022): Open App Markets Act S.2710, https://www.congress.gov/bill/117th-congress/senate-bill/2710.
[176] Deutscher (n5) 309.

undertakings operate across a range of areas.[177] This approach is also similar to that of the DMA, which removes the step of the Commission defining the markets within which a gatekeeper is active. Furthermore, the bill reduces the threshold for legal tests in identifying which conduct should be regulated, shifting from a consumer welfare approach towards a market structure-oriented regulation.[178] Similarly to the EU, there is also a shifting of the burden of proof onto the targeted company and its online presence, focusing on the market concentrations without relying on market definitions.[179]

Despite the United States being the home of a majority of the targeted gatekeepers, it is not the jurisdiction that takes the initiative and leads their regulation. While there are Bills submitted for review, these are still subject to scrutiny and currently remain in proposal status. It seems that the European jurisdictions, particularly the EU, have acted faster than the US in establishing rules, which may result in the US introducing similar rules as can be seen through the 'Brussels effect'.

Section 3.3 The United Kingdom

In the United Kingdom, a Digital Markets Unit (DMU) has been established within their NCA, the Competition and Markets Authority (CMA).[180] This was done in response to the rising challenges of the digital economy, yet, as the UK is no longer a Member State there can be diverging standards in terms of how they choose to regulate digital platforms.[181] When looking at the regulation of the digital market in the United Kingdom, many similar approaches but also differences can again be identified.

The UK has chosen a different method in important aspects of the DMA, such as the scope of applicability of new regulations. The CMA has decided to maintain the approach of establishing dominance in at least one digital market which allows a company to have a 'strategic market status'.[182] Such a status is achieved when undertakings have substantial and entrenched market power while maintaining a strategic market position, also taking into

[177] Deutscher (n5) 306; S.225 - 117th Congress (2021-2022): Competition and Antitrust Law Enforcement Reform Act of 2021, https://www.congress.gov/bill/117th-congress/senate-bill/225.
[178] Singh (n169) 8.
[179] ibid 9.
[180] Lancieri (n86) 621.
[181] Botta (n26) 502.
[182] Alexiadies and de Streel (n55) 186-187.

consideration the undertaking's global turnover and within the UK.[183] While the position of the business is also relevant, this differs from the DMA's gatekeeper thresholds by maintaining that a company must be dominant in order to fall under stricter digital platform regulations. The framework of the DMA *explicitly* states that dominance is not a factor that is considered in the allocation of gatekeeper status. This divergence can be analysed from the perspective of balance vs flexibility in the applicability of rules.

It can be argued that the UK's approach could be more successful in terms of maintaining a policy balance by maintaining the criterion of dominance rather than arbitrarily applying thresholds.[184] On the other hand, by focusing on set quantitative and qualitative thresholds without standards of dominance, there can be more room for manoeuvre in terms of applying the rules of the DMA.[185] Both approaches can bring about their own advantages, however, it can be recognized that dominance standards could contribute to more accurate regulation of platforms - without such consideration, dominant companies can escape the scope of the DMA and proceed freely to do the conduct that it intends to regulate.

In terms of what conduct is prohibited and how it is done, the approach in Article 6 of the DMA is comparable to the UK's in dealing with digital platforms. For example, a shared factor is a dialogue with the regulator to discuss obligations and customised remedies.[186] However, this is taken a step further in the sense that the CMA does not intend to explicitly define a list of obligations for platforms or of conduct that they consider to be prohibited. This is arguably a big difference from the regulatory regime of the DMA, as instead, the Digital Markets Unit is to enter into negotiations with the designated platforms to create a 'code of conduct'.[187] This indicates that instead of a fixed list such as those in Articles 5-6 DMA, the UK will regulate on the basis of general principles, guidelines and a code of conduct following the principles of open choices, fair trading, trust and transparency.[188] For example, when dealing with digital platforms that provide short message services, the CMA will take into account core values and specific theories of harm upon which they will base a code of conduct negotiated together with

[183] CMA Advice (n148) paras 4.10, 4.12, 4.17, 4.23.
[184] Alexiadies and de Streel (n55) 186-187
[185] ibid.
[186] ibid.
[187] CMA Advice (n148) para 4.33.
[188] Botta (n26) 505; CMA Advice (n148) para 4.38.

the platforms.[189] This means that the rules that these platforms must follow will be suited to their business models and will have tailored remedies to adapt to their needs. This further demonstrates increased flexibility and proportionality from the CMA, as it acknowledges that a strict set of rules cannot be applied uniformly across all digital platforms, which can contribute to the success of the DMU by working collaboratively with the platforms.[190]

Furthermore, the CMA does not define sectors of the digital market which fall under the scope of application of the Digital Markets Unit.[191] In some ways, this again provides further flexibility, as it is at the discretion of the DMU to establish guidelines upon which they can identify which sectors are priorities. The CMA does refer to the core platform services identified in the DMA, however, does not require them to be explicitly listed in legislation.[192] This can be viewed as a more suitable approach for the dynamics of the digital economy, as there can be periods where certain sectors do not require constant regulation and resources can be more efficiently redirected.

Section 3.4 Germany

In Germany, the German Competition Authority (BKartA) has also strived to regulate digital conglomerates and platforms through the German Competition Act (GWB), namely through amendments in January 2021. This amendment, represented in Section 19(a), focuses on allowing the BKartA to prohibit certain conduct by companies without the need to prove an infringement of competition law.[193] The approach from the German regulator shares similarities with the DMA as well as the CMA's regulation and can be looked at in comparison.[194]

Firstly, in terms of identifying what companies fall under the scope of these new rules, the threshold or criterion is to be of 'paramount significance in different markets'. This criterion is met through platforms that are vertically integrated, have a strategic role through operating and being dominant in multi-sided markets as well as by having access to data that is competitively

[189] Alexiadies and de Streel (n55) 186-187
[190] ibid; Colangelo (n6) 6.
[191] Botta (n26) 504; CMA Advice (n148) para 4.23.
[192] CMA Advice (n148) para 4.23
[193] GWB (n148) 10th amendment.
[194] Colangelo (n6) 4.

relevant.[195] This is clearly a combination between the dominance standard and the quantitative/qualitative approach of the DMA.[196]

With regards to the conduct that is regulated, Section 19(a) GWB has an exhaustive list of prohibited conduct by the affected undertakings, similar to those listed in Articles 5-6 of the DMA. These include, among others, rules on self-preferencing, pre-installed apps, tying and bundling as well as interoperability.[197] However, in terms of a sector-specific approach, the BkartA has a similar solution to the CMA, in that it does not define explicitly which sectors, platforms and services are targeted by the legislation.[198] Therefore, the list of behaviours regulated is provided on a more general basis and does not include positive obligations for digital companies, unlike the DMA where there are a variety of provisions detailing how undertakings should conduct their business.[199] This could prove to be a more appropriate approach in comparison to the far-reaching and detailed prohibitions and obligations within the scheme of the DMA.

In addition to this, while the conduct listed in the DMA is outright prohibited, the BkartA 'may' prohibit the behaviours listed in the GWB in the event of a breach.[200] This is a significant difference in the approach to regulating gatekeepers, as this allows the NCA to review effects on competition, and effects on the market and allows for efficiency defences from the undertakings concerned.[201] The DMA has a strict *ex-ante* application of rules with no consideration of efficiencies, the rules are directly applicable and there is no possibility for gatekeepers to present defences to their conduct. However, in Germany's jurisdiction, undertakings have the possibility and burden of proof to demonstrate why certain prohibitions by the BkartA may not be 'objectively justified'.[202] This clearly allows for a system where gatekeepers are regulated, however, innovation efficiency and consumer welfare are also taken into consideration along with market contestability.

[195] GWB (n148) Section 18(a), Section 19(a), Section 19(a)(1)(3)-(1)(4); Botta (n26) 503.
[196] Deutscher (n5) 306.
[197] GWB (n148) Section 19(a)(2).
[198] Botta (n26) 504; GWB (n148) Section 19(a).
[199] Botta (n26) 504.
[200]GWB (n148) Section 19(a)(2).
[201] Botta (n26) 505.
[202]GWB (n148) Section 19(a)(2); Deutscher (n5) 309.

Therefore, while both regulatory regimes contain a list of obligations and prohibitions for certain conduct, the methods taken to achieve these measures seem to be more balanced in the GWB than in the DMA. It is interesting to analyse how the application of these rules in the German jurisdiction will change once the DMA rules are fully in effect, as the rules will be directly applicable. It is worth noting that Germany approached the regulation of the digital market through competition law means, which the DMA strictly is not, therefore there could potentially be a situation where both tools are simultaneously applicable. So far, the German BKartA has taken a distinct initiative in the regulation of the digital economy and it may continue to do so.

Section 3.5 Potential Regulatory Fragmentation

As has been shown, various jurisdictions have different approaches to the regulation of the digital economy, sometimes even within the jurisdiction of the EU in Germany. This can contribute with benefits but also create adverse side-effects in terms of how efficiently digital platforms are regulated. The countries have shared approaches in identifying a narrow and limited category of targets through qualitative criteria i.e. the 'digital gatekeepers', the 'covered platforms', the 'undertakings of paramount significance for competition across markets' and the firms that enjoy 'strategic market status'. This is a clear divergence from the thus far used dominance standard threshold, as it shows that NCAs are instead trying to focus on the common market structure characteristics that arise in the presence of such digital conglomerates. However, it is a common element that the designated undertakings are subject to status reviews periodically from the relevant NCAs.[203]

It is also interesting to analyse the specific sectors that the jurisdictions aim to regulate, as there is also a divergence in terms of distinguishing which online platforms fall within the scope of regulation. This is further emphasised in terms of the different approaches to the actual conduct that is regulated which can be linked with the powers of the NCAs, as more general prohibitions in the UK will give more discretion to the DMU than that which is available to the Commission acting on specific obligations and prohibitions. The difference between a strict *ex-ante* approach vis-a-vis a negotiated code of conduct with platforms is an interesting divergence to analyse, especially from the perspective of procedural efficiency. Furthermore, the long-term

[203] Botta (n26) 504; CMA advice (n148) para 4.28; GWB (n148) Section 19(a)(1).

success of applying rules in a 'one-size-fits-all' approach compared to rules that are adapted to the needs of platforms' business models will be a relevant point to consider as well.

Over time, it will be possible to deduce which regulatory regime is the most efficient to achieve these specific competition law goals. However, in a broader economic sense, such a divergence across the approaches of regulation also increases the costs for digital platforms in terms of compliance burdens, as their business models will have to be adapted to suit local standards.[204] Therefore, the divergences across the jurisdictions can introduce unintended side effects such as higher compliance costs but also lower legal certainty. As was presented in this section, the regulatory regimes and policy have their own nuances, which therefore can introduce a lack of concrete requirements for platforms to comply with, but also a lack of concrete expectations for consumers in the digital market. [205]

Section 4 - Identified Weaknesses

In light of the previously analysed issues and potential negative consequences of the nature of the Digital Markets Act, this section is a synthesis of the previously discussed case law and analysis to identify the existing weaknesses in the new digital regulation regime. Furthermore, as a variety of trade-offs can be identified with the lack of consideration for efficiencies and pro-competitive consequences, subsequent recommendations and amendments will be discussed in Section 5. As the general objective of the DMA is to pursue contestability and fairness in the digital market, it is arguably creating an environment where the provisions contained in the regulation are not the most appropriate for digital platforms and business models. Targeting the core service platforms will undoubtedly limit their valuable contributions to the digital market which contradicts traditional competition law goals and sacrifices aspects of consumer welfare.[206] As will be further analysed, this can be identified from the perspective of innovation, efficiency, types of error costs and overregulation.

Section 4.1 Overall Economic Weakness, Innovation Incentives

It can be stated that gatekeepers enjoy large levels of power in the digital economy, which can lead to misuse and unfair practices that can cause harm to consumers. It can also be fair to say

[204] Botta (n26) 502
[205] OECD Analytical Note (n151) 17.
[206] Cennamo et al (n72) 1.

that regardless of the effects of their business models and strategies, they should be regulated as gatekeepers have large impacts on digital markets.[207] The strict application of the obligations laid down in Articles 5-6 are not in place to solve harmful conduct, instead, it is a regulation of the business model itself.[208] However, regulating business activities without consideration of economic effects is a path to misregulation as well as over-regulation. The factors that allow these businesses and ecosystems to develop are also threats to their success on the market, therefore the DMA needs to strike a balance when applying obligations - however, it diverges from economic literature and is agnostic towards business models.[209]

Firstly, it is important to consider that while this regulation addresses the digital market, it can have implications on the 'physical' market as well as digital and non-digital services can intertwine. There is an ongoing process of digital transformation, with business models being increasingly integrated with digital services and instruments, creating a more multifaceted economy.[210] This can be further analysed when considering the specific set of core platform services to which the DMA is applicable, for example in the context of online product sales. The gatekeepers will continue to compete with physical stores on the market of the product itself, not in the digital sector as is presupposed - the 'digital' element, in this case, is merely a different form of distribution but not an entirely different market.[211] Therefore, a lack of consideration of the economic effects of fundamentally changing the digital business models can transform into harm for business dynamics in the 'physical' markets as well.

Regardless, as the Digital Markets Act is built upon the presumption that a distinction exists to separate the digital sector, there are still significant economic implications that can occur. An overall factor that is significantly identified in this thesis as being at risk is technological development and innovation. The *ex-ante* application of the obligations, without consideration for economic or innovative justifications, significantly reduces the competitiveness of existing and future gatekeepers.[212] This disrupts a fundamental factor of the digital market, namely being its dynamic character with novel methods. By providing artificial levels of protection to smaller businesses it benefits contestability but at the cost of innovation, which will also be

[207] Schneider (n63) 160-161.
[208] ibid 162.
[209] Colangelo (n6) 3.
[210] Schneider (n63) 168-169; Bentata (n12) 6-8.
[211] Schneider (n63) 169-170.
[212] ibid 170-171.

discussed in the following section.[213] To provide a specific example, gatekeepers will have the obligation towards other businesses to ensure access and interoperability with their services, which completely removes the incentive for smaller businesses to innovate and compete on the merits.[214] The rules pertaining to this in the DMA articles remove the possibility for gatekeepers to protect their innovation and justify that based on economic or innovation factors, which therefore can introduce the risks of 'free-riding' on innovation leaders.[215]

On the other hand, when looking at the Impact Assessment, it was stated that the framework of the DMA will boost and generate spending in R&D in the digital sector, as increased limits on mergers and acquisitions will 're-divert' funds.[216] It is identified that these increases will be beneficial to society and will contribute to creating value in the market, even though the links between this rediversion of funds remain unclear. Regardless, following basic economic theory, this conclusion on R&D investment is faulty as it would rather discourage gatekeepers from further investments due to their explicit targeting and limitations.[217] There is a clear divergence in the policy goals of competition law, as the DMA focuses on maximising opportunities for smaller undertakings rather than maximising consumer welfare and economic progress. These aspects will be further discussed in the next section, which will focus more in-depth on innovation factors.

Section 4.2 Procedural Efficiency and Chilling-Effect vs Innovation

To continue the analysis on innovation, firstly, a trade-off between procedural efficiency over innovation can be identified, owed to the *per se* rules. While the objective of the provisions is to protect fair competition and contestability, these are achieved through sacrificing digital innovation by limiting the conduct of undertakings.[218] Furthermore, while the DMA increases efficiency by reducing lengthy investigations and time-frames to rule on digital competition issues, the self-executing obligations do not take into consideration the unique nature of the digital market, which can ultimately generate repercussions at the expense of consumers.[219] Especially in the context of platform ecosystems, innovation and development is a significant

[213] Schneider (n63) 171.
[214] ibid.
[215] Kontosakou (n73) 527; Teece et al (n140) 2.
[216] Teece et al (n140) 2; Impact Assessment Study (n28) 60.
[217] Teece et al (n140) 2.
[218] Portuese (n70) 2.
[219] ibid; APEC (n27) 35.

form of creating value, a capacity that will be lost due to the non-discriminatory and blatant application of obligations.[220]

Currently, the focus of the DMA seems to be a redistribution in the balance of power on digital markets, but it disregards the sources of value from the platforms themselves, which removes the dynamic efficiencies of the digital world and rigidifies competition.[221] While the targeted conduct in Articles 5-6 of the DMA has the potential to be harmful, direct prohibitions create a trade-off with the potential value enhancements that they could bring through pro-competitive effects.[222] The success of this Regulation in terms of controlling the digital market is dependent on not only a 'fast application of the rules' but also on whether the market continues to function according to its base characteristics and whether society continues to benefit from innovation.

In connection with this, in a framework with ex-ante and self-executing obligations, it is natural to create an environment where a chilling effect on innovation is facilitated. It can be stated that this is another trade-off from the newly established and directly applicable regulatory objectives, which remove case-by-case analysis and consideration of other market indicators.[223] A chilling effect in this context indicates that gatekeepers will refrain from innovating or investing in research and development due to the threat of legal sanctions.[224] The DMA does consider chilling effects, however, this is done from the perspective of smaller businesses that are unwilling to enter the market due to the unfair practices of gatekeepers.[225] Hence, from the regulatory perspective, it is assumed that the introduction of clear ex-ante rules increases business confidence to challenge and compete with gatekeepers.

This is a clear indication that the Regulation does not consider the chilling effect the new rules will have on 'gatekeepers' in terms of their future innovations and developments. This indicates a shift towards a 'precautionary approach', meaning that the EU would rather prohibit conduct than to risk potential negative consequences from innovation on the digital market. The result of this change is a maintenance of 'static' over 'dynamic' competition, with an attempt to maintain the status quo of the digital market rather than allow for disruptions with new

[220] Cennamo et al (n72) 1-2.
[221] ibid 2; Ezrachi (n63) 11.
[222] Cennamo et al (n72) 2.
[223] Chirico (n45) 497.
[224] Teece et al (n140) 2.
[225] DMA Proposal (n43) Section 1.4, 1.4.3.

technological developments.[226] While the DMA was introduced in response to increasing competition issues, and not to be a 'static' competition law tool, it is clear that the tipping of digital markets is considered the highest irreparable harm that is worth preventing.[227] This is a clear justification for the implementation of *ex-ante* rules that would block the mistake of not intervening in time or not intervening at all.[228]

It is important to consider the trade-off between the speed of enforcement vis-a-vis the quality of the judgement in terms of innovation and chilling effects.[229] Especially as innovation brings about positive spill-over benefits across multiple sectors in society such as employment, productivity and overall welfare status.[230] Competition that is innovation-driven contributes to animating the entire market and competition process; however, this is not the type of competition promoted by the DMA.[231] The policies contained therein inhibit and discourage innovation, which will have significant adverse side effects on consumers and economic performance.

Section 4.3 Error Costs and False Positives

The departure from *ex-post* to the *ex-ante* application of competition law will bring significant erroneous decisions. In terms of the error costs that could potentially be associated with the DMA, it is important to place importance on minimising the costs of decision errors in the formation, application and enforcement of competition law.[232] This is to be carried out efficiently by introducing rules that reduce the probability of such errors in addition to taking into account the harm of false decisions. There are two types of error costs, Type I errors that deal with false positive interventions and Type II errors that deal with a failed lack of intervention, both of which could be potential consequences of the DMA's framework as these are not reflected within the obligations.[233]

[226] Portuense (n70) 2 .
[227] Chirico (n45) 497.
[228] Davies et al (n71) 511.
[229] Cabral et al (n35) 10.
[230] Teece et al (n140) 3.
[231] ibid 4-5.
[232] Davies et al (n71) 510.
[233] ibid 511; Lancieri (n86) 616; Crémer and Dinielli (n50) 10.

False positives as a potential consequence indicate that conduct will falsely be considered prohibited and damaging to the digital market. Such a situation could arise that due to the new obligations conduct will be restricted that is in practice pro-competitive, simply because it is being carried out by gatekeepers.[234] This can be explained by the transition to *ex-ante* rules, as it sets aside the necessity of distinguishing between conduct that fosters competition and conduct that inhibits competition. It is also important to consider this factor from the point that while existing jurisprudence provides a basis for identifying certain conduct as harmful, intervention is not always proven to be justified (especially in an ex-ante manner) as many of existing cases are subject to appeal and judicial scrutiny.[235] Therefore, there is not a 'concrete' confirmation that the CJEU supports the theories of harm pursued by the DMA based on past competition law issues in the digital market. This emphasises the potential for false positives due to the removal of efficiency considerations that can mitigate the presupposed harm.

From another perspective, the DMA's scope is not applicable to dominant companies on the digital market that are not classified as gatekeepers, as dominance is not a prerequisite for gatekeeper status.[236] This is further emphasised by the lack of 'market definition', thereby ignoring the traditional foundations of competition law thus far.[237] This can give rise to errors, as it will potentially catch unfair practices from non-dominant gatekeepers while allowing non-gatekeeper dominant companies to evade the same obligations.[238] While it is stated that the DMA operates in parallel with existing competition law tools, where Article 102 TFEU covers the actions of dominant companies, these practices may not always be considered anti-competitive. Critics have identified this flaw in the DMA, as it essentially allows for the rivals of gatekeepers to be exempt from these obligations, which are deemed harmful to the contestability of the market.

To put these issues into practical terms, the design of the DMA to maintain contestability indicates it is in favour of non-gatekeeper businesses, which disregards the fact that this contributes to the potential replacement of gatekeepers. If these businesses continue to be protected and gatekeepers keep being limited, smaller undertakings can utilise the same tactics

[234] Portuese (n70) 2.
[235] Alexiadies and de Streel (n55) 174.
[236] Digital Markets Act (n1) Recital 5; Colangelo (n6) 2.
[237] Digital Markets Act (n1) Recital 5.
[238] Portuese (n70) 7 ; Alexiadies and de Streel (n55) 175-176.

and develop into market leaders themselves.[239] Therefore, while Google search may be subject to specific obligations, other search engines such as Bing would be promoted and protected, but not based on merits or due to its increased innovation.[240] This would be a potential consequence stemming from the lack of economic or effects-based safeguards against the gatekeeper obligations, and will ultimately lead to impacts on consumer welfare.

Section 4.4 Legal Certainty vs Overregulation

In the consideration of legal certainty, there is a lack of consensus in terms of the effects that the DMA is expected to have. Some scholars view this Regulation as a sign of higher levels of legal severity and authority through the use of ex-ante rules, which in turn would increase legal certainty.[241] However, this is expected to introduce a trade-off between legal certainty and overregulation, as the current approach would remove a variety of the safeguards that have been thus far offered by competition law.[242]

There has been criticism for the functioning of Article 102 TFEU, as the Commission had the discretion to identify new types of abuses the digital world developed, which made it difficult for larger companies such as Microsoft and Google to innovate without fearing that it would be identified as abusive conduct. Essentially, even if a company was trying to improve its product or compete on the merits, intent was not considered a relevant factor to identify whether an abuse had taken place, which led to outcomes such as *Google Shopping.* Under the DMA gatekeepers will be explicitly told what they can, cannot and must do, thereby in theory increasing legal certainty for gatekeepers. However, this places severe limitations on the dynamic nature of the economy. Continuing the sentiment that the DMA does not consider economic and efficiency theories, it is clear that the strict application of *ex-ante* rules removes the factors that were in place to protect pro-competitive behaviour that would introduce benefits to innovators, entrepreneurs and consumers.[243]

Such a safeguard is the effects-based assessment, which considers a counterfactual assessment of the benefits and detriments to competition. The inclusion of such a step when dealing with alleged anti-competitive conduct contributes to preventing over-enforcement by allowing for

[239] Schneider (n63) 172.
[240] ibid.
[241] Petit DMA review (n50) 530.
[242] Schneider (n63) 174.
[243] ibid.

consideration of other market factors/processes and maintaining the goals of competition law.[244] The lack of such an assessment thereby further highlights the need for efficiency considerations and evidentiary requirements for the intervention of competition law.[245] When regulating a sector of the market, it is essential to maintain the core characteristics of an open-market economy, such as the freedom to conduct a business.[246] Serious market interventions require serious consideration, however, the current functioning of the DMA articles removes the checks and balances of competition law.

The risks of over-regulation in digital markets have been pointed out by a variety of scholars.[247] Specifically sector-specific regulation has been shown to distort competition, hamper innovation, reduce economic efficiency and harm consumer benefits.[248] It is argued that while regulations are shown to be beneficial solutions to digital problems, they do not provide as much clarity as expected and do not recognize the burdens and distortions they bring.[249] There is support rather for the liberalisation of these markets, as effective regulation needs to be able to have a clear purpose, a clear solution and a clear reason why it is the measure that will solve a certain problem.[250] To put this into perspective in the sphere of the DMA, it has been repeatedly emphasised that the regulation itself seems 'confused' and lacks a clear approach as to its role in competition law. While it can be claimed that regulation can prevent the gatekeepers from abusing their market power, it does not strictly benefit other factors within the digital economy.[251] This further highlights the general issue of the lack of consideration for efficiencies and countervailing benefits within the legal regime and the weaknesses that it incorporates.

Section 5 - Analysis and Recommendations

The Digital Markets Act introduces revolutionary changes to competition policy, shifting the focus from the effects of anti-competitive conduct on consumers to protecting contestability

[244] Schneider (n63) 174.
[245] ibid 175.
[246] ibid.
[247] Wilson Christine S and Klovers Keith, 'The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech' (2020) 8 Journal of Antitrust Enforcement 10; Petit Competition Cases (n137).
[248] ibid 14.
[249] ibid.
[250] ibid 26.
[251] ibid 28.

for businesses on the digital market supposing that this will ultimately benefit consumers.[252] The purpose of this thesis was to investigate the likely effects of the removal of efficiency justifications in the framework of the DMA for competition law in the digital market. The previous sections analysed the role of pro-competitive effects as well as different regulatory approaches to the digital economy, thereby identifying the weaknesses in the Digital Markets Act. It is imperative that the regulation is 'fit-for-purpose' as a defectively designed and enforced regime can have negative effects that will spill over into other aspects of the economy.[253] The following section will attempt to suggest and justify recommendations on amendments to the DMA on the basis of considering efficiency justifications and pro-competitive effects. As proposed by scholars and economists alike, these may include the consideration of an efficiency defence, increasing flexibility through harmonic *ex-ante* and *ex-post* processes, altering the thresholds and a mechanism for error costs.[254]

Section 5.1 Including an Objective Justification or 'Efficiency Defence'

The overall aim of this thesis was to present research and arguments in favour of considering pro-competitive effects, countervailing impacts and efficiency justifications in the framework of the Digital Markets Act. The DMA diverges from traditional competition law in the sense that it includes per se rules prohibiting concrete conduct where there is no individual examination as to the effects.[255] The functioning of Articles 101-102 TFEU was supplemented with the consideration of promoting economic efficiencies and ensuring the justification of certain conduct should consumers also receive sufficient benefits.[256] It would be a recommended amendment to include the possibility for an efficiency defence within the functioning of the Regulation to allow for other stakeholders, such as consumers, to enjoy the benefits and advantages of such conduct.[257]

Section 2 of this thesis aimed to demonstrate through existing case law the potential benefits that the *ex-ante* application of the obligations would negate, particularly since the content of Articles 5-6 stems from this jurisprudence. This indicates that the conduct regulated by the

[252] Alexiadies and de Streel (n55) 170.
[253] APEC (n27) 34.
[254] Chirico (n45) 497.
[255] Kühling J and others, 'Recommendations for an Effective and Efficient Digital Markets Act' (Monopolkommission 2021) <https://www.monopolkommission.de/images/PDF/SG/sr_dma_fulltext.pdf> 43, 46-47.
[256] Ezrachi (n63) 10.
[257] Kühling et al (n255) 7.

DMA is capable of producing anti-competitive effects but also economic advantages.[258] Furthermore, there are a variety of academics but also economic panels that criticise and argue for the inclusion of such a defence in the approach of the DMA. The report from the economic experts identifies the need for an efficiency defence in the framework of the regulation, citing theories of value creation that justify certain types of conduct from gatekeepers.[259] They propose amendments to the DMA's approach, namely two separate sets of prohibitions with different thresholds for exceptions - a 'black list' which would require extreme considerations and a 'grey list' which allows for efficiency defences and pro-competitive justifications.[260] The German Monopolies Commission also supports this theory, stating that gatekeepers apply to the EC and bear the burden of proof for an exemption should the conduct be sufficiently efficient and beneficial - outweighing the disadvantages.[261] It can be concluded, however, that this amendment needs to be taken into consideration with regard to the conduct in question, as each obligation is liable to produce a variety of effects, thereby requiring a well-developed arrangement for such a defence.[262]

Overall, it is clear that the lack of possibility for gatekeepers to be exempted from obligations on the basis of the benefits they bring will contribute to losses of welfare in the digital economy.[263] As discussed in Section 3, it has been demonstrated that various jurisdictions approach the regulation of digital markets with the opportunity to objectively justify conduct. It can be seen that the overall impacts of the system would be improved if the benefits to consumers and efficiency gains would be taken into account, in context with the contestability of digital markets.[264] As the DMA contains concrete prohibitions and not general obligations, it cannot be stated that its application will be sufficiently accurate as broader situations don't seem to be taken into account. Therefore, as technology develops and thereby the potential DMA provisions may also change, it is important to consider the dynamics of the digital economy that produces benefits and improves overall welfare.[265] The mechanism needs to consider the technical and economic developments, consumer benefits as well as the market structure of the digital economy. On the basis of this, there are a variety of economic and

[258] Kühling et al (n255) 43.
[259] Cabral et al (n35) 3, 10-11.
[260] ibid 3.
[261] Kühling et al (n255) 7, 43.
[262] ibid 44.
[263] ibid 7.
[264] ibid.
[265] ibid 44.

welfare factors that justify the need for the DMA to be supplemented with an efficiency defence, naturally, adjusted to the objectives of maintaining fairness and contestability.

Section 5.2 Increase Flexibility, Combination of Approaches

The current inflexible and 'one-size-fits-all' rules-based approach of the obligations in the DMA has been widely criticised due to their inflexibility.[266] It is incorrect to state that either ex-post or ex-ante regulations are unable to function in the dynamic digital market, as each approach has its own unique advantages. It would be misguided to disregard the traditional competition law approach that has thus far intervened in digital cases, as they have come with extensive market analysis and economic considerations which are removed in an *ex-ante* approach.[267] However, *ex-ante* obligations bring much-needed efficiencies and early interventions to protect the structure of the digital market. There needs to be a clear balance between the enforcement efficiency and the flexibility of the Regulation, so as to include a substantive remedy design.[268]

The approach of the DMA, with precise and 'backwards-looking' rules, contrasts the main characteristics of the digital economy, which is innovative, dynamic and rapidly changing.[269] It is important to recognize that certain conduct may end up being abusive and restrictive thereby foreclosing a certain market, however, it may also end up promoting innovation incentives, consumer welfare and competition.[270] This represents the need for a harmonic combination of ex-ante and ex-post approaches to tackle the peculiarities of the digital market to introduce an appropriate balance. This could be introduced through the creation of *ex-ante* standards for obligations that determine when conduct is harmful to competition, but through an *ex-post* application/enforcement process that can assess the situation thoroughly. Introducing such flexibility and a level of caution to the DMA's structure would be more beneficial in maintaining the potential pro-competitive and economic benefits for the market and consumers alike.[271] Another approach to such flexibility could be the amendment of Articles 5-6 in a manner that focuses exclusively on positive obligations for gatekeepers, rather than negative prohibitions. Through such an approach, a system of regulatory dialogue can be

[266] Eifert, et al (n33) 1004; Colangelo (n6) 4.
[267] Portuese (n70) 8
[268] Kühling et al (n255) 6; Lancieri (n86) 616.
[269] Colangelo (n6) 3.
[270] Kontosakou (n73) 522.
[271] Ezrachi (n63) 11.

established, mirroring the CMA and DMUs methods.[272] This can be beneficial by contributing to avoiding societal costs and efficiency losses that can come with *ex-ante* rules, as unsuitable or out-of-date rules can also contribute to creating such market failures.[273]

It can be difficult to achieve the optimum balance between the protection of the incentive to innovate and the effective intervention/regulation of the dynamic digital market, as the consequences of certain conduct are not easily identifiable as it is according to the black letter law in the DMA.[274] Therefore, it can also be recommended to introduce more 'general' obligations and standards in Articles 5-6 rather than focusing on concrete conduct that is to be prohibited. This approach has been demonstrated by the UK, as discussed in section 3.3, which has acknowledged that strict rules cannot be uniformly applied across the digital market. The CMA will operate on a basis of general principles, a code of conduct and guidelines that pursue the aims of open choices, trust and transparency alongside fair trading.

It is recommended that such an approach can be implemented and integrated into the functioning of the DMA, to increase its flexibility and therefore also its success in regulating the digital economy. The protective effect that Articles 5-6 aim to achieve can arguably lead to overreaches and mistakes in individual instances that could negate the efficiency factors of that conduct.[275] To remedy such an issue, increased flexibility in the provisions in conjunction with an efficiency defence, as previously discussed, should be included. This would allow the rules to be applied in a more appropriate manner that is more tailored to the specific characteristics of the markets in question.[276]

Section 5.3 Abiding by Principle of Proportionality

Following the discussion in the previous section, with regard to the shift to *ex-ante* rules and *per se* prohibitions, it can be questioned whether the DMA is in accordance with the principle of proportionality laid down in Article 5(4) TEU.[277] This principle relates to the previously discussed 'flexibility' factor, as it entails that in the exercise of powers by EU authorities various criteria need to be considered. There needs to be a balance between the effects of the

[272] Botta (n26) 512.
[273] Narayanan B and Lee-Makiyama H, 'Economic Costs of Ex Ante Regulations' (European Centre for International Political Economy 2020) ECIPE Occasional Paper 07/2020 <https://ecipe.org/wp-content/uploads/2020/10/ECI_20_OccPaper_07_2020_Ex-ante_Regulations_LY06.pdf> 3.
[274] Kontosakou (n73) 522.
[275] Kühling et al (n255) 45.
[276] Lancieri (n86) 616.
[277] TEU (n8) Art 5(4).

legislation and the purpose it intends to achieve, considering the suitability, necessity and narrow sense proportionality of intended measures.[278] The proportionality in the narrow sense entails considerations towards the question of whether the benefits of limiting and restricting conduct outweigh the accompanying disadvantages, essentially whether such regulation is justified. In the context of the DMA, it can be argued that the lack of distinction between conduct that promotes and conduct that suppresses competition could potentially violate this principle, as it could pose excessive burdens in relation to the sought objective.[279]

The structure of Article 6 is set up in a manner that leaves room for some notion of proportionality, but on the other hand, Article 5 follows a more 'blunt' approach.[280] In relation to the content of these articles, a more ideal approach can be seen in the German BKartA which lists similar prohibited conduct to the DMA, however on a more general basis. This is paired with the BkartA's powers that are to be exercised at their discretion, by taking into account the effects on competition, thereby diverging from the DMA's strict application of rules.[281] This can contribute to maintaining proportionality between the measures imposed and their actual effects, as the more far-reaching a provision the bigger the justification that is required for such an imposition. Another recommendation can be to amend the provisions of the DMA to integrate proportionality factors in their enforcement, instead of applying them in a *per se* manner, such as in the form of open-ended principles.[282] This can link together with the cost-benefit analysis discussed in the *Intel* case (Section 2.2.6), as it can be compared to a manifestation of the principle of proportionality - a provision should be considered unreasonable if the costs outweigh the benefits.[283] This demonstrates the link between proportionality and economic efficiency, emphasising the need for consideration of these principles within the DMA.

The principle of proportionality is relevant in all areas of EU law and is necessary to ensure the necessity and proportionality of regulatory interventions.[284] However, it can be argued that the DMA regime with strict *per se* obligations alongside prohibitions is an extensive burden

[278] Portuese (n70) 9-10; Diez (n41) 19.
[279] Portuese (n70) 9.
[280] Alexiadies and de Streel (n55) 181
[281] Botta (n26) 505
[282] Portuese (n70) 9; Alexiadies and de Streel (n55) 169.
[283] Portuese (n70) 9.
[284] ibid 10.

upon the designated gatekeepers and clearly does not balance economic or other considerations.[285] As discussed in Section 5.1, the inclusion of an efficiency defence or the opportunity to provide objective justifications would mitigate the rigidity of the DMA provisions and introduce more proportional measures. It can be argued that the current state of the regulation is not the 'least restrictive means' to achieve fairness and contestability in the digital market.[286] Particularly as the provisions are included to work towards changing the structure of the market, rather than on maintaining fair competitive processes, there is a lack of consideration for balancing negative and positive effects. Therefore, the blanket prohibitions should be adjusted and tailored to be compliant with the principle of proportionality.

Section 5.4 Mechanism for Error-Costs - Rebuttable Presumptions

As the DMA is aimed at large gatekeepers, the impacts of its application are naturally also significant on the digital economy, which would indicate a need for safeguards to ensure its beneficial regulation.[287] As indicated in Section 4.3, the lack of an opportunity to justify conduct through efficiency defences due to the *ex-ante* obligations gives rise to the probability of error costs. Type I error costs are false positive interventions and Type II errors are a failure to intervene.[288] The structure of the DMA should be altered to provide a remedy for this occurrence, which can be done by including rebuttable presumptions for the regulated conduct themselves – not just the 'gatekeeper' status.

As previously discussed, there are possibilities for Type I and II errors, which can each be dealt with through tailor-made opportunities to rebut presumptions. In situations where Type I errors are unlikely as they theoretically concern conduct that is always judged to be anti-competitive, the presumption of illegality may prevail without an effects analysis.[289] There may be situations where Type I and Type II errors are probable, but the effects of Type II are heavier than Type I. This indicates that the situation concerns conduct where the welfare benefits are outweighed by consumer harm, therefore the presumption of anticompetitive conduct can remain however possibilities should be provided to undertakings to be able to demonstrate efficiency considerations to rebut the illegality of the conduct.[290] Alternatively, there may be situations

[285] Portuese (n70) 10.
[286] ibid 11.
[287] Schneider (n63) 175.
[288] Davies et al (n71) 511; Lancieri (n86) 616.
[289] Davies et al (n71) 511.
[290] ibid.

where Type I and II errors are probable, but the effects of Type I are heavier than Type II. This concerns 'legal' conduct that – when prohibited – has greater efficiency losses than the cost to society when allowing it. In these situations, the conduct should be presumed legal and pro-competitive, which can be rebutted on the basis of evidence of an infringement due to detrimental effects.[291] Finally, when Type II error risks are considered unlikely, therefore in cases of false non-interventions, the conduct in question should be presumed to be legal.

It can be argued that the European Commission and legislators do not have the level of expertise required to accurately designate conduct that is harmful in all instances. False interventions and non-interventions can both have burdensome effects, which should be prevented and mitigated in the DMA regime. This can be done by introducing mechanisms for rebuttable presumptions for the regulated conduct that are tailored to the type of potential error costs, which can allow for opportunities to present efficiency considerations according to the discussed scenarios. The DMA itself applies to large undertakings, thereby indicating the risk of market tipping, it can be used to justify the use of *ex-ante* rules to avoid Type II errors (lack of intervention) which can have high costs.[292] However, Type I errors can also have significantly high costs, especially in a market as dynamic and fast-paced as the digital sector where undertakings are active in various sectors of the economy which is further emphasised by the different business models across platforms.[293]

Past jurisprudence relating to abuse of dominance has been subject to analysis and has frequently dealt with situations where both Type I and Type II errors are probable. This indicates that efficiency considerations should be included in the judgement of conduct, thereby supporting the inadequacy of *per se* rules.[294] Efficiency effects should play a role in the consideration of prohibiting or allowing conduct, through stimulation of dialogue between the enforcing institution and the gatekeeper in question. This would provide a balance to the application of the DMA, which currently does not weigh consumer, welfare and efficiency harms or benefits in its prohibition of conduct.

[291] Davies et al (n71) 511.
[292] ibid 512.
[293] ibid.
[294] ibid 511.

Section 5.5 Consideration of Ecosystems

The approach of the European legislator in the DMA is clearly prioritising traditional static competition structures, as can be seen through its assumptions and thresholds.[295] The gatekeeper status is an indication of the EU's acceptance that such powerful market positions can be reached due to the characteristics of the digital market and their business models; however, it has the counter-effect of limiting and containing the market failures associated with that.[296] This can have the potential consequences of losing the benefits of network effects, ecosystems and economies of scale, which indicates a need for an amendment or reconsideration of the thresholds.[297]

The target of the DMA rules are gatekeepers, which can be distinguished from 'basic' dominant undertakings through the element that they operate across distinct markets through their ecosystems and are able to exercise high levels of control upon them.[298] A group of NCAs indicated that it would be important for the DMA to be able to appropriately regulate digital ecosystems and not just pursue digital gatekeepers, as these concepts capture different types of activity within their scope.[299] However, this is not a notion that is acknowledged within the Regulation's framework and is therefore of great controversy when considering its impacts on efficiency and innovation on digital business models.[300]

To put this issue into practical terms, Google can be looked at as an example, in terms of its ecosystem building through the Android operating system. Through their Google Mobile Services, they have linked the Android OS together with Google products such as Chrome, Search and Gmail (also explained in Section 2.2.3 *Google Android*). However, there are various other stakeholders who rely on Android to enter their relevant markets, such as app developers who develop products to be compatible with the OS, producers of technological devices who install Android in their products, advertisers who utilise the data collected by Google to improve their services on GMS and many more.[301] This demonstrates the complex ecosystem

[295] Teece et al (n140) 5.
[296] Eifert et al (n33) 994.
[297] Teece et al (n140) 5.
[298] Davies et al (n71) 509-510.
[299] Alexiadies and de Streel (n55) 176
[300] Davies et al (n71) 509-510.
[301] ibid.

built around Android, with various active 'players' on various active markets through the multi-sided platform who mutually benefit from each other in order to create a high-quality ecosystem which produces economic and welfare benefits.

Furthermore, this demonstrates that the DMA's *ex-ante* application of strict prohibitions and obligations can have detrimental effects across the digital (and physical) economy, as it does not take into consideration the complex incentives which are present. The undertakings operating within an ecosystem are motivated to develop, innovate and protect the system within which they participate, which can produce significant pro-competitive effects, specifically in terms of efficiency.[302] This is explained by some scholars as a 'flywheel effect' indicating that the development of individual players generates an overall much larger effect on the ecosystem, such as developing their businesses for compatibility with Android, which thereby reinforces the quality of the OS, which then reinforces the initial incentive to develop.[303]

The DMA does not consider or take into account these discussed incentives and dynamics, as it instead approaches the ecosystem notion with 'traditional' concerns of excess market power, tipping of markets and exclusionary abuse.[304] However, it should also account for undertakings that contribute to ecosystems, based on the benefits that are provided to end users.[305] As mentioned in Section 5.1, the DMA is in need of an efficiency defence, a remedy that could also take into account the dynamics of digital ecosystems and ensure that the prescribed rules do not produce unintended negative effects. In terms of ecosystems, this would provide an opportunity for competition authorities to be able to assess the potential harm versus the potential benefits of ecosystems for competition.[306] When looking at what competition policy the DMA intends to address, it is clear that it was introduced with the goal of resolving market failures associated with the ecosystem models.[307] Therefore, the obligations and prohibitions contained therein should reflect these aims, potentially by amending the gatekeeper designation to have a primary focus on those platforms which operate in ecosystems.[308] This would increase

[302] Davies et al (n71) 509-510.
[303] ibid.
[304] ibid
[305] Kühling et al (n255) 6.
[306] ibid.
[307] Colangelo (n6) 5.
[308] ibid 6.

the competence of the functioning of the DMA and would more accurately reflect the market conditions which it aims to regulate.

Conclusion

To conclude, the aim of this thesis was to research the consequences on the digital market of the removal of objective justifications or the "efficiency defence" in the new Digital Markets Act. The research to answer the main question and subsequent sub-questions was conducted through analysis of jurisprudence, legislation and economic/competition theory based on academic works. The research has concluded that there are demonstrated and proven benefits that will potentially be lost once the DMA's new regulatory methods are fully applicable.

The thesis does not negate the existence of competition issues with Article 101 and 102 TFEU within the digital market as discussed in Section 1, pertaining to tipping markets and excessive network effects. However, the new framework is designed to have *ex-ante* regulation that shifts the focus towards market-structure objectives without consideration of effects. This approach is problematic, especially in terms of economic effects, innovation and investment incentives, which is ultimately harmful to consumers as well as competition. Particularly in a dynamic and fast-paced market such as the digital economy, more sensitive and nuanced regulation is required that is appropriate for the conditions of the market. It has been demonstrated in Section 2 through the *Google Shopping, Google Android, Microsoft, Booking.com, Epic Games* and *Intel* cases that the role of pro-competitive effects must be considered when adjudicating digital competition cases. Though the final judgement of the discussed cases may not be in favour of the "Big Tech" companies, there is ample research supporting the significance of the role of pro-competitive effects and the consideration of innovation factors. When applying these results to the "bigger picture" it is also clear that the identified benefits contribute greatly to overall economic and consumer welfare, which is not reflected in the DMA.

The research has also concluded that there are a variety of legal methods and remedies available to mitigate the negative effects on the digital market without removing objective justifications. This was demonstrated in Section 3 through a narrow comparison between the jurisdictions of the United States, United Kingdom, Germany, Japan and the EU. The variety of analysed regulatory regimes each brings about its own advantages and disadvantages, however, neither regime blocks the possibility to assess pro-competitive effects and countervailing justifications.

This is a significant area where the DMA deviates, despite aiming to address similar competition issues in the digital market. Furthermore, a variety of jurisdictions chose an approach between the *ex-post* and *ex-ante*, such as through guides or codes of conduct instead of blanket prohibitions. There is an evident rigidity and inflexibility built into the functioning of the EU's new regulatory regime in comparison to other solutions, which was more deeply researched and analysed in Sections 4 and 5. The comparative analysis also identified a potential future legal problem, whereby large digital platforms have to comply with diverging regulatory regimes thereby increasing fragmentation and compliance costs in the digital economy.

The research has identified clear weaknesses in the regulatory regime of the DMA, many of which can be traced back to an overall economic weakness and lack of innovation incentives. These issues can also be explained by a change in the policy goals of the DMA in comparison to traditional competition law. As the focus has shifted to the protection of smaller undertakings in the digital economy, this is achieved by limiting the "power" of larger companies. This naturally removes the importance previously placed upon maximising consumer welfare, economic progress, innovation and efficiencies which are the traditional goals of competition law. This can not only be seen in the "one-size-fits-all" *ex-ante* approach but also in the aim of prioritising procedural efficiency by dealing with digital market issues faster at the cost of innovation and chilling effects. There is a clear mismatch in the attempt to enforce these rules and maintain static competition in a dynamic economy, which will arguably also lead to increased error costs and false-positive interventions. While it can be argued that the DMA will introduce a new level of legal certainty in the digital field for gatekeepers, the point can also be made that it is an overreach and thereby an overregulation. There are a variety of trade-offs that will materialise in the long run, which should have been reflected and mitigated in the provisions and rules of the DMA, such as through the consideration of pro-competitive effects. The thesis argues that the new regulation can distort competition, hamper innovation, reduce economic efficiency and harm consumer benefits.

In light of the identified issues and weaknesses, Section 5 focused on proposing solutions and recommendations on how to amend the current DMA framework, so as to be more effective and successful in the long run. It is clearly demonstrated that a defectively-designed regulation can lead to a variety of negative spillover effects, which indicates the need for improvements.

The main recommendation that stems from the research conducted in this thesis is the need to include the possibility for objective justifications, such as an efficiency defence. It is clearly demonstrated throughout the research that such a consideration is imperative for its appropriate functioning in regulating the digital market The prohibitions and obligations in the regulation should be amended to allow for such a possibility, thereby introducing more flexibility into the overall regime. Tying together with the increased flexibility, it is also recommended to convert the content of these rules into more generally worded principles that can be applied on a case-by-case basis and hence move away from regulating the concrete conduct of gatekeepers. Furthermore, it is recommended that these changes be introduced in parallel with adhering to the principle of proportionality, as there needs to be a balance between the intention and the effects of the regulation. There seems to be no balance or cost-benefits analysis when looking at the rules and application of the DMA, which further strengthens the point that it is an over-regulation of this sector. This can also be mitigated by introducing a mechanism for error costs such as rebuttable presumptions and an opportunity for undertakings to appeal against a decision to prohibit their conduct. This again ties together with the concept of taking into consideration the efficiencies and countervailing benefits to conduct that may be considered anti-competitive. The consideration of ecosystems is also recommended to be included in the regulation,

The question arises whether this futuristic and ‘revolutionary’ regulation is in fact backwards-looking in the fast-paced digital world. The European Commission had the opportunity to launch an innovative competition law tool that is suitable for the digital market and its dynamic competition approach, however, the tool that has been introduced seems to favour static competition and disregard important characteristics of the digital economy. This is important to take into consideration in terms of adverse effects on the European economy as a whole, not only on the digital markets specifically. In an increasingly digitised society, it is important that Europe moves forward with the developments rather than becoming less competitive globally.

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Abstract

This thesis researched the role of objective justifications in competition law and the implications of their exclusion from the “Digital Markets Act” (DMA) on the digital economy. The evaluation of pro-competitive effects is a fundamental component of competition law, providing legitimate reasons for why certain conduct is not anti-competitive. This entails the assessment of efficiency gains, welfare factors as well as innovative developments when making decisions. The digital market is a fast-paced, dynamic and rapidly evolving economy where the role of objective justifications is emphasised due to these unique characteristics. The research presents that the removal of this element from the DMA eliminates crucial safeguards which increase the vulnerability of the regulation in combination with its strict ex-ante nature. Furthermore, the inability to conduct assessments on overall market impacts limits the effectiveness of decision-making, which can have detrimental consequences in the digital economy. The evaluation of various jurisdictions’ approaches enhances the findings of the research, whereby the current regime envisioned in the DMA framework is too rigid and inflexible. The thesis argues that a shift in focus to protect the market structure rather than the market performance is conducted in an unbalanced manner, therefore presenting the DMA as an overregulation that fails to address the specific needs of the digital market. There are several recommendations and modifications that should be included within the regulatory regime to ensure its success at appropriately controlling the digital economy.

Diese Arbeit untersuchte die Rolle objektiver Rechtfertigungsgründe im Wettbewerbsrecht und die Auswirkungen ihres Ausschlusses aus dem "Digital Markets Act" (DMA) auf die digitale Wirtschaft. Die Bewertung der wettbewerbsfördernden Wirkungen ist ein grundlegender Bestandteil des Wettbewerbsrechts, der legitime Gründe dafür liefert, warum ein bestimmtes Verhalten nicht wettbewerbswidrig ist. Dies beinhaltet die Bewertung von Effizienzgewinnen, Wohlfahrtsfaktoren sowie Innovationsentwicklungen bei der Entscheidungsfindung. Der digitale Markt ist eine schnelllebige, dynamische und sich rasch entwickelnde Wirtschaft, in der die Rolle objektiver Rechtfertigungen aufgrund dieser einzigartigen Merkmale hervorgehoben wird. Die Untersuchung zeigt, dass durch die Streichung dieses Elements aus der DMA entscheidende Schutzmechanismen wegfallen, was die Anfälligkeit der Verordnung in Verbindung mit ihrem strengen Ex-ante-Charakter erhöht. Darüber hinaus schränkt die Unmöglichkeit, Bewertungen der Gesamtauswirkungen auf den Markt durchzuführen, die Wirksamkeit der Entscheidungsfindung ein, was in der digitalen Wirtschaft nachteilige Folgen

haben kann. Die Bewertung der Ansätze verschiedener Rechtsordnungen untermauert die Ergebnisse der Untersuchung, wonach die derzeitige Regelung, die im DMA-Rahmen vorgesehen ist, zu starr und unflexibel ist. Die These lautet, dass die Verlagerung des Schwerpunkts auf den Schutz der Marktstruktur und nicht auf die Marktleistung unausgewogen ist, so dass sich das DMA als Überregulierung erweist, die den besonderen Bedürfnissen des digitalen Marktes nicht gerecht wird. Es gibt mehrere Empfehlungen und Änderungen, die in das Regulierungssystem aufgenommen werden sollten, um dessen Erfolg bei der angemessenen Kontrolle der digitalen Wirtschaft sicherzustellen.