Ondrej Blažo*

Pregledni naučni rad
UDC: 358.114.1:004.738.5
doi: 10.5937/spz66-34993

THE DIGITAL MARKETS ACTS – BETWEEN MARKET REGULATION, COMPETITION RULES AND UNFAIR TRADE PRACTICES RULES**

Abstract

In 2020 the European Commission presented its legislative package aimed to deal with new challenges for the internal market stemming from development on digital markets and alleged abuses and anticompetitive practices therein, including the Digital Markets Act (DMA). The aim of this paper is not to evaluate content of the DMA itself, but to evaluate the position of the DMA in the context of other market sector-oriented regulations, rules on unfair trade practices, competition rules as well as fitness of legal basis and observance of rule of law safeguards. As the DMA proposal departed from competition law legal basis enshrined in Art. 101 et seq. of the Treaty on the Functioning of the European Union, it paved the way for the possibility to impose sanction under both regimes. This possibility of double sanctions and necessity for check of proportionality in all actions of the Commission as well as in imposition of fines constitute one of the most relevant shortcomings from the "constitutional" point of view of position of the DMA in the EU legal framework. As it is argued in this paper, without more synchronization with competition regulatory regimes, the DMA proposal contains elements that can, at the end of the day, diminish its legal effectiveness via subsequent judicial battles.

Keywords: *European Union, digital markets, Digital Markets Act, competition law, proportionality.*

1. Introduction

In December 2020 the European Commission presented its legislative package aimed to deal with new challenges for the internal market stemming from development on digital markets and alleged abuses and anticompetitive practices

* Associate Professor at the Faculty of Law, Comenius University Bratislava, Slovakia, e-mail: *ondrej.blazo@flaw.uniba.sk*. ORCID: https://orcid.org/0000-0001-9721-8724, Web of Science ResearcherID: https://publons.com/researcher/E-3924-2013/

** The paper was prepared within project Jean Monnet Network European Union and the Challenges of Modern Society (Legal Issues of Digitalization, Robotization, Cyber Security and Prevention of Hybrid Threats) Project ID: 611293-EPP-1-2019-1-CZ-EPPJMO-NETWORK.

therein. The proposals of the Digital Markets Act (COM/2020/842 final), (hereinafter: DMA) and the Digital Services Act (Digital Services Act and amending Directive 2000/31/EC COM/2020/825) are envisaged as substantial founding of the European toolkit on digital markets in order to establish "contestable and fair digital markets", as the title of DMA suggests.

Although the motives of the DMA proposal are given in the Explanatory Memorandum attached to the DMA proposal as well as the context with other policies of the European Union (hereinafter: EU), the position of the DMA in the EU legal and constitutional framework is still blurred.

DMA includes Art. 114 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) as its only legal basis. *A contrario*, DMA suggested as tool of harmonization of national rules on the internal market, rather than competition rule. Since DMA shall cover certain potentially anti-competitive practices of gatekeepers, link to competition rules as well as *ne bis in idem* is inevitably apparent. Since DMA covers *ex ante* regulation of economic activities of "gatekeepers", i.e., undertakings providing services essential for access to specific market, it also resembles some aspects of sectoral market regulation. Moreover, by the black-listed unfair practices, there is a conceptual link with regulation of unfair business-to-business practices (Directive (EU) 2019/633).

The aim of this paper is not to evaluate content of the DMA itself, but to evaluate the position of the DMA in the context of other market sector-oriented regulations, rules on unfair trade practices, competition rules as well as fitness of legal basis and observance of rule of law safeguards.

2. "Constitutional" Basis of the DMA Proposal

The DMA proposal relies on Art. 114 TFEU as its only explicit legal basis and other provisions that can serve as its substantive legal basis are not mentioned (references to procedural rules under Art. 290 TFEU, principle of subsidiarity under Art. 5 of the Treaty on European Union or limits laid down by the Charter of Fundamental Rights of the European Union are not relevant in this context). The purpose of the action of the EU under Art. 114(1) TFEU shall be adoption of "the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market." The concept under Art. 114 TFEU is usually understood as provision on harmonization of laws. Compared to the context of the World Trade Organization, where concept of "harmonization" corresponds to "de-regulation", in the context of the EU "harmonization"

can introduce a new regulation on the EU level replacing the national regulation that created obstacles to the internal market (Klamert, 2015, p. 361). Currently, there is no substantial divergence between national regulation of digital markets between the Member States, because, in the majority of cases, any specific regulation is simply missing and the Member States still rely on competition rules, as the European Commission itself has done before. Indeed, such a legal framework is emerging in the Member States, as can be observed in recent amendments of German competition law (Franck & Peitz, 2021).

Although the terms "harmonization" and "approximation" suggest using directives, the employment of regulations is not excluded, and the Court of Justice of the European Union confirmed this option in several cases.[1] On the other hand, the case law of the Court of Justice developed manoeuvring framework for using Art. 114 TFEU. The conditions can be summarized as follows:

1. Object of measures adopted on the basis of Art. 114 TFEU must genuinely be to improve the conditions for the establishment and functioning of the internal market (Judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, para. 32; Judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, para. 60; Judgment of 2 May 2006, *United Kingdom v Parliament and Council*, C-217/04, EU:C:2006:279, para. 42).
2. A mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of Art. 114 TFEU as a legal basis (Judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, para. 32).
3. The Union legislature may have recourse to Art. 114 TFEU in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (Judgment of 12 December 2006, *Germany v Parliament and Council*, C-380/03, EU:C:2006:772, para. 37 and the case law cited therein) or to cause significant distortions of competition (Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, paras. 84 and 106).
4. Recourse to Art. 114 TFEU is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of

[1] For example: Judgment of 22 January 2014, *United Kingdom v Parliament and Council*, (Case 270/12, EU:C:2014:18); Judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321; Judgment of 2 May 2006, *United Kingdom v Parliament and Council*, C-217/04, EU:C:2006:279; Judgment of 6 December 2005, *United Kingdom v Parliament and Council*, C-66/04, EU:C:2005:743.

national laws; however, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.[2]

5. Where an act based on Art. 144 TFEU has already removed any obstacle to trade in the area that it harmonises, the Union legislature cannot be denied the possibility of adapting that act to any change in circumstances or development of knowledge having regard to its task of safeguarding the general interests recognised by the Treaty (Judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, para. 43; Judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paras. 77 and 78).

While providing space for "preventive harmonization" with rather low threshold (Weatherill, 2011, p. 833) and allowing the EU's institution quite broad discretion and scope of using Art. 114 TFEU as a legal basis for their acts, in particular situations, when they use Art. 114 as the sole legal basis, Art. 114 TFEU still cannot be used (or abused) as a "universal" legal base for any expansion of the EU's law, including competence of institutions.

On the other hand, Art. 352 TFEU can serve as a legal basis for expansion of EU policies in the new areas as well. It is probable that the EU institution will avoid using Art. 352 TFEU as a legal basis if it is possible due to required unanimity in the Council of the EU (comparing to ordinary legislative procedure under Art. 114 TFEU). In this context, referring to case law of the Court of Justice, Lamadrid de Pablo and Bayón Fernández suggest that Art. 352 TFEU, and not Art. 114 TFEU, "would be the appropriate legal basis to create a new regulatory apparatus pursuing autonomous legal concepts and goals and operating independently of national laws" (Lamadrid de Pablo & Fernández, 2021, p. 578). The Court of Justice saw the distinction between application of Art. 114 and Art. 352 TFEU in the answer to the question whether the act of the EU creates a new element established purely on the basis of the EU law that is not stemming from national law of the Member States. E.g., in patent law, it distinguished between harmonization of national patents (possible application of Art. 114 TFEU) and creation of "EU patent" (possible application of Art. 352 TFEU)[3]: "The patents to be issued under the Directive are national patents, issued in accordance with the procedures applicable in the Member States and deriving their protective force from national law. As the creation of a Community

[2] For example, Judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, para. 32, Judgment of 12 December 2006, *Germany v Parliament and Council*, C-380/03, EU:C:2006:772, para. 38 and the case law cited therein.

[3] Corresponding provisions of the Treaty on Establishing of the European Communities were Art. 95 and Art. 308 respectively.

patent is neither the purpose nor the effect of the Directive, it does not introduce a new right which would require recourse to the legal basis afforded by Article 235 of the Treaty. That view is not affected by the fact that the inventions covered were not previously patentable in certain Member States - that, indeed, is precisely why harmonisation was warranted - nor by the fact that the Directive makes certain clarifications and provides for derogations from patent law as regards the scope of the protection." (Judgment of 9 October 2001, *Netherlands v Parliament and Council*, C-377/98, EU:C:2001:523, para. 25). Similarly, creation of a new legal form of cooperative society (Council Regulation (EC) No 1435/2003, p. 1), in addition to national legal forms was considered a suitable forum for application of Art. 352 TFEU (Judgment of 2 May 2006, *Parliament v Council*, C-436/03, EU:C:2006:277, para. 40).

In both, application of Art. 114 TFEU and Art. 352 TFEU, the question of proportionality is crucial (in the areas of shared competence also the principle of subsidiarity). In the case of Art. 114 TFEU the legislation may cover merely rules necessary for removal of obstacles to the internal market created (or at least potentially created) by national legislation. Apart from the question of proportionality of substantive rules (see in details De Pablo & Fernández 2021), enforcement framework and vestment of centralized enforcement powers into hands of the Commission may exceed what is necessary for removal of such obstacles to the internal market. However, the Court of Justice stretched the limits of Art. 114 TFEU in *ENISA* case (Judgment of 2 May 2006, *United Kingdom v Parliament and Council*, C-217/04, EU:C:2006:279) and in *Short Selling Regulation* case (Judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18), in which the United Kingdom claimed abuse of Art. 114 TFEU (for more details see Howell, 2014; Marjosola, 2014). The court acknowledged, that also administrative powers vested to the EU specialized agency can represent a form of harmonization (Judgment of 2 May 2006, *United Kingdom v Parliament and Council*, C-217/04, EU:C:2006:279, para. 44). "Accordingly, the EU legislature, in its choice of method of harmonisation and, taking account of the discretion it enjoys regarding the measures provided for under Article 114 TFEU, may delegate to a Union body, office or agency power for the implementation of the harmonisation sought. That is the case in particular where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately." (Judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, para. 105). Even though the Court of Justice admitted that Art. 114 TFEU can be a legal basis also for institutional and enforcement rules, their application and scope must still be linked to overcoming possible fragmentation of the internal market, that can, in the end, limit discretion of the Commission when applying the DMA.

Apart from Art. 114 TFEU, there are other "candidates" for legal basis for the DMA: Art. 352 TFEU solely or together with Art. 103 TFEU. Both provisions were used for adopting the EC Merger Regulation (Council Regulation (EC) No 139/2004, p. 1). Although both alternatives can be useful from the substantive point of view, they are not suitable from the procedural and political point of view. First, both diminish influence of the European Parliament: Art. 103 TFEU involves the European Parliament merely as a consultative body[4] and Art. 352 TFEU does not allow the European Parliament to make amendments to legislative proposal on its own.[5] Moreover, acts adopted under Art. 352 TFEU require unanimity in the Council of the European Union.

As it will be shown later, question of a proper legal basis is not purely a theoretical one. Apart from the possibility of annulment of the DMA in case of an ill-selected legal basis, the purpose and the legal basis is relevant for assessment of *idem* regarding application of *ne bis in idem* safeguard.

3. The DMA as Sector Market Regulation?

The concept of "gatekeeper"[6] under DMA resembles network operators under sector regulations (Larouche & De Streel, 2021, p. 544).[7] The "gatekeeper" thus

[4] "The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament."

[5] "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament."

[6] Under Art. 3(1) DMA "A provider of core platform services shall be designated as gatekeeper if:
(a) it has a significant impact on the internal market;
(b) it operates a core platform service which serves as an important gateway for business users to reach end users; and
(c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future."

[7] See Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (*OJ* L 158, 14. 6. 2019, pp. 125–199) (hereinafter "DCRIME"), Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (*OJ* L 211, 14. 8. 2009, pp. 94–136) (hereinafter "DCRIMNG"), Directive (EU) 2018/1972 of the European Parliament and of the Council of 11

controls access to the core platform that is inevitable for providing certain group of services or goods. Compared to digital markets and telecommunications, the regulation of the energy sector can rely directly on primary law – Art. 194(2) TFEU. Sector market regulatory directives empower (and require) the Member States to create and maintain effective and competitive market in their respective territories and jurisdictions and to remove barriers created by specific character of network industries, such as energy sector and electronic communications. Under the DCRIME, DCRING and EECC the national regulatory authority may impose specific obligations to undertakings operating transmission, distribution systems or other networks and public services duties. The anti-barrier purpose of the sector regulation directives is underlined in their texts, e.g., aim of the EECC is to create "[…] a legal framework to ensure freedom to provide electronic communications networks and services, subject only to the conditions laid down in the [EECC] […]" (Rec. 5), the DCRIME is aimed to secure "common rules for a true internal market and a broad supply of electricity that is accessible to all […]" (Rec. 19), or effective unbundling required by the DCRING. Security of supply in energy sector is also one of the key elements of sector regulations and duties linked to safeguarding supplies are a part of duties in public interest (e.g., Art. 3(2) DCRING). The DMA proposal thus deviated from the concept of sector regulation as a measure aimed to establish competition and freedom on market suffering from structural barriers as well as from the principle of proportionality of regulatory measures (i.e. under Art. 68(2) EECC measures taken by the national regulatory authority under EECC shall be the least intrusive way of addressing the problems identified in the context of the market analysis), (Ibáñez Colomo, 2021, p. 569).

Compared to sector regulation directives, the DMA does not contain elements of duties in public interest. On the other hand, the DMA provides an exhaustive list of obligations of the gatekeepers in respect of each platform they operate (Arts. 5 and 6 DMA). The executive (regulatory) powers of the European Commission can emerge in two aspects:

1. evaluation whether the measures adopted by the gatekeeper are "[…] effective in achieving the objective of the relevant obligation" (Art. 7(1) DMA);
2. expansion of lists of obligations of the gatekeepers under Arts. 5 and 6 via delegated acts (Art. 10 DMA).

December 2018 establishing the European Electronic Communications Code (Recast) (*OJ* L 321, 17. 12. 2018, pp. 36–214) (hereinafter: "EECC").

Ex ante regulation under the DMA proposal shall not be subject to margin of appreciation and proportionality test performed by the regulatory authority (as in energy and telecommunication sector) but shall be based on *per se* prohibitions established by the DMA and consecutive delegated acts of the Commission. The "regulatory authority" – the European Commission – will not assess proportionality and necessity of particular obligations levied upon the gatekeeper in actual market context. The undertaking cannot escape from obligations under Arts. 5 and 6 DMA challenging fulfilment of test of economic or market necessity. The gatekeeper shall create its own framework of market "self-regulation" in order to comply with obligations under Arts. 5 and 6 DMA being under the threat of possible sanctioning by the Commission for "under regulation" (Art. 36(1) DMA).

Summing up, even though the DMA proposal resembles access-on-market requirements designed on the basis of market sector regulation, its structure is completely different because of setting blacklist of *per se* prohibited behaviour (as a counterpart to gatekeepers' obligations). The Commission is not empowered to "shape" the less competitive or uncompetitive market (market regulation *stricto sensu*) but to act as a "watchdog" over fulfilment of obligation stipulated by law (via *ex post* review). Thus, the DMA proposal combines *ex ante* setting market conditions (similar to market regulation) directly stipulated in the legislative act (or delegated act) with *ex post* evaluation of fulfilment of these duties (similar to protection of competition).

4. The DMA as Unfair Trade Practices Regulation?

Comparing to business-to-consumer unfair trade practices (B2C UTP),[8] the EU has not introduced comprehensive legal framework on business-to-business unfair trade practices (B2B UTP), with an exemption of agriculture sector[9] (*cf.* Piszcz, 2018). Both, UCPD and UTPD contain a list of "unfair trade practices" – Arts. 5 to 9 and Annex I UCPD and Art. 3 UTPD as a minimal standard of harmonization. The Member States can provide additional protection against B2C

[8] See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (*OJ* L 149, 11. 6. 2005, p. 22–39) (hereinafter: "UCPD").

[9] See Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (*OJ* L 111, 25. 4. 2019, p. 59–72) (hereinafter: "UTPD").

as well as B2B UFTs insofar they follow the internal market rules in general (Art. 9 UTPD) or are covered by the general clause prohibiting B2C UTP [Art. 5(1) UCPD]. Both directives, UCPD and UTPD represent a form of minimal-standard harmonization of laws of the Member States in order to provide minimum level of the Europe-wide protection (*cf.* Rec. 23 UCPD and Rec. 1 UTPD). Creating European framework on UTP also contribute to the functioning of the internal market via elimination of barriers to free movement created by the disparities of national UTP regulations (*cf.* Rec. 23 UCPD).

In the relation of the DMA proposal to national rules, it distinguishes several groups of rules. For the first group, "regulations or administrative action for the purpose of ensuring contestable and fair markets", the DMA proposal is designed as *numerus clausus*, i.e., the Member States cannot impose further obligations on gatekeepers [Art. 5(1) first sentence DMA]. However, outside the scope of rules "for the purpose of ensuring contestable and fair markets", the Member States may introduce general UTP rules for providers of core platform (i.e., where these obligations are unrelated to the relevant undertakings having a status of gatekeeper) [Art. 5(1) third sentence DMA]. Therefore, the Member States can introduce national rules on providers of core platforms and impose their own national lists of obligations of such providers, provided they do not impose duties specifically on gatekeepers.

5. The DMA as a Competition Rule?

The relation of the DMA proposal to competition is crucial for several reasons. Firstly, the internal market, in general, is shared competence of the EU and the Member States, while protection of competition on the internal market is subject to exclusive competence of the EU. Secondly, possible sanctions under the DMA and sanctions for infringements of competition rules can raise the question of violation of *ne bis in idem* safeguard as embedded in Art. 50 of the Charter of Fundamental Rights of the European Union. Thirdly, full compliance with the DMA requirements can create a safe harbour for gatekeepers or they can still face investigation and sanctions for violation of competition rules.

The DMA proposal is one of the answers to an insufficient legal framework created by the EU competition rules to tackle the market strength of digital platforms on the one hand and support the innovation on the other hand (Kalesná & Patakyová, 2021, p. 37; Larouche & De Streel, 2021, p. 545). Art. 114 TFEU cannot be used as a legal basis for harmonization if there is a specific tool stipulated in the treaties ("Save where otherwise provided in the Treaties […]" para. 1 thereof) (Franck *et al.*, 2021, p. 37). Although the Damages Directive 2014/104/EU is based

on dual legal basis, as for coherence of public enforcement (Art. 101 *et seq*. TFEU) and private enforcement (based primarily on private law of the Member States), using Art. 144 TFEU as a single legal basis simply outmanoeuvres EU competition rules as a legal basis for DMA proposal. Simply, Art. 114 TFEU is inapplicable in the areas of EU's exclusive competence since it presupposes at least the possibility of existence of national rules. Moreover, the provisions of EU competition law (Arts. 101 to 103 TFEU) are not even mentioned as a legal basis for the DMA and Larouche and De Streel stress that the Commission put the DMA proposal outside of the competition law framework on substantive reasons, although being rather unconvincing and the substantive gap between competition law and the DMA is narrower than the Commission tries to show (Larouche & De Streel, 2021, pp. 545–546). There can be seen a link with several aspects of competition law: previous decision-making practice of the Commission at digital markets where the Commission had no difficulty to define markets and dominant position at those markets[10] aim to achieve openness and competitive market and measures against foreclosure of market. Also, the structure of remedies, interim measures as well as fines seem to be copied from competition rules (Art. 18 *et seq.* DMA).[11]

The question whether the DMA shall be an instrument of competition law or not is not purely theoretical and it is relevant in the context of *ne bis in idem* safeguard and also regarding the question whether fulfilment of all obligations stipulated in the DMA provides a safe harbour for the gatekeeper.

It seems that the DMA proposal tries to solve this issue very simply. The relation to "core" competition rules is explained in Art. 1(6) DMA, since the DMA should be applied without prejudice to the application:

1. Arts. 101 and 102 TFEU;
2. national rules prohibiting anticompetitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions;
3. national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers;
4. Council Regulation (EC) No 139/2004 and national rules concerning merger control.

[10] See Microsoft (Case COMP/AT.37792) Commission Decision of 24 March 2004; Microsoft (Tying) (Case COMP/AT.39530) Commission Decision of 16 December 2009; Google Search (Shopping) (Case COMP/AT.39740) Commission Decision of 27 June 2017; Google Android (Case COMP/AT.40099) Commission Decision of 18 July 2018.

[11] Compare Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty (*OJ* L 1, 4. 1. 2003, p. 1–25).

The implication for the existence of a "safe harbour" appears to be obvious. Even fulfilment of all obligations under DMA does not absolve a gatekeeper for due respect to competition rules under Arts. 101 and 102 TFEU. The DMA cannot serve as a "block exemption" to Arts. 101 or 102 TFEU since it is not planned to be based on Art. 103 TFEU that provides legal basis for such an exemption and enforcement rules of Art. 101 and TFEU.

On the other hand, following one legal rule cannot constitute a violation of another rule. In the sphere of competition law judgment in *CIF* case (Judgment of 9 September 2003, CIF, C-198/01, EU:C:2003:430) consolidate this contradiction based on the principle of rule of law. Indeed, *CIF* case dealt with contradiction between national and Community competition rules, however its conclusions[12] may be useful in the case of the DMA as well *mutatis mutandis*: "Where [gatekeeper] engage in conduct contrary to [Art. 101 or 102 TFEU] and where that conduct is required or facilitated by [the DMA] [the Commission], one of whose responsibilities is to ensure that [Art. 101 or 102 TFEU] is observed:

1. has a duty to disapply the [DMA];
2. may not impose penalties in respect of past conduct on the [gatekeeper] concerned when the conduct was required by the [DMA];
3. may impose penalties on the [gatekeeper] concerned in respect of conduct subsequent to the decision to disapply the [DMA], once the decision has become definitive in their regard;
4. may impose penalties on the [gatekeeper] concerned in respect of past conduct where the conduct was merely facilitated or promoted by the [DMA], whilst taking due account of the specific features of the legislative framework in which the undertakings acted" (the text in brackets is a replacement to the text of *CIF* ruling). Hence, in the particular case, possible violation of Art. 101 or 102 TFEU can lead to disapplication of provision of the DMA

[12] "Where undertakings engage in conduct contrary to Article 81(1) EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority, one of whose responsibilities is to ensure that Article 81 EC is observed:
- has a duty to disapply the national legislation;
- may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was required by the national legislation;
- may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard;
- may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted."

on obligations of a gatekeeper on one hand, and to impossibility to impose a fine according to Regulation (EC) No 1/2003. This imaginable outcome also flows from the "constitutional" hierarchy between Arts. 101 and 102 TFEU (primary law) and the DMA (secondary law). It must be admitted that the situation described above is more theoretical compared to a situation when violation of the DMA constitutes at the same time infringement of Art. 101 or 102 TFEU.

The Court of Justice had to deal with hierarchy of competition rules and sectoral regulation in several cases. In the *Telefónica* case it rejected any consideration of previous regulatory decision of national authority since "[…] the Commission's implementation of Article 102 TFEU is not subject to any prior consideration of action taken by national authorities" (Judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, para. 135). The previous intervention of national regulatory authority is definitely irrelevant in cases when the authority merely encourages to engage still autonomous behaviour that leads to infringement of EU competition rules (Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, para. 83) since the undertaking in dominant position "have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market" (Judgment of 9 November 1983, *Michelin v Commission*, C-322/81, EU:C:1983:313, para. 57). Nevertheless, the problem will not arise when both, application of the DMA and the EU competition rules are concentrated in the actions of the Commission. However, national competition authorities are vested with power to apply Arts. 101 and 102 TFEU under Regulation (EC) No 1/2003 and hence can face a situation in which they have to assess the behaviour of an undertaking previously covered by the DMA (moreover, such a behaviour can be explicitly approved by the Commission under Art. 7 DMA). Therefore, this contradiction of powers and competence can be solved by considering the Commission always empowered to hear all cases that involve or may involve gatekeeper under DMA.

The Court of Justice recently elaborated and summarized *ne bis in idem* e.g., in *Slovak Telekom* case confirming it as relevant in proceedings which may lead to the imposition of fines under competition law (Judgment of 25 February 2021, *Slovak Telekom*, C-857/19, EU:C:2021:139, para. 41). For the relation between the DMA and competition rules, the question of *idem* is the most relevant issue. Under the Court of Justice's case law, *idem* is subject to the threefold sub-condition that the facts must be the same, the offender the same and the legal interest protected the same (Judgment of 14 February 2012, *Toshiba Corporation and Others*,

C-17/10, EU:C:2012:72, para. 97). Under the principle *ne bis in idem*, the same person cannot therefore be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset (Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and Case 219/00 P, EU:C:2004:6, para. 338). On this basis, the Court of Justice found in *Slovak Telekom* case the following: "The principle ne bis in idem, as enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it applies to infringements of competition law, such as the abuse of a dominant position referred to in Article 102 TFEU, and precludes an undertaking from being found liable or proceedings from being brought against it afresh on the grounds of anticompetitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged. By contrast, that principle does not apply where proceedings are brought against or sanctions imposed on an undertaking separately and independently by a competition authority of a Member State and the European Commission for infringements of Article 102 TFEU relating to separate product markets or separate geographical markets, or where a competition authority of a Member State is relieved of its competence pursuant to the first sentence of Article 11(6) of Regulation (EC) No 1/2003" (Judgment of 25 February 2021, *Slovak Telekom*, C-857/19, EU:C:2021:139, operative part, para. 2). Therefore, the *idem* can be eroded via time, geographical or product elements, even in the case of application of competition rules at the same undertaking. *A fortiori*, the DMA is not, under its legal basis, designed as set of competition rules and therefore the third criterion of *idem* can be challenged. In *Showa Denko* (Judgment of 29 June 2006, *Showa Denko v Commission*, C-289/04 P, EU:C:2006:431) the Court of Justice also rejected identity of charges in cases where an undertaking was penalized by competition authority of a non-EU state. And finally, *ne bis in idem* is not precluding "a national competition authority from fining an undertaking in a single decision for an infringement of national competition law and for an infringement of Article 82 EC. In such a situation, the national competition authority must nevertheless ensure that the fines are proportionate to the nature of the infringement" (Judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283). These explanations will be probably further developed in currently pending C-151/20 *Nordzucker and Others* the Austrian court seeks answers for the definition of *idem* in the cases of parallel application of competition law by national competition authorities form different Member States.[13] In the context of

[13] "Questions referred:

Is the third criterion established in the Court of Justice's competition case-law on the applicability of the 'ne bis in idem' principle, namely that conduct must concern the same protected legal

relation between the DMA and EU competition rules (as well as national competition rules) decision in case C-117/20 *bpost* in which national court is dealing with the question of impact of previously acquittal regulatory decision on subsequent fine in proceeding on application of competition law. In its opinion, AG Bobek saw no infringement of *ne bis in idem* in this case because of different legal interests protected by competition law and sector regulation.[14]

Due to different legal basis and verbal departure from the legal framework of the EU competition law it seems, based on aforementioned case law, that imposition sanction under the DMA and Regulation (EC) No 1/2003 or national competition law does not *per se* violate the *ne bis in idem* principle. Indeed, the Court of Justice evaluated cases dealing with competence of national competition authorities and national regulatory authorities *vis-à-vis* the application of the EU competition law by the Commission or national competition authority. In the case of the DMA and Regulation (EC) No 1/2003 by the Commission the

---

interest, applicable even where the competition authorities of two Member States are called upon to apply the same provisions of EU law (here: Article 101 TFEU), in addition to provisions of national law, in respect of the same facts and in relation to the same persons?

In the event that this question is answered in the affirmative:

Does the same protected legal interest exist in such a case of parallel application of European and national competition law?

Furthermore, is it of significance for the application of the 'ne bis in idem' principle whether the first decision of the competition authority of a Member State to impose a fine took account, from a factual perspective, of the effects of the competition law infringement on the other Member State whose competition authority only subsequently took a decision in the competition proceedings conducted by it?

Do proceedings in which, owing to the participation of a party in the national leniency programme, only a declaratory finding of that party's infringement of competition law can be made also constitute proceedings governed by the 'ne bis in idem' principle, or can such a mere declaratory finding of the infringement be made irrespective of the outcome of previous proceedings concerning the imposition of a fine (in another Member State)?"

[14] Opinion of 2 September 2021, Bpost, C-117/20, EU:C:2021:680, para. 162:

"Thus, it would appear that, subject to verification by the referring court, both offences that have been pursued successively in the sectoral and competition proceedings seem to be linked to the protection of a different legal interest and to a legislation pursuing a different objective. First, in terms of the protected legal interest, achieving liberalisation of certain, previously monopolistic, markets follow a different logic than the ongoing and horizontal protection of competition. Second, that is also evident with regard to the undesirable consequences that punishment of each of the offences is intended to prevent. If the aim is to liberalise a sector, then potential harm caused to competition upstream or downstream is not necessarily an issue that the sectoral regulatory framework must tackle. By contrast, an abuse of a dominant position that results in a distortion of competition upstream or downstream from the dominant undertaking is very much a concern of competition rules."

situation is different since the enforcing authority is the same. Theoretically, the gatekeeper non-compliant with obligations under the DMA and Art. 101 or 102 TFEU can be, thus, fined up to total aggregate fine of 20% of total undertaking's turnover. This approach will be apparently disproportionate, compared, e.g., to situation of undertaking abusing dominant position at digital market, that is not considered a gatekeeper. Even though the Court of Justice allowed parallel fines for different violations related to competition law, in *Powszechny Zakład Ubezpieczeń na Życie* it required an ultimate test of proportionality. Although imposition of fines under the DMA and Regulation (EC) No 1/2003 does not constitute a violation of the *ne bis in idem* principle, the overall penalty may be considered disproportionate.

There may be several approaches to tackling this problem. Firstly, informal solution, consisting of case-by-case evaluation of proportionality of a fine. Secondly, soft law solution, update of the Commission's notice on fining policy (Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, p. 2–5) and declaring that the Commission will take into account previous fine under the DMA, and *vice versa*, publishing notice on fining policy under the DMA with mirroring provision. Thirdly, hard law amendment, with explicit provision in Regulation (EC) No 1/2003 and the DMA on the approach and mechanism clearing doubts on proportionality of doubled fines. Fourthly, the least probable, creating of a single enforcement code establishing enforcement and sanctioning powers of the Commission in both areas – the DMA and Arts. 101 and 102 TFEU.

6. Conclusions

The proposal of the DMA (and other legislative proposals of the "Digital Package") represent a new approach to the regulation of digital markets and tries to overcome shortcomings of EU competition law. Even though it is possible to apply competition law as flexibly as possible, Arts. 101 and 102 TFEU together with Regulation (EC) No 1/2003 are designed for *ex post* evaluation. In dynamically changing digital markets, *ex post* evaluation and enforcement can be too delayed to be effective. In this context, *ex ante* rules contained in the DMA proposal can mitigate anti-competitive behaviour and foreclosure of markets and avoid irreparable damage.

However, the novelty of the DMA in the EU regulatory framework causes legislative shortcomings of the proposal. First, relying on Art. 114 TFEU as the sole legal basis can endanger legality of the regulation as a whole, due to the test

of proportionality. Although Art. 352 TFEU can be considered a better legal basis, from the substantive point of view, the democratic deficit and requirement of unanimity can impede eagerness of the EU institution to employ it. Unclear or ambiguous legal basis can have serious impact also on the application of the sanction regime of the DMA due to necessity to observe the *ne bis in idem* safeguard, in particular, *vis-à-vis* competition rules. As the DMA proposal departed from legal basis enshrined in Art. 101 *et seq.* TFEU it paved the way for the possibility to impose sanction under both regimes. This possibility of double sanctions and the necessity for a check of proportionality in all actions of the Commission as well as in imposition of fines constitute one of the most relevant shortcomings from the "constitutional" point of view of the position of the DMA in the EU legal framework. As it is argued in this paper, without more synchronization with competition regulatory regimes, the DMA proposal contains elements that can, at the end of the day, diminish its legal effectiveness via subsequent judicial battles.

References

Franck, J.U. & Peitz, M. 2021. Digital Platforms and the New 19a Tool in the German Competition Act. *Journal of European Competition Law and Practice*, 12(7), pp. 513–528.

Howell, E., 2014. The European Court of Justice: Selling Us Short?. *European Company and Financial Law Review*, 11(3), pp. 304–312.

Ibáñez Colomo, P. 2021. The Draft Digital Markets Act: A Legal and Institutional Analysis. *Journal of European Competition Law & Practice*, 12(7), pp. 561–575.

Kalesná, K. & Patakyová, M.T. 2021. Digitálne platformy: súťažné právo verzus regulácia ex ante. *Právny obzor*, 104(1), pp. 26–38.

Klamert, M. 2015. What We Talk About When We Talk About Harmonisation. *Cambridge Yearbook of European Legal Studies*, (17), pp. 360–379.

Lamadrid de Pablo, A. & Bayón Fernández, N. 2021. Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It. *Journal of European Competition Law and Practice*, 12(7), pp. 576–589.

Larouche, P. & De Streel, A. 2021. The European Digital Markets Act: A Revolution Grounded on Traditions. *Journal of European Competition Law and Practice*, 12(7), pp. 542–560.

Marjosola, H., 2014. Bridging the constitutional gap in EU executive rule-making: The court of justice approves legislative conferral of intervention powers to European securities markets authority: Court of Justice of the European

Union (Grand Chamber) Judgment of 22 January. *European Constitutional Law Review*, 10(3), pp. 500–527.

Piszcz, A., 2018. The EU 2018 Draft Directive on UTPs in B2b Food Supply Chains and the Polish 2016 Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. *Yearbook of Antitrust and Regulatory Studies*, 11(17), pp. 143–167.

Weatherill, S. 2011. The Limits of Legislative Harmonization Ten Years after Tobacco Advertising : How the Court's Case Law Has Become a "Drafting Guide". *German Law Journal*, 12(3), pp. 827–864.

Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (*OJ* C 210).

Website References

Franck, J.U., Monti, G. & Streel de, A. 2021. Legal Opinion commissioned by the Federal Ministry for Economic Affairs and Energy concerning Article 114 TFEU as a Legal Basis for Strengthened Control of Acquisitions by Digital Gatekeepers. Available at: https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/article-114-tfeu-as-a-legal-basis-for-strengthened-control-of-acquisitions-by-digital-gatekeepers.pdf?__blob=publicationFile&v=5 (15. 11. 2021).

Legal Sources

Charter of Fundamental Rights of the European Union.

Commission Decision of 16 December 2009, Microsoft (Tying) (Case COMP/AT.39530).

Commission Decision of 18 July 2018, Google Android (Case COMP/AT.40099).

Commission Decision of 24 March 2004, Microsoft (Case COMP/AT.37792).

Commission Decision of 27 June 2017, Google Search (Shopping) (Case COMP/AT.39740).

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*OJ* L 1).

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (*OJ* L 24).

Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (*OJ* 2003).

Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (*OJ* L 321).
Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (*OJ* L 111).
Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (*OJ* L 158) .
Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (*OJ* L 149).
Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (*OJ* L 211).
Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (*OJ* L 349).
Opinion of 2 September 2021, bpost, C-117/20, EU:C:2021:680.
Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (digital markets act) com/2020/842 final.
Proposal for a regulation of the European Parliament and of the Council on a single market for digital services (digital services act) and amending directive 2000/31/ec com/2020/825 final.
Treaty on Establishing of the European Communities.
Treaty on European Union.
Treaty on Fuctioning of the European Union.

Case Law

Judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741.

Judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062.
Judgment of 12 December 2006, *Germany v Parliament and Council*, C-380/03, EU:C:2006:772.
Judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72.
Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603.
Judgment of 2 May 2006, *Parliament v Council*, C-436/03, EU:C:2006:277.
Judgment of 2 May 2006, *United Kingdom v Parliament and Council*, C-217/04, EU:C:2006:279.
Judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18.
Judgment of 25 February 2021, *Slovak Telekom*, C-857/19, EU:C:2021:139.
Judgment of 29 June 2006, *Showa Denko v Commission*, C-289/04 P, EU:C:2006:431.
Judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283.
Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544.
Judgment of 6 December 2005, *United Kingdom v Parliament and Council*, Case 66/04, EU:C:2005:743.
Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, C-219/00 P, EU:C:2004:6.
Judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321.
Judgment of 9 November 1983, *Michelin v Commission*, C-322/81, EU:C:1983:313.
Judgment of 9 October 2001, *Netherlands v Parliament and Council*, C-377/98, EU:C:2001:523.
Judgment of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430.

Dr Ondrej Blažo
Vanredni profesor, Pravni fakultet, Univerzitet Comenius, Bratislava, Slovačka
e-mail: *ondrej.blazo@flaw.uniba.sk*

ZAKON O DIGITALNIM TRŽIŠTIMA – IZMEĐU TRŽIŠNE REGULACIJE, PRAVILA KONKURENCIJE I PRAVILA NEPOŠTENE TRGOVINSKE PRAKSE

Sažetak

Evropska komisija je 2020. godine predstavila zakonodavni paket koji ima za cilj da se nosi sa novim izazovima za unutrašnje tržište koji proističu iz razvoja digitalnih tržišta i navodnih zloupotreba i nekonkurentnih praksi u njima, uključujući Zakon o digitalnim tržištima. Cilj ovog rada nije da se proceni sadržaj samog zakona, već da se oceni njegov položaj u kontekstu drugih tržišno orijentisanih propisa, pravila o nelojalnoj trgovinskoj praksi, pravila konkurencije kao i podobnosti pravnog osnova i poštovanje mera zaštite vladavine prava. Pošto je predlog Zakona o digitalnim tržištima odstupio od pravnog osnova koji je sadržan u odredbama o konkurenciji Ugovora o funkcionisanju Evropske unije (čl. 101 i dalje), nastala je mogućnost za uvođenje sankcija pod oba režima. Ova mogućnost dvostrukih sankcija i neophodnost provere proporcionalnosti u svim radnjama Evropske komisije, kao i u izricanju novčanih kazni, predstavljaju jedan od najrelevantnijih nedostataka sa „ustavnog" stanovišta. Kako autor rada tvrdi, bez veće sinhronizacije sa regulatornim režimima konkurencije, predlog Zakona o digitalnim tržištima sadrži elemente koji na kraju krajeva mogu da umanje njegovu pravnu efikasnost kroz naknadne sudske postupke.

Ključne reči: Evropska unija, digitalna tržišta, Zakon o digitalnim tržištima, pravo konkurencije, proporcionalnost.

Primljeno: 19. 11. 2021.
Izmenjeno: 18. 3. 2022.
Prihvaćeno: 21. 3. 2022.