Breaking down Apple's walled garden

Will the use of anti-steering clauses come to an end?

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Table of Contents

List of abbreviations

ACM	Autoriteit Consument en Markt (Dutch NCA)
Commission	European Commission
CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
ECJ	European Court of Justice
Et al.	And others
EU	European Union
GDPR	General Data Protection Regulation
IAP-system	In-app purchase system
iOS	iPhone Operating System
Mw	Mededingingswet (Dutch National Regulation on Competition)
NCA	National Competition Authority
PSP	Payment Service Provider
TFEU	Treaty on the Functioning of the European Union

Chapter I - Introduction

1.1 Background and problem statement

Smartphones and tablets are mobile devices with multimedia, Internet browsing and app capabilities. The basic functions of these smart mobile devices are controlled by system software, also known as operating systems. The most popular operating systems for smartphones in the European Union are Google's Android and Apple's iOS. Together, 99% of the smartphones run on one of these operating systems.[1] Apple's iOS is an exclusive operating system, meaning that it does not grant licenses to install iOS on devices which are not produced by Apple.[2] In 2008, Apple introduced the App Store for iOS, which started with just 500 apps.[3] Apps are small software applications that run on a mobile operating system. Users can install, update, and remove apps from their devices via the App Store, which is pre-installed on all iPhones. Strikingly, iPhone users do not have the possibility to download apps outside of the App Store.[4]

Regarding the App Store for iPhones, Apple acquired a very powerful and monopolistic position, which is caused by several factors. As mentioned earlier, 99% of the smartphones are run by either iOS or Android and iPhone users can only download apps via Apple's App Store.[5] This means that Apple has a monopoly in the market for app distribution on iOS.[6] This powerful position gives Apple the ability to apply strict rules to app developers, who have to agree with the terms of different guidelines and (license) agreements if they want to reach the iOS users.[7] An example is the fee of $99 a year they have to pay for participating in the Developer Program of Apple.[8] Furthermore, when selling digital content or services in an app, such as a game currency or an upgrade to a version of the app without ads, app providers are obliged to use Apple's in-app purchases (payment) system (IAP-system).[9] Apple generally

[1] Damien Geradin and Dimitrios Katsifis, 'The Antitrust Case Against the Apple App Store' 8 (2020) TILEC Discussion Paper No. DP2020-035, 8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3744192#references-widget> accessed 25 October 2021

[2] Ovidiu Constantin Novac and others, *Comparative study of Google Android, Apple iOS and Microsoft Windows Phone mobile operating systems (*14th International Conference on Engineering of Modern Electric Systems (EMES), Oradea, June 2017, IEEE 2017) 154-159

[3] 'The App Store turns 10: How Creativity, Innovation and Entrepreneurship Ignited a Worldwide App Phenomenon' (*Apple Newsroom*, 5 July 2018) <www.apple.com/newsroom/2018/07/app-store-turns-10/> accessed 25 October 2021

[4] The Netherlands Authority for Consumers & Markets, 'Market Study into Mobile App Stores' (Report ACM/18/032693, 11 April 2019) 19-21 <www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf> accessed 25 October 2021

[5] Report ACM/18/032693 (n 4) para 20

[6] Geradin and Katsifis, DP2020-035 (n 1) 1

[7] Ibid 9

[8] 'Choosing a Membership' <https://developer.apple.com/support/compare-memberships/> accessed 25 October 2021

[9] Report ACM/18/032693 (n 4) 5; Section 3.1.1 of the App Store Review Guidelines <https://developer.apple.com/app-store/review/guidelines/#in-app-purchase> accessed 26 October 2021;

charges a 30% commission for these in-app purchases.[10] This commission does not apply to content that is not delivered on the phone, for example an Uber ride or a package from Amazon.[11] According to Apple, the revenue from the commission is used to safeguard privacy and the security of apps.[12]

There are some exceptions to this 30% commission. For example, Apple receives a 15% commission for auto-renewing subscriptions purchases after one year of paid subscription.[13] The same 15% applies to small business with less than $1 million in developers' earnings on all their apps in total in the prior calendar year.[14] Another exemption applies to the so-called 'reader apps', which allows users to access content or subscriptions they previously purchased such as books, music, video, and newspapers.[15] Since September 2021, developers of these reader apps can link their customers directly to their own website, where they can sign up. This allows developers to circumvent Apple's mandatory IAP-system and the 30% commission.[16]

A related and controversial element of Apple's Guidelines for developers are the anti-steering provisions for in-app purchases. The first provision reads as follows: "Apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase."[17] Furthermore, section 3.1.3 of the Guidelines states: "The following apps may use purchase methods other than in-app purchase. Apps in this section cannot, within the app, encourage users to use a purchasing method other than in-app purchase. Developers can send communications outside of the app to their user base about purchasing methods other than in-app purchase."[18] According to these rules, it is

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Pramod Kumar, 'Implement In App Purchase (IAP) in iOS applications [swift]' (*Medium*, 7 August 2018) <https://medium.com/swiftcommmunity/implement-in-app-purchase-iap-in-ios-applications-swift-4d1649509599> accessed 30 January 2022

[10] Section 3.4(a) of the Paid Applications Agreement (Schedules 2 and 3 of the Apple Developer Program License Agreement) <https://developer.apple.com/support/downloads/terms/schedules/Schedule-2-and-3-20211021-English.pdf> accessed 26 October 2021

[11] Report ACM/18/032693 (n 4) 5

[12] Bobby Allyn, 'A Judge Rules Apple Must Make It Easier To Shop Outside The App Store' (*NPR*, 10 September 2021) <www.npr.org/2021/09/10/1023834758/apple-app-store-epic-games-fortnite-verdict?t=1635255858170> accessed 26 October 2021

[13] Competition Markets Authority (UK), 'Appendix H: in-app purchase rules applied by Apple and Google to app developers distributing apps through Apple's and Google's app stores' (*Interim report on Mobile Ecosystems Market Study*, 14 December 2021*)* 9 <https://assets.publishing.service.gov.uk/media/61b86a0ce90e070441bcf983/Appendix_H_-_In-app_purchase_rules_in_Apples_and_Googles_app_stores.pdf> accessed 29 January 2022

[14] 'App Store Small Business Program' (*Developer Apple*) <https://developer.apple.com/app-store/small-business-program/> accessed 29 January 2021

[15] Competition Markets Authority (UK), Appendix H (n 13) 5

[16] Sean Hollister and Sam Byford, 'Apple Concedes to let Apps like Netflix, Spotify, and Kindle Link to the Web to Sign Up' (*The Verge*, 1 September 2021) <https://www.theverge.com/2021/9/1/22653264/apple-reader-app-exception-anti-steering-signup-page> accessed 29 January 2022

[17] In-App Purchase of the App Store Review Guidelines, Section 3.1.1 <https://developer.apple.com/app-store/review/guidelines/#business> accessed 25 October 2021

[18] In-App Purchase of the App Store Review Guidelines (n 17) Section 3.1.3, accessed 29 January 2022

prohibited for app developers to *encourage* users to pay through other means or to *inform* them within the app itself about alternative options to pay. Neither is it allowed to include a link within the app, which would give users the possibility to make an out of app purchase.[19] To give an example: the anti-steering clauses prohibit game developers to include a link to their website in the app itself or to mention anything in their app about the possibility to buy extra lives via their website. Apple's justification for the anti-steering clauses is that it would be inappropriate if developers could free-ride on Apple's investment by circumventing Apple's IAP-system.[20] It is important to make a distinction between the mandatory use of Apple's IAP-system combined with the 30% commission and the anti-steering clauses which ensure this IAP-system cannot be bypassed. Although all three elements are inextricably linked with each other, the focus in this thesis will be on the anti-steering clauses.

The anti-steering provisions have been the centre of attention in various proceedings and investigations worldwide.[21] In June 2020 for instance, the European Commission (hereinafter: Commission) started an investigation into Apple's proprietary IAP-systems and their anti-steering clauses regarding music streaming apps which compete with "Apple Music".[22] In April 2021, the Commission issued their preliminary view that Apple distorted competition in the music streaming market. While the Reader App exemption allows users to purchase a subscription outside the app and afterwards access the content in the app, it is not allowed for app developers to inform their users about these usually cheaper purchase possibilities. The concern of the Commission is that users of Apple devices are either precluded from buying certain subscriptions within the app or pay a significantly higher price for their music subscription service. The investigation is still ongoing, but if the Commission confirms this

[19] Competition Markets Authority (UK), Appendix H (n 13) 10-11

[20] Competition Markets Authority (UK), Appendix H (n 13) 11

[21] *Epic Games v. Apple Inc.*, 493 F. Supp. 3d 817 (N.D. Cal. 2020); 'Japan Fair Trade Commission sluit onderzoek App Store af' (*Apple News*, 1 September 2021) <www.applenieuws.nl/2021/09/japan-fair-trade-commission-sluit-onderzoek-app-store-af/> accessed 26 October 2021; Damien Geradin 'Korean Bill banning Apple and Google from mandating their in-app payment solutions moves forward' (*The Platform Law Blog*, 1 September 2021) <https://theplatformlaw.blog/2021/09/01/korean-bill-banning-apple-and-google-from-mandating-their-in-app-payment-solutions-moves-forward/> accessed 28 January 2022; Malcolm Owen, 'Apple Fighting Russia Over Alternative App Store Payments' (*Apple Insider*, 5 December 2021) <https://appleinsider.com/articles/21/12/05/apple-takes-on-russian-regulator-in-court-over-app-store-warning> accessed 28 January 2022; Case ROT 21/4781 & ROT 21/5782 *Apple Inc./ACM* [2021] (ECLI:NL:RBROT:2021:12851); Australian Competition & Consumer Commission (ACCC), 'Digital Platform Services Inquiry: Interim Report No. 2 – App marketplaces' (March 2021) 79 <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-march-2021-interim-report> accessed 19 May 2022

[22] 'Antitrust: Commission opens investigations into Apple's App Store rules' (Press release, 16 June 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073> accessed 21 February 2022; 'Antitrust: Commission sends Statement of Objections to Apple on App Store rules for Music streaming providers' (Press release, 30 April 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061> accessed 21 February 2022

view, then the conduct in question is infringing Article 102 of the Treaty on the Functioning of the European Union (TFEU).[23]

Besides these anti-steering clauses, other types of conduct by online platforms have given rise to concerns. Examples are the use of non-public data, self-preferencing, combining personal data and bundling of core platform services.[24] The Commission has noted these unfair practices as well and proposed a new regulation; the Digital Markets Act (DMA). This ex-ante regulation aims to regulate the behaviour of those digital platforms that act as a gatekeeper between business users and their customers. With regard to anti-steering clauses, Article 5(4) and (5) specifically prohibit the use of these clauses. However, several issues have been raised regarding, amongst others, the enforcement mechanisms and the design of the ex-ante obligations and prohibitions.[25] Important to note is that the DMA is complementing the existing EU competition rules, not replacing them.[26]

1.2 Research question and sub-questions

As can be derived from the abovementioned proceedings and the proposed DMA, Apple's anti-steering clauses are an actual and problematic issue, both in the EU and globally. These clauses seem to distort competition by prohibiting developers to inform consumers about other payment options. Hence it is relevant to delve deeper into these anti-steering clauses and contribute to the current policy debate on this subject. This thesis will therefore focus on the following research question:

How do EU competition law and the proposed Digital Markets Act address anti-steering clauses and are there any remaining gaps?

This research question will be divided in the following sub-questions:

- How can EU competition law be applied to anti-steering clauses?
- How does the Digital Markets Act aim to complement and address the deficiencies of competition law regarding anti-steering clauses?
- How will competition law and the Digital Markets Act presumably relate to each other in terms of enforcement?

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[23] 'Antitrust: Commission sends Statement of Objections to Apple on App Store rules for Music streaming providers' (Press release, 30 April 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061> accessed 26 October 2021

[24] Bas Braeken, Jade Versteeg and Timo Hieselaar, 'An Overview of Big Tech Cases Leading up to the Digital Markets Act (DMA)' (*Bureau Brandeis*, 30 June 2021) <www.bureaubrandeis.com/an-overview-of-big-tech-cases-leading-up-to-the-digital-markets-act-dma/?lang=en> accessed 28 January 2022

[25] European Parliament, 'Digital Markets Act' (Briefing EU Legislation in Progress, May 2021) <www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS_BRI(2021)690589_EN.pdf> accessed 26 October 2021

[26] Luís Cabral and others, *The EU Digital Markets Act; A Report from a Panel of Economic Experts* (Report by the Joint Research Centre, Publications Office of the European Union, 2021) 5

1.3 State of the art

As mentioned before, there have been several investigations and proceedings recently regarding Apple's anti-steering clauses. In June 2019 there has been a class-action lawsuit in the US of iOS developers against Apple, which resulted in a settlement.[27] Consequently, Apple had to allow app developers to inform their customers of alternative payment options by contacting them via email. In the beginning of October 2021, Apple updated their App Store Review Guidelines by deleting the following part of section 3.1.3: 'Developers cannot use information obtained within the app to target individual users outside the app to use purchasing methods other than in-app purchase (such as sending an individual user an email about other purchasing methods after that individual signs up for an account within the app).'[28] The impact of deleting section 3.1.3 should not be overestimated. While app developers are now allowed to talk about other available purchase methods via other communication channels, it is still prohibited for them to mention them in the apps themselves. Admittedly, Apple did allow for the latter in early 2022, but only in relation to reader apps.[29]

In the European Union (EU), anti-steering clauses are assessed under Article 102(a) TFEU, which prohibits the imposition of unfair trading conditions.[30] The most precedential cases and decisions in this respect, date back to a time before or just after the discovery of the world wide web.[31] It is therefore questionable to what extent the legal framework of unfair trading conditions can be applied to certain conditions imposed by digital platforms, such as Apple's anti-steering clauses. Interestingly, according to Botta, a 'revival' of exploitative abuses under

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[27] 'iOS Developers Sue Apple over App Store Fees in New Class-Action Lawsuit' (*HBSS Law*, 4 June 2019) <www.hbsslaw.com/press/apple-ios-app-developers/ios-developers-sue-apple-over-app-store-fees-in-new-class-action-lawsuit> accessed 26 October 2021

[28] Jesse Hollington, 'Hit From All Sides | Apple Has Officially Relaxed Its App Store Rules (Slightly) (*iDropNews*, 25 October 2021) <www.idropnews.com/news/apple-officially-relaxes-its-app-store-rules-slightly/171568/> accessed 26 October 2021

[29] ibid; 'Japan Fair Trade Commission closes App Store investigation' (*Apple Newsroom Press Release*, 1 September 2021) <www.apple.com/ca/newsroom/2021/09/japan-fair-trade-commission-closes-app-store-investigation/> accessed 26 October 2021; Sarah Perez, 'Apple to now allow 'reader' apps to use external links, if approved' (*TechCrunch*, 30 March 2022) <https://techcrunch.com/2022/03/30/apple-to-now-allow-reader-apps-like-streaming-music-books-video-and-more-to-use-external-links-if-approved/> accessed 18 June 2022; Section 3.1.3(a) of the App Store Review Guidelines <https://developer.apple.com/app-store/review/guidelines/#reader-apps> accessed 18 June 2022

[30] 'Antitrust: Commission sends Statement of Objections to Apple on App Store rules for Music streaming providers' (Press release, 30 April 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061> accessed 21 February 2022

[31] Case 127/73 *BRT v SABAM* [1974] ECR I-51; GEMA Statues (Case IV/29.971) Commission Decision 82/204/EEC [1981] OJ L 94/12; DSD (Case COMP D3/34493) Commission Decision 2001/463/EC OJ L 166/1; '30 jaar World Wide Web: idee was 'vaag en opwindend'' (RTL Nieuws, 12 March 2019) <https://www.rtlnieuws.nl/tech/artikel/4638096/wordl-wide-web-geschiedenis-30-jaar-tim-berners-lee> accessed 19 May 2022; *Apple Inc./ACM* (n 21) para. 5; Marco Botta, 'Chapter 7. Exploitative abuses: recent trends and comparative perspectives' 11 (Research Handbook on Abuse of Dominance and Monopolization, Draft, Edward Elgar Publishing 2021) <https://ssrn.com/abstract=3909894> accessed 21 February 2022

Article 102(a) TFEU is taking place in digital markets.[32] The recent landmark decision in the Google Ads Case[33] shows that digital platforms can be sanctioned for imposing unfair trading conditions.

The problematic character of anti-steering clauses has been discussed in the literature. Geradin and Katsifis are of the opinion that the anti-steering clauses of Apple are not applied in a transparent, objective, and non-discriminatory manner. In their view, the Reader App exemption is enforced in an inconsistent manner. While email apps fall outside the exemption, several email apps in the App Store did not use the IAP but could still allow their users to access content purchased outside the app.[34] In order to address the anti-competitive concerns, they suggest removing the mandatory use of the IAP-system or eliminating the anti-steering clauses.[35] Völcker and Baker on the other hand, argued there is no antitrust case against Apple's App Store. In response to the suggestion of deleting the anti-steering clause, they stated that this provision and the mandatory IAP-system are not self-standing obligations, but two sides of the same coin. Deleting the anti-steering clause would render the effectiveness of the obligation to use IAP. The comparison is made with a grocery owner who would not be allowed to take measures which prevent customers from leaving without paying. The products would essentially be for free. Neither a business, nor the App Store should have to operate like this.[36]

The abovementioned shows that there is some disagreement regarding the anti-competitive character of anti-steering clauses. Moreover, while Apple tries to delay the deletion of the anti-steering clauses as long as possible, the DMA specifically prohibits these clauses.[37] Consequently, around the beginning of 2024, Apple is presumably obliged to delete their clauses entirely.[38] This thesis contributes to the current policy and academic debates by explaining how competition law and the DMA address anti-steering clauses, and therefore

[32] Botta (n 32) 3, 14 & 22
[33] Autorité de la concurrence, 'Decision 19-D-26 of 19 December 2019 regarding practices employed in the online search advertising sector'
[34] Geradin and Katsifis, DP2020-035 (n 1) 55-57
[35] ibid 83
[36] Sven Völcker and Daniel Baker, 'Why There is No Antitrust Case Against Apple's App Store: A Response to Geradin and Katsifis' (26 July 2020) para 260 <https://ssrn.com/abstract=3660896> accessed 19 May 2022
[37] Regulation *(EU) 2022/...* Of The European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2022] 2020/0374 (COD) Article 5(4) and (5), link via 'Digital Markets Act (DMA): agreement between the Council and the European Parliament' (Press Release European Council, 25 March 2022/11 May 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/> accessed 15 May
[38] Damien Geradin, 'The Leaked "Final" Version of the Digital Markets Act: A Summary in Ten Points' (The Platform Law Blog, 9 April 2022) <https://theplatformlaw.blog/2022/04/19/the-leaked-final-version-of-the-digital-markets-act-a-summary-in-ten-points/> accessed 20 May 2022; Luca Bertuzzi, 'DMA: Significant Additions Made it Into the Final Text' (Euractiv, 14 April 2022) <https://www.euractiv.com/section/digital/news/dma-significant-additions-made-it-into-the-final-text/> accessed 20 May 2022; Mauricette Schaufeli and Lauren Delleman, 'Digital Markets Act close to completion: what are the main changes and concerns?' (NautaDutilh, 19 May 2022) <https://www.nautadutilh.com/en/information-centre/news/digital-markets-act-close-to-completion-what-are-the-main-changes-and-concerns> accessed 20 May 2022

whether these clauses could be preserved in the future. Moreover, since both regimes can address anti-steering clauses, it is important to discuss how they relate to each other in terms of enforcement and what the possible remaining challenges are in this respect.

1.4 Methodology

To answer the research question, a primarily doctrinal legal approach will be taken. The first sub-question requires an analysis of previous court cases and decisions by the Commission and National Competition Authorities (NCAs) in order to construe a legal framework of unfair trading conditions under Article 102(a) TFEU. This framework will consequently be compared with the Dutch Court Case regarding anti-steering clauses in order to assess to what extent the current framework is suitable for assessing anti-steering clauses imposed by digital platforms. The second sub-question requires an analysis of the anti-steering prohibition in the DMA. This question also has a comparative component with the first sub-question. Various elements of the anti-steering prohibition in the DMA will be compared to the current legal framework in order to understand how the DMA complements the current competition law regime. The third sub-question requires a more forward-looking approach. Again, the DMA and competition law will be compared, with the focus on the relationship between them in terms of enforcement.

Apart from the anti-steering clauses, the mandatory in-app purchase system of Apple including the 30% commission will have a central focus as well, because these three elements are inextricably linked to each other. At last, although anti-steering clauses are a globally applied, this thesis will focus on EU law.

1.5 Overview chapters

Chapter II will start with a discussion of previous case law concerning unfair trading conditions under Article 102(a) TFEU. This legal framework will then be compared with the Dutch NCA (ACM) investigation and court case into Apple's anti-steering clauses in dating apps in the Dutch App Store.[39] This recent case gives some useful insights because the ACM sets out the case law on which it based its decision. Chapter III will discuss various aspects of the DMA, such as the anti-steering prohibition, the characteristics of the per se violations and the remedies. These will be compared with various aspects of competition law to see how the DMA complements and addresses the deficiencies of the DMA. Chapter IV will have a focus beyond the DMA. It will discuss the possibility to update the list of obligations, and how the DMA and competition law relate to each other in terms of enforcement. This chapter will be less comprehensive, because it is difficult to anticipate on the relationship between the DMA

[39] ACM, 'Summary of Decision on Abuse of Dominant Position by Apple' (ACM/19/035630, 24 August 2021) <https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf> accessed 16 February 2022; *Apple Inc./ACM* (n 21)

and competition law, especially in terms of enforcement, since the DMA has not come into force yet. The last conclusive chapter will provide a summary and answer to the research question.

Chapter II – EU competition law and anti-steering clauses

2.1 Introduction

The focus in this chapter will be on the investigations of the Dutch ACM and the Dutch provisional relief court case regarding Apple's anti-steering clauses,[40] which are assessed under Article 102(a) TFEU. The chapter will start with a more general discussion of the assessment of unfair trading conditions, in order to establish a general legal framework. Hereinafter, the Dutch NCA investigation and the court case are discussed together, because only the Court case includes references to previous case law and therefore provides a better understanding of the legal framework of Article 102 TFEU. It will be examined how the legal framework of 'unfair trading conditions' is applied to anti-steering clauses in digital markets. The investigation of the Commission into Apple's anti-steering clauses will not be further discussed in this chapter. While the Commission expressed their preliminary view, there is no final decision yet. The following question will be the focus of this chapter: *How can EU competition law be applied to anti-steering clauses?*

2.2 Unfair trading conditions in the digital markets

The anti-steering clauses of Apple presumably constitute an exploitative abuse which is prohibited under Article 102(a) TFEU.[41] In order to establish a violation of this prohibition, it must be proven that an undertaking with a dominant position in the relevant market abused this position by 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions', which has an effect on trade between member states. This term refers to non-price conditions, such as a dominant firm imposing contractual clauses on its customers.[42]

When competition authorities assess whether Article 102(a) is violated, their analysis generally consists of three steps. First, it is assessed whether the undertaking in question is an unavoidable trading partner. Then it is examined if the provision in question is unfair, whereby the potential anti-competitive effects are also taken into account. At last, the undertaking can provide an objective justification.[43] The assessment thus constitutes a case-by-case analysis in

[40] ACM, 'Summary of Decision on Abuse of Dominant Position by Apple' (ACM/19/035630, 24 August 2021) <https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf> accessed 16 February 2022; Case ROT 21/4781 & ROT 21/5782 *Apple Inc./ACM* [2021] (ECLI:NL:RBROT:2021:12851); See also The Netherlands Authority for Consumers & Markets, 'Market Study into Mobile App Stores' (Report ACM/18/032693, 11 April 2019) <www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf> accessed 25 October 2021

[41] Case ROT 21/4781 & ROT 21/5782 *Apple Inc./ACM* (n 40) para. 5; Marco Botta, 'Chapter 7. Exploitative abuses: recent trends and comparative perspectives' 11 (Research Handbook on Abuse of Dominance and Monopolization, Draft, Edward Elgar Publishing 2021) <https://ssrn.com/abstract=3909894> accessed 21 February 2022

[42] Botta (n 41) 12

[43] Botta (n 41) 17-18

which the likely anti-competitive effects must be proven.[44] A preliminary remark regarding this effects-based approach must be made. In the *Alsatel*-case, Article 102 TFEU was literally applied, and it suggests that a competition authority is not obliged to demonstrate anticompetitive effects in order to proof an Article 102(a) TFEU infringement.[45] However, this interpretation has been criticized and there seems to be a general consensus that the anti-competitive effects must in fact be proven.[46]

There are a few cases of the Commission and the EU Court of Justice in which some guidelines are given to assess the criteria of 'unfairness' of trading conditions. One of the first guiding cases in this respect is the *SABAM case* from 1974, which concerned the question whether certain contractual clauses regarding the assignment of present and future copyrights constituted an abuse of dominance by imposing directly or indirectly unfair trading conditions.[47] The court stated that it is for the relevant court to determine the inequitable nature of certain provisions by considering the individual/combined *effects* of these clauses. The relevant court should 'decide whether and to what extent they affect the interests of authors or third parties concerned, with a view to deciding the consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions.'[48] The court concluded that the obligations imposed by the undertaking were *not absolutely necessary* for

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[44] Tambiama Madiega,'Digital markets act' (European Parliament Briefing, PE 690-589, February 2022) 9 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS_BRI(2021)690589_EN.pdf> accessed 19 May 2022; Henrique Schneider, 'Digital Markets Act: Regulating Competition Regardless of Effects' in Henrique Schneider and Andreas Kellerhals (eds), *25 Jahre Kartellgesetz – ein kritischer Ausblick* 174 (EIZ Publishing 2022)

[45] Case C-247/86 *Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel) v Novasam* [1988] ECR-05987 para 10; Damien Geradin and Dimitrios Katsifis, 'The Antitrust Case Against the Apple App Store' (2020) TILEC Discussion Paper No. DP2020-035, 546-547 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3744192#references-widget> accessed 25 October 2021; Autorité de la concurrence, 'Decision 19-D-26 of 19 December 2019 regarding practices employed in the online search advertising sector' para 353

[46] Geradin and Katsifis (n 45) Footnote 195 stating "However, intervention seems to be particularly justified when unfair trading conditions lead to reduction in consumer welfare"; Decision 19-D-26 of 19 (n 45) para 353 reiterates that anticompetitive effects do not need to be demonstrated, but then includes an assessment concerning the potential effects of the alleged anti-competitive practice in question (para 366); Vincent Giovannini, 'Interim measures confirmed against Google in the press publisher's case' (Competition Forum: Law & Economics, 29 October 2020) 5 <https://competition-forum.com/interim-measures-confirmed-against-google-in-the-press-publishers-case/> accessed 22 May 2022; Madiega (PE 690-589) (n 44) 9; Federico Marini Balestra and Lucia Antonazzi, 'From Abuse of Dominance to Abuse of Rights: The Last Resort Tool To Apply Article 102 TFEU?' (*Bird & Bird*, 16 March 2022) <https://www.twobirds.com/en/insights/2022/italy/from-abuse-of-dominance-to-abuse-of-rights> accessed 22 May 2022, the authors plead for a detailed effect-based analysis, especially in the case of novel kinds of abuses; Kay Jebelli, 'The EU Digital Markets Act: Five Questions of Principle' (*Disruptive Competition Project*, 9 February 2021) <https://www.project-disco.org/competition/020921-the-eu-digital-markets-act-five-questions-of-principle/> accessed 22 May 2022; Regulation *(EU) 2022/...* Of The European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2022] 2020/0374 (COD) Recital 10, link via 'Digital Markets Act (DMA): agreement between the Council and the European Parliament' (Press Release European Council, 25 March 2022/11 May 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/> accessed 15 May 2022

[47] Case 127/73 *BRT v SABAM* [1974] ECR I-51 para 3-6

[48] ibid para 13-14

the attainment of its object and consequently unfairly infringe a member's right of freedom to exercise his copyright.[49]

In the *GEMA statutes case*, the Commission starts by referring to the *SABAM case* and reiterates the necessity to investigate whether, by taking all the relevant interests into account, the provisions in question ensure a balance between on the one hand maximum freedom for the librettists, and on the other hand effective management of the copyrights by the collecting society.[50] Furthermore, the Commission infers from the judgement that 'the decisive factor is whether they exceed the limits absolutely necessary for effective protection (*indispensability test*) and whether they limit the individual copyright holder's freedom to dispose of his work no more than need be (*equity*).'[51]

A few years later in 2001, the *DSD case* was decided by the Commission. This case concerned certain agreements concluded in light of the collection and recovery of sales packaging.[52] The Court stated that 'unfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of proportionality.'[53] This principle was infringed, because the contracting parties of the dominant company DSD could only choose between accepting the unreasonable commercial terms or set up their own systems of packaging and distribution channels. The latter is also referred to as the 'take it or leave it'-approach. Furthermore, in the assessment of the trading conditions, it is important to take into account the bargaining power of the contracting parties concerned and the specific conditions which are imposed by the stronger party on the weaker party.[54]

A more recent case concerning the imposition of unfair trading conditions by a big online digital platform is the investigation of the French NCA into Google Ads Rules.[55] The decision stated that unfair trading conditions are imposed when a dominant undertaking offers products and customers wishing to acquire these 'will have no choice but to accept the transaction terms determined by the dominant undertaking, however unfair they may be,

[49] ibid para 15; Viktoria H.S.E. Robertson, 'Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data' (2020) 57 Common Market Law Review 179 <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\COLA\COLA2020006.pdf> accessed 9 March 2022

[50] *GEMA Statues* (Case IV/29.971) Commission Decision 82/204/EEC [1981] OJ L 94/12 para 36

[51] ibid; Robertson (n 49) 179 (emphasis added)

[52] *DSD* (Case COMP D3/34493) Commission Decision 2001/463/EC OJ L 166/1 para 1; The appeal against this decision was dismissed by the Court, Case C-385/07 P *Der Grüne Punkt* [2009] ECR I-06155

[53] ibid para 112

[54] Robertson (n 49) 180-181

[55] The appeal case against this decision at the Paris Court of Appeal has been decided on the 7th of April. Unfortunately, an English version has not been published yet so only the Decision by the French NCA will be discussed.; Court D'Appel De Paris, Pôle 5 - Chambre 7 [2022] 20/03811 - N° Portalis 35L7-V-B7E-CBRJV <https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-sector-online-search-advertising-sector> accessed 19 may 2022

because they will not be able to turn to alternative operators that meet their needs'.[56] This statement seems to correspond with the 'take it or leave it'-approach.

According to the French NCA, Google had breached Article 102(a) TFEU. Google, an unavoidable trading partner, had unilaterally imposed their rules and because of the dependent position in which digital advertisers find themselves, they did not have a choice in accepting these rules. Furthermore, the rules have not been applied and defined in a transparent and objective way, without discrimination. There were no objective justifications and lastly, the potential anti-competitive effects were assessed.[57]

In their assessment, the NCA states that the 'case law examines whether such conditions are both *necessary and proportionate* to fulfil the objective pursued by the dominant undertaking or the realisation of its social purpose.'[58] This statement seems to broadly summarize the previous discussed investigations and court case. Article 102(a) TFEU takes an effects-based approach, although disputed by some authors, in which a balancing test of the different interests is required, and the principles of necessity and proportionality should be complied with. Furthermore, if a dominant undertaking with a large bargaining power applies the 'take it or leave it'-approach, it seems to infringe the principle of proportionality.

2.3 ACM decision & provisional relief ruling by the Rotterdam Court

In August 2021, the ACM finished their investigation into abuse of dominance by Apple in its App Store. The decision only applied to dating apps offered in the Dutch App Store. In short, the decision stated that Apple abused its dominant position by imposing 'unreasonable conditions on dating-app providers' and therewith violated Section 24 Mededingingswet (Mw) and Article 102 TFEU.[59] There was no objective justification applicable.[60] Hereinafter, the three elements of the decision and court case will be discussed, whereby the focus will be on the abuse of the dominant position.

2.3.1 Dominant position

The Rotterdam court rules that the ACM has correctly found that Apple holds a dominant position in the relevant market for app store services on the iOS mobile operating system for dating app providers.[61] Since there exist no sufficient substitutes for the App Store for dating-

[56] Botta (n 41) 16; Decision 19-D-26 of 19 (n 45) para 357
[57] Botta (n 41) 17; Decision 19-D-26 (n 45), p. 4, para 379, 426, 436, p 134 'Decision'
[58] Decision 19-D-26 (n 45) para 352 (emphasis added); Case T-83/91 *Tetra Pak* [1994] ECR II-00755 para 138-140; *BRT v SABAM* (n 47) para 8-11
[59] ACM, 'Summary of Decision on Abuse of Dominant Position by Apple' (ACM/19/035630, 24 August 2021) <https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf> accessed 16 February 2022
[60] ibid
[61] *Apple Inc./ACM* (n 40) para 8

app providers, Apple can act to a high degree independently from providers of dating apps. For these apps, it is necessary that they have a large userbase because that increases the change of a successful match, which would make the app more appealing to use. This also means that the users of these apps assume that the reach of the dating app is not confined to a certain operating system. Consequently, the providers of dating apps are forced to be present in the Google Play Store and Apple's App Store.[62] In addition, alternative app stores on smart mobile devices are not allowed by Apple. Websites are neither an alternative, because they cannot offer the same functionality as an app.[63] Because of this dominant position, Apple can dictate the conditions for app providers related to access to the App Store. Conditions which will not be taken into account by consumers in selecting a smart phone device.[64] Apple put forward some arguments which mainly criticize the investigation of Kien en Telecompaper, on which the ACM partly based their findings. According to the court, these have been sufficiently rebutted by the ACM.[65]

2.3.2 Abuse of the dominant position – Reasoning of the ACM

The judgement starts with an outline of the legal framework used by the ACM based on previous case law. The ACM first reiterates the 'special responsibility' of dominant undertakings,[66] which must be assessed on a case-by-case basis and is all the more important in situations concerning a product such as a digital platform in which participation is practically inevitable (*SABAM*[67]).[68] The ACM states that the undertaking must ensure that the conditions it imposes do not disadvantage a specific section of its customers to such an extent that the conditions are disproportionate towards this group.[69]

In the contested decision, the ACM states that the core of the assessment of fairness of the contractual terms constitutes a proportionality test (*SABAM*[70]). It must be determined whether the conditions in question are necessary to achieve the purpose of the contract (*SABAM*[71]). If so, a balancing exercise follows between the interests of the freedom of customers and the interests of the effectiveness of the business model that the dominant

[62] ACM/19/035630 (n 59)
[63] ibid
[64] ibid
[65] *Apple Inc./ACM* (n 40) para 8
[66] Meaning the dominant undertaking should not impair, through their conduct, effective undistorted competition and not to exploit their position by applying unfair conditions in commercial relations with their suppliers, customers and consumers (Case 322/81 *Michelin* [1983] ECR I-3461 para 57; Case C-202/07 P *France Télécom* [2009] ECR I-2369 para 105; Case C-209/10 *Post Danmark I [*2012] para 23; Case C-413/14 P *Intel* [2017] para 135)
[67] *BRT v SABAM* (n 47) para 8
[68] Case C-395 and 396/96 *Compagnie maritime belge transports* [2000] ECR I-1365 para 114; Case C-333/94 P *Tetra Pak/Commission* [1996] ECR I-5951 para 24; *Apple Inc./ACM* (n 40) para 9 & 10.1
[69] Ibid 10.1
[70] *BRT v SABAM* (n 47) para 8
[71] Ibid para 10-12

undertaking intends to create with the agreement (*Der Grüne Punkt,*[72] *SABAM II*[73]).[74] Furthermore, the ACM states that the test for unfair trading conditions in Article 102(a) TFEU requires an adverse effect in the sense of disadvantage. In an exploitative case relating to unfair trading conditions, it must be determined whether there is a disadvantage for the direct and indirect purchasers in the markets where the undertaking operates (*SABAM*[75]).[76]

Consequently, the ACM applies a proportionality test and states that there would be no abuse if the disputed conditions are necessary and proportionate to achieve a legitimate aim. Also, the least damaging effective measure must be applied (*SABAM*[77]). An appropriate balance must be found between the interest of the dominant undertaking and the interest of users in being able to use those services under reasonable conditions (*SABAM*[78] *II*; *Kanal 5 and TV4*[79]).[80]

In applying the legal framework to the facts of this case, the ACM seemed to assess the mandatory use of the IAP in combination with the anti-steering clause as provided in Article 3.1.1 of the Review Guidelines. Both conditions are namely inextricably connected.[81] The ACM argued as follows. First, the freedom of choice of dating app providers and dating app users is being limited. The Terms and Conditions of Apple[82] effectively oblige dating app providers to purchase the IAP service. Because of their revenue model, these providers are in a dependent position in relation to Apple. They do not have real possibilities to escape this dependency and therefore acceptance of the Terms and Conditions is practically inevitable.[83] This reasoning seems to align with the 'take it or leave it'-approach. App developers could either accept the Terms and Conditions or set up their own app store.

The ACM further argued that the Terms and Conditions mean that dating app users are customers of Apple instead of customers of dating app providers themselves. This has several disadvantages for both app providers and users. For example, because no data is provided to app providers, they cannot directly interact with their users for providing customer service. It also makes it more difficult for these providers to do a person check, which is of great importance for dating app providers in the context of security, checking for age or malicious

[72] *Der Grüne Punkt* (n 52) – Appeal case against the DSD-decision by the Commission (n 54), the Court dismisses the appeal
[73] Case C-372/19 *SABAM II* [2020] para 60
[74] *Apple Inc./ACM* (n 40) para 10.2
[75] *BRT v SABAM* (n 47) para 8
[76] *Apple Inc./ACM* (n 40) para 10.3
[77] *BRT v SABAM* (n 47) para 8 and further
[78] *SABAM II* (n 73) para 30
[79] Case C-52/07 *Kanal 5 and TV 4* [2008] ECR I-09275 para 30-31
[80] *Apple Inc./ACM* (n 40) para 10.4
[81] ibid para 3.6, 4.4, 10.4
[82] *Apple Inc./ACM* (n 40) para 3.6, 4.4, 10.4
[83] *Apple Inc./ACM* (n 40) para 11.2

users.[84] In short, without the Terms and Conditions, app developers could settle their payments for in-app purchases either themselves or with the cooperation of a Payment Service Provider (PSP) of their choice. Also, Apple's Terms and Conditions are disadvantageous for consumers because they impair on the direct customer relationship between dating app providers and users of dating apps.[85]

2.3.3 Abuse of the dominant position – Ruling of the Rotterdam Court

The case does not provide much information regarding Apple's counterarguments.[86] It merely states that the judge leaves aside Apple's arguments about the allegedly experimental nature of the assessment used by the ACM. Instead, the Court had to assess whether the decision of the ACM is expected to be upheld.[87] Interestingly the Court starts by stating that there are several remarks to be made regarding the various judgements of the European Court of Justice (ECJ) that the ACM had used in its assessment. However, it considers the general rule to be correct. This means that Apple may not, in the context of its economic dominant position, impose conditions that are favourable to it, but *disproportionately* burdensome for its customers, while those customers *cannot reasonably refuse* these conditions.[88] This is an interesting statement, especially since the Court does not specify what the "remarks" entail and to which specific cases these apply.

The Court agrees that the case law as cited by ACM provides that the possibility of Apple to organize their exploitation model as they see fit is limited by their special responsibility to prevent, amongst others, exploitation of their trading partners. Their chosen exploitation model however, results in app providers not having a direct customer relationship with their users. Besides, dating app providers particularly rely on presence in the App Store. Because of Apple's economic dominance, app providers have no other real choice than to accept the Terms and Conditions. However, only if these conditions imposed on dating app providers constitute unfair obligations which cannot be refused by dating app providers because of Apple's economic dominance, this practice would be considered exploitative.[89] This last part about the inevitable acceptance of the unfair conditions again seems to refer to the prohibition of the 'take it or leave it'-approach.

[84] ibid para 11.3
[85] ibid para 12.2
[86] Not all the information is publicly available, because the judge in the preliminary relief proceedings partially suspended an order under a penalty payment imposed by the ACM. The ACM had six weeks to decide on Apple's objections against that order. Until that time, the ACM was not allowed to provide information about this suspended part. Therefore, only part of the ruling is made publicly available by means of an extract. The full judgement might contain a more detailed explanation of Apple's counterarguments.; ibid, first paragraph under 'Inhoudsindicatie'
[87] ibid para 13
[88] ibid para 13
[89] ibid para 14

The judge considers as follows. First of all, the judge agrees with the ACM that Apple strongly hinders the dating app providers in their customer contact. This is caused by the fact that these providers cannot choose another method of payment than the IAP, neither are they allowed to refer in the app to other payment methods outside the app. In this way Apple positions itself as a commission agent between the dating app providers and the consumers and therefore a customer relationship arises between Apple and the consumers, instead of between dating app providers and consumers. Consequently, this practice makes it more difficult to provide customer service, but also to fight against fraud and increase the security of the app. The judge considers these obligations to be detrimental for dating app providers and states they *only accept them because of Apple's dominant position.* Furthermore, the judge in preliminary relief proceedings followed the ACM in its view that these conditions are also *disproportionate* because they are *not necessary* for the operating model of the App Store. [90] This assessment seems to be in line with the current legal framework discussed in paragraph 2.2, because the court balanced the different interests of the parties to see whether Apple's conditions are necessary and proportionate, and if app providers have a real choice in accepting them.

According to the court, the ACM has convincingly refuted Apple's assertions that these conditions are necessary in connection with privacy and security. In particular, the weight of Apple's argument is strongly put into perspective by the fact that Apple does not require Schedule 1 app providers[91] which sell services or goods through their apps, for privacy and security reasons, to process payments through Apple.[92] Apple's Video Partner Program, in which in-app purchases are paid for via a PSP of the app provider's own choosing and the consumer pays directly to the app provider via the PSP, illustrates that the conditions are apparently *not necessary* for Apple even within Schedule 2. The interim relief judge concludes that the ACM is correct in taking the position that this part of Apple's conditions imposed on the dating app providers is unfair within the meaning of Article 102(a) TFEU. The ACM made it plausible that Apple is acting in violation of Article 24 Mw and Article 102 TFEU, by obliging dating app providers to process in-app purchases only via the mandatory IAP-system.[93]

The court ruled that Apple was obliged to let dating app providers who offer their app in the Dutch App Store choose themselves which party they wanted to handle payments for digital

[90] ibid para. 15-17

[91] Schedule 1 applies to free apps in which no paid content is offered (this includes apps which use the IAP API for delivering free content). Schedule 2 applies to paid apps or apps in which paid content is offered (e.g. subscription for a music streaming service). Schedule 3 applies to applies to apps developed specifically for use within a single company/internal use which are offered via Custom App Distribution.; *Apple Inc./ACM* (n 40) para. 3.7; Apple Developer Program License Agreement, 1 <https://developer.apple.com/support/downloads/terms/apple-developer-program/Apple-Developer-Program-License-Agreement-20211213-English.pdf> accessed 19 May 2022

[92] Since schedule 1 applies to free apps in which no paid content is offered, I presume the Court refers to apps selling physical goods or services that will be consumed outside the app; App Store Review Guidelines Section 3.1.3(e) <https://developer.apple.com/app-store/review/guidelines/> accessed 19 may 2022

[93] *Apple Inc./ACM* (n 40) para. 15

content and services sold within the app. In addition, it should be possible for these dating app providers in the Dutch App Store to refer within their app to other payment systems outside the app for purchases within the app.[94]

2.3.4 Legal framework and remarks on the Rotterdam Interim Relief Court Case

Considering the successful application of the legal framework as discussed in paragraph 2.2 in the Dutch Apple case, it seems that this framework is still suitable for alleged Article 102(a) infringement in the digital context. It should be noted that although the *GEMA*- and the *DSD-decisions* by the Commission seem to contribute to the legal framework of unfair trading conditions, only the *SABAM* court case is referred to in later cases. This can be explained by the fact that Commission decisions can be subject to legal review by the Court of Justice of the European Union (CJEU), so the rulings of the CJEU provide better precedents in this respect.[95] It must however be kept in mind that Article 102(a) infringements are assessed on a case-by-case basis. This specific judgment applies to anti-steering clauses for dating apps in the Dutch App Store and it does therefore not provide conclusive answers as regards anti-steering clauses applicable to other apps in general or dating apps in other countries.

The ACM published a market study into mobile app stores in April 2019 which entailed complaints from app providers that Apple's anti-steering clause is not implemented or reviewed equally among different app developers. An example given by one app provider is that a competing app, which offers the same subscription service, has a link included in the app that directs to a payment method outside the app. The app provider presumes this is because the competing app provider has significantly less income and is therefore less interesting for Apple.[96] In the *Google Ads* case, as discussed in paragraph 2.2, one of the elements contributing to the breach of Article 102(a) TFEU was applying the rules in a discriminatory manner. Although Apple seemed to have done the same with their anti-steering clauses, the argument has not been put forward by the ACM in the Rotterdam Court case. Moreover, based on this *Google Ads* case, Geradin and Katsifis state that Article 102(a) TFEU obliges Apple to 'define and apply its Guidelines in an objective, transparent and non-discriminatory manner'.[97] However, in their view the mandatory use of the IAP-system and the 30% commission is based on an unclear and arbitrary distinction. While all apps benefit from the same set of services in the App Store, only those that offer digital goods or services are required to use the mandatory IAP-system and pay the commission.[98]

[94] *Apple Inc./ACM* (n 40) para. 18-19 and 'Beslissing'
[95] 'Procedures in Article 102 Investigations' (European Commission) <https://ec.europa.eu/competition-policy/antitrust/procedures/article-102-investigations_nl> accessed 11 May 2022
[96] Report ACM/18/032693 (n 40) 92-93
[97] Geradin and Katsifis (n 45) 554
[98] ibid

2.4 Conclusion

This chapter illustrated that anti-steering clauses are considered problematic in light of national and EU competition law. The discussed case law and proceedings show that anti-steering clauses can be assessed under Article 102(a) TFEU. First, it must be established that the undertaking concerned has a dominant position in the relevant market. Secondly, it must be assessed whether the provision in question constitutes an unfair trading condition and, although sometimes disputed, what the anti-competitive effects are. The case of the Rotterdam Interim Relief Court suggests that the legal framework as discussed in paragraph 2.2 for 'unfair trading conditions' is also adequate for the assessment of anti-steering clauses in digital markets. This test seems to entail two steps. On the one hand, it must be assessed whether the conditions imposed by the dominant undertaking are necessary and proportionate (and not 'disproportionately burdensome'). On the other hand, it must be assessed whether these unfair conditions cannot be refused because of the undertaking's dominance and related its strong bargaining power ('take it or leave it'-approach). Moreover, it is possible for the undertaking to provide an objective justification, although there seems to be a high bar and the given objectives must be necessary and proportionate as well. With regard to Apple's anti-steering clauses, their objectives of safeguarding privacy, safety, and quality were not accepted by the ACM or the court. However, since only a summary of the ACM decision is made publicly available and because of the "remarks" in the Rotterdam Court case, some questions remain regarding the applicable case law and consequently the exact legal framework for the assessment of anti-steering clauses. In addition, while this has not been assessed in the case of Dutch Dating apps, the French Google Ads Case shows that the application of conditions in a discriminatory, non-objective, or non-transparent manner can contribute to the finding of a violation of Article 102(a) TFEU. Perhaps the main proceedings will also discuss the way in which anti-steering clauses are applied to app developers.

Based on the Dutch court case, Apple is obliged to delete the anti-steering clauses with regard to dating-apps in the Dutch App Store. So far, they have not fully met their obligation and therefore they have to pay the maximum penalty payment of 50 million euros.[99] The main proceedings in the Netherlands and the outcome of the investigation of the EU Commission will confirm whether the legal framework as provided above is still applicable for article 102(a) violations by digital platforms.

[99] 'ACM to assess adjusted proposal of apple regarding its conditions for dating apps' (ACM, 28 March 2022) <https://www.acm.nl/en/publications/acm-assess-adjusted-proposal-apple-regarding-its-conditions-dating-apps> accessed 11 May 2022

Chapter III – The Digital Markets Act

3.1 Introduction

This chapter will focus on the DMA and the way in which this regulation complements competition law regarding anti-steering clauses. This will be done by comparing different elements of competition law with the DMA to see how the DMA is complementing (the deficiencies of) competition law. The first part of this chapter will provide a little background of the DMA and discuss the main issues that led to the adoption of the DMA. Thereafter, a more in-depth discussion will follow of different elements of the DMA, including the specific anti-steering prohibition, the *per se* violations in general and the remedies. The conclusion will provide a summary and answer to the following question: *How does the Digital Markets Act aim to complement and address the deficiencies of competition law regarding anti-steering clauses?*

3.2 Background of the Digital Markets Act

In the last few years there have been many studies by National Competition Authorities (NCAs) and international organizations which have revealed some acute problems that had arisen in digital markets.[100] These problems mainly pertain to the contestability of large platforms and the fact that some of these platforms were restricting competition by taking advantage of their dominant position. An example of this, as was extensively discussed in the previous chapter, is by imposing unfair conditions on their trading partners and consumers.[101] Generally, the problem with competition law and the digital economy was that people perceived the procedures to be taking too long, coming too late, and so far, competition has not been (re)stimulated appreciably by these rules.[102]

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[100] See for example The Netherlands Authority for Consumers & Markets, 'Market Study into Mobile App Stores' (Report ACM/18/032693, 11 April 2019) 92-93 <www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf> accessed 25 October 2021; Competition Markets Authority (UK), 'Mobile ecosystems: Market study interim report' (14 December 2021) <https://www.gov.uk/government/publications/mobile-ecosystems-market-study-interim-report> accessed 12 May 2022; 'CADE launches study on digital platforms: The publication includes the Council's case law as to mergers and acquisitions and illegal activities that involve the sector' (Ministério da justiça e segurança pública, updated 28 September 2021) <https://www.gov.br/cade/en/matters/news/cade-launches-study-on-digital-platforms-1> accessed 5 may 2022; 'Abuse of dominance in digital markets' (OECD, DAF/COMP/GF(2020)7 & DAF/COMP/GF(2020)8, 19 May 2021) <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets.htm> accessed 12 may 2022; Jan Krämer and others, 'Digital Markets and Online Platforms: New Perspectives on Regulation and Competition Law' (Centre on Regulation in Europe, 18 November 2020) <https://cerre.eu/publications/digital-markets-online-platforms-new-regulation-competition-law/> accessed 12 May 2022

[101] Commission, 'Commission Staff Working Document; Impact Assessment Report, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) SWD(2020) 363 final Part 1/2' para 4 & 39

[102] Monopolies Commission, 'Recommendations for an effective and efficient Digital Markets Act' (Special Report 82, 2021) 8 <https://www.sipotra.it/wp-content/uploads/2021/10/Recommendations-for-an-effective-and-efficient-Digital-Markets-Act-1.pdf> accessed 26 March 2022; Oliver Budzinski and Juliane Mendelsohn,

There were three main issues that arose regarding these large platforms, and which were also present in the proceedings and investigations against Apple's anti-steering clauses. The first issue relates to the weak contestability of platform markets. This is due to the fact that some of these gatekeepers, i.e. large digital providers that serve as a gateway for business users and consumers, exercise control over a whole platform ecosystem, such as Apple's 'walled garden'.[103] Existing and new market operators are basically incapable of contesting these gatekeepers, regardless of their innovativeness and efficiency (high entry barriers). An additional consequence is the increased probability that these markets do not function well and therefore the outcome for consumers is not optimal in terms of quality, choice, price, and innovation.[104] Secondly, many businesses are economically very dependent on gatekeepers, which often significantly increases the bargaining power of the latter ('take it or leave it'-practices). That in turn results in unfair business conditions which would not have been established in a well-functioning and competitive market.[105] A specific example given in the impact assessment is the imposition of anti-steering provisions. Herewith the business users are prevented from directing their acquired consumers to offers outside the platform, 'even though such alternatives may be cheaper or otherwise potentially more attractive'.[106] The last issue concerns the fragmentation of regulation and oversight because of the different national legislations that apply to these global businesses.[107]

3.3 General aspects of the Digital Markets Act

The DMA complements the traditional competition rules, it does not replace them. The DMA therefore does not prejudice the application of national competition law and Article 102 TFEU.[108] The regulation aims to 'contribute to the proper functioning of the internal market

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'Regulating Big Tech: From Competition Policy to Sector Regulation?' (Ilmenau Economics Discussion Papers 27/154, October 2021) 2, 5-6 <https://ssrn.com/abstract=3938167> accessed 9 June 2022

[103] The term 'walled garden' is often used because Apple completely controls the phone itself (the hardware), the operating system iOS and the apps which can be installed (software). It has a closed ecosystem of different Apple products which are all connected with each other. (see Joanna Stern, 'iPhone? AirPods? MacBook? You Live in Apple's World. Here's What You Are Missing' (The Wall Street Journal, 4 June 2021) <https://www.wsj.com/articles/iphone-airpods-macbook-you-live-in-apples-world-heres-what-you-are-missing-11622817653?mod=followjoannastern> accessed 28 March 2022; '"Open" vs. "Closed" Software Ecosystems: A Primer' (LeasePilot) <https://leasepilot.co/blog/open-vs-closed-software-ecosystems-a-primer/#:~:text=Apple's%20iPhone%2FiOS%20platform%20is,hardware%20(the%20phone%20itself)> accessed 12 May 2022)

[104] Impact Assessment Report on the DMA, SWD(2020) 363 Part 1/2 (n 101) para 26-27

[105] ibid para 28

[106] ibid para 39

[107] ibid para 29

[108] Cani Fernández, 'A New Kid on the Block: How Will Competition Law Get Along with the DMA?' (2021) 12/4 Journal of European Competition Law & Practice 271 <https://academic.oup.com/jeclap/article/12/4/271/6224264?login=false> accessed 6 March 2022; Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)' COM (2020) 842 final Article 1(6); Regulation *(EU) 2022/...* Of The European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2022] 2020/0374 (COD) Article 1(6), link via 'Digital Markets Act (DMA): agreement between the Council and the European Parliament' (Press Release European Council, 25 March 2022/11 May 2022)

by laying down harmonised rules ensuring for all businesses, *contestable* and *fair* markets in the digital sector across the Union where gatekeepers are present, to the benefit of *business users* and *end users*.'[109] The objective of competition law focuses on the protection of undistorted competition and consequently protecting consumer welfare.[110] Although the DMA itself stipulates that both regimes pursue different objectives, this does not seem to be a settled matter yet.[111] It has been argued for example that contestability is a 'guiding legal principle of competition law or at least larger competition policy'.[112]

By increasing the contestability and fairness, the DMA expects results and impacts such as greater consumer choice, innovation, and lower prices.[113] These results benefit consumer welfare and therefore there seems to be a certain overlap between the objectives of competition law and the DMA. More specifically, consumer welfare is a direct objective of competition law, while the effects of the objective of the DMA would ultimately also improve consumer welfare. However, the objective of the DMA broadens the horizon by the taking into account the interests of businesses in their relationship with the platform as well, which clearly differs from competition law objectives. Since the scope of the objectives has not been further specified, there remains some uncertainty and possible tension regarding the relationship between the DMA and competition law.[114] This is especially relevant in light of the *ne bis in idem* principle, which will be further discussed in Chapter IV.

As discussed in Chapter II, an undertaking must have a dominant position in the relevant market in order to fall under Article 102(a) TFEU. The burden of proof is on the NCA or other investigatory entity, not the undertaking itself. The proposed DMA takes a different approach and does not contain a requirement similar to that of the dominant position. Instead, Article

<https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/> accessed 15 May 2022

[109] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 1(1) (emphasis added)

[110] Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11/1 The Competition Law Review 131 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605777> accessed 6 March 2022; Digital Markets Act (final) 2020/0374 (COD) (n 109) Recital 11

[111] Digital Markets Act (final) 2020/0374 (COD) (n 108) Recital 11; Dimitrios Katsifis, 'Ne bis in idem and the DMA: the CJEU's Judgments in bpost and Nordzucker – Part II' (*The Platform Law Blog*, 29 March 2022) <https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/> accessed 21 May 2022; Heike Schweitzer; 'The Art to Make Gatekeeper Positions Contestable and The Challenge to Know What is Fair: A Discussion Of The Digital Markets Act Proposal' [2021] 3 ZEuP 12-13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837341> accessed 22 may 2022; Marco Cappai and Giuseppe Colangelo, 'A Unified Test For the European *ne bis in idem* Principle: The Case Study of Digital Markets Regulation.' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951088> accessed 22 May 2022; Patrick Harrison and Monika Zdzieborska, 'Importance Of Robust Application Of The Ne Bis In Idem Principle In Competition Enforcement And Regulation' 3, 10-11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4059170> accessed 22 May 2022

[112] Budzinski and Mendelsohn (n 102) 17

[113] DMA proposal COM (2020) 842 final (n 108) 59

[114] Budzinski and Mendelsohn (n 102) 17-18; Matthias Bauer and others, 'The EU Digital Markets Act: Assessing the Quality of Regulation' (European Centre for International Political Economy, Policy Brief 02/2022) 21-22 <https://ecipe.org/publications/the-eu-digital-markets-act/> accessed 16 June 2022

3(1) DMA contains more general criteria to establish whether an undertaking can be designated as a 'gatekeeper'.[115] Furthermore, Article 3(2) includes some thresholds which, if reached by the platform, presume that the requirements of paragraph 1 are fulfilled. The thresholds are essentially designed to capture the biggest online platforms, which include Apple.[116]

When the thresholds in paragraph 2 are met, the undertaking is obliged to inform the Commission within three months.[117] A more proactive approach is therefore required from gatekeepers themselves, instead of the Commission. The DMA also includes a shift in the burden of proof. If the thresholds are met, it is up to the undertaking to demonstrate they fall out of the scope of Article 3(1) DMA.[118] The Commission also has the ability to adapt the thresholds themselves and the methodology for determining when they are met.[119]

3.4 The anti-steering prohibition in the Digital Markets Act

The text of the anti-steering provision in the DMA has been amended by the European Parliament and the EU Council and the final version of the anti-steering clauses, as laid down in Article 5 DMA, reads as follows: '(4) The gatekeeper shall allow business users, **free of charge, to communicate and** promote offers, **including under different conditions**, to end users acquired via its core platform service **or through other channels**, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper.'[120] The second part of the initial proposal is now included in paragraph 5 and reads as follows: 'The gatekeeper shall allow end users to access and use, through its core platform services, content, subscriptions, features or other items, by using the software application of a business user, including where those end users acquired such items from the relevant business user without using the core platform services of the gatekeeper.'[121] The objective of this provision is to prevent exclusivity and disintermediation of gatekeepers, such as Apple, in relation with end users. Furthermore, it ensures that

[115] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 3(1)
[116] Luís Cabral and others, 'The EU Digital Markets Act A Report from a Panel of Economic Experts' (European Commission, Report by the Joint Research Centre, 2021) 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783436> accessed 27 March 2022; See also Pieter van Cleynenbreugel, 'Digital Markets Act: beware of procedural fairness and judicial review booby-traps!' (*European Law Blog*, 24 June 2021) <https://europeanlawblog.eu/2021/06/24/digital-markets-act-beware-of-procedural-fairness-and-judicial-review-booby-traps/> accessed 28 March 2022; Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 3(2); Mario Mariniello and Catarina Martins, 'Which platforms will be caught by the Digital Markets Act? The 'gatekeeper' dilemma' (Bruegel Blog, 14 December 2021) <https://www.bruegel.org/2021/12/which-platforms-will-be-caught-by-the-digital-markets-act-the-gatekeeper-dilemma/> accessed 17 May 2022; See also Budzinski and Mendelsohn (n 102) 19
[117] DMA proposal COM (2020) 842 final (n 108) Article 3(3)
[118] ibid Article 3(4)
[119] ibid Article 3(5)
[120] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 5(4) (emphasis added on included parts compared to the proposal)
[121] ibid Article 5(5)

business users are free in promoting and choosing the distribution channel which they consider most appropriate for interacting with end users already acquired via the gatekeeper's core platform services.[122]

The prohibition of anti-steering clauses is now divided in two sequential sections in Article 5 DMA.[123] As explained in the first chapter, the Reader App exemption allows developers of reader apps to directly link within their app to their website, for example to subscribe. Furthermore, users can access previously purchased content within the app.[124] Article 5(4) DMA specifically allows developers to communicate and promote offers to end users, and to conclude contracts with them without the obligation to use the core platform services of the gatekeeper. This seems to imply that app developers can include a link to their website in order to conclude (subscription) contracts and therewith avoiding the 30% commission. Moreover, Article 5(5) DMA shows that end users can acquire their items within an app, even though they purchased it outside the app store. Therefore, in my view, the DMA seems to have broadened the scope of the Reader App exemption to all apps.

The introduction of the anti-steering prohibition in the DMA seems to reflect the thinking of the Commission in the current App Store investigation.[125] However, the fact that the Commission includes anti-steering clauses while their investigation is not completed yet has been criticized. Professor Körber for example, is of the opinion that the obligations in Article 5 and 6 of the DMA are not based upon a 'stable body of settled case-law, but still murky ground.'[126] This might be problematic in combination with the exclusion of an efficiency defence.

Moreover, some authors have pointed out the risks of the anti-steering prohibition. First of all, concerns of free-riding and payment fraud are expressed. Article 5(4) together with 5(7),

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[122] Commission,' Working Paper on The Digital Markets Act' (Presentation during Working Party meeting on 19 February 2021, 23 February 2021), WK 2554/2021 INIT slide 4 <https://www.euractiv.com/wp-content/uploads/sites/2/2021/03/wk02554.en21.pdf> accessed 25 March 2022

[123] Henry Mostyn & Nuna Van Belle (*Cleary Antitrust Watch*, 29 March 2022) <https://www.clearyantitrustwatch.com/2022/03/final-agreement-reached-on-digital-markets-act-a-paradigm-shift-in-digital-regulation/> accessed 7 April 2022;

[124] Nivedita Balu and Stephen Nellis, 'Explainer: Apple gives 'reader' apps a way around commission. Who wins?' (Reuters, 2 September 2021) <https://www.reuters.com/technology/apple-gives-reader-apps-way-around-commissions-who-wins-2021-09-02/> accessed 15 May 2022; Section 3.1.3(a) of the App Store Review Guidelines <https://developer.apple.com/app-store/review/guidelines/#reader-apps> accessed 15 may 2022

[125] Heike Schweitzer and Frederik Gutmann, 'Unilateral Practices in the digital market: An overview of EU and national case law' [2021] Art. N° 101045 e-Competitions Antitrust Case Laws e-Bulletin, Footnote 194 <https://www.concurrences.com/fr/bulletin/special-issues/unilateral-practices-in-the-digital-market/unilateral-practices-in-the-digital-market-an-overview-of-eu-and-national-case> accessed 28 March 2022

[126] Torsten Körber, 'Lessons From the Hare and the Tortoise: Legally Imposed Selfregulation, Proportionality and the Right to Defence Under the DMA' NZKart 2021, 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3914669> accessed 28 March 2022; See also Bauer and others (n 114) 15

which prohibits the mandatory use of an ancillary service, increase the risk of free riding by business users.[127] Furthermore, marketplaces or app stores might turn into 'unpaid advertising platforms', where end users are captured and redirected to the website of businesses to fulfil the purchases. These kinds of practices would be unacceptable offline, since it undermines the 'legitimate commission-based business models', such as Apple applies.[128] Besides the fact that the anti-steering clauses themselves would be prohibited, Apple's commission-based business model would presumably be impossible to apply as well.[129] After all, it seems probable that app developers would rather direct their users to a purchasing system outside the app, than paying the 30% commission to Apple. A potential consequence of the abolishment of the commission-based model could be that platforms have to adopt listing fees or subscription-based models for services that are now offered for free. Consumer prices and costs for new businesses might consequently increase, the digital inclusiveness could be reduced and the number of new features and functionalities for users might decrease.[130] Apple itself also expressed its concern in light of the initial proposal that the anti-steering provision undermines its ability to recoup their investment in security and privacy of the App Store.[131]

Even though the criticism entails some valid points and concerns, it must be kept in mind that it eventually comes down to a balancing of the different interests, which is a difficult exercise. Prices could for example increase in the short term, but if anti-steering clauses are prohibited, consumers would perhaps benefit from additional competition in the long term.

[127] Digital Europe, 'Final steps towards a targeted and predictable Digital Markets Act' (DigitalEurope, 2 February 2022) <https://www.digitaleurope.org/wp/wp-content/uploads/2022/02/Final-steps-towards-a-targeted-and-predictable-Digital-Markets-Act.pdf> accessed 7 April 2022; 'Event Highlights | Digital Markets Act Trilogue: Protecting the Consumer Interest' (PubAffairs Bruxelles, 7 January 2022) <https://www.pubaffairsbruxelles.eu/event-highlights-digital-markets-act-trilogue-protecting-the-consumer-interest/> accessed 18 April 2022; Martin-Michail Alexidis, ICYMI: Event on the Digital Markets Act – Trilogue' (Disruptive Competition Project, 20 January 2022) <https://www.project-disco.org/european-union/012022-icymi-event-on-the-digital-markets-act-trilogue/> accessed 18 April 2022; Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 5(7); DMA proposal COM (2020) 842 final (n 108) Article 5(e)

[128] Digital Europe (n 127)

[129] Response of the Information Technology Industry Council (ITI), 'Make Your Voice Heard on the Digital markets Act (DMA)' (Greens EFA) <https://www.greens-efa.eu/commenttool/make-your-voice-heard-on-the-digital-markets-act-dma/> accessed 7 April 2022; See also PubAffairs Bruxelles (n 127)

[130] Alexidis (n 127); PubAffairs Bruxelles (n 127); Gareth Shier and others, 'A Review of Amendments to the DMA by Parliament and the Council' 1 & 30 (Oxera, 10 January 2022) <https://www.oxera.com/insights/reports/review-of-dma-amendments/> accessed 18 April 2022

[131] 'Apple Initial Comments on the Proposed Digital Markets Act' (views provided by the Irish government, January 2020) <https://enterprise.gov.ie/en/Consultations/Consultations-files/Apple-DSA-Submission.pdf> accessed 11 April 2022

3.5 *Per se* violations vs. case-by-case approach

3.5.1 Comparison between Article 102 TFEU and Article 5 Digital Markets Act

Competition law is fundamentally based on a case-by-case approach, meaning that a decision is based on a specific undertaking and the specific facts of a certain case.[132] This approach has different consequences, which are often considered to be adverse for the effectiveness of competition law. First of all, competition law decisions do not automatically have *erga omnes* effects.[133] While the idea is that these decisions have a deterrent and precedent effect on other undertakings, and their future behaviour would be disciplined by these decisions, the reality of this is far from certain.[134] In case of anti-steering clauses for example, a practice which competition authorities seem to consider very harmful, it is necessary for these authorities to investigate the clauses of all the different undertakings separately and based on the specific circumstances of the case.[135] A related downside of this case-by-case approach is the duration of these complex enforcement proceedings which is very long and consume a lot of resources.[136] Moreover, third parties who are also harmed by the same anti-competitive practices in other markets, cannot immediately rely on previous findings of infringement in order to claim damages before national courts. They still have to prove the infringement.[137]

The DMA takes a totally different approach. The obligations laid down in Article 5 constitute a *per se* violation, meaning that it is enforced irrespective of any anticompetitive effects.[138] It

[132] Giuseppe Colangelo, 'The European Digital Markets Act and antitrust enforcement: a *liaison dangereuse*' (ICLE White Paper, 19 May 2022) 12 <https://ssrn.com/abstract=4070310> accessed 9 June 2022

[133] '[…] the idea that when an international court authoritatively settles interpretative questions, it is not only legally binding on the parties to the case, but it also has an *erga omnes partes* effect across all of the contracting states'; Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' [2017] 28/3 the European Journal of International Law 823 <https://academic.oup.com/ejil/article/28/3/819/4616673> accessed 1 April 2022

[134] OECD, 'Ex-Ante Regulation and Competition in Digital Markets – Note by BEUC' (2 December 2021, DAF/COMP/WD(2021)66) para 7 <https://one.oecd.org/document/DAF/COMP/WD(2021)66/en/pdf> accessed 15 April 2022

[135] OECD DAF/COMP/WD(2021)66 (n 134) para 8; cf ACM, 'Summary of Decision on Abuse of Dominant Position by Apple' (ACM/19/035630, 24 August 2021) <https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf> accessed 1 April 2022 *(Anti-steering clauses for dating apps in the Dutch app store*); cf 'Antitrust: Commission sends Statement of Objections to Apple on App Store rules for Music streaming providers' (Press release, 30 April 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061> accessed 1 April 2022 (*Anti-steering clauses in music streaming apps which compete with Apple music*)

[136] OECD DAF/COMP/WD(2021)66 (n 134) para 8-9

[137] ibid para 10

[138] Tambiama Madiega,'Digital markets act' (European Parliament Briefing, PE 690-589, February 2022) 9 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS_BRI(2021)690589_EN.pdf> accessed 15 May 2022

appears that these practices are considered to be restrictive by object.[139] This is clearly in contrast with article 102 TFEU, which generally requires the finding of a negative effect on competition.[140] The DMA does not take into account the negative or positive effects of a violated obligation, nor does it examine the impact on the market.[141] This assumption of harmfulness of the prohibited behaviours in the DMA has been criticized. Some authors have argued that certain behaviours can also have pro-competitive effects.[142] Furthermore, the Commission seemed to contradict itself by, for example, prohibiting self-preferencing, while it stated in a previous report that this behaviour is not abusive per se and therefore requires an effects test.[143]

Another difference between competition law and the DMA is that Article 102 TFEU is a catch-all clause, which consequently covers many types of conduct. Article 5 of the DMA includes more specific and concrete rules.[144] Article 5(4) and (5) are, just as the other obligations enshrined in Article 5 of the DMA, directly applicable and self-executing. Within six months after a platform is designated as gatekeeper, it is obliged to implement measures in order to comply with the obligations following from Article 5.[145] Moreover, gatekeepers should fully and effectively comply with the obligations in Article 5 and 6 and not engage in behaviour undermining this effective compliance.[146] This also means that gatekeepers are burdened with a greater responsibility, because they must continuously comply with all the obligations from the DMA independently of the individual case. As opposed to the *ex post* regime in

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[139] Christian Bergqvist, 'What to consider restrictive by object?' (Kluwer Competition Law Blog, 13 November 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2020/11/13/what-to-consider-restrictive-by-object/> accessed 23 may 2022; Case C-373/14 P *Toshiba* [2016] para 26-27

[140] ibid 21

[141] ibid 10

[142] How Platforms Create Value For Their Users: Implications For the Digital Markets Act (Oxera, Prepared For the Computer and Communications Industry Association, 12 May 2021) 32 & 52 <https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf> accessed 4 June 2022; Alexandre de Streel and others, 'Digital Markets Act: Making Economic Regulation Of Platforms Fit For The Digital Age' *(Centre on Regulation in Europe (CERRE)*, December 2020) Section 2.1 & 2.2.2 < https://cerre.eu/publications/digital-markets-act-economic-regulation-platforms-digital-age/> accessed 4 June 2022; Derek Holt and Felix Hammeke, 'European Union: Two-Sided Markets, Platforms and Network Effects (AlixPartners LLP, 7 December 2021) <https://globalcompetitionreview.com/guide/digital-markets-guide/first-edition/article/european-union-two-sided-markets-platforms-and-network-effects> accessed 4 June 2022; See also Meredith Broadbent, 'Implications Of The Digital Markets Acts For Transatlantic Cooperation' (Center For Strategic & International Studies, September 2021) 6 <https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation> accessed 4 June 2022

[143] Salomé Cisnal de Ugarte, Melanie Perez and Ivan Pico, 'The Digital Markets Act's Per Se Prohibitions Increase Legal Risks for Non-Gatekeeper Platforms' (King & Spalding LLP for the CCIA, 9 February 2022) 4-5 <https://www.kslaw.com/attachments/000/009/434/original/King___Spalding_%E2%80%93_The_Digital_Markets_Act%E2%80%99s_Per_Se_Prohibitions_Increase_Legal_Risks_for_Non-Gatekeeper_Platforms_%E2%80%93_9_February_2022.pdf?1644955782> accessed 27 March 2022

[144] Monopolies Commission Special Report 82 (n 102) 21-22

[145] DMA proposal COM (2020) 842 final (n 108) Article 7(1) and 3(8); Monopolies Commission Special Report 82 (n 108) 24; Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 3(10); 'Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets (European Commission Press Corner, QANDA/20/2349, 23 April 2022) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349> accessed 17 May 2022

[146] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 13(3) and (4)

competition law, the *ex ante* regulation in the DMA does not require proof of a violation in order for the DMA to be applicable.[147]

To summarize, the DMA includes *ex ante* regulation consisting of various specific and detailed obligations in Article 5 that are directly applicable and self-executing for gatekeepers. The DMA is therefore supposedly less time consuming than competition law, which requires a case-by-case analyses of different practices in order to establish a violation of Article 102 TFEU. Moreover, Article 102 TFEU covers many types of anti-competitive practices ("catch-all clause"), while the obligations in the DMA include very specific types of conduct. In contrast to competition law, the DMA does not take an effects-based approach. The anti-competitive effects of the prohibited practices are rather presumed. At last, the possibility of an efficiency defence is not included in the DMA, which will be further discussed in paragraph 3.5.4.

3.5.2 *Per se* violations and exceptions

With regard to these *per se* prohibitions in the DMA, it has been argued that even if these types of obligations might have been necessary and proportionate in specific cases decided by the ECJ, that does not automatically imply they are necessary and proportionate regarding every situation and all core platform services.[148] This argument seems to align with the competition law approach and to disagree with the fact that the *per se* violations are enforced irrespective of a platform's business model.[149] In support of this argument, Professor Körber cited part of the Google Search case, in which the Commission stated that the 'Decision is a precedent which establishes the framework for the assessment of the legality of this type of conduct. At the same time, it does not replace the need for a *case-specific analysis* to account for the specific characteristics of each market.'[150] However, others consider the fact that the obligations are inspired on previous experience in competition law enforcement as an advantage which supports and justifies the adoption of *ex ante* regulation, by which repeated and lengthy enforcement cases can be avoided.[151]

As mentioned above, the obligations apply to all gatekeepers irrespective of their specific characteristics and business models. Indirectly there seem to be two situations in which individualisation is provided for. The first one is provided by the fact that certain obligations

[147] Monopolies Commission Special Report 82 (n 102) 9; DMA proposal COM (2020) 842 final (n 108) 15
[148] Körber (n 126) 12
[149] Oscar Borgogno & Giuseppe Colangelo, 'Platform and Device Neutrality Regime: The Transatlantic New Competition Rulebook for App Stores?', Stanford-Vienna TTLF Working Paper No. 83, 35 <http://law.stanford.edu/wp-content/uploads/2022/01/borgognocolangelo_wp83.pdf> accessed 25 March 2022
[150] ibid 13; European Commission, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service' (Press Release, 27 June 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784> accessed 28 March 2022 (emphasis added)
[151] OECD DAF/COMP/WD(2021)66 (n 134) para 22

can only be applied to specific types of core platform services, such as app stores. The second one follows from the possibility of the Commission to further specify the obligations of Article 6 according to the gatekeeper and the specific circumstances of their service.[152] Such a regulatory dialogue does not exist in relation to the obligations of Article 5 DMA.[153] Interestingly, the final version has amended the initial proposal by including that the Commission has a 'discretion' as to whether and when it will engage in the regulatory dialogue.[154] So not only is a distinction made between on the one hand the explicit, more "hardcore" prohibitions in Article 5, and on the other hand the more supplementary obligations in Article 6 which can be specified in the specific cases.[155] But by including the 'discretion' of the Commission, the independency and own responsibility of gatekeepers to comply with the obligations seems to be emphasized. They will not have the assurance of the Commission specifying the required measures that must be taken.

Lastly, the DMA provides for an exception to the obligations in Article 5 and 6. A gatekeeper can submit a reasoned request for suspension of a certain obligation to the Commission. The Commission in that regard enjoys a broad discretion and the conditions for an exception are restrictively framed, meaning that the gatekeeper must demonstrate that the economic viability of the operation of the gatekeeper within the EU would be endangered by the specific obligation.[156] Moreover, the Commission can also grant an exemption on grounds of public health or public security.[157]

3.5.3 The inflexibility of the Digital Markets Act and absence of an efficiency defence

An important component of the *per se* prohibitions is that the DMA does not allow for the gatekeeper to argue an efficiency defence which would eventually benefit the consumer. Reason for this exclusion is the previous experience with these anti-competitive practices enshrined in Article 5 and 6 DMA, which show that it is highly unlikely that consumers benefit from these practices.[158] The fact that gatekeepers cannot rely on an efficiency defence and provide objective justifications for their presumed violation of the obligations, has been criticized. In its Impact Assessment, the Commission refuted the concerns by explaining that

[152] Alexandre de Streel and others, 'The European Proposal For a Digital Markets Act: A First Assessment' *(Centre on Regulation in Europe (CERRE)*, January 2021) 16 <https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf> accessed 3 April 2022

[153] DMA proposal COM (2020) 842 final (n 108) Article 7(2)

[154] Damien Geradin, 'The Leaked "Final" Version of the Digital Markets Act: A Summary in Ten Points' (The Platform Law Blog, 9 April 2022) <https://theplatformlaw.blog/2022/04/19/the-leaked-final-version-of-the-digital-markets-act-a-summary-in-ten-points/> accessed 20 May 2022; Digital Markets Act (final) 2020/0374 (COD) (n 108) Recital 65

[155] Cleynenbreugel (n 116)

[156] DMA proposal COM (2020) 842 final (n 108) Article 8; Monopolies Commission Special Report 82 (n 102) 10; Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 9

[157] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 10

[158] OECD DAF/COMP/WD(2021)66 (n 135) para 23 & 25

these efficiency arguments are often one-sided and 'do not seem to match the evidence underlying the Impact Assessment including the calls for regulation […] Such efficiency-related defences have also been rejected by the Courts as being unfounded.'[159] In this respect it must be noted that it is possible for gatekeepers to implicitly provide efficiency arguments in their regulatory dialogue with the Commission regarding the specification of the obligations in Article 6 DMA. This limited possibility, however, could only shape the obligation, not remove them in their entirety.[160] Moreover, during the non-compliance proceedings, gatekeepers might indirectly have a possibility to provide an efficiency defence by submitting their observations concerning the preliminary findings of the Commission. This will be further explained in paragraph 3.6.

The detailed obligations in Article 5 seem to speed up the enforcement procedure, because the rules increase the predictability, are more easily enforced and there is less regulatory discretion.[161] However, the narrow scope of these specific obligations makes them less flexible. Consequently, they might fail to capture certain anti-competitive practices or adapt to market evolution.[162] Furthermore, in case of regulatory intervention, these detailed rules might not be able to provide an overall logical and rationale.[163] Whether this inflexible character is problematic, has been debated in the literature.[164]

According to the German Monopolies Commission, the inflexibility of the DMA contains the risk over overregulation, for example where a gatekeeper must refrain from certain conduct while this is not harmful.[165] This is an interesting observation, especially since the DMA explicitly states in the explanatory memorandum that the mechanism within the DMA ensures that there is no over-regulation.[166] In conclusion, the German Commission considers this possible overenforcement justified when taking into account the partly insufficient enforcement of digital platforms by the current competition law, and centralisation of power by certain digital platforms in these digital markets. In addition, they point out that possible unfair results could be avoided by giving gatekeepers the ability to justify their conduct.[167] As explained before, this possibility seems to be included indirectly in the non-compliance

[159] Impact Assessment Report on the DMA, SWD(2020) 363 Part 1/2 (n 102) para 158
[160] Alexandre de Streel and others (CERRE Assessment Paper, January 2021) (n 152) 22
[161] ibid 21
[162] ibid 21; Budzinski and Mendelsohn (n 114) 12
[163] ibid 21
[164] Henrique Schneider, 'Digital Markets Act: Regulating Competition Regardless of Effects' in Henrique Schneider and Andreas Kellerhals (eds), *25 Jahre Kartellgesetz – ein kritischer Ausblick* (EIZ Publishing 2022); Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' in Nicolas Charbit and Sébastien Gachot (eds), *Eleanor M. Fox Liber Amicorum: Antitrust Ambassador to The World* (Concurrences Antitrust Publications & Events, 31 August 2021)
[165] Monopolies Commission Special Report 82 (n 102) 10 & 22; See also Bauer and others (n 114) 17
[166] DMA proposal COM (2020) 842 final (n 108) 6
[167] Monopolies Commission Special Report 82 (n 102) 10 & 22

proceedings. As regards the risk of over-regulation, it must be kept in mind that the Commission has the possibility to amend, include or delete obligations in the DMA.[168]

In light of the approach towards Article 5 and 6 DMA, Alexandre the Streel et al. have advocated for a more flexible approach by improving Articles 5 and 6. They argue that the obligations contained in Article 5 should be very limited and only include detailed obligations which are *always* detrimental to fairness and market contestability ("Black list"). Article 6 on the other hand, should contain more generally drafted obligations, based on theories of harm.[169] In my opinion, although the DMA seems to take this approach with the per se violations, it is disputable whether it would be justified to classify certain practices as *always* detrimental to fairness and market contestability, especially in light of the rapidly evolving nature of digital markets. Moreover, the arguments made against the inflexibility of the DMA seem in contradiction to the reason behind the introduction of this regulation. Since competition law enforcement, based on a flexible case-by-case approach, could not adequately address the competition problems arising from digital platforms, a different and less flexible regulation was necessary.[170] Drafting the obligations in Article 6 more generally, as proposed by de Streel et al, could lead to less strong precedents because the cases might again be based on specific circumstances, business-models, and anti-competitive effects. This seems to undermine the whole purpose of the DMA. Instead, it might better to add certain practices to the list of obligations if they turn out to be anti-competitive or start proceedings under Article 102 TFEU.[171] Both possibilities will be further explored in Chapter IV.

3.6 Remedies for breaching Article 5(4) and (5) Digital Markets Act

In case of a breach of Article 102 TFEU, behavioural or structural remedies could be imposed by the Commission. These include a request to cease the abusive conduct (with the possibility to impose periodic penalty payments), imposing a fine or changing the structure of an undertaking, such as the fragmentation of a business.[172] The case law and investigations by competition authorities regarding anti-steering clauses have shown that Apple is trying to delay the adjustments of the clauses as long as possible. The fact that Apple would rather pay 50 million euros than amending their clauses as required by the Rotterdam Court shows the

[168] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 12, 19
[169] Alexandre de Streel and others (CERRE Assessment Paper, January 2021) (n 152) 21
[170] OECD, 'Ex Ante Regulation in Digital Markets – Background Note' (DAF/COMP(2021)15, 1 December 2021) 8 <https://one.oecd.org/document/DAF/COMP(2021)15/en/pdf> accessed 20 may 2022
[171] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 19
[172] 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 [2003] OJ L 1/1 Recital 12, Article 7, 23(2)(a), 24; David Bosco and others, 'Structural Remedies: A Unique Antitrust Tool' [2013] N° 2 Competition Law Journal (Concurrences) 22 <https://www.gibsondunn.com/wp-content/uploads/documents/publications/AlexiadisSependa-StructuralRemedies.pdf> accessed 18 June 2022

importance of adequate remedies available for the Commission in cases of non-compliance with the obligations in the DMA.[173]

If a gatekeeper does not comply with Article 5(4) and/or (5) DMA, the Commission shall within 12 months from the opening of the proceedings *endeavour* to adopt a non-compliance decision in which it orders the gatekeeper 'to cease and desist with the non-compliance within an appropriate deadline and to provide explanations on how it plans to comply with that decision'.[174] However, the Commission shall first inform the gatekeeper about its preliminary findings and 'explain the measures it is considering taking or that it considers that the gatekeeper should take in order to effectively address the preliminary findings.'[175] Gatekeepers then have the possibility to submit their observations concerning the preliminary findings and the intended measures within (minimally) 14 days.[176] In addition, the Commission can decide not to adopt a non-compliance decision and it has a discretion in whether or not to impose fines.[177] In my view, this seems to be a safeguard in which gatekeepers implicitly have the possibility to provide objective justifications or plead an efficiency defence, without being sanctioned necessarily. The initial proposal also provided for the possibility for gatekeepers to offer commitments in cases of non-compliance proceedings by the Commission, but the final version only allows for these commitments in cases of *systematic* non-compliance.[178] Perhaps the avoidance of undue delays might be the reason to amend the provision on commitments.

In cases of non-compliance with the anti-steering provision, whether that would be intentional or negligently, the Commission is allowed to impose a fine on the gatekeeper concerned. The maximum fine is equal to the maximum fines under competition law and should not exceed 10% of its total worldwide turnover of the previous financial year.[179]

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[173] The Netherlands Authority for Consumers & Markets, 'Apple fails to satisfy requirements set by ACM' (ACM, 24 January 2022) <https://www.acm.nl/en/publications/apple-fails-satisfy-requirements-set-acm> accessed 4 April 2022; The Netherlands Authority for Consumers & Markets, 'ACM to assess adjusted proposal of Apple regarding its conditions for dating apps' (*ACM*, 28 March 2022) <https://www.acm.nl/en/publications/acm-assess-adjusted-proposal-apple-regarding-its-conditions-dating-apps> accessed 4 April 2022

[174] DMA proposal COM (2020) 842 final (n 108) Article 25; P9_TA(2021)0499 (n 172) Amendment 190; Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 29(2) and (5)

[175] DMA proposal COM (2020) 842 final (n 108) Article 25(2); Amendments Adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD)) – P9_TA(2021)0499 Amendment 191 <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0499_EN.html> accessed 22 May 2022; Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 29(3)

[176] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 29, 34(1) and (2)

[177] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 29(7) and 30(2)

[178] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 25 and 18; DMA proposal COM (2020) 842 final (n 108) Article 23(1), 16 and 25

[179] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 30(1); 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 [2003] OJ L 1/1 Recital 12, Article 7, 23(2)(a), 24; Article 23(2); Guidelines on the method of setting fines imposed

However, when there has been a non-compliance decision in the preceding 8 years regarding the same or a similar infringement committed by the gatekeeper in relation to the same core platform service, the fine could be increased to maximally 20% of the total worldwide turnover.[180] At last, the amount of the fine will be fixed based on the duration, recurrence, and gravity.[181]

If the gatekeeper systematically fails to comply with the obligations, the Commission could impose additional behavioural or structural remedies, such as prohibiting it from entering into a merger or breaking up the company.[182] Systematic non-compliance occurs when at least *three* non-compliance decisions are issued within a period of *8 years*,[183] 'which can concern different core platform services and different obligations'.[184] Furthermore, this systematic non-compliance must have maintained, extended, or strengthened the gatekeeper position.[185] When a market investigation confirms the infringement, the Commission can impose any behavioural or structural remedies on the gatekeeper that are proportionate and necessary in view of the required effective compliance with the DMA.[186] While these remedies seem to be the "ultima ratio" of the DMA, it remains unclear what these remedies would look like exactly. Could these remedies for example go beyond compliance with the obligations in Article 5 and 6 DMA and address larger systematic shortcomings?[187] Competition law does not provide clarification in this respect, because even though it includes the possibility to impose structural remedies, these have never been used in repeated infringement cases.[188] Moreover, structural remedies are considered to be very difficult, which makes it questionable whether the actual use is to be expected.[189] At last, gatekeepers can challenge enforcement and sanctioning decisions by the Commission at the CJEU. During these proceedings, the imposition/enforcement of penalties will be suspended.[190]

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pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52006XC0901%2801%29> accessed 18 may 2022

[180] ibid Article 30(2)

[181] Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 30(4)

[182] 'Digital Markets Act: EU Institutions Agree on New Rules to Curb the Power Of "Big Tech" Platforms' (Crowell, 17 May 2022) <https://www.crowell.com/NewsEvents/AlertsNewsletters/All/Digital-Markets-Act-EU-Institutions-Agree-on-New-Rules-to-Curb-the-Power-Of-Big-Tech-Platforms> accessed 18 May 2022; Digital Markets Act (final) 2020/0374 (COD) (n 109) Recital 75 and Article 18(1); Bauer and others (n 114) 18

[183] Digital Markets Act (final) 2020/0374 (COD) (n 109) Article 18(3)

[184] ibid Recital 75

[185] ibid Recital 75 and Article 18(1)

[186] Digital Markets Act (final) 2020/0374 (COD) (n 109) Article 18(1)

[187] Budzinski and Mendelsohn (n 114) 10

[188] ibid; Commission, 'Commission Staff Working Document; Executive Summary of the Impact Assessment Report, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) SWD(2020) 264 final, Recital 172. Note that structural remedies have been imposed under commitment-based decisions under Article 9 of the 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 [2003] OJ L 1/1, but not under Article 7 (finding and termination of infringement decision by the Commission).; Bosco (n 173) 21

[189] Budzinski and Mendelsohn (n 114) 10

[190] Bauer and others (n 114) 19; Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' [2021] 12/7 Journal of European Competition Law & Practice 573

3.7 Conclusion

Anti-steering clauses are assessed on a case-by-case basis under competition law, which generally seems to include showing the anti-competitive effects. It seems that the current legal framework for assessing unfair trading conditions under Article 102(a) TFEU is also suitable to assess these clauses by digital platforms, but the exact legal framework and applicable case law remains uncertain. In general, there were several difficulties in tacking the anti-competitive practices by big digital platforms via competition law, such as procedures taking too long, coming too late and decisions having less precedential effects because of the case-by-case analysis.

The DMA seems to address these deficiencies by creating greater legal certainty through the very specific *ex ante per se* prohibitions and significantly relieves the burden of proof on the Commission. The concept of dominant undertaking was displaced by the 'gatekeeper' criteria, which makes it easier to establish the applicability of the DMA, especially with the included presumptions in Article 3(2). This new concept relieves the Commission from proving dominance and it shifts the burden of proof to the gatekeepers, which have to demonstrate they fall out of the scope of Article 3(1) when the thresholds are met. Article 5(4) and (5) in the DMA specifically prohibit the use of anti-steering provisions and these provisions seem to broaden the scope of the Reader App exemption to all apps. The anti-steering prohibition in the DMA applies to all gatekeepers, irrespective of their business model. Moreover, the anti-competitiveness of anti-steering clauses is presumed which means the Commission no longer has to prove the anti-competitive effects or apply a proportionality or necessity test. In addition, as soon as Apple is designated as a gatekeeper is has to comply with the anti-steering obligation, so a more proactive approach is required from the gatekeepers (*ex ante*). It is not necessary that the Commission first establishes a violation (*ex post*). Moreover, no efficiency defence is allowed, and the regulatory dialogue only applies to the obligations in Article 6 and lies within the discretion of the Commission.

After designation as a gatekeeper, the undertaking has six months to comply with the obligations. In case of non-compliance, the Commission shall endeavour to provide a decision within 12 months after opening of proceedings. These periods are significantly shorter compared to Article 102-proceedings, although it is questionable whether these deadlines are realistic in practice. Especially since the term 'endeavour' suggests the 12 months is no hard deadline and gatekeepers still have the possibility to file an appeal against decisions of the Commission at the CJEU. The remedies provided in the DMA are similar to those of competition law, although the DMA seems to go further in cases of systematic non-compliance where the fine could be increased to maximally 20% of the worldwide turnover, which is twice as much as the maximum fine under competition law. Moreover, it remains

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276> accessed 17 June 2022; Digital Markets Act (final) 2020/0374 (COD) (n 108) Article 32(5), 33(5)(b) and 45; Article 261 and 263 TFEU

unclear what the structural remedies would look like exactly and whether the Commission will actually impose these difficult remedies, considering the fact that they have so far not been used in repeated infringement cases under competition law.

All these characteristics in the DMA seem to speed up the enforcement procedure and increase predictability. Because of the presumptions, the proactive approach of gatekeepers themselves and reduced burden of proof on the Commission, the rules are more easily enforceable than competition law. However, questions have been raised as to whether the DMA might be too inflexible, and some have argued for the inclusion of an efficiency defence or more general formulated obligations. Considering the fact that proceedings under competition law were taking too long and coming too late, I think it is important not to include more safeguards which could further delay the proceedings. The non-compliance proceedings already allow, in my view, for an implicit possibility to provide an efficiency defence within a strict deadline and there is the possibility to appeal at the CJEU. Moreover, drafting the obligations in Article 6 more generally could lead to less strong precedents. Instead, it might be advisable to delete, include or amend certain obligations if necessary.

To conclude, a remaining challenge might be striking the right balance between on the one hand tackling the unfair practices of gatekeepers within a timely manner, and on the other hand avoiding overenforcement of the per se obligations for which no (explicit) efficiency defence is allowed.

Chapter IV – Enforcement of the Digital Markets Act and competition law

4.1 Introduction

After extensively discussing the obligations in the DMA, it is important to look at the future and see how the DMA will be enforced and what the relation will be between the DMA and competition law. This chapter will first explain the possibility to update the list of obligations in the DMA (hereinafter referred to as "adaptation mechanism") which enables the Commission to participate on possible future harmful practices. Then, the relationship between enforcement of the DMA and competition law will be discussed, including the role of NCAs. This chapter will focus on the following question: *How will competition law and the Digital Markets Act presumably relate to each other in terms of enforcement?*

4.2 Adaptation mechanism

When a market investigation by the Commission has shown that certain practices are contrary to the objectives of the DMA, the list of obligations in Article 5 and 6 DMA can be updated.[191] While this adaptation mechanism seems to be efficient in light of the rapidly changing digital economy, it must be mentioned that the prior market investigation could initially take up to 24 months, which might have meant that the updating could lag behind in relation to possible changing behaviour of gatekeepers.[192] This concern was shared by the ministers of France, Germany and the Netherlands. While they welcomed the adaptation mechanism, they shared the concern that the current proposal might not be able to tackle the fast-moving patterns of digital platforms sufficiently.[193] In the final version of the DMA, this period has been amended to 18 months.[194]

While I do think reducing the period by six months is to be welcomed, I think it is questionable whether this would be enough considering the shown resistance by Apple in amending their

[191] Regulation *(EU) 2022/...* Of The European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2022] 2020/0374 (COD) Article 12 and 19, link via 'Digital Markets Act (DMA): agreement between the Council and the European Parliament' (Press Release European Council, 25 March 2022/11 May 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/> accessed 15 May 2022 (emphasis added on substantial included parts compared to the original proposal)

[192] Monopolies Commission, 'Recommendations for an effective and efficient Digital Markets Act' (Special Report 82, 2021) 23 <https://www.sipotra.it/wp-content/uploads/2021/10/Recommendations-for-an-effective-and-efficient-Digital-Markets-Act-1.pdf> accessed 26 March 2022

[193] Friends of an effective Digital Markets Act (Ministers of France, Germany and the Netherlands), 'Strengthening the Digital Markets Act and Its Enforcement' para 4 (27 May 2021) <https://www.bmwi.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=6> accessed 27 March 2022

[194] Digital Markets Act (final) 2020/0374 (COD) (n 191) Article 19(3)

anti-steering clauses.[195] The scope of the anti-steering prohibition is very narrow, which might mean that slight adjustments by Apple could mean their clauses no longer fall under the prohibition. In case of circumvention attempts, the Commission needs an adequate and suitable tool to respond. However, similar to the current ex post competition law regime entailing the risk of remedies coming too late, the 18 months might also be too long.[196] Especially when taking into account the 6 months' time for compliance and the maximum of 12 months to impose a non-compliance decision.[197] At last, the final version of the DMA includes the possibility to remove obligations from Article 5 and 6. This seems an extra safeguard for those unforeseeable circumstances where a strict obligation would no longer be anti-competitive, which could be possible in this rapidly changing digital environment.

4.3 The *ne bis in idem* principle

The obscurity of the relationship between the DMA proposal and competition law has been observed by some national governments as well, which pointed at the need to further specify a sound coordination between the DMA and competition law.[198] Fortunately, the final version gave some more clarity. The new article 38(7) provides that NCAs can initiate an investigation into possible non-compliance by a gatekeeper with the obligations of the DMA, but only the Commission has the power to adopt infringement decisions and impose fines or remedial measures. Moreover, once the Commission starts proceedings, the NCA will be relieved from the possibility to start such an investigation or will have to end it when it already started.[199] However, the possibility for NCAs to investigate possible violations of competition law remains. This raises the question whether it would be possible to penalize a gatekeeper for the same conduct via competition law and the DMA. According to the *ne bis in idem* principle, the same person or undertaking can only be sanctioned once regarding the same unlawful practice.[200]

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[195] Daniel Mandrescu, 'The Apple App Store case in the Netherlands – a potential game changer' (Lexxion, 18 january 2022) <https://www.lexxion.eu/en/coreblogpost/the-apple-app-store-case-in-the-netherlands-a-potential-game-changer/#:~:text=Within%20this%20scope%2C%20in%20the,informing%20consumers%20about%20transaction%20modalities> accessed 26 March 2022; The Netherlands Authority for Consumers & Markets, 'Apple fails to satisfy requirements set by ACM' (*ACM*, 24 January 2022) <https://www.acm.nl/en/publications/apple-fails-satisfy-requirements-set-acm> accessed 3 April 2022; 'Update on dating apps distributed on the App Store in the Netherlands' (Apple News and Updates, 14 January 2022) <https://developer.apple.com/news/?id=mbbs4zql> accessed 26 March 2022

[196] Damien Geradin, 'What will be the role of EU competition law in a post-DMA environment?' (*The Platform Law Blog,* 2 February 2021) <https://theplatformlaw.blog/2021/02/02/what-will-be-the-role-of-eu-competition-law-in-a-post-dma-environment/> accessed 27 March 2022

[197] Digital Markets Act (final) 2020/0374 (COD) (n 191) Article 3(10), 20 & 29(2)

[198] Friends of an effective Digital Markets Act (n 193) para 2; See also Pieter van Cleynenbreugel, 'Digital Markets Act: beware of procedural fairness and judicial review booby-traps!' (*European Law Blog*, 24 June 2021) <https://europeanlawblog.eu/2021/06/24/digital-markets-act-beware-of-procedural-fairness-and-judicial-review-booby-traps/> accessed 28 March 2022

[199] Digital Markets Act (final) 2020/0374 (COD) (n 191) Article 38(7) and Recital 91

[200] 'Ne Bis In Idem' (Concurrences Antitrust Publications & Events) <https://www.concurrences.com/en/dictionary/ne-bis-in-idem-86490-en> accessed 21 May 2022; Monika

The recent *Bpost*-case by the CJEU clarified this *ne bis idem* principle.[201] This case concerned an undertaking who was fined twice for the same conduct. Once for abuse of a dominant position (Article 102 TFEU) and once for violating sectoral regulation.[202] The *ne bis in idem* principle means there must be a prior final decision ("bis") and the subsequent proceedings or decisions must concern the *identical* facts as the final decision ("idem").[203] Since mere similar facts are not sufficient, this principle does not apply to the Dutch anti-steering case and the investigation by the Commission, because these concern anti-steering clauses for different types of apps and in a different geographical area.

If both conditions of "bis" and "idem" are met, duplication of proceedings is not allowed, unless a justification applies. This means that both regulatory regimes must pursue different objectives. In the *Bpost*-case, the sectoral rules and competition law pursued different legitimate objectives.[204] Consequently, duplication was allowed, provided that some conditions were met which follow from the principle of proportionality.[205] First, the rules must be precise and clear so undertakings can predict what acts or omissions could be subject to duplication of proceedings and penalties. Second, there must be sufficient coordination between the competent authorities in conducting the proceedings within a proximate timeframe. Third, 'the overall penalties imposed correspond to the seriousness of the offences committed'.[206]

As discussed in paragraph 3.3, the DMA (sectoral regulation) itself claims to pursue different objectives from competition law, although this has been disputed and there seems to be a certain overlap as well.[207] This means that a gatekeeper could potentially be fined twice for the same conduct, provided that the conditions laid down in the *Bpost-case* are met. However, it is unlikely that the Commission will start two sets of proceedings simultaneously, since it costs a lot of time and resources while the same results could be achieved via the DMA.[208] The question then arises if competition law could be used as a safety net when the DMA proceedings do not have the desired effect. The answer seems to be no, because the

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Zdzieborska and Stefan Ciubotaru, 'There and Back Again: Towards a Coherent Ne Bis In Idem Principle in EU Law (*Kluwer Competition Law Blog*, 14 September 2022) <http://competitionlawblog.kluwercompetitionlaw.com/2021/09/14/there-and-back-again-towards-a-coherent-ne-bis-in-idem-principle-in-eu-law/> accessed 21 May 2022; Dimitrios Katsifis, 'Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I' (The Platform Law Blog, 28 March 2022) <https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/> accessed 20 May 2022

[201] Case C-177/20 *Bpost SA v Autorité belge de la concurrence* [2022]

[202] ibid para 8-15

[203] ibid para 28 & 36

[204] ibid para 40-44

[205] ibid para 47-48

[206] ibid para 58

[207] Digital Markets Act (final) 2020/0374 (COD) (n 191) Recital 10

[208] Dimitrios Katsifis, 'Ne bis in idem and the DMA: the CJEU's Judgments in bpost and Nordzucker – Part II' (*The Platform Law Blog*, 29 March 2022) <https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/> accessed 21 May 2022;

proceedings must be conducted in a 'sufficiently coordinated manner within a proximate timeframe'.[209] This suggests the proceedings should be conducted concurrently. Since this is unlikely, the Commission will presumably decide in advance whether competition law or the DMA would be better suited for sanctioning the anti-competitive conduct.

This might be different when proceedings are brought by two different authorities, for example by the Commission and a national competition authority. In the *Nordzucker*-case, the Court clarified that satisfaction of the "idem" criterium needs to be examined by reference to the territory, the product market and the time period during which the anticompetitive conduct allegedly took place.[210] Note must be made that this case concerned two antitrust proceedings, instead of proceedings based on sectoral regulation, so the application to duplication of competition law/DMA-proceedings might be disputable.[211] Suppose the *Nordzucker*-case applies and proceedings are initiated by an NCA and a few months later by the Commission. According to Katsifis that would presumably mean the time periods in both cases are different, and therefore the facts are not identical. Moreover, if the Commission would start proceedings after national proceedings have been finalised, it could carve out the territory of that specific Member State and continue for the rest of the EU. Therewith, it avoids violating the *ne bis in idem* principle.[212]

In short, it seems that in theory a gatekeeper could be subject to sanctions imposed by the Commission based on the DMA and sanctions imposed by a NCA or national court based on competition law, both for the same anti-competitive practice. If the *Nordzucker*-case would apply and the *ne bis in idem* principle would not be applicable because of the (slightly) different time periods, this could be problematic. The DMA aims to complement competition law where it falls short in addressing anti-competitive conduct. However, the outcome could be that a gatekeeper is sanctioned twice, without the *Bpost* limitation that 'the overall penalties imposed correspond to the seriousness of the offences committed', which does not seem to be the desired rationale behind the DMA.[213]

4.4 Possible influences of the Digital Markets Act on competition law enforcement

With regard to the relationship between the DMA and Article 102 TFEU, de Ugarte et al. point out the risk that the effects of the DMA will likely spill over to the enforcement regime of Article 102 TFEU and national provisions prohibiting abuse of dominance. This assertion is substantiated by different arguments. First of all, they consider there to be a genuine risk that the Commission uses the commercial practices stated in the DMA as presumed to be harmful and therefore prohibited under Article 102 TFEU (which also applies to non-gatekeeper),

[209] *Bpost SA v Autorité belge de la concurrence* (n 201) para 58
[210] Dimitrios Katsifis (*The Platform Law Blog*, 29 March 2022) (n 208); Case C-151/20 *Nordzucker* [2022] para 41
[211] Dimitrios Katsifis (*The Platform Law Blog*, 29 March 2022) (n 208)
[212] Dimitrios Katsifis (*The Platform Law Blog*, 29 March 2022) (n 208)
[213] Case C-177/20 *Bpost SA v Autorité belge de la concurrence* [2022] para 58

provided that no justification suffices. In addition, the DMA could potentially become a benchmark for the abusive nature of terms and conditions imposed by non-gatekeepers, either under Article 102 TFEU and national provisions regarding abuse of dominance.[214] In the Google Shopping case,[215] the General Court already relied on an EU regulation[216] for determining what implies good behaviour on the market. Currently, a ECJ case is pending which will soon provide clarification regarding the possibility of whether the General Data Protection Regulation[217] (GDPR), and therewith potentially other EU regulations, can be relied upon as a benchmark for abuse in competition law.[218]

4.5 Conclusion

This chapter discussed some aspects which will especially be relevant after the DMA comes into force. The adaptation mechanism addresses the potential problem of competition law lagging the rapid changing online environment, because it enables the Commission to anticipate on possible future harmful practices. Although 18 months is significantly shorter than starting an Article 102 proceeding, it might still be too long, taking into account the extra time for compliance by gatekeepers and the time to impose a non-compliance decision by the Commission. Perhaps the time limit for a non-compliance decision could have been shortened in cases of violation of recently added obligations, because the Commission already extensively investigated this type of conduct which might make it easier to establish a violation of that conduct by a gatekeeper.

It is difficult to provide a definitive answer regarding the question what the relationship will be between the DMA and competition law regarding the enforcement of both regimes. However, some interesting observations can already be made. First of all, while NCAs can also start investigations into possible violations of the obligations in the DMA, the Commission is the sole enforcer of the DMA who can impose sanctions. The possibility to start antitrust proceedings based on competition law remains for these NCAs. This raised the question whether sanctioning a gatekeeper twice for the same conduct, based on the DMA and

[214] Salomé Cisnal de Ugarte, Melanie Perez and Ivan Pico, 'The Digital Markets Act's Per Se Prohibitions Increase Legal Risks for Non-Gatekeeper Platforms' (King & Spalding LLP for the CCIA, 9 February 2022) 5-8 <https://www.kslaw.com/attachments/000/009/434/original/King___Spalding_%E2%80%93_The_Digital_Markets_Act%E2%80%99s_Per_Se_Prohibitions_Increase_Legal_Risks_for_Non-Gatekeeper_Platforms_%E2%80%93_9_February_2022.pdf?1644955782> accessed 27 March 2022

[215] Case T-612/17 *Google Shopping* [2021]

[216] Regulation No 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union ("Open Internet Regulation") [2015] OJ L310/1

[217] 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 L119/1

[218] Request for a preliminary hearing lodged on 22 April 2021, Case C-252/21 *Facebook and others*; De Ugarte, Perez and Pico (n 214) 5-8

competition law, would be in violation of the *ne bis in idem* principle. It seems that this would be allowed, as long as both proceedings are conducted concurrently and the "justification" conditions from the *Bpost*-case are met. Therewith, it avoids violating the *ne bis in idem* principle. However, it is debatable whether this duplication of sanctions is desirable.

Consequently, one of the regimes could not be used as a 'safety net' in case the other regime does not have the desired effects, unless the Commission carves out the territory of a member state where the NCA closed the investigation regarding the same anti-competitive practice. In addition, the risk of spill over effects could possibly lead to more overlap between the enforcement of two different regimes.

Future cases will provide further clarification regarding this duplication and the legality of possible spill over effects. Especially the question whether the DMA and competition law pursue different aims, as claimed in the DMA itself, is of importance for the *ne bis in idem* principle.

Chapter V – Conclusion

This thesis examined how anti-steering clauses are assessed under EU competition law and the proposed DMA and whether there are any remaining gaps. Anti-steering clauses are assessed under Article 102(a) TFEU, which prohibits the imposition of 'unfair trading conditions'. After establishing that the undertaking in question has a dominant position in the relevant market, the 'unfairness' of the imposed conditions must be assessed. This legal framework generally consists of two steps. First, it must be assessed whether the conditions imposed by the dominant undertaking are necessary and proportionate (and not 'disproportionately burdensome'). In this respect the Rotterdam Court followed the effects-based approach. Secondly, it must be assessed whether these unfair conditions cannot be refused because of the undertaking's dominance and related its strong bargaining power ('take it or leave it'-approach). Based on the Rotterdam Court case, it seems that this framework is also suitable to assess anti-steering clauses imposed by digital platforms, even though it has been mainly developed before the 'digital era'. At last, dominant undertaking can provide an objective justification, which must be necessary and proportionate as well.

While the assessment of the Rotterdam Court seemed to align with the current legal framework of unfair trading conditions, it remains unclear what the remarks of the Court exactly entailed and to which CJEU cases they applied. Moreover, the French NCA case shows that the application of conditions in a discriminatory, non-objective, or non-transparent manner can also contribute to the finding of a violation of Article 102(a) TFEU. While this has not been assessed in the Dutch interim relief case, it might be included for the establishment of an infringement in the main proceedings as well.

The proposed Digital Markets Act takes a totally different approach in assessing anti-steering clauses. Instead of a 'one size fits all'-clause such as Article 102(a) TFEU, the DMA contains very specific and detailed obligations, including the anti-steering prohibition which seems to have extended the Reader App exemption to all apps. While the burden of proof is largely on the Commission in competition law, this has been moved to the gatekeeper under the DMA. With regard to the gatekeeper criteria, the thresholds imply certain presumptions which could be refuted by the gatekeeper. Moreover, the obligations under Article 5 are directly applicable and self-executing, which requires a more pro-active approach from gatekeepers. Furthermore, the obligations in Article 5 are considered to be anti-competitive *per se*, meaning the Commission no longer has to proof the anti-competitive effects. The DMA therefore seems to align more with the concept of anti-competitive restrictions by object, although this concept under competition law allows for an efficiency defence or objective justification, while the DMA does not.

In general, the above-mentioned aspects of the DMA make this regulation more easily enforceable and increase predictability. The enforcement procedure is also significantly faster,

which is a result of the aforementioned characteristics and presumptions, such as the fact that the Commission does not need to show the anticompetitive effects and gatekeepers cannot (explicitly) provide an efficiency defence. It is questionable though whether the deadlines in the DMA are realistic in practice.

Various authors have noticed possible deficiencies of the DMA and opted, for instance, for the inclusion of an efficiency defence or formulating certain obligations more broadly. Eventually it comes down to finding a balance between on the one hand tackling the unfair practices of gatekeepers within a timely manner, and on the other hand avoiding overenforcement of the *per se* obligations for which no (explicit) efficiency defence is allowed. The DMA already includes several safeguards, such as the regulatory dialogue for Article 6, the implicit possibility to provide an efficiency defence or justification during the non-compliance proceedings via observations, the adaptation mechanism and (exceptional) exemptions for certain obligations. Future proceedings will determine if the design and safeguards of the DMA is sufficient to prevent the "ultimate remedy" of an appeal at the CJEU, which could lead to long proceedings after all.

In terms of future developments, the adaptation mechanism in the DMA seems an adequate response for new anti-competitive practices which are not yet included in the DMA or existing obligations that (partly) lost their anti-competitiveness. However, considering the rapidly evolving digital markets, the time frame for amendments might be too long, especially when taking into account the 6 months' time for compliance and the maximum 12 months to impose a non-compliance decision. Moreover, there seems to be some uncertainty regarding the relationship between enforcement of the DMA and enforcement of competition law. The *Bpost*-case suggests it would be possible to sanction an undertaking twice for the same conduct, once under Article 102 TFEU and once under the DMA. However, since some authors have argued both instruments pursue the same objective, a duplication of proceedings might be in violation of the *ne bis in idem* principle. Moreover, the DMA could not be used as a 'safety net' if the proceedings under competition law do not have the desired effects, or the other way around. At last, there is the risk of possible spill over effects from the DMA to competition law. The pending *Facebook*-case will provide more clarity regarding the question whether the GDPR, and therewith potentially also the DMA, can be relied upon as a benchmark for abuse in competition law.

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