



Private Macht und der Digital Markets Act

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Neue Machtprobleme im Digitalen

“Looking at narrowly defined markets and finding that there is no horizontal overlap between Google and Sanofi does not get the gist of the case. The gist of this case is the establishment of data services in healthcare and the data-driven locking-in of customers to a specific system. The bigger picture is that this system, the Google-operated e-health platform, is integrated in an even larger environment, where it is easy for a consumer to settle in: a Google-controlled, interoperable ecosystem.” - *Podzsun*, CPI Antitrust Chronicle (2018) 5.



Ursachen und Erscheinungsformen

- Neue Strukturen und Machtkonzentrationen, die mit gängigen Methoden und Instrumenten nicht erkennbar waren.
- Konzentration beruht auf: Zusammenschlüssen; datenbasierte Netzwerkeffekten; Disruption; Marktversagen in Plattformmärkten
- „Private Macht“ hat auch eine private, politische, soziale Dimension; sie ist auch „normativ“ (“the power so shape current and future normality, normativity, markets, behaviour, and truth.”)

Semantische Erfassung

- general platform economics & multi-sided markets
- platform envelopment (Eisenberg 2011); „moligopoly“ (Petit 2016)
- intermediary market power (DE) strategic market status (UK)
- „ORAM“ „gatekeepers“ (DMA)
- Ecosystems (Crémer, et al; Jacobines & Lianos)

Facetten und Ansätze

Facetten	Bispiele	Ansätze
<i>Machtquellen</i>	Wirtschaftliche Macht, Finanzkraft, Daten, Innovation, Arbeitskraft	<i>USA</i> : FTC v Meta (AICOA; OAMA)
<i>Architektur</i>	Marktmacht, Plattformen, Ökosysteme, Intermediäre	<i>UK</i> : DMU
<i>Erscheinungsformen</i>	wirtschaftliche und nicht wirtschaftliche Faktoren	<i>DE</i> : § 19a GWB
<i>Bereich</i>	Politik, im Sozialen, Privatem, normative Macht	<i>EU</i> : DMA (DSA, Data Act, Data Gov Act, GDPR, AI-Reg)

DMA – „core platform services“

I Scope of the DMA

Core platform services

The scope of the DMA is limited in that the obligations do not apply to all digital services, but only to those qualifying as 'core platform services'.

> **Art. 2(2)** provides a closed list of 10 core platform services (CPSs):

a online intermediation services: facilitate direct transactions between consumers and business users offering goods or services.

examples:  


b online search engines: allow users to make queries (e.g., as a keyword or voice request) to perform searches of all websites (or all websites in a particular language) and return results.

example: 

c online social networking services: enable end users to connect, share, discover and communicate with each other (e.g., via posts or chats).

example: 

d video-sharing platform services: provide programs and/or user-generated videos to the general public and determine the organization of this content (e.g., through algorithms) without having editorial responsibility.

example: 

e number-independent interpersonal communication services: enable direct interpersonal exchange of information without connecting with publicly assigned numbers in national or international numbering plans.

example:  WhatsApp

f operating systems: control the basic functions of the hardware or software and enable software applications to run on them.

examples:  

g web browsers: enable users to access and interact with web content hosted on servers connected to networks such as the Internet (includes both standalone and integrated/embedded browsers).

example:  chrome

h virtual assistants: software that can process demands, tasks or questions (based on, i.a., audio, visual or written input) and in turn provides access to other services or controls connected/physical devices.

example:  amazon alexa

i cloud computing services: enable access to a scalable and elastic pool of shareable computing resources.

example: 

j online advertising services provided by an undertaking providing any of the other core platform services.

example:  Google Ads

key **relevant provision** **relevant deadline**
note the provided examples are **not** taken from the text of the DMA, but are my own

Moreno Belloso, Natalia, The Proposal for a Digital Markets Act (DMA): A Summary (January 3, 2022). Available at SSRN: <https://ssrn.com/abstract=3999966> o

DMA – „gatekeepers“

Gatekeeper criteria

The scope of the DMA is further limited in that the obligations do not apply to all CPS providers, but only to those designated as 'gatekeepers'.

> **Art. 3(1)** lays out **three criteria** for designating an undertaking as a gatekeeper and **Art. 3(2)** provides size-based **thresholds** for establishing the presumption that an undertaking meets these criteria:

- a** The undertaking has a significant impact on the internal market.
 - > Presumptively met if: annual EU turnover ≥ EUR 7.5 billion in each of the last three financial years (**or** average market capitalisation or equivalent fair market value ≥ EUR 75 billion) **and** the CPS is provided in at least 3 Member States.
- b** The undertaking provides a CPS which is an important gateway for business users to reach end users.
 - > Presumptively met if: monthly active end users in the EU ≥ 45 million **and** yearly active business users in the EU ≥ 10.000 in the last financial year.
- c** The undertaking enjoys an entrenched and durable position or it is foreseeable that it will do so in the near future.
 - > Presumptively met if: the user thresholds under **b** were met in each of the last three financial years.

↪ **Annex I** provides CPS-specific indicators for calculating users.

Designation process

The DMA provides two main avenues for designating an undertaking as a gatekeeper:

1 All thresholds in Art. 3(2) are met

2 Not all thresholds in Art. 3(2) are met, but all criteria in Art. 3(1) are nevertheless satisfied

DMA – Ziele und Rechtsnatur

- Liste von ca. 23 Praktiken die für Gatekeeper zukünftig untersagt sind.
- Asymmetrisch und „Sektorspezifisch“ .
- Nicht Wettbewerbsrecht – sondern verfolgt andere Ziele:
- Fairness: *„They must not impose unfair conditions on their users. Obligations are unfair if they represent a significant imbalance of rights, obligations and profit opportunities (fair bargain).“ –Podszun, Bongartz & Langenstein, ssrn.com/3788571*
- Bestreitbarkeit: *„For the purpose of this Regulation, contestability should relate to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services“ –DMA-Trilog*



Danke!

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