Interplay of Gatekeepers' Obligations and Consumer Rights under the Digital Markets Act

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Abstract – **Although the Digital Markets Act primarily aims to protect small undertakings in the digital sector in their relations with Big Tech undertakings by introducing contestable and fair markets, consumers as end users can also be considered important participants. The Digital Markets Act provides that large undertakings, if they meet the prescribed conditions, can be designated as gatekeepers with a special legal position. The main characteristic of this legal position concerns several obligations which they must adhere to while providing core platform services. Those obligations provide a better legal position for small undertakings but it is questionable if they also create benefits for consumers as end users.**

This article aims to explain the relation between gatekeepers` obligations and the legal position of consumers in the digital sector. It shows that it is possible for a normative regulation, originally aimed at providing contestable and fair markets, to bring many benefits to consumers. This can be seen through new special rights for consumers and even support of the rights that already exist for consumers through general consumer protection law.

Keywords – Digital Markets Act; gatekeeper; gatekeepers` obligations; consumer; consumer rights

I. INTRODUCTION

Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (hereinafter: Digital Markets Act) [1] entered info force on 1 November 2022 and will apply from 2 May 2023. The Digital Markets Act and Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2] are two European Commissions` important legislative initiatives known under name "The Digital Services Act Package". [3].

The Digital Markets Act can be considered a legislative response to the imbalance between a small number of big undertakings and a vast number of small undertakings on the internal market. This imbalance is reflected through unfair practices and unfair competition imposed by large undertakings ("Big Tech" companies such as Google, Microsoft, YouTube, Meta, and Apple). [4] On the one hand, large undertakings which provide core platform services have gained considerable economic power, a better negotiating position, connections with a vast number of business users and end users (including consumers), which gives them access to large amounts of data. [5] On the other hand, small undertakings are faced with many barriers, no matter how innovative they are.

The main goal of the Digital Markets Act is to create rules aimed to ensure contestability and fairness for the markets in the digital sector in general. [6] To achieve this goal, large undertakings can be designated as "gatekeepers" pursuant to the Digital Markets Act, which means that they would have a new legal position determined by various obligations. Although the main goal of the Digital Markets Act is to interfere in relations between undertakings, it must not be forgotten that consumers are also important participants on the internal market. This article aims to investigate to what extent the Digital Markets Act takes into account consumers as end users, explain how their position has been changed, and to highlight actual benefits for consumers having in mind existing legal solutions designed for the protection of consumers.

II. LEGAL POSITION OF GATEKEEPERS AFTER THE DIGITAL MARKETS ACT

A. The term "gatekeeper"

The Digital Markets Act provides a set of rules applicable to undertakings which will be designated as gatekeepers by the European Commission. First of all, the Digital Markets Act defines the term undertaking "as an entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, including all linked enterprises or connected undertakings that form a group through the direct or indirect control of an enterprise or undertaking by another" (Article 2 paragraph 27 of the Digital Markets Act).

Upon designation, such gatekeepers would be obliged to provide their services legally, aligned with *ex ante* regulation provided in the Digital Markets Act. [7] This means that the Digital Market Act provides special regulation which, by creating gatekeepers` obligations, from the point of view of EU competition law, tries to solve problems by preventing them [8].

Such regulation is applicable to undertakings with a place of residence both in the EU and outside of the EU if a core platform service is offered to business users or end users established or located in the Union (Article 1 paragraph 2 of the Digital Markets Act), designated as

gatekeepers. It is explicitly provided that electronic communications networks and services are excluded form application (Article 1 paragraph 3 of the Digital Markets Act).

The preamble to the Digital Markets Act emphasizes that "gatekeepers have a significant impact on the internal market, providing gateways for a large number of business users to reach end users everywhere in the Union and on different markets". [9] In addition, Article 2 of the Digital Markets Act defines a gatekeeper as an "undertaking providing core platform services". A core platform service means any of the following services: online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services along with online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the previously listed core platform services. [10] Some authors have highlighted that this list of services is a result of "the Commissions' deepest concerns about contestability and fairness". [11]

B. Designation of Gatekeepers

A new competence for the European Commission is to designate an undertaking as a gatekeeper. The Digital Markets Act introduces two different designation procedures. In the first one, the undertaking notifies the Commission (Article 3 paragraph 3 of the Digital Markets Act), and in the second one the Commission starts the procedure on its own initiative and in accordance with the powers provided in the Digital Markets Act (Articles 16 and 17). The goal of both procedures is to determine if an undertaking meets the thresholds set out in Article 3 paragraphs 1 and 2 of the Digital Markets Act.

Article 3 of the Digital Markets Act regulates three thresholds which must be met to designate an undertaking as a gatekeeper. First of all, an undertaking must have a significant impact on the internal market. It will be presumed that this prerequisite is met if an undertaking "achieves an annual Union turnover equal to or above EUR 7.5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States" (Article 3 paragraph 2 (a) of the Digital Markets Act). Secondly, an undertaking must provide such core platform service "which is an important gateway for business users to reach end users". Again, it is presumed that this prescription is met if the undertaking "in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union, which will be identified and calculated in accordance with the methodology and indicators set out in the Annex to the Digital Market Act" (Article 3 paragraph 2 (b) of the Digital Markets Act). Thirdly, an undertaking must "enjoy an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future". It will be presumed that this last prerequisite is achieved if the above mentioned thresholds (from Article 3 paragraph 2 (b) of the Digital Markets Act) are met in each of the last three financial years.

C. Gatekeepers` Obligations

Upon designation, the undertaking`s legal position will significantly change. The rules that will apply to gatekeepers after designation can be found in Chapter III of the Digital Markets Act entitled "Practices of Gatekeepers that Limit Contestability or are Unfair". Although this chapter sets out numerous gatekeepers` obligations along with the obligation to comply with those obligations, it also regulates possible suspensions of certain obligations in exceptional situations (Article 9 of the Digital Markets Act). In order to create a functional system, the European legislator has envisaged special powers for the European Commission [12], among which of great importance are decisions on imposing fines [13].

For the purposes of this paper, gatekeepers` obligations are divided into three main categories. [14] Obligations in the first category mostly concern end users' personal data and processing of such data (Article 5 paragraph 2 and Article 6 paragraphs 2, 10 and 11 of the Digital Markets Act). The main goal to be achieved with this regulation for end users is to provide a free choice to opt in to data processing and also to change their mind concerning the consent given for data processing. [15]. Since the goal of this research is to discuss end users` legal position as consumers, those gatekeepers` obligations will not be further elaborated.

The second category of gatekeepers` obligations consists of obligations for gatekeepers concerning interoperability of number-independent interpersonal communications services (Article 7 of the Digital Markets Act). Those are specific obligations relating to only interpersonal communications services. [16] Although they do provide a better position for end users concerning their safety and choices to use a certain service, those rules do not take a general approach applicable to all services in the digital sector or have a connection to classical consumer rights therefore they will also be excluded from further analysis.

The third category of gatekeepers` obligations consists of numerous obligations principally regulating relations between gatekeepers and small companies as business users offering goods and services to other end users, both undertakings and consumers (Article 5 paragraphs 3-10 and Article 6 of the Digital Markets Act). Provisions regulating those obligations are taken as core gatekeepers` obligations relevant for this research. Hypothetically, they can directly or indirectly affect end users' position concerning their consumer rights. In the following research, the question on the relation of gatekeepers' obligations and the legal position of end users as consumers will be discussed from the point of view given through these obligations.

III. CONSUMERS AND THE DIGITAL MARKETS ACT

A. *The term "consumers"*

The Digital Markets Act does not define the term "consumer". Concerning the fact that the goal of this regulation is not primarily consumer protection, such an approach is hardly surprising. Some authors have emphasized that protection of consumers in the Digital Markets Act is only a reflex of the regulation aimed to provide a better position of business users. [17]

On the other hand, the Digital Markets Act does define the end user as "any natural or legal person using core platform services other than as a business user" (Article 2 paragraph 20 of the Digital Markets Act). Overall, this definition encompasses consumers who are, from the point of view of this paper, understood as consumers as defined in general legal sources of consumer protection law. In that sense, consumer means any natural person acting for the purposes which are outside his trade, business, craft or profession. Such general definition of the term "consumer" derives from Article 2 paragraph 1 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament [18], which has been amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [19].

B. *Legal solution for consumers under the Digital Markets Act*

Two legal solutions arising from the Digital Markets Act directly affect the legal position of consumers. One might say that they also indicate that the Digital Markets Act is actually quite oriented towards providing protection of consumer rights. Both legal solutions establish a legal framework for legal actions available to consumers in cases of breach of their rights arising from the Digital Markets Act.

The first significant provision amends Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (hereinafter: Directive (EU) 2020/1828). [20] Article 42 of the Digital Markets Act provides that "Directive (EU) 2020/1828 shall apply to the representative actions brought against infringements by gatekeepers of provisions of this Regulation that harm or may harm the collective interests of consumers". [21] Without such amendment it would be impossible to even use representative action mechanisms for the protection of collective interests of consumers. That is apparent from the regulation of the scope of application of Directive (EU) 2020/1828 while representative actions brought against infringements by traders are possible only in explicitly regulated situations. [22]

Another legal solution is provided along with gatekeepers` obligations in Article 5 paragraph 6 of the Digital Markets Act. Under this provision "the gatekeeper shall not directly or indirectly prevent or restrict business users or end users from raising any issue of non-compliance with the relevant Union or national law by the gatekeeper with any relevant public authority, including national courts, related to any practice of the gatekeeper". In addition, the Digital Markets Act in Article 51 regulates the amendment to Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (hereinafter: Directive (EU) 2019/1937). [23] The main goal of Directive (EU) 2019/1937 is to provide minimum standards for the protection of persons reporting breaches of Union law. Sources of law are, for the purposes of this specific regulation, divided into ten different categories. [24] Those categories must be interpreted by way of Part I of the Annex to Directive (EU) 2019/1937 which gives a list of legal sources divided into the said categories, providing the exact legal sources that can be breached and that are within the scope of the directive. In that sense, it should be noted that Article 51 of the Digital Markets Act amends only the category of legal sources concerning protection of privacy and personal data, and security of network and information systems (Part 1 of the Annex of Directive (EU) 2019/1937, part J.), but on the other hand, it does not amend the category concerning legal sources aimed to protect consumers (Part 1 of the Annex to Directive (EU) 2019/1937, part I.). Nevertheless, the amendment set out in Article 51 of the Digital Markets Act should be interpreted in favor of consumers, in a way that it is possible to report even breaches of provisions affecting the legal position of consumers as established by the Digital Markets Act (which will be further elaborated below). Also, it has to be emphasized that a person entitled to report a breach (Article 4 regulates the personal scope of Directive (EU) 2019/1937)[25], known as the "whistleblower", need not be a consumer. The legal position of "whistleblowers" is strictly connected with a work-based relationship and it is not necessary that he is also a consumer in a specific situation.

C. *Consumer rights in relation to gatekeepers` obligations*

It has been stated above that gatekeepers' obligations can be categorized into three different categories, while the third category refers to the core obligations that are general obligations for gatekeepers. [26] Those obligations form the basis for further research.

A special analysis of the provisions that are considered to regulate the core obligations has been carried out in order to gain more specific insight into the

relation between gatekeepers` obligations and the legal position of the consumer. To achieve this goal, two tests for the provisions were created.

The first test focused on the content of the norm. The first question in the test was: Does the provision create a subjective right for the consumer, likely to be followed by a claim or a request? If the answer was positive, it was necessary to describe such right, but if it was negative, a new question was asked. The second question was: Does the provision strengthen or give support to the consumer right or principle that already exists in consumer protection law? In the case of a positive answer, it was explained how it affects consumer rights. On the other hand, if the answer was negative, an additional question was asked: Does the provision in any way affect consumer rights? If so, this relation was explained having in mind that this effect can also be negative.

The second test concerned the relation of gatekeepers` obligations and consumers to find out how those provisions in general relate to consumer rights. The test consisted of only one question: To what extent do the provisions regulating gatekeepers` obligations contribute to a better legal position of consumers in the digital sector? It was possible to choose between three answers: a) the obligation contributes to a considerable extent, b) the obligation contributes to a limited extent, and c) the obligation does not contribute at all.

Teleological methodology was used in both tests, while they were based on the interpretation of the goals each provision achieves and having in mind the relation to consumers. The total number of obligations interpreted was 19 (n=19; Art. 5 paragraphs 3-10 (p. 9 and 10 were taken as one obligation concerning advertisement) created 7 gatekeepers` obligations while Art. 6 paragraphs 3-9, 12-13 (p. 3, 4, and 7 were taken as two obligations) created 12 gatekeepers` obligations).

The results of the first test led to several conclusions. Nine obligations (47.3 %) were found to create new specific rights for consumers (Article 5 paragraphs 4, 5 and 6; Article 6 paragraphs 3, 4, 7, 9 and 13 of the Digital Markets Act). This means that:

- consumer has a right to conclude contracts directly with traders or through a third-party online intermediation service regardless of the core platform that the consumer usually uses;
- the consumer may request access and use through any core platform service content, subscriptions, features or other items regardless of the core platform usually used or used to conclude a contract,
- consumer has a right to raise any issue of non-compliance with the relevant Union or national law without any negative consequences,
- consumer has a right to easily uninstall any software applications on the operating system of the gatekeeper, without prejudice to the possibility for that gatekeeper to restrict such uninstallation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third parties,
- consumer has a right to easily change default settings on the operating system, virtual assistant and web browser of the gatekeeper,
- consumer has a right to install and use third-party software applications or software application stores and set that downloaded software application or software application store as their default,
- consumer has a right to access the open internet and this right should not be limited by any technical means, all in connection with a right to switch between different undertakings providing internet access service,
- consumer has a right to achieve portability of data provided or generated through his activity by using the core platform service,
- consumer has a right to terminate a core platform service.

One obligation (5.2 %) supports consumer rights that are already known in consumer protection law (Article 6 paragraph 5 of the Digital Markets Act). It is important to emphasize that those core platform services that provide services which are the same as those provided by business users using the same platform core service (for example Amazon while it offers its own products along with other users products) are not allowed to give a better position in the ranking or indexing of their own products. This means that consumers will have a more transparent way of being informed on the offers according to the principle of transparency, they will be better informed and, finally, they will be able to make a reasonable decision for the conclusion of contracts. [27]

Eight obligations (42.1 %) do not create new rights for consumers and they do not support existing consumer rights but, in a way, do concern consumer rights (Article 5 paragraphs 3, 7, 8, and 9, Article 6 paragraphs 4, 6, 8, and 9 of the Digital markets Act). In that sense, several benefits for consumers arise from the Digital Markets Act. Overall, consumers will have the right to choose from different products and services in the digital sector and also to choose between different business users (traders) providing those products and services, regardless of their basic platform core service. They will be able to compare terms and conditions from even more traders and to choose those that they find the most suitable for their needs. For consumers, possibilities to choose will be more extensive while the market will become more open and the use of services more flexible, while some of them will not be bound directly to certain core platform services. From the technical point of view (i.e. concerning hardware and software), the possibility to freely choose will not be limited. Those conclusions support a very important and relatively new notion of "consumer choice", previously expressed by the ECJ in *Google and Alphabet v Commission (Google Shopping)*. [28] Some authors have already concluded that the Digital Markets Act creators had in mind this notion during the legislative procedure and explained that

"protecting the sovereign decision-making capacity of consumers becomes increasingly important in the digital world". [29] Also, beside consumer choice, some gatekeepers` obligations, such as those in case of more transparent marketing, might lead to a reduction of traders` costs and even a reduction of the final prices.

The first test showed that only one obligation (5.2 %) does not have any effect on consumer rights and consumers' legal position in general. It can also be concluded that gatekeepers` obligations do not bring into existence or undermine any existing consumer rights.

The second test also led to important conclusions on how gatekeepers` obligations contribute to a better legal position of consumers in the digital sector. The research has shown that nine gatekeepers` obligations (47.3 %) contribute to a considerable extent, nine obligations (47.3 %) contribute to a limited extent and only one (5.2 %) does not contribute at all to a better position of consumers.

IV. CONCLUSION

In general, the objective of regulation of the Digital Markets Act is the creation of a completely new legal order in the relations between Big Tech companies and small undertakings. It mainly consist of rules prohibiting abuse of rights and an overall better position of big undertakings toward small undertakings as business users. Along with that, it creates a framework for the functioning of this new system of rules by giving new competences to the European Commission. At first glance, the Digital Markets Act could lead to a conclusion that it does not bring much to consumer rights, but that conclusion would be wrong.

Two important amendments to the Digital Markets Act directly affect the position of consumers. Firstly, the amendments to Directive (EU) 2020/1828 open a new path for collective redress as an important instrument of consumer protection. Without such regulation, such protection would not even be possible. Secondly, any breach of gatekeepers` obligations may result in an issue of non-compliance. According to amendments to Directive (EU) 2019/1937, "whistleblowers" could report breaches of provisions provided in the Digital Markets Act including those provisions that aim to regulate the legal position of consumers as end users.

If the Digital Markets Act is seen only from the point of view of consumer, it can be said that consumers are not the main focus. In that sense, the Digital Markets Act does not regulate the term "consumer" but only the term "end user". End users can be both business users and consumers. Also, there are no provisions regulating consumers proper. The research on the legal position of consumers was based on an extensive interpretation of gatekeepers` obligations in order to determine how each provision interferes with the legal position of consumers. To obtain more concrete answers it was important to categorize gatekeepers` obligations and to separate those that have the most general scope and to classify them under the name "core gatekeepers` obligations". Those obligations were the basis for two tests applied to find exact answers. One test dealt with the content of the norm and the other concerned the overall position of the consumer after the Digital Markets Act.

The research has shown that nine obligations of the total of 19, create new rights for consumers. One gatekeepers` obligation supports the existing consumer right – the right to be informed along with the principle of transparency. Eight obligations affect the legal position of consumers with an emphasis on the free choice of consumers while only one obligation should not have any impact on consumers. Also, obligations should not have any negative effect on the existing framework for the protection of consumers.

The second test aimed to emphasize a possible positive impact on consumers' legal position in general. The results of the second test showed that nine gatekeepers` obligations contribute to a better legal position of consumers to a considerable extent, nine obligations contribute to a limited extent and only one does not contribute at all.

Both tests gave comparable data, which leads to some general conclusions. Although the Digital Markets Act initially cannot be seen as a legal source of consumer rights, it significantly changes their legal position. Consumers have also been faced with many barriers in the digital sector while using one platform service, which led to the impossibility to use services provided from other platform core services. New consumer rights will remove many obstacles, create a more flexible environment to gather information, conclude, terminate or even change contracts, to switch between core platform services or adjust digital content and services to their needs.

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