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The Digital Markets Act and the Whack-A-Mole Challenge

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ABSTRACT

The article addresses the implementation of the Digital Market Act's rules on 'anti-circumvention'. We present an effects-based approach and propose a three-step procedure to identify whether a certain practice should be conceptualized as circumventing an obligation. We apply this approach to several practices suspected of circumventing the ban on parity clauses and analyse how our results fit into the Digital Market Act's concept and instruments for avoiding circumvention. Moreover, we elaborate on the role that the anti-circumvention rules may play in safeguarding the effectiveness of the restrictions on bundling and self-preferencing in ranking, thus illustrating how they may operate to future-proof the Digital Markets Act but also where their limitations lie.

Keywords: Digital Markets Act, anti-circumvention, antitrust law, price parity clauses, bundling, self-preferencing

JEL classification: K21

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I. Introduction

The gist of the Digital Markets Act[1] is that it imposes specified commands ('dos') and prohibitions ('don'ts') on designated gatekeepers to promote contestability and fairness in digital markets.[2] This regulatory technique brings up the whack-a-mole[3] challenge: whenever a digital gatekeeper, against her interests, is forbidden from engaging or forced to engage in a certain conduct, she has strong incentives to look for alternative routes not covered by the DMA to achieve the same or a similar desired outcome.[4] This newly appearing 'mole' could then, if the same contestability or fairness issue is concerned, be 'whacked' by the Commission through the adoption of a delegated act updating the obligations for gatekeepers. This requires a prior market investigation pursuant to Article 19 DMA, and is in any case limited to defined extensions and specifications of existing obligations.[5] If, following a market investigation, the Commission deems it necessary to introduce new obligations, it should propose amending the DMA.[6] However, this would not only tie up considerable resources[7] and entail a time-delaying procedure but possibly herald only a new round in the search for circumvention strategies: a new 'mole' popping up in a different spot.

For this reason, under the heading 'Anti-circumvention', Article 13 DMA aims to avoid the whack-a-mole problem by prohibiting DMA gatekeepers from pursuing circumvention strategies: the DMA rules should apply to any practice of a gatekeeper that 'corresponds to the type of practice that is the subject of one of the [DMA] obligations'.[8] This article contributes to the operationalization of the DMA's anti-circumvention rules. We do so in three parts.

In Section II, we will discuss how relevant circumvention strategies can be identified. Using the prohibition of price parity clauses[9] as an example, we will show how the digital gatekeepers' business practices can be analysed, classified, and evaluated as a (possibly

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[1] 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 (Digital Markets Act). OJ L 265, 12.10.2022, pp. 1–66 ('DMA').

[2] DMA, recital 7 ('the purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular').

[3] 'Whack-a-mole' is an arcade or computer game in which moles that emerge from holes have to be knocked back into the holes using a hammer or keys. In its colloquial usage the term whack-a-mole describes a situation characterized by a series of repetitive and futile tasks where the successful completion of one task only leads to another one popping up elsewhere. See <https://en.wikipedia.org/wiki/Whac-A-Mole> (accessed 26 May 2023).

[4] See Jacques Crémer and others, 'Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust' [2023] Journal of Antitrust Enforcement 1, 15 ('It is important to recognize that full compliance [with the DMA] might significantly reduce the profits of some of the gatekeepers. That potential profit loss creates financial incentives to evade regulation').

[5] DMA, art 12 and recital 69.

[6] DMA, recital 69, fourth sentence.

[7] The scarcity of legislative resources is an important factor limiting legislative (ex ante) rulemaking. The saving of the associated (opportunity) costs is a major asset of rule-making by authorities, be it by way of competition enforcement, a UK-style market investigation or – in the context of the DMA – via the anti-circumvention provisions. See Jens-Uwe Franck, 'Competition Enforcement versus Regulation as Market-Opening Tools: An Application to Banking and Payment Systems' [2023] Journal of Antitrust Enforcement 13–14 ('On opportunity costs of legislative rulemaking').

[8] DMA, recital 70, second sentence.

[9] DMA, art 5(3).

circumventing) reaction to a behavioural constraint by the DMA. We will argue that an understanding of, on the one hand, the economic rationality behind the obligation and, on the other hand, the observed business practice may be crucial in this regard. A business practice should be coined a circumvention strategy if it may cause or avoid a market outcome equivalent to the one a prohibition is intended to prevent or a command is meant to achieve. The yardstick against which 'equivalence' is to be determined is normative in nature; it is to be determined essentially based on the rationality underlying the relevant DMA obligation. Thus, the concept of 'circumvention' may be operationalized by combining economic and normative analyses.

In Section III, we will analyse the DMA's anti-circumvention provisions against the insights of the first part. Using as an example the prohibition of price parity clauses and business practices identified as candidates for illegal circumvention practices, we will explore the dividing line between conduct that, pursuant to the DMA's anti-circumvention provision, has to be considered an infringement and practices that would only be illegal if the DMA obligations were updated. It becomes apparent that the DMA's anti-circumvention concept also presupposes a dividing line between practices captured by Article 5, 6 or 7 DMA as such and those captured as circumventing practices pursuant to Article 13 DMA.

In Section IV, we will further illustrate our approach, addressing challenges and limitations. For this purpose, we analyse the prohibition of bundling according to Article 5(7) DMA and self-preferencing according to Article 6(5) DMA with regard to possible circumvention strategies, their market effects and their assessment under Article 13 DMA. We will argue that the general prohibition of circumvention under Article 13(4) DMA reaches its limits with regard to across-the-board fee increases or where gatekeepers make material changes to (or even completely redesign) their business model. Even if in such scenarios market effects similar to those following a prohibited practice might be demonstrated in individual cases, capturing them as an anti-circumvention practice would in general present excessive implementation challenges and would exceed the powers delegated to the Commission and the courts via Article 13 DMA.

II. Identifying critical circumvention strategies

Undertakings frequently modify business practices and conditions and occasionally revamp their overall business model. How can we determine whether a practice should be considered to be circumventing a DMA obligation? To inform the implementation of the DMA's anti-circumvention instruments, we will set out and illustrate an approach that centres on the examination and evaluation of market effects: a business practice should be considered a strategy to circumvent an obligation if it can lead to a market outcome and economic effects equivalent to those that the obligation in question seeks to avoid or, similarly, if it can prevent a market outcome that the obligation in question seeks to achieve. Thus, we propose the following three analytical steps.

First, it needs to be clarified which market effects the (possibly circumvented) DMA obligation seeks to achieve or avoid. This is a matter of interpreting the relevant DMA obligation. The link to the DMA's overall objectives needs to be elaborated: how did the legislature envisage

the obligation promoting 'contestability' and/or 'fairness'? Did it care about a specific user group on the platform or was it assumed that the obligation would make all users better off? The recitals to the DMA and the legislative materials should be consulted for this purpose. The experience and insights of competition enforcement, on which individual provisions of the DMA are obviously based, may also be informative.

Second, the market effects of the business practices that are suspected of 'circumvention' need to be explored. Information on potentially prohibited circumvention practices can be expected from market participants who repeatedly interact with a platform and therefore may have a sound intuitive understanding of its business model and strategy.[10] The analysis of ensuing market effects should be conducted in the light of the identified regulatory objectives of the respective obligation.

Third, the obligation's intended impact on the market and the – actual or potential – market effects by the suspicious business practice need to be compared and examined for equivalence, based on the objectives and normative values that underlie the obligation. Whether there are equivalent market effects may depend on the market conditions in the individual case.[11] Whether or not 'equivalence' is to be established is ultimately a normative question and depends on the reach one assigns to the anti-circumvention rules.

This approach should be understood as a screening tool to identify conduct that corresponds to practices subject to DMA obligations and which has the potential to undermine the effects intended by the DMA so that its prohibition would be consistent with the DMA's rationality.

1. A 'cure-all approach'?

To avoid misconception, it should be emphasized at the outset that we do not claim to present a 'cure-all approach' for the implementation of the DMA's anti-circumvention rules. We acknowledge that the analysis of business practices based on their economic rationality promoted here may have (relatively) little weight in the analysis of possible circumvention practices in relation to obligations that are born less out of desired economic effects than from the protection of preexisting legal rules and principles – such as the end consumers' rights to privacy as protected by the data-related obligations pursuant to Article 5(2) DMA. There, for example, the question arises as to whether an end consumer's consent to processing, combining or cross-using her personal data has indeed been given 'by a clear affirmative action or statement establishing a freely given, specific, informed and unambiguous indication of agreement'[12] as required under Article 7 General Data Protection Regulation (GDPR).[13] The question then could arise whether the design, in which a

[10] See Crémer and others (n 4) 9.

[11] For example, as we argue below sub II.5.c) and III.3.c), the effects of 'undercutting' are only equivalent to those of parity clauses (as prohibited by Article 5(3) DMA) if a direct sales channel is not available or if sales via the direct sales channel is only a weak substitute for sales via platform.

[12] DMA, recital 37.

[13] 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). OJ L 119, 4.5.2016, p. 1–88.

gatekeeper offers the choice to the end user, is designed in a non-neutral manner and, therefore, should be captured as a circumvention strategy.[14]

Moreover, regarding the required interoperability of communication devices such as messaging services as foreseen under Article 7 DMA, one may expect that the most urgent challenges for effective implementation will concern technical details such as the provision of the necessary interfaces and possible trade-offs with sub-objectives such as the level of security and privacy that the services may or must guarantee. Therefore, in various contexts, ensuring the effective implementation of DMA obligations and identifying circumvention strategies will need to focus on normative and technological aspects rather than on their economic rationality.

Nevertheless, it stands that the DMA with its two overarching goals – contestability and the fairness of the core platform services provided by gatekeepers – has a market-regulating impetus and indeed aims at certain economic effects. As stipulated in the DMA's recitals, while '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',[15] 'unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage'.[16] Each obligation may address one or both goals.[17] Therefore, the effectiveness of the DMA and the identifying of circumventing strategies can be measured against the market effects intended by and the economic rationality underlying the various obligations.

How the individual obligations are intended to further the overarching DMA goals is to be determined by interpretation, considering in particular the corresponding recitals to the DMA. To understand this link and to be able to assess which effects may be intended by a certain command or prohibition to promote contestability and fairness, an economic perspective will often be helpful. Economic insights may reveal how a particular obligation may lower barriers to entry or in what form and to what extent the legislature may have expected its enforcement to strike a 'fairer' balance between the interests of the platform operator and the various user groups or possibly also among the various user groups.

2. Does an effects-based analysis contradict the DMA's regulatory technique?

The DMA is conceptualized as legislative (ex ante) regulation: the rules prescribed to the gatekeepers are elaborated in detail, they submit clear and precise dos and don'ts, and they apply promptly and generally to the designated core platform services. Exemptions are only provided for in individual cases and under restrictive conditions;[18] an efficiency defence is not available. This is to keep the complexity and costs of implementation low. The regulatory

[14] DMA, recital 70, fourth sentence.
[15] DMA, recital 32.
[16] DMA, recital 33.
[17] DMA, recital 31 ('The obligations correspond to those practices that are considered as undermining contestability or as being unfair, or both'). It is recognized that contestability and fairness may be intertwined: 'The lack of, or weak, contestability for a certain service can enable a gatekeeper to engage in unfair practices. Similarly, unfair practices by a gatekeeper can reduce the possibility of business users or others to contest the gatekeeper's position' (DMA, recital 34).
[18] DMA, art 10.

technique is intended to avoid the very difficulties that, in the view of the EU legislature, caused the enforcement of EU competition law to prove (too) ineffective and inefficient vis-à-vis the large digital gatekeepers. Doesn't an approach for the implementation of the DMA that is based on market effects and economic rationalities of the individual DMA obligations thwart these deliberate regulatory choices? Three aspects seem important to us here.

First and foremost, our approach is only intended to help fill in the framework provided by the DMA; in no way is it intended to undermine regulatory choices. The scope of the existing obligations under Articles 5 to 7 DMA is not affected, and in particular not restricted, by our approach. While in this section we will present and exemplify our approach, in the subsequent section[19] we will focus on the DMA's regulatory technique and on the mechanics of Article 13(4) and (6) DMA, and how our approach fits in there. It will become apparent that these rules should be understood as a deliberate attempt to safeguard the effectiveness of the DMA obligations through an effects-based anti-circumvention approach, and thus as an essential mechanism to future-proof the DMA. Along the way it will also become clear that even the application of obligations laid down in Article 5 DMA, at least in part, presupposes an effects analysis and, for this reason, can already be regarded as part of a DMA strategy designed to prevent circumventions of its core prohibitions or commands.

Second, the regulatory technique of the DMA is supposed to differ from that of competition law, which – in the words of the DMA – is characterized by:

> an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question.[20]

The approach proposed here for implementing the DMA's anti-circumvention strategy would not call into question this distinction from competition enforcement. It should allow for a value-consistent identification of practices that correspond to those that are subject to a DMA obligation and which, therefore, should be conceptualized as circumventions and imposed on the DMA gatekeepers' core platform services. On the one hand, an effects-based approach may identify practices that should be seen as circumventions simply because they are endorsed by a DMA gatekeeper. In this respect, commands or prohibitions may operate even on the same level of abstraction as the obligations they protect from circumvention. But even if, on the other hand, the qualification as a circumvention to be prohibited depends on an individual, case-specific analysis of market conditions,[21] it could still clearly be distinguished from competition enforcement as it would not open the door for case-by-case efficiency considerations.

Third, insofar as the DMA's obligations aim at certain welfare effects, it is only natural that welfare analyses are not only adequate but may be essential to identify practices that correspond to practices subject to an DMA obligation and which, thus, should be regarded as circumventions. This is related to the DMA's underlying regulatory technique, distinguishing it from competition enforcement. Indeed, practices of two-sided platforms can yield ambivalent

[19] See sub III.
[20] DMA, recital 10.
[21] See sub III.3.c) for illustration and further discussion.

welfare effects for their different user groups: a certain practice (or its prohibition) can have a beneficial effect on one user group but a detrimental effect on another. This can be further complicated if the extent of these divergent effects differs in terms of probability and time horizon. Competition enforcement, however, typically seeks to avoid getting involved in the business of netting countervailing welfare effects, which entails intersubjective comparisons and, thus, not only brings with it measurement problems but also requires normative judgements on distributional effects.[22] One of the advantages of regulatory intervention by the DMA (as opposed to competition enforcement) is therefore that it resolves these challenges of incommensurability, which are not uncommon in gatekeeper practices: legislation as a sword to cut the Gordian knot. That the DMA explicitly aims at 'fairness' in the relationship between the platform operator and its user groups is an expression of the fact that the DMA is also intended to bring about a 'fairer' distribution of the rents generated by platform transactions. The EU legislature knew that with each individual obligation also comes at least an implicit statement about a desired change in distribution of rents between platform and users and among the different user groups. Thus, identifying practices corresponding to those covered by the DMA obligations also requires distilling the welfare impacts on the different user groups intended by a particular DMA obligation and assessing the equivalence of possibly circumventing practices against the background of these findings. Once again, we are in no way advocating an efficiency defence or effects-based analysis through the back door in order to weaken the provisions of Articles 5 to 7 DMA. The approach should be about identifying and consistently extrapolating the value judgements of the legislature behind these obligations and thus being able to recognize which practices could undermine the existing obligations in their effect and which should therefore be prohibited as circumvention practices.

3. Why choosing the ban on price parity clauses and (potential) reactions as an example

In the following we will use the prohibition of price parity clauses[23] and observable or conceivable business reactions to illustrate our approach to identifying circumventing business practices. This prohibition is stipulated in Article 5(3) DMA. We see four reasons why the restriction on gatekeepers' price parity policies is well suited to analysing possible circumvention strategies and thus illustrating approaches for their identification.

First, the legislative choice to ban both wide and narrow price parity clauses[24] builds on competition practice and legislative interventions in various Member States. Therefore, the provision's regulatory objective and scope are well understood. At the same time, the legislature used an open, effects-based approach to define what is forbidden to gatekeepers:

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[22] See Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 Journal of European Competition Law and Practice 513, 523.

[23] In the US, price parity clauses are often called most-favored-customer clauses or 'MFNs' (standing for most-favored-nation clauses). This may lead to misunderstanding and wrong analogies. Most-favored-customer clauses traditionally mean that a seller cannot set different prices to different consumers or different prices over time. Price parity clauses do not contain such restrictions; they impose restrictions concerning prices faced by a given consumer across different distribution channels.

[24] Wide price parity clauses stipulate that sellers must not offer a lower price through any other channel (this includes direct and indirect channels); narrow price parity clauses stipulate that sellers must not offer a lower price in the direct sales channel but are allowed to set lower prices on other platforms.

they must not 'prevent' business users from offering products at a lower price via competing online intermediaries or via their own online sales channels. The term 'prevent' indicates that practices other than straightforward contractual prohibitions imposed by the gatekeeper can also be captured. The obligation could thus be considered typical insofar as there may often be no crystal-clear line between conduct that is covered by a (broad) interpretation of a DMA obligation and conduct that may (only) fall under the anti-circumvention provision. While, in any event, the approach we want to illustrate may be useful both for the interpretation of the DMA obligations and for the implementation of the anti-circumvention rules, this scenario also gives us the opportunity to elaborate on the relevance of the dividing line between infringements of the obligations as such and of the obligations in conjunction with the anti-circumvention rules.

Second, the economic impact of the use of parity clauses is extensively studied, with well-developed theories and empirical analyses of economic effects that will be presented below.[25] The rationality of the prohibition of parity clauses pursuant to Article 5(3) DMA is therefore well understood in economic terms.

Third, various business practices of gatekeepers that are potential candidates for being conceptualized as circumventions of the prohibition of price parity requirements are apparent. One reason why it is easy to find such candidates is that, before the DMA came into force, gatekeepers in various jurisdictions were prevented from imposing price parity requirements thanks to competition practice (partly stopping the use of only their 'wide' form,[26] and partly also of their 'narrow' form[27])[28] and legislative interventions applicable to online hotel booking platforms in Austria, Belgium, France, and Italy.[29] Subsequently, the emergence of certain practices such as 'de-ranking' and 'undercutting' or a certain trend towards a business model relying on monetization through advertising could be observed.

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[25] See below sub II.4.

[26] In April 2015, for instance, the Swedish, French and Italian competition authorities accepted a commitment by Booking.com to reduce its wide parity clause to a narrow parity clause. See <https://www.agcm.it/media/comunicati-stampa/2015/4/alias-7623> accessed 26 May 2023. In August 2015, Booking removed its wide parity clause across all European markets. This lead various national competition authorities, for example the UK's Competition and Markets Authority (CMA), to close its investigation against Booking. CMA 16 September 2015, Press Release 'CMA Closes Hotel Online Booking Investigation' <https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation> accessed 26 May 2023.

[27] In Germany, Booking.com stopped using narrow parity clauses in 2016 after the Bundeskartellamt, the German Competition Authority, found them to be in breach of competition law. Bundeskartellamt 22 December 2015, B9-121/13, Booking.com <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B9-121-13.pdf?__blob=publicationFile&v=4> accessed 26 May 2023. The decision was initially successfully challenged by Booking before the Higher Regional Court of Düsseldorf (4 June 2018, Kart 2/16(V), Booking.com ('*Enge Bestpreisklausel II*')), but was subsequently upheld by the Federal Court of Justice (BGH 19 May 2021, KVR 54/20, Booking.com).

[28] The Commission has left competition enforcement with regard to the use of parity clauses by hotel booking platforms to Member States' competition authorities. This must arguably be understood as a deliberate choice for a decentralized approach. See Jens-Uwe Franck and Nils Stock, 'What Is "Competition Law"? – Measuring EU Member States' Leeway to Regulate Platform-to-Business Agreements', 39 Yearbook of European Law 320, 358–359. However, a pending reference for a preliminary ruling from the Rechtbank Amsterdam on the assessment of Booking.com's use of parity clauses under Article 101 TFEU now provides the ECJ with an opportunity to provide general guidance on this issue. See Case C-264/23 *Booking.com and Booking.com (Deutschland)*.

[29] European Commission, Impact Assessment Report, SWD(2020) 363 final, Part 2/2, 111. For an overview of these legislative interventions and their motivation see Jens-Uwe Franck and Nils Stock (n 28) 362–70.

Choosing the prohibition of parity clauses as an illustrating example thus allows us to draw on real-world reactions when exploring the implementation and reach of the DMA's anti-circumvention concept.

Fourth, we can see that the reach of 'anti-circumvention' is of considerable practical importance regarding Article 5(3) DMA. Various platform operators whose designation as DMA gatekeepers can be regarded as certain (Amazon; Apple[30]) or at least likely in the future (Booking.com[31]) have in the past made use of parity clauses vis-à-vis their business users. Moreover, the additional prohibition of narrow parity clauses can be seen as paradigmatic for the strategy in the DMA to achieve its regulatory goals of 'contestability' and 'fairness' not only by creating more competitive pressure through competing intermediaries but also by creating space for 'disintermediation': business users should remain free to do without intermediation services. The specific instances in which Amazon and Apple used price parity clauses are Amazon's general pricing rule and Apple's pricing restriction on e-books.[32] Amazon addressed the sellers on its platform as follows:

> you must always ensure that the item price and total price of an item you list on Amazon.com are at or below the item price and total price at which you offer and/or sell the item via any other online sales channel.

In 2013, after the Bundeskartellamt, the German competition authority, initiated investigations, Amazon removed price parity clauses in Europe,[33] but it continued to impose the clause in the US. In 2019, it apparently also removed the clause in the US; however, the clause was replaced by a similar 'fair pricing policy'. While Apple had originally obliged publishers to set e-book prices in Apple's iBookstore at the lowest retail price available in the market, it abandoned its practice following antitrust investigations.[34]

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[30] As has been reported by Euractiv's Tech Brief of 7 July 2023, 'Google's Alphabet, Amazon, Apple, TikTok's ByteDance, Meta, Microsoft and Samsung have all notified the Commission that they meet the threshold for gatekeeper status under the Digital Markets Act. However, no information will be released yet on which Core Platform Services they reported until the Commission releases its final assessment in September.' <https://mailchi.mp/f6988b7da97a/tech-brief-gdpr-harmonisation-competition-authorities-on-data-protection?e=088a65b038> (accessed 10 July 2023).

[31] In a press release of 4 July 2023, Booking.com has stated that 'due to the negative impact of COVID-19 on its business, it does not meet the criteria set out in the regulation and as a result the regulation does not require the submission of a formal notification.' However, the company expects 'that these thresholds will likely be met at the end of 2023, in which case the company would expect to notify the European Commission of that fact within the required deadlines.' <https://www.bookingholdings.com/press-releases/booking-com-updates-expected-timing-for-european-commission-dma-notification/> (accessed 10 July 2023).

[32] See Martin Peitz, 'The Prohibition of Price Parity Clauses and the Digital Markets Act' (2022) (TechREG Chronicle, January 2022).

[33] See press release of the Bundeskartellamt of 26 November 2013, 'Amazon Abandons Price Parity Clauses for Good' <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html> accessed 26 May 2023.

[34] See European Commission, 25 July 2013, Case AT.39847 – *E-Books*, Annex I, Final Commitments – Apple, p. 4 ('Apple will not include in its new agreements with the 5 Publishers or in any new agreements with any other publisher a Retail Price MFN') <https://ec.europa.eu/competition/antitrust/cases/dec_docs/39847/39847_26805_4.pdf>

4. Step 1: identifying the economic rationality and intended market effects of the (possibly circumvented) obligation

First, against the background of the DMA's overarching goals, it is to be asked what rationality is attached to the prohibition pursuant to Article 5(3) DMA. The provision is drafted in such a way that it not only prohibits price parity clauses but goes further, to protect the freedom of business users to offer their products on other online sales channels under more favourable conditions. Nevertheless, the ban on price parity clauses forms its core and is the key to understanding the economic rationality of the provision.

The prohibition of price parity clauses addresses both goals of the DMA: contestability and fairness. Price parity makes it more difficult for new platform operators to challenge incumbent platforms because sellers cannot pass lower commission rates on to consumers through lower retail prices. This also applies to direct channels in which no commissions are paid but other costs are incurred by sellers: if these costs are lower than commissions, the seller would be inclined to set a lower price in the direct channel but they are not allowed to do so under parity. Thus, price parity reduces contestability. Price parity makes it less costly (in terms of lost transactions) for a platform to raise commission rates. Thus, price parity tends to increase the power imbalance between platform and sellers and thus speaks to the fairness goal.

The theoretical economics literature developed largely in response to competition cases in EU Member States and other jurisdictions, mostly in the context of hotel booking portals, but provides information about economic effects related to contestability and fairness.[35] The literature distinguished between the possible efficiencies from these clauses and anticompetitive and welfare-reducing outcomes.

The basic argument by which price parity clauses are anticompetitive is straightforward. Consider first a monopoly platform that charges fees on the seller side and competes against the direct sales channel. If the platform obliges sellers on its platforms not to offer a lower price in the direct channel (price parity), consumers are not inclined to use the direct channel if the platform offers some convenience benefit. The platform will then set a high fee and extract a large fraction of seller profits.[36] If price parity clauses were prohibited, the platform's fee setting would be constrained because the sellers would serve consumers in the direct channel if the fee were too high. The idea here is that, once consumers encounter a product that they like on the platform, they are inclined to check for it outside the platform. This is a powerful argument against narrow and wide price parity clauses.

With competing platforms, the argument extends to wide price parity clauses, prohibiting users from offering a product under more favourable conditions on competing platforms. Since the sellers' retail prices must therefore be the same across the competing platform, a seller cannot serve more consumers on a platform that lowers its fee. This reduces the platform's incentive to offer a reduced fee and means that wide price parity clauses can be

[35] The following summary of economic effects of price parity clauses is taken from Peitz (n 32).

[36] Of course, also under price parity, a seller has the possibility to leave the platform and sell only via the direct channel. However, if consumers continue to consult the platform and take little notice of a single seller not being listed on the platform, such a deviating seller would lose most of its sales, since leaving the platform makes the seller less visible to consumers.

used as a facilitating device to soften platform competition. At the same time, consumers have little reason to try out new look-alike platforms and, thus, barriers to entry are higher with such clauses in place.

One criticism of the above arguments may be that quality competition is neglected: with price parity in place, platforms may have a strong incentive to increase service quality offered to consumers to attract them to their platform. Economic theory predicts that, accounting for such costly quality provision will lead to socially excessive investments in service quality (which benefits consumers), but overall consumers will be harmed because the consumer surplus gained from higher service quality is more than offset by higher retail prices.[37]

Another criticism is that one should not neglect the investments by platforms that allow consumers to easily collect and process information about various offers on the platform. Absent price parity, consumers would continue to find this service useful but, with lower retail prices elsewhere, desert the platform and finalize the transaction elsewhere, depriving the platform of revenues. Platforms would receive no compensation for such showrooming services, which may depress their incentive to provide such a useful service to consumers. Price parity clauses make seller free-riding unlikely since consumers cannot find lower prices elsewhere.

Absent price parity, consumers search on the platform and will not transact via the platform if the differential between the price on the platform and the price on the direct distribution channel exceeds the convenience benefit from transacting on the platform. Sellers will want to set low prices in the direct channel that induce consumers to switch only if fees exceed convenience benefits by a sufficient amount. This constrains the platform's fee setting since the platform will want to avoid free-riding. Economic theory predicts that consumers are better off when price parity clauses are prohibited in such a context.[38]

With competing platforms and showrooming, wide price parity clauses continue to decrease consumer welfare. Results regarding narrow price parity clauses are less clear-cut. If narrow price parity is needed for the viability of platforms and platform competition is sufficiently intense, narrow price parity clauses are in the interest of end users.[39]

Without doing justice to a larger economics literature on price parity clauses,[40] we summarize the economic theory on price parity as follows: there are strong indications that price parity clauses are detrimental to end users if competition between platforms is not effective. This is likely to be the case for gatekeeper platforms within the meaning of the DMA.[41] In this sense, economic theory backs the presumption that price parity clauses are anticompetitive and

[37] This argument is developed and formalized by Benjamin Edelman and Julian Wright, 'Price Coherence and Excessive Intermediation' (2015) 130 Quarterly Journal of Economics 1283–328.

[38] This result is due to Chengsi Wang and Julian Wright, 'Search Platforms: Showrooming and Price Parity Clauses' (2020) 51 Rand Journal of Economics 32–58.

[39] For the economic theory behind this insight, see again Wang and Wright (n 38).

[40] Other contributions include Andre Boik and Kenneth Corts, 'The Effects of Platform MFNs on Competition and Entry, (2016) 59 Journal of Law and Economics 105–34; Justin Johnson, 'The Agency Model and MFN Clauses', (2017) 84 Review of Economic Studies 1151–85; Wang and Wright (n 38).

[41] More precisely, it applies to core platform services of a designated gatekeeper and thus, according to Article 3(9) DMA, to those platform services that 'individually are an important gateway for business users to reach end users'.

decrease end users' welfare when imposed by a gatekeeper platform.[42] Since a gatekeeper platform competes against the direct channel (but faces only weak constraints from other platforms), the objective of imposing price parity is to limit the use of the direct sales channel.[43] Price parity arguably pushes the power imbalance between platform and seller further towards the platform and allows the platform to charge higher fees that are partly passed through to end users.

The prohibition of narrow price parity clauses in several EU Member States allows for a before-and-after comparison (possibly with some control groups). The Bundeskartellamt undertook an investigation of the hotel booking sector; it summarized its main findings as follows:[44]

> The investigations have shown that ultimately the elimination of the narrow price parity clauses has not harmed Booking.com's market success. Meanwhile Booking.com is by far the leading online hotel platform in Germany, and even without the price parity clause the company has been able to consolidate its market position further and achieve enormous growth rates … The accommodations use the pricing options now available to them in a diversified sales mix, without neglecting the 'hotel booking portal' sales channel … Most consumers do not compare accommodation prices but book where they first found an accommodation, which rules out any significant redirection/free-riding activities … An accommodation's own online direct sales channel is predominantly used by consumers who already knew the accommodation before they made a booking.

While more than half of the hotels made use of the possibility of price differentiation across channels, it is noteworthy that the commission rates that platforms charge hotels have not changed.

5. Steps 2 and 3: analysing market effects of suspicious practices and assessing equivalence with market outcome aimed at by the relevant DMA obligation

In the following, we discuss four practices that may be triggered by a prohibition of price parity and are therefore possible candidates of anti-circumvention strategies. We do not claim that there cannot be other strategies that may be pursued in response to this prohibition. For example, it may become more attractive for a platform to use the strategy of bundling different products or services to make disintermediation less attractive for end users. Also, the introduction of first-party content and thus vertical integration may become more attractive for the platform when price parity clauses are prohibited. Thus, we do not claim to provide an exhaustive list of possible circumvention strategies.

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[42] A caveat is due. According to economic theory, in some environments price parity may be consumer welfare increasing and beneficial for the platform even if there is a single platform. See Chang Liu, Fengshi Niu and Alexander White, 'Optional Intermediaries and Pricing Restraints' unpublished manuscript (2021), for such a result when some consumers always use the direct distribution channel, and the other consumers choose between the direct distribution channel and the platform channel – the latter provides a convenience benefit that is not available in the direct distribution channel.

[43] What happens is that a seller who makes a sale on the direct channel free-rides on the search functionalities of the platform if consumers are unlikely to discover the product through other means and thus the seller has to rely on the platform's showrooming service to be able to obtain significant traffic on the direct channel.

[44] Bundeskartellamt (2020), The Effects of Narrow Price Parity Clauses on Online Sales – Investigation Results from the Bundeskartellamt's Booking Proceeding, p. 4 <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_VII.pdf?__blob=publicationFile&v=3> accessed 26 May 2023.

Moreover, as the ban on price parity agreements in Article 5(3) DMA is drafted in an open, effects-based way, the prohibition itself – i.e. without relying on a specific ban on circumventions – may to a certain extent capture practices that can yield the same effects as price parity agreements. However, whether a boundary must be drawn here and, if so, where it can be drawn will be discussed in the third part below.[45] In what follows, we focus on whether certain practices will yield market effects equivalent to agreeing to price parity so that their prohibition would be consistent – regardless of whether that is by Article 5(3) DMA as such or in conjunction with the prohibition of circumventions pursuant to Article 13 DMA.

a) Exclusivity

(1) Phenomenon. Exclusivity here refers to the practice that a particular product or service is provided only on the platform; thus, through contracting, the possibility of consumers to buy that product or service elsewhere (on a competing platform or through a direct channel) is eliminated. Instead of being contractual, exclusivity may be implicit. The latter is the case when a seller of the platform can offer its product or service elsewhere but anticipates that if it does so it will be delisted or made invisible on the platform (this punishment may apply only to the product or service that violated the implicit rule or to a broader set of products or services offered by the seller).[46] Economic theory on repeated games tells us that such a threat is credible in a wide set of circumstances when future profits are sufficiently important.

From the platform's viewpoint, exclusivity can be also framed as a bundling requirement that products or services that a shown on the platform can only be purchased on the platform; in particular, disintermediation is made impossible or at least difficult.[47]

(2) Market effects. A practice to sign exclusivity agreements with business users can be regarded as a more direct alternative for a platform to avoid sales taking place in the direct channel. In other words, with exclusivity, by definition, there will not be any off-platform transactions.[48]

(3) Equivalence. A policy of exclusivity may clearly yield the same undesired effects that are meant to be avoided by the ban on price parity clause.

b) De-ranking

(1) Phenomenon. As has been documented in the case of hotel booking platforms,[49] when hotel booking platforms can no longer use price parity clauses, it could be observed that a

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[45] See below sub III.

[46] This shows that exclusivity is conceptually closely related to de-ranking, which makes a product or service less visible on the platform and is thus a softer version of de-listing.

[47] An example for a platform engaging in such a practice is Airbnb, which takes active measures to make communication off the platform between host and guest difficult before contracting on the platform and thus aims at avoiding disintermediation.

[48] The question may arise whether it is likely that such a circumvention strategy may be chosen (if legal). Based on the Chicago School arguments, it would have to be shown that the seller has an incentive to sign the exclusivity clause. We observe that in many B2C environments each individual seller is small relative to the platform and consumers have little incentive to discover offers outside the platform, as long as most sellers are present. Thus, an individual seller who does not contract with the platform will lose most of its sales.

[49] For an empirical analysis that finds lower rankings because of lower prices on other distribution channels, see Matthias Hunold, Reinhold Kesler and Ulrich Laitenberger, 'Rankings of Online Travel Agents, Channel Pricing, and Consumer Protection' (2020) 39 Marketing Science 92–116. A discussion of the platform's

lower hotel price outside the platform goes hand in hand with that hotel receiving a worse ranking in the organic search results. This implies that the offer is less likely to be seen by end users and thus leads to lower revenues for the hotel. Since prices off the platform are lower, the relative likelihood that a booking takes place on the platform is also reduced. Thus, a hotel with a lower off-platform price will feature a lower conversion rate. Hence, when using conversion rate as a relevant outcome variable, a ranking algorithm indeed assigns a worse position to a hotel with a lower off-platform price that is otherwise comparable to another hotel.

(2) Market effects. De-ranking by the platforms' recommendation algorithm thanks to a low conversion rate makes it less attractive for a seller to offer a lower price elsewhere. Thus, sellers may in effect honour price parity to maintain a high position in the ranking. This allows the platform to charge a high commission rate because a seller's attempt to terminate more transactions off the platform is self-defeating.

(3) Equivalence. The consequences of de-rankings may be similar to price parity in the sense that they discipline the seller into not offering a lower price off the platform. However, the seller is not prohibited from doing so. If it does, a higher fraction of its sales is made off the platform than would be the case under price parity. Nevertheless, from an effects-based perspective, de-rankings that are due to lower prices off the platform can be seen as similar in effect to price parity. Thus, if it can be shown that the platform assigns a worse position when the price off the platform is lower, this can be seen as circumventing the prohibition of price parity clauses. De-ranking due to lower prices off the platform then has qualitatively the same effect as price parity regarding the business user's effective freedom to set the price to consumers. This raises the same contestability and fairness issue as price parity. In particular, a platform entering with a more favourable offer is limited in its potential to grow because business users have no incentive to provide more attractive terms to consumers since this would have repercussions on incumbent platforms.

As such, an outcome obtains when the recommendation algorithm uses as an input conversion rates but not prices off the platform: a platform's commitment not to use such prices as inputs does not solve the problem for the regulator. Indeed, the prohibition of using off-platform prices as a ranking parameter can be counterproductive as conversion rates on the platform may need to be corrected by off-platform prices to provide non-biased recommendations. Instead, if a seller's off-platform prices are lower than those of another seller with the same conversion rate on the platform, the former should be ranked better by the algorithm, as end users are overall more likely to buy from it.

c) Undercutting

(1) Phenomenon. If an intermediation platform, at its own expense, reduces the price at which its business user offers a product, this is known as 'undercutting'. This practice has been used, for instance, by online travel agencies (OTAs). As reported by a German hotel association, in 2019 Booking.com introduced the so-called 'early payment benefit', where a

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incentives when designing its recommender system is provided, for instance, by Paul Belleflamme and Martin Peitz, *The Economics of Platforms: Concepts and Strategy* (CUP 2021) chapter 6.

hotel guest is offered a reduced price by the platform operator waiving part of its commission. This special offer is used when a hotel's 'price-performance score' is below a certain threshold. Thus, in fact, when the platform identifies lower hotel prices on competing OTAs or on the hotel's own online sales channels, the 'price-performance score' of the hotel decreases and Booking.com seeks to counter the lower hotel prices offered on alternative online sales channels.[50] This pricing strategy is implemented based on Booking.com's general terms and conditions:

> Booking.com may give an incentive with respect to the Room Price at its own cost. In such case Booking.com shall pay part of the Room Price on behalf of the Guest.[51]

Thus, in line with its terms and conditions, Booking.com may use its 'undercutting' policy at its own discretion.[52] From the hotels' perspective, this may appear to be troublesome because, through selective price reductions, the platform can undermine the hotel's pricing policy.[53]

It is remarkable that, with effect from 1 January 2022, the Portuguese legislature has banned this practice of 'undercutting',[54] justifying the prohibition in a rather general manner on the grounds that this mechanism resembled the resale of a product at a loss and that its prohibition thus could prevent 'distortions and imbalances' that may arise in economic relations.[55] Although the Portuguese legislature did not explicitly relate the prohibition of 'undercutting' with the parity policy of OTAs, it is noticeable that the ban on 'undercutting' has been adopted simultaneously with an amendment to Portuguese antitrust law, adding parity clauses to the illustrative list of agreements that may be caught as anticompetitive agreements under Article 9 of the Portuguese Competition Act.[56] Thus, even if there is no explicit statement to this effect, the simultaneity of these interventions suggests that the ban on 'undercutting' was also intended to ensure the practical effectiveness of a possible[57] prohibition of (price) parity clauses under antitrust law.

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[50] Hotelverband Deutschland IHA, Hotelmarkt Deutschland 2020, p. 279.

[51] Booking.com, General Delivery Terms (as of January 2022), sub 2.2.4 (on file with the authors).

[52] However, the practical implementation depends on the hotels agreeing to Booking.com processing the payment. Apparently, the hotels can practically do without this. Hotelverband Deutschland IHA, Hotelmarkt Deutschland 2020, p. 279.

[53] Hotelverband Deutschland IHA, Hotelmarkt Deutschland 2020, p. 279.

[54] The prohibition was inserted as Artigo 5.º-A into the 'Regime aplicável às práticas individuais restritivas do comércio' ('Regulation applicable to individual trade restricting practices'). Decreto-Lei n.º 166/2013, de 27 de dezembro, Diário da República n.º 251/2013, Série I de 2013-12-27 <https://dre.pt/dre/legislacao-consolidada/decreto-lei/2013-70861276-175576079> accessed 26 May 2023.

[55] Decreto-Lei n.º 108/2021, de 7 de dezembro, Diário da República n.º 236/2021, Série I de 2021-12-07, Pág. 2: 'Introduz-se, assim, um mecanismo similar ao da proibição da venda de bens com prejuízo, evitando que se estabeleçam distorções ou desequilíbrios nas relações económicas' ('A mechanism similar to the prohibition on selling goods at a loss is thus introduced, preventing distortions or imbalances from arising in economic relations'). <https://dre.pt/dre/detalhe/decreto-lei/108-2021-175506671> accessed 26 May 2023.

[56] Lei n.º 19/2012, de 8 de maio, Diário da República n.º 89/2012, Série I de 2012-05-08, páginas 2404–2427. In Article 9 of the Act, which is otherwise modelled on Article 101 TFEU (omitting the inter-State clause), a subparagraph f) has been inserted, which reads as follows: '[Agreements that] […] establish, within the scope of the supply of goods or accommodation services in tourist resorts or local accommodation establishments, that the other contracting party or any other entity cannot offer, on an electronic platform or in an establishment in physical space, prices or other sales conditions of the same good or service that are more advantageous than those practiced by an intermediary, who acts through an electronic platform'). <https://dre.pt/dre/legislacao-consolidada/lei/2012-73888498-175576077>.

[57] As the amendment only adds parity clauses to the list illustrating which agreements may be caught by the prohibition of anticompetitive agreements, it seems uncertain how (if at all) this has changed the legal

(2) Market effects. In standard oligopoly markets, economists have analysed the effects of best-price or price matching guarantees; the starting point of this literature is the insight that, under price matching, competition tends to be weaker since consumers can claim a refund if they find the product cheaper elsewhere. Price matching clauses in combination with narrow price parity clauses have been shown to implement the same outcome as wide price parity clauses. That is because narrow price parity removes the business users' possibility to set lower prices on the direct channel, while price matching removes the platforms' incentives to set lower fees than their competitors.[58] They can therefore be seen as a circumvention strategy regarding the prohibition of wide price parity. According to this finding, price matching clauses can thus be seen as a response to reduce competition between platforms when wide price parity clauses are prohibited but narrow price parity is allowed or lower prices on the direct channel not an issue.

In the absence of narrow price parity clauses, however, it appears unclear what the effects of price matching policies are and whether they effectively reduce competition with the direct channel. What can be said is that, absent price parity clauses, a price matching guarantee allows the seller to sell at a lower price without affecting the price–cost margin it makes on the platform because the price reduction will be paid out of the platform's commission. The seller only has to bear the lower price–cost margin on the direct channel and therefore appears to have a stronger incentive to lower its price than if this clause were not present.

This argument takes the platform fees as given, and the competitive concern arises because of platforms' incentives when setting their commissions. To illustrate this point, suppose that the use of direct sales channels is prohibitively costly. The use of price parity clauses may be used as a facilitating device to preserve high fees. The argument goes as follows. Assume that all platforms initially set high fees. Absent price matching policies, a platform may deviate to a lower fee. A business user who preserves their margin would in response set a lower price to consumers. If a lower fee, through lower retail prices, increases consumer demand on that platform by attracting some consumers from other platforms, the deviation strategy is profitable in an environment in which retail prices on the other platforms do not immediately respond to such a fee reduction. However, platforms' price matching policies achieve such immediate reaction and thereby reduce the incentive of other platforms to unilaterally reduce fees.

(3) Equivalence. To establish equivalence, one needs to focus on the regulatory objectives behind an obligation and the relevant market effects. As was shown, it is not clear why a

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situation and, thus, the amendment will have an actual impact on competition practice. But see the explanatory memorandum accompanying the amendment of the Competition Act. Decreto-Lei n.º 108/2021, de 7 de dezembro, Diário da República n.º 236/2021, Série I de 2021-12-07, Pág. 2: 'Desta forma, garante -se que os fornecedores de bens ou os prestadores de serviços possam oferecer, livremente, o bem ou serviço a um preço inferior, igual ou superior ao oferecido pelo intermediário, permitindo que o mercado funcione de forma equilibrada e concorrencial' ('In this way, it [*scil.*, the revision of the antitrust regime] ensures that suppliers of goods or service providers can freely offer the good or service at a price lower, equal or higher than that offered by the intermediary, allowing the market to function in a balanced and competitive way'). <https://dre.pt/dre/detalhe/decreto-lei/108-2021-175506671> accessed 27 May 2023).

[58] Francisca Wals and Maarten Pieter Schinkel, 'Platform Monopolization by Narrow-PPC-BPG Combination: Booking et al.' (2018) 61 International Journal of Industrial Organization 572–89.

price matching policy by a gatekeeper should limit trade on the business user's direct channel. While price matching may result in competing platforms having less incentive to set lower fees, this does not directly affect the sellers' leeway to translate lower fees into lower product prices, but it can restrict competition between platforms in a similar way as a wide parity arrangement. Thus, if one assumes that the focus of the ban on price parity clauses lies in preserving inter-platform competition, then a price matching policy can be seen as equivalent to a price parity policy.

By contrast, if the focus of the ban on price parity clauses lies in the trade on the direct channel and the competitive pressure this exerts on the platform, then it is not apparent that 'undercutting' will have effects equivalent to a parity policy. In particular, the business user has the option to lower prices on the direct channel without being punished by the platform. The latter may match prices, but by doing so cannot reduce the business user's margin.

With regard to 'undercutting', equivalence could therefore only be asserted across the board if one assumed that the prohibition under Article 5(3) DMA was intended to protect the business user's freedom to ultimately determine that the prices that must be paid by end users on the platform are higher than on the direct channel. As we explain below,[59] however, this ratio cannot be inferred from the provision. An attempt to establish general equivalence (or non-equivalence) of 'undercutting' is thus inappropriate, as the concrete market environment determines the economic effects of 'undercutting'. As argued below,[60] a direct channel may not be available or sales via this channel may be only a weak substitute for sales via the platform.

d) (Partial) switch to an advertising-financed business model

(1) Phenomenon. A different strategy by the platform could be to rethink the overall business model and to increase advertising revenues by adding sponsored search entries. As in the case of hotel booking services, platforms relied almost exclusively on transaction fees. However, for example, Booking recently introduced an ad-funded part to its business: hotels can obtain attractive positions in the ranking and are labelled as 'promoted'. To list such native ads, hotels place bids that, if successful, determine the cost per click ('CPC'). Such native advertising gives the platform a revenue source that does not require the transaction to be completed on the platform.

(2) Market effects. Here, a business user may advertise its offer and end users may complete the transaction outside the platform. Thus, completing transactions outside the platform becomes less of an issue for the platform since it now makes money from advertising. The platform now directly monetizes its gatekeeper role vis-à-vis consumers' demand for recommendations of certain types of products; its business model moves closer to a traditional advertising model as it is no longer transactions but impressions or clicks that are monetized.

(3) Equivalence. An increasing focus on advertising revenues may be the direct response to the prohibition of price parity clauses. It does not affect the sellers' ability to determine the

[59] See below sub III.3.c).
[60] See below sub III.3.c)III.3.c).

price for each transaction independently. What is more, it does not entail a reduction of off-platform transactions. Therefore, we do not see that it should be conceptualized as circumventing the ban on parity clauses.[61]

e) Conclusion

Regarding the four practices that we have studied in terms of 'market effects' and 'equivalence', for two practices it is without further ado appropriate to understand them as 'circumvention': exclusivity and de-ranking. In the case of undercutting, this judgement depends on case-specific circumstances.

Exclusivity, by definition, means that the business user cannot sell the product via other platforms or via its own online sales channel. If enforced or threatened by a gatekeeper, it can thus bring about those effects that the prohibition of price parity agreements is intended to prevent. De-ranking when prices off the gatekeeper's platform are lower does not exclude the business user's freedom to sell at different prices elsewhere but makes it less attractive. Given that, by definition, the gatekeeper platform enjoys outstanding importance as an online sales channel, it may be assumed that this effect is significant.

If a platform pursues a policy of 'undercutting', it can undermine the pricing policy of a business user. Yet, as it is not clear that the implementation of a price matching policy by a gatekeeper will limit trade on the business user's direct channel, 'undercutting' should be only considered a circumvention of a ban on price parity agreements in those market environments in which the direct channel imposes little competitive constraint. In contrast, a per se circumvention of Article 5(3) DMA could only be shown if one assumed that the provision was intended to guarantee the business user the freedom to determine not only what price it receives when selling via a platform but also what price the end consumers must pay when buying via the platform – regardless of whether or not that will have an effect on the trade via the business user's own sales channel.

A switch to a business model that relies (more) on advertising revenues will not reduce off-platform transactions and, hence, should not be conceptualized as a circumvention strategy.

III. Applying the DMA's anti-circumvention concept

In this section we will analyse the DMA's rules on 'anti-circumvention' and how an effects-based approach as suggested in the previous part fits into the DMA's concept.

[61] With the introduction of advertising, the platform may overhaul its overall price structure. As the polar opposite case to relying only on transaction-based fees the platform may remove transaction-based fees and completely move to an ad-funded model. In this case, a seller has little incentive to move transactions off the platform. In this case, the likely effect is that the change of monetisation model does lead to a reduction of off-platform transactions. However, it is difficult to conceptualize the adoption of an ad-funded business model as a circumvention strategy to the prohibition of price parity clauses.

1. Capturing circumventions: Article 5(3) DMA as a paradigm of an effects-based DMA obligation

The basic regulatory idea of the DMA is to prohibit gatekeepers from engaging, or require them to engage, in certain behaviours. These obligations are to be understood as the result of a preceding balancing of the various interests of the market participants (gatekeepers, competing platform operators, business users and end users) in the light of, in particular, the general interest in competitive markets and a functioning EU internal market. Ideally, Articles 5, 6 and 7 DMA should contain self-executing rules that are clear, concise and easy to implement. The EU legislature was not naïve about the fact that this is a practically unattainable ideal and has, therefore, delegated to the Commission the competence to adopt implementing acts for the obligations contained in Articles 6 and 7 DMA.[62]

The prohibition embodied in Article 5(3) DMA illustrates that obligations under Article 5 DMA are also drafted in an open and effects-oriented way. The regulatory core of the provision lies in the prohibition of price parity agreements between gatekeeper platforms and business users, which prevent the latter from offering their products at more favourable conditions via competing platforms or their own online sales channels. This becomes clear from recital 39 DMA, whose first sentence reads:

> In certain cases, for instance through the imposition of contractual terms and conditions, gatekeepers can restrict the ability of business users of their online intermediation services to offer products or services to end users under more favourable conditions, including price, through other online intermediation services or through direct online sales channels.

The contractual agreement of parity is mentioned only as an example of the prohibited conduct. The actual wording of Article 5(3) DMA reads:

> The gatekeeper shall not prevent business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper.

The wording 'shall not prevent' indicates an effects-oriented scope that goes beyond the mere prohibition of parity agreements, as we find it in ex ante regulation in national legal systems.[63] Thus, the obligation is meant to guarantee that the business users of the gatekeeper's intermediation service enjoy a comprehensive leeway to implement a differentiated pricing (and conditions) policy vis-à-vis their customers (the end users), depending on the online sales channel used. Measures that may 'prevent' business users from making use of this leeway are prohibited under Article 5(3) DMA. This is further reinforced and specified by recital 39, fourth sentence, DMA:

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[62] Article 8(2) DMA.

[63] See, for example, under Italian law, Legge 124/2017, Art. 1, comma 166: 'E nullo ogni patto con il quale l'impresa turistico-ricettiva si obbliga a non praticare alla clientele finale con qualsiasi modalita` e qualsiasi strumento, prezzi, termini e ogni altra condizione che siano migliorativi rispetto a quelli praticati dalla stessa impresa per il tramite di soggetti terzi, indipendentemente dalla legge regolatrice del contratto' ('And null and void is any agreement by which the accommodation company undertakes not to charge the final customer prices, terms and conditions that are better than those practiced by the same company through third parties, regardless of the law applicable to the contract'). <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2017;124> accessed 29 May 2023.

> To ensure that business users of online intermediation services of gatekeepers can freely choose alternative online intermediation services or direct online sales channels and differentiate the conditions under which they offer their products or services to end users, it should not be accepted that gatekeepers limit business users from choosing to differentiate commercial conditions, including price.

This prohibits, in particular, measures that are to be understood as sanctions imposed by a gatekeeper in reaction to observing a business user offering its customers a product at more favourable prices or other conditions via other online sales channels. Thus, recital 39, fifth sentence, DMA mentions 'de-listing' or 'increased commission rates' as a prohibited measure.

> Such a restriction should apply to any measure with equivalent effect, such as increased commission rates or de-listing of the offers of business users.

It stands out that the legislature notes that it is the 'effect' of a measure that ultimately defines the outer limit of the scope of the prohibition. Therefore, individual practices that, according to our analysis above, should be conceptualized as circumventing the prohibition of price parity clauses (which form the core of the prohibition) may already be directly captured by Article 5(3) DMA.

In sum, we have seen that Article 5(3) DMA is an illustrative example of a DMA obligation drafted in an open, effects-oriented way. Therefore, an effects-based analysis may already be helpful and, in fact, in some cases even necessary to identify whether a particular practice is covered by this obligation.

2. 'Anti-circumvention' pursuant to Article 13 DMA

Under the heading 'Anti-circumvention', Article 13 DMA groups together several rules that differ in objective and scope. The provisions relevant to our analysis, namely those concerning circumvention of the obligations laid down in Articles 5, 6 and 7 DMA, are Article 13(4), (6), (7) and (8) DMA.[64]

a) Substantive rules

Article 13(4) DMA introduces a general anti-circumvention provision, stating that:

> The gatekeeper shall not engage in any behaviour that undermines effective compliance with the obligations of Articles 5, 6 and 7 regardless of whether that behaviour is of a contractual, commercial or technical nature, or of any other nature, or consists in the use of behavioural techniques or interface design.

The rationality of this concept is further explained in recital 70 DMA:

> [1] Given the substantial economic power of gatekeepers, it is important that the obligations are applied effectively and are not circumvented. [2] To that end, the rules in question should apply to any practice by

[64] Article 13(1) DMA prohibits circumvention of the thresholds under Article 3(2) DMA. Article 13(2) DMA empowers the Commission to request information to determine whether an undertaking engages in such circumvention practices. Article 13(3) DMA is merely a rhetorical affirmation of Article 8(1) DMA, stating that '[t]he gatekeeper shall ensure that the obligations of Articles 5, 6 and 7 are fully and effectively complied with'. Article 13(5) DMA serves to effectuate obligations imposed on gatekeepers, as for example in Article 6(10) DMA, to allow their business users to collect, process and exploit certain data. Strictly speaking, the provision is not concerned with circumventing practices but specifies how a gatekeeper can comply with the said obligations.

> a gatekeeper, irrespective of its form and irrespective of whether it is of a contractual, commercial, technical or any other nature, insofar as the practice corresponds to the type of practice that is the subject of one of the obligations laid down by this Regulation. [3] Gatekeepers should not engage in behaviour that would undermine the effectiveness of the prohibitions and obligations laid down in this Regulation.

The wording of this recital, in particular its second sentence, suggests that the concept of 'anti-circumvention' as embodied in Article 13 DMA presupposes a dividing line between conduct that would be directly prohibited or in any other way regulated by Articles 5, 6 or 7 DMA and conduct that would as such not be covered by those provisions but only in conjunction with the rules on 'anti-circumventing' as it may yield effects equivalent to the conduct covered by a particular rule contained in Articles 5, 6 or 7 DMA.

Article 13(6) DMA specifies the concept against circumventing practices:[65]

> The gatekeeper shall not degrade the conditions or quality of any of the core platform services provided to business users or end users who avail themselves of the rights or choices laid down in Articles 5, 6 and 7, or make the exercise of those rights or choices unduly difficult, including by offering choices to the end-user in a non-neutral manner, or by subverting end users' or business users' autonomy, decision-making, or free choice via the structure, design, function or manner of operation of a user interface or a part thereof.

This is obviously intended to cover measures through which the gatekeeper indirectly exerts pressure on business users by lowering the quality of the intermediation service so that the business user must expect fewer transactions via the gatekeeper.

b) Procedural rules

Article 8(2) DMA empowers the Commission to adopt implementing acts, specifying which measures a particular gatekeeper needs to implement to comply with the DMA obligations. This instrument is only available with regard to the obligations contained in Articles 6 and 7 DMA but not for those enshrined in Article 5 DMA. Therefore, the Commission cannot use this tool, for example, to specify which measures are prohibited under Article 5(3) DMA – beyond the ban on explicitly imposing parity requirements – as they 'prevent' business users from exercising their freedom to implement differentiated pricing and conditions policies on various online distribution channels. In contrast, the power of issuing implementing acts in the case of circumvention pursuant to Article 13(7) in conjunction with Article 8(2), third subparagraph, DMA also applies as to the obligations contained in Article 5 DMA. As already indicated in recital 70 DMA, we can see that Articles 13 and 8 DMA presuppose that a line can be drawn between practices that are captured by Article 5 DMA as such (or not) and practices that are captured as circumventing measures pursuant to Article 5 in conjunction with Article 13(4) and (6) DMA.

c) Public enforcement

If the Commission finds an infringement of Articles 5, 6 or 7 DMA, it may adopt a non-compliance decision pursuant to Article 29(1)(a) DMA, including a cease-and-desist order.[66]

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[65] See also DMA, recital 70, fourth sentence: 'Such behaviour includes the design used by the gatekeeper, the presentation of end-user choices in a non-neutral manner, or using the structure, function or manner of operation of a user interface or a part thereof to subvert or impair user autonomy, decision-making, or choice.'

In addition, where it finds that the gatekeeper intentionally or negligently violated the said obligations, it may impose a fine pursuant to Article 30(1) DMA. Yet, whether the same enforcement mechanisms are applicable if conduct is prohibited for violating Articles 5, 6 or 7 DMA in conjunction with Article 13(4) and (6) DMA may at first sight appear doubtful because the latter provision is mentioned neither in Article 29 nor in Article 30 DMA. If one were to consider Articles 29 and 30 DMA not (directly) applicable to circumventing practices, the Commission would first need to issue an implementing act pursuant to Articles 8(2) and 13(7) DMA. A non-compliance decision and the imposition of a fines could then be based on a violation of the implementing act.[67]

However, such an interpretation is contradicted by Article 13(8) DMA, which states that the Commission's competence to issue implementing acts pursuant to Article 13(7) with Article 8(2) DMA 'is without prejudice to the powers of the Commission under Articles 29, 30 and 31 [DMA]'. In this regard, it should first be noted that the reference in Article 13(8) DMA to 'paragraph 6 of this Article' should be considered an editorial mistake and must instead be read as a reference to Article 13(7) DMA. This is clear from the published four-column documents in the context of finalizing the DMA: the (now) Article 13(7) and (8) DMA go back to a proposal that the Council introduced into the negotiations, at the time as Article 11(3a) and (3b) DMA, where in Article 11(3b) DMA reference was made to 'paragraph 3a'.[68]

Moreover, in the context of Article 13 DMA, we do not see that this reference to Articles 29, 30 and 31 DMA could reasonably have any other meaning than that the legislature intended to clarify that those articles should also apply to infringements that only arise from an interaction of Articles 5, 6 or 7 DMA with Article 13 DMA.

This seems to be appropriate because Article 13(6) DMA in particular contains clear and precise stipulations. Beyond this, it is true that the general prohibition of circumvention according to Article 13(4) DMA is to be interpreted in individual cases in an effects-oriented manner. However, this does not mean that the resulting obligations would necessarily be so unclear that they could not be foreseen by the gatekeepers and should therefore be excluded a priori from direct public enforcement (including the possibility of fining).

Ultimately, in individual cases the gatekeepers remain free to invoke the principle of the legality of criminal (and quasi-criminal) offences and penalties ('*nullum crimen, nulla poena sine lege*') that restricts the imposition of fines for infringements pursuant to Articles 5, 6 or 7 with Article 13(4) DMA. Thus, the addressees of these obligations must be able to anticipate which behaviour is permitted and which is not (and thus punishable). In the words of the ECJ:

> legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision

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[66] Article 29(5) DMA.

[67] See DMA arts 29(1)(b) and 30(1)(b).

[68] The then proposed Article 11(3b) DMA read: 'Paragraph 3a is without prejudice to the powers of the Commission under Articles 25, 26 and 27.' See Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) 2020/0374 (COD), Version [Version for Trilogue on 24 March 2022] 22-03-2022 at 16h43, no 226a and 226b, p. 200/317.

> and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable.[69]

Accordingly, if the conduct captured by a prohibition, results only from an analogy, (quasi-)criminal liability is to be ruled out. We submit, however, that the implementation of the 'anti-circumvention' provision needs to be distinguished from extending an obligation via a conclusion by analogy.[70] Article 13(4) DMA should rather be understood as an extension of the obligations under Articles 5, 6 and 7 DMA as explicitly prescribed by the legislature, albeit in the form of a general clause.

In sum, with regard to the available instruments of public enforcement, it therefore makes no difference whether conduct is directly covered by Articles 5, 6 or 7 DMA or (only) in conjunction with Article 13(4) and (6) DMA. In both scenarios, Articles 29, 30 and 31 DMA are applicable. We acknowledge, however, that the imposition of fines will be subject to the principle of legality.

d) Private enforcement

Parties aggrieved by an infringement of DMA provisions may invoke those rules directly before national courts. The DMA – unlike, for instance, the GDPR[71] – does not explicitly address the availability of private rights of action. However, the obligations established in Articles 5, 6 and 7 DMA, including the prohibitions on circumvention under Article 13(4) and (6) DMA, convey implicit rights to those affected by a breach. Member States have a duty to protect these individual rights under the general principle of loyalty as set out in Article 4(3) TEU. They must therefore provide the necessary instruments under domestic law to enable parties affected by an infringement to bring actions for injunctive relief and damages.

This understanding is based on two findings: an interpretation of the DMA reveals that the availability of private enforcement is inherent in the DMA and the DMA obligations, including the anti-circumvention obligations pursuant to Article 13(4) and (6) DMA, meet the requirements for direct effect.

Article 39 DMA provides in detail for the Commission's cooperation with national courts. This assumes that (possible) DMA violations can be the subject of proceedings before national courts. Since enforcement of the DMA by national authorities is not provided for, Article 39 DMA presupposes the possibility of private rights of action. While it does not necessarily follow that these rights are directly prescribed by Union law, the wording used in Article 13(6)

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[69] ECJ 3.5.2007 Case C-303/05 *Advocaten voor de Wereld* ECLI:EU:C:2007:261, para 50. See also General Court, 8.7.2008, T-99/04, *AC-Treuhand v Commission*, ECLI:EU:T:2008:256, paras 139–40.
See also ECJ 28.6.2005 Case C-189/02 P *Dansk Rørindustri and Others v Commission* ECLI:EU:C:2005:408, para 202: 'The Court of First Instance held, first of all and correctly, that the principle of non-retroactivity of criminal laws, enshrined in Article 7 of the ECHR as a fundamental right, constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules and that that principle requires that the penalties imposed correspond with those fixed at the time when the infringement was committed.'

[70] Cf. Article 12(1)(2) DMA: the scope of delegated acts is based on (and, in fact, limited by) the idea of a conclusion by analogy.

[71] 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 or GDPR). OJ L 119, 4.5.2016, p. 1–88. See, e.g., arts 79 and 82.

DMA ('who avail themselves of the rights … laid down in Articles 5, 6 and 7') shows that the EU legislature assumed that the said DMA obligations are capable of (implicitly) conveying individual rights to the core platform operator's business users and end users.[72] Moreover, it hardly seems consistent with the policy of the DMA to assume that it should be up to the Member States whether they want to provide for private enforcement or not. This would lead to considerable legal uncertainty and fragmentation of enforcement.

The direct and general applicability of the obligations enshrined in the DMA follows from its legal nature as a regulation pursuant to Article 288(2) TFEU. Taking this as a starting point, the ECJ has repeatedly emphasized that regulations 'by reason of their nature and their function in the system of the sources of Community law … have direct effect and are as such, capable of creating individual rights which national courts must protect'.[73] However, whether a particular obligation enshrined in EU law indeed has direct effect (and can thus generate an implicit right) depends, as in the case of regulations, on whether the respective provision is 'sufficiently clear, precise and unconditional to be considered justiciable'.[74] This requirement goes back to the seminal judgment in *Van Gend en Loos*[75] and was specified in subsequent case law, setting the threshold for direct effect relatively low. For example, in *Defrenne II*, the ECJ did not reject the direct effect of (now) Article 157 TFEU because of a lack of precision or a need for national implementing measures,[76] even though the provision merely stipulates that 'Member States shall ensure the principle of equal pay for male and female workers for equal work or work of equal value'. In *BRT II*, the ECJ considered Articles 101(1) and 102 TFEU to be capable of 'creat[ing] direct rights in respect of the individuals concerned'[77] without even discussing the clarity and precision of the obligations resulting from the provisions, although their application may require courts to undertake complex impact analyses and balancing exercises in individual cases. It appears, thus, sufficient that the essential values and principles behind an obligation – which might be phrased vaguely, such as the concept of 'abuse' in Article 102 TFEU – can be identified, enabling courts to apply it consistently in individual cases.

The obligations contained in Articles 5, 6 and 7 DMA are unconditional and sufficiently clear and precise in line with ECJ case law. It is true that Article 8(2) DMA empowers the Commission to adopt 'measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations laid down in Articles 6 and 7 [DMA]'. However, unlike

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[72] But cf. for a fundamental opposition against the presumption that DMA obligations would create corresponding rights Oles Andriychuk, 'Do DMA Obligations for Gatekeepers Create Entitlements for Business Users?' (2023) 11 Journal of Antitrust Enforcement 123–32.

[73] ECJ 14.12.1971 Case C-43/71 *Politi v Ministero delle finanze* ECLI:EU:C:1971:122, para 9. See also ECJ 17.9.2002 Case C-253/00 *Muñoz and Superior Fruiticola* ECLI:EU:C:2002:497, para 27; ECJ 13.10.2005 Case C-379/04 *Richard Dahms* ECLI:EU:C:2005:609, para 13.

[74] This is the quintessence of the analysis of ECJ case law formulated by Paul Craig and Gráinne de Búrca, *EU Law* (7th edn, OUP 2020) 217.

[75] ECJ 5.2.1963 Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1, 12–13 ('obligations which the Treaty imposes in a clearly defined way upon individuals'; 'clear and unconditional prohibition'; 'not qualified by any reservation on the part of states'; 'implementation … does not require any legislative intervention').

[76] ECJ 8.4.1976 Case C-43/75 *Defrenne v SABENA* ECLI:EU:C:1976:56, paras 4–40.

[77] ECJ 30.1.1974 Case C-127/73 *BRT v SABAM* ECLI:EU:C:1974:6, para 16.

in cases where the ECJ has ruled against direct effect,[78] Article 8(2) DMA does not provide for an obligatory implementing measure to make a provision applicable in practice and thus effective. This is in line with the fact that Article 8(4) DMA stipulates that Article 8(2) DMA is 'without prejudice' to the Commission's sanctioning powers. The Commission is therefore not granted any political leeway to shape the DMA obligations. Rather, it is restricted to specifying the obligations with regard to particular gatekeepers in order to promote effective compliance. This is the case even if the degree of precision among the various obligations in the catalogues according to Articles 5, 6 and 7 DMA differs: the regulatory objectives and values of the DMA are so clearly formulated, and additionally specified in the recitals to the individual obligations, that these obligations are to be regarded as justiciable without hesitation.[79]

Moreover, the anti-circumvention rules pursuant to Article 13(4) and (6) DMA also have direct effect and thus create corresponding rights.[80] These prohibitions of circumvention also apply unconditionally and are effective irrespective of implementation measures by the Commission.[81] The decisive criterion for a finding of circumvention under Article 13(4) DMA is that a practice 'corresponds' to a prohibited practice,[82] i.e. that its effects are equivalent to that practice in value terms. The overriding regulatory objectives and values have been stipulated ('contestability' and 'fairness') and specified in more detail in the recitals to the individual obligations. The required effect analyses with regard to (possible) circumvention practices certainly are no more complex than, for example, the direct effectiveness of Articles 101 and 102 TFEU demands of the courts. Furthermore, it should be noted that Article 157(1) of the TFEU, the direct effect of which was endorsed by the ECJ in *Defrenne II*,[83] requires courts to apply a similar equivalence criterion when they have to consider whether a certain work is of 'equal value'. If Article 13(4) DMA is therefore to be regarded as justiciable, this applies all the more so to Article 13(6) DMA, which is in any case drafted more precisely and explained in more detail by means of various examples.

3. Illustration: strategies responding to the ban on price parity clauses

What follows from this with a view to those practices discussed in the previous part as possible circumventions of a prohibition of price parity agreements?

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[78] See, e.g., ECJ 11.1.2002 Case C-403/98 *Monte Arcosu* ECLI:EU:C:2001:6, paras 25–29. The case concerned a directive in which a Member State had been expressly required to define a concept relevant to the application of a provision.

[79] See 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, Antitrust Ambassador to the World, Liber Amicorum* (Concurrences 2021); Giorgio Monti, *Procedures and Institutions in the DMA* (CERRE 2022) 23. Some observers were sceptical as to whether Article 6 DMA should be considered to have direct effect. See, e.g., Rupprecht Podszun, 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act' (2022) 13 JECLAP 254, 264–65.

[80] See Björn Christian Becker, 'Privatrechtliche Durchsetzung des Digital Markets Act' [2023] Zeitschrift für Europäisches Privatrecht 403, 424–25.

[81] DMA, art 13(7) in conjunction with art 8(2).

[82] DMA, recital 70.

[83] ECJ 8.4.1976 Case C-43/75 *Defrenne v SABENA* ECLI:EU:C:1976:56, paras 4–40.

a) Exclusivity

If a platform operator imposes – explicitly or implicitly – exclusivity on a business user, it can effectively prevent the latter from offering its products more favourably via alternative online sales channels. If a gatekeeper de-lists a business user in reaction to such offerings, or threatens to do so, this is prohibited under Article 5(3) DMA. The fact that 'de-listing' is mentioned in the fifth sentence of recital 39 DMA as an example of measures that intolerably restrict the freedom of business users to use alternative online distribution channels points out that this conduct is directly covered by Article 5(3) DMA, i.e. without the need for recourse to Article 13 DMA.

b) De-ranking

De-ranking (or its threat) by a gatekeeper can render it (significantly) less attractive for a business user to offer its products on other online channels at more favourable terms. On the one hand, given the broad language used in recital 39, fourth sentence, DMA ('can freely choose'), one could reasonably argue that such conduct is captured directly by Article 5(3) DMA.[84]

On the other hand, however, de-ranking or the threat of it cannot, strictly speaking, 'prevent' business users from offering lower prices or better conditions off the gatekeeper platform: depending on the circumstances of the individual case, this may still be worthwhile for the business user (albeit to a lesser extent). Therefore, in the light of the use of the word 'prevent' in the text of the provision, a good case can be made that the provision does not cover all kinds of behaviour that can make differentiation of prices and conditions across different online sales channels less attractive.

Moreover, if we consider that Article 13(6) DMA explicitly covers 'degrading' of 'conditions or quality' and the 'offering [of] choices to the end-user in a non-neutral manner', this suggest that it is more in line with the DMA's anti-circumvention concept to not regard de-ranking as being directly covered by Article 5(3) DMA but (only) in conjunction with the prohibition of circumventions pursuant to Article 13 DMA. This also has the advantage that it gives the Commission the option to further clarify this through implementing measures under Article 8(2) DMA.

c) Undercutting

A platform operator, pursuing a policy of undercutting, does effectively restrict the freedom of its business users to determine their pricing policy independently: if the gatekeeper can decide on her own to reduce the price at which a product is offered to end users via her

[84] Such a reading appears to be also in line with the Commission's interpretation of Article 5(1), point (d) of Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. OJ 11.5.2022 L 134/4. See European Commission, Guidelines on vertical restraints (2022/C 248/01), para 253: 'For example, where the provider of online intermediation services makes the offering of better visibility for the buyer's goods or services on the provider's website or the application of a lower commission rate dependent on the buyer granting it parity of conditions relative to competing providers of such services, this amounts to an across-platform retail parity obligation.'

platform in such a way that the price matches lower off-platform prices, she undermines the business user's strategy to differentiate pricing among various online sales channels.

When we recall the broad wording used in recital 39, fourth sentence, DMA to describe the potential scope of Article 5(3) DMA ('ensure that business users of online intermediation services of gatekeepers can freely … differentiate the conditions under which they offer their products … to end users'), it seems that a policy of undercutting or a contractual agreement permitting it can be subsumed under Article 5(3) DMA.

However, if one looks at the text of Article 5(3) DMA and the wording of recital 39, first sentence, DMA, this allows for a different interpretation: the emphasis here is not that the business user must be in a position to ultimately set and differentiate prices and conditions across various online distribution channels but rather that the business user, given the conditions at which she offers a product on the gatekeeper platform, may offer this product at different conditions (which are more favourable for the end users) on other online channels. With such a reading of the provision, a gatekeeper's response to the exercise of this freedom (for example, by offering a product at a lower price on the user's own website) would only be captured by the prohibition if it might have the effect that the business user, anticipating the response, will not make use of the freedom that Article 5(3) DMA is intended to guarantee in the first place. In the light of our analysis above,[85] however, it is not clear why this should generally be the case, especially because the seller does not lose any profits from sales via the platform if the platform operator follows a price reduction on the seller's own sales channels by reducing prices at its own expense.

Consequently, 'undercutting' should not *as such* be covered by Article 5(3) DMA: while this practice can indeed be understood as a response of the gatekeeper to the exercise of the freedom guaranteed by Article 5(3) DMA, unlike 'de-listing' or (to a lesser extent) 'de-ranking', it has no potential to effectively hinder the business user who anticipates this response from using its leeway. Undercutting neither affects the quality of the intermediation service provided by the platform nor reduces the business users' margins achieved on sales via the platform.

This reading of Article 5(3) DMA is supported by recital 39, second and third sentences, DMA, where the regulatory objective of the provision is precisely circumscribed:

> Where such restrictions relate to third-party online intermediation services, they limit inter-platform contestability, which in turn limits choice of alternative online intermediation services for end users. Where such restrictions relate to direct online sales channels, they unfairly limit the freedom of business users to use such channels.

As our analysis has shown, it is not clear why 'undercutting' as such should be capable of necessarily producing any of these two effects. First, as long as narrow price parity cannot be enforced, price matching cannot weaken inter-platform contestability in a way equivalent to wide price parity. Second, there is no reason to presume that a price matching policy by the gatekeeper could restrict trade on direct channels (in a way equivalent to a narrow price parity clause).

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[85] See above sub II.5.c).

Therefore, as long as sales through the direct channel are a good substitute for sales via the platform, we see no good reason why 'undercutting' should be considered prohibited under Article 5(3) DMA. For the same reason, we cannot see that 'undercutting' would undermine the regulatory objectives behind the prohibition of Article 5(3) DMA. It should, thus, as such not be prohibited as circumvention under Article 13(4) DMA.

By contrast, if the direct channel is not a good substitute, there are good reasons to consider 'undercutting' to be a commercial practice undermining Article 5(3) DMA and, therefore, as an illegal circumvention attempt pursuant to Article 13(4) DMA. In a given market environment, the assessment of the constraining role of the direct channel may depend on the identity of the business users. For example, in the context of hotel booking platforms, large hotel chains may have well-established direct channels, whereas independent hotels may lack such a sales channel (or, even when visible to them, consumers may not trust the direct channel).

This illustrates a key question for the implementation of an effects-based approach to anti-circumvention: how should practices be treated that have equivalent effects to those addressed by Articles 5, 6 and 7 DMA only in certain market environments and/or only with regard to certain business users? Should it be the case that a prohibition under Article 13(4) and (6) DMA can then be applicable to only those identified scenarios? Or should it be understood that the prohibitions on circumvention can only cover practices that can be assumed to have equivalent effects to a prohibited practice for all core-platform services covered by the DMA? In support of the latter, it could be argued that the pattern of the regulatory technique of Articles 5, 6 and 7 DMA would then be extended to the anti-circumvention rules. Furthermore, allowing for a context-specific application would increase the complexity of the implementation of the anti-circumvention rules, causing higher implementation costs and greater legal uncertainty for gatekeepers.

However, it is Article 13(4) and (6) DMA's gist to safeguard the prohibitions of Articles 5, 6 and 7 DMA, i.e. to make the regulatory approach of the DMA more resilient. The interpretation of the anti-circumvention rules must be thought of in terms of this objective; therefore, it would seem to be coherent and, indeed, convincing if Article 13(4) and (6) DMA – in contrast to the obligations under Articles 5, 6 and 7 DMA – also allowed for case-specific differentiations. An extension to case-related effects analyses makes the anti-circumvention approach more effective. If one really wanted to capture as prohibited circumvention only those practices that have equivalent effects in all scenarios covered by the DMA, one would considerably reduce the safeguarding effect of Article 13(4) and (6) DMA. Moreover, implementation is, even if individual scenarios are considered, still more straightforward than, for example, competition enforcement, because the respective obligations provide normative guidance, which will be extrapolated in each case.[86] Furthermore, the Commission can contribute to legal certainty by clarifying its view of effective ('non-circumventive') compliance in the regulatory dialogue with the gatekeepers. The latter, in turn, may document and

[86] See above sub II.2.

explain their commercial practices in their compliance reporting.[87] In our view, therefore, convincing arguments speak in favour of also providing for a differentiated application of the anti-circumvention rules according to market circumstances and business users.

d) (Partial) switch to an advertising-financed business model

Where a gatekeeper, as a direct response to a ban on price parity clauses, (partly) switches to an advertising-financed business model, there is no reason to consider that this could be caught by Article 5(3) DMA. In particular, the sellers remain completely free to set and indeed differentiate the pricing for their offers on the various online distribution channels including direct channels.

Moreover, as a (partial) switch from a commission-based to an advertising-financed business model does not conflict with the regulatory objective intended by Article 5(3) DMA, it does not undermine its effectiveness and, therefore, should also not be captured via Article 13(4) DMA.

IV. Implementing a market-effects-focused approach: further illustration, challenges and limitations

As emphasized at the outset, we do not claim that our approach works as a cure-all tool for anti-circumvention. In fact, there will be many settings where the focus must be on technological know-how to monitor the effective enforcement of an obligation and to prevent circumvention. However, it remains the case that the DMA, with all its obligations, is aimed at achieving certain market effects. And, with the DMA in place and enforced, gatekeepers will learn to avoid practices directly captured by the obligations. Clear infringements will be more and more unlikely to be observed, and it will also become more challenging to identify circumvention strategies as suspicious practices will no longer be observable as a response to interventions by the enforcer. This is where economic analysis arguably plays a more important role as it can causally link market outcomes to certain business practices. Thus, if such a link between a business practice and a particular market outcome that mimics the one that would obtain under the prohibited practice, such a practice can be seen as a candidate for infringing the DMA's anti-circumvention policy. In the following, we will provide further examples of how an anti-circumvention concept that focuses on economic rationality and the intended market effects of an obligation can be implemented, and, at the same time, point out limits to this approach.

1. Bundling, Article 5(7) DMA

Article 5(7) DMA prohibits a gatekeeper to bundle a core platform service with certain services specified in the provision. It is highlighted by way of example that the gatekeeper operating an app store that is designated as a core platform service may not impose the use of its in-app payment system on app developers.

[87] See DMA, art. 11. Moreover, pursuant to DMA, art 29(5), in a non-compliance decision the Commission will have to order the gatekeeper to explain 'how it plans to comply with that decision'.

Similar to the prohibition of parity clauses, this is also an obligation that can draw on experience with the enforcement of competition law. In December 2021, the Netherlands Authority for Consumers and Markets (ACM)[88] ordered Apple to adjust its App Store conditions to enable dating-app providers to use alternative in-app payment systems other than Apple's 'In-App Purchase' ('IAP').[89]

Accordingly, it is the essence of Article 5(7) DMA that the gatekeeper must not make the use of a core platform service dependent on the use of another service specified in the provision. But the provision goes beyond this: first, Article 5(7) DMA also prohibits requiring end users to use the gatekeepers' service, thus indirectly imposing its use on business users.[90] Second, beyond the ban on obligatory use, the provision also prohibits requiring business users from offering the gatekeeper's (competing) service to end users or from ensuring interoperability with it.

a) Economic rationality and intended market effects

The purpose of Article 5(7) DMA is described in recital 43 DMA as 'protect[ing] the freedom of the business user to choose alternative services to the ones of the gatekeeper',[91] without giving a precise idea about the market effects that are desired in the light of the regulation's overall goals of promoting contestability and fairness. However, the pro-competitive impetus of the provision is obvious: gatekeepers shall be prevented from leveraging their market position, expanding it to markets for services related to a designated core platform service through bundling practices. Thus, it is the gist of the provision to ensure open markets for those latter services (identification services, web browser engines, payment services or supporting technical services for payment services), which in turn may enhance competition for further related services. In the DMA, this is illustrated by the example of the web browser engines, a core software component of every web browser:

> each browser is built on a web browser engine, which is responsible for key browser functionality such as speed, reliability and web compatibility. When gatekeepers operate and impose web browser engines, they are in a position to determine the functionality and standards that will apply not only to their own web browsers, but also to competing web browsers and, in turn, to web software applications.[92]

To be more specific, Apple, for instance, has developed the WebKit engine for its Safari browsers and, through its App Store rules, requires all (competing) browsers on iOS to use WebKit as their browser engine.[93] Thus, Apple excludes competition among browser engines for browsers. In its final report on the market study on 'mobile ecosystems', the UK's Competition and Markets Authority (CMA) maintained that, by doing so, Apple effectively 'limits the capability of all browsers on iOS devices, potentially depriving iOS users of useful

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[88] See Autoriteit Consument & Market (ACM) 24.8.2021, ACM/UIT/559984. A summary of the order as upheld by the court is available at <https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf> accessed 11 April 2023.

[89] For an overview of Apple's in-app payment system rules see Competition and Markets Authority, 'Mobile Ecosystems. Market Study Final Report' (10.6.2022) Appendix H, paras 4–7.

[90] DMA, recital 43, fifth sentence.

[91] DMA, recital 43, sixth sentence.

[92] DMA, recital 43, second and third sentences.

[93] There seems to be no doubt that Apple's App Store meets the thresholds for gatekeeper status under the DMA. See Friso Bostoen, 'Understanding the Digital Markets Act' (2023) 68 Antitrust Bulletin 263, 297.

innovations'.[94] Moreover, the CMA noted restrictive effects on web apps, 'raising developers' costs and harming innovation'.[95] Furthermore, the authority states that Apple's WebKit restriction could not be justified by security concerns and noted that 'Apple benefits financially from weakening competition in browsers via the browser engine ban'.[96]

Thus, we may conclude that, by prohibiting certain bundling practices under Article 5(7) DMA, the EU legislature aimed at protecting competition on the markets for those services mentioned in the provision against envelopment by the gatekeeper, thus ensuring potential for more innovation in these and related services and lowering costs for providers of those services.

b) Indications of suspicious practices and their assessment

The dispute between the Dutch ACM and Apple over an effective implementation of the possibility of dating-app providers using competing in-app payment methods gives a flavour of the role that Article 13 DMA may play in the context of Article 5(7) DMA. Apparently, Apple set out to make the new option unattractive through various practical complications. For example, Apple originally sought to require dating-app providers to develop and submit a new app for Apple's App Store. This would not only have resulted in considerable additional costs for the providers; they would also have run the risk of losing customers or, in any case, not winning them over to the new version of the app with an alternative payment option, as customers would have had to switch to the new app, which would have required deleting the old one and installing the new one. The ACM rejected those conditions as not effectively complying with its decision.[97] In the context of the DMA, such a request to develop and launch a completely new app in the app store when making use of the freedom to choose alternative services as protected under Article 5(7) DMA could have been rejected pursuant to Article 13(6) DMA as it would have made 'the exercise of those rights and choices unduly difficult'.

The same would also apply to the fact that Apple sought to require that the use of alternative in-app payment methods be linked with the display of a pop-up, through which end consumers were to be warned about the risks of using these payment methods:

> All purchases in the <App Name> app will be managed by the developer '<Developer Name>.' Your stored App Store payment method and related features, such as subscription management and refund requests, will not be available. Only purchases through the App Store are secured by Apple.[98]

This display characterizes Apple's standards as 'private' and 'secure', suggesting that the payment standard used by the app developer is less private and less secure than Apple's.

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[94] Competition and Markets Authority, 'Mobile Ecosystems. Market Study Final Report' (10.6.2022) para 5.57.
[95] Competition and Markets Authority, 'Mobile Ecosystems. Market Study Final Report' (10.6.2022) para 5.66.
[96] Competition and Markets Authority, 'Mobile Ecosystems. Market Study Final Report' (10.6.2022) para 5.75.
[97] See Autoriteit Consument & Market (ACM) (14.2.2022) 'ACM: Developing a New App Is an Unnecessary and Unreasonable Condition that Apple Imposes on Dating-App Providers' <https://www.acm.nl/en/publications/acm-developing-new-app-unnecessary-and-unreasonable-condition-apple-imposes-dating-app-providers> accessed 13 May 2023.
[98] See Nick Heer, 'Apple's Rules for External Payment Mechanisms in iOS Apps' (*Pixel Envy*, 4 February 2022) <https://pxlnv.com/linklog/ios-external-payment-rules> and Eric Benjamin Seufert, 'Apple to Developers: Heads I Win, Tails You Lose' (*MDM*, 7 February 2022) <https://mobiledevmemo.com/apple-to-developers-heads-i-win-tails-you-lose> accessed 14 May 2023.

Under Article 13(6) DMA, such an obligatory 'pop-up warning' can be captured as offering 'choices to the end-user in a non-neutral manner' is prohibited. Meanwhile, Apple has adapted the wording of the requested display.[99]

Things are more complicated, however, with practices related to the fee structure of the core platform services. Thus, Apple, for example, in reaction to the Dutch ACM's decision, reduced the commission charged for in-app transactions that will be operated via an alternative in-app payment system, from 30 per cent to 27 per cent.[100] Google, in an effort to comply with the DMA, originally also announced a reduction of the service fee charged to developers by three per cent if consumers used an alternative payment system,[101] but subsequently offered developers '[e]nrolling in the user choice billing pilot' a reduction of 4 per cent.[102]

Regardless of the exact amount of the discounts, the question is whether the fee structure may in fact prevent app providers from using their freedom to offer alternative in-app payment methods. This would be the case if the fee reduction were insufficient to cover the incremental cost of alternative payment methods[103] because the fee for the bundled offer would be lower than Apple's fee for in-app transactions (using an alternative payment system) plus the incremental cost associated with the use of an alternative payment system. This could be seen as a margin squeeze, which makes it unattractive not to use the bundled service and, thus, would be equivalent to the original bundling practice,[104] making it a case of an illegal circumvention pursuant to Article 13(4) DMA.[105]

2. Self-preferencing in ranking, Article 6(5) DMA

Article 6(5) DMA prohibits self-preferencing in ranking, which essentially means that gatekeepers who offer products or services through their own core platform service must not 'reserve a better position, in terms of ranking, and related indexing and crawling, for their own offering that that of the products or services of third parties also operating on that core platform service'.[106] In recital 51 DMA, examples of relevant core platform services are listed, namely online search engines, software application stores, video-sharing platforms, online

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[99] The new obligatory 'in-app modal sheet' reads: 'All purchases in this app will be processed by a service provider selected by the developer "developerName". The developer will be responsible for the payment methods and related features such as subscriptions and refunds. App Store features, such as your stored App Store payment method, subscription management, and refund requests, will not be available.' <https://developer.apple.com/support/storekit-external-entitlement> accessed 14 May 2022.

[100] <https://techcrunch.com/2022/02/04/apple-to-charge-27-fee-for-dutch-dating-apps-using-alternative-payment-options> accessed 13 May 2023.

[101] <https://blog.google/around-the-globe/google-europe/an-update-on-google-play-billing-in-the-eea> accessed 13 May 2023.

[102] <https://support.google.com/googleplay/android-developer/answer/12570971?hl=en> accessed 13 May 2023.

[103] As assumed, e.g., by Damien Geradin 'Google's Latest Attempts to Squeeze App Developers in the Face of Regulation: When Principles and Coherence No Longer Matter' (*The Platform Law Blog*, 13 September 2022) <https://theplatformlaw.blog/2022/09/13/googles-latest-attempts-to-squeeze-app-developers-in-the-face-of-regulation-when-principles-and-coherence-no-longer-matter> accessed 13 May 2023.

[104] It is sufficient that the argument applies to a sizable fraction of apps. It does not have to apply to all, since some app providers may have different preferences over the available payment systems (e.g., because of differences in the composition of the end user base).

[105] It should be noted, moreover, that Article 6(12) DMA allows the fee structure of an app store to be reviewed as to whether it grants access at FRAND conditions. See Bostoen (n 93) 300–301.

[106] DMA, recital 51, third sentence.

social networking services, online marketplaces and virtual assistants.[107] The potential scope of the provision can further be appreciated through the definition of 'ranking' provided in Article 2(22) DMA:

> 'ranking' means the relative prominence given to goods or services offered through online intermediation services, online social networking services, video-sharing platform services or virtual assistants, or the relevance given to search results by online search engines, as presented, organised or communicated by the undertakings providing online intermediation services, online social networking services, video-sharing platform services, virtual assistants or online search engines, irrespective of the technological means used for such presentation, organisation or communication and irrespective of whether only one result is presented or communicated.

The obligation thus broadly prohibits the highlighting of the gatekeeper's own offers or even the display of only its own offers to the end user.[108] Own offers in this sense include those of the gatekeeper as defined in Article 2(1) and (27) DMA and, therefore, including offers provided by 'linked enterprises or connected undertakings that form a group through the direct or indirect control[109] of an enterprise or undertaking by another'.

The prohibition of self-preferencing in ranking is inspired by competition enforcement, most notably the Commission's decision in *Google Shopping*, maintaining that Google has abused its dominant position on the search market by giving an illegal advantage to its comparison-shopping service.[110] The decision has been upheld by the General Court;[111] an appeal is pending.[112]

a) Economic rationality and intended market effects

Broadly speaking, the provision aims at fair competition on a gatekeeper platform where the gatekeeper may have a conflict of interest due to its dual role.[113] While this perspective speaks to the DMA's fairness objective, the provision must, more specifically, be understood as ensuring the contestability of markets adjacent to the core platform service: the prohibition of self-preferencing is to prevent vertically integrated gatekeepers from leveraging their position as operator of a core platform service, enveloping adjacent markets.

In the spirit of the Chicago School, one may question the implicit claim that a platform may have an incentive to engage in self-preferencing that reduces end user welfare.[114] Suppose that a monopoly platform in dual mode sells its own products and runs a marketplace for third-party sellers. Clearly, this platform has the option to drop the marketplace and operate under full vertical integration. In this case it would earn monopoly rents on its vertically integrated products. Thus, if it decides to open a marketplace (even when heavily using self-preferencing), the platform must gain from this (at least in the long run). Operating in dual

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[107] DMA, recital 51, fourth and fifth sentences.
[108] DMA, recital 52, third sentence.
[109] DMA, art 2(28).
[110] Case AT.39740, *Google Search (Shopping)*.
[111] Case T-612/17, *Google and Alphabet v Commission*, EU:T:2021:763. An appeal is pending (C-48/22 P).
[112] C-48/22 P.
[113] DMA, recital 51, first sentence.
[114] The exposition here follows partly verbatim Martin Peitz, 'The Prohibition of Self-Preferencing in the DMA, (2022) CERRE issue paper <https://cerre.eu/wp-content/uploads/2022/11/DMA_SelfPreferencing.pdf> accessed 26 May 2023.

mode, the platform may guide consumers to its own product more often than what is in the interest of consumers, at given prices. We would call this self-preferencing. However, the platform could also increase the fee it charges to sellers.[115] Sellers will at least partially pass this fee increase on to consumers. By doing so, the platform reduces the degree of self-preferencing when keeping its recommendation policy unchanged and increases its profit. Thus, it is not clear whether any observed more favourable treatment of first-party offer can be detrimental to end user welfare.

One way to think about this question is to realize that the platform in dual mode has multiple instruments that affect the net benefit that accrues to end users. This includes the retail price of its own product; the fee charged to sellers; and its steering policy, which can be thought of as affecting the visibility of third-party products vis-à-vis first-party products. With reduced visibility of third-party products, consumers will sometimes buy the first-party product even though, at given prices, consumers would prefer to buy from a third-party seller. When further reducing visibility, which increases the profit from selling the first-party product but reduces the profit that stems from the fee charged to sellers, the platform has to compensate the consumers to keep the consumer's net benefit unchanged.

Why would a platform in dual mode then bias rankings in favour of its first-party products when it could increase its fee charged to sellers? Incentives to do so are particularly strong in cases in which the platform is not free to change the fee it charges to sellers. Most obviously, this is the case if that fee is zero. An example is the *Google Shopping* case, in which there are no fees for organic search results and, therefore, strong incentives for Google to bias organic search results in favour of first-party offers.

More generally, if the platform chooses uniform fees for broad product or service categories, this fee is not tailor-made for a specific product or service. The platform can use algorithms to adjust rankings and favour first-party products and services over the corresponding third-party products and services when the uniform fee is lower than the fee that would be profit-maximizing for these specific products or services. This even holds in cases in which the fee is product-specific but in which the fee cannot be easily changed over time and sales conditions vary over time; a particular instance is situations in which the opportunity costs of third-party sellers vary over time but are unobservable to the platform when setting the fee but can be incorporated by the algorithm that determines the ranking.

b) Indications of suspicious practices and their assessment

What are the possible responses by a platform to the prohibition of self-preferencing? One obvious option would be an increase in the fee charged to third parties. Another response would be the use of a more granular fee structure, taking into account the specificities of products and services. Yet another response could be to fully or partially replace organic rankings by paid-for advertising in which third-party sellers could bid for different ad slots and in which the platform or its integrated first-party unit could also make bids for these slots.

[115] For a related discussion, see Richard Feasey and Jan Krämer, Implementing Effective Remedies for Anti-Competitive Intermediation Bias on Vertically Integrated Platforms, (2019) CERRE report, ss 2.2 and 2.3 <https://cerre.eu/wp-content/uploads/2020/05/cerre_report_intermediation_bias_remedies.pdf> accessed 26 May 2023.

Instead of participating in these ad auctions, the platform might also provide a specific placement of its first-party offers that is not available to third parties but is clearly marked as a first-party offer. Yet another response by the platform could be to scale down or even cease its first-party activities and instead sign bilateral agreements with selected third-party sellers, which are then offered exclusively or presented more favourably than other third-party sellers.

We do not claim to be able provide an exhaustive list of possible responses, but want to point out that those responses could be wide-ranging. Certainly, this does not imply that any such observed change of platform behaviour is necessarily a response to the prohibition of self-preferences, as it may be partly or fully motivated by other changes of market conditions beyond the control of the platform. The pressing question for our purposes is which of those responses can be seen as equivalent to self-preferencing. The answer is not straightforward and may depend on the concrete circumstances. We comment further on four possible responses.

(1) Fee increase. As explained above, an unregulated platform may prefer self-preferencing with moderate fees over high fees. With the prohibition of self-preferencing, the platform may thus have an incentive to raise its fees. The economic consequences are similar to self-preferencing in the sense that end users obtain lower net benefits than in a situation with moderate fees and no self-preferencing. Consequently, a fee increase could be seen as a strategy undermining the effects intended by a prohibition of self-preferencing and, therefore, as a practice suspected of circumventing this obligation. However, such a conceptualization would raise a number of challenges. First, it would seem difficult to establish in a legally secure manner that a fee increase was in fact entailed by waiving self-preferencing and, thus, as being intrinsically linked to the respective DMA obligation. What is more, with new product categories introduced with the prohibition in mind, no fee increase may be observable and yet fees are high because of the prohibition being already in place. Even when the prohibition can be seen as causing high(er) fees, implementing the anti-circumvention mandate is not straightforward. Essentially, the Commission or a court applying the anti-circumvention rules would need to regulate the fee level. It would have to do so without a clear benchmark as to what constitutes a fair fee. Thus, we submit that, owing to these implementation problems alone, one should refrain from considering a price increase as a candidate for illegal circumvention of the prohibition of self-preferencing. This, of course, does not preclude evaluating the level of fees based on Article 6(12) DMA as to whether access to software application stores, online search engines and online social networking services is granted on FRAND terms.

(2) A more granular fee structure. With self-preferencing in place, a platform operator tends to prefer uniform fees for broad categories of products or services for a number of reasons: they are more easily administered; they are more immune to complaints about discrimination from third parties; and they are a response to possible hold-up problem.[116] In contrast, after a

[116] The hold-up problem that may arise is that the platform may be able to extract most of the surplus for product-specific fees. Then, if a third party must make upfront investments and foresees this rent extraction, it may decide not to enter. Uniform fees protect third parties from such ex post rent extraction.

prohibition of self-preferencing, the platform will have an incentive to opt for a more granular structure, possibly taking into account which products it would like to have important first-party sales for. Market outcomes may then be qualitatively similar to those under self-preferencing. Thus, this practice may be seen as candidate for a circumvention strategy. However, since there are many reasons for a redesign of the fee structure, it may be difficult to relate a change in business practice to the compliance with the prohibition of self-preferencing, a challenge that will become more pressing the longer the DMA is in place.

(3) Ad funding and differential placements. A platform may respond to the prohibition of self-preferencing in organic rankings by taking first-party offers out of its organic ranking and placing them prominently outside this ranking, possibly accompanied by sponsored offers (sold through ad auctions). Such a practice may steer end users to first-party offers and, therefore, have economic effects similar to self-preferencing.[117] On a broad interpretation, this could well be captured as a circumvention strategy under Article 13(4) DMA. However, the Commission and/or the courts making such an assessment should be aware that, with such an understanding, they would effectively be taking on the role of a product designer. In our view, where a gatekeeper, in response to a DMA obligation, makes material changes to its business model, classifying this shift as a prohibited circumvention may exceed the mandate under Article 13(4) DMA. Rather, it should then be for the EU legislature to make a new appraisal and possibly to expand the catalogue of obligations in the DMA.

(4) Bilateral contracting and exclusivity. A platform may completely redesign its business model and fully or partly withdraw first-party offers and instead engage in bilateral contracting with select third parties, with the outcome that instead of steering end users to first-party offers (i.e. self-preferencing) it then steers end users to select third parties.[118] In the extreme, it mutates to a closed platform and only provides access to these select third parties. The economic outcome may then resemble the one under self-preferencing. In the extreme, non-select third parties are completely excluded. While it seems possible to call this a circumvention practice, the anti-circumvention prohibition may then lead to the prohibition of a wide set of business practices whose economic effects are complex to evaluate, and which may not be intrinsically related to the self-preferencing prohibition. In coining such radical changes to a business model, even if it comes with equivalent (undesired) economic effects, a circumvention of the prohibition on self-preferencing would exceed the powers conferred upon the Commission and courts under Article 13 DMA. This is not to say that there are no regulatory limits to such behaviour. With regard to software application stores, online search engines and online social networking services, Article 6(12) DMA prescribes FRAND access.

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[117] Ironically, in the *Google Shopping* case, the (then) Commissioner Joaquín Almunia considered endorsing the second settlement proposed by Google that would have implemented such a business model: apart from displaying Google's vertically integrated offer prominently there would have been another prominent display of three competitors for Google's first-party offers. These three additional slots would have been auctioned off to the highest bidders with the auction revenues going to Google. See, e.g., Alex Barker, 'Google, Almunia and the long march to settlement' Financial Times (29 October 2013).

[118] Amazon's 'Amazon Exclusive' programme by is an example of a platform providing particular benefits to select brand manufacturers. To qualify, a brand manufacturer must offer distinct products on Amazon that are not available on other e-commerce platforms. In return, Amazon offers various advantages. These include the ability to avoid Amazon's price matching, brand protection by not allowing copycats onto the marketplace and, under some conditions, improved visibility in Amazon's search results.

Furthermore, designated core platform services will typically be subject to abuse control under antitrust law, from which a right to access and/or a prohibition of discrimination among (potential) business users may ensue.

V. Concluding remarks

The DMA rests on the ideal of establishing clear and precise rules, thus creating a high level of legal certainty, keeping the administrative costs of implementation and enforcement low, and promoting a high level of compliance. A great deal of legislative effort has gone into achieving this. Yet this regulatory technique brings with it the 'whack-a-mole challenge'. The gatekeepers have every incentive to devise new practices with the same effects. While the Commission and the EU legislature can (and should) respond by enacting delegated acts or expanding the catalogue of DMA obligations, they may only be buying themselves time until the next round of circumvention practices. Therefore, the DMA's anti-circumvention rules must be viewed as an essential coverage of its rule-based regulatory approach and, in fact, as an instrument to prevent the legislative effort that went into creating the DMA obligations from being creepingly devalued. As we have shown, the practices captured by the anti-circumvention rules are subject to the same instruments of public and private enforcement as the obligations under Articles 5, 6 and 7 DMA.

We have argued that, to identify practices that are to be categorized as illegal circumventions as they correspond to the obligations laid down under Articles 5, 6 and 7 DMA, an effects-based approach will be needed. While our proposed three-step procedure may be seen as a cumbersome approach to implement Article 13(4) and (6) DMA, we do not see any alternative to draw the line between legal and illegal responses to the DMA's obligations. Certainly, it would not be adequate to look only at gatekeeper responses based on the time a new business practice would appear. If the timing of a practice were crucial, which should then be the appropriate limiting principles on the application of the anti-circumvention rule? While this may thus make intervention overly intrusive in the short term, over time it will rarely occur to observe immediate responses to obligations covered by Articles 5, 6 and 7 DMA, since (a) gatekeepers will learn to anticipate restrictions and, thus, avoid practices (directly) covered by Articles 5, 6 and 7 DMA, and (b) even if they fail to foresee them they will carefully plan when to respond with a practice that may constitute a circumvention strategy. Under such an approach, the DMA's anti-circumvention concept would likely lose its power over time.

We also note that the decision of whether a particular practice classifies as a circumvention strategy may be context-specific. This means that the equivalence of the practice cannot always be established before analysing the specifics of the market environment and it may be that it has to be differentiated depending on the market position of the business user.[119] While this may be seen as yet another complication in applying Article 13 DMA, a less flexible approach would either fail to satisfy the equivalence criterion or take the bite out of the anti-circumvention concept, namely if only those practices that would under all market

[119] See sub III.3.c).

conditions yield corresponding effects could qualify as ‘equivalent’. Moreover, investigating possible circumventions should be the focus of the European Commission.[120] If it were to implement an effects-based analysis of practices under the anti-circumvention prohibition, this would leave a footprint by the European Commission. This will likely be helpful for gatekeepers in navigating compliance with the DMA and will allow them to document and explain their practices in their compliance reporting. Hence, legal uncertainty would be less than may be feared.

We acknowledge the normative limitations of an effects-based approach, which the general prohibition of circumvention under Article 13(4) DMA also encounters. Such limits are apparent with regard to across-the-board fee increases or where gatekeepers make material changes to their business model or even completely redesign it. Even if, in such scenarios, market effects equivalent to those of a prohibited practice could be shown in individual cases, their capture as an anti-circumvention practice would generally involve excessive implementation difficulties and exceed the powers conferred on the Commission and the courts by Article 13 DMA.

Certainly, an effects-based approach to anti-circumvention reduces legal certainty, falling short of the expectations some may have associated with the DMA. However, no one should be under the illusion that neat and precise core obligations alone can have the effects they are intended to have if the gatekeepers do not have to fear that evasive manoeuvres will be strictly scrutinized and, if necessary, stopped.

[120] Crémer and others (n 4) 7.