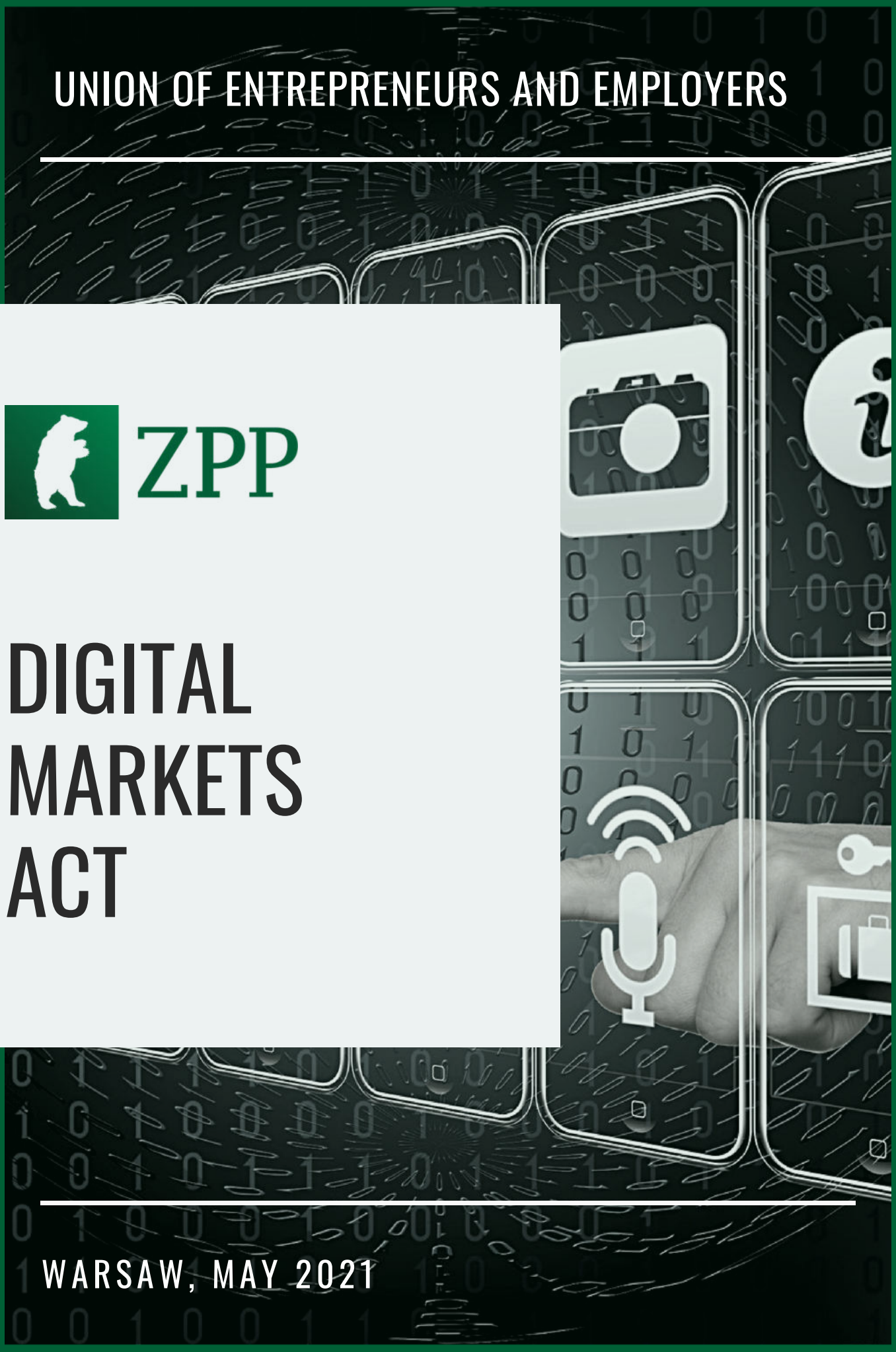
UNION OF ENTREPRENEURS AND EMPLOYERS

ZPP

DIGITAL MARKETS ACT



WARSAW, MAY 2021

INTRODUCTION

On 15th December 2020

the European Commission (EC) submitted a proposal for a Regulation on contestable and fair markets in the digital sector (COM(2020) 842), commonly known as the Digital Markets Act or DMA. The DMA tries to respond to some of the challenges related to digitisation and to ensure fair conditions for online competition.

The Union of Entrepreneurs and Employers supports all initiatives aimed at improving the competitiveness and functioning of digital markets. Nevertheless, it does appear that the DMA can lead to a number of unforeseen consequences. Shortly after becoming Executive Vice President of the European Commission for A Europe Fit for the Digital Age, Margrethe Vestager stated: “We’ll need rules, including a new Digital Services Act, which can make sure that platforms serve people, not the other way round” [1].

[1] Margrethe Vestager, Building a positive digital world, speech at the Digital Summit in Dortmund, Germany on 29th October 2019, available at: https://ec.europa.eu/competition/speeches/index_2019.html.

The rules put forward in the DMA apply to access watchdogs, i.e. large digital platforms which, according to the EC, are unavoidable business partners for smaller online businesses and therefore require special scrutiny [2]. The use of media slogans, however, does not serve as guarantee of good law [3].

New rules and regulations on how data is used and aggregated as well as how digital platforms guide consumers might lead to competition and innovation being hampered which would be detrimental to both European consumers and businesses [4].

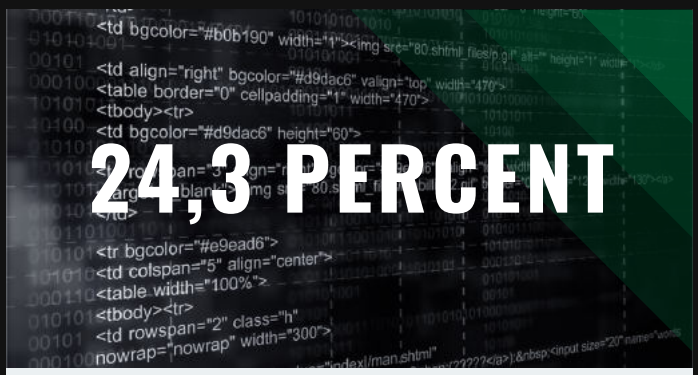
Experts indicate that by 2025, as much as 24.3% of global economic activity will take place in the digital sector and the value of the digital economy will rise to USD 23 trillion [5].

Broadly understood digitalisation is rightly regarded as one of the most important drivers of the EU's economic recovery [6]. The share of the digital sector in generating Polish GDP is also rising dynamically – from 3% in 2014, 6.2% in 2016, to the forecast 12% in 2025. In light of the growing economic significance of the digital sector, any and all necessary measures must be taken so that overregulation does not stifle its growth and endanger recovery from the coronavirus crisis.

DMA can lead to a number of unforeseen consequences.

[2] Cf. Recital 2 of the draft Regulation on contestable and fair markets in the digital sector COM (2020) 842 (DMA).
[3] Cf. Daniel Beard and Jack Williams, The pitfalls of preventing discrimination through ex ante regulation, available at: https://chillingcompetition.com/2020/09/04/the-pitfalls-of-preventing-discrimination-through-ex-ante-regulation-by-daniel-beard-and-jack-willams/.
[4] Carmelo Cennamo and Daniel Sokol, Can the EU Regulate Platforms Without Stifling Innovation?, available at: https://hbr.org/2021/03/can-the-eu-regulate-platforms-without-stifling-innovation#.
[5] Oxford Economics, Digital Spillover – Measuring the true impact of the digital economy, available at: https://www.oxfordeconomics.com/recent-releases/digital-spillover.
[6] European Council, A digital future for Europe, available at: https://www.consilium.europa.eu/en/policies/a-digital-future-for-europe/.

BY 2025

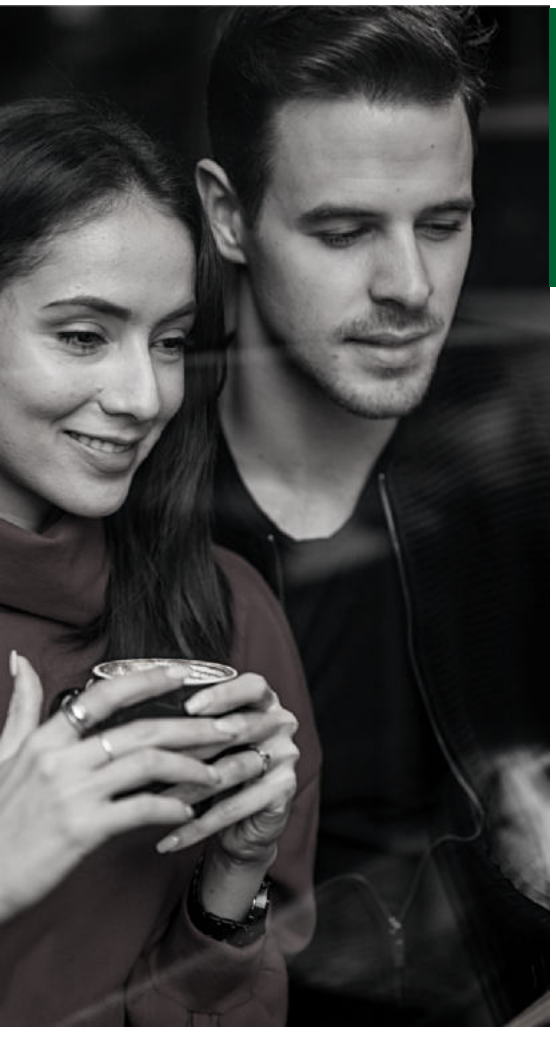


24,3 PERCENT

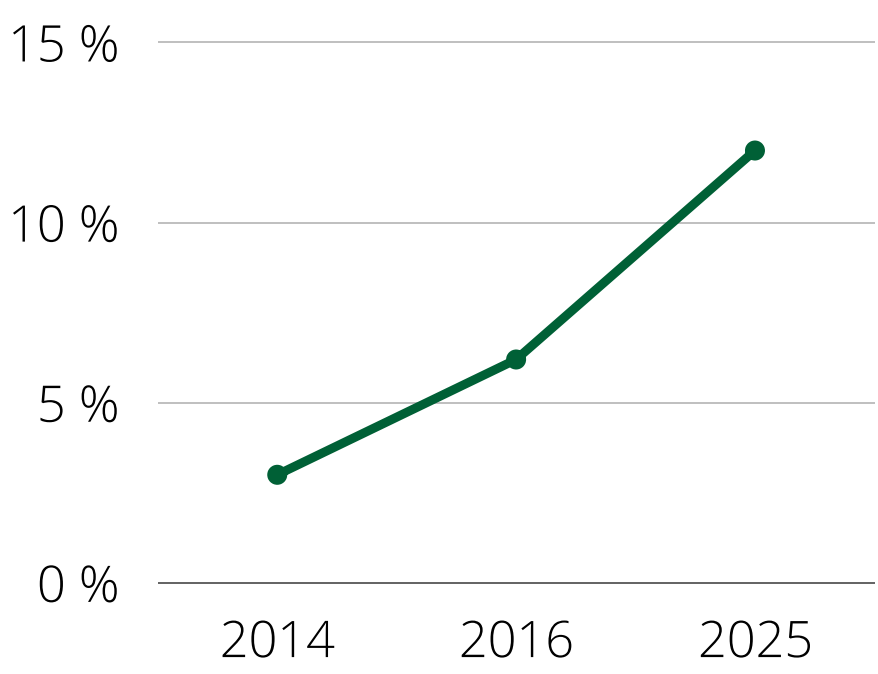
GLOBAL ECONOMIC ACTIVITY
WILL TAKE PLACE
IN THE DIGITAL SECTOR

UP TO
$ 23 TRILLION

THE VALUE OF THE DIGITAL
ECONOMY WILL INCREASE



DIGITAL SECTOR SHARE IN CREATING POLISH GDP



New rules and regulations on how data is used and aggregated as well as how digital platforms guide consumers might lead to competition and innovation being hampered which would be detrimental to both European consumers and businesses.

From the perspective of digital regulations, adapting the regulations to the constant technological progress is a major challenge. The government of the United Kingdom commissioned a report that argues that “persistent” and problematic dominance characterises the largest web portals as they hold a large market share in their industries for a long time [7]. This statement is a reflection of the traditional way of measuring competition based on market shares, concentration, and market launch opportunities [8]. It fails, however, to take into account that the main source of competition in digital markets is not the imitation and duplication of existing products, but their complementation and differentiation [9].

Search engines dominate the entry points to the web, leaving portals and browsers behind. Mobile networks have replaced desktop computers, and social networks have changed personal and professional communication forever [10]. Traditional analysis searches for similarities between products to find the market competitive. When evidence of product interchange-ability is lacking, the regulator can easily conclude that there is insufficient competition and, consequently, announce market failure [11].

[7] Jason Furman et al., Unlocking digital competition, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.
[8] Gregory Sidak and David Tecee, Dynamic Competition in Antitrust Law, Journal of Competition Law and Economics, Vol. 5, Nr. 4, (2019) 581-631.
[9] Cf. Nicolas Petit, Big Tech and the Digital Economy: The Moligopoly Scenario, Oxford University Press, 2020.
[10] Nicolas Petit, Big Tech Platforms and Schumpeter’s Creative Destruction, available at: https://promarket.org/2020/11/19/big-tech-platforms-indirect-entry-antitrust/.
[11] Ibidem.

In our view

the DMA ought to be investigated with respect to other digital regulations, thus showing the changes currently taking place in the legal environment of the digital sector. This report identifies specific elements of this regulation which, due to their potentially excessively stringent nature, may negatively affect consumers, business users, SMEs, data protection and environmental quality.

„We will need legislation, including a new act about digital services that will ensure that platforms serve people, not the other way around".

Margarethe Vestager

The photo comes from the website https://www.mainlifestyle.dk

REGULATING

THE DIGITAL ECONOMY

Regulating the digital economy is currently one of the most important topics on the agenda of the world's largest organisations, including the World Trade Organization, the International Monetary Fund, the World Bank, the Organisation for Economic Co-operation and Development, and the European Union [12].

Recently, only at the level of the European Union, a number of regulations has been introduced, the purpose of which is to regulate enterprises operating in the broadly understood digital ecosystem. The DMA is merely one example of new regulations to follow the likes of the GDPR, the P2B Regulation, the ePrivacy Regulation, the Digital Services Act, the regulation on preventing the dissemination of terrorist content online, and the regulation on digital services tax.

[12] Daniil Petrovich Frolov and Anna Victorovna Lavrentyeva, Regulatory Policy for Digital Economy: Holistic Institutional Framework, Montenegrin Journal of Economics Vol. 15, Nr. 4 (2019), 33-44.

In 2018, Regulation 2016/679

on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, commonly known as GDPR, entered into force, thus repealing Directive 95/46 /EC. This regulation introduced specific requirements for businesses and organisations as well as to a considerable degree changed the way personal data is collected, stored, and managed [13]. The GDPR applies to European entities processing personal data of natural persons within the EU, as well as to entities based in third countries, directing their offer to residents of the European Union. Importantly, the GDPR applies to all entities, regardless of their size. It is estimated that the average implementation cost of GDPR in SMEs exceeded PLN 32,000 [14]. A study on the impact of the GDPR on SMEs, conducted in July 2019, showed that many small businesses lacked the resources – in terms of both finances and personnel – to adapt to the new requirements [15].

[13] YourEurope, Data protection under GDPR, available at: https://europa.eu/youreurope/business/dealing-with-customers/data-protection/data-protection-gdpr/index_en.
[14] Instrum Justicia, Europejski Raport Płatności (The European Payments Report), available at: https://logsystem.pl/blog/32-tys-zlotych-to-sredni-koszt-wdrozenia-rodo-w-msp-az-20-firm-nie-wie-co-to/.
[15] Support Small and Medium Enterprises on the Data Protection Reform II, Report on the SME experience of the GDPR, available at: https://www.trilateralresearch.com/wp-content/uploads/2020/01/STAR-II-D2.2-SMEs-experience-with-the-GDPR-v1.0-.pdf.

Similarly to the GDPR repealing Directive 95/46/EC

the ePrivacy Regulation will replace the Directive on privacy and electronic communications 2002/58 /EC, which has been in force for 20 years.
The ePrivacy Regulation regulates issues related to privacy in electronic communications in the EU. Besides adapting the legal framework to new technologies, the regulation also aims to adapt the provisions on electronic communications to the GDPR [16]. The new regulation is to increase the protection of data from electronic communications services. For example, the obligation of confidentiality will cover data obtained through the provision of traditional communication services, but also data obtained in connection with the provision of the so-called OTT services, or over-the-top communications services. These services relate to real-time communication operating via the Internet; therefore, they include Voice-over-Internet-Protocol (VoIP), e-mail services, and popular instant messaging services. Interestingly, the provisions of the ePrivacy Regulation, unlike the GDPR, are to apply to natural persons as well as legal entities.
The new regulations will bring about a number of changes, including cookies and cookie walls management policy, online advertising, electronic marketing or metadata administration.

[16] European Commission, Proposal for an ePrivacy Regulation, available at: https://digital-strategy.ec.europa.eu/en/policies/eprivacy-regulation.

The new requirements will be particularly acute for start-up companies and enterprises from the SME sector, which do not have access to large amounts of data, contacts or customer databases. At the same time, the new restrictions will translate into higher prices for services, such as advertising, and will reduce the smaller entities' ability to compete. In 2020, Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services, the so-called P2B Regulation, entered into force. It applies to providers of online intermediation services and Internet search engines [17]. Online payment services, online advertising tools, online advertising exchanges, which are not provided in order to facilitate the initiation of direct transactions and do not include contractual relations with consumers, are excluded from the scope of the P2B Regulation [18].

The new requirements will be particularly acute for start-up companies and enterprises from the SME sector, which do not have access to large amounts of data, contacts or customer databases.

[17] European Commission, Platform-to-business trading practices, available at: https://digital-strategy.ec.europa.eu/en/policies/platform-business-trading-practices.
[18] Błażej Grochowski and Agnieszka Sagan-Jeżowska, P2B: Nowe wymagania dla pośredników w eCommerce (P2B: New requirements for eCommerce intermediaries), available at: https://eizba.pl/eversheds-sutherland-wierzbowski-p2b-nowe-wymagania-dla-posrednikow-w-ecommerce/.

The aim of the new rules is to ensure transparent and fair cooperation conditions for users of business platforms.

To comply with the P2B Regulation, ISPs (Internet service providers) need to include many new elements in their terms of service contracts with business users that allow for fair access to consumers. Thus, the regulation forced suppliers to revise contracts along with terms and conditions for the provision of services. Importantly, the regulation also introduced new requirements for handling business user complaints and bringing cases to mediation [19]. Since the entry into force of the P2B Regulation in July 2020, no impact assessment has been carried out regarding its functioning. Nonetheless, the EC proposed new measures to regulate the behaviour of ISPs and platforms in the form of the DMA and the Digital Services Act.

It is estimated that the average implementation cost of GDPR in SMEs exceeded PLN 32 000.

[19] Ibidem.

At the very same time as the DMA,

the Digital Services Act (COM(2020) 825) known as the DSA is being processed to repeal the Directive on electronic commerce adopted in 2000. The text of the new regulation was presented in December 2020 and the works are already in progress. It will regulate online intermediation services, including hosting services, online platforms, and very large online platforms (VLOPs). Although the regulation maintains some of the provisions introduced by the Directive on electronic commerce, it creates a new framework that may disrupt the functioning of the digital single market. For example, according to the country-of-origin principle introduced by the electronic commerce directive, companies providing digital services are obliged to comply with the law of their country of origin, not the law of the country where the consumer is located.

Regulation creates a new framework that may disrupt the functioning of the digital single market.

Nowadays, this principle has become the cornerstone of the digital single market

that allows digital business to develop. The country-of-origin principle is important for enterprises from the SME sector and from the Central and Eastern European region in particular, as it eliminates the fear of applying foreign laws in the event of a court dispute and, consequently, the fear of the need to use the services of specialised lawyers and legal offices. Although the principle has not been formally challenged in the draft act, the large scope of Coordinators' regulatory interventions may violate this principle and lead to disharmonisation of the rules in force.

Furthermore, the DSA introduces changes that will affect the content published on the Internet. For instance, Art. 17 of the proposed regulation changes the system for handling complaints by online platforms. Importantly, this provision applies to all platforms, not just VLOPs. Under this provision, platforms are required to ensure a human touch in handling complaints. Given the scale at which content moderation takes place, including billions of spam messages or inappropriate content, this provision is too uncompromising in terms of its requirements. It also means that the complaint handling process will become significantly longer. More importantly, such a requirement will particularly affect smaller entities with limited human resources and, therefore, a limited capacity to handle complaints.

The grievance process will be considerably longer.

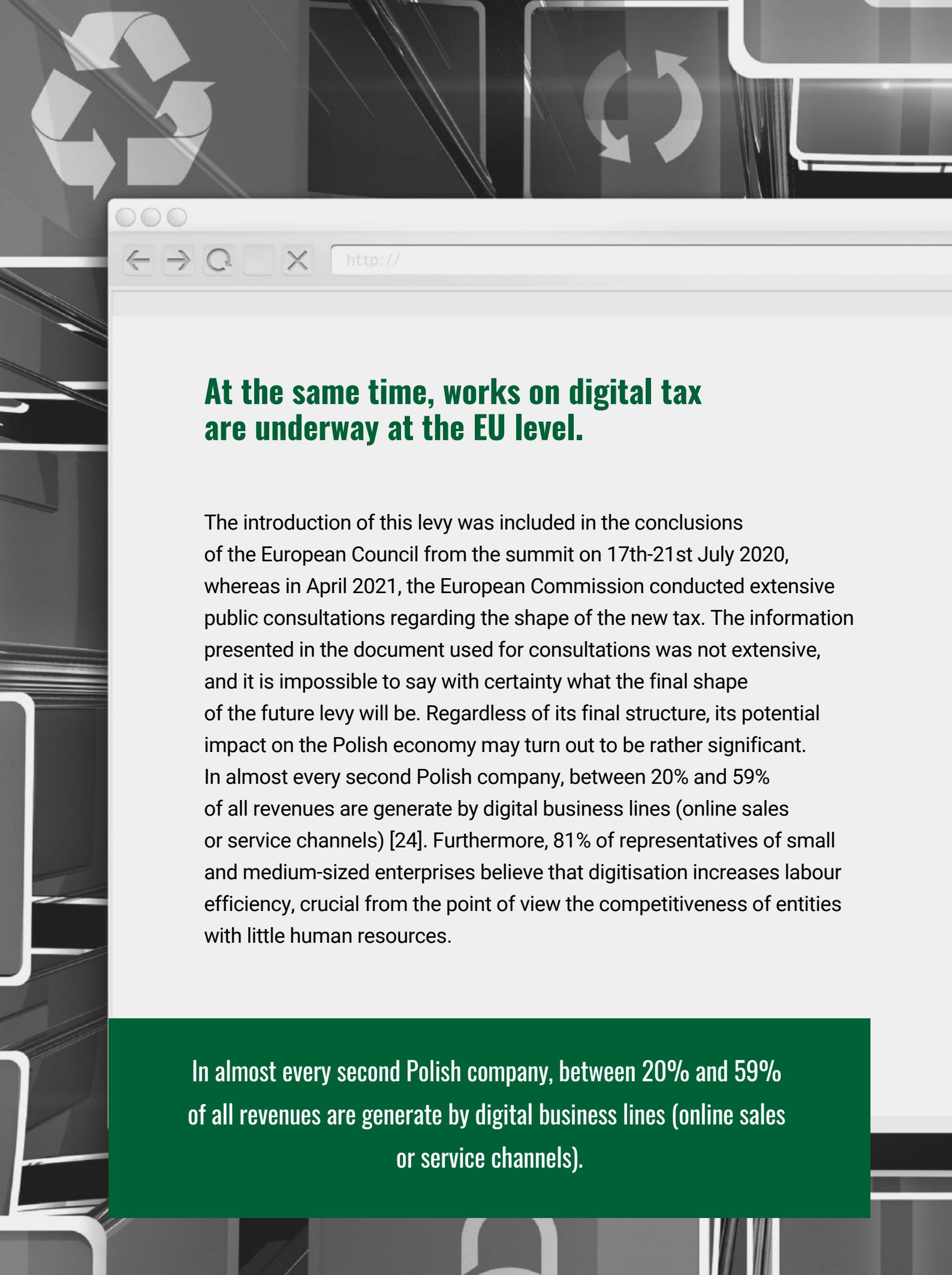
Notably, on 28th April 2021, the European Parliament adopted the Regulation on preventing the dissemination of terrorist content online, also known as the TCO. The new regulation obliges platforms to remove or block access to content flagged as being of terrorist nature within a maximum time of one hour. No obligation to monitor or filter content has been imposed on the platforms. However, if national authorities determine that a specific platform is extremely vulnerable to terrorist propaganda, it will have to take appropriate measures to prevent the publication of such content. The regulation allows freedom in the choice of measures, but the use of algorithms or the employment of moderators will undoubtedly generate costs for platforms and will as a result affect the prices of services for enterprises and consumers.

What remains an important issue of Internet censorship resulting from content filtering.

As many as 79 human rights organisations signed an open letter to MEPs urging them not to support the TCO [20]. In their letter, they argued that the regulation would encourage platforms to use automated content moderation tools that do not distinguish the purpose of the publication and are unable to distinguish between propaganda and satirical material [21]. Notably, as a result of the introduced changes, legal materials documenting, amongst other, discrimination against minorities might be removed [22]. Said organisations emphasised that the removal of materials exposing violence in war zones was already a serious problem presently, making it difficult to collect evidence and identify the guilty parties [23].

As many as 79 human rights organisations signed an open letter to MEPs urging them not to support the TCO.

[20] Jowita Kiwnik Pargana, PE przyjął przepisy o usuwaniu treści terrorystycznych (European Parliament adopted legislation on the removal of terrorist content), available at: https://www.dw.com/pl/pe-przyj%C4%85%C5%82-przepisy-o-usuwaniu-tre%C5%9Bci-terrorystycznych/a-57379054.
[21] Ibidem.
[22] Ibidem.
[23] Ibidem.



At the same time, works on digital tax are underway at the EU level.

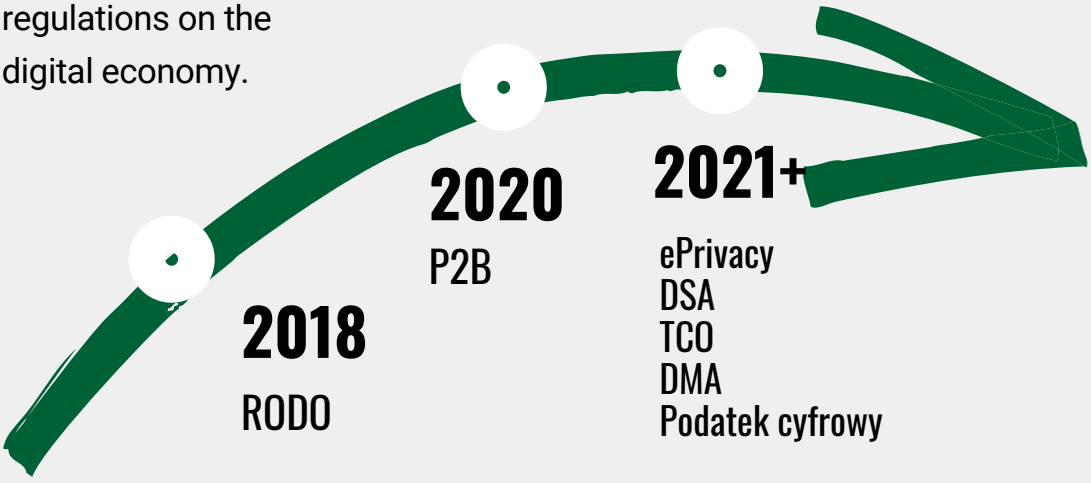
The introduction of this levy was included in the conclusions of the European Council from the summit on 17th-21st July 2020, whereas in April 2021, the European Commission conducted extensive public consultations regarding the shape of the new tax. The information presented in the document used for consultations was not extensive, and it is impossible to say with certainty what the final shape of the future levy will be. Regardless of its final structure, its potential impact on the Polish economy may turn out to be rather significant. In almost every second Polish company, between 20% and 59% of all revenues are generate by digital business lines (online sales or service channels) [24]. Furthermore, 81% of representatives of small and medium-sized enterprises believe that digitisation increases labour efficiency, crucial from the point of view the competitiveness of entities with little human resources.

In almost every second Polish company, between 20% and 59% of all revenues are generate by digital business lines (online sales or service channels).

[24] Związek Przedsiębiorców i Pracodawców (Union of Entrepreneurs and Employers), Podatek cyfrowy i wynikające z niego zagrożenia (Digital tax and the risks arising from it), available at: https://zpp.net.pl/wp-content/uploads/2019/11/Podatek-cyfrowy-i-wynikaj%C4%85ce-z-niego-zagro%C5%BCenia.pdf.

The increase in service prices related to tax shifting will be severe for contractors of large digital economy entities, and therefore also to a large extent for companies from the SME sector. It turns out, therefore, that in spite of declarations according to which the digital tax was supposed to be designed to burden the “largest of players” financially, it will in fact constitute an additional cost for the sector of micro, small and medium-sized enterprises, making it difficult for them to use modern digital solutions, essential to the development of their companies [25].

With the above-mentioned facts in mind, two basic conclusions can be drawn about the impact of the new regulations on the digital economy.



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[25] Ibidem.

1. DIRECTIVES ARE REPLACED BY REGULATIONS

A directive is a legal act

enforced in an EU member state that is binding in terms of the final result, not in terms of the specific means of achieving it. Differences between individual member states emerge in the process of transposing directives, thus making greater use of the regulations will strengthen the legal integrity of the digital single market. However, in the case of regulations, including the Digital Markets Act, the European Commission provides for the possibility of clarifying certain provisions by means of delegated acts. The content of these secondary acts is largely decided by the European Commission, and therefore neither the member states, nor the European Parliament have any influence over it. At the same time, the risk arises that the exact content of these acts will go beyond the established legal framework defined in a democratic process – the risk of the so-called backdoor regulation. The broad competences of the European Commission in the area of delegated acts mean that it becomes a de facto regulator, not subject to democratic control.

2. THE MULTIPLICITY OF NEW REGULATIONS REDUCES LEGAL CERTAINTY AND HAMPERS ECONOMIC ACTIVITY

The multiplicity of new regulations generates the risk of conflicts between legal acts. First of all, some of the issues raised in the Digital Markets Act have already been regulated by the P2B Regulation. New regulations, introduced prior to the evaluation of the effectiveness of the P2B Regulation, threaten to further increase complexity for participants in the digital economy without achieving the intended result. Secondly, the DSA establishes the obligations and responsibilities of platforms to remove content posted online – similar to the Terrorist Content Online Regulation or the Directive on Copyright in the Digital Single Market. The latter two pieces of legislation have a narrower scope than the DSA, but all three are as a matter of fact limited to regulating online content, as well as they establish different obligations and liability thresholds for online platforms.

The high number of new regulations is a source of difficulties in terms of definitions and procedures, and as a result also reduces legal certainty. At the same time, this means that companies operating in the digital sector must take into account the high costs related to adapting their activities to new requirements. Due to limited resources, companies from the SME sector will be disproportionately burdened with these costs. Ultimately, compliance costs can become a barrier either to market entry, or expansion for certain companies.

DIGITAL MARKETS ACT

DMA VS COMPETITION LAW

The assumptions of the DMA seem to be declaratively serving the right goals

– securing competition within the market and providing consumers with a wide range of available services and suppliers. However, the draft regulation contains certain solutions that might have negative consequences for consumers and businesses as well as the market. It is important to fine-tune the rules in such as to improve them, not worsen the quality of the EU's digital single market.

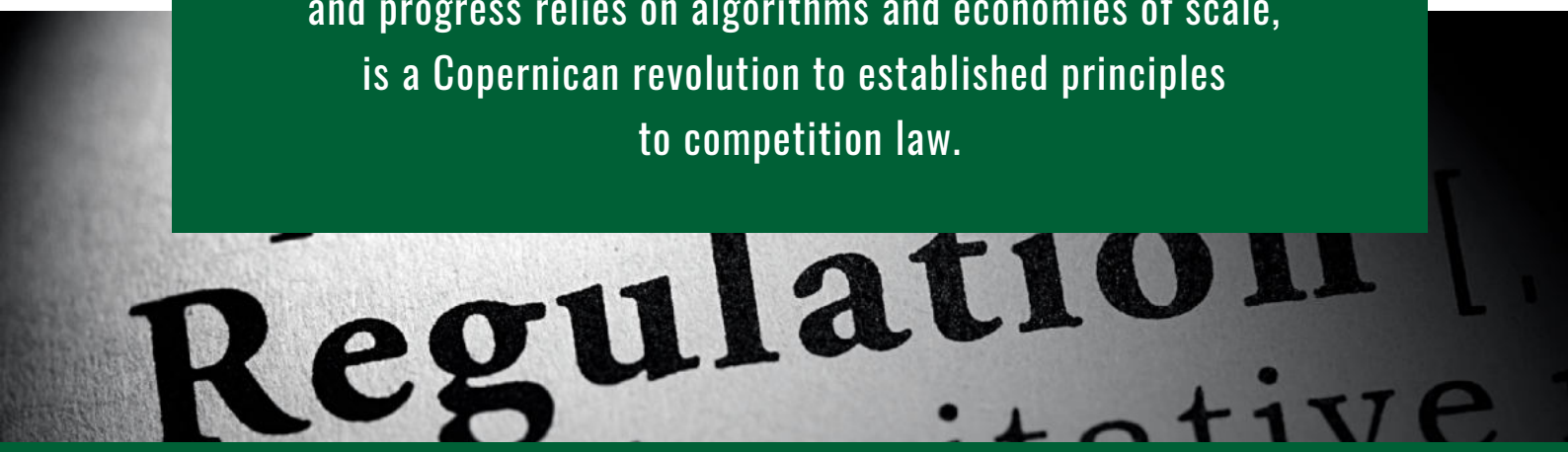
As was mentioned in the introduction, the DMA provides a new concept of the so-called gatekeepers, which are large online platforms that control access to information and services in the digital sector. A number of new obligations are imposed on gatekeepers to ensure fair treatment for business users and a better offer for consumers. The obligations imposed are ex ante controls, i.e. they regulate the behaviour of enterprises in a preventive manner, before potential market irregularities occur.

Ex ante control

is applied when regulating the utilities sectors, that is, in markets with natural monopolies. The energy sector and telecommunications are examples of such markets. Privatization led to a situation where the dominant operator "inherited" a systemic monopoly, and thus significant market power [26]. Competing through the creation of a parallel grid, e.g. for energy, is unprofitable, and therefore, to liberalise the market and create the possibility of competition, ex ante non-discrimination requirements were imposed on dominating companies to, for example, allow access to the grid [27]. The introduction of ex ante controls in digital markets, where networks are the result of investment and competition, and progress relies on algorithms and economies of scale, is a Copernican revolution to established principles to competition law [28].

Competition law is based on an ex post control system and prohibits, amongst others, the abuse of a dominant market position. In the law of the European Union, one can find a relevant regulation in Art. 102 of the Treaty on the Functioning of the European Union (TFEU) and in individual national acts. When a company abuses its dominant position, for instance by applying discriminatory practices against its trading partners (Art. 102(C)), the European Commission or a relevant national authority on competition has the right to initiate proceedings and punish the company in question, as it did take place in recent cases before the Court of Justice of the European Union as well as national courts [29].

The introduction of ex ante controls in digital markets, where networks are the result of investment and competition, and progress relies on algorithms and economies of scale, is a Copernican revolution to established principles to competition law.



[26] Daniel Beard and Jack Williams, The pitfalls of preventing discrimination through ex ante regulation, available at: https://chillingcompetition.com/2020/09/04/the-pitfalls-of-preventing-discrimination-through-ex-ante-regulation-by-daniel-beard-and-jack-willams/.
[27] Ibidem.
[28] Ibidem.
[29] Cf. C-525/16 MEO and CAT 27 Royal Mail v. Ofcom.

However, the European Commission recognises that the harmful structural effects of unfair trade practices (UTPs) on digital markets are so severe that ex ante controls ought to be applied [30]. Among actions leading to the limitation of choice for the consumer and reduction of competition, the authors mention the effects of dependence on one supplier and the lack of multi-homing [31] by users – the practice of simultaneous use of different platforms [32]. Additionally, the share of multi-homing users and the share of users switching between different platforms and services were listed together as one of the three DMA indicators of monitoring implementation [33]. The DMA impact assessment study also identifies barriers to supplier switching as a "key challenge" [34].

Despite such a clearly defined thesis, the DMA and all accompanying documents contain rudimentary evidence to support the phenomenon of the lack of multi-homing. This supporting study cites one reference to studies conducted ten years ago in which the vast majority of iPhone owners planned to purchase another phone from the same company [35]. The study did not provide any additional empirical evidence to support the lack of multi-homing [36].

The supportive study also concluded that "strong network effects" can make it difficult for users to switch platforms [37]. To support this thesis, the results of a consumer focus group carried out for the supportive study were cited. The problem, however, lies therein that the consumer focus group in question consisted of one 90-minute meeting with nine people [38]. In light of the above, it should be stated that the EC has failed to present any evidence that would justify taking systemic actions with far-reaching consequences for many digital platforms and markets [39].

[30] Explanatory Memorandum to the DMA, 4.
[31] Recital 2 of the DMA.
[32] Justus Haucap, Competition and Competition Policy in a Data-Driven Economy, available at: https://www.intereconomics.eu/contents/year/2019/number/4/article/competition-and-competition-policy-in-a-data-driven-economy.html.
[33] Recital 2 of the DMA. skutków finansowych regulacji, ¶ 1.4.4.
[34] Pinar Akman, A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835280.
[35] Ibidem.; European Commission, Digital Markets Act – Impact Assessment Support Study, Executive Summary and Synthesis Report, 15, available at: https://op.europa.eu/en/publication-detail/-/publication/0a9a636a-3e83-11ebb27b-01aa75ed71a1/language-en.
[36] Ibidem.
[37] Ibidem.
[38] Ibidem.
[39] Pinar Akman, A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835280.

To make matters worse,

the results of a study conducted on a sample of over 11,000 consumers from ten countries on five continents, reveal a much more complicated picture of consumer behaviour. While the prevalence of multi-homing varies by platform and country, it occurs in every surveyed country and on every type of platform analysed, including search engines, instant messaging, e-commerce, and social networks [40]. At the same time, more than 40% of respondents decided to stop using a given platform within the last two years [41]. The above results clearly indicate that the thesis about the lack of multi-homing is not supported by empirical research [42].

Moreover, despite the introduction of an ex ante control system, the DMA does not exclude ex post controls [43]. In other words, the DMA does not replace the current legal regime established under Art. 102 TFEU, but creates a new layer of regulation. This is associated with serious problems. First of all, the creation of a new "regulatory infrastructure" may generate definition disputes and uncertainty [44]. Secondly, we currently do not know what the interaction between the "old competition law" and the DMA will look like. A fundamental and crucial question from the perspective of enterprises relates to DMA measures: will they be applied in addition to antitrust measures, or will the solutions introduced in the DMA be considered lex specialis and applied separately? Both of these factors will significantly reduce legal certainty, which will diminish the willingness of entities to take risks and thus slow technological progress, to the detriment of consumers and business users [45].

The EC cannot derive any benefits that could lead to operating systems with far-reaching consequences for the platform and its follow-up.

[40] Ibidem, 12.
[41] Ibidem, 34.
[42] Ibidem.
[43] Ibidem.
[44] Ibidem.
[45] Ibidem.

The slowdown in technological development

has measurable effects. Badri Narayan and Hosuk Lee-Makiyama from the European Centre of Political Economy attempted to calculate the costs resulting from the introduction of ex ante controls [46]. Their research shows that the introduction of the new regulations will lead to a loss of around EUR 85 billion of GDP and EUR 101 billion of lost consumer welfare [47].

These losses can be compared to the loss of all the benefits the EU economy has gained so far from bilateral free trade agreements.

To conclude, the European Commission presented fragmentary evidence to support the thesis of existing market problems, which it then used to justify the need to introduce horizontal obligations.

As a result, the DMA will spark major changes in competition law and thus reduce legal certainty and companies' willingness to invest and innovate. The following quote from Daniel Beard and Jack Williams serves as the perfect punch line: "Sponsoring lawyers and compliance departments to be involved in extensive exchanges with regulators is an excellent means of shifting resources from technology developers to professional services providers. But it is far from clear that social utility and consumer welfare is enhanced by such a process" [48].

It may increase the risk of unjustified regulatory intervention. It may encourage operators to be excessively conservative. In a rapidly changing industry, a complex regulatory process can be a real obstacle to innovation.

[46] Badri Narayan and Hosuk Lee-Makiyama, Economic Costs of Ex ante Regulations, available at: https://ecipe.org/wp-content/uploads/2020/10/ECI_20_OccPaper_07_2020_Ex-ante_Regulations_LY06.pdf.
[47] Ibidem.
[48] Daniel Beard and Jack Williams, The pitfalls of preventing discrimination through ex ante regulation, available at: https://chillingcompetition.com/2020/09/04/the-pitfalls-of-preventing-discrimination-through-ex-ante-regulation-by-daniel-beard-and-jack-willams/.

„Sponsorship of compliance checks with lawyers
in the replacement control system with frequency
is the repair of the organ and department from technology
management to service or service delivery.
It is not clear whether such a process of increasing utility,
but lighting does”.

Daniel Beard i Jack Williams

The photos come from the website www.monckton.com.

RESPONSIBILITIES OF GATEKEEPERS

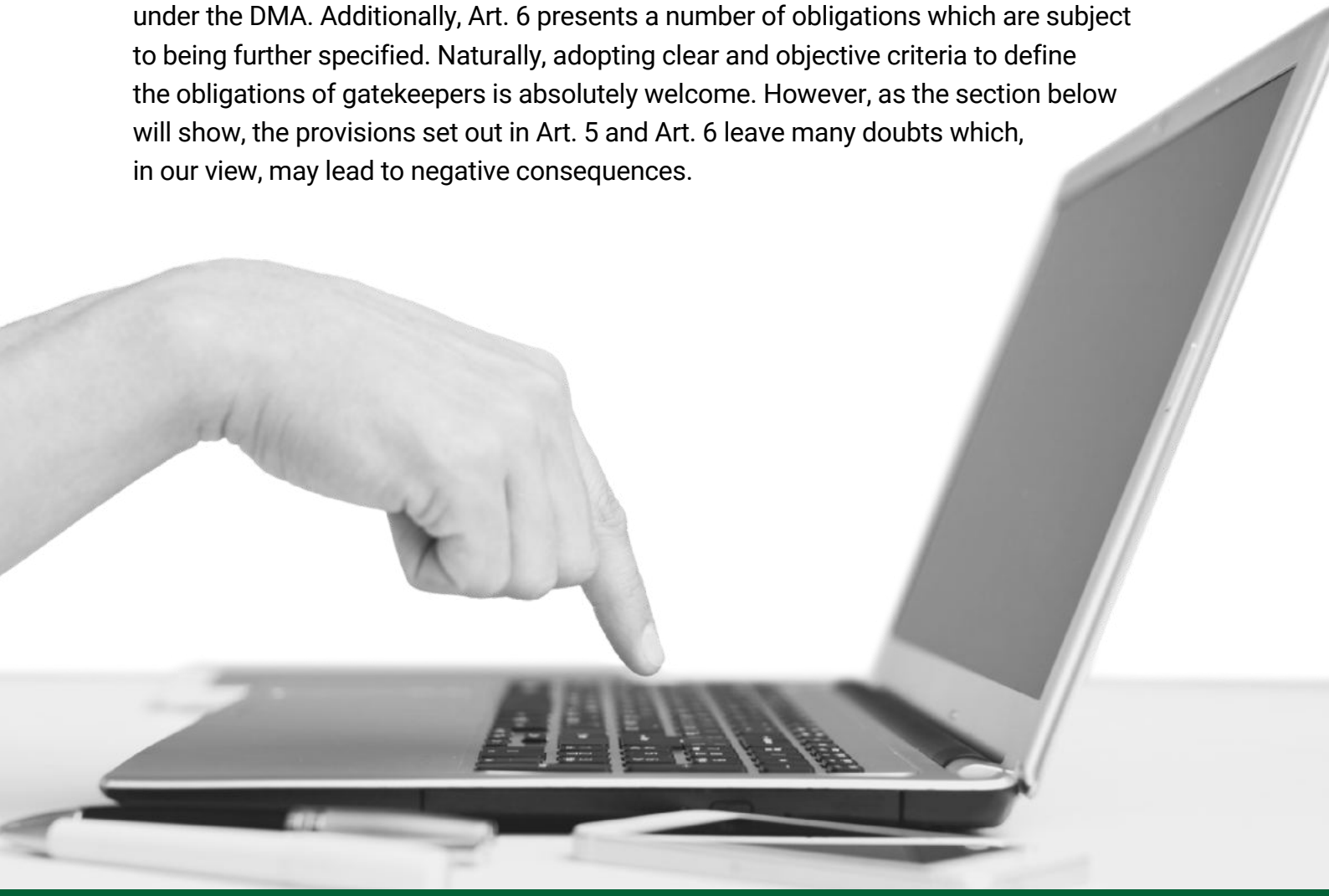
The draft of the DMA establishes new responsibilities for gatekeepers, i.e. enterprises that control “core services” serving as an important “gateway” for business users to reach end users. These services include online intermediation, search engines, social networking, video sharing platform services, interpersonal electronic communication services, operating systems, cloud services, and advertising services. The DMA introduces arbitrary criteria for the designation of gatekeepers relating to turnover (annual turnover within the EEA amounting to minimum EUR 6.5 billion over the last three years) and the number of active users (at least 45 million monthly active end users in the EU and at least 10,000 active EU-based business users annually). These criteria represent a departure from established competition law practices. The concept of dominant position on the market under Art. 102 TFEU is the subject of extensive jurisprudence of the CJEU, based on objective criteria such as market share [49].

Moving away from recognised and well-functioning competition law practices and replacing them with arbitrary thresholds may lead to innovation hampering, for example companies might purposely stop growing in order not to exceed the thresholds and become the subject of more demanding regulation.

[49] Damien Geradin et al., The Concept of Dominance in EC Competition Law, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=770144.

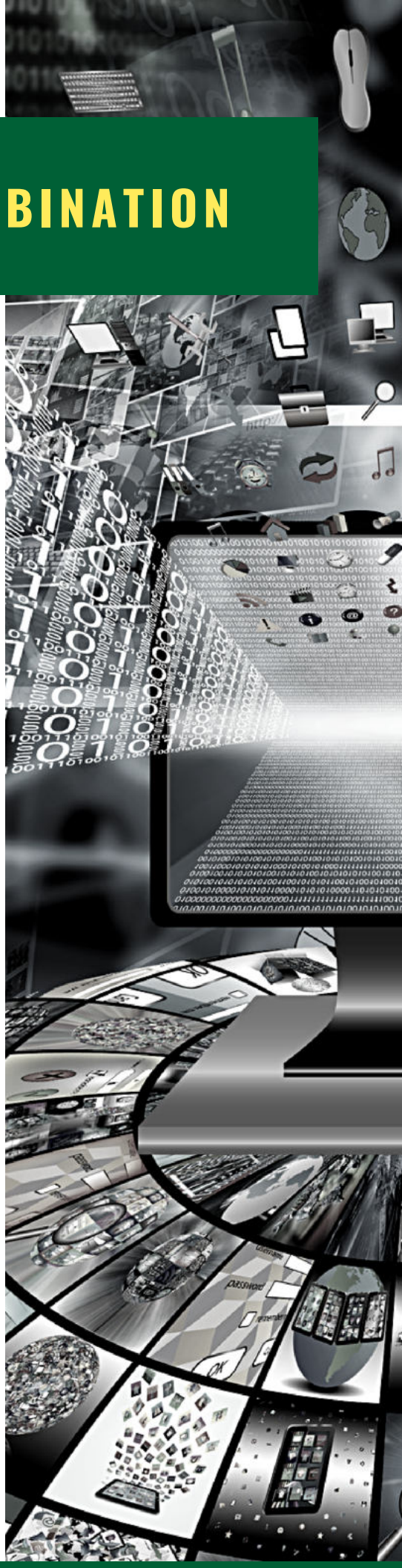
Importantly

the list of criteria on the basis of which an enterprise can be designated as a gatekeeper is open. Art. 3(6) of the draft DMA states that the European Commission may consider a company that has not reached the above-listed thresholds as a gatekeeper, but it significant impacts – in the opinion of the Commission – the internal market and has achieved an established and durable position in the area of its activity. To this end, the EC takes, among others, the following into account: the turnover, the number of business users, entry barriers, scale effects, or the dependence of business or end users on a single supplier, but also other structural characteristics of the market – which manifests that the catalogue of prerequisites is open. Provisions that are formulated this way pave the path to their arbitrary application and raise serious doubts with regard to the compliance of such an approach with basic principles such as justice, legal certainty, and the rule of law [50]. From the perspective of companies active in the digital sector, this is naturally a huge risk that could lead to an artificial limitation of their activities. The DMA distinguishes between two categories of duties. The obligations outlined in Art. 5 are not subject to being further clarified, i.e. the practices described in said article are prohibited under the DMA. Additionally, Art. 6 presents a number of obligations which are subject to being further specified. Naturally, adopting clear and objective criteria to define the obligations of gatekeepers is absolutely welcome. However, as the section below will show, the provisions set out in Art. 5 and Art. 6 leave many doubts which, in our view, may lead to negative consequences.



[50] Daniel Beard and Jack Williams, The pitfalls of preventing discrimination through ex ante regulation, available at: https://chillingcompetition.com/2020/09/04/the-pitfalls-of-preventing-discrimination-through-ex-ante-regulation-by-daniel-beard-and-jack-willams/.

PROHIBITION OF DATA COMBINATION

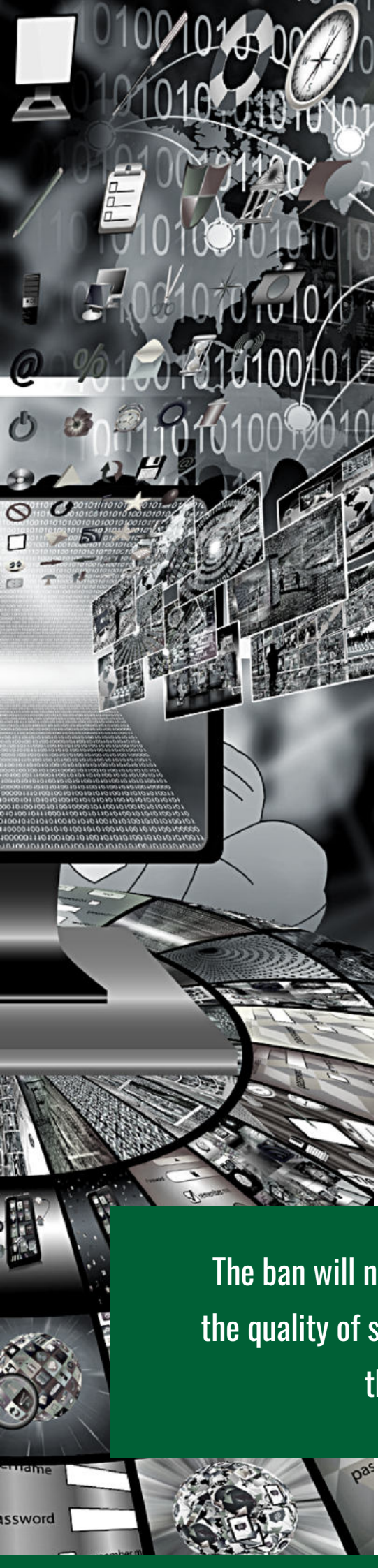


Pursuant to Art. 5(a)

a gatekeeper “refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, (…) unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679”. This provision is inspired by the case of Bundeskartellamt (the Federal Cartel Office of the Federal Republic of Germany) against Facebook.

In accordance with Facebook’s regulations, users could use the portal only if Facebook could also collect user data outside of Facebook on the Internet or within smartphone applications and assign this data to the user’s Facebook account. All data collected on the Facebook platform or services being part of Facebook, such as WhatsApp and Instagram, and on third party websites can be aggregated and assigned to the user’s Facebook account. As a result of this case, Bundeskartellamt prohibited Facebook from combining user data from different sources without the user’s express consent [51].

[51] Bundeskartellamt, Bundeskartellamt prohibits Facebook from combining user data from different sources, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.



The DMA similarly prohibits data combination

but extends the ban established by Bundeskartellamt to combining data from different services of the same gatekeeper. Such a provision can lead to many practical inconveniences for users. The inability to combine data as part of the services offered by a single gatekeeper will change the way of using the services that, in the eyes of consumers, have been a single service so far.

For example, one will need to log in to related applications separately. While, from the consumer's point of view, such a change may only be limited to more mouse clicks, the prohibition of data combination has serious technical and economic consequences. The ban will not only hamper the possibility of improving the quality of services provided, and even lead to their deterioration. The inability to combine data from various services, such as maps and search engines, will lead to a decline in the quality of targeted advertising, which is the basis of many entrepreneurs' business model.

The ban will not only hamper the possibility of improving the quality of services, and even an example to deteriorate the quality of services provided.

At the same time

the legitimacy of such a restriction is questionable should one take into account the data protection guaranteed by the GDPR. It is also noteworthy that the GDPR lists six possible legal grounds for processing data, only one of which requires user consent. There is no hierarchy within this list; however, any and all processing of personal data should be based on the legal basis that is most appropriate in the circumstances of the processing in question [52]. The DMA deviates from this concept by proposing merely express consent as a valid legal ground for data combination.

Interestingly, the DMA seems to limit the possibility of combining data only in a situation where the user has not consented to their processing. Therefore, in practice, the DMA will not lead to greater protection of the users' data, but will only limit itself to the necessity to providing new consent in the form of clicking the appropriate window.

The DMA deviates from this concept by proposing merely express consent as a valid legal ground for data combination.

[52] University College Dublin, Six Legal Bases for Processing – GDPR Article 6, available at: https://www.ucd.ie/gdpr/about/sixlegalbasesforprocessinggdprarticle6/.

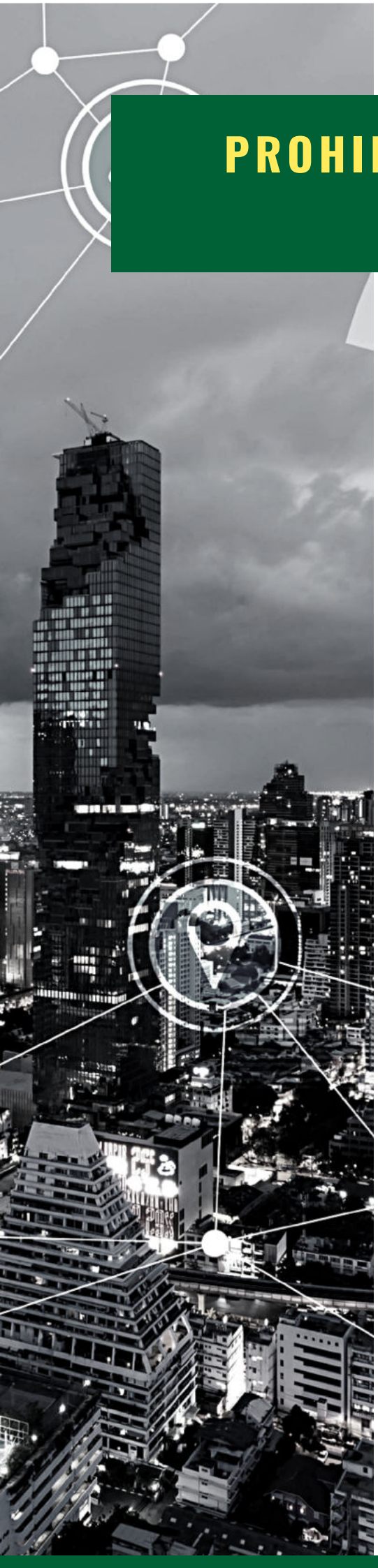
TRANSPARENCY

Pursuant to Art. 5(g),

a gatekeeper shall “provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper”.

The purpose of the above article is to establish transparency in relations with business users. Transparency supports building good cooperation, but one should remember that the basic principle governing business relations is the freedom to conclude contracts. Furthermore, contracts are very often subject to confidentiality obligations. At the same time, Art. 5(g) of the draft DMA may be interpreted as requiring gatekeepers to have access not only to the prices that the contractor pays, but also to the disclosure of prices paid by a competitor. In our opinion, the provision in its current wording cannot be applied in business relations.

The basic principle governing business relations is the freedom to conclude contracts, which are often subject to confidentiality obligations.



PROHIBITION OF USE OF BUSINESS USER DATA

Art. 6(1)(a) of the draft DMA

obliges gatekeepers to “refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users”.

The purpose of this ban was to prevent gatekeepers from monitoring their business users’ data in order to better place ads and price their competing products and services. Interestingly, Recital 45 of the DMA, which relates to cloud services, states that the prohibition of the use of business user data “should not affect the right of gatekeepers to use aggregated data for providing ancillary data analytics services, subject to compliance with Regulation 2016/679 and Directive 2002/58/EC as well as with the relevant obligations in this Regulation concerning ancillary services”. The provision of ancillary services has therefore only been allowed for cloud services – other Internet services will have to adhere in full to this ban.

At the same time,

one should note that Art. 6(1)(a) of the draft DMA may have adverse effects in terms of advertising and search engines. In its current wording, the regulation may lead to a practical limitation of the use of geolocation. Thanks to geolocation, consumers can find the services or products they are looking for close to their location. This is both time-efficient and convenient. More importantly, geolocation allows one to find places in one's area that have no website. At this point, one ought to note that over 25% of European SMEs do not have a website [53]. The result of the adoption of the discussed regulation would be their omission from search engine results without the geolocation function. This would mean that the deterioration of the situation of smaller companies might be an unforeseen consequence of DMA.

art. 6(1)(a) of the DMA project may have adverse effects in terms of advertising and search - it may lead to a practical limitation of the use of geolocation.

[53] University of Cambridge, The Environmental Impact of the Internet, available at: https://www.statista.com/statistics/910088/smes-in-europe-that-have-a-website/.

PROVIDING ACCESS TO DATA

Art. 6(1)(a) of the draft DMA,

a gatekeeper shall “provide to any third party providers of online search engines, upon their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper, subject to anonymisation for the query, click and view data that constitutes personal data”.

The purpose of this provision is to provide access to data. Such a solution may in theory contribute to the growth of business users that make use of the services of gatekeepers. However, in practice, it raises a lot of controversy. The fundamental problem with data sharing relates to the protection of privacy. The GDPR obliges such entities to prevent the identification of data of natural persons. Similarly, we see in Art. 6(1)(j) an obligation to anonymise personal data. The question then arises how to share data that is compliant with data protection regulations and that will be useful for business users. Furthermore, it seems problematic to make data available to a potentially unlimited number of entities. The regulation does not specify the terms on which data would be made available, or what standards of data security have to be ensured by entities requesting access to data. Correspondingly, the DMA does not contain any provisions regulating liability in the event of data protection violation.

Another threat is related to potential abuses.

A provision formulated this way paves the path for bad actors to misuse the DMA in order to obtain information about the functioning of algorithms and to disrupt the functioning of search engines.

Ultimately, one must consider the environmental impact of increased data traffic. In 2020, the ICT industry was responsible for 3.6% of the entire global carbon footprint, and data centres are responsible for 45% of the industry's total carbon footprint, an increase of 12% compared to 2010, and this figure will grow exponentially [54].

Moreover, it is possible that anonymised data will not be of value to business users. Then we will find ourselves in a situation where the DMA generates costs for the environment without any real value. Therefore, it seems necessary to conduct a thorough impact assessment of the proposed regulation and to make sure that it is compliant with other strategic European objectives.

In 2020, the ICT industry was responsible for 3.6 percent global carbon footprint, and data centers are responsible for 45 percent the industry's total carbon footprint, an increase of 12 percent compared to 2010.

[54] University of Cambridge, The Environmental Impact of the Internet, dostępne pod adresem: https://www.statista.com/statistics/910088/smes-in-europe-that-have-a-website/.

SUMMARY

At the declarative level,

the DMA aims to ensure fair conditions for online competition and improve the welfare of European consumers. However, we are concerned that the DMA could lead to the opposite of its intended consequences: degrade the quality of digital services provided to European businesses and consumers, slow down technological development, reduce economic growth, and ultimately threaten the recovery from the coronavirus pandemic. There are several potential sources of these risks.

First of all, the DMA is not an act detached from the legal system of the European Union, but an integral part of the rapidly changing regulatory environment of the digital sector. In our report, we list seven legal acts regulating the broadly understood digital economy that have entered into force or have been proposed since 2018 – and it is not a comprehensive list.

Importantly, the scope of application of some of these regulations overlaps, for example: the GDPR with the ePrivacy Regulation in terms of protection of personal data of natural persons; the P2B Regulation with the DMA with regard to regulating the terms of cooperation with online platforms; the Terrorist Content Online Regulation with the Directive on Copyright in the Digital Single Market and the DSA in relation to online content. The European Commission seems to be proposing new regulations without taking into account the fact that the time required for a reliable impact assessment of the previous one has often not ended yet.

By acting this way, the EC not only significantly increases the regulatory burden on entrepreneurs, generating costs and hindering business operations, in particular for small European entities, but also reduces legal certainty, which discourages companies from risk taking, innovation, and investments. Digital tax is another initiative that, due to its transferability, will translate into increased costs for business partners of large digital platforms and consumers – that is – European men and women.

The DMA could lead to the opposite of its intended consequences: degrade the quality of digital services provided to European businesses and consumers, slow down technological development, reduce economic growth, and ultimately threaten the recovery from the coronavirus pandemic.

Furthermore, we observe a trend of replacing directives with regulations. In principle, doing so will strengthen the legal integrity of digital single market. However, one should keep in mind that the EC provides for the possibility of specifying the provisions of regulations, including the DMA, by means of delegated acts, which opens the way to the so-called backdoor regulation.

Secondly, the changes proposed in the DMA constitute a “Copernican Revolution” in relation to the established rules of competition law. In the opinion of the European Commission, the harmful structural effects of unfair practices are so severe that the control system should be changed from ex post to ex ante. The lack of multi-homing and the barrier to platform changing by users are the key features of platforms threatening competition and the welfare of consumers. However, no reliable evidence has been cited to support this thesis. In fact, to prove the lack of multi-homing in the entire digital sector, one study on the use of a specific model of smartphones from a decade ago was cited, and the difficulties in changing the platform used are

justified in relation to the results of the focus group, which consisted of one 90-minute-long meeting with nine people. To make matters worse, the results of a survey of more than 11,000 consumers located in ten countries on five continents show that multi-homing occurs in every country covered by that study, and that over 40% of the respondents decided to stop using a platform. The above results clearly show that the rhetorical theses that justify the enormous changes introduced by the DMA are not supported by empirical findings.

The European Commission seems to be proposing new regulations despite the fact that the time allowing for a reliable assessment of the effects of the previous one has often not elapsed. In this way not only significantly increases the regulatory burden on entrepreneurs, generating costs and hindering the functioning of business, in particular for small European entities, but also reduces legal certainty, which discourages enterprises for risk taking, innovation and investment.

Besides, the DMA, despite the introduction of an unjustified ex ante control system, does not exclude ex post controls under Art. 102 TFEU. Legal uncertainty will deter enterprises from taking risks and innovating – again to the detriment of both consumers and businesses.

Ultimately, one ought to note that slowing down technological progress risks losing around EUR 85 billion of GDP and EUR 101 billion of consumer welfare – equivalent to all the benefits that the EU economy has gained thus far from bilateral free trade agreements [55].

Third, there is a number of provisions in the draft DMA that might potentially have unintended consequences. The prohibition of combining data from different services offered by the gatekeeper may entail practical inconvenience for users, hinder improvement and even degrade the functioning of the application, bringing questionable added value, given that the protection of personal data is guaranteed by the GDPR. The provision on transparency can be interpreted as requiring entrepreneurs to be transparent with regard to the prices paid by a given contractor, as well as the prices paid by a competitor.

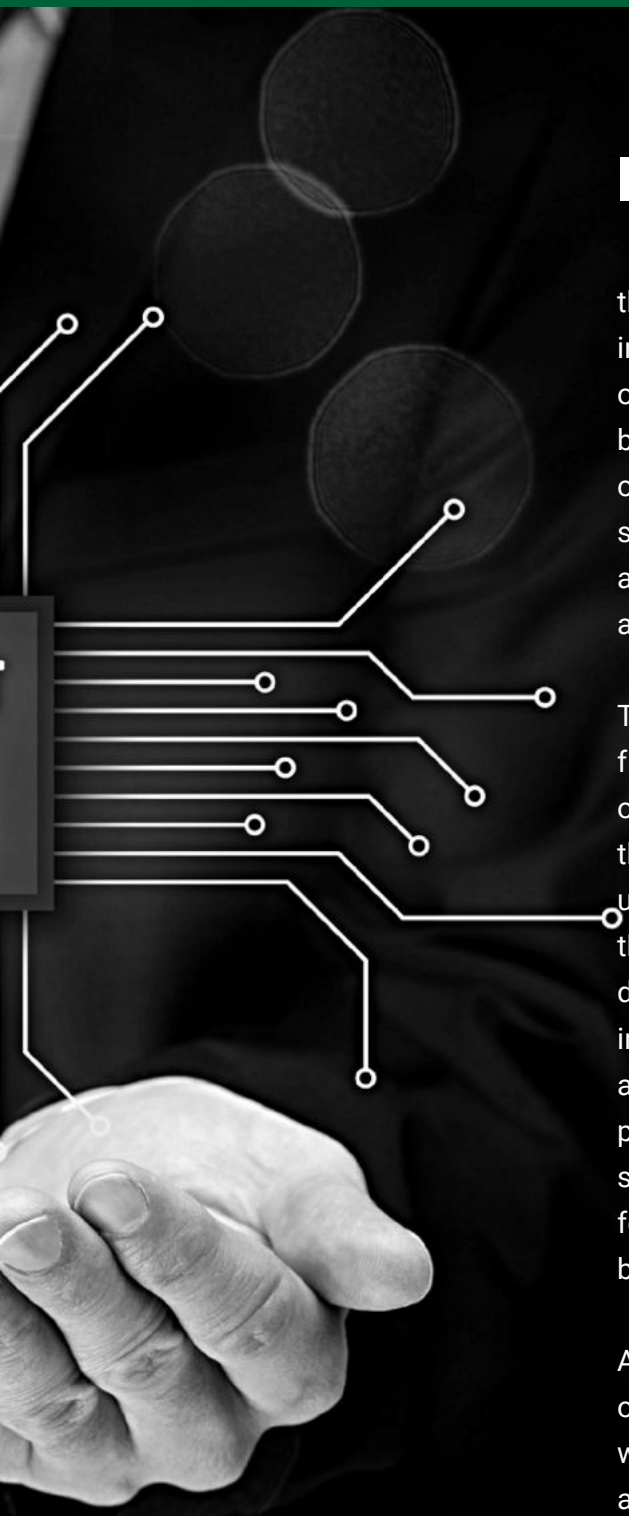
SLOWDOWN IN TECHNOLOGICAL PROGRESS THREATENS TO LOSE THE EUROPEAN UNION (IN EURO)

85 billion GDP

and

101 billion PROSPERITY CONSUMERS

[55] Badri Narayan i Hosuk Lee-Makiyama, Economic Costs of Ex ante Regulations, available at: https://ecipe.org/wp-content/uploads/2020/10/ECI_20_OccPaper_07_2020_Ex-ante_Regulations_LY06.pdf.



In our opinion,

the provision in its current wording is impossible to apply in business relations. The prohibition of the use of data of business users is intended to prevent unfair competition, but in practice it may lead to a deterioration in the quality of services provided, including limiting geolocation when searching – this will have the greatest impact on small and medium-sized enterprises that do not have a website and whose visibility will as a result decrease.

Then, the provisions on ensuring access to data raise doubts from a data protection perspective. The legitimacy of the provision may be questioned also taking into account the fact that anonymised data will not add value to business users. The cumulative effect of all the changes may be that entrepreneurs in the EU will in fact use worse and more difficult-to-use services. It is worth keeping in mind that imposing further restrictions on entrepreneurs and the consequent deterioration in the quality of services provided will slow down the pace of development of the digital sector in the European Union, which is of key importance for the economic recovery after the crisis caused by the pandemic.

A related problem is the lack of specificity in a number of obligations and prohibitions included in the DMA. Although we already know the proposed regulation, we are currently only able to imagine the potential consequences of their application. As a result, a special role should be assigned to the dialogue of the business world with the regulator in order to clarify specific provisions of the DMA, so that the objectives of the regulation can be achieved to the fullest degree, without the negative impacts listed above.

The imposing further restrictions on entrepreneurs and the consequent deterioration in the quality of services provided will slow down the pace of development of the digital sector in the European Union, which is of key importance for the economic recovery after the crisis caused by the pandemic.

51 900
associated companies

580 000
employees
in member companies

15
organizations local

20
organizations
industry

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