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Implementing Lessons from the *Microsoft* and *Google* Sagas to Address Challenges Met with Past Remedial Solutions in the Novel DMA Proposal

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Introduction

A) The Legal Issue and Pertinence of the Paper

Ever since the establishment of antitrust regulation, competition authorities have been confronted with the task of correcting dysfunctional markets to maximize consumer welfare.[1] The main concern of competition authorities are firms with market power, as these are prone to abuse their market position in such a way as to harm consumers.[2] Some of the anti-competitive practices include: predatory pricing – i.e., when a monopolist (dominant firm)[3] prices its own products lower than the market price with the final goal of chasing competitors out of the market; anti-competitive agreements – e.g., horizontal price-fixing (cartel-like behavior); exclusive dealing agreements – i.e., on the vertical level of trade, a dominant firm agrees to work with only one or few distributors.[4]

Already before the existence of the Internet, competition regulators were confronted with different realities of competition enforcement. There were choices to be made between a 'more economic approach' and a rather legalistic approach; or, between a 'pro-consumer' oriented, and 'pro-competitor' oriented.[5] For instance, it is 'pro-consumer' for prices to be lower in the short-term. However, if competition regulators insist on the 'quick fix' of pricing, it could drive competitors out of the market altogether, leading to the total economic welfare to be harmed in the long-term.[6] Similarly, the Chicago School of Thought argues that the effects of a firm's conduct must be assessed, and not the type of conduct in itself. This is the type of analysis employed by US competition regulators and courts as well.[7] The EU has been more formalistic in that sense. There are a number of examples where the EU Commission and Courts found a firm's conduct to be anti-competitive, where the US Competition authorities (the Department of Justice 'DoJ', or the Federal Trade Commission 'FTC') did not and would not even start an investigation into the matter.[8] For instance, the EU investigated Google's unfair competitive practices

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[1] M Lorenz, *An Introduction to EU Competition Law* (CUP 2013) 2-3.

[2] R Whish and D Bailey, *Competition Law* (7th edn, OUP 2012) 2.

[3] Some jurisdictions use the 'monopolist' or 'monopolistic behavior' instead of 'dominant firm' or 'dominant behavior'. It is essentially the same concept, however the degree of market power needed for a firm to be labelled as a monopolist in the US is greater than the market power needed in the EU for a firm to be 'dominant'. See, G Monti, *EC Competition Law* (CUP 2004)127-128; see also Case 85/76 *Hoffmann – La Roche v Commission* [1979] ECR 461, 509-2 for a definition of abuse of dominant position in the EU.

[4] This is a controversial topic. Not all exclusive dealing agreements are anti-competitive in nature. In the EU, there is a Vertical Block Exemption Regulation ('VBER'), in which, even if this act is considered anti-competitive, if the firms' market share is less than 30%, the anti-competitive conduct would be exempt . See, Commission Regulation (EU) No 330/2010 of 20 April 2010 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 [2010] OJ L102/1, art 3(1) ('VBER').

[5] Monti (n 3) 355-6.

[6] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2012) 39.

[7] A Bradford et al, 'The Chicago School's Limited Influence on International Antitrust' (2019) 87 University of Chicago Law Review 297, 309-312.

[8] Ibid.

regarding Google's search engine and the self-preferencing of Google over its own shopping services. The investigation led to a trial and Google was found guilty of breaching EU competition law by abusing their dominant position in the market.[9]

With technological development, the existence of the Internet, and the surfacing of an entirely new environment where different and new markets continue forming, competition authorities are still playing 'catch-up'. A perfect example is the way competition authorities have been trying to handle BigTech in the past 20 years. We are all familiar with BigTech, as we all make use of one or more of these companies' products at a certain point in time – among others, Amazon, Alphabet (Google), Apple, Facebook, Microsoft. For longer than a decade, all these corporations have established a dominant position in digital markets worldwide.[10] This dominant position was inevitably asserted as the product each company offered was unique at the time and through further innovation, these same companies continued developing more interlinked products which improved and added onto the initial one.[11] Thus, consumers would end up predominantly utilizing these multiple services out of commodity and, to a certain extent, habit.[12] It is an established fact that there is nothing wrong with a company attaining a dominant position if this occurs due to vigorous competition and fair play, and the services continue being the best the market has to offer.[13] The issue comes when these tech giants seek to keep their dominant position in the market through anti-competitive means, such as: engaging in exclusionary conduct, restricting market entry, following a corporate strategy of 'killer acquisitions', etc.[14] In other words, these monopolists act as 'gatekeepers' to the market and prevent other competitors to enter or to hold any position in the market for a longer period.

In endeavor to regulate digital markets, the EU Commission has submitted a draft proposal for the long-awaited Digital Markets Act (hereinafter 'DMA') which would allow the Commission to assess market failure and endeavor to restructure the market as a whole instead of investigating

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[9] *Google Search (Shopping)* (Case AT.39740) Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement [2018] OJ C 9/11, recital 1.

[10] Reuters Staff, 'How Big Tech companies gain and maintain dominance' *Reuters* (International, 6 October 2020 <https://www.reuters.com/article/us-usa-tech-antitrust-congress-factbox/how-big-tech-companies-gain-and-maintain-dominance-idUKKBN26R3RD> accessed 29 January 2021.

[11] Patrick Barwise and Leo Watkins, 'The Evolution of Digital Dominance: How and Why We Got to GAFA' in Martin Moore and Damian Tambini (eds), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple*
(OUP 2018) 22-26.

[12] Douglas Heaven, 'How Google and Facebook hooked us – and how to break the habit' (*New Scientist*, 7 February 2018) <https://www.newscientist.com/article/mg23731640-500-how-google-and-facebook-hooked-us-and-how-to-break-the-habit/> accessed 20 January 2021.

[13] This is called 'bundling' of services. For instance, if one uses an Android phone, they would also use Google Play Store, Gmail, Google Chrome, etc. (and they will have those applications previously installed on their phone). This excludes any other shopping services, for instance, or any other platform through which applications could be downloaded. See more on bundling, Stigler Committee, 'Stigler Committee on Digital Platforms' (Stigler Center for the Study of the Economy of State, 2019) available at < https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report> accessed 20 February 2021, 30-31 ('Stigler Report').

[14] Ibid 71-73.

companies one at a time and for one specific harm at a time. The DMA is not antitrust law; it is a separate regulation, an addition to the EU legal framework, which would be the main legal instrument to tackle digital markets' contestability and fairness.

B) Research Question

Having in mind the above-said, this thesis seeks to answer the following question:

To what extent does the DMA Proposal successfully address the remedial challenges met in the *Microsoft* and *Google* Commission Decisions?

To tackle this question, the following sub-questions will be addressed:

1) What are the challenges associated with handling large online platform's anti-competitive conducts?
2) How did the Commission address the anti-competitive conducts in the *Microsoft* and *Google* Commission Decisions and what were the challenges therein?
3) How does the DMA Proposal implement the lessons learnt from the *Microsoft* and *Google* Decisions?

C) Methodology and Contribution to Previous Research

The legal doctrinal method of analysis will be implemented in the making of this thesis through critically assessing academic literature, legislation and case-law.[15] Both descriptive and normative framework of analysis will be utilized throughout the thesis. The territorial scope of the thesis will be the EU, and the focus will be on antitrust regulation within the EU. Only legal instruments within the EU legal framework will be discussed.

This thesis will contribute to the general academic research regarding the new DMA proposal by using the *Microsoft* and *Google* Commission Decisions as a benchmark to assess whether the Commission has learnt the lessons from these exact cases when the DMA was being drafted. The reason to choose these two Commission Decisions is that they are they concern more than one type of abusive behavior, many remedies and commitments, the process has taken more than a decade, and there is sufficient evidence when it comes to issues with compliance and the specific design of the remedy in order to evaluate the extent to which the remedies were satisfactorily implemented.

D) Roadmap

The thesis consists of three main chapters, as well as an Introductory and Concluding chapters. The three main chapters will endeavor to answer the three sub-questions detailed above. Chapter I will be of descriptive nature and will set the base for the discussion by answering what the challenges associated with handling large online platform's anti-competitive conducts are. This will be done by, firstly, describing the general characteristics of Large Online Platforms and their

[15] M.D. Pradeep, 'Legal Research - Descriptive Analysis on Doctrinal Methodology ' (2019) 4 International Journal of Management, Technology, and Social Sciences (IJMTS) 95, 97.

impact in digital markets. Afterwards, the modes of addressing the negative impact on markets and consumers will be discussed, as well as the challenges in tackling the negative impact. Chapter II will be of more analytical nature, yet there will still be a description of the facts of the *Microsoft* and *Google* Commission Decisions which are a focal point of this paper's discussion. Chapter III will then present the DMA Proposal's main characteristics as well as some background on the drafting of the Proposal, which will be followed by an analysis based on the obligations entailed in the DMA which are based on the Microsoft and Google Decisions. The compliance mechanism suggested by the DMA Proposal will also be assessed utilizing the *Google* and *Microsoft* Decisions as a benchmark. The Concluding chapter will answer the research question – i.e., the extent to which the DMA Proposal successfully addresses the remedial challenges met in the *Microsoft* and *Google* Commission Decisions. The limitations of the findings, as well as further points for research will be addressed.

Chapter I: Dominant Digital Platforms. Characteristics, Market Impact and Antitrust Challenges

1.1 Introduction

Digital markets' main players are Large Online Platforms. These platforms' essential role is to connect distinct user groups, - i.e., act as an intermediary between user groups, and therefore, they largely depend on the amount and type of users that utilize their services. The more and versatile users attracted, the bigger the influence in the digital environment. Large online platforms enjoy similar characteristics which enable the gatekeeping position in their relevant markets. These characteristics are, among others, multi-sidedness, strong network effects, high returns to scale, and big access to data.[16]

This chapter will seek to answer the following question: what challenges do large online platforms present to antitrust authorities and how are those challenges addressed? To succeed in finding the answer, the common characteristics of online platforms will be discussed, as well as their role and impact on digital markets and consumers, followed by an initial discussion on the challenges involved with antitrust authorities tackling the negative impact on digital markets and consumers. This paper's aim is not to evaluate the potential pro-competitive effects of seemingly anti-competitive conduct by firms. The focus will rather be on the extent to which solutions have been effective in the past in regard to reaching the goal the solutions were designed for.

1.2 Common Characteristics and Market Impact of Large Online Platforms

Large Online Platforms generally entail a multi-sided business model, as they are present on two or more markets simultaneously. They create their own ecosystem by linking their services from each market.[17] They usually offer a part of their services at a zero-price cost which contributes to

[16] UNCTAD, 'Competition issues in the digital economy (Geneva, 10–12 July 2019)' (1 May 2019) TD/B/C.I/CLP/54, 3-5.

[17] Jason Furman et al, 'Unlocking Digital Competition - Report of the Digital Competition Expert Panel' (UK CMA 2019) para 1.28 ('Furman Report').

the growth of users on all sides of the platform.[18] Therefore, the larger the user-base becomes, the stronger the network effects. In addition, high returns to scale are a specific feature for online platform services, as the cost of production is significantly less than each additional user of the platform.[19] It is, thus, difficult for a new entrant to succeed in the market without having access to necessary interoperability information upfront.[20]

The strong network effects and incumbency position large online platforms possess, contribute to their ability to acquire and collect a large quantity of consumer and business data.[21] In fact, the amount of data retrieved from users has been increasing immensely, given that the virtual cost of collecting and storing said data has been decreasing.[22] Thus, platforms like Facebook (including the acquired by them social media giant Instagram) and Google benefit from information gathered by users and business users in order to, on the one hand, selectively showcase advertisements about products that the users are interested in, and on the other hand, ensure businesses' advertisements are noticed. Simply, the more data a platform acquires, the better chance for profit both for the online platform and for the company advertising a product or service on the platform, if advertising is the business model the company profits from.[23] Other ways of profit include: the bundling or tying products which would entice the consumer to use the bundled or tied product (even in those cases where the consumer does have the option to not utilize the product), the acquisition of companies in other markets to enter said market, and afterwards combine the data acquired from both markets to improve product quality and better fit the needs of consumers (e.g., via consumer feedback), etc.[24]

a) Positive Impact

The biggest digital companies bring about a number of positive outcomes to the digital economy (and the economy altogether). Herewith, some of the positive impacts of online platforms. Large online platforms are prime drivers of innovation.[25] For instance, it is evidenced that BigTech companies are in top 20 of spending in Research and Development (R&D), with Amazon, Alphabet (Google), and Apple being in top 10 according to the PwC Global Innovation Study back in 2018.[26] According to another study by Cornell University, WIPO[27] and INSEAD[28] published in year 2020, Amazon, Apple, Alphabet, Microsoft and Facebook, are all in top 10 of

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[18] Ibid [1.32].
[19] J Crémer et al, Competition Policy for the Digital Era: Final Report (Publications Office of the European Union 2019) <http://ec.europa.eu/competition/information/digitisation_2018/report_en.html> accessed 1 August 2021, 20.
[20] Furman Report (n 17) [2.73], [4.2].
[21] Joe Kennedy, 'The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown' (March 2017) Information Technology & Innovation Foundation, 1.
[22] M Stucke & A Grunes, *Big Data and Competition Policy* (OUP 2016) 6.
[23] J Rochet & J Tirole, 2004, 'Two-Sided Markets: An Overview' (2004) IDEI Working Paper 5.
[24] Furman Report (n 17) [1.40], [1.73].
[25] Furman Report (n 17) 19-20.
[26] Crémer Report (n 19) 20.
[27] Acronym for 'World Intellectual Property Organization'. Official website : WIPO, World Intellectual Property Organization, < https://www.wipo.int/portal/en/index.html> accessed 18 August 2021.
[28] Acronym for 'Institut Européen d'Administration des Affaires'. Official website: INSEAD, The Business School of the World < https://www.insead.edu/> accessed 18 August 2021.

the 'most valuable brands' in the world.[29] These companies are all valued by consumers and are used daily worldwide.[30]Furthermore, online platforms keep expanding their services and creating brand new markets. This creates more opportunities for consumers and businesses.[31] For instance, small to medium-size firms which do not have the financial opportunity to advertise their services on TV or radio station, have the opportunity to advertise on platforms like Google or Facebook faster and at lower cost.[32] These small to medium-size companies are, therefore, able to grow their business and become known by a multitude of customers. Last but not least, online platforms offering search comparison services (such as Booking.com, Skyscanner, Google Shopping) increase consumer welfare by showing the best offer to users. This improves information asymmetry and transparency for services.[33] For instance, it is easier for consumers to choose which flight ticket to purchase by which airline, when they have all of the information shown to them with a few clicks, in stead of searching for a travel agency and paying the fee for the services of that travel agency.

b) Negative Impact

While large online platforms can bestow a positive effect on the internal market as discussed above, there are many risks and red lights involved with no involvement from regulators. Hereby, the negative connotations related to digital platforms that are relevant for this paper's discussion. It shall be noted that due to the limited scope of this paper, it is not possible to address all anti-competitive effects sufficiently while at the same time discussing the remedial solutions offered by the Commission with the DMA proposal. The DMA proposal's aim is to improve market contestability and fairness, thus, the following risks shall be discussed below: market concentration due to online platforms leveraging market power, which could lead to deterioration in competition quality in terms of innovation and in terms of reduction of choice for consumers.

Firstly, the fact that there are only a few well-known platforms which have each enveloped a specific part of the digital markets' environment, is by itself, concerning. For instance, Google and Facebook are the main leaders in digital advertising; Google is the leader in online search, and Bing (by Microsoft), or DuckDuckGo are valid competitors, yet not minimally measuring to Google's power in the online search digital service.[34] This is a sign of market concentration where those platforms are present. Market concentration occurs when a singular or limited number of companies with market power become a sole 'barrier to entry' for future competitors when the use of the service, or product cannot be avoided by the end-user. When there are visibly strong network effects and low (to zero) marginal costs of production – i.e., high returns to scale, then it is highly possible that the company possessing those qualities has already caused the

[29] S Dutta et al (eds), *The Global Innovation Index 2020: Who Will Finance Innovation?* (Publication by Cornell University, INSEAD, and WIPO 2020) available at <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2020.pdf> accessed 4 August 2020, 26-27.
[30] Furman Report (n 17) [1.13]-[1.14].
[31] OECD, 'Annual Report on Competition Policy Developments in Mexico' (9 November 2020) DAF/COMP/AR(2020)23, 16 ('Mexico 2018 Report').
[32] Australian Competition and Consumer Commission, 'Digital Platforms Inquiry–Final Report' (26 July 2019), 131.
[33] Autorité De La Concurrence & Bundeskartellamt, 'Competition Law and Data' (10 May 2016), 14.
[34] Stigler report p. 75; Unlocking Digital Competition, Expert Panel Report, para 1.61

market to 'tip' and new entrants would meet a 'barrier' to enter the relevant market.[35] Therefore, the new DMA proposal's task is to increase market contestability – i.e., ease the entrance of new competitors in the markets.[36]

Secondly, information gathered by large online platforms in terms of consumer and business data, contributes to their gatekeeping position. As mentioned in the previous section, acquiring information about consumer preferences can be efficient; the issue is that large online platforms can use said data to keep future competitors out of the market, manipulate search results, manipulate feedback and reviews, or otherwise use consumer data to the platform's ecosystem's advantage. The bigger user-base the platform has, the more information can be gathered, the more dominant the market position becomes.[37] Furthermore, when market contestability is low, consumers are presented with less options of products and services to utilize simply because there are not enough competitors in the market. This is another negative side-effect of market concentration. Consumer's choice can be reduced further if the dominant online platform uses its market power to its own advantage by, for instance, engaging in self-preferencing conduct. The former describes online platforms' ability, due to their market power, to offer its own services instead of third-parties' services on the platform.[38]

1.3 Potential Solutions and Challenges

As the main characteristics of large online platforms and their role and impact on digital markets have been discussed, it follows that the potential solutions and challenges related to those solutions shall be addressed. This section will explore the different remedy categories, and some of the challenges when it comes to intervening timely and in the correct manner in digital markets.

a) Remedies

Remedies in competition regulation aim at restoring competition to the way it was or would have been if the anti-competitive conduct had not occurred.[39] Unfortunately, competition authorities have been largely unsuccessful with imposing remedies designed correctly concerning gatekeeping platforms. The digital world is growing much faster than what competition authorities could handle with the powers and methods they utilize currently, which is also one of

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[35] Crémer Report (n 19) 2. See also, J Sunderland et al, 'Digital Markets Act: Impact assessment support study :executive summary and synthesis report (Publications Office of the European Union 2019) <https://op.europa.eu/en/publication-detail/-/publication/0a9a636a-3e83-11eb-b27b-01aa75ed71a1> accessed 4 August 2021, 14.

[36] Commission (EC), 'Proposal for a Regulation of The European Parliament and of The Council on contestable and fair markets in the digital sector' (Digital Markets Act) COM(2020) 842 final, 1.

[37] G Parker et al, 'Digital Platforms and Antitrust' (SSRN, 22 May 2020) available at <https://ssrn.com/abstract=3608397> accessed 8 July 2021, 2.

[38] House Majority Report (USA), 'Investigation of Competition in Digital Markets) [2020], 307-312. See also, Pedro Caro de Sousa, 'What Shall We Do About Self-Preferencing?' (*Competition Policy International*, 24 June 2020) < https://www.competitionpolicyinternational.com/what-shall-we-do-about-self-preferencing/> accessed 10 August 2021.

[39] OECD, 'Remedies and Sanctions in Abuse of Dominance Cases' (15 May 2007) DAF/COMP(2006)19, 7.

the reasons for the introduction of the DMA proposal.[40] Before this paper addresses the Commission's approach in savoring competition pre-DMA, the categories of remedies available will be presented below.

There are two main categories of remedies: behavioral remedies and structural remedies. Additionally, in cases of non-compliance, companies can be fined with a sum formed by a specific percentage of the company's turnover, and for faster results, the Commission has imposed interim measures, not only in regard to online platforms, but also in other industries. Due to the limited scope of this paper, deterring online platforms' conduct with penalty payments and interim measures will not be addressed. Hereby, the two main categories of remedial solutions will be presented, and the challenges associated with each category.

(i) Behavioral Remedies

The safest remedy for competition regulators (and the preferred first choice) is the 'behavioral remedy'. These can be divided into two sub-categories depending on what part of the company's behavior they affect – either 'performance' or 'conduct'.[41] The latter encompass remedies concerning a specific 'market outcome'[42] and are usually a regulatory measure rather than a case-by-case imposed remedy. For instance, such regulatory measure would be an obligation for companies to increase market prices, increase/decrease production, to enlarge their distribution network, general improvement of product quality, etc. This is not a method usually utilized by the EC. Conduct remedies are the 'go-to' practice, especially when it comes to digital markets in general.[43] Conduct remedies are a safe destination, but their monitoring and enforcement has proven burdensome.[44]

(ii) Structural Remedies

The other option are 'structural remedies' where a change in the structure of the company is imposed.[45] The easiest way to apply a structural remedy is to a merging or already merged entity as the business division within the company is clear. It could entail divestment of a certain part of the business, transfer of assets, transfer of intangible rights (e.g., trademark rights), re-branding (new name for the company, possibly new board of directors, etc.). The end-goal is that there is absolutely no relationship between the purchased property rights and their former owner. One of the main pros of structural remedies is that further monitoring is not necessary; in terms of effectiveness, this is the best option in order for the EC (or other competition authorities) to not

[40] Furman Report (n 17) 2.
[41] OECD Remedies (n 39) 186.
[42] Ibid.
[43] Conduct remedies involve a 'cease and desist order', supply third parties with certain interoperability information, a promise to not bundle services together, commitment to not use data from an acquired company, etc. Some of the remedies designed in previous case-law concerning digital platforms will be discussed in Chapter II of this paper.
[44] OECD Remedies (n 39) 187-88.
[45] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, recital 12.

be invested in the future anti-competitive conduct of the companies.[46] However, structural remedies are not appropriate on all occasions. A structural remedy is a last resort measure due to the unbearable costs it might be on the company and on the market as at the same time the positive effects that could result from a divestiture could be disproportionate to the anti-competitive effects. For a structural remedy to be imposed, a direct causal link must be proven between the conduct, the harm on consumers, and the remedy – i.e., it must be the structure of the company that is causing the harm on consumers and the market as a whole.[47] For instance, a structural remedy would be, least to say, inappropriate if the issue is a company tying two products. Certainly, it would be a more practical remedy to order the untying of the products instead of obligation the company to create a brand new company of the tied product. A structural remedy is usually utilized in the case of mergers, i.e. – horizontal integration of companies, and sometimes, in the case of vertical integration, when companies foreclose the market by integrating and operating on each level of the supply chain, thus becoming self-sufficient and creating a barrier to entry on all levels of the supply chain. With mergers, it is simply not as cost-bearing to restructure the company back to before the merger occurred.[48]

b) Challenges

Challenge 1: Remedial Design

Remedy design in digital markets in general has proven challenging over the past 30 years. There have been many investigations started by competition authorities, some of which led to a claim of anti-competitive conduct restricting the markets, other investigations were dismissed when the firms proposed commitments in order to repair the anti-competitive behavior. Certainly, there is no 'one size fits all' remedy, as competition authorities need to impose different remedies on a case by case basis.[49] The main issue with digital markets is that it is nothing that antitrust institutions have dealt with before, and it keeps changing without notice. Behavioral remedies (as well as periodic penalty payments or a fine due to the anti-competitive conduct) are the two methods applied in the past 30 years in a range of cases.[50] For instance, a platform holding important interoperability information due to its incumbent position, consists of a barrier to entry for new competitors. If said interoperability information is available to potential competitors, then advertisers will have multiple choices of ad platforms to promote their product, and consumers being able to check multiple platforms when looking for a product, instead of only Google Search.[51] Thus, the quality in the market in general should be improved.

Structural remedies on the other hand have not yet been imposed yet in digital markets. As mentioned above, on the reason for this is that it is a radical solution which might harm the

[46] OECD Remedies (n 39) 187-88.
[47] Nicholas Economides and Ioannis Lianos, 'The quest for appropriate remedies in the EC Microsoft cases: a comparative analysis' in Luca Rubini (ed), *Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case* (Edward Elgar 2010) 407.
[48] William H. Page, 'Optimal Antitrust Remedies: A Synthesis' (SSRN, 17 May 2012) available at <https://ssrn.com/abstract=2061791> accessed 29 July 2021, 23.
[49] OECD Remedies (n 39) 186.
[50] These include the Google and Microsoft Commission Decisions addressed in Chapter II of this thesis.
[51] Making the Digital Markets Act more resilient and effective 18

competitive process in the long run by, among other things, causing a slower innovative process. Whereas gatekeepers might be obstructing the competitive process, they are highly innovative companies which are responsible for most of the technology we use nowadays (e.g., Android, Apple, Microsoft, Google, etc.). Divesting or re-branding a company could be too burdensome to the company to actually process the separation, find an appropriate buyer, and do everything concerning the divestment.[52] In that time, all these company resources would have been put to innovation and research & development (R&D). A separation could, thus, result in worse quality or quality that the market would not evolve to for a longer period of time.

Challenge 2: Ensuring Compliance

Compliance is usually not an issue when it comes to structural remedies as it is a one-off measure where competition authorities have clearly stated what needs to be restructured within the company. However, as addressed in the text above, the Commission has not yet imposed structural remedies in regard to digital gatekeepers. The Commission, thus, imposes behavioral remedies and then the digital company needs to submit commitments to comply with the remedy.[53] The issue is that the compliance mechanism chosen by the company might not implement the remedy in the best suited manner for the market. Therefore, the Commission needs to follow through and ensure that the commitments chosen are the best fit for compliance. This has proven challenging (and rather slow) in the EU *Microsoft* and *Google* Decisions, which will be discussed in Chapter II. In short, the compliance mechanism chosen by both companies was not sufficient, but neither did the Commission act timely to address the improper compliance.

1.4 Conclusion

This Chapter addressed the common characteristics of dominant platforms in digital markets, the positive and negative impact they pose on consumers and markets, the manner by which the Commission could tackle the negative impact, and the challenges associated therein. The following Chapter will discuss cases concerning two tech giants – Microsoft and Google, to pinpoint the remedies the Commission had imposed, the compliance mechanism used by the companies.

Chapter II: Remedial Solutions in the *Microsoft* and *Google* Commission Decisions

2.1 Introduction

This chapter will discuss the remedies imposed by the EC concerning online platforms by revisiting the following case Commission decisions – *Google Search (Shopping),*[54] *Google*

[52] William H. Page (n 48) 23-24.
[53] Regulation 1/2003 (n 45) art 9.
[54] *Google Search (Shopping)* (Case AT.39740) Commission Decision of 27.6.2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area [2017] C(2017) 4444 final.

Android,[55] and *Microsoft*, specifically addressing the Windows Media Player ('WMP') bundle,[56] and Microsoft Internet Explorer ('IE') tying,[57] and the refusal by Microsoft to supply necessary interoperability information to third parties acting in the work group operating system server market.[58] These cases are relevant for this paper because they concern two digital gatekeepers, one, is an online search engine, the other one is an operating system, and both companies have created an ecosystem of services that go beyond online search and operating system. All these cases resulted in a lengthy investigation, elaborate Commission decision, specific remedial solutions. The extent to which some of the remedial solutions were effective, or in what way they were effective, can already be discussed since there has been enough time passed and sufficient number of commentators assessing these cases.

This chapter seeks to find the answer to the following question: how has the Commission been handling digital gatekeeping platforms until now and why was the chosen method not as effective as desired? To be successful in this endeavor, the chapter will be structured in the following manner. Section 2.2 will present the *Microsoft* Commission Decisions, their background and the timeline by which the decisions were taken and will evaluate the remedial solutions and the after-effect of them to the market and market participants (or potential market entrants). Similarly, section 2.3 will explore the *Google* Decisions and discuss the remedies imposed therein, as well as the compliance mechanism chosen. Section 2.4 will provide an overall assessment of the impact of those cases and form an opinion on the remedies designed for the cases by evaluating the similarities and the differences in the Commission's approach over the years, and the reason why the remedies have, or have not, been a success. Finally, section 2.5 will introduce the new approach taken in the EU regarding gatekeeping online platforms.

2.2 The Microsoft Saga

a) Background

The Microsoft Corporation is a world renowned company which was first incorporated in the 1970s. It went on to become a market leader on many fronts due to, among other things, its innovative company model, creativity, and aggressive competition practices.[59] The Microsoft Saga lasted 15 years, from 1998 until 2013. It all started with a complaint by Sun Microsystems who claimed that Microsoft had refused to supply specific interoperability information regarding Microsoft's interface.[60] In addition, in 2000, the Commission investigated the market for streaming media technology, and a year later, came to the conclusion that Windows Media Player ('WMP') was illegally "tied" to the Windows Operating System ('WOS'), i.e. – the WMP was

[55] *Google Android* (Case AT.40099) Commission Decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement [2018] C(2018) 4761 final.
[56] *Microsoft I* (Case COMP/C-3/37.792) Commission Decision of 24 March 2004, para 5.
[57] *Microsoft II* (Case AT.39530) Commission Decision of 6 March 2013, para 2.
[58] *Microsoft I* (n 56) [3].
[59] N Economides, 'The Microsoft Antitrust Case' (2001) 1 Journal of Industry, Competition and Trade: From Theory to Policy 7, 10.
[60] Commission, 'Commission opens proceedings against Microsoft's alleged discriminatory licensing and refusal to supply software information' (Brussels, 3 August 2000) available at < https://ec.europa.eu/commission/presscorner/detail/en/IP_00_906> accessed 3 August 2021.

pre-installed on the computers using the WOS, and this had negative effects on the single market competition.[61] In 2004 the Commission published a decision in which it scrutinized Microsoft's conduct on both occasions. The Commission fined Microsoft 497 million euros for the 'refusal to supply information' and imposed more intrusive remedies regarding the tying of WMP with the WOS – Microsoft had to launch a product without pre-installed WMP on the WOS.[62] This product was launched in 2005. In 2006, the EU fined Microsoft again for not complying with the 2004 Decision. In the meantime, Microsoft lodged an appeal to the EU Court of First Instance ('CFI') against the 2004 Decision, yet the CFI upheld it. In 2008 the Commission fined Microsoft again for nearly 1 billion euros due to non-compliance with the 2004 Decision, which was followed by an appeal to the CFI. In 2012 the General Court ('GC') upheld the 2008 Decision and simply lowered the fine by less than 50 million euro. In the meantime the Commission launched an investigation into the bundling of Internet Explorer (Microsoft's internet browser) with WOS. Microsoft then made commitments to 'fix' this issue but was fined in 2013 for non-compliance with said commitments. The Commission reached the conclusion that Microsoft had abused its dominant position by: (i) refusing to provide important interoperability information, (ii) tying WMP with WOS, and, in a later decision, (iii) bunding the browser IE with WOS.

b) Remedies and Compliance Mechanisms - Refusal to Supply Interoperability Information, Tying of WMP with WOS, and IE with WOS

The Microsoft decision rose the question of the importance to supply necessary interoperability information not only in regard to Sun Microsystems. The EC ordered Microsoft 'to disclose complete and accurate specification for the protocols used by Windows work group servers in order to provide file, print and group and user administration services to Windows work group networks'.[63] This was a necessary remedy given that the structure of the market was affected by Microsoft leveraging its market power.[64] The Commission also obliged Microsoft to provide a plan on compliance with the order.[65] The Commission specified the extent of interoperability information that needed to be provided,[66] and it was more extensive than what was asked by US authorities in similar proceedings.[67]

This remedy, however, proved complicated because the Commission needed to find a way to continuously verify whether Microsoft is providing accurate and complete interoperability information. Therefore, the Commission imposed an additional obligation on Microsoft – Microsoft needed to also find a Monitoring Trustee. The Monitoring Trustee needed to be an independent institution which would constantly ensure Microsoft's compliance with the remedies imposed.[68] The costs for the Monitoring Trustee were to be covered by Microsoft entirely.[69] In

[61] *Microsoft I* (n 56) [310].
[62] Ibid [1011].
[63] Ibid [999].
[64] Ibid [1069-73].
[65] Ibid art 6.
[66] Ibid [287], [289], [688–91].
[67] Microsoft was also under investigation in the US before the investigation in the EU began. Due to the limited scope of this paper, the specific facts and theory of harm in the US will not be addressed, as this paper's focus is the remedial design and compliance mechanism, in addition to the speed by which the remedies were imposed. For more information on the theory of harm and other specifics of the US case, see N Economides,(n 59).;
[68] *Microsoft I* (n 56) [1048].

April, 2004, Microsoft proposed a plan to the Commission which was similar to the plan proposed to the US authorities, in that it was equally challenging to monitor that the plan is being followed properly.[70] The Commission and independent experts were not satisfied with the plan, and after several conversations between the Commission and Microsoft, the Commission ended up appointing a Monitoring Trustee instead of Microsoft.[71] The CFI, however, annulled this later on by criticizing the Commission of acting beyond its powers – the Commission obliged Microsoft to provide important interoperability information to said Monitoring Trustee. The CFI decided that it should have been Microsoft to appoint a Monitoring Trustee to share such sensitive information with. There was no timeline established either on how long the Monitoring Trustee would monitor Microsoft's compliance.[72]

As for the tying of WMP and WOS, a whole new product was developed,[73] but the success of said product was nearly null, if by success, one understands the fact that very few users actually took advantage of the version of WOS without WMP bundle.[74] The Commission straight-forward obliged Microsoft to put a version of the WOS on the market without WMP included.[75] Microsoft, however, implemented this in a very odd manner – the pricing for the product without the bundle and with the bundle was the same, which is presumed to be one of the reasons the effect of the remedy in terms of effects on social welfare.[76]

Similarly, regarding the bundling of Internet Explorer to WOS, Microsoft was obliged to provide the so-called 'screen choice' which would enable consumers to choose the browser they would like to utilize – a similar screen choice measure to the one imposed on Google in the *Google Android* decision discussed below.[77]

2.3 'Google Search' and 'Google Android' Commission Decisions

a) Short Timeline of the Cases

The investigation started in 2010 when a price comparison website lodged a complaint to the Commission about Google's online search practices.[78] The Commission, then, initiated

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[69] Ibid [1048(v)].
[70] William H. Page and Seldon J. Childers, 'Software Development as an Antitrust Remedy: Lessons from the Enforcement of the Microsoft Communications Protocol Licensing Requirement' (2007) 14 Michigan Telecommunications and Technology Law Review 77, 108.
[71] Commission, 'Competition: Commission appoints Trustee to advise on Microsoft's compliance with 2004 Decision (IP/05/1215)' (Brussels, 5 October 2005) available at < https://ec.europa.eu/commission/presscorner/detail/en/IP_05_1215> accessed 1 July 2021.
[72] Ibid.
[73] *Microsoft I* (n 56) art 6.
[74] Nicholas Economides and Ioannis Lianos (n 47) 425.
[75] *Microsoft I* (n 56) art 6.
[76] Nicholas Economides and Ioannis Lianos (n 47) 413.
[77] Paul Gennai, 'An update on Android for search providers in Europe' (*Google Blog*, 2 August 2019) available at < https://www.blog.google/around-the-globe/google-europe/update-android-search-providers-europe/> accessed 15 August 2021.
[78] Commission, 'Antitrust: Commission probes allegations of antitrust violations by Google' (30 November 2010) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1624> accessed 26 August 2021.

investigations into Google's alleged violation of Article 102 TFEU due to Google's alleged anti-competitive self-preferencing conduct on internet search results.[79] Down the road, in year 2013, a lobbying group lodged a complaint on Google's Android practices as well.[80]

In 2014 Google submitted commitments to the Commission which will be discussed herewith; unfortunately, the Commission was not satisfied with Google's commitments implementation and, in 2015, Google was charged for abusing its dominant position by self-preferencing and manipulating online search results to its own advantage.[81] The same year the Commission began investigating Google on its Android practices (i.e., two years after the complaint was initially lodged by the lobbying group).[82] In 2016 and 2017 more charges against Google. Another decision from 2018 with a record fine of more than 4 billion euro regarding the Google Android case. All charges are still under appeal in 2021 before the General Court ('GC') and awaiting final judgments.[83]

b) Anti-competitive Conduct, Remedies Imposed and Implementation

(i) Anti-competitive Self-preferencing in 'Google Search (Shopping)'

To even begin with discussing a solution, one needs to narrow down the problem.[84] Google is a leader in the 'online search' market as mentioned in Chapter I of this paper. The Google Search engine is also of help when a consumer is searching for a product online. The way in which Google shows products is in the so-called 'Shopping Units', which are shown as the first result and direct the consumer to the retailer's website where the consumer can finalize the purchase.[85] This is not all that Google can do, however. Google has created its own 'Google Shopping' website where consumers can compare the prices and other characteristics of the products they are searching for and base their purchase decision on the comparison provided by the website. The fact that Google's search results showed these 'Shopping Units' to consumers was by itself an anti-competitive conduct given the dominant position Google had in the online search market.[86] Why? Because due to Google's leading position in the general search results market, consumers were in a way 'manipulated' to click on the most visible search results, and this way,

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[79] Ibid.

[80] Commission Documents, 'Non-confidential version of the complaint by FairSearch of 25 March 2013 (Doc ID 17)' (2013) para 25.

[81] Commission, 'Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android' (15 April 2015) available at < https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4780> accessed 26 August 2021.

[82] Refer to text of fn 67 in this paper.

[83] Find reference for the appeals

[84] Nicholas Economides and Ioannis Lianos (n 57) 399.

[85] T Höppner, 'Antitrust remedies in digital markets: lessons for enforcement authorities from non-compliance with EU Google decisions' (*Hausfeld LLP*, 19 November 2020) <https://www.hausfeld.com/nl-nl/what-we-think/publications/antitrust-remedies-in-digital-markets-lessons-for-enforcement-authorities-from-non-compliance-with-eu-google-decisions/> accessed 14 August 2021.

[86] *Google Search (Shopping)* (n 54) [334], [342], [649].

third parties' comparison shopping services ('CSSs') were not visited by consumers.[87] Additionally, Google did not present rankings for its own comparison website, as opposed to third parties' comparison website, which was deemed as anti-competitive 'demotion' of rivals.[88]

Due to the strong network effects and presence in the online search environment, Google was able to affect the market structure for CSSs.[89] The Commission, therefore, needed to think of a solution which would bring the market structure to a 'but for' condition, i.e. – what it should have been but for the effects of the anti-competitive self-preferencing by Google. The Commission was lenient towards Google and chose to impose behavioral, rather than structural remedies, even though the latter would have been a more straight-forward option.[90] Thus, the EC ordered Google to 'effectively bring the infringement to an end' and to not engage in any similar behavior in the future which would have 'the same or equivalent object or effect'.[91] The Commission gave Google 90 days to submit commitments 'to implement a remedy that would effectively bring the abuse to an end.[92]

Google chose to firstly separate the Shopping Units part and the shopping standalone website which used to be a part of Google Shopping. This was an internal restructuring of the company. The focus was on the *access* of rival CSSs, as this is what Google believed and defended before the Commission Decision was published.[93] Google did not, however, stop the 'demotion' against rival CSSs or in any manner alter the way the Shopping Units were positioned on the search results.[94] Thus, Google kept engaging in self-preferencing by putting its own Shopping Units first in its search results, and in this way, pushed rivals out of the market.[95] As for 'access', Google implemented an auction mechanism which would make access by CSSs easier.[96] In an open letter to the Commission, 41 founders of CSSs, operating in 21 different Member States, complained that the compliance mechanism adopted by Google did not in any manner reinstate effective competition in national markets for CSSs.[97]

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[87] Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — Google Search (Shopping)) (notified under document number C(2017) 4444), paras 14-19.
[88] *Google Search (Shopping)* (n 54) [348], [380].
[89] *Ibid.*
[90] C Ritter, How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? (2016) 7 Journal of European Competition Law & Practice 587, 590.
[91] *Google Search (Shopping)* (n 54) art 3.
[92] *Google Search (Shopping)* (Case AT.39740) Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement [2018] OJ C 9/11, para 30. ('Summary Decision – *Google Search (Shopping)*')
[93] Google, 'Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17' (22 January 2020) para 6.4.
[94] Ibid [6.9].
[95] CSSs Service Providers, 'Letter to the Commission' (28 November 2019) 2.
[96] More on the auction mechanism implemented by Google, see, B Vesterdorf and K Fountoukakos, 'An Appraisal of the Remedy in the Commission's *Google Search (Shopping)* Decision and a Guide to its Interpretation in Light of an Analytical Reading of the Case Law' (2018) 9 Journal of European Competition Law & Practice 3.
[97] Ibid 1.

From a legal standpoint, the fact the Google believed that the issue was about access to Shopping Units, was what contributed to the wrongful implementation of the remedy. In fact, the Commission had continuously rejected that the case was about access to the services.[98] Unfortunately, by the Commission being lenient, giving freedom to the commitments Google could choose to implement the measure, and then failing to enforce that Google is properly complying with the remedy imposed, are all reasons that the remedy allegedly failed to produce the effects it was designed for.[99]

(ii) Anti-competitive Tying and Exclusionary Conduct in Google Android

The Commission charged Google on four different abusive infringements of Article 102 TFEU, two of which involved the anti-competitive tying of Google Search engine to Google Play store, and the tying of Google Chrome browser with Google Play store.[100] In addition, the Commission stated that Google had abused its dominant position by having made 'the licensing of the Play Store and the Google Search app conditional on hardware manufacturers agreeing to the anti-fragmentation obligations', [101] and by having 'granted payments to [original equipment manufacturers] OEMs and mobile network operators (MNOs) on condition that they pre-installed no competing general search service on any device within an agreed portfolio.[102] The EC ordered Google and Alphabet to immediately bring the infringement to an end and fined Google for the nearly a decade-long abuse. Google had 90 days to comply and was subject to daily penalty payments in case of non-compliance within the 90-day framework.[103]

Google chose to comply with the remedy in the following manner: firstly, Google unbundled the Google Search engine from the Google Play store, and the Google Chrome browser from the Google Play store. This would entail that a user could install Google Play, without being obliged to install Google Chrome and use Google Search; however, the user would be obliged to install all other Google applications (e.g., Gmail, Google Maps, etc.).[104] Google also decided to separately license Google Search app and Google Chrome. In addition, Google offered 'a choice screen requiring Android users to choose a default search provider'.[105] In the beginning, three

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[98] *Google Search (Shopping)* (n 54) [650].
[99] T Höppner (n 85).
[100] The other two abusive conducts concerned, firstly, the licensing of the Google Play store and Google Search app, and secondly, the conclusion of exclusionary agreements with manufacturers in order for those to not pre-install other search services but the Google Search service.
See also, *Google Android (n 55)* [272].
[101] *Google Android* (Case AT.40099) Summary of Commission Decision of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA [2019] OJ C 402/19, para 18.
[102] Ibid [22].
[103] Ibid [31].
[104] Hiroshi Lockheimer, 'Complying with the EC's Android decision' (*Google Blog*, 16 October 2018) available at <https://www.blog.google/around-the-globe/google-europe/complying-ecs-android-decision/> accessed 20 August 2021.
[105] Oliver Bethell, 'Changes to the Android Choice Screen in Europe' (*Google Blog*, 8 January 2021) available at <https://blog.google/around-the-globe/google-europe/changes-android-choice-screen-europe/> accessed 23 August 2021.

search engines would have been placed in the choice screen if they were eligible according to criteria set by Google (e.g., the provider must offer a 'general search service', they must have an app in the Google Play store, etc.).[106] In order to be placed there, these search engines needed to enter an auction, and basically pay for their place – the highest bids would take place in the choice screen.[107] After complaints from CCS providers and talks with the Commission, the choice screen remedy changed. Currently, up to twelve CCSs can apply to be a part of the choice screen, participation is free of charge, application to be a part of the choice screen occurs via email, and the screen choice is renewed annually.[108]

2.4 Comparative Analysis of the Remedies, the Compliance Mechanisms, and the Overall Effect on the Relevant Markets

Finding the common ground between these two cases is not difficult. Both companies are digital gatekeepers in their relevant markets. Some of the theories of harm in the cases are similar as well – with *Microsoft* there is the tying of free products to the 'paid' WOS (both WMP and IE) which led to excluding competitors from the market and discouraging market entry, as well as the refusal to supply important interoperability information to third parties which was exclusionary on the vertical level of the supply chain. In *Google Search (Shopping)* one of the issues was 'self-preferencing', and thus putting other CCSs to a disadvantage. In *Google Android*, the obligation on manufacturers to have, among other things, the Chrome Browser application and the Google Search application pre-installed on mobile phones, presented anti-competitive tying of products. The remedies were similar, but not entirely: on the one hand, there was an obligation on the companies to cease tying the products. The companies were also fined billions of euros (and dollars) for non-compliance, and in the EU case, for the prolongation of the abusive conduct. Finally, the 'remedies' in question were set up many years after the initial investigation against the companies was started, and after the conduct occurred – i.e., *ex post* investigation and remedies

In *Microsoft,* the remedies addressed each abusive conduct in a direct manner – i.e., a direct obligation was thought out by the Commission. These obligations were, as follows, the unbundling of the bundled products/services, the creation of a new product offered on the market (WOS without the bundles WMP), the providing of specific interoperability information which the Commission had described – in other words, the Commission obliged Microsoft on the exact information that needed to be provided to third parties, and finally, the choice screen measure offered by Microsoft and approved by the Commission regarding the IE tying with WOS. With the latter measure, Microsoft set the benchmark for the *Google Android* choice screen measure later on. Where did it go wrong? Firstly, the untying of WMP and WOS and the creation of a new product on the market which would offer the WOS without WMP pre-installed. Here, a small detail might have been the reason for the failure of the remedy. The Commission was very specific with the remedy design, it was even included that the new product without WMP could

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[106] Ibid.

[107] Hausfeld, 'Google finally amends Choice Screen remedy to prevent non-compliance proceedings in EU Android case | European Union' (*ICLG*, 11 June 2021) available at <https://iclg.com/briefing/16488-google-finally-amends-choice-screen-remedy-to-prevent-non-compliance-proceedings-in-eu-android-case> accessed 25 August 2021.

[108] Ibid.

not be offered at a higher price, for the sake of not making it less attractive to consumers.[109] The pricing of the product without or with the WMP bundle was exactly the same. Therefore, consumers simply opted to purchase the WOS with the WMP bundle, as it seemed more plausible from a pricing perspective, and there was no extra benefit to buying the product without the preinstalled WMP.[110] Both the Commission and Microsoft later on agreed that the remedy did not bring about the expected results.[111]

On providing interoperability information, the Commission did not take into account how difficult ensuring enforcement would be. Even though the Commission did realize that the appointment of a Monitoring Trustee was necessary due to the complexity of the measure, it still involved a great amount of technical knowledge to follow through and check what kind of information Microsoft was actually sharing. Other than the difficulty with compliance, Windows' market share actually grew from early 2000s until late 2000s, growing from 60% to 68% in less than a decade.[112] Nowadays, Microsoft's (Windows') market position has not declined and keeps being stable with more than 70% in 2019.[113] While this does not mean that the remedy was entirely ineffective, it can also be presumed that the remedy was not sufficiently effective as it was hoped for by the Commission. The market structure did not change, neither did Microsoft's position, or consumers' preference at large.[114]

In both the *Google* and *Microsoft* Decisions a similar remedy was the 'choice screen' remedy as a response to the tying of the Google Search Application with Google Play Store in the *Google Android* Decision, and the tying of IE with WOS in the *Microsoft* Decision. In Microsoft, the Commission started the investigation and Microsoft reacted to the investigation by proposing a plan, initially different from the choice screen,[115] but ended up choosing the choice, or as firstly called, the 'ballot screen' option. Microsoft's commitment involved the inclusion of 12 rival browsers, with the 5 biggest competitors being shown before scrolling, and the other 7 after scrolling sideways.[116] Microsoft committed to also being responsible for the technical cost of including the browser and this would be done 'free of charge'.[117] Google in the *Google Android* decision ended up tailoring the choice screen commitment to the Microsoft commitment as this was the benchmark that the Commission would accept as a suitable commitment. What went wrong with this remedy in the Decisions? With Internet Explorer, the remedy contributed to the decline in market share in the EU of the IE browser; if compared to the decline of market share in the US, the IE browser was losing market share much faster than in the US after the

[109] *Microsoft I* (n 56) [1012].
[110] Dan Gore & Ashwin van Rooijen, 'Ex Post Assessment of European Competition Policy: The Microsoft cases' (Draft report prepared for the 2021 Annual Conference of the GCLC) 16.
[111] Paul Meller, 'Microsoft and Europe Agree Software Remedy Has Failed' (*NY Times*, 25 April 2006) available at <https://www.nytimes.com/2006/04/25/technology/microsoft-and-europe-agree-software-remedy-has-failed.html> accessed 1 July 2021.
[112] GCLC Draft Report (n 112) 8.
[113] Ibid 9.
[114] Ibid.
[115] Microsoft initially offered to put a special version of WOS, Windows 7 E, on the European market, similarly to what the Commission had obligated Microsoft to do in regard to the WOS and WMP tying. Since the Commission was not completely satisfied with the
[116] *Microsoft II* (n 57) [14].
[117] Ibid.

implementation in the remedy.[118] After 2014, Microsoft ceased to comply with the decision, as the decision had expired (the decision was valid for 5 years).[119] In between, however, Microsoft had failed to comply with the decision in between May 2011 to July 2012, and was, therefore, fined by the Commission[120] in accordance with Article 23(2) of Reg 1/2003.[121] While Microsoft claimed that the non-compliance was due to a system error, one could never be certain exactly what had occurred. Currently, in 2021, Microsoft decided to stop support of Internet Explorer which means that IE will no longer exist as a browser.[122] Whether the remedy imposed back in 2009 has a causal connection to the end of support of the IE browser can only be speculated upon.

Finally, in *Google (Search) Shopping*, the Commission obliged Google to 'cease and desist' the self-preferencing. As discussed above, Google's implementation of the remedy was not suitable, partly because Google did not agree with the Commission's reasons for the harm done. Google considered that 'access' to the Google Shopping CSS was the issue and, thus, the measures taken had no particular effect on the market structure.[123] To compare between the Google and Microsoft Decisions, one of the issues here was the freedom the Commission gave to Google as opposed to Microsoft. The Commission was stricter with the remedy design in the Microsoft Decisions – e.g., the Commission did not just oblige Microsoft to 'cease and desist' the anti-competitive conduct, but also specified the manner by which the conduct should be corrected. The only difference would be the IE browser measure; yet there, Microsoft submitted commitments during the investigation process, and no Decisions were published just yet.[124]

2.5 New Approach

The new DMA proposal in the EU is endeavoring to circumvent the 'investigation', 'market definition', and 'market power' lengthy process by introducing an *ex ante* approach 'to ensure that markets characterized by large platforms with significant network effects and acting as gatekeepers, remain fair and contestable for innovators, businesses, and potential market entrants.'[125] The DMA, therefore, does not focus on defining the market in which the companies operate but on the following three conditions: firstly, the companies must 'have a significant impact on the internal market,' secondly, they must 'operate one or more important gateways to

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[118] GCLC Draft Report (n 110) 16.

[119] L Essers, 'Microsoft kills EU browser choice screen' (ARN Net, 18 December 2014) available at <https://www.arnnet.com.au/article/562795/microsoft-kills-eu-browser-choice-screen/> accessed 1 August 2021.

[120] Commission, 'Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments' (Brussels, 6 March 2013) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_13_196> accessed 2 August 2021.

[121] Reg 1/2003 (n 45) art 23(2).

[122] E Bowman, 'Internet Explorer, The Love-To-Hate-It Web Browser, Will Die Next Year' (NPR, 22 May 2021) available at <https://www.npr.org/2021/05/22/999343673/internet-explorer-the-love-to-hate-it-web-browser-will-die-next-year> accessed 5 August 2021.

[123] Google Response to the Court (n 94) [6.4]; also, T Höppner (n 85).

[124] Commission, 'Antitrust: Commission accepts Microsoft commitments to give users browser choice' (Brussels, 16 December 2009) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_09_1941> accessed 22 August 2021.

[125] DMA Proposal (n 36) 3.

customers' and thirdly, they must 'enjoy or are expected to enjoy an entrenched and durable position in their operations.'[126] In other words, the DMA focuses on the impact the company has on the single (internal) market as a whole and on the network effects it enjoys and is thus an impassable part of consumers and businesses using their services, whether out of commodity or habit, or because the company provides the best quality on the market.

2.6 Conclusion

This Chapter presented the Google and Microsoft Commission Decisions. These Decisions were chosen as they involve two gatekeeping platforms which would fall under the scope of the new DMA proposal, and the remedies utilized in those cases, were in some ways reinstated in the DMA proposal. After evaluating and comparing the Decisions and the outcome therein, three main points can be estimated: the Decisions outcome took quite a long time and most Decisions are still under appeal with the Court, the remedies imposed were either not sufficient or not well-designed, and finally, ensuring compliance with those remedies was not a particularly successful endeavor. It follows that the new DMA proposal needs to, at the least, incorporate those issues met in the past in order to be a successful regulation. The next and final Chapter of this paper will present the DMA proposal.

Chapter III: The DMA Proposal and Implementing the Lessons from The *Google* and *Microsoft* Decisions

3.1 Introduction

This Chapter will address the new DMA Proposal, and the extent to which the Commission has implemented lessons from the *Microsoft* and *Google* Commission Decisions. The Chapter will be structured as follows: section 3.2 will provide a background on the DMA and its general structure, section 3.3 will follow the procedure in the DMA Proposal in order to assess to what extent the speed of intervention would actually be faster than the current framework, section 3.4 will present the obligations in the DMA in general, while only focusing on the ones similar to the remedies imposed on or commitments made by Microsoft and Google as a response to the Commission's investigations throughout the years, section 3.5 will address the extent to which the Commission has applied the lessons learnt from the Microsoft and Google cases to regulate digital gatekeepers altogether. Section 3.6 will summarize the Chapter's findings.

3.2 The DMA Proposal

a) Background

Back in 2016, the Commission published a Communication regarding "Online Platforms […] Challenges for Europe"[127] which started the conversation on digital platforms' impact on the

[126] Ibid.

[127] Commission, 'Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Online Platforms and the Digital Single Market Opportunities and Challenges for Europe (Brussels, 25 May 2016)' (Communication) COM/2016/0288 final.

EU's single market. The Communication gave attention to the growth of the digital economy and the differences of value-creation from traditional markets.[128] It was a result of a public consultation initiated by the Commission which was summarized in a Staff Working Document back in 2016.[129] The Communication outlines that online platforms, among other things, "benefit from network effects" and "operate on multi sided markets",[130] and the more users there are, the more value creation occurs, the more interdependent users on different sides of the market become, as their only (or rather best) way of reaching each other is via this platform. The Communication focuses on the future regulatory framework in the EU, with the main goal being *balance* – i.e., regulation should not disrupt innovation and should not keep digital platforms away from Europe, but at the same time competition needs to be safeguarded and companies need to have the chance to be a part of a 'fair' market.[131]

Fast-forward into year 2020, the Commission submitted two public consultations in connection with the Digital Markets Act, the outcome of which was a majority support for new regulatory framework which would tackle unfair market practices by digital platform providers.[132] In essence, online platforms were concerned about the concept of 'digital gatekeeper' being too broad, and that in any case, if said platform is in fact a 'gatekeeper', the abusive conduct could be tackled by Article 102 TFEU.[133] However, the Commission was of the opinion that, firstly, not all gatekeepers can be considered 'dominant', and secondly, when it comes to large online platforms, it is nearly impossible to satisfy the steps of Article 102 to prove dominance in the first place, let alone – abuse of said dominant position.[134] A new regulatory framework was, therefore, necessary to not only secure market fairness, but also ensure bigger consumer surplus and innovation incentives. The Commission, then, chose to create a new framework which would be: (i) *ex-ante* regulation-based – i.e., there would be positive and negative obligations that would need to be complied with by gatekeepers, (ii) a description of the main platform services, (iii) both qualitative and quantitative criteria to assess which providers of said services can be labeled as 'gatekeepers', and finally (iv) the option to update the regulation after a market investigation proves that there are new challenges, or simply new anti-competitive behavior.[135] The DMA makes it possible for the Commission to not lose time with defining the exact market a digital platform operates in, but rather focuses on the impact the gatekeeping platform has on the internal market as a whole. On that note, a digital gatekeeper, according to the DMA, is a 'provider of core platform services' ('CPS').[136] The common characteristics of these CPSs constitute, as described in Recital 2 DMA proposal:

> […] very strong network effects, an ability to connect many business users with many end users through the multi-sidedness of these services, a significant degree of dependence of

[128] Ibid 2, 3.
[129] Commission, 'Online Platforms Accompanying the document Communication on Online Platforms and the Digital Single Market' (Staff Working Document) SWD(2016) 172 final.
[130] Communication (n 129) 3, 4
[131] Ibid 4.
[132] Ibid 7.
[133] Ibid 8.
[134] Ibid 8.
[135] Ibid 10
[136] DMA Proposal (n 36) art 2(1).

> both business users and end users, lock-in effects, a lack of multi-homing for the same purpose by end users, vertical integration, and data driven-advantages.[137]

These characteristics pinpoint companies like Facebook, Microsoft, Alphabet (Google), Apple, etc., which have been and continue being under antitrust scrutiny all around the world.[138]

b) The Procedure of Becoming a Gatekeeper

Firstly, after a company has been designated as a gatekeeper – which is an obligation of the gatekeeper to notify themselves and their CPSs to the EC within three (3) months after they have satisfied the conditions of being a gatekeeper.[139] The EC needs to designate the company as gatekeeper sixty days, i.e. two (2) months, after receiving the information by the gatekeeper. After that, the company has six (6) months.[140] The gatekeeper could also argue that it does not cover the threshold set in the DMA, and submit proof to the EC. The EC would then need to make a decision on this matter within five (5) months.[141] This places an overall initial timeline to compliance anywhere from a minimum of eleven (11) months to fourteen (14) months. Another route, if the gatekeeper does not notify themselves, the Commission could launch a market investigation (similarly to the market investigation provision under Regulation 1/2003), and the investigation needs to be completed within twelve (12) months. After those twelve (12) months, the EC needs to notify the gatekeeper, and if the gatekeeper considers that the threshold is not covered, they have to submit proof to the EC and the EC again has five (5) months to notify its decision to the gatekeeper. Afterwards, the gatekeeper would have six (6) months to comply. This process would generally take longer – twenty-three (23) months to compliance (i.e., nearly two (2) years after the market investigation would be launched). In comparison to the previous framework, and, for instance, in the case of *Microsoft* and *Google*, as discussed in the previous Chapter, market investigation took one (1) year and was followed by a decision. The process after is what took longer.

3.3 Proposed Ex-ante Obligations – Lessons From the 'Google' and 'Microsoft' Commission Decisions

The DMA proposal includes specific obligations on the gatekeeping platforms. Article 5 consists of 'self-executing' measures which need to be complied with within six months of a company designated as a gatekeeper.[142] In the case of non-compliance, the EC would take the necessary measures – e.g., interim measures,[143] acceptance of commitments,[144] penalty payments,[145] and finally, as a last resort, structural remedies.[146] Due to the limited scope of this paper, not all

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[137] Ibid rec (2).
[138] See case-law discussed in Chapter 2.
[139] DMA Proposal (n 36) art 3(3).
[140] Ibid art 3(8).
[141] Ibid art 15(3).
[142] Ibid art 5.
[143] Ibid art 22.
[144] Ibid art 23.
[145] Ibid art 26.
[146] Ibid art 16.

obligations will be discussed; only the ones which have been imposed in the *Google* and *Microsoft* decisions and whether the DMA incorporates the lessons from those two cases regarding both remedy design and compliance.

a) The Remedies in the Decisions

To recap the information from the previous chapter, here are the remedies imposed in Google and Microsoft Commission decisions. In Microsoft: to correct the tying of WOS and WMP, the EC obligated Microsoft to design and offer a new version of Windows in Europe without the WMP included; to address the market structure of work group server operating systems, the EC imposed on Microsoft to provide important interoperability information to third parties which would enable those to design software which could be integrated with WOS, and thus prevent Microsoft from foreclosing additional markets by leveraging market power; and, the choice screen remedy which was submitted as a commitment by Google and the aim of which was to enable more browsers to enter the market. Out of these, it seems that the choice screen commitment was the most successful, judging by the decline of market share and usage of the IE browser as opposed to other browsers, and that the decline was faster in the EU than in the US. Certainly, this is just a probability as there could have been other reasons for the decline of the usage of the IE browser.

In *Google Search (Shopping)*, self-preferencing conduct was addressed by the Commission imposing a 'cease and desist' order and Google submitting commitments which were not in line with the Commission decision, particularly, the legal theory for the reason the harm occurred. In Google Android, the choice screen commitment was chosen by Google, with the Commission (and affected CSSs) not approving the first commitment, which was then followed by a commitment using the Microsoft choice screen as a benchmark.

b) The Decisions' Effect on the DMA

As already mentioned, the DMA is concerned with market contestability – or in other words, the DMA needs to ensure that the market structure allows for new entrants and the strong network effects, the ecosystems created, the incumbency position, and the high returns to scale gatekeeping companies possess[147] (e.g., Google and Microsoft), do not actually 'keep the market gates closed'. Article 6 constitutes the obligations that, in this author's opinion, literally implement the remedies and commitments submitted in the *Microsoft* and *Google* Decisions.

Firstly, Article 6(1)(b), which obliges gatekeepers to' allow end users to un-install any pre-installed software applications' – i.e., the issue in the *Google Android Decision* regarding the tying of Google Chrome and Google Search App with Google Play Store. While Microsoft's WMP was also pre-installed on the WOS, the WMP could have been un-installed, thus this obligation would not apply to Microsoft's case, as the Commission's remedy then was that Microsoft completely removed the WMP from the WOS and offer this version of Windows in the European market. Given the specifications of the remedy, it shall be presumed that the Commission could not have implemented it in the DMA, but would be able, if necessary, to tailor a similar remedy to a specific conduct.

[147] Crémer Report (n 19) 20.

Article 6(1)(d) implements the issue posed in *Google Search (Shopping)* entirely, as it states that the gatekeeper shall 'refrain from treating more favorably in ranking services [its own products or services] compared to similar services or products of third part[ies] and apply fair and non-discriminatory conditions to such ranking'.[148] In other words, if the DMA proposal is adopted, self-preferencing would officially be a conduct that could affect digital markets' structure and would thus be a conduct that gatekeepers should be careful with. Google's compliance mechanism, however, was what was wrong with this remedy, and as other rival CSSs claimed, the structure of the market was not affected by the way Google complied with the remedy. It follows that the Commission would need to strictly follow the manner by which not only Google but other gatekeeping platforms implement this remedy.

Finally, Article 6(1)(f) implements the issue in the *Microsoft* Decision regarding Microsoft's refusal to supply interoperability information to third parties, which was necessary for these third parties to access the adjacent market. Article 6(1)(f) reads as follow: '[gatekeepers shall] allow […] providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used [by the gatekeeper] in the provision […] of any ancillary services'.[149] However, as mentioned in the previous Chapter, again ensuring compliance with this measure, particularly, that Microsoft would provide the technical information necessary to fully comply with the Commission's Decision.

c) Compliance?

After a company is designated as a gatekeeper, they have six (6) months to comply and in the case of non-compliance, the EC could impose different enforcement measures – from interim measures[150] and commitments on behalf of the gatekeeper,[151] to structural remedies (i.e., separation of the company) in case of systemic non-compliance.[152] After the six (6) months have passed, the timeline for the imposition of interim measures is not clear, neither is the timeline for the lapse of time that can pass until the gatekeeper submits commitments in order to address the non-compliance.[153] It shall be noted, however, that the DMA involves a dialogue rule between the EC and the gatekeeper – i.e., the Commission needs to communicate to the gatekeeper within three months into the investigation on what the eventual measures might be to ensure compliance.[154] Article 16 of the DMA proposal sets the rules for the imposition of behavioral or structural remedies and it involves the following timeline: the investigation that would be launched in order to narrow down the measures that should be imposed would last twelve (12) months, while in the meantime, in order to even begin investigation to impose additional behavioral or structural remedies, the EC would need to have issued at a minimum of three (3) non-compliance decision within five (5) years before the investigation would be launched. Structural remedies would only be possible if there would be no other more appropriate

[148] DMA Proposal (n 36) art 6(1)(d).
[149] Article 6(1)(f)
[150] Ibid art 22.
[151] Ibid art 23.
[152] Ibid art 16.
[153] Ibid art 25.
[154] Ibid art 25(2).

behavioral remedy. All in all, the process to impose additional remedies would take nearly six (6) years.

Judging by the *Microsoft* and *Google* Decisions, and the difficulties with ensuring compliance, the DMA appears vague regarding the manner of ensuring compliance and, on some points, similar to the current framework. For instance, the fact that the Commission can act in case of non-compliance, impose interim measures in case of 'serious and irreparable damage' to users, is not something novel, as it is already included in Reg 1/2003 and has been utilized in cases not concerning online platforms.[155] Furthermore, the gatekeeper submitting commitments is also a practice utilized in previous cases, including the *Microsoft* and *Google* Decisions. Similarly, the Commission can impose behavioral or structural remedies in case of systematic non-compliance, but the Commission is currently able to utilize these tools as well.[156] Certainly, the difference is that once a company qualifies as a gatekeeper, then the company will be subject to all obligations entailed in the DMA, whereas with the current framework, the Commission would need to start separate investigations into each anti-competitive conduct, and find a causal connection between the harm on consumers, the harm on market structure, and the conduct itself. The DMA makes this process faster as there is no need to launch an investigation into each anti-competitive behavior; all the Commission needs to, in a way, prove, is that the company qualifies as a gatekeeper under Article 3 DMA proposal.

3.4 Final Thoughts?

The DMA proposal appears to have incorporated the remedy design utilized in the *Microsoft* and *Google* Decisions, or at the least, the ones which are widely applicable to more services. For instance, the choice screen remedy in Google and Microsoft is quite specific to be imposed as a general obligation for all gatekeeping companies. What would be of use to the Commission is to consider whether the fact that all companies are subject to the same numbder of obligations, is actually useful. Nevertheless, if the monitoring aspect is excluded from the discussion, what is seen from the *Google* and *Microsoft* Decisions is that a better tailored remedy has been better perceived. The best remedies (or submitted commitments) were the ones multiply communicated between the Commission and the company, until the Commission acknowledged the suitability of the remedy.[157]

Regarding compliance, the Commission has codified the ability to appoint monitoring experts at its own cost, and not at the cost of the Company.[158] However, the extent to which ensuring compliance via the DMA would be effective in terms of correct implementation of the Articles 5 and 6 obligations, is unclear. It shall be noted that whereas under the current framework the Commission investigates one company at a time, and later on imposes remedies on said company, with the DMA, all gatekeepers are already obligated to refrain or completely cease behaviors entailed in Articles 5 and 6. Nevertheless, while this is certainly a faster intervention, there are even more obligations which the DMA needs to continuously ensure compliance with.

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[155] Reg 1/2003 (n 45) art 8.
[156] Ibid rec (12).
[157] See, A de Steel and P Larouche, 'The European Digital Markets Act proposal: How to improve a regulatory revolution' (2021) 2 Concurrences 45, 58.
[158] DMA Proposal (n 36)

The question is – if the Commission has met difficulties with ensuring compliance in regard to only one Company and one single Decisions, how would the Commission tackle the monitoring of the large number of obligations constituted in the DMA? While it is useful to appoint a Monitoring Trustee, it would also be useful to create a new Digital Markets Authority, similar, for instance, to the Digital Markets Unit in the UK, which would be central in dealing with digital markets and implementing the DMA.[159]

Finally, the many obligations that would be imposed, the monitoring process behind them, and the nearly impossible imposition of additional remedies due to non-compliance calls for attention.[160] For the sake of working with available resources, not over-burdening companies with compliance and the EC with monitoring, the timeframe to impose remedies should be shortened (e.g., two non-compliance decision in two years' time), while at the same time the obligations to be complied with are decreased in number by only requiring basic obligations that are not specifically written in current antitrust framework.[161] Certainly, what is different with the DMA is that some of the remedies that used to be imposed on a case by case basis, would transform into ex-ante regulatory measures should the DMA be adopted. However, in the meantime, companies can simply choose to not comply, and if this occurs, it would take quite a long time until an additional enforcement decision is made, which is almost equal to having to deal with a situation on a case-by-case basis.

3.5 Conclusion

This chapter presented the DMA proposal's main characteristics and, in short, the process of a company being designated as a gatekeeper. The second part of the Chapter analyzed the DMA proposal from the perspective of the *Microsoft* and *Google* Decisions to evaluate the extent to which the DMA proposal incorporates the challenges met in tackling the anti-competitive conducts by these two companies in the past 20 years.

Concluding Remarks

a) Recap of Arguments

This thesis addressed the topic of remedial solutions and compliance in digital markets and the argument was divided in three main chapters. In the first chapter, the main characteristics of large online platforms were presented in order to familiarize the reader with the issues online platforms present to competition law. Thus, the common characteristics of online platforms are: multi-sidedness (i.e., presence in multiple markets), the role of intermediaries, the strong network effects and formation of an ecosystem, and economies of scale and scope. These platforms act as gatekeepers in digital markets and thus, affect, market contestability and can harm the structure of the markets to an irreversible point. The ways the Commission and other competition

[159] CMA, 'Digital Markets Unit' (UK Gov, 7 April 2021) available at <https://www.gov.uk/government/collections/digital-markets-unit> accessed 15 August 2021.
[160] A de Steel et al, 'Making the Digital Markets Act More Resilient and Effective' (CERRE Report, May 2021) 17.
[161] L Cabral et al, 'The EU Digital Markets Act: A Report from a Panel of Economic Experts' (Report to the EU Commission, 2021) 10-11.

authorities address those challenges is by imposing remedies, which can be either imposed ex post, as is the current framework, or ex ante, via a regulation, which is the new DMA proposal. The main challenges concerning remedial solutions applicable to this paper were addressed – i.e., remedy design and monitoring compliance.

Chapter II provided a discussion on the following Commission Decisions: *Microsoft – Refusal to Supply Interoperability Information* & *Microsoft – Illegal Tying of WMP with WOS*, (*Microsoft I*)[162] , and *Microsoft – illegal tying of IE with WOS*,[163] *Google Search (Shopping)*[164] and *Google Android*.[165] The result of the discussion is twofold: firstly, in regard to remedy design, the Commission was more strict towards Microsoft by specifying the remedies in *Microsoft I*, in contrast with the *Google* Decisions, where the Commission limited itself to impose a 'cease and desist' order, without specifying how this order should be implemented. Furthermore, it was noted that Google as a company utilized Microsoft's commitments regarding the IE and WOS tying as a benchmark when reviewing the initial commitments proposed for its own choice screen remedy implementation. Effect-wise, the remedies were not ill-designed, but rather small details were missed when imposing the remedy or approving the commitments submitted by the companies – i.e., the fact that the Commission did not consider the impact that the Windows version without the WMP bundle and with the WMP bundle would be sold at the same price, or the initial approval of the auction-based choice screen remedy in *Google Android*. Another detail that was overlooked was the manner of ensuring compliance, as seen with the Microsoft I interoperability remedy, it was quite difficult from a technical knowledge standpoint to ensure that Microsoft did indeed share the interoperability information necessary to implement the remedy imposed by the Commission.

Chapter III then presents the new DMA Proposal and its main characteristics, as well as the process of being subject to the regulation once in force. Afterwards, the Microsoft and Google Decisions, or rather, the remedies and compliance mechanisms involved in these Decisions, were compared to the obligations set out in Article 6 of the DMA Proposal, and what was found is that the Commission did use these two cases as a benchmark when drafting some of the obligations in the DMA. From a remedial design standpoint, it can be considered that the Commission has implemented the successful remedies, but the issue with ensuring compliance still holds. The Chapter then discusses that the Commission seems to have not thoroughly designed the compliance mechanisms which is equally as important as the exact remedy to be imposed or commitment to be submitted.

Chapter III thus proposes the creation of a separate Digital Markets Authority which would only tackle issues with monitoring obligations under the DMA. Another point of recommendation would be the specification of which obligations apply to which platform. Platforms are different – from operating systems, to social networks, and not every obligation will be applicable to each platform.[166]

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[162] *Microsoft I* (n 56).
[163] *Microsoft II* (n 57).
[164] *Google Search (Shopping)* (n 54).
[165] *Google Android* (n 55).
[166] DMA Proposal (n 36) point 1, page 2.

b) Answer to the Research Question

This thesis' aim is to answer the question of the extent to which the DMA Proposal has addressed the remedial challenges met in the Microsoft and Google Decisions. The answer is as follows: the Commission did implement the lessons when it comes to remedy design, while still leaving the companies some leeway for discussion, but failed to sufficiently implement the lessons learnt from endeavoring to ensure compliance. In addition, a negative connotation could be that there are quite a lot of obligations included in the DMA, which calls for a better plan to ensure compliance and proper implementation of the obligations. The Commission did state in the DMA that there could be a Monitoring Trustee appointed or another team of experts to aid the Commission with monitoring and ensuring compliance, and the team would be a cost for the Commission. The fact that the team or Monitoring Trustee would be a cost for the Commission is the effect of the Court ruling where the Court did not agree with Microsoft paying the cost for a Monitoring Trustee.[167] However, given how difficult it resulted to ensure compliance with only one company, it would be, therefore, even more difficult to ensure compliance for all gatekeepers who need to share specific interoperability information. In fact, depending on the market they operate in, this information would be distinct in terms of importance for third parties.

c) Limitations to the Research

This research is limited to remedy design and compliance without looking into effects that the specific remedies might pose on the digital economy and quality competition. In addition, this research did not expand to discuss the points of privacy regulation, the meaning of data and the sharing of said data for markets and consumers, nor was there a discussion on the correlation between data protection, consumer protection, and competition law.

d) Points for Further Research

Given the number of obligations that gatekeepers would need to comply with, it would be a vital point of discussion to what extent the compliance with these obligations would be disproportionately burdensome on behalf of the gatekeepers themselves. While it would be difficult for the Commission to ensure compliance and constantly monitor gatekeepers' behavior, it would also be a challenge for gatekeepers to follow through with all these obligations. It is questionable whether over-burdening some of the prime drivers of innovation, is in fact better for market competition, and if market contestability is indeed accomplished via the DMA, to what extent does this improve the quality of competition in digital markets and the platform economy.

[167] *Microsoft I* (n 56) [1048]; see also Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, point 1.

Bibliography

Primary Sources

Primary Legislation

Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/1.

Consolidated version of the Treaty on European Union (TEU) [2012] OJ C 326/13.

Secondary Legislation

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

Commission Regulation (EU) No 330/2010 of 20 April 2010 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 [2010] OJ L102/1.

Case-law

Case 85/76 *Hoffmann – La Roche v Commission* [1979] ECR 461.

Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

Commission Decisions

Microsoft I (Case COMP/C-3/37.792) Commission Decision of 24 March 2004.

Microsoft II (Case COMP/C-3/39.530) Commission Decision of 16 December 2009.

Google Search (Shopping) (Case AT.39740) Commission Decision of 27.6.2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area [2017] C(2017) 4444 final.

Google Search (Shopping) (Case AT.39740) Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement [2018] OJ C 9/11.

Google Android (Case AT.40099) Commission Decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement [2018] C(2018) 4761 final.

Google Android (Case AT.40099) Summary of Commission Decision of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA [2019] OJ C 402/19.

Secondary Sources

Books

Lorenz M, *An Introduction to EU Competition Law* (CUP 2013).

Monti G, *EC Competition Law* (CUP 2004).

Nazzini R, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2012).

Stucke M and Grunes A, *Big Data and Competition Policy* (OUP 2016).

Whish R and Bailey D, *Competition Law* (7th edn, OUP 2012).

Edited Contributions

Barwise P and Watkins L, 'The Evolution of Digital Dominance: How and Why We Got to GAFA' in Moore M and Tambini D (eds), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (OUP 2018).

Economides N and Lianos I, 'The quest for appropriate remedies in the EC Microsoft cases: a comparative analysis' in Rubini L (ed), *Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case* (Edward Elgar 2010).

Journal Articles

Bradford A et al, 'The Chicago School's Limited Influence on International Antitrust' (2019) 87 University of Chicago Law Review 297.

Economides N, 'The Microsoft Antitrust Case' (2001) 1 Journal of Industry, Competition and Trade: From Theory to Policy 7.

Economides N and Lianos I, 'Acritical Appraisal of Remedies in The E.U. Microsoft Cases' (2010) 2 Columbia Business Law Review 346.

Kennedy J, 'The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown' (March 2017) Information Technology & Innovation Foundation.

Page WH and Childers SJ, 'Software Development as an Antitrust Remedy: Lessons from the Enforcement of the Microsoft Communications Protocol Licensing Requirement' (2007) 14 Michigan Telecommunications and Technology Law Review 77.

Pradeep MD, 'Legal Research - Descriptive Analysis on Doctrinal Methodology ' (2019) 4 International Journal of Management, Technology, and Social Sciences (IJMTS) 95.

Ritter C, How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? (2016) 7 Journal of European Competition Law & Practice 587.

Steel A de and Larouche P, 'The European Digital Markets Act proposal: How to improve a regulatory revolution' (2021) 2 Concurrences 45.

Wigand RT, 'Whatever happened to disintermediation?' (2020) 30 Electron Markets 39.

Working Papers

Rochet J & Tirole J, 2004, 'Two-Sided Markets: An Overview' (2004) IDEI Working Paper.

Commission Documents

Commission (EC), 'Proposal for a Regulation of The European Parliament and of The Council on contestable and fair markets in the digital sector' (Digital Markets Act) COM(2020) 842 final.

Commission, 'Competition: Commission appoints Trustee to advise on Microsoft's compliance with 2004 Decision (IP/05/1215)' (Brussels, 5 October 2005) available at < https://ec.europa.eu/commission/presscorner/detail/en/IP_05_1215> accessed 1 July 2021.

Reports

OECD, 'Remedies and Sanctions in Abuse of Dominance Cases' (15 May 2007) DAF/COMP(2006)19. N39

Autorité De La Concurrence & Bundeskartellamt, 'Competition Law and Data' (10 May 2016).

OECD, 'Rethinking Antitrust Tools for Multi-Sided Platforms' (2018) <www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm> accessed 5 March 2021.

OECD 'Quality considerations in digital zero-price markets' (9 October 2018) DAF/COMP(2018)14.

UNCTAD, ‘Competition issues in the digital economy (Geneva, 10–12 July 2019)’ (1 May 2019) TD/B/C.I/CLP/54.

Gorp, N van and Bijl, P de, ‘Digital Gatekeepers: Assessing Exclusionary Conduct – Report Commissioned by the Dutch Ministry of Economic Affairs and Climate Policy’ (eConomics, 2019).

Stigler Committee, ‘Stigler Committee on Digital Platforms’ (Stigler Center for the Study of the Economy of State, 2019) available at <https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report> accessed 20 February 2021 (‘Stigler Report’).

Crémer, J. et al, ‘Competition Policy for the Digital Era: Final Report’ (Publications Office of the European Union 2019) <http://ec.europa.eu/competition/information/digitisation_2018/report_en.html> accessed 1 August 2021.

Sunderland J et al, ‘Digital Markets Act: Impact assessment support study :executive summary and synthesis report (Publications Office of the European Union 2019) <https://op.europa.eu/en/publication-detail/-/publication/0a9a636a-3e83-11eb-b27b-01aa75ed71a1> accessed 4 August 2021.

Australian Competition and Consumer Commission, ‘Digital Platforms Inquiry–Final Report’ (26 July 2019).

Furman J et al, ‘Unlocking Digital Competition - Report of the Digital Competition Expert Panel’ (UK CMA 2019) (‘Furman Report’). N17

OECD, ‘Annual Report on Competition Policy Developments in Mexico’ (9 November 2020) DAF/COMP/AR(2020)23.

House Majority Report (USA), ‘Investigation of Competition in Digital Markets’ [2020].

Gore D & Rooijen A van, ‘Ex Post Assessment of European Competition Policy: The Microsoft cases’ (Draft report prepared for the 2021 Annual Conference of the GCLC).

Cabral L et al, ‘The EU Digital Markets Act: A Report from a Panel of Economic Experts’ (Report to the EU Commission, 2021).

Steel A de et al, ‘Making the Digital Markets Act More Resilient and Effective’ (CERRE Report, May 2021).

Online Contributions

Bethell O, 'Changes to the Android Choice Screen in Europe' (Google Blog, 8 January 2021) available at <https://blog.google/around-the-globe/google-europe/changes-android-choice-screen-europe/> accessed 23 August 2021.

Bowman E, 'Internet Explorer, The Love-To-Hate-It Web Browser, Will Die Next Year' (NPR, 22 May 2021) available at <https://www.npr.org/2021/05/22/999343673/internet-explorer-the-love-to-hate-it-web-browser-will-die-next-year> accessed 5 August 2021.

Commission, 'Antitrust: Commission accepts Microsoft commitments to give users browser choice' (Brussels, 16 December 2009) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_09_1941> accessed 22 August 2021.

Commission, 'Antitrust: Commission probes allegations of antitrust violations by Google' (30 November 2010) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1624> accessed 26 August 2021.

Commission Documents, 'Non-confidential version of the complaint by FairSearch of 25 March 2013 (Doc ID 17)' (2013).

Commission, 'Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments' (Brussels, 6 March 2013) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_13_196> accessed 2 August 2021.

Commission, 'Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android' (15 April 2015) available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4780> accessed 26 August 2021.

Commission, 'Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Online Platforms and the Digital Single Market Opportunities and Challenges for Europe (Brussels, 25 May 2016)' (Communication) COM/2016/0288 final.

Commission, 'Online Platforms Accompanying the document Communication on Online Platforms and the Digital Single Market' (Staff Working Document) SWD(2016) 172 final.

CSSs Service Providers, 'Letter to the Commission' (28 November 2019) 2.

Gennai P, ‘An update on Android for search providers in Europe’ (Google Blog, 2 August 2019) available at < https://www.blog.google/around-the-globe/google-europe/update-android-search-providers-europe/> accessed 15 August 2021.

Google, ‘Response to the Court's Questions for written answers of 19 December 2019 in Case T-612/17’ (22 January 2020).

Höppner T, ‘Antitrust remedies in digital markets: lessons for enforcement authorities from non-compliance with EU Google decisions’ (*Hausfeld LLP*, 19 November 2020) <https://www.hausfeld.com/nl-nl/what-we-think/publications/antitrust-remedies-in-digital-markets-lessons-for-enforcement-authorities-from-non-compliance-with-eu-google-decisions/> accessed 14 August 2021.

Lockheimer H, ‘Complying with the EC’s Android decision’ (Google Blog, 16 October 2018) available at <https://www.blog.google/around-the-globe/google-europe/complying-ecs-android-decision/> accessed 20 August 2021.

Page WH, ‘Optimal Antitrust Remedies: A Synthesis’ (*SSRN*, 17 May 2012) available at <https://ssrn.com/abstract=2061791> accessed 29 July 2021.

Parker G et al, ‘Digital Platforms and Antitrust’ (*SSRN*, 22 May 2020) available at <https://ssrn.com/abstract=3608397> accessed 8 July 2021.

Sousa PC de, ‘What Shall We Do About Self-Preferencing?’ (*Competition Policy International*, 24 June 2020) < https://www.competitionpolicyinternational.com/what-shall-we-do-about-self-preferencing/> accessed 10 August 2021.

Online Newspapers and Magazines

Meller P, ‘Microsoft and Europe Agree Software Remedy Has Failed’ (*NY Times*, 25 April 2006) available at <https://www.nytimes.com/2006/04/25/technology/microsoft-and-europe-agree-software-remedy-has-failed.html> accessed 1 July 2021.

L Essers, ‘Microsoft kills EU browser choice screen’ (*ARN Net*, 18 December 2014) available at <https://www.arnnet.com.au/article/562795/microsoft-kills-eu-browser-choice-screen/> accessed 1 August 2021.

Heaven D, ‘How Google and Facebook hooked us – and how to break the habit’ (*New Scientist*, 7 February 2018) <https://www.newscientist.com/article/mg23731640-500-how-google-and-facebook-hooked-us-and-how-to-break-the-habit/> accessed 20 January 2021.

Reuters Staff, ‘How Big Tech companies gain and maintain dominance’ (*Reuters International*, 6 October 2020) <https://www.reuters.com/article/us-usa-tech-antitrust-congress-factbox/how-big-tech-companies-gain-and-maintain-dominance-idUKKBN26R3RD> accessed 29 January 2021.