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Interim Measures in Digital Markets: Interaction Between the DMA and Regulation 1/2003

ARTICLE

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ABSTRACT

This Article investigates the interplay in the field of interim measures between the Digital Markets Act (DMA) and Regulation 1/2003 on the implementation of Articles 101 and 102 TFEU competition rules. The European Commission's interim powers under Article 24 of the DMA are examined, exploring the parallels and contrasts with the legal framework established for competition law. It is argued that ordering interim measures under the DMA generally seems an easier task, but that the latter's invigorated approach to digital markets will also spill over to competition cases, enhancing in the sector the rarely used interim powers under Article 8 of Regulation 1/2003.

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1 INTRODUCTION

Much ink has been spilled on the Digital Markets Act (DMA),[1] particularly on the relationship of this new, largely competition-driven Regulation, with competition law traditional concepts and methods. Several aspects, however, remain unexplored. One of the areas yet to be examined is the power which the DMA grants the European Commission (Commission) to order interim measures pending investigations. Established under Article 24 DMA, the tool is closely inspired by the interim powers which the Commission holds for Articles 101 and 102 TFEU enforcement under Article 8 Regulation 1/2003.[2] Ordering interim measures under either of these Regulations presupposes, in a nutshell, that three legal conditions are met: (i) urgency linked to a risk of serious and irreparable damage for certain interests; (ii) a *prima facie* violation of the substantive provisions at stake; and (iii) proportionality, implying notably that the adverse consequences caused by the measures must not unreasonably outweigh the benefits for the interests they seek to protect. Interim powers are fundamentally concerned with the full and effective application of a final decision in a case. They are, therefore, a crucial enforcement tool to ensure that both the DMA and competition law provisions are complied with in practice, and not only in theory, that their objectives are safeguarded, and that the synergies of their intended complementary application in digital markets are achieved.

Having as its primary focus the uncharted territory of Article 24 DMA, this article looks at the interplay between the DMA and Regulation 1/2003 in the area of interim measures in a twofold way. Firstly, from the DMA's perspective, to pave the way for the future exercise of the Commission's interim powers, it is of interest to investigate the legal framework for interim measures under this new Regulation, exploring the parallels and contrasts with Article 8 Regulation 1/2003, and enquiring, in general terms, how difficult it appears to be for the Commission to meet the relevant conditions. Secondly, regarding competition law, this article is intrigued by whether the deep concerns over ill-functioning digital markets and lack of timely enforcement that underlie the adoption of the DMA may impact the future exercise of interim powers in the sector and lead to a more meaningful use of the tool in competition law investigations. From the standpoint of the effectiveness of Articles 101 and 102 TFEU enforcement, it is, in fact, a worrying observation that the Commission has imposed interim measures only once in the hundreds of proceedings which it has opened under Regulation 1/2003 in more than twenty years.

This article does not look or advocate for legislative amendments to relax the applicable conditions and facilitate interim action by the Commission under the DMA or competition law. Rather, the intent is to explore the potentialities of the existing legal frameworks which are here presumed to be generally sound. The assessment will extract the main guiding principles from the case law of the Court of Justice of the European Union (CJEU),[3] the Commission's decisions, and literature regarding the Commission's interim powers in competition law, without ignoring the CJEU's own powers to grant interim relief in different areas. Analogies are justified given that all the interim powers at stake are similarly governed by the three conditions mentioned above, and that they all exist to ensure the effectiveness of a final decision or a final ruling in a case. In this respect, recent judicial interim proceedings concerning the Digital Services Act (DSA) will be considered inasmuch as the CJEU underlines, in the context of the proportionality assessment, the great importance of the interests protected by the EU rules for the digital sphere.[4]

The analysis proceeds as follows. Section 2 provides background information on the challenges posed by digital markets and the EU's commitment to rein in giant technology companies (big tech) that will inform the subsequent analysis. Section 3 then offers an overview of the aims

1 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ [2022] L 265/1.

2 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty OJ [2003] L 1/1.

3 References to 'CJEU' include the Court of Justice (CJ) and the General Court (GC), former Court of First Instance (CFI).

4 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) OJ [2022] L 277/1. See Section 4.3.

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and structure of the DMA to better grasp the specificities of digital markets and the role of interim measures within the DMA's system. Section 4 identifies and explores the main features of the Commission's interim powers under Article 24 DMA, and puts forward that a combination of legal and policy factors facilitates interim action under the DMA. Section 5 turns to the vexed question of the scarcity of interim decisions under Article 8 Regulation 1/2003. Focusing on digital markets, the Section argues that the acknowledgement in the DMA of the specificities of these markets, and of the systemic risks which big tech practices can pose for consumers, businesses, and the whole of society if timely intervention is not secured, provides a strong indication that competition law investigations in the sector are generally good candidates for interim measures. Most importantly, the DMA reflects a shift in the overall enforcement environment conducive to prioritizing the effective application of competition law over the historical preoccupation with avoiding excessive enforcement. The latter likely being a major factor behind the Commission's reluctance towards using the tool, a more active exercise of interim powers to prevent serious and irreparable damage to competition should follow. Section 6 concludes.

2 THE EU's COMMITMENT TO VIGOROUSLY DISCIPLINE DIGITAL MARKETS

The adoption of the DMA, together with the DSA, marks an important milestone in the EU's efforts to regulate the activities of big tech. These new rules are part of a broader political and legal context in which there is extensive agreement that the proper functioning of digital markets requires swift and strong intervention. As the present article explores, such resolve is not without implications for the exercise by the Commission of its interim powers both within the DMA and Regulation 1/2003.

The digital transformation of our societies and economies has brought countless benefits, in terms of participation, market integration and expansion, choice, personalization of content and experiences. Despite these undeniable benefits, people have become increasingly aware of the risks of the digital transformation-promise, spurring intense debate over how to address the threats associated with the data-driven tech industry and its all-encompassing ecosystems. It is well documented, for example, that digital technologies can facilitate the misuse of personal data, foster polarization, amplify online hate speech, or be instrumentalized by authoritarian regimes.[5] Furthermore, the concentration of economic, political, and cultural power in a few corporate behemoths gave them competitive advantages hard to surmount – resulting notably from the unprecedented exploitation of large datasets and a surge of acquisitions[6] – but also significant influence over democracy, fundamental rights, societies and the economy.[7]

The concerns over the negative consequences of a handful of companies dominating the digital space have prompted several responses around the world, reflecting different visions and policy trade-offs. It has been observed that three leading regulatory models – so-called 'digital empires'– emerged in the EU, the US and China.[8] Europe has pioneered some of the most interventionist actions. Germany, for example, threatened with sanctions for failure to swiftly remove illegal content online,[9] and enacted special competition rules for digital platforms,[10]

5 On these issues, see e.g. M Moore & D Tambini (eds.), *Digital dominance: the power of Google, Amazon, Facebook, and Apple* (OUP, 2018); M Eifert et al., 'Taming the giants: The DMA/DSA package' (2021) 58 *CML Rev.*, 988; A Bradford, *Digital Empires: The Global Battle to Regulate Technology* (OUP, 2023); European Commission, <2023 Report on the state of the Digital Decade | Shaping Europe's digital future>, section 4.3.

6 Recitals (36), (44), (59) DMA; See Report for the European Commission, J Crémer et al., *Competition Policy for the Digital Era* ('Special Advisers Report', 2019), 110–111.

7 A Gerbrandy & P Phoa, 'The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-Power', in M Bennett et al., (eds.), *Wealth and Power, Philosophical Perspectives* (Routledge, 2022), 170–174.

8 Bradford (n 5), 6–7, suggesting that the US pioneered a 'market-driven' model, China a 'state-driven' model, and the EU a 'rights-driven' model, each reflecting diverging economic theories, political ideologies, and cultural identities.

9 Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*) (Facebook Act) of 2017.

10 Amendment of the German Act against Restraints of Competition (GWB-Digitalisierungsgesetz – GWB Digitalisation Act) of 2021.

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whereas the UK took steps towards a new pro-competition regime for digital markets.[11] Even in the US, where traditionally markets are believed to self-correct and there has been reluctance to intervene for fear of holding back innovation, momentum is building with increasingly stronger public and political support to constrain the power of tech companies.[12]

At EU level, in addition to several competition law proceedings for abusive conduct and large fines,[13] the appetite for scrutinizing big tech more intensively explains legislation such as the DSA and the DMA, as well as the Commission, the European Parliament, and the Council signing, in 2022, the European Declaration on Digital Rights and Principles for the Digital Decade. Internal Market Commissioner Thierry Breton amusingly encapsulated the EU's commitment in a reply to Elon Musk on Twitter/X, stressing that 'in Europe, the bird will fly by our rules'.[14] Alongside competition rules, these instruments affirm an enhanced responsibility of big online platforms in mitigating the harmful effects stemming from the functioning and use of their services, their business models and market positions.[15] The aim of the DMA, in particular, is to make digital markets more open to competition (contestable) and fairer.[16] To this end, a catalogue of obligations is imposed on the biggest digital companies to rein in their gatekeeper power vis-à-vis business users and end users, which is meant to complement Articles 101 and 102 TFEU competition rules, ensure fast intervention and increase legal certainty.[17] Roughly two weeks after the deadline to comply with the DMA, the Commission opened non-compliance investigations against Alphabet, Apple and Meta,[18] and Executive Vice-President Margrethe Vestager emphasized the importance of achieving the DMA objectives so that 'consumers have the benefits of open and contestable markets. A market with competition'.[19] It appears indeed fairly obvious that the adoption of the DMA is largely explained by the conclusion that lengthy competition law investigations – with their open-ended provisions, case-by-case inquiries of very complex facts, likely effects, arguments about efficiencies and objective justifications – do not allow intervening vigorously enough to tackle the pressing concerns arising in the online platform environment.[20]

3 HOW THE DMA IS SET TO BOOST INTERVENTION IN DIGITAL MARKETS

The DMA is set to speed up intervention and increase legal certainty in digital markets through a catalogue of relatively clear obligations (do's and don'ts) on so-called 'gatekeepers' providing

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11 See <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets>.

12 Bradford (n 5), 19, 21; A Satariano and & D McCabe <Forced to Change: Tech Giants Bow to Global Onslaught of Rules – The New York Times>, 3 March 2024; 'Justice Department Sues Apple for Monopolizing Smartphone Markets' (DOJ PR 24–326), 21 March 2024.

13 See *Google Search (Shopping)* (Case AT.39740), Commission Decision of 27 June 2017 (infringement decision and €2.42 bn fine); *Google Android* (Case AT.40099), Commission Decision 18 July 2018 (infringement decision and €4.34 bn fine); *Google Search (AdSense)* (Case AT.40411), Commission Decision 20 March 2019 (infringement decision and €1.49 bn fine); *Apple – App Store Practices (music streaming)* (Case AT.40437), Commission Decision 4 March 2024 (infringement decision and €1.8 bn fine); *E-book MFNs and related matters (Amazon)* (Case AT.40153), Commission Decision 4 May 2017 (commitments); *Amazon – Buy Box* (Case AT.40703), Commission Decision 20 December 2022 (commitments); *Facebook Marketplace* (Case AT.40684), Commission Decision 19 December 2022 (statement of objections). A 'new competition tool', that would have enabled remedies without a prior finding of infringement, was also considered: see C Farinhas, 'DMA: a step forward in ensuring swift intervention in the digital sector but flexibility is key' (2021) Utrecht University GDS Blog, 12 January 2021.

14 W Preussen, <EU Commissioner to Elon Musk: Twitter will play by our rules – POLITICO>, 28 October 2022.

15 See Report on the state of the Digital Decade (n 5), section 4.3; Eifert et al. (n 5), 989.

16 Art 1 DMA; Recital (7) DMA.

17 Recitals (5), (10), (11), (78) DMA; Art 1(5), (6) and (7) DMA; DMA impact assessment report (SWD(2020) 363 final), paras 118–123, 328–348.

18 See Commission's Press Release IP/24/1689.

19 'Remarks by Executive Vice-President Vestager and Commissioner Breton on the opening of non-compliance investigations under the Digital Markets Act', Speech/24/1702.

20 See e.g. Recitals (5), (10) DMA; DMA impact assessment (n 17), paras 119, 153, 176; OECD, *Ex ante regulation in digital markets*, *OECD Roundtables on Competition Policy Papers* 272 (2021), section 2.2. (on the perceived lack of effectiveness of competition law enforcement alone); G Monti, 'The Digital Markets Act: Improving Its Institutional Design' (2021) 5 *Eur Competition & Reg L Rev*, 90 (the slowness by which cases proceed is among the main perceived weaknesses of competition law that the DMA seeks to surmount); G Colangelo, 'The European Digital Markets Act and antitrust enforcement: a liaison dangereuse' (2022) 47 *E.L. Rev.*, 602 (the DMA is mainly explained by a competition law enforcement failure, the emphasis being on the speed of intervention). The scarcity of interim measures decisions under Regulation 1/2003 has certainly contributed to such an understanding.

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'core platform services' (CPSs). The Commission and the judiciary – the CJEU and Member States courts – will scrutinize compliance.[21] CPSs include online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services.[22] Companies will be designated gatekeepers if they meet three criteria: (i) have a significant impact on the internal market; (ii) provide a CPS which is an important gateway for business users to reach end users; and (iii) enjoy an entrenched and durable position in their operations, or if it is foreseeable that they will enjoy such a position in the near future.[23] At the time of writing, the Commission has designated six gatekeepers – Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft – in relation to well-known digital services, such as Youtube, Amazon Marketplace, Safari, TikTok, Facebook and Windows PC OS.[24]

The declared overarching aim of the new legislation, comprising 54 Articles accompanied by 109 Recitals, is twofold. On the one hand, the DMA seeks to avoid fragmentation in the internal market through harmonized obligations that bring together different solutions adopted by Member States to tackle the adverse societal and economic implications of gatekeepers' practices.[25] On the other hand, in complement to competition law, the DMA seeks to contribute to contestable and fair digital markets, particularly CPSs, to the benefit of business users and end users across the EU. The concern boils down to fostering the emergence of alternative platforms, innovation, high quality of digital products and services, fair and competitive prices, enabling all players to take greater advantage of the digital economy.[26]

For the purposes of the DMA, contestability is understood as the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services.[27] The underlying widely accepted premise is that digital markets require strong and timely intervention because a unique combination and strength of certain features make it difficult for new entrants, irrespective of how innovative and efficient they are, to displace the few firms that have acquired ultra-dominant positions globally.[28] Various reports have identified the features explaining the tendency for high and persistent levels of concentration in the sector.[29] In particular, economies of scale are pushed to the extreme explaining the rise of products and services offered at a zero monetary price;[30] strong economies of scope favour the growth of wide digital ecosystems;[31] strong network effects require entrants to persuade a critical mass of users to coordinate migration to their services;[32] the fact that digital companies have accumulated unprecedented amounts of data, an indispensable ingredient of the digital economy business models.[33] These dynamics make

21 Recital (91) DMA; Art 39 DMA.

22 Art 2(2) DMA.

23 Art 3(1) DMA.

24 See Commission's Press Release IP/23/4328.

25 Recitals (6), (8) DMA; Art 1(1) DMA.

26 Recital (107) DMA; Art 1(1) DMA; DMA legislative proposal (COM/2020/842 final), 9–10; DMA impact assessment (n 17), para 69.

27 Recital (32) DMA; Art 12(5) DMA.

28 Recitals (2) to (4) DMA; Special Advisers Report (n 6), 3; Report for the UK Government, *Unlocking Digital Competition, Report of the Digital Competition Expert Panel* ('Furman Report', 2019), 37; Stigler Center for the Study of the Economy and the State, *Stigler Committee on Digital Platforms Final Report* ('Stigler Report', 2019), 11. M Stucke & A Ezrachi refer to 'super-platforms': 'Emerging Antitrust Threats and Enforcement Actions in the Online World' (2017) 13 *Competition Law International*, 231.

29 For an overview, see F Lancieri & P Morita Sakowski, 'Competition in Digital Markets: A Review of Expert Reports' (2021) 26 *Stan. J.L. Bus. & Fin.*, 65.

30 High up-front investment and fixed costs are coupled with low or near-zero marginal costs of additional users: Furman Report (n 28), 32; Special Advisers Report (n 6), 20, 22.

31 Operating simultaneously across multiple adjacent markets is linked to cost reductions or quality increases: Furman Report (n 28), 32; Special Advisers Report (n 6), 4, 15.

32 The benefits to a user increase as the number of users increases (Furman Report (n 28), 35). The size of this advantage depends on factors such as multi-homing (freedom to switch between services, or use multiple services simultaneously), data portability (ability of users to transfer elsewhere the data that a platform has collected about them), and interoperability (ability to exchange information and mutually use the information exchanged through interfaces or other solution) (Special Advisers Report (n 6) 2, 6).

33 Recital (32) DMA; Special Advisers Report (n 6), 2, 29; Furman Report (n 28), 23.

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digital markets prone to 'tipping', a phenomenon in which a winner will take most of the market once a certain advantage is gained in terms of scale or intermediation power between end users and business users.[34]

Intertwined with the unprecedented concentration of power in digital markets is the potential for unfair behaviour vis-à-vis business users. In the context of the DMA, unfairness means an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage. The understanding is that because business users are significantly dependent on the CPSs of a few giant digital companies acting as gateways to reach end users, these companies can unilaterally set conditions not allowing business users to capture fully the benefits of their own contributions.[35]

Against this background, Chapter III of the DMA, largely drawing on competition law investigations,[36] bans or imposes close to two dozen practices with a view to lower barriers to entry or expansion and constrain the superior bargaining power of gatekeepers.[37] The task is accomplished through, firstly, self-executing obligations (Article 5), deemed sufficiently clear to be complied with by gatekeepers without additional guidance;[38] and, secondly, through obligations whose complexity and transformative potential may require that the Commission specifies further, in possible dialogue with gatekeepers, the measures necessary to ensure effective compliance (Articles 6, 7 and 8).[39] The Commission can, however, proceed to non-compliance findings regardless of such specification.[40] Also, gatekeepers must not engage in behaviour that may circumvent the DMA obligations (Article 13). Self-executing obligations include, for example, the prohibition to combine personal data from the CPS with personal data from other services of the gatekeeper or third parties, unless properly authorized,[41] the prohibition to prevent business users from selling at different conditions on other online channels ('most-favoured-nation-clauses'),[42] or the duty to provide advertisers with information regarding the price and fees they pay.[43] In turn, obligations susceptible to further specification comprise, for example, the duty to allow pre-installed software applications to be easily uninstalled,[44] a ban on 'self-preferencing',[45] or the obligation to apply fair and non-discriminatory general conditions of access for business users to software application stores, online search engines and online social networking services.[46]

Given the ambition of the new legislation to secure fast intervention and increase legal certainty in the sector, the application of the DMA purposely does not imply, by contrast with competition law, a case-by-case analysis of the object or effects of the practices, and firms are unable to advance efficiencies or other justifications to escape the duties.[47] The only exemptions admissible are on grounds of public health or public security (Article 10). Moreover, the Commission can

34 Recital (26) DMA; DMA impact assessment (n 17), para 79; Furman Report (n 28), 4; Stigler Report (n 28), 6.

35 Recitals (33), (34) DMA; Art 12(5) DMA.

36 See e.g. A de Streel (coord.) et al., *The European proposal for a Digital Markets Act: A first assessment* (Centre on Regulation in Europe – CERRE, 2021), 21; A Witt, 'The Digital Markets Act: Regulating the Wild West' (2023) 60 *CML Rev*., 649. For P Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12 *JECLAP*, 565, the DMA includes more ambitious forms of market restructuring.

37 It is beyond the scope of this article to examine each rule in detail. See the discussions in e.g. Eifert et al. (n 5); Monti (n 20); Ibáñez Colomo (n 36). The literature classifies the substance of these obligations according to various criteria. For example, for Ibáñez Colomo (n 36), 563, the DMA revolves around three main concerns: strengthening; leveraging; and exploitation of market power. For Monti (n 20), 91, the DMA addresses four types of market failures: lack of transparency in the advertising market; platform envelopment; restrained mobility of business users and clients; unfair practices.

38 Recital (65) DMA. Without prejudice to Art 12(2)(c) DMA.

39 Witt (n 36), 640; Ibáñez Colomo (n 36), 564, points out that these duties allow the changing of gatekeepers' ecosystems and the design of products.

40 Recital (65) DMA; Art 8(4) DMA.

41 Art 5(2)(b) DMA.

42 Art 5(3) DMA.

43 Art 5(9)(a) DMA

44 Art 6(3) DMA.

45 Art 6(5) DMA.

46 Art 6(12) DMA.

47 Recital (10) DMA. Regarding competition law, see e.g. Case C-333/21 *European Superleague Company* [2023] ECLI:EU:C:2023:1011, paras 189–190, 201–202.

exceptionally suspend, in whole or in part, the operation of a specific obligation, but strictly where gatekeepers demonstrate that compliance endangers the economic viability of their operation due to exceptional circumstances beyond their control (Article 9).

The DMA establishes the possibility to 'update', following market investigations, the list of obligations on gatekeepers through delegated acts (Articles 12 and 19), thus injecting a degree of flexibility necessary to tackle the fast-changing digital environment. However, the updating mechanism is limited to certain instances, such as extending the scope of the obligations to other services and users or specifying the way they must be performed to ensure effective compliance. To introduce entirely new obligations departing from the contestability or fairness issues addressed in Chapter III of the DMA, or to remove existing obligations, the Commission must formulate a legislative proposal amending the DMA.[48]

Public enforcement is centralized on the Commission. It includes non-compliance decisions ordering the termination of an infringement (Article 29), the application of fines and periodic penalty payments (Articles 30 and 31).[49] If a market investigation reveals systematic non-compliance by gatekeepers, additional behavioural or structural remedies may be imposed to protect the DMA's objectives, including a temporary ban on mergers (Article 18).[50] The Commission can also order interim measures (Article 24). Further explored below in Section 4, interim powers are a key component of the enforcement toolbox established by the EU legislature to ensure that the new rules are fully and effectively complied with in practice and that the ability of the DMA to accomplish its mission is not merely illusory.

4 THE COMMISSION'S INTERIM POWERS UNDER ARTICLE 24 DMA: THEIR ROLE AND HOW FEASIBLE IT SEEMS TO MEET THE CONDITIONS

Largely modelled on the Commission's interim powers under Article 8 Regulation 1/2003 in the field of competition law, Article 24 DMA governs interim measures in this new legislation. The first thing to notice is that they can be ordered against gatekeepers 'only in the context of proceedings opened with a view to the possible adoption of a non-compliance decision pursuant to Article 29'.[51] The possibility has thus been rejected to do so notably pending the completion of market investigations conducted to examine whether new practices should be added to the list of obligations.[52]

Similarly to Article 8 of Regulation 1/2003, interim measures under Article 24 DMA presuppose certain conditions that have been adjusted to the context of the DMA. Thus, there must be 'urgency due to the risk of serious and irreparable damage for business users or end users of gatekeepers', and there must be enough elements for 'a *prima facie* finding of an infringement of Article 5, 6 or 7'. Also, Article 24 DMA provides that the measures will 'only apply for a specified period and may be renewed in so far this is necessary and appropriate'. Proportionality plays a decisive role in interim proceedings since the acceptable reach of interim measures will vary in each case according to what is considered appropriate, necessary, and striking a fair balance between the several interests affected in the event that such measures are ordered and in the event they are not.[53] For the purposes of the present analysis, proportionality is therefore regarded as the third legal condition for interim measures.

The DMA legal framework reflects the key features characterizing interim powers (their nature) across different settings at EU level.[54] These features provide the theoretical principles essential

48 Witt (n 36), 642; Recital (69) DMA; Art 19 DMA.

49 Up to 10% of the company's global turnover (20% in the event of recidivism).

50 Recital (75) DMA.

51 See also Recital (84) DMA.

52 Art 19 DMA. Regarding this possibility, see Farinhas (n 13).

53 See e.g. *Broadcom* (Case AT.40608), Commission Decision of 16 October 2019, paras 511–512; Case C-639/23 P(R) *Commission v Amazon Services Europe* [2024] ECLI:EU:C:2024:277, para 143. EU institutions must observe proportionality by virtue, first and foremost, of Art 5(4) TEU and Art 52(1) EU Charter of Fundamental Rights.

54 On the topic see C Farinhas, 'Unlocking the Power of the European Commission to Order Interim Measures under Regulation 1/2003: An Inquiry into the Nature of the Tool' (2022) 59 *CML Rev.*, 1711.

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to tackle the many practical issues likely to arise when considering the tool.[55] According to the EU *acquis* in this field, interim measures are primarily urgent measures, explained by the need to intervene swiftly while possible illegality is being investigated to remove the danger that the conduct causes serious damage difficult to undo. They are protective measures, intended to safeguard, in the context of the DMA, contestable and fair digital markets.[56] Moreover, they are ancillary measures, intended to preserve the ability of a possible final infringement decision to ensure full and effective compliance with the DMA obligations. Also, interim measures are provisional, offering a temporary solution that will be replaced at the end of the investigation.[57]

Finally, it is noteworthy that, notably in the context of competition law, the CJEU has alluded to the inherently exceptional character of interim measures.[58] It could be tempting to argue that, as a corollary, interim measures should be a rare occurrence and that the conditions for their application should be interpreted very narrowly to reduce them to a bare minimum.[59] This position is unjustified and would undermine the tool.[60] The exceptionality of interim measures is, in fact, already fully reflected in the design of the legal framework. The imposition of obligations on gatekeepers in connection with non-compliance normally presupposes a finding of infringement of Articles 5, 6 or 7 DMA, after a full investigation has been completed. Thus, it is only in urgent (exceptional) situations, where there is a risk of serious and irreparable damage pending an investigation, that the Commission can constrain the activities of gatekeepers without holding firm views on whether the rules have been breached. The conditions for interim measures must, of course, be rigorously applied, and the factual expectation is that they will not be met in all cases.[61] Both a *prima facie* finding of infringement and urgency are required.[62] Damage must be both serious and irreparable.[63] This means that, contrary to other conceivable options in the field of interim proceedings,[64] even if an infringement is obvious, it is still necessary to show urgency and, without *prima facie* signs of infringement, urgency alone is insufficient to enable the use of interim measures.

4.1 URGENCY: RISK OF SERIOUS AND IRREPARABLE DAMAGE FOR BUSINESS USERS OR END USERS OF GATEKEEPERS

Urgency is the universal heart of interim measures in different contexts.[65] The time required to investigate a violation can defeat the purpose of legal provisions before authorities can adjudicate on the substance of the case. This is why legal systems across the world incorporate interim proceedings. Sound decision making must indeed be reconciled with effectiveness since there is little point in taking a decision incapable of guaranteeing compliance after years of investigation. As a notable scholar in the field has put it, to concentrate all efforts in the adoption of a flawless final decision, yet one that will produce no meaningful effects, is like

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55 P Calamandrei, *Introduzione allo Studio Sistematico dei Provvedimenti Cautelari* (Cedam, 1936) – Spanish translation *Introducción al estudio sistemático de las providencias cautelares* (Ediciones Olejnik, 2018), 27–28.

56 Recital 8 DMA; Art 1(1) DMA. The degree of injury threatening the DMA objectives is something to consider when balancing the interests involved.

57 This does not imply ascertaining the specific obligations that may be included in a possible infringement decision, nor completely rejecting definitive effects linked to interim measures (Farinhas (n 54), 1729–1732, 1733–1736).

58 See e.g. Case T-184/01 R *IMS Health v Commission* [2001] ECLI:EU:T:2001:259, para 144. Confirmed in Case C-481/01 P(R) *NDC Health v IMS* [2002] ECLI:EU:C:2002:223.

59 See applicants' claim in Joined Cases 229 & 228/82 R *Ford v Commission* [1982] ECLI:EU:C:1982:320, p. 3096.

60 In this vein, see M Jaeger, 'Le référé devant le président du Tribunal de l'Union européenne depuis septembre 2007' (2010) *JDE*, 197–213, 202–203 (the exceptional character of interim action should not be overrated as provisional protection must not be restrained if the applicable conditions make it necessary).

61 See e.g. C Emin & M Kadar, 'Interim measures' in K Dekeyser et al., (eds.), *Regulation 1/2003 and EU Antitrust Enforcement: A Systematic Guide* (Kluwer, 2022), 255–256.

62 See e.g. Case T-44/90 *La Cinq v Commission* [1992] ECLI:EU:T:1992:5, paras 28–30.

63 For the specific situation of public procurement, see Case C-35/15 P(R) *Commission v Vanbreda Risk & Benefits* [2015] ECLI:EU:C:2015:275.

64 For example, Portuguese administrative law enabled interim relief if the applicant's claim was obvious (R Lynce de Faria, *Tutela Cautelar Antecipatória no Processo Civil Português* (UCP, 2016), 111–112). Conversely, in Spain, the possibility to examine the substance of the case within interim proceedings was a contentious issue until 1990 (C Jiménez Plaza, *El Fumus Boni Iuris: Un análisis jurisprudencial* (Iustel, 2005), 25–29).

65 Farinhas (n 54), 1717–1721.

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carefully preparing a medicine for a patient who is already deceased.[66] This would be a dismal result for the auspicious DMA.

4.1.1 Urgency is at the heart of the DMA

Undoubtedly, the conditions for interim measures cannot apply mechanically since the factual and legal circumstances of each case are always critical. Nevertheless, establishing a risk of serious and irreparable damage under Article 24 DMA does not appear extremely difficult. As Section 3 noted, a major common thread behind the enactment of the DMA is the recognition that prompt intervention is an absolute necessity in the digital sphere to avoid gatekeepers from hampering contestability and fairness. The DMA's Impact Assessment is revealing on how acting quickly in the face of practices regarded as particularly harmful has shaped the DMA:[67]

> Speed of intervention is essential in digital markets where, due to the market specificities explained [...] the larger the gatekeeper the greater and quasi-automatic its capacity to gain power and strengthen its position, further reinforcing its ability to engage in unfair practices. In particular [...] it is common to observe markets tipping quickly in favor of one gatekeeper once that gatekeeper has obtained a certain advantage over rivals. The unfair practices identified [...] are harmful and action is required in the most efficient manner possible.[68]

The irreversibility of the damage linked to the practices covered by the DMA is explicitly stated:

> [Those practices] affect negatively SME business users and small-scale platforms, which may force the latter to exit the market, thus further weakening market contestability [...]. Such negative effects [...] could not be easily reversed and should therefore be addressed in a timely manner preventing their further proliferation and irreversibility. Speed is therefore given important consideration.[69]

In the same way the DMA obligations are fed by competition law debates and cases, interim measures decisions in the field of competition, however scarce, offer valuable insights on the types of considerations that may support a finding of serious and irreparable damage under Article 24 DMA.[70] Although unrelated to online platforms, certain decisions seem particularly useful given the DMA's cornerstones of preventing gatekeepers from engaging in practices that limit contestability or are unfair. For example, in *Broadcom*, *ECS/AKZO*, or *BBI/Boosey & Hawkes*, urgency lay in the risk of competitors exiting the market, enabling one company to completely dominate the market and gain a near monopoly.[71] In turn, in *Sea Containers/Stena Sealink* urgency was tied to a 'gatekeeper' of port facilities making the introduction of new services by other firms more difficult. The Commission underlined that '[w]here an undertaking is denied the opportunity to provide a new product or service to a market and that opportunity is likely to diminish considerably in value in the absence of interim measures, there is sufficient urgency to justify interim measures'.[72] Moreover, in *Sealink/B&I Holyhead*, the Commission worried about discriminatory conditions of access to the same port facilities creating disadvantages for the firms in terms of customer dissatisfaction and a reputation for delay and inefficiency that would take a long time to rebut.[73]

Also transposable to the DMA is the understanding that the risk does not need to materialize within 'days, weeks or at most a few months'.[74] The period until the Commission can

66 Calamandrei (n 55), 43 (my translation).

67 DMA impact assessment (n 17), paras 13, 51, 374 and 384.

68 ibid, para 329.

69 ibid.

70 This is all the more so since, with the exception of *Broadcom* (n 53), all these interim measures decisions are prior to Regulation 1/2003, at a time when pursuant to the case law the Commission could also order interim measures to prevent serious and irreparable damage for individuals: see e.g. *IMS Health* (n 58), para 53.

71 *Broadcom* (n 53); *ECS/AKZO* (Case IV/30.698), Commission Decision of 29 July 1983; *BBI/Boosey & Hawkes* (Case IV/32.279), Commission Decision of 29 July 1987.

72 *Sea Containers/Stena Sealink* (Case IV/34.689), Commission Decision of 21 December 1993, para 58.

73 *Sealink/B&I Holyhead* (Case IV/34.174), Commission Decision of 11 June 1992.

74 *Broadcom* (n 53), paras 446 and 467.

reasonably take a decision on the substance of the case is the relevant time horizon, enabling the examination of progressive and incremental market developments.[75] It should further be considered that the notion of irreparability comprises damage difficult to repair, the Commission not being required to establish serious and irreparable damage with absolute certainty – a sufficient degree of probability is enough.[76]

4.1.2 Damage for business users or end users of gatekeepers

As mentioned in Section 4, the legal standard for urgency under Article 24 DMA is 'risk of serious and irreparable damage for business users or end users of gatekeepers'. According to Recital (84) DMA, interim measures ensure that, during an investigation, the suspected conduct does not cause this sort of damage to these categories of persons. The choice to specify the possible victims of the conduct, instead of referring generally, for example, to damage for contestability or fairness in digital markets, contrasts with the competition law framework and makes it easier to meet the threshold.

During the legislative procedure for the adoption of Regulation 1/2003, a proposal specifying interim measures intended to protect consumers or undertakings was rejected. Article 8 of this Regulation chose to link urgency to a 'risk of serious and irreparable damage to competition', which comes across as a more ambiguous and demanding threshold.[77] In doing so, Regulation 1/2003 also departed from previous case law that enabled the Commission to impose interim measures based on serious and irreparable damage to the party seeking their adoption, or based on intolerable damage to the public interest, including the EU's interest in the efficacy of its competition policy.[78] At the time, the explanation put forward was that the Commission did not act in the interest of individuals, who could ask national courts to protect their rights, but in the public interest.[79] Obviously, notwithstanding the wording of Article 24 DMA, the enforcement of the DMA is also grounded in public interest concerns.[80] Besides adopting 'damage to competition' as the relevant threshold on urgency, Regulation 1/2003 also established that the Commission orders interim measures 'on its own initiative'. The intention behind these combined changes seems to have been essentially to strip complainants of the procedural rights which the CJEU previously afforded them at the interim stage, including a formal right to request interim measures and the possibility to challenge a refusal.[81] The shift had the advantage of reducing the Commission's workload, freeing resources to deal with the more promising cases in line with the policy resolve at the time.[82] Yet, it most likely also reduced the incentives to bring to the Commission's attention cases suitable for interim measures, paving the way for the complete indifference devoted to the tool thereafter,[83] whilst the duration of competition law investigations has increased.[84]

By contrast, the DMA's system, although not granting complainants formal rights,[85] is far from signalling to business users and end users that national entities are their primary guarantors at any stage of the enforcement. With several provisions expressly referring to third parties

75 ibid, paras 467 and 468.

76 See e.g. Case C-149/95 P(R) *Commission v Atlantic Container Line and Others* [1995] ECLI:EU:C:1995:257, paras 37–38; Case T-148/21 R *Paccor Packaging and Others v Commission* [2021] ECLI:EU:T:2021:687, para 24.

77 In this vein see C Emin, 'Necessary, Important, But Seldom Used: The Unfulfilled Potential of the European Commission's Interim Measures' 14 (2023) *JECLAP*, 512.

78 See e.g. *IMS Health* (n 58), para 53.

79 See Regulation 1/2003 legislative proposal (COM/2000/0582 final), explanatory memorandum; Commission Notice on the handling of complaints by the Commission under Arts 81 and 82 of the EC Treaty OJ [2004] C 101/65, 80.

80 Recital 8 DMA underlines that the rules are intended to ensure contestable and fair digital markets 'to the benefit of the Union's economy as a whole and ultimately of the Union's consumers'.

81 See e.g. *La Cinq* (n 62).

82 See Emin (n 77), 514–515; M Kadar, 'Evaluating 20 Years of Regulation 1/2003: Are EU Antitrust Procedures 'Fit for the Digital Age'?', 23 September 2022, SSRN: <https://ssrn.com/abstract=4227830>, 9.

83 After *NDC Health/IMS Health* (Case COMP D3/38.044), Commission Decision of 3 July 2001, the Commission adopted interim measures only once, in *Broadcom* (n 53).

84 See e.g. J Caminade et al., 'Interim measures in antitrust investigations: An economic approach' (2020) 17 *Journal of Competition Law and Economics*, 438; Furman Report (n 28), 104–105.

85 Kadar (n 82), 10, notes that complainants have no formal status in the DMA.

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(business users, end users, competitors), the system appears designed not only to enable but to encourage them to be proactively involved in the enforcement efforts, notably by submitting evidence about potential infringements that can be particularly useful for interim measures.[86]

4.1.3 Pecuniary damage

Recital (84) DMA adds that interim measures are 'important to avoid developments that could be very difficult to reverse by a decision taken by the Commission at the end of the proceedings'. This is an important clarification in determining the irreparable character of the damage. Since Article 24 DMA specifies victims (business users or end users) who can potentially bring damage claims against gatekeepers,[87] the question could arise whether it would be relevant to distinguish between purely pecuniary damage and other types of damage. In fact, according to the case law on the CJEU's interim powers, purely pecuniary damage cannot, in principle, be considered to be irreparable, because applicants can seek financial compensation for their losses that will be able to restore their situation.[88] Recital (84) DMA rejects the transposition of this approach. Instead, it evokes the judgment in *La Cinq*, where the CJEU refused to extend the case law on purely pecuniary damage to the Commission's interim powers in competition law, declaring that the notion of irreparable damage implied looking at the possibilities for remedial action strictly within the context of the administrative procedure.[89] This option is understandable because, also under the DMA, the ultimate goal of interim measures is to guarantee that legal commands are fully and effectively complied with and their objectives safeguarded, something the financial compensation of those affected by the illegal conduct does not replace.

4.2 *PRIMA FACIE* FINDING OF AN INFRINGEMENT OF ARTICLES 5, 6 OR 7 DMA: SERIOUS DOUBTS OF INFRINGEMENT AT FIRST SIGHT

To protect gatekeepers from arbitrary and abusive interference, the Commission must show 'a *prima facie* finding of infringement' of Articles 5, 6 or 7 DMA. This legal standard is not defined further, but the decisional practice and the case law on competition law has elaborated on the threshold in terms that are transposable to the DMA.[90]

After some fluctuations in the wording used with varying levels of strictness,[91] the Commission's latest interim measures decision, in *Broadcom*,[92] spells out the threshold as adjusted by the CJEU.[93] It emphasizes that 'the finding of a *prima facie* infringement is inherently not based on a full and final appreciation of the facts and law in question'; and declares that such a finding 'is rather based on a legal analysis providing sufficient indications "at first sight" that the conduct subject to the investigation raises serious doubts as to its compatibility with the […] rules'. The case law has also made clear that the condition could not imply anything akin to manifest violations, an idea that would be contrary to the logic of interim powers. On multiple occasions, the CJEU found it unacceptable to try to place on the same footing the requirement of a *prima facie* finding of infringement and the requirement of certainty that only a final decision should satisfy.[94]

Interim proceedings are indeed surrounded by doubt and the possibility of errors.[95] This is the price which legal systems across the world accept to pay to safeguard the effectiveness of legal provisions. Although some factual and legal foundation is indispensable, any threshold applicable

86 See e.g. Recitals (75), (89) DMA; Arts 8(6), 18(5)(6), 27(1) DMA.

87 On the topic see e.g. J Kindl, 'Prospects for concurrent private enforcement of the DMA and Article 102 TFEU' (2024) 12 *Journal of Antitrust Enforcement*, 241.

88 See e.g. *Amazon Services Europe* (n 53), para 132.

89 *La Cinq* (n 62), para 80; see also *Broadcom* (n 53), paras 489–496.

90 Article 8 Regulation 1/2003 also provides that the Commission can order interim measures 'on the basis of a *prima facie* finding of infringement' of Arts 101 or 102 TFEU.

91 *Distribution system of Ford Werke AG* (Case IV/30.696), Commission Decision of 18 August 1982 (distinct likelihood of infringement); *BBI/Boosey & Hawkes* (n 71, reasonably strong *prima facie* case of infringement); *Mars/Langnese and Schöller* (Case IV/34.072), Commission Decision of 25 Mach 1992 (presumption of infringement).

92 *Broadcom* (n 53), para 352.

93 Case T-23/90 *Peugeot* [1991] ECLI:EU:T:1991:45, para 21; *IMS Health* (n 58), paras 67–68.

94 *Peugeot* (n 93), para 24; *La Cinq* (n 62), paras 60–62.

95 Calamandrei (n 55), 83–84, calls it the 'price' of speed.

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within (urgent, ancillary, and provisional) interim proceedings must involve an enquiry of reduced intensity and extension regarding facts and legal arguments. Such '*summaria cognitio*' (light assessment) contrasts with the '*cognitio plena*' (fully fledged assessment) necessary for definitive conclusions once the investigation is completed. The concerns at the interim stage therefore mainly revolve around whether the positions advanced are justifiable and credible.[96]

Just like urgency, showing a '*prima facie* infringement' of Articles 5, 6 or 7 DMA does not appear very problematic, especially when compared to competition law. Competition rules are broad and vague, their determination being seldom achieved without complex economic analysis and fierce battles over the boundaries of the law and the features of each situation.[97] The considerable level of uncertainty that may persist on whether an infringement will ultimately be found, coupled with a long-standing policy reluctance to intervene without holding firm views, noted in Section 5 below, has relegated interim powers to almost complete oblivion in the past two decades.[98] Conversely, as already mentioned, the policy resolve in the DMA was to speed up intervention and enhance legal certainty through a list of relatively clear obligations, targeting a group of previously designated gatekeepers and CPSs, thus reducing the need for context-dependent individual assessments.[99] Within such a framework, it should generally be easier not only to meet the relevant threshold (serious doubts at first sight), but even to gather elements offering considerably strong indications of infringement. This is not to say, however, that there is little room left for enquiries and that interim measures will be unnecessary for the enforcement of the DMA. The ongoing debates on whether the gatekeepers' implementation strategies ensure full and effective compliance with the DMA show that difficulties inherent to legal interpretation will naturally emerge regarding the exact implications of the new rules.[100] This is particularly true since the trade-off between the desired speed, certainty and flexibility of enforcement has favoured a combination of self-executing obligations with other obligations that may need to be further specified by the Commission through a dialogue with gatekeepers to facilitate implementation.[101]

4.3 PROPORTIONALITY: ADEQUATE, NECESSARY AND BALANCED INTERIM MEASURES

It is common ground that the Commission's interim action must be proportionate. By virtue of the principle of proportionality, the Commission can intervene during an investigation regarding a possible violation of Articles 5, 6 or 7 DMA, provided that it imposes on gatekeepers measures suitable and necessary to tackle the danger identified. In addition, a fair balance between the several interests potentially involved, including the public interest in ensuring effective compliance with the DMA, the interests of business users, end users, gatekeepers, and of any third parties, must be secured so that the adverse effects caused do not considerably outweigh the benefits.[102]

It is noteworthy that Article 24 DMA contains a general clause, establishing that the Commission 'may adopt … interim measures', rather than a closed list. It therefore enables all types of interim measures that may be required in each case, including those going beyond the conservation of the so-called *status quo*. To perform their function, interim measures may indeed have to preserve, reinstate or introduce a certain situation for the first time. They may also entail (negative) commands to refrain from doing something, or (positive) commands to undertake certain actions.[103]

96 C Farinhas, 'Are Interim Measures under Regulation 1/2003 Excluded in New or Complex Cases?' 14 *JECLAP*, 520.

97 See e.g. P Larouche & A de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 7 *JECLAP*, 546.

98 See e.g. Farinhas (n 54), 1740; Farinhas (n 96), 527.

99 DMA impact assessment (n 17), paras 112 and 374; Witt (n 36), 641; Ibáñez Colomo (n 36), 561.

100 See e.g. investigations cited at n 18; T Mickle & A Satariano, 'Apple Has a New Plan for Its App Store. Many Developers Hate It', *New York Times*, 1 February 2024 <https://www.nytimes.com/2024/02/01/technology/apple-app-store-europe.html>.

101 See Section 3; DMA impact assessment (n 17), paras 346 and 348.

102 See n 53.

103 It is a frequent misconception to believe that interim measures must maintain or restore the *status quo*, or that altering the *status quo* or imposing positive orders will necessarily be more damaging to those affected (Farinhas n 54).

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Moreover, the threat of serious and irreparable damage for business users or end users (urgency) combined with the uncertainty over whether the gatekeeper has actually breached the DMA obligations (*prima facie* finding of infringement), makes it important to chart the course of action likely to inflict the smallest irreparable loss, thereby minimizing the harm caused by errors resulting from hasty interim decisions (to intervene or not and how).[104] The requirement to strike a fair balance between the interests involved responds to this concern, since the Commission must calibrate its intervention in the light of the damage it seeks to avoid, the damage which it can inflict, and the strength of the indications of infringement which it holds.[105] The fact that some types of interim measures may be particularly stringent, and even difficult to revert, is an aspect to consider, but always alongside the alternative scenarios.[106] The exercise of interim powers thus comprises a delicate evaluation, susceptible of different outcomes depending on the features of each case, and in which the Commission enjoys broad discretion.[107] That said, as noted in the previous Sections 4.1.1 and 4.2, it is anticipated that both urgency and the indications of infringement may be significant in the context of the DMA, factors that will facilitate strong interim action. In error-cost framework parlance, the risk of false positives or over-enforcement, that is, imposing interim measures on practices that will not be found illegal at the end of an investigation, appears generally low, whereas the harmful consequences of false negatives or under-enforcement, that is, allowing illegal practices to continue unchecked during an investigation, seem generally high.[108]

A recent interim order of the Court of Justice (CJ), on 27 March 2024, in *Amazon*, regarding the disclosure of Amazon's business secrets on advertising activities, illustrates how, in the context of the enforcement of the new EU rules for the digital sector, the balance of the interests involved may weigh against powerful online platforms.[109]

The case concerns an application by Amazon seeking notably the temporary suspension, pending final judgment on its action for annulment, of the obligation under the DSA for Amazon Store to compile and make publicly available a repository containing detailed information on its online advertising. In the first instance, the General Court (GC) balanced the interests involved in favour of Amazon, mainly because of the serious and irreparable damage the disclosure of confidential information could cause the firm.[110] However, ruling on the Commission's appeal, the CJ overruled the GC's ruling, balanced the interests involved very differently, and allowed the disclosure.[111] Particularly striking is the importance which the CJ attaches in the evaluation to the objectives which the EU legislature seeks to achieve with the DSA, underlining that 'the interests defended by the EU legislature prevail, in the present case, over Amazon's material interests';[112] that the DSA 'is a central element of the policy developed by the EU legislature in the digital sector. In the context of that policy, that regulation pursues objectives of great importance';[113] and that 'not applying certain obligations laid down by that regulation will lead to a delay, potentially for several years, in the full achievement of those objectives'.[114] These proportionality considerations may possibly spill over to the exercise by the Commission of its interim powers under the DSA and the DMA, making it more difficult to challenge before

104 This idea is articulated by the 'error-minimizing Leubsdorf-Posner formulation' developed by Professor John Leubsdorf and followed by Judge Richard Posner. See, in this respect, J Leubsdorf, 'The Standard for Preliminary Injunctions' (1978) 91 *Harvard Law Rev.*, 541; R Brooks & W Schwartz, 'Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine' (2005) *58 Standford Law Rev.*, 390.

105 See Farinhas (n 96), 527.

106 *Amazon Services Europe* (n 53), para 143. Joined Cases T-24/92 R and T-28/92 R *Langnese-Iglo v Commission* [1992] ECLI:EU:T:1992:71, illustrate the difficulty of weighing up conflicting interests when any course of action can cause irreversible developments.

107 See e.g. *IMS Health* (n 58), para 120.

108 On these concepts, see e.g. Caminade et al. (n 84), 442; OECD, *Interim Measures in Antitrust Investigations, OECD Roundtables on Competition Policy Papers 283* (2022), section 4.3.

109 *Amazon Services Europe* (n 53).

110 Case T-367/23 *Amazon Services Europe v Commission* [2023] ECLI:EU:T:2023:589.

111 *Amazon Services Europe* (n 53), paras 143–165.

112 ibid, para 164.

113 ibid, para 155.

114 ibid, para 157.

the CJEU interim measures imposed by the Commission in the context of these new digital Regulations so as to fully safeguard their high valued objectives.

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5 INTERIM MEASURES IN DIGITAL MARKETS UNDER REGULATION 1/2003 AFTER THE DMA

The digital sector seems generally a good place to mark an inflection point in the Commission's unsatisfactory policy regarding interim measures in competition cases under Article 8 Regulation 1/2003.

It is clear that, despite being driven by goals linked to competition and concerns over the slow pace of competition law investigations,[115] the DMA does not mean the end of Articles 101 and 102 TFEU enforcement against big tech. The EU legislature explicitly states that competition law will have a complementary role in tackling the conduct of gatekeepers.[116] The room left for competition law to fill gaps may be wide, considering, on the one hand, that new problematic practices will frequently emerge in the fast-changing digital markets and, on the other hand, that substantial updates to the DMA will take time, given that the Commission is required to rely on in-depth market investigations and seek legislative amendments.[117] Article 19 DMA, governing market investigations into new services and new practices, signals that competition law cases are expected to continue offering valuable experience that will help shape the evolution of the DMA. It provides that, in its assessment 'the Commission shall take into account any relevant findings of proceedings under Articles 101 and 102 TFEU concerning digital markets [...]'.

If doubts existed over the willingness of the Commission to enforce competition law against gatekeepers in the DMA era, the Commission rushed to dispel them through the Article 102 TFEU infringement decision targeting Apple on 4 March 2024.[118] Just a few days before the deadline to ensure compliance with the DMA, the Commission fined Apple over €1.8 billion, considering that the firm had abused its dominant position in the market for the distribution of music streaming apps to iPhone and iPad users (iOS users) through its App Store. The Commission notably found that Apple applied restrictions on app developers preventing them from informing iOS users about alternative and cheaper music subscription services available outside of the app. These 'anti-steering provisions' were regarded as 'unfair trading conditions' incompatible with Article 102 TFEU, and Executive Vice-President Margrethe Vestager underscored that abuse of dominance investigations will continue to break new ground and explore novel harms in the online economy alongside the DMA.[119]

The action against Apple definitely shows the EU's commitment to rein in the operation of tech giants, especially when compared to the much looser grip traditionally kept on the sector by US authorities.[120] However, it offers yet another example of a competition case where the Commission did not find it appropriate to impose interim measures pending an investigation initiated five years previously, following a complaint by Spotify, regarding conduct that had lasted for almost ten years, and which has led iOS users to pay significantly higher prices for music streaming subscriptions and caused further harm in the form of a degraded user experience.[121] In fact, in the period between 2001 and today, the Commission adopted one

115 See e.g. Monti (n 20), 98, or Larouche & Street (n 97), 544–545, arguing that contestability and fairness concern both the DMA and competition law.

116 Recitals (10), (11), (78) DMA, Art 1(5), (6) and (7) DMA. Larouche & Street (n 97), 543, note that, contrary to the US where antitrust and regulation have been regarded as exclusive of one another, in the EU, sector-specific regulation and competition should be seen as complements which pursue similar objectives but with different means.

117 See Section 3 of this article. Monti (n 20), 100, notes that the Commission will face difficult choices about whether to fill gaps using the DMA or competition law.

118 *App Store Practices (music streaming)* (Case AT.40437), Commission Decision of 4 March 2024.

119 A Bagley, 'Vestager: DMA won't stymy ambition of abuse of dominance probes' *Global Competition Review*, 1 March 2024. The Commission subsequently opened non-compliance investigations against Alphabet, Apple and Meta under the DMA; one of the issues is precisely the implementation by Alphabet and Apple of the anti-steering obligations under Art 5(4) DMA (Commission's Press Release IP/24/1689).

120 Bradford (n 5).

121 See Commission's Press Release IP/24/1161.

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single interim measures decision, against *Broadcom*,[122] in what clearly does not reflect a meaningful exercise of interim powers under Article 8 Regulation 1/2003. It is a conspicuously low level of interim action, even for an exceptional tool, raising legitimate concern that the EU system of undistorted competition is not being adequately protected in a considerable number of situations.[123]

In recent years, multiple reasons have been explored to try to explain the scarcity of interim measures in competition cases. Regarding the legal framework, it has been debated, for example, whether the thresholds to establish urgency or a *prima facie* violation are too stringent, if the procedural safeguards of undertakings are excessive, or if the way in which the CJEU scrutinized the Commission's interim measures decisions in the past might have dissuaded the Commission from using the tool.[124] Engrained misconceptions undercutting interim powers have also been noted, particularly the idea that the reasoning of the CJEU in *IMS Health*, in 2001, suspending the Commission's interim measures, shows that the tool must be reserved for the (rare or nonexistent) situations of clear-cut infringements.[125] Proposals to clarify and even to relax the legal framework to facilitate interim action have been made.[126] Reflection is ongoing on the suitability of the applicable requirements to guarantee that interim measures can duly perform their function, and the changes that the current evaluation of Regulation 1/2003 may bring about, notably regarding the exercise of the procedural rights of the undertakings, are awaited with expectation.[127]

That said, it cannot be ignored that the scarcity of interim decisions in the field of competition law may largely be attributable to a policy choice of the Commission following the introduction of Regulation 1/2003, rather than to a legal framework utterly flawed and unfit for purpose. It is indeed common ground that the early 2000s marked the rise of the economics and effects-based approach in the application of competition law, which drove the Commission to avoid interfering with the activities of undertakings, unless it held firm views about the illegality of their conduct, for fear of making mistakes (false positives).[128] Such policy development comes across as a death sentence on interim measures since, as already explained, to be able to perform their function interim powers rely, by definition, on a mere provisional analysis prone to doubt and error. As one Commission official has underlined:

> [T]here might have been a certain shift [after Regulation 1/2003] in the focus of the agency from timeliness to appropriateness of antitrust enforcement, which may have contributed to the Commission being less willing to take risks in running antitrust investigations, in particular when it comes to imposing interim measures.[129]

This hypothesis helps to make sense of the puzzling coincidence that the Commission put aside interim powers precisely around the time the EU legislature reinforced them by expressly incorporating the tool in the enforcement toolbox through Article 8 Regulation 1/2003.[130] It further explains why, during such a long period, the Commission appears to have accepted with

122 *Broadcom* (n 53). In 2001 the Commission adopted interim measures in *IMS Health* (n 83).

123 The scarcity of interim measures has long been described as one of the Commission's most serious failures in competition law, denoting an excessive concern with administrative convenience over effectiveness in protecting competition: J Temple Lang, 'The strengths and weaknesses of the DG Competition Manual of Procedure' (2013) 1 *Journal of Antitrust Enforcement*, 145–146.

124 E.g. J Art, 'Interim relief in EU competition law: A matter of relevance' (2015) 1 *Italian Antitrust Review*, 55; D Mantzari, 'Interim measures in EU competition cases: Origins, evolution, and implications for digital markets' (2020) 9 *JECLAP*, 487; A Ruiz Feases, 'Sharpening the European Commission's tools: Interim measures' (2020) 16 *European Competition Journal*, 404.

125 *IMS Health* (n 58). See Farinhas (n 54, n 96).

126 E.g. *Rapport d'information 3127 sur les plateformes numériques à Assemblée Nationale déposé par la Commission des Affaires Économiques* (2020), 57–58; Ruiz Feases (n 124); Emin (n 77); B Cullen, 'Reviving Interim Measures in EU Antitrust Proceedings' (2023) 14 *JECLAP*, 528.

127 See Evaluation of Regulations 1/2003 and 773/2004 <Regulation 1/2003 – European Commission (europa.eu)>.

128 See e.g. Caminade et al. (n 84), 438.

129 M Kadar, 'The use of interim measures and commitments in the European Commission's Broadcom Case' (2021) 6 *JECLAP*, 445.

130 Before *Broadcom* (n 53), the Commission last imposed interim measures in 2001 in *IMS Health* (n 83). The CJEU first acklowleged, by inference, the Commission's interim powers in competition law in Case 792/79R *CameraCare* [1980] ECLI:EU:C:1980:18.

little resistance that the legal framework is unreasonably burdensome, allowing misconceptions about the tool to flourish, not seeking further clarification from the CJEU in the context of a more steady imposition of interim measures, nor pushing for the adjustments it might consider necessary.

Digital markets today offer fertile ground for the policy pendulum to swing towards reviving interim measures under Article 8 Regulation 1/2003, so that the Commission can start exploring the tool more actively even if the legal framework remains in essence unchanged. In fact, although, as noted above in Section 4.1.1 regarding Article 24 DMA, whether or not the conditions (urgency, *prima facie* violation and proportionality) are met will ultimately depend on the individual circumstances of each situation, competition law investigations involving the digital sector generally seem good candidates for interim measures. Already prior to the DMA, several voices argued that anticompetitive conduct in fast-moving markets was more likely than in other sectors to inflict serious and irreparable damage to competition pending investigations, justifying urgent intervention through interim measures. It has been observed in this respect that, due to the specificities of these markets, mentioned in Section 3, notably their tendency to concentrate around one ultra-dominant undertaking, the Commission's increasingly complex and long investigations enabled harmful practices to become entrenched and any subsequent infringement decisions would be incapable of reversing the anticompetitive effects.[131] The premise that urgency is a hallmark of investigations involving digital markets also finds support in the case law. In cases such as *Microsoft* and *TeliaSonera*, the CJEU underlined that swift intervention is particularly warranted in certain settings, notably in markets with network effects or rapidly growing markets (such as digital markets), because here anticompetitive strategies can more easily consolidate and distort competition with irreversible consequences.[132] Meanwhile, in the context of a wide agreement in the EU favouring a uniquely interventionist approach in the digital sector, noted in Section 2, the EU legislature firmly acknowledged in the DMA the dangers of ill-functioning digital markets and how vital it is to guarantee that competition is effectively protected through timely action, a goal that seems difficult to achieve without using the full gamut of enforcement powers, in particular interim measures. In this vein, debating how they can strengthen the DMA, the heads of the national competition authorities of the EU have underscored that:

> The ability to intervene quickly is recognized as an absolute necessity in digital markets. […] one key objective is that of being able to carry out […] investigations within a timeframe that responds to the rapid changes in the market. Making wider use of interim measures can contribute to this goal.[133]

The DMA itself, in Recital (78), points towards increasing interim intervention in competition cases. After underlining the possibility of opening Articles 101 or 102 TFEU proceedings against gatekeepers, it declares that '[i]n cases of urgency due to the risk of serious and irreparable damage to competition, the Commission *should consider* adopting interim measures in accordance with Article 8 of Regulation […] 1/2003'.[134] It remains to be seen when this impetus will translate into action.

6 CONCLUSION

The DMA is an important instrument in a new era marked by a strong appetite to rein in the power of tech giants through timely and forceful action. This is something that competition law, with its lengthy investigations, reluctance to err on the side of overenforcement, and consequently reluctance to employ interim measures, has fallen short of ensuring. Time will tell whether the desired outcomes will be successfully secured, and how the intended complementary

131 See e.g. Furman Report (n 28), 104–105; Report for the German Government, Commission 'Competition Law 4.0', *A New Competition Framework for the Digital Economy* (2019), summary 18; J Krämer (ed.), *Digital markets and online platforms: New perspectives on regulation and competition law* (CERRE, 2020), 50.

132 Case T-201/04 *Microsoft v Commission* [2007] ECLI:EU:T:2007:289, para 562; Case C-52/09 *TeliaSonera Sverige* [2011] ECLI:EU:C:2011:83, para 108.

133 European Competition Network, *Joint paper of the heads of the national competition authorities of the European Union: How national competition agencies can strengthen the DMA* (2021), 5.

134 Emphasis added.

relationship between the DMA and competition law will unfold. The task seems anything but easy and fierce legal battles appear inevitable, ranging from whether the legal basis for the DMA is correct, to the implications of the *ne bis in idem* principle, or the exact meaning of the DMA provisions. In the enforcement endeavours, the Commission should embrace its interim powers since the tool is crucial to guarantee that intervention is meaningful, and that the objectives pursued by the DMA and competition law are duly safeguarded. Regarding competition rules in particular, to continue showing little concern for the full and effective protection of Articles 101 and 102 TFEU implies that investigations against gatekeepers will work mainly to impose fines, whose deterrent effect on companies with massive financial resources is doubtful, and to add other practices to the DMA list of obligations in the future. The joint efforts of the DMA and competition law to tackle problematic examples of big tech power could and should be more ambitious.

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