HDE Handelsverband Deutschland

Position Paper

on the EU proposal on contestable and fair markets in the digital sector (Digital Markets Act)

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1. Background

The German Retail Federation (Handelsverband Deutschland - HDE) is thankful for the opportunity to comment on the proposal for a Digital Markets Act (DMA). With this proposal, the European Commission wants to close gaps in existing EU law that have become apparent in the enforcement of competition rules in order to "enable enforcement measures to maintain competitive markets". This is intended to address structural competition problems better and earlier, because the Commission believes that these problems cannot be solved (effectively) with the existing competition framework. The DMA is aimed only at very large companies that have been identified as so-called "gatekeepers" and defines certain behaviours that they must proactively implement.

The way the DMA works follows three central elements: 1) First, the gatekeepers concerned are to be identified based on (predominantly) quantitative criteria. 2) These gatekeepers then have to follow a comprehensive catalogue of obligations ("Dos and Don'ts"). 3) This framework is supplemented by a market investigation tool (on the basis of the original New Competition Tool). The role of the enforcement authority is assumed solely by the European Commission.

2. Position

To remain globally competitive, retailers need a regulatory framework that supports strong European retail and wholesale ecosystems in a digital environment, providing them with legal certainty and incentives to invest in robust omnichannel strategies. Today's markets - and digital markets in particular - are evolving rapidly, with new services and business models emerging all the time. It is therefore crucial that any potential policy intervention aimed at addressing specific business practices is clearly focussed and does not inadvertently stifle innovation.

Hence, we support the Commission's goal of ensuring fair and competitive markets. Competition is essential for innovation and consumer welfare. In principle, we therefore believe that the existing regulatory instruments would be sufficient to continue to achieve these goals. Thus, we see a need for improvement in specific areas with regard to the present proposal. In addition, in the further procedure it is important not to leave the narrow corridor of possibilities which the Commission has set for itself and the other institutions with the choice of legal basis.

<u>The following points are of central importance for HDE and will be detailed in the further course of this position paper:</u>

- Numerous exceptions have been integrated into the scheme for designating gatekeepers, which allow the Commission to take action against companies that do not or not yet meet the (quantitative) criteria. This weakens legal certainty and increases the potential for misuse of the instrument. Therefore, the scope of the DMA and the resulting powers of the Commission should be clearly limited to the companies defined under Article 3(2).

- When calculating the active monthly users of gatekeeper platforms, it should be noted that these must actually be active users who use the platform in question continuously or on a repeated basis and not just once and consequently having become non-active users.
- The separation of the catalogues of obligations in Articles 5 and 6 appears artificial, incomprehensible and not expedient. We therefore demand an actual differentiation of the catalogues and a regulated procedure that determines when exactly and under what conditions, for which type of gatekeeper the Article 6 obligations also apply. In principle, the applicability of individual obligations, which are obviously tailored to specific industries, to all gatekeepers should be strongly questioned.
- We consider it extremely questionable that the list of obligations can be extended by the Commission by means of a delegated act. Also in view of the far-reaching consequences that additional obligations may have for the companies concerned, we therefore call for an update of the list of obligations to be subject to the ordinary parliamentary procedure, including an appropriate transition period for each individual adjustment.
- We are particularly critical of certain prohibitive practices:
    - For example, the requirement in Article 5(c) would degrade online marketplaces to mere advertising platforms and take away the incentive for operators to invest in setting them up. It would also run counter to the aspirations of the Digital Services Act.
    - The use of self-preferencing is recognized in the retail industry, both online and offline, as an efficiency-enhancing and pro-competitive practice. Therefore, a blanket ban is inappropriate. Rather, a case-by-case assessment is required to evaluate the impact of such practices in the specific situation.
    - With regard to Article 6(1j), it should be clarified that search functions in online stores are not to be equated with online search engines and may therefore not fall within the scope of this provision.
- The limited framework for the market investigation tool should be maintained in the further procedure, especially against the background of the fragile legal basis.
- When imposing remedial measures, the principle of proportionality should be strictly observed and appropriate safeguards should be put in place. We see good approaches to this in the present proposal, which must be preserved in the course of the procedure.
- The transitional period from the entry into force of the regulation to its applicability should be extended to at least 24 months.

a) General Regulatory Approach

Online platforms are drivers of digitization and of the associated benefits for competition and consumers. We are therefore critical of the Commission's approach of generally defining such companies as regulatory addressees. This takes insufficient account of the diversity of business models. De facto regulation under competition law (see below) should continue to be based on the proven concept of market dominance.

Furthermore, we doubt that it is necessary to draw up a catalogue of prohibited practices without subjecting the Commission to the obligation to examine the actual competitive - including possible efficiency-enhancing - effects of the practices in the specific individual case. At most, we can recognize such a mechanism for the obligations under Article 6, but not for those under Article 5 (see in detail under d)). Regulation of certain types of conduct should only be possible to the extent necessary in a specific case - also in view of any justifications to be taken into account in favour of the regulated company - to deal with any negative effects on the market and should always be based on due process. An impact test-based approach would also be in line with the recommendations of the expert report to the Commission on "Competition Policy for the Digital Era".

Any regulatory intervention against such companies requires a determination of specific (anti-competitive) illegal behaviour to be proven on a case-by-case basis. General prohibitions prevent such a case-by-case assessment. Also in view of the heterogeneity of the various business models of online platforms, such general bans should be rejected, not least because there is no firm basis for assuming that certain conduct by such companies is always anti-competitive and should therefore be banned regardless of the circumstances of the individual case.

Any government action should aim to avoid unintended consequences and ensure that market players continue to have incentives to research, develop and grow organizationally. The mere fact that a company is successful and large is not a sufficient reason to take drastic measures.

b) Legal Basis

The Commission fears diverging national regulations and a fragmentation of the internal market. Against this background and taking into account the cross-border nature of the core platform services provided by gatekeepers, the Commission sees a need for harmonization (see Recitals 6-9) and accordingly uses Article 114 TFEU as the legal basis. Thus, the DMA is primarily intended to serve as an instrument to enforce gatekeeper regulations uniformly throughout the internal market - and not as a competition instrument, for the adoption of which unanimity in the Council of Ministers would be required and the European Parliament would play a much smaller role.

De facto, this creates competition law under the guise of internal market law - as was already the case with the P2B Regulation 2019/1150/EU. This is supported by the parallels to national initiatives in the field of competition law e.g. the recent amendment to the German Competition Act, the specific references to the latter as the origin of the need for harmonization, and the indication that the Regulation aims to "supplement the enforcement of competition law" (Recital 9), thus leaving Articles 101 and 102 TFEU and national competition laws untouched. Against this background, there are doubts as to whether the current DMA draft and any further amendments in the further course of the legislative process are based on a sufficient legal foundation and can withstand judicial review. The rejection of the two previous DMA drafts by the Regulatory Scrutiny Board due to insufficient legal basis already reveals that these doubts are not unjustified.

Therefore, in the further course of the procedure, the legislator must at least ensure that the final version of the DMA does not go beyond the declared objective of preventing regulatory fragmentation in the internal market.

c) Scope / Designation of Gatekeepers (Art. 3)

In our original position paper, we had already called for the scope to be narrowly defined and to focus exclusively on areas where competition problems have been observed that cannot be solved by milder means (e.g., interim measures and proceedings under Articles 101 and/or 102 TFEU). We therefore welcome that the application is limited to a small number of very large global players and that the DMA focuses on markets where competition is limited, e.g. due to lock-in effects. Furthermore, a new instrument should only be applicable in cases where there is a cross-border dimension and not to purely national situations. This has been taken into account insofar as a core platform service must be offered by a gatekeeper in at least three Member States to fall within the scope, which we consider positive. Furthermore, we welcome the fact that gatekeepers are to be defined uniformly across the EU and that a regulation was chosen for the purpose of full harmonization.

Specifically, the proposal defines gatekeeper platforms as companies that play a particularly important role in the internal market due to their size and importance for (business) users, that offer at least one so-called "core platform service" (Art. 2(2); such as search engines, social networks, certain messenger services, operating systems and online intermediary services) in a B2C or B2B relationship (Art. 1(2)) and that have a permanent, large user base in several EU countries.

Firstly, it should be critically noted that this link to "core platform services", especially with regard to "online intermediation services", also covers companies for which such a service is closely and inseparably connected to physical infrastructures. This creates the risk that the DMA - unintentionally - also subjects retail companies to greater regulation if they market their own logistics infrastructure via their online intermediation service. The definition of "online intermediation services" in Article 1.5 should therefore be restricted to cover only services whose core activity is primarily characterized by the processing of data and not by the operation of physical infrastructures.

In detail, there are three essential cumulative criteria by which a company falls within the scope of application of the DMA:

1. A size which has a significant impact on the internal market (Art. 3(2a)): this is presumed if the company has an annual turnover in the EEA of at least €6.5 billion in the last three financial years or if its average market capitalization or market value in the last financial year was at least €65 billion and it offers a core platform service in at least three Member States.

2. Control of a "core platform service" for commercial users to reach end users (Art. 3(2b)): this is assumed if the company operates a core platform service with more than 45 million monthly active end users (on average over the last year) established or based in the EU and more than 10,000 annually active commercial users established in the EU.

3. An (expected) established and lasting position (Art. 3(2c)): this is assumed if the company has fulfilled the two criteria from 2.) in each of the last three financial years.

First of all, with regard to point 2, the Commission is called upon under Article 3(5) to propose by delegated act a methodology for calculating the figure of 45 million active users/month. In this context, we would like to emphasize that the calculation must be based on *actual* active users who use the platform on a permanent basis, i.e. regularly or repeatedly, and not just once or consequently having become non-active users.

Furthermore, Article 3(1)(c) specifically states that the company "enjoys an entrenched and durable position … or it is foreseeable that it will enjoy such a position in the near future." As the last half-sentence is not reflected in the quantitative concretization (= the other two criteria must have been fulfilled in each of the last three financial years), thus it is completely unclear when this should be "foreseeable" and only legal uncertainty is created, we plead for deletion of this provision.

If all quantitative thresholds have been met, the company in question is presumed to be a gatekeeper - unless it submits "sufficiently substantiated arguments" proving otherwise (Art. 3(4)), with the burden of proof explicitly resting with the company (Recital 23). In principle, we support this provision, as it takes into account that justified exceptions must be possible in individual cases. Considering the enormous consequences of a company's role as a gatekeeper, this provision (in its application) should be given a high priority. We assume that the Commission will clearly and comprehensibly explain what is meant by "sufficiently substantiated arguments" in good time before the Regulation becomes applicable, so that these can be measured against an objective standard after submission by an affected company. In contrast to Recital 23, we are of the opinion that economic and efficiency-related arguments should also be taken into account. At the same time, it should also be defined in more detail under which conditions the Commission can reject the arguments presented and that this must also be "sufficiently substantiated".

However, we are much more critical of the subsequent provision in Article 3(6): even if the defined thresholds are not met, the Commission can evaluate the specific situation of a particular company in the context of a market investigation (pursuant to Article 15) and decide to nevertheless qualify it as a gatekeeper on the basis of a qualitative assessment. This passage clearly gives the Commission too much room for manoeuvre and reduces the previously clearly and quantitatively defined criteria to absurdity, since the Commission can decide on the gatekeeper status independently of these and largely freely. Ultimately, the regulation thus deprives companies of all legal and planning certainty.

If, contrary to the position of the HDE, this qualitative assessment is retained, "multihoming" should at least be taken into account as an additional criterion - in addition to an explicit consideration of the market share of a potential gatekeeper. Markets with strong multihoming - such as online retail - generally offer greater competitive intensity. This would also introduce a more risk-based element into the status assessment.

In addition, providers of core platform services that do not yet have an "entrenched and durable position" but are expected to do so in the near future (Recital 26/Art. 15(4)) would already be subject to "a

subset of obligations" (Recital 26) "appropriate and necessary to prevent the gatekeeper concerned achieves by unfair means [such] an entrenched and durable position in its operations" (Art. 15(4); see also Recital 27). However, it remains completely unclear at what point such a potential gatekeeper can be considered as an addressee for this special regulation.

After an overall consideration of the framework for the designation of gatekeepers from Article 3, it can be stated that the Commission does ostensibly focus on initially clear, quantitative criteria in order to identify gatekeepers. However, numerous exceptions have been integrated that allow the Commission to also take action against companies that do not meet the criteria or - in the Commission's view - do not yet meet them. This weakens the legal certainty and increases the potential for abuse of the instrument. Therefore, the scope of application of the DMA and the resulting powers of the Commission should be clearly limited to the companies defined under Article 3(2).

d) Obligations for Gatekeepers (Art. 5 & 6)

In addition to the definition of the gatekeeper, the DMA consists of two pillars, a market investigation tool (see below) and a list of prohibited practices. Seven such obligations are supposed to apply to gatekeepers in principle (Art. 5), while for another list of eleven obligations a specification can be made by the Commission in the context of a dialogue (Art. 6). The latter seems to be a kind of "dark grey list", where the Commission can question whether the measures taken by the gatekeeper are sufficient to achieve the objectives. If, in the Commission's view, these measures are insufficient, it can specify the measures.

The fact that the Commission can challenge specific individual compliance with the provisions of Article 6 and impose more precise obligations is not conducive to legal certainty. Moreover, the artificial separation of the sets of obligations that this creates seems incomprehensible and will have little effect on companies in practice. Since the Commission, as the enforcement authority, is responsible for ensuring compliance with the obligations anyway (Art. 24), it can enter into a dialogue with the companies concerned at any time, demand improvements or make specifications - irrespective of whether the obligation stems from Article 5 or 6.

We therefore call for a clear delimitation of the catalogues of obligations. If it is apparently obvious even to the Commission that the obligations under Article 6 are not concrete and specific enough (for each potentially affected company) to be implemented "simply", why should companies be liable for a breach of the rules from day 1? There is therefore a need for a regulated procedure that specifies when exactly and under what conditions, for which type of gatekeeper, the Article 6 obligations also apply. Within the framework of such a procedure, companies must also be able to explain why certain obligations are either not relevant in their case or would even have negative effects. A "comply or explain" approach would be conceivable, in which the gatekeeper either complies directly with the requirements or alternatively justifies why this is not necessary and appropriate, whereupon a dialog with the Commission is initiated. However, the draft does not yet allow for precisely such a justification. Rather, exceptions to the requirements of Articles 5 and 6 on the basis of Article 8 are only possible in narrowly defined extreme cases (see below).

Furthermore, the catalogue of obligations seems to have been pieced together from very different previous and ongoing antitrust cases. As a result, evaluations from sometimes very specific cases have been unreflectively cast into generally applicable rules that are now to apply indiscriminately to every gatekeeper, regardless of the industry in which the gatekeeper is active. This can have counterproductive effects and lead to unintended consequences, especially since the impact of certain practices on other affected industries - beyond their original case - has not been sufficiently examined in the impact assessment for the DMA. In many cases, therefore, it is not possible to foresee how exactly the provisions will be applied outside their original context, and in some cases it is even questionable whether application is justified at all.

This may lead to the following unintended, paradoxical result: i) on the one hand, an overly broad restriction of uncritical conduct if the provisions are applied outside their original context, and at the same time ii) on the other hand, an insufficient restriction of existing unfair conduct due to a lack of specificity. A prohibition that may make sense in the hotel industry does not necessarily lead to the desired result in the retail sector (see also the comments on Art. 5 (c) below). While certain companies and their practices are clearly reflected in the obligations, others will wonder what these sometimes very specific obligations mean for their own business activities. At the same time, the question arises as to how future-proof regulations are that were drafted almost exclusively with a look in the rear-view mirror.

We therefore call for clarification that provisions from Articles 5 and 6 can be "core service-specific" and thus cannot be applied to other, core platform services under certain circumstances. Thus, it should be possible for a gatekeeper to demonstrate that a particular measure is not relevant to its business model. The DMA even already recognizes this logic to a limited extent. Some of the obligations already apply only to certain categories of core platform services, e.g. Article 6 (k) is only applicable to "stores for software applications". We propose to broaden this approach.

Finally, we find it extremely questionable that the catalogue of obligations from Articles 5 and 6 can be expanded by the Commission at any time (and largely on its own) by delegated act (Art. 10). At the same time, only very soft limits are set for the Commission for this procedure. While the explanatory part of the proposed regulation still explicitly refers to the fact that only obligations for which "sufficient experience" is available have been included (page 6), the possibility of expanding the catalogue of obligations in an expedited procedure therefore seems inappropriate. Also against the background of the far-reaching consequences that additional obligations may have for the companies concerned, we therefore call for an update of the catalogue of obligations to be subject to the ordinary parliamentary procedure, including an appropriate transition period for each individual adjustment.

<u>Specific considerations for individual obligations:</u>

- *Gatekeepers shall refrain from giving preference in ranking to services and products offered by the gatekeeper itself or by a third party belonging to the same company over similar services or products offered by third parties, and shall rank on the basis of fair and non-discriminatory conditions (Art. 6(1)(d)).*

The use of so-called self-preferencing is recognized in the retail sector online and offline as an efficiency-enhancing and pro-competitive practice. The design of stores and webshops is an essential part of entrepreneurial freedom and self-preferencing is used online and offline to optimize business operations in terms of sales, profitability, logistics, etc. Introducing private labels to compete with branded products or to differentiate oneself from other retailers or opening an (online) store to third parties leads to more competition, thus more innovation, better prices and more choice for consumers.
At this stage, moreover, there is neither case law nor robust experience on the competitive consequences of self-preferencing in online and offline retailing that would justify a blanket ban on self-preferencing. The European Court of Justice has clarified that in order to prohibit certain practices, there must be sufficiently reliable and robust experience confirming that the practice by its very nature impairs the proper functioning of competition. The only area in which the Commission has such robust experience concerns search engines.
We therefore believe that self-preferencing must in principle be subject to a case-by-case analysis and an effects test, as recommended by the expert report to the Commission on "Competition Policy for the Digital Era," which does not consider self-preferencing to be abusive in principle[1]. A blanket ban seems inappropriate - also against this background - because self-preferencing can have important pro-competitive and efficiency-enhancing effects, as the EU Observatory for Online Platforms also recognizes in its report on differentiated treatment[2]. Therefore, a case-by-case assessment is imperative to evaluate the impact of this practice in a specific case. Furthermore, the P2B Regulation has already introduced criteria regarding ranking transparency for business users. It is too early to assess the impact of this requirement and therefore too early to conclude that it has not had the desired effect.

- *Gatekeepers shall allow commercial users to advertise offers to end users acquired via the core platform service and to conclude contracts with these end users, regardless of whether they use the gatekeeper's core platform services for this purpose (Art. 5 (c)).*
In the case of this requirement, which originates from the smartphone app store sector, a worrying free-rider issue arises in relation to online marketplaces for goods. If sellers on marketplaces are allowed to refer to offers in their own online store or on other platforms without restriction, marketplaces effectively degenerate into pure advertising platforms, which calls the entire business model into question given the low margins in online retailing. Sellers (especially e.g. manufacturers of branded products) would systematically refer customers to their own web shops/direct sales channels and thus pull them away from marketplaces. However, providing contacts to a large number of consumers is the core business of any e-commerce platform. If this is de facto prohibited above a certain size, European e-commerce platforms will also lack the incentive to invest. Especially in the case of sellers from EU third countries,

[1] „Self-preferencing is not abusive per se, but should be subject to an effects test." https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf (p. 66)
[2] "In the online platform economy, differentiation is inherent in rankings, whose exact function is to list content in an order of importance or relevance in view of the platform's offering to end-users." https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68355 (p. 5)

this obligation would also lead to another undesirable effect: While the platform cannot close the account of such a third-country merchant (as there is no infringement), its activity through its own channels can be controlled much more poorly. This would clearly contradict the efforts of the Digital Services Act, the sister proposal to the DMA.

- *Gatekeepers should refrain from merging personal data from core platform services with personal data from other services/third party services and from enrolling end users in other services of the gatekeeper in order to merge personal data, unless the end user has been given a choice in this regard in accordance with Regulation (EU) 2016/679 and has consented (Art. 5 (a)).*
  With regard to the issue of data use, we would like to emphasize that we consider it positive that the use of personal data within the limits of the General Data Protection Regulation (GDPR) continues to be possible. The GDPR stipulates that companies need a legal basis for any data processing - and that includes the aggregation of data from multiple services. Even where data is used on the basis of legitimate interests without explicit consent, end users have extensive rights under the GDPR to influence such use (e.g., by opting out). The GDPR therefore adequately and appropriately regulates this situation and the proposed rule in Article 5 (a) is superfluous.

- *Gatekeepers shall grant third parties operating online search engines access to ranking, search, click and display data relating to unpaid and paid search results generated by end users in the gatekeeper's online search engines at their request on fair, reasonable and non-discriminatory terms, subject to anonymization of the search, click and display data, which is personal data (Article 6(1)(j)).*
  It should be clarified that search functions in online stores are not to be equated with online search engines and may therefore not fall within the scope of this provision. When searching an online store or marketplace, the aim is to find specific products in precisely this store and not to search for suitable websites on the Internet. Admittedly, this already follows from the relevant definition of "online search engine" in the P2B Regulation. Nevertheless, a corresponding explicit clarification would be desirable.

It is also to be welcomed that the Commission can suspend a specific obligation in whole or in part upon a justified request by a gatekeeper pursuant to Article 5 or 6 (Article 8). However, the material hurdles for this seem to us to be set too high. A suspension should only be possible in cases where the viability of the gatekeeper's business activities is at risk and only if there are exceptional circumstances over which the gatekeeper has no influence. In addition, the envisaged annual review of the suspension decision leads, in our opinion, to a high administrative burden. Although the possibility of suspension should be retained in principle, we advocate a substantive and procedural simplification of the provision. In particular, it should be possible for affected companies to justify conduct that does not comply with the requirements of Articles 5 and 6 in each individual case by referring to pro-competitive effects or to the result of a comprehensive weighing of interests, in line with the "comply or explain" approach mentioned above.

e) Market Investigation Tool (Art. 14-17)

The Commission had originally intended to use this instrument to examine markets (from all sectors) that are "on the verge of failure" - i.e., reveal structural competition problems - and, if necessary, impose remedial measures on a case-by-case basis (e.g., unbundling/divestiture of companies). However, the instrument was "downgraded" due to concerns expressed by the Commission's internal review panel and now primarily complements the wider DMA framework. This is to be welcomed in principle and should be retained in the further procedure, especially in view of the fragile legal basis. In principle, a market investigation should only be carried out under very exceptional circumstances.

f) Remedial Measures (Art. 16)

In the case of systematic infringements and if no alternative, equally effective measures are available, the Commission may impose remedies (Art. 16) in addition to fines (Art. 26), such as requiring a gatekeeper to sell an undertaking or parts thereof. Companies are considered to be "systematically infringing" if at least three fines have been imposed within five years.

A new instrument allowing the imposition of remedies without a finding of competition law violations would be a disproportionate and serious interference with the free market economy and a significant departure from the fact-based approach to competition law used today, which is subject to clear standards and judicial review. In addition, there are considerable constitutional concerns regarding the planned structural and abuse-independent powers of intervention. There is also the question of how the structural remedies can be effectively enforced against players from non-EU countries.

However, should this path be pursued further, this power must be exercised in strict compliance with the principle of proportionality and with due regard for appropriate safeguards, the rights of defense of the companies concerned and principles of due process under the rule of law. This requires a case-by-case analysis and written notification of the objections to the affected parties. We see good approaches to this in the present proposal.

g) Further Points

- Applicability: Article 39 provides for a transitional period of only six months until the rules become applicable. This is far too short and insufficient to implement the extensive and complex obligations operationally. Affected companies could be forced to change their entire business model. The P2B Regulation, which deals with comparatively easy-to-implement transparency and information obligations, provided for a transition period of 12 months. The period should therefore be extended to at least 24 months. It may also be worth considering making implementation periods generally more flexible and only allowing them to begin once all the guidelines and delegated acts required for application are available in final form. In the past, there have often been cases where these documents were not available until after the application deadline, making it de facto impossible for the companies concerned to apply the regulations.
- Further reporting requirements: Articles 12 and 13 provide for further reporting obligations at the expense of gatekeepers, which are to be rejected in this form. The obligation under Article 12 to notify all mergers and acquisitions to the Commission should be deleted in favour of the existing

requirements of the Merger Regulation. If the Commission sees a need for regulation, this should be addressed there. The same applies to the reporting of certain profiling techniques, which Article 13 proposes. Such matters are already adequately regulated by the GDPR and can be effectively enforced on this basis.

- Fines: In case of infringements, the Commission may impose fines of up to 10 percent of the company's total annual worldwide turnover (Article 26) and periodic penalty payments of up to 5 percent of the company's total annual worldwide turnover (Article 27). It seems inappropriate to adopt the fines from competition law on a one-to-one basis, since the present proposal is about internal market law and - in contrast to competition law - an individual case analysis as well as an efficiency defence should not be possible in the DMA. We therefore advocate either adjusting the level of fines or linking an offense more closely to a case-by-case analysis or an effects test. In any case, fines and structural remedies should be ultima ratio, used only in exceptional circumstances and with the necessary safeguards.
- Review of gatekeeper status: Digital markets are fast-moving by nature, and we welcome the principle of a review every two years (Art. 4) to keep pace with market developments. This should include a review of gatekeeper platforms and the criteria for defining them.
- Relationship with national authorities: Enforcement of the DMA should be at the EU level, as the proposal addresses gatekeepers that are present in several countries. We would further recommend that the DMA clarifies the relationship with national rules and national regulatory authorities and the potential impact of divergent national approaches. The EU legislator must ensure that the DMA cannot override national competition laws or even make them illegal. This applies in particular to the recently amended German Competition Act, particularly Section 19a.