WHO SHOULD GUARD THE GATEKEEPERS: DOES THE DMA REPLICATE THE UNWORKABLE TEST OF REGULATION 1/2003 TO SETTLE CONFLICTS BETWEEN EU AND NATIONAL LAWS?

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WHO SHOULD GUARD THE GATEKEEPERS: DOES THE DMA REPLICATE THE UNWORKABLE TEST OF REGULATION 1/2003 TO SETTLE CONFLICTS BETWEEN EU AND NATIONAL LAWS?

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The relationship between EU competition laws, national competition laws, and laws that regulate markets and market participants (e.g. unfair trading practices) has been on the EU agenda from its very inception, and recently sparked additional debate with the entry into force of the DMA. The DMA replicates some of the concepts of Article 3 of Regulation 1/2003 to define the situations in which the EU regulation of gatekeepers excludes the application of other EU or national laws. Yet, the matter is far from settled. The test codified in Article 3 is a less-than-perfect solution, which is a result of a political compromise rather than legal-economic theory. This paper submits that the transposition of such a test to the DMA is likely to be met with an equal degree of legal uncertainty and fragmentation. It begins by discussing the conflicts of laws according to the DMA, shows that this solution was at least partially inspired by the test for the resolution of conflicts with Articles 101 and 102 TFEU, and concludes by pointing to the difficulties of transplanting the text of the latter into the former.

I. INTRODUCTION

The relationship between EU competition laws, national competition laws, and laws that regulate markets and market participants (e.g. unfair trading practices) has been on the EU agenda from its very inception. In recent years, the relationship between those laws and (EU and national) regulation of online platforms has sparked additional debate. The controversy revolves around the fate of national rules that are similar or overlapping with EU laws on competition (Article 101 and 102 TFEU) and on digital markets (the Digital Markets Act, "DMA").[2]

While at first sight such matters might appear purely technical, they are subject to heated political debate between the EU and its Member States. Matters of conflict of law determine which institutions have the power to govern markets and societies, the substantive rules and extent of their powers, and may considerably limit national legislation and action. In the context of the DMA, such questions will ultimately determine who would guard core platform services with considerable economic power – the digital gatekeepers.

When it comes to national laws conflicting or overlapping with the EU competition rules, Article 3 of Regulation 1/2003 (entered into force in May 2004) was supposed to have settled this matter, after many years of uncertainty.[3] More recently, the DMA replicated some of the concepts of Article 3 of Regulation 1/2003 to define the situations in which the EU regulation of gatekeepers excludes the application of other EU or national laws.

Yet, the matter is far from settled. As we have demonstrated elsewhere, the test codified in Article 3 to settle conflicts is a less-than-perfect solution, which is a result of a political compromise rather than legal-economic theory.[4] In this paper, we submit that the transposition of such a test to the DMA is likely to be met with an equal degree of legal uncertainty and fragmentation. We begin by discussing the conflicts of laws according to the DMA, show that this solution was at least partially inspired by the test for the resolution of conflicts with Articles 101 and 102 TFEU, and conclude by pointing to the difficulties of transplanting the text of the latter into the former.

II. CONFLICT OF LAWS ACCORDING TO THE DMA (DIGITAL PLATFORMS)

The enforcement of the DMA rests principally with the European Commission, albeit with some assistance from national authorities in the investigation of conduct. This (essentially) centralized enforcement system is, according to Article 37 of the DMA, justified by the desire to achieve coherent enforcement of "available legal instruments applied to gatekeepers" across the common market. This aim is also reflected by the legal basis for the DMA – Article 114 TFEU – aiming to ensure the proper functioning of the internal market.

It is no surprise, therefore, that Recital 9 of the DMA states that fragmentation of the internal market should be averted. On paper, the DMA attempts to avoid this fragmentation by opting for a centralized enforcement system, limiting the extent to which national authorities can impose obligations on gatekeepers alongside the DMA. At the same time, it does not preclude the application of *other national rules* to gatekeepers to the extent they differ from the DMA. To this end, the DMA provides two types of exceptions to the primacy of the DMA; for national laws regulating digital platforms (Article 1(5)) and for EU and national competition laws (Article 1(6)).

Article 1(5) starts by establishing the primacy of the DMA, stating that Member States are prohibited from imposing "further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets." Yet, it permits the Member States to impose national obligations on digital platforms – even when they provide core platform services – "for matters falling outside the scope" of the DMA, and as long as those obligations "do not result from the fact that [they] have the status of a gatekeeper within the meaning of" the DMA.

Article 1(6) deals with conflicts between the DMA and EU and national competition laws. It stipulates that the DMA is without prejudice to the application of *EU competition law*, namely Articles 101 and 102 TFEU and the EU merger control rules, and to the application of *national competition rules*. It is noteworthy that these national competition rules do not only include rules equivalent to those of EU competition law. They

2 Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) (2020) COM/2020/842 final.

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

4 Or Brook & Magali Eben, *Article 3 of Regulation 1/2003: a historical and empirical account of an unworkable compromise* (working paper, 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4237413.

also include rules that do not have equivalents at EU level, namely "national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of additional obligations on gatekeepers."

According to Recital 9 of the DMA, Member States are only prohibited from applying "national rules which are within the scope and pursue the same objectives" as the DMA. Other national rules, with a different objective, remain unaffected. National competition rules (both equivalent to 101 and102 TFEU, and those that go further (Article 1(6) rules)) are explicitly considered to have such a different objective. They remain applicable, therefore, as long as they do not undermine the uniform and effective application in the internal market of obligations imposed under the DMA.[5] Recital 11 further clarifies that the DMA's objective is distinct from these national competition rules, since competition law "protects undistorted competition on the market," while the DMA ensures that markets with gatekeepers are contestable and fair.

The tests informing the conflict of laws, therefore, depends on a few important criteria that are not fully clarified by the wording of Articles 1(5) and (6) of the DMA. First, to distinguish the situations caught by Article 1(5) from those of Article 1(6), one must distinguish between "competition rules" and other "obligations on gatekeepers by way of laws, regulations or administrative measures." This difference appears to hinge, at least at a minimum, on the objectives of those two sets of laws: if the obligations imposed on gatekeepers have, according to the DMA, the "purpose of ensuring contestable and fair markets," competition rules a priori seem to have a *different* objective. Yet, as we will show below, the objectives of those two pieces of legislations are not without doubts.

Second, it is not fully clear when an obligation "result[s]" from the "gatekeeper" status in the meaning of Article 5(1) of the DMA. If this is an important distinguishing criterion, it will need to be established how gatekeeper status differs from traditional concepts (e.g. significant market power, bottlenecks on which others are economically dependent, dominance) and new concepts (e.g. undertakings with "Strategic Market Status" as in the UK, or with "paramount significance for competition across markets" in Germany).

Third, to identify whether national competition rules on unilateral conduct can be applied to situations caught by the DMA by virtue of Article 1(6), it will be necessary to determine what it means for such resulting obligations to be "additional" to those listed in the DMA. Could the German Bundeskartellamt argue, for example, that the obligations it applies based on Section 19(a) of the German Competition Law (GWB), such as prohibitions on the combinations of data without offering users sufficient choice, are "additional" to those foreseen in Article 5 of the DMA?

As the next section shows, the uncertainty surrounding many of those open questions traces back to the historical origins – Article 3 of Regulation 1/2003.

III. CONFLICT OF LAWS ACCORDING TO ARTICLE 3 OF REGULATION 1/2003 (COMPETITION LAW)

The above-mentioned test of the DMA for resolving conflicts with overlapping EU and national laws seems to be inspired by the test guiding the relationship between EU competition law (Articles 101 and 102 TFEU) and national (competition and others) laws, as codified in Article 3 of Regulation 1/2003. The choice to adopt a similar solution for the DMA should not be taken for granted. Unlike the (essentially) centralized setting of the enforcement of the DMA, the enforcement of Articles 101 and 102 TFEU is based on a decentralized approach, whereby EU law is to be applied by the Commission and national competition authorities ("NCAs") in parallel. In this context, conflicts are mostly likely to arise between EU and national competition laws, and between EU competition laws to other national measures that regulate markets and market participants, such as abuse of economic dependence, unfair competition, and restrictive trading practices.

Article 3(1) of the Regulation enacts the principle of parallel application of *EU and national competition laws*, by obliging NCAs and national courts to apply Articles 101 and 102 TFEU when they apply their national *competition laws* to anti-competitive agreements and unilateral practices that affect trade between Member States. Article 3(2) sets the general principle of primacy of the EU competition law provisions. Yet, Articles 3(2) and (3) provide for two exceptions from this general rule. Member States are not precluded from the application of (i) "stricter" national rules on unilateral conduct (equivalent to Article 102 TFEU); and (ii) provisions of national law that "predominantly pursue an objective different" from that pursued by Articles 101 and 102 TFEU.

The resolution of conflicts, as codified in Article 3, is not based on solid legal or economic theory of market regulation. Rather, it is the product of heated political negotiations and compromise among the Member States. As we detail elsewhere based on an archival study, for the first 40 years of its existence, EU primary and secondary laws did not define the relationship between EU competition law and national (competi-

5 Recital 10.

tion and other) laws.[6] This was not a mere oversight. Article 87(2)(e) of the EEC Treaty had explicitly ordered the Council to adopt such rules within a period of three years after the Treaty entered into force. The Member States, however, failed to come to an agreement on this politically sensitive question. Instead, the Commission and ECJ were left to rule on those matters on a case-by-case basis. They adopted a complex and case-specific set of rules, reflecting the general principles of parallel application of EU competition and national law and the primacy of EU competition law.

Regulation 1/2003, therefore, was the first time in which the Council had acted on its powers to regulate the relationship between EU competition and national laws. Initially, the Commission advocated for a radical law reform, according to which Articles 101 and 102 TFEU should "apply to the exclusion of national competition laws" when a practice has an effect on trade between Member States.[7] According to the Commission, parallel application of EU and national laws was unwarranted because it will lead to unnecessary parallel proceedings.[8]

Yet the Member States strongly disagreed to limit their powers to adopt national legislations on markets and competition, and particularly to regulate unfair trading practices. The relationship between EU competition and national laws was one of the most controversial issues in the negotiation process of Regulation 1/2003. Bringing the discussion to a halt on more than one occasion, the Member States managed to reach a compromise only towards the very end of the negotiations. Article 3, as a result, is not based on a robust legal theory of decentralization. Its vague and complicated wording does not offer clear guidance on drawing the dividing line between practices that fall under the exceptions of Articles 3(2) and (3).

> Article 3:
> *1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101](1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101] of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102] of the Treaty, they shall also apply Article [102] of the Treaty.*
> *2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article [101](1) of the Treaty, or which fulfil the conditions of Article [101](3) of the Treaty or which are covered by a Regulation for the application of Article [101](3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.*
> *3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.*

The adopted wording of Article 3 does not offer a clear and predictable set of rules to settle conflicts between EU competition law to national rules on competition and unfair trading practices. In this context, two main sets of challenges arise:[9]

A first set of challenges relates to conflicts between EU and national competition laws, and more specifically what type of conduct falls under the exception of Article 3(2), prescribing that the Member States are not precluded from adopting and applying "stricter national laws which prohibit or sanction unilateral conduct." This wording raises a number of questions, including: while the Article refers to "stricter national laws" in general rather than to national competition laws, Recital 8 of the same Regulation states that this rule refers specifically to "stricter *national competition laws*";[10] Article 3(2) and Recital 8 refer to national competition laws that prohibit or sanction "unilateral conduct," unlike Articles 1 and 3(1) of the Regulation that refer to an "abuse prohibited by Article [102]." This suggests that Article 3(2) may codify conduct beyond abuse of a dominant position; Moreover, Article 3(2) does not clarify what "stricter" means. A broad range of possibilities may apply, such as a stricter standard of what constitutes an abuse, a lower level of market power to establish a position of dominance, different degrees and types of economic power (e.g. economic dependence, or gatekeeper powers), or rules applying to conduct that was objectively justified under Article 102 TFEU.

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6 Brook & Eben, *supra* note 4.

7 Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (2000/C 365 E/28), Recital 8.

8 Explanatory Memorandum to COM(2000)582 Implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, para 6.

9 We discuss these challenges, their historical origins and practical implications in Brook & Eben, *supra* note 4.

10 Emphasis added.

A second set of challenges relates to the distinction between rules covered by Article 3(2) (national competition law) and by Article 3(3) (other rules). The former exception is considerably more limited than the latter. National competition rules should be applied side by side the EU rules, are subject to procedural and institutional safeguards of EU law, and in case of divergence could be accepted only as long as they are "stricter" than Article 102 TFEU.[11]

Despite such implications, the dividing line between (stricter) national rules on unilateral conduct in the meaning of Article 3(2) and national rules with a predominantly different objective in the meaning of Article 3(3) is not a straightforward exercise. It hinges on identifying the objective or the national rules and determining whether they are sufficiently similar to those of EU competition law. Yet, the goals of EU competition law are subject to great debate, and there is no clear consensus.[12]

Similarly, identifying the objectives of the national legislation is by no means an easy task, and Article 3 does not indicate how they should be determined. We have shown elsewhere that three possible benchmarks can be used to identify the objectives of the national laws: according to the objective of the national statutes examined as a whole; the objective of the specific national provision to be compared with Article 101 or 102 TFEU; or the harm the enforcement of a national provision addresses in practice.[13]

By systematically studying the practice of French and German NCAs and courts as a case study (2004-2021), we demonstrated empirically that the decisions of NCAs and judgment of national court do not consistently identify a benchmark to inform the objectives of the national law, and that their practices do not consistently comply with a single benchmark. In fact, diverging interpretations and classifications do not only exist among jurisdictions, but even within a single Member State.

In particular, our findings showed that it is not entirely accurate to say that national rules that protect competition on the market directly are being classified as national competition laws (subject to Article 3(2)'s narrow exception), and those that are more concerned with the protection of individual interests, fairness, equilibrium in commerce, freedom, or ensuring access of individual market participants to the market are classified as other national laws (subject to Article 3(3)'s broad exception). Rather, national enforcement differed, ascribing different and often overlapping objectives to national competition and "other" laws.

Regulation 1/2003's test, focused on the objectives of the national laws and measures, in other words, does not appear to work smoothly in practice. The unclear test resulted in much legal uncertainty, and fragmentation in the applicable laws across the EU. As we argue in the concluding section, because the DMA has adopted a similar test, such weaknesses are likely to also affect the enforcement of the DMA.

IV. REPRODUCING AN UNWORKABLE TEST?

There are clear similarities between the approaches of Article 1 of the DMA and of Article 3 of Regulation 1/2003. Not only do both regulations seek to avert fragmentation of the internal market while allowing some space for the application of (diverging) national rules, but the test for resolving conflicts with national laws also uses similar concepts: both tests foresee that Member States can apply *national competition rules on unilateral* conduct (Article 3(2) of Regulation 1/2003 and Article 1(6) of the DMA)[14] as well as rules having a different *objective* (Article 3(3) of Regulation 1/2003 and Article 1(5) of the DMA).

Similarly to Article 3 of Regulation 1/2003, the DMA refers to the objectives of the national law to distinguish competition rules from non-competition rules. However, it seems to go further still, by adding that the national competition rules are those which are "based on an individualised assessment of market positions and behaviour, including its actual or likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments."[15] This seems to be a slight improvement from Regulation 1/2003, which appeared to consider that rules fell in the "predominantly different objective" category because they "pursue[d] a specific objective, *irrespective of the actual or presumed effects of such acts on competition on the market*."[16]

11 For a discussion see, Brook & Eben, *supra* note 4.

12 Stylianou & Iacovides, "The goals of EU competition law: a comprehensive empirical investigation" Legal Studies (2022).

13 Brook & Eben, *supra* note 4.

14 Admittedly, the wording of the DMA is not identical to that of Article 3: it does not explicitly refer to "stricter" national rules on unilateral conduct, but rather to national competition rules on unilateral conduct which amount to the imposition of additional obligations on gatekeepers or apply to non-gatekeepers.

15 Recital 10.

16 Recital 9, emphasis added.

The DMA, in other words, arguably provides two tests to differentiate between the DMA and other national (competition and non-competition) rules: first, the objectives of the national laws (Article 1); and, second, whether enforcement involves an assessment of market positions and effects on the market (Recitals 9-11).

The definition of the objective of competition law in the DMA is near identical to that in Regulation 1/2003.[17] The DMA and Regulation 1/2003 also both include references to "fairness" as non-competition law: while Regulation 1/2003 puts forward rules sanctioning unfair trading practices as examples of rules with a predominantly different objective, the DMA considers fairness one of its two main objectives. This would imply that the DMA is indeed distinct from competition law, which thus remains applicable in parallel under both pieces of legislation, because of its diverging objectives.

As the experience of applying Article 3 of Regulation 1/2003 has shown us, this is not an easy distinction to make in practice. Article 3 of Regulation 1/2003 did not provide a clear solution for settling conflicts between Articles 101 and 102 TFEU and national (competition and other) rules. European national practices are not aligned in defining the objectives of the national laws. Various and conflicting approaches are adopted not only across the Member States, but even within the same jurisdiction.

Replicating Article's 3 "different objective" test to the DMA, we therefore argue, is not a robust means to ensure uniformity, effectiveness, and legal certainty in the application of the DMA across the internal market.

Admittedly, the approach in the DMA is more concrete – focusing on the formal way in which effects analysis takes place – and may thus be a better benchmark to distinguish laws from each other. Yet, here too, it is possible to foresee a problem: despite the intentions of the legislator to avoid the lengthy and complicated process that results from the need to assess market positions, effects, and justifications, it cannot be ruled out completely that the DMA will require some assessment of this type: in, for example, the assessment of the effectiveness and proportionality of measures taken to comply with the obligations, during the judicial review, or as part of the limited possibility for an undertaking to provide "sufficiently substantiated arguments" that it is not a gatekeeper.

17 Recitals 9-11 of the DMA and Recital 9 of Regulation 1/2003.

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