Enough of Fairness: Pre-Emption and the DMA

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Abstract This chapter looks at the DMA through the prism of pre-emption and the relationship between EU and national law. It explains the fundamentals of pre-emption in EU law and shows the consequences for the DMA and national rules that are to ensure fairness in the digital market space. It argues that fairness in the digital market with regard to business users and consumers has been exhaustively regulated by the DMA. Thus, existing and future national rules that aim to address additional fairness matters are pre-empted and cannot be applied to gatekeepers. The only option Member States have is to introduce further fairness related matters into their competition laws which elevates the well-known debates about the relationship between competition law and fairness to a new level.

1 Introduction

This chapter is a rather constitutional discussion, looking at the relationship between EU law in form of the DMA and the competences of the Member States. It focuses on the doctrinal elements of the ECJ's jurisprudence that explain the relationship between these two spheres of law. In particular, the chapter focuses on the concept of pre-emption and how it relates and would be applied in relation to the DMA and national laws adopted by the Member States. The chapter first explains the background of the DMA and its inception in order to further concretise the question. It, then, explores and analyses the concept of pre-emption to establish its basic features. Subsequently, it examines the implication of pre-emption in the context of the DMA, in other words it scrutinises the extent to which Members States rules are pre-empted

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by the DMA. Finally, it highlights the consequences of the pre-emptive effect of the DMA. It argues that a rather confusing situation is created which will lead to a number of issues, in particular a situation where Member States are not able to adopt further 'fairness regulation' in the digital field at national level. Moreover, the chapter shows that one of the few options left for Member States is to introduce more fairness elements into national competition laws. In this way, the DMA might be an incentive to change the way competition law is conceived at national levels in Europe.

2 Background and Question

In the last couple of decades, internet-based technology has developed at breakneck speed transforming the society that we live in while the law has had problems in catching up.[1] This problem in catching up with technological developments might not be surprising as some have described the development of the digital economy as the fourth industrial revolution.[2]

Competition law has been no different. It has been trying to catch up with the technological developments and a never-before-seen growth and power of companies such as Apple, Alphabet or Meta and the like.[3] The conduct of these digital companies has given rise to a different form of economic logic; the economy is shifting to what is called the attention economy and the usage of user-harvest data.[4]

The activities of these digital companies do not only affect the EU but also raise concern in other regions of the world. China has for example developed the Draft Antitrust Guidelines for Platform Economy (Platform Guidelines) which take up some elements of the EU's approach.[5] Similarly, Chile published a draft law in September 2021 in an effort to regulate their own digital market.[6]

The EU's original attempt to deal with the digital economy was Directive 2000/31 which however, even when combined with application of traditional competition law, proved to be insufficient to regulate the digital market.[7] EU Member States started to address this gap by introducing new competition provisions such as Section 19a of the German competition act that came into force in 2021. This provision imposes special obligations on undertakings with 'paramount significance for competition across markets.' Similar discussions about changes to the competition law have also taken place in other Member States, for example the Netherlands

[1] See Chesterman (2020).

[2] Philbeck and Davis (2018), p. 17.

[3] Nicoli and Iosifidis (2023), p. 24.

[4] Li and Li (2021), p. 3.

[5] For an overview, see Liu and Vryna (2022).

[6] See e.g. Chahuán et al. (2021).

[7] For a good overview, see de Streel and Husevoc (2020).

in the case of the Guidelines for promoting a transparent and fair online platform economy for undertakings developed by the Authority for Consumers and Markets and France with its Decree No. 2017-1434, which regulates obligations applicable to platforms and marketplaces. EU, then, decided to adopt the DMA. It introduces an innovative ex-ante system in contrast to the traditional ex-post assessment in competition law[8] and regulates so-called 'gatekeepers'. In this way, the legislation creates a new category of companies within the digital market which are presumed to have a critical relevance for the market and to which special obligations apply. The DMA, thereby, abandons the requirement of showing dominance or market power under Article 102 TFEU and replaces it with a set of quantitative criteria such as the amount of users in the EU.

Given the DMA's close relationship to competition law there were debates about the legal basis and whether it should be adopted under Article 103 TFEU which provides for the adoption of 'regulations or directives to give effect to the principles set out in Articles 101 and 102' TFEU. Viewing the DMA through the lens of competition law also seems to make sense as an important concern about gatekeeper companies is that they operate in an environment with winner-takes-all markets.[9] Interestingly, the legislation was in the end adopted under Article 114 TFEU, the EU's harmonisation provision, rather than competition law's Article 103 TFEU. Although there was criticism regarding the legal base,[10] using Article 114 TFEU offered an easier legislative procedure[11] and allowed the Council and the Parliament could act as co-legislators.[12]

Yet, given the cross-border nature of the often global platforms and the different attempts and discussions about regulating the behaviour at Member State level, it seems understandable why harmonisation was a key concept for the DMA. Moreover, a harmonisation approach also relates to the EU's ambition to create a single digital market.[13] Thus, the DMA, as proposed in December 2020 and signed into law in September 2022, aims to 'contribute to the proper functioning of the internal market'.[14]

Against this background our question is what does this shift from a competition law basis to the internal market basis mean for Member States and their competences to regulate vis-a-vis the EU. In other words, we examine whether and to what extent Member States will still be able to adopt rules to add issues that are related to big tech and gatekeepers in particular. To do so, we are exploring what kind of national rules

[8] See Ibáñez Colomo and Kalintiri (2020).

[9] In this direction Ruutu et al. (2017).

[10] Lamadrid and Ibáñez Colomo (2020). See also in this volume Annegret Engel, Licence to Regulate: Article 114 TFEU as Choice of Legal Basis in the Digital Single Market.

[11] Article 114 TFEU has less requirements than 103 TFEU and unanimity according to Art 293(1) TFEU is not required where the Council amends the proposal by the Commission.

[12] Lamadrid de Pablo and Bayón Fernández (2021), p. 576.

[13] See Communication from the Commission (2015).

[14] Preamble para 7.

are pre-empted by the DMA, in light of the typical internal market concern of double regulatory burdens and harmonisation.[15]

3 Pre-Emption

Having set out the basic premises on which the DMA rests, we now turn to exploring the relationship between the DMA and national law. However before engaging in this exercise in more detail, we need to establish the basic principle that governs this relationship: pre-emption.

Pre-emption in the EU is a concept that cannot only be compared to but is also deeply influenced by the US doctrine of pre-emption. In the USA, it that governs the relationship between US federal and state law.[16] Arena traces the concept of pre-emption back to its Latin roots of *premptio* where *pre* means in advance and *emptio* means acquisition or purchase and its roots in US constitutional law of 1917.[17] In the EU, the concept is also deeply intertwined with supremacy and it can be seen as the other side of the coin.[18] While the principle of supremacy is used to establish the relationship between EU and national law, or more precisely the relationship between the two fields of law, pre-emption is concerned with the questions of whether or not a conflict exists.[19] It is also related to questions of competence, as the competence questions informs the analysis.

While pre-emption is far less studied than supremacy in the EU context,[20] Schütze distinguishes between three different forms of pre-emption. The first is field pre-emption, the second rule pre-emption, and, finally, obstacle pre-emption.[21] And while the delimitation of the different forms of pre-emption are not always watertight,[22] the distinction helps thinking about the overlap and interaction between EU and national law.

Field pre-emption exist only in very rare cases, where the EU has the exclusive competence in an area.[23] Thus, the exercise of that Union competence sets a direct limit to national powers. It excludes national law in its entirety[24] with the case

[15] For a general overview regarding the issue of dual burden and harmonisation see.e.g Perišin (2008).

[16] For a general comparison on pre-emption in the EU and US, see e.g. Schütze (2016).

[17] Arena (2016), p. 28; for an overview of US law in that regard and its development, see also Gardbaum (1994).

[18] Arena (2018), p. 326.

[19] Waelbroeck (1982), p. 551.

[20] For the few studies see e.g. Arena (2016); Schütze (2016); Waelbroeck (1982).

[21] Schütze (2016), p. 1038; Arena (2018), p. 324.

[22] Schütze (2016), p. 1043.

[23] Schütze (2016), p. 1023 Arena (2018), p. 327.

[24] Schütze (2016), p. 1040.

Ratti[25] being an example of this kind of pre-emption. While field pre-emption might be more easily established in the few areas where the Treaty provides for the exclusive competence of the EU, field pre-emption can also exist in other situations. *Ratti* concerned a clash between EU law and the Italian legal system. In this case, Mr. Tulio Ratti argued that he did not have to comply with the stricter Italian law, given that his products (solvents) were fully compliant with EU law (Directives 73/173 and 77/728). As the implementation deadline for the Directive had passed, the Court held that, Mr. Ratti was bound only by Directive 77/728. In this sense, the ECJ closed the possibility of a Member State to rely on its own failure to implement the Directive in time.

With the rationale of strict regulatory uniformity in certain matters, the question is whether EU rules can be seen as exhaustive field pre-emption as for example in cases of exhaustive/complete/maximum harmonisation measures.[26] The rationale for this field pre-emption in such cases is that once the compromise between the different interests and Member States is reached at EU level, Member States should not unilaterally upset this compromise.[27]

Originally, this examination of exhaustiveness was easier as the Court would distinguish between regulations which would always pre-empt the field while directives would never amount to field pre-emption.[28,29] This distinction gave rise to the idea that regulations had 'exclusive' and 'exclusionary' effect.[30] However, this basic distinction between directives and regulations is not used anymore which nowadays makes the assessment more difficult.[31] Often the relevant EU regulations or directives do not state whether they are intended as exhaustive/complete/maximum harmonisation and the ECJ must interpret the EU rules[32] in detail as—unlike in the US constitutional law—there is no list of *indica* that the ECJ uses.[33] Yet, it might be said that one positive *indicia* for field pre-emption is exhaustiveness of the EU rules.[34] This contrasts with partial harmonisation measures. In these situations, certain aspects are regulated by the EU while others are left to the Member States.[35]

Where the area is not in the exclusive competence of the EU, but competences are shared and the EU rules are only aimed at partial harmonisation, the other forms of

[25] Case 148/78 *Criminal proceedings against Tullio Ratti* EU:C:1979:110.

[26] Arena (2018), p. 331.

[27] For such an explanation see Weatherill (2002), pp. 52–57.

[28] Arena (2018), p. 332.

[29] For Directives rule or obstacle pre-emption could exist.

[30] Arena (2016), p. 28.

[31] Arena (2018), p. 332. See also Arena (2016), p. 30, who sets out a number of cases which shifted from the simple directive vs regulation distinction to a more sophisticated analysis.

[32] Arena (2016), pp. 40–42.

[33] Ibid.

[34] Arena (2016), pp. 42–43.

[35] Arena (2016), pp. 52–55.

pre-emption are relevant. In such situations, the Member States retain power and their pre-emption does not apply as long as their rules do not contradict the EU rules.[36] Pre-emption can, then, take the form of rule pre-emption or obstacle pre-emption.

The clearest form of pre-emption in this area is rule pre-emption which describes situations, where national rules directly contradict specific EU rules.[37] A case where this form of pre-emption can be observed is in *Gallaher*[38] regarding the labelling of tobacco products in the UK. In this case, the Court held that, even though Member States could impose stricter rules to their own products (in this case, warnings and health information in cigarette packets), this did not apply to products imported from other EU countries where these complied with the minimum requirements established by EU law.

More difficult are situations of obstacle pre-emption. These are situations where the conflict is more indirect.[39] The national measure jeopardises EU law, by limiting the scope, otherwise impeding the functioning or attainment of the objective of the EU measure.[40] In such cases, the Court has to examine the EU law and the national law in greater detail to determine whether the national law creates obstacles to the functioning and the objectives of the specific EU law.[41] Such an assessment can be observed in *Bussone*[42] concerning EU law on the standardisation around marketing and labelling of eggs. The court held that the Directive had direct effect and that a Member State could not make the application more difficult by means of national law even if that national law was adopted after the Directive.

The analysis of 3 rule pre-emption and in particular obstacle pre-emption is more complicated because the ECJ will not only have to establish the object of the EU law measure but will, also, have to examine whether EU law foresees explicit or implicit derogations.[43]

Overall, the task in cases of pre-emption is to establish the scope of EU law and then, in a second step, to examine the national measure with the view of determining whether there is an overlap in scope.[44]

[36] Schütze (2016), p. 1037; Arena (2016), p. 32.

[37] Schütze (2016), p. 1042.

[38] Case C-11/92 *Gallaher* EU:C:1993:262.

[39] Arena (2018), p. 324.

[40] Schütze (2016), p. 1042; Arena (2018), p. 327.

[41] Ibid, 1041.

[42] Case 31/78, *Francesco Bussone* v. *Italian Ministry of Agriculture* EU:C:1978:217.

[43] Arena (2018), p. 303.

[44] Arena (2018), p. 349.

4 Pre-Emption and the DMA

With this background and understanding in mind, we now explore what kind of pre-emption would be applicable in the context of the DMA and to what extent it would prevent national rules. This assessment will first involve an examination of the DMA and its legal basis to establish its scope and the relevant areas of pre-emption. In a second step, we will identify what kind of national rules are pre-empted by the DMA.

In the first step, it is necessary to take into account the legal basis of the DMA. One reason for field pre-emption would have been if the DMA had been adopted under 103 TFEU, the EU's exclusive competence for competition matters. However, in the end it was adopted under the internal market provisions of Article 114 TFEU so not as a new set of competition rules,[45] even though it has been classified as an ex-ante mechanism of addressing competition in digital markets.[46]

The adoption of the DMA under Article 114 TFEU provides us with the insight that the EU wanted to regulate in an area of shared competence and that the DMA is adopted as a form of harmonisation in the face of potentially divergent national rules covering the field. In this way it centralises the rules applicable to this area at EU level.[47] Some have, thus, described the DMA as a form of minimum harmonisation,[48] which would allow Member States to adopt their own more stringent standards.

If the DMA would be a form of minimum harmonisation, field pre-emption would most likely be out of the question and we would have to investigate obstacle and rule pre-emption. However, such a finding might be premature and a more detailed look at the DMA and its rules is required before one can come to such a conclusion. A first indication as to whether a regulatory regime is exhausted can be found in the comprehensiveness and detail of the rules adopted.[49] The DMA contains rather detailed and extensive rules for gatekeepers and has been adopted as regulation rather than as a directive. This seems to cast some doubt as to whether it is only intended as minimum harmonisation. Moreover, the DMA itself is rather clear as it specifies in its preamble that:

> [. . .] the purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular. [. . .] Moreover, while gatekeepers [. . .] can adopt, and in some cases have adopted, different business conditions and practices in different Member States, which is liable to create disparities between the competitive conditions for the users

[45] De Streel (2021).

[46] Beems (2022), p. 1.

[47] Hoffmann et al. (2022), p. 4.

[48] Ibid 7.

[49] Arena (2018), p. 332.

> of core platform services provided by gatekeepers, to the detriment of integration of the internal market.[50]
>
> By approximating diverging national laws, it is possible to eliminate obstacles to the freedom to provide and receive services, including retail services, within the internal market. A targeted set of harmonised legal obligations should therefore be established at Union level to ensure contestable and fair digital markets featuring the presence of gatekeepers within the internal market to the benefit of the Union's economy as a whole and ultimately of the Union's consumers.[51]
>
> Fragmentation of the internal market can only effectively be averted if Member States are prevented from applying national rules which are within the scope of and pursue the same objectives as this Regulation. [. . .][52]

These explanations seem to contradict a finding of minimum harmonisation and instead seem to indicate a form of field pre-emption. This finding is also supported by Article 1 that sets out the subject matter and scope of the DMA. It explains in Article 1(5) that Member States cannot 'impose further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets.'

There is a narrowly drafted exception for obligations imposed under competition law. Article 1(6) specifically holds that national merger rules can still be applied and that national competition laws can also still be applied insofar as they mirror Article 101 and 102 TFEU. Moreover, national competition laws can also impose other unilateral conduct obligations on gatekeepers, if those obligations are also imposed on non-gatekeepers or the obligations are specifically aimed at gatekeepers and impose further obligations on them. This reading of Article 1(6) is confirmed by the Preamble which sets out that:

> At the same time, since this Regulation aims to complement the enforcement of competition law, it should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question, and to national rules concerning merger control.[53]

Thus, for the area of competition law, the DMA might well be described as minimum harmonisation, which in turn would mean that only obstacle or rule pre-emption apply.

However, outside of the area of competition law the situation is rather different. At first sight Article 1(5) contains a broad reaffirmation of Member States' competence to regulate. The Article emphasises that Member States are free to impose 'obligations on undertakings, including undertakings providing core platform

[50] Preamble para 7.

[51] Preamble para 8.

[52] Preamble para 9.

[53] Preamble para 10.

services, for matters falling outside the scope of this Regulation, [. . .] and do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation.' Yet, a closer look indicates a much narrower scope. Outside the area of competition law, the pre-emptive effect of the DMA is only subject to two limitations. First, the Member States are not allowed to use the status of gatekeeper under the DMA to impose further obligations on such gatekeepers. The second limitation comes from the fact that Member States are able to regulate only 'matters falling outside *the scope*' of the DMA. While this might read like a generous reaffirmation of Member States' competences, a more detailed examination reveals a very broad area where Member States are not able to regulate. This broad area emerges from *the scope* of the DMA as set out in Article 1(1) and 1(2) DMA. Within that broad *scope* the Member States cannot regulate.

Article 1(1) DMA explains that '[t]he purpose of this Regulation is [. . .] laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users.' It then further elaborates in Article 1(2) DMA that [t]his Regulation shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective [. . .] of the law otherwise applicable to the provision of service.'

The scope of the DMA encompasses thus the following:

> Contestability and fairness in markets in all situations where gatekeepers provide services in the digital sector to business and end users.

This scope is the area where the DMA foresees field pre-emption.

5 The Competence Confusion, the End of Fairness, and the Resulting Pressures on Competition Law

Whether intended or not, with the DMA a strange legal landscape emerges. A landscape where the competence allocation between the EU and Member States becomes particularly unclear. A landscape where the concept of fairness in the digital world is unable to evolve and where Member States are generally prevented from protecting consumers and businesses from new unfair practices by gatekeepers. A landscape where Member States' only option to address such fairness issues in digital markets is the expansion and reshaping of their competition laws.

Given that scope and the rules of pre-emption explained above, the ECJ will have to interpret the scope of the DMA to determine whether or not Member States can regulate a certain area where gatekeepers are involved.

The ECJ will have to interpret and clarify what the different terms setting out the scope of the DMA mean, terms such as 'digital sector', 'business user' and 'end user'. While the interpretation of these terms might be rather straightforward, more effort is required to determine what 'contestability of markets' means. The preamble

provides some help in this regard and sets out in para 32 that the term has to be understood as to 'relate to the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services.' It also mentions the low contestability in the digital market with 'network effects, strong economies of scale, and benefits from data'. With some help and insights from competition law and economics we can imagine that the meaning of this term can also be sufficiently clarified.

However, things become rather difficult where the Court has to come to a binding interpretation of the term 'fairness in markets'. Fairness is already a rather difficult concept to interpret in specific cases such as Article 102 TFEU cases.[54] And while the preamble explains what 'unfair' within the context of the DMA may mean, the interpretation of the term fairness will pose challenges. The preamble of DMA explains:

> For the purpose of this Regulation, unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage. Market participants [. . .] should have the ability to adequately capture the benefits resulting from their innovative or other efforts. Due to their gateway position and superior bargaining power, it is possible that gatekeepers [. . .] unilaterally set unbalanced conditions [. . .] and may also consist in excluding or discriminating against business users [. . .][55]

This explanation seems to provide only the bare minimum for orientation. Thus, unfairness relates to the power of gatekeepers of their users and business partners and a resulting imbalance concerning rights and obligations between them. However, this is only of little help to determine the precise competences that the EU exercised and which the Member States would be barred from using. First, this explanation is not a part of the definitions of the DMA but only contained in the preamble. Second, it does only tell us what unfairness is. Third, and related, not all matters that do not come under definition of *un*fairness are automatically fair.

In this situation, the ECJ will have the impossible task of determining the competence allocation between the EU and Member States. It will be extremely difficult to determine what competences to regulate Member States retain, if the DMA has exhaustively regulated 'fairness' in the 'market' with regard to the relationship between 'gatekeepers' and their 'business users' and 'end users'.

In the most stringent reading vast areas of law such as consumer protection law or other rules that protect small businesses can be seen as ensuring fairness in the market. The only limiting principle that the scope of the DMA provides in this regard is 'in the digital sphere'. This also seems to call into question rules that may also be associated with fairness considerations, such as a fair and equal moderation policy in the name of protecting freedom of expression or media plurality. In the end, nearly all kinds of areas of law somehow regulate 'fairness'. The term 'fairness' is, thus,

[54] See e.g. Pera (2022).

[55] Preamble para 33.

ill-suited to determine the competence allocation between the EU and Member States.

The difficulty with this term and possibly vast areas that Member States can now no longer regulate with regard to gatekeepers bring about another unintended consequence. On the one hand, fairness and the resulting obligations for gatekeepers seem now to be fixed. Only a (unlikely) change of the DMA in the future can address new fairness concerns. Member States will be broadly prevented from addressing those absent amendments to the DMA. On the other hand, unintended consequences might be new pressures on competition law to take up more fairness concerns.

If Member States do not have the power to adopt new laws to impose additional obligations on gatekeepers to ensure fairness in their relationship with end and business users, they might turn to competition law to achieve those aims. In fact, the DMA specifically allows for more stringent obligations to be imposed on gatekeepers as long as they are contained in the national competition law. Thus, Member States are free to adopt new rules to ensure fairness under their competition law. It seems the only 'safe passage' for new fairness concerns regarding gatekeepers. Where such fairness matters are placed in the national competition law, the Member States are free to impose further obligations on the gatekeepers based on Article 1(6) of the DMA. While it goes beyond the scope of this paper to discuss the pros and cons of bringing in more fairness considerations into competition law,[56] it would certainly change the character of competition law in the EU and would increase divergence in an area of law, that is characterised by a high level of uniformity.

6 Conclusion

This chapter has examined the DMA from a constitutional perspective by looking at the relationship of EU law in the form of the DMA and national rules. This relationship has been analysed through the prism of pre-emption. The chapter first explained the concept of pre-emption and its different forms how the concept needed to determine whether a conflict between EU and national law exists. The focus has, then, shifted to examining what these abstract findings mean more concretely in the context of the DMA. In particular, the chapter explored the concept of field pre-emption and how the DMA fully harmonises an entire area of law by imposing not only minimum harmonisation but rather full harmonisation which leaves little room for Member States to regulate gatekeepers by imposing additional obligations except in the context of competition law.

[56] On the debate in general see Ayal (2014), with regard to the EU competition e.g. Pera (2022); Marco Colino (2019); Lamadrid de Pablo (2017); Dunne (2021); and specifically with regard to the digital market, see Graef (2018); for the debate in the US see e.g. Fox (1986) Erickson (1987), Scherer (1990), Hughes (1994), Horton (2013), Cote (2021).

The chapter has shown how the DMA is aiming to regulate not only contestability but also 'fairness in the marketplace' with regard to the relationship between gatekeepers and its business and end users. This broad area of coverage and the ambition to regulate 'fairness in the marketplace' leads to substantial challenges. First, it is unclear how a concept like fairness can be effectively used by the ECJ to demarcate the boundaries of EU competences with those of the Member States. The vagueness of the concept of fairness also when paired with limiting factors such as 'with regard to gatekeepers and relationship to their business and end users' means there are no clear boundaries as nearly all areas of law can be said to be related to fairness. In turn, this seems to call into question vast areas of law such as consumer protection laws and their application to gatekeepers covered by the DMA. This raises the serious question as to whether Member States will ever be able to impose any further obligations on gatekeepers via other areas of law. The only exception foreseen in the DMA is competition law. Combined with the broad area of Member States regulatory space pre-empted by the DMA, this exemption may lead to a situation where Member States have an incentive to include further fairness related matters into their national competition laws. An area of law that has often been successful at resisting notions of fairness focusing instead of notions of efficiency.

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