The Brave Little Tailor v. Digital Giants: A Fairy-Tale Analysis of the Social Character of the DMA

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Abstract[1]

This Chapter examines the Digital Markets Act (DMA) from an interdisciplinary perspective, considering both legal and social science perspectives and using the Brothers Grimm's fairy tale of "The Brave Little Tailor" as a connecting narrative element. The DMA is a key piece of legislation in the legal jigsaw of the EU's digital strategy. It aims to contribute to contestable and fair markets in the digital sector across the EU, where a small number of large undertakings, called "gatekeepers", are present and provide core platform services, such as Facebook, YouTube, Google Shopping, and WhatsApp. This Chapter focuses on whether the DMA has a social character and seeks to answer this question in two main sections. The first reflects on the complicated relationship between law and social science and develops a so-called practical approach to try to overcome this never-unanimous discussion. This approach focuses on the benefits of learning from one another by sharing knowledge in an interdisciplinary context rather than taking one side. Subsequently, reflections on the social character of law in general are made. As such, the overriding good of society – derived from the principle of proportionality – serves as a benchmark for further consideration. The second section provides a legal overview of the DMA. It focuses on key aspects of the EU Regulation, such as background considerations on its development, objectives, and material and geographical scope. Building on this and using the aforementioned benchmark, the Chapter assesses several social aspects of the DMA. This mapping exercise shows that, while the DMA is not explicitly intended

1 This Chapter solely reflects the personal opinion of the author. The author would like to thank Dr Lucie Antoine for her initial support and Marie-Therese Sekwenz, Rita Gsenger as well as Lukas Kestler for their valuable comments during the writing process. The author also thanks all participants of the Digital Decade Workshop at the Weizenbaum Institute, Berlin, in September 2024 for their supportive feedback, which was tremendously helpful to the process of completing this paper.

to be a social Regulation, it contains several implicit social aspects that indicate a social character. Finally, and importantly, given the practical approach, the Chapter aims to stimulate further social science research on this topic. Accordingly, the Chapter ends by proposing possible further interdisciplinary research questions.

1. A fairy-tale introduction

Once upon a time, a few large digital giants—called gatekeepers—were able to use their great economic power to set the rules of the game on the internet, much to the detriment of their users and the platform economy. The economic power of these undertakings stems from the creation of "core platform services" (Art. 1(2), 2(2) DMA) (CPSs), which include, for example, online search engines, online social network services, or web browsers such as Facebook, Instagram, YouTube, Google Shopping, Google Maps, Amazon and WhatsApp. Among other things, these services connected many business users with many end users. This multi-sidedness allowed the digital giants to leverage their acquired advantages, such as access to large volumes of data, in other areas of their activities, potentially leading to network effects. Problematically, some of these undertakings could control entire platform ecosystems in the digital economy, even if they were not necessarily dominant under European competition law. That dominant position made it extremely difficult for existing or new market players to compete with them, as entry and exit barriers were (perilously) high. Consequently, a high risk existed that relevant digital markets would become dysfunctional. Stricter rules were requested to combat the digital giants and contain these potential threats. Therefore, the brave little tailor—called the European Commission (EC)—came up with a bold idea: the online and offline worlds are ultimately the same, so what is considered illegal offline must also be illegal online (Vestager, 2020). It is important to ensure everyone—whether they offer or use digital platforms in the EU—benefits from security, trust, innovation, and business opportunities (Breton, 2020). The EC has thus been working for several years on a new regulatory cutting pattern called the Digital Markets Act (DMA; Regulation (EU) 2022/1925). Although this Regulation was not entirely perfect from the outset, the brave little tailor never wavered in its efforts to complete its work and proposed it to the European legislator in 2020. Fortunately, the fight against the digital giants soon began to bear fruit. In less than two years,

the EC designated seven gatekeepers, namely Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft, and Booking, and a total of 24 CPSs provided by these gatekeepers. In addition, the first judgment of the General Court at the Court of Justice of the European Union (CJEU) has been decided (ByteDance Ltd v. EU Commission, 2024a). The decision is currently the subject of an appeal (ByteDance Ltd v. EU Commission, 2024b).

This Chapter examines the DMA from an interdisciplinary perspective, taking into account both jurisprudence and social science. The focus is on whether the DMA is a Regulation with a social character—a question that has yet to be addressed in research. It aims to contribute to a better understanding of the relationship between jurisprudence and social sciences in terms of platform undertakings. The genre of the fairy tale functions as a connecting narrative element. As a subject of research, they are overlapping phenomena incorporating influences from a wide range of disciplines, including those relevant to this Chapter (cf. Bluhm, 2023, p. 3; Frey, Berthold and Bürgle, 2023, p. 541; Pöge-Alder, 2023a, p. 531). Fairy tales have, for centuries, been passed down and adapted from generation to generation (Pöge-Alder, 2023b, p. 447). They reflect the cultural backgrounds and moral concepts of earlier generations and deal with issues that remain relevant today and affect many people (Siegel and McDaniel, 1991, p. 558). Different phenomena of human existence and behaviour appear in fairy tales, such as emotions, moral judgements, communication, and social roles, making them a research subject in the social sciences (Frey, Berthold and Bürgle, 2023, p. 541). In addition, motifs and actions of jurisprudence are often found in fairy tales. The legal influence of the most famous fairy tale collectors and lawyers, the brothers Jacob (1785–1863) and Wilhelm Grimm (1786–1859), known as the "Brothers Grimm", plays a significant role (cf. Diederichsen, 2008, p. 13). The question of law and justice in fairy tales has therefore always been of interest to legal scholars (cf. Carpi and Leiboff, 2016; Lox, Lutkat and Kluge, 2007).[2] In the present analysis, the connecting, narrative fairy tale is that of *The Brave Little Tailor* (in German: Von einem tapfern Schneider), first published in 1812 by the Brothers Grimm in their *Children's and Household Tales* (in German:

2 See also "Once upon a law – the Grimm Brothers' stories, language and legal culture", a joint research project by the Faculty of Arts and Social Sciences, the Faculty of Law, and the University Library of Maastricht University. This project explores the relationship between the Brothers Grimm's collection of fairy tales, their work on language, and the law. See, Once upon a law, 2022.

Kinder- und Hausmärchen (KHM); cf. Grimm and Grimm, 1812, p. 77).[3] The protagonist of the fairy tale, the brave little tailor, goes out into the world and experiences various (un-)real adventures and challenges before finally marrying the king's daughter and ascending to the throne as a reward for his courage. One of the ways he proves his bravery is by killing seven flies (not people, as the other fairy tale characters mistakenly believe) with one blow, which he prominently writes on his belt. Notwithstanding the coincidence, the EC has already named seven gatekeepers—but not (yet) killed them!—shows the brave little tailor's aptness as a narrative element. He is a symbol of how to deal meaningfully with the forces and powers of life and develop moral autonomy in the process (Müller, 1985, p. 24). As shown below, the EC had a similar vision in mind when developing the DMA.

In order to answer the research question, this Chapter proceeds as follows: first, it reflects on the controversial relationship between law and social science and advances a proposal for dealing with this controversy by adopting a so-called *practical approach*. With this in mind, the social character of law in general is considered. The second step involves providing a legal overview of the DMA. Afterwards, the Chapter assesses the Regulation in terms of its social aspects. The previous considerations serve as a benchmark for this mapping exercise. The final step is to draw conclusions in relation to the research question and to develop research questions for further interdisciplinary research on the topic.

3 The KHM is a collection of fairy tales first published in 1812 by Jacob and Wilhelm Grimm. A second volume followed in 1814 (though this was dated 1815), and a revised edition appeared in 1819. The final German edition to be published during the lifetime of the Grimm brothers was the seventh (1857). Although the most accurate translation of the Grimms' title would be Children's and Household Tales, most English readers are familiar with these stories as Grimms' Fairy Tales, or, more commonly, grammatically incorrect, Grimm's Fairy Tales. The fairy tale of The Brave Little Tailor can be found in no. 20 of the KHM.

2. Foundational reflections on law and social science

2.1 The (complicated) relationship between law and social science: a practical approach

By its nature, law and social science are interdisciplinary (Bornstein, 2016, p. 113). According to common understanding, social science is the scientific discipline that deals with the order and organisation of human coexistence (Lehner, 2011, p. 13 f.). The research object of social science is society, i.e., a large and heterogeneous group of people whose coexistence and interaction are ordered and organised (Lehner, 2011, pp. 24, 80; Luhmann, 1995, p. 7). The word social, in simple terms, has three meanings: (1) socially oriented; (2) facing society (negative: antisocial); and (3) aiming at a certain state of society, especially in the sense of negating hardship and approaching equality (Zacher, 1981, p. 726).[4] Social science primarily uses empirical research methods, which continue to be somewhat novel in legal research. Regarding the common understanding of law, it can become a suitable sparring partner for social science. The law is the sum of the rules, regulations, principles, norms, ethics and standards that govern human behaviour in society (Parajuli and Lamicchane, 2019, p. 140). Consequently, the law, in its diversity, has a social connection. The legal system is a differentiated functional system in society; therefore, it always carries out the self-reproduction (autopoiesis) of the social system with its own operations (Luhmann, 1999, p. 3). In other words: From a legal perspective, the legal world is not detached but rather part of our everyday world; we live in the law of this society, even if we do not follow its dictates —whether we want to or not (Kißler, 1984, p. 91). Accordingly, various social functions have emerged in the law to consolidate the cohesion of the legal community. Examples include the settlement of conflicts (reaction function), the control of behaviour (regulatory function), the legitimacy and organisation of social rules (constitutional function), the shaping of

4 These meanings are also reflected in the origin of the word *social*. The word was etymologically borrowed in the 18th century from the French word *social*, which comes from the Latin word *sociālis* (concerning society, communal, sociable), derived from the Latin *socius* (common). The French word *social*, meaning sociable at the beginning of the 17th century, was understood by 18th-century encyclopaedists, who stood in the tradition of natural lawyers, in the sense of directed towards the relationships of living together, connected to the community and serving it as an expression of natural and rational morality that characterises human coexistence (Pfeifer et al, 1993).

living conditions (planning function), and the administration of justice (supervisory function) (Rehbinder, 1973, p. 366).[5]

Nevertheless, the relationship between jurisprudence and the social sciences has consistently been difficult to tackle. A unanimous view on this topic may well be an impossible goal to achieve. Crucial questions arise, such as "Is law a science and if law is a [real] science, what is it really? Law as a social science?" (Rottleuthner, 2021, pp. 264 ff.; Transl. by the author), "What particular characteristics must a social order have in order to be called law?" (Geiger, 1987, p. 5; Transl. by the author), or *What can the lawyer learn from the social sciences?* (Derber, 1963, p. 145). The controversy is often understood as an evaluation of the individual view of the questioner, taking into account their different personal views of society and the law (Hopt, 1975, p. 341). Consequently, the "defensive ignoramus", "progressive author", and "critical jurist" (Hopt, 1975, p. 341; Transl. by the author) involved in this discussion will never agree on one view. Furthermore, although society links the two disciplines, it is perhaps surprising to note that the relationship between the law and social science has tended to be examined in a generally one-sided manner (Kähler, 2018, p. 107). On the one hand, jurisprudence has traditionally drawn comparatively strong links to other disciplines, such as economics, history, and philosophy, thereby leading to it being termed as the "science of sciences" in the 17th century (cf. Doddridge, 1631, p. 35). Of course, this does not grant jurisprudence the right to assume a position of supremacy in scientific discourse. On the other hand, the social sciences have a contrary understanding of this relationship, as the study of law plays only a subordinate role (Rosenstock, Singelnstein and Boulanger, 2019, p. 3). One reason could be that social science research on law in the German-speaking world, unlike in the Anglosphere, remains relatively confined within the respective disciplinary boundaries. Moreover, social science research on law also lacks an institutionally secured bundling as well as a place of firm anchoring (Rosenstock, Singelnstein and Boulanger, 2019, p. 28; Shapiro and Pearse, 2012, p. 1504). Admittedly, this Chapter also analyses whether the DMA contains social aspects, mainly from a legal perspective, due to relevant background knowledge. Thus, the social is explored within the legal.

5 This list is not exhaustive. In the relevant literature, a large number of different functions have emerged, which can vary depending on the perspective of the respective observer. According to Pötzsch (2009, pp. 131 ff.), law has not only a social and societal function but also ensures peace, guarantees the freedom of the individual, and regulates private legal relationships, for example.

Does this complicated relationship mean that a fruitful exchange between the two disciplines is doomed to failure? That cannot be the case. Although the concrete value of interdisciplinary research can never be quantified, the solution cannot be to refrain from any form of exchange. In fact, the beauty of interdisciplinary research is the shared desire to investigate problems and questions that affect several disciplines. At best, the combined expertise of the interdisciplinary team should lead to more innovative and impactful science (cf. Wuchty, Jones and Uzzi, 2007, p. 1036). The exact nature of the relationship between the disciplines is less important for the research question at hand. Rather, the benefits of interdisciplinary research lead this Chapter to a so-called *practical approach* inspired by the brave little tailor. In order to comprehend this approach, it is necessary to examine one key scene within the fairy tale: In a trial of strength with a giant, the brave little tailor crushes a piece of cheese (believed by the giant to be a stone) until its juice runs out, thereby demonstrating his strength through this seemingly impossible task (Ashliman, 2005). He took something similar to what the giant used but something he could manage within the limits of his strength. Therefore, the proposed *practical approach* focuses on the benefits of learning from one another by sharing knowledge in an interdisciplinary context. It does not try to settle the heated debate outlined above, nor does it pass any judgment on understanding the right or wrong relationship between the two disciplines.

2.2 What constitutes the social character of law?

Given the complicated relationship between law and social science, general considerations of the social character of law are challenging. Spoiler: There is no single definition or list of criteria. Accordingly, one might ask why this question is worth asking. The aim is not to find a specific answer. Instead, it deals with the complexity of the question, and maps out cases and criteria that might serve as a starting point for further (interdisciplinary) research. To simplify complex issues, lawyers—quite understandably—tend to press laws into fixed patterns. In order to think outside of these patterns and dare to try something new, it is worth also tackling ambiguous questions. That is a suitable way to develop interdisciplinary research and to benefit from the above. Similarly, the little tailor rarely had a single solution to his challenges

on his journey. Instead, he had to come up with creative solutions to get ahead.

When considering the social character of law, the first thing that comes to mind is whether it is directly aimed at serving society. This is undoubtedly the case when the legislator explicitly defines serving society as the aim or objective of the relevant legal text, such as in the German Social Codes (SGB; *Sozialgesetzbuch*).[6] Others may go even further and understand the law in general as a social system endowed with sanctioning power, whose claim to validity, unlike other systems (e.g., customs or morality), is justified by a higher degree of social communication (Habermas, 1992, p. 44; Kißler, 1984, pp. 92, 95; Luhmann, 1995, p. 35). The premise of the law as a social system is consistent with the assumption that the law, in its diversity, has a social connection. Do these considerations mean that no law is *antisocial* or, conversely, that every law has a social character per se? Is it not the case that any law that has been the subject of a legislative process and thus has the legitimacy of its society (at least in a democratic state) automatically serves its society? Ideally, such a law should not be directed against its society but rather strengthened, as the consideration of the functions of law has already shown.

Nevertheless, the *principle of proportionality* may help make this idea more tangible and find points of reference in the law, given that a democratically legitimate law is inherently social. This principle of the rule of law plays an important role in protecting fundamental rights and assessing legislation in the EU and its Member States. At the European level, very early on, the CJEU took up proportionality in its case law (see Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community, 1956) before establishing it as a general principle (Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970). With the Maastricht Treaty, the principle of proportionality was "constitutionalised" (Lenaerts, 2021, p. 1), and is now reflected in Art. 5(4) of the Treaty on European Union (TEU) and in the EU Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, and functions as a general principle of EU law. According to Art. 5(4) TEU, the content and form of EU action shall not exceed what

6 For instance, as mentioned in Section 1(1) of the SGB First Book (I) – General Part, according to which the law of the Social Code is intended to shape social benefits, including social and educational assistance, in order to realise social justice and social security.

is necessary to achieve the objectives of the Treaties; the institutions of the EU shall apply the principle. Furthermore, as a general principle of EU law, proportionality also applies to the Member States when they implement EU measures or when their actions restrict fundamental freedoms (Lenaerts, 2021, p. 2; see also Art. 4(3) TEU). Inversely, the principle is reflected at the national level. In Germany, for instance, the principle of proportionality has constitutional status despite not being explicitly mentioned. It derives from the principle of the rule of law (see Art. 20(3) of the Basic Law for the Federal Republic of Germany (GG; *Grundgesetz*)) and from the very nature of fundamental rights. It limits the state's interference in the individual rights and freedoms of its citizens. As an expression of the citizen's general claim to freedom vis-à-vis the state, these rights may only be restricted by public authority to the extent that doing so would be indispensable for protecting the public interest. According to Wienbracke (2013, p. 148), the assessment of the principle of proportionality has four components: Firstly, all EU or national measures must have a legitimate purpose (the so-called *desired end* in EU law). Second, they must also be suitable for achieving or furthering the purpose pursued. Third, measures must be taken to achieve said purpose. Fourthly, it must not be disproportionate to the objective and purpose of public interest that they pursue, which is also referred to as *appropriateness* in the narrower sense. Upon closer inspection of the four components, the appropriateness test means that those affected by a state measure must not be excessively or unreasonably burdened. Therefore, balancing the various legal interests affected by a state measure is required. In this regard, the German Federal Constitutional Court (BVerfG; *Bundesverfassungsgericht*) has regularly ruled that the loss of freedom protected by fundamental rights must not be disproportionate to the public welfare objectives served by a restriction of fundamental rights (cf. BVerfG, 2020, para. 95). The legislator must strike an appropriate balance between general and individual interests. In so doing, the so-called *prohibition of excessiveness* must be observed. To this end, the scope and weight of the interference must be balanced against the importance of the law in question for the effective fulfilment of the tasks of the state. Within narrow limits that must always be observed, an individual impairment may be accepted in favour of the so-called *overriding common good of society*. The common good of society is a desirable societal state, which can be prioritised after an appropriate balance has been struck. Due to its fundamental social meaning, it thus serves as a benchmark for determining the social character

of law in general, which is of interest for the underlying fairy tale. This idea will be developed in the later evaluation (under Section 4).

3. Legal overview of the DMA

A basic legal understanding of the underlying Regulation is needed to follow the *practical approach*. There is little doubt that large platform undertakings, such as Google and others have a vital role as economic actors and drivers of innovation and efficiency in the 21st century. On the downside, some undertakings have become (too) powerful market players in recent years, thereby threatening the functionality of the digital sector. To provide a regulatory counterweight to this risk, the DMA is one of the pieces in the jigsaw of various European legislative initiatives that prioritise the individual and open up new opportunities for other market participants (European Commission, 2023). Even the supposedly weaker little tailor always finds his way using his wits, cunning, courage, and adaptability. That requires innovative ideas, such as throwing a bird instead of a stone to defeat giants in a stone-throwing contest (which occurred after the cheese-stone showdown). The same concept can be seen in the DMA: The European legislator is taking a bold and optimistic step. Instead of waiting and letting things take their course, the first regulatory measures have been taken, although they will be evaluated regularly. Naturally, this has not been immune from the scepticism and disapproval of those affected. However, this bold and optimistic step was necessary to ensure that the digital sector does not become a legal vacuum for some at the expense of many.

3.1 Background considerations on the development of the Regulation

In December 2020, the EC published the first proposal for a Regulation to promote contestable and fair markets in the digital sector. At the time, the EC was a global pioneer with this initiative, much like the brave little tailor who ventured out into the unknown. After going through the European legislative process with several amendments, the European Parliament and the Council adopted the DMA with an overwhelming majority in July 2022. The final text was published in the *Official Journal of the EU* on 12 October 2022 and entered into force on 1 November 2022. Due to its legal nature

as an EU Regulation, it became directly applicable in all EU Member States from 2 May 2023 without transposing into national laws.

In a nutshell, the EC considered three main problems when drafting the legislative proposal (cf. 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, pp. 1 ff.). Firstly, the risk of weak competition in markets in the digital sector due to excessive control of entire platform ecosystems by large online platforms, which essentially cannot be challenged by existing or new market participants—regardless of how innovative and efficient they may be. Secondly, the risk of unfair terms and conditions for business users due to a high degree of economic dependency on online platforms. Therefore, business users generally have a poorer negotiating position, which could be exploited unfairly or be detrimental to the end user. The negative effects of such unfair practices on the economy and society were feared. Thirdly, until the introduction of the DMA, no standardised Regulation that could adequately sanction the harmful activities of online platforms existed in the EU. Finally, there was a risk of fragmented Regulation and supervision by the individual Member States (and still exists; see Herrmann and Kestler, 2024, pp. 143 ff.).

3.2 The dual objectives of the DMA

In order to adequately address the aforementioned problems, the DMA has two objectives: It aims to ensure the *contestability* and *fairness* of markets in the digital sector for business and end users of CPSs, thereby contributing to the smooth functioning of the internal market (see Art. 1(1) and (2), Recital 7 DMA). Both objectives are intertwined ("dual-function rotary switch", cf. Crémer et al, 2023, p. 989), which leads to a complex interpretation (Hoffmann, Herrmann and Kestler, 2024, p. 133). The dual objective of equal priority is intended to emphasise that the DMA is not (purely) a competition policy legislation but that the provisions are to be understood as complementary to the existing competition policy standards (Käseberg and Gappa, 2024, Art. 1, Rn. 5). The problem is that the legislation frequently mentions the objectives, such as in Art. 12(5), and in Recitals 31–34 DMA, the exact definition is left open (Crémer et al, 2023, p. 978; König, 2023a, Art. 1, Rn. 4 ff.). A lack of understanding of the objectives can lead

to more difficult implementation in the initial phase of the Regulation, as there is little case law on interpretating of the DMA so far.[7]

An indication of how to specify the objective of contestability in the DMA can be found in Arts. 12(5) lit. (a)(i) and (ii). According to this, the contestability of CPSs is limited if a gatekeeper practice is capable of impeding innovation and limiting choice for business and end users by creating or strengthening barriers to entry or expansion (i), or, alternatively, preventing other operators from having the same access to a key input as the gatekeeper (ii). The contestability of the CPS and the associated ecosystems is particularly limited by the CPS's inherent features, especially by network effects, strong economies of scale of individual services, and data advantages. For a better understanding of fairness, Art. 12(5) lit. (b) can help. According to this, a gatekeeper practice shall be considered unfair where there is an imbalance between the rights and obligations of business users, and the gatekeeper obtains an advantage from business users that is disproportionate to the service provided by the latter to the former (see Recital 32). In particular, the legislator had in mind the case where gatekeepers, by virtue of their gateway function and overwhelming bargaining power, engage in conduct that prevents others from fully benefiting from their own contributions and set unilaterally unbalanced conditions for the use of their CPSs or services provided with, or in support of, their CPSs (see Recital 33). In sum, contestability is aimed at fundamental market structure problems and predatory practices, while fairness is geared towards the exploitative nature of certain CPSs.

3.3 The material and geographical scope

The material scope of the DMA relates to markets in the digital sector where gatekeepers operate (see Art. 1(1) and Recital 7). The term *digital sector* is legally defined in Art. 2(4), and includes all products and services s provided by means of, or through, information society services within the meaning of Art. 2(3) DMA in conjunction with Art. 1(1) lit. (b) Directive (EU) 2015/1535, lays down a procedure for providing information in

7 To date, claimants have brought five actions before the CJEU to challenge decisions taken in the context of the gatekeeper designation procedure: 'ByteDance Ltd v. EU Commission' (2024a and 2024b); 'Meta Platforms v. EU Commission' (2024) and 'Apple v. EU Commission' (2024a and 2024b). All cases concern the disputed position as gatekeeper, not the interpretation of fairness and contestability.

the field of technical regulations and rules on information society services. The rules include any service normally provided for remuneration at a distance, by electronic means and at the individual request of a recipient of services. This broad understanding of the term is limited by the personal requirement that *gatekeepers* must be active in these markets. Gatekeepers are the sole addressees of the DMA. It was not the legislator's intention to include all undertakings operating in the digital sector in the material scope of the Regulation per se. Rather, the material scope was deliberately kept small in order to account for the economic characteristics of digital markets. Examples include the pronounced network effects and the dependence on large amounts of data, which lead to large economic power in the hands of a few undertakings. According to Art. 2(1), a gatekeeper is an undertaking that provides CPSs and has been designated as such by the EC pursuant to Art. 3, which is quoted (in part) below for ease of reference.

> *1. An undertaking shall be designated as a gatekeeper if:*
> *(a) it has a significant impact on the internal market;*
> *(b) it provides a core platform service which is an important gateway for business users to reach end users; and*
> *(c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.*
>
> *2. An undertaking shall be presumed to satisfy the respective requirements in paragraph 1:*
> *(a) as regards paragraph 1, point (a), where it achieves an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States;*
> *(b) as regards paragraph 1, point (b), where it provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union, identified and calculated in accordance with the methodology and indicators set out in the Annex;*
> *(c) as regards paragraph 1, point (c), where the thresholds in point (b) of this paragraph were met in each of the last three financial years.*
>
> *3. Where an undertaking providing core platform services meets all of the thresholds in paragraph 2, it shall notify the Commission thereof without delay and in any event within 2 months after those thresholds are met and provide it with the relevant information identified in paragraph 2. […]*
>
> *[…]*

Figure 1: Excerpt from Art. 3 DMA

The basic concept of the designation process is set out in Art. 3(1) and is based on three cumulative qualitative criteria. These criteria can be determined as fulfilled in two ways: First, operationally, by considering the thresholds under Art. 3(2), which represent quantitative rebuttable

presumptions. Secondly, through a market investigation under Art. 3(8) in conjunction with Art. 17. A key criterion for the designation process is that the relevant undertaking provides a CPS (defined in Art. 2(2)). These include, for example, online search engines, online social network services, or web browsers. While the list of CPSs is exhaustive, it can be further extended to include services in the digital sector by means of the ordinary legislative procedure in accordance with Art. 19(3) lit. a). It is important to note that providing a CPS is sufficient, i.e., the DMA does not require a conglomerate in an economic understanding or the control of an ecosystem of digital services (König, 2023b, Einleitung, Rn. 25, 26). Pursuant to Art. 3(3), an undertaking providing CPSs and meeting any of the thresholds set out in Art. 3(2) is obliged to notify and provide the relevant information to the EC. This obligation arises without delay and, in any case, within two months of the thresholds being met. The EC has the sole authority to designate an undertaking as a gatekeeper if all relevant criteria are met. The gatekeeper should be determined without undue delay and at the latest within 45 working days after receiving the complete information referred to in Art. 3(3). In this process, cooperation and coordination with national competent authorities (NCAs) enforcing competition rules to conduct investigations into potential non-compliance by gatekeepers with certain obligations under the DMA is possible (see Arts. 1(7), 37, 38, 41 and Recital 91).

The geographical scope of the DMA is laid out in Art. 1(1) based on the beneficiaries of the Regulation, namely businesses and end users, and refers to the EU. According to the legal definition in Art. 2(21), a business user refers to any natural or legal person acting in a commercial or professional capacity using CPSs for the purpose, or in the course, of providing goods or services to end users. In addition, according to Art. 2(20), an end user means any natural or legal person using CPSs other than as a business user. The distinction between the two types of users is based on how the platform is used: A business user uses CPSs to offer its products/services, while the party demanding the service is always the end user. It is irrelevant whether the person demanding the service is acting privately or as part of their professional activities. Therefore, anyone who uses a CPS to offer products or services for private purposes (e.g., private sellers on eBay) is considered an end user (Bongartz and Kirk, 2024, Art. 2, Rn. 107). The DMA applies to CPSs provided or offered by gatekeepers to business users established in the EU or end users established or present in the EU. The

place of establishment and location of the gatekeeper are irrelevant. The other law applicable to the provision of services is also irrelevant. The EC is thus building a bridge to the United States of America, where most of the gatekeepers appointed so far come from, without necessarily creating a global regulatory framework.[8] This endeavour brings to mind the story of the brave little tailor who, after killing seven flies with one blow, spoke of his accomplishment as follows: "'The town? [...] The whole world shall hear about this!' And his heart jumped for joy like a lamb's tail. The tailor tied the banner around his body and set forth into the world, for he thought that his workshop [the tailoring shop] was too small for such bravery" (Ashliman, 2005).

3.4 The gatekeeper's obligations and prohibitions

Two aspects are of great importance when considering the gatekeeper's obligations and prohibitions. First, to whom they apply and how they are designed, and second, the new *ex ante* control approach of the DMA. Starting with the first aspect, it is particularly important to understand that although gatekeepers are the sole addressees of the DMA, the behavioural obligations and prohibitions only apply to specific CPSs of the gatekeeper concerned. The DMA cannot be applied, as long as a gatekeeper service is not designated as a CPS. In other words, a gatekeeper must comply with all DMA obligations and prohibitions for each of its CPSs listed in the individual designation decisions of the EC (see Arts. 5(1), 6(1), and 3(9)), which, however, does extend to the entire undertaking. The obligations and prohibitions form the core of the Regulation and are laid down in Arts. 5–7, but could be updated in the future following market analyses. It is important to note that they are essentially the same for all gatekeepers and that there is no overarching system between the obligations and prohibitions, so that all gatekeepers and both obligations and prohibitions are considered equally (Göhsl and Zimmer, 2025, Art. 5, Rn. 2, 3). An overview of the three DMA articles containing the do's (obligations) and don'ts (prohibitions):

– Firstly, Art. 5 contains provisions that apply without further specification. Examples include the obligation not to prevent business users

8 The term *Brussels effect* is often used in this context, referring to the de facto adoption of EU law outside the European Single Market (for further information, see Bradford, 2020).

from offering products through other distribution channels at different prices or conditions (Art. 5 (3)) and the prohibition on requiring end or business users to an identification service, a web browser engine, a payment service, or technical services that support the provision of payment services (Art. 5(7)).

– Secondly, the provisions of Art. 6 are also directly applicable but may be further specified by an EC decision on a case-by-case basis under Arts. 8(2) or (3). The direct applicability results from the unconditional nature of the obligations. This means that the behavioural requirements set out in Art. 6 are already binding in themselves and do not necessarily require further implementing measures by the EC. For this reason, the wording of the official heading of Art. 6 should not be misleading, as it places the provisions of Art. 6 under the condition that they are "susceptible of being further specified under Art. 8". The possibility of further specification refers only to the EC's ability to determine the measures that a particular gatekeeper must take to comply with the obligations and prohibitions of Art. 6 and not, in the abstract, to the obligations and prohibitions themselves (Bueren and Weck, 2023, Art. 6, Rn 1). In addition, the EC may, on its own initiative or at the request of a gatekeeper, initiate specification proceedings under Art. 8. However, there is no right for a gatekeeper to initiate such a procedure. Rather, it is at the discretion of the EC to decide whether to engage in such a process, respecting the principles of equal treatment, proportionality and good administration (cf. Art. 8(3)). Examples of obligations under Art. 6 include the prohibition on treating services and products offered by the gatekeeper more favourably than similar services or products offered by third parties in the ranking and related indexing and crawling and the obligation for the gatekeeper to apply transparent, fair and non-discriminatory conditions to such ranking (Art. 6(5)). The DMA has a broad understanding of rankings (see definition in Art. 2(22)) which includes, but is not limited to, algorithmic rankings. Moreover, an obligation not to impose general conditions for terminating the provision of CPSs that are disproportionate (Art. 6(13)) are defined.
– Thirdly, Art. 7 contains far-reaching interoperability obligations for (simplified) messaging services, such as WhatsApp, as these are particularly sensitive to network effects due to the frequent lack of connectivity between communication services from different providers. The background to this interoperability consideration is that users understandably prefer services that other party to the conversation also uses. As such,

services with many users become increasingly attractive and economically stronger due to high usage shares, which, in turn, can lead to consumer dependency and reduce competition in the relevant market.

The second aspect of great importance is the DMA's new *ex ante* control approach. Under this approach, the aforementioned obligations and prohibitions for gatekeepers providing CPS are classified as permitted or prohibited even before the behaviour has occurred. Therefore, all of the DMA's obligations are immediately and directly applicable without the need for a concretising decision by the EC ("self-executing"; cf. Podszun, 2023, p. 1). Why is this *ex ante* approach new? Under European competition law, which has so far been the main legal instrument to tackle behaviour that threatens competition in the EU's single market, the EC can only act if the undertaking concerned has already breached a legal obligation (so-called *ex post* control approach). One reason is that, under the central European competition rules of Arts. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), investigation procedures require a specific analysis that can only be conducted *ex post* (i.e., after a competition problem has emerged) and may take too long (Madiega, 2022, p. 2). The EC has now skilfully transferred responsibility for compliance with the Regulation to the addressee at an early stage. Consequently, gatekeepers must ensure and demonstrate compliance with the obligations, which must be effective to achieve the objectives and relevant obligations of the Regulation (see Art. 8(1)). As a side note, the DMA is not seen as European competition law; therefore, the established *ex post* control approach does not fit here. Instead, Art. 1(6) clarifies that both regimes apply in parallel. However, the relationship between the DMA and national competition law is controversial due to the unclear scope of Art. 1(6) s. 2 lit. (b), which shall not be further explained here due to the introductory focus of this Chapter.[9]

3.5 Enforcement and penalties for non-compliance

The EC is the sole enforcement authority (sole enforcer) of the DMA, and has full discretion over whether to open a proceeding under the DMA. The EC's procedural, investigative, and decision-making powers are regulated in Art. 20 et seq. To optimise procedures within the EC and to pool

9 For further discussion of this problem see Graef, 2024; Gryllos, 2024; Moreno Belloso and Petit, 2023; Robertson, 2024.

resources, a DMA unit has been formed within the EC, which consists of a joint team of members of the Directorates-General for Competition ("DG COMP") and Communications Networks, Content and Technology ("DG CONNECT"). By contrast, NCAs have only a supporting role in the enforcement procedure. Indeed, the DMA allows them to cooperate and coordinate when enforcing national competition rules for gatekeepers, as well as to initiate investigations into compliance with the DMA and report their findings to the EC. For instance, the German legislator has granted such powers to the German Federal Cartel Office (BKartA; *Bundeskartellamt*) in the 11th amendment to the German Competition Act (GWB; *Gesetz gegen Wettbewerbsbeschränkungen*). In case of overlapping investigations under the DMA, the NCA concerned should inform the EC before taking its first investigative measure into possible non-compliance by gatekeepers with certain obligations and prohibitions under the DMA.

As noted above, the DMA's obligations and prohibitions are self-executing: Gatekeepers are legally obliged to implement their do's and don'ts. They must ensure this, inter alia, by establishing a compliance function, and are subject to audit and reporting obligations, which place the burden of proof of compliance with the DMA on the gatekeepers. In case of breaching an obligation or prohibition, gatekeepers face fines of up to 10% of their total global turnover or up to 20% in the event of a repeat offence (see Arts. 29–30). The wording of Art. 30(1) ("may impose") indicates that the EC has discretion in imposing a fine. Therefore, the EC is not obliged to impose a fine and cannot be forced by third parties. In fixing the amount of a fine, the EC shall consider the gravity, duration, and recurrence, as well as possible delays caused to the proceedings by the gatekeeper (Art. 30(4)). In addition, the EC may impose periodic penalty payments under Art. 31, which may also be imposed cumulatively with fines as per the *ne bis in idem* principle, which prohibits double jeopardy in the same case. The periodic penalty payments shall not exceed 5% of the gatekeeper's average daily global turnover per day in the preceding financial year. From a monetary perspective, the total amount of possible fines can be a highly sensitive issue for gatekeepers, as the fines are not imposed on the CPS that breaches an obligation or prohibition but on the undertaking as a whole. Consequently, it is hoped that this will have a strong deterrent effect.

4. Assessment of social aspects of the DMA

Based on the legal overview, this section more closely inspects the research question: Is the DMA a Regulation with a social character? In light of the earlier foundational reflections on law and social science, the DMA is not a Regulation with an explicitly stated aim or objective to serve society, such as the German SGB. However, this does not mean that the DMA does not implicitly serve society—much like how fairy tales do not represent only one view of human existence and behaviour. In order to make the social character of the DMA more tangible and to identify its specific social aspects, the earlier consideration of the *overriding common good of society* is used as a benchmark for this mapping exercise, which also accords with the proposed *practical approach*. Therefore, a selection of aspects is identified in the DMA that may constitute explicit or implicit social criteria, considered in light of the overriding common good of society. This selection is not exhaustive, as other or additional aspects may be used depending on the benchmark chosen and the focus of further investigation. An overview:

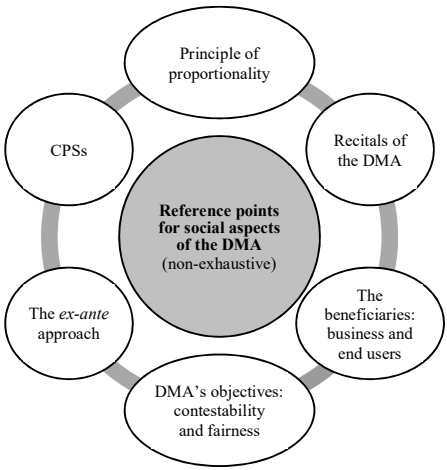

Figure 2: Overview of non-exhaustive reference points for social aspects of the DMA (created by the author)

4.1 Explicit references to the principle of proportionality in the DMA

As shown, the common good of society is an important element in examining proportionality when testing the appropriateness (in the narrower sense) of a European or state action and at the same time, it is a suitable criterion when analysing the social character of law in general. The principle of proportionality is explicitly mentioned on several occasions within the DMA, such as in Recitals 27, 28, 29, 65, 75, and 107, and Arts. 8(3), 23(10). As stated in Recital 107, in accordance with the principle of proportionality as set out in Art. 5(4) TEU, the DMA does not go beyond what is necessary in order to achieve its objectives. This illustrates that while priority is given to achieving its objectives, the Regulation also sets limits when considering individual cases. This ensures, among other things, the proper functioning of the internal market, which is one of the core objectives of the EU (Huerkamp and Nuys, 2024, Art. 18, Rn. 34). Therefore, the inclusion of the principle of proportionality is a strong expression of a social aspect in the DMA.

4.2 The recitals

A second possible starting point for a social aspect can be found in the DMA's recitals. Prior to the DMA's introduction, several Member States had already enacted laws addressing unfair practices and the contestability of digital services, such as Germany's Section 19a of the GWB. However, this led to an inconsistent level of regulation across the EU, with the risk of internal market fragmentation and higher compliance costs. The European legislator has recognised this problem (cf. explanations under Section 3.1.). Recitals 6 and 31 thus state that the identified unfair practices of large platform undertakings can negatively affect the European economy and society in the internal market. These practices have created the need for a clear and unambiguous set of harmonised rules to address these issues. These considerations by the European legislator clearly show that the protection of European society as a whole was one of the intentions of the

regulatory process. Indeed, the desire for this protection strongly reflects the Regulation's social aspect.

4.3 The beneficiaries

The beneficiaries of the Regulation provide a third possible starting point for a social aspect. As mentioned, these are the business and end users of CPSs in the EU. Under the present definition of society as a large and heterogeneous group of people whose co-existence and interaction are ordered and organised (Lehner, 2011; Luhmann, 1995), both beneficiaries – at least in the form of any natural person—are part of European society as a whole. Both are key elements in designating an undertaking as a gatekeeper under Art. 3 (see above). The provision of services to many business and end users signals the existence of dependencies and a resulting imbalance in bargaining power (whatever its causes). In this respect, it indicates unfair market conditions (Bueren and Weck, 2023, Art. 3, Rn. 54). At the same time, high user numbers of at least 45 million monthly active end users established or located in the EU and at least 10,000 yearly active business users established in the EU in the last financial year show the influence of a few CPSs on large parts of European society. For example, the CPS Facebook, which belongs to the designated gatekeeper Meta Platforms, Inc., had 408 million monthly active end users in the fourth quarter of 2023 alone (Meta Platforms Inc., 2024). In contrast, approximately 449 million people had their usual residence in an EU Member State as of 1 January 2024 (Eurostat, 2024). Of course, not every person in Europe uses Meta; multiple visits by individual users are also possible. Nevertheless, these figures are an impressive illustration of how one specific CPS can reach a huge swathe of society. In purely numerical terms, the European legislator has thus prioritised the protection of society's common good over the economic interests of a few large platform undertakings. Consequently, these considerations also imply a strong social aspect of the DMA.

4.4 The regulatory objectives

A fourth approach to a social criterion can be found in the DMA's dual objectives of contestability and fairness of digital-sector markets. A major underlying question in drafting the legal text was whether democratic

societies should accept the behaviour of large platform undertakings to their own detriment. The DMA has clearly rejected this with its stated objectives. The fairness objective considers that users of CPSs should be afforded the highest level of protection, which can promote user trust in digital platform undertakings by ensuring the protection of their rights. By creating a level playing field from a contestability perspective, the DMA seeks to ensure that no CPS exercises excessive market power, such as by spreading disinformation or exploiting user data. Consequently, small and medium-sized enterprises (SMEs) should be able to enter the market and compete, thereby leading to more diverse, innovative, and resilient digital economy. Ultimately, this can also benefit users by giving them a wider choice of services and products and by improving the quality and security of CPSs. However, it is not only users who are empowered but society as a whole. Based on the underlying question, the political representatives of European society set limits to almost unfathomable digital powers, using overarching objectives to do so. These objectives express their vision of how society should relate to platform undertakings and, thus, at its core, a social aspect.

4.5 The ex ante control approach

A fifth approach to a social criterion is the DMA's new *ex ante* control approach to gatekeeper obligations. The European legislator believes that the self-execution of the DMA's obligations and prohibitions has a strong deterrent effect. Ideally, harmful behaviour should not occur in the first place. In this way, the welfare of the beneficiaries, and thus of a large part of European society, is addressed and protected early. Therefore, this approach also supports social aspect due to time constraints.

4.6 Core platform services

Finally, CPSs may also be an appropriate reference point for the DMA's social aspects. Indeed, the legislator intended that certain types of services, such as online intermediation services, online search engines, operating systems, or online social networks, should fall within the scope of the DMA because of their ability to affect a large number of users, which entails a risk of unfair business practices (see Recital 14). Affecting many users

also means affecting a large part of European society. All these CPSs have in common that they can map society in the digital world, figuratively speaking, thereby representing a digital copy of social conditions in the analogue world. Therefore, the real social condition is inextricably linked to its digital counterpart. For instance, online social networking is legally defined in Art. 2(7) DMA, as a platform that enables end users to connect and communicate with each other, share content, and discover other users and content across multiple devices and, in particular, via chats, posts, videos, and recommendations. In short, the service must cumulatively have contact, content-sharing, and discovery functions—thereby mirroring real-world behaviour. So far, Facebook, Instagram, LinkedIn and TikTok have been identified as this type of CPS. By definition, they all have a significant de facto influence on social life in the digital space. It was not for nothing that the EC at the beginning of this Chapter boldly demanded that the same should apply in the offline and online world. Overall, the legislator also considered social aspects when deciding on the CPSs.

5. Conclusion & considerations for further (interdisciplinary) research

> *"'Boy, make the jacket for me, and patch the trousers, or I will hit you across your ears with a yardstick! I have struck down seven with one blow, killed two giants, led away a unicorn, and captured a wild boar, and I am supposed to be afraid of those who are standing just outside the bedroom!' When those standing outside heard the tailor say this, they were so overcome with fear that they ran away, as though the wild horde was behind them. None of them dared to approach him ever again." (Note: This is the end of the fairy tale The Brave Little Tailor; Ashliman, 2005)*

At the end of his fairy tale, the brave little tailor once again had to use cunning (and luck) to defeat all of his opponents. The young king's daughter had just married him when she learned of his true origins and realised that they had made a king out of a tailor. She complained to her father, the old king, and asked for his help. Yet the king's armour-bearer, who had overheard this conversation, was favourably disposed towards the young man and told him of the attack the old king was preparing. "I'll put a stop to that," said the little tailor (Ashliman, 2005), and, fortunately, he did. It is hoped that the DMA will also be a success for the EC in its fight against the machinations of the big platform undertakings. For social as much as economic reasons, this success story must not go as far as the end of "The Brave Little Tailor" and drive those undertakings out of the EU. The respective gatekeepers have already become essential to the

EU's analogue and digital society. Nevertheless, the previous discussion has shown that the DMA weighs the economic advantages of the gatekeepers against the common good of society, with the latter outweighing the former. However, it would be wrong to assume that the DMA is a Regulation with an explicitly social character or explicitly formulated objectives. Rather, the DMA is a Regulation with several *implicit* social aspects that form its social character. Such implicit social aspects include, for example, the legislative recitals, the beneficiaries of the Regulation, certain CPS, and the objectives of the DMA. Further research is needed in line with the *practical approach* developed in this Chapter. Therefore, this Chapter, written primarily from a legal perspective, would like to invite social scientists to explore the social aspects of the Regulation further. As shown, the social science perspective on law is particularly underrepresented in research. The DMA can provide a starting point for further research, but the underlying problem is, of course, more comprehensive and can be applied 1:1 to other legal texts. Just as the law consumes social science as a trend-setting discourse to supplement its worldview, so too can the reverse be enriching if one is open to the similarly foreign (like the brave little tailor with the cheese and the stone). Possible further interdisciplinary research questions might include the following:

- Should the DMA promote social issues?
- When are the DMA's objectives fair and contestable for society?
- What factors in the DMA most influence the behaviour of gatekeepers?
- How does the designation as a gatekeeper influence the behaviour of other undertakings in digital markets?
- How aware are the beneficiaries of the DMA of the rights and obligations introduced by the Regulation?
- How does the DMA affect consumer trust in digital platforms?
- How does the DMA affect marginalized groups and their ability to participate in digital markets?
- What are the challenges in enforcing the DMA across diverse national contexts within the European Union?
- What role do non-EU countries play in shaping or responding to the DMA as a regulatory model?

In this context, the question of the relationship between law and the social sciences, as well as the influence of society on law in general, must also be considered. As outlined, this relationship depends on, among other things, the circumstances and the attitude of the observer. Even as interdisciplinary

research on the DMA is desired, a unanimous opinion can never be reached. However, this can also be an advantage. Therefore, the following should be noted in the spirit of the underlying fairy tale: If the brave little tailor continues to defend himself against the digital giants successfully, the idea of a fair and contestable digital market will still be alive tomorrow. These successes could pave the way for further legal acts with an (implicit or—to take a bold step further—even explicit) social character that could benefit (European) society as a whole.

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