**Future proofing the DMA for Agentic AI - Lessons from the AI Act**

Jan-Frederick Göhsl, Assistant Professor for Private Law and Law of the Digital Economy at the University of Münster, Germany.*

*(The final version of the paper has been published in World Competition, 48, no. 3 (2025): 315–336)*

Abstract: *Fully automated agents will soon be changing the landscape of the digital economy. In the process, they will make the lives of consumers a whole lot easier. However, the age of Agentic AI presents new challenges for digital regulation, particularly for the Digital Markets Act (DMA). Due to the different business models of such AI Agents, it is by no means certain that the DMA is even applicable to these services. This is especially true for those AI Agents that can automatically conclude contracts for consumers. While the introduction of special rules for AI Agents in international contract law has been discussed for some time, the DMA shows a significant blind spot in this regard, as these services do not fall under any category of core platform services in the DMA. This problematic gap could be closed either by introducing a general definition of core platform services or by extending the Commission's mandate to adopt delegated acts in order to add new services to the list of core platform services. That the latter solution is feasible is suggested by a comparison of the DMA's rules with the rules for high-risk AI systems in the European AI Act.*

Keywords: Artificial Intelligence, AI Agents, Agentic AI, AI Act, Digital Regulation, Digital Markets Act, Core Platform Services, Gatekeeper, General Definition, Delegated Acts

## 1 Introduction

Generative AI (Gen AI) is on its way to revolutionizing the digital economy. Both innovative start-ups and big tech are investing considerable funds in research into Gen AI technologies. It is becoming apparent that services that are developed on Gen AI foundation models will significantly impact the digital economy in the short and medium term.[1] While we have only seen gradual developments in existing business models over the last ten to fifteen years, AI-driven services are now poised to change

* In accordance with the ASCOLA Declaration of Ethics, I have nothing to declare. E-mail: jgoehsl@uni-muenster.de.

[1] *Compare* Erik Brynjolfsson & Danielle Li, *The Economics of Generative AI*, NBER The Reporter No. 1 (2024) 16-19; Wouter Simons & Alessandro Turrini & Lara Vivian, *Artificial Intelligence: Economic Impact, Opportunities, Challenges, Implications for Policy*, European Commission Discussion Paper 210 (2024), 14-18. *See also* Oxford Economics, *How GenAI will change the world economy*, Research Briefing (30 April 2024), https://www.oxfordeconomics.com/resource/how-genai-will-change-the-world-economy/.

the shape of the digital economy. We are currently on the doorstep of so-called Agentic AI services.[2] The term Agentic AI refers to autonomous AI Agents that can perform tasks on behalf of users, such as searching for products online and completing transactions, without requiring further user involvement. These AI Agents could increasingly be used in many digital offerings. Acting autonomously, it is likely that they can take on more and more tasks for users. For example, Agentic AI could drastically change how we search online, how we use web browsers[3] or even how we shop online.[4]

So far, the digital regulation and competition policy debate has tended to focus on three separate issues related to Gen AI: Firstly, the debate has focused on the impact of Gen AI on digital services in general.[5] The Commission has issued a request for information to several Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs) under the regime of the Digital Services Act (DSA[6]). The aim of these requests for information is to assess whether and how these platforms address the risks of misinformation, hallucination and manipulation posed by Gen AI implemented in platform services.[7] This part of the debate is more closely aligned with the DSA. Secondly, with a stronger focus on competition issues, it has been discussed whether the foundation models of Gen AI, like Open AI's GPT or Google's Gemini, (should) fall under the regulation of the Digital Markets Act (DMA[8]) or competition law.[9] Thirdly, attention has been drawn to the more competition-oriented regulation of some specific

[2] Mark Purdy, *What Is Agentic AI, and How Will It Change Work?*, Harv. Bus. Rev. (2024), https://hbr.org/2024/12/what-is-agentic-ai-and-how-will-it-change-work.
[3] For the WebDreamer project *compare* Sajjad Ansari, *WebDreamer: Enhancing Web Navigation Through LLM-Powered Model-Based Planning*, Markettechpost (24 November 2024), https://www.marktechpost.com/2024/11/24/webdreamer-enhancing-web-navigation-through-llm-powered-model-based-planning/. For more information on the Project Mariner of Google, *compare* Google, *Project Mariner*, https://deepmind.google/technologies/project-mariner/.
[4] *Compare* Perplexity.ai, *Shop without limits*, Perplexity.ai Shopping, https://www.perplexity.ai/shopping.
[5] Kasia Söderlund et al., *Regulating high-reach AI: On transparency directions in the Digital Services Act*, 13 Internet Policy Review 1 (2024); Luca Nannini et al., *Beyond phase-in: assessing impacts on disinformation of the EU Digital Services Act*, AI & Ethics (2024), https://doi.org/10.1007/s43681-024-00467-w; Philipp Hacker & Andreas Engel & Marco Mauer, *Regulating ChatGPT and other Large Generative AI Models, Regulating ChatGPT and other Large Generative AI Models*, FAccT '23, 1112-1123 (12-15 June 2023), https://doi.org/10.1145/3593013.3594067.
[6] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27 Oct. 2022, 1–102.
[7] Commission, *Commission sends requests for information on generative AI risks to 6 Very Large Online Platforms and 2 Very Large Online Search Engines under the Digital Services Act* (14 March 2024); Commission, *Commission compels Microsoft to provide information under the Digital Services Act on generative AI risks on Bing* (17 May 2024). *See also* Sandra Wachter & Brent Mittelstadt & Chris Russel, *Do large language models have a legal duty to tell the truth?*, R. Soc. Open Sci. 11:240197 (2024), https://doi.org/10.1098/rsos.240197.
[8] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12 Oct. 2022, 1–66.
[9] Friso Bostoen & Anouk van der Veer, *Regulating Competition in Generative AI: A Matter of Trajectory, Timing and Tools*, TILEC Discussion Paper, DP 2024-02, 10; Philipp Hacker et. al., *Regulating Gatekeeper Artificial Intelligence and Data: Transparency, Access and Fairness under the Digital Markets Act, the General Data Protection Regulation and Beyond*, 15 Eur. J. Risk Regul. 49 (2024); Alba Ribera Martinez, *Generative AI in Check:*

forms of Gen AI services, i.e. specific consumer- and/or business-facing services such as chatbots or so-called answer engines.[10] This paper is intended to contribute to the third prong of the discussion.

Using the example of AI-driven digital shopping assistants (AI Agents), this paper examines the implications of Agentic AI for regulation by the DMA. The paper examines whether these AI Agents that serve for consumers as digital assistants could fall within the scope of the DMA. Since the DMA only contains an exhaustive list of so-called core platform services in Article 2(2) DMA, this presupposes that AI Agents would fall under one of these categories. Only the services listed in Article 2(2) DMA function as potential norm addressees of Article 3(1) DMA and consequently of the obligations under Article 5 to 7 DMA. This article aims to show that the DMA has a structural deficit when it comes to targeting AI Agents. According to the view taken here, AI Agents do not fall within the scope of the DMA because they cannot be subsumed under one of the categories of core platform services under Article 2(2) DMA. The fact that the DMA has gaps, at least for some technological innovations that could replace parts of the platform economy, means that the DMA in its current form will not be applicable to some important areas of the future digital economy. This finding may be at odds not only with the DMA's objectives of ensuring contestable and fair digital markets, but also with the Commission's general policy goal regarding Gen AI developments to use all available tools "to ensure that markets remain competitive, contestable and fair".[11] This paper therefore presents two policy options to address this issue. Firstly, the introduction of a general definition of core platform services would increase the adaptability of the DMA to innovative changes, while at the same time remaining proportionate due to the further gatekeeper designation requirements in Article 3(1) DMA. Secondly, taking into account a different approach in the AI Act, it is suggested that the amendment of the list of core platform services in the DMA could also be handled more flexibly by allowing the Commission to add new services or amend the definition of existing services by delegated acts without infringing Article 290 TFEU.

The paper is organized as follows: The legal, technological and economic background of AI Agents is set out in more detail in Section 2. Section 3 illustrates that AI Agent services cannot be subsumed under the core platform categories currently listed in Article 2(2) DMA and that the low adaptability of the

---

*Gatekeeper Power and Policy under the DMA,* 25-31 (6 December 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5025742 Yasar et al., *Integration of Generative AI in the Digital Markets Act: Contestability and Fairness from a Cross-Disciplinary Perspective*, LSE Law, Society and Economy Working Papers 4/2024; José Zapata, *General-Purpose AI Models as Essential Inputs in Downstream Markets: The Need for a Strict Standard Regarding Mandatory Access*, 73 GRUR Int. 948, 952 (2024).

[10] Bostoen & Van der Veer, *supra* n. 9, 10; Christophe Carugati, *Antitrust issues raised by answer engines*, Bruegel Working Paper (13 June 2023), https://www.bruegel.org/working-paper/antitrust-issues-raised-answer-engines; Ribera Martinez, *supra* n. 9, 21-25.

[11] *Compare* European Commission, *Competition in Generative AI and Virtual Worlds*, Competition Policy Brief Issue 3 (2024), 13.

DMA is proving to be problematic from a competition policy perspective. The following Section 4 elaborates on the two proposed adjustments to the DMA: the introduction of a general definition of core platform services and, in line with the approach of the AI Act, the adoption of a more flexible instrument for adding new core platform services to the list in Article 2(2) DMA. Sec. 5 concludes with a brief summary.

## 2 Legal, technological and economic background of AI Agents

The example of AI Agents seems particularly suitable for an analysis of the adaptability of the DMA, as the use of such forms of Agentic AI is already being intensively discussed by international contract law scholars as one of the most realistic future scenarios.[12] Both the European Law Institute project-group (ELI Expert Group) on Guiding Principles and Model Rules on Algorithmic Contracts and the UNICITRAL Model Law on Automated Contracting assume that in the future there will be so-called digital assistants (which are called AI Agents in the context of this paper) that can purchase products and services on a retailer's website on behalf of a consumer, for example, without the consumer having to visit the website itself.[13] Instead, the consumer would order such an AI Agent to purchase a specific product under certain parameters. These orders would then be carried out automatically by the AI system without any further involvement of the consumer.

For consumers, these AI Agents could significantly reduce their search costs on the internet.[14] It would no longer be necessary for them to search for products or services on online marketplaces or other (vertical) search engines themselves. Instead, they could rely solely on the services of the AI Agent.[15] Up to now, online marketplaces with their platform-based business model, have also served to reduce consumers' search costs by providing them with a curated collection of offers from business users. However, visiting an online marketplace or entering a query in a search engine and then selecting relevant and trustworthy offers requires significantly more attention from consumers compared to commissioning autonomously acting AI Agents. As a result, search costs for current platform services are comparatively higher than those of AI Agents. Furthermore, consumers cannot be sure whether all

[12] European Law Institute (ELI), *Interim Report of the European Law Institute (ELI Project on Guiding Principles and Model Rules on Algorithmic Contracts), EU Consumer Law and Automated Decision-Making (ADM): Is EU Consumer Law Ready for ADM?* 20 (2023). *See also* John Linarelli, *Artificial Intelligence and Contract Formation: Back to Contract as Bargain?, Emerging Issues at the Intersection of Commercial Law and Technology* (Stacy-Ann Elvy & Nancy Kim ed., Cambridge University Press 2023); Lauren Henry Scholz, *Algorithmic Contracts*, 20 Stan. Tech. L. Rev. 128 (2017); Stefan Grundmann & Philipp Hacker, *Digital Technology as a Challenge to European Contract Law*, 13 Eur. Rev. Cont. L. (2017).

[13] ELI Interim Report, *supra* n. 12, 22. UNCITRAL Model Law on Automated Contracting, A/79/17.

[14] *Compare* on the concept of transaction costs in the digital economy Frank Nagle & Robert Seamans & Steven Tadelis, *Transaction cost economics in the digital economy: A research agenda*, Strategic Org. (2024), https://doi.org/10.1177/14761270241228674.

[15] Grundmann & Hacker, *supra* n. 12, 283.

relevant retailers are actually available on the visited marketplace or whether there may be better offers on the retailers' own websites. For example, it is usually beneficial for consumers to also visit a hotel's own website when booking a hotel room.[16] Instead, an advanced AI Agent, unlike a consumer that faces time and attention constraints,[17] would be able to check all available offers from business users across the World Wide Web and select the best offer at a fraction of the search costs without the risk of missing relevant offers out.[18] Therefore, the ability of AI Agents to further reduce search costs and to guarantee the best results is likely to appeal to many consumers.[19]

The scenario described above is not purely science fiction. Rather, it is actually a probable scenario from a technical point of view. There are already feasible technical approaches for digital agents to be able to conclude binding contracts, especially in high frequency trading.[20] Precursors of consumer-facing services can also be found in the digital economy. Perplexity.ai launched a service at the end of 2024 that enables customers to use shopping services via the perplexity.ai search mask.[21] The service uses AI-based search to provide transaction completion directly through the Perplexity.ai search platform. The way it works is similar to an online marketplace, such as Amazon Marketplace, that basically matches supply and demand through its service. However, perplexity.ai shopping simplifies the transaction by requiring only one click from the consumer to complete the order once the search query has been entered. At present, perplexity.ai's project requires that retailers explicitly and voluntarily agree to perplexity.ai's terms of service. But involvement of business users is even now not absolutely necessary, as Google's "Project Mariner" shows.[22] This AI-based service enables users to carry out simple tasks completely automatically in the user's browser by using a Large Language Model (LLM). In the process, the AI system can visit third-party websites and collect information without any direct interaction with business users.[23] The path to completing a transaction on a retailer's website

[16] This applies even more so for Booking.com since the DMA entered into force. Following the Commission's designation of Booking.com as a gatekeeper, the undertaking is no longer allowed to apply MFN clauses pursuant to Article 5(3) DMA.
[17] These constraints also form the basis of the theory of bounded rationality, *compare* Reinhard Selten, *Bounded Rationality*, 146 J. Inst. & Theoretic. Econ. (1990). The theory goes back to Herbert A. Simon, *Models of Man, Social and Rational. Mathematical Essays on Rational Human Behavior in a Social Setting* (John Wiley & Sons 1957).
[18] Scholz, *supra* n. 12, 146. *See also* Rory Van Loo, Helping Buyers Beware: The Need for Supervision of Big Retail, 163 U. Pa. L. Rev. 1311, 1330 (2015) who developed the theoretical approach for such a service.
[19] What is not considered here is the possibility of algorithm aversion, which could make people reluctant to fully rely on automated AI systems. This could lead to AI Agents being less successful than expected. *Compare* on the topic of algorithm aversion Berkeley J. Dietvorst, Joseph P. Simmons & Cade Massey, *Algorithm Aversion: People Erroneously Avoid Algorithms After Seeing Them Err*, 144 J. Experiment. Psych. 114 (2015); Ibrahim Filiz et al., *The extent of algorithm aversion in decision-making situations with varying gravity*, 18 PLoS One (2023).
[20] *See* Scholz, *supra* n. 12, 137-141.
[21] *See* Perplexity.ai, supra n. 4.
[22] Google, *supra* n. 3.
[23] Van Loo, *supra* n. 18.

according to specific target criteria defined by the consumer in advance therefore seems not very far away. It may only be a matter of time before these services expand their capabilities to become true digital shopping assistants. The ELI Expert Group on the ELI Model Rules for Automated Contracting also envisions this scenario, as the ELI Model Rules are to be created for this very purpose.[24]

At least in the medium term, the market success of AI Agents would suggest that they may have the potential to compete fiercely with online intermediation services, at least to some extent.[25] In such a case, AI Agents would play a key role in the future digital economy. A new bottleneck situation could arise between consumers and business users, who would then essentially interact via these AI Agents instead of using intermediary platforms. New dependencies could be the result. Since the DMA essentially addresses such user dependencies,[26] the question arises as to whether the DMA would even be applicable to such AI Agent services.

## 3 The DMA may not apply to standalone AI Agents

The DMA is intentionally designed to be applicable only to a small group of large digital undertakings. Article 3 DMA requires potential norm addressees to operate a core platform service from the list in Article 2(2) DMA. Furthermore, the other requirements of Article 3(1) DMA must be met. In terms of innovative standalone AI Agents, the premise that the service serves as a core platform service is proving problematic. This is because the DMA only contains an exhaustive list of core platform services in Article 2(2) DMA. As long as Agentic AI is only integrated in a complementary manner into existing services that fall into one of the core platform categories, the DMA already applies to these **embedded agents**.[27] For example, AI-generated recommendations (rankings) and chatbot features such as the recent integration of Meta AI in Facebook, Instagram and WhatsApp, are perceived as part of the overall core platform service. The definition of the core platform service categories is in principle

[24] ELI, *supra* n. 12, 19-21.

[25] This replacement competition would probably fall in the category of a market disruption, compare on disruption theory Clayton M. Christensen, *The Innovator's Dilemma* (Harv. Bus. Rev. Press 1997). *See also* Joshua Gans, *The Disruption Dilemma* (MIT Press 2016) *as well as* Clayton M. Christensen, Michael E. Raynor & Rory McDonald, *What Is Disruptive Innovation?*, Harv. Bus. Rev. 44-53 (December 2015). *Compare* for an overview over the literature on disruption theory Alexander Lennart Schmidt & Peter Van der Sijde, *Disruption by design? Classification framework for the archetypes of disruptive business models*, 52 R&D Mgmt. 893, 894-895 (2022).

[26] Heike Schweitzer, *The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal*, 29 Zeits. Europ. Privat'R. 503, 519 (2021); Philipp Hornung, *The Ecosystem Concept, the DMA, and Section 19a GWB*, 12 J. Antitrust Enf't. 396, 412 (2024).

[27] *See also* European Commission High-Level Group for the Digital Markets Act, *Public Statement on Artificial Intelligence* (22 May 2024), https://digital-markets-act.ec.europa.eu/high-level-group-digital-markets-act-public-statement-artificial-intelligence-2024-05-22_en.

technology-neutral,[28] so embedded complementary Agentic AI technologies are well covered by the DMA.

However, for **standalone AI Agents**, like app- or web-based shopping agents, a closer analysis shows that none of these categories apply. The term 'standalone' in this context refers to Agentic AI services that are either not embedded at all in other core platform services, or to such services that may be (artificially) embedded in an existing core platform service but ultimately serve different user purposes than just being a feature of the core platform service. A good example of the latter is the role of Facebook Marketplace in the social network Facebook.[29]

### 3.1 AI Agents as intermediation service

First, it is necessary to describe in more detail how the AI Agents work in order to assess whether they fall into the category of online intermediation services pursuant to Article 2(2)(a) DMA. As the name suggests, AI Agents act as agents for consumers.[30] They act on behalf of the consumers and search for suitable offers on various retailer websites, depending on previously defined target criteria. In the case of a fully automated AI Agent, as anticipated in the introduction, the AI Agent would then also conclude the contract with the retailer on behalf of the consumer. A key difference to traditional intermediation services is that the AI Agent would only act for and on behalf of the consumer. Since an AI Agent could access the business users' websites, it would no longer be necessary for the undertaking providing the AI Agent to enter into terms of service agreements with business users.[31] An existing contractual relationship between the provider of such an AI Agent and a business user would no longer be a necessary prerequisite for the provision of the AI Agent services. In the case of an AI Agent, the business user would only enter into a contract in the legal sense with the consumer.[32] This would mean that there would only be a two-way contractual relationship instead of the current three-way relationship on online marketplaces.

This distinction in existing contractual relationships is crucial for the application of the category of online intermediation services as a core platform service in accordance with Article 2(2)(a) DMA. For the definition of "online intermediation service", Article 2(5) DMA refers to the definition in Article 2(2)

[28] *See* Recital (14).
[29] *Compare* Annex D (2)(c). *See* also Commission Decision (EU) of 5 Sep. 2023 on Case DMA.100044 Meta - online intermediation services – marketplace, para 249-254.
[30] This is why these constellations are also referred to as Agentic AI.
[31] ELI, *supra* n. 12, 29 even demand that retailers shall be obliged to enter into a contract with a consumer using such an AI Agent.
[32] ELI, *supra* n. 12, 19-21.

of Regulation (EU) 2019/1150 (P2B-Regulation[33]). Article 2(2) P2B-Regulation requires a service to meet **three cumulative criteria** in order to be an 'online intermediation service'. According to the first prong of the test in Article 2(2)(a) P2B-Regulation, the service must constitute an information society service within the meaning of (b) of Article 1(1) of Directive (EU) 2015/1535[34]. This requirement is usually unproblematic, since an AI service is almost always provided at a distance, by electronic means and at the individual request of the recipient of the service.

The second condition in Article 2(2)(b) P2B-Regulation presupposes that the service allows business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded. It could be questioned whether this condition is met by AI Agents because they may only act on behalf of consumers and they do not necessarily require any activity from business users. The AI Agents simply visit the business users' websites and conclude contracts on the website interface. If such a narrow interpretation were to be applied, it would already be apparent at this point that AI Agents would not constitute online intermediation services within the meaning of the DMA. It may, however, also be argued with regard to Article 2(2)(b) P2B-Regulation that a broader interpretation is required. Indeed, it is undisputed that the AI Agents enable, at least indirectly, the establishment of business contacts between business users and end users. In this respect, making the website available with the knowledge that it can be accessed by AI Agents could at least be considered sufficient to fulfil the requirement of Article 2(2)(b) P2B-Regulation that goods or services can be offered to consumers.

In any case, the classification of an AI Agent as an online intermediation service fails at least the third prong of the test under Article 2(2) P2B-Regulation. Article 2(2)(c) P2B-Regulation requires that the services are provided to business users **on the basis of contractual relationships between the provider of those services and business users** which offer goods or services to consumers.[35] As shown, AI Agent services no longer necessarily meet this requirement because the services are not provided to business users, but primarily to consumers. Since the services may be solely consumer-facing, a contractual relationship between the provider of the AI Agent and the business user is not necessarily part of the

[33] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, 57–79.
[34] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services OJ L 241, 17 Sept. 2015.
[35] *Compare* Bongartz/Kirk, DMA Article 2 Definitions, in: Podszun (Edit.), Digital Markets Act, 2024, para 33-35.

business model.[36] For these reasons, at least consumer-only AI Agents could not be classified as online intermediation services within the meaning of Article 2(5) DMA, although they ultimately have the potential to replace, at least to some extent, some of the online intermediation services, i.e. the marketplaces, currently designated under the DMA.[37]

### 3.2 AI Agents as virtual assistants

AI Agents could also serve as virtual assistants pursuant to Article 2(2)(h) DMA. The term virtual assistant is defined in Article 2(12) DMA as software that can process demands, tasks or questions, including those based on audio, visual, written input, gestures or motions, and that, based on those demands, tasks or questions, provides access to other services or controls connected physical devices. This category of core platform services was originally introduced to target offers like Amazon Alexa or Apple Siri.[38] The idea behind the introduction of this category of core platform services was that a similar bottleneck situation could arise when services or connected products are accessed or controlled by a virtual assistant, rather than a traditional operating system that is based on a hardware device.[39]

As AI Agents undoubtedly process user demands, the most important prerequisite of the definition in Article 2(12) DMA is that virtual assistants need to provide access to services or control (physical) products. In this context, it should be noted that this core platform service category also focuses on intermediary services between end users and providers of services or products.[40] It is therefore not enough for an (AI) assistant to perform a few more or less complex tasks on behalf of the end user. Providing access to another service or control of a connected product is a necessary requirement. Since the second alternative, the control of products, relates to the Internet of Things (IoT)[41] and is therefore not relevant in the context of contracting AI Agents, it comes down to the question of how to understand the term 'access to services'.

---

[36] In this respect, the same consideration applies as for price comparison sites, *compare* Philipp Bongartz & Alexander Kirk, DMA Article 2 Definitions, para 35 (Rupprecht Podszun ed., Nomos & Beck & Hart Publ. 2024). Of course, it is also possible, as in the current example of perplexity.ai shopping, that business users were included in AI Agents business model through a usage agreement. In this case, the requirement of Article 2(2)(c) P2B-Regulation would be fulfilled. However, the design of the business model and thus the applicability of Article 2(2)(c) P2B-Regulation would depend on the sole discretion of the provider of the AI Agent.

[37] Designated intermediation services are Google Maps, Google Play, Google Shopping, Amazon Marketplace, Apple App Store, Booking.com and Meta Marketplace.

[38] *See* Bongartz & Kirk, *supra* n. 36, para 67; Ribera Martinez, *supra n. 9*, 24-25; Yasar et al., *supra n. 9*, 12.

[39] *Compare* Recital (55). *See also* European Commission, *Final report – sector inquiry into consumer Internet of Things* COM(2022) 19 final, para 40, 41, 45, 47.

[40] Victoriia Noskova, *Virtual assistants as gatekeepers for consumption? – how information intermediaries shape competition*, 19 European Competition Journal 30, 32 (2022). *See* Oliver Budzinski & Victoriia Noskova & Xijie Zhang, *The brave new world of digital personal assistants: benefits and challenges from an economic perspective*, 20 Netnomics: Economic Research and Electronic Networking 177, 179 (2019) for a general definition of personal assistants from an economist's point of view.

[41] *Compare* Ribera Martinez, *supra n. 9*, 24.

Given that the general understanding of the undefined term 'service' in the DMA is very broad, the fact that AI Agents search for offers on the websites of potentially relevant vendors on behalf of end users could, at first sight, be considered to fall under the umbrella of 'access to services'.[42] A closer look at Annex E of the DMA on virtual assistants, which sets out the relevant end user and business user definitions for each core platform service, suggests that the understanding of 'service' under Article 2(12) DMA may be narrower than one might initially think. Annex E defines active business users of virtual assistants as developers who offered at least one virtual assistant software application or a functionality to make an existing software application accessible through the virtual assistant during a year. This definition shows that the term 'access to services' may not be fulfilled by the business model of contracting AI Agents. Rather, 'services' in this context means only a software application that is provided for the virtual assistant and that can ultimately be accessed by using the virtual assistant. Thus, the term 'services' refers only to other software services (applications or other platform services) of the gatekeeper itself or of third parties.[43] For example, it covers the case where a virtual assistant steers users to a pre-installed search engine that is used as an additional service.

When comparing the definition of business users of virtual assistants with that of business users of web browsers in Annex E, this narrow understanding of 'services' in the context of virtual assistants becomes even clearer. For web browsers, Annex E specifies that business users are active if their websites have been accessed via the web browser at least once during the year or if they have offered a plug-in, extension or add-ons used on the web browser. This explicit reference to website offerings in the definition allows the reverse conclusion (*argumentum e contrario*) to be drawn for virtual assistants, namely that the mere possibility for a third party to visit a website is not sufficient for the definition of 'services' within the meaning of Article 2(12) DMA.

The narrow understanding of 'access to services' also becomes apparent when some of the behavioural obligations in Article 6 DMA are taken into account. Virtual assistants are mainly mentioned in connection with provisions dealing either with the favouring of software services or with the access of other software services to the virtual assistant. For example, Article 6(3)(2) DMA requires the provider of a virtual assistant to introduce a choice screen regarding the default search engine which is embedded in the virtual assistant. The reference to the software dimension of 'access to services' is also particularly clear in Article 6(7) DMA. This provision treats an operating system and a virtual

[42] Yasar et al., *supra n. 9*, 12 also raise this question, but leave it largely unanswered.
[43] Recital (49). *See also* Friso Bostoen, *Understanding the Digital Markets Act*, 68 The Antitrust Bulletin 263, 278 (2023) who highlights the role of virtual assistants as interfaces for other platforms such as search engines or marketplaces.

assistant in the same way with regard to interoperability obligations. The focus is on ensuring that application or hardware developers have access to the basic functionalities of the virtual assistant.[44] This at least confirms that the understanding of the relevant business users of virtual assistants in Annex E of the DMA is consistent with the content of the DMA provisions.

For these reasons, the definition is unlikely to be met if the business model of an AI Agent is limited to independently performing tasks, even if these tasks are complex and ultimately lead to the conclusion of contracts.[45] The autonomous conclusion of a contract on behalf of a consumer thus does not constitute a separate service from the offering of the AI Agent.[46] In fact, it would be unnatural to separate the step of entering the search command by the user and the subsequent automatic conclusion of the contract by the AI Agent.[47] This means that AI Agents lack the necessary link to another service or digital product. This leads to the conclusion that AI Agents cannot be regarded as virtual assistants within the meaning of Article 2(2)(h) DMA.

### 3.3 AI Agents as web browsers

AI Agents might qualify as web browsers within the meaning of Article 2(2)(g) DMA. The term "web browser" is defined in Article 2(11) DMA as a software application that enables end users to access and interact with web content hosted on servers that are connected to networks such as the Internet, including standalone web browsers as well as web browsers integrated or embedded in software or similar.[48] The term software application means pursuant to Article 2(15) DMA any digital product or service that runs on an operating system.[49] AI Agents could certainly be offered as a standalone application. They could run on the operating system of a device, such as a smartphone. However, it would also be possible to offer such a service only via the World Wide Web, i.e. only on a website. In the latter case, a subsumption under Article 2(2)(g) DMA already fails due to this requirement. Independent of this, the most important feature of the definition of the web browser is also problematic. The central characteristic of a web browser is that the service enables end users to access and interact with web content.[50] Here it is questionable whether the autonomous interaction of AI Agents with business users' websites can be attributed to end users as an interaction in the sense of

[44] *See* Björn Herbers, *DMA Article 6 (7) Interoperability of operating systems and virtual assistants*, para 138 (Rupprecht Podszun ed., Nomos & Beck & Hart Publ. 2024).
[45] *See also* Ribera Martinez, *supra n. 9*, 24-25.
[46] It would probably be different if a chatbot, such as Amazon Alexa, optionally pointed to services that would constitute an AI Agent. *Compare* Noskova, *supra* n. 40, 33-34.
[47] This also applies to a link to a payment service. In this regard, the user is not granted "access" to the payment service. The mere processing of the transaction via a payment service is not sufficient. Rather, it would be necessary for the user to be able to actively control or at least interact with the service.
[48] *See* Bongartz & Kirk, *supra* n. 36, para 64-65.
[49] Bongartz & Kirk, *supra* n. 36, para 79-82.
[50] Bongartz & Kirk, *supra* n. 36, para 65.

the definition. This is supported by the fact that the AI system acts as an agent for the consumer. From this point of view, it might be reasonable to attribute the interaction of the AI Agent to the consumer. However, the fact that the definition particularly presupposes that an interaction is **made possible** speaks against such an attribution. The case where an interaction is carried out by the service itself does not fall within the scope of the definition.

This finding also results from the interplay with other categories of core platform services. For example, an online search engine also interacts with websites in the form of web crawling by analyzing the respective content in the course of crawling. This does not mean that an online search engine is classified as a web browser.[51] Instead, it constitutes a distinct category of core platform services. It follows that the mere interaction of the service itself with the content of a website is not sufficient to meet the definition. Rather, end users need to actively engage with the content provided, which is not the case with AI Agents or with online search engines. Accordingly, AI Agents do not act as web browsers in accordance with Article 2(2)(g) DMA.

### 3.4 The DMA's current adaptability is low

The difficulties identified in dealing with AI Agents under Article 2(2) DMA reveal a central problem of the DMA. The static (backward-looking) catalogue of core platform services and the AI-driven evolution of covered services could leave regulatory gaps in the near future. This is reinforced because AI, especially Agentic AI, will enable new business models, which may differ from the known categories of core platform services listed in Article 2(2) DMA.[52] It cannot be assumed for every case of AI-driven services that a category of core platform services can be interpreted broadly enough to capture these new services.[53] The example of the AI Agents presented in Section 2 serves as a prime example of this conclusion. The consequence would be that the DMA might not be applicable for these service categories.

[51] Bongartz & Kirk, *supra* n. 36, para 64.

[52] Note that corresponding developments can also be observed in the area of web browsers and answer engines. *Compare* Carugati, *supra* n. 10 *as well as* Thomas Weck, *AI and Competition Policy: Balancing Innovation and Market Regulation*, 1 AIRe 440, 442 (2024). For further technical insights compare Ansari, *supra* n. 2. *See as well* Yu Gu et al., *Is Your LLM Secretly a World Model of the Internet?. Model-Based Planning for Web Agents*, ArXiv (10 November 2024), https://arxiv.org/abs/2411.06559.

[53] *Compare* Nicholas Hirst, *AI interim measures may be needed to ensure antitrust can keep up, EU's Guersent says*, MLex (9 April 2024), https://www.mlex.com/mlex/articles/2123091/ai-interim-measures-may-be-needed-to-ensure-antitrust-can-keep-up-eu-s-guersent-says. On the role of AI embedded in core platform services Margrethe Vestager, *Speech at the European Commission workshop on "Competition in Virtual Worlds and Generative AI"* (28 June 2024), https://ec.europa.eu/commission/presscorner/detail/en/speech_24_3550. *See also* Yasar et al., *supra n. 9*, 12.

The fact that this is a practically relevant problem is suggested by the EU Parliament's statement in the annual competition policy report 2024. In this statement, the EU Parliament called on the Commission "*to assess the need of launching a market investigation under Article 19 DMA, adding new categories of core platform services under Article 2(2) DMA in the light of the latest technological developments that may lead to new types of services that do not fall within the existing categories such as generative artificial intelligence*."[54] Anyhow, the initiation of such a market investigation would only be the beginning of a long process to add new core platform services to the list of the Digital Markets Act. This is because the Commission cannot simply adopt a delegated act in the procedure under Article 19 DMA in order to add a new service to the list of core platform services in Article 2(2) DMA.[55] The Commission's powers to adopt delegated acts are very limited when it comes to the position of the norm addressees. The Commission can only specify the methodology for determining whether the quantitative thresholds laid down in paragraph 2 of Article 3 DMA are met. It is also possible to adjust that methodology regularly to market and technological developments by means of a delegated act.[56]

Therefore, an amendment of the list of core platform services can only be reached by a reform of the DMA in the course of an ordinary legislative procedure of the Union (Article 294 TFEU).[57] This procedure is unfavorable because it is unclear whether the necessary majorities for such a reform can be achieved and even if they are achieved, compliance with the legislative process leads to considerable time delays, which would undermine the purpose of the DMA to speed up the procedures.[58]

However, given the swift development of AI-based business models, rapid regulatory intervention may be particularly beneficial to accompany the transition to an AI economy. To be clear, intervention in this context only means that the DMA's rulebook would apply to AI-driven business models, such as AI Agents, if the providers of these services meet the other prerequisites of the DMA. This does not mean that these business models are considered inherently harmful. As the High-Level Group for the Digital Markets Act rightly pointed out in its statement on Artificial Intelligence, the developments initiated by AI-driven innovations are twofold. On the one hand, AI technologies could lead to the emergence of new gatekeepers that have the potential to further decrease market contestability and fairness.[59] On

[54] European Parliament, resolution of 16 January 2024 on competition policy – annual report 2023 (2023/2077(INI)), para 42.
[55] Florian Huerkamp & Marcel Nuys, *DMA Article 19 Market investigation into new services and new practices*, para 8 (Rupprecht Podszun ed., Nomos & Beck & Hart Publ. 2024). *See also* Yasar et al., *supra n. 9*, 7.
[56] *See* Articles 3 (6), (7), 49 DMA.
[57] Rupprecht Podszun & Philipp Bongartz & Sarah Langenstein, *The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers*, 10 J. Eur. Consumer and Mark. L. 60, 61 (2021).
[58] *See* Filomena Chirico, *Digital Markets Act: A Regulatory Perspective*, J. Eur. Competition L. & Prac. 493, 497 (2021).
[59] High-Level Group, *supra* n. 27.

the other hand, AI-driven innovation could create "*a window of contestability*" by challenging the incumbents' current business models, which could ultimately increase the overall openness of digital markets.[60] In this context, the timely application of the Digital Markets Act may provide the necessary regulatory framework for the transition between two phases of digital competition. Ultimately, the application of the Digital Markets Act could help to ensure that future digital markets that are characterized by AI business models, are fairer and more contestable than today's digital markets. That said, it would be an essential precondition to increase the adaptability of the DMA.

## 4 How to increase the DMA's adaptability

In order to increase the adaptability of the DMA, the Commission could – in addition to the catalogue of core platform services in Article 2(2) DMA – be given **additional options** of **classifying** a service as a **core platform service**. There are two conceivable ways to increase the adaptability of the DMA to AI-driven business models in the future. Either a general definition of core platform services could be introduced in Article 2 DMA, or the Digital Markets Act could follow the approach of the European AI Act[61] to extend the Commission's power to adopt delegated acts.

### 4.1 General definition of core platform services

One option to increase the Digital Markets Act's adaptability would be to rely on a general definition of core platform services, which could read as follows:[62]

> "*A 'core platform service' is a service which interconnects end users and business users and has the capacity to affect the actions of a significant number of end users or business users alike*."

With such a general definition, the Commission would be able to react flexibly to market developments.[63] The central theoretical element of the definition would be the influence of the service on the business and end users. The ability to influence dependent user groups would form the core

[60] Ibid.
[61] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828.
[62] This proposal originally goes back, in a somewhat modified form, to Daniel Zimmer & Jan-Frederick Göhsl, 19 Zeitschr. f. Wettb'R. 29, 39-40 (2021). *Compare as well* Teresa Rodríguez de las Heras Ballell, *The Scope of the DMA: Pivotal for success, critically assessed*, Verfassungsblog (30 August 2021), https://verfassungsblog.de/power-dsa-dma-02/. The alternative definition of core platform services referred to in Yasar et al., *supra n. 9* does not appear to be accurate, since the referenced passage from the Commission rather represents a general description of the gatekeeper requirements.
[63] For reasons of proportionality, the Commission would need to conduct a market investigation if it desired to invoke the general clause.

element underlying the concept of gatekeeping as such.[64] In practice, the Commission would have to examine whether the service is **potentially suitable** for serving as an important gateway within the meaning of Article 3(1)(b) DMA. This requires an analysis of the particular market conditions in which the service is embedded.[65] Whether the service actually functions as such an important gateway would then have to be examined in the context of Article 3(1) DMA.

Introducing such a general definition would not seem to be at odds with the DMA's goal of increasing the speed of enforcement. The Commission was able to assign the currently designated core platform services to the individual categories in Article 2(2) DMA without much administrative effort.[66] This would not change as the introduction of a general definition would not affect the individual definitions of the core platform services already listed, nor would it prevent the swift application of this list, which is ultimately its raison d'être. The proposed general clause would only have a complementary effect. The Commission could continue to use the service categories listed in Article 2(2) DMA. This would ensure that designation decisions could be reached within a very short period of time in relation to known service categories, without the Commission having to carry out in-depth investigations. While the application of the general definition would be expected to be more complex and therefore take longer to execute, the process would likely still be quicker than a legislative amendment each time a gap in the DMA arises. The designation procedure by means of a general definition would also probably be completed more quickly than the adoption of a delegated act by the Commission. It is also true that in designation proceedings based on the general definition, it may be expected that the decisions will increasingly be reviewed in appeals to the European Courts. However, this does not represent a disadvantage from the perspective of enforcement speed because the actions pursuant to Article 278 TFEU have no suspensory effect.[67]

Furthermore, relying on a general definition would not infringe the principle of proportionality within the meaning of Article 5(4) TEU.[68] The DMA essentially addresses gatekeeping situations, which can exist independently of the technological design of a platform service. The scope of application of the

[64] *See also* Damien Geradin, *What Is a Digital Gatekeeper? Which Platforms Should Be Captured by the EC Proposal for a Digital Market Act?*, Working Paper 17 (2 April 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788152; Nicolas Petit, *The Proposed Digital Markets Act (DMA): A Legal and Policy Review*, 12 J. Eur. Competition L. & Prac. 529, 533 (2021).
[65] *See* for a comparable approach Yasar et al., *supra n. 9*, 8.
[66] *See* for an overview over the designations proceedings Alba Ribera Martinez, *The Requisite Legal Standard of the Digital Markets Act's Designation Process*, 20 J. Competition L. & Econ. (2024) *as well as* Vlatka Butorac Malnar & Ivana Kunda, *Designating Gatekeepers and Very Large Online Platforms under the EU Digital Acquis*, J. Consumer & Mkt. L. Rev. 242, 244 (2024).
[67] Case T-131/16 R, *Belgium v Commission*, 19.7.2016, ECLI:EU:T:2016:427, para 12; Case T-1077/23 R, *ByteDance*, 9.2.2024, ECLI:EU:T:2024:94, para 7-10.
[68] *Compare* on the proportionality principle Case C-58/08, *Vodafone*, 8.6.2010, ECLI:EU:C:2010:321, para 51.

Digital Markets Act is therefore already very limited to specific business segments of the digital economy. If the general definition were phrased and then also applied narrowly, there would be a low risk of the scope being significantly extended as the Commission had to assess on an individual basis whether a service might in theory serve as an important gateway for business users. In addition, the DMA contains further criteria for determining the position of the norm addressee. To wit, to designate an undertaking that is providing such a new core platform service as a gatekeeper, the undertaking would also have to fulfill the high hurdles of Article 3(1) DMA.[69] Above all, it would still have to be examined whether the service constitutes an important gateway for business users according to Article 3(1)(b) DMA. Thus, the general definition would significantly increase the adaptability of the DMA, while the other criteria in Article 3(1) DMA provide sufficient safeguards to avoid excessive burdens on undertakings.

Of course, in order to implement this proposal, it would be necessary to amend the DMA by way of an ordinary – time-consuming – legislative proceeding. However, such an amendment is the only way to ensure that no further gaps emerge in the future that would have to be filled at a later stage again through an ordinary legislative procedure. As the identified regulatory gap regarding AI Agents would have to be closed anyway, this could also be used as an opportunity to reach a one-off political compromise – which is certainly difficult but not impossible to achieve – that would indeed be future proof.

### 4.2 What the DMA can learn from Article 7 AI Act

In the current version of the DMA, the Commission is not allowed to adopt delegated acts to add new core platform services to the list in Article 2(2) DMA.[70] As regards the position of the norm addressee, the Commission can only amend the methodology for calculating the user numbers in Article 3 DMA by delegated act (see 3.4.).[71] The reason for this may be that it has been argued that authorizing the Commission to adopt delegated acts to amend the list of core platform service in Article 2(2) DMA would violate the principle in Article 290 TFEU that only non-essential elements of the legislative act may be amended by such a delegated act.[72]

[69] *Compare* Thorsten Käseberg & Sophie Gappa, *DMA Article 3 Designation of gatekeepers*, para 5-6 (Rupprecht Podszun ed., Nomos & Beck & Hart Publ. 2024). *See* also Malna & Kunda, *supra n. 66*, 243-244.
[70] Compare Article 19(3)(a) and *e contrario* Articles 3(6), (7), 12(1), (2), (3), 19(3)(b) DMA and Recitals (20), (22), (77), (78), (79), (97). See also Käseberg & Gappa, *supra n. 69*, para 23.
[71] Article 3(6), (7) DMA.
[72] *See* German Monopolies Commission, *Recommendations for an effective and efficient Digital Markets Act*, Special Report 82 para 48 fn. 61 (2021). *See also* Matthias C. Kettemann & Martin Müller, *§ 7 Plattformregulierung*, para 34 (Hans Steege & Kuuya J. Chibanguza, Nomos 2023).

Nevertheless, it seems doubtful that Article 290 TFEU would really have precluded the authorization of the Commission to add further core platform services to the list in Article 2(2) DMA by means of a delegated act.[73] These concerns about the limiting scope of Article 290 TFEU appear to be unfounded on closer examination. The CJEU has consistently held that the question of which parts of a legislative act are essential and which are not depends not on the intensity of the interference with certain parties, but on its political significance.[74] The first doubts as to the limiting effect of Article 290 TFEU in relation to the addition of new types of core platform services to the list in Article 2(2) DMA arise when taking into account the Impact Assessment of the Commission's first DMA proposal in 2020. In addition to the Commission's proposal of the DMA,[75] the Impact Assessment sets out alternative regulatory options that the Commission considered feasible. One of the alternative options (Option 3) discussed contained a framework that would have allowed the Commission to add new core platform services to the list in Article 2(2) DMA by the adoption of a delegated act.[76] Option 3 would have combined a list of core platform services with a flexible option for the Commission to add new services to the list following a market investigation, which would ultimately have led to an extension of the scope of the current Article 19(3)(b) DMA. A potential problem of Option 3 with Article 290 TFEU was not even discussed in the relevant coherence section of the Impact Assessment.[77] Instead, Option 3 was not pursued further, mainly because the additional flexibility regarding the norm addressee position would also have increased the Commission's discretion, which could have led to a lower level of legal certainty.[78]

However, a comparison with the European Artificial Intelligence Act (AI Act) suggests that these concerns appear to be unfounded. Such a comparison indicates that a different regulatory approach would have been legally possible, politically feasible and economically viable.[79] The AI Act incorporates a regulatory approach to high-risk AI systems that is different from the current version of

[73] Note that Article 290 (1) TFEU stipulates that only non-essential elements of the legislative act can be amended by delegated acts. *Compare* C-355/10, *European Parliament v European Union*, 5.9.2012, ECLI:EU:C:2012:516, para 64.
[74] *Compare* Paul-John Loewenthal, *Article 290 TFEU* para 12 (Manuel Kellerbauer ed., Oxford University Press 2019) who highlights with reference to the CJEU that essential elements of legislation "are intended to give concrete shape to the fundamental guidelines of Community policy". *See also* Case C-240/90, *Germany v Commission*, 27.10.1992, ECLI:EU:C:1992:408, para 36-37.
[75] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector COM/2020/842 final (15 Dec. 2020).
[76] Commission, *Staff Working Document, DMA Impact Assessment Report*, SWD(2020) 363 final (15 Dec. 2020) paras 223, 226, 229, 235.
[77] Ibid, paras 358 et seq.
[78] Ibid, para 371, 379.
[79] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L, 2024/1689, 12.7.2024.

Article 19(3)(a) DMA, but rather comparable to the presented alternative Option 3 discussed in the Impact Assessment of the DMA. In Article 6(2) AI Act in conjunction with Annex III, the AI Act contains a list of high-risk AI systems. This list in Annex III of the AI Act is equivalent to the approach taken in Article 2(2) DMA. However, unlike the current version of Article 19(3)(a) DMA, Article 7 of the AI Act empowers the Commission to adopt delegated acts to amend the list of high-risk AI systems in Annex III of the Regulation by adding or modifying use cases of high-risk AI systems.[80] To do this, the Commission must assess whether an AI system falls within one of the eight areas set out in Annex III, and whether the AI system poses a risk of harm that is equal to or greater than the risk of harm posed by the high-risk AI systems already listed in Annex III. In order to increase legal certainty in this process, Article 97(4) AI Act prescribes that the Commission shall consult stakeholders prior to the adoption of a delegated act.[81] Additionally, Article 97(5) AI Act provides for a mandatory transitional period, which can also be used for adaptation and which further reduces legal uncertainty.[82]

The situation under Article 7 AI Act seems to be generally comparable to the determination of new core platform services under the DMA. Although the objectives of the AI Act are, of course, different from those of the DMA, both acts have the same legal basis, i.e. Article 114 TFEU.[83] Thus, both acts ultimately pursue the overarching goal of ensuring the establishment and functioning of the internal market. Furthermore, the status as a high-risk AI system pursuant to Article 6 AI Act is also associated with far-reaching obligations in Article 8 to 15 AI Act.[84] The requirements in the AI Act are more procedural in nature than in the Digital Markets Act and have less of an impact on specific market behavior, but they are nonetheless comparable in terms of the intensity of the regulation. The provisions for high-risk AI systems primarily aim to protect individuals. This coincides with the objectives of the DMA to protect end users and business users.[85]

In essence, both regulations target specific digital offerings that, by virtue of their characteristics, entail a particular risk of harm to individuals. However, high-risk AI systems pose an even greater risk to the

[80] Note that Article 97 AI Act contains specific rules on the exercise of the delegation. *See also* Lena Enqvist, *'Human oversight' in the EU artificial intelligence act: what, when and by whom?*, 15 L. Innovation & Tech. 508, 516 (2023); Martin Ebers, *Truly Risk-based Regulation of Artificial Intelligence How to Implement the EU's AI Act*, Eur. J. Risk Regul. 15-16 (2024), https://doi.org/10.1017/err.2024.78.
[81] This instrument is specifically tailored to increase legal certainty, *compare* Commission, *Staff Working Document, AI Act Impact Assessment Report*, SWD(2020) 363 final (15 Dec. 2020), 51.
[82] *See also* ibid.
[83] *Compare* Art. 1(1) AI Act and Art. 1(1) DMA as well as Recital (1) and (3) of the AI Act and Recital (7) of the DMA.
[84] *Compare* for an overview Jonas Schuett, *Risk Management in the Artificial Intelligence Act*, 15 Eur. J. Risk Regul., 367–385 (2024) as well as Michael Veale & Frederik Zuiderveen Borgesius, *Demystifying the Draft EU Artificial Intelligence Act*, 22 Comput. L. R. Int. 97, 102-106 (2021).
[85] Art. 1 (1) DMA.

fundamental rights of individuals. The list of high-risk AI systems in Annex III covers not only the use of AI in criminal cases, but for example also in education and employment. All eight categories listed in Annex III AI Act are areas that have a particularly strong impact on the personal lives of those affected. The impact of the covered situations is even more pronounced than in the DMA, which "only" touches on economic issues. In addition, the number of organizations affected by the classification of an AI system as high-risk is significantly higher than under the narrowly tailored Digital Markets Act.[86] This means that the personal scope of the far-reaching behavioural obligations for high-risk AI systems is significantly broader than in the DMA.

The broader personal scope of the AI Act also suggests that a more flexible approach in the DMA would not unnecessarily increase legal uncertainty for potential norm addressees, as feared in the DMA Impact Assessment. If the remaining legal uncertainty is deemed to be acceptable in the AI Act for a much larger number of organizations – under the umbrella of the described countermeasures in Article 97 (4), (5) AI Act – then it must apply a fortiori to the DMA, given that the regulation is only aimed at the very largest platform businesses. Consequently, if there is a possibility to extend the list of norm addressees by delegated acts for high-risk AI systems, this should definitely be a policy option for the Digital Markets Act.

Moreover, it does not seem reasonable to treat comparable legal situations in the digital economy differently; this may ultimately lead to legal fragmentation. There should therefore be a greater interest in ensuring coherence between the various digital legal acts.[87] Finally, a comparative approach to the recent digital legislation proves to be an effective tool to identify both legal problems in each act and feasible policy solutions that have already been implemented in another digital legislation. Such a comparative analysis can lead not only to a coherent digital legislation. Since the legislator can ultimately learn from mistakes made in some digital legal acts, it can also contribute to more effective regulation in individual cases.

From this point of view, the comparison between the DMA and the AI Act suggests that the lack of an option to adopt delegated acts with respect to norm addressees in the Digital Markets Act may be a (policy) mistake and that other regulatory options would be available in this context. Furthermore, the comparison shows that if it was politically feasible to introduce such a regulatory mechanism in the AI Act, the chances of a corresponding amendment of the DMA are at least not very low.

[86] It is likely that thousands of AI systems are going to be classified as high-risk. *Compare* AI Act Impact Assessment, *supra* n. 81, 67-68.

[87] *Compare* for a comparable approach to understanding fairness norms in different legal acts Behrang Kianzad, *Fairness, Digital Markets and Competition Law – Reconciling Fairness Norms in Digital Markets Act, Data Act and AI Act with Competition Law*, 4 J. L. Mkt. & Innovation, 133–160 (2025).

For these reasons, it would be worth considering whether a similar authorization to that in Article 7 of the AI Act could be introduced in the Digital Markets Act. This would definitely lead to a faster designation process of new services.[88]

In order to keep the scope of the authorization narrow, the Commission could also only be allowed to amend the definitions of the core platform service categories currently contained in Article 2(2) DMA. The Commission could then, for example, by means of a delegated act, remove the requirement of a tripartite contractual relationship for online intermediation services from its definition (this is the breaking point for AI Agents, see again 3.1.). This would mean that AI Agents could also be considered as online intermediation services under Article 2(2)(a) DMA in the future. Such a change would be the least invasive intervention in the regulatory content of the DMA, but it would also be a good way to significantly increase the adaptability of the DMA.

## 5 Summary

Agentic AI has the potential to revolutionize parts of the platform economy. The particularly practical example of AI Agents showed that the scope of the DMA might not be sufficiently adaptable for some significant changes induced by AI. As it is possible that AI Agents could, at least to some extent, replace currently successful intermediary platforms, this could lead to the emergence of new gatekeepers.[89] The regulatory gaps described in the application of the Digital Markets Act could mean that the incipient transition to an AI economy is not accompanied by the necessary regulatory intervention to prevent AI markets from being distorted by emerging AI incumbents. This would ultimately be incompatible with the objectives of the Digital Markets Act and also with basic competition policy goals, i.e. keeping markets open and contestable. As the High-Level Group for the DMA noted in its statement on AI, AI-driven business models could also lead to a "*window of contestability that allows new players to emerge*".[90] This window of contestability should be preserved. In this context, the ability to apply the DMA to AI-driven business models could help to ensure that current gatekeepers do not transfer their position of power, and that new emerging gatekeepers also have to play by the rules to ensure that the digital market environment of the future is more contestable than in today's markets.

The introduction of a general definition of core platform services could remedy the issue of the current low adaptability of the DMA to AI-driven competition. As explained, there are no concerns about violating the principle of proportionality when introducing such a clause. The high hurdles in

[88] *See also* Rupprecht Podszun, *From Competition Law to Platform Regulation – Regulatory Choices for the Digital Markets Act*, 17 Economics no.: 20220037, 11 (2023).
[89] High-Level Group, *supra* n. 27.
[90] Ibid.

Article 3(1) DMA would prevent over-enforcement. The Commission could then promptly react to market changes without the need for a burdensome amendment of the DMA in a lengthy and costly legislative procedure.

Alternatively, a comparison with Article 7(1) AI Act shows that the Commission could probably be authorized to extend or at least amend the list of core platform services by means of delegated acts without infringing Article 290 TFEU. This measure would have the advantage of being even less intrusive than the introduction of a general definition. However, the market investigation that would likely be required prior to any amendment to the list of core platform services in Article 2(2) DMA would also increase the amount of time it would take to designate providers of new AI-driven business models as gatekeepers. Ultimately, both suggested options display clear advantages compared to the status quo, so that the policy option should be chosen that currently appears to be capable of reaching consensus at the European level.