Concurrences

REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

The European Digital Markets Act proposal: How to improve a regulatory revolution

Article | Concurrences N° 2-2021 | pp. 46-63

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The European Digital Markets Act proposal: How to improve a regulatory revolution

ABSTRACT

The paper analyses the recent European Commission Proposal for a Digital Markets Act which will regulate the digital gatekeepers in order to increase market contestability and fairness in the European digital economy. First, the paper summarises the main elements of the Commission proposal: objectives, scope, criteria to designate gatekeepers, obligations imposed on gatekeepers as well as institutional design and enforcement mechanisms. Then, for each of those elements, the paper suggests improvements to the Commission proposal, in order to make the Digital Markets Act more flexible and adaptable to the rapid pace of change of digital markets and to straighten out issues of institutional coordination and enforcement effectiveness.

Cet article étudie la récente proposition de la Commission européenne pour une législation sur les marchés numériques qui vise à réguler les contrôleurs d'accès en vue de d'accroitre la contestabilité des marchés et l'équité dans l'économie numérique européenne. D'abord, l'article résume les principaux éléments de la proposition : ses objectifs, son champ d'application, les critères pour désigner les contrôleurs d'accès, les obligations imposées à ces contrôleurs ainsi que le système institutionnel et de mise en œuvre. Ensuite, pour chacun de ces éléments, l'article propose des améliorations à la proposition de la Commission en vue de rendre la législation plus flexible et adaptable à l'évolution rapide des marchés numériques ainsi que d'améliorer la coordination institutionnelle et l'effectivité de la mise en œuvre

I. Introduction

1. Over the last years, authorities across the world have adopted or commissioned reports on the competition issues raised in the digital economy, in order to explore how to handle the increasing economic, innovation and informational power of Big Tech firms.[1] They are now beginning to unveil their plans for action. On 15 December 2020, the European Commission tabled a legislative proposal for a Digital Markets Act (DMA), the goal of which is to increase the contestability and fairness of the EU digital economy.[2] The same day, the Commission also introduced the Digital Services Act (DSA) proposal, with the aim of ensuring that Europe is a safe, predictable and trusted online environment where fundamental rights are protected.[3] Those proposals are now in the legislative process before the European Parliament and the Council of Ministers. They could be made into law by 2022, and begin to apply in 2023.

2. This paper focuses on the DMA, which the Commission presents as an attempt to avoid the perceived pitfalls of applying competition law to digital markets, in particular the intricacy of the analysis, the duration of cases and the lack of effectiveness of some of its remedies. The DMA would accordingly complement competition law with a stylised form of regulation that eschews lengthy analysis of specific markets, firms and practices in favour of synthetic concepts that are meant to generalise from available data and enforcement practice. In this paper, we assume for the sake of argument that there is sufficient momentum to carry through the DMA proposal in line with its basic principles, and accordingly we focus more on specific aspects where the proposal could be improved. After this

*This paper is partly based on the CERRE First Assessment of the DMA (January 2021), which was written with contributions from Amelia Fletcher, Richard Feasey, Jan Krämer, Bruno Liebhaberg and Giorgio Monti. The authors thank Axel Desmedt, Alexandre Ruiz Feases and Thomas Streinz for very useful comments.

1 *See*, for instance, Crémer et al. (2019), Furman et al. (2019), Scott Morton et al. (2019). For a list of those reports, *see* Alexiadis and de Streel (2020), and for a summary of some of those reports, *see* Ennis and Fletcher (2020).

2 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 15 December 2020. The Impact Assessment of the Commission services provides very useful background information to better understand the rationale of the proposal: Impact Assessment Report Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363 final, 15 December 2020.

3 Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020.

introduction, section II summarises the main elements of the DMA proposal; then, section III makes some recommendations to improve the proposal; finally, section IV briefly concludes.

II. Digital Markets Act proposal in a nutshell

1. Objectives and principles

3. The general goal of the DMA is to ensure a high level of innovation, quality of service, user choice and competitive and fair pricing in the European digital economy.[4] To achieve this general goal, the DMA proposal sets three specific objectives:[5] (i) ensure contestability of digital markets, which means that markets should remain open to new entrants and innovators; (ii) guarantee fairness in the B2B relationship between the digital gatekeepers and their business users, which is defined as a balance between the rights and obligations of each party and the absence of a disproportionate advantage in favour of the digital gatekeepers;[6] and (iii) strengthen the internal market.

4. Contestability refers to decreasing entry barriers to digital markets and to levelling the playing field among existing gatekeepers and other firms offering substitute or complementary digital services.[7] In so doing, long-term efficiency (i.e., the future size of the pie) and consumer welfare are expected to increase. The objective of fairness is more akin to *ex post* fairness and relates to distribution of the value created by digital markets (the division of the pie).[8] Contestability and fairness are also pursued by other EU laws, such as competition law and the emerging "platform law" which consists of the Platform-to-Business Regulation,[9] the GDPR,[10] the Audiovisual Media Services Directive[11] and the European Electronic Communications Code.[12] However, the Commission has identified some regulatory gaps that the DMA proposal aims to close.[13] In covering those gaps, the DMA will complement—and not substitute for—those other EU rules.[14] In particular, the DMA would apply when competition law cannot act or can only act in an ineffective manner in achieving market contestability and B2B fairness.[15] The DMA proposal also complements the GDPR by strengthening or extending some of its obligations.[16]

5. The objective of harmonisation is also key because the biggest digital platforms operate on a global scale and their conducts impact most, if not all, Member States.[17] To achieve regulatory harmonisation, the DMA proposal prohibits Member States from imposing further obligations on gatekeepers for the purpose of ensuring contestable and fair markets.[18] However, Member States remain free to impose obligations (i) which pursue other legitimate interests such as consumer protection or unfair competition, or (ii) which are based on national competition rules, provided this is allowed under EU competition law.

6. In pursuing those three objectives, the DMA proposal applies two key general principles of EU law:[19] (i) firstly, the principle of effectiveness which implies that any obligation imposed should achieve the objectives of the DMA; and (ii) secondly, the principle of proportionality which implies that the content and form of regulatory obligations should not exceed what is necessary to achieve the objectives of the DMA.[20]

4 DMA Proposal, recitals 25 and 79. For the intervention logic underlying the DMA Proposal, *see* Impact Assessment, p. 31.

5 DMA Proposal, Art. 1(1).

6 DMA Proposal, Art. 10(2) and also Art. 7(6) and recital 57.

7 In this context, contestability is sometimes referred to as *ex ante* fairness: *see* Speech of Executive VP Vestager on Fairness and Competition, 25 January 2018, GCLC Annual Conference, available at https://wayback.archive-it.org/12090/20191129212136/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en.

8 Note that *ex post* fairness may also contribute to efficiency and innovation: *see*, among others, Clarkson and Van Alstyne (2020).

9 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, p. 57 (hereinafter "P2B Regulation").

10 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 199, 4.5.2016, p. 1.

11 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1, as amended by Directive (EU) 2018/1808 (hereinafter "AVMSD").

12 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, [2018] OJ L 321, 17.12.2018, p. 36 (hereinafter "EECC").

13 DMA Proposal, recitals 5, 10–11.

14 In EU economic law, regulation often complements regulation, *see* Dunne (2015), Hellwig (2009) and Larouche (2000).

15 DMA Proposal, recitals 9 and 10 and IA, paras. 119–124.

16 In particular the requirement of user consent for so-called data fusion (when personal data from different platform services is being pooled) and obligations related to data portability and transparency on consumer profiling algorithms: DMA Proposal, Arts. 5(a), 6(1)(h) and (i), and Art. 13, respectively.

17 The proposal is based on Article 114 TFEU, which means that its main aim and purpose is to harmonise laws with a view to securing the internal market.

18 DMA Proposal, Art. 1(6).

19 *See* in particular DMA Proposal, Art. 7(2) for obligation specifications as well as Art. 15(1) and (2) for additional behavioural and structural remedies in case of systematic non-compliance.

20 TEU, Art. 5(4).

2. Services susceptible to *ex ante* regulation: Core platform services

7. The DMA proposal covers a closed list of eight digital services—or business models—which are named "core platform services" (CPS).[21] Many of these services have already been defined in previous EU legislative enactments. The eight CPSs are:

– Online B2C intermediation services, which are information society services[22] (i) that allow business users to offer goods or services to consumers, (ii) with a view to facilitating the initiating of direct transactions between business users and consumers regardless of whether the transaction is finally concluded offline or online and (iii) which provide services to business users, based on contractual relationships between the platform and the business user.[23] They include marketplaces[24] such as Amazon Marketplace and app stores[25] such as Apple App Store or Google Play Store. As the first part of the definition refers to consumers (and not end-users), intermediation services do not include B2B intermediation services.

– Online search engines, which are information society services "*allow*[ing] *users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found*";[26] they include for instance the Google search engine or Microsoft Bing.

– Online social networks, which are "*platform*[s] *that enabl*[e] *end users to connect, share, discover and communicate with each other across multiple devices and, in particular, via chats, posts, videos and recommendations*";[27] they include, for instance, Facebook.

– Video-sharing platform services, which are "*services where the principal purpose, or an essential functionality is the provision of programmes and/or of user-generated videos to the general public for which the platform does not have editorial responsibility but determines the organisation of the content*";[28] they include, for instance, YouTube.

– Number-independent interpersonal communication services, which are "*services that enable direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons (whereby the persons initiating or participating in the communication determine its recipient) and which does not connect with publicly assigned numbering resources*";[29] they include WhatsApp, Skype or Gmail, to name but a few.

– Cloud computing services, which are information society services that enable "*access to a scalable and elastic pool of shareable computing resources*";[30] they include for instance Amazon Web Services (AWS) or Microsoft Azure.

– Operating systems, which are "*systems software which control the basic functions of the hardware or software and enable software applications to run on it*";[31] they include for instance Google Android, Apple iOS or Microsoft Windows.

– Advertising services offered by a provider of any of the seven core platform services mentioned above including ad networks, ad exchanges and any ad intermediation services.

8. Those eight core platform services were selected by the Commission because of their following characteristics: extreme economies of scale and scope, important network effects, multi-sidedness, possible user lock-in and absence of multi-homing, vertical integration and data-driven advantages. Those characteristics are not new in and of themselves, but when they apply cumulatively, they lead to market concentration as well as dependency and unfairness issues which, according to the Commission, cannot be addressed effectively by existing EU laws.[32] On the basis of such characteristics, the Commission did not select video streaming and video-on-demand services such as Netflix because of the absence of multi-sidedness, nor B2B industrial platforms because of the absence of strong bargaining power asymmetry which could lead to unfairness.

9. The DMA proposal also contains a built-in dynamic mechanism that allows the European Commission, after a so-called market investigation, to propose to the EU legislative bodies that the DMA be amended in order

21 DMA Proposal, Art. 2(2). Those types of digital services are also referred to by the Commission as "business models": Commission Staff Working Document of 25 May 2016, Online Platforms, SWD(2016) 172 final.

22 An information society service is a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient: 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, 17.9.2015, p. 1.

23 The DMA Proposal relies on the definition set out in the P2B Regulation, Art. 2(2).

24 Defined as information society services allowing consumers and/or traders "*to conclude online sales or service contracts with traders either on the online marketplace's website or on a trader's website that uses computing services provided by the online marketplace*": Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, OJ L 194, 19.7.2016, p. 1 (hereinafter "Network Information Security Directive") Art. 4(17).

25 Defined as "*a type of online intermediation services, which is focused on software applications as the intermediated product or service*": DMA Proposal, Art. 2(12).

26 Here as well, the DMA relies on definitions already included in previous enactments: P2B Regulation, Art. 2(5) and Network Information Security Directive, Art. 4(18).

27 DMA Proposal, Art. 2(7). This definition is new to the DMA.

28 Definition taken from the AVMSD, Art. 1(1aa).

29 Definition taken from the EECC, Art. 2(5) and (7).

30 Definition taken from the Network Information Security Directive, Art. 4(19).

31 DMA Proposal, Art. 2(10). This definition is also new to the DMA.

32 DMA Proposal, recital 2; also Impact Assessment, paras. 128–130.

to include new digital services in the list of CPSs.[33] By implication, the list of CPSs is therefore considered to form an essential element of the DMA, since it can only be expanded through a legislative act.[34] In the end, that market investigation mechanism to add to the CPS list does not add much to the right of legislative initiative already entrusted to the Commission by the TEU.[35]

3. Criteria to designate gatekeepers of core platform services

10. The DMA constitutes asymmetric regulation: its obligations do not apply to any and all providers of core platform services, but only to those providers which have been designated as gatekeepers. Such designation is done by the European Commission on the basis of a cumulative "three criteria" test, namely: (i) significant impact on the EU internal market; (ii) control of an important gateway for business users to reach end-users; and (iii) entrenched and durable position.[36] The gatekeeper designation is made on an individual firm and individual CPS basis: it only concerns the CPS(s) for which the firm meets the "three criteria test" to be designated as gatekeeper, to the exclusion of other CPSs offered by the same firm, and a fortiori of other digital services outside the CPS list. For instance, if Facebook holds a gatekeeper position for social network services, that does not mean that Facebook will also be designated as a gatekeeper for its marketplace services.[37]

11. In order to ease the gatekeeper designation process, the DMA proposal introduces a rebuttable presumption, for each of the three criteria, in the form of a threshold. The first criterion (significant impact) will be deemed fulfilled if the CPS provider[38] achieved an annual EEA turnover equal to or above €6.5 billion or a market capitalization of at least €65 billion and that CPS provider is currently active in at least three Member States. The second criterion (important gateway) will be deemed met if the CPS provider reached, for a specific CPS, more than 45 million monthly active end-users in the EU (around 10% of the EU population)[39] as well as more than 10,000 active business users on an annualised basis.[40] As for the third criterion (entrenched and durable position), it will be fulfilled if the user thresholds set above are met for the last three financial years.[41] In practice, a CPS provider should self-assess whether it meets those size thresholds and, when it does, it should notify the Commission, providing all the relevant information within three months.[42] On that basis, within two months the Commission will designate this CPS provider as a gatekeeper unless the provider elects to try to rebut the presumption.[43] The Commission Impact Assessment indicates that the use of those thresholds could result in ten to fifteen CPS providers being designated as gatekeepers, but does not give any explanation for this estimated range.[44]

12. As just mentioned, a CPS provider that meets the presumptive thresholds may try to rebut the presumption and demonstrate that the "three criteria test" is not fulfilled.[45] Such rebuttal must rely on an open list of quantitative and qualitative indicators such as financial and commercial size, number of users, entry barriers, scale and scope effects, user lock-in and "*other structural market characteristics*."[46] Conversely, if on the basis of the same indicators, a CPS provider does fulfil the "three criteria test" despite falling under the presumptive thresholds, the Commission may designate that provider as a gatekeeper.[47]

13. Table 1 below summarises the "three criteria test" to designate the gatekeepers, the thresholds for the gatekeeper presumption and the quantitative and qualitative indicators that can be used to rebut the presumption or to designate gatekeepers that are below the thresholds.

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33 DMA Proposal, Art. 17(a).

34 Indeed Art. 290 TFEU provides that delegation is only possible for non-essential elements of the legislative act.

35 TEU, Art. 17(2).

36 DMA Proposal, Art. 3(1).

37 DMA Proposal, Art. 3(7) and recital 29.

38 Or the overall firm to which it belongs, if the CPS provider is but a division or a subsidiary.

39 The same criterion is proposed to designate the "very large online platforms," which are subject to additional obligation and a more Europeanised oversight under the DSA: DSA Proposal, Art. 25(2).

40 DMA Proposal, Art. 3(2) and recital 23. The Commission could, in a delegated act, clarify the methodology to measure the size thresholds in order to ensure legal predictability and could also adjust the thresholds: DMA Proposal, Art. 3(5).

41 DMA Proposal, Art. 3(2)(c). The market capitalisation threshold, however, needs only be fulfilled for the last financial year.

42 DMA Proposal, Art. 3(3).

43 DMA Proposal, Art. 3(4) and Art. 15(3).

44 Impact Assessment, para. 148. Caffarra and Scott Morton (2021) calculated on a preliminary basis that the thresholds "*will capture not only (obviously) the core businesses of the largest players (GAFAM), but perhaps also a few others. Oracle and SAP, for instance, would appear to meet the thresholds, as would AWS and Microsoft Azure. Conversely Twitter, Airbnb, Bing, LinkedIn, Xbox Netflix, Zoom and Expedia do not appear to meet the thresholds at present, and Booking.com, Spotify, Uber, Bytedance/TikTok, Salesforce, Google Cloud and IBM Cloud appear to meet some but not others.*" However, Oracle and SAP do not appear to offer CPS as they do not operate B2C platforms and do not have separate business users and end users.

45 DMA Proposal, Art. 3(4).

46 DMA Proposal, Art. 3(6) and recital 25.

47 DMA Proposal, Art. 3(6) and Art. 15. Three or more Member States may request the Commission to proceed with such designation.

Table 1. Criteria, thresholds and indicators to designate gatekeepers

"Three criteria test"	Presumptive size thresholds	Quantitative and qualitative gatekeeper indicators
1. Significant impact on the internal market	***Financial and geographical size (at firm level)*** – Annual EEA Turnover (last 3 years) > €6.5 bn *or* Market cap (last year) > €65 bn – *and* currently provides one CPS in at least 3 Member States	***Size, operation and position*** – Very high turnover derived from end-users of a single CPS – Very high market capitalisation – Very high ratio of equity value over profit – High growth rates, or decelerating growth rates coupled with increased profitability
2. Important gateway to reach end-users	***User size (at CPS level)*** – Monthly EU active end-users > 45 m – *and* yearly EU active business users > 10,000	***Users*** – Number of end-users – Number of dependent business users – User lock-in, lack of multi-homing
3. Entrenched and durable position	CPS user thresholds met for the last 3 years	***Entry barriers*** – Network effects, data-driven advantages – Economies of scale and scope (incl. from data) – Vertical integration
		Other structural market characteristics

14. Next to existing gatekeepers, the Commission may also designate an emerging gatekeeper when a CPS provider meets the first two criteria (i.e., significant impact and important gateway) and the fulfilment of the third criterion is foreseeable.[48] In this case, the emerging gatekeeper is subject to a subset of the obligations imposed on existing gatekeepers, with the aim of preventing market tipping.

4. Obligations imposed on core platform service gatekeepers

15. A digital platform that has been designated as a gatekeeper for one or several core platform services is subject to a table of "18 Commandments" of the contemporary prophets Vestager and Breton. Those new Commandments are divided into two lists: first, a blacklist comprising seven directly applicable detailed obligations which are in practice mostly prohibitions; and secondly, a grey list comprising eleven more or less detailed obligations which may need to be specified by the Commission. In principle, both lists apply automatically to all the CPS providers that have been designated as gatekeeper independently of their business models. In practice, however, half of the obligations are CPS specific. Also, the application of the obligations is limited to the CPS for which there has been a gatekeeper designation and does not apply to the other CPSs provided by the online platform.

16. The blacklist comprises the following prohibitions and obligations:

(a) Refrain from combining personal data sourced from the CPS with personal data from other services of the gatekeeper or third parties, and from signing in end-users to other services of the gatekeeper in order to combine personal data, unless the end-user has been presented with the specific choice and provided meaningful consent.[49] Such practice has been condemned under competition law by the German competition authority in *Facebook*[50] and under consumer protection law by the Italian Competition and Consumer Authority.[51]

(b) Allow business users to offer the same services to end-users through third-party intermediation services on different terms and conditions than those offered through the gatekeeper CPS.[52] Such clauses have been condemned in *Amazon E-book*,[53] or in several *Online hotel booking* cases.[54]

48 DMA Proposal, Art. 15(4), recitals 27 and 63.

49 DMA Proposal, Art. 5(a).

50 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html. This decision is under appeal, waiting for the answer by the Court of Justice to a preliminary question raised by the German appeal Court on the GDPR and its relationship with competition law.

51 https://en.agcm.it/en/media/press-releases/2017/5/alias-2380 and https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes.

52 DMA Proposal, Art. 5(b). This provision complements P2B Regulation, Art. 10.

53 Commission Decision of 4 May 2017, case AT.40153 – *Amazon E-books*.

54 *See* https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

(c) On the one hand, allow business users to promote offers to end-users acquired via the CPS and to conclude contracts with these end-users regardless of whether for that purpose they use the gatekeeper CPS (prohibition of anti-steering clause) and, on the other hand, allow end-users to access, through the gatekeeper CPS, content, subscriptions, features or other items by using the apps of a business user, where these items have been acquired by the end-users from the relevant business user without using the gatekeeper CPS.[55] The legality of such a clause under competition law is currently being reviewed in *Apple App Store*.[56]

(d) Restricting business users from raising issues related to gatekeeper practices with public authorities.[57]

(e) Refrain from bundling the gatekeeper CPS with identification services.[58]

(f) Refrain from bundling several CPSs covered by a gatekeeper designation.[59] Such bundling was prohibited in *Google Android*.[60] As the obligation only concerns CPSs covered by a gatekeeper designation,[61] it does not prohibit the gatekeeper from entering new markets (especially if doing so from scratch, as opposed to an acquisition).[62]

(g) Provide advertisers and publishers with information concerning the price paid by the advertiser and publisher and remuneration paid to the publisher.[63] Such lack of transparency is currently investigated in *Google Ad Tech*.[64]

17. The grey list comprises the following eleven prohibitions and obligations, which may need to be specified further by the Commission for each designated gatekeeper:

(a) Refrain from using, in competition with business users, any data not publicly available which is generated or provided to the gatekeeper when these business users or their customers use the CPS.[65] Such practice is currently under scrutiny in *Amazon Marketplace*.[66]

(b) Allow end-users to uninstall preinstalled apps on its CPS.[67] This issue was central to *Microsoft (tying)* and *Google Android*.[68]

(c) Allow the use of third-party apps and app stores using or interoperating with the OS of the gatekeeper and allow these apps and app stores to be accessed by means other than the gatekeeper CPS (sideloading).[69] This practice is at the core of *Apple App Store*.[70]

(d) Refrain from ranking its own products and services more favourably than competing third-party product and services and conduct ranking under fair and non-discriminatory conditions.[71] This form of self-preferencing was prohibited in *Google Shopping*[72] and is now under investigation in *Amazon Buy Box*.[73]

(e) Refrain from technically restricting the ability of end-users to switch between different apps and services to be accessed with the OS of the gatekeeper.[74]

(f) Allow business users and providers of ancillary services access to and interoperability with the same features that are used by the CPS gatekeeper in providing ancillary services.[75] This other form of self-preferencing is analysed in *Apple Pay*.[76] This obligation imposes interoperability between complementary services but not between substitute services, as provided in the EECC for interpersonal communications app such as WhatsApp or Skype.[77]

(g) Provide advertisers and publishers, free of charge, access to the performance measuring tools of the gatekeeper and the information necessary to carry out their own independent verification of the ad inventory.[78]

(h) Provide effective, continuous and real-time portability of data generated through the activity of a business user or its end-user, in particular for end-users to facilitate the exercise of data portability.[79] This obligation extends the portability requirement of the GDPR by widening its scope to non-personal data as well as data generated by business users.[80]

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55 DMA Proposal, Art. 5(c). This provision complements P2B Regulation, Art. 10.

56 Case AT.40437 – *Apple – App Store Practices (music streaming)*.

57 DMA Proposal, Art. 5(d).

58 DMA Proposal, Art. 5(e). Even though there is no actual case on this, a number of studies have pointed to the practices of Facebook and Google on this issue.

59 DMA Proposal, Art. 5(f).

60 Commission Decision of 18 July 2018, case AT.40099 – *Google Android*. This case is under appeal at the General Court in *Google v. Commission*, case T-604/18.

61 Compare with Electronic Communications Regulation, where the regulator may impose obligations beyond the SMP designation: Art. 63(3) EECC.

62 Which is an important force of competition as shown by Petit (2020).

63 DMA Proposal, Art. 5(g).

64 Cases AT. 40660 and AT.40670. *See* Geradin and Katsifis (2020).

65 DMA Proposal, Art. 6(1)(a). This provision complements P2B Regulation, Art. 9.

66 Case AT.40462 – *Amazon Marketplace*.

67 DMA Proposal, Art. 6(1)(b).

68 Commission Decision of 16 December 2009, case AT.39530 – *Microsoft – Tying* and Commission Decision of 18 July 2018, case AT.40099 – *Google Android*.

69 DMA Proposal, Art. 6(1)(c).

70 Case AT.40716 – *Apple – App Store Practices*.

71 DMA Proposal, Art. 6(1)(d). This provision complements P2B Regulation, Art. 5 and Commission Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council, OJ C 424, 8.12.2020, p. 1.

72 Commission Decision of 27 June 2017, case AT.39740 – *Google Search (Shopping)*. This case is under appeal at the General Court in *Google v. Commission*, case T-612/17.

73 Case AT.40703 – *Amazon – Buy Box*.

74 DMA Proposal, Art. 6(1)(e). There is no publicly known precedent for this obligation.

75 DMA Proposal, Art. 6(1)(f).

76 Case AT.40452 – *Apple – Mobile payments*. The Commission also refers to German legislation on the topic, as well as an Italian investigation into *Google Maps* and a Dutch case on NFC access.

77 EECC, Art. 61(2)(c), which allows the national competent authorities may also impose on the providers of number-independent interpersonal communications services obligations to make their services interoperable, including by relying on standards, if (i) those providers reach a significant level of coverage and user uptake; (ii) the Commission has found an appreciable threat to end-to-end connectivity between end-users and has adopted implementing measures specifying the nature and scope of any obligations that may be imposed by the national authorities; and (iii) the obligations imposed are necessary and proportionate to ensure interoperability of interpersonal communications services.

78 DMA Proposal, Art. 6(1)(g).

79 DMA Proposal, Art. 6(1)(h). For an economic rationale of such extensive data portability obligation, *see* Krämer (2020).

80 GDPR, Art. 20 and Guidelines of 13 April 2017 of Working Party 29 on the right to data portability, WP 242 rev.01.

(i) Provide business users, free of charge, with effective, high-quality, continuous and real-time access to data that is provided for or generated in the context of gatekeeper CPS use by those business users and their end-users.[81]

(j) Provide any third-party providers of online search engines with access on FRAND terms to ranking, query, click and view data in relation to search generated by end-users on online search engines of the gatekeeper.[82]

(k) Apply FRAND conditions, which can be assessed with different benchmarking methods, for the access by business users to app stores.[83]

18. Although those obligations apply directly to the designated gatekeepers, they may be specified by the Commission in a regulatory dialogue with the gatekeeper. Such specification may be done at the Commission's initiative when assessing the measures taken by the gatekeeper. It may also be done at the gatekeeper's request which, on this occasion, can notify the Commission of specific measures to implement the obligations.[84] The specification should be done on the basis of two principles: (i) the effectiveness of the measures in achieving the objectives of the obligation and (ii) the proportionality of the measures given the specific circumstances of the CPS and the gatekeeper.[85]

Table 2. Obligations and prohibitions applicable to provision of core platform services by designated gatekeepers

	Blacklist	Grey list
Transparency (in ad intermediation)	– Price transparency for ads (Art. 5(g))	– Performance transparency for ads (Art. 6(1)(g))
Envelopment through bundling or self-preferencing **Denial of access to platforms and data**	– No tying to business users from CPS to ID services (Art. 5(e)) – No tying from CPS to other CPS (Art. 5(f))	– No use of data related to business users to compete against them (Art. 6(1)(a)) – No self-preferencing in rankings (Art. 6(1)(d)) – Access to and interoperability with OS for third parties on same terms as proprietary ancillary services (Art. 6(1)(f)) – Allow "sideloading"(interoperability) of third-party apps or app stores, unless threatens integrity (Art. 6(1)(c)) – Provide free of charge real-time data sharing for business users (Art. 6(1)(i)) – Provide FRAND access to click-and-query data for search engines (Art. 6(1)(j))
End-user and business user mobility	– No wide MFN/parity clauses (Art. 5(b)) – No anti-steering clauses (Art. 5(c))	– Allow uninstalling of apps, unless essential to OS/device (Art. 6(1)(b)) – Device neutrality: No technical restriction of switching or multi-homing across apps using OS (Art. 6(1)(e)) – Provide real-time data portability for end-users (Art. 6(1)(h))
Unfair *sensu stricto*	– No data fusion without user consent (Art. 5(a)) – No bar to user complaints to public authorities (Art. 5(d))	– FRAND access to app stores (Art. 6(1)(k))

81 DMA Proposal, Art. 6(1)(i). This question also seems to play a role in AT.40716 – *Apple – App Store Practices*.

82 DMA Proposal, Art. 6(1)(j) and Art. 7(6). For an economic rationale of such obligation, *see* Krämer, Schnurr and Broughton Micova (2020) and Prüfer and Schottmüller (2020). There is no known precedent for such an obligation.

83 DMA Proposal, Art. 6(1)(k) and Art. 7(6). The Commission alludes to ongoing investigations relating to Apple practices in relation to its App Store. Recital 57 provides that: "*The following benchmarks can serve as a yardstick to determine the fairness of general access conditions: prices charged or conditions imposed for the same or similar services by other providers of software application stores; prices charged or conditions imposed by the provider of the software application store for different related or similar services or to different types of end users; prices charged or conditions imposed by the provider of the software application store for the same service in different geographic regions; prices charged or conditions imposed by the provider of the software application store for the same service the gatekeeper offers to itself*."

84 DMA Proposal, Art. 7(2) and (7) respectively.

85 DMA Proposal, Art. 7(5).

19. The Commission services explain that the new 18 Commandments were selected because they "*are considered unfair by taking into account the features of the digital sector and where experience gained, for example in the enforcement of the EU competition rules, shows that they have a particularly negative direct impact on the business users and end users*."[86] The selection is thus backward-looking. However, in order to be future proof as well, a flexibility clause provides that the Commission has the power to add new obligations ensuring market contestability and B2B fairness.[87] The Commission can do that via a delegated act (and thus without having to initiate the lengthy and complex legislative procedure) after having carried out a so-called market investigation which could last 24 months. The DMA proposal indicates that those new obligations may be necessary when a designated gatekeeper engages in courses of conduct that are unfair or that limit the contestability of the CPS, but without such courses of conduct being explicitly covered by the lists of obligations.[88]

20. In order to better understand the underlying logic of the long lists of obligations imposed on gatekeepers, Table 2 attempts to present the 18 Commandments according to four possible theories of harm to market contestability or fairness: (i) lack of transparency; (ii) on the supply side of the market, bundling, self-preferencing or denial of access to gatekeepers' platforms and data; (iii) on the demand side, lack of mobility (multi-homing and switching) of business users and end-users; and (iv) lack of balance (unfairness) between the rights and obligations of the gatekeepers and their business users. The first three theories relate to harm to market contestability and value creation (longer-term efficiency) while the fourth theory relates to fairness and value distribution. Table 2 also shows that most obligations relate to the contestability objective while only a few relate to the fairness objective.

21. As explained above, the full suite of 18 Commandments automatically applies after a gatekeeper designation without the possibility for the Commission to select the most appropriate ones on the basis of the proportionality principle and given the characteristics of the gatekeepers. Moreover, there is no possibility for the gatekeeper to rely on an efficiency defence to escape the imposition of an obligation, as is the case under competition law.[89] The DMA proposal only provides for two very narrow escape clauses. First, the application of the obligations may be suspended at the request of a gatekeeper when the economic viability of its operations in the EU is at risk due to exceptional circumstances beyond the control of the gatekeeper.[90] The Commission Impact Assessment gives the example of an unforeseen external shock that temporarily eliminates a significant part of end-user demand for the relevant core platform service.[91] Thus, the possibility of suspension only provides for a very narrow objective justification. Second, gatekeepers may be exempted, at their request or at the Commission's initiative, from some obligations in order to protect the public interest regarding morality, health and security.[92]

22. Next to the black and grey lists, gatekeepers are also subject to two additional specific transparency obligations, this time vis-à-vis the European Commission. First, they must inform the Commission of any intended acquisition of a provider of information society services.[93] This obligation, which goes further than the notification requirement imposed under the Merger Regulation,[94] aims to allow the Commission to review gatekeeper designation on the basis of new acquisitions by the gatekeepers (and possibly extend the designation to other CPSs) as well as to monitor contestability trends in digital markets.[95] It may also allow the Commission to nudge national competition authorities to refer to the Commission mergers falling below the EU jurisdictional thresholds, pursuant to Article 22 of the Merger Regulation.[96] Secondly, gatekeepers must submit to the Commission an independently audited description of consumer profiling techniques used in providing the CPS for which a gatekeeper designation applies.[97] This obligation, which goes further than the transparency and audit requirements of the GDPR,[98] aims to allow more privacy competition between substitute CPSs and, in turn, to prevent that deep consumer profiling would become the industry standard.[99]

5. Institutional design

23. To enforce the 18 Commandments, the DMA proposal puts forwards a centralised model at the EU level. It would confer fully-fledged regulatory powers to the European Commission, empowering it to: (i) designate the gatekeepers; (ii) specify, when needed, the obligations imposed on them; (iii) monitor compliance; (iv) sanction gatekeepers in case of non-compliance; (v) adapt, with delegated acts, the size thresholds for gatekeeper designation and the list of obligations to which gatekeepers are subject; and (vi) conduct market investigations that could lead to gatekeeper designations, to the extension of the

86 Impact Assessment, para. 153. Also DMA Proposal, recital 33.

87 DMA Proposal, Arts. 10 and 17(b).

88 DMA Proposal, recital 66.

89 Guidance of 3 December 2008 on the Commission's enforcement priorities in applying Article [102 TFUE] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7, at paras. 28–31.

90 DMA Proposal, Art. 8.

91 Impact Assessment, para. 400.

92 DMA Proposal, Art. 9.

93 DMA Proposal, Art. 12.

94 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1, Art. 1.

95 DMA Proposal, recital 31.

96 Commission Guidance of 26 March 2021 on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113, 31.3.2021, p. 1.

97 DMA Proposal, Art. 13.

98 GDPR, Art. 13.

99 DMA Proposal, recital 61.

DMA to new CPSs, to the addition of new obligations to the 18 Commandments, or to gatekeeper sanctions for systematic non-compliance.

24. Conversely, the role of the Member States and their national authorities is more limited than in other fields of EU law. Member State representatives are merely grouped into a new comitology-type committee called the Digital Markets Advisory Committee (DMAC).[100] The DMAC would provide non-binding advice to the Commission on the implementing decisions.[101] Moreover, if the Commission proceeds with a delegated act to add new obligations to the Commandments, the standard formula for dual control by the Member States applies: before the adoption of the act, representatives of the Member States should be consulted by the Commission, and after the adoption of the act, the Council of Ministers of the EU may oppose such act.[102]

6. Oversight and enforcement

25. In the proposal, DMA enforcement is modelled on antitrust enforcement,[103] hence it is mostly bilateral (between the Commission and a single firm) and at times adversarial. Enforcement steps are the following. First, the Commission designates a gatekeeper, either with a simple and quick test (on the basis of the presumptive thresholds) or with a more complex and slower process (after a market investigation). The Commission may specify the obligations of the grey list in a regulatory dialogue with the regulated gatekeeper.

26. Secondly, for each gatekeeper designation, the Commission, possibly supported by external experts,[104] monitors the correct application of the obligations by the gatekeeper in question. To do that, the Commission would enjoy extensive investigation powers, such as requests for information, including access to databases and algorithms, interviews and on-site inspections.[105] During its investigations, the Commission should respect due process principles towards the gatekeeper: right to be heard, access to the file and respect for professional secrecy.[106]

27. Thirdly, should a gatekeeper be found prima facie in non-compliance, the Commission may impose interim measures, in case of serious and irreparable damage to the users of the gatekeeper.[107] Later in the procedure, the Commission may also accept and make binding commitments offered by the gatekeeper to ensure compliance with its DMA obligations.[108] Alternatively, the Commission may issue a cease-and-desist order and fines up to 10% of worldwide turnover as well as periodic penalty payments.[109]

28. Fourthly, in case of systematic non-compliance—namely (i) three non-compliance decisions within five years and (ii) the strengthening or extension of the gatekeeper position—the Commission may go further and impose more stringent behavioural or, if needed, structural remedies.[110]

7. Market investigation: The flexibility clauses of the DMA

29. The DMA rests on three main concepts, namely, a list of "core platform services" (its material scope of application), "gatekeepers" (the firms that are subject to the DMA) and a list of obligations imposed on gatekeepers of core platform services. The DMA proposal features three types of market investigation, all of which are to be conducted by the Commission, that relate to each of these concepts respectively: (i) the first type of market investigation would allow the Commission to designate a gatekeeper on the basis of a series of quantitative and qualitative indicators; (ii) the second type would lead to behavioural and, if necessary, structural remedies when a gatekeeper systematically refuses or fails to comply with the obligations and prohibitions; (iii) the third type would provide the foundation for extending the scope of application (i.e., adding new CPSs to the list) and adding to the list of obligations contained in the DMA. In practice, the market investigations are flexibility clauses to adapt the DMA to the evolution of technologies and markets or to factor in additional enforcement experience. However, using a single and common "market investigation" label for all three types of flexibility clauses in sector-specific regulation is a misnomer[111] because they have little in common with the antitrust market investigations existing in some jurisdictions such as the UK and, furthermore, because each of them concerns a specific type of flexibility, different from the others.

100 DMA Proposal, Art. 32.

101 Those decisions relate to designation of gatekeepers; suspension and exemption of obligations; imposition of interim measures; acceptance of gatekeeper commitments; and sanctions for non-compliance or systematic non-compliance.

102 DMA Proposal, Art. 37(4) and (6).

103 As explained in Impact Assessment, paras. 198, 218.

104 DMA Proposal, Art. 24.

105 Resp. DMA Proposal, Arts. 19, 20 and 21.

106 Resp. DMA Proposal, Arts. 30 and 31.

107 DMA Proposal, Art. 22.

108 DMA Proposal, Art. 23.

109 DMA Proposal, Arts. 25–29.

110 DMA Proposal, Art. 16.

111 As put by Albert Camus, "*mal nommer les choses c'est ajouter au malheur du monde.*"

III. Assessment and suggestions for improvement

30. After having reviewed the main elements of the Digital Markets proposal, this section aims to propose improvements to each of those elements to ensure that the new law will be effective in increasing contestability and fairness in the digital economy and contribute to the Digital Single Market.

1. Objectives and principles

1.1 Contestability and fairness

31. The objective of market contestability is consistent with the main concerns which have been raised by many recent reports on the functioning of digital markets. The goal is not to protect business users, complementors or competitors of the digital gatekeepers as such, but rather to protect the competitive process in the digital economy. This is in line with the ordo-liberal tradition of Europe[112] and has been a standard objective of several EU economic laws, including competition law. However, over the last twenty years, competition policy has tended to favour more short-term effects (both harms and efficiencies) over long-term consequences (on competition or innovation). Such evolution has multiple causes, including the static bias induced by increased reliance on economic theories that focus on available and measurable static data, and the raising of the standard of proof which makes the demonstrations of long-term effects more difficult.[113] The DMA aims to reverse this short-term bias embodied in recent competition law by heralding a return to protecting contestability and the competitive process as such, possibly independently of short-term efficiencies, thereby giving more importance to long-term effects.

32. The objective of B2B fairness is consistent with the national traditions of many Member States,[114] but less present at the European level.[115] Indeed EU economic regulation in general has tended, so far, to leave distributional issues on the sidelines. Competition law, in particular, prioritises exclusionary abuses over exploitative abuses, even though Article 102 TFEU explicitly extends to exploitation. This may be justified as the heterogeneity of preferences among Member States is higher for distributional issues than for (short- or long-term) efficiency issues. However, as digital markets may lead to significant unfairness across all the Member States, a fairness objective may be justified, provided it is very well crafted and does not lead to legal uncertainty or regulatory creep.

112 Eucken (1992), Gerber (1998). For an attempt to rejuvenate this line of analysis in the context of the digital economy, *see* Schinkel and Larouche (2014).

113 Federico et al. (2019).

114 *See* Renda et al. (2014) for analysis of national B2B fairness law in the Member States.

115 Stuyck (2011).

1.2 Harmonisation and the interplay between the DMA and national competition law

33. While the DMA proposal prohibits the Member States from imposing further obligations on designated gatekeepers for the purpose of ensuring contestable and fair markets, it does not impede Member States from imposing obligations on the basis of EU or national competition rules.[116] Specifically, any obligation imposed on designated gatekeepers via national competition law is allowed, provided this is compatible with Regulation (EC) No. 1/2003.[117] For instance, the parallel imposition of obligations under the DMA and under the newly adopted Section 19a of German Competition Act,[118] which targets similar platforms, is possible. Such parallel imposition, at best, undermines the internal market and, at worst, leads to incompatibility.

34. In order to avoid such pitfalls, a good coordination between the Commission as a DMA enforcer and the NCAs is essential. However, there is no obvious existing forum where such coordination should take place. In particular, the European Competition Network and the coordination mechanisms of Regulation (EC) No. 1/2003 would not necessarily be appropriate, because according to the Commission proposal the DMA is deemed not to be a competition law tool. Thus, a new cooperation forum should be established, where the Commission and the NCAs (possibly with other independent national authorities) could meet to discuss the enforcement of the DMA. Such forum would reduce the risk of divergent or incompatible decisions adopted by the Commission under the DMA and by an NCA under competition law. Such forum would also, as explained below, allow the NCAs to bring their expertise and legitimacy in support of DMA enforcement.

35. While the establishment of a cooperation forum between the Commission and the NCAs may reduce the risks of divergent or incompatible decisions, it may not alleviate it completely. Therefore, a conflict rule needs to be in place. In that regard, a narrow rule based on the concrete actions of the respective authorities is preferable to an absolute hierarchical rule based on "fields" or "competences."[119] On that basis, both competition law and the DMA could apply concurrently, unless their concurrent application puts the designated gatekeeper in a situation where it cannot comply with both regimes at the same time. For instance, this could be the case if the Commission imposes under the DMA some form of

116 DMA Proposal, Art. 1(6).

117 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1, as amended, Art. 3(2) provides that "*Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings*."

118 *See* Section 19a of the German Competition Act (GWB), concerning abusive conduct of firms of paramount significance for competition across markets. A non-official English translation is available at https://www.d-kart.de/wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf.

119 As explained by Larouche and de Streel (2020).

data portability while a national competition authority imposes another form of data portability. There would on the other hand be no conflict if, under one regime, the gatekeeper platform is put under a regulatory obligation, whereas under the other regime, the conclusion was that no obligation should be imposed. In such a situation, the platform can comply with both regimes. To the extent that the two regimes are complementary, there should not be any significant proportionality issue, since the respective interventions of each authority are presumably necessary and proportionate to the aims of the respective regimes.

36. Should a firm find itself in a position where it cannot comply with one regime without breaching the other, then we would suggest the following conflict rule. Our starting point is the preservation of the single market (which is the objective of the DMA) while respecting the EU legal hierarchy (i.e., EU competition law prevails over the DMA, but national competition law going further than EU law does not prevail over the DMA). Therefore, in case of an incompatibility between an obligation imposed by the Commission under the DMA, which applies across the EU, and a contradictory remedy imposed by an NCA under national competition law, which applies only to one Member State, the DMA obligation should prevail. Alternatively, the same outcome could be reached through the principle of sincere cooperation of Article 4 TEU, in that a Member State cannot impose an obligation that undermines EU law. Thus, should a national competition authority impose to a designated gatekeeper an obligation that contradicts the DMA, the gatekeeper could refuse to implement such obligation by claiming that the Member State violates EU law by imposing such obligation.[120]

2. Definition of core platform services and criteria to designate gatekeepers

2.1 Definition of core platform services

37. "Core platform services" are not defined in the DMA proposal, which merely contains a list of service types, many of which are defined in other EU instruments. On the positive side, the DMA proposal seeks to build on existing legislative definitions, and therefore avoids reinventing the wheel. On the negative side, these definitions were elaborated over many years, in instruments that are not always entirely consistent with one another: throwing them in the "core platform services" basket may not provide much guidance. A general characterisation of CPS can be found in the recitals of the proposal: core platform services feature economies of scale, negligible marginal costs, strong network effects, multi-sidedness, user dependency, lock-in, lack of multi-homing, vertical integration and data-driven competitive advantages.[121] It is not clear why this general definition was not included directly in Article 2 as a chapeau to the list. Furthermore, not all services listed in Article 2(2) necessarily feature all these characteristics. In particular, several CPSs are not two-sided, such as number-independent interpersonal communication services and cloud computing services, and other CPSs are in themselves essentially one-sided because the other "side" comprises another CPS.[122] The notion of "core platform services" might therefore not age very well.

2.2 The criteria to define gatekeeper power

38. There is no clear definition of gatekeeper in EU law, although the European institutions have used the term in antitrust[123] and regulatory contexts.[124] Caffarra and Scott Morton (2021) define "gatekeeper" as "*an intermediary who essentially controls access to critical constituencies on either side of a platform that cannot be reached otherwise, and as a result can engage in conduct and impose rules that counterparties cannot avoid*." The definition can be made broader by including cases of economic dependency. For instance, according to the Expert Group for the Observatory on the Online Platform Economy (2020), dependence occurs "*if and to the extent that the business faces a high cost from switching away from the platform to a substitute. Such switching costs can arise for instance if a business has made significant platform-specific investments, such as building its technology to be compatible with the platform's specification; these investments would have to be written down ('sunk costs') and new investments made if the business were to switch to a substitute. Switching costs can also arise from the fact that any substitutes are far inferior, such as when a single platform is a gatekeeper to a given market or market segment, and there are few other means of reaching that market or segment*."

39. The "three criteria test" and the associated indicators are in line with the concepts of gatekeepers and dependencies. It is true that the test does not explicitly mention market power or dominant position (as no relevant market needs to be defined in the designation process) but the second and third criteria implicitly include the presence of market power, and several indicators to rebut the presumption are also linked to market power.[125]

120 CJEC, 9 September 2003, *Consorzio Industrie Fiammiferi (CIF)*, case C-198/01, EU:C:2003:430.

121 DMA Proposal, recitals 2 and 12.

122 For instance, the other "side" of a search engine is advertising services. A platform with both of these functions can be seen as two-sided and will have both multiple end-users and multiple business users. But it is less obvious that this is true of each function considered in isolation. This may also be true of social networks, video-sharing platform services and operating systems.

123 For instance, in case COMP/M.2876 – *NewsCorp/Telepiù*, para. 198, the Commission considered the merging parties would have been "*the 'gatekeeper' of a tool (Videoguard CAS) that may facilitate entry for any alternative pay DTH operator and of an infrastructure (the platform) that may ease the conditions for the broadcasting of pay and free TV satellite channels.*"

124 Explanatory Memorandum of the Commission Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final, 26 April 2018: "*This growing intermediation of transactions through online platforms, combined with strong indirect network effects that can be fuelled by data-driven advantages by the online platforms, lead to an increased dependency of businesses on online platforms as quasi 'gatekeepers' to markets and consumers.*"

125 This is the case in particular of user lock-in or, more generally, the different types of entry barriers.

40. However, the three criteria test for gatekeeper designation risks of being over-inclusive which, in turn, may strain the monitoring and the enforcement process as well as negatively impact the relevance and the strength of the prohibitions and obligations.[126] In drafting the proposal, the Commission services envisaged a stricter test which would require the gatekeeper to provide at least two CPSs (instead of merely one, as finally proposed).[127] This additional condition would have led to a more limited number of regulated platforms, estimated to be between 5 and 7 (instead of 10–15 under the DMA proposal). This would have the advantage of focusing the DMA on the most obvious and pressing contestability issues.[128]

2.3 The indicators to designate the gatekeepers

41. The reliance on presumptive thresholds, which are relatively easy to ascertain, will incentivise the digital platforms trying to rebut the presumption to disclose the quantitative and qualitative indicators that they know better than the Commission. However, it should be clear that these thresholds are only based on size and that size is not directly linked to gatekeeper power. In particular, the size of a platform, which is often multi-product, is not necessarily correlated with the size of the CPS itself, let alone the size of the CPS in Europe. Also, the mere number of users of a CPS does not necessarily reflect the control of a gateway. Gateway power derives more from the incentive and the ability of users to switch or multi-home between competing platforms than from the mere number of users.[129] This is why it should be possible to rebut the presumption.[130] The list of quantitative and qualitative indicators that can be used to rebut the presumption—or to designate as gatekeeper firms that fall below the presumptive thresholds—are sound and reflect the (admittedly limited) economic literature on gatekeepers. However, it is regrettable that the absence of multi-homing, which is a key indicator of gatekeeper position[131] is only mentioned in a recital (25) of the DMA proposal and not in Article 3(6). Also, as the gatekeeper concept is new in EU law and the list of indicators proposed in the DMA remains open, the Commission could enhance legal predictability by adopting guidelines on the way it will use and assess those indicators.[132]

126 Geradin (2021).

127 Impact Assessment, paras. 148 and 388.

128 Indeed, as recognised in the DMA proposal: "*As gatekeepers frequently provide the portfolio of their services as part of an integrated ecosystem to which third-party providers of such ancillary services do not have access, at least not subject to equal conditions, and can link the access to the core platform service to take-up of one or more ancillary services, the gatekeepers are likely to have an increased ability and incentive to leverage their gatekeeper power from their core platform services to these ancillary services, to the detriment of choice and contestability of these services.*": DMA Proposal, recital 14.

129 Cabral et al. (2021) and Geradin (2021).

130 In that regard the wording of the Impact Assessment, which mentions (at para. 389) that the gatekeeper presumption could only be rebutted in very exceptional circumstances, is unfortunate.

131 As explained Cabral et al.(2021).

132 Those guidelines are often adopted in competition law and in some sectoral regulation. *See*, for instance, Commission Guidelines of 27 April 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, OJ C 159, 7.5.2018, p. 1. However, those guidelines are usually based on past administrative practice and case law, neither of which are yet developed for the legal concept of gatekeeper.

3. Obligations imposed on gatekeepers of core platform services

3.1 General flexibility: Replacing the market investigation with principle-based obligations

42. The DMA proposal combines detailed rules for the existing obligations (in order to facilitate and speed up the enforcement) with broad discretion in adding new obligations (in order to adapt the DMA to rapid technological and market evolution). While flexibility in the DMA is necessary, especially because the obligations are very detailed, relying on so-called market investigations to update the obligation list may not be ideal for several reasons. On the one hand, a two-year process may be too long given the rapid evolution of the markets.[133] On the other hand, the procedure may give too much discretion to the Commission. An alternative approach that is quicker and with clearer constraints could be preferable and the regulatory design of the Unfair Commercial Practice Directive (UCPD)[134] may be a source of inspiration. To fight unfair practices, the UCPD contains a list of 35 detailed practices which are self-executing (27 misleading practices and 8 aggressive practices)[135] but also a more general definition of misleading and aggressive practices allowing the enforcer to catch new practices not (yet) identified in the list.[136]

43. Transposing this regulatory design to the DMA, a new provision could be included—after the detailed obligations (in Articles 5 and 6)—with a more principle-based prohibition.[137] This new provision could include a more generic prohibition of conduct having the object of the effect of limiting users switching or multi-homing. It could also include a more generic prohibition of conduct aiming at enveloping existing or potential competitors through bundling and self-preferencing. Moreover, to reduce the risks of over-regulation in applying those new generically defined prohibitions, a gatekeeper should be able to bring forward a defence

133 Especially since the Commission is likely to be drawn into extensive formal or informal discussions before and during the market investigation, sometimes with the intent of derailing the process given the firm two-year deadline at DMA, Art. 17.

134 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.6.2005, p. 22, as amended by Directive (EU) 2019/2161 (hereinafter "UCPD").

135 UCPD, Annex I.

136 UCPD, Art. 6(1) states: "*A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the* [key elements listed in the Directive], *and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.*" UCPD, Art. 8 states: "*A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.*"

137 The advantage of principle-based regulation; *see* Hancher and Larouche (2011).

that its conduct does not harm market contestability and fairness and, therefore, should not be prohibited.

44. Those principle-based prohibitions could replace the proposed Article 10, which is too open-ended and slow. However, if the proposed Article 10 were to be maintained, it could at least be made more symmetric, so as to allow the Commission not only to add but also to remove obligations if regulatory experience, market developments or technological evolution make existing obligations either no longer relevant or no longer effective and proportionate in achieving market contestability and B2B fairness.

3.2 Specific individualisation: Improving the specification process of the grey list obligations

45. The DMA proposal provides that the whole list of 18 Commandments applies directly and to all designated gatekeepers independently of their characteristics and business models. Thus, there is no explicit individualisation of the obligations per gatekeeper. This stands in contrast with the CMA Digital Markets Taskforce Advice to the UK government.[138] Moreover, the regulated gatekeeper cannot rely on an explicit efficiency defence or objective justification to escape the obligations.[139] In the Impact Assessment, the Commission services explain that no room was left for efficiency defences because they "*are often one-sided and do not seem to match the evidence underlying this Impact Assessment including the calls for regulation raised by an overwhelming majority of respondents to the* [open public consultations]. [They] *have also been rejected by the Courts as being unfounded*."[140] To be sure, there are two implicit and indirect possibilities of individualisation. First, half of the obligations only apply to some types of CPS (in particular marketplaces, app stores, search engines, operating systems and ad-tech services). Secondly, the grey list obligations may be specified by the Commission according to the characteristics of the CPS and the gatekeeper.[141] In this specification process which takes place in dialogue with the gatekeeper and which is to be carried out on the basis of the principles of effectiveness and proportionality, the Commission may individualise the obligations.

46. However, the specification process of Article 7 could be improved by making the possible individualisation outcomes more explicit, and by clarifying the role of the gatekeepers as well as their business users in the process. For instance, the process could be as follows:[142] (i) first, the designated gatekeeper proposes measures to implement the different obligations; (ii) then the Commission tests such measures with the business users and the competitors of the gatekeepers; (iii) finally, the Commission decides whether the measures are effective to achieve the objective of the obligation and proportionate given the characteristics of the gatekeeper. In practice, this should lead to a determination of compliant measures, done in a collaborative manner between the Commission and the regulated gatekeepers.

47. Such specification process could also provide for an explicit and well-framed defence to be brought by the gatekeepers. Such defence could be helpful because many practices in the digital economy have multiple positive and negative effects on contestability and fairness (and welfare and innovation) and there are (still) many unknowns in the competitive dynamics of digital markets. At the substantive level, the gatekeeper relying on such defence should demonstrate convincingly that a practice does not harm market contestability or B2B unfairness. This should not be, however, the DMA equivalent of an efficiency defence under competition law. In particular, it should not suffice to show that a course of conduct generates short-run efficiencies if, at the same time, it increases market power and reduces longer-term competition and innovation. Indeed, the contestability objective implies that long-term competition is favoured over short-term efficiencies. At the procedural level, the defence should be brought during the specification process and within its timeframe, so it should not delay the regulatory process.

48. Moreover, during the specification process, the Commission could also have the possibility of refraining from imposing a specific obligation to a regulated gatekeeper, on the basis of the principles of effectiveness and proportionality.[143] This is all the more important given that, under the current proposal, the flexibility clause provides that the Commission may add new obligations to the black and grey lists but cannot remove obligations.

4. Institutional design

49. As the regulated gatekeepers are large, often global, firms whose practices affect most—if not all—Member States, it is appropriate to centralise enforcement at the EU level.[144] It is also pragmatic to confer enforcement power to the Commission instead of setting up a new EU regulatory agency, which would have raised legal and political difficulties.[145] However, those important new powers of the Commission raise several issues.

138 https://www.gov.uk/cma-cases/digital-markets-taskforce#taskforce-advice.

139 As exceptions to this principle, narrow objective justifications are possible for app installing (Art. 6(1)(b)) and site loading (Art. 6(1)(c)).

140 Impact Assessment, para. 158.

141 DMA Proposal, Art. 3(7) and Impact Assessment, para. 399.

142 Also Monti (2021).

143 This is a form of "forbearance" clause, as in Electronic Communications Regulation where the NRA should only apply the obligations which are proportionate: EECC, Art. 68.

144 BEREC Opinion on the European Commission's proposal for a Digital Markets Act: For a swift, effective and future-proof regulatory intervention, BoR (21) 35, section 3.

145 In particular the old case law of the Court of Justice which considers that the EU legislature could not delegate an executive function to a newly created regulatory agency without upsetting the institutional balance of the EU Treaties: CJEC, 13 June 1958, *Meroni & Co, Industrie Metallurgiche v. High Authority of the European Coal and Steel Community*, case 9-56, EU:C:1958:7. However such case law has been softened in CJEU, 22 January 2014, *United Kingdom v. European Parliament and Council*, case C-270/12 EU:C:2014:18.

4.1 The features of the Commission as the EU digital regulator

50. If the Commission wants to become an EU-level specific regulator on the model of NRAs in other areas of sector-specific regulation, it should then partake in the prevailing EU model for NRAs, which relies on a combination of independence, accountability and expertise.[146] For one, the Commission should then be independent not only from the regulated gatekeepers (as is the case now), but also from political power: such an independence requirement may be in tension with the (geo-)political role that the Commission is increasingly eager to play. Thus, the old debate on the independence of DG Competition and the need to create a separate EU antitrust agency may come back with a vengeance as the Commission acquires more regulatory powers and, at the same time, wants to become more political. With those increasing powers, the Commission should also be increasingly accountable, which may imply more hearings of the Commission department in charge of the DMA before the European Parliament and strict judicial review of its decisions by the EU courts.

51. Finally, the Commission should also have sufficient budgetary and human resources. The Commission foresees a team of 80 FTEs by 2025,[147] but that may not be enough especially given the strict deadlines with which the Commission must comply. Also, the composition of the staff is as important as its size. Indeed, a key feature of the DMA is to give to the Commission extensive investigation powers over databases and algorithms. Those new powers will be very useful given the importance of data and algorithms in the impugned conduct. However, these investigation powers could only be exercised effectively if the Commission has the human and technical capability to analyse and interpret the large volumes and variety of data provided by the platforms.[148] Regarding human capabilities, the Commission could set up in-house dedicated teams of data analysis and AI specialists as national authorities are increasingly doing.[149] Regarding technological capabilities and following its White Paper on AI,[150] the Commission should develop its own AI tools to process the data to be analysed as is increasingly done by financial regulators[151] and by competition agencies.[152]

146 *See* Larouche, Hanretty and Reindl (2012).

147 Commission Explanatory Memorandum to the DMA Proposal, p. 11.

148 For instance, in the *Google Shopping* antitrust investigation, the Commission had to analyse very significant quantities of real-world data including 5.2 terabytes of actual search results from Google (around 1.7 billion search queries): Commission press release IP/17/1784 of 27 June 2017, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service.

149 For instance, the French authorities have set up the "Pôle d'expertise de la régulation numérique," which offers digital expertise to the French regulatory administrations, and the French Competition Authority has established a digital unit. In the UK, the CMA has set up CMA's a Data, Technology and Analytics (DaTA) unit and Ofcom has created an Emerging Technology directorate and data science team.

150 White Paper of 19 February 2020 on Artificial Intelligence – A European approach to excellence and trust, COM(2020) 65 final, p. 8.

151 For instance, the Data Science/Artificial Intelligence (Datalab) excellence hub created in 2018 within the French financial regulator. *See also* the Conference organised by the Club of Regulators in cooperation with the OECD Network of Economic Regulators, RegTechs: Feedback from the First Experiments, available at http://chairgovreg.fondation-dauphine.fr/node/708.

152 *See* Schrepel (2021).

4.2 The combined use of multiple powers by the Commission

52. The Commission should maximise the synergies between its different powers (which are based on different legal instruments) especially when they apply to the same digital platforms while being clear and predictable about how those powers will be applied and combined.[153]

4.2.1 Concurrent regulatory and competition powers

53. Once the DMA is adopted, the Commission will have concurrent regulatory and competition powers. To intervene against conduct of the digital gatekeepers which would (already) be regulated by the DMA, the Commission should rely on its DMA powers as the obligations and prohibitions are compulsory. The interesting question, however, is which route the Commission will follow when intervening against courses of conduct that are not (yet) covered by the DMA. Given the concurrency of powers, the Commission would be able to choose between competition law and the DMA. Under the former, the Commission would open an abuse of dominance case and should build a theory of harm to the requisite legal standard imposed by the EU courts. Under the latter, the Commission would launch a market investigation and then adopt a delegated act to add the course of conduct under consideration to the list of the DMA obligations. In order to do so, the Commission should prove that such conduct weakens market contestability or creates an imbalance between the rights and the obligations of the gatekeeper and its business users. This standard of intervention will have to be interpreted by the courts but, on first analysis, it may be lower for a delegated act under the DMA than the for an competition case under Article 102 TFEU.

54. It is reasonable to expect that the Commission will choose between its competition and DMA powers not only according to the type of gatekeeper conduct at play but also as a function of the ease of intervention. As the DMA intervention standard may be lower than the competition standard, we may reasonably expect the Commission to favour market investigation under the DMA over competition law enforcement when intervening against designated gatekeepers. This is not a problem as such, since the regulated platforms have gatekeeper power. However, to ensure legal predictability, the Commission should explain in advance the criteria it will use to choose between its regulatory and competition powers.[154]

153 Also Marsden and Podszun (2020).

154 In the UK, where most of the regulators have concurrent power, they have concluded MoU with the competition authority which to clarify how concurrent powers will be exercised. *See*, for instance, Memorandum of understanding of 8 February 2016 between the CMA and Ofcom on concurrent competition powers. Also Crocioni (2019).

55. To do that, the Commission may, for instance, rely on the criteria it uses to select markets for *ex ante* regulation in telecommunications.[155] Such selection is based on three criteria, and the third one in particular indicates that: "*Competition law interventions are likely to be insufficient where for instance the compliance requirements of an intervention to redress persistent market failure(s) are extensive or where frequent and/or timely intervention is indispensable*."[156] The Commission could also rely on the criteria proposed by Motta and Peitz (2020) to determine when the new EU market investigation tool (the so-called New Competition Tool as it was then mooted) would be a better route than an Article 102 TFEU enforcement action. According to the authors, this may be the case when a competition law assessment is long, complex and uncertain or when a competition law assessment would not solve a generalised problem, but just deal with one specific conduct or firm.

56. On that basis, possible criteria to favour a DMA investigation over competition law enforcement could comprise the recurrence or the prevalence of a conduct by different types of gatekeepers, or the need to intervene quickly or with remedies that require an extensive monitoring.[157] Adopting such criteria would be useful to ensure legal predictability, without, however, undercutting the responsibility of the Commission to apply EU competition law. Indeed, competition law—which is primary law—cannot legally be sacrificed on the altar of the DMA—which is secondary law. More fundamentally, given that the initial list of obligations and prohibitions found in the DMA appears largely based on experience in competition law enforcement, it may seem appropriate to continue to use competition law as the first line of intervention, in order to build up experience and "test-drive" theories of harm in actual cases before courses of conduct are enshrined in the DMA list of prohibitions and obligations.

4.2.2 DMA and DSA powers

57. Next to the DMA, the DSA proposal also aims to confer important new investigation and sanctioning power to the Commission against very large online platforms. Those platforms are defined as platforms that store information provided by, and at the request of, a recipient of a service; disseminate such information to the public; and have more than 45 million active users.[158] Therefore, some designated gatekeepers under the DMA will also meet the criteria of very large online platforms under the DSA. Those very large online platforms are subject to a series of transparency and risk assessment obligations which may have to be enforced by the Commission in cooperation with the regulatory authorities of the Member State where the platform is established.

58. Although the DMA and DSA obligations pursue different objectives, they may apply to the same digital platforms and may complement each other. Therefore, it may be helpful to clarify how the obligations imposed under the DSA (in particular the new transparency requirements on online advertising and on recommendation systems)[159] will complement and support the objectives and obligations imposed under the DMA.[160] Both types of obligations will also be enforced by the Commission, and enforcement synergies are surely possible. In particular, it could be useful to clarify how the information received during a DSA investigation could be used for a DMA investigation and vice-versa.

4.3 National authorities supporting centralised enforcement by the Commission

59. While it is justified that the Commission enforces the DMA given the small number of targeted gatekeepers as well as their size and the widespread impact of their practices, more involvement of the national authorities than currently foreseen may be needed to support centralised enforcement by the Commission. National authorities may be particularly helpful for the following tasks, for which they may have a comparative advantage compared to the Commission. First, they are more localised than the Commission, hence may more easily receive complaints from small and local business users. National authorities may receive such complaints and, when founded, forward them to the Commission for further action. Second, national authorities may have expertise and experience that can usefully support the Commission in specifying the obligations of the grey list. Indeed, several national authorities have expertise in dealing with digital platforms as well as data and algorithms; they also have experience in implementing some of the obligations of the DMA proposal such as interoperability, access to data or data portability. Third, national authorities may be closer to the "field" and may more easily monitor the correct implementation of the imposed obligations.[161]

60. It is also key that the national authorities assisting and supporting the Commission are independent from political power. While the Commission may expect

155 In the EU telecommunications regulatory framework, the "three criteria test" placing the frontiers between competition law and regulation is used to select markets for regulation but not the obligations which are imposed on those markets. In the DMA, the criteria should be used to select the obligations to be imposed but not the markets (or core platform services) on which those obligations will be imposed.

156 EECC, Art. 67(1) clarified by Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, OJ L 439, 29.12.2020, p. 23, recital 17. *See also* Never and Preissl (2008).

157 Those criteria may also be inspired by the reasons mentioned by the Commission services for the insufficiency of competition law in dealing with some structural competition problems in the digital economy: Impact Assessment Report on the DMA Proposal (fn. 138), at paras. 119–124.

158 DSA Proposal, Arts. 2(h) and 25.

159 DSA Proposal, Arts. 29 and 30.

160 Although the Impact Assessment (at paras. 410–413) calls for separation of the two enforcement mechanisms because of different objectives, competences and level of centralisation.

161 As it has sometimes been practised under the merger control: Commission Decision of 2 April 2003, case COMP/M.2876 – *NewsCorp/Telepiù*, para. 259.

such independence,[162] it is by no means guaranteed. Under the DMA proposal, the DMAC is a comitology committee whose members should be representatives from the Member States, but not necessarily from their independent authorities (NCA or NRA).[163] In practice, national representatives in comitology committees are often coming from ministries. To deal with this issue, EU competition law and most EU sectoral economic regulation provide for an additional instance next to the comitology-type committee, namely, a network or agency regrouping NCAs or NRAs, as the case may be.[164] In the same vein, the DMA could establish, next to the DMAC, a network of independent national authorities.[165] It would then be up to the Member State to decide which (existing or new) national authorities should be designated as their National Digital Markets Authority in such network.

5. Oversight and enforcement modes

61. The oversight of digital gatekeepers and the enforcement of the DMA will prove extremely difficult because the digital sector is complex and fast moving, the Commission suffers from a significant information asymmetry vis-à-vis the gatekeepers and the proposed deadlines are relatively short. Therefore, DMA enforcement could be made more collaborative (while carefully guarding against capture). It could be based on an "ecosystem of enforcement" where the regulator orchestrates DMA supervision and implementation by the platforms and their (business and end) users.[166] To achieve this, the DMA could learn much from its companion DSA proposal.

62. The DMA proposal already provides for some rules that will nudge the regulated gatekeepers to cooperate with the Commission. The gatekeeper presumption based on financial and user size will incentivise the platforms to disclose relevant information (for instance, on their user lock-in or single-homing, or entry barriers) if they wish to rebut the presumption. Similarly, the specification of grey list obligations encourages a regulatory dialogue. Also, the graduated sanctions in case of violation of the obligations foster compliance.

63. However, given the difficulty of oversight and enforcement, those rules may not be enough. They may need to be complemented with other tools. As already mentioned, the specification process of grey list obligation should more explicitly and clearly involve the regulated gatekeepers, in particular by requiring a notification of the measures they plan to take to implement the obligation. The DMA could also explicitly provide that the Commission can request that a gatekeeper test different compliance designs (A/B testing) with its users and report on their effects so the Commission could decide which measure or remedy is most effective. Moreover, the DMA could impose more internal compliance mechanisms, as it has been proposed in the DSA. Those mechanisms may include the requirement to perform a regular risk assessment of corporate practices,[167] to carry out a regular independent audit[168] or to appoint compliance officers.[169]

64. Finally, the DMA could rely more on co-regulation and codes of conduct to ensure compliance with its obligations.[170] As codes of conduct would be developed and complied with by platforms, there is a risk that such form of self-regulation becomes self-serving and/or is not well enforced. Therefore, those codes should comply with the principles for better self- and co-regulation set out by the European Commission.[171] Those principles ensure, on the one hand, that rules are prepared openly and by as many as possible relevant actors representing different interests and values and, on the other hand, that they are monitored in a way that is sufficiently open and autonomous, and are sanctioned when violated.

65. Next to the regulated gatekeepers, the Commission could also be supported by the other stakeholders, in particular by the relevant business users. Currently, the DMA proposal is silent on the very useful role that those stakeholders could play. The DMA could clarify how and when business users may lodge confidential complaints without fearing retaliation by the gatekeeper from which they depend.[172] It could also give a role to business users and end-users, as well as to providers of substitute and complementary services, in the specifications of the grey list obligations, in the market testing of commitments proposed by the gatekeepers and in the design of remedies in case of non-compliance.

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162 Impact Assessment (at paras. 192 and 409) refers to independent national authorities as members of the Digital Markets Advisory Committee.

163 Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13, Art. 2.

164 EECC, Art. 118 establishing the Communications Committee (COCOM), which is a comitology committee, and Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of the European Regulators for Electronic Communications, OJ [2018] OJ L 321, 17.12.2018, p.1.

165 This is also proposed in the BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 3.

166 *See* de Streel and Ledger (2021). *See also* French regulators, New regulatory mechanisms – data-driven regulation, July 2019; World Economic Forum (2020).

167 DSA Proposal, Art. 26. Also GDPR, Art. 35.

168 DSA Proposal, Art. 28.

169 DSA Proposal, Art. 32. Also GDPR, Arts. 37–39.

170 DSA Proposal, Art. 35. Also GDPR, Arts. 40–41.

171 Those principles are available at https://ec.europa.eu/digital-single-market/en/best-practice-principles-better-self-and-co-regulation. *See also* Finck (2018).

172 Such retaliation would then breach Article 5(d) of the DMA.

IV. Conclusion

66. In proposing the Digital Markets Act, the Commission aims to tame the gatekeeper power of the largest digital platforms in Europe and ensure more contestability and fairness in the digital economy. Ultimately, the goal of the EU institutions is to take back control over the digital economy and guarantee the autonomy and self-determination of EU business users that depend on the biggest digital platforms. While the Commission proposal should be commended as a courageous step in the right direction, it could be improved during the ongoing legislative negotiations. Two main improvements are particularly needed to ensure the effectiveness of the DMA. First, the detailed prohibitions and obligations should be complemented with more principle-based provisions, in order to bolster the resilience of the law in an economic sector which is dynamic and sometimes unpredictable. Second, while enforcement should remain centralised with the European Commission, national authorities should play a bigger role in supporting the Commission in its very difficult oversight and enforcement tasks. Moreover, enforcement modes could be more modelled on existing sectoral regulation rather than on competition law. In that regard, the DMA has a lot to learn from its companion proposal for a Digital Services Act. ■

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