The European Union's Digital Markets Act: Objectives, Operation and Opportunities

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1. Introduction

The Digital Markets Act (DMA) is the European Union's major instrument to regulate the economic consequences of market power in the digital sphere.[1] In brief, the DMA empowers the Commission to designate providers of certain digital services (e.g. operating systems, search engines and app stores) as gatekeepers when these providers are an important gateway for other firms operating in related digital markets (e.g. the provider of an application must have access to the operating system and possibly the app store that a user has on their mobile phone so that the user can download and use the application, and an ecommerce store needs to be visible on a search engine so that consumers can find it). Once a firm's digital service is designated as a gatekeeper then that firm has a set of obligations listed in the DMA with which it must comply. This is a form of ex ante regulation, which requires that gatekeepers amend their business model, sometimes quite significantly. The Commission is afforded powers to oversee compliance and impose remedies if there is a failure to comply with the obligations.

When considering how to regulate digital markets, the Commission had considered two other choices besides the DMA. One was recommended by the Special Advisers' Report requested by the Commissioner for Competition.[2] This was to adjust competition law enforcement in ways that would target digital dominance more effectively. This option was not selected because experience from existing cases revealed that this was slow, there have been appeals against decisions of the Commission, and decisions are unlikely to provide effective remedies. For example, the *Google Shopping* case started in 2010, it took seven years before a decision was issued, the case was appealed and the Court of Justice judgment is expected in late 2024, moreover there remain concerns that the remedy has been ineffective.[3] Some other competition law cases were resolved more quickly but the concern remained that antirust requires significant resources to bring a successful case. Moreover, the

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[1] Regulation 2022/1925 on contestable and fair markets in the digital sector [2022] OJ L265/1 (in the text this is referred to as the Digital Markets Act, or DMA). All documents about the DMA, including related legislation, Commission decisions and gatekeeper reports, are available at: https://digital-markets-act.ec.europa.eu/index_en

[2] J. Crémer, Y-A de Montjoye and H. Schweitzer, *Competition Policy for the Digital Era* (2019). For discussion, see Editorial comments: Special advice on competition policy for the digital era (2020) 57(2) Common Market Law Review 315

[3] N. Lomas, 'Google antitrust complainants call for EU to shutter its Shopping Ads Units' TechCrunch 18 October 2022. The Commission reports that it is monitoring compliance but it is not clear that this satisfies Google's rivals. European Commission, *Staff Working Document Accompanying the Report on Competition Policy 2022*, SWD(2023)76 final, p.57.

view was taken that some market failures could not be fixed by competition law alone because entry is blockaded.[4] The second option was to implement a so-called New Competition Tool. This would be a Regulation to empower the Commission to investigate a market, identify competition concerns, and impose a set of remedies to remove these.[5] The inspiration was the UK's market investigation powers. This would allow the Commission, for example, to consider the entirety of Google's or Microsoft's digital businesses and identify which conduct harms competition. It would fit nicely with an emerging understanding that digital services are offered within an ecosystem: a user on the Google ecosystem for example, benefits from a range of services that this firm offers. This is convenient on the one hand but may foreclose entry of rivals on the other. The concept also allows one to think about how to stimulate competition between ecosystems.[6] However, there was a concern that the New Competition Tool could also apply to any other market, not only digital, and that the scope of powers that the Commission would have been too wide. This also was abandoned and the Commission elected to propose the DMA.

The advantages of the DMA are that it allows for quick intervention (once a gatekeeper is designated it has six months to comply) and by providing very focused obligations it is expected that enforcement can be quick in cases of non-compliance. At the same time, by focusing systematically on a number of digital service markets, it takes into account the importance of regulating ecosystems.

In this chapter, a brief account of the way the DMA operates is presented with reference to the first wave of gatekeeper designation decisions in section 2. The Commission's enforcement powers are presented in section 3 along with some suggestions on how these can be used optimally. Concluding reflections on the strengths and weaknesses of the EU's regulatory approach are found in section 4.

2. The DMA in operation

2.1 Gatekeeper designation

An undertaking is a gatekeeper if it has a significant impact on the internal market, it provides a core platform service which is an important gateway for business users to reach end users and it has an entrenched and durable position.[7] An undertaking is presumed to be a gatekeeper in a given core platform service if it achieves an annual turnover of EUR 7.5 billion or above in the last three financial

[4] A. Fletcher et al, 'The Effective Use of Economics in the EU Digital Markets Act' (2024) Journal of Competition Law & Economics https://doi.org/10.1093/joclec/nhad018
[5] European Commission 'Antitrust: Commission consults stakeholders on a possible new competition tool' 2 June 2020 IP/20/977.
[6] M.G. Jacobides and I. Lianos, 'Ecosystems and Competition Law In Theory and Practice' (2021) 30(5) Industrial and Corporate Change 1199.
[7] DMA, Article 3(1)

years; where, for a given core platform service, it has 45 million active end monthly users and at least 10,000 yearly active business users in the EU; and where these numbers have been met in each of the last three years.[8] If an undertaking meets these thresholds, it must notify the Commission at the latest two months after these thresholds are met. The purpose of this approach is to speed up the identification of the undertakings to be regulated by avoiding lengthy and costly market definitions and assessments of economic power found in competition law cases.

On 6 September 2023, the Commission designated as gatekeepers six firms: Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft.[9] These firms are gatekeepers in a number of core platform services. Alphabet is the firm with the most designations (Google Play, Google Maps and Google Shopping as online intermediation services, YouTube as video sharing service, Google Search as a search engine, Android Mobile as Operating System, Alphabet's advertising services, and Google Chrome as browser), while Amazon is only designated as gatekeeper for its marketplace and its advertising services. On 1 March 2024, Booking, X and ByteDance have also notified potential gatekeeper status.[10] On 29 April 2024 Apple's iPad operating system, browser and App Store were designated following a market investigation. While it did not meet all the numerical thresholds, the Commission concluded that user numbers were predicted to rise, end-users were locked-in to the iPad and Apple can leverage its large ecosystem to make prevent end-users from switching to other operating systems for tablets, and business-users were locked-in to the iPad operating system because of the large user base.[11]

Undertakings who meet the thresholds but who consider that they should not be designated have two options. The first is to rebut the presumption by showing that they have no significant impact on the internal market or that their service is not an important gateway or that it does not have an entrenched and durable position.[12] Some undertakings had their rebuttal evidence accepted very shortly after notification, while for others the Commission opened a market investigation procedure to determine if the rebuttal evidence was sufficient.[13] At the time of writing, all the rebuttals have been successful. The Commission concluded quickly that Samsung's web browser was not a gatekeeper and that the number-independent interpersonal communications services offered by Microsoft and Alphabet were not gatekeepers. After a market investigation which lasted a little less than six months, it was decided

[8] DMA, Article 3(2)
[9] DMA, Article 3(4). European Commission 'Digital Markets Act: Commission designates six gatekeepers' (6 September 2023).
[10] European Commission, News Announcement, Booking, ByteDance and X notify their potential gatekeeper status to the Commission under the Digital Markets Act (1 March 2024)
[11] 'Commission designates Apple's iPadOS under the Digital Markets Act (29 April 2024) Press Release IP/24/2363. The legal basis for this kind of market investigation is DMA, Art 17.
[12] DMA, Article 3(5).
[13] DMA, Article 17.

that Apple's iMessage service and Microsoft's search engine Bing, its web browser Edge and its online advertising services were not gatekeepers.[14] Generalizing from the decisions, the Commission has tested whether, in spite of the high turnover and high number of users, business users depend on these services. In the case of Microsoft and Google's email services it was found that there is no dependency and that very little communications take place exclusively on the email channel of the undertaking.[15] In Samsung it was found that its browser was significantly less popular than the other two which have been designated and that Samsung is, if anything, one of the business users who depends on Google's operating system.[16] Apple's number-independent interpersonal communications services (iMessage) was not designated because user numbers were much lower than rivals and it has limited importance as a B2C communications channel.[17] Microsoft's search engine (Bing), web browser (Edge), and advertising services were significantly smaller than rivals which had been designated.[18] While all rebuttals have been successful, two things should be remembered. First, this is not an indication that rebutting the presumption is easy. The decisions that are publicly available at the time of writing show that it was very clear that the undertakings had no economic power in those markets. Second, a successful rebuttal does not last forever. If Samsung manages to gain market share and develop its browser so that in the future it becomes an important provider, for example, it may then be designated as gatekeeper.

Another way to challenge the designation is to appeal against the decision of the Commission. At the time of writing, Bytedance has contested the designation of TikTok on a number of grounds, including that it faces competitive pressure from others who are replicating its business model, and also claiming that it is a video sharing service and not, as the Commission claims, a social network.[19] Apple has questioned whether its App Store should be designated as a single product because it claims that each version is designed for a specific device (e.g. iPhone and iPad or Mac personal computer) and it also claimed that it should not be subjected to Article 6(7) obligations for its operating system as this is inconsistent with the Charter of Fundamental Rights and disproportionate.[20] Meta instead has brought

[14] European Commission, 'Commission closes market investigations in Microsoft's and Apple's services under the Digital Markets Act (13 February 2024).
[15] Case DMA.100006 Alphabet – Number-independent interpersonal communications services (5 September 2023) and DMA.100023 Microsoft – Number-independent interpersonal communications services (5 September 2023).
[16] Case DMA.100038 Samsung – Web Browsers (5 September 2023)
[17] Case DMA.10022 Apple – number-independent interpersonal communications services (12 February 2024).
[18] Cases DMA.100015 Microsoft Online search engines; DMA.100028 Microsoft Web browsers; DMA.100034 Microsoft Online advertising services (12 February 2024).
[19] Case T-1077/23, *Bytedance v Commission* (pending), TikTok, 'Appealing our Gatekeeper Designation Under the Digital Markets Act (16 November 2023).
[20] Case T-1080/23 *Apple v Commission* (pending).

a more fundamental challenge claiming that its Facebook Messenger and Marketplace services are not subject to the DMA: Messenger is said to be a feature of Facebook and not a self-standing service while Marketplace is a consumer to consumer platform and thus outside the scope of the DMA.[21] On the one hand, appeals are a necessary feature of any regulatory system at the start and help clarify the scope of the rules. On the other hand, appeals also serve to slow down the application of the regulation and hamper the effectiveness of the DMA.

2.2 Gatekeeper Obligations

At the time of writing 22 core platform services have been designated as being controlled by gatekeepers. Gatekeepers have six months from the date of designation to implement compliance measures. On 7 March 2024 the undertakings that were designated in September of the previous year announced their compliance measures. Before this date, gatekeepers have made public announcements to explain how they expect to comply. This is important because business users require some time to prepare for the new relationships they will enjoy with gatekeepers. In Table 1 below the obligations are summarized and the main beneficiary of (and interest protected by) of each obligation is set out.

TABLE 1: Obligations, and principal beneficiary and interest protected

Article	**Obligation**	**Beneficiary and interest protected**
5(2)	No combination of data without user consent	Reduce data advantage of gatekeeper, potentially allowing other businesses to enter
5(3)	Allow business users to offer the same products or services through third party intermediation channels or their own channel at prices and conditions that differ from those offered via the gatekeeper	Business users have multiple ways of reaching consumers
5(4)	No anti-steering policies: business users can communicate with end users off the platform	Business users can enter digital markets more easily

[21] Case T-1078/23, Meta Platforms v Commission (pending), J. Kastrenakes, 'Meta will fight the EU over regulating Messenger' The Verge, 15 November 2023.

5(5)	Allow end users to access digital services using a core platform service by using the software application of a business user	Business users can enter digital markets more easily
5(6)	No forbidding business users and end users to raise issues of non-compliance with relevant authorities or courts	Facilitate dispute settlement
5(7)	Do not require end users or business users to use services of the gatekeeper (e.g. web browsers and payments services)	Business users can enter digital markets more easily, end users have more choice
5(8)	Do not require business users to register for multiple gatekeeper services	Business users can enter digital markets more easily, end users have more choice
5(9)	Provide information to advertisers	Business users can determine if the service is good value for money
5(10)	Provide information to publisher about advertising services	Business users can determine if the service is good value for money
6(2)	Gatekeeper cannot use data about businesses to compete with them	Business users retain a competitive advantage
6(3)	Allow end-users to uninstall any software application on the operating system of the gatekeeper and change default settings on the operating system, virtual assistant or browser	End users can switch digital service providers
6(4)	Allow side loading: the installation of third party software applications or app stores using the gatekeeper operating system	Business users can enter digital markets more easily
6(5)	No self-preferencing in ranking	Business users can enter digital markets more easily

6(6)	Allow end users to switch software applications accessed using the gatekeeper services	End users can switch digital service providers
6(7)	Interoperability with and access to the hardware and software facilities controlled by the operating system or virtual assistant	Business users can enter digital markets more easily
6(8)	Online ad transparency	Publishers and advertisers can assess the value of the ad services provided
6(9)	End user data portability	End users can switch digital service providers
6(10)	Business users have access to data generated or provided to the core platform service provider when their services are used	Business user can improve its services
6(11)	FRAND access to rank, query, click and view data generated by end users on online search engines	Business user can enter search market
6(12)	FRAND access for business users to app stores, search engines and social networking sites	Business users can compete with gatekeeper downstream
6(13)	No disproportionate conditions for termination of service	Business users and consumers can switch
7	Horizontal interoperability for number independent interpersonal communication services	New entrants in messaging markets

As may be seen, the majority of the obligations are for the benefit of business users. By facilitating their access to the market it is expected that consumers will benefit by having more choice which should lead to better quality and price as well as innovation.[22] The reason these are listed in separate articles is somewhat arbitrary: obligations in Articles 6 and 7 may be further specified by the Commission, as we discuss below, while Article 5 obligations are supposed to be clear. As we discuss,

[22] A. de Streel, 'DMA Compass' in A. de Streel (ed) *Effective and Proportionate Implementation of the DMA* (CERRE, 2021), p.32. For other classifications, see F. Bostoen, 'Understanding the Digital Markets Act' (2023) 68(2) Antitrust Bulletin 263, P. Ibáñez Colomo, *The New EU Competition Law* (2023) ch.5

all provisions raise complex interpretation issues. Article 7 was inserted late in the legislative process and this is the only obligation with a timetable for compliance: in the beginning interoperability is only expected for end-to-end messaging and sharing of images and files between two individual end-users, while messaging within groups of users is only expected two years after designation and voice calls withing four years of designation. This recognizes the technological complexity of this obligation.

The purpose of the obligations is twofold: to achieve more contestability and fairness in markets. It is worth spending some time discussing these two general aims first before going to examine some of the obligations. Fairness is meant to be enhanced in the relationship between business users and gatekeepers. Gatekeeper conduct is unfair when it results in "an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage."[23] The concern is that business user are dependent on the gatekeeper who can as a result treat them poorly. An app developer needs access to an app store, and a new search engine needs access to an operating system for example. The app stores can take advantage of their position to extract high fees from businesses.

Contestability is defined as "the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services."[24] There are two types of contestability: first a rival can compete to replace a gatekeeper – for example a new browser could enter and become more popular than Chrome or Safari. For this to occur, the gatekeepers in the operating system and app store markets would have to ensure that users are able to find and download the new browser. This access stimulates inter-platform competition. A second type of contestability is when a rival competes with the gatekeeper on a related market. For example, Spotify competing against iTunes. In this situation Apple may have incentives to make its music store more easily accessible to users, thereby strengthening its position in the Apple ecosystem. This intervention stimulates intra-platform competition: the gatekeeper is not displaced but it is regulated to facilitate the entry of other business users.[25]

Each of the 22 obligations raises complex issues of interpretation. It is worth remembering that not every gatekeeper is bound by every obligation. For example, Article 6(11) only applies to Google at present because it is the only online search engine that has been designated. No other core platform service is bound by this provision. Conversely, a provision like Article 5(6), by which gatekeepers cannot prohibit business and end users to make complaints, applies to each gatekeeper. Space prevents a full

[23] DMA, Recital 33.
[24] DMA. Recital 32.
[25] F. Bostoen, 'Understanding the Digital Markets Act' (2023) Antitrust Bulletin 68(2) Antitrust Bulletin 263.

discussion of obligations, and two are selected to give an impression of the legal issues that arise and how the concepts of fairness and contestability can be used to help interpreting the obligations.

Article 5(2)(a) is particularly important for business models which rely on providing free services to end users: these providers collect data which is used to sell advertising on its platform. Business want to advertise because the data allows gatekeepers to promise personalized advertising which is valuable because it can result in greater sales of the products that are advertised. If a gatekeeper collects data from multiple services that it offers and combines this data, then that gatekeeper gains a significant competitive advantage over any rival wishing to enter the same digital market as the gatekeeper or any other market by relying on an advertising model. Article 5(2)(a) requires that unless the user consents, the gatekeeper may not process personal data of the end user which they make available when using the services of third parties who make use of the gatekeeper's core platform services if that processing is for the purposes of providing online advertising services. The thinking behind this prohibition is that a gatekeeper will obtain less data and this would create a more level playing field with other service providers who use data collection as a business model. The aim therefore is to make digital markets more contestable. However, there are some difficulties in applying this provision effectively. The first is that users must be presented with a choice whether to allow the use of data or not. How this choice is presented to users and how it is designed matters. If a gatekeeper advises end users that if they do not consent they will receive less valuable services, this will encourage more people to consent but it may be an infringement of the DMA. In particular, Article 13 of the DMA prohibits gatekeepers from circumventing the obligations. One specific example of circumvention is 'offering choices to the end-user in a non-neutral manner.'[26] But even if the gatekeeper does not try and influence that choice with a message that strongly advises the end user to consent, there may be other ways of making consent less effective by the way in which the choices are designed. For example, if the default is that data is collected, consumers may stick to that default even if asked to change it. Accordingly it may be argued that the consumer should opt in to data sharing rather than be asked if they wish to opt out. In addition to difficulties in designing the right compliance mechanism in terms of choice, Article 13 also provides that the gatekeeper cannot 'degrade the conditions or quality of any of the core platform services provided to … end users who avail themselves of the rights or choices laid down in Articles 5, 6 and 7.'[27] This means that a gatekeeper has to offer its service in two different ways: one type of service where data is not collected, whereby the end user receives a less personalized service, and one where the user receives a more personalized service because they have

[26] DMA, Article 13(6).
[27] DMA, Article 13(6).

consented to more data being collected. The question arises about what kind of quality the end user should be expected when refusing consent. A gatekeeper could justify reducing the quality of the service if, absent the user's consent to data being used, a particular service cannot be offered. What would happen if a gatekeeper were to decide that if a user refuses to consent to data sharing then the service is provided with 50% more advertisements than for users who consent? The business logic for the gatekeeper is as follows: if a user consents to data sharing for advertising purposes then the gatekeeper can sell the possibility of personalized advertisements which are more valuable. If the user does not consent then the advertiser finds it less valuable to place an ad for such a user and will pay less. By doubling the amount of advertising space, the gatekeeper can maintain its profits. However, this might be judged an inferior product because the user is inconvenienced and this measure may not comply with the DMA.[28]

A second illustrative obligation is that found in Article 6(3). This obligation applies only to operating systems gatekeepers (in the mobile phone sector these are Android and iOS). Each of these is a gatekeeper because consumers who own a device do not multi-home operating systems: each device has a single one and there is limited switching of devices from one operating system to another because an operating system is part of a wider ecosystem of services and users are therefore reluctant to switch. Moreover there seems to be limited competition between Apple and Android.[29] Under Article 6(3) the gatekeeper must allow users to 'easily un-install any software applications on the operating system.' Moreover, if there are some default settings which are found either on the operating system or on the virtual assistant or web browser of the gatekeeper that direct or steer end users to the gatekeeper products then the gatekeeper must afford the user a choice to switch. The logic is to reduce the gatekeeper's ecosystem power by allowing a user to opt for using different browsers and search engines. The objective is clear but implementation may be tricky: the gatekeeper will have to provide a choice screen of the 'main available service providers'. It is not clear how these providers are selected and it is not clear what an effective choice screen will look like. If a user is presented simply with a list of alternative browsers, will they have sufficient information to choose? What are the incentives for users to inform themselves, in particular when they are used to an ecosystem whereby all services are integrated and it works well enough? The DMA places a lot of emphasis on the consumer making active choices to move away from the services provided by gatekeepers but it remains to be seen if they will take advantage of these options. Much here hinges on monitoring the kind of choice architecture that gatekeepers provide: are they designing choice

[28] For further discussion, see A. de Streel and G. Monti 'Data-Related Obligations in the DMA' in de streel (ed) *Implementing the DMA: Substantive and Procedural Aspects* (CERRE, 2024)
[29] CMA, Mobile Ecosystems – Market Study final report (2021) ch. 3.

boxes that allow users to make well-informed decisions?[30] These are not easy decisions for the Commission to take.

It should be noted that the obligations that gatekeepers have must be implemented and there are limited ways for the gatekeeper to argue that they are not bound by the DMA. Notably, there is no 'efficiency defence' like that in competition law. In other words, the gatekeeper cannot claim that it will refuse to offer end users a choice of browsers because consumers gain from having a default browser installed. The only defences are of a technological or public interest nature. The first defence is found in some of the obligations themselves, like in Article 6(3) that has been discussed above. The gatekeeper can make the claim that some applications cannot be uninstalled by end users when these are 'essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third parties.'[31] The wording suggests that this is a narrow exception. The second defence is found in Article 9 where the gatekeeper can ask the Commission to suspend the application of an obligation when compliance 'would endanger, due to exceptional circumstances beyond the gatekeeper's control, the economic viability of its operation in the Union.'[32] Observe that this is limited in time and while it may be extended, the expectation is that at some point in the future, the economic conditions will allow full compliance. The third and final defence (found in Article 10) is if the gatekeeper shows that compliance creates a risk to public health or public security.

In sum, while the DMA sets out per se prohibitions, there is a lot of room for gatekeepers to design compliance in a manner they deem fit. This creates incentives to comply creatively to deny entry or rivals and difficulties for the Commission to examine whether the way a gatekeeper has complied is adequate. This requires an innovative style of compliance and enforcement, which we discuss below.

3. DMA enforcement

3.1 The responsibilities of the gatekeeper

The gatekeeper 'shall ensure and demonstrate compliance' with the obligations in the DMA.[33] To do this, it is obliged to publish a compliance report describing the measures it has taken.[34] In addition, it must establish a compliance function: persons who are independent of the operational functions of the gatekeeper and who are expected to have sufficient authority and resources to monitor

[30] A Fletcher, 'Behavioral Insights in the DMA: A Good Start, But How Will the Story End?' CPI TechREG Chronicle (October 2022).
[31] DMA, Article 6(3).
[32] DMA, Article 9(1).
[33] DMA, Article 8.
[34] DMA, Article 11.

compliance from within the corporation.[35] The compliance team inside the undertaking will organize and monitor compliance measures as well as advise management and employees on compliance. Taken together, these obligations mean that gatekeepers are expected to be the first to self-assess regularly whether their efforts to comply with the DMA are effective. It is important that the Commission facilitates and encourages the use of these techniques for the following reasons: the gatekeepers know their business best and are better placed to make technical adjustments to their services than the Commission, the quicker compliance occurs the better, and by requiring the compliance officer to oversee the implementation of the obligations, the gatekeeper is able to adjust its business quickly if it seems that the way it has implemented an obligation is not working well. In order to stimulate this kind of virtuous conduct, the Commission should consider offering some rewards for gatekeepers who make good efforts to comply. For example the Commission could encourage the gatekeepers to engage in constructive dialogue with the business users and consumers who are expected to benefit from the DMA – a reward for this proactive effort to comply can be that the gatekeeper avoids fines if there is no compliance.[36] The Commission has facilitated dialogues between gatekeepers and business users in the run up to the DMA but it is not clear how frequently gatekeepers have discussed matters with business users in private even if this seems essential to ensure some of the obligations are implemented effectively.

On 7 March 2024, the six firms that were designated gatekeepers in September have submitted these compliance reports. The Commission set up a series of workshops where these compliance reports were discussed with interested parties – business users and consumers. The purpose of these workshops seemed to be to enable users to gain a better understanding of the opportunities they have available now. It may well be, however, that a gatekeeper adjusts its compliance in response to comments it receives as well. After all, the DMA's novelty suggests that some efforts at compliance may be tentative at first. On 25 March 2024 the Commission opened its first non-compliance investigations against Alphabet, Apple and Meta for some of their obligations. It has also adopted orders requiring many other gatekeepers to retain documents, indicating further investigations are likely.[37] Three things should be kept in mind: first, the Commission is able to start proceedings against one gatekeeper either for infringing a single provision or multiple. This is at the Commission's discretion. Second, nothing prevents the gatekeeper from adjusting its compliance pending the Commission decision and this may lead to the case being closed. Third, the speed with which the

[35] DMA, Article 28.

[36] R. Feasey and G. Monti, 'DMA Process and Compliance' in A. de streel (ed) *Implementing the DMA: Substantive and Procedural Principles* (CERRE, 2024)

[37] Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act (25 March 2024) Press release IP/24/1689.

Commission took these steps indicates a willingness to ensure that the benefits of the DMA are felt quickly: this can reveal the added value of the law to stakeholders and may also serve to encourage gatekeepers to comply effectively knowing enforcement is highly likely.

One significant aspect of the gatekeeper's obligation is that the measures 'shall be effective in achieving the objectives of this Regulation and of the relevant obligation.'[38] This raises a number of questions. First, how can one determine whether a measure is effective in achieving the objectives of the relevant obligation? Consider the obligation to allow consumers to select how far their data may be used by the gatekeeper found in Article 5(2). The gatekeeper will have to provide a choice screen where the consumer can decide on the settings he or she prefers. Is effectiveness judged solely by considering how well designed and clear the choices are (a procedural approach to effectiveness)? Or is effectiveness to be judged by how many people opt out of sharing their data (a substantive approach to effectiveness)? The former is relatively easier to test, but the latter may be more relevant for the purposes of the Commission because it is only if sufficient consumers opt out of giving a gatekeeper their data that markets may become more contestable and fair by reducing the gatekeeper's data advantage. The second question is what it means for compliance to achieve the objectives of the Regulation as a whole. A possible answer here is that when a gatekeeper has multiple obligations, then all of these should be implemented in a consistent manner. For example, some provisions of the DMA work together to allow side-loading: a consumer should be able to install an application on their mobile device without using the gatekeeper's app store. For this to work the business user who wants to promote side-loading will benefit from Article 5(3), which allows it to offer different terms than those it sells on the gatekeeper's app store, Article 5(4), which allows it to communicate directly with the end consumer and inform them of the opportunity of side loading, and Article 6(4) which allows side-loading. In other words, compliance with the objectives of the Regulation means that the implementation of the obligations taken as a whole should stimulate the kind of contestable market the Commission has in mind, in this example, the entry of rival app stores and the opportunity of business users to bypass the costs faced by selling exclusively via the app store.

3.2 The Powers of the Commission

The DMA replicates the enforcement structure found in competition law, but it also adds other powers that may be used in the alternative to secure compliance. If one assumes that firms wish to comply with the law, then the regulator should first use powers that are designed to stimulate compliance and

[38] DMA, Art 8(1).

only when these do not work should it move to select ever tougher punitive measures. This approach seems to be present in the DMA but it remains to be seen if it is adopted.[39]

If we apply this approach, by which the Commission starts with soft measures to secure compliance, then the first action the Commission may take is to engage in a dialogue with a gatekeeper and either informally advise it on how to comply or more formally, it can begin proceedings and either cease these proceedings once the gatekeeper complies or issue a specification decision by which the Commission sets out how an obligation should be implemented.[40] Gatekeepers may also request a specification decision for obligations found in Articles 6 and 7. The reason for allowing the gatekeeper to make this request is that these obligations may not be easy to interpret and a channel for receiving official guidance was opened. The advantage of a specification decision is that the gatekeeper is safe from infringement actions if it implements it unless there is a change in circumstances or the measures are later found to be ineffective.[41] On the other hand a gatekeeper may be reluctant to seek such guidance because it limits its freedom to design the core platform service in the way it prefers. Before a specification decision is issued, third parties are able to comment, which can serve as a way for the Commission to better understand whether the measures it proposes to set out are compliant.[42] Importantly, it is for the gatekeeper to come up with a first draft of measures for the Commission to assess, and not for the Commission to design a compliance measure from scratch.

If these informal and formal ways of securing compliance do not work, then the Commission has the power to impose interim measures in case of urgency and the power to issue a non-compliance decision.[43] In a non-compliance decision "the Commission shall order the gatekeeper to cease and desist with the non-compliance within an appropriate deadline and to provide explanations on how it plans to comply with that decision."[44] Again, the initiative of designing compliant measures is with the gatekeeper. This is also the approach the Commission has taken in some of its competition law decisions in digital markets. It is said that this has two advantages: first the firm is free to adjust its conduct in the manner it considers to be least disruptive and second it avoids the risk of the Commission imposing remedies that are disproportionate.[45] A fine may also be imposed in this instance, which, like in competition law, may not exceed 10% of the undertaking's total worldwide

[39] G. Monti, 'The digital markets act: Improving its institutional design' (2021) 5(2) European Competition and Regulatory Law Review 90.
[40] DMA, Article 8(2).
[41] DMA, Article 8(9). In these circumstances a fine is unlikely to be issued.
[42] DMA, Article 8(6).
[43] DMA, Articles 24 and 29(1).
[44] DMA, Art 29(5).
[45] V. Bottka, L. Repa and E. Rousseva 'Ordinary Procedure: From Initiation of Proceedings to the Adoption of a Final Decision' in E. Rousseva (ed) *EU Antitrust Procedure* (2030), para 6.109.

turnover.[46] However, a fine of up to 20% of annual turnover may also be imposed where the gatekeeper has committed the same or similar infringement in relation to the same core platform service in the preceding eight years.[47] This serves to punish recidivism and is expected to strengthen the deterrent effect of fines.

Finally, the Commission can take additional steps if it considers that the gatekeeper has engaged in systematic non-compliance. This is defined as a setting where (i) the Commission has issued at least three non-compliance decisions against a gatekeeper in relation to any of its core platform services within the past eight years, and (ii) 'it has maintained, strengthened or extended its gatekeeper position.'[48] This is a scenario where the Commission has the power to step in and impose its preferred remedies. It is also under a duty to review these remedies to ensure that they work and may modify them if they are found to be non-effective.[49] The Commission may impose any behavioral or structural remedy it considers necessary. It appears unlikely that the Commission will ever use this provision to order the breaking up of a US firm, asking it to sell off its search engine, for example. This may be legally possible but politically impractical.[50] The great powers that the Commission has to impose its own remedies are balanced in two ways. First, the Commission must prove via a market investigation that the conduct of the undertaking has had some effects on the market. Second, the parties may at any moment propose commitments to resolve the Commission's concerns.[51] The Commission retains a discretion on whether to accept these if it considers that they ensure effective compliance with the DMA. Nothing prevents the undertaking from making more than one attempt to offer commitments.

Above the menu of enforcement choices that are available has been provided. As indicated, one enforcement strategy could be to start by persuasion and only escalate when the gatekeeper is unwilling to comply. However, it may take the view that a particular gatekeeper is unwilling to cooperate and therefore non-compliance proceedings may start immediately. with a view to imposing a fine. There is another choice which the Commission has to make, which is what cases to prioritise. The Commission will have some information from the compliance reports and it will also receive complaints from business users and consumers. Some national competition authorities will also serve as points of contact for complaints and some may have powers to carry out investigations, even if the

[46] DMA, Article 30.
[47] DMA, Article 30(2).
[48] DMA, Articles 18(1) and (3).
[49] DMA, Article 18(8),
[50] Consider for example the fierce political backlash when the Commission intervenes in mergers of US firms. See E.M. Fox, GE/Honeywell: The U.S. Merger that Europe Stopped - A Story of the Politics of Convergence in E.M. Fox and D. Crane (eds) *Antitrust Stories* (2007).
[51] DMA, Article 25.

Commission has exclusive competence. However, it cannot be expected that the Commission will investigate everything that happens, because it simply lacks the resources to do so. Accordingly, it will have to establish some priorities. One way of doing so is to carry out a cost-benefit analysis that takes into account how costly it is to identify an infringement, the probability of finding an infringement and the benefits of enforcement.[52] For example, it may be more beneficial for the Commission to investigate cases where there is a breach of an obligation that has a greater adverse effect on the market. There will also likely be a political consideration when selecting cases: the Commission will be eager to win some early cases to demonstrate the value of having the DMA regulating conduct. Priorities are particularly important because the Commission is the exclusive enforcer of the DMA. National competition authorities may be called upon to assist in identifying possible infringements and collecting evidence but they lack direct enforcement powers.[53]

Finally, when it comes to enforcement, there are two general principles that should be borne in mind: effectiveness and proportionality.[54] In all of its choices the Commission has to ensure that the outcomes are likely to secure contestability and fairness. Second, what remedies are offered by the parties or imposed by the Commission, must be proportionate. This places an important limit to the powers of the Commission. Consider for example a situation where the gatekeeper is required to offer a choice screen to users to select their default search engine (as provided in Article 6(3)) and it is found that few users switch to the search engine of rivals because the gatekeeper sets a warning if a user does not choose its search engine. This would be non-compliance. An effective remedy might be one where the gatekeeper removes its search engine from the choice screen: then users will definitely switch. But this would be a disproportionate remedy because the same objective can be achieved with a less restrictive measure – for example simply prohibiting the gatekeeper from putting warning signs if the user opts for a search engine which is not the gatekeeper's. Removing the gatekeeper's search engine from the choice screen would deprive users of a service that many have selected in the past because of its quality.[55]

4. Prospects for the DMA

[52] J. Crémer, D., Dinelli, P. Heidhues, G. Kimmelman, G. Monti, R. Podszun, M. Schnitzer, F. Scott Morton and A. de Streel, 'Enforcing the Digital Markets Act: institutional choices, compliance, and antitrust' (2023) 11(3) Journal of Antitrust Enforcement 315.

[53] This creates some tension between EU and national competition law, especially with those Member States that have amended them to better address digital markets, see A.C. Witt, 'The Digital Markets Act: Regulating the Wild West' (2023) 60(3) Common Market Law Review 625.

[54] See for example DMA, Articles 8(7) and 18(1).

[55] See generally Fletcher et al (above n 4).

The legislation discussed in this article is an innovative attempt to address competition problems in the digital sector. It remains to be seen if this will be a success. On the positive side, the enforcement architecture is expected to bring faster changes to the conduct of gatekeepers. This itself can be useful because it creates more opportunities for new entry. The ability of the Commission to monitor how gatekeepers comply is also valuable as the gatekeepers can be steered or required to modify their conduct if their compliance efforts are insufficient. Another benefit of the DMA is that it has a built in set of processes to correct its regulatory targets. The Commission may decide to update the obligations, for example by extending an obligation that presently applies only to one type of core platform service to others (e.g. extending the ban on self-preferencing to other services).[56] It can also open a market investigation to identify whether an undertaking providing core platform services who does not qualify under the quantitative thresholds should be designated because it has sufficient economic power.[57]More radically, a market investigation may also be opened to determine if new services and new practices should be added. This allows the Commission to address any risk of under-enforcement relatively quickly. Unfortunately, the DMA does not explicitly provide for the powers to remove certain obligations if it is proven they are unnecessary or harmful. Such a removal can only occur by legislative amendment.[58] Nevertheless, the flexibility provided by these rules serves to make the DMA adaptable to changes in technology.

However, there are some weaknesses in the DMA. The first is that the Commission will never have sufficient resources to monitor all obligations equally closely, so some under-deterrence is likely to occur. More specifically looking at the obligations and gatekeepers, it is not clear how easy it will be to achieve contestability. For example, how we can envisage a new search engine to be able compete against Google whose market shares in the EU are around 90%. The DMA tries to inject competition by allowing users to choose alternatives and by allowing rivals to buy search results data from Google. However, the only realistic entrant seems to be Microsoft's Bing. This would mean replacing a monopoly with a duopoly, but not increasing contestability in search. Or consider app stores: the best rival would be another established app store. This means that Alphabet might consider requiring that Google Play be installed on Apple. Users of Apple devices would then choose between two app stores. But both of these are already gatekeepers, again this may not be the kind of contestability the EU would like to see. In particular in these two examples suggest that the possible winners of the DMA are other large US tech companies. For those who saw the DMA as an instrument of industrial policy which would penalize US firms and favour the emergence of EU digital giants, this outcome would be

[56] DMA, Article 12.
[57] DMA, Article 17.
[58] DMA, Article 53(3).

a serious disappointment. However, many business users see the DMA as an opportunity for growth and the next few years will reveal how far the DMA can transform the landscape of digital markets and if it will do so for the better. For example, we may see the emergence of app stores catering for specific consumers, like those who play video games. And the choice screens may encourage more consumers to switch to search engines and browsers that offer greater privacy safeguards. The extent to which artificial intelligence will revolutionise the provision of some digital services means that the Commission will have to be watchful for the pro-competitive opportunities and anti-competitive risks that this new technology will bring.[59]

[59] Competition and Markets Authority, AI Foundation Models: Update Paper (11 April 2024). https://www.gov.uk/government/publications/ai-foundation-models-update-paper