DMA@1

DE STREEL, Alexandre; Feasey, Richard; Monti, Giorgio

Publication date:
2025

Document Version
Publisher's PDF, also known as Version of record

cerre Centre on Regulation in Europe

DMA IMPLEMENTATION FORUM

DMA@1: LOOKING BACK AND AHEAD

March 2025

Richard Feasey
Giorgio Monti
Alexandre de Streel

cerre

DMA Implementation Forum

DMA@1: Looking Back and Ahead

Richard Feasey
Giorgio Monti
Alexandre de Streel

March 2025

As provided for in CERRE's bylaws and procedural rules from its "Transparency & Independence Policy", all CERRE research projects and reports are completed in accordance with the strictest academic independence.

The project, within the framework of which this report has been prepared, received the support and/or input of the following CERRE member organisations: ACM, Amazon, Apple, Arcep, Aspiegel, CnaM, Epic Games, Google, Media for Europe, Microsoft, Ofcom, and Qualcomm. However, they bear no responsibility for the contents of this report. The views expressed in this CERRE report are attributable only to the authors in a personal capacity and not to any institution with which they are associated. In addition, they do not necessarily correspond either to those of CERRE, or of any sponsor or of members of CERRE.

The authors would also like to thank their colleagues Marc Bourreau, Jan Kramer and Amelia Fletcher for their extremely useful comments in drafting the report. The authors benefitted also from the very helpful assistance of Max van Iersel in carrying out the interviews that form the basis of this paper.

info@cerre.eu – www.cerre.eu

Table of Contents

About CERRE

Providing high quality studies and dissemination activities, the Centre on Regulation in Europe (CERRE) is a not-for-profit think tank. It promotes robust and consistent regulation in Europe's network, digital industry, and service sectors. CERRE's members are regulatory authorities and companies operating in these sectors, as well as universities.

CERRE's added value is based on:

- its original, multidisciplinary and cross-sector approach covering a variety of markets, e.g., energy, mobility, sustainability, tech, media, telecom, etc.;
- the widely acknowledged academic credentials and policy experience of its research team and associated staff members;
- its scientific independence and impartiality; and,
- the direct relevance and timeliness of its contributions to the policy and regulatory development process impacting network industry players and the markets for their goods and services.

CERRE's activities include contributions to the development of norms, standards, and policy recommendations related to the regulation of service providers, to the specification of market rules and to improvements in the management of infrastructure in a changing political, economic, technological, and social environment. CERRE's work also aims to clarify the respective roles of market operators, governments, and regulatory authorities, as well as contribute to the enhancement of those organisations' expertise in addressing regulatory issues of relevance to their activities.

About the Authors

Richard Feasey is a CERRE Senior Adviser, an Inquiry Chair at the UK's Competition and Markets Authority and Member of the National Infrastructure Commission for Wales. He lectures at University College and Kings College London and the Judge Business School. He has previously been an adviser to the UK Payments Systems Regulator, the House of Lords EU Sub-Committee and to various international legal and economic advisory firms. He was Director of Public Policy for Vodafone plc between 2001 and 2013.

Giorgio Monti is a CERRE Research Fellow and Professor of Competition Law at Tilburg Law School. He began his career in the UK (Leicester 1993-2001 and London School of Economics (2001-2010) before taking up the Chair in competition law at the European University Institute in Florence, Italy (2010-2019). While at the EUI he helped establish the Florence Competition Program which carries out research and training for judges and executives. He also served as Head of the Law Department at the EUI. His principal field of research is competition law.

Alexandre de Streel is the Academic Director of the digital research programme at CERRE, professor of European law at the University of Namur and visiting professor at the College of Europe (Bruges) and SciencesPo Paris. He sits in the scientific committees of the Knight-Georgetown Institute (US), the European University Institute-Centre for a Digital Society (Italy) and Mannheim Centre for Competition and Innovation (Germany). His main research areas are regulation and competition policy in the digital economy (telecommunications, platforms and data) as well as the legal issues raised by the development of artificial intelligence. He regularly advises the European Union and international organisations on digital regulation.

Executive Summary

One year of implementing the DMA has already delivered some concrete results, opening opportunities for business users and increasing choice for end-users. However, *Roma non uno die aedificata es*t and indeed, this first year shows that DMA implementation is a complex task, with both regulators and those being regulated learning as they go. The process has proven challenging, and the current geopolitical context has added further pressures. This report looks back and reflects on the initial implementation, identifying both strengths and weaknesses. Based on this experience, the report looks ahead and offers policy recommendations aimed at improving the DMA implementation process and at fostering better cooperation between the EU and national regulators involved. Additionally, the report provides recommendations for preparing the 2026 evaluation of the DMA.

Improving the Implementation Process

We start by making recommendations to increase transparency, improve legal predictability, streamline institutional arrangements, and ultimately build greater trust among all stakeholders. Our recommendations aim to foster an efficient, transparent, and collaborative regulatory approach, ultimately leading to better compliance of the DMA. Ultimately, trust among stakeholders must be strengthened to avoid delays, ensure cooperation, and facilitate compliance.

Greater Transparency: The current lack of systematic direct multi-lateral dialogue between gatekeepers, business users, and the Commission hinders transparency and causes delays. To address this, the Commission could facilitate regular meetings and online forums, ensuring more direct engagement between all parties and using the tools which businesses themselves use. Additionally, compliance reports could be more standardised and updated more frequently as compliance evolves, with business users able to access confidential information under NDAs. Relatedly, the visibility and the role of compliance officers could be strengthened. Finally, the establishment of inclusive governance mechanisms (with standards, certification and dispute resolution tools) would facilitate the effective implementation of the DMA access type obligations.

More Legal Predictability: Learning from its first year of experience, the Commission could now develop priorities for DMA enforcement, clearer guidance on compliance objectives and acceptable measures. Moreover, specification decisions could be used more proactively to clarify compliance expectations, reducing uncertainty for gatekeepers and business users alike.

Improving Institutional Arrangements: We also suggest merging the DMA teams within the Commission and creating an independent entity, free from political influence, with its own budget and identity. This integrated entity should work closely with the other Commission departments responsible for connected policies, such as consumer protection, intellectual property or data protection and cybersecurity. Moreover, national authorities should be more involved in advocacy and preliminary assessments, with a clearer division of tasks between the Commission and national agencies.

Strengthening Regulatory Cooperation

As the digital rulebook has grown substantially within the EU and the Member States, many authorities are now tasked with overseeing various aspects of digital platform operations. To deal with this, we recommend enhancing regulatory cooperation both at the national and EU levels.

At the national level, the authorities could establish networks and work closely together to develop a shared understanding of the digital ecosystems; on that basis, they could develop coordinated general policy approaches and make consistent individual decisions.

At the EU level, a harmonised approach to regulating digital markets is necessary to avoid the application of parallel national laws. The DMA has several mechanisms in place for collaboration between the Commission and national authorities, in particular the Digital Markets Advisory Committee and the DMA High-Level Group. Their roles could be enhanced for greater transparency and stakeholder involvement. Additionally, the High-Level Group's composition could be expanded to include ENISA to address cybersecurity concerns. In the long term, we recommend the establishment of a European System of Digital Regulators, which would consist of a European Digital Authority (EDA) responsible for direct enforcement of laws under the digital rulebook, including the DMA, and a network of National Digital Regulators. The EDA would handle high-level decision-making and enforcement across the EU, while national regulators would retain significant roles in implementing decisions and monitoring compliance at the Member State level.

Preparing the DMA Evaluation

Finally, we make recommendations to prepare the evaluation of the DMA along three dimensions.

Who Will Do the Evaluation? The Commission is responsible for conducting the evaluation but this creates a potential conflict of interest as the Commission is also enforcing the DMA. To address this, we propose that an independent body, such as the Court of Auditors or a dedicated high-level group, be involved in preparing a report to inform the Commission's evaluation. The draft Commission evaluation could undergo public consultation before finalisation, ensuring sufficient independence and expertise in the evaluation process.

What Will Be Evaluated? The evaluation will focus on the effectiveness, efficiency, and consistency of the DMA's implementation.

- Effectiveness: this will examine whether the DMA meets its objectives (such as contestability, fairness, and internal market) for the core platform services and ultimately increase innovation and users benefits. The evaluation must also identify trade-offs and unintended consequences, such as potential impacts on consumer experience, privacy or security;
- Efficiency: this will assess the adequacy of the DMA's implementation process, which as explained above, could focus on transparency, legal predictability, as well as governance and trust-building mechanisms among stakeholders;
- Regulatory consistency: the evaluation will assess how well the DMA aligns with other components of the EU digital rulebook, particularly in terms of the consistency of objectives and regulatory coordination.

Which indicators and data need to be collected? To ensure a comprehensive evaluation, quantitative indicators regarding market outputs (i.e., whether the opportunities opened by the DMA are taken up) and qualitative indicators must be established. Then data will need to be collected from multiple sources, including gatekeepers' compliance reports, business and end-users, civil society, the Commission services, the national regulators (through the DMA High Level group and ENISA), consumer surveys, and independent academic or commercial research.

Issue Paper

Policy Recommendations to Improve DMA Process and Institutions

March 2025

1. Introduction

One year of implementing the DMA has already delivered some concrete results, opening opportunities for business users and increasing choice for end-users.[1] The process has nevertheless proven more challenging than anticipated, as few prohibitions and obligations have been self-executing. This is not surprising, given that the DMA applies to markets that are both complex and evolving, many of which have not been regulated previously. In some cases, gatekeepers also lack the incentives to self-enforce. Additionally, every new law contains provisions that require clarification through administrative processes and, potentially, judicial interpretation. The current geopolitical context further complicates the task of implementation.

In Section 2, we explain how some of these challenges can be addressed, drawing on lessons learned during this first year of experience. Specifically, we focus on increasing transparency, improving legal predictability, streamlining institutional arrangements, and ultimately building greater trust among all stakeholders. Having (and being perceived to have) robust processes for implementing and enforcing the DMA in a predictable and de-politicised manner is important as many of the DMA obligations are not self-executing and are even more critical in today's increasingly tense international geopolitical environment.

The DMA is also a key part of the broader European digital rulebook, which has expanded significantly over the past five years. It is therefore crucial that the DMA is implemented consistently with the other laws in this rulebook, maximising synergies and minimising potential conflicts. As discussed in Section 3, this requires close coordination between the EU and national regulators overseeing the DMA and other aspects of the digital rulebook.

Finally, due to its complexity and novelty, the implementation of the DMA may lead to unintended consequences, and some prohibitions or obligations may need to be refined to effectively achieve their goals. For this reason, as outlined in Section 4, the DMA should be subject to a thorough and independent evaluation. If necessary, the EU institutions should be ready to adjust the rules and/or their implementation based on the outcomes of that evaluation.

[1] https://digital-markets-act.ec.europa.eu/about-dma_en

2. Improving the Implementation Process

2.1. Greater Transparency

Multi-lateral Regulatory Dialogue

To date there has been, to our knowledge, limited dialogue directly between gatekeepers and business users, or as part of a multi-lateral dialogue involving gatekeepers, business users and the Commission. This lack of dialogue reduces transparency and introduces delays because gatekeepers and business users both find themselves having to engage bi-laterally with the Commission and the Commission finds itself acting as an intermediary between gatekeepers and business users.

To increase and improve multi-lateral dialogue will require the **Commission taking a more active convening role by organising physical meetings to which both gatekeepers and business users are invited to address specific issues, in monitoring the effectiveness of these dialogues and, if necessary, in providing further guidance and direction.** When useful in case of technical issues, technical experts from the national regulatory authorities should be associated.

The format of these meetings will depend on nature of the issues to be addressed. **At least initially, the Commission should take an active role** in chairing them, organising the agenda and ensuring that appropriate representatives are present. It could, for example, encourage business users to co-ordinate positions in advance, ensure there is a wide range of representation and ensure that the meetings focus on problem solving in relation to specific obligations rather than wider advocacy or commercial matters. It could ensure that commercially confidential information is appropriately handled and that actions arising from the meeting are properly recorded and followed through. Over time, it may be possible for the Commission to take a less active or directive role and for the gatekeeper and business user participants to manage arrangements amongst themselves.

The Commission should also **trial online tools to improve engagement between gatekeepers and business users on specific technical issues**, with dedicated chatrooms or forums in which gatekeepers and business users can participate, including (for business users) on an anonymous basis if they wish (to overcome concerns about retaliation). These tools are already used by gatekeepers and business users in their normal course of business and should be adopted (or at least trialled) by the Commission for regulatory purposes. If guidelines or conduct changes are required to ensure online tools work more effectively (e.g. how the gatekeeper is expected to assess conflicting proposals and how disagreements will be resolved, how business users should engage and how discussions should be structured), then the Commission should develop them in consultation with the participants.

If these approaches are not effective then the Commission may require additional legal powers, for instance to compel gatekeepers or particular gatekeeper staff to attend meetings, or may need to consider introducing other incentives to ensure constructive participation and engagement.

The advantages of this approach have been discussed by, for example, the Joint Research Center, which has recommended the implementation of co-creation as an alternative to regulation. This is “a collaborative and participatory process in which multiple stakeholders – ranging from public administrations to citizens, businesses, academia and civil society – work together in designing,

implementing and evaluating public services and policies."[2] It is approach used in more mature sectoral regulatory environments, such in telecommunications<;[3] but is seen as particularly useful in digital markets which are characterised by fast-moving technical processes and has been encouraged when digital public services are deployed.

A similar participatory approach should improve implementation by encouraging the identification of better compliance solutions (through widespread participation and dialogue) which business users who have been part of the process should be more likely to accept. It will, however, take time and effort to establish these dialogues and to build trust amongst the participants and this will require the Commission to take the initiative at the outset.

Compliance Reports and Officers

Another important transparency tool in the DMA is the **compliance report** which could be improved by requiring that confidential parts of the report are made available to business users subject to suitable NDAs. Moreover, the non-confidential version of the compliance report could be subject to **more continuous updating** and revision (rather than annually) while respecting the principle of proportionality – this should become a 'live' document on the gatekeeper's website (allowing for annual publication and scrutiny to be withdrawn)**.** In particular, substantial changes to interfaces or business user services or support should be reflected in changes to the live report as and when they are implemented by the gatekeepers.[4]

Also, compliance reports could be **more standardised** regarding their content and their indicators in order to facilitate comparison and compliance benchmarking across gatekeepers while recognising the differentiation in the business models of the gatekeepers.

Moreover, there should also be contact points for business users that wish to engage with the gatekeeper on commercial issues arising from the compliance report, with **compliance officers** taking a more prominent and visible role than envisaged under the DMA at present. The compliance officer could be required to certify not only that the contents of the compliance report were factually accurate, as required by the Commission's Template,[5] but also to provide an opinion (akin to a solvency report in a financial audit) as to whether or not the actions thereby described meant that the gatekeeper is in compliance with the DMA.

2.2. More Legal Predictability

Priorities Setting

The **Commission should develop guidance on how it will prioritise implementation and enforcement of the DMA** (and the associated evidence and data collection) while recognising the constraints which

[2] Joint Research Center, 'Supporting EU policy implementation with co-creation: The Case of the Interoperable Europe Act' (JRC139808) (EU, 2025).
[3] CERRE, 'Implementing the DMA' (2024), p.109 https://cerre.eu/wp-content/uploads/2024/01/CERRE-BOOK-IMPLEMENTINGDMA.pdf
[4] We note that gatekeepers are likely to be subject to Art 3 of the Platform to Business Regulation 2019/1150 which requires that notice of changes be given at least 15 days in advance of their implementation.
[5] https://digital-markets-act.ec.europa.eu/legislation_en#templates

the Commission is subject to. Priority principles set by the National Competition Authorities are pitched at a high level of generality. For example, the British CMA takes five considerations into account before deciding to enforce the law: strategic significance, impact of intervention, whether the CMA is best placed to act, resources required, risks.[6] Similar criteria are found in others, like the Belgian Competition Authority.[7] Other agencies set out priorities by focusing on certain markets, e.g. the Dutch competition authority in 2024 promised to focus on digital, energy and sustainability as focus areas.[8] Our preference is for DMA priorities to resemble those of the CMA and that these criteria are then utilised when individual enforcement action is taken.[9]

Regulatory Objectives and Compliance Acceptability

The DMA shifted the burden of proof onto the gatekeepers (relative to competition law) to show that they comply effectively with the obligations of the law. However, the feedback from the interviews we carried out suggests that sometimes the objectives of specific obligations are not clear and gatekeepers are unsure of the measures required to achieve effective compliance. The Commission appears sometimes reluctant to commit explicitly to accepting measures as being compliant and the gatekeepers are sometimes reluctant to engage fully and transparently with the Commission because they are unsure how the Commission will react.

In future, **the Commission should be willing to give more precise indications on the specific or concrete objectives to be achieved for each core platform service and their related obligations as well as more feedback on whether potential measures proposedly the gatekeepers would be accepted by the Commission as being compliant**. However, in order to provide greater reassurance to gatekeepers, the Commission may require the gatekeeper to provide evidence of performance in trials against output indicators (i.e. conducts that arise from users engaging with gatekeepers) or outcome indicators (i.e., consequence of those users conducts for market structure) and gatekeepers should be prepared and willing to provide such evidence when requesting guidance on specific proposals.

Specification Decisions

One important legal tool to clarify whether potential measures will be acceptable is the specifications decisions that can be adopted by the Commission. To our knowledge at this stage, no gatekeeper has requested a specification decision from the Commission, despite feedback from gatekeepers that compliance is inhibited or delayed by the lack of clarity as to what the Commission considers is required to ensure compliance and despite the publication of template for such requests.[10] The

[6] CMA, Prioritisation Principles (CMA 188) (30 October 2023)
[7] https://www.abc-bma.be/sites/default/files/content/download/files/2024_politique_priorit%C3%A9s_ABC.pdf https://www.abc-bma.be/sites/default/files/content/download/files/2024_politique_priorit%C3%A9s_ABC.pdf
[8] https://www.acm.nl/system/files/documents/focus-acm-2024.pdf
[9] J. Cremer, D. Dinielli, 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 (with), *Journal of Antitrust Enforcement*, 2023.
[10] Article 8(3) DMA was intended to allow gatekeepers to obtain further guidance on measures required to comply with obligations in Article 6 so as to comply more quickly and more effectively, but has yet to achieve that objective.

Commission may wish to investigate whether and how gatekeepers could be encouraged to request specification decisions or, in the absence of that, should take the initiative themselves.

One way to do this involves **Commission being more pro-active in setting forth its position as to what compliance might mean at the start of a regulatory dialogue rather than by asking the gatekeeper to come up with an alternative method of compliance to that set out in the compliance report without providing any guidance on where the compliance point lies**. If the gatekeeper considers this guidance to be unsatisfactory (i.e. insufficient or incomplete), it should be prepared to initiate a specification decision procedure. If the gatekeeper does not do so, then the Commission might reasonably consider the guidance is clear and that the gatekeeper should comply with it. This requires both parties to the dialogue to take steps which may expose them to an element of legal risk, but which are necessary if greater trust is to develop between them.

More generally, the **Commission should explain when it will initiate a specification decision rather than, for example, initiating infringement proceedings**. The limited practice to date does not necessarily allow one to draw any general lessons yet as to when the Commission will act in particular ways. The two specification decisions adopted so far suggest that the Commission had already engaged with the gatekeeper involved on several occasions regarding compliance with Article 6(7) of the DMA, that it is aware of many interoperability requests and that it is thus appropriate to specify this obligation.[11] This suggests that specification decisions will come only after several rounds of dialogue[12] and then perhaps only when the Commission judges that the obligation in question is a priority for enforcement in light of its economic importance. This is a helpful first step in explaining some of the considerations that the Commission will take when deciding to specify and we expect that further practice will clarify the criteria further. As noted above, in our view there is an important distinction to be drawn, on the one hand, between a lack of clarity about what is required to comply (which is resolved via specification decisions) and, on the other hand, disagreement between Commission and gatekeeper as to whether measures which the Commission has clearly stated are required to be taken are in fact required to ensure compliance (which is addressed via enforcement decisions and potentially, subsequent appeals).

In the longer term, the Commission should also explore whether the **scope of the specification decisions should be expanded** to also include measures required to comply with the obligations included in Article 5 of the DMA.

2.3. Improving Institutional Arrangements

Organisation within the Commission

The issue paper on DMA implementation suggests that the joint reporting lines and staffing (from both DG Comp and DG Connect) involved in establishing the Commission's DMA team create complexity for the Commission itself and uncertainty for gatekeepers and business users. It may also undermine the development of a consistent approach or an effective regulatory culture, with some teams seen to be adopting an approach more appropriate to antitrust enforcement than regulatory dialogues. In

[11] https://digital-markets-act-cases.ec.europa.eu/cases/DMA.100204 and https://digital-markets-act-cases.ec.europa.eu/cases/DMA.100203

[12] As indicated in recital 65 of the DMA.

addition, dual reporting lines add complexity and may increase the risk that decisions are perceived to be taken on political rather than administrative grounds, which we think should be avoided. There is no obvious benefit to the existing institutional arrangements.

To address these concerns, we recommend that the **DMA team should be established as an independent entity within the Commission with a separate premises, budget and identity of its own.** This should allow it to develop a distinctive culture more appropriate to the particular functions it performs. This team should also have close links to (or co-exist with) those staff implementing the Digital Services Act (DSA), since there are likely to be some synergies between the two and it is important to avoid conflicts. Also, this DMA team should work closely with the other departments of the Commission in charge of other policies which are related and impacted by the DMA implementation, such as consumer protection, privacy, cybersecurity or intellectual property.

Moreover, the **role of technical reports which are commissioned by the Commission** should be clarified: will they be published, how does the Commission intend to use them and how can interested parties engage with the consultants or academics?

In the longer term, it should also be explored whether the Commission enforcement powers under the DMA (and other laws of the EU digital rulebook) should be transferred to a **new and independent European Digital Authority, with appropriate safeguards against political interference**. Such European regulator has been proposed in the Letta Report of 2024 and was already recommended in the Bangemann Report back in 1994.[13]

Division of Enforcement Roles Between the Commission and the National Authorities

National authorities currently perform a limited role in the implementation of most of the DMA obligations, though that are some important exceptions such as the horizontal interoperability obligation for which BEREC plays a very useful role.[14] We recommend that the **Commission and national authorities** – in particular national competition authorities - **seek to agree on a clear division of tasks in implementing the DMA based on their respective comparative advantages** and how those national authorities might better engage in the future.

This might include **national authorities taking primary responsibility in advocacy on the opportunities afforded to business users by the DMA and the benefits to consumers[15] and for initial engagement with business users and end users in national markets.** In particular, the national authorities may be well placed to receive inquiries about the DMA or complaints and to carry out preliminary assessments to filter those which are worth passing on to the Commission for further

[13] Bangemann group, Recommendations of the high-level group on the information society to the Corfu European Council, p.17; E. Letta, Much more than a market: Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens, Report to the Council, p. 56.

[14] https://www.berec.europa.eu/en/all-topics/ni-ics-interoperability

[15] For example, the Dutch ACM with the support of other NCAs organised a conference for business users to explain the benefits of the DMA: https://www.acm.nl/en/publications/ecn-digital-markets-act-conference-2024. The Belgian Competition Authority has published a brief guide for the benefit of tech challengers to explain the opportunities that the DMA generates for them as well as examples of successful compliance: https://www.belgiancompetition.be/en/about-us/publications/digital-markets-act-short-guide-tech-challengers-0

action and/or signposting business users to engage directly with the Commission and/or participate in a multi-lateral dialogue a particular issue (which may be easier if earlier our recommendations for using digital platforms is pursued). However, it is important that business users are not thereby denied direct access to the Commission if they wish to pursue it and that engagement between the national authorities and Commission is undertaken in a transparent manner.

Inclusive Governance Mechanisms

Finally, the Commission could incentivise the gatekeepers and the business users to agree on **inclusive governance mechanisms**[16] which could facilitate the implementation of some access type obligations such as interoperability and portability when they are clear and targeted to achieve the objectives of the DMA; such mechanisms could also reduce the trade-offs between certain rights and interests. Those governance mechanisms could include: (i) the continuous development of standards; (ii) independent third-party or gatekeeper non-discriminatory automated certification mechanisms for access seekers, as well as (iii) independent and rapid dispute resolution mechanisms when there is a disagreement between the gatekeepers and business users on the implementation of the security defence.[17]

2.4. Building Trust Between Participants

The feedback from the interviews we carried out indicates that trust between the main stakeholders (Commission, gatekeepers and business users) and in the regulatory process itself needs to be strengthened. Without trust, it is difficult to have constructive dialogue or to avoid reverting to a formal enforcement process. This lack of trust contributes to delay and uncertainty on both sides, inhibits compliance by gatekeepers and makes it more difficult for business users to take advantage of opportunities arising from measures which gatekeepers have taken.

The different recommendations made so far to increase transparency, legal predictability and streamline the institutional arrangements should contribute to increase trust among market participants. Additional measures to protect the rights and expectations of the gatekeepers and business users are also intended to promote trust.

Protection of Rights and Expectations of the Gatekeepers

Trust may be improved by measures to ensure the Commission will have proper regard to gatekeepers' rights. This could be achieved by introducing **a function akin to that of the Hearing Officer** in antitrust and merger cases, as was already discussed during the legislative negotiations. This was a position established in the early 1980s recognising the need to better safeguard the procedural rights of undertakings at a time when the Court of Justice of the EU was beginning to fashion these rights on a case-by-case basis. Its role extends to protecting undertakings subject to competition proceedings and also third parties.[18] The Commission is primarily responsible for safeguarding procedural rights, but the Hearing Officer is a safeguard mechanism to which parties may turn to in

[16] Z. Meyers, *Which Governance Mechanisms for Open Tech Platforms?*, CERRE Report, January 2025.
[17] Z. Meyers, Balancing security and contestability in the DMA: the case of app stores, European Competition Journal, 2024 referring to the dispute resolution mechanisms which have been established in telecommunications regulation.
[18] Decision 2011/695 on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ L275/29, Recital 3. Of course, the hearing officer also protects complainants but this role does not exist in the DMA.

case there is no bilateral resolution of procedural issues.[19] Even prior to the oral hearing, the Hearing Officer has certain powers that may be relevant in the DMA context (e.g. to extend the time limit for replying to a request for information, to secure access to the file, and to ensure the protection of business secrets and confidential information).[20] This role also exists in national competition authorities (e.g. the office of the procedural officer in the CMA).[21] A Hearing Officer for the DMA can probably be introduced by a Commission Decision. However, the possible establishment of a Hearing Officer should not undermine the effectiveness of the DMA enforcement.

Protection of Rights and Expectations of the Business Users

Business users are also engaging bi-laterally with the Commission. Article 27 of the DMA envisages that business users may inform national authorities or the Commission about a practice or behaviour that falls within the scope of the DMA, but the recipients are 'under no obligation to follow-up on the information received.' The DMA's Implementing Regulation also focuses on the rights of gatekeepers.[22] Any perception that complaints will not be considered by the Commission or national authorities or that feedback to the Commission will not then be put to gatekeepers risks making business users reluctant to provide input into matters of compliance or engaging commercially with the opportunities which the DMA is intended to create.

This can be addressed by **guidance to business users on how to engage with the Commission** and what they can expect from the Commission when they do. This should include a clear statement explaining what can be expected when information is supplied to address concerns that information conveyed to the Commission ends up in a 'black box'.[23] It might also include guidance to encourage (under appropriate circumstances) business users to co-ordinate their activities amongst themselves before providing inputs to the Commission (or gatekeepers). By now, the Commission should have received enough input from third parties to be able to make suggestions on good practices on the submission of information and to have designed an internal process to manage the input it receives. While the Commission enjoys full discretion, it is still important that principles of good administration are followed.[24]

[19] Decision 2011/695, Recital 8 and Article 3(7). W.P.J. Wils, 'The Role of the Hearing Officer in Competition Proceedings before the European Commission' (2012) 35(3) World Competition 431.
[20] Decision 2011/695, Articles 7, 8 and 9.
[21] Guidance, Procedural Officer: raising procedural issues in CMA cases (13 March 2024) https://www.gov.uk/guidance/procedural-officer-raising-procedural-issues-in-cma-cases
[22] Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council [2023] OJ L102/6, Art 7(7).
[23] Cf. Competition and Markets Authority, Digital markets competition regime guidance (CMA194) (2024), pp.127-128
[24] Commission Decision 2024/3083 of 4 December 2024 establishing the Code of Good Administrative Behaviour for Staff of the European Commission in their relations with the public OJ L, 2024/10001.

3. Strengthening Regulatory Cooperation

Along with improvements to the DMA implementation process, we recommend better coordination between the EU and national regulators responsible for the DMA and other components of the digital rulebook to ensure strong regulatory coherence. This consistency is crucial, as emphasised in the mission letter of Executive Vice President Virkunnen.[25]

3.1. Regulatory Cooperation at the National Level

The growing body of laws within the EU (and national) digital rulebooks has resulted in an increase in the number of national authorities overseeing digital platforms. These include authorities responsible for competition law, data protection, consumer protection, telecommunications services, and media services. [26]

To ensure effective supervision, **these different authorities should work closely together to develop a shared understanding** of the digital ecosystems they regulate. Based on this common understanding, they can develop **coordinated general policy approaches and make consistent individual decisions**. Such national coordination is also encouraged by the Court of Justice of the EU on the basis of on the loyalty clause of the EU Treaties. [27]

In practice, an increasing number of Member States, such as France, Germany, and the Netherlands,[28] have established networks of national authorities involved in supervising the digital value chain.

3.2. Regulatory Cooperation at the EU level

In addition to cooperation at the national level, cooperation at the EU level also needs to be strengthened—both among the regulators responsible for the DMA and between the regulators overseeing the DMA and other laws within the digital rulebook.

For the first type of cooperation, the **DMA establishes mechanisms for collaboration between the Commission and national authorities**, particularly the national competition authorities within the European Competition Network. However, as mentioned earlier, the division of roles between the Commission, which is the sole enforcer of the DMA, and the national authorities, which support the Commission's tasks, could be clarified and improved. Looking ahead, the Commission may consider adopting maximum harmonisation as a more effective approach to regulating digital markets, thereby preventing the application of parallel national laws.

---

[25] "*You will also work to stress test the EU acquis and table proposals to eliminate any overlaps and contradictions and be fully digitally compatible, while maintaining high standards. To achieve this goal, regulators should have the ability and the incentives to cooperate at the national level and at the EU level*."

[26] G. Monti and A. de Streel, *Improving institutional design to better supervise digital platforms*, CERRE Report, January 2022. The national authorities of the Member States where the gatekeeper is established often have a particularly important role given the application of the principle of the country of origin in most of the laws of the EU digital rulebook.

[27] Case C-252/21 *Meta Germany*, paras 52-53, ECLI:EU:C:2023:537. The Court decided that Art.4(3) TEU requires consultation and cooperation among the different regulatory agencies.

[28] https://www.acm.nl/en/about-acm/cooperation/national-cooperation/digital-regulation-cooperation-platform-sdt

The second type of cooperation is particularly complex, as it involves regulators overseeing different legal instruments. To facilitate this regulatory cooperation, the DMA has established the Digital Markets Advisory Committee (DMAC) and the DMA High Level Group, a network that includes five regulatory networks: ECN, CPC, EDPB, BEREC, and ERGA. The High-Level Group is a crucial mechanism for ensuring regulatory consistency across the digital rulebook and for providing a holistic view of platform markets and the orchestrating role of gatekeepers.

However, the **roles of the DMAC and the High-Level Group could be enhanced in terms of transparency and stakeholder involvement**. Initial steps could include creating a more user-friendly dedicated websites that explain how the DMAC and High-Level Group function, provide reports of meetings, and detail the work being undertaken by sub-groups (including an annual work plan).[29]

Additionally, gatekeepers, business users, and other interested parties should be given opportunities to consult and/or submit comments on the work of the DMA High-Level Group. Furthermore, the High-Level Group could encourage the participation of technical experts in fields beyond competition, such as security, privacy, and intellectual property. In light of the importance of cybersecurity objectives and regulations, the composition of the DMA High Level Group could also be **expanded to include ENISA**.

In the longer term, it may be beneficial to establish a systemic and comprehensive institutional structure that, on one hand, enables and incentivises coordination across countries and regulatory regimes, and, on the other hand, provides for hierarchical relationships that allow for the rapid adoption of final decisions in the interest of the EU as a whole, rather than merely in the interest of individual Member States. One way to achieve these goals could be to **establish a European System of Digital Regulators, consisting of a European Digital Authority and a network of National Digital Regulators**.[30] The European Digital Authority could assume the direct enforcement powers currently held by the Commission under existing laws of the digital rulebook (such as the DMA, DSA, etc.), as well as the enforcement powers of the various regulatory networks established by the EU digital rulebook. National digital regulators would retain significant roles, as they would, on one hand, participate in the main aspects of decision-making conducted by the European Digital Authority and, on the other hand, implement decisions adopted by the European Digital Authority in their respective Member States and monitor compliance by regulated firms.

[29] The current website of the DMAC is at: https://ec.europa.eu/transparency/comitology-register/screen/committees/C114400/consult?lang=en and of DMA High Level group is at https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3904

[30] A potential source of inspiration for this new system could be the Single Supervisory Mechanism (SSM), under which significant banks in the Eurozone are supervised by the European Central Bank (ECB) in close cooperation with national financial supervisors through the establishment of Joint Supervisory Teams.

4. Preparing the DMA Evaluation

Given the complexity of digital markets and ecosystems, as well as the novelty of the DMA, an ex post evaluation of the law will be essential to identify both the strengths and weaknesses of the rules and their enforcement, as well as the necessary remedies to address these weaknesses. The first evaluation should be conducted by the Commission in May 2026, with subsequent evaluations every three years thereafter. Given the importance, as well as the challenges, of this evaluation, preparations should begin today. [31] In particular, three key issues need to be addressed in accordance with the 2021 Better Regulation Guidelines of the Commission. [32]

Who Will Do the Evaluation?

The first issue concerns who will carry out and be involved in the evaluation. The DMA stipulates that, as with all other EU laws, the Commission should conduct the evaluation. However, unlike many EU laws that are enforced by national authorities, the DMA is enforced by the Commission itself. This creates a potential conflict of interest, as the Commission would be tasked with evaluating its own enforcement.

To mitigate this risk, **an independent body could be involved in the evaluation, ideally ahead of the Commission**. This could be the Court of Auditors or an ad hoc independent high-level group, which could prepare a report to inform the evaluation conducted by the Commission. Additionally, the **draft evaluation report from the Commission could be subject to public consultation** before being reviewed by the Regulatory Scrutiny Board and finalised by the Commission. Of course, there is a balance to be struck between the number of actors involved, the procedural steps required, and the speed of the evaluation process. However, we believe that involving independent experts before the Commission drafts the evaluation report, and allowing for public consultation afterward, will ensure sufficient expertise and independence without overly complicating the process.

What Will Be Evaluated?

The second issue concerns the framing of the evaluation, particularly in terms of effectiveness, efficiency, and consistency. The evaluation of *effectiveness* is likely the most complex aspect because, on one hand, the DMA pursues multiple objectives (contestability, fairness, internal market), and on the other, evaluation can occur at different levels (firms/gatekeepers, core platform digital services, rules/obligations). This requires an identification of the **multiple and causal relationships between: (i) the steps taken by gatekeepers to implement DMA obligations, (ii) the behaviours that emerge from businesses and end users interacting with gatekeepers to leverage the opportunities created by the DMA, and (iii) the long-term interests of the users, in particular in terms of choice and innovation.**

The evaluation should also examine the **trade-offs and tensions between the DMA's various objectives as well as with the other laws of the digital rulebook and whether they are balanced in a way that favours the long-term interests of end users. This includes identifying possible unintended**

[31] M. Bassini, M. Maggiolino and A. de Streel, Better Law-Making and Evaluation for the EU Digital Rulebook, CERRE Report, January 2025.
[32] European Commission Better Regulation Guidelines SWD(2021) 305.

consequences of DMA implementation, such as a deterioration in the consumer journey, the loss of innovation if new products are not deployed in the EU, or potential reductions in the security of digital services or privacy protections. The trade-off analysis should also recognise that some effects (positive or negative) may be more immediate than others. It is therefore crucial that the evaluation considers these dynamic elements.

The evaluation of *efficiency* could deal with the **implementation process** and whether the existing process is adapted to the nature of the DMA and the types of its obligations. As we discussed in Section 2 of this paper, this part of the evaluation could focus in particular on transparency, legal predictability, institutional arrangements, and the mechanisms to build trust among all stakeholders.

Finally, the evaluation of *regulatory consistency* in objectives and rules will be particularly important, given the significant **regulatory interplay between the DMA and other parts of the EU digital rulebook**. This will also require an assessment of the effectiveness of the regulatory coordination mechanisms in place.

Which Indicators and Data Need to be Collected for this Evaluation and by Whom?

This evaluation framework will enable the Commission to determine which **quantitative and qualitative indicators** should be measured to ensure the robustness of the evaluation.

Once the evaluation has been properly framed and the indicators identified, the third issue is to determine which **data is necessary for the evaluation, why it is needed, and how and from whom it should be sourced**. Data could be sourced from a variety of entities, including the gatekeepers (particularly through their compliance reports), business and end-users, civil society, the Commission (such as the Joint Research Centre), the DMA High-Level Group, ENISA, consumer surveys, and independent academic or commercial research.

Issue Paper

Implementing The DMA: Early Feedback

March 2025

1. Introduction

In this Issue Paper, we identify themes arising from the implementation of the DMA to date. In large part, **we draw on evidence obtained from 21 semi-structured interviews with DMA stakeholders**.[33] We interviewed senior members of 3 designated Gatekeepers, 14 firms who described themselves as Business Users, two civil society organisations and two national regulatory agencies. Nearly all of the Business Users and all civil society organisations were actors that have had significant exposure to the DMA, with each engaging repeatedly with the European Commission (hereafter 'the Commission'). Two Business Users had relatively less exposure to the DMA, one in particular had not contacted the Commission at all. The two national authorities have made efforts to be involved in the DMA. All stakeholders wished to remain anonymous.

We consider that this sample allowed us to gain a good understanding of **the early process of DMA implementation going beyond what is publicly available**. As we discuss further below, although this may appear to be a simple two-stage process in theory, implementation in practice involves an ongoing and complex set of interactions between many different parties.[34] Implementation requires both that the Gatekeeper take certain actions to comply with the obligations in Articles 5, 6, and 7 of the DMA and that the Commission take actions to assess whether compliance is achieved and, if not, take actions which seek to ensure compliance.

In the first section, we present views from the key participants in the **implementation process** – the Commission, the Gatekeepers, the Business Users, and other third parties– on the way they have interacted with each other. As already noted, we would characterise this as a series of ongoing dialogues or repeated interactions with various feedback loops between the participants in order to arrive at a view of what compliance means. These dialogues may also be a way in which the Commission can exercise 'soft power 'by guiding or influencing the actions of Gatekeepers without or before resorting to more formal legal measures.

The second section considers the more **formal legal measures and the various tools** that were included in the DMA to allow the Commission to ensure effective implementation or sanction non-compliance. These include the Compliance Reports which Gatekeepers are required to produce and publish,[35] the Compliance Officer which Gatekeepers are required to appoint, the process for obtaining or providing further guidance by way of specification decisions under Article 8 DMA and decisions about when and whether to initiate proceedings which may result in a finding of non-compliance and fines. We do not in this paper or at this stage consider what measures might be taken in the event of 'systematic 'non-compliance or how other aspects of the market investigation regime might be used by the Commission. This is because there is no practical experience of these aspects of the DMA at this stage, although the changes we recommend in this paper do not depend on, and need not await, implementation of these other aspects of the DMA.

[33] Most interviews were carried out in September and October 2024 and a smaller subsequent tranche of interviews occurred in January and February 2025. The authors benefitted from the extremely helpful assistance of Max van Iersel (PhD candidate, Tilburg University) in carrying out the interviews that form the basis of this paper.
[34] The report does not address the experience of the process of designation which took place prior, or other aspects of the DMA such as market investigations.
[35] We ignore the consumer profiling reports which Gatekeepers are required to submit under Article 15.

The third section considers some **longer-term or cross-cutting issues** that have been highlighted in our interviews. Some of these may be more difficult and will take longer to resolve, and may be issues to return to once work on the initial implementation of the DMA has been completed.

In the Annex, we report the results of the responses to the questions we asked. Given the relatively small number of responses and the diversity of answers we do not provide statistical data but, when possible, we have explained how many and which type of stakeholder took a particular position.

We note that the DMA is a new law which is enforced in complex and evolving markets and the DMA is at the beginning of its implementation. We realize that, at this stage, the Commission, the Gatekeepers and the Business Users are still in a learning phase. This Issue Paper aims to report on this initial implementation phase and is complemented by another Issue Paper which, on the basis of this early feedback, gives recommendations to improve the implementation process.

2. Informal Interactions Between the Participants

In this section, we consider the bi-lateral interactions between the Commission and Gatekeepers (following their designation), between the Commission and Business Users (and other interested parties such as consumer or civil society groups) and, between Gatekeepers and Business Users as well as multi-lateral interactions. This draws on the responses found in section 1.1 of the Annex.

2.1 Commission and Gatekeepers

2.1.1. Different Forms of Dialogue and Engagement

The first observation is that there has clearly been **extensive interaction between the Gatekeepers and the Commission** both prior to and after 6 March 2024, the date at which Gatekeepers providing the initial set of designated core platform services were expected to have complied with the DMA. This partly reflects the realisation on both sides that many aspects of the DMA are not 'self-enforcing ' in the way that some have claimed (or hoped). The Commission appears to have been keen to understand the actions which Gatekeepers proposed to take or were taking prior to March 2024 and the Gatekeepers told us they had sought clarification from the Commission as to how different actions which they were contemplating would be viewed by the Commission.

Gatekeepers

It seems that **different Gatekeepers adopted different engagement strategies, although all appear to have engaged in some form of dialogue with the Commission**. The DMA does not require Gatekeepers to enter into any formal or informal or regulatory dialogue with the Commission outside of the formal specification decision process found in Article 8 of the DMA and does not prescribe how any such dialogue should be conducted. It is difficult to see how it could do so. This leaves the Gatekeepers with considerable freedom in deciding when and how to engage, and we assume they will do so in a way that they judge to best suit their commercial objectives. Similarly, the Commission is under no legal obligation to engage in an informal dialogue with Gatekeepers and it too can decide, based on its interactions with Gatekeepers, whether and how to engage in informal dialogues. This aspect of the DMA compliance process is therefore unregulated terrain.

It will be difficult for any individual Gatekeeper to determine how their engagement with the Commission compares with that of another Gatekeeper given that Gatekeepers are free to decide how they choose to engage with the Commission. It is for the Gatekeeper to decide whether to only send in a compliance report, or, at the other extreme to seek a specification or as a middle way, to engage with the Commission informally to discuss its compliance choices.

As a side note, we do not have any information on whether the DMA **Whistleblower Tool** which the Commission has established has been used or what impact, if any, it has had on the Commission's work.[36] One interviewee said it did not work.

[36] https://digital-markets-act.ec.europa.eu/whistleblower-tool_en

European Commission

On the Commission side, stakeholders have suggested that there are some differences in the approach taken by different officials and teams. This is perhaps not surprising if we recall that the teams which the Commission has assembled to oversee the implementation of the DMA are drawn from different Directorates-General (COMP and CNECT), that the internal organisation had only been established a few months prior and that the workload during this initial engagement phase was, by all accounts, very demanding. The combination of COMP and CNECT staff may have been necessary in order to assemble the resources and expertise required in the time available, but we think it has added complexity to the Commission's internal decision-making processes (to co-ordinate views between Directorate-General and between teams) as well as resulting in differences in approach and outlook.

DG COMP has a well-established and clearly defined approach to engagement with external parties that are suspected of having infringed competition law or are engaged in a merger. Some Gatekeepers see this approach replicated in the DMA. As we have said in previous CERRE reports,[37] this approach is very different from the more informal regulatory dialogues which sectoral regulators engage in. DG CNECT has experience engaging on a repeated basis with regulated firms and with national regulators, but most of this relates to high-level policy discussions and new legislative initiatives rather than to the implementation or enforcement of those policies (which is generally undertaken by national regulatory authorities). Our impression from some of the interviews is that the DG COMP approach to engagement has tended to dominate so far, with some complaints about an overly formalistic reliance upon lengthy Requests for Information (RFIs) from the Commission to gather information (including some duplication of requests between different Commission teams) and an overly legalistic approach in general. Other Gatekeepers reported that DG CNECT is also responsible for a high number of RFIs and engages in minimal discussion while another observed that there should be more coordination among the two DGs.

This may, however, also to some extent reflect the approach to engagement being taken by the Gatekeepers themselves, who may lack experience in engaging in regulatory dialogues in Europe. In one of the authors''experience, regulatory dialogues in the United States (e.g., with the Federal Communications Commission) tend to be more legalistic and more akin to antitrust procedures. Gatekeepers are also likely to be more familiar with antitrust proceedings in Europe, particularly in recent years.

It has also been suggested that the **Commission may have been consciously experimenting with different engagement models in order to assess which was most effective** and that, at some point, it will consolidate around a particular model. It may also reflect the fact that staff from DG COMP will have prior knowledge of some Gatekeepers' lines of business and some obligations from previous antitrust procedures, whereas other Gatekeepers and/or other issues may be unfamiliar to them. In some cases, the Commission may also have a clearer idea about what good compliance means, while for other obligations it remains more open to Gatekeeper proposals.

We think it is important that, in considering any changes we might recommend, **the Commission retains a degree of freedom in deciding what the most effective way is to engage with any particular Gatekeeper at any particular point in time. That said, we would expect that a greater degree of**

[37] https://cerre.eu/publications/implementing-the-dma-substantive-and-procedural-principles/

consistency and predictability in the engagement between Gatekeepers and Commission will develop over time. This may occur as the DMA units develop their own internal culture and approach which is distinctive from the parent Directorates-General from which the staff have been drawn. The prospects for this may depend on how long the staff inside the DMA units remain in post. If staff are constantly being cycled through the organisation from other parts of the Commission, then it will be more difficult to develop a coherent culture. It may also be improved if the DMA team were to have simpler reporting lines to a single individual.

Although we are conscious that individual Gatekeepers will often hold information advantages over the Commission during these interactions, the Commission will hold an information advantage if it is engaging with a number of Gatekeepers on implementation of the same obligation. Interviewees told us that they think the Commission has adopted a matrix organisation so that, in addition to staff dedicated to particular Gatekeepers, staff also have horizontal visibility of the actions being taken or proposed by different Gatekeepers in relation to the same obligation. How useful this is will depend upon differences in the business models employed by different Gatekeepers. One Gatekeeper reported to us in a follow-up discussion post-interview that its compliance on certain obligations and the quality of its compliance report has been benchmarked against other Gatekeepers. Most Business User interviewees had not seen evidence that the Commission is comparing or benchmarking different Gatekeepers, although this does not mean the Commission is not doing so more systematically. One Business User suggested that the organisational structure of the Commission could be used for benchmarking. We think the **capacity to 'benchmark' performance across Gatekeepers is important in offsetting other informational disadvantages and the Commission should ensure that it is able to do it and that, more generally, it avoids silos in its organisational structure**. This should not come at the expense of affording Gatekeepers the liberty to design and differentiate their products in the way they feel is most appealing for consumers

At the end, the biggest challenge is likely to be that any resetting of the engagement model (away from what some see as a more adversarial posture which might also reflect a strategy on the part of Gatekeepers to test the limits of the regime and the Commission's reaction at an early stage) will require change on both sides; this may be difficult if one party changes and the other does not as a dialogue requires constructive engagement by both sides. In our view, **a key requirement for effective dialogue is a degree of trust between those involved**. This is something that is developed over time and through repeat interactions. It may also involve parties being more prepared to take risks from time to time.

2.1.2. Guidance on Compliance Acceptability and Enforcement strategies

Compliance Acceptability

A recurring theme in interviews has been the **Commission's reluctance to provide guidance,** with Gatekeepers tending to recommend that the Commission develop guidelines on substantive issues in in order to help Gatekeepers self-assess whether their proposed actions are compliant. One Gatekeeper also suggested in a post-interview follow-up, that guidelines on fines would also be desirable. Various explanations have been offered for the absence of guidelines. In our view, there are four important considerations.

First, we have already suggested that the Commission's expectations about the extent to which the obligations in the DMA could be self-executing may have been misplaced (or may have been rhetorical). When talking about the need for informal guidance, interviewees have **not drawn the clear distinction between Article 5 obligations and Article 6 obligations** in the way that the DMA itself does.

Second, the approach to **assessing and providing feedback on remedies** in antitrust proceedings does not generally require the Commission to specify in detail what a compliant remedy might be. The Commission tends to proceed instead by rejecting proposals which it considers would be insufficient to address concerns until it arrives at something which it considers acceptable (another interviewee described this as a process of narrowing down options, although options still remain at the end of the process). In this case, we also consider that even if the Commission had wished to specify what a Gatekeeper should do, in many cases it may not have the technical information or knowledge of the product to be able to do so confidently, at least at the outset.[38]

Third, it has been suggested that there is an **asymmetry in risk and risk appetite** and the Commission is concerned that any guidance will be exploited by the Gatekeeper (or possibly a Business User or other aggrieved party) in subsequent litigation. The Commission may think that Gatekeepers are seeking guidelines not in order to improve their compliance but for other strategic purposes (e.g. the Commission provides guidance whilst it is still subject to an information disadvantage and is unable to change its position later). We do not think that RFIs and input from Business Users can resolve this informational asymmetry completely.

Finally, it has also been suggested by both Business Users and Gatekeepers that the Commission has **lacked a clear assessment framework against which to judge proposals that are being put** to it. In other words, Commission staff are not sufficiently clear about how to weigh up different considerations or trade-offs when assessing proposals that are being put to them and different staff may have different approaches or arrive at different conclusions. In such circumstances, the Commission may find it difficult to arrive at a clear view itself, irrespective of whether it would be willing to share it with the Gatekeeper or not.

The perceived reluctance on the part of the Commission to provide informal guidance to Gatekeepers appears to have **had a number of consequences**. *First*, some have suggested that some Gatekeepers have, since March 2024, turned to other third parties who they perceive may influence the Commission's thinking and who may be more prepared than the Commission itself to tell the Gatekeeper what they think it should do. This seems reasonable when we have argued elsewhere that Gatekeepers ought, in any event, to be consulting directly with Business Users and third parties where appropriate to do so.[39]

Second, some Gatekeepers have adopted an incrementalist approach to compliance, in which some actions were taken prior to March 2024 and others at different times since. We think this is to some

[38] We have received mixed views on the level of technical expertise within the Commission, but most interviewees think there is still room for improvement and for greater ad hoc involvement of academics or other independent expert advisers (if the Commission's procurement rules allow). The Commission has issued tenders for consultancy reports on interoperability and emerging technologies, but it is not clear how interested parties can engage with them, whether they will be published or how they will be used to inform the Commission's work or specific enforcement activity.
[39] R. Feasey and G. Monti, DMA Process and Compliance' in A. de Streel (coord), *Implementing the DMA: Substantive and Procedural Issues* (CERRE, 2024).

extent unavoidable when complex changes have to be made and as Gatekeepers develop and change their existing products and services. However, to the extent that this contributes to delays in compliance or undermines the effectiveness of the changes being implemented (e.g. repeated changes to choice screens could lead to consumer fatigue and so undermine their effectiveness as a measure to improve contestability) or is a consequence of the lack of guidance provided by the Commission, it is a concern.[40]

We note these points whilst at the same time recalling that Article 8(3) of the DMA allows a Gatekeeper to formally request that the Commission provide guidance on how to comply with a particular obligation under Article 6 or 7. **No Gatekeeper we interviewed appears to have given this serious consideration** and we are not aware that any such requests have been made. We discuss this further in Section 3.

Enforcement Strategies

Another theme from interviews which we also return to in Section 3 is the perception that, having been reluctant to provide guidance on the actions required to comply with the DMA, the **Commission is also reluctant to signal when it will escalate its enforcement activity** by moving to a more formal mode of interaction, either through opening a non-compliance proceeding under Article 29 or a specification proceeding under Article 8 of the DMA. We think there is a balance to be struck here between on the one hand providing Gatekeepers with an opportunity to address the Commission's concerns as part of the informal regulatory dialogue and without that dialogue breaking down and, on the other, allowing Gatekeepers to engage in strategic behaviour by delaying actions until the last minute in the knowledge that no sanctions will follow from this.

2.2 Commission, Business Users, and Other Parties

As with Gatekeepers, the DMA does not expressly require informal engagement or dialogue between the Commission and Business Users or other third parties such as consumer representatives or civil society organisations, but such engagements have occurred, both before and after the compliance deadline of March 2024. **The perception of individual business users that the Commission has engaged more intensively and more extensively with Gatekeepers than with them** is consistent with the evidence we have received. Most Business Users have particular interests in the DMA which relate to a subset of the obligations which the Gatekeepers are being required to implement.

Business Users tended to take the opposite view to Gatekeepers in telling us that they thought the actions required to comply with the DMA were relatively clear, or at least that it was clear that certain actions that had been taken by the Gatekeepers were non-compliant and that the Commission ought to be initiating non-compliance proceedings as a result. **This leads us to wonder whether and to what extent the Commission's reluctance to say what actions it would consider to be compliant reflect the difficulty Business Users have in determining what actions the Gatekeeper should take (as opposed to what they should not do) or the lack of agreement amongst different Business Users as**

[40] See section 2.2 for the business user perspective on this.

to what that should be. We would expect there to be greater agreement that a certain action is not compliant than agreement over what should be done instead.

Some Business Users also thought that the Commission was more reluctant to provide guidance on economic and pricing issues (such as the level of access fees) than on technical issues. They attributed this partly to the Commission's reluctance to be seen to be dictating commercial terms between Gatekeepers and Business Users.

The majority of Business User-Commission interactions that were reported by Business Users were initiated by them. In general, Business Users have engaged more frequently since 6 March 2024. One Business User reported that the Commission was relatively more active in soliciting its views than the other Business Users we interviewed. One civil society organisation was also active in providing detailed information to the Commission explaining what it saw as compliant and non-compliant behaviour. Some Business Users engage with the Commission via trade associations. While Business Users welcomed the Commission's open door policy, they said the uncertainty about how the information they provided is used makes it difficult to plan their engagement or allocate resources, and means that they often can only guess at the context within which a particular question is being asked if clarifications are sought. Once they have responded to the Commission request, they generally have no insight into what happens next or what the impact or consequences of their engagement might be.

Most Business Users felt that better visibility (including of Gatekeeper responses to points which they had made to the Commission) would allow them to engage more effectively with the Commission and that this, in turn, should enable the Commission to engage more effectively with the Gatekeepers. Some felt there had been a lot of activity and announcements in March and April 2024 but had very little visibility of progress since then. Some described their interactions with the Commission as occurring within a 'black box 'in which it is difficult to determine what the Commission does with the information it has received, what it thinks of it, or what effect it has on the conduct of the Gatekeeper.

We discuss greater multi-lateral engagement, which we think is one way to provide greater visibility for all parties, below. In the meantime, one concern that arises is that Business Users and other third parties may become discouraged and disillusioned with the DMA if they perceive that their engagement is not having any demonstrable impact. Some interviewees thought they could see the effect of their input on changes in the conduct of some Gatekeepers, but others were less sure and almost all expressed frustration about the extent of compliance achieved by the Gatekeepers as of March 2024. There is a question as to whether the expectations of some Business Users about what the DMA will achieve and how it will operate have been realistic (and whether the Commission ought now to reset expectations, including by specifying new deadlines for substantive compliance) but even if that were so **the active engagement and participation by Business Users remains critical feature if the DMA is to be successful. We would be concerned if perceived failures in the implementation process to date were to result in Business Users disengaging from it**. This is not only because the Commission depends on input from Business Users and other parties to reduce the disadvantages in terms of technical expertise and market knowledge which it otherwise faces in its interactions with the Gatekeepers but also because the effectiveness of the measures in the DMA depends upon

Business Users and consumers actively engaging with the opportunities that the DMA is intended to create for them.

2.3 Gatekeepers, Business Users and Multi-lateral Dialogues

It appears that **bi-lateral interactions on the DMA between Gatekeepers and Business Users (without Commission involvement) have been infrequent and limited**, both before March 2024 and since then, although some thought Gatekeepers had become more engaged with third parties since March 2024 and some Gatekeepers claimed extensive engagement with Business Users both before and after March 2024. From our sample of Business Users, it seems that a minority are able to engage frequently with Gatekeepers, but the majority report infrequent interactions. Where these interactions have occurred, some Business Users say that they have involved Gatekeeper account managers doing outbound communications rather than soliciting feedback from customers or being willing or able to enter into a meaningful dialogue about the approach being taken. Some Business Users reported useful bi-lateral engagement with some Gatekeepers, but overall, our impression is that this has not been undertaken in a systematic way and has had relatively limited impact on the measures that Gatekeepers have chosen to adopt.

There was a mixed response to the public workshops organised by the Commission.[41] About half of respondents felt that these were useful in forcing the Gatekeeper to explain its position, while the other half felt there was not sufficient space for constructive discussion. Although the tone and approach varied between the meetings, two interviewees felt that well-rehearsed points were repeated but questions were not comprehensively answered. Nobody suggested that these meetings had a significant impact on Gatekeeper conduct or implementation. Most Business Users and one Gatekeeper felt the Commission was uncertain about what it was seeking to achieve from these meetings and appeared reluctant to intervene or direct the meeting towards any particular objective.

We suspect that the reliance on bilateral engagement with the Commission rather than bi-lateral engagement between Gatekeepers and Business Users has a number of consequences. Most obviously it places the Commission in the position of intermediary between the Gatekeeper and the Business Users. The effectiveness of the implementation is then entirely dependent on how effective the Commission is at fulfilling this role. The Commission has to know the right questions to ask each party to elicit the information it requires, and to be able to communicate information from one party to another in order to elicit useful responses from each. It also means that the speed and scope of the process are, to a large degree, determined by the resources that are available to the Commission and the way it decides to allocate them, as well as the speed at which the Commission can co-ordinate and make decisions internally. Most interviewees felt that the Commission had insufficient resources and a complex decision-making structure, although many recognised that the staff is working very hard.

Some interviewees[42] **felt there should be more (but selective) multi-lateral engagements involving the Commission, Gatekeepers, Business Users and perhaps other relevant national authorities if necessary**. This was true both of one Gatekeeper and some Business Users, which we think is

[41] https://digital-markets-act.ec.europa.eu/events/workshops_en
[42] 5 business users, one Civil Society Organisation and one Gatekeeper.

important. Most accepted that the precise configuration of the meeting (public or private) and the type of attendees (lawyers or engineers, one Gatekeeper or several if the same obligation is discussed) would depend on the objectives being pursued. Most thought the Commission would need to take the lead to ensure these engagements were effective, both in terms of initiating the dialogue and specifying who is expected to contribute and in terms of chairing and refereeing the meeting itself (to a greater extent than it has appeared willing to do to date). In order to do this, the Commission will itself need to have a clear set of objectives for each meeting.

We think that, after a series of these multi-lateral dialogues are concluded, the Commission should evaluate how to make this approach more effective and how best practices are identified across the various workshops. It may be that additional legal powers to oblige Gatekeepers to participate in the manner decided by the Commission are necessary. However, in the first instance, the key considerations should be about identifying relevant participants to these multilateral dialogues so as to ensure that all parties affected are represented, develop a process to facilitate exchanges of relevant information, and establish processes to structure the dialogue.

One issue that arose in this context and which requires further thought is the **concern on the part of some Business Users over the threat of retaliation by some Gatekeepers** if they complained or otherwise engaged with the Commission on the DMA. This concern was reported more or less explicitly by the Business Users who mentioned it. We do not take a position on whether this concern is well founded or not, but perceptions also matter if their effect is to exclude some Business Users from participating in the regulatory dialogue with the Commission or in direct discussions with Gatekeepers, and this were to distort the way in which the DMA is implemented or favour some interests over others. It is recognised that trade bodies or other representative organisations can go some way towards aggregating and reconciling views and shielding individual members but in our view, there are also benefits in regulators dealing directly with individual companies rather than representative organisations that are constrained in what they can say.

Some Business Users thought that others would seek to launch commercial services that were enabled by the DMA before seeking to engage with the Commission in order to improve further the terms of trade with the Gatekeeper. We see this as primarily a commercial matter for the Business Users. It might accelerate the introduction of new services but might also deprive the Commission of important feedback from Business Users whilst implementation was being discussed with the Gatekeeper.

An example of where a **multi-lateral dialogue might assist is the design and testing of choice screens**. Implementation has tended to proceed incrementally, with Gatekeepers making a series of modifications, presumably in response to feedback from the Commission and others that the existing measures were not judged to be effective. An alternative approach would have been for the Commission to convene a series of meetings for all parties to agree an A/B testing programme and research methodology for testing different choice screen formats which could be undertaken either by the Gatekeeper itself or by some mutually agreed third party. The results of these tests could be used by the Gatekeeper to inform their implementation programme before introducing it into a live environment and would provide Business Users and third parties with an understanding of why the Gatekeeper had chosen one approach rather than another. This might have allowed all parties to arrive at a consensus on what changes to be made, either more quickly or even at all. We recognise,

however, that decisions about what and how to implement following this engagement will ultimately remain a matter for the Gatekeeper itself.

Another suggestion based on conversations with stakeholders is that **the Commission use other tools to capture feedback in a multi-lateral setting**. For example, the Commission could oversee chatgroups to which Business Users and others could contribute, and could decide whether or not to do so on an anonymised basis (in which case the Commission might need to control entry into the group). This would allow participants to see what others were saying and to assess the extent to which a consensus on a particular issue might be possible and the extent to which their own position aligned or did not align with others.

More generally, we think the **Commission should consider how digital communications tools could be used to support the implementation of the DMA, and how the normal business processes which Gatekeepers already use to interact with counterparties can be applied in a regulatory context**. Instead of the traditional approach of face-to-face meetings and written documents favoured by the Commission and legal services, there may be opportunities to use the kinds of digital tools that are already employed by the Gatekeepers and the Business Users in their ordinary course of business.

If multi-lateral engagements were to become more common, we think it possible that Business Users and others might co-ordinate more amongst themselves than they have done to date. Some were concerned that multi-lateral engagement would expose conflicts between Business Users which the Gatekeepers would then seek to exploit in order to delay compliance. Business users might have incentives to resolve some of these disputes before engaging with the Commission, rather than leaving it to the Commission to do so.

3. Formal Instruments

We have already emphasised that the informal interactions between the Commission, the Gatekeepers and Business Users and other parties which have been reported in interviews are not formally recognised or legislated for in the DMA. They occur both because it would be impossible to implement the DMA without some dialogue of this kind and because such informal dialogues and the exercise of soft power and persuasion can often be faster, more flexible, and require fewer resources than the application of the formal legal instruments which are contained in the legislation. On the other hand, regulated firms are more likely to be susceptible to the influence of soft power if formal instruments and sanctions represent effective deterrents and provide for effective remedies.

To recap briefly, the DMA envisages that there will be both internal and external mechanisms to ensure implementation and compliance by a Gatekeeper. Internally, the Gatekeeper is required to appoint a Compliance Officer with duties to inform and advise the management of the company as to its level of compliance and to organise, monitor and supervise the actions being taken by the Gatekeeper to implement the DMA.[43] Externally, the Gatekeeper is required to produce a Compliance Report, a public version of which is available to Business Users and other third parties who are expected to scrutinize it and draw the Commission's attention to those areas where they consider the actions taken by the Gatekeeper have fallen short.[44]

Whether as a result of this feedback or on the basis of its own assessment, the Commission can at any time commence proceedings under Article 20 of the DMA to assess whether the actions taken by the Gatekeeper are or are not compliant and may adopt a decision under Article 29 of the DMA if it concludes they are non-compliant. This decision will require the Gatekeeper to cease the non-complaint actions and inform the Commission of the actions it plans to take to comply with the decision. The Commission may (but is not required to) consult with Business Users and third parties prior to coming to a non-compliance decision.[45] It is then for the Gatekeeper to report to the Commission with the measures it has taken to ensure compliance.[46]

In addition (or perhaps alternatively, as we discuss below), the Commission can at any time initiate proceedings under Article 20 to specify the actions a Gatekeeper should take to ensure compliance with any aspect of Articles 6 and 7. In this instance, the Commission is obliged to consult with Business Users and other third parties after it has come to a preliminary finding and before it adopts a final decision.[47]

3.1 Gatekeepers Compliance Formal Tools

3.1.1. Compliance Officers

Business User interviewees had very little to say about **compliance officers, who do not appear to be very visible outside of the Gatekeeper organisations**. It is not clear, to them for example, if the

[43] DMA, Article 28(5)(a).
[44] DMA, Article 11 and https://digital-markets-act-cases.ec.europa.eu/reports/compliance-reports.
[45] DMA, Article 29(4).
[46] DMA, Article 29(6).
[47] DMA, Article 8(6).

formally designated compliance officers are leading or are responsible overall for the informal engagements between that Gatekeeper and the Commission over the DMA. Most Business Users were not aware as to who the individual was and had had no contact with them and some thought the Commission had not paid much attention or attached much priority to this aspect of the DMA.

Our sample of Gatekeepers is modest – one explained that the role of the compliance officer is not useful when there is compliance and the right communication lines with the Commission already exist. It indicated that this role is more useful for some Gatekeepers than others. The other two Gatekeepers considered that the role was clear, and one said that the Commission had provided guidance on the role of the compliance officer.

We think the compliance officer function can be viewed in two ways: a **'minimalist 'approach**, which is what we think is the case today, and a potentially more expansive role (which may require changes to the DMA to achieve). The minimalist view is that the compliance officer serves as an adviser to the senior management of the Gatekeeper and performs a pseudo-independent audit function to assess implementation of a set of specified actions. On this view, the compliance officer may not have a role in deciding what the actions to be taken actually are or what their consequences might be (but only to assess and report on whether or not they have been taken). Management may confer such responsibilities on the compliance officer, but this is not required under the DMA.

However, a **more expansive approach would be for the Compliance Officer to provide a focal point for external engagement** – for example as someone to whom Business Users could appeal (rather than going to their account manager) if they consider that the Gatekeeper organisation is failing to implement appropriately or if they perceive a mismatch between what the Gatekeeper says it has done or is doing and their own experience; we recognise this is possible today, but received no evidence of it happening. The compliance officer could be required to certify not only that the contents of the compliance report were factually accurate, as required by the Commission's template, but to provide an opinion (akin to a solvency report in a financial audit) as to whether or not the actions thereby described meant that the Gatekeeper was in compliance with the DMA. The Officer would then be concerned not only with whether actions were being taken with, as Article 28(5) of the DMA states, 'the aim 'of ensuring compliance but with assessing whether or not they are actually having that effect.[48]

Our aim here is to explore whether there might be a need for greater internal challenge within the Gatekeeper over the actions it is taking to implement the DMA (and maybe also for the Gatekeeper to itself be able to demonstrate this) and, if there is, how this might be achieved.

3.1.2. Compliance Reports

Comprehensiveness and Comparability

We have not seen or discussed the confidential versions of the compliance reports that Gatekeepers have submitted to the Commission in March 2024 and so are not able to assess how far they diverge from the different formats which different Gatekeepers have chosen to adopt for the public version

[48] This degree of personal accountability would be closer to the function of Senior Management Functions in financial services regulation and Senior Managers under digital content regulation in the UK: https://www.fca.org.uk/firms/approved-persons and https://www.legislation.gov.uk/ukpga/2023/50/section/110.

of the report. It is clear that, **notwithstanding the Commission's Template,**[49] **different Gatekeepers have taken different approaches to the public versions of the compliance report**. This may reflect different views on the intended audiences or purpose of the report, or other strategic considerations. One Gatekeeper reported that the Commission has a preference for the public version to be a redacted version of the confidential version and that this was sub-optimal because the public would benefit from a more accessible document and targeted information could be supplied in other ways that would benefit Business Users and others.

The general view of Business Users and others is that the reports have fallen some way short of expectations. Both Gatekeepers and Business Users seem generally supportive of the idea of a document that presents in one place the various actions and measures which a Gatekeeper has taken and which it may otherwise be communicating to a range of different audiences through a range of different channels. Business Users thought that the Commission will need to be more prescriptive in defining the contents and format of the compliance report, including specifying KPIs (a topic which CERRE researched previously)[50] and that it would need to enforce these requirements.

There is also some support for a multi-lateral meeting in which the Gatekeeper is required to explain the contents of the document and take questions on it in front of the Commission, although many thought the format of these meetings should differ from those organised in March 2024 in order to be more constructive and informative.

Some stakeholders noted that despite most (public) compliance reports not meeting the requirements of the Commission template, no action had been taken as a result; revised or more compliant reports had not been required or published since March 2024. Most accepted that the Commission has limited resources and may have decided to prioritise other issues, but at some point, we think it will need to take action to ensure that the compliance reports better perform the role that was envisaged in the DMA, or that they find other and better ways to enable Business Users and third parties to understand the actions that have been taken and whether and why the Gatekeeper considers that they ensure compliance with the DMA. Having said that, the Commission template is not legally binding on Gatekeepers. They may be penalised for failing to demonstrate compliance adequately or for providing wrong information, but the choice about how to present information remains theirs. Two Gatekeepers reported that they received feedback on the format of their reports.[51]

Dynamicity

This point links to another, which is that both Gatekeepers and Business Users criticise the **existing arrangements as being a series of 'set piece 'or snapshot events** including the annual publication of a compliance report and an annual meeting to discuss its contents. This sits uncomfortably alongside the continuous process of regulatory dialogue in which the various participants are otherwise engaged and normal Gatekeeper commercial practice, which is to release software updates on a regular basis and to explain them in their developer blogs. One consequence of this is that Gatekeepers can be expected to make changes to implement the DMA much more frequently than once a year, which will

[49] https://digital-markets-act.ec.europa.eu/legislation_en#templates.
[50] https://cerre.eu/publications/implementing-the-dma-substantive-and-procedural-principles/.
[51] One Gatekeeper reported that the requirements in the Commission Template go beyond what is legally required by the DMA.

mean the compliance report is out of date until the next version is published. Although we recognise that some Gatekeepers will also provide updates about changes, including to implement the DMA, in the ordinary course of business, they have no obligation to do so under the DMA. We therefore think would be better if the compliance report was regarded and managed as a 'live' document which would be updated as soon (or before) substantial changes were made. This would serve to formalise the approach of some Gatekeepers who already provide information to users in this manner.

If Gatekeepers regularly change the way in which they implement measures to comply with the DMA, then this is likely to have implications for those Business Users who are seeking to benefit from the opportunities which those changes give rise to. The current arrangements (as interpreted by Gatekeepers) seem to envisage that Business Users will be informed after the event of the actions which the Gatekeeper has taken and, there is **no requirement in the DMA for the Gatekeeper to provide advance notice to Business Users of changes it plans to make**. Some platforms have such duties on the basis of other EU laws.[52] This leaves Business Users with uncertainty, not only because they do not know what changes are likely to be made in future but also because they do not know when they might be made. This may affect the launch plans of services which the Business User intends to offer and other related commercial activities which it wishes to undertake. Conversely Business Users reported that they expected greater ex ante engagement by Gatekeepers to facilitate quick entry by Business Users.

Many regulated access regimes require the regulated firm to provide advance notice of changes to arrangements with third parties and there is a change management process that is approved by the regulator. This may result in some delay in implementation of those changes, but in our view this cost is likely to be more than offset by the benefits to the intended beneficiaries of the DMA, being the Business Users and their end customers. **In requiring Gatekeepers to update 'live 'versions of compliance reports, the Commission could also require Gatekeepers to give notice of changes well in advance of implementing them**. This may require an amendment to the DMA but it is in line with the existing requirements some platforms already have under the Platform-to-Business Regulation.

3.2 Commission Enforcement Tools

Although some Business Users and others argued that Gatekeepers were expected to be in full compliance from Day 1 of the new regime and that non-compliance proceedings should be initiated whenever that was not the case, most interviewees accepted that **implementation will be an iterative process rather than a single shot game**. This still leaves room for disagreement about how quickly the process should move. Two Business Users explicitly noted that compliance was expected on 6 March 2024 but observed changes made after that date. Of the Business Users who contacted the Gatekeepers, all indicated that further discussion with a Gatekeeper was necessary to ensure they could benefit from the DMA. Business users who contact the Commission likewise do this in order to ensure there is compliance. The question for these interviewees was how long it would now take to achieve substantial compliance with the DMA given that any expectation of achieving full compliance in March 2024 has been abandoned.

[52] Article 3(2) of the Platform to Business (P2B) Regulation 2019/1150 provides that the providers of online intermediation services shall notify, on a durable medium, to the business users concerned any proposed changes of their terms and conditions at least 15 days in advance of the change.

The experience to date suggests that setting arbitrary deadlines is not likely to be helpful and that what is reasonable to expect will depend on the nature of the obligation and the business model to which it is being applied, a point also noted by one Gatekeeper. Some are clearly more straightforward than others. The Commission may have its own milestones and deadlines, and may share these with Gatekeepers, but Business Users and others remain unaware. It may be that more can be shared by the Commission.

3.2.1. Specification Proceedings

Specification Initiated at the Request of a Gatekeeper

We have already noted that no Gatekeeper has yet, so far as we know, used Article 8(3) of the to oblige the Commission to consider a request for clarification as to the actions it is expected to take in order to comply with the DMA. At the same time, Gatekeepers have told us that the Commission has not always provided sufficient or sufficiently clear guidance on the actions they are expected to take to comply and that they would have liked the Commission to do so. This suggests to us that this aspect of the specification decision regime is not working as intended.

Given the limited sample of Gatekeepers surveyed, we can only speculate as to why this might be the case. It may be that Gatekeepers assume the Commission would reject such a request if it were made, since if the Commission is unable or unwilling to provide more specific guidance under the informal regulatory dialogue there may be no reason to think the Commission would be any more willing to do so because it has received a formal request under Article 8(3). In addition, Gatekeepers may feel that moving to a formal request will be interpreted by the Commission as a breakdown in the informal dialogue, or may in any event precipitate that (as indicated by two Gatekeepers, for example). Gatekeepers may consider that they are more likely to obtain a favourable interpretation of their actions from the Commission under the informal process than in a specification decision (e.g. because the Commission is subject to inflexible timelines once it initiates formal proceedings) and/or that the publication of specification decision may have consequences for the Commission's subsequent approach to enforcement (e.g. by recording its expectations in a decision which is published, the Commission may consider that it must take enforcement action if the Gatekeeper subsequently fails to comply, whereas any expectations set in an informal dialogue between the Gatekeeper and the Commission will remain between them). All Gatekeepers favoured informal dialogue to the specification process.

Taken together, these mean that **Gatekeepers currently face considerable uncertainty about how the specification process will work and what the consequences might be relative to alternative courses of action**. Although the Commission might develop guidance on how it would approach such requests were it to receive them, the only way these uncertainties will really get resolved is if Gatekeepers exercise the option provided to them by Article 8(3).

Specification Initiated by the Commission

The situation is different for Article 8(2) of the DMA because the Commission has, in September 2024, initiated a specification procedure in relation to various interoperability matters.[53] However, there is uncertainty amongst our Business User interviewees as to the Commission's thinking in deciding to initiate such proceedings and, indeed, what the purpose of specification decisions might actually be. One Business User suggested that these were essential, while another expressed a preference for dialogue.

One question is **what purpose specification decisions might serve which could not be achieved by guidelines**. One important difference is that specification decisions are addressed to a particular Gatekeeper and so the decision cannot, as a matter of law, have general applicability to other Gatekeepers or be enforceable against them. Nonetheless, it seems likely that specification decisions directed at one Gatekeeper will be closely read by others and that at least some aspects of the decision will have wider relevance. It may be that the Commission will explain what it considers to be of wider relevance in the decision itself or that it may then incorporate those aspects of the decision into a separate set of guidelines.

There is also **uncertainty**, at least amongst Business Users and third parties who are not party to the dialogue between the Commission and Gatekeeper, about the **relationship between specification decisions and non-compliance proceedings**. Is a decision to initiate a specification proceeding with a 6-month deadline a (faster) way for the Commission to accelerate compliance by the Gatekeeper than initiating a non-compliance procedure which is likely to take 12 months or more? Or are they directed at fundamentally different purposes? Will it be possible for the Gatekeeper to make changes prior to the issuing of a specification decision which would mean that no decision is produced, as appears envisaged under the non-compliance proceedings of Article 29 which we discuss next? If so, the specification process does not improve transparency much and, depending on whether preliminary findings are produced or not, compliance may end up being achieved through the same kind of informal dialogue as preceded the opening of the specification procedure. On the other hand, it may be that the specification procedure is a way of committing both the Commission and Gatekeeper to greater transparency, with the outcome of their engagement being clear to all in the contents of the public version of the specification decision.

One Gatekeeper was concerned that the deadlines for specification decisions (3 months for preliminary findings and 6 months for a final decision) are too tight (both for the Commission and the Gatekeeper) and that a '**stop the clock** '**procedure should be allowed**. We would expect that the opening of proceedings is likely to be preceded by extensive engagement between the Commission and Gatekeeper before the clock starts and note that the decision as to when to formally initiate the proceeding lies with the Commission.

However, this concern raises a wider issue that we have observed above that stakeholders find the informal dialogue helpful but lacking in structure. A better understanding of the role and relationship

[53] https://digital-markets-act-cases.ec.europa.eu/cases/DMA.100204 and https://digital-markets-act-cases.ec.europa.eu/cases/DMA.100203.

between the informal dialogue process and the specification decision process is required. We discuss this more fully in the Recommendations paper.

3.2.2. Non-compliance Proceedings

Commission Prioritisation

Views on non-compliance proceedings have been influenced by the Commission's decision to initiate a number of such proceedings in March 2024, the same month as the first set of designated Gatekeepers were required to comply with the DMA.[54] Two Business Users expressed the view that enforcement was too slow already. Most Business Users are unsure why the Commission had chosen to initiate them in relation to some matters but not others. Six Business Users, one Civil Society Organisation and one Gatekeeper said that they felt the Commission prioritised easy cases, one Gatekeeper expressed concerns about political considerations. Three Business Users felt that the enforcement efforts were not in the right direction and two stakeholders felt that the volume of complaints affected enforcement choices.

This is a reflection of a general uncertainty about how the Commission is prioritising its cases. It is perhaps inevitable that Business Users whose issues were addressed in the non-compliance proceedings welcomed them whereas those whose issues had not been addressed and who considered there was evidence of blatant non-compliance were frustrated by the Commission's approach**. Everyone recognises that the Commission has limited resources and will need to prioritise how it allocates them, but most want more clarity from the Commission to enable them to understand how it does this**.

We noted earlier that the Commission's understanding and position on different issues and in relation to different Gatekeepers will have depended to some degree on whether DG COMP had engaged on the issue with a particular Gatekeeper under a previous antitrust proceeding. In such cases, the Commission may have started with a better-defined view of what compliance means than for those cases where the Gatekeeper's business model and services are unfamiliar to the Commission. On the other hand, if there are different case-handlers under the DMA then the officials will also lack familiarity even if there has been a prior antitrust proceeding. To the extent that the DMA allows the Commission to resolve concerns which it had previously been unable to address adequately using competition law, it seems reasonable that the Commission would focus on these issues first before moving on to less familiar territory. Some interviewees also suggested that other criteria may be being applied – for example, that the Commission was prioritising actions that were more visible to the consumer, such as choice screens, or thought to be more self-executing than other obligations, or issues that had attracted the most attention, publicity, or lobbying activity from Business Users.

This led to concerns amongst Gatekeepers that some might be being unfairly targeted as compared to others and concerns amongst Business Users that the concerns of other Business Users were being prioritised over theirs. We think this is to some extent inevitable in any regulatory regime, but we would be concerned if the Commission were thought to be acting in an arbitrary or politically-

[54] https://digital-markets-act-cases.ec.europa.eu/search.

motivated manner.[55] **Without guidance on how the Commission will prioritise its work, concerns about unfair conduct or political influence are likely to remain**. The new Commissioners in charge of the DMA are expected to ensure rapid and effective enforcement of the DMA so the political steer is clearly about prioritising the key challenges in digital markets.[56] but this commitment needs to be communicated more precisely, particularly in a rapidly evolving geopolitical environment.

Relationship between Enforcement Tools

Whilst Business Users were concerned that some issues were being prioritised but others neglected, some Gatekeepers were concerned that the Commission had initiated non-compliance proceedings so quickly. They linked this concern to what they perceived as the lack of clear guidance from the Commission as to what actions were required to comply during the informal engagement process that had preceded the start of the formal proceedings. Two Gatekeepers argued that without greater guidance from the Commission about what obligations entail, either during the informal dialogue or via guidelines, it would be difficult for Gatekeepers to avoid ending up in non-compliance proceedings. Even then, there is concern that it may remain unclear to the Gatekeeper what actions it must take to avoid a non-compliance decision at the end of the formal process and that there is not enough time for this clarity to emerge.

We assume the Commission would dispute this claim and without being directly involved it is impossible for us to judge. The fact that the Commission has now initiated two specification proceedings may suggest that the **Commission draws a distinction between issues about which it considers there is a legitimate degree of uncertainty (for which specification decisions are an appropriate pathway) and issues on which it considers it is already clear what actions the Gatekeeper must take (for which infringement proceedings are the appropriate choice)**. There may be legitimate disagreements about this but again we note that Gatekeepers also have the opportunity to request further clarification under Article 8 of the DMA. A Gatekeeper that had had such a request rejected by the Commission and then been subject to a non-compliance proceeding might have stronger grounds to raise this concern.

There is a perhaps an even more **fundamental question about what the non-compliance procedure is intended to achieve, given that the DMA also includes the option of a specification procedure**. Is it primarily intended to penalise Gatekeepers for non-compliance when it is already clear what actions should be taken or is it intended to be a mechanism for obtaining compliance when there may be some uncertainty about what actions are required? Article 29 of the DMA requires the Commission to issue a 'cease and desist 'order in relation to existing actions but places the onus on the Gatekeeper to decide what actions it will take 'to comply with the decision'.

However, the issue may not be that the actions already being taken by the Gatekeeper cause it to be non-compliant but that the Gatekeeper needs to take additional actions alongside those that it is already taking (i.e. compliance is not just about removing barriers but also about taking steps to enable). The question is whether the Commission will specify what those additional actions are in the decision or whether it will simply state that the existing actions are insufficient to ensure compliance.

[55] One stakeholder suggested that the Commission's recent conduct has been influenced by the transition from one set of Commissioners to another.
[56] Mission Letter from Ursula von der Leyen to Executive Vice Presidents Ribera Rodríguez and Virkunnen (17 September 2024).

The specification of those additional actions might be something we would expect to be in a specification decision, making the interaction between non-compliance procedures and specification procedures an important issue, but one which remains unclear at this stage.

We note that the approach in Article 29 is different from that envisaged in Article 18 for systematic non-compliance, whereby the Commission can specify and impose specific structural or behavioural remedies on the Gatekeeper. In such a case, the Commission is clearly expected to define the actions which the Gatekeeper is required to take in order to bring itself into compliance. The same is not obviously the case for individual cases of non-compliance that have been assessed under Article 18. Whilst we recognise that Article 29 introduces the possibility of structural remedies and merger prohibitions which are not envisaged under Article 18, it is not clear to us why the approach to behavioural remedies should differ between Article 18 and Article 29 in the way that it does.

The position may be **more straightforward in circumstances where compliance is achieved by simply removing barriers or ceasing a particular form of conduct**. In these situations, the DMA envisages the Commission being able to apply interim measures to stop problematic conduct in the same way that it can do (but has rarely done in practice) under competition law. This provision has yet to be tested but may be difficult to apply when, in many cases, the damage to Business Users and consumers is not the removal of some choice or opportunity which previously existed or on which firms were previously relying but a failure to introduce new choices or opportunities which have never previously been a feature of the market. The Commission has not adopted interim measures yet, to the frustration of some Business Users.

Gatekeepers would like **greater clarity on when the Commission is likely to initiate non-compliance proceedings and how and when opportunities to resolve them might then be available**. There are clear provisions in a market investigation into systematic non-compliance under Article 18 for commitments to be offered by the Gatekeeper and accepted by the Commission under the Article 25 procedure. There is no such explicit provision in relation to a non-compliance procedure under Article 29, but we do not consider this would exclude a Gatekeeper from offering to change its conduct to remedy the non-compliance concern or the Commission accepting such commitments and closing the proceeding if it sees no reason to impose a fine.

On the other hand, the deterrent effect of the enforcement regime is weakened if the regulated firms can always predict the regulator's response and calibrate their actions so as to do the minimum necessary to avoid escalation or fines and delay full compliance for as long as possible. **Some reasonable degree of unpredictability about the way the Commission will act is, in our view, an important part of the deterrence function of an effective enforcement regime that should be retained**.

Another area of uncertainty is how a move by the Commission to initiate formal proceedings in relation to one aspect of the DMA might affect the informal engagement between the Commission and the Gatekeeper in relation to other aspects. Will both sides be able to compartmentalise the issues and engage with each other in different ways depending on the issue at hand? Or will a move to formal proceedings reduce the opportunity for informal dialogue or its effectiveness? It is probably too early to say. Similarly, Business Users and others are uncertain at this stage as to how they will participate in the proceeding. Article 29 of the DMA says that the Commission may consult third parties but it is under no obligation to do so. We noted earlier that Business Users have found the

informal regulatory dialogue to be rather opaque and their concerns about the more formal non-compliance procedure no doubt reflect this. This is another issue on which further guidance from the Commission would generally be welcomed by many interviewees.

Procedural Aspects

Given that the non-compliance procedure remains untested, there is bound to be some uncertainty about how it will work. One issue is about the access to the file and whether Gatekeepers should be able to obtain information before formal proceedings begin. This goes back to the reactions of stakeholders to the informal process: it is both welcomed as a pragmatic approach to secure compliance, but suboptimal in lacking procedures and safeguards.

Another issue is about what happens if the Gatekeeper changes its course of conduct. It seems to be anticipated that the Gatekeeper may make changes during the procedure, likely after preliminary findings, which could lead the Commission to close the case without issuing any formal decision, as sometimes occurs in antitrust proceedings. Alternatively, the Commission may be persuaded that the actions the Gatekeeper has already taken are sufficient to ensure compliance, in which case the Commission is also not required to issue a formal decision.

Gatekeepers also had concerns about the procedure and their ability to challenge aspects of it. These comments extend beyond formal enforcement and are also discussed in section 4 below. Many of the **procedural aspects of the formal enforcement regime in the DMA** are modelled on those found in competition law, but it is unclear whether the Commission intends, for example, to allow Gatekeepers to request an oral hearing (and, if so, whether other parties would be invited to participate) or whether there will be a Procedural Officer to whom parties can appeal (e.g. in relation to issues of legal privilege). These are matters on which the Commission could either give guidance at the outset, or where it may wish to experiment with different procedures for a while before alighting on the one that works best.

Many interviewees recognised that some questions relating to the interpretation of certain obligations in the DMA, would likely only be resolved in the European courts.[57] This aspect of the regime is unlikely to differ from the experience of implementing competition law and we expect it will take years for some of these issues to be fully litigated.

[57] One interviewee thought the Tik Tok/Bytedance designation judgement (Case T-1077/23) by the General Court of the EU ought to embolden the Commission, another considered what restorative remedies might be imposed in a non-infringement decisions.

4. Longer-term Considerations

In this section, we highlight a number of points that have been made to us, and which look beyond the immediate implementation of the DMA.

4.1 Horizon Scanning and DMA High Level Group

A number of interviewees thought that the current implementation issues under the DMA were largely directed at resolving issues which had arisen over the past decade or so and which had proved incapable of being effectively resolved under competition law. However, the **aim of the DMA is not simply to resolve, ex post, issues that are already a feature of the market or the industry but also to anticipate and resolve, ex ante, emerging and new issues which may affect contestability and fairness in the future**. It is not yet clear how the various elements of the DMA will do this. Some Business Users went beyond this and were concerned that Gatekeepers were seeking to delay implementation of the DMA for existing technologies until new technologies such as AI superseded them, at which point regulating the existing technologies would be irrelevant.

Many saw a role for the **DMA High Level Group in identifying these new and emerging issues**[58] and so informing the evolution of the DMA as the Commission considers new core platform services or new obligations in the future. We know the High Level Group is already considering AI in the context for the DMA.[59] Others saw a role for working groups comprised of experts drawn from Gatekeepers, Business Users, academics, and other third parties and highlighted the work of the Security and Privacy Expert Group which we understand the Commission has established (but which has not been publicised by the Commission). We note the Commission has also tendered for experts to report in technical measures required for horizontal interoperability[60] (which appears more directed at existing implementation issues) and on the impact of emerging technologies.[61] Some interviewees thought that the Commission should already be investigating new candidate core platform services.

Interviewees welcomed these forward looking initiatives but felt that they should be part of a clearer structure and roadmap, likely overseen by the DMA High Level Group, which ensured that third parties knew how to engage effectively with them. **Some thought the DMA High Level Group should be more transparent** in its workings and publish more information about the topics it discussed, the composition and functions of working groups, etc.

4.2 Promoting the Benefits of the DMA

Some Business Users and others were concerned that the Commission had done little to explain the (longer term) benefits of or opportunities provided by the DMA to consumers or SMEs in Europe, whereas Gatekeepers had highlighted the potential (and immediate) costs in terms of alleged risks to consumers downloading third party apps or by announcing that they would not launch new services

[58] Similarly to what the DRCF does in the UK: https://www.drcf.org.uk/projects/projects/horizon-scanning/
[59] https://digital-markets-act.ec.europa.eu/high-level-group-digital-markets-act-public-statement-artificial-intelligence-2024-05-22_en
[60] https://digital-markets-act.ec.europa.eu/dma-call-tenders-study-interoperability-tools-digital-single-market-2024-06-25_en
[61] https://digital-markets-act.ec.europa.eu/study-how-emerging-technologies-may-impact-digital-market-regulation-2024-10-14_en

in Europe and attributing this to uncertainty arising from the implementation of the DMA. Most recognised that there was a question about where the Commission should be allocating its resources (and welcomed the conference for SME Business Users which was organised by the ACM)[62] but we think it may also reflect a lack of clarity about how the outcomes of the DMA should be assessed or measured.

This may be something the Commission will consider as it prepares its second annual report under Article 35 of the DMA.[63] Business users proposed different **ways and actors to promote the benefits of the DMA**. Some suggested highlighting compliance measures that have led to changes, others suggested that National Competition Authorities (NCAs) could promote the benefits of the DMA to local audiences. Five stakeholders welcomed the workshop organised by the Dutch Authority for Competition and Markets which fostered awareness of the opportunities that the DMA creates.

4.3 Role of National Authorities

Finally, we asked interviewees about their engagement with and the role of national authorities in implementing the DMA. Most Business Users and Gatekeepers thought the involvement of national authorities had been very limited to date. Three Business Users reported limited engagement based on their requests but reported a lack of interest. Two Business Users reported a greater willingness to take active roles and two Gatekeepers reported that coordination is necessary among national authorities. It was clear to us that **different national authorities have different levels of interest in participating in the implementation of the DMA and differing legal, economic, and technical capabilities to do so**. The two national authorities we interviewed explained that they engaged directly with Business Users and communicate what they find to the Commission. One national authority verifies these concerns before sharing them with the Commission.

One input in DMA implementation from national authorities to date has likely been through the **national telecom authorities who participate in BEREC**. BEREC directly engages with the European Commission and met with both the concerned Gatekeeper and potential competitors. It has provided three opinions to the Commission (e.g. on the contents of the Meta Reference Offer implemented under Article 7, the compliance of which is ultimately assessed by the Commission) which helped to improve the technical details of the implementation foreseen by the Gatekeeper.[64]

[62] There were different views on the benefits of this conference. Some thought it raised awareness amongst Business Users but others thought it also allowed them to share common concerns and experiences in implementing the DMA and identify allies.
[63] https://digital-markets-act.ec.europa.eu/about-dma/dma-annual-reports_en
[64] all decisions are available here: https://www.berec.europa.eu/en/all-topics/ni-ics-interoperability

Annex 1 – Interview Summary

This Issue Paper is based on 21 semi-structured interviews. 15 were carried out between September and November 2024 and 7 were carried out between January and March 2025. We interviewed persons representing three designated Gatekeepers, 14 firms who described themselves as Business Users (coded BU, except one respondent who indicated that in addition to being a Business User they were also a research institution representing the interests of consumers and this firm is coded BU/CSO), two organisations representing civil society (coded CSO) and two regulatory bodies (coded NRA). One respondent indicated that in addition to being a Business User they were also a research institution representing the interests of consumers. All the parties to the interviews had experience with the DMA.

All stakeholders wished to remain anonymous. To retain anonymity the report merely identifies the kind and number of stakeholders that have provided certain responses. The questionnaire used has a common core of questions but varied somewhat depending on the type of DMA stakeholder and all variations may be found in Appendix 2 to this paper which also explains the information provided to the parties we interviewed.

The results are reported below. Each conversation lasted approximately 1 hour. We went through the questions and asked follow-up questions based on responses given. This enabled the interviewees to develop certain observations and identify themes that were relevant to how they understood the process to be. This allowed us to gain a deeper understanding of the way they perceived the DMA's enforcement process to have gone so far.

Given the relatively small number of respondents and the diversity of answers, we do not always provide precise quantitative data but when possible, we have explained how many and which type of stakeholder took a particular position. While the sample is relatively small, we have discussed matters in depth with each interviewee and a number of common themes arose.

All BUs except one are actors that have existing and new services that are offered via Gatekeepers and are thus familiar with the technological and regulatory landscape. This allowed us to obtain well-informed responses. While this improved the quality of the discussion, newcomers may well have different experiences that we are unable to report on.

For each question set the paper opens with a general overview of the answers given and then reports on what emerged from the various discussions.

Engagement with the European Commission

Business Users and Civil Society Organisations

All Business Users report that engagement with the Commission has become more frequent and regular since 6 March 2024.

Two BUs highlighted a lack of consultation during the pre-compliance phase, while all others report sporadic engagement before 6 March. Some BUs were more active than others and no pattern emerged. CSO participation varies, one reported significant more engagement with the Commission

than the other. One CSO supplied written observations and engaged to explain Gatekeeper compliance and non-compliance. Most CSO conversations were initiated by the CSO.

The majority of Business Users report that they have been the ones to initiate dialogue with the Commission and that since 6 March 2024 this is regular (quarterly or monthly). However, One BU reports that at times the Commission initiates contact (indicating roughly 40% of contacts are started by the Commission). In our sample, this is the exception as all other respondents indicate that they are in the lead in contacting the Commission. For example, one BU noted that it expected to be contacted by the Commission but this did not happen. One BU contacted the Commission because the Commission announced an open door policy. One BU reports that the Commission sought some clarifications from it on issues that it had raised. One BU reports that the Commission reached out to members of a trade association with a questionnaire about the DMA to secure industry views.

Most Business Users contact the Commission directly but one BU reports that they contact the Commission via a trade association (some interviewees referred to these as business associations, we have retained the phrase trade association for consistency). One BU engaged with the Commission both individually and via a trade association. Two BUs explained that the trade association is beneficial because BUs can gain a better understanding of the position of members and align their viewpoints. Three BUs engaged via a trade association as well as individually. One BU did not report participating via a trade association but explained that these would be better than bilateral meetings because the trade association could coordinate BU positions.

One BU explained that it was not aware which person to contact about compliance issues, but this is a point no other interviewee made.

One BU indicated that the Commission has an open-door policy and actively engages with Business User, a sentiment shared by many others. Indeed, nearly all BUs are satisfied with the ability to communicate their views and information to the Commission. All Business Users report that there is more engagement from 6 March and all Business Users feel they are able to contact the Commission to air their views, for example one BU explained that the Commission is open to understanding technological matters that it may not be aware of, a point repeated by many stakeholders. A different perspective was offered by one BU who considered that the Commission does not collect BU feedback systematically. One BU remarked that the Commission gave more attention to the prominence of a BU rather than more objective factors like market share.

However, while there is general satisfaction at the ability to inform the Commission, a majority of Business Users identify a lack of transparency and feedback from the Commission. For example, one BU sent a paper with some issues but did not get a response. One BU notes that while engagement is positive, it is not clear how the Commission follows up. One BU expects that its input is used to address compliance issues but that it is difficult to see how issues are followed-through. One BU explained that it saw the Commission as an intermediary between Business Users and Gatekeepers: it seeks to protect the users' identity in communicating with the Gatekeeper, but there is an opaque process of interaction, described as a "black box" insofar as one BU considers that it does not know how the Gatekeepers respond to its observations. One BU advocated greater transparency and another BU suggests that dialogues should be more structured, including regular follow-ups and opportunities to submit additional information. One BU also observed that there is uncertainty about how information is used by the Commission and a lack of updates. The BUs spoke of a "black box" explaining that while

they are satisfied with the speed of Commission enforcement, they feel a lack of information and feedback about how the concerns raised are utilised. One BU thought that the Commission's openness to representations was designed to compensate for the absence of procedural rights for Business Users. However, one BU remained concerned that they are currently entirely reliant on the Commission's willingness to share information as a means of understanding how issues are addressed.

One BU shared many of the points made in the paragraph above adding that it would help for the Commission to communicate how BU input is used by the Commission. One BU suggests a "complaints filing" system that allows for tracking of the status of complaints. One CSO and three BUs express concern that they are not aware whether the Commission ultimately agrees with its suggestions and how these are managed.

Four BUs and one CSO understand that the Commission works on specific obligations and Gatekeepers with the same staff/teams. This understanding of the operation of the Commission was also noted by others, although in less detail. One CSO adds that the level of outreach varies between teams, with some being more proactive in engaging with shareholders. One BU also says that this setup where teams specialise is a good idea because it allows for consistency in enforcement and allows for benchmarking. At the same time, the same BU also notes that the Commission is able to see the bigger picture. One BU noted that each team has officials from both DG COMP and DG CONNECT and considered that the organisation allows for consistency as meetings are with the same officials. One BU however noted that there should be more coordination among the various teams highlighting that there is no information sharing among teams so that it had to convey the same information more than once to each team.

One BU, echoing the opinions of other Business Users, indicates that the engagement with third parties is not systematic. One BU suggests the need for more structured three-way discussions that include Gatekeeper, Business Users and the Commission. Two CSOs both echoed the importance of a structured way for the Commission to secure input from third parties fearing that dialogue at the moment is mostly between the Commission and Gatekeepers. CSOs made some suggestions: improving Commission transparency regarding its activities and a timeline for its actions which would allow it to provide more meaningful and informed feedback.

Some respondents commented on the Commission's expertise and resources. There is agreement that the Commission is resource constrained but one BU noted that the Commission is looking into the right things. One BU worries that the enforcement stage is already too slow at this point in time, however another two BUs though enforcement was speedy. Turning to expertise, six BUs considered that the Commission lacked expertise. Normally BU express concerns about expertise relating to the technology but one BU noted that the Commission also lacked expertise in economics. Related, one BU explained that it makes its engineers available to the Commission to address technical issues. One BU sees an improvement in the Commission's technical knowledge and that this has improved since the time the DMA was proposed. One BU considered that at times the Commission should take a broader approach to assessing compliance and should gain a better understanding of how businesses engage with proposed solutions. One BU also considered that the Commission was open to exploring how to achieve the best results. One NRA indicated that the Commission initially lacked expertise but then has developed significant technical expertise and for certain specific issues it has sufficient in-house expertise.

One BU reports on work on a technical paper by the Commission to which it has been asked to comment. This paper is designed to assist compliance with some DMA obligations. It is not clear whether this will be made public or result in guidelines.

One BU observed that the Commission becomes more formal and guarded once infringement proceedings commence. One BU considered that the use of RFIs was a positive step in securing valuable information with adequate time to provide information being available.

Reflecting more recent developments, one BU noted that Gatekeepers modify their compliance (which was due on 6 March 2024) only after the Commission commences enforcement proceedings. Two BUs wonder if in this setting the Commission must continue to pursue infringement proceedings anyway since compliance was due on 6 March, which would lead to non-compliance findings that could later add up to facilitate a finding of systematic non-compliance.

One BU explained that the Commission encourages Business Users to engage via collective groups or trade associations so that consensus among members can drive changes in compliance. The Commission uses associations as a key tool to gauge consensus on various issues. Two BUs report that efforts are made to find a common denominator among members. One BU confirms these meetings of trade associations but takes the view that these are more relevant for smaller actors who might not otherwise be reached by the Commission. The Commission still engages with larger firms bilaterally. One BU supports efforts to aggregate Business Users in coalitions which could assist those with fewer resources. However, they note remaining concerns about potential retaliation as it may be possible for a Gatekeeper to identify who is a member of an association.

In terms of substance, one BU and one CSO explained in high level terms that they provide information to the Commission about their business model, what they consider to be compliance with the DMA and their interpretation of the rules of the DMA.

Gatekeepers

Gatekeepers report on pre-designation and pre-compliance discussions with the Commission. Pre-compliance meetings were already held before 2023 but after designation. These were regular but that these became more ad hoc since 6 March. Two GKs report that compliance meetings are preceded by a written submissions and that the Commission and Gatekeeper both take the lead depending on the issue under discussion: the Commission being more interested in certain topics. One GK reports that it has to also explain the working of its services during these discussions.

All GKs report that the dialogues are constructive. One observed that they have become more so as time passes indicating that at the start the Commission expected the Gatekeeper to come up with compliance but shifting more recently to an approach which is more dialogue driven. However later in the conversation One GK also pointed out that the Commission may also move to a more formal process (e.g. requests for information). Two GKs noted that at times they wished for more guidance on how to comply although one GK noted that by the end of 2023 the Commission became clearer about what it considered compliant conduct while noting that the Commission seems to have some latitude in determining what compliance is and some more fixed goalposts would help.

GKs report that they meet with the same officials during compliance meeting, Two GKs noted that more coordination should take place between officials from DG COMP and DG CNECT, not least in streamlining information requests.

Two GKs report that there are varying levels of expertise among EC officials. One GK considers it necessary to explain how its services work. At the same time all GKs report that the content of meetings is largely legal, one GK estimating that 70% of content is legal and 30% is on technical matters.

Two GKs report that the way the Commission engages with GKs relies on a more traditional antitrust approach with RFIs post 6 March 2024. One of them would prefer a continuation of a dialogue-based approach.

One GK reports that there is a difference in engagement from designation to compliance, with the latter being more constructive.

Regulatory Bodies

One NRA's engagement is limited to giving feedback on specific issues at the request of the Commission. Another has been more active: (a) it has regularly engaged with the Commission through various fora (ECN, Advisory Committee); b) it has seconded some officials to the Commission, which is seen as reciprocally beneficial: helping the Commission by adding expertise, and helping NCAs by gaining exposure to new issues. It is also expected to bring greater trust between the two enforcer groups. One NRA reports similar initiatives are planned by other NRAs.

One NRA suggested that looking forward ways of working together (e.g. via join teams like in banking supervision may be considered but this remains speculative until greater experience is obtained.

Compliance Reports

Business Users, NRAs and CSOs

Business Users were generally dissatisfied with the compliance reports. Only one CSO reported studying the compliance reports and also expressed dissatisfaction with them. Business Users considered the template provided by the Commission was useful but that few Gatekeepers followed it.

Eight BUs found compliance reports unhelpful because they lacked sufficient information to assess if the Gatekeepers were compliant. One BU also indicated a lack of detail and felt that they contained an excessive amount of legalese. Three BUs report that compliance reports should be more helpful for Business Users by making it clear how they may request certain entitlements from a Gatekeeper. One BU considered that the reports gave no meaningful answers to allow Business Users to take action. One reports that some compliance reports contain conflicting information. One BU considered that the reports lacked detail and did not reveal how the Gatekeeper had achieved compliance. One BU observed inconsistencies in the reports as well. One BU did not use the reports for any of its business decisions. One BU felt there should be an opportunity to challenge the reports during

workshops. and also felt that BUs should be called to engage much earlier in the process for a more effective dialogue.

Two BUs noted that Gatekeepers change the way they comply after the compliance reports are published so that these are out of date very quickly. This point was also observed in passing by other Business Users. One CSO suggests that compliance reports should evolve across time as several Gatekeepers have made adjustments to their compliance efforts since submission. Having an up-to date document can assist both beneficiaries of the DMA and CSOs.

One BU reports that it has provided feedback on the compliance reports via a trade association. It saw these reports as useful but remarked that on substantive matters the proposals benefit Gatekeepers and not Business Users. This BUY also remained uncertain about how compliance will be actually executed. One BU also observed that the compliance reports reveal a mismatch between the Gatekeepers and the Commission about what compliance with the DMA means.

Most Business Users felt that the Commission template was adequate and reports would have been more helpful had they followed it.

One BU reports on a meeting in January 2024 which was initiated by the Commission and which included some Gatekeepers and stakeholders where Gatekeepers provided proposed compliance measures to which stakeholders have feedback but it did not consider that this feedback was reflected in the final version of the compliance reports.

One BU expressed the view that benchmarking across Gatekeepers can improve enforcement. The suggestion made was to create a hub for the latest compliance proposals that could stimulate competition among Gatekeepers to comply with the DMA.

One NRA reviewed the compliance reports as a basis for both (i) examining compliance and (ii) helping understand other market signals it receives about the market. NRAs are not privy to confidential versions of the report. Overall, This NRA's opinion of the compliance reports has commonalities with answers by GK and BUs, specifically that the NRA saw compliance as an iterative process allowing the Commission to assess areas for improvement. Contrary to BSs' largely negative responses, this NRA considers these as a good initial step.

Compliance Efforts by Gatekeepers

How Gatekeepers Report that they Design Compliance Before the Deadline

One GK explained that the compliance measures required of it were limited and took the view that engagement with consumers and Business Users before 6 March 2024 was of limited relevance but remained open to feedback. After 6 March 2024, one GK sought feedback on the compliance measures that it had implemented and explained that it wishes that Business Users see the benefit of using its services. One GK received comments on its compliance plan from stakeholders and the Commission and adjusted its compliance accordingly. Another GK however reports that most developers were silent at this stage.

Two GKs report that compliance was planned in-house with one securing the support of external consultants. Two GKs also report that the Commission provides feedback, one of these notes that this was mostly about the format of the compliance report.

One GK suggests that the Commission appears to have had a preference for the public reports to be a redacted version of the confidential ones.

How Gatekeepers Report Compliance Assessment Post the Deadline

One GK explained that it has a significant workforce dedicated to compliance which audits and monitors the steps taken. For some obligations, compliance may be achieved by self-executing reports but this is not feasible for all obligations. Nevertheless, its good is to measure compliance with automated systems in a way that is durable, allows for reports to be provided and which may be audited.

One GK reports that it is working on indicators, including tracking complaints and counting numbers of requests and how may are approved.

One GK reports that it interacts with end-users through surveys and meets with developers to ensure they receive necessary information. It has developed a workflow to consolidate feedback from developers and end users and communicating this to the Commission.

One GK reports that the Commission has sought some clarification about the points raised in the compliance report but that otherwise the feedback was positive.

One GK observed that in its view measuring compliance is difficult because of the lack of clarity about the obligations.

Specification Decisions

Two GKs see this option as risky, prioritising dialogue. A Gatekeeper making a request could be perceived as a breakdown in dialogue and is not a preferred option.

One GK did not consider making a request preferring to engage in dialogue with the Commission which proved useful as the Commission was able to clarify its understanding of the obligations and this was taken into account.

One GK criticised the procedures for regulatory dialogue in Article 8 noting that the timescale is too tight and the feedback period after a summary of specifications is too brief.

Compliance Officer

One GK is unclear about the precise role of the compliance officer especially when a company is already compliant and has established communication lines with the commission. It emphasises that it is more important to involve the right teams within the firm than a specific individual. One GK believes that this office may be more useful for others but not when the company is willing to engage and cooperate.

One GK thinks the role of the compliance office is clear and see this as a compliance backstop and referee. The compliance officer was present at the compliance workshops and attends all meetings between the Commission and Gatekeeper. One GKGK felt the Commission provided guidance on various aspects of the compliance officer's role and that its officer is a senior manager who oversees compliance with KPIs – when goalposts are unclear these are set based on the GK's understanding of the intention behind the DMA.

Engagement with Gatekeepers

Bilateral

Most Business Users report that there was no (2 BUs) or very limited (7 BUs) interaction with Gatekeepers before 6 March and that this did not change significantly since. One CSO engaged with Gatekeepers before 6 March and obtained two sorts of responses: (a) some meetings were constructive; (b) others were less open to feedback. It reports that the input provided had some impact on the final compliance report. Another BU reported that in its view enforcement is for the Commission and it was not for the BU to contact Gatekeepers.

Another BU reported that a Gatekeeper contacted it to persuade the BU to advocate for the Gatekeeper's position at the Commission.

One BU reported ongoing discussions which appear to be more frequent than the other users. That said, this BU also reported that its requests go unanswered. One BU reported that one Gatekeeper cut a conversation short without addressing the substantive questions that were raised. One BU considered that a Gatekeeper had not provided concrete or precise answers to the BU's questions. One BU said that an informal group of stakeholders initiated conversations with Gatekeepers but this did not result in an open dialogue between the two sides. One BU indicated that one Gatekeeper reached out with proposed compliance measures one week before the deadline. One BU indicates that it proactively reached out to several Gatekeepers but only one Gatekeeper arranged a workshop which was attended by a number of other Business Users. One BU considers that the pre-compliance period needed to offer greater opportunities for users and experts to provide input and comment on Gatekeeper plans. One BU engaged with a Gatekeeper via a trade association, at first at the initiative of the Gatekeeper. One BU reports contacting several Gatekeepers and one of these engagements proved fruitful as the conduct of the Gatekeeper changed. However, one BU saw bilateral meetings as sub-optimal favouring multilateral meetings where the Commission's involvement can facilitate quicker solutions.

One BU reports that it is not well informed of compliance measures. Frequently there are updates to compliance post 6 March 2024 and these are linked to software updates but Business Users are not informed. One BU reported some better awareness in that one Gatekeeper provides it with data delivered through an API about the reach of the Business User's services

One BU reports that Gatekeepers are not willing to discuss the design of compliance measures with Business Users. It considers these discussions as essential to ensure contestability. Two other BUs confirmed this suggesting an unwillingness for deeper engagement. One BU expected more data from GK to understand how compliance affects its operations.

One BU however met a Gatekeeper to provide information on proposed compliance measures - it considered that it had been able to put its views forward but without any follow-up to the meeting. It also indicated that the meeting was about the Gatekeeper presenting its understanding of the DMA rather than being an interactive discussion.

One BU reports that its meetings were with account managers of the Gatekeeper which is not the most helpful point of contact to secure compliance. Another BU confirms that some Gatekeepers have appointed relationship managers for specific sectors, though their remit is wider than the DMA.

One BU did not consider that the compliance officer would be a useful point of contact unless the issue was of major importance, while another BU reported to not being aware who the compliance officers are and often information about changes in compliance were obtained from the Commission rather than the Gatekeeper.

Five BUs and one NRA report on privately held workshops on specific obligations and considered that these allowed for a more interactive Q&A session than public workshops. Two BUs supports a wider use of these kinds of workshops. Another BU considered that these were useful for bringing together BUs that have differing opinions. Its impression is that the Commission used these workshops to find a compromise position between the two sides. (One BU felt that the Commission preferred to facilitate finding of a compromise solution.) One BU took the view that the Commission seeks solutions from Gatekeepers but that it could play a greater role in moderating these discussions and felt the Commission could be more pro-active. One BU was more critical because it felt that the Commission did not share its views about what conduct is compliant, but it supported these multilateral meetings because they allow the Commission to observe the various viewpoints directly. This BU also reported that they were not included in certain multilateral meetings, and this was one of the reasons for which it decided to participate via a trade association.

One NRA explained that a roundtable was organised by the Commission with one Gatekeeper on a specific obligation which allowed in-depth discussion on technical means of compliance. This NRA considered this was the most valuable meeting of all because it addressed the informational asymmetry between Gatekeepers and Business Users. The NRA explains that other roundtables were also organised by the Commission which allow it to obtain better information and for Business Users to be heard by the Gatekeepers and to speak freely. This NRA was not aware of who had been invited but observed that participants included firms that had shown an interest in public and larger companies that could benefit from the DMA obligation. One BU who did not appear to be aware of these meetings suggested that three-way meetings would be highly beneficial especially if they included third -party technical experts. In the view of this BU these trilateral meetings would help overcome the informational asymmetry between Gatekeeper and Commission. One BU wonders if these trilateral meetings could be required. Likewise, another BU agreed that multilateral meetings cold be effective but wondered if these can be organised for every issue and suggested that specification decisions could be used instead.

One NRA suggests that Gatekeepers are opting for minimal compliance rather than in ensuring a level of compliance that would foster contestability in practice. It reports that pressure from third parties has led to some improvements in compliance.

One CSO reported increased engagement once it made its concerns about non-compliance public: this elicited a response by some Gatekeepers who became more willing to implement the suggestions proposed by this CSO.

Public Workshops

There was a mixed response to the public workshops, which were attended by all except one stakeholder interviewed. Some (4 BUs and one CSO) considered that they were useful in forcing the Gatekeeper to explain its position publicly. Others (7 BUs, one CSO and two GKs) felt they were not helpful: a missed opportunity to provide candid feedback to Gatekeepers, the Gatekeepers failed to answer questions, there was no follow-up after the workshops, and the meetings were too large to allow in-depth discussion. One BU said that at times Gatekeepers gave misleading and even incorrect answers. One CSO while generally positive remarked that some were scripted and made discussion difficult.

There was agreement among most Business Users that the Commission role was too passive during these workshops (at least three BUs were explicit on this); the same point was made by Gatekeepers. The feedback was that the Commission could push Gatekeepers to provide fuller answers, be more proactive in setting the agenda and in explaining the expectations for the workshops.

Recommendations for improvement were made by a number of interviewees, particularly Business Users: (i) industry-specific workshops with more than one Gatekeeper (two BUs); (ii) obligation-specific workshops (two BUs and one CSO); (iii) changing the composition of these workshops so as to involve technical staff from Gatekeepers rather than policy officers or lawyers (one GK, one CSO and two BUs). All four report that private, problem-solving workshops can be more useful than public workshops in certain instances.

Are Guidelines Needed?

Most stakeholders who responded considered there should be more guidance from the Commission. The exceptions are two BUs who felt this was too soon and the Commission should instead determine what it understands by compliance.

Those wishing for guidance identified the following issues:

- Clarifying the involvement of third parties and experts in the process (one BU, one GK)
- Commission's internal processes and workflows were remarked by many members (five BUs and one CSO), including on interim measures (one BU) and on the consequences of providing inaccurate information in reports and meetings (one BU). Two BUs considered that one objective of such guidance should be to alleviate some of the perceived nervousness on the part of Business Users when considering their potential engagement with Gatekeepers. One CSO thought that guidelines should explain that Gatekeepers are expected to test compliance measures before implementing them. The current practice of re-rolling out compliance measures after discovering that the original design is non-compliant risks compounding the harm to consumers according to one CSO. One GK took the view that there were many blank

spaces in the DMA process in particular on the stock-taking process on compliance that could be set out in advance to set expectations.

- Substantive rules on obligations (one CSO, three BUs and one GK) and more specifically to either set minimum standards (one BU) or what constitutes good compliance (one BU, and one GK), or what certain vague terms mean (one BU). One BU suggests that the Commission should provide benchmarks for good compliance rather than detailed instructions. One BU and one CSO suggested the CMA's Guidance on the DMCCA as a good example of useful guidance. Two GKs suggested that guidance is particularly important for obligations that do not align perfectly with the Gatekeeper business model which requires variations in the way compliance is achieved. One NRA agrees that guidance on substantive issues is important but stresses that this is best achieved by proper industry engagement and a three-way dialogue among Business Users, Gatekeepers and Commission is vital for the success of any guidelines. One BU took the view that guidance is better than specification decisions because they are more flexible. One GK added that guidelines are also necessary for specifying the meaning of certain terms found in the DMA. Conversely one BU considered that guidelines on substantive issues had little potential because each Gatekeeper is different.

Role of National Authorities

Overall, respondents had low expectations about the utility of national authorities but some expect this to change and identify certain national competition authorities as being interested in helping make the DMA a success. One BU remarked that cooperation with regulators outside the EU is also important.

Three BUs report limited engagement only at the BU request and regret lack of interest by NCAs. One BU has interacted actively with three NCAs at their request to discuss how NCAs can fill gaps in topics not covered by the DMA. One BU has also engaged with three NCAs all of which have expressed a commitment to ensure the success of the DMA but reports that they see their role as limited to addressing gaps in the DMA or promoting action for country-specific concerns. One BU also reports that some NCAs are willing to take active roles in DMA enforcement.

One CSO notes that there is a varied approach by NCAs as well as some coordination among them. However, two GKs are concerned that coordination can be improved especially in fields where there are overlapping issues.

One KK and 5 BUs report no engagement about DMA issues. One of these BU would like to see a more proactive approach by NCAs. One BU reports engagement with NCAs concerning a non-designated service. Three BUs think that smaller firms might find NCAs more useful as contact points.

Three BUs, one NRA and one CSO welcomed the ACM-led workshop (June 2024) that served to foster awareness of the opportunities opened by the DMA. One CSO and one NRA in particular noted that this event helped Business Users identify shared concerns and raise awareness of the opportunities that the DMA offers to them.

Four BUs and one CSO remark that NCA expertise can assist the Commission, something which one NRA is investing in by sending staff to the Commission. It is not clear how frequent this process of seconding staff to the Commission is.

Two NRAs explain that they engage directly with Business Users who see the NRAs as a channel to share issues. One NRA specified that language issues may make people more willing to bring issues to a national body than the Commission. One NRA verifies the concerns received before presenting these to the Commission and the Gatekeeper through public reports. Both NRAs share the information received with the Commission systematically. One NRA may continue to monitor the progress of these reports sent to the Commission. It noted one specific example where this involvement proved effective in improving compliance.

One NRA would like greater autonomy from the Commission so as to engage better with third parties and to be able to have direct meetings which could allow them to provide more well informed opinions. Presently all information is routed through the Commission. One NRA emphasised the importance of cooperating with the Commission. One NRA expects to have greater enforcement powers in the coming months which will allow it to be more active in DMA issues.

Do You Detect a Prioritisation Policy?

Most stakeholders prefaced their answers by saying that these were just their impressions. This tallies with our intention which was to gauge what the perceived priorities are.

Six BUs say the Commission prioritises low hanging fruit, one CSO and one GK expressed a similar view suggesting that choices are made where antitrust investigations have already occurred, and the Commission has expertise. One GK saw no such pattern and instead worried about the different enforcement approaches used by the Commission. One GK worried about the risks of political considerations informing enforcement choices. One BU thinks the Commission also pursues high profile complex cases. Two BUs see a focus on the software side (B2C) at the expense of the hardware side (B2B). One BU echoes this by indicating a perception that enforcement focuses on benefiting end users. One BU is also worried that future technologies do not get enough attention. One GK and one BU take the view that priority is based on issues receiving the most complaints and one GK thinks that certain actions are based on the principle that whatever the Commission does to one it must do to all. However, one BU reports that the Commission seems to measure compliance on a case-by-case basis and enforcement seems to be sensitive to behaviour of the Gatekeeper. One NRA suggests the one non-priority issue is interoperability. One CSO attributed priorities to resource limitations. One BU felt that priorities would allow it to plan effectively, e.g. in understanding when RFIs and consultations were expected. One BU considers priorities are based on how vocal BUs are and about longstanding antitrust issues. Three BUs would welcome more information about priorities but do not expect to see this.

One BU thinks that findings from simple cases can be used to establish guidelines for others to follow. One BU believes that not disclosing priorities is beneficial as it gives the Commission discretion to select based on available information.

One BU thinks the rationale for enforcement choices is to make people aware of the benefits of the DMA but is concerned that B2B issues are more important for long term contestability. Another BU

however thinks that some consumer-facing obligations are not prioritised. One CSO likewise thinks that priorities should be in areas where competition concerns are emerging. One BU also considers that priorities are not well selected.

One BU reports that it is too early to tell how the Commission will request to complaints about non-compliance and would like to see some guidance on what may be expected in terms of request timelines and the level of information that should be disclosed in making a complaint.

One BU expressed a concern that the Commission can ill afford to lose in court while Gatekeepers are more willing to litigate because even a defeat and a duty to comply is not particularly harmful, while a Commission losing a case has greater consequences. This may make the Commission risk-averse and may account for two BUs' concern that enforcement is slow. But one BU also questioned the merits of pursuing and punishing a Gatekeeper for not complying immediately even if they later do comply: would a penalty serve a useful purpose here?

Cooperation between Commission and Other Bodies

This question attracted the least amount of responses as nearly all stakeholders did not witness any cooperation yet. One BU remarked that while it expected some cooperation it did not observe other regulators present at workshops it attended.

Two BUs both commented that lack of openness about the high level group creates difficulties in knowing about who to engage with and how. One of these BU elaborated on this suggesting that a clear path for direct engagement or collaboration with the high level group would allow stakeholders to participate effectively. One BU did not observe any cooperation and one GK noted limited work with data protection agencies. One GK was positive about the potential of the high level group, in particular for the integration of considerations that many not be priorities for DG COMP and CNECT. One GK was the only stakeholder reporting that they had the opportunity to make a presentation to the high level group.

One stakeholder (redacted to preserve anonymity) gave some insights into the work of the high level group: the agenda is set by the Commission, and discussions are around how similar issues are addressed by different regulators. This is said to assist the Commission in understanding how to enforce the DMA. Improvements are expected by the Commission actively reaching out to the various participants to ensure that each node sends people with relevant expertise on the topic. It is expected that external experts will be included in future meetings, for example on new topics.

One CSO suggested that the high level group is not a forum to discuss individual compliance and suggests that it could be modelled along the lines of the UK system.

Other Comments

In this section, we report on additional points that were mentioned that do not fit under the headings of the questionnaire but emerged from our discussions.

Some stakeholders made additional comments about the limitations that Business Users face in engaging with the DMA. One BU thinks that NDAs may prevent Business Users from providing evidence to the Commission, which means that the Commission should be using its powers to request information more aggressively to ensure that it has the right information. More generally three BUs indicated that there is a "fear factor" among them and that one way to counter this is a campaign showing tangible effects of the DMA which may make other Business Users more ready to engage with Gatekeepers. One BU explains that they have had experience of retaliation. This BU also explains that there are specific markets that are crucial for the long-term viability of Business Users which creates a position of asymmetrical power even with the DMA in place. Retaliation risks, according to this BU, extend to markets outside the EU so that investments in opportunities created by the DMA could entail a loss in markets outside the EU as Gatekeepers retaliate there. One BU sees this as a difficulty in deciding how much to take advantage of the DMA. Two BUs thought that greater guarantees of anonymity would assist in this regard, one BU thought that Gatekeepers can play one BU against another, aware that not all BUs agree on what optimal compliance is.

One BU impression of the DMA is that it delivers only a fraction of its potential. The issue of limited resources could be addressed by involving third parties who can provide expertise and flag potential issues, helping to identify concerns that might otherwise lead to formal complaints later in the process. Another BU also confirms but is more philosophical about this - their expectations were not that there would be immediate compliance. One BU considers that the impact of compliance may differ among BUs and that this is something that the Commission risks overlooking.

One BU thinks the Commission should be more proactive in explaining what is good and what is bad compliance, by using indicators. One GK also took the view that a better understanding of what compliance means should be conveyed by the Commission. One BU takes the view that industry responses should be used to guide an assessment of whether there is good compliance.

One BU thinks that Gatekeepers are currently dominating the public conversation by focusing on 'issues' with the DMA that make technology work less well. One BU thinks greater public awareness of the benefits of the DMA is needed and responsibility is on all stakeholders. Another BU suggests that an example of effective interoperability that allows the entry of new hardware could be a useful signal of the benefits of the DMA as would evidencing data about consumer switching. One BU agreed with the importance to engage with consumers and suggests that everyone (Gatekeepers, Business Users and regulators) have a role to play in educating consumers about the changes the DMA causes. One BU suggested that NCAs would be particularly well-placed for this.

One BU noted that device-specific designations were not what the DMA intended and should be revisited as they risk under-regulating certain core platform services.

One BU suggested that specification decisions are double-edged. On the one hand they can help clarify vague terms (e.g. does uninstall mean delete or disable?) but they may also be used as weapons to challenge decisions in court. They therefore suggest that the best role for such decisions is to provide hard law guidance on matters that are unlikely to be litigated. Another BU instead considered that specifications were necessary to secure compliance in certain fields.

One BU observed that the Commission addresses compliance and remedies separately: this allows the Commission to steer Gatekeepers to comply after 6 March. One BU considered that this allowed Gatekeepers to prolong cases without becoming compliant.

One CSO raised the question of how to best secure compliance: a faster solution with dialogue versus a non-compliance decision with a sanction. A decision can help achieve redress but there are trade-offs.

Annex 2: Questionnaire Used During Interviews

Confidentiality of submissions: Questionnaire on DMA Process and Enforcement

CERRE is conducting a research project entitled the "CERRE Forum on DMA Implementation and Compliance" (hereafter the 'Project'). In the course of this project the researchers will conduct interviews with various DMA stakeholders.

CERRE has commissioned researchers to carry out the interviews for the Project. The following researchers have been commissioned (hereafter the 'Researchers'): Richard Feasey, Giorgio Monti, Alexandre de Streel.

The Purpose of the Study

As part of the Project, CERRE is investigating the systems of compliance and enforcement found in the DMA in order to produce a paper that explores the ways in which the DMA enforcement processes have been implemented so as to establish good practices and identify areas for improvement or modification.

In order to gain a better understanding of the process, the Researchers will contact a number of stakeholders in order to better understand the expectations that the DMA has created and the extent to which these have been met. These discussions will form part of the foundation from which the researchers will draw in preparing the paper on the DMA procedures. The questions asked seek to obtain two types of input: (i) information about how the DMA process is working from the perspective of stakeholders; (ii) information about how stakeholders evaluate the DMA compliance process.

Guarantee of Confidentiality and Anonymity

CERRE undertakes to guarantee the confidentiality of information provided, and the anonymity of the interviewee's identity and their affiliation.

Unless required by law, CERRE and the commissioned researchers listed above, will not disclose to any third party, nor use for any purpose other than carrying out the Project, any confidential information, or supply any document or information not publicly available to any third party.

The results of the interviews will be published by CERRE within the context of the Project without reference to the personal identity and affiliation of the interviewee, unless the interviewee has agreed in writing to the contrary.

This guarantee of confidentiality and anonymity shall remain after the completion of the Project.

Interview Process

The format of each conversation will take place the form or a semi-structured Interview. That is to say, the interview will start with a set of open-ended questions (see below) which allow the interviewee to develop further reflections on the topic.

The interview will be attended by a Research Assistant who will be documenting the contributions of the interviewee, as well as a member of the CERRE secretariat.

Anonymity: The default setting is that these interviews are anonymous. Each session will be recorded and the researchers will draw up an extended summary of the discussion. Each of these summaries will be filed but will not be made publicly available. Interviewees may waive anonymity if they wish to do so in writing.

Use of interview data: The data will be presented in various ways: it may be presented as quantitative results (e.g., percentage of respondents who have taken a particular view) and the researchers may use quotes from the summaries, albeit while retaining anonymity (e.g., Stakeholder 1 said…) unless otherwise specified by the interviewee.

Post-interview: Interviewees will receive a copy of their summary for comment and approval before the final version is filed. There may be additional follow-up/clarification through email, unless otherwise requested by interviewee.

CERRE undertakes to delete the recording of the interview after the results have been published in the context of the Project.

Questions

1. Please describe your role as a DMA stakeholder: e.g., designated gatekeeper, business user, consumer, consumer association. (It may be that you occupy more than one role, if so identify all that apply).
2. Please describe how you have engaged with the European Commission in relation to compliance with the DMA (please distinguish between engagement prior to 6 March and engagement since then):
    a. How have you engaged? (meetings, written representations)
    b. How often?
    c. Who took the initiative?
    d. What was the purpose of the engagement?
    e. Was it helpful?
    f. How might it have been improved?
3. **[GK]** Has the Commission's approach to engaging with you changed at any time and, if so, in what ways?
4. **[non-GKs]** Have you used or relied upon the compliance reports published by GKs in your engagement with the EC or for other purposes?
    a. Do compliance reports published to date serve their purpose (and what do you understand that to be)?

b. If not, how might they be improved?

5. **[GKs]** Please describe how you assessed your own compliance prior to 6 March:

   a. Did you engage directly with consumers?

      i. How and for what purpose?

      ii. Did it achieve your objectives?

   b. Did you engage directly with business users?

      i. How and for what purpose?

      ii. Did it achieve your objectives?

   c. Are there any lessons to be learned in terms of how GKs assess their own compliance?

   d. Do you consider that the public workshops organized by the Commission were useful (and if so why and how), and if not, how could they be improved?

6. **[Non-GKs]** Please describe your engagement with gatekeepers:

   a. Did gatekeepers contact you directly before 6 March to discuss their compliance projects?

   b. Have you contacted a gatekeeper directly with respect to the DMA before or after 6 March?

      i. If so, for what purpose?

      ii. Did you achieve your objectives?

   c. Do you consider that the public workshops organized by the Commission were useful (and if so why and how), and if not, how could they be improved?

7. **[GKs]** How are you assessing your compliance post 6 March?

   a. Do you use KPIs?

   b. Do you engage with business users (and how do you do this)?

   c. Has the Commission provided any feedback or asked questions in relation to your compliance report?

8. **[GKs]** Have you considered requesting a specification decision from the Commission in relation to any of the obligations in Article 6 (or Article 7)?

   a. If so, which obligations and why?

   b. If not, why not?

   c. Would you consider making such a request later and, if so, under what circumstances?

9. **[GKs]** Can anything be done (by the Commission or anyone else) to make the role of the Compliance Officer more effective or to reduce the costs to a GK of compliance (whilst still ensuring effective compliance)?

10. Should the Commission publish guidelines on any substantive or procedural aspect of the DMA? If more than one suggestion, please rank these.

11. What roles have national authorities played so far in the DMA?

    a. Do you expect this to change?

    b. Do you expect certain authorities to be more active than others, if so which and why?

12. Do you detect a prioritisation policy in the Commission's enforcement and should this policy be articulated more explicitly?

13. Is the cooperation between the Commission and other regulatory bodies (which is expected from the DMA) evident in your experience of the Commission's proceedings?

14. Do you have any other comments on the way in which the compliance and enforcement of the DMA has, in your experience, worked to date? Are there any suggestions for improvement that you wish to make?

Issue Paper

Interplay Between the DMA and Other Regulations

March 2025

1. Introduction

Over the past five years, the EU digital rulebook—along with its associated EU and national enforcers—has expanded significantly. As a result, the Digital Markets Act (DMA) is now just one of many laws that gatekeepers must comply with. It is, therefore, crucial that the DMA is enforced in a way that is consistent with the objectives and obligations of the other pieces of the digital rulebook. This will require close cooperation between the European Commission, which oversees the DMA, and the EU and national authorities responsible for enforcing the other parts of the digital rulebook. Achieving this may also necessitate a legislative effort to streamline the objectives and rules of the digital rulebook.

The purpose of this paper is to explore the regulatory interplay between the DMA and a selection of other key laws, specifically competition law, privacy law, and cybersecurity law. While other regulatory interactions—such as those with content law, consumer protection law, or intellectual property law—are also important, they will not be addressed in this paper. For each of the selected laws, this paper reviews regulatory overlaps, discusses issues that have arisen, and proposes ways to improve the overall effectiveness of regulation in this field. Additionally, we identify key uncertainties and interpretative questions and suggest possible approaches for addressing them.

2. The DMA and Competition Law

Generally speaking, EU and national competition laws continue to apply to firms that have been designated as gatekeepers.[65] But there are some limitations to the powers of National Competition Authorities (NCAs) and national courts.

This section focuses on the overlap between the DMA and the application of national and/or EU competition law by NCAs or national courts. We do not look at the possible overlaps that may arise between the DMA and the enforcement of EU competition law by the European Commission. We expect that this overlap is managed internally using the following criterion: **if the DMA applies, then the Commission will prefer applying it to EU competition law**. Not on the basis of a legal principle, but on the basis that the DMA has several institutional advantages that make it foreseeable that a quicker and more effective remedy may be obtained than under competition law.

Nothing prevents the Commission from **applying competition law to the conduct of a gatekeeper when its concerns are unrelated to obligations under the DMA**. Of course, there may be questions about whether a particular conduct is best characterised as circumvention of a DMA obligation rather than a stand-alone abuse of a dominant position and in this context different strategies might be considered.[66]

We leave it open whether there should be a priority rule in a revised version of the DMA. For example, a rule that requires the Commission to first examine if conduct may be better handled under competition law before proceeding under the DMA. It is not clear whether adding such a requirement would improve the regulatory process.[67] Moreover, given that the DMA seeks to promote different goals to competition law, it is not clear if such a priority rule makes sense. In electronic communications, the legislative intent was that regulation would eventually give way to competition law enforcement which made the priority rule logical in that economic context.

2.1 True Conflict between DMA and Competition Law

What happens if there is a conflict between compliance as required in the DMA and a remedy imposed on the basis of a breach of national competition law? According to Recital 10 of the DMA, the application of EU and national competition law 'should not affect the obligations imposed on gatekeepers under this Regulation and their uniform and effective application in the internal market.' This may be interpreted to mean that a **national competition authority cannot impose a remedy that would conflict with the gatekeeper's obligations**. This interpretation is followed by the Spanish competition authority in its Booking decision where it indicates that Booking may request a change to

[65] DMA, Article 1(6).
[66] For example, the Commission might prefer to start non-compliance proceedings and issue a decision to set a precedent about the scope of the concept of circumvention.
[67] G. Monti (2010) observes that UK regulators in the period 2000-2010 had to justify the application of sector specific regulation by showing that competition law would not be sufficient. The decisions surveyed showed that this requirement was treated in a perfunctory manner.

the remedies when there is a conflict with the firm's obligations under the DMA.[68] On this reading, the DMA prevails. Is this right?

An affirmative answer may be derived from the focus the DMA places on uniform application. A gatekeeper subject to a specific obligation under the DMA should not find itself bound by conflicting rules imposed by a national competition authority.[69] But **this only applies if there is a 'true conflict'** – that is to say the firm cannot possibly comply with two rules at the same time.[70] Consider the following examples:

1. Gatekeeper X implements procedures to comply with DMA Art 5(3) by making it clear to business users that they may henceforth set different prices when selling on ecommerce platforms other than the gatekeeper;

2. National Competition Authority 1 finds gatekeeper X to have abused its dominant position on an ecommerce platform and imposes a remedy that forbids the gatekeeper from ranking a business user higher if that business user sells via X's platform exclusively;

3. National court 2 finds that gatekeeper X has not abused its dominant position by giving ranking priority to business users who also use another of gatekeeper X's service.

There is no conflict between (a) and (b). The gatekeeper simply has more onerous obligations in the jurisdiction of NCA1. We do not discuss the extent to which the conduct in (b) is a circumvention of the DMA based on Article 13. The point is that there is no conflict between the obligations imposed by the Commission and the competition authority. All that happens is that the gatekeeper has additional obligations in the jurisdiction of NCA1. A scenario like this may be seen in the additional duties that Meta has in regard to data: it is bound both by the DMA and by the remedies agreed with the German Competition Authority.[71]

There is also no conflict between (a) and (c) because national court 2 does not require the firm to apply wide price parity clauses. Firm X can comply with both the DMA and competition law by complying with the stricter rule of the two. We use a court in this example because NCAs are not allowed to issue non-infringement decisions of EU competition law.[72]

The **only real conflict arises if the application of EU or national competition law by a national authority or national court would require that the gatekeeper behaves in a way that is forbidden by the DMA**. There is a remote chance of this scenario occurring because the two rules promote analogous objectives.[73] Moreover, if this were to arise the NCA would be in breach of EU Law and its

[68] Comisión nacional de los mercadoes y la competencia, Case S/0005/21, Booking (decision of 29 July 2024) Para 882 (https://www.cnmc.es/expedientes/s000521).
[69] A similar approach applies in EU competition law, see Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd* EU:C:2000:689.
[70] J. Cremer, D. Dinielli, P. Heidhues, G. Kimmelman, G. Monti, R. Podszun, M. Schnitzer, F. Scott-Morton, A. de Streel, Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust, *Journal of Antitrust Enforcement*, 2023.
[71] Bundeskartellamt, 'Facebook Proceeding Concluded' Press Release 10 October 2024. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/10_10_2024_Facebook.html
[72] Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o.* EU:C:2011:270.
[73] Hypothetically, if an Article 102 TFEU decision by the Commission were to require that a gatekeeper behave in a way that is contrary to the DMA, this decision would be lawful insofar as the Commission's application of primary law takes precedence over the Commission's application of secondary law but this scenario is unlikely to occur.

remedy unenforceable in the national courts because the NCA would require the gatekeeper to act contrary to EU Law.[74]

Therefore, **while it is correct to say that the DMA prevails over national competition law, the better view is that the conduct required of gatekeepers by the Commission under the DMA and remedies imposed by NCAs will hardly ever create a true conflict. Nevertheless, conflicts may arise as NCAs continue to exercise their enforcement powers. Moreover, a real challenge is ensuring that the two remedies are complementary**, which is discussed further below.

2.2 Competition Law and DMA as Multi-Layered Regulations

A criticism that has been made is that the DMA scores very poorly when it comes to harmonisation because it allows national competition authorities to add further remedies to gatekeepers which affects their planning and business models, and it places limited controls on Member States adding further legislation that overlaps with the DMA.[75] The only thing Member States are forbidden to do is to piggy back on the notion of gatekeeper as determined in the DMA and impose on these gatekeepers additional obligations. This is a very modest limitation. Thus, section 19a of the German Competition Act is in line with EU Law because, while its regulatory reach overlaps with that of the DMA, it has its own concept of 'paramount significance for competition across markets that has to be satisfied before obligations may be imposed. And even if some of the obligations overlap with the DMA, enforcement is still possible because these rules are applied on a different basis than that of the DMA. The concern is that it is too easy for Member States to supplement the DMA. Indeed, the application of section 19a by the Bundeskartellamt achieves outcomes where the same firms who are designated as gatekeepers find themselves with additional obligations that are at times an extension of what they are already obligated to do under the DMA.

It is difficult to bring a legal challenge against these laws. As explained above, they do not create a true conflict and there is no infringement of the *ne bis in idem* principle as often the facts are not identical. It is equally difficult to make a claim that a law such as the new Section 19a is contrary to EU Law since it is specifically authorised by the DMA. Member States have regularly insisted on 'gold-plating 'EU competition law. This was already evident during the debates that led to Regulation 1/2003; Member States agreed to the parallel application of EU and national competition law and with the provision that national law may not contradict EU law only if they were allowed to retain stricter national competition rules targeting unilateral conduct.[76] By this time, all Member States had reformed (or recently implemented) competition laws that replicated Articles 101 and 102 TFEU but some had retained some stricter norms which they wished to keep applying.

When the enforcement of EU competition law was decentralised, an **additional safeguard was built in by which once the Commission begins to consider certain conduct, then national competition authorities are no longer able to take action**.[77] In a similar setting, a national court applying EU

[74] Case C-198/01, *Consorzio Industrie Fiammiferi v Autoritá Garante della Concorrenza e del Mercato* EU:C:2003:430.
[75] https://cerre.eu/publications/better-law-making-and-evaluation-for-the-eu-digital-rulebook/.
[76] Regulation 1/2003, Article 3. For discussion see G. Monti *EC Competition Law* (2007) pp.406-409.
[77] Regulation 1/2003, Article 11(6).

competition law is also expected to stay proceedings pending a decision of the Commission.[78] After the Commission decides, then the national competition authority or national court may not reach decisions that conflict with that of the Commission. But this rule is only applicable when the national level institution (court or authority) applies EU competition law.[79] It would not apply if the national institution would rely on stricter national competition laws or apply any other rules of law that pursue different objectives. Therefore, this rule cannot be transplanted to the DMA context. One may argue that a similar priority rule could be built in by which the national laws cannot apply once the field has been covered by the DMA but then this cannot prevent a Member State from imposing additional obligations provided these are not contrary to EU Law.

Our view is that **what matters most of all is that there continues to exist dialogue between national authorities and the Commission when the former is looking to impose stricter requirements**. This appears to be occurring between the Commission and the German Competition Authority and has been commended by the European Parliament.[80] This is built into the DMA and it may be improved by setting out a procedure to structure this dialogue with firms. Presently what is governed is the exchange of information between the Commission and the NCAs and then only in specific moments. A more precise framework to structure coordination might help make coordination and compliance more effective.

NCAs could also develop a general principle that if the intervention of NCA2 or the Commission solves NCA1's concerns then the latter would not impose remedies. For example, if the Commission were to secure a change in compliance by the gatekeeper, then the NCA which remains competent would have to consider if continuing to pursue its competition law case is necessary or whether the Commission remedy removes the competition concern. This happens in merger control where remedies obtained in one jurisdiction may lead another competition authority to clear without adding further remedies.[81] This would avoid unnecessary duplication.

From an enforcement perspective, stricter requirements imposed on the basis of national law may be helpful in identifying additional market failures that are not covered by the DMA and which the legislator may not have foreseen. This allows for an improvement of the regulatory regime as these decisions may be used as a basis for revisions of the DMA. Franck for example takes the view that '[t]he 19a tool could thus permanently assume the role of a forerunner for possible regulation at EU level.[82]'

However, from another enforcement perspective, if the parallel application forces a gatekeeper to modify its conduct depending on the jurisdiction, this might be economically harmful: compliance costs may rise and a gatekeeper may be unwilling to offer its services in Member States where the behavioural remedies imposed are seen as excessively costly. It follows that just as the Commission should carry out an ex post impact analysis of the DMA, so should NCAs who have sector-specific

[78] Regulation 1/2003, Article 16 and see *Masterfoods* (above).
[79] If the Commission initiates proceedings in some Member States but excludes others, then the national competition authorities in the excluded States may apply competition law, see Case C-815/21 P *Amazon v Commission*, EU:C:2023:308.
[80] The EP 'encourages the Commission to pursue the coordination of enforcement activities and cooperate with national competition authorities in order to facilitate an effective interplay between competition law and the DMA, especially in the context of the DMA's 'further obligations' European Parliament resolution of 16 January 2024 on competition policy – annual report 2023 (2023/2077(INI)), para 39.
[81] 4a24a21a-en.pdf US submission.
[82] Page 51.

powers and it would be desirable if a commonly agreed method was found to assess the impact of regulation. One might go further and build on the concerns about over-regulation found in the Draghi report. In particular the report observes that one of the causes of the rising weight of EU regulation is that Member States 'gold plate 'EU legislation or 'implement laws with divergent requirements and standards from one country to another.[83]' While Draghi's concern was principally at the excessive burdens faced by SMEs, the same concern applies to gatekeepers: as shown above the example of the new German Laws gold plate the DMA. If this is unavoidable, then means to stimulate dialogue among regulators become ever more necessary.[84]

In sum, from a policy perspective, in the **short term**, there must continue to be dialogue among the Commission and regulators to ensure that enforcement actions are complementary. Perhaps, some mechanisms to contain extra regulation by national authorities would serve to clarify the regulatory burden: **an agreement that an NCA would not intervene unless the DMA does not address its competition concerns may be one mechanism that can be implemented without legislation**.

More **long-term**, the Commission may consider that **maximum harmonisation** is a better way of proceeding in regulating digital markets, thereby preventing the application of parallel national laws. It has moved in this direction in other fields.[85]

2.3 Two Principles to Manage the Legal Interactions

Having discussed some policy options for managing overlaps, we turn to the legal principles that apply.

2.3.1. Ne Bis in Idem Principle

First, **the principle of *ne bis in idem* governs the parallel application of the DMA and other laws. However, the scope of application and the degree of protection afforded by this principle is narrow**. The *ne bis in idem* principle means that a firm has the right not to be tried or punished twice for the same offence.[86] It requires a first punishment being meted out and this prevents a second investigation on the same facts. The commencement of a second investigation harms the reputation of the firm and imposes costs on it: this is the legal right that the principle protects.[87] A scenario where this right may be invoked is if there has been a non-compliance decision by the Commission under the DMA (which counts as a criminal procedure in light of the high penalties that may be imposed)[88] and then the start of competition proceedings by a national competition authority based on the same facts. In this context, the *ne bis in idem* principle applies because there has been a prior decision and a second proceeding begins which is directed against the same legal person based on the same,

[83] M. Draghi, *The Future of European Competitiveness – Part A* (September 2024), p.65.
[84] P. Larouche and A. de Streel, The integration of wide and narrow market investigations in EU economic law, in M. Motta, M. Peitz and H. Schweitzer (eds) *Market Investigations: A New Competition Tool for Europe?* Cambridge University Press, 2022, 164-215
[85] S. Weatherill, *Contract Law of the Internal Market* (2016) ch.6.
[86] Article 50, Charter of Fundamental Rights.
[87] B. Van Bockel, *The Ne Bis in Idem Principle in EU Law* (2010) pp.209-212.
[88] Case C-117/20, bpost v Autorité Belge de la concurrence EU:C:2021:689, paras 25-29.

identical, facts as the Commission decision.[89] Facts are identical having regard to the infringement period and the evidence under consideration.

However, the Court of Justice of the EU in *bpost* judgment held that a limitation of the right protected by *ne bis in idem* is allowed.[90] Generally, a second proceeding may be opened if this is necessary and it genuinely meets objectives of general interest recognized by the EU or the need to protect the rights and freedom of others.[91] The Court explained that this general principle may be analysed by considering a set of indicators. These are listed in table 1 on the left hand side and applied to the question of whether an NCA may apply competition law after the Commission has issued a non-compliance decision on the same facts.

Table 1: Ne bis in idem principle and the DMA

General principles of *ne bis in idem*	**Application when competition law is enforced after a final DMA decision is reached**
Second proceedings are provided by law	*Yes*: DMA, Art 1(5)
Two laws pursue distinct legitimate objectives	*Yes*: DMA aims at fairness and contestability, competition law at keeping markets open or consumer welfare
Proportionality: do we need the second proceeding to achieve the goals of competition law?	*Yes*, provided the accumulated legal response is not excessively burdensome for the firm.
Are there clear and precise rules to explain when there will be duplication and is there sufficient coordination between the authorities? Are the two proceedings sufficiently close in time? Is the overall fine excessive?	First question *Yes*: DMA, Arts 1(5) and 38. Second and third questions are a *matter of fact*

However, the **right protected by the principle of *ne bis in idem* is limited in two ways**:

- It only applies if the second enforcer in time considers the same facts. Thus, when the German NCA acts against a gatekeeper based on national law and considers exactly the same conduct as the Commission then the principle applies, but it does not apply if the NCA develops a different theory of harm that relies on additional evidence.

[89] Bpost (Ibid.), para 36.
[90] Based on Article 52 of the Charter of Fundamental Rights, which allows limitations on the exercise of rights and freedoms in certain circumstances.
[91] Bpost (Ibid.), para 41.

- It only applies if the first authority has initiated criminal proceedings. Decisions leading to a fine are normally treated as criminal because the high level of fines makes these sufficiently punitive. It is not clear however if a specification decision by the Commission triggers the right of protection under *ne bis in idem*, because specification decisions do not directly lead to a fine being imposed on the gatekeeper. A fine may be imposed only if there is no compliance with the specification decision, which requires the commencement of different proceedings.[92]

These two limitations mean that while *ne bis in idem* principle protects an important fundamental right, it is not a principle that may be invoked frequently in the DMA context. For example, the Spanish NCA decision on Booking's price parity clauses came before the DMA but penalised conduct that occurred in the past, while the DMA's obligation not to set price parity clauses applies prospectively from the date the DMA applies to booking. The *ne bis in idem* principle does not bite. However, as explained earlier, the Spanish NCA has built in a proviso that allows the firm to seek changes to the remedies should compliance with the DMA create problems with continued compliance with the Spanish decision. This opens the opportunity for reassessment but again the *ne bis in idem* principle is not applicable because the Spanish NCA considered a wider swath of conduct in its decision. The legal basis for this reconsideration is a more general principle of cooperation, which we now discuss.

2.3.2. Cooperation Principle

The example of the Booking decision reveals a second, more important, principle that should be the focus of attention: the **general legal duty of loyal cooperation (Article 4(3) TEU) requires that both Commission and NCA take care to coordinate their conduct**. And Article 38 DMA is designed precisely to achieve this. The duty to coordinate applies irrespectively of whether the same facts are being looked at and irrespective of whether the proceedings are criminal in nature. In practical terms, there are two key coordination moments in the DMA:

- When an NCA intends to start proceedings against a gatekeeper, it shall inform the Commission. Note that this information duty applies even if the Commission has taken no enforcement action against the gatekeeper and even if the action has no overlap with the DMA. The identity of the firm is all that matters for the duty to cooperate to start. This information may also be shared with other NCAs;
- A draft remedies decision shall also be sent to the Commission. Note that the Commission has no veto powers but the expectation is that this facilitates coordination to ensure that the remedy complements the DMA.

The NCA and Commission have the power to exchange information, including confidential information. The procedures in Article 38 ensure that there is compliance with the *ne bis in idem* principle but they also assist more generally in securing that there is good cooperation among NCAs when the same undertakings are being regulated. It creates a wider basis for ensuring that a consistent policy is pursued.

[92] DMA, Article 29(1)(c) and 30(1)(b).

NCAs who are members of the European Competition Network have experience with this and a soft law notice helps supplement Regulation 1/2003 to **ensure that the rights of the defence are protected**.[93] These are somewhat more extensive than under the DMA:[94]

- Information must be gathered lawfully according to the law applicable to the authority and the sending authority may inform the receiving authority if there is a legal challenge against the collection of this evidence. This is not provided for in the DMA, but in 2024 one is entitled to assume that NCAs and the Commission ensure the legality of searches. Matters were different in 2004 when Regulation 1/2003 came into force and many NCAs were just starting out. Moreover, the 2019 ECN+ Directive ensures harmonized procedures, including powers to inspect premises.[95] From this perspective, there is no need to prescribe this requirement under the DMA.
- Information covered by the obligation of professional secrecy is not to be disclosed. Under the DMA, Art 36 imposes this obligation on the Commission, but there is no corresponding provision on NCAs although one might expect this to be part of their protocols already. Again, one may legitimately expect that NCA officials will respect professional secrecy, not least since NCAs have this obligation under the ECN+ Directive.[96]
- On the basis of Regulation 1/2003, information coming from the Commission may only be used to apply national law when this does not lead to an outcome finding an infringement different from that under Arts 101 and 102 TFEU.[97] This means that if the Commission and the NCA are cooperating when both exercise their antitrust powers, then the NCA cannot use information received from the Commission to apply provisions like section 19a of the German Competition Law. This limitation is not found in the DMA: NCAs are free to apply any provision of national competition law. This is because Regulation 1/2003 foresees a scenario where both NCA and Commission are analysing the same case and a discussion is being had about which authority should be competent to take the case. Remember that the animating principle of Regulation 1/2003 is that each antitrust case should be addressed by one authority.[98] The purpose of the DMA is different and the Commission and NCAs are necessarily applying different rules so this safeguard is unnecessary.
- Information that is exchanged may not be used to impose sanctions on individuals save in specific circumstances. This is not found in the DMA. This omission is probably because the key concern of the DMA is to ensure that behavioural remedies are coordinated.

[93] Commission Notice on cooperation within the Network of Competition Authorities (Network Notice) [2004] OJ C 101/43.
[94] Network Notice paras 26-28.
[95] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (2019) OJ L11/3 (ECN+ Directive), Article 6 and more generally Article 3 confirming that national procedures shall comply with general principles of EU Law and the Charter of Fundamental Rights. The review of implementation suggests this has generally been transposed successfully. European Commission, Report on the transposition of Directive 2019/1 COM(2024) 558 final (29 November 2024).
[96] ECN+ Directive, Article 31(2).
[97] Regulation 1/2003 Article 12(2).
[98] One of us has repeatedly shown that this is a mistaken view because NCAs may only apply competition law to conduct occurring in or affecting its territory so that if a case having an effect on trade is assigned to one NCA this necessarily results in under-deterrence and remedies that do not solve competition concerns in the EU as a whole.

Article 38(1) DMA specifically foresees that implementing acts are necessary to ensure that arrangements for cooperation are based on a sound legal footing for NCAs who are not members of the European Competition Network. This will enhance the legitimacy of cooperation and safeguard fundamental rights. Cooperation is the most powerful mechanism to ensure that multiple enforcement actions are complementary and do not impose disproportionate requirements on gatekeepers.

The other gap in the DMA is that there is no provision explicitly coordinating fines when there are parallel infringements. Even if the *ne bis in idem* principle does not apply, it would be desirable to ensure that fines are coordinated to ensure that firms do not face disproportionate penalties. Fines should remain proportionate. The case-law on *ne bis in idem* allows for an ex post adjustment of fines: thus, the second authority imposing a fine must take into account the fine of the first authority. However, codifying this approach in soft law would be desirable.

3. The DMA and the GDPR

We have discussed the interplay between these two legal instruments in previous CERRE papers and do not propose to revisit that analysis there.[99]

3.1 Article 5(2) DMA

3.1.1. Consent or Pay Models

The main point of discussion in considering Article 5(2) DMA has been about how this is to be applied to gatekeepers whose business model is to combine use data from a variety of digital services when that data is used to sell advertising space. In this two-sided market, the consumer receives a service at no monetary fee in exchange for data and the business model is successful because this data can be exploited by the platform. There has always been a tension in the way this business model is utilised. On the one hand, some take the view that personal data is a right and that cannot be the basis of a market transaction. On the other hand, some take the view that data has economic value and that therefore a data subject should be entitled to relinquish its data rights in exchange for something else they value. Some brief reflections on this high-level point are in the box below.

The EU regulatory framework embraces two views about personal data that appear to clash. Generally, on the one hand, the GDPR safeguards user's rights to data. On the other hand, some EU legislation sees the economic value of that data, for example the data portability rules in the DMA. While some may argue that data portability confers on 'natural persons… control of their own personal data'[100] it is also the case that data portability is a means to engage in economic activities and obtaining better services.[101] At a conceptual level it is tricky to recognize the same object (data) as a human right protected for its own sake and as an asset which is valuable for the economic efficiency that results.

Looking at EU Law generally then, personal data has an economic value to both the person and the firms securing access to it. This however, clashes with the EDPB's view according to whom 'personal data cannot be considered as a tradeable commodity, and large online platforms should bear in mind the need of preventing the fundamental right to data protection from being transformed into a feature that data subjects have to pay to enjoy."[102] This statement is difficult to reconcile with the economic role that data plays. Striking an adequate balance between fundamental rights protection and economic utility is complex. Some have taken issue with whether consent as the basis for achieving this balance is satisfactory as data holders may not always be able to make good choices. Other ways of protecting fundamental rights have been suggested that would be more protective of data subjects. [103]

[99] G. Monti and A. de Streel 'Data-Related Obligations in the DMA' in A. de Streel (coord), *Implementing the DMA: Substantive and Procedural Principles* (CERRE 2024) pp.70-83.
[100] GDPR, Recital 7.
[101] See e.g. European Commission, Staff Working Document on Common European Data Spaces SWD(2024) 21 final.
[102] European Data Protection Board, Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms (17 April 2024), para 180.
[103] I. Cofone, *The Privacy Fallacy* (CUP, 2023).

In this Issue Paper we do not question the importance of protecting the fundamental right to data, but we flag the tension in the legislative framework and raise a question about whether using consent as the mechanism by which data subjects can exercise their rights makes too many assumptions about the workability of this approach.

The consent or pay model has featured prominently in respect to the policies of one gatekeeper. At the time of writing, this gatekeeper announced a model which aligns with preferences of the Commission that we discussed in an earlier CERRE paper. In brief, end-users have a choice of three alternatives when accessing Facebook and Instagram: (i) a free version when they give consent to personal data being used by Meta; (ii) a free less-personalised version with less end-user data; (iii) a subscription version when even less data is collected in exchange for a monthly fee.[104] We do not examine the gatekeeper's compliance but want to draw attention to three general aspects that arise from the design of a consent or pay model.

First, as a matter of procedure what this episode reveals is the **importance of cooperation among the regulators when rules overlap**. This episode has seen the application of competition law and consumer law by national authorities, followed by the involvement of the European Data Protection Board and the Commission on the basis of the DMA. In September 2024, it was announced that the Commission and the EDPB would work jointly to provide further guidance on the application of the DMA and GDPR.[105] While this is a welcome development, it is not clear what the relationship is between this bilateral cooperation and the DMA High Level Group. Given that this also triggers competition and consumer law issues, it is not clear why bilateral dialogue is preferred. This raises a more general point about the role of the High Level Group.

Second, as a matter of substance it should be recalled that the **obligation in Article 5(2) is both procedural and substantive**. There must be an adequate choice architecture that allows the consumer to make a free, specific and informed choice and the choices must be compliant with Article 5(2).[106] Designing a good choice screen is a huge challenge because the less personalised version does require the end user to consent to some data and it is not clear how any choice screen can help a consumer understand the relative merits of the two free options. This goes back to our point in the box above that consent is a problematic benchmark in this context.

Third, this episode allows for a discussion about **what it means for a gatekeeper to offer 'less personalised but equivalent alternative**.' The comparison is between, on the one hand, the quality of the more personalized service (where the end user consents to data being shared for the provision of personalized ads) and, on the other hand, the less personalized service (where the end user does not consent to data being shared) offered by the same gatekeeper. It is not about what other service providers do. The quality of the two services may be assessed in two ways:

- One way is to compare the *functionalities* available to the end-user. These should be the same irrespective of the choice made;

[104] Facebook and Instagram to Offer Subscription for No Ads in Europe | Meta.
[105] https://digital-markets-act.ec.europa.eu/commission-services-and-edpb-will-start-joint-work-guidance-interplay-between-dma-and-gdpr-2024-09-10_en.
[106] Thus, a choice screen that tells the consumer 'for best results consent to sharing all your data' would probably not comply.

- A second comparator may be the *user experience* with the two different ways in which advertisements are provided. If the end user who opts for a less personalized services finds it hard to enjoy their navigation experience because of the volume of ads shown, this would suggest that the two services are not equivalent.

In this Issue Paper we take no view on what the right benchmark is but emphasise that this question is likely answered better via multi-disciplinary cooperation among regulators.

3.1.2 Article 5(2) DMA and Other Legal Contexts

It is important to bear in mind that Article 5(2) DMA is a rule that creates obligations between the gatekeeper and the end-user in order to achieve contestability.[107] The logic is to limit the amount of data gatekeepers can combine and reduce the advantages this gives them. From this perspective, it should be clear **that if the gatekeeper combines end-user data in ways that do not create barriers to contestability, then the obligation in the DMA should not apply**. For example, suppose a gatekeeper combines an end-user's data to work out if this end-user poses a risk to others, then the provisions of the GDPR apply but the DMA does not because this data collection policy has no impact on contestability. Conversely, the DMA does not forbid a gatekeeper from implementing measures to further protect the privacy of end-users, even going beyond what is required by the GDPR. Indeed, this is something that the DMA encourages by indicating that service providers should compete on privacy and data protection settings.[108]

This reading draws support from another data-related obligation, Article 6(2) DMA. Here the gatekeeper is allowed to obtain data but may not use that data for certain purposes. Protocols must be designed so that this data is only accessible to those who may use it for lawful purposes but may not be used by segments of the gatekeeper who could use that data to harm contestability in relevant markets. For example, a gatekeeper may collect data from business users and use this to improve its display functions, but may not use that data to develop goods or services that risk competing with those of the business users whose data it has access. But data may be used for these purposes lawfully only if such use is compatible with the GDPR.

If we generalise from these two points, we can conclude that the **data-related obligations in Article 5(2) apply to a gatekeeper to the extent that its business model reveals that the obligation is needed to ensure the objectives of the DMA are met**. In this context, it would be disproportionate to apply Article 5(2) DMA to conduct that does not have an effect on contestability.

The default rule is that gatekeepers are expected to comply with all the obligations set out in the DMA except for those that are reserved to a specific type of core platform service. However, in addition a gatekeeper may establish that a particular obligation does not apply, or applies only in part, if it can show that compliance would not have any effect on achieving the objectives of the DMA. **The burden of proof remains on the gatekeeper to explain why a particular obligation should not apply to it or should apply in a more limited form**.

[107] See also Recital 72 DMA: "The data protection and privacy interests of end users are relevant to any assessment of potential negative effects of the observed practice of gatekeepers to collect and accumulate large amounts of data from end users."
[108] DMA, Recital 72.

The practical effect of this approach is that the gatekeeper would then only have to comply with the GDPR. This releases the gatekeeper from being only able to rely on consent as a means of being entitled to process personal data. The gatekeeper can then demonstrate that processing is necessary for the performance of a contact or necessary for the compliance of a legal obligation. The Court of Justice of the EU has read these restrictively; however it remains possible for a gatekeeper to avail itself of these legal bases if they can show that the data is not used to harm market contestability.

3.2 Data Portability

We have discussed this in earlier reports.[109] Generally speaking there is no overlap of rules in this context because the DMA provides a different routes to achieve legal portability. In brief, **Article 6(9) DMA appears to offer greater portability rights than the corresponding rules in the GDPR and the obligations on gatekeepers are also more extensive than those of data controllers in the GDPR**. The rationale is that the DMA imposes asymmetric regulation, placing a greater onus on the gatekeeper. It allows for data to be transferred when this would enhance contestability of markets by affording business users the chance to obtain as much data as possible to enter the market. As discussed above, it is clear that the DMA recognises the economic value of data and inserts requirements that are quite extensive and burdensome. Article 6(10) provides similar portability rights but this time for business users.

Table 2: Comparing GDPR and DMA on data portability[110]

	GDPR Art 20	DMA Art 6(9)	DMA Art 6(10)
Scope of data[111]	Data processed by automated means and personal data concerning the data subject	Data provided by the end user or generated through their activity on the CPS and 'any other data to effectively enable portability' (Rec 59)	Aggregated and non-aggregated data, incl. personal data provided or generated in the use of the CPS
Quality of access	Structured, commonly-used, machine-readable format.	in a usable format for end user and authorized third party (Rec 59)	Effective and high quality
Recipient	Right to transmit that data to another controller Where technically feasible, the data subject has the right to have the data transmitted directly to another controller	End users and third parties authorized by end users	Business user and third party authorized by the business user

[109] J. Kramer, 'Data Access provisions in the DMA' (CERRE, 2023).
[110] See also K. Bania and D. Katsifis, 'The Interplay between the DMA and Other Rules' in K. Bania and D. Geradin (eds), *The Digital Markets Act* (2024), pp.305-308. The main point the authors make is that the DMA does not complement the GDPR rights but does something different. We agree but do not consider this to be a problem per se, it only shows that recital 59 is badly drafted.
[111] For completeness, the data available is that which the data holder has obtained lawfully.

Tools		Gatekeeper shall provide tools to facilitate data portability (Rec 59)	Gatekeepers to provide appropriate technical measures, e.g. APIs or integrated tools for small volume business users (Rec 60)
Cost	Reasonable fee or refusal if requests are manifestly unfounded or excessive	Free of charge	Free of charge
Frequency		Continuous and real-time access	Continuous and real time
Limit	Right shall not adversely affect the rights and freedoms of others	None expressly provided but arguably the right shall not adversely affect the rights and freedoms of others.	with regard to personal data, access only if: (1) data is directly connected with services of business user; (2) end user opts in to sharing products or services
Safeguards	Controller may request information to confirm the identity of the data subject	None expressly provided, but: (i) as GDPR gatekeeper may confirm identity of data subject; (ii) compliance with other EU Laws may limit data transfers.	None expressly provided, but: (i) as GDPR gatekeeper may confirm identity of data subject; (ii) compliance with other EU Laws may limit data transfers.
Aim	Strengthen control of his or her data (Rec 68)	Contestability of CPS or innovation potential of the digital sector (Rec 59)	Contestability in a variety of industry sectors.

The table reveals just how asymmetric the regulatory framework is. The major difference when it comes to data portability for end-users is the requirement that data access is provided on a continuous and real-time basis. Another point of difference worth noting is that the GDPR builds some safeguards to allow the controller to verify the identity of the data subject, and similar safeguards may be implied in the DMA. Moreover, the GDPR also creates a procedure to govern the interaction between the data subject and controller. Conversely, the DMA expects that the gatekeeper will be responsible for designing a method of compliance that affords effective access to data. Can gatekeepers limit their obligations under these provisions?

One consideration relates to **the kind of data that is requested by the end user or business user**.

- The *maximalist view* is that the party requesting data has a right to request whatever data they wish for based on the DMA. This can be justified by the need to facilitate contestability and innovation and these processes require giving rival businesses as much information as possible to try and compete on the market. If some data turns out to be superfluous, this is irrelevant.

- A *minimalist view* is that the party requesting data should have a business model beforehand and present the gatekeeper with a request for specific types of data that are required to develop the business. This may be justified by invoking the principle of proportionality: the gatekeeper cannot be expected to incur costs to supply the data unless the business user shows that the data transfer is necessary to the new venture.

A balance between these two positions would be to afford the party requesting data the right to request what data they seek without requiring a detailed explanation of why they need it. A firm can motivate a request for data with a preliminary business plan. This is important to stimulate new entry and innovation.

Related, the requirement to provide continuous, real time data may not always be technically feasible. A gatekeeper should be able to demonstrate that there are limits to how this access can be provided such that it would be disproportionate to expect more from it.,

A final point is **whether the data access may be varied over time**. Suppose the initial portability requests is for data points A, B and C but later the recipient realises she only requires point A. At that moment, there should be an obligation on the recipient to vary the data request and a gatekeeper should be free to stop providing data B and C if it is clear that this is unnecessary. Otherwise, the gatekeeper incurs unnecessary costs of transferring useless data bundles. This argument is less valid for Article 6(9) where the end-user requests data and one should not question the end user's wishes.

Another consideration may relate to **the reputational risk that a gatekeeper incurs and the risk of data misuse that harms data subjects**.[112] This applies in particular when a third party receives data. This argument is a delicate one, however. First, while Article 6(4) DMA explicitly addresses the possibility of some vetting of third party providers, there is no mention of this in Articles 6(9) and (10). At the same time, when demonstrating compliance under Article 8(1) DMA the gatekeeper must reveal how it complies with EU Law more generally, which may require certain safeguards to protect users.

However, once data is transferred from gatekeeper to a third party, that third party becomes a data controller and as such has certain responsibilities vis-à-vis the data subject. Therefore, a gatekeeper should not use the risk of a third party infringing the GDPR as an excuse for not transferring data – self-help is not a remedy that the DMA appears to allow.[113] However, the end user may be unaware of the precise allocation of responsibilities and may well (unfairly) blame the gatekeeper for defective data management. To balance the rights of end users and business users on the one hand and gatekeepers on the other, a **gatekeeper should be allowed to warn users of the risks of porting data or to object to data transfers when the third party has been identified as not currently complying with GDPR by a national authority**.

Conversely, the reputational risk may be on the other side. Established firms are trusted by end-users who are thereby more likely to consent to requests to share data. Conversely a third party may be less trusted. This explains why Article 13(5) DMA requires that the gatekeeper shall 'take the necessary steps to … enable business users to directly obtain the required consent to their processing 'and 'shall

[112] Z. Meyers, *Which Governance Mechanisms for Open Tech Platforms?*, CERRE Report, January 2025.
[113] Likewise dominant firms may not take matters in their own hands to protect users, see Hilti v Commission.

not make the obtaining of that consent by the business user more burdensome than for its own services. 'In other words, the **DMA is less concerned with the reputational risk incurred by the gatekeeper than by the risk that the business user's capacity to secure consent from the end-user is hampered by the gatekeeper**.

4. The DMA and Cybersecurity rules

4.1 Openness and Cybersecurity

While several DMA obligations aim to open existing digital ecosystems in order to increase contestability, innovation and fairness, **such opening should not happen to the detriment of the security of the regulated core platforms services**. Safeguarding cybersecurity has become an increasingly important economic, societal and policy concern and objective in the Europe and in the world, particularly given the current evolution of international geo-politics. This is why the previous EU administration has adopted a series of new cybersecurity laws, in particular the revised Network and Information Systems Directive (NIS2) in 2022 and the Cyber Resilience Act (CRA) in 2024.[114]

The Cyber Resilience Act introduces mandatory cybersecurity requirements for manufacturers and retailers, governing the planning, design, development, and maintenance of such products. These obligations must be met at every stage of the value chain. Under the CRA, operating system and web browser providers are required to ensure baseline product security to manage risks across their platforms. In doing so, they need to take into consideration risks emanating from business users connected to their software, including through the access provisions of the DMA, such as alternative distribution and interoperability. While many business users of operating systems and browsers have also to manage risks related to interoperability, the scale of such risks for operating system providers is proportionate to the amount of business users they distribute or interoperate with.

At the outset, it is important to note that the **relationship between ecosystems' openness and cyber security is not unidirectional**.[115] On the one hand, more openness may improve resilience by increasing the numbers of providers of digital services as well as security by increasing competition on that dimension among those providers. On the other hand, more openness may also open new doors for hackers, cyberattacks and users manipulation undermining cybersecurity. Thus, ecosystems openness does not *per se* decrease security, but it should be organised in a way - in particular with governance mechanisms - which protects cybersecurity.

Moreover, the relationship between openness and cybersecurity depends on the competences and **cyber-literacy of the end users**. The literacy is particularly important as the digital ecosystems become more open and users are confronted with new choices, hence possible new security risks. Therefore, more users are competent, less the possible tension between openness and security will be.

This why gatekeepers should be able to develop users security empowerment tools like installation sheets, provided there are used in a transparent and non-discriminatory manner. In addition, Member States and national agencies may launch education campaigns as well as stimulated the establishment of independent security certification mechanisms.

[114] Directive 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union (NIS 2 Directive), OJ [2022] L 333/80 and Regulation 2024/2847 of the European Parliament and of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements and amending Regulations 168/2013 and 2019/1020 and Directive 2020/1828 (Cyber Resilience Act), *OJ L, 2024/2847, 20.11.2024*

[115] A. Bradford, The Optimal Size of a Tech Company, Draft, February 2025.

4.2 True Conflict and Trade-offs Between DMA and Cybersecurity

It is also important to note that digital platforms **and gatekeepers have private incentives to ensure the security of their ecosystem** in order to maintain the trust of their users; some platforms even use security as a competitive distinguishing factors against other providers. Platforms also have incentives to open their ecosystems to new app stores and apps developers in order to increase the value of their ecosystems.[116] But the optimal level of openness at the private level may not be the socially optimal one and this is why the DMA imposes more openness under some circumstances.

However, it is important that, in doing so, **the implementation of the DMA does not reduce the optimal level of security** and, crucially**,** it is key that the DMA does not impede the gatekeepers to comply with their obligations under the EU and national cybersecurity rules. Moreover, the implementation of the DMA should not reduce the **possibility of the platforms to differentiate** themselves and compete on security dimensions.[117]

To guarantee this, the DMA provides for specific **security and service integrity defences** (next to the privacy defences) attached to some of the DMA 'openness' obligations, in particular the obligations related to vertical and horizontal interoperability.[118] This defence allows the gatekeepers to take strictly necessary and proportionate measures to maintain the security and the integrity of their regulated digital services. In doing so, those defences allow a balancing between contestability and security and the consistency between DMA and EU cybersecurity laws in two different scenarios.

The first scenario is when there is a *true conflict* between the DMA and EU or national cybersecurity laws as understood in the section 2 i.e. that a gatekeeper cannot possibly comply with two rules at the same time. In this scenario, the **DMA security defence allows a gatekeeper to take the measures imposed by EU cybersecurity rules** and ensure that the DMA does not impinge on the ability of the gatekeepers to comply with their obligations under the EU and national cybersecurity laws. Moreover, if different measures comply with cybersecurity rules and achieve the same degree of security, the principle of proportionality implies that the gatekeeper should choose the one which is the least detrimental to contestability and fairness.

The second scenario is when there is no true to conflict between the DMA and cybersecurity rules but a gatekeeper wants to impose additional security measures than those imposed under EU laws. In this scenario, the application of the principle of proportionality of the security defence would require a **weighing the impact on cybersecurity against the benefits of contestability and fairness** where there is a trade-off.[119]

[116] M.G. Jacobides, Cennamo C., Gawer A. 2024. Externalities and complementarities in platforms and ecosystems: From structural solutions to endogenous failures. *Research Policy*, vol. 53
[117] M. Bauer and D. Pandya, Cybersecurity at Risk: How the EU's Digital Markets Act Could Undermine Security across Mobile Operating Systems, ECIPE Policy Brief 04/2025.
[118] DMA, Art. 6(3), 6(4), 6(7), 7(3) and 7(6).
[119] Z. Meyers, Balancing security and contestability in the DMA: the case of app stores, European Competition Journal, 2024.

4.3 Process and Governance Mechanisms to Manage Legal Interactions

Thus for both scenarios, the application of the integrity and security defences – and more generally the optimal balance between openness and security *when* they are in tension – may be difficult to apply in practice because it involves, on the one hand, complex technical questions[120] and, on the other hand, novel legal interpretations issues regarding the DMA (such are the exact scope of the security defence) as well as the EU cybersecurity laws (such as the exact security measures to be taken by the providers of operating system and web browser). Those difficulties require robust process and governance mechanisms to deal with the interactions between the DMA and cybersecurity laws.

First, the Commission should closely **cooperate with EU and national cybersecurity agencies** – in particular ENISA- to guarantee a consistent application of the DMA and cybersecurity rules. On the medium term, the composition of the DMA High Level group could be expanded to cybersecurity agencies. It is also important that the Commission build internal expertise and could rely on best external expertise in cybersecurity matters.[121]

Second, the Commission could clarify through **specification decisions and/or guidelines** how the scope and the application security and integrity defence will be interpreted by the Commission.[122]

Third, the Commission should incentivise the gatekeepers and the business users to agree on **inclusive governance mechanisms**[123] which could reduce the possible tension between contestability and security and guarantee that level of cybersecurity is not compromised by the increased openness of a digital ecosystem.

Those governance mechanisms could include:

- The continuous development of security **standard**s;
- Independent third-party or gatekeeper non-discriminatory automated **certification mechanisms** to ensure that the app stores and app developers having access to the open digital ecosystems are sufficiently secure;
- Independent and rapid **dispute resolution mechanisms** when there is a disagreement between the gatekeepers and business users on the implementation of the security defence.[124] In this regard, the establishment of an independent conciliation process that the Commission proposes in its draft specification decision on the process of interoperability applicable to Apple may a be step in the right direction.[125]

[120] Landis, Bietti, Park, SoK: "Interoperability vs Security" Arguments: A Technical Framework, 2025.
[121] Including through studies as currently done: https://digital-markets-act.ec.europa.eu/dma-commission-launches-call-tenders-study-mobile-ecosystems-2023-09-19_en; a study looking at specific security concerns that could arise in relation to i) uninstallation, ii) alternative app distribution , and iii) alternative browser engines.
[122] Z. Meyers, fn 119.
[123] https://cerre.eu/publications/which-governance-mechanisms-for-open-tech-platforms/
[124] Z. Meyers, fn 119 referring to the dispute resolution mechanisms which have been established in telecommunications regulation.
[125] Draft Decision, paras 43-47 : https://digital-markets-act-cases.ec.europa.eu/cases/DMA.100204

5. Gatekeepers in Other EU Laws

In this section, we consider two developments – the choice to exclude gatekeepers from the benefit of EU Laws (5.1) and the extension of gatekeeper obligations in other laws (5.2). We present and discuss two specific policy initiatives below. At a more general level, these developments need further justification and analysis. The notion of gatekeeper was developed specifically to address concerns about contestability and fairness in a given set of core platform services. **It is not obvious that this notion is also useful in contexts outside the DMA, which is a Regulation that addresses a set of specific markets**. At most, there should be an ex ante analysis about whether the concept of gatekeeper is fit for purpose in other domains. Otherwise there is a risk that regulation is not addressed to the right actors. It may well be that asymmetric regulation is required under other EU Laws, but then selecting the target for higher regulatory requirement must be based on the ordinary regulatory impact assessment, and not a mechanical transposition of the gatekeeper concept.

5.1 Excluding Gatekeepers from the Benefits of EU Laws

In some regulatory frameworks that have come in after the DMA, the EU has elected to exclude gatekeepers from the benefits of new regulation. The **Data Act** explicitly excludes gatekeepers as defined and designated in the DMA from being able to obtain data: they can neither obtain nor solicit such data.[126]

> *Article 5(3)*
>
> *Any undertaking designated as a gatekeeper, pursuant to Article 3 of Regulation (EU) 2022/1925, shall not be an eligible third party under this Article and therefore shall not:*
>
> *(a) solicit or commercially incentivise a user in any manner, including by providing monetary or any other compensation, to make data available to one of its services that the user has obtained pursuant to a request under Article 4(1);*
>
> *(b) solicit or commercially incentivise a user to request the data holder to make data available to one of its services pursuant to paragraph 1 of this Article;*
>
> *(c) receive data from a user that the user has obtained pursuant to a request under Article 4(1).*

This is explained in Recital 40 which states that the aim of the legislation is to benefit start-ups and small firms as well as forms from traditional sectors which have 'less developed digital capabilities.'[127] In contrast, gatekeepers already have 'unrivalled ability' to acquire data and it is seen as disproportionate to give them access to more data. The 'fairness of the distribution of data value across market actors' would otherwise be hampered. However, this merely prevents the consumer

[126] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) OJ L,2023/2854 (22/12/2023), Article 5(3).
[127] Data Act, Recital 40.

from requesting that data held by another firm is shared with a gatekeeper. Recital 40 closes by stating that "As voluntary agreements between gatekeepers and data holders remain unaffected, the limitation on granting access to gatekeepers would not exclude them from the market or prevent them from offering their services." This means that there can be certain datasets that can be transferred lawfully to gatekeepers.

The criticism that may be made of this approach is that it **seems to deny the consumer's rights as co-creator of data**. The data in question is generated when the consumer uses the goods or services of a firm. In this context, the Data Act empowers the consumer to demand that 'his/her' data is shared with another service provider and it is not clear why it is not proportionate to allow them to share this data with a gatekeeper who may be able to cover precisely the service that the consumer wants and for which the consumer's data is an essential input. It is true that some gatekeepers already have a huge trove of data which confers on them competitive advantages, but this concern is not addressed by stifling the development of valuable services which some gatekeepers may be best placed to provide. Moreover, the DMA already contains data-related obligations designed to address this source of economic power in specific contexts.

This is an unfortunate development. The DMA does not prevent a gatekeeper from benefiting from the obligations that are imposed upon other gatekeepers. In markets like internet search or app stores, the **quickest way to create contestability would seem to be to facilitate market access to existing actors some of whom may well be gatekeepers in other core platform services**. Gatekeepers also have less fear of retaliation and may thus be key to forcing changes on rival gatekeepers that can then benefit all other business users. Nor does the DMA have specific rules to prevent the growth of a firm offering core platform services.

In sum, it is not shown that by excluding gatekeepers from the Data Act one enhances the objectives of the Data Act itself, which is about facilitating entry of market players who can make use of data to provide innovative services. It seems like the Data Act exclusion is designed to achieve, indirectly, the aims of the DMA.

5.2 Extending Gatekeeper Obligations in Other EU Laws

It may also be tempting to extend the regulation of gatekeepers in other regulations. For example, in reforming the **EU Merger Regulation's** jurisdictional thresholds one could provide that all acquisitions by a gatekeeper must be notified. And its call for evidence on virtual worlds the Commission uses the notion of gatekeeper.[128]

In financial services, the European Banking Authority (EBA) has observed that some gatekeepers have entered certain financial sectors – especially e-money and payment services, even if so far entry is modest. The EBA study considers the entry of a wider range of tech firms too.[129] The study reports

[128] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13757-Virtual-worlds-metaverses-a-vision-for-openness-safety-and-respect_en

[129] Amazon, Alibaba (Ant Group), Apple, Baidu (Du Xiaoman), Google, JD.com, Mercado Libre, Meta Platforms (previously Facebook), Microsoft, NTT Docomo, Rakuten, Samsung, Tencent, Tesla, Uber, Vodafone and Orange.

that firms like gatekeepers are well placed to participate in the provision of financial services but that they also create certain risks because of their wider portfolio of services. A plausible regulatory response could be that the gatekeeper notion is extended to financial market regulation so that gatekeepers are placed under scrutiny by financial service authorities. It is not clear if the gatekeeper label however is sufficiently capacious to include all tech firms that may create financial risks. As suggested above, our preference is to base any asymmetric regulation on an impact assessment that identifies the right target for such regulation.

In the proposed **Regulation on Financial Data Access (FiDA), gatekeepers are given special attention**.[130] The Regulation aims to facilitate access and sharing of customer data in financial services to stimulate the provision of innovative services including personalized financial products. FiDA is expected to reduce entry barriers by facilitating switching by creating a harmonized framework for access to financial data.[131] The text is currently under negotiation and the current version may be used to explain and discuss the kinds of regulatory choices that are envisaged when it comes to gatekeepers.

Originally, the European Parliament had suggested excluding gatekeepers altogether, like in the Data Act. The current draft under discussion however, allows gatekeepers to benefit from the Regulation with certain limitations.

First, Draft FiDA Article 6(4b) indicates that the gatekeeper cannot combine the data it obtains under this Regulation with other data that it has.[132] This is stricter than DMA Art 5(2) because combination is not allowed even if the consumer were to consent. This requires specific justification that explains what risk this seeks to combat and why this risk manifests only when gatekeepers act in this way and no other actors.

Second, Draft FiDA Article 12 provides that a financial information service provider wishes to access customer data must be authorized by the competent authority of the Member State of establishment. Article 12(4a) provides that when such an application comes from a gatekeeper then a specific assessment is performed which is also considered by the ESA. The special assessment regime is provided for in Draft Article 18a.

Focusing on the substance, the competent authority should consider the following:

(a) a programme of operations submitted by the gatekeeper setting out the functioning, services and activities performed, access to customer data and the size of activity.

https://www.eiopa.europa.eu/document/download/3fccfa9e-7dbf-49ce-afa9-8abfa22df22a_en?filename=Joint%20ESAs%20Report%20-%20Stocktaking%20of%20BigTech%20direct%20financial%20services%20provision%20in%202023.pdf.

[130] The current draft is available at: https://data.consilium.europa.eu/doc/document/ST-16312-2024-INIT/en/pdf (published on 2 December 2024).

[131] Useful background may be found at: https://www.financial-data-access.com/.

[132] FiDA Art 6(4)(f): "Data users that are designated as a gatekeeper or that are owned or controlled by an undertaking that has been designated as a gatekeeper shall be prohibited from combining customer data referred to in Article 2(1) of this Regulation with other data relating to the customer that the designated gatekeeper may already collect, store, or otherwise possess for purposes outside this Regulation."

(b) Network effects and data driven advantages of the gatekeeper 'in particular in relation to that undertaking's access to, and collection of, customer data or analytics capabilities'

(c) Evidence that the entity has in place sufficient safeguards to demonstrate compliance with Articles 5 – 8 of the Regulation

(d) 'evidence that the entity 'has in place sufficient IT, governance and organizational safeguards to demonstrate compliance with Article 6(4)(f),[133] and that the segregation of data is ensured at all times and permanently in accordance with Article 6(4b)'

Items (a) and (b) are supplementary checks: only gatekeepers that satisfy these two requirements fall under FiDA. However, some guidance on how to decide when the economic criteria in (b) are met would be helpful. On the one hand, one might see this as a useful way of avoiding over-regulation because not all gatekeepers will this be subject to this regime. On the other hand, the very fact that the concept of gatekeeper is not sufficient to identify the target of asymmetric regulation suggests that transplanting the gatekeeper concept here is not satisfactory as a way to regulate markets.

The substantive risk-assessment is carried out under items (c) and (d) by which the competent authority ensures that there is no risk that the gatekeeper can leverage its competitive advantages.[134] This means that gatekeepers can participate in these markets provided that they do not combine the data in order to achieve a competitive advantage over other entrants. At a micro-level, this requires some additional specification to identify the degree of network effects and data driven advantages that are sufficiently high to warrant closer supervision to ensure that intervention is proportionate. However, more generally, it is not clear why these additional requirements are necessary before allowing the entry of gatekeepers.

Generally, FiDA proposes a stricter regime for gatekeepers both in regulating their entry into the market and then controlling their conduct. There are two general concerns about this approach. First, as indicated above, without an ex ante impact assessment that identifies market failures that need to be addressed then the proposal is not well-justified. Second, some of the strictness of FiDA for gatekeepers seems to be designed to address contestability concerns which are part of the DMA, while FiDA is legislation has other objectives. It is designed to empower customers of financial institutions and to stimulate the development of innovative financial products and services.[135] We suggest further reflection is needed before inserting additional requirements for DMA-designated gatekeepers in other elements of EU regulation that are designed for different reasons.

[133] This provides that 'where the data user is part of a group of companies, customer data listed in Article 2(1) shall only be accessed and processed by the entity of the group that acts as a data user.'
[134] FiDA Draft Regulation, Articles 18(5) and (6) provides that the gatekeeper may modify its plans f they are deemed unsatisfactory.
[135] FiDA Draft Regulation, Recitals 1 and 3.

Issue Paper

Preparing the Evaluation of the DMA

March 2025

1. Introduction

In her Political Guidelines, the President of the European Commission Ursula von der Leyen stated that: "we need to make business easier and faster in Europe. I will make speed, coherence and simplification key political priorities in everything we do."[136]

In the mission letter to Executive Vice-President Virkunnen, President von der Leyen instructs her to: "work to stress test the EU acquis and table proposals to eliminate any overlaps and contradictions and be fully digitally compatible, while maintaining high standards. New legislation must ensure that our rules are simpler, more accessible to citizens and more targeted. You will ensure the principles of proportionality, subsidiarity and Better Regulation are respected, including through wide consultations, impact assessments, a review by the independent Regulatory Scrutiny Board and a new SME and competitiveness check. Proposals must be evidence-based and the Joint Research Centre, our internal scientific service, can support you in that work".[137]

The future evaluation of the Digital Markets Act (DMA) will be an important opportunity to apply those principles. Article 53 of the DMA provides that:

1. By 3 May 2026, and subsequently every 3 years, the Commission shall evaluate this Regulation and report to the European Parliament, the Council and the European Economic and Social Committee.

2. The evaluations shall assess whether the aims of this Regulation of ensuring contestable and fair markets have been achieved and assess the impact of this Regulation on business users, especially SMEs, and end users. Moreover, the Commission shall evaluate if the scope of Article 7 may be extended to online social networking services.

3. The evaluations shall establish whether it is required to modify rules, including regarding the list of core platform services laid down in Article 2, point (2), the obligations laid down in Articles 5, 6 and 7 and their enforcement, to ensure that digital markets across the Union are contestable and fair. Following the evaluations, the Commission shall take appropriate measures, which may include legislative proposals.

4. The competent authorities of Member States shall provide any relevant information they have that the Commission may require for the purposes of drawing up the report referred to in paragraph 1.

To ensure that the evaluation of the DMA meets the political commitments, the Commission should have both the necessary capacity and the incentive to conduct a robust and independent evaluation. This Issue Paper first reviews general methodologies for good evaluation (section 2) and then applies these methodologies to the evaluation of the DMA.

[136] Political Guidelines of the European Commission 2024-2029, p.7.
[137] https://commission.europa.eu/document/3b537594-9264-4249-a912-5b102b7b49a3_en.

2. Methodologies for Evaluation

In addition to robust ex ante impact assessments, ex post evaluations are equally, if not more, important, as they assess the actual impact of EU legislation. This is why, as is often the case with EU laws, Article 53 of the Digital Markets Act (DMA) requires an evaluation by the European Commission four years after its entry into force, with subsequent evaluations every three years. Furthermore, the legislator specifically instructs the Commission to evaluate the issue of social network interoperability, which was a contentious topic during the political negotiations.

This evaluation is particularly crucial because the DMA is a new piece of legislation, and some of its potential negative or positive effects may not have been anticipated in the Commission's Impact Assessment or by the Council and European Parliament during their negotiations. Given the complexity of digital markets— which are not yet fully understood, dynamic, and innovative— the DMA might have unintended consequences. As a result, the current version of the DMA may need adjustments and improvements in future iterations.

As noted by the Council of the OECD in its Recommendation on agile regulatory governance:[138]

> *"In light of the regulatory challenges raised by innovation, undertaking a shift in regulatory policy processes will be essential, whereby the traditional "regulate and forget" mindset must give way to "adapt-and-learn" approaches. The capability to detect and understand innovations and their potential impact on existing regulations, or, more important, the public values that are at stake, is key. Addressing any "pacing problem" requires, in particular, shortening timeframes throughout the policymaking process and using regulatory management tools in a more dynamic, adaptive and iterative manner. In this new paradigm, stakeholder engagement, regulatory impact assessment (RIA), and ex post evaluation should not be seen as a series of discrete requirements to be conducted successively, but rather as mutually complementary tools embedded in the policy cycle to inform the appropriate adaptation of regulatory (or alternative) approaches."*[139]

2.1 Dimensions to Evaluate

According to the European Commission Better Regulation Guidelines,[140] an ex post evaluation should be an evidence-based assessment along five dimensions, determining the extent to which the EU law:

1. Is effective in fulfilling expectations and meeting its objectives (which implies that the objectives of the law are clearly identified), this includes an analysis of the unexpected and unintended effects;

[138] OECD, *Recommendation of the Council for Agile Regulatory Governance to Harness Innovation*, OECD/LEGAL/0464, p.9. This recommendation is supported by an very interesting report by the World Economic Forum (2020), *Agile Regulation for the Fourth Industrial Revolution: A Toolkit for Regulators*

[139] This is referred as back-to-back evaluation and impact assessment as Tool 50 of the Commission Better Regulation Toolbox.

[140] European Commission Better Regulation Guidelines SWD(2021) 305, p.23 and Tool 47 of the Better Regulation Toolbox 2023.

2. is efficient in terms of cost-effectiveness and proportionality of actual costs (including administrative and adjustment costs) to benefits, this includes an analysis of possibilities of simplification and reduction of inefficiencies;

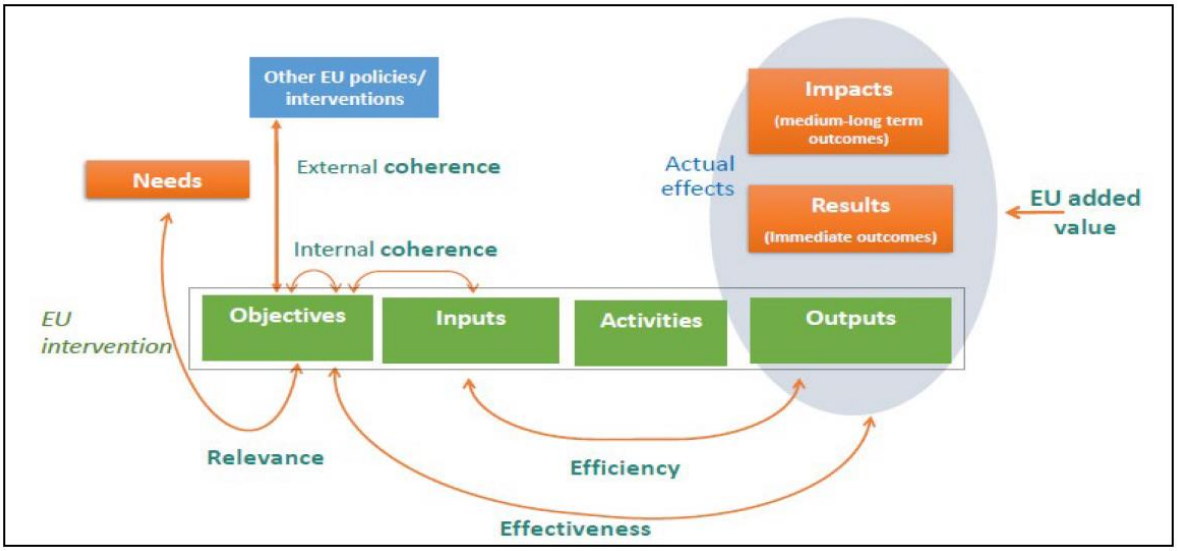
3. is relevant to current and emerging needs;

4. is coherent internally (i.e. within the same legal instrument) as well as externally with other EU interventions and international agreements; this includes the identification of tensions and synergies among regulatory instruments;

5. and has EU added value, i.e. produces results beyond what would have been achieved by Member States acting alone.

The Better Regulation Guidelines clarify that the evaluation goes beyond an assessment of *what* happened; it also considers *why* it happened (the role of the EU intervention) and, if possible, *how much* has changed.

Figure 1: Simplified View of a Regulatory Evaluation[141]



When several laws are evaluated together, the evaluation could be done through a more comprehensive **fitness check** to determine the coherence of the various laws and seek to quantify any synergies (e.g. improved performance, simplification, lower costs, reduced burdens) or inefficiencies (e.g. excessive burdens, overlaps, gaps, inconsistencies, implementation problems, and/or obsolete measures) over time. This would help identify the cumulative impact of the interventions, in terms of costs and benefits.

[141] European Commission Better Regulation Toolbox 2023, p.405.

2.2 Features of a Good Evaluation

The **Commission's Better Regulation Guidelines** state that evaluations should be independent and objective, relying on all relevant information and conducted without influence or pressure from third parties. They must also transparently report both the positive and negative aspects of the analysis.[142]

Additionally, the Guidelines emphasise that evaluations should be based on the best available evidence, drawn from a diverse and appropriate range of methods and sources—this approach is referred to as "triangulation."[143] This requires identifying relevant indicators and data to conduct a robust evaluation across the five dimensions, followed by the collection of these data as soon as the new law comes into force.[144]

To enhance the quality of evidence and efficiently manage this data, the OECD recommends leveraging technological solutions.[145] **Big Data and AI technologies** offer significant opportunities to improve the evaluation of EU laws. As demonstrated by the use of SupTech by financial supervisors,[146] these technologies can (i) streamline data collection, improve reporting, virtual assistance, and data management, and (ii) enhance data analytics for market surveillance, misconduct analysis, and prudential supervision.[147] More ambitiously, SupTech could also be used for market evolution simulation through agent-based computational modelling.[148]

For innovative markets like technology ones, the OECD further advises developing **adaptive, iterative, and flexible regulatory assessment cycles**. The evaluation process should evolve over time as more information on the impact of a law becomes available. This approach allows evaluators to refine indicators, data, and processes. Ultimately, evaluation should lead to the adaptation, correction, and improvement of the law.

[142] European Commission Better Regulation Guidelines SWD(2021) 305, p.26.
[143] European Commission Better Regulation Guidelines SWD(2021) 305, p.26.
[144] As noted in Tool 46 on designing evaluation of the European Commission Better Regulation Toolbox, the JRC or external sources may be useful to identify and collect the relevant indicators.
[145] OECD Recommendation on Agile Regulatory Governance, p.6.
[146] For an overview of the suptech used by financial supervisors, see the database of the Cambridge SupTech Law at the Cambridge Judge Business School: https://ccaf.io/suptechlab/ as well as the Bank of International Settlement (BIS) Innovation Hub: https://www.bis.org/about/bisih/topics/suptech_regtech.htm. Next to regulators, the antitrust authorities are also exploring the use of big data and AI to improve their operations: the Computational Antitrust project at https://law.stanford.edu/codex-the-stanford-center-for-legal-informatics/computational-antitrust/.
[147] S. di Castri, Hohl S, Kulenkampff A and J Prenio (2019), *The suptech generations*, Financial Stability Institute Insights 19.
[148] As suggested by Arthur (2021), 'Foundations of Complexity Economics', *Nature Review: Physics* 3, 136-145.

3. The Evaluation of the DMA

While the first evaluation of the DMA is scheduled for May 2026—allowing enough time for implementation and the identification of initial effects—it should already be prepared now. This is crucial because framing the impacts to be assessed, identifying the appropriate indicators, and collecting relevant data requires time.

This preparation is particularly important given the mixed outcomes of evaluations of some early regulations within the EU's digital rulebook. One of the first pieces of this rulebook is the General Data Protection Regulation (GDPR), which entered into force in 2018 and has already been assessed twice by the European Commission, in 2020[149] and 2024. [150] Both reports highlight that the GDPR gives EU citizens control over their data and creates a level playing field for businesses. The reports also emphasise the need for: (i) proactive support by national Data Protection Authorities for stakeholders' compliance efforts, especially SMEs; (ii) consistent application of the GDPR across the EU and robust cross-border enforcement mechanisms, [151] and (iii) effective cooperation between EU and national regulators to ensure coherent application of the EU digital acquis.

However, these two Commission reports do not provide a comprehensive or rigorous evaluation of the GDPR. Instead, they offer a qualitative assessment of its initial implementation. In particular, the reports do not thoroughly assess the effectiveness and efficiency of the GDPR or its impact on innovation. As noted in the Draghi Report, this is concerning given the growing body of academic research indicating the negative effects of the GDPR on European tech innovation—particularly for start-ups. [152]

3.1 Process of Evaluation

The European Commission is responsible for the evaluation of the Digital Markets Act (DMA), as it is for most EU laws. However, there is a potential conflict of interest since the Commission also serves as the enforcer of the DMA. While the Commission often outsources the preparatory work for an evaluation to external consultants, these consultants are not always entirely independent, particularly since they must regularly bid for new contracts with the Commission. Additionally, the draft evaluation reports produced by Commission services undergo review by the Regulatory Scrutiny Board, which performs an independent quality control. Yet, this Board is also part of the Commission, is not immune to internal influences, and operates with very limited resources.

To mitigate this risk, it would be prudent to **involve an independent body in the evaluation process, ideally before the Commission. One possibility would be the European Court of Auditors (ECA)**, which reports directly to the European Parliament. In addition to its main role of auditing EU finances, the ECA can conduct performance audits of specific EU policies. [153] For example, the ECA recently

[149] Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation, COM(2020) 264 and SWD(2020) 115.
[150] Second Report on the application of the General Data Protection Regulation, COM(2024) 357.
[151] Hence, the Commission Proposal of 4 July 2023 for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation 2016/679, COM(2023) 348.
[152] Draghi Report, Part B, p.319.
[153] European Court of Auditors Methodological Guide 2023, pp. 18-24.

published a critical and insightful report on the EU's Artificial Intelligence ambitions.[154] Given that one of the ECA's strategic areas of focus is EU economic competitiveness[155]—of which the tech sector is a critical component—it would make sense for the Court to contribute to the evaluation of the DMA. To do so effectively, the Court should develop specific expertise in the tech sector and adopt a pragmatic, rather than a formalistic, approach to the evaluation.

A complementary option would be for the European Parliament and the Council to appoint a panel of **high-level independent experts** on a merit basis. One relevant precedent is the interdisciplinary team of top academics that produced the 2019 Report on Competition Policy for the Digital Era, which was well-regarded for its expertise and independence. [156]

To further enhance the independence and quality of the evaluation, the **draft evaluation report from the Commission service should be subjected to a meaningful public consultation** before being reviewed by the Regulatory Scrutiny Board. This would allow all relevant stakeholders—who often have access to better information and data than the Commission—to provide their input on the identified causal relationships, policy trade-offs, and the use of indicators and data. Stakeholders may also propose alternative indicators and data for consideration.

Based on the outcome of the public consultation, the Commission service should revise the draft evaluation report and provide a separate document explaining how the feedback has been incorporated. With this additional information, the Regulatory Scrutiny Board would be in a better position to conduct a more rigorous quality control of the evaluation, ensuring the appropriate use of indicators and data.

3.2 Dimensions to Evaluate

Among the five dimensions of an evaluation (mentioned in section 2.1), three are particularly important for the DMA and more broadly for the evaluation of the EU digital rulebook: effectiveness, efficiency/proportionality, and coherence.

3.2.1. Effectiveness

As explained above, effectiveness refers to the **problems that the DMA aims to solve and its capacity to achieve its objectives**. The Digital Markets Act (DMA) has three primary goals: (i) increasing market contestability (or, conversely, reducing entry barriers), (ii) promoting fairness, and (iii) strengthening the internal market.[157] Additionally, the DMA seeks to increase transparency in online advertising markets, foster innovation among designated gatekeepers as well as other digital firms (including start-ups and scale-ups) in European markets, and expand choice for European users.

However, **these objectives are interconnected and achieving one may facilitate the achievement of others**. For example, greater contestability in the market may, over time, lead to more fairness, as a well-functioning market serves as a strong disciplining force against unfair practices. Relatedly, some

[154] https://www.eca.europa.eu/en/publications/SR-2024-08. This report is not a regulatory evaluation.
[155] **The 2021-25 Strategy of the European Court of Auditors:** https://www.eca.europa.eu/Lists/ECADocuments/STRATEGY2021-2025/STRATEGY2021-2025_EN.pdf.
[156] https://competition-policy.ec.europa.eu/about/europes-digital-future/shaping-competition-policy-era-digitisation_en.
[157] DMA, Art.1.

objectives may be realised more quickly than others. Contestability and internal market goals, for instance, may be achieved sooner than fairness or innovation objectives. Therefore, the first evaluations of the DMA should account for this time dimension when assessing its effectiveness.

Another challenge is the potential **trade-offs between objectives**. For example, increased market contestability may enhance the ability and incentives for market entrants to innovate but, in some cases, could also reduce the ability and incentives for gatekeepers to innovate.

Moreover, the pursuit of DMA objectives may result in **unintended and unforeseen consequences**, such as a degradation in the consumer journey, forgone innovation if new products are not deployed in the EU, or potential reductions in the security of digital services or in privacy protection. These trade-offs and unintended consequences should be carefully examined in the evaluation of the DMA.

3.2.2. Efficiency and Proportionality

Efficiency refers to two key aspects: first, that the **benefits of the DMA exceed its costs**, and second, that the costs to achieve the DMA's objectives are minimised, as required by the principle of proportionality.

It is important to note that the **time horizon for costs and benefits may differ**. Costs are often frontloaded, while benefits typically take time to materialise. Therefore, a cost-benefit analysis conducted only a few years after the implementation of the DMA could be misleading unless it accounts for this time lag.

As a starting point, the evaluation could revisit the benefits and costs estimated in the DMA Impact Assessment and assess whether the Commission's predictions have been realised. [158] If the outcomes differ, the evaluation should explore the reasons behind this, as this could provide valuable insights for improving future impact assessments. Additionally, the evaluation should examine any benefits and costs not accounted for in the initial impact assessment.

The **total costs of implementing the DMA** were estimated in the Commission's Impact Assessment to range from €43.8 million to €50.9 million, covering the following components: [159]

- *European Commission*: implementation and supervision costs of €16.7 million (80 FTEs, IT support, and external expertise).
- *National authorities*: €6 million (based on 3.5 FTEs for 27 Member States).
- *Gatekeepers*: €21.15 million for 15 designated gatekeepers.
- *Business users*: net additional resource requirements are expected to be very limited, as costs associated with legal actions against gatekeepers under other EU or national laws (e.g., competition law) would be redirected to DMA enforcement actions.

[158] Impact Assessment Report of the Commission Services of 15 December 2020 on the 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.
[159] The projected costs and benefits are summarised in the Regulatory Scrutiny Board Opinion of 10 December 2024 on the DMA draft Impact Assessment.

A simple back-of-the-envelope calculation suggests that these direct costs may have been substantially underestimated. One reason for this underestimation is that none of the DMA obligations are self-executing, and the challenges of compliance—both for gatekeepers and business users—along with enforcement difficulties, were not adequately addressed in the impact assessment. However, the real, higher-than-anticipated enforcement costs may still be significantly outweighed by the ultimate benefits of the DMA.

To reduce implementation costs, the evaluation should explore opportunities for simplification and the reduction of inefficiencies, in line with the political commitment of President von der Leyen and the recommendations of the Draghi Report. A companion recommendations paper suggests **improvements to the DMA implementation process that could help lower compliance and enforcement costs**. These improvements include: (i) greater transparency; (ii) more legal predictability regarding enforcement priorities and compliance requirements; (iii) more effective institutional arrangements within the Commission and with national authorities, and (iv) ultimately, fostering greater trust between all participants in the regulatory process.

In addition to direct compliance and enforcement costs, the evaluation should also assess the **indirect costs**, particularly those arising from unexpected and unintended effects of DMA implementation. These could include a degradation of the consumer journey, stifled innovation, or reductions in the security and privacy of digital services.

The direct and indirect costs should be compared with the **total benefits of DMA implementation**, which, as previously noted, often take more time to materialise. The projected benefits of the DMA, as outlined in the Commission's Impact Assessment, include:[160]

- Reduction of *market concentration* due to decreased entry barriers: a decrease in the Herfindahl-Hirschman Index (HHI) by 0.25 (for user share) and 0.11 (for revenue share);
- Increase in *R&D investment* due to market de-concentration and resource reallocation from mergers and acquisitions (M&A) to R&D: €12-23 billion.
- Increase in *innovation* due to higher R&D investment: €221-323 billion.
- *Economic growth* resulting from increased R&D in the ICT sector: €12-23 billion.
- Reduction in *internal market* fragmentation, which would foster increased online cross-border trade and its indirect/spillover effects: €92.8 billion.
- Overall increase in *consumer surplus* from lower costs and prices, as companies could reduce spending on online ads: €13 billion.

The evaluation should verify **whether these estimated benefits have been realised in practice**. If the projected benefits have not materialised, the evaluation should examine whether the causality assumptions made in the Impact Assessment hold true. Specifically, the evaluation should provide empirical evidence to support or challenge the assumptions about the relationship between competition and innovation in digital markets. Furthermore, the evaluation should assess whether the DMA has effectively redirected investment toward R&D and away from mergers and acquisitions. The evaluation may clarify the conditions under which increased R&D leads to meaningful innovation and

[160] *Ibidem*.

economic growth, ensuring that these claims are supported by market-specific evidence rather than generalised theoretical models. Finally, the evaluation should reconsider the assumption that innovation will automatically lead to GDP and employment growth. A more nuanced analysis is needed to understand how these factors interact in practice within the digital economy.

In addition, the evaluation should explore **other direct and indirect benefits—both current and future—that the DMA** may have generated but were not anticipated in the Commission's Impact Assessment.

3.2.3. Consistency with the EU and National Digital Rulebook

Consistency refers to regulatory coherence both within the DMA itself and with other EU laws' objectives, and rules. Given the growing number of EU laws and enforcement agencies overseeing digital markets, as highlighted in the companion Issue Paper on Regulatory Interplay, this dimension of the evaluation has received clear political commitment from President von der Leyen and Executive Vice-President Virkunnen.

The evaluation, ideally conducted through a fitness check, should analyse the **relationship between the DMA and the vertical laws that apply to digital platforms**, such as:

- the European Electronic Communication Code 20218/1972,
- the Revised Audiovisual Services Directive 2018/1808 and the European Media Freedom Act 2024/1083,
- the Platform-to-Business Regulation 2019/1150,
- The Copyright in the Digital Single Market Directive 2019/790,
- The E-Commerce Directive 2000/31 Digital Services Act 2022/2065.[161]

More importantly, the evaluation should identify the overlaps, risks of tensions, and opportunities of synergies between the **DMA and the other horizontal EU laws** applicable to designated gatekeepers, in particular for the protection of:

- *Competition*: Art. 101 and 102 TFEU, Merger Regulation 2004/139;
- *Consumers*: Unfair Commercial Terms Directive 1993/13, Unfair Commercial Practices Directive 2005/29, Consumer Rights Directive 2011/83 and Representative Actions Directive 2020/1828;
- *Product safety*: AI Act 2024/1689;
- *Privacy*: General Data Protection Regulation 2016/679;
- *Cybersecurity*: Information Services Directive 2022/2555, Cyber Resilience Act 2024/2847.

[161] Interestingly, the European Commission has just launched a study on the interplay between the DSA and the other laws of the EU Digital Rulebook: https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/tender-details/fe873a7c-afc4-4306-b6e7-c970e6a606ff-CN.

In addition, the evaluation should also review the relationship between **DMA and related national laws** (such as Section 19a of the German competition law, the different national competition rules regarding economic dependency) and analyse whether the objective and the expected benefits of market integration have been fully achieved.

In addition to examining the relationship between the laws, the evaluation should also analyse the **relationship between the EU and national agencies** responsible for enforcing these laws. It should assess their coordination mechanisms, determine whether the risks of tensions are minimised, and evaluate whether opportunities for synergies are maximised. [162]

3.3 Indicators and Data

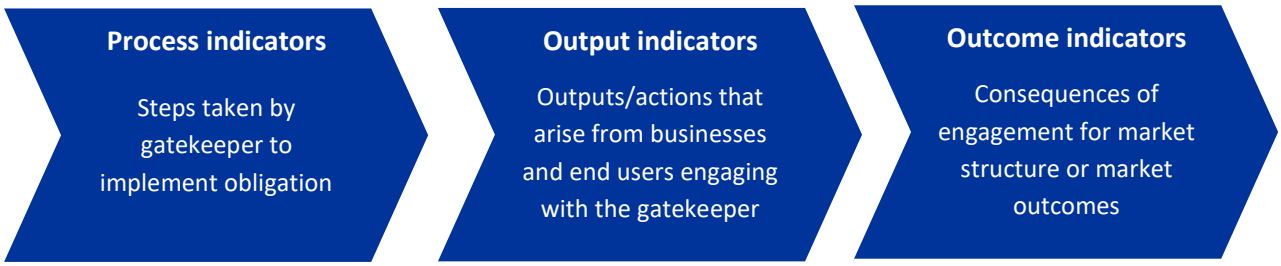
3.3.1. Types of Indicators

On the basis of the evaluation dimension, a clear list of indicators and data should be determined. Those indicators should be specified in advance as well as be stable and consistent over time allowing the evaluator to understand the dynamic effects of the DMA.

In previous work on the DMA,[163] CERRE distinguished between three types of indicators:

- the *processes indicators,* which measure the change of process and products adopted by the gatekeepers to comply with the DMA obligations;
- the *output indicators,* which capture both the extent to which conduct by the gatekeeper has created new opportunities for firms or users and also the extent to which firms or users have engaged with those opportunities; they include, for instance, the ration of the end-users who decide to multi-home between platforms or switch from one platforms to another, or to port their data among platforms;
- the *outcome indicators,* which measure how market outcomes as a whole are affected by these outputs, such as how prices or market shares change in response to action being taken by the gatekeepers for a particular core platform service or as a result of other factors that may be unrelated to the actions of gatekeepers or their compliance with the DMA.

Figure 2: Types of indicators



Regarding the DMA objectives, the different types of indicators are interrelated and may have varying time horizons. Changes in gatekeepers' processes and services can lead to shifts in market participants

[162] G. Monti and A. de Streel, *Improving institutional design to better supervise digital platforms*, CERRE Report, January 2022.
[163] https://cerre.eu/publications/implementing-the-dma-substantive-and-procedural-principles/.

conducts and output, which, in turn, can affect market outcomes. However, the relationship between these three types of indicators is not linear. Outcome indicators, in particular, are multi-factorial, meaning the evolution of indicators alone would not be enough to evaluate the effects of the DMA. Nevertheless**, output indicators are important metrics that, when combined with other data, can contribute to assessing the DMA's effectiveness**.

In addition to the types of indicators, the level of evaluation and the associated indicators should also be defined. The effects of the DMA could potentially be assessed at three levels: (i) firms (i.e., the different designated gatekeepers); (ii) digital services (i.e., the different core platform services), or (iii) rules (i.e., the various DMA prohibitions and obligations). For initial evaluations, the **most relevant level may be to focus on the evolution of core platform services** and how the implementation of the DMA's various obligations has impacted those developments.

Additionally, alongside indicators, **specific case studies** related to the evolution of a core platform service, or the impact of particular DMA obligations could complement the evaluation by providing more in-depth insights into the DMA's effects.

3.3.2. Sources of Data

Once the indicators have been specified, a strategy for data identification and collection should be developed. These data could be sourced from the following:

- *Gatekeepers*, particularly from their compliance reports, which, according to the Commission's Template, should include data such as technical changes, modifications to terms and conditions (including remuneration flows), and customer experience; [164]
- *Business or end-users, or civil society groups* that can provide insights into the DMA's impact on their activities or experiences; [165]
- The Joint Research Centre of the *European Commission*, which monitors the effects of the digital transition and evaluates horizontal and sector-specific EU digital policies; [166]
- The *DMA High Level group* as well as other *EU bodies or regulatory networks*, the European Union Agency for Network and Information Security (ENISA) could also very usefully contribute with relevant data;
- *Consumer surveys*, particularly focused on how consumers perceive the effective implementation of the DMA, and whether they believe it has or could create benefits or costs for them;
- *Academic or commercial research*, [167] which ideally should be mapped out by the Commission as part of the evaluation process.

[164] DMA, art.11 and Commission Template Compliance Report, point 2.1.2. A non-confidential version of those compliance report is available at: https://digital-markets-act-cases.ec.europa.eu/reports/compliance-reports. The compliance reports, which are submitted by each gatekeeper, are different from the evaluation to be done by the Commission as the first aim to assess the quality of compliance while the second assesses the quality of the law. But the compliance reports are an important source of information and data for the evaluation of the DMA.
[165] For instance, reports by BEUC: https://www.beuc.eu/general/competition-digital-markets.
[166] https://joint-research-centre.ec.europa.eu/jrc-science-and-knowledge-activities/digital-transition_en.
[167] Such SensorTower and other app download tracking sources.

The data should be collected and processed in the most suitable manner and when data points are multiple and numerous, they should be processed and analysed using AI tools where possible and relevant, as recommended by the OECD.

cerre Centre on Regulation in Europe

Avenue Louise 475 (box 10)
1050 Brussels, Belgium
+32 2 230 83 60
info@cerre.eu
www.cerre.eu

Centre on Regulation in Europe (CERRE)
CERRE Think Tank
CERRE Think Tank