# The EU's digital markets act

De Streel, Alexandre; Alexiadis, Peter

*Published in:*
Business law international

*Publication date:*
2022

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

# The EU's Digital Markets Act: Opportunities and Challenges Ahead

Peter Alexiadis and Alexandre de Streel*

## Introduction

As witnessed in a series of studies, analyses and papers published over the course of 2019–2020, an international consensus was emerging that the public policy concerns arising consistently in connection with digital platforms either required a fundamental rethink of how competition policy should address such concerns or provide the rationale for the creation of a *sui generis* regulatory regime. If the latter approach were to be chosen, this would mean that competition policy would be left with a complementary role to play, and one that would logically be directed at new modes of commercial behaviour.[1]

The genesis of such a public policy choice in the European Union was brought into sharp focus by the protracted competition law investigation into various commercial practices of Google in internet search by the European

* Peter Alexiadis, Visiting Professor, King's College London and Alexandre de Streel, Professor, University of Namur, Visiting Professor College of Europe and SciencesPo Paris, Academic Director Centre on Regulation in Europe, Chair of the European Commission Expert Group of the EU Observatory on the Online Platform Economy.

1 See, eg, at the level of the EU and the UK respectively: https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf; https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf accessed 13 May 2022 see also the other international authorities referred to in P Alexiadis and A de Streel, *Designing an EU Intervention Standard for Digital Platforms* (2020), Robert Schuman Centre for Advanced Studies Research Paper No 2020/14.

Commission (the 'Commission'), which had been ongoing since 2010 and which had to wait to be resolved by the vindication of the Commission's 2017 decision before the General Court as late as November 2021.[2] In response to the demands by EU Member States that appropriate action be taken to compensate for the slow and arguably ineffective application of EU competition rules, a draft regulatory package was introduced by the Commission in December 2020 that would regulate key problematic business practices of large digital platforms across the EU. Whereas the so-called Digital Services Act (DSA)[3] was to deal with critical public policy issues that were consumer-facing, it was the Digital Markets Act (DMA) that laid out the unique regime that would apply economic regulation to large digital platforms.[4]

On 24 March 2022, almost 20 years to the day when the Commission introduced its regulatory framework for electronic communications,[5] and in what reflects an extraordinarily swift period in which EU legislation of such importance would otherwise be reviewed by all relevant EU institutional actors, political agreement was finally reached on the DMA text by the European Council and the European Parliament (with the Commission under the auspices of the so-called 'trilogue' negotiations), with the agreement being brokered under the French Presidency of the EU. During

2 Refer to *Google/Shopping* (Case AT.39740), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0112(01)&qid=1623672511230&from=EN. Refer also to the other infringement actions brought in *Google/AdSense* (Case COMP/M.4731), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0722(03)&qid=1623672676071&from=EN and in *Google/Android* (Case AT.40099) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC1128(02)&qid=1623672807825&from=EN accessed 13 May 2022. As regards the ruling of the General Court in *Google Shopping* upholding the decision of the Commission in Case AT.39740, refer to judgment of 10 November 2021 in Case T-612/17 *Google & Alphabet v Commission* (ECLI:EU:T:2021:763). That case is the subject of a further appeal on questions of law to the European Court of Justice in Case 48/22P. At the time of writing, the respective appeals in the *AdSense* and *Android* cases are still pending before the General Court. As regards the incremental steps taken by the Commission over the years in addressing issues raised by digital platforms prior to its decision in *Google Shopping*, refer to P Alexiadis, 'Forging a European Competition Policy response to Digital Platforms' (2017) 18(2) BLI 91–154.

3 Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC (the e-Commerce Directive), 15 December 2020, COM (2020) 825, Political agreement on the text was achieved on 23 April 2022; see Commission Press Release IP/22/2545. The Digital Services Act addresses, inter alia, issues of illegal content on social networks and illegal products on marketplace, recommender systems and online advertising.

4 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets on the digital sector (Digital Markets Act), Brussels, 15 December 2020, COM (2020) 842.

5 Refer to Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive) OJ 2002 L 108, pp 33–50.

these negotiations, despite the expression of firmly held positions on the part of all institutional actors and members of industry,[6] an extraordinary level of agreement existed as to the need for the core elements and structure of the DMA, as reflected in the original proposal tabled by the Commission, to be maintained.

As a general observation, the amendments proposed by the European Parliament were consistently designed to strengthen and broaden the Commission's powers under the DMA in every material respect, while also making the Commission more accountable in terms of its speed and transparency in decision-making. By contrast, the Council by and large sought to retain the essential powers of the Commission reflected in the original proposal for the DMA, while at the same time seeking to promote the parallel freedom of the Member States to take some meaningful forms of action against digital platforms (especially in terms of the exercise of their competition law powers).[7] For its part, the Commission emphasised the importance of preserving the integrity of the initially proposed structure of the DMA and respect for the principles of proportionality and effectiveness when exploring whether or not to expand the scope of obligations on digital platforms and the penalties that they should face.

While the final text of the DMA is provisionally scheduled to be adopted by the end of the French Presidency in June 2022, given the number of formal steps of implementation that need to be completed to render the obligations of the DMA actionable, it will only truly result in actionable legal

6 A representative number of industry stakeholder organisations that have made important contributions in the Trilogue negotiation process include: the Coalition for Competitive Digital Markets (CCDM) – extend interoperability obligations, proactively prompt users to selects defaults for all core platform services; European Broadcasting Union (EBU) – inclusion of virtual assistants as core platform services and strengthening of self-preferencing prohibition; French Association of Large Companies (AFEP) – gatekeeper designations, range of mandated obligations, exemptions and enforcement tools; Association of Commercial Television & Video on Demand Services in Europe (ACT) – concerns about self-preferencing and access to data obligations under Article 6(1), DMA; Privacy International – focus on rights and interests of end users, strengthening interoperability obligations, addressing negative effects of mergers, strengthening transparency in profiling, ensuring full conformity with GDPR; Computer & Communications Industry Association (CCIA) – the importance of promoting open markets, avoiding regulatory dependency, preserving dynamic competition and innovation for the benefit of consumers.

7 For an overview of the emerging positions of the European Parliament and the Council since the introduction of the DMA, refer to P Alexiadis (Portuguese language text) in 'O *Digital Markets Act* da União Europeia: Um relatório de Progresso', www.jota.info/opiniao-e-analise/artigos/o-digital-markets-act-da-uniao-europeia-um-relatorio-de-progresso-02072021.

enforcement by the end of 2023/start of 2024.[8] Well before the ink will dry on the DMA, however, it is just as clear that this legislation will serve as a blueprint around many parts of the world for how policy-makers could or should proceed against digital platforms.[9]

The object of this article is to: (1) provide an outline of the defining elements of the DMA; and (2) identify key aspects of that legislation, whether from a substantive, procedural or institutional point of view, where the intended outcomes of the DMA might be compromised. While the majority of these reflections will resonate with an international audience, the more procedural and institutional open issues raised by the DMA may be of more limited interest to a European audience.

## The key elements of the DMA

The regime established under the DMA is based on a coherent set of policy principles that establish the basis for the regulation of very large digital platforms. At its heart, the DMA reflects a coherent regulatory regime in which:

---

8 For example, the final text is scheduled to be published in the EU's *Official Journal* by October 2022, allowing for a six-month period in which the DMA will come into force (ie, by around April 2023), with firms being obliged to notify the Commission of their gatekeeper status (where applicable) within two months of the DMA coming into force. Thereafter, the processes of gatekeeper designation and remedy prescription may mean that gatekeepers will only be obliged to respect their obligations under the DMA around February/March of 2024.

9 In the week that the DMA was agreed by the members of the trilogue, the Commission and the Chinese authorities met in Brussels with a lead agenda item being the way in which the regulatory obligations imposed under the DMA would, inter alia, interact with competition law and data protection obligations. Moreover, parallel developments around the world suggest that the European initiative is anything but an isolated legal development. For example, refer to legislative change in Korea (proposed Online Platform Act); the release of consultation documents in Australia (ACCC Public Consultation on *Options for Legislative Reform to Address Concerns Relating to the Perceived Dominance of Certain Digital Platform Services in Australia*, 28 February 2022); numerous legal probes into the commercial practices of Google in India (also reflected in the CCI's *Market Study on E-commerce* in 2020); the anticipated introduction of a new hybrid regulatory/competition law regime in the United Kingdom (Policy Paper on *Digital Regulation: Driving Growth and Unlocking Innovation*, March 2022); and the tabling of ground-breaking legislation in the United States in 2021 (see, eg, Platform Competition and Opportunity Act of 2021, American Choice and Innovation Online Act of 2021, etc), alongside the unparalleled antitrust actions of over 11 states' Attorneys-General vs Google for its alleged anti-competitive location data practices. Most recently, Commissioner Vestager has extolled the virtues of a global approach being adopted towards digital platforms in an effort to avoid them taking advantage of enforcement gaps (see Reuters, 5 May 2022).

1. firms designated as 'digital gatekeepers';
2. whose gatekeeping function is exercised in relation to specified 'core platform services';
3. will be the subject of a series of obligations and prohibitions, subject to some form of privacy and security defence but no 'efficiency' defence;
4. the infringement of which will be censured in light of sweeping anti-circumvention measures and which can lead to serious penalties;
5. with the regime being sufficiently robust or 'future proof' through the potential adoption of a series of measures, should circumstances so require, that facilitate the tightening of existing obligations and prohibitions, the imposition of new ones, the addition of new core platform services, and the identification of new digital gatekeepers through the mechanism of a market review mechanism;
6. with the Commission being obliged to satisfy tight timetables for action and being subject to potential legal challenge for the various decisions that it will need to adopt under the DMA; and
7. while the Commission will be assisted in the exercise of its exclusive decision-making power under the DMA by the technical expertise that can be harnessed from Member States' relevant antitrust and regulatory agencies, a residual role will continue to exist for both the Commission and national competition authorities in the enforcement of competition rules.

We turn below to these and other related elements of the DMA.

## The legal characteristics of the DMA

A proper understanding of the DMA and its likely impact needs to take into account both the nature of the legal instrument chosen to embody its provisions under EU law and its policy origins.

### *The choice of a regulation*

When considering the approach taken by the EU, one needs to be mindful of the fact that the Commission has couched the DMA in the form of regulation, as is now often the case for digital market legal instruments. The selection of such a legislative instrument has important implications.

First, the fact that a regulation is immediately effective without need for any implementing act at national level means that the key obligations and prohibitions set forth in the legislation should, in principle, be relatively clear

and unambiguous so as to establish enforceable rights across the EU.[10] This means that the Commission will prefer to rely on somewhat bluntly framed provisions rather than prescribing very nuanced legal rights or by according to itself broad discretion in rule-making or individual decision-making, as this would arguably be inconsistent with the principle of legal certainty.[11] By contrast, EU law-making achieved through directives[12] inevitably involves a broader variety of drafting and implementation approaches between Member States, although they should in principle endorse the same legal obligations. In practice, the 'look and feel' of EU directives may appear very different in a particular national legal setting. Clearly, given the pan-European nature of large digital platforms, the choice of a directive for the economic regulation of digital gatekeepers, as defined in the DMA, did not seem appropriate to the Commission.

Second, a regulation is very much the preferred legal option for EU law-makers when the Commission is to be the sole enforcement authority under the legislation. This logically follows from the fact that a regulation addresses an issue that stretches across the single market and is legally in effect across all 27 Member States simultaneously.[13]

Third, it is important that all the relevant procedural rules necessary to ensure the seamless operation of the regulation have been enacted by the time legal obligations are intended to be enforceable. The principle of legal certainty is not abrogated simply because the regulation leaves scope for additional supporting legal instruments to be adopted where they are procedural or clarificatory in nature. Then again, the existence of a hollow

10 There has been a tendency over the past decade to depart incrementally from this principle, leaving an increasing number of provisions in Regulations that require follow-up action to render them clear and unambiguous.

11 A good example of where the Commission has departed from this general principle can be found in the so-called Open Internet Regulation, Regulation (EU) 2015/2120 of 25 November 2015 (OJ 2015 L 310, pp 1–18). This Regulation, while being very specific on the nature of the obligations imposed in relation to international roaming, left open the interpretation of fundamental principles under the legislation affecting the principle of net neutrality until a later point in time when the Commission and the European regulators group, BEREC, released important policy statements that clarified the scope of certain obligations under the legislation. In that case, however, no firms sought to challenge the fundamental legality of the legislation despite this apparent 'gap' in legal certainty at the time of its adoption.

12 It is worth noting that internal market measures are usually pursued through the national implementation of Directives, a secondary source of EU law that relies upon its implementation into national law by the respective legislatures of the Member States.

13 A classic case in point is the EU Merger Regulation, which is characterised by the Commission exercising a 'a one-stop-shop' style of jurisdiction over large mergers. By contrast, the Open Internet Regulation applied the principle of net neutrality on a pan-European basis, while allowing national Member States to enforce the rules at the same time as respecting EU level guidance from BEREC.

set of legal principles without the necessary legal processes to render those principles effective is problematic from the viewpoint of the enforceability of the regulation. Accordingly, legislators have seen fit to delay the full application of the DMA until 2023/2024, partly in recognition of the fact that key pieces of supporting procedural rules and guidance will need to be promulgated in advance of the DMA coming into effect.

Fourth, while it is in theory possible for a regulation to be challenged on the basis that it departs from fundamental principles of sound administration such as the principles of proportionality or subsidiarity, or other more basic principles such as its legal basis,[14] it seems unlikely that such a challenge would succeed before the European courts. The conceptual basis for such challenges leaves a significant margin of discretion in the hands of the Commission, while the fact that the legislation has passed through the scrutiny of all three key European institutions suggests that courts will be unlikely to challenge successfully the integrity of the legislation even if it is set against a backdrop of open-ended principles.[15]

Irrespective of the legal instrument used to regulate large digital platforms, the legal implications of the DMA come into sharp focus because the Commission is obliged to adopt a number of decisions under the legislation that will be susceptible to appeal before the European courts. These decisions include, inter alia, a decision by the Commission to designate that a digital platform has 'gatekeeper' status and the core platform services that will be regulated, decisions on the interpretation and specifications of obligations and prohibitions that will apply to gatekeepers and decisions to initiate market reviews. Given the number of times when the Commission will be called upon to adopt decisions under the DMA that will have a direct impact on a discrete group of digital platforms, it is difficult to envisage how the DMA will not become a focal point for litigation.

---

14 Refer to A Lamadrid de Pablo and N Bayón Fernández, 'Why The Proposed DMA Might be Illegal Under Article 114 of the Treaty on the Functioning of the European Union (TFEU), And How To Fix It' (2021) 7(12) Jour. European Competition Law & Practice 576–589.

15 For example, the challenge of the so-called Roaming Regulation by all major mobile operators in the UK in 2008 was made ostensibly on such grounds, driven by the central thought that the adoption of the Regulation was unnecessary in light of the existing legal framework at the time allowing national regulatory authorities to challenge bilateral roaming relationships under the market analysis procedure. See Preliminary Reference from the High Court of England and Wales in Case C-58/08, *Vodafone et al v Secretary of State for Business Enterprise, etc* (on the application of Regulation (EC) No 717 of 2007) judgment of 8 June 2010, ECLI:EU:C:2010:321. More generally, the Court of Justice only exceptionally annuls legislation based on Article 114 TFEU, as should be the case for the DMA: see J U Franck, G Monti and A de Streel, *Options to Strengthen the Control of Acquisitions by Digital Gatekeepers in EU Law,* TILEC Discussion Paper 2021-16, October 2021, pp 26–42.

*The policy drivers behind ex ante intervention*

The overriding policy basis of regulation under the DMA is to:

1. ensure that digital markets are contestable;
2. guarantee a level of fairness in business-to-business (B2B) relationships in the digital world; and
3. strengthen the digital internal market (Article 1(1) of the DMA).

In establishing these three overarching policy goals, the DMA is pursuing an overt regulatory agenda. Even allowing for a new-found appreciation of the 'Brandeis School'[16] of antitrust analysis, none of the three express policy drivers of the DMA is rooted in the strict economic approach that has been traditionally pursued by competition authorities around the world over the past three decades. Similarly, while competition policy has long been focused on the likely *effects* of anti-competitive conduct on consumer welfare, the DMA centres its attention on improving the situation faced by business users of digital platforms, on the assumption that this will generate positive outcomes for end users. To some extent, some of the more tangible benefits of consumer welfare can be witnessed in the types of obligations to which digital platforms will be subject under parallel legislation in the form of the DSA, essentially relating to the protection of consumer choice, privacy and safety rather than on the more traditional antitrust emphasis on low pricing that is more suited to the non-digital world.

The focus on the 'contestability' of digital markets is directed towards the lowering of entry barriers and the opening up of digital markets to new entrants, whether they be complementors, direct competitors or disruptors (Recital 32 of the DMA).[17] Thus, the DMA should open up *existing* digital platforms to competition at different layers of the value chain (intra-platform competition) and is also intended to promote greater head-to-head competition between

16 The Brandeis school of thinking about antitrust harm (attributed to the US Supreme Court's Justice Brandeis) contends that, inter alia, the ability of the economy to deliver rewards that are for the common good, including the support of democracy, is just as important a measure of antitrust success as short-term low prices. By contrast to his support for the 'protection of competition', the so-called Chicago school of thinking takes the view that antitrust rules should be applied very narrowly by reference to a short-term understanding of 'consumer welfare'. Refer to discussion in T Wu, *The Curse of Bigness* (Atlantic Books 2020), esp at pp 59–67.

17 P Larouche and A de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) Jour of European Competition Law & Practice 548–552.

digital platforms (inter-platform competition).[18] Concerns about contestability follow from the fact that the types of digital markets covered by the DMA are already considered by many to have 'tipped' in favour of the largest platform, coupled with the observation that the key digital players are not in a position to exert competitive constraints on one another in their 'home' markets.[19] Insofar as the DMA changes the commercial landscape to the degree that it will encourage existing digital payers to enter one another's competitive spaces, the possibility exists that inter-platform competition might indeed be possible, despite the proverbial network competition horse having already bolted from the digital stable through the effects of market 'tipping'. There are arguably greater possibilities for intra-platform competition taking off, however, when it comes to new digital services being launched in the future under the shadow of the behavioural rules established under the DMA.[20]

When it comes to promoting 'fairness', this quality is something with which competition enforcement policy has struggled for decades, even when one allows for the fact that the concept is arguably built into the notion of 'discrimination' and is expressly referred to in paragraph (a) of Article 102 of the TFEU (which refers to 'unfair purchase or selling prices or other unfair trading conditions' as part of the range of prohibited abusive practices). Because the concept of fairness is much more intuitive than it is scientific, it has been largely shunned by competition authorities (at least in its explicit use) unless addressing excessive pricing claims, while at the same time it has become increasingly employed in EU regulatory instruments where it is felt

18 Both types of competition are also pursued by telecommunications regulation, but Recital 27 of the European Electronic Communications Code (Directive (EU) 2018/197, OJ 2018 L 321/36) expresses a preference for infrastructure-based competition. See M Cave, C Genakos and T Valletti, 'The European Framework for Regulating Telecommunications: A 25-year Appraisal' (2019) 55 Review of Industrial Organisation 47, which explains the progressive shift from services-based to infrastructure-based competition and define infrastructure-based competition as the 'gold standard'.

19 In other words, despite their vast assets, the other members of the GAFAM have been unable to exert sustainable competitive constraints on Google in the provision of search services, Facebook (Meta) when it comes to providing social media, Amazon with respect to marketplace sales, and so forth.

20 As a counterweight to this, some stakeholders are concerned that the mandated obligations and prohibitions under the DMA will also become established as universal truths in the Commission's application of competition rules in all digital contexts, irrespective of whether they fall outside the scope of the DMA.

that the pursuit of open systems[21] or where the redress of unequal positions in bargaining power[22] is necessary.

The DMA seeks to address fairness issues largely by constraining large digital platforms in their role as intermediators between businesses and end users (Recital 33 of the DMA).[23] It is implicit that this intermediation role, while capable of providing end users with tangible benefits, nevertheless places business providers on the other side of the platform in a disadvantageous bargaining position. Given the inherent difficulties faced by competition law in censuring potential anti-competitive conduct driven by network effects and positive feedback loops, the role of regulatory intervention driven by notions of fairness is to iron out some of the behavioural kinks in the marketplace that exacerbate the impact of network effects.

Finally, the clear internal market goals being pursued by the DMA cannot be overlooked. The *sine qua non* for achieving an internal market – the policy 'sacred cow' of European integration policy – must surely be the achievement of a single digital space for European businesses and consumers. While it is clear that the common market goal is not alien to competition law enforcement, either in the application of vertical restraints policy or in the creation of pan-European energy markets, it is equally clear that it does not fit squarely within the remit of 'pure' competition policy.

Given the manifest regulatory hue of the DMA, the question to be asked is whether some of the supporting institutional mechanisms established under the legislation are 'fit for purpose' or will be saddled with a (potentially inappropriate) competition law frame of reference.

**Threshold/definitional issues**

The application of the DMA is premised upon the satisfaction of two legal conditions precedent: (1) the designation of firms with a 'gatekeeper' status; (2) made in relation to a list of core platform services.

---

21 Eg, a series of symmetric obligations on all electronic communications sector operators designed to ensure connectivity provide number portability and to facilitate interoperability. Refer to the European Electronic Communications Code (above).

22 See Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ 2019 L 186/55, which complements the DMA by imposing transparency and dispute resolution mechanisms for small and large intermediary platforms. See also Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ 2019 L 111/59. The concept of fairness also lies at the heart of recent proposals to introduce an EU Data Act on 23 February 2022.

23 G Crawford et al, 'Fairness and Contestability in the Digital Markets Act', (2021) Yale Tobin Center for Economic Policy, Policy Discussion Paper 3.

*The subject matter of regulation (core platform services)*

Based on the understanding that they have unique economic characteristics whose cumulative effect lends itself to certain anti-competitive characteristics, a series of eight 'core platform services' were identified under the proposed DMA as being the subject of regulatory obligations (Article 2 of the DMA). The original list of such services referred to the following:

1. online intermediation, which covers services that: (1) allow business users to offer goods or services to consumers, with a view to (2) facilitating the initiating of direct transactions between business users and consumers regardless of whether the transaction is finally concluded offline or online; and that (3) provide services to business users, based on contractual relationships between the platform and the business user;
2. search engines, which cover services 'allowing users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found';
3. social networking, which covers 'platforms that enable end-users to connect, share, discover and communicate with each other across multiple devices and, in particular, via chats, posts, videos and recommendations';
4. video-sharing platforms, which cover 'services where the principal purpose, or an essential functionality is the provision of programmes and/or of user-generated videos to the general public for which the platform does not have editorial responsibility but determines the organisation of the content';
5. number-independent interpersonal communications, which cover 'services that enable direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons (whereby the persons initiating or participating in the communication determine its recipient) and which does not connect with publicly assigned numbering resources';
6. operating systems, which cover 'information society services that enable access to a scalable and elastic pool of shareable computing resources';
7. cloud computing, which covers 'system software which control the basic functions of the hardware or software and enables software applications to run on it'; and
8. advertising services provided by a provider of any of the other listed core platform services.

Those services were selected for regulation because of their following characteristics: extreme economies of scale and scope, important network effects, multi-sidedness, possible user lock-in and absence of multi-homing, vertical integration and data-driven advantages. While those characteristics are not new in and of themselves, their cumulative effect can lead to market concentration as well as generating dependency and unfairness in commercial dealings. According to the Commission, these issues cannot be addressed effectively by existing EU laws (Recital 2 of the DMA).

Most of these core platform services have already been identified in existing Commission competition law investigations as being capable of leading to anti-competitive effects (ie, they illustrate a particular theory of harm). In the case of operating systems, the precedent stretches back to the *Microsoft* case of 2004,[24] where the issues of interoperability and bundling were considered. Unfortunately, at the time of writing, not all of these investigations have been concluded nor, with the exception of *Google Shopping*, have the theories of harm that they have identified been subject to judicial scrutiny. Thus, while the Commission's ex post competition enforcement experience provides the empirical basis for regulatory intervention in an ex ante manner with respect to certain digital platform providers, the question is whether such intervention is justified where the European courts have yet to endorse each individual theory of harm (given that the Commission's competition law decisions are subject to appeal) or where the Commission has yet to address a specific decision with respect to the core platform services in question.

The European Parliament sought to expand the original list of core platform services in the course of the trilogue discussions to include web browsers, virtual assistants and connected TV. While there is little doubt that virtual assistants enjoy a 'gatekeeping' quality, that logic is less clear in the case of web browsers[25] and problematic in the case of connected TV. In the final version of the DMA, only virtual assistants[26] and web browsers[27] have been added to the proposed Commission list of core platform services.

24 Commission decision of 21 April 2004 in Case COMP/C-3/37.7392, as upheld by the General Court in Case T/201/04 *Microsoft Corp v Commission*, ECLI:EU:T:2007:289.

25 One could argue that such a conclusion could be supported on the basis of the *Microsoft* precedent (see above) and is supported by the nature of the enquiry by Australia's Competition Authority, the ACCC (refer to 2019's *Digital Platform Services Inquiry*).

26 This covers software applications that enable end users to access and interact with web content hosted on servers that are connected to networks such as the internet, including stand-alone web browsers as well as web browsers integrated or embedded in software or similar equipment.

27 This covers software that can process demands, tasks or questions, including those based on audio, visual, written input, gestures or motions and, based on those demands, tasks or questions that provide access to other services or controls connected/physical devices.

*The objects of regulation (gatekeepers)*

Regulatory obligations are imposed only on those digital platforms that can be classified as 'gatekeepers' (Article 3(1) of the DMA) in relation to the core platform services. Such a classification is based on a three-criteria test:

1. a significant impact on the EU internal market;
2. control of an important gateway for businesses to reach end-users; and
3. an entrenched and durable market position.

Rebuttable presumption based on quantitative indicators

The cornerstone idea that ex ante regulatory obligations should only be imposed on a limited number of digital platforms that perform a 'gatekeeper' function is a major departure either from the ex post standard of 'dominance' as the threshold trigger under a competition law analysis and from the ex ante competition-style of analysis for the designation of an operator with significant market power (SMP) in a defined antitrust 'market' under electronic communications regulation.[28] Those threshold tests used in other contexts adopt an analytical model that seeks to identify a theory of harm, based on the character of an existing market position, that is protected by significant entry barriers. By contrast, the DMA posits its nominatively qualitative tests predominantly in quantitative terms (Article 3(2) of the DMA). Thus:

1. impact on the market is measured in terms of revenues generated in the EU of at least €7.5bn or market capitalisation of at least €75bn and a presence in at least three Member States by the gatekeeper in question;
2. the gatekeeping function is identified by reference to the number of active monthly users in the EU of at least 45 million and business users numbering at least ten thousand; and
3. with the entrenched nature of the gatekeeper's position being simply determined on whether the users' quantitative levels have been satisfied for at least three years.

While the marriage of theories of harm developed under a competition law analysis (see discussion below on Articles 5–6 of the DMA) might well be compatible with the concept of a 'gatekeeper' (as opposed to a dominant firm), it is arguable whether the combination of quantitative indicators does little more than identify 'very large' digital platforms providing core platform services. The question that therefore needs to be answered is whether the DMA is doing little more in practice than regulating the 'usual

28 European Electronic Communications Code, Article 63.

suspects' among the GAFAM group,[29] thereby conveniently ignoring other European firms that might be posing serious competition threats but fall under the DMA radar because of the quantitative aspects of the definition of 'gatekeeper'.[30] That criticism should not be borne out in practice, however, as the Commission's impact assessment of its DMA proposal suggested that the quantitative criteria upon which it had relied would yield a total target group of around 15–20 gatekeepers that would fall within the scope of the DMA.[31]

During the course of the trilogue negotiations, the European Parliament sought to raise the revenue and market capitalisation thresholds proposed by the Commission in an effort to target only a smaller number of firms. According to the position espoused by a group of leading national competition authorities,[32] while it is felt that the DMA should pursue a more prioritised enforcement strategy by capturing only the more important digital gatekeepers, it should at the same time be able expressly to capture digital 'ecosystems' within its scope. However, this position was not endorsed in the final compromise text, presumably because the concept of a 'digital platform' captures that of an 'ecosystem' in any event, and because it is wise to avoid the use of too many newly defined terms when casting a net over the objects of regulation.

### Rebutting the presumption with qualitative factors

Digital platforms identified on the basis of the quantitative criteria can escape a 'gatekeeper' designation if they are able to satisfy the Commission through 'substantiated arguments' that they do not satisfy the three-criteria test for being treated as a gatekeeper under Article 3(1). Such argumentation will need to address issues listed in Article 3(8) of the DMA such as:

---

29 The acronym often used to refer to Google, Apple, Facebook (now 'Meta') Amazon and Microsoft. (One can presumably refer to the group as 'GAMMA' hereafter.)

30 For an example, the US government's position has expressed the concern that the threshold criteria, as proposed, was disproportionately focused on large US-origin digital platforms. Refer to Politico, 31 January 2022.

31 Refer to SWD (2020) 364 final, Brussels 15 December 2020, discussion in Sections 8 and 9. According to one notable commentator: 'The focus proposed in many jurisdictions on confining regulation to a small number of the largest digital platforms seems both sensible and probably inevitable. I see no special awkwardness in defining this group in a way which is based on the likely scale of consumer detriment rather than a criterion used previously in a different context [telecommunications].' (Martin Cave, 'What Lessons Can be Drawn for Digital Platforms from the Regulation of Traditional Networks?', *TechReg Chronicle*, December 2021, pp 2–8 at p 8).

32 www.bmwi.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4. Also refer to A de Streel, R Feasey, J Krämer and G Monti, *Making the Digital Markets Act More Resilient and Effective*, CERRE Recommendations Paper, May 2021.

- the size of the firm's operations overall;
- the number of business users depending on the core platform service;
- entry barriers derived from network effects and data-driven advantages;
- scale and scope effects;
- business user or end-user lock-in;
- conglomerate structure or vertical integration; and
- other structural business or services characteristics.

Conversely, the Commission has the ability to designate a firm as gatekeeper, even where it cannot currently satisfy the quantitative indicators if the Commission can determine that it meets the three criteria test of Article 3(1) on the basis of the qualitative factors listed in Article 3(8). This is quite a controversial string to add to the Commission's enforcement bow, as the margin of discretion afforded to the Commission by the European courts will inevitably be higher in practice than that afforded to a digital gatekeeper seeking to convince the Commission that a gatekeeper designation should not apply, even if on their face both procedures are subject to the same legal standard (ie, substantiated arguments).

The question that needs to be asked is why the criteria listed in Article 3(8) of the DMA should not also form the appropriate qualitative criteria by which gatekeepers can be identified by the Commission in the first place. If that were to be the case, the qualitative threshold would be more aligned to the dominance or SMP standards[33] insofar as they require that the regulator establish clear economic standards upon which regulation under the DMA should be based, with quantitative standards being used to determine whether the effects on the European market are sufficiently high as to warrant intervention. The principle of legal certainty would not, in the view of the authors, be compromised by reliance on such economic features to screen eligible 'gatekeepers' (especially if supported by appropriate Commission guidance) as it has not proven to be problematic in the case of the review of concentrations under the EU Merger Regulation[34] or the designation of an SMP operator under the European Electronic Communications Code.

Gatekeepers falling within the scope of the DMA must notify the Commission promptly of their gatekeeper status and the Commission must designate them as such in a short period of time, with the Commission also able to take such action where a gatekeeper has failed to make the required notification (Article 3(3) and (4) of the DMA). In its designation decision,

33 Refer to Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: a legal and institutional analysis' (2021) 7(12) *Journal of European Competition Law & Practice* 561–575.

34 Where the substantive test of review relied at first on the standard of 'dominance' and later on the standard of a 'Substantial Lessening of Effective Competition', both of which require complex economic standards.

the Commission will identify the gatekeeper's affiliates within the scope of the gatekeeper status and the core platform services that they provide.

### REVIEW OF GATEKEEPER STATUS

With a view to ensuring that the list of designated gatekeepers is kept current in the face of emerging technology and new business models, or even misrepresentations made by gatekeepers, a review mechanism is available (Article 4 of the DMA) to the Commission, which allows it to determine whether market circumstances justify the expansion (or reduction) of the list of designated gatekeepers under the DMA.

When it comes to determining whether an existing gatekeeper designation should be relinquished, the review period shall be three years, whereas the Commission shall review on an annual basis whether the designated gatekeepers ought to be expanded. These review periods were the subject of significant debate during the trilogue negotiations when compared to the original DMA proposal. The three-year review period tends to reflect a typical innovation cycle in a fast-moving digital industry (and the period usually used to assess the likelihood of potential competition), whereas the shorter annual review period seems to reflect the reality that revenues and consumer growth in digital platforms may change very quickly.

## Obligations and prohibitions under the DMA

A digital platform designated as a gatekeeper is then subject to a series of 22 ex ante obligations or prohibitions in total, a rise in number from the list of obligations found in the Commission's original DMA proposal. These obligations are, in turn, broken down into three groups consisting of:

1. binary obligations and prohibitions (nine in total: Article 5 of the DMA), which are supposedly clear on their face in terms of their subject matter and in terms of their harmful effect, and which therefore do not require any further elaboration;
2. more refined and targeted obligations and prohibitions (12 in total: Article 6 of the DMA) designed to address particular theories of harm, but which require greater individualised specification, pursuant to information gleaned by the Commission in a 'regulatory dialogue' with gatekeepers and affected stakeholders; and
3. a specific horizontal interoperability obligation (new Article 7 of the DMA), which would require a series of implementation measures to be effective.

The logic behind this bifurcated system is to provide the Commission with the legal certainty in preventing certain practices whose object cannot be

condoned irrespective of the particular circumstances of the case, while also providing it with greater flexibility in adopting more tailored obligations to take due account of different business models and possible permutations of the obligations in specific digital platform contexts (ie, where perceived 'effects' on the competitive process need to be assessed more carefully).

*Binary (self-executing) obligations*

Of the nine binary obligations now imposed under Article 5, perhaps the most prominent is that which is inspired by a German Cartel Office investigation into Facebook,[35] according to which gatekeepers are prohibited from combining the personal data of users sourced from different core platform services provided by them or others, unless users have granted clearance for such a practice in unequivocal terms consistent with the procedure afforded under the General Data Protection Regulation. By implementing such an obligation, it is hoped that some of the reinforcing network effects generated by digital platforms will be diluted, thereby pressing the gatekeeper to provide its core platform services on their individual merits.

In an attempt to inject transparency into the crucial advertising relationships enjoyed by many intermediaries, gatekeepers are also obliged to provide advertisers and publishers with information regarding prices paid for advertising services and remuneration received by the gatekeeper, upon request from either party.

With a view to ensuring that gatekeepers do not take advantage of their privileged position vis-à-vis business users, another obligation prevents them from interfering with the right of those users to engage with public authorities about the practices engaged in by gatekeepers.

The remaining obligations listed in Article 5 relate essentially to the freedom to be accorded by gatekeepers to business users to allow them to deal in various ways with third parties on the gatekeeper's platform, including the ability to refuse the provision of tied services by the gatekeeper, along with the prohibition of most favoured nation (MFN) clauses and anti-steering clauses.

As part of the trilogue negotiations, the European Parliament sought to extend the list of obligations under Article 5 by incorporating obligations from the original proposed list in Article 6, on the understanding that they were also self-executing provisions that did not require further elaboration. This approach was ultimately not accepted.

35 www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html. This decision is under appeal and also awaiting for the answer by the Court of Justice (Case C-252/21) to a preliminary question raised by the German Appeal Court on the impact of the GDPR and its relationship with competition law.

A number of questions arise as regards the practical operation of Article 5. First, even if one assumes that the supposed self-executing nature of the obligations satisfies the legal certainty test usually required of a regulation, it must be asked whether it is not being overly optimistic to presume that these provisions will not result in legal challenges.[36] One can foresee that designated gatekeepers would challenge the interpretation and the application of certain obligations designed to confer greater freedom on business users by arguing that their actions are not covered and do not have the effects identified in Article 5. Perversely, it is precisely because these obligations are not nuanced or crafted to a particular digital platform business model that they are arguably more susceptible to legal challenge from gatekeepers likely to argue that the application of such remedies needs to be more nuanced to have greater legal certainty when applied to their particular situation.[37] Obligations imposed under Article 6 (see below), by contrast, because they will be subject to a rigorous application to particular facts, are more likely to survive this type of legal challenge. Second, as noted earlier, given that the genesis of these Article 5 obligations can be found in the various theories of harm developed by the Commission and other competition authorities in past and ongoing competition law investigations, it is open to speculation whether a number of these obligations will be justifiable if their rationale is overturned by the European courts.

*Tailored obligations*

Beyond the supposedly more straightforward obligations listed in Article 5, the revised Article 6 lists 12 obligations whose more precise details need to be determined by the Commission in a process of regulatory dialogue with gatekeepers whose general parameters are set forth in Article 8 of the DMA. This process, while inevitably more cumbersome in terms of implementation, is nevertheless necessary because the nature of the prescribed obligations not only requires specific tailoring to take into account the characteristics of individual core platform services when determining their effect on the competitive process, but also requires that the different technical and business concerns of the gatekeeper be taken on board in formulating obligations.

36 Refer to the dialogue between some digital platforms and consumer protection agencies on the interpretation of the self-executing prohibitions contained in the EU consumer protection *acquis* https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/social-media-and-search-engines_en accessed 13 May 2022.

37 The President of the Germany's Bundeskartellamt, Andreas Mundt, has openly speculated that legal challenges made in relation to Article 5 obligations may be numerous (CRA Brussels conference on 'Competition & Regulation in Disrupted Times', 31 March 2022).

The types of obligations listed in Article 6 contain important prohibitions relating to self-preferencing by gatekeepers in the provision of ranking information, the prevention of switching by customers through the use of technical means, and the prevention of end-users from de-installing a gatekeeper's software applications for core platform services.

In addition, positive obligations exist on gatekeepers to foster data portability and interoperability, provide access to key data, ancillary services and performance measuring tools (the latter in relation to advertisers and publishers), either on fair, reasonable and non-discriminatory (FRAND) terms or at no additional cost.

In contrast to the blunt approach adopted under Article 5, the approach adopted in relation to obligations imposed under Article 6 requires that greater emphasis be placed on the *proportionality* of the measure, as it is important that its impact not deter innovation. This exercise will be particularly sensitive when determining whether access to essential inputs, data portability or full interoperability measures are selected to address contestability concerns, especially where gatekeepers raise technical or regulatory reasons for their inability to comply with certain measures. Arguably, it will ultimately be the success of these more targeted measures under Article 6 that will determine the true success of the DMA in the long run. Moreover, given the fact that the details of the Article 6 measures will have been brokered by the Commission and the gatekeepers in question, one can assume that these measures are less likely to be challenged successfully on appeal.

Those obligations may be specified by the Commission during the course of a 'regulatory dialogue' specified under the Article 8 of the DMA. According to this process, gatekeepers will have the ability to engage the Commission in a bilateral process designed to ensure the latter that the measures proposed by the gatekeeper in question are effective. The Commission exercises its discretion as to whether or not to trigger this process and has the power to issue a non-confidential version of the proposed measures for third-party comments – similar to the manner in which remedies are 'market tested' under competition law and merger review procedures – and needs to run the procedure in accordance with the principles of equal treatment, proportionality and good administration. The Commission also reserves the right to re-open proceedings where it considers that circumstances have changed, there has been a material non-disclosure or the existing measures have been ineffective.

Although the EU approach is couched in a manner that affords the Commission discretion whether to commence a dialogue with gatekeepers, we can imagine that the Commission would decline to engage in such a

process only in very specific circumstances (eg, further elaboration of measures is unnecessary), given that it is already obliged to satisfy a number of standards of appropriate behaviour when triggering the regulatory dialogue mechanism.

*Interoperability obligations for communications apps*

At the request of the European Parliament, a new Article 7 has been introduced in the final version of the DMA to ensure the horizontal interoperability for basic functionalities among number-independent interpersonal communications services. This provision complements and strengthens for the designated gatekeepers the interoperability obligations already contained in the European Electronic Communications Code.[38] Given the complexity of realising interoperability, this new obligation will be applied sequentially over a period of four years and may rely on new standards developed at the request of the Commission (Article 48, DMA). Contrary to what was requested by the European Parliament and some commentators,[39] this new interoperability obligation has not been extended to social networks.

*Anti-circumvention measures*

The Commission's original DMA proposal had a very sweeping anti-circumvention provision, according to which digital gatekeepers would continue to be bound by obligations imposed under Articles 5 and 6 of the DMA where they had sought to 'undermine' their impact through contractual, commercial, technical or other means. The clear message given by the Commission in the proposal was that gatekeepers should not attempt to engage in the regulatory 'gaming' of the system by taking advantage of various technical or commercial loopholes to circumvent their obligations. Having said that, an anti-circumvention clause that is drafted too broadly will always be susceptible to legal challenge if it is tantamount to a declaration

38 European Electronic Communications Code, Article 61. According to Martin Cave (op cit at 8), commenting that traditional price control or vertical separation remedies are unlikely to prove valuable in a digital platform setting, It is noted that: 'The most promising affinity with traditional network regulation lies with the mandating of interoperability in telecommunications, where such interoperability was able to counteract what would otherwise have been insuperable disadvantages for fledgling entrants, arising from direct network effects. In the case of digital platforms, the same remedy looks able to counteract a dominant firm's advantages arising from both direct and indirect network effects.'

39 David Dinielli et al, 'Equitable Interoperability: the "Super Tool" of Digital Platform Governance' (2021) Yale Tobin Center of Economic Policy: Digital Regulation Project, Policy Discussion Paper 4 https://tobin.yale.edu/digital-regulation-project accessed 13 May 2022.

that gatekeepers promise to act lawfully or within the spirit of the law, as it will jeopardise the legal certainty goal. As explained above, this level of uncertainty is particularly problematic when the legal obligations are contained in a regulation.

With a view to making the Commission's original anti-circumvention provision more likely to be considered legally enforceable, the European Parliament proposed a series of detailed amendments to the original provision by providing a very significant level of detail as regards how circumvention might be achieved and why it would be in contravention of the regulation. These amendments include references to conduct designed to effect changes in interface designs, product engineering, service degradation and so on, the effect of which is to prevent or dissuade customers from switching. The final text (Article 13 of the DMA) now establishes two distinct sets of criteria that will need to be followed by gatekeepers:

1. As regards the satisfaction of the quantitative thresholds set forth in Article 3(2) that justify the designation of a 'gatekeeper' status, platforms should ensure that their core platform services are not segmented, fragmented, split, divided or subdivided, whether by contractual, commercial, technical or other means, as a means of circumventing those thresholds. The Commission can proceed to make a gatekeeper designation if such steps of circumvention have been taken.
2. As regards the need to ensure full compliance with the measures prescribed under Articles 5, 6 and 7 of the DMA, gatekeepers should take no actions to subvert end-user or business-user autonomy or diminishing choice in their decision-making, irrespective of whether they deploy strategies regarding product structure, design or manner of service operation to achieve circumvention. The failure to respect this principle can result in a market investigation.

From a legal perspective, the compromise position agreed by the European institutions constitutes a significant improvement on its predecessor text and arguably significantly increases the legal enforceability of the anti-circumvention provision. The conditions in the text establish clear guidance to gatekeepers regarding the actions they need to avoid in order to comply with the anti-circumvention principle.

*Exceptions to the general rules*

Gatekeepers bound by the measures issued under Articles 5–7 of the DMA have a few options to put an end to such measures, but both of these options

are limited in their scope and require the Commission (again) to adopt individual reasoned decisions in triggering the two available exceptions under the DMA:

1. Suspension decisions can be adopted under Article 9 by the Commission in response to a reasoned request by a gatekeeper that, due to exceptional circumstances beyond the control of that gatekeeper, compliance with the specific obligation would endanger the economic viability of the operation in question. The suspension of measures may also occur on a temporary (interim) basis in extreme circumstances. Given the sweeping nature of this exception, the Commission is obliged to review its necessity on an annual basis.
2. Public interest exemption decisions can be adopted under Article 10 by the Commission where the gatekeeper can prove, according to a reasoned request, that it should be exempted, in whole or in part, from the obligations in relation to individual core platform services on the grounds of public health or public security. The Commission can also exercise this power on an interim basis, where justified.

It is difficult to envisage how a gatekeeper will be able to justify an exemption on public health grounds other than in very rare circumstances, especially given the scope of the Digital Services Act. There may be more cause for optimism among gatekeepers that a 'public security' exemption could be triggered, given the delicate balancing act that needs to occur in many cases between open systems and the confidentiality of end-user data.

*Information regarding concentrations*

Gatekeepers will also be obliged to notify the Commission of acquisitions in the digital space, even where those transactions would not trigger national merger filing obligations (Article 14 of the DMA). This is one of the more controversial obligations under the DMA, insofar as it incorporates subject matter into the legislation that is not directly related in any way to the theories of harm addressed by Articles 5–7 of the DMA. Gatekeepers will be obliged to 'inform' the Commission of intended 'concentrations', within the meaning of that EU Merger Regulation, where the merging entities or the target provide core platform services 'or other services in the digital sector or enable the collection of data', irrespective of whether those concentrations would be notifiable under the EU Merger Regulation or national merger control rules.

Armed with the above information, Member State competition authorities may request the Commission to examine the proposed concentration pursuant to the referral procedure available under Article 22 of the EU

Merger Regulation. In turn, the Commission will publish an annual list of such acquisitions, taking due account of details with regard to protecting the business secrets of the affected parties.

A number of issues flow from the obligation contained in Article 14. As a general observation, it needs to be asked whether an obligation to inform the Commission of prospective mergers, irrespective of their size or impact on a digital market, is appropriate for a legal instrument like the DMA whose genesis is steeped in tackling theories of harm developed under competition law infringement actions. This is especially the case since merger enforcement in the EU has not yielded any results that would suggest that the current merger regime is capable of addressing major competition concerns arising from mergers among digital players that are more significant than other sectors of the European economy.[40] In addition, given the longstanding existence of a specific legal instrument at EU level governing merger control, one needs to ask whether the amendment of that piece of legislation would have been a more coherent form of law-making.[41]

Moreover, given the fact that the DMA is largely a reflection of the fact that certain digital markets have already 'tipped', it has to be asked whether introducing a pre-emptive tool (merger control) sits comfortably alongside a regulatory tool which concedes that markets need to be realigned because of a lack of contestability and concerns about fairness.[42] It must also be questioned whether the new 'information' obligation adds anything to the Commission's existing powers of merger referral under Article 22 of the EU

40 One is reminded that the Commission, even when given a second opportunity to review the *Facebook/WhatsApp* concentration, did not see fit to veto that concentration: see original decision of 3 October 2014 in Case COMP/M.7217, which was followed by a fine of €110m being imposed on Facebook for the supply of misleading information to the Commission in the context of its merger review.

41 Introducing an alternative filing threshold, for example, into the EU Merger Regulation for digital mergers might have been a more coherent approach. Member States such as Germany and Austria have, for example, introduced thresholds based on transaction size rather than on revenue, in order to catch more digital transactions. Moreover, the studies on digital platforms (refer to those listed in Alexiadis and de Streel, n 1 above) are virtually in universal agreement that the key merger enforcement issue in the digital space is the substantive test for review, rather than threshold jurisdictional issues.

42 Refer to discussion in P Alexiadis and Z Bobowic, 'European Merger review of Killer Acquisitions in Digital Markets – Threshold Issues Governing Jurisdictional and Substantive Standards of Review' (2020) 16 Indian J L & Tech 64, on the greater likelihood of 'Type 1' errors occurring in a merger or a regulatory context.

Merger Regulation,[43] especially given that acquisitions by larger digital players will inevitably be something that lies in the public domain, with Member States already being capable of referring concentrations to the Commission for review by the latter where national merger thresholds have not been met. Finally, despite the unique nature of the provision, Article 14 is limited to information being provided about 'concentrations';[44] this suggests that a range of joint ventures or minority shareholdings by digital platforms might not trigger the Article 14 obligation.

*Comparison with the UK approach*

In many respects, the approach taken in relation to Article 6 measures mirrors the approach endorsed in the UK in dealing with digital platforms, both with respect to tailored remedies and with respect to a regulatory dialogue providing the backdrop to those measures. The UK has opted to take a different approach to regulation of digital platforms in two significant respects, namely:[45]

1. the UK approach will rely on a finding of dominance with respect to at least one digital activity that provides a form with strategic market status (SMS); and

---

43 Indeed, the express linkage of the DMA information obligations with the case referral procedure adopted by the Commission for non-notifiable mergers might be a risky legal strategy, given that the result of ongoing litigation between the Commission and the notifying parties in the *Ilumina* case (Case T-23/22, Annulment of European Commission decision of 29 October 2021 in Case COMP/M.10493) has yet to be resolved (although a judgment is likely to be delivered by the General Court before the end of the calendar year 2022; namely, probably prior to the DMA taking legal effect). The judgment in that case will determine the extent to which the Member States can allocate jurisdiction to the Commission to take certain merger reviews, even where they do not satisfy local merger thresholds; in this regard, refer to the controversial Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 26 March 2021, which seems to have reversed decades of Commission practice in encouraging referrals only where concentrations satisfy national merger filing thresholds.

44 Refer to Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, esp regarding the discussions on sole and joint control (paragraphs 54–61 and 62–82 respectively) and 'full function' joint ventures (at Section IV).

45 As found in www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy-february-2021-refresh, based on www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy. Refer to Marco Botta, 'Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila' (2021) 12(6) Jour of European Competition Law & Practice 500.

2. ex ante regulation will pursue a tailored approach with respect to every Short Message Service (SMS)-designated operator, which will be subject to its own enforceable code of conduct based on a set of core values that are adapted to suit the respective business models of the individual platforms, and requiring that the UK's Competition and Markets Authority identifies a theory of harm that will be addressed in the provisions of that code of conduct.

It has to be asked whether the approach adopted by the UK, by focusing on the existence of dominance with respect to at least one digital activity and by tailoring remedies with respect to each SMS-designated operator, has struck a better policy balance than the EU by relying on a well understood criterion for the application of its new regime (dominance), while at the same time allowing for greater flexibility in the formulation of remedies by tailoring all remedies to accord with particular digital platforms through the adoption of codes of conduct.

By the same token, by not relying upon the dominance standard, the EU has arguably left itself much greater room for manoeuvre for the application of competition rules, whether at EU or national level, to apply in the sector if dominance can be established as the basis of leveraging theory. At the same time, fashioning remedies through the adoption of a code of conduct brokered for each individual platform does not prima facie sit comfortably with the legal tradition in most Member States, which has not found comfort thus far in working out remedies collaboratively with industry, on the one hand, and which is keen to adopt an approach that is consistent across the whole territory of the EU and which minimises the degree of legal uncertainty in the implementation and enforcement of the DMA, on the other. The EU process might also be seen as being much more likely to yield results quickly than would be the case under a protracted negotiation procedure with many large digital platforms to agree upon a code of conduct in each case.[46]

**The extension of regulation**

In a fast-moving innovative sector such as digital, the danger always exists that regulatory measures may find themselves quickly obsolete in the face of emerging technologies and the adoption of different business models. Accordingly, the DMA has introduced a number of options built around a market investigation mechanism (Articles 16–19 of the DMA), the object of which is to allow the Commission to respond to such changed economic and business circumstances.

46 W Kerber, 'Taming tech giants with a *per se* rules approach? The *Digital Markets* Act from the "rules vs. standard" perspective' (2021) 3 Concurrences 28–34.

In an important amendment to the Commission's original proposal, the final version of the market investigation mechanism found in Article 16 envisages the use of the Commission's investigatory powers under the DMA even prior to the opening of a formal market investigation. In addition, given the potentially heavy evidentiary burden that must be borne in conducting such investigations, the Commission will be able to ask one or more 'competent national authorities' to support its market investigations. Third parties will be given the opportunity to comment on the Commission's findings and the measures, subject to periodic scrutiny.

The market investigations will be targeted to address three particular types of issues, each of which will result in the adoption of a Commission decision:

1. The determination of whether a gatekeeper could rebut the presumption based on quantitative indicators (Article 17 of the DMA). In order to escape designation, gatekeepers will be obliged to introduce 'sufficiently substantiated arguments' whose impact is to 'manifestly put into question' the presumption that its gatekeeper status should continue.
2. The determination of whether or not 'systematic non-compliance'[47] is occurring in relation to the obligations laid down in Articles 5, 6 or 7 of the DMA (see discussion below), which have maintained or strengthened the gatekeeper's position in the market (Article 18 of the DMA). As a result, tougher behavioural or even appropriate structural remedies may need to be applied where this is deemed to be proportionate. In extreme cases, gatekeepers might be prevented from engaging in merger activity in affected areas for a limited period of time.
3. The determination of whether *new* services or new practices should fall within the scope of the DMA, thereby triggering amendments that update or increase the range of core platforms services or obligations set forth in the DMA (Article 19 of the DMA; see also Article 12 of the DMA). In keeping with the philosophy of the DMA to draw upon existing competition law investigations as the basis for theories of harm that shape the obligations listed in the DMA, the Commission will draw upon its experiences in the enforcement of Articles 101 and 102 of the TFEU and 'other relevant developments'.

It is hoped that these powers not only render the DMA future-proof, but also play a significant role in minimising the extent to which gatekeepers feel that they can circumvent their legal obligations by changing the focus of the commercial strategy and the technical configurations of their services. The downside in their application is that the market investigation mechanism

47 Deemed to be constituted by three infringements concluded by Commission decision to have occurred over a period of eight years.

may take years between instigation and the formulation of remedies that can be effectively implemented.[48]

## Institutional framework underlying the DMA

### *Commission hegemony and its support*

The institutional model for the enforcement of the DMA is a *highly* centralised one, with power vesting exclusively in the Commission to conduct the various analytical steps outlined above. The logic underpinning the DMA is that the Commission alone should be responsible for the enforcement of the DMA, and the Commission is provided with a number of enforcement and investigative tools to achieve these ends.[49]

The DMA delegates powers to the Commission in a number of important areas, including the power to adopt delegated acts to update the existing obligations contained in Articles 5, 6 and 7 of the DMA (Article 49 of the DMA). This power to adopt various delegated acts is critical to the future-proofing of the regulation. In addition, the Commission will adopt implementing acts as there are a number of substantive concepts that require further clarification and procedures that require further elaboration (Article 46 of the DMA). Of particular interest for institutional stakeholders are the Commission's additional powers added in the trilogue negotiations to issue guidance on the application of the DMA and its powers to encourage standardisation bodies to publish appropriate standards (Articles 47–48 of the DMA).

While the critical role that the Commission should play is indisputable, given the pan-European nature of the subject matter and the importance that regulatory policy should not become fragmented over time, questions still need to be asked as to the extent to which the Commission will require assistance

48 One alternative and more time-sensitive means of building up knowledge on the weaknesses of remedies imposed in relation to core platform services could have been the adoption of a dispute settlement mechanism in relation to all obligations and prohibitions listed under Arts 5-7 of the DMA, comparable to that administered by national regulatory authorities under the EU regulatory framework for electronic communications (see, most recently, Arts 25–27 of the European Electronic Communications Code). While this may have put the Commission in a position of decision-maker across a much wider range of issues that could be the subject of an appeal, it had the advantage of facilitating quick remedial action and the development of a knowledge base that could prove to be invaluable when the market investigation mechanism was actually triggered.

49 It should not be forgotten, however, that European law-makers also consider the Commission to be ultimately accountable to them. To this end, they require (through an amendment introduced in the trilogue negotiations) that the Commission reports to them every year on the operation of the DMA and whether it is delivering its avowed goals in terms of contestability, fairness and the development of the internal market (Art 35, DMA).

at Member State level, the role that Member States can play in intervening in digital markets independent of the Commission and the extent to which competition rules will apply in parallel with regulation (see below).

Internally within the Commission itself, the fundamental question that needs to be asked is whether it is the Directorate-General (DG) for Competition ('DG Competition') that will apply the legislation, or whether it will be other Directorates-General such as the DG for Communications Networks, Content and Technology ('DG Connect') (given its proximity to the subject matter covered by the DMA and its experience in handling behavioural remedies) or the DG for Internal Market, Industry, Entrepreneurship and SMEs ('DG Grow') (given the internal market credentials of the legislation) that have the responsibility to do so. Given that the DMA is clearly a regulatory instrument whose genesis is borne of the belief that competition law is largely *ineffective* in dealing with types of harmful conduct generated by digital platforms, it would seem counter-intuitive to have DG Competition playing an exclusive role in the administration of the legislation. The answer lies in the approach being considered around the world by a number of institutions, whereby digital platform issues are addressed by new bodies or networks of institutions that bring together the different skill-sets necessary to regulate such a complex and dynamic sector.[50] The same approach will now be taken within the Commission itself, harnessing the inter-disciplinary skills of different departments.[51]

Going beyond these internal organisational issues, one needs to ask whether it is possible for the Commission, given its limited resources, to assume responsibility for the full range of functions that need to be performed under the DMA. As has been pointed out above, the Commission is already obliged to adopt a raft of decisions under the legislation that will be the subject of judicial review. By the time the political compromise had been reached on the DMA, the Commission had committed to deploying

50 Such as the Digital Regulation Cooperation Forum (DRCF) in the UK, which includes the Competition and Markets Authority (CMA), the Information Commissioner's Office (ICO), Ofcom and the Financial Conduct Authority (FCA) or the Digital Regulation Cooperation Platform (SDT); in the Netherlands, the comparable body is composed of the Authority for Consumers and Markets (ACM), the Data Protection Authority (AP), the Authority for the Financial Markets (AFM) and the Media Authority (CvdM). Refer to discussion in A de Streel and G Monti, *Improving institutional design to better supervise digital platforms*, CERRE Report, January 2022.

51 There is strong precedent for the adoption of such an approach. In 2002, the new regulatory framework for electronic communications, while administered directly by national regulatory authorities, was subject to Commission veto by a joint task force constituted by members of DGs Competition and Information Society (the former DG Connect). The supervisory role was passed exclusively to DG Connect over time, as DG Competition no longer felt that its participation in decision-making was necessary.

80 personnel exclusively to the application of the DMA but its officials have openly speculated that its pool of expertise might be expanded further in the future. However, practical experiences garnered in the electronic communications sector suggest that the Commission needs to be wary of not underestimating the amount of effort required to monitor the dynamics of such complex industries, run the necessary investigative and decisional procedures under the DMA, and expand upon obligations that will require compliance monitoring.[52] It may be the case, therefore, that national regulatory authorities most closely connected with the digital services sector (eg, electronic communications sectoral regulators, data protection authorities and data security authorities) will often be better placed to assist in the formulation, monitoring and ongoing enforcement of remedies that fall more comfortably within the world of regulation than the world of competition (ie, obligations concerning interoperability, access to data, the portability of personal information and even the prohibition on self-preferencing).[53] If and when recourse is made to such specialist bodies, the challenge will be to strike a balance between legal certainty, the desire to avoid enforcement fragmentation and the need to respect the principle of subsidiarity.

A novelty that has been introduced into the legislation in the course of the trilogue negotiations is the imposition of a 'compliance function' that needs to be performed by gatekeepers to ensure that their obligations under the DMA are complied with (Article 28 of the DMA). The compliance function must be performed by officers of the gatekeeper's company that are independent of its operational functions, with the gatekeeper needing to ensure that its compliance team is well resourced and staffed, and able to report directly to management and liaise with the Commission. The provision is novel insofar as it is most usual for the Commission to outsource such a monitoring/compliance function to an independent third party rather than the party subject to mandated obligations,[54] unless compliance is perhaps based on complex issues of a structural nature (ie, corporate) that can be objectively satisfied. Where the transfer of commercially sensitive information

52 The Annex to the *DMA Impact Assessment Study*, at p 68, estimates that the implementation of the EU electronic communications framework requires 60 FTEs at the Commission, 28 FTEs at BEREC and 41 FTEs in *each* national regulatory authority; amounting to a total of 1 195 FTEs.

53 Moreover, to the extent that those national authorities act through a pan-European grouping, interfacing with the Commission can be a relatively seamless exercise.

54 In the merger context (and to some extent, competition law field), the Commission outsources these functions to a monitoring trustee, while in a field such as aviation, the management of airport slots is a regulatory function performed by a party independent of the airport in question and the airlines using it.

between business units is an issue, this type of concern is usually addressed through the erection of information barriers between those business units (ie, so-called 'Chinese walls') or through the absolute prohibition of the transfer of such competitively sensitive information.[55] Another novelty that will support the Commission's work is that the designated gatekeepers will have to adopt a compliance report describing the measures taken to comply with the obligations and the prohibitions of the DMA (Article 11 of the DMA).

In addition, designated gatekeepers are under a separate legal obligation pursuant to the terms of Article 15 to submit to the Commission an 'independently audited' description of the techniques they use for the profiling of consumers across its core platform services. This obligation has been reinforced since its original proposal, including the requirement that the audited report would be forwarded to the European Data Protection Board and that a non-confidential version would be made available to the general public.

As a result of an amendment introduced during the trilogue negotiations, the Commission can also be supported by 'whistleblowers', who will benefit from the protection guaranteed by the new directive on the protection of persons who report breaches of EU law (Article 43 of the DMA).[56]

*The Commission's procedural powers*

In administering the DMA, the Commission has been provided with a broad range of procedural powers that inspired by the terms of Regulation 1/2003 and supporting guidance, which apply to the Commission in the field of competition law enforcement. If anything, however, these competition-style powers are strengthened in the DMA setting.

Accordingly, the Commission is able to request information from, and to carry out interviews with, gatekeeper personnel (Articles 21–22 of the DMA). In what might otherwise appear to be procedural 'overkill' (in the sense that this power is usually associated with a competition law investigation where an infringement has been alleged), the Commission can also conduct on-the-spot inspections (Article 23 of the DMA). Those inspections can involve not only the inspection of a gatekeeper's books and the ability to make copies of documents, but can also require that explanations be given

55 For example, information barriers are commonly used to prevent anti-competitive 'spillover' of sensitive commercial information between joint venture partners and their non-joint venture businesses. By contrast, electronic communications operators are prohibited from sharing the interconnection data of their competitors with their operational business units.

56 Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ 2019 L 305/17.

regarding technical operations and the use of IT, algorithms and other technical apparatus and processes, with the Commission being able to seal the inspected premises. It is anticipated that the Commission will obtain the authorisation and assistance of local officials wherever required, although a novel feature of these powers introduced at the trilogue stage is the ability of the Commission to use appointed auditors or other external experts to assist it in conducting such inspections.

In addition, the Commission is empowered to adopt interim measures where 'serious and irreparable damage' is threatened (Article 24 of the DMA), although how this legal standard can be met in the absence of an alleged competition law-style infringement is open to conjecture. The Commission also has broad powers to monitor compliance and to investigate non-compliance (Articles 26–29 of the DMA), with the assistance of external auditors or national officials from competent authorities. It is also possible for the Commission to solicit commitments from gatekeepers to ensure compliance (Article 25 of the DMA). As a *quid pro quo* for these sweeping powers lying in the hands of the Commission while acting in its capacity as a regulator under the DMA, gatekeepers are extended the sorts of legal rights that one usually associates with competition law proceedings, namely the right to be heard, the right to access to the file, and professional secrecy non-disclosure in Commission decision (Articles 34–36 of the DMA).

While the range of measures made available to it empowers the Commission in its role as a regulator to be on a par with those powers it finds itself exercising in a competition law context[57] (and with those powers enjoyed by national sector-specific regulators), arguably the most important of these powers lies in its ability to escalate its enforcement powers on a sliding scale (ie, Articles 29–31 of the DMA), namely:

- the adoption of 'non-compliance' decisions (which it should 'endeavour' to issue within 12 months), with the ability of third parties to participate in the consultation process;
- the imposition of administrative fines up to ten per cent of global worldwide turnover for infringements by a gatekeeper of its regulatory obligation or failure to respect prohibitions;
- the raising of administrative fines that can rise up to 20 per cent of global worldwide turnover where gatekeepers are repeat offenders;
- the imposition of periodic penalty payments at much lower levels (one per cent and five per cent) where a gatekeeper has failed to take certain actions;
- the consolidation of behavioural remedies where they have been found to be ineffective in practice;

57 Namely, those powers listed in Regulation 1/2003.

- the introduction of structural measures where necessary due to the persistent failure of existing behavioural remedies, including the legal separation of the gatekeeper's discrete business units;
- gatekeepers engaging in multiple infringements of the DMA can also be prevented from engaging in acquisitions of actual or potential competitors in the areas relevant to the infringements in question; and
- the failure of remedies might form the basis upon which the Commission would trigger the DMA's market investigation mechanism (see above) with a view to determining whether core platform services should be redefined or new remedies introduced to address identified market failures.

The maximum level of financial penalties that can be imposed are, in and of themselves, very significant.[58] Given the revenues currently attributable to the larger digital platforms around the world, fines imposed on the levels outlined above could run into the many billions of euros. While the ten per cent global turnover figure matches existing competition law instruments, the fact remains that the Commission has not come close to imposing such high penalties in percentage revenue terms in its competition practice. In this respect, the 20 per cent figure is arguably most problematic in terms of being challenged on the ground that it is disproportionate, insofar as recidivist behaviour can be censured by many other means other than such a severe rise in financial penalties. Moreover, the measure does seem somewhat draconian when one considers that the recidivist behaviour that triggers it is deemed to have occurred three times over a period of eight years.

The additional prohibition on firms engaging in M&A activity, which emerged during the trilogue negotiations, is analogous in some respects to practice under public procurement principles, insofar as offending firms are prevented from bidding for future tenders in which they have been found to have engaged in previous anti-competitive activity. Having said that, the comparable prohibition under public procurement rules is always time-limited in advance (eg, three years or a period reflective of the bidding cycle in question) and is usually limited to the subject matter of the offending bid. Given the much more open-ended nature of the prohibition in the DMA, especially given the referral powers on potentially minor concentrations (see above), this is an area where the authors would not be surprised if gatekeepers challenged such measures as being disproportionate.

The potential severity of financial penalties or M&A prohibitions notwithstanding, the proverbial 'Sword of Damocles' that lies above the heads of gatekeepers is the possibility that the Commission might indeed split their

58 The Commission is restricted by limitation periods of five years for the imposition of penalties and the enforcement of existing provisions.

integrated conglomerate businesses into individual business units, thereby enhancing the ability of customers to switch providers for individual services rather than feeling bound to take the gatekeeper's full palette of digital services. In mandating such legal or structural separation, the Commission would be denying gatekeepers the ability to generate a multiplier ecosystem effect in addition to their existing network effects and positive feedback loops generated in relation to their principal services.[59] By contrast, the comparable structural remedies that are available under the European Electronic Communications Code, because they are designed to address the market failures that derive from vertical integration, are directed towards a change in the commercial incentives of the business unit responsible for network provision.[60] The difficulty in imposing such an extreme measure is as much political as it is legal; one can imagine that, unless the United States authorities are contemplating the adoption of comparable measures in relation to the same operators, mandating legal or structural separation in the EU against a US-origin gatekeeper may raise significant political tensions and might also be difficult to implement in practice, especially where it resulted in European consumers being denied certain digital services from the gatekeepers affected by such measures.

*The role of EU Member State authorities and courts*

This lack of Commission resources seems to have been identified by a number of institutional amendments proposed by the European Parliament, some of which have been embraced in the trilogue negotiations. The agreed text of the DMA now envisages Member State involvement in matters as diverse as the conduct of market investigations, the issuance of on-the-spot inspections authorisations, the monitoring of remedies and the ability of third parties to raise concerns about non-compliance with Member State authorities. These specific functions are set out within the broader context of cooperation now foreseen under the final version of the DMA, with the Commission being able to call upon appropriate Member State authorities for assistance.

---

59 M G Jacobides, C Cennamo and A Gawer, 'Towards a theory of ecosystems', (2018) Strategic Management Journal , 2255–2276. In order to reap such benefits, a gatekeeper straddling such different businesses is prone to engage in strategies such as self-preferencing activities that favour its own businesses ahead of others, irrespective of quality or price considerations.

60 Refer, for example, to Art 77 of the European Electronic Communications Code. The key concern addressed by such a structural measure would be the prevention of discriminatory behaviour by the regulated dominant firm (which would include self-preferencing) down the horizontal/vertical axis, thereby threatening to foreclose direct competitors.

As it is not the role of the Commission to make the choices for Member States as to which of their national institutions should take up these different roles, there will be Member States that will no doubt make different choices when determining which of their national authorities will be in the key position to play a key role in the enforcement of the DMA.[61]

Aside from recourse to Member State expertise in these particular contexts outlined above, the Commission has shown itself prepared to expand the involvement of Member States further by introducing two separate institutional reference points under the DMA that will facilitate the more general obligation on the various institutions to coordinate their actions with the Commission, namely:

- The creation of an High-Level Group for the Digital Markets Act (Article 40 of the DMA), composed of an equal number of representatives (numbering no more than 30 personnel in total) from a variety of EU institutions,[62] which bring together different elements of expertise that are relevant to the application of the DMA. This body will be chaired and funded by the Commission, with its role being to advise and recommend on the types of measures that should be adopted under the DMA, and to facilitate the coordination and cooperation between the Commission and the Member States in their enforcement decisions.
- The creation of a 'Digital Market Advisory Committee' (Article 50 of the DMA), which is a standard comitology committee to whom the Commission shall turn to request expert opinions before adopting implementing acts. Those opinions shall be published to accompany Commission decisions adopted under the DMA.

It cannot be disputed that the creation of the above two expert groups adds an important enforcement dimension to the Commission's powers under the DMA and goes a long way to ensuring that the resources required for the effective administration of the legislation are sufficient.

Beyond their participation in the various EU-level expert groups (see above), EU Member States might also have a unique role to play insofar as they may become a forum for private litigation brought against gatekeepers

61 For example, given their proactive roles in the public consultation on the DMA, it would not be surprising if the respective German, French and Dutch governments accorded prominence to the roles played respectively by their national competition authorities.

62 The institutions to be represented are BEREC (the Body of European Regulators for Electronic Communications), the European Data Protection Supervisor and the European Data Protection Board, the European Competition Network, the Consumer Protection Cooperation Network and the European Regulatory Group of Audiovisual Media Regulators.

who have been found to have breached the rules under the DMA.[63] However, in order to minimise the risk of policy fragmentation among the EU's 27 Member States, the trilogue negotiations introduced a separate provision setting out the principles under which the Commission and Member State courts will cooperate (Article 39 of the DMA). According to this provision, judgments of Member State courts must not only alleviate to take contrary positions to those taken by the Commission under the DMA but must forward their judgments to the Commission. Similar to the competition law counterpart provisions in Regulation 1/2003, the Commission can participate in national proceedings by submitting its own written observations and participating in proceedings by intervening as an amicus curiae. To encourage private enforcement, the possibility of representative actions[64] will also be extended to the DMA (Article 42 of the DMA).

Outside the regulatory measures found in the DMA, Member States are only permitted to impose obligations on digital platforms where they are pursuing other legitimate public policy goals or exercising national competition law powers, insofar as those powers do not contradict EU competition rules (Article 1(5)–(6) of the DMA).

**The role of competition policy**

Although the Commission is permitted to exercise its competition powers where appropriate (especially given that gatekeepers are not necessarily 'dominant' firms within the meaning of Article 102 of the TFEU),[65] the likelihood of that occurring must be very limited once the current pending competition law investigations cases have been resolved,[66] given the fact that the problematic practices caught by Articles 5, 6 and 7 of the DMA reflect competition law theories of harm. Nevertheless, it is open to the Commission to use its competition policy powers to address anti-competitive conduct that is not currently caught by the DMA or to investigate the impact of new

63 See discussion in Assimakis P Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' (2021) *Liber Amicorum E Fox*,425–44.

64 Directive 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22, OJ 2020 L 409/1.

65 The greater use of the Art 101 of the TFEU prohibition on anti-competitive agreements and practices might, however, be used more in practice where digital gatekeepers achieve anti-competitive results by agreement with either favoured customers or customers with little bargaining power.

66 At the time of writing, it is a matter of public record that the Commission is involved in a series of investigations concerning the commercial practices of Google, Amazon and Apple, in addition to an investigation into the cloud computing practices of Microsoft.

services that might be candidates for inclusion in future amended versions of the DMA (eg, as new core platform services).

Whereas a number of stakeholders were concerned that the availability of unlimited freedom for national competition authorities to enforce EU and national competition rules would lead to the 'Balkanisation' of the enforcement process, the consistent position espoused by a number of Member States and national competition authorities over the course of the consultation process was that competition law should be seen as a complement to the regulation policies introduced by the DMA, rather than as a substitute.[67] In other words, competent national authorities with competition law powers should not be deprived of using their powers to intervene against digital platforms where national circumstances so demand and especially where new core platform services and questionable commercial practice emerge.

The enforcement balance achieved in the DMA suggests that the advocates of a relatively unfettered competition policy have prevailed, although care has been taken to ensure that parallel enforcement does not result in gatekeepers falling foul of the *ne bis in idem* principle.[68] However, it will require much goodwill and coordination on the part of competition authorities at EU and national level, and the Commission acting in its new regulatory capacity, to ensure that this principle is not flouted. Matters are complicated by the fact that regulatory principles under the DMA are imbued with competition law theories of harm, while there will always be some risk of 'regulatory creep' of non-competition-based principles under the DMA working their way into competition law enforcement at the national level.[69] In such situations, designated gatekeepers might indeed seek recourse to the national courts in litigation against the perceived double enforcement of regulation and competition law in the same action. In this regard, the actions of German legislators in extending competition policy to address the practices of 'ecosystems' is particularly problematic, with the Bundeskartellamt declaring that competition action is possible against Google because it is

67 Whereas Member States such as Germany, France and the Netherlands strongly supported the possibility of national enforcement of competition policy, Member States concerned about preserving the integrity of an EU-level regulatory model included the Scandinavian Member States. On the question of the complementary between the DMA and competition law, refer to P Larouche and A de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) Jour of European Competition Law & Practice 542–561.

68 Namely, the principle that a defendant should not be prosecuted on multiple occasions for the same offence. See G Colangelo, *The Digital Markets Act and EU Antitrust Enforcement: Double & Triple Jeopardy* (2022).

69 A good example of this under Belgium, French and German law is that the notion that dominance may exist where parties are 'dependent' on the alleged infringing undertaking.

an undertaking that is 'of paramount significance for competition across markets' (ie, rather than an undertaking that is 'dominant' in a 'relevant market' for antitrust purposes).[70]

With a view to minimising such cross-jurisdictional concerns, the DMA now includes a provision that deals with the issue of coordination and cooperation between the Commission and national competition authorities in enforcing competition rules in relation to digital platforms. According to the new Article 38 of the DMA, the Commission and Member State competition authorities are obliged to inform themselves of competition enforcement action under the auspices of the European Competition Network, thereby hopefully providing a structure within which enforcement overlaps are identified. It is expressly recognised that national competition authorities will have an important role to play where the market investigation mechanism is triggered under the DMA. On balance, the concerns about competing competence need to be put in perspective, insofar as there already exists a significant amount of tension in the parallel application of competition rules by the Commission and Member State authorities – adding the DMA as a source of tension arguably does little to exacerbate a tension that already exists.

## Conclusions

While the essential elements of the Commission's original DMA proposal have remained firmly intact, the final version agreed upon by the European Parliament and Council constitutes a marked improvement in a number of important respects.

First, by bringing Member States into the enforcement, monitoring remedy formulation elements of the legislation, the Commission has succeeded in maintaining its exclusive decision-making powers while at the same time ensuring that it is no longer likely to be an enforcement bottleneck under the legislation. In garnering expertise drawn from the ranks of the various national regulators that are intimately involved in some aspect of digital platforms, the logistical and technical challenges of applying the DMA no longer seem as daunting as they did under the original proposal. Empowering Member States in the process also builds the momentum towards creating an internal market and minimising the risks of fragmentation through the application of local regulation or competition policy. The identity of the local regulators that will be involved in the process and the mechanics of their involvement vis-à-vis themselves and the Commission is something that will no doubt occupy EU policy-makers between now and the start of

70 Ruling of 31 December 2021. A ruling along similar lines was made on 4 May 2022 against Meta Platforms Inc FB.O, the owner of Facebook.

2023 as implementing legislation and guidance are formulated, as will the Commission's own internal reorganisation to administer the new regulation.

Second, important trade-offs have been made in order to accommodate the European Parliament's insistence that the Commission be kept to tight deadlines in its decision-making and that tough penalties be imposed on gatekeepers infringing the DNA's obligations and prohibitions. As a *quid pro quo*, the Council and the Commission have fashioned a number of provisions in the DMA that guarantee procedural rights to gatekeepers, which allow them to defend their interests in a manner that reflects the practice under competition rules. Given the number of instances in the legislation where the Commission is called upon to adopt decisions that can be appealed before the European courts, these are rights that gatekeepers will no doubt appreciate. Gatekeepers are less likely to appreciate the inclusion of a 'whistleblowing' incentive for their problematic practices to be revealed, nor the increased possibility that private enforcement litigation will be directed against them, and even less the opportunities available to national competition regulators to take action against them.

Third, the possibility of a 'regulatory dialogue' as an integral element of the Article 6 process of proportionate remedies adds an element of flexibility to the remedy selection process that takes greater account of the differences between digital platforms in terms of their business models, the use of technology and market impact. By contrast, the legal certainty initially attached to the 'one-size-fits-all' approach adopted to binary remedies that apply under Article 5 may prove to be more problematic in terms of legal challenge than those measures adopted under Article 6.

Fourth, the temptation to caste a net too widely over the number of 'gatekeepers' and the 'core platform services' they provide has been largely resisted in the final amendments to the DMA. Catching too many gatekeepers seems to be an unproductive exercise, given that there are a limited number of digital platforms whose practices have proved to be problematic under EU competition law practice. In this regard, it is somewhat disappointing that the DMA, in pursuit of the goal of legal certainty, has adopted a test for gatekeepers whose only real elements in practice are quantitative in nature. By the same token, the risks inherent in adding those core platform services that have yet to identify a theory of harm under competition rules have been avoided; this should leave decision-making less vulnerable to legal challenge.

Fifth, the DMA's ability to expand and be modified with the passage of time is reflected in tighter market investigation mechanisms. These provisions, while being both labour and time-intensive, nevertheless provide the basis

upon which the DMA can be reconfigured as new challenges emerge or as old challenges diminish in their significance.

The net result is a piece of legislation that, while respecting the limitations posed by the choice of a regulation as the relevant legal instrument and the existing institutional actors in the digital space, promises much in terms of net impact on market structures. How much of that promise is realised in its first few years of operation when legal challenges are likely to be lodged and theories of harm are still unconfirmed remains to be seen. One thing is clear – the Commission has created a legal regime that is very much 'state of the art', but one that will generate challenges in its implementation and in its ability to maintain the dividing line between ex post and ex ante policies.