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Enforcing the Digital Markets Act: institutional choices, compliance, and antitrust

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ABSTRACT

This article discusses how the European Commission can achieve the goal of effectively implementing the Digital Markets Act. Based on legal and economic reasoning, we highlight the important role of the gatekeeper's compliance report, and discuss how to incentivize gatekeepers to write useful reports. In addition, we develop recommendations regarding the internal organization of the Commission, the prioritization of cases, and how to effectively use the concurrent enforcement powers of the Digital Markets Act and Article 102 of the TFEU. We illustrate the principles we develop using four different EU antitrust cases. Furthermore, we discuss coordination between the Commission and National Competition Authorities and the need to already develop an independent evaluation process for the Digital Markets Act.

KEYWORDS: Competition law, Antitrust law, European Union Law, Regulation, Digital Markets
JEL CLASSIFICATIONS: K21, K23, K40, L43, L51

I. EXECUTIVE SUMMARY

The Commission is charged with implementing the Digital Markets Act (DMA). Based on economic and legal reasoning, this article asks how the Commission can fulfil this challenging task effectively. We make recommendations about how the Commission might prioritize cases, design optimal internal work structures, maximize the compliance mechanism's effectiveness, avoid reinventing at least some wheels by leaning on antitrust tools and knowledge, and leveraging the Commission's concurrent antitrust and regulatory powers to ensure the speedy and effective resolution of current and future investigations.

This article offers a significant number of recommendations, as we highlight in this Executive Summary. The authors place different levels of emphasis on different recommendations, but all believe each one to be well-founded. We hope these can at least serve as the basis for further discussion, and at best be adopted by the Commission and other agents affected by the Digital Markets Act (DMA).

Based on a cost–benefit analysis, for example, we make a number of recommendations regarding the compliance reports that the gatekeepers must submit to the Commission annually as one part of the overall compliance mechanism the DMA envisions. Specifically, and to maximize the DMA's impact, we urge that:

- The Commission demand that compliance reports are effective in that they contain: (i) verifiable technical and economic facts; (ii) a description of how the gatekeeper complies with the DMA and what concrete behavioural changes the gatekeeper undertook to do so; and (iii) the legal, technical, and economic analysis that forms the basis of the gatekeeper's belief that it satisfies the DMA.
- To incentivize useful compliance report, the Commission treat an incomplete, unclear, or unsatisfactory report as a signal of possible non-compliance. This should substantially increase the likelihood of investigation or proceeding against such a gatekeeper. Importantly, even though obfuscatory reports are likely to make it harder to investigate a gatekeeper, the Commission must resist the temptation to investigate more aggressively gatekeepers with more informative reports to set the right reporting incentives.
- After the first year, the Commission require the annual compliance report to demonstrate the effects of the changes the gatekeeper introduced to comply with the DMA. To do so, the gatekeeper should be required to use quantitative indicators and measures of business users' access to consumers, business user entry, end-user choices, end-user switching, changes in prices, or terms of use, etc. The report must include all useful and readily available outcomes. Over time, these indicators will evolve and become more stringent.
- The Commission require all but the truly confidential data to be included in the public summary of the annual compliance report. The public summary must be written in plain language in a way that explains to business users, end users, and competitors how to take advantage of technical or other changes that aim to either make the service more contestable or to increase its fairness. Furthermore, the Commission should establish a low-cost method for these stakeholders (as well as researchers) to provide feedback on the report as well as the core platform's behaviour more generally.
- The Commission use its (soft) power to encourage a 'compliance culture' within the gatekeepers covered by the DMA. To incentivize such a culture, the Commission should take the strength of the internal compliance function into account when prioritizing enforcement proceedings.

- The Commission develop procedures for regular exchange and communication with the chief compliance officer. The Commission could also strengthen the role of the chief compliance officer within the gatekeeper itself. To do so, it can require the annual report to explain the chief compliance officer's role in the company and at what stage of a new product/technology development the compliance team became involved. Finally, higher ranking members of the Commission should ask the chief compliance officer to be present at all meetings with the company (even if not concerning the DMA).

Regarding the internal organization of the Commission, we make the following recommendations:

- To minimize the risk of losing over procedural issues, the Commission should work on procedural safeguards of the parties' rights from the start. It should publish procedural rules and best practices, which initially can be inspired by those for mergers, the Antitrust Manual of Procedures, and by what has been learned from recent Court decisions in antitrust cases.
- The Commission should establish completely digital workstreams that incorporate technical features that enable to manage the stream of information in such a way that all relevant legal issues are respected.
- The Commission should assign some staff who specialize on individual gatekeepers, in addition to ones that specialize on specific core platform services (CPS) and the related obligations. We suggest that this will be typically more useful than staff specializing on individual obligations (across different gatekeepers). Based on a variety of arguments, we propose that gatekeeper specialist should be given a key, if not the leading, role in investigations.

Many of the DMA's obligations were derived from ongoing or decided antitrust cases. We distinguish between antitrust cases whose conduct falls fully within the scope of the DMA (which we refer to as type A cases) and those for which only some of the gatekeeper's conduct falls within the DMA (which we refer to as type B cases). Regarding the concurrent enforcement powers given by the DMA and Article 102 TFEU to the Commission, we recommend that:

- For type A cases, the Commission attempt to close the antitrust case with commitments that resemble, and cover, the DMA obligations. This will reduce the time that business and end users must await for fairer and more contestable markets. At the same time, the company can save on compliance cost and avoid a liability decision of the Commission that can be used by private claimants.
- Some gatekeepers may, however, try to delay the effective enforcement of the DMA to benefit from monopoly power absent contestability and fairness. In these cases, we recommend that the Commission not prematurely close the antitrust case but keep both of its concurrent enforcement powers. To save on costs, however, it may be beneficial in type A cases to slow the antitrust enforcement down if the Commission thinks that enforcement via the DMA is likely to be quickly achieved.
- For type B cases, the Commission may abandon those parts of the Article 102 TFEU case that are covered by the DMA, and then decide whether the remainder still warrants an Article 102 TFEU case. It may also try and bundle the issues and settle the entire case in such a way that the parts that overlap with the DMA are closed with commitments

that resemble, and cover, the DMA obligations while the remainder is settled in the spirit of an Article 102 TFEU case.

We also discuss legal issues relating to concurrent powers. Importantly, we argue based on precedent that the legal principle of *ne bis in idem* does not hinder the parallel applications of Article TFEU 102 and the DMA and discuss the safeguards necessary to do so. Similarly, based on precedent, we explain that the Commission can make additional document requests for useful (confidential) information that it came across in antitrust cases—even though it may not share this information absent such a request. Indeed, we recommend that when asking for exactly the same information in exactly the same format, the Commission should set an extremely short deadline. This will encourage gatekeepers to simply waive their corresponding confidentiality rights whenever the Commission decides to assess conduct under the DMA instead of Article 102 TFEU.

To illustrate, we apply our principles to simplified and stylized versions of four existing EU antitrust cases:

- We suggest that the Apple Near-Field Communication (NFC) chips case is a type A case in which appropriate commitments by Apple solve both the antitrust and the DMA requirements. The key discussion will likely resolve around the Article 6(7) proviso that allows the gatekeeper to take strictly necessary and proportionate measures to ensure the integrity of the service it provides. The Commission will determine if the measures imposed on rivals are more stringent than the measures required of Apple's own mobile wallet.
- We explain that the Amazon Buy Box case is a type B case in which if the offered commitments are effective, they yield a potential wider-reaching remedy than applying only the DMA would.
- We discuss why the Google ad tech case is a type B example in which compliance with the DMA—although it contains elements that would not be achievable under antitrust—may be insufficient to create contestability. First, some of Google's discriminatory practices may have to be pursued under Article 102 TFEU. Secondly, we explain that divestures in the ad tech stack may be necessary to create contestability. Since divestures are only envisioned in the DMA after multiple instances of non-compliance with the DMA, we recommend that the Commission carefully delineate between different potentially anticompetitive actions Google has taken in the ad tech stack market, which will allow it to open multiple, distinct investigations. This will increase the pressure to comply, and in case of multiple instances of non-compliance, open the door to divestitures as a workable solution.
- We suggest that Google Search is an example of an Article 102 TFEU case that has finished and in which the Commission has prevailed, but contestability and fairness have not been achieved. While the DMA contains further provisions—in particular, Article 6(5) and 6(11)—that apply to Google search, we remain concerned that these are insufficient to achieve the DMA's goals. We are hopeful though that an effective prohibition of tying between Android OS and the search engine allows device makers that do not contain a browser that qualifies as a core platform service to sell the default engine position to none CPS. Entrants in the search market could then bid for this position, which we argue would likely increase competition to the benefit of the consumer and contestability.

We discuss the coordination between the Commission and National Competition Authorities (NCAs), who are free to apply Article 102 TFEU in parallel with the DMA. We recommend that:

- NCA continues to run existing cases with a view for DMA-style remedies.
- Eventually, NCAs may be best placed for cases with a distinct national focus—such as those regarding press publishers' rights—as well as cases against gatekeepers that are closely connected to previous cases by a given NCA. Initially, however, we recommend that NCAs respect the Commission's prerogative in dealing with gatekeepers to reduce overlap and coordination costs.
- We reiterate that it will be very important for the Commission to motivate NCAs to contribute their resources and knowledge. We thus recommend that the Commission acknowledge such contributions very prominently, and work on establishing a robust coordination mechanism with the NCAs.

Regarding the choice between the DMA and antitrust in future cases, we note that, if the conduct is fully covered by the DMA, then the Commission will want to use its regulatory powers. When not, the Commission can choose between opening an antitrust investigation or open a market investigation, with the aim of adding new obligations (where feasible) via a delegated act. We recommend that in new cases, nevertheless, the Commission should typically use antitrust as a first line of intervention. This will require the development of a consistent and sound theory of harm, and the experience doing so will help formulating a DMA obligation later if necessary. The need to intervene quickly or the need to stop conduct that is prevalent among different gatekeepers, however, suggests relying on a market investigation in those cases.

Finally, we suggest that, even though all eyes are on the Commission's roll-out of the DMA, there is another aspect of implementation that should not be delayed: the Commission and/or the Parliament should begin to create a legitimate and independent evaluation process for the DMA. This is important both for democratic legitimacy and for purposes of improvement in the law and its enforcement.

II. INTRODUCTION

The final enactment of the European DMA[1] into law raises pressing questions about how to quickly get off to a good start in its enforcement. The European Commission ('Commission'), like all regulators, has limited resources, and this places a premium on thinking through the regulatory strategy and devising clever ways to implement the law to make it as effective as possible. The enforcement strategy will affect both short-run effectiveness and long-term impact. This article analyses how the DMA could be implemented most effectively. We analyse the institutional design of enforcement within the Commission, how case selection decisions can advance the Commission's priorities, and how the Commission might use compliance mechanisms specific to the DMA in tandem with certain tools borrowed from antitrust as supplements, all with the goal of ensuring that the Commission's initial enforcement strategy sets the stage for maximum DMA impact.

The task of enforcing the DMA is substantial. At the initial stage, the task of the Commission is to designate 'gatekeeper' status to undertakings meeting certain quantitative

[1] Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (Digital Markets Act), OJ [2022] L265/1.

thresholds the DMA establishes and to determine the 'core platform services' each gatekeeper offers to consumers and business services (Article 3 DMA). This is to be completed by September 2023 at the latest.[2] In March 2024, six months after an undertaking has been designated as a gatekeeper, the obligations of the DMA need to be respected (Article 3 (10)). The obligations in Articles 5, 6, and 7 are meant to be self-executing, ie, they do not require further activation or specification by the Commission. The Commission must perform the following tasks in enforcement once the DMA takes full effect and gatekeepers meeting the quantitative thresholds are designated:

- Some tasks relate to gatekeeper designation: (i) open a market investigation with the aim to designate a gatekeeper (Article 16, 17 DMA); and (ii) review gatekeeper status according to Article 4 DMA;
- Some tasks relate to the clarifications on the obligations: (i) further specify obligations under Articles 6 and 7 according to Article 8 DMA upon request by a gatekeeper or on its own initiative and engage in informal discussions with gatekeepers and other stakeholders on the implementation of Article 5 DMA; (ii) answer requests for suspension according to Article 9 DMA; (iii) answer requests for exemption according to Article 10 DMA;
- Some tasks relate to the oversight of the regulated gatekeepers: (i) receive reports from the gatekeepers on implementation of the obligations according to Article 11 DMA; (ii) receive information on the compliance function of gatekeepers (Article 28 DMA); (iii) receive information about concentrations according to Article 14 DMA; and (iv) receive audits on profiling according to Article 15 DMA;
- Some tasks relate to the enforcement of the obligations: (i) investigate and monitor compliance with obligations and measures according to Article 26 with the aim of taking a non-compliance decision according to Article 29, impose a fine according to Article 30; impose a periodic penalty payment (Article 31); (ii) investigate potential circumvention according to Article 13 DMA; and (iii) open a market investigation with the aim to find systematic non-compliance (Article 16, 18 DMA);
- Some tasks relate to the functioning or the updating of the DMA: (i) adopt implementing provisions or guidelines (Article 46, 47); (ii) report annually to the European Parliament and the Council (Article 35); (iii) evaluate the DMA (Article 53) every three years; (iv) open a market investigation with the aim to define new services and practices (Article 16, 19 DMA) and, on that basis, update obligations for gatekeepers according to Article 12 DMA by delegated acts.

This overview may not be exhaustive, but it certainly is exhausting, and it starkly reflects the considerable burden placed upon the European Commission. The list, moreover, does not include litigation in which the Commission almost certainly will be involved (be it in cases where claimants invoke breaches of the DMA in national court and the Commission is heard or actions against Commission decisions in the enforcement of the DMA). We note also that parties enjoy various rights, including the right to be heard and to access the file, respect of which requires substantial Commission resources. We expect that gatekeepers will operate with large teams of lawyers, economic, and technical experts. It remains to be seen whether third parties, eg, representatives of business users, will engage heavily in the

[2] The DMA defines 'gatekeeper' using qualitative criteria that are presumed to be met when an undertaking meets certain quantitative criteria, such as yearly turnover, average market capitalization over a term of years, number of consumer and business users of its services, number of Member States in which it operates, and other similar factors. art 4(1)-(2) DMA.

processes the DMA implementation entails; but even if they are in support of enforcement, their necessary and welcome contribution will consume further resources.

The starting point for this analysis is the fact that the European Commission is the central enforcer of the DMA and has limited and probably insufficient resources.[3] The skills necessary for digital platform enforcement are in short supply in the market. The lean enforcement staff will experience additional pressures as well, including those arising from the need to meet timelines the DMA itself imposes and the need to show the public that the law can produce results quickly. All of these elements mean the Commission faces a difficult road ahead, one that we hope this article makes less daunting.

In light of the tasks and the resources available, maximizing the impact of the DMA will require careful choices. This article makes arguments in favour of general priorities for the Commission in the first three years of the DMA, as well as a specific set of recommendations concerning enforcement policies. Our general priorities follow. The focus of Commission work should be concentrated on these tasks:

- Discuss the implementation of the DMA obligations with gatekeepers via specification decisions (Article 8) or informally,[4] and generate a shared understanding of the nature of the duties required to demonstrate compliance under Articles 8 and 11;
- Investigate potential circumvention (Article 13);
- Monitor compliance with a view to non-compliance decisions (Article 26, 29).

Our advice is generated from the answers to two main questions. In Section III, we discuss how the DMA enforcement process can be designed to maximize the impact of the new law. In Section IV, we describe how competition law enforcement can be leveraged to increase the impact of the DMA. We emphasize the benefits in effectiveness and speed, which the Commission can gain from leveraging its existing work on digital antitrust cases and transitioning them into DMA cases. The rules in the DMA cover a tremendous amount of economic activity. The five largest platforms alone affect the daily lives of most European businesses and citizens. Enforcing the DMA well will benefit social welfare going forward. In addition, successful enforcement of the DMA will serve as a model for other jurisdictions that are considering legislation of their own. We provide a summary of all our recommendations in the executive summary (Section I). As noted, the group of authors ranks the individual recommendations differently in terms of importance, but all believe that every recommendation is worth including.

III. INSTITUTIONAL CHOICES FOR DMA ENFORCEMENT

In this section, we discuss how the DMA enforcement process can be designed to maximize the impact of the new law. We model decision making within the Commission and the implications for how to set priorities for the numerous tasks identified above ('Setting enforcement priorities' section). We also analyse the contribution of the mandatory compliance

[3] For the telecommunication sector, the Annex to the DMA Impact Assessment Study <https://op.europa.eu/en/publication-detail/-/publication/0a9a636a-3e83-11eb-b27b-01aa75ed71a1/language-en> (last accessed 2 March 2023), p 68, estimates that the implementation of the EU electronic communications framework requires 60 full-time equivalents (FTEs) at the Commission, 28 FTEs at BEREC, and 41 FTEs in 'each' national regulatory authority; amounting to a total of 1195 FTEs. The Commission foresees 80 staff while the MEP Schwab, the EP rapporteur for the DMA, has called for at least 150 employees.

[4] We note that the legislator did not provide for a tool of regulatory dialogue for art 5 DMA, but we encourage the Commission nonetheless to engage in informal discussions. This, however, should not lead to non-transparent 'deals' without the involvement of business users and end users.

mechanisms for gatekeepers that are provided for in the DMA ('Ensuring effective oversight' section). We make some suggestions on how to make good use of these provisions and actively demand gatekeeper involvement. We also propose a certain institutional design for the regulator ('Organization of the Commission' section). The internal organization of the work of the European Commission will have a large impact on effectiveness of the DMA. Here, we also deal with the strategic behaviour by gatekeepers who prefer not to comply with the DMA.

Setting enforcement priorities

The DMA will be binding on the gatekeepers and their CPS will be required to follow all its prescriptions in March 2024. However, there are in some cases ambiguities on the precise definition of the obligations. It also is possible that a gatekeeper may even not try to comply with certain elements of the law.

We detail the process by which the Commission takes enforcement decisions later in the article, but present this simplified summary here: the Commission, for a specific CPS of a specified gatekeeper, receives one or several signals that a specific obligation has not been fulfilled. These signals could be a complaint from a competitor or business user, the results of an investigation by a NCA,[5] or suspicions raised by the annual compliance report the DMA requires gatekeepers to file.[6] On the basis of those signals, the Commission must decide whether to open proceedings.[7] To do that, the Commission will do a cost–benefit analysis.[8] A simple way to express the (net) benefits of pursuing an infringement procedure is:[9]

$$\{\textit{the probability of finding an infringement given the signals received by the Commission}\} \\ x\ \{\textit{the (gross) benefits of finding an infringement, including deterrence}\} \\ -\{\textit{public cost of the procedure}\}.$$

Costs of the procedure

The single largest element of the cost of the procedure is the cost of determining whether an 'infraction has actually been committed', or, more precisely, to determine whether the gatekeeper has demonstrated compliance.[10] This cost depends on the nature of the obligation and how blatant the breach is. For instance, a breach might be explicitly contemplated or required by contractual language. An example of this could be a 'most favored nation (MFN)' provision in a CPS contract with a business user. Or a consumer-facing function of a CPS might demonstrate non-compliance by lacking mandatory functionality (such as sideloading).[11] Article 5(10) obliges gatekeepers that sell digital ads on the open web to provide certain data to their publisher-clients; a failure to provide the data, a fact that is fairly simple to confirm, constitutes a violation. Breaches such as these generally will be easier to investigate than an obligation that requires an examination of the gatekeepers' internal algorithms (such

[5] As provided for by art 38 DMA.
[6] As mandated by art 11 DMA.
[7] On the basis of art 20 DMA. Note, however, that art 20.2 of the DMA states that 'the Commission may exercise its investigative powers under this Regulation before opening proceedings'. For the purposes of this article, unless explicitly stated otherwise, this exercise of investigative powers, which will presumably also include some preliminary dialogue with the gatekeeper(s), is considered a proceeding.
[8] The analysis will not be mathematically precise, of course. Many of the costs, as well as the benefits, cannot easily be reduced to Euro values.
[9] In order to simplify the formula, we aggregate in the term 'gross benefits', not only the direct benefits such as putting an end to the infringement and the collection of a fine but also the indirect benefits such as those resulting from the power of an enforcement action to deter other gatekeepers from infringing.
[10] According to art 8(1) DMA.
[11] Under art 6(4) DMA.

as the prohibition of self-preferencing in ranking results).[12] Likewise, compliance or non-compliance with Article 6(2), which governs the use of data for the purpose of competing with the business users of the CPS, will be relatively more difficult to investigate.[13]

Another type of cost is driven by the fact that some of the 'obligations may need further specification'. This suggests that some proceedings (eg, under Article 8) may be primarily designed to clarify what the provisions mean. If the party accepts the interpretation quickly, and complies with it thereafter, then the costs will be minimal and the benefits potentially quite large, but there is no reason to think that will be the norm.

Another important cost will be the cost of 'designing and enforcing the remedies or sanctions', which will vary according to the obligations and the CPS, as well as whether there is an existing antitrust investigation (as explained below in Section IV). The design of some remedies will be broadly known before an investigation is launched, including remedies for conduct similar to an antitrust violation with which the Commission or other authorities already have substantial experience. Other remedies will need to be created from whole cloth, which will add to the public cost.

The cost of finding an infringement will also depend on the degree of 'cooperation of the investigated gatekeeper'. Some gatekeepers may adopt a strategy of aggressive 'lawyering' while others may adopt a more cooperative strategy. The cost of investigating the former will be much higher. The behaviour of the Commission will, in turn, influence the choice of strategies by the gatekeepers. It is important that the Commission not be deterred by the increase in cost due to aggressive strategies. One way to think about this is to recognize that there is an additional benefit to investigating an 'aggressive' gatekeeper: the deterrence effect of such an investigation on the choice of the firm to be uncooperative.[14]

The costs will also depend on the 'involvement of third parties' in the investigations and the evidence put forward. Gatekeepers may overburden the Commission with data, thereby potentially increasing the costs of investigation by an information overload. Yet, the Commission needs evidence to make its case. Such evidence can be provided by third parties, eg, complainants (Article 27) who participate in these markets and understand the platform's strategy. They can be very helpful and can lower costs if they support the Commission well, but their involvement also increases costs, eg, by requests for access to file or informal talks.

Finally, enforcement costs can be limited by relying on 'support from national agencies'. National agencies and the Commission should make good use of this boost of capacities. When national agencies have relevant experience with practices or with gatekeepers, the Commission will lower its costs by asking them to assist in enforcement, as foreseen in Article 37 DMA. International case teams with people from different agencies could become a consistent feature of DMA enforcement. Also, as in competition law enforcement, the Commission can take advantage of synergies with private enforcement. Cases that look somewhat simpler and have a potential complainant may be good choices for enforcement by national courts, particularly if there is a good national infrastructure for private enforcement of the DMA.

[12] Under art 6(5) DMA.

[13] art 6.2 poses difficult questions about its cross-border application, questions that are not insubstantial given that the undertakings expected to be designated as gatekeepers operate worldwide. We will not explore the issues fully, but we would like to mention a difficulty with the interpretation of art 6.2 due to the international nature of the platforms. One of the section's provisions prohibits the use of data about third-party sales to develop competing products or services. Plainly, the provision applies with full force in Europe. But what if a gatekeeper uses data from non-EU sales by third-party sellers to develop such a product and sell it outside the EU? Such questions abound. article 2, which provides a full list of definitions, does not help because its definitions neither contain nor imply geographic boundaries.

[14] Including perhaps disincentivizing a platform from proposing ineffective remedies.

Probability of finding an infringement

As indicated in the analysis of costs, the probability of finding an infringement in some cases will be high because it can easily be observed. The probability may also be high if, during the dialogue or in its compliance report, the gatekeeper has justified its interpretation of the DMA obligations in a manner that contradicts the Commission. Third parties and business users may provide information to the Commission that indicates the probability of infringement.

Benefits of finding an infringement

Findings of violations or the issuing of a specification decision will generate various benefits. Some benefits will be easy to identify and even quantify, whereas others will not. Regardless of whether the procedure ends after the specification proceeding described in Article 8, or whether the Commission adopts a non-compliance decision as described in Article 29, the main benefits will be in terms of 'increased contestability or fairness'.

There will also be a 'political component': successful proceedings will show European citizens that the DMA plays its role and thereby increase political support for its enforcement. It could be a good idea to prioritize, at least in part, infringements whose termination will have immediate tangible benefits in the early years of the DMA.[15] This category likely includes cases with big impact, either because the platform is large and economically important, or because the improvement for business or end users is very salient to those business or end users.

Our 'model' of the net benefits of opening an investigation could be enriched in many dimensions.[16] In particular, one should add the 'learning benefits from the investigation': learning about the technology, the constraints that bear on the firms, the harm done to other firms by the behaviour of the gatekeeper, the business model of the gatekeeper, the design of new methods for enforcing obligations, etc. The Commission will gain expertise at identifying and evaluating suspicious behaviour. Antitrust scholars have written about learning benefits in the context of antitrust investigations; they will be similar for the DMA.[17] The benefits will be especially significant when an investigation relates to obligations whose contours are not yet clear; it will be greater for obligations with broad application (eg, the obligations apply lots of services offered by several of the gatekeepers) than for obligations with narrow application (eg, the obligation applies only to one or two services of only a single gatekeeper).

Finally, we note that there is benefit in there being 'some uncertainty in the way in which the Commission chooses which cases to pursue'. For this reason, the Commission should conduct some investigations early that are outside of these guidelines; no industry or product type should be made to feel safe from enforcement, and there should be no types of conduct or breaches of the obligations the gatekeepers consider to be safe. On the other hand, the pay-off will be higher from pursuing a relatively high percentage of potential cases in which the benefits of finding an infringement are large and a relatively low percentage of potential cases in which the benefits would be minimal.[18]

[15] There is a paradox here. The DMA aims to change gatekeeper conduct so that all of them comply with all obligations. At the same time, however, proceedings and finding of infringement are in some sense necessary for showing that the DMA functions as intended!

[16] For dimensions and practice of priority setting in competition law cf O Brook and K Cseres, Policy Report: Priority Setting in EU and National Competition Law Enforcement, 2021, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930189> accessed 2 March 2023.

[17] R Podszun, 'Adaptive Antitrust Enforcement – Evolutionary Ideas for Reforming Regulation 1/2003' (2020) J Eur Compet Law & Pract 437; G Monti and B Rangoni, 'Competition Policy in Action: Regulating Tech Markets with Hierarchy and Experimentalism' (2022) 60(4) J Common Mark Stud 1106.

[18] A more complete analysis would also take account of the ways in which gatekeeper conduct will respond to changes in the Commission strategy.

Ensuring effective oversight

The probability of finding an infringement depends on the information available after the signal is received, ie, at the time of the decision to open the investigation. The Commission can significantly affect the quality of the signals because it will be designing the reporting environment. We have already pointed at information from third parties. In this section, we turn to the feature of compliance of gatekeepers. Competition law rarely requires those whose conduct is bound by rules to take steps that make enforcement of those rules easier, and thus more likely. The DMA, however, does just that. Inspired by the movement towards compliance management systems that entered boardrooms in the past years,[19] the DMA features strong compliance obligations that enlist gatekeepers as partners in their own regulation. The Commission will have to implement policies that ensure that these mechanisms work properly and help the Commission in enforcement. We look at two tools introduced in the DMA: reporting and the internal compliance function.

Compliance report

The quality of the compliance report

As we have already mentioned, it is up to the gatekeepers to prove compliance with the regulation. To do so, they must submit to the Commission an annual mandatory compliance report (Article 11). The better and the more explicit these reports, the easier will be the Commission's supervisory task. The reports must therefore contain in-depth analysis and explanations for why the gatekeepers believe that the policies they have adopted generate effective compliance.

Because the DMA provisions establishing the obligation to generate compliance reports contain few details, the Commission has significant leeway in drafting a set of requirements that harnesses the compliance reports' significant potential powers and uses.

Take the example of the prohibition of self-preferencing in ranking. There is a vast difference between stating 'we build our algorithms with data that does not include the identity of the seller' and 'we have conducted the following A/B tests to ensure that our search results do not show self-preferencing'. In the second case, the Commission must only—although this is not an easy task—check the quality of the A/B testing and review the results. In the first case, much more work is needed for the Commission to determine compliance. The cost of ensuring compliance will be very different in these two scenarios.

We therefore recommend that the Commission allocates sufficient effort, especially in the first years of the DMA, to identify, communicate, and enforce criteria for drafting the compliance report.[20] This suggestion is strengthened by the obligation of the gatekeeper to demonstrate compliance—it has the burden of showing that the measures taken are designed to achieve the aims of the DMA. Proper design of the reports' requirements will be crucial to successful enforcement.

An effective report should contain technical and economic facts and information describing how the gatekeeper complies with the DMA. This information must be detailed in a way that can be verified by the Commission and at a level of granularity that is useful and comprehensible. It will be important to have the explanation of why the platform believes its changes are effective in achieving contestability and fairness, including the platform's own analysis and quantitative measures of contestability and fairness. The platform may also

[19] M Rorie and B van Rooij (eds), *Measuring Compliance Assessing Corporate Crime and Misconduct Prevention* (Cambridge 2022).

[20] As under art 46.1.f DMA.

evaluate technical trends that impact interpretation of the data or suggest different outcomes that would be useful to measure. Gatekeepers could also partner with business users to help create feedback on new tools or interfaces.

An important point to stress about the compliance reports is that they are, in and of themselves, necessary to achieve contestability and fairness. This is relevant to the incentives for the gatekeeper to provide a sufficient report, since it means that not providing a good report will by itself have negative consequences. Therefore, an unsatisfactory or incomplete report should be seen as a signal that the obligation has not been met, and hence should increase the probability of finding an infringement.[21] A bad or missing report should trigger an investigation and generally bring the CPS higher in the enforcement priority order of the Commission in order to create an incentive to submit good reports.

The 'game' played by the Commission and the gatekeepers with respect to the quality of the reports will be quite complex. An obfuscatory report might signal non-compliance, and hence encourage the regulator to focus its attention on the gatekeeper who submitted it. An obfuscatory report also makes the monitoring task of the regulator more difficult, as the activities of the gatekeeper are less clear and finding the right questions to ask is more difficult; this will discourage the regulator from challenging the gatekeeper who submitted it. This second effect might well be more powerful than the first, and a focus on the short-run cost and benefits might therefore tempt the Commission to investigate more aggressively the authors of more informative reports. But such a response would, in turn, encourage obfuscation. This illustrates the need to give enough weight to the benefits of more aggressively investigation of the gatekeepers submitting confusing reports, as this will encourage transparency in the long run. We therefore recommend that the Commission dedicates important resources to the investigation of gatekeepers with the less informative reports, and signal that this will be the case.

The evolution of compliance report

After the first year, the annual compliance reports should also be required to show the effects of the changes introduced by the gatekeepers to comply with the DMA, as this will be critical for demonstrating their impact on the objectives of the DMA. Gatekeepers know best the changes they have made and have access to data on the results. Contestability might be reflected in quantitative indicators and measures such as business user access to consumers, business user entry, end-user choices, end-user switching, price changes, and the like. Fairness might be measured by analysing the different prices, fees, and rules concerning data on different sides of the platform. The Commission can develop standards and expectations that gatekeepers measure and report on readily available outcomes. Again, a gatekeeper that does not submit adequate evidence may be signalling that it is not in compliance with the law, so such conduct should lead to a greater probability of investigation by the Commission. The indicators and thresholds should evolve, and presumably become more stringent over time. The Commission should make clear that it will use its implementing powers to develop the indicators and thresholds over time.[22] Compliant platforms with complete reports will help the public, business users, and courts better identify which platforms are non-compliant.

[21] Economic theory (which we will not address here) supports the practice of treating the provision of no information as the equivalent of unfavourable information. There is an analogous feature of modern US and UK law called an 'adverse inference'. A judge can impose an 'adverse inference' when a litigant refuses or insufficiently complies with orders to provide data, documents, or testimony relating to an issue in dispute. The adverse inference deems the disputed issue conclusively determined against the uncooperative litigant. See *Black's Law Dictionary* (8th edn, 2004) <https://en.wikipedia.org/wiki/Black%27s_Law_Dictionary>.

[22] Under art 46(1)(f) DMA.

The non-confidential public summary

Article 11(2) obliges the gatekeepers to produce a non-confidential summary of the report. This summary is also an enforcement tool that can substantially lower the costs to the Commission. Indeed, it will help third parties inform the Commission of instances of non-compliance and in some exceptional cases, of misleading statements. For this reason, we think that only truly confidential data be omitted from the summary.

Moreover, the 'summary' of the report should be written by the platform to be useful to business users, end users, and competitors. In particular, the instructions for business users to take advantage of additional platform openness must be clear and explicit. The objective of the DMA is to rebalance access to consumers and the division of surplus away from gatekeepers and towards business users. Technical change on the part of the platform without explaining to business users and platform rivals how to use those changes to improve their services and innovate will not result in improved contestability and fairness. Likewise, end users need to be aware of the choices and tools available to them to move their business across gatekeepers and complements in response to better terms.

If the public report must contain detailed, clear, and actionable information for business and end users they will be better able to benefit from the changes. Furthermore, such a report will be more useful to civil society, competitors, and regulators in other jurisdictions as they will be able to follow and evaluate the enforcement process.

Many business users that will benefit from the DMA are small- and medium-sized enterprises (SMEs), which typically do not have staff dedicated to interacting with regulators. The Commission may want to establish a very low-cost method by which small business users can provide feedback on these public reports and CPS behaviour more generally. National authorities are well-positioned to assist with gathering this feedback due to their language and geographic advantages.[23]

Internal compliance function

Article 28 DMA obliges gatekeepers to have a compliance function, equipped with the necessary powers, status, resources, and independence. This idea takes its cue from positive experiences made with compliance management systems in the past years where corporations—in the wake of hefty fines and sanctions—moved to internal mechanisms of compliance. Such mechanisms, implemented inside the undertakings themselves, can help in enforcement. The staff in this role can serve as a quick point of contact for the Commission and this can be particularly helpful in the context of specification decisions or the provision of informal advice about how to comply with the DMA. Since the compliance officer needs to have direct access to the top management, communicating with them may lead to the quick resolution of issues where otherwise the Commission would need to deal with less specialized experts or people lower in the hierarchy. Including the compliance officer in all relevant communications and meetings with the Commission (including all DMA-related meetings and communications and others if they are relevant) will reduce the ability of the gatekeeper to remain strategically uninformed about Commission requests or priorities and will endow the compliance officer with the soft power that comes with full information. Compliance officers often establish training for staff and introduce a corporate culture that has a stronger understanding of, and respect for, the relevant law, not least to avoid significant fines. Furthermore, the compliance officer is well placed to take the lead in writing the compliance report given it is expected to be prepared in coordination with developers and management.

[23] As foreseen by art 27(1) DMA.

Because the Commission's relationship with each gatekeeper's chief compliance officer is key to streamlining investigation and enforcement, the Commission might consider developing procedures and expectations regarding regular exchange and communication with the chief compliance officer. The Commission should also do what it can to buttress the role of the chief compliance officer within the gatekeeper itself. To do so, it should require the annual report to explain the chief compliance officer's role in the company and at what stage of a new product/technology development the compliance team became involved.

It will be much easier to implement fairness and contestability by design in the initial engineering of platform services than much later by intervention of an external authority. It would be desirable if the compliance function gives signals to the gatekeeper's organization that certain practices may violate the DMA and can be sanctioned, thereby allowing the platform to choose a different technological path up front.

The compliance function has been favoured especially by the European Parliament, rather than the Commission. There is nothing in the recitals to illuminate the role of internal compliance for the working of the DMA. But considering the success of this approach in other contexts, we encourage the Commission to take a positive stance towards 'compliance culture' in companies and to develop procedures for regular exchanges and communication with the chief compliance officers. In setting priorities for enforcement, the Commission can then consider whether a company has a strong internal compliance function. Enforcement may be more effective if it concentrates on companies that lack meaningful processes of compliance.

Organization of the Commission

Finally, the internal organization of the Commission will—of course—heavily affect DMA enforcement. We understand that staff is drawn together from the Directorates General (DG) for Competition and DG CONNECT. DG Competition is experienced in enforcement through litigation, and DG CONNECT has more experience in regulation. The law envisions that enforcement starts from Day 1. But as a practical matter, new enforcement institutions often need some time to find the right approaches.

Avoiding the risk of losing on procedure

The Commission must do 'learning on the job', take cases, set precedent in its approach—and also take the risk of losing in court. Without strong and determined enforcement activities, including the risk of litigation, the DMA will not get going. The European courts will ultimately decide whether an approach is lawful or not.

In competition law enforcement, the Commission suffered some blows in important cases in the past years over procedural issues, eg, for not safeguarding the rights of parties correctly.[24] The DMA is relatively silent on the rights of parties, and in DMA enforcement, there is not an established framework for procedures. The risk of violating party rights can be minimized if the Commission works on procedural safeguards from the start. The Commission is expected to publish procedural rules and best practices very soon. These can be inspired by the procedural rules for mergers and the Antitrust Manual of Procedures, modulated where appropriate considering the learning effects from recent cases. Setting out clear procedures and safeguards may minimize the risk of losing in court on procedure while enhancing the foreseeability of proceedings for all the parties concerned, including third parties.

[24] For example, General Court, 15.06.2022, Case T-235/18 – Qualcomm; ECJ, 16.06.2022, Case C-697/19 P – Sony.

Making use of regulatory economies of scope

There will be synergies between different regulatory proceedings, as what is learned in one can be deployed in others. These 'economies of scope' will arise in two dimensions. The first dimension is the greater ease of enforcing different violations by the same gatekeeper. There is an important fixed cost in understanding the algorithms and the business model of any firm, especially firms as large, as complex, and as innovative as the designated gatekeepers. Once this understanding has been reached, for instance when exploring a possible violation of an obligation, it may be easier and less expensive to find other violations. The second dimension is that, once a violation of one obligation in the DMA list has been monitored for one gatekeeper, it will be easier to monitor it for any other gatekeepers. We note also that there may be economies of scope between enforcement of the DMA and other EU laws applicable to digital platforms that are enforced by the Commission, in particular the DSA.[25]

The two synergies should be mirrored in the organization of the Commission services in charge of the enforcement of the DMA. On the one hand, some of the staff will specialize by type of CPS and their related obligations. For example, it makes sense to ask one or several staff members to have a deep understanding of search and to be ready to intervene in proceedings centred on search. On the other hand, other staff could specialize in designated gatekeepers and develop a sophisticated vision of their business models and the relationship between their services (CPS and others). Any specification and non-compliance proceeding would require the combination of both types of staff.

It is important that the gatekeeper specialists be given a key, and maybe a leading, role for the following reasons. First, the DMA favours a holistic view of enforcement. The gatekeepers must write reports detailing what they have done to meet the different DMA obligations applicable to the CPS they provide and, as explained above, there is one compliance 'function' per gatekeeper. It therefore makes sense to have one primary point of contact at the Commission for each gatekeeper. The second reason is that knowing the firm decreases the cost of investigation: one knows which unit is responsible for what, the names of the knowledgeable employees, and so on. The third reason is more fundamental and, we believe, more important. The DMA is neutral regarding the business models of the gatekeepers, but there are many reasons why enforcement and even interpretation of the obligations should be shaped by the business model of the gatekeepers.[26] The staff of the Commission who focuses on a gatekeeper will be more aware of its business model and be able to interpret the obligations in its light.

The fourth reason is that some of the gatekeepers might try to escape obligations by such strategies as renaming some functionalities or reorganizing their services in a way, which hides the more problematic aspects of some CPS. It is important to recognize that full compliance might significantly reduce the profits of some of the gatekeepers. That potential profit loss creates financial incentives to evade regulation. Staff members who focus on the gatekeepers will be better able to discover, and hopefully prevent, this type of behaviour. We recognize that this might create a risk of different interpretation of the same obligations if different staff evaluate the same rule across different gatekeepers. We feel, however, that this risk can be mitigated by the existing coordination procedures between the different DGs within the Commission and the role of the Legal Service in ensuring consistent interpretation of the same legal text to different addressees.

[25] Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31, OJ [2022] L277/1

[26] C Caffarra and F Scott Morton, 'The European Commission Digital Markets Act: A Translation' (*Vox EU*, 5 January 2021) I.

Our suggestion would make the enforcement of the DMA resemble, in this respect, the Digital Market Unit that the Furman Report proposed for UK. Like our suggestion above, the bespoke regulation envisioned in the UK proposal is primarily designed around a specific gatekeeper and its business model. Some commentators had feared that such a unit would be susceptible to capture by the firms it is supposed to regulate; if this is the case, our proposal would also increase the risk of capture. We recognize the concern. It can be mitigated, if necessary, by rotation of staff, the role of the CPS specialist, and other strategies that the public sector knows how to deploy.

Employing digital workstreams

Regarding procedural rights of parties, the Commission should—as in enforcement overall—rely heavily on digital tools to help it. We recommend that the Commission establishes completely digital workstreams, incorporating technical legal features from the start so as to manage the stream of information. This will also enable teams to work effectively across geographic boundaries.

The Commission will benefit from deep knowledge of the inner workings of gatekeeper to hit the right points and to understand the complex interplay of technology and business strategies. It will be a challenge to preserve relevant knowledge, especially that of people who know the day-to-day workings of gatekeepers. Such a system should include information from national agencies and third parties and whistle-blowers.

It may also be valuable to ask for user experiences, which are valuable both in setting priorities and evaluating compliance. The German government, for instance, has installed a complaint mechanism for the DMA to collect both business and end-user complaints that it will use to help shape the priorities of the German agencies assisting in enforcement of the DMA.[27]

IV. LEVERAGING ANTITRUST ENFORCEMENT

Transitioning existing antitrust cases into DMA enforcement in a thoughtful and strategic manner can save on these resources by exploiting the existing knowledge regarding competition problems, by learning from previous (perhaps unsuccessful) attempts to redress these through remedies, and by building on the existing analysis of how to foster competition.

Many of the DMA obligations are derived from decided, or ongoing, antitrust cases. The insights generated by the Commission's analysis of antitrust cases have been generalized beyond the initial inspiring case to create many of the provisions in the DMA. Table 1 shows the correspondence between DMA obligations and past or ongoing antitrust enforcement.

Although antitrust can have a role in addressing such issues, EU lawmakers determined that it is insufficient to remedy the problems posed by digital gatekeepers and therefore chose a regulatory path.[28] The DMA requirements for platform behaviour are more expansive than antitrust remedies in two ways. First, they may apply to more than one corporation (all the relevant CPSs) in a market or industry. Second, they mandate affirmative steps to make markets more contestable, rather than simply prohibiting past conduct or levying a fine. Thus, they have the capability to deter a wider swath of behaviour as well as improve competition in a large number of markets.[29]

[27] See press release of the Ministry for Economics and Climate Protection, 13 October 2022, <https://www.bmwk.de/Redaktion/EN/Pressemitteilungen/2022/10/20221013-start-of-the-digital-markets-act-economic-affairs-ministry-launches-consultation-on-experience-with-digital-platforms.html> accessed 2 March 2023. The e-mail-address is DMA@bmwk.bund.de.

[28] DMA, recital 5.

[29] This is the legislators' intention. DMA, Recitals 10 and 11.

Table 1: DMA obligations and antitrust cases

	ARTICLE 5	***Antitrust cases***
5(2)	No data fusion without user consent	*Facebook (Germany)*[a]
5(3)	No wide and narrow MFN/parity clauses or exclusive dealing	- *Amazon E-Book 2017*[b] - *Booking (various NCAs) (2017)*[c]
5(4)	No anti-steering	- *Apple App Store SO 2021*[d]
5(5)	No anti-disintermediation	- *Apple (Netherlands) 2021*[e]
5(6)	No prevention of raising issues with public authorities	- *Amazon (Germany) 2019*[f]
5(7)	No tying CPS to ID or payment services	
5(8)	No tying regulated CPSs	- *Microsoft Explorer 2009*[g] - *Google Android 2018*[h] - *Google AdTech (ongoing)*[i]
5(9)	Online ads price transparency for advertisers	
5(10)	Online ads price transparency for publishers	
	ARTICLE 6	
6(2)	No use of data related to business users to compete against them	- *Amazon Marketplace SO 2020*[j] - *Facebook Marketplace (ongoing)*[k]
6(3)	Allow un-installing of apps and default changes unless essential to OS/device	- *Microsoft Explorer 2009*[l] - *Google Android 2018*[m]
6(4)	Allow 'side loading' of third-party apps or app stores, unless threatens integrity	- *Apple App Store SO 2021*[n] - *Apple (Netherlands) 2021*[o]
6(5)	No self-preferencing in rankings	- *Google Shopping 2017*[p] - *Amazon Buy Box (ongoing)*[q]
6(6)	No technical restriction of switching or multi-homing across apps using OS	
6(7)	Access and (vertical) interoperability for business users and ancillary services to OS should be as for proprietary ancillary services	- *Apple Pay-NFC SO 2022*[r]
6(8)	Online ads performance transparency	- *Google AdTech (ongoing)*[s]
6(9)	Data portability for end-users: real time and free	
6(10)	Data sharing of business-users' data: real time and free	
6(11)	Data sharing of click and query data: FRAND	
6(12)	Access FRAND to app stores, search and social network	- *Google (France) 2020*[t]
6(13)	No disproportionate conditions or process for termination of service	

[a] Bundeskartellamt, 6.2.2019, B6-22/16. Currently under appeal by the European Court of Justice. See the opinion of Advocate General Rantos, 20.9.2022, C-252/21.
[b] COM, 4.5.2017, AT.40153.
[c] Konkurrensverket, 15.4.2015, dnr 596/2013; Autorité de la concurrence, 21.4.2015, 15-D-06; Bundeskartellamt, 22.12.2015, B9-121/13; Autorità garante della concorrenza e del mercato, 23.3.2016, I779B.
[d] COM, 30.4.2021, AT.40437 (press release).
[e] Autoriteit Konsument en Markt, 24.8.2021, ACM/19/035630, confirmed by Rechtbank Rotterdam, 24.12.2021, ROT 21/4781 en ROT 21/4782.
[f] Bundeskartellamt, 17.7.2019, B2-88/18.
[g] COM, 16.12.2009, AT.39.530.
[h] COM, 18.07.2018, AT.40099.
[i] COM, 22.6.2021, AT.40670 (press release).
[j] COM, 20.7.2022, AT.40462 (market test notice).
[k] COM, 4.6.2021, AT.40684 (press release).
[l] COM, 16.12.2009, AT.39.530.
[m] COM, 18.07.2018, AT.40099. Largely upheld by the General Court, 14.9.2022, T-604/18.
[n] COM, 30.4.2021, AT.40437 (press release).
[o] Autoriteit Konsument en Markt, 24.8.2021, ACM/19/035630, confirmed by Rechtbank Rotterdam, 24.12.2021, ROT 21/4781 en ROT 21/4782.
[p] COM, 27.6.2017, AT.39740. Currently under appeal by the European Court of Justice (C-48/22 P).
[q] COM, 20.7.2022, AT.40703 (market test notice).
[r] COM, 16.6.2020, AT.40452 (press release).
[s] COM, 22.6.2021, AT.40670 (press release).
[t] Autorité de la concurrence, 21.6.2022, 22-D-13.

The contrast in the potential efficacy of the two tools, combined with their now simultaneous application to several of the same cases of conduct, sets up the main point we make in this section. DG Competition should be concerned that bringing some ongoing antitrust cases to a close, such as those against Amazon and Apple, would involve extensive time and resources, or that obtaining useful and timely remedies would be a challenge. But helpfully, much of the conduct in those cases is also covered under the DMA. Therefore, the Commission has the option to transition those cases over to regulation and take remedies under the DMA either in addition to, or instead of, using Article 102 TFEU.

We set out our discussion of how this transition may be carried out in the following way. In 'Typology of EU antitrust cases' section, we cover how one might manage the ongoing antitrust cases that have been launched by the Commission based on concerns that the conduct infringes Article 102 TFEU and that the conduct is regulated under the DMA. We create four options for the regulator, two of which entail parallel application of antitrust and DMA and two of which entail abandoning the antitrust case and focusing only on the DMA. In 'Some legal issues on the relationship between antitrust and the DMA' section, we review the principal legal issues that should be confronted in applying these options. In 'Strategic choices' section, we make recommendations based on the likely enforcement strategies of the Commission and the compliance strategies of the firms. In 'Application to existing EU antitrust cases' section, we give some examples by reviewing a number of ongoing antitrust cases to discuss how these might be handled given the framework we have constructed. Then we develop the interplay between these European laws and national competition law cases ('National antitrust cases' section). We finally propose a way to assign cases in the future to the path of abuse of dominance under competition law (Article 102 TFEU) or to the DMA path ('The choice between the DMA and antitrust in future cases' section).

Typology of EU antitrust cases

There are four possible enforcement options for conduct that is governed by both the DMA and the Article 102 TFEU. In this section, we describe the advantages and disadvantages of those options. The analysis depends critically on whether all the elements of conduct in an antitrust case fall fully inside the rules specified in the DMA or has elements that fall outside. We show these two options as Venn diagrams (Figure 1). A type A example is one where the elements of the Article 102 TFEU case are all covered under the DMA. In contrast, a type B case has some piece(s) of the gatekeeper's conduct that fall outside the scope of the DMA but may constitute abuse of dominance. The discussion below will cover both kinds of cases and provide examples of each type. We will emphasize the setting where the whole antitrust case falls within the ambit of the DMA (type A), because this fits many of the cases that inspired the DMA in the first place.[30] Since antitrust cases move slowly, we assume the Commission can conclude any ongoing antitrust case after the date when compliance is required under the DMA (around March 2024), or commitments can be made in 2023 to settle the case.

As an example of a type B case, consider platform conduct that includes, as one element of challenge, a supra-competitive monetary price to consumers. The fairness provision of the DMA seems not to be designed with respect to consumers, but rather with respect to the smaller complementary businesses that use these platforms.[31] Therefore, Article 102 TFEU

[30] As explained in the Impact Assessment Report of the Commission Services on the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD (2020) 363, pp 53–60.

[31] According to some of us, this is a flaw in the DMA because it does not permit it to solve some contestability and fairness problems that apply to end consumers only, see J Cremer and others, 'Fairness and Contestability in the Digital Markets Act' (2021) Yale Tobin Center for Economic Policy, Policy Discussion Paper 3.

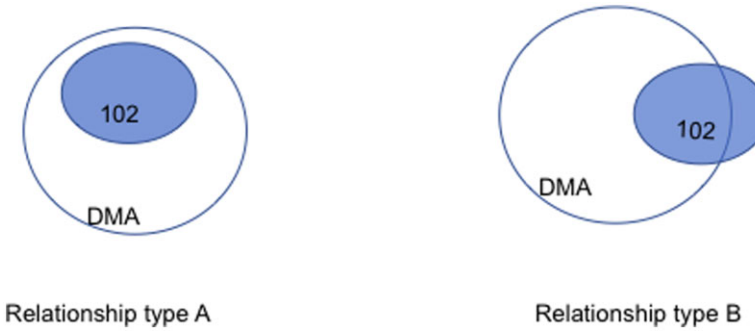

Figure 1. Possible relationships between Article 102 TFEU case and the DMA.

could generate an excessive pricing element that may fall outside the DMA rules. Or consider the collection and use of data: some of these activities are regulated by the DMA, while the excessive collection of data by a dominant company discussed by the German Competition Authority in the Facebook case could fall within the Article 102 TFEU.[32]

Option 1: continue the antitrust case and later apply the DMA

In the case of conduct that is actionable under both laws but is presently under antitrust investigation, one option would be to continue the Article 102 TFEU case and move to issue an infringement decision (or a non-infringement decision).[33] An infringement decision allows the Commission to identify past harm and impose a fine and remedial action. The decision may facilitate private follow-on damages claims and thus achieve both deterrence and punishment. Such a finding also expresses public disapproval of the firm's conduct. Of course, the DMA remains available to be applied later should circumstances change or if the EU courts rule against the Commission's antitrust findings.

The disadvantages of this approach are familiar: significant resources are needed to show dominance and abuse, not least given the case law of the European Court of Justice (ECJ) sometimes insisting on a somewhat regimented effects-based analysis whose contours remain to be specified.[34] The effectiveness of any remedy under antitrust is widely viewed as a weakness of Article 102 TFEU. Appeals of Article 102 TFEU decisions are likely; these commit further resources and take years to carry out. Furthermore, the standard of review exercised by the courts today is arguably higher than in the past and even after a careful analysis by the Commission, there is a risk of being overturned by the court.[35]

Nonetheless, this path is attractive if the Commission wishes to identify as abuse a broader palette of conduct than would be possible to regulate under the DMA (type B). The reach of the DMA, and the extent of compliance with it, will determine what antitrust theories can be pursued and what remedies will be needed.

[32] Opinion of AG Rantos in Case C-252/21 *Meta v Bundeskartellamt.*

[33] Regulation 1/2003, art 10 allows the Commission to decide that there is no infringement in cases where the public interest so requires. This/ has never been done even if it could serve to clarify the law.

[34] Consider in this context the relatively basic questions about the analytical framework of art 102 sent by an experienced Italian court to the ECJ in *Servizio Elettrico Nazionale SpA* and *Others v Autorità Garante della Concorrenza e del Mercato and Others*, Case C-377/20, EU:C:2022:379, and the demanding approach the General Court required in the analysis of rebates in *Intel v Commission*, Case T-286/09 RENV, EU:T:2022:19.

[35] Since the creation of the General Court, the decisions of the Commission have been reviewed in much more depth than previously, see, eg, *Airtours plc v Commission*, Case T-342/99, EU:T:2002:146, *Intel v Commission* (above n 5). The Court's powers in this respect were noted early on, see M van der Woude, 'The Court of First Instance: The First Three Years' (1992) 16 Fordham Int Law J 412.

Assuming the DMA has not yet come into force, what will the response of the parties be? A platform may conclude that it will be required to adopt all the expected antitrust remedies when the DMA kicks in. In principle then, an infringement decision does not change the conduct the platform must follow starting in 2024. Nonetheless, it may still wish to fight the antitrust case to avoid financial penalties or redress actions, or to delay behaviour change and the resulting potential competition until it is required to comply with the DMA. Indeed, if the platform thinks it can successfully challenge some DMA obligations and avoid compliance with those obligations, then it may treat the antitrust case as if it is standing alone which would incentivize the platform to fight a strong Article 102 TFEU remedy.

Option 2: close the antitrust case with a commitment decision that reflects the DMA

The next logical option is to continue the antitrust case but remain open to commitments from the platform that would satisfy the competition problems.[36] From the company's side, instead of fighting, it can offer commitments and avoid a decision on liability by the Commission. The lack of liability will disincentivize private claims since there is no follow-on action possible. Such a commitment would involve agreeing to comply with the DMA a bit earlier than would otherwise be the case.[37]

The advantages of commitments are that they achieve a speedier resolution of the antitrust case and allow a collaborative design of remedies while third parties also have a say in the market test.[38] Under the DMA there is more certainty about what solution to achieve contestability is required and adopting the DMA specifications may allow the Commission to design a faster and more collaborative process. Having said that, because we are thinking about cases occurring early in the evolution of DMA enforcement, the details of executing that solution will likely involve 'further specification' as well as iteration over time between a platform's actions and Commission evaluation, so the solution will not arrive instantly.

Again, in our type A setting, the Article 102 TFEU commitments that resolve the antitrust concerns would in any case be necessary to achieve compliance with some obligations of the DMA when it comes into force. This overlap would make adoption attractive to a platform that is not planning to fight the DMA, because the commitments made can also be used to satisfy compliance with some of the DMA obligations. In our type B setting with a broad antitrust case, accepting commitments that comply only with the DMA might fail to stop other forms of conduct that pose competition risks. Because efforts to combat those behaviours would be abandoned when the Article 102 TFEU case is settled, the Commission should guard against opportunistically narrow commitment offers. Of course, NCAs would be free to pursue any abandoned Article 102 TFEU claims that had not been addressed by the commitment decision.

A benefit of Option 2 is that, if the commitment decision is drafted in a manner that requires compliance with both instruments, the newly designated gatekeeper can demonstrate compliance with relevant DMA obligations simply by submitting the commitment documents. The platform and the Commission both save resources by avoiding what otherwise might have been a full-fledged inquiry into the relevant conduct or business practice.

[36] The Commission is not obliged to accept commitments, but this path is convenient for it if it allows it to secure compliance more quickly than by continuing the infringement procedures.

[37] This may be the strategy Amazon took with the German Cartel Office in the Terms & Condition case and in the ongoing cases before the European Commission in the Marketplace case: <https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40462> accessed 2 March 2023; and in the BuyBox case: <https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40703> accessed 2 March 2023.

[38] Regulation 1/2003 art 27(4). The Commission may notify persons who are likely to be affected by the outcome of the case and request their comments. U von Koppenfels and F Christ, 'Commitments' in E Rousseva (ed), *EU Antitrust Procedure* (OUP 2020) para 8.58.

The fact that several antitrust cases inspired the DMA is critical to the analysis here. The desired remedies for troublesome antitrust cases 'are already reflected' in the DMA rules. This indicates it is possible that ongoing Article 102 TFEU cases may be easily closed with commitment decisions that comply with the DMA. The platform likely understands that this is the remedy the Commission wants, and further anticipates it will have to comply with those rules eventually regardless of the outcome of the competition case. Thus, DG Competition may be able to obtain a better commitment decision due to the DMA. NCAs seeking effective remedies may also try to settle their Article 102 TFEU case with the DMA, because this would permit the obligations to apply across the EU instead of only in the Member State of the NCA.[39]

Compliance with the DMA may be very costly for some firms, in that compliance will impede or eliminate firm's prior ability to earn monopoly profits. Firms finding themselves in this situation have an incentive to delay compliance as long as possible and therefore not offer commitments. As highlighted in Option 1, such a firm may choose to fight the competition case and challenge the DMA obligation rather than looking for a commitment decision. Resistance to the DMA could run from litigation on the interpretation of the DMA obligations to creative ways to slow down the regulatory process and the date at which any effective changes in conduct take place. In this scenario, having two differentiated tools that can be deployed at the same time may be helpful to the Commission if it must enforce against a platform using such a delay strategy.

If the Commission chooses to maintain both legal tools and seek a commitment that will satisfy both, then, in our view, non-compliance with the commitments must become an enforcement priority as it would be a violation under two separate laws (and therefore particularly harmful to deterrence and to the rule of law).

Option 3: abandon the entire antitrust case and apply the DMA

The Commission could abandon the antitrust case if it sees no benefit in imposing a fine or securing compliance before the DMA duties kick in to require a change of conduct. It makes sense to abandon the pursuit of conduct regulated under the DMA if a competition decision adds little value (which we assume to be the case in setting A). As we note above, however, given the uncertainty of which gatekeepers will be identified, whether the DMA will be challenged in whole or in part, and how long it will take to further specify certain obligations, the Commission might be giving up a useful enforcement tool if it prematurely closes an Article 102 TFEU case. A compromise position might be to slow down the antitrust investigation, and in that way save resources, while preserving the option to finish the case if needed.

The standard cost–benefit trade-off will apply here, namely (i) how close the Commission is to a final decision, so how much additional resources would be required for the Article 102 TFEU case; (ii) whether there are benefits in terms of retrospective sanctions or the ability to facilitate subsequent damages action; and (iii) whether the firm is interested in making a commitment under Article 102 TFEU.

A key factor in choosing this strategy is that the Commission's history of antitrust investigations should markedly speed up its enforcement of related provisions in the DMA. Rather than determining from scratch exactly how a particular conduct is harming contestability, gathering evidence, evaluating the evidence and data, and considering what the most effective

[39] For example, the remedy that the ACM accepted a commitment by Apple to allow users of dating apps to pay other than via Apples payment system but this only applies in The Netherlands. See <https://developer.apple.com/support/storekit-external-entitlement/> accessed 2 March 2023; 'The entitlements that comply with the ACM order are only available for dating apps on the App Store in the Netherlands, and apps distributed pursuant to those entitlements must only be used in an iOS and/or iPadOS app on the Netherlands storefront.'

remedy will be, the team at the Commission that has been investigating that market for years can simply leverage its existing knowledge to enforce the relevant DMA provision. While this strategy may appear to be abandoning the antitrust case, to the extent that the learning remains with the Commission, it can be applied under the new instrument. The fact that Commission staff are already informed and expert in particular areas means that, for those cases, DMA enforcement begins at a point that is most of the way along the enforcement path.

Option 4: abandon the 'duplicate' part of the antitrust case if those competition concerns are addressed by the DMA

The Commission could abandon the Article 102 TFEU case for those types of conduct covered by the DMA but continue investigating the conduct that is not covered by the DMA (in scenario B cases). Whether the remaining competition concerns merit continuation depends on what conduct and harms would be 'left behind' because the DMA does not address them in the case, and the likely harm caused by conduct that is not regulated under the DMA. This option may be exercised either by an infringement or a commitment decision and could be carried out by the Commission or an NCA.

Above, we have sketched the possible reasons for picking each strategy. One additional consideration when picking an option is the timing of 'when' the infringement occurred. Option 3 (abandonment of antitrust) makes sense for cases in which the infringement is relatively new so that there is no past harm to penalize, and a forward-looking remedy suffices. Options 1 and 4 (issue an infringement decision) make sense if punitive measures are deemed useful to address past conduct.

Some legal issues on the relationship between antitrust and the DMA

Ne bis in idem

From a legal perspective, the first point to note is that nothing stops the parallel application of Article 102 TFEU and the DMA when these two instruments focus on different forms of conduct. Importantly, 'even if the same conduct' is scrutinized using both instruments, the ECJ has recently rendered a judgment that allows the Commission to investigate while the antitrust case is pending. In *bpost SA v Autorité belge de la concurrence*,[40] the tariffs set by the incumbent postal service operator were condemned by the postal regulator based on sector-specific rules first and by the competition authority on the basis of a finding of abuse of dominance second. When bpost challenged the legality of the second infringement procedure for breach of the right against double prosecution (*ne bis in idem*), the ECJ confirmed that parallel proceedings do not infringe the principle of *ne bis in idem* provided two conditions are met: (i) a substantive condition by which the two rules must pursue different objectives; (ii) a set of procedural requirements are met: the defendant can foresee the parallel application of the two rules, the agencies coordinate, the two cases are brought close to each other in time, and the overall penalty is calculated having regard to the duplication of proceedings.

This judgment is of great interest for the DMA and seems to open up the possibility of parallel actions as we describe in Option 1 above. Regarding the first condition, the ECJ held that the rules opening postal services to competition pursue a different aim than competition law: the former are about liberalization (perhaps analogous to contestability) while the latter are about undistorted competition.[41] The criteria for the second condition are largely

[40] Case C-117/20 *bpost v Commission*, EU:C:2022:202.

[41] This dictum also suggests that challenging the DMA (with its explicit goals of contestability and fairness) for replicating competition law (fostering competition) will not get judicial support. This is also why the ECJ rejected the request to annul

embedded in the DMA. For antitrust cases in which the Commission has instituted proceedings before the DMA was agreed upon, however, a gatekeeper may have good grounds to say that at that time the DMA did not exist and so it could hardly foresee that application of the DMA obligations. A possible way of addressing this objection would be for the Commission to declare that the antitrust case will not be investigated from the time that the DMA obligations start. This means that when exercising Option 1 the Commission would be seeking to find an infringement under Article 102 TFEU for past conduct while, when enforcing the DMA, it will be seeking compliance for the future. This would mean that the two enforcement actions concern different facts and therefore *ne bis in idem* would not bite.

Exchange of confidential information

A second legal issue that is worth discussing is the extent to which the antitrust file may be transferred to the unit in the Commission applying the DMA. Generally, confidential information obtained by the Commission during antitrust proceedings may not be transmitted to others.[42] An exception exists for cooperation between the European Commission and NCAs in the application of Articles 101 and 102 TFEU that allows confidential information to be transmitted from one agency to another. But the exemption applies only if the receiving authority applies Articles 101 or 102 TFEU 'in respect of the subject-matter for which it was collected by the transmitting authority'.[43] The receiving authority may use that information also to apply national competition law but here only if the application of national competition law in parallel to EU competition law 'does not lead to a different outcome'.[44] It follows that unless specific provisions for the sharing of information are set out in secondary law, confidential information may not be transmitted to the Commission team tasked with applying the DMA. And even then, it is unlikely that legislation could allow for confidential information obtained under one legal basis to be transferred to a body that uses it to apply a different set of rules.[45]

This is not necessarily a barrier to using information gained while carrying out an antitrust procedure into a DMA proceeding: the Commission may simply request the information a second time under the appropriate legal basis. The Court has recognized that officials are not required to 'undergo selective amnesia' and may use knowledge acquired using one procedure as circumstantial evidence to make a request for information on another legal basis.[46] Given that some of the same Commission staff investigating the Article 102 case will be enforcing similar issues in the DMA, they will be familiar with both cases. This will permit staff to promptly make additional document requests when material would be useful to the other investigation. We recommend establishing rules or norms such that when an arm of the Commission requests information—in the same format—that has already been given to another arm of the Commission, the deadline for compliance is extremely short, eg, a few working days.

the telecommunications liberalization Directive because it was pursuing similar objectives than those of competition law: C-202/88 *France v Commission*, ECLI:EU:C:1991:120.

[42] See, eg, art 16, Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to arts 81 and 82 of the EC Treaty [2004] OJ L123/18.

[43] art 11(2), Regulation 1/2003.

[44] art 11(2), Regulation 1/2003.

[45] But see Schweitzer <https://op.europa.eu/en/publication-detail/-/publication/1851d6bb-14d8-11eb-b57e-01aa75ed71a1> accessed 2 March 2023. In Schweitzer's view, it would be possible for secondary legislation to allow the transfer of information from one proceeding to another provided that both are the same type of proceedings for the purposes of the European Convention on Human Rights. Conversely, if information obtained during an administrative proceeding were to be transferred to a body that may impose quasi-criminal penalties then this exchange of information would be forbidden because it harms the rights of the party to due process.

[46] See, eg, *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others*, Case C-67/91, EU:C:1992:330: an NCA, on obtaining information from the Commission pursuant to EU antitrust proceedings, may use this knowledge to open proceedings to seek information from the parties under national law.

Note also that in merger cases parties often waive confidentiality rights to allow antitrust agencies from different jurisdictions (eg, USA and EU) to assess a merger jointly. This serves to accelerate regulatory clearance and allows agencies to coordinate on the design of remedies. Likewise, under the DMA, gatekeepers may wish to waive confidentiality rights and agree for confidential information to be shared if the Commission proposes to assess conduct under the DMA instead of Article 102 TFEU.

Strategic choices

The transition from antitrust to regulation brings up strategic issues both for the Commission and for the platform in question. The Commission will want to use what it judges to be the stronger tool at any moment to achieve maximal speed and strength of the overall effort to obtain contestability. Thus, it seems unlikely that it will be best to choose to enforce using 'only' Article 102 TFEU or 'only' the DMA. Rather, it seems likely to us that Option 2 will be the best strategy most of the time. Closing the antitrust case with commitments that mirror the DMA obligations lessens the time consumers must wait for more contestable markets as well as reducing antitrust enforcement risk for the Commission. Moreover, there will be little uncertainty about what remedy is required if the DMA rules were designed with problematic antitrust cases in mind and this knowledge is leveraged into the DMA. Those antitrust cases were either not proceeding quickly enough, or antitrust rules did not capture the exclusionary behaviour, or the remedy available under antitrust did not create contestability, and these issues are presumably reflected in the DMA. At the same time, the Commission would be reserving the right to use antitrust should the platform resist enforcement under the DMA.

Regardless of what happens under Article 102 TFEU, a platform that does not plan to contest the legality of action under the DMA will need to comply with the DMA rules within a relatively short period of time. The cost of complying a little bit earlier is likely to be lost profits (due to lessened market power). The benefit to the gatekeeper is enforcement certainty as well the avoidance of litigation costs. A second benefit is that when both investigations can be settled with the same package of behaviour, this will be efficient both in the short term and for the longer-term compliance. For example, a gatekeeper could file the same report to demonstrate both compliance under Article 102 TFEU and the DMA. And third, a gatekeeper starting early into discussions with the Commission may have the benefit of a first-mover advantage: Defining the requirements of a certain provision in the DMA as the first gatekeeper to do so may mean benefits over other gatekeepers who must later follow the same path and use similar solutions.

The strategic issues are even more interesting for other jurisdictions that have antitrust laws but do not (yet) have regulation.[47] In the USA, for example, there are several antitrust cases running against Google.[48] Where the DMA rules adequately address the antitrust harms, the plaintiffs in those cases may find it to their advantage to seek remedies identical to those in the DMA. First, a US court will know it is a feasible and proportionate remedy, with little to no incremental implementation cost to the platform, and no threat to the existence of the platform's business viability (provided the gatekeeper is still open for business in Europe). Second, because all of Europe is also adopting this remedy, a US court can rest assured it is not going out on a policy or technological limb; and by the time US appeals are exhausted and the remedy is being decided there may even be European evidence of the impact of the remedy on entry and competition.

[47] A Fletcher, 'International Pro-Competition Regulation of Digital Platforms: Healthy Experimentation or Dangerous Fragmentation?' (2023) 39(1) Oxford Rev Econ Policy 12–33.

[48] See B Brody, Here's our cheat sheet for 2022's tech lawsuits, Protocol, 2 January 2022, <https://www.protocol.com/policy/tech-lawsuits-22> accessed 2 March 2023.

While structural remedies are generally favoured over behavioural ones in the USA, the nature of the DMA's enforcement in Europe puts remedies based on its rules in a unique category. Furthermore, platforms should find these remedies to be low-cost and may want to embrace them for that reason.[49]

Application to existing EU antitrust cases

In this section, we work through some illustrative examples showing how to operationalize the ideas above. We take public information about these cases, assume it is true, and simplify/stylize it in order to craft settings to illustrate our points. The examples do not represent any author's complete thinking about any case.

The Apple NFC chip: type A example where commitments solve both antitrust and the DMA requirements

We start with Article 6(7) DMA, which requires access and interoperability to the same features of the OS for hardware and software providers. This provision echoes the Commission's case against Apple relating to the NFC chip and the digital mobile wallet. The Statement of Objections in this case was issued by the Commission shortly after the agreement on the DMA, on 2 May 2022. The Press Release says Apple's policies harm competition 'in the mobile wallets market on iOS'.[50] The antitrust case is constructed in this manner: Apple holds a dominant position in the mobile wallet market. It abuses this position by limiting access to a standard technology used for contactless payments with mobile devices in stores ('NFC' or 'tap and go'). The result of this conduct favours Apple Pay and excludes rival providers of mobile wallets. There is clear overlap between the antitrust concerns and the DMA.

Running the antitrust case will require analysis of the impact of the refusal to give equal access to application programming interfaces to rival wallet providers on competition in the downstream market, namely the payment options users can choose on the device. The antitrust case might be slowed down by debates over what the relevant market is, what the correct legal standard for analysing this refusal to cooperate with other firms is, and on whether there are likely anticompetitive effects. Conversely, under the DMA the Commission can focus solely on the remedy that follows from the obligation in Article 6(7).

In this setting, Apple could make commitments that would resolve the competition concerns and the DMA concerns simultaneously. From the undertaking's perspective, this avoids protracted litigation and the risk of a fine and reduces compliance costs by proposing commitments that also address the DMA duties.

The key point of discussion for the Commission and Apple then becomes how to operationalize compliance having regard to the proviso in Article 6(7): 'The gatekeeper shall not be prevented from taking strictly necessary and proportionate measures to ensure that interoperability does not compromise the integrity of the operating system, virtual assistant, hardware or software features provided by the gatekeeper, provided that such measures are duly justified by the gatekeeper.' The gatekeeper might require that a mobile wallet provider meets certain technical criteria or require some sort of testing of its services before granting access. It must, however, first show that these measures are necessary and that the design features requested of the rival are not more stringent than those required of the gatekeeper's own mobile wallet.

[49] By 'low cost' we do not mean relative to keeping a monopoly position, but low cost relative to designing and running two different remedies while losing a monopoly position.

[50] Case AT 40.452. European Commission, Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay (Press Release IP/22/2764, 2 May 2022).

Amazon Buy Box: type B example where commitments solve the DMA requirements and antitrust is abandoned

The 'Buy Box' refers to the white box on the right side of the Amazon product detail page, where customers can add items for purchase to their cart. Amazon's algorithm selects a single seller for the Buy Box. In the jargon, sellers compete to 'win' the Buy Box. Winning is critical for profitability because most buyers tend to choose the seller in the Buy Box even if there are other sellers competing to sell the same product. The Commission opened an investigation based on concerns about the objectivity of the criteria to win the Buy Box: (1) are there conditions that govern the selection of the Buy Box that favour Amazon products or sellers who use Amazon's logistics and delivery services (the so-called 'fulfilment by Amazon or FBA sellers')?[51] In the same case, the Commission raises a second issue unrelated to the Buy Box: (2) whether third-party sellers can reach Prime users. Prime users make more purchases than non-Prime users, so denial of access to Prime users has a major impact on sellers.

For the moment, assume that (i) Amazon's algorithm leads to favourable rankings of its own products or the products of those sellers who also use Amazon's delivery services and (ii) the algorithm makes it hard for third-party sellers to compete to sell to Prime users. Does all this conduct fall within Article 6(5) DMA? It is not obvious. This provision covers favouring in ranking services and products offered by the gatekeeper: it therefore surely covers instances where the algorithm favours Amazon goods over those of rivals. Would it also apply if the algorithm gives priority to sellers who use Amazon delivery at the expense of sellers who do not? Perhaps yes because this favours Amazon's delivery services over the services of rivals, but the text is not completely clear on this.

Even if we agree that this conduct is covered by the DMA, there is also a tricky technical issue for a regulator to solve. If the ranking perfectly reflects consumer preferences and consumers prefer Amazon delivery, this should not be a violation of Article 6(5) since the ranking would be unbiased in that case. In a setting like this, a regulator must be able to evaluate the algorithm used by the platform in order to determine if the weight put on delivery reflects the preferences of consumers. In its filings, the platform will have a responsibility to prove to the Commission that the weights it uses are appropriate and fair. Evaluating the compliance reports that Amazon submits to the Commission on this issue will require expertise in data and algorithms. Furthermore, it is unclear that denial of access to Prime customers is covered by Article 6(5).

At the time of writing, Amazon has offered commitments to resolve this concern in four ways. First by applying non-discriminatory conditions to determine which product wins the Buy Box. Second, by proposing a second displayed offer in the Buy Box. Both remedies combined would ease entry of rivals. Third, other sellers are entitled to access Prime customers provided they have fulfilled certain conditions. Fourth, sellers are eligible for access to Prime customers even if they use a delivery option other than Amazon. However, press reports suggest that Amazon's first round of commitments to resolve the Commission's competition concerns has been rejected and a further set of commitments are expected.[52] Without engaging on the merits of the proposed commitments here in detail, the concern expressed is that the commitments give too much leeway to Amazon to determine who is eligible and the second displayed offer is set in a way to put consumers off (the consumer is advised that ordering the second display may entail a later delivery). At the same time, the tenor of the commitments offered suggests that Amazon is willing to open its platform to facilitate easier

[51] Case AT 40.703 *Amazon Buy Box* (Proceedings opened 10 November 2020). There is also a second case AT.40462 which is about Amazon's use of non-publicly available data generated by sellers. Amazon has also made commitments to resolve this antitrust concern. This conduct has also been penalized by the Italian competition authority.

[52] 'EU's Vestager takes second shot at redesigning Amazon's website' Politico 19 October 2022.

Box 1: The digital display advertising market

In the digital display advertising market, we have publishers on one side (e.g., the Financial Times) who sell online advertising space to firms wishing to advertise (e.g., a hotel chain). The bringing together of multiple buyers and sellers of advertising space is carried out by three services: (1) publishers utilize ad server tools, which keep an inventory of all advertising space on sale; (2) advertisers use ad buying tools that carry out its chosen campaign, i.e., types of audience and publications that the advertisers wish to appear on; and (3) finally ad exchanges bring together ad servers and ad buying tools and serve as a platform where the trades take place.[53] Every time a user logs on to the Financial Times all three services are activated; in theory, the advertisers keenest to reach the user in question will place the higher bids, the one posting the highest bid will be selected by the publisher, and it will be displayed the reader who has just logged on. This means that the system is activated every single time a user visits a website: the speed at which these transactions occur, and volume of transactions, make these markets effective and economically important. The concern today is that all three services are dominated by Google, which has the incentive and ability to exclude rivals and is alleged to have done so in multiple jurisdictions. The case is being litigated currently in the US and an investigation in the EU is ongoing.

access by sellers. This might be an instance where, provided commitments are likely to be effective, applying antitrust law may yield a potentially wider-reaching remedy than solely applying the DMA.

Google ad tech: type B example where compliance with the DMA may not be sufficient to create contestability and the antitrust investigation will continue

The ad tech value chain falls under the DMA where the 'online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services' are provided by an undertaking that provides any of the CPS outlined in the DMA. Google will likely qualify as a gatekeeper in these CPS (Box 1).

Will the DMA be able to make these markets more fair and more contestable? The DMA creates a different environment that may reduce Google's advantages and invigorate competition going forward. First, Article 5(2) prohibits combining data across functions without user permission. Google is the company that has many functions (eg, Gmail, maps, browser, and more) and uses them to combine data; other ad tech players do not offer as many functions. If users choose not to link those data, this will help level the playing field between Google and its rivals in ad auctions. Article 5(7) directly prohibits a gatekeeper from tying its browser to a CPS, which again limits the data the gatekeeper can collect and levels the data playing field for rivals.

Second, customers could be aided by the obligation in Article 6(2) not to use the business user's data to compete against the business users of the platform. This requirement might prohibit Google's sell-side platform (SSP), for example, from using data from other publishers to help it choose when to disadvantage a rival SSP. Adherence to this rule might reduce some of the conduct at issue in the antitrust case.

[53] See, for example, Competition and Markets Authority, 'Online Platforms and Digital Advertising' (2020) Market Study Final Report, <https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf> accessed 17 March 2023.

Finally, Articles 5(9) and (10) impose a transparency obligation by which the gatekeeper who supplies online ad services must provide information to advertisers, publishers, and any third party who operates on this market on behalf of these two parties. Parties are entitled to receive daily reports on the price and fees paid by that advertiser, the remuneration received by the publisher, and the metrics on which each of the prices, fees, and remunerations are calculated. Article 6(8) provides that in addition, advertisers, publishers, and third parties helping these two sides of the market must have access to the gatekeeper's performance measuring tools and the data used so that they can run their own tests to assess the performance of the ad tech supplier. The effect of these three obligations is that publishers and advertisers can see if they are receiving value for money. It empowers them either to renegotiate the deal with the ad tech supplier or to look elsewhere for a fairer or more competitive offer. The question is whether rivals are present to make this threat to leave a reality.

Notice that requiring the commitments in an antitrust case to include transparency obligations like those in the DMA seems like it might be hard; these go beyond what is usually obtained by applying antitrust law. This example shows a key difference between the two legal instruments: while antitrust normally prohibits conduct that hinders could be rivals of dominant firms, the DMA is designed to regulate markets so as to achieve more fairness and facilitate the entry of rivals.

The DMA, however, does not contain a general non-discrimination provision; many of Google's alleged tactics in this area are forms of discrimination that may not require user data. For example, one piece of conduct is Google's placement of its own demand-side servers physically close to the machines carrying out the auctions.[54] This allowed Google's own bids to arrive more quickly than rival bids from machines that were some miles away. Google then chose auction rules requiring bids to arrive in a short window of time, knowing its rivals would often be unable to meet that requirement and therefore be shut out of the bidding. For example, the Texas complaint describes a provision of Google's agreement with Facebook that Facebook would have a longer amount of time to submit bids (in milliseconds) than other bidders in the auction.[55] It does not appear to us that the DMA contains any provision that would limit discriminatory access of this sort to ad tech auctions, and therefore conduct similar to this would need to be pursued under Article 102.

But while all of these steps are helpful for contestability—more balanced data holdings, a mandate not to discriminate, and the ability to see performance—they do not directly open the digital advertising marketplace. It appears that Google will still be able to act in a discriminatory fashion in ad tech under the DMA. Moreover, a concern going forward, and currently the subject of a commitments process at the UK Commission and Markets Authority (CMA),[56] is that Google's intended removal of third-party cookies could create new competition concerns in the ad tech value chain, which the DMA provisions are not well designed to address. And lastly, of course, the experience of the Google search case teaches that behavioural remedies aimed at creating competition can be ineffective.[57]

[54] See D Srinivasan, 'Why Google Dominates Advertising Markets: Competition Policy Should Lean on the Principles of Financial Market Regulation' (2020) 24 Stan Tech L Rev 55.

[55] See generally Opinion and Order, In re Google Digital Advertising Antitrust Litigation (13 September 2022), <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Google%20ruling.pdf> accessed 2 March 2023.

[56] See generally Investigation into Google's 'Privacy Sandbox' Browser Changes, UK Competition and Markets Authority (as updated 3 November 2022), <https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes> accessed 2 March 2023.

[57] See generally Antitrust remedies in digital markets: lessons for enforcement authorities from non-compliance with EU Google decisions, Hausefeld (2020), <https://www.hausfeld.com/en-us/what-we-think/competition-bulletin/antitrust-remedies-in-digital-markets-lessons-for-enforcement-authorities-from-non-compliance-with-eu-google-decisions/> accessed 2 March 2023.

If these regulatory solutions do not sufficiently address contestability in ad tech, the DMA has another tool, but one that can only be used sequentially after the first ones have failed. This is the possibility of divestiture.[58] Divestitures of businesses at one end or the other of the ad tech stack would eliminate the conflict of interest that is at the heart of the competition problem, and for this reason divestiture may be an efficient solution. To prepare for this possibility, it would make sense for the Commission to open investigations into digital advertising and categorize those investigations in a way such that several different actions are delineated. If Google complies with the DMA, digital advertising markets will become more open and contestable, if not perhaps fully contestable, and this will benefit business and end users. If the platform engages in multiple instances of non-compliance, then the Commission could pursue ad tech divestitures as a solution. Such an approach would be novel, and therefore it is important that the backstop to the DMA in such a setting is Article 102, which can be redeployed to investigate any remaining or new competition problems.

Google Search: type A example where the DMA rules are more effective than antitrust remedies

Consider two Commission cases that are in the remedies phase: the Google Shopping case and Google Android (Box 2).

The DMA includes a few provisions that may improve contestability and fairness in the market for general search. The most directly applicable include Article 6(5), which prohibits self-preferencing in search, the abuse found in Google Shopping.[59] If effective, this should be useful in giving specialized (vertical) search a fair chance of obtaining top spots in organic search results relative to Google's own content. (It remains an open question whether Google will design its search results page so that consumers can see organic results, and therefore the specialized competitors. It may be more profitable for Google to populate the first few pages of results with Google's own monetized content, which would mean rivals continue to be excluded from this way of accessing consumers.[60]) Contestability may also improve since entrants may purchase Google's click and query data on FRAND terms (Article 6(11)) in order to improve the quality of their search engines.

We offer a few reasons why these provisions may not be sufficient to create contestability in search. Access to click and query data may be delayed due to disputes over what constitutes FRAND and the data may be rendered less helpful depending on how privacy concerns are interpreted and weighed. The DMA requires that users be presented with a search engine choice screen (Article 6.3). Given that the choice screen will be ultimately controlled by Google, there are significant questions about how this should be designed and whether it will be effective. Even in a best-case scenario, however, such a screen will only shift users in uncertain small numbers across to rival search engines. Rivals will not succeed without volume because volume generates higher quality search results. Importantly, a choice screen does not offer users financial remuneration for what is a very valuable choice on their part, namely, to give all their search advertising revenue to the chosen search engine.

[58] In settings with significant conflicts of interest, behavioural remedies may not solve the underlying problem when a divestiture would; this makes divestitures an important part of the competition toolkit. Ad tech may be an example of a setting in which such conflicts of interest exist.

[59] More specifically, the provision bans self-preferencing in ranking, and related indexing and crawling. This would therefore appear to cover search, as well as other services.

[60] See generally Antitrust remedies in digital markets: lessons for enforcement authorities from non-compliance with EU Google decisions, Hausefeld (2020), <https://www.hausfeld.com/en-us/what-we-think/competition-bulletin/antitrust-remedies-in-digital-markets-lessons-for-enforcement-authorities-from-non-compliance-with-eu-google-decisions/> accessed 2 March 2023. We can imagine, but cannot predict, that the Commission would deem populating the first few pages of results with its own monetized content to be circumvention, in which case it might be prohibited under the anti-circumvention requirements.

Box 2: Google Search

These cases together constitute a set of issues similar to those in the US DOJ and US state complaints against Google. Although Google has appealed against both European decisions, it has also sought to comply with the decisions. The remedies here have been, judging from the Commission's own actions and third-party comments, a failure in terms of their impact on the search market. Google still dominates the search market, even if now there is some competition among vertical search providers in the advertised links at the top of the Google search page.

In response to the Android decision, Google has created a choice screen so that users can select a search engine on new Android smartphones and tablets as of August 2019. Under the search remedy in place until recently, the European Commission permitted Google to sell access to the same rivals the EC had found it illegally excluded. Only on 1 September 2021 did Google remove this payment element – now the choice screen contains up to 12 search engines with top ranking given to the five most popular search engines in the country (but arranged randomly).[61] Here, we see an example of an Article 102 case that has finished, the Commission prevailed, and yet contestability and fairness have not been achieved.

Article 5(8), appears to us to be anti-tying provision that prohibits gatekeepers from requiring users to register with one CPS in order to get access to another, may be applicable to requirements that handsets that run on the Android OS (likely an Alphabet CPS) include Google Search as the exclusive default search engine (likely also to be designated an Alphabet CPS) or come preinstalled with the Chrome browser (another likely CPS designee of Google). If this is the case, the provision is potentially highly significant in creating contestability. It is critical to permit original equipment manufacturers (OEMs) to pre-install an exclusive default search engine that has a small market share (today, any general search engine that is not Google). We understand that under the DMA an Android device maker that does not own a browser that qualifies as a CPS will be able to contract for the default search engine of its choice. If Android OEMs have this capability, then they will be able to partner with an entering rival search engine. Entrant search engines would bid a share of their search revenue in exchange for a block of exclusive default users from the OEM. We know from experience that exclusive defaults are generally very predictive of usage, so when entrant becomes the pre-installed default search engine of one handset, the entrant search engine will likely obtain a large reliable flow of traffic. Entrants will therefore bid against each other (and the choice screen option) to obtain the default position with an OEM. This will result in the OEM getting a potentially large share of the search ad revenue generated by that search entrant because it represents the chance for the entrant to obtain volume, raise quality, and break into the market. While the entrant may sell ads at a lower price than Google (eg, 60 cents instead of €1), the higher share of revenue may leave the OEM better off (eg, 70 per cent instead of 10 per cent) and cause it to support entry in search. Thus, the DMA's prohibition against tying may be more effective in creating contestability than the choice screen remedy.

[61] See Francesco Decarolis and Muxin Li, 'Competition, Defaults, and Antitrust Remedies in Digital Search' (2022) Competition Policy International 1–7, <https://www.competitionpolicyinternational.com/wp-content/uploads/2022/01/7-Competition-Defaults-and-Antitrust-Remedies-in-Digital-Search-Francesco-Decarolis-Muxin-Li.pdf> accessed 17 March 2023.

Any increased competition among search engines will result in an increased search revenue subsidy to handset makers. That search revenue will give them a strong financial incentive to compete for customers. Each customer gained will produce revenue over time for the OEM through that customer's ongoing use of search—and therefore will lower the OEMs costs. That incentive combined with strong competition among handset makers will lead to lower prices for consumers. By allowing search engines to bid for the OEM default channel, end consumers gain 'financially' from search engine competition in a way they will not with a choice screen; they likely gain as well through the usual channels of increased quality, innovation, etc. Likewise, the OEM business user will be able to develop innovative partnerships with search and other app developers, support innovation and variety in search, control the design of their home screens, and have more options to grow their own businesses. For these reasons, the DMA rules also promote fairness.

National antitrust cases

Enforcement of the DMA and the application of national competition rules or of Articles 101, 102 TFEU by national agencies was a major topic of concern in the negotiations of the DMA. In particular, the 'Friends of an Effective Digital Markets Act', ie, the governments of France, Germany, and the Netherlands, declared that competition enforcement and the DMA must complement, not weaken, each other.[62]

At the time of enactment of the DMA, several national competition agencies have substantial experience with cases against gatekeepers and/or are running cases against them. This behaviour can continue because Member States are free to apply Article 102 TFEU and national competition rules in parallel to the DMA.[63] However, there is a tension here because Member States have a duty not to take decisions that run counter to the DMA. So there will be interesting and important questions concerning the resolution of those national cases that overlap with the DMA. To help with coordination, there is a cooperation mechanism provided for in the law.[64]

In the past, coordination of cases of Article 102 TFEU was done through the European Competition Network (ECN) but this process will have to be modified to incorporate the DMA. In the future, the initiation of cases will likely be coordinated on the basis of Article 38. This provides for regular exchanges of information among the NCA and the Commission and other NCAs. This helps to coordinate enforcement and allows each NCA to comment or assist the NCA that has taken charge. However, an ongoing NCA case will be terminated if the Commission opts to open proceedings under the DMA.[65] To help facilitate coordination, we propose two different paths forward.

For ongoing national competition cases that overlap with the DMA, we recommend that the national agencies continue to run the case under their rules, but with a view to DMA-style remedies. In the future, NCAs may be best placed for cases against gatekeepers that have a distinct national nexus or that are closely connected with other cases that had been dealt with by the national agency.

Regarding the starting phase of the DMA—before a proper system of coordination and information exchange has warmed up—we recommend that national agencies respect the Commission's prerogative in dealing with gatekeepers. This may keep costs of coordination

[62] cf the statements of 27 May 2021, <https://www.bmwk.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.html> accessed 2 March 2023; and of 8 September 2021, <https://www.bmwk.de/Redaktion/DE/Downloads/XYZ/zweites-gemeinsames-positionspapier-der-friends-of-an-effective-digital-markets-act.pdf> accessed 2 March 2023.

[63] cf art 1(6) DMA.

[64] arts 37, 38 DMA.

[65] This scheme broadly mirrors that found in antitrust, see Regulation 1/2003, art 11.

and overlaps down. At the same time, it is the Commission's obligation to involve national agencies in a meaningful DMA enforcement. The success of the DMA will partly depend on the Commission's ability to motivate national agencies to help in enforcement. National agencies have resources and knowledge to contribute, and they may have a better rapport with smaller stakeholders (eg, business users of a CPS) that can provide valuable insights. The Commission may want to explore ways to set incentives for national agencies to commit resources and contribute actively. This may sometimes be hard for national enforcers if the decision in the end is taken by the Commission. Public acclaim and the credit will then go to the Commission and perhaps less will accrue to the national agencies that were involved. One way to improve incentives would be to acknowledge much more prominently the contributions of national agencies. Another route is to adopt more advanced types of cooperation and integration that have inherently less incentive conflict. A possible model is the Single Supervisory Mechanism under which the biggest banks of the Eurozone are supervised by the European Central Bank in close cooperation with the national financial supervisors through the establishment of Joint Supervision Teams.[66] While this could not be reproduced formally, as the Commission would be the sole decision-maker, it may serve as an inspiration for the organization of joint work.

The choice between the DMA and antitrust in future cases

For future cases of overlap, the Commission will likely want to rely wherever possible on its DMA powers as the obligations and prohibitions are compulsory. To determine the exact scope of the DMA and 'how far' it could go in addressing the conducts of the designated gatekeeper, two legal rules contained in the DMA are important: the first is the principle of effectiveness, which applies to each obligation contained in Articles 5–7 individually but also to the DMA objectives and system as a whole;[67] the second is the prohibition of circumventing the rules with conduct that is not directly covered by Articles 5–7 of the DMA but which undermines the effectiveness of those obligations.[68]

When the conduct of the gatekeeper is not covered by the DMA, the Commission has the right to open a market investigation and, to a limited extent, add new obligations with a delegated act (which is a form of accelerated procedure to amend the DMA's list of obligations). Besides the new possibility that has been opened by the DMA, the Commission keeps its right to open an antitrust case. Thus, with the DMA, the Commission has become a regulator with concurrent power. Under its antitrust power, the Commission would open an abuse of dominance case and should build a theory of harm to the requisite legal standard imposed by the EU Courts. Under its regulatory power, the Commission would launch a market investigation and then adopt a delegated act to add the course of conduct under consideration to the list of the DMA obligations.[69] In order to do so, the Commission should prove that such conduct weakens market contestability or creates an imbalance between the rights and the obligations of the gatekeeper and its business users.[70] This standard of intervention will have to be interpreted by the Courts, but, on first analysis, it is likely to be lower for a delegated act under the DMA than the legal standards applied to the review of individual decisions under competition law.

Given that the initial list of obligations and prohibitions found in the DMA appears to be largely based on experience in competition law enforcement, in new cases it may be appropriate to continue to use competition law as a first line of intervention. This will allow the

[66] <https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html> accessed 2 March 2023.
[67] DMA, art 8(1).
[68] DMA, art 13.
[69] DMA, art 19.
[70] DMA, art 12.

Commission to build up experience and 'test-drive' theories of harm in actual cases before courses of conduct are enshrined in the DMA list of prohibitions and obligations. An advantage of this approach is the discipline required to specify a theory of harm and create solid economic reasoning about how competition is impacted. This understanding can then be built on to analyse the effect on fairness and move forward with a new rule through the delegated acts process.

When it comes to a widespread issue, however, there is a significant difference in the applicable legal standards and therefore the costliness of intervention under the two laws. As the DMA standard requires carrying out a specified regulatory process rather than engaging in an uncertain legal action, we may reasonably expect the Commission to favour a market investigation under the DMA over competition law enforcement when intervening against designated gatekeepers. It may take some experience with these transitions before the Commission knows enough to set down the criteria it will use to choose between its regulatory and competition powers.[71]

To do that, the Commission may, for instance, rely on the criteria it uses to select markets for ex ante regulation in telecommunications.[72] Such selection is based on three criteria, and the third one indicating that:

> Competition law interventions are likely to be insufficient where for instance the compliance requirements of an intervention to redress persistent market failure(s), are extensive or where frequent and/or timely intervention is indispensable.[73]

The Commission could also rely on the criteria proposed by Motta and Peitz to determine when the new EU market investigation tool that was then under study (the so-called New Competition Tool) would be a better route than an Article 102 TFEU enforcement action.[74] This may be the case when a competition law assessment is long, complex, and uncertain or when a competition law assessment would not solve a generalized problem, but just deal with one specific conduct or firm. On these bases, possible criteria to favour a DMA investigation over competition law enforcement could comprise the recurrence or the prevalence of a conduct by different types of gatekeepers, or the need to intervene quickly or with remedies that require an extensive monitoring.[75]

Adopting such criteria would be useful to ensure legal predictability, without however undercutting the responsibility of the Commission to apply EU competition law. Indeed, competition law—which is primary law—cannot legally be sacrificed on the altar of the DMA, which is secondary law. Moreover, some cases (such as the type B cases) could not be

[71] In the UK where most of the regulators have concurrent power, they have concluded MoUs with the competition authority that clarify how concurrent powers will be exercised. See, for instance, Memorandum of understanding of 8 February 2016 between the CMA and Ofcom on concurrent competition powers.

[72] In telecommunications regulation, the three-criteria test placing the frontiers between competition law and regulation is used to select markets for regulation but not the obligations that are imposed on those markets. In the DMA, the criteria should be used to select the obligations to be imposed but not the markets (or Core Platforms Services) on which those obligations will be imposed.

[73] EECC, art 67(1) clarified by Commission Recommendation 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, OJ 2020 No L439/23, recital 17. The first criterion relates to the presence of high and non-transitory barriers to entry and the second criterion addresses whether a market structure tends towards effective competition within the relevant time horizon, having regard to the state and prospect of infrastructure-based competition and other sources of competition behind the barriers to entry: recitals 8 and 13 of the Commission Recommendation 2020/2245.

[74] M Motta and M Peitz, *Intervention Trigger and Underlying Theories of Harm*. Expert Study for the European Commission (2020).

[75] Those criteria may also be inspired by the reasons mentioned by the Commission services for the insufficiency of competition law in dealing with some structural competition problems in the digital economy: Impact Assessment Report on the DMA Proposal, at paras 119–24.

covered by an extension of the DMA obligations and therefore, the Commission will have to rely on its antitrust power to intervene.

V. CONCLUSION

This article has explored how the Commission might enforce the DMA in a manner that employs strategy, takes account of efficiency, acknowledges the need to gain public support and trust, leverages past learning, anticipates behavioural responses, and encourages the devotion of time and resources early on to activities such as designing reporting requirements and workplace responsibilities that, together, seem most likely to us to maximize the law's long-term impact. The executive summary provides a comprehensive listing of these recommendations, many of which are quite specific, and each of which we hope will be of assistance to the Commission as it begins enforcing the DMA.

We hope that the impact of this article extends beyond the utility of the recommendations themselves, however. As we note in the introduction, all regulators are constrained by limited resources, and all regulators, therefore, should take time to devise regulatory enforcement strategies that maximize the effectiveness of the regulatory schemes they oversee in light of the resources available. We hope our recommendations here model this sort of analysis, spur additional thinking about the DMA and other regulatory schemes, and convey to those undertakings subject to regulation that enforcement will be both vigorous and thoughtful.

Strategic regulation should not end once enforcement begins, however. And although this article focuses principally on the roll-out of DMA enforcement, there is another aspect of implementation to which we would like to draw attention, and which deserves a much longer exploration: the Commission and/or the Parliament should start a robust and independent process for evaluation of the DMA. This is important both for democratic legitimacy and for purposes of improvement in the law and its enforcement. There is a natural tendency for designers and enforcers of regulations to become defensive about the consequences of the regulations. We see this, for instance, in the case of the General Data Protection Regulation (GDPR) where even the most obvious drawbacks are not acknowledged. As more and more significant regulations affect the digital sector, it is important both substantially and for social acceptability that the regulators show their eagerness to correct flaws.

APPENDIX A—CONFLICT OF INTEREST DISCLOSURES

Jacques Crémer: Within the last three years he has engaged in consulting on matters unrelated to the topic of this paper for a marketplace platform with whom he has a nondisclosure agreement.

David Dinielli: He has no engagements or affiliations to disclose pursuant to the disclosure policy of the American Economic Association.

Paul Heidhues: Within the last three years—in collaboration with E.CA Economics—he engaged in competition and consumer protection consulting for the Competition and Markets Authority of the UK as well as in the context of trucking, banking, elevator, and timber industries.

Gene Kimmelman: He has no engagements or affiliations to disclose pursuant to the disclosure policy of the American Economic Association.

Giorgio Monti: He is a member of the Supervisory Board for the Consumer Competition Claims Foundation in the Netherlands. He has no engagements or affiliations to disclose pursuant to the disclosure policy of the American Economic Association.

Rupprecht Podszun: He has no engagements or affiliations to disclose pursuant to the disclosure policy of the American Economic Association.

Monika Schnitzer: She has no engagements or affiliations to disclose pursuant to the disclosure policy of the American Economic Association.

Fiona M. Scott Morton: Within the last three years, she has provided economic consulting for corporate clients including Amazon, Apple, and Microsoft on issues unrelated to implementation of the DMA, and for a number of government plaintiffs.

Alexandre de Streel: He is Academic Director at the Centre on Regulation in Europe (CERRE) and Chair of the EU Observatory on the Online Platform Economy advising the European Commission. He has no engagements or affiliations to disclose pursuant to the disclosure policy of the American Economic Association.

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