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The Digital Markets Act – Institutional Design and Suggestions for Improvement

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ABSTRACT

The Digital Markets Act (DMA) is a major policy initiative to regulate platform gatekeepers in a more systematic manner than under competition law. This paper reflects on the institutional set-up in the Commission proposal. While the DMA is well-designed, this paper recommends improvement in the following aspects: (i) matching the DMA's objectives with obligations imposed on gatekeepers; (ii) facilitating co-regulation; (iii) streamlining the enforcement pyramid; (iv) emphasising the role of private enforcement; (iv) clarifying the role of competition law.

JEL: K21, K23

1. Introduction

In its Digital Strategy Communication in February 2020, the Commission announced that the proposal of the Digital Services Act package would include one pillar aiming at achieving a fair and competitive economy. [1] This vision is now enshrined in its proposal for a Digital Markets Act (DMA), which was released on 15 December 2020.[2]

Generally, the DMA is a well-designed tool which surmounts what have been perceived as the main weaknesses of using competition law in digital markets: the slowness by which antitrust cases proceed and the lack of teeth in the remedies imposed. It achieves this by setting out a set of discrete obligations on a limited set of gatekeepers who offer core platform services.[3] Nearly all of the 18 obligations are based on prohibiting conduct that has been found to infringe Articles 101 or 102 TFEU or which is currently under investigation by the Commission. Therefore, one of the main enforcement problems was not that there was an absence of law to regulate platforms,

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[1] Communication from the Commission of 19 February 2020, Shaping Europe's digital future, COM(2020) 67.

[2] European Commission, Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final (hereinafter, DMA.)

[3] For an excellent account of who should be regulated, see D. Geradin, 'What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?' (18 February 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788152

but that the procedural and substantive requirements in competition law were seen as a barrier to effective enforcement. However, as discussed further below, the DMA is more than just a turbocharged application of Article 102 TFEU.

This paper focuses on the institutional design of the DMA and makes suggestions on how this may be improved to become more effective. In section 2 we discuss the policy objectives pursued by the DMA. This is important to allow us to test if the institutional choice matches the DMA's objectives. We suggest that it does even if the manner in which the DMA is drafted could be improved to highlight the policy objectives more clearly and by matching the objectives with the obligations gatekeepers have. In section 3 we consider the merits of centralising enforcement in the Commission and we consider this to be justified. Section 4 discusses the method by which the DMA seeks to secure compliance. Here we suggest that the DMA could do a better job at stimulating compliance by facilitating greater cooperation between Commission and gatekeepers. It also needs improvement to address fast-moving markets. In section 5 we discuss the role of private enforcement and suggest that there are good reasons for the DMA to recall that such enforcement can be a helpful complement to public enforcement. In section 6 we discuss the relationship between the DMA and competition law enforcement and suggest that we may see the application of competition law to supplement the DMA. The recommendations that flow from this study are found in section 7.

2. The DMA's aims

Before moving on to a discussion of institutional aspects it is worth reflecting briefly on the fact that the DMA prohibitions overlap, substantively and substantially, with competition law. However, it would be a mistake to see the DMA as a regression back to the form-based approach for which the Commission was so criticised in the 1980s.[4] Having said that, the obligations which the DMA imposes on gatekeepers are not set out in a systematic manner. There is, nevertheless, a coherent message. One way of explaining this is to show that the obligations may be classified under four theories of harm: (i) addressing a lack of transparency in the advertising market; (ii) preventing platform envelopment; (iii) facilitating the mobility of business users and clients; (iv) preventing practices that are unfair.[5] This tallies with the objectives in the draft proposal which speak of contestability and fairness.[6] By grouping them in this way, we can see that the legislator intends to devise a set of complementary obligations that restrain gatekeepers in a systematic manner.

[4] For the Commission's account, see DMA, Recital 5 suggesting that competition law is casuistic and ex post. Furthermore, that some gatekeepers may not be dominant but merit regulation anyway.
[5] This is the position in CERRE, 'The European Proposal for a Digital Markets Act – A First Assessment' (19 January 2021), p.19.
[6] DMA, Article 1(1)

Consider, for example the prevention of envelopment: a number of the obligations try and ensure that the gatekeeper does not extend its market power in adjacent markets, for example Article 5(e) keeps the market for identification services open by preventing the gatekeeper from requiring the business user to use the gatekeeper's own services; more generally Article 5(f) prevents the gatekeeper from forcing the business user to sign up to another core platform service offered by the gatekeeper (e.g. a gatekeeper offering an operating system must allow the user to pick any search engine) and Article 6(1)(b) requires that the gatekeeper allows the user to uninstall any pre-installed software applications. By systematically targeting a range of platform envelopment strategies, the DMA seeks to contain gatekeepers. This systematic approach goes beyond what could be achieved under Article 102 TFEU which can just address, retrospectively, certain forms of envelopment that the dominant firm has used. If the strategy of the DMA then is to ex ante control a range of forms of conduct that cumulatively serve to cause specific types of market failures, then it may be recommended that the obligations in Articles 5 and 6 should be grouped along the lines of the policy aims that they seek to achieve rather than listed in what appears to be a random order. This would make the policy approach more obvious and facilitate legal interpretation by the courts who could then interpret the law guided by its overall objectives.

Another way of thinking about the purpose of the obligations is the following: some appear to be designed to facilitate the entry of rivals to the gatekeepers, while others allow for competition in markets related to that of the gatekeepers and thereby preventing the gatekeeper from expanding its market power. On this reading the legislator appears to suggest that some gatekeepers can be – gradually – supplanted while others are akin to utilities and must be regulated as such. An example of a market where the Commission probably considers that an incumbent could be displaced is that for search engines. Three provisions of the DMA seem designed to facilitate entry of new players: Article 6(j) requires that a new entrant in the search engine market can obtain data from the gatekeeper on FRAND terms, Article 6(b) allows users to uninstall applications, and Article 6(e) allows end users to switch applications easily. Read together, these are designed to facilitate contestability in the market for search engines. Obviously this is not 'contestability' as was understood by Baumol in the 1980s,[7] but it is a regulatory design that assumes that a gatekeeper who is an incumbent today can be displaced.

In sum, the DMA is more than an enhanced and simplified application of Article 102 TFEU: while the obligations may be criticised as being based on existing competition concerns, they are forward-looking in trying to create a regulatory environment where gatekeeper power is contained and perhaps even reduced.

[7] W.J. Baumol, 'Contestable Markets: An Uprising in the Theory of Industry Structure' (1982) 72(1) American Economic Review 1.

3. Public Enforcement: Design

Table 1 maps the institutional design of a set of economic regulations. As is clear the DMA very much resembles the shape of competition law enforcement as it existed before Regulation 1/2003. In other words, the Commission is the sole agent in charge of the application of the DMA.

Table 1: Multi-level institutions

	EU Competition Law	**General Data Protection Regulation GDPR**	**EU Consumer Law**	**Electronic Communications**	**DMA**
1. EU level	Commission – full powers			Commission – in part	Commission – full powers
2. Networks	European Competition Network	European Data Protection Board	Consumer Protection Cooperation network	BEREC	
3. National level	National Competition Authority (NCA)	National Data protection authority (DPA)	National Consumer Protection Authority (CPA)	National Regulatory Authority (NRA)	
4. Effect of decision	Commission: EU-wide NCA: national[8]	EU-wide by 'lead' authority.[9]	Cross-border if collaborative decision	national	EU-wide

This model is also found in the EU Merger Regulation and the Single Supervisory Mechanism for banking supervision. The Commission has exclusive competence for concentrations having an EU dimension (subject to some exceptions).[10] The European Central Bank has exclusive competence

[8] Very exceptionally, an NCA has issued a decision about conduct overseas.

[9] Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)[2016] OJ L119/1, Article 56 but a number of cooperative pathways are found see Articles 60 to 62

[10] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

to supervise systemically significant banks.[11] There are clear legal bases for these two domains.[12] The Code of Conduct on Computerised Reservation systems also operates in this way, with the Commission auditing compliance.[13] There are a number of arguments in favour of opting for a centralised model when it comes to the DMA.

First, a number of the gatekeepers are likely to operate globally, making the EU the most effective level of governance. It is not easy to see how the principle of subsidiarity could lead to a different approach.

Second, the big platforms operate broadly the same systems across all Member States (and indeed globally), due to the huge economies of scale involved in designing and operating these systems. Therefore, if different National Regulatory Authorities (NRAs) were to require different tailor-made remedies, this risks leading to a big reduction in efficiency and may be impossible to justify on the basis of proportionality - even if any one of the remedies would be cost-justified if applied across the EU.

Third, monitoring compliance is likely to be costly and may require careful large-scale data analysis or direct review of algorithm design. It is highly unlikely that individual national regulators will be well set up to do this, and even if they were it would highly duplicative to do it more than once. This seems to be reflected in the weakness of some national authorities that apply the General Data Protection Regulation.[14]

Fourth, the largest platforms have deep pockets and securing compliance is more likely if they face a single, well-resourced regulator than multitude of small agencies who might even disagree among each other on the appropriate course of action.

Finally, the targets of this regulation will be a fairly small number of firms: not enough to require the assistance of national regulators.[15] Moreover, a single regulator can benefit from managing a set of cases in parallel and learn across the different dossiers.

[11] Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.
[12] Articles 103 and 127(6) TFEU respectively.
[13] Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems OJ L 35, 4.2.2009, p. 47 Articles 13-16.
[14] Accessnow, *Two Years Under the EU GDPR: An Implementation Progress Report* (2020).
[15] The Commission suggests 10 to 15 but the basis of this estimate is questioned. See CERRE, above n 5, p.13.

Having said that, it is not always clear why a particular institutional architecture is chosen.[16] The functional rationales offered above may not play a determinative role as the DMA is negotiated: Member States may prefer more powers for national agencies as a means of exerting some control, or they may favour centralising matters in the hands of the Commission to signal a commitment to regulation. It remains to be seen whether Member States or the European Parliament will plead for a decentralised system.

As it stands the role of Member States is limited. First, three or more Member States may request that the Commission open a market investigation to determine if a core platform provider should be designated as a gatekeeper.[17] Second, Member States participate via the Digital Markets Advisory Committee which is to be instituted to assist the Commission.[18] However this committee only comes into operation rather late in the procedure (e.g. in market investigation or enforcement actions) which, as we suggest below, may well play a marginal role in the day-to-day supervision of gatekeepers if these are willing to comply.

One argument that has been made in favour of assigning more powers at national level is that national regulators may be better placed to receive complaints or to assist in designing the remedy in question or monitoring compliance ex post. These are valid points and in an ideal world a selfless regulator would do so. However it is not clear how one can create incentives for national regulators to act as contact points for complainants or as monitors if then they just pass the evidence gathered to Brussels for the Commission to act upon these findings. For this proposal to work effectively the national regulators would have to be empowered to enforce the DMA against firms directly. However, as we will see below, the way in which firms are expected to comply may not make this an attractive option.

It is beyond the scope of this paper to reflect more fully on how the Commission's internal working practices should be designed. It may be expedient to divide the work between DG COMP and DG CNCT as one study has suggested: this would allow for the pooling of experience within the Commission.[19] It has also been suggested that staff from national regulators could be seconded to the Commission.[20] This is sensible as the knowledge gap between regulator and regulatee is quite high. In this context, however it is also worth noting that the Commission is

[16] See the illuminating discussion by L. Van Kreij, Towards a Comprehensive Framework for Understanding EU Enforcement Regimes (2019) 10 European Journal of Risk Regulation 439.
[17] DMA, Article 33. The logic behind this is that gatekeepers should provide a core platform service in at least three Member States, see Article 3(2)(a).
[18] DMA, Article 32.
[19] P. Marsden and R. Podszun, *Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement* (Konrad-Adenauer-Stiftung e. V. 2020) ch.4.
[20] CERRE, above n 5, p.25.

also proposing to appoint 'independent external experts and auditors to assist the Commission to monitor the obligations and measures and to provide specific expertise or knowledge to the Commission.' This is a welcome development as it will strengthen the Commission's capacity to secure compliance.[21]

4. Public enforcement: style

4.1 Towards co-regulation

The aspect of the DMA that requires the most improvement is in facilitating compliance.[22] One welcome aspect of the proposal is that the Commission understands that while some obligations are easy to execute others are 'susceptible of being further specified.'[23] The procedure for such specification could be improved upon, however. The present format is as follows: the gatekeeper has six months to comply from the moment that they are designated.[24] Given that many would-be gatekeepers are already on notice at the time of writing and will thus not be surprised when the DMA comes into force, it means that many will have been planning for compliance for quite some time. This might explain why the Commission seems to require self-assessment: the gatekeeper's duty is to ensure that the measures it takes are effective.[25] If there are concerns about non-compliance the Commission's powers are provided in Article 7(2):

> Where the Commission finds that the measures that the gatekeeper *intends to implement* pursuant to paragraph 1, or has implemented, do not ensure effective compliance with the relevant obligations laid down in Article 6, it may by decision specify the measures that the gatekeeper concerned shall implement. The Commission shall adopt such a decision within six months from the opening of proceedings…. (emphasis added)

This procedure suggests that it could be at least a year from the coming into force of the DMA before the gatekeeper is bound (six months to implement plus six months for the Commission to decide). This is on the assumption that the gatekeeper agrees that it is bound by the DMA. This would appear to frustrate one of the main reasons for the DMA: quick action. Furthermore, the italicised text is a little odd because it appears to foresee some form of precautionary notification which is not further spelled out.

[21] It is helpful to inscribe this in law to avoid the problem that arose in *Microsoft v Commission*, Case T-201/04, EU:T:2007:289 where the Court quashed the part of the Commission decision requiring the appointment of a monitoring trustee as the Commission had no such powers.
[22] This subsection builds on CERRE above n 5 p.26.
[23] DMA, Article 6.
[24] DMA, Article 3(8).
[25] DMA, Article 7(1).

It is submitted that a preferable approach would be the following: that gatekeepers are required to notify the Commission of the measures they intend to take to comply with both Articles 5 and 6, and it is for the Commission to review these and make them binding if there is agreement, or to recommend revisions if there are concerns. The parties could be given three months to come up with a compliance pathway and the Commission three months to take a view. If concerns remain then the procedure could be lengthened. This would be like phase 1 and phase 2 merger procedures. Given that, as suggested in section 2 above, the package of obligations should be seen as a coherent whole, it would be more informative for the Commission to review how the gatekeeper seeks to comply with the whole set of obligations rather than just those in Article 6.

This procedure would allow for a more productive exchange of views between the Commission and the gatekeeper. One might even wish to include a market test for the obligations, like we have in commitment decisions. The advantage is also that the first step to secure compliance is not a unilateral imposition of obligations by the Commission (which is what Article 7(2) seems to imply) but a more consensual procedure. If one begins with the assumptions that firms wish to comply with the law, then a responsive regulator would facilitate compliance without immediately resorting to unilateral measures. The result of this would then be a decision addressed to the gatekeepers binding them to the course of conduct proposed. This, as we will see later, can also facilitate private enforcement. To a certain extent, this approach is also foreshadowed in Recital 29 which speaks of a 'regulatory dialogue': the proposal here seeks to entrench this dialogue in a more explicit and structured manner.

In contrast to this suggested approach, the sole option for the gatekeeper to securing dialogue at this stage is found in Article 7(7) by which the gatekeeper may 'request the opening of proceedings pursuant to Article 18 for the Commission to determine whether the measures that the gatekeeper intends to implement or has implemented under Article 6 are effective in achieving the objective of the relevant obligation in the specific circumstances.' As discussed above, this procedure is rather long and a mandatory notification would appear a superior alternative. This recommendation also calls for some rethinking of the punitive aspects of the DMA, to which we now turn.

4.2 Climbing up the enforcement pyramid

As suggested, the first step in compliance could be refined by allowing for a more cooperative approach between the two sides. Given the relatively small number of gatekeepers and the informational asymmetries involved this would seem a possible avenue to explore. What is intriguing about the procedure after this first stage is how frequently the gatekeeper is afforded

the possibility of correcting its conduct. In this context there seem to be too many enforcement steps and the suggestion above would remove one of these, making the supervision of platforms more responsive.[26]

As things stand, after the gatekeeper begins to comply, the Commission has the following three instances where it can raise concerns. First, under Article 7, as noted above, the Commission may decide to impose its own vision for how the gatekeeper should comply. Note that in this procedure there is no scope for the gatekeeper to make commitments, even if they are entitled to receive the Commission's preliminary findings within three months of the procedure opening. This may just be an oversight because it appears that the intention of communicating this is 'to explain the measures it considers to take or it considers that the provider of core platform services concerned should take in order to effectively address the preliminary findings.'[27] This appears an invitation to make commitments.[28]

Second, the Commission can commence a non-compliance procedure, which may be closed by the parties offering commitments. If none are presented, the remedy is a cease and desist order to which a penalty may be added.[29] In keeping up with the spirit of communication the gatekeeper is obliged to provide 'explanations on how it plans to comply with the decision.'[30]

Third and finally, the Commission may step up enforcement if there is systematic non-compliance. This is defined both formally (there must have been three non-compliance or fining decisions in the past five years) and by reference to the effects of the conduct in question ('where its impact on the internal market has further increased, its importance as a gateway for business users to reach end users has further increased or the gatekeeper enjoys a further entrenched and durable position in its operations.')[31] In these situations the Commission is open to receiving commitments but if none are forthcoming then it may 'impose on such gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with this Regulation.'[32] The big stick of behavioural or structural remedies however may only be levelled after a market investigation has been undertaken and it looks like a decision which is far down the line given all the options for compliance that the gatekeepers are offered.

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[26] This draws, generally, on I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford University Press, 1992) p.35 for the enforcement pyramid.
[27] DMA, Article 7(4).
[28] DMA, Article 23 does not foresee commitments for Article 7 procedures. It allows these only for non-compliance and systematic non-compliance decisions.
[29] DMA, Articles 25(3) and 26.
[30] DMA, Article 25(3).
[31] DMA, Article 16(3) and (4) respectively.
[32] DMA, Article 16(1).

It is suggested that these three levels of enforcement are too many and they are also incoherent. As it stands the Commission can impose remedies unilaterally at the very start and at the very end. Unilateral remedies at the end may be justifiable, but it is not clear why the gatekeeper cannot make commitments at the first stage. Moreover the firms are given several options to comply, and perhaps too many, which risks slowing down the imposition of meaningful remedies.

If the first stage is turned into a compulsory notification procedure at the end of which a binding set of commitments is reached, this would simplify matters considerably. This can be achieved simply by redrafting Article 7. This would leave the Commission with a first stage where the firms are guided to comply, a second stage where on a first offense they are entitled to mend their ways while paying a relatively small penalty, which may be followed up by a significantly more aggressive power in cases where repeated bad behaviour worsens the market failure: at this final stage the Commission can order the undertaking to comply with its vision for how the market should work. By this stage the trust between regulator and regulatee is likely to have evaporated, legitimising unilateral sanctions.

4.3 keeping the system up-to-date

It is trite to say that digital markets move quickly. This is why the DMA tries to provide a system to intervene quickly. However, speedy intervention needs to be accompanied by a system which is adaptive. In this respect the DMA risks proving somewhat cumbersome. On the positive side there is close scrutiny of gatekeepers (which as suggested could be enhanced by a notification procedure) and an anti-circumvention clause is inserted to remind the gatekeepers that that they cannot use compliance with other EU Law obligations as an excuse for non-performance. Moreover, the clause also adds a further obligation: the 'gatekeeper shall not degrade the conditions or quality of any of the core platform services provided to business users or end users who avail themselves of the rights or choices laid down in Articles 5 and 6, or make the exercise of those rights or choices unduly difficult.' This reminder is welcome even if it should be obvious. It supports the argument below that private enforcement may be necessary to cover the risk that the gatekeeper harms individual businesses.

However, what if the obligations are not sufficient? What if there are other core platforms where there is a gatekeeper? Here the DMA proposal offers the following approach: a market investigation has to be initiated at the end of which the Commission may, by delegated legislation, add to the obligations in Articles 5 and 6.[33] However, the inclusion of further core

[33] DMA, Article 17(b) and Article 10.

platform services requires a proposal to amend the Regulation.[34] Given that the market investigation may take 24 months, this procedure looks fairly slow. It was always the case that by listing prohibited forms of conduct one risked Type 2 errors, but the procedures here do not allow for these to be cured sufficiently quickly. Note also that there is a clause which requires a review every three years, at the end of which more obligations or more core platforms may be proposed.[35] This risks clashing with the market investigation and speaks in favour of a quicker procedure at least for upgrading the obligations on gatekeepers.

An alternative approach could be the following: the Commission could reserve the right to proceed by delegated legislation also during a non-compliance procedure or where it observes further forms of conduct that are likely to have the equivalent effects as those forms of conduct that are forbidden. Furthermore, a procedure could be designed whereby, during the lifetime of the compliance effort the Commission may add *or remove* obligations on the gatekeeper. Some obligations may no longer be necessary given market developments. A sunset clause would reduce the risk of Type 1 errors, while a quicker procedure for adding new obligations would address the risk of under-inclusive regulation.

However, the Commission is against this, probably because it fears criticism that the list of obligations is open to the criticism that it is too long and too restrictive. In Recital 33 the Commission explains that the rationale for the obligations imposed is because '*experience gained*, for example in the enforcement of the EU competition rules, shows that they have a particularly negative direct impact on the business users and end users.' This language, in particular the italicised part, is very close to that used by the ECJ in *Cartes Bancaires* to justify the existence of restrictions by object.[36] It then explains that updates must be based on 'a thorough investigation on the nature and impact of specific practices that may be newly identified.' This seems to echo the reasoning in *Intel*, where before condemning a practice with ambiguous welfare effects one must make sure that the effects are harmful.[37] However this fear of Type 1 errors may be misplaced in markets which have been too loosely regulated so far.

5. Private enforcement

The P2B Regulation (which applies horizontally to a range of digital platforms) is based on a similar philosophy to the DMA (securing fair relations between platforms and businesses) but there the legislator did not require a system of public enforcement. Online intermediation service

[34] DMA, Article 17(a).
[35] DMA, Article 38. The date for the first review is not set, it may even be shorter than three years, as some recitals suggest.
[36] *Groupement des cartes bancaires v Commission*, Case C-67/13 P, EU:C:2014:2204 paragraph 51.
[37] *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraphs 137-139.

providers shall provide an internal system for handling complaints, and it is expected that the majority of cases are resolved with this procedure.[38] Failing this, the terms and conditions should specify a mediation procedure.[39] Enforcement may also be by representative organizations or public bodies which may take action in national courts.[40] The Regulation also encourages the development of codes of conduct.[41]

In addition the Regulation requires amendments or additions to national laws. Member States shall 'lay down the rules setting out the measures applicable to infringements of this Regulation and shall ensure that they are implemented.'[42] However, there is no expectation that new enforcement bodies are established, nor that states are required to provide for public enforcement and fines.[43] Some Member States may opt for public enforcement, but it suffices that courts are empowered to impose 'effective, proportionate and dissuasive' remedies.[44]

Arguments in favour of relying on private enforcement in the DMA are that the gatekeepers are best placed to internalise the obligation and adjust their commercial practices to secure compliance, while their clients are in the best position to see if there is non-compliance. Private law remedies would serve to deter such conduct (by the award of damages) and would also facilitate compliance (by the issuance of injunctive relief). In many spheres of EU Law, enforcement is left to private actors who serve as private attorneys-general. On the one hand the Court of Justice of the EU has issued numerous rulings supporting private enforcement: in cases where individuals sue Member States for infringements of EU Law the Court has said that 'the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.'[45] *Courage v Crehan* replicated this approach when the rights are infringed by undertakings: 'the existence of such a right [to damages] strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.'[46] Such reasoning supports the use of private

[38] Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57, Article 11, recital 37.
[39] Ibid., Articles 12 and 13.
[40] Ibid., Article 14
[41] Ibid., Article 17
[42] Ibid., Article 15
[43] Ibid., Recital 46
[44] Ibid., Article 15(2).
[45] *Francovich and others v Italy*, Joined cases C-6/90 and C-9/90, EU:C:1991:428 para 33.
[46] *Courage v Crehan*, Case C-453/99, EU:C:2001:465 para 27.

enforcement: it serves to safeguard both the subjective rights of the victim and the general interest pursued by EU Law.

However, one of the longstanding enforcement problems in B2B relations is that the two contracting parties are often reluctant to use formal rules to enforce contracts.[47] In some instances businesses prefer informal methods to solve disputes to keep good relations between each other,[48] while in others one of the two sides might have a weaker bargaining position and be concerned of reprisals if it complains. This has been observed in other contexts (e.g. in relations between farmers and supermarkets) and the Commission also notes that in the P2B context a large number of businesses are probably afraid of retaliation if they complain.[49] Matters may be different in the kinds of markets regulated here however. We have seen that undertakings like Brave and Fortnite are quite aggressive in asserting their position as to how major platforms are hampering their growth. There may thus be a set of undertakings eager to use private law to secure compliance with the DMA.

To a large extent the DMA facilitates private enforcement: as we have seen the Commission will designate the gatekeepers, so there is no need for a claimant to define markets and establish dominance. Likewise with the obligations, the blacklisted clauses of Article 5 are meant to be self-executing so there is nothing that prevents a business who considers that these have not been complied with to use the courts. Likewise Article 6 obligations will be subject to a system of specification, ideally involving the Commission. As suggested in section 4.2 above, one option could be that the gatekeeper and Commission agree ex ante on a how the gatekeeper will comply and this is crystallised in a decision. This would bind the parties and make space for a private law action by the aggrieved parties when the gatekeepers fall short.

To these advantages, we can consider two counter-arguments which apply in particular to Article 6 obligations. One is the risk of divergent interpretations of these obligations by national courts. Consider for example Article 6(1)(d), which is about self-preferencing. If the way the gatekeeper specifies compliance is simply that they will design an algorithm that ensures equal treatment of like offerings then national courts may well differ in determining whether the gatekeeper has been infringed the DMA. The second, related concern is that gathering and analysing evidence to reveal an infringement of this obligation may be complex for the claimant to begin with. However, it would be unfair to design a set of prohibitions and prevent private litigation just

[47] See CEPS, *Legal framework covering business-to-business unfair trading practices in the retail supply chain*, (Study for the European Commission 2014).
[48] H. Beale and A. Dugdale, "Contracts Between Businessmen" (1975) 2 British Journal of Law and Society 45.
[49] Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, SWD(2018) 138 final (part 1/2) p.26.

because a subset of these raise concerns about uniformity of interpretation. It may well be that claimants will be unlikely to initiate litigation in cases where the infringement is a matter of judgment. In these instances the claimant may wait for a Commission decision and build a follow-on damages action after an infringement decision is reached.

In sum, a provision modelled on the P2B Regulation may help confirm the role of national courts: requiring Member States to ensure 'adequate and effective enforcement' and ensuring that courts are able to provide remedies that are 'effective, proportionate and dissuasive.'[50]

6. Relationship between competition law and regulation

6.1 Overlaps

As explained in section 2, the current DMA prohibitions are modelled on conduct that is or could constitute an abuse of a dominant position. Spelling out the relationship between the DMA and competition law is thus inevitable. Recital 10 holds the key. The Commission explains that the DMA 'pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims at protecting a *different legal interest* from those rules and should be without prejudice to their application' (my emphasis).

This is then codified in Article 1(6), which provides that the DMA is 'without prejudice' to the application of Articles 101 and 102 and national competition laws that apply similar prohibitions. National competition rules that prohibit forms of unilateral conduct that do not fall under Article 102 may apply if they impose 'additional obligations on gatekeepers.'[51]

Article 1(6) deals with overlaps in a legally convincing way: conduct may infringe both the DMA and Article 102, and nothing prevents parallel actions. Primary EU Law cannot be displaced by a Regulation. Legally, the question is if such parallel action infringes the ne bis in idem principle. According to the Court, for this principle to apply, 'the facts must be the same, the offender the same and the legal interest protected the same.'[52] Note how Recital 10 explains that the legal

[50] P2B Regulation (above n 34) Article 15.
[51] DMA, Article 1(6). It is also without prejudice to EU and national merger rules and the Digital Services Act.
[52] *Toshiba*, Case C-17/10, EU:C:2012:72, para 97, discussed in G. Monti, 'Managing decentralized antitrust enforcement: Toshiba' (2014) 51 Common Market Law Review 261.

interests protected are different, however this will need conformation by the Court. Arguably there is some similarity since both competition law and the DMA seek to promote competition, but at times the ex-ante framework may be applied merely to ensure fairness between contracting parties. The answer may thus depend upon the activity being challenged. The Commission has taken the view that the application of national telecommunications law (which is based on the transposition of EU directives) by the NRA protect a different legal interest than the competition rules but has at the same time reduced the fine taking into account the penalties imposed by the NRA for infringements which partially overlapped with those in the decision.[53] The lesson from this example is that the Commission is within its rights to apply both DMA and Article 102 and that national competition authorities and courts remain competent to address conduct that infringes the DMA under national or EU competition law.

However, it may be argued that the DMA is a lex specialis which would compel the Commission to apply only the DMA. Pragmatically, this is also the better approach since the design of the DMA makes life so much easier for the Commission. Accordingly we would not expect the Commission to apply Article 102 to address conduct which it has regulated under the DMA.

5.2. Competition law doing more than the DMA

An issue which may arise with more frequency and which poses greater risks is that a national court of a competition authority might wish to apply Article 102 to achieve more ambitious results than the Commission was able to under the DMA. Recall that conduct which a national regulator authorises may still be found to infringe EU competition law, as we have seen from the case-law in the telecommunications sector (e.g. *Deutsche Telekom*).[54] In applying the DMA the Commission may impose obligations under Article 6 in a manner that does not satisfy a national competition authority. May EU competition law apply notwithstanding regulatory clearance?

Before we discuss this question it may be helpful to provide an example to illustrate the point under discussion. Consider Article 6(1)(b): the gatekeeper is required to allow end-users to uninstall pre-installed software so that they switch from an app provided by the gatekeeper to an app offered by a third party. For example, there is a default search engine that the user may uninstall and they upload a different one on their smartphone. Consider now a competition authority finding that in spite of this remedy few consumers switch because the default settings

[53] COMP/39.525 – *Telekomunikacja Polska*, paras 144-145. The point was not discussed on appeal.

[54] *Deutsche Telekom v. Commission*, C-280/08P, EU:C:2010:603. Geradin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom' (2004) 41 Common Market L. Rev. 1519; G. Monti, Managing the Intersection of Utilities Regulation and EC Competition Law (2008) 4(2) Competition Law Review 123.

are sticky. Then a competition authority may wish to act under Article 102 to force the gatekeeper to offer a choice screen when the customer buys the smartphone or require the gatekeeper not to install any search engine at all, allowing the consumer to make that choice without any nudge. In this scenario, either of these two competition law obligations would go further than the remedy under the DMA.

From a policy perspective, there are good arguments against the application of competition law in the ways suggested above: the regulator may be assumed to have a comparative institutional advantage (e.g. better knowledge of the sector, a more refined set of remedies) than the competition authority or a national judge. Moreover the DMA pursues also a fairness goal as well as a competition goal. This leads to two arguments: first that it is likely that the regulator will have considered the importance of setting remedies to enhance competition, so from this perspective the application of competition law to consider the same interest is wasteful. Second, the regulator might decide to balance competition in the short term with a longer view of the market. For instance, in electronic communications the regulator pursues the promotion of competition but also the facilitation of investment and might trade off a reduction of competition if this improves investment in better quality networks.[55] These points speak against the use of competition law to do more than the DMA.

In the US similar arguments have been used to limit the scope of application of antitrust law when the sector is regulated by a dedicated body. In a case where the statute retained the application of antitrust law (as does the DMA) the Supreme Court was confronted with the question of whether to expand the doctrine of refusal to deal beyond its existing confines. In addressing this:

> [o]ne factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.[56]

It followed that since duties to deal were regulated by the Telecommunications Act there was no justification for supplementing such duties with antitrust.[57] Similar policy arguments would appear to militate in favour of the non-application of competition law. Thus if the Commission were to refuse to investigate a complaint on the basis that the matter had been adequately

[55] Directive 2018/1972, establishing the European Electronic Communications Code [2018] OJ L 321/36, Article 3
[56] *Verizon v Trinko* 540 U.S. 398, 412 (2004).
[57] Conversely had the allegation been of collusion, then the Sherman Act would have applied.

addressed under the DMA this would be a sound justification. Likewise the thinking behind *Trinko* could be used as a policy argument for doubting the added value of EU competition law.

An argument that favours the application of competition law to supplement the DMA is the somewhat backward looking and unsystematic list of prohibitions combined with the slow procedure for upgrading the DMA, which we discussed above. By opting for a rule-based approach the Commission is clearly trading off some Type 2 errors in exchange for a speedy intervention. In this context the cure could be the application of a more robust competition law. Past experience suggests that the ECJ views this argument more favourably, largely on the primacy of Treaty obligations but possibly also because it allows one to keep in check weak regulatory efforts.[58]

7. Recommendations

The DMA is a major plank of the Commission's digital markets policy. In order to make this Regulation more effective, the following suggestions are made in this paper:

1. The obligations imposed on gatekeepers should be more clearly matched with the policy ambitions of the DMA. This would make it easier to understand the role and purpose of the obligations taken individually and cumulatively. As shown above, often a set of obligations in the DMA is designed with a specific objective in mind. Making this more explicit will also allow the Council and the European Parliament consider if the obligations are sufficient (see Section 2 above).

2. Concentrating enforcement powers in the Commission is a reasonable choice given the size of the gatekeepers and the EU-wide effect of their conduct. There are also too few gatekeepers to make it expedient to divide regulation among various national authorities (see Section 3 above).

3. A notification procedure should be made compulsory: gatekeepers should explain how they intend to comply with Articles 5 and 6 and the Commission should help them in achieving compliance. A market test may even be desirable in cases where the views of third parties may be helpful. The Commission should close the Article 7 procedure with a decision making the compliance design binding. These changes can be achieved by amending Article 7 and bring it closer to the 'regulatory dialogue' noted in the preambles of the DMA (see Section 4.1 above).

[58] Monti (above n 54) where this point is noted with reference to weak national regulation being corrected by the Commission applying EU competition law.

4. The enforcement pyramid implicit in the Regulation should be refined: if Article 7 is amended then the Commission would have only two further steps to increase the pressure to comply: non-compliance decisions and systematic non-compliance. It may be worth considering whether the Commission should not accept commitments in the latter procedure (see Section 4.2 above).

5. The Commission should have the opportunity of imposing additional obligations on gatekeepers more quickly than provided under the DMA. For example, it should be able to do so after an infringement decision. Conversely a sunset clause should be inserted whereby obsolete obligations can be phased out (see Section 4.3 above)

6. Private enforcement may be rare but it can serve as an additional deterrent device. Furthermore, it can also be that parties are quicker at identifying infringements and the use of national courts to secure interim injunctions can assist in achieving the aims of the Regulation. It would be helpful if the Regulation recalled the right to have recourse to private enforcement (see Section 5 above). This option would be strengthened by a compulsory notification-decision stage where the gatekeeper's compliance path is crystallised. Private parties will be able to rely on this to establish infringements of obligations that require further specification.

7. EU competition law continues to apply, and the Commission or national authorities may well decide to use competition law to upgrade the obligations in the DMA if these prove insufficient to instil fairness or make markets contestable. Conversely, this may be an argument for the legislator to consider a quicker mechanism for the Commission to react under the DMA (as recommended in point 5) when the current obligations are not enough to remedy the market failure (see Section 6 above).