Article

The Proposed Digital Markets Act (DMA): A Legal and Policy Review

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I. Introduction

In December 2020, the Digital Markets Act (DMA) was proposed.[1] It was prepared by the European Commission (EC) following several years of work. The DMA attempts to improve 'fairness' and 'contestability' in the digital sector.[2] The DMA acknowledges that some companies designated as 'gatekeepers' maintain power over 'core platform services' by virtue of incumbency advantages or bad business behaviour.[3] The DMA additionally worries about extension of gatekeepers' control over 'ancillary services' and about incipient gatekeeping positions resulting from tipping effects.[4] The DMA states that it is built on 'strong evidence' of high concentration, trading partner dependence, and unfair conduct.[5] The DMA foresees that targeted regulation of gatekeepers' behaviour will promote the emergence of alternative platforms, improve innovation levels, and drive prices down in the digital sector.[6] The DMA covers eight types of core platform services: online intermediation services (including software application stores), online search engines, social networking, video sharing platform services, number independent interpersonal electronic communications services, operating systems, cloud services, and advertising services.[7]

This short paper gives an overview of the DMA. It does so by describing the DMA's general characteristics (II), the 'gatekeeping' market situations it targets (III), the legal treatment of gatekeeping (IV), the multi-level governance system (V), and the choice of economic policy it articulates (VI). The paper concludes by highlighting areas for further consideration by lawmakers (VII). The ambition of the paper is essentially descriptive. The paper does not cover Chapter V of the DMA, which reproduces extensively similar provisions found in Regulation 1/2003 related to the application of European competition law.[8] Heavy footnoting has been deliberately omitted.

Key points

- The proposed Digital Markets Act (DMA) is in substance a sector-specific competition law.
- The DMA marks a movement from an effects based approach towards per se rules of conduct.
- The DMA is built on the logic of removing discretion from gatekeepers to increase third party participation in core platform services.
- The DMA is under specified: the proposed obligations should each be accompanied by, or grouped according to, a statement of purpose.

II. General characteristics of the DMA

The DMA is essentially a sector-specific competition law.[9] Its provisions dealing with fairness are secondary. The main behavioural obligations imposed on gatekeepers eye towards preserving competitive processes. The DMA's more occasional injunctions on gatekeepers to engage in fair and discriminatory behaviour or to ensure a level playing field simply keep with the European tradition of

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1 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final.

2 The DMA's recitals make ample reference to these two concepts. See for instance Recitals 2, 4, 6, 8, 10, 12, 15–16, 28, 32–33, 58, 65–66, 77–79. Furthermore, Article 1(1) states that the DMA lays down 'rules ensuring contestable and fair markets in the digital sector'.

3 DMA (n 1) Recitals 2 and 3.

4 DMA (n 1) Recitals 14 and 26.

5 Explanatory Memorandum attached to the DMA (n 1) 6.

6 DMA (n 1) Recital 79.

7 DMA (n 1) Article 2(2).

8 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

9 For explicit reference, see the Legislative Financial Statement attached to the DMA (n 1) Section 1.4.1, stating that '[t]he general objective of this initiative is to ensure the proper functioning of the internal market by promoting effective competition in digital markets'. See, however, Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal' (2021) Zeitschrift für Europäisches Privatrecht (forthcoming), arguing that even though the DMA is not competition *law* proper, it is still competition *policy*.

using competition law to neutralise not only the causes of market power, but also exceptionally its manifestations. In this sense, the DMA is not an unfair trading law that would mostly regulate, and specify, gatekeepers' terms and conditions towards users. The DMA primarily pursues objectives similar to European or national competition laws.

The DMA appears built on the logic that the traditional approach to competition law enforcement is not a panacea in the digital sector. Individualised fact-finding as well as the legal and economic evaluation of market power and the determination of abusive behaviour are inefficient in light of the high likelihood and/or high levels of harms associated with certain forms of gatekeepers' conduct.[10] And traditional competition law enforcement that fines abusive market power behaviour in the marginal case allegedly leaves too many instances of bad behaviour under-deterred, because monetary penalties just represent a cost of doing business for gatekeepers. A regulation that systematically forbids categories of business conduct regardless of market circumstances leaves less opportunity for distinguishing to defendants in the particular case and ensures higher levels of general 'deterrence' than fact specific antitrust proceedings.

Instead of proceeding under a case-by-case basis, the DMA formulates general *per se* rules. The DMA's prescriptions and proscriptions apply 'independently from the actual, likely, or presumed effects of the conduct of a given gatekeeper'.[11] Combined with the market capitalization presumptions governing the designation of gatekeepers, the trend towards, and multiplication of, *per se* rules marks an evolution in the direction of increased legal severity and authority. It also incidentally ensures increased legal predictability and procedural efficiency.

Under a particular conception of administrative action, one might consider that the DMA embodies an expansion in administrative discretion. It does just the contrary. Compared to a competition law in which the agency enjoys by law flexibility over resource prioritisation, market definition, and market power evaluation, the qualification of the facts, and the selection of a theory of liability, the DMA removes administrative discretion.

Of course, by creating room for the control of business behaviour on fairness grounds, the DMA opens itself to the attack that it increases administrative discretion. To put the point clearly, the DMA expands the range of social goals that can be legitimately pursued by administrative action. But again, it is essential to recall that there have always been two theories of abusive behaviour in EU competition law, one based on fairness (that targets exploitative abuse), the other on freedom to compete (that targets exclusionary abuse). Moreover, it does not seem that the DMA is trying to allow for the development of a new system of control of business behaviour that would specify fair outcomes. Instead, the thrust of the DMA is to seek to achieve it indirectly, by giving assurances of a fair and level playing field, which is key to ensure contestability in the digital sector.[12]

A better interpretation is that the DMA represents an expansion of the administrative State and a limitation of the free enterprise system. The DMA achieves this through a dual reduction in the discretion of gatekeepers in relation to their market conduct and of administrative agencies in the implementation of competition law. The discretion that is observed lies in the exercise by lawmakers of their legitimate power to promulgate a targeted regulation and to select the obligations to include in the list of 18 practices that are forbidden.

Rather than representing the DMA as an increase in administrative discretion, the DMA is better interpreted as a striving towards imposing *stricter* restrictions on unilateral conduct engaged in by undertakings, compared to the prohibitions found in the Treaty competition rules. A company subject to the DMA can be forbidden to behave in certain ways without a showing of a dominant position being required. For example, Article 6(1)(f) of the DMA forbids tying practices whereby a gatekeeper conditions access to a core platform service on an obligation to subscribe or register to another core platform service. Admittedly, establishing a gatekeeping position might act as a surrogate to the threshold condition of dominance. There is, however, a practical difference. Under the DMA, no detailed market definition and market power evaluation are required before a finding of unlawful behaviour can be made.[13]

Similarly, the DMA declares unlawful a range of practices that would only be deemed abusive upon proof that at least a discrete amount of competition has been actually, or is likely to be, foreclosed in a relevant market. For example, Article 6(1)(d) contains an obligation of equal treatment that mirrors the prohibition of Article 102(c) Treaty on the Functioning of the European Union

10 DMA (n 1) Recitals 5 and 12. See also the Explanatory Memorandum attached to the DMA, 3–4.

11 DMA (n 1) Recital 10.

12 See the recitals cited in n 2 for instances where the DMA mentions 'fairness' and 'contestability'. See also DMA (n 1) Recital 51 for explicit reference to 'the level playing field'.

13 Instead of requiring context-specific assessments, the DMA rests upon *ex ante* prohibitions of a set of practices for digital firms that meet a set of predetermined size-based thresholds. These thresholds and prohibitions will be discussed in Parts III and IV below, respectively.

(TFEU). Importantly, however, the provision does not require a showing of a 'competitive disadvantage'.[14]

The DMA also revitalises Treaty law prohibitions that have obsolesced. Recall that Article 102 TFEU contains a system of direct supervision of the behaviour of dominant firms that forbids them to take advantage of their market power by exploiting suppliers and purchasers by setting inequitable prices and terms of trade or by discriminating amongst customers. Professor René Joliet talked of 'misuse of powers towards utilizers'.[15] Administrative agencies have been reticent to issue decisions condemning exploitative behaviour by dominant firms. The reasons are practical. Assessing whether price levels are inequitable or discriminatory requires information that is often not available or hard to interpret. Errors are common. But there are also concerns of legitimacy. An approach that consists in regulating the activities of a dominant firm is antagonistic to a free market philosophy. Government direct interference with the price system might require a clear legislative mandate. Whichever of these reasons might have explained administrative inertia, the DMA combats at the margins some forms of exploitative business behaviour. The trend is clearest in relation to search engines, ranking services, and recommender systems where Articles 6(1)(g), (i), and (k) require gatekeepers to give their customers' access to a whole range of measurement tools, business intelligence data, and software applications on terms that are fair and reasonable, and even occasionally for free (in relation to advertisement). With this, the DMA provides the legislative mandate needed to raise agency confidence and intervention legitimacy.

The process of adoption of stricter substantive law by the DMA can be best understood as one additional example of adoption of sector-specific competition law by the EU lawmakers. There is no question that the legislature can adopt rules of competition that circumvent the threshold rules of the Treaty provisions, as interpreted in the case law of the EU courts.[16] The EU lawmakers have used this leeway in the past in telecoms, energy, payment cards systems, and credit rating markets.[17] The upside is that a clear and well-delineated statutory instrument avoids 'tricks' like overstretching doctrine, which generate legal uncertainty in other areas of application of competition law. Moreover, there is a merit in a regulation that targets a few companies. Larry Lessig once wrote that behaviour is more 'regulable' under certain circumstances, like for instance when ownership of the means of production is concentrated in a few hands, as is arguably the case of the gatekeeping situation.[18]

The DMA does not say anything about the kind of objectives it tries to achieve. The DMA merely indicates that it purports to promote 'fairness' and 'contestability'.[19] But the meaning of these expressions is vague, and it does not give the reader confidence that there is clarity of purpose behind legislative efforts to increase fairness and contestability. The DMA is, in a sense, underspecified. There is no reference to a clear theory of competition like commodification, differentiation, or Schumpeterian innovation.[20] On close reading, the DMA's theory appears to cover an approach substantially similar to, but considerably watered down from, that followed by the USA in 1956 with AT&T, when (i) the Bell Labs were forced to openly licence their 8,600 patents and (ii) to get out of all business not directly connected with the communications field.[21] It is possible to infer similarity to the extent that the obligations in the DMA lay down soft line of business restrictions. Some of them are conditional on platform entry in adjacent markets. They set conditions on platform entry in adjacent markets and constraints on monetization opportunities if the platform competes with other players outside of the gatekeeping market.[22] Others are not conditional on platform entry. Platforms must in

14 Specifically, Article 102(c) prohibits dominant firms from 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. Until recently, the case law offered little guidance on how to apply the provision. In 2018, the CJEU clarified that an effects-based assessment is required and that it is necessary to 'examine all the relevant circumstances'. Case C-525/16, *MEO—Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, EU:C:2018:270, para 28.

15 Rene Joliet 'Monopolization and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power' (Martinus Nijhof 1970) 247. Experts refer to this as exploitative abuse.

16 The EU competition rules may not apply, for instance, when the conduct in question is required by sector-specific regulation and the undertaking has no discretion to act differently. See e.g. Case C-280/08P, *Deutsche Telekom v European Commission*, EU:C:2010:603.

17 See for instance Directive (EU) 2018/1972 of the European Parliament and the Council of 11 December 2018 establishing the European Electronic Communications Code OJ (2018) L 321/36 (telecommunications) or Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, OJ (2015) L123/1 (payment cards).

18 Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 Harvard law review 501.

19 Again, see the recitals cited in n 2.

20 See, however, Pierre Larouche and Alexandre de Streel, 'Will the Digital Markets Act Kill Innovation in Europe?' (Competition Policy International, 19 May 2021) available at https://www.competitionpolicyinternational.com/will-the-digital-markets-act-kill-innovation-in-europe/ talking about how the DMA affects innovation and discussing two different scenarios of innovation that can be discerned when looking at the DMA.

21 The 1956 consent decree between AT&T and the Department of Justice settled an antitrust suit brought against AT&T in 1949. *United States v Western Electric Co.*, 1956 Trade Cas. (CCH) 68,246 (DNJ 1956).

22 For instance, under DMA (n 1) Article 6(1)(a), a gatekeeper that also competes with its business users cannot use the data of its business users to compete against them. A gatekeeper's entry into an adjacent market (here, the markets in which its business users operate) is thus made

effect relinquish proprietary control of resources, assets, and capabilities in order to assist firms with whom they compete or not and this in an indefinite set of markets.[23]

The DMA thus formulates a policy not distinct in nature from 'common carrier' regulation as applied in US law.[24] Beyond this, however, any further analogy founders. The DMA embodies none of the classical features of common carrier regulation. There is no rate regulation, no general and unconditional duty to deal, no structural separation provision, and no outright line of business restriction. To say something trite, but true the DMA is an *ad hoc* regulation. It incrementally codifies the approach of past competition cases, in an attempt to horizontalize their findings and accelerate the application of remedies through *per se* obligations.[25]

III. The market situation covered in the DMA: gatekeeping

The DMA enacts a law of gatekeeping focused on the distribution layer of the internet. The DMA covers enterprises that control business users' access to demand and end users' access to supply.

Not all gatekeeping positions are a concern. The scope of the DMA is restricted to eight 'core' platform services, at the exclusion of others.[26] The reference to 'core' is an additional element required to focus the DMA on the choke points on the internet, where 'gatekeeping' situations exert the most substantial impact on business and end users.[27] Like Thurman's Arnold concept of economic toll bridges, the concept of gatekeeping seems to have a bad connotation.[28]

The defining criterion of a gatekeeping position is its irreversibility (or weak reversibility). The DMA embodies this idea by multiple references to durability, entrenchment, and weakened contestability.[29] The DMA is inspired by economic works on network effects, where the addition of a marginal user by a platform leads to large individual increases in marginal benefits for other users. Network effects produce 'tipping'. Users aggregate around one (or more) platforms. Demand is sticky. Unlike in conventional dominance analysis, the focus is not only on horizontal size (how large a firm has grown).

In addition, the concept of gatekeeping appears broader than the concept of dominance, in the sense that several platforms might be gatekeepers of a similar core platform service, like for example, application stores.

It is important to note that the DMA does not challenge economic 'power' situations in themselves. The DMA does not entitle the competent authorities to dismember a gatekeeper or restructure the core market where it operates. Equally, it is important to understand that the DMA, unlike the system of control of abuse, is not a system of discretionary supervision of bad behaviour by firms with gatekeeping positions. A specified list of prescriptive and proscriptive rules applies as soon as a firm is designated as a gatekeeper. There is no requirement of 'improper' use of gatekeeping power that triggers application of the rules. And there is no process of evaluation of 'improper' purpose or effect, negligence or deliberateness. The DMA is both a 'no fault' regime and a *per se* prescription and proscription system.

A. Test of gatekeeping

Conventional with the approach followed in competition law to assess market power, the DMA does not look at digital platforms' gatekeeping power in the eye. The tests that are suggested to ascertain gatekeeper power do not diagnose the presence of monopoly profits, rents, or 'unfair' conditions, as a condition for intervention. The DMA follows a long tradition in applied economics that refuses, for good reason, to draw the inference of monopoly power from observation of high profits.

Different from the approach followed in competition law, however, the DMA retains an information-light test to allow for a practical system of advance designation of gatekeeping positions. The point is to avoid that the concept should turn on a definition of the relevant market and on an assessment of market power and of the position of the firm compared to rivals. The system is intended to allow for 'fast' designation of firms without incurring the costs of test of structure.[30]

conditional upon the gatekeeper refraining from using certain data for competitive purposes.

23 For instance, DMA (n 1) Article 6(1)(g) requires gatekeepers to provide business users free, continuous and real-time access to data generated by the use of the gatekeeper's core platform service by these business users. The obligation does not require a competitive relationship between the gatekeeper and business user.

24 Common carrier regulation imposes duties on 'common carriers' to provide their services on a non-discriminatory basis. Historically, common carriers have included companies such as railroad, shipping, utility, and telecommunication companies.

25 For an overview tracing many of the obligations back to a past or ongoing investigation, see Alexandre de Streel, Bruno Liebhaberg, Amelia Fletcher, Richard Feasey, Jan Krämer and Giorgio Monti, 'The European Proposal for a Digital Markets Act: A First Assessment' (2021) CERRE Assessment Paper, 16–17.

26 DMA (n 1) Article 2(2).

27 The term 'core platform service', in contrast, does not necessarily refer to the platform's core market, where most of the revenue and profits are achieved. At least the DMA does not provide for this.

28 Thurman Arnold, 'Antitrust Law and Enforcement, Past and Future' (1940) 7 Law and Contemporary Problems 5, 12.

29 See for instance DMA (n 1) Recitals 15, 21, 23–24, 26–27, 30, 63 and Article 3(1).

30 On the need for a 'fast designation process', see DMA (n 1) Recital 16.

The DMA formulates in Article 3(1) a three-pronged cumulative test of gatekeeping. The test is intended to cover cases of platform power that reach a threshold level of substantiality, criticality, and durability. The first prong considers whether a platform 'has a significant impact on the internal market'. The terms used express a concept similar to that of the holding of a dominant position in a 'substantial part' of 'the internal market' in Article 102 TFEU. The DMA specifies a presumption of substantiality when the platform belongs to a group with a turnover exceeding €6.5 billion or represents a market capitalization in excess of €65 billion in at least three Member States.[31]

The second prong embodies a criticality requirement. The platform must be a choke point for access by business users to end users. Indispensability is not necessary. What seems to be required is that the platform is an important gateway. This is how to read the concept of a 'core' platform service.[32] The eight services listed in Article 2 can thus be taken to refer to 'core platform services' only after an empirical inquiry. The DMA formulates a presumption of criticality when the platform has more than 45 million monthly active users in the EU and more than 10,000 yearly active business users.

The third prong subordinates application of the DMA to a condition of durability. The provision excludes from the DMA transient market power situations that the competitive process can dissolve at lower cost. The DMA defines a presumption of durability when the thresholds of criticality have been met in the last 3 years.

The DMA also introduces an alternative test of gatekeeping in Article 3(6). The idea is to allow the Commission to designate gatekeepers that do not cross the quantitative presumptions of Article 3(2) or to rebut substantiated defences of lack of substantiality, criticality, or durability pursuant to Article 3(4). In such cases, the Commission must establish that the three conditions of Article 3(1) are met. The DMA specifies six relevant data points to guide the Commission's assessment, without however giving indication of priority or weight. These are size, user adoption, entry barriers, scale and scope effects, lock in, and data capabilities. But the list is not exhaustive. The inquiry appears to demand something close to a market power analysis, without requiring a relevant market definition.

B. Designation process

The DMA gives the EC authority to 'designate' digital platforms for immediate application of command and control 'obligations'. The difference with the regime of antitrust liability currently in place for digital platforms is one of degree, more than nature. The DMA works with many more positive obligations than the antitrust rules (which are mostly proscriptive). More important, the DMA does not condition the application of the obligations on a test of anticompetitive injury.[33] A conceivable argument is that the gatekeeper screen allows an inference of economic harms and a dispensation of factual inquiry, similar to the establishment of dominance under Article 102 FTEU. This argument is, in our view, weaker. The modern case law under Article 102 TFEU has systematically required a test of anticompetitive purpose or effect. And even when the case law was less demanding, the evaluation of dominance turned on empirical proof of weakened competitive conditions.[34] None of these understandings is present under the test of gatekeeping as formulated.

The designation process works on the following procedure. Providers of one or more core platform services listed in Article 2 that meet the thresholds of Article 3(2) have 3 months to notify their initial assessment and related information to the Commission.[35] The Commission can also act on its own motion, by launching an investigation seeking to designate a gatekeeper under Article 15. The Commission must complete the designation procedure in a period of 60 days.[36] Article 3(8) then says that a designated gatekeeper enjoys 6 months to conform with the obligations laid down in Articles 5 and 6. The same time limits apply when a suspected gatekeeper makes a substantiated defence that requires the Commission to proceed with a qualitative designation or where the Commission operates on its own motion under Article 15. Designations are open to automatic review every 2 years, but changes in facts on which designations were based allow earlier reconsideration.[37]

The procedural and substantive safeguards that cabin in the potential exercise of administrative discretion are limited. The DMA allows a provider of core platform services to present a defence to the effects that the requirements of paragraph 1 are not met. But the text of the DMA rules out conventional safeguards like the right to

31 The presumptions might be further specified under a delegated act. DMA (n 1) Article 2(5).

32 See also DMA (n 1) Recital 15, stating that the targeted obligations 'should only apply' to 'core platform services that individually constitute an important gateway for business users to reach end users'.

33 Instead, the DMA automatically subjects a digital platform that has been designated as a gatekeeper to the obligations.

34 Case 6/72, *Europemballage Corporation and Continental Can v Commission*, EU:C:1973:22, para 33–37.

35 DMA (n 1) Article 3(3).

36 DMA (n 1) Article 3(4).

37 DMA (n 1) Article 4.

be heard and the right of access to the file from the designation process.[38] The omission of due process provisions that have now become a staple of competition proceedings can be interpreted as reflecting an intention to allow fast intervention in dynamic markets. The exclusion of due process provisions will be a cause of disagreement and will likely generate litigation before the EU courts. The fact that the DMA has a regulatory ambition does not imply by nature a relaxation of due process requirements. The case law of the EU courts has established that due process rights also apply in socio-economic regulation, on the ground of fundamental rights protection[39] . The same impression of avoiding giving defendants the benefit of a regulatory dialogue comes from the exclusion of any possibility of settlement at the designation process under Article 23. When the designation process follows a market investigation under Article 15, the Commission must simply communicate its preliminary findings to the core platform service supplier before adoption of a final decision.[40]

Abstract substantive safeguards limit, frame, and structure the Commission's evaluation of gatekeeping positions. Article 3(1) focuses on concepts like 'significant impact', 'important gateway', and 'entrenched and durable position', which leave considerable leeway to the administration in designating gatekeeping positions. Moreover, in Article 15(4), the DMA leaves open a possibility to designate incipient gatekeepers, when a gatekeeping position is foreseeable in the near future. While abstract and general standards tend to protect individual freedom more than concrete and individualised rules, the low level of specification of Articles 3(1) and (6) could raise, rather than limit the Commission's discretion compared to a traditional market power and market definition assessment. On the other hand, the DMA hints that it is focused on a specific class of market power problems, when Article 3(6) singles out factors like 'network effects', 'data-driven advantages', and 'user lock-in' for the gatekeeper assessment. It is unclear, however, whether these limitations are dispositive, so that the Commission would not be allowed to designate a gatekeeper in markets, which do not work on network effects or just on low levels of network effects like very specialised platforms (e.g., a dating service for a specific population class). Complaints of unbounded discretion at the designation process would probably recede if network effects were made a primary criterion for the evaluation of gatekeeping positions under Article 3(1). One possible limitation of administrative discretion can be seen in the fact that efficiencies stemming from concentration are not relevant to a gatekeeper designation.

C. Adaptations

The designation process works on threshold levels that create adverse selection problems. The stated ambition of the DMA is to promote the single market.[41] That ambition requires a relaxation of the constraints on the supply and demand side for business users and end users willing to operate across national borders. The level at which the presumption of Article 3(2)(b) is currently set might however achieve the opposite result, by catching predominantly entities that seek to grow beyond their home territory. The problem is not one of legal analysis. All threshold rules create over and under inclusion problems. The problem is one of consideration of empirical facts about business strategy in the digital sector. New entrants in the digital sector normally raise capital, launch their service, grow home, and then expand to one country (or more) at a time. In the majority of cases, a new entrant will select new entry territories by order of highest growth potential. The selection rule focuses on countries with the largest base of addressable users that allows exploitation of the substantial economies of scale documented in the digital sector. More clearly, new entrants, small and large, will prioritise the next largest Member State for territorial expansion (with possible exceptions in the case of linguistic and cultural similarities). Against that backdrop, the 45 million-user threshold appears to create adverse effects on small and medium sized digital businesses that contemplate their *first* territorial expansions. Small and medium sized digital businesses might refrain from targeting large Member States and redirect their expansion strategies towards small Member States with lower scaling potential.

The designation process also contains flexibility clauses or open ended concepts that undermine its targeted ambition. Article 3(6) gives the Commission wide discretion to designate a gatekeeper within the lax constraints of Articles 2 and 3(1). Article 2's list of platform services covers both specific services like search engines or social networking services, that concern only a small group of large incumbent firms from the digital industry, and

38 DMA (n 1) Article 30 provides these safeguards with respect to Commission decisions taken under a range of DMA provisions, but Article 3 is not included.

39 Case C-32/95 P, *Commission v Lisrestal*, EU:C:1996:402.

40 Different time limits apply. When the Commission works under Article 3(6), it has 6 months to communicate its preliminary findings, and 12 months to adopt a decision. When it works under Article 3(2), but the provider of core platform services has shown that it does not meet the requirements of Article 3(1), the Commission has 3 months to communicate its preliminary findings, and 5 months to adopt a decision.

41 See for instance DMA (n 1) Recital 8, emphasising the need to eliminate 'obstacles to the freedom to provide and receive services (. . .) within the internal market'.

general purpose services like operating systems and cloud computing, that have broad implications for many firms beyond this group. Incidentally, the DMA gives no definition of 'platform' in Article 2. And other platforms that constitute 'important gateways', like applications stores, are not directly mentioned in the list of 'core platform services', but only indirectly referenced in the definitions. And Article 15(4) gives the Commission the power to designate incipient gatekeepers, to ensure the prevention of situations of market tipping.

IV. The legal treatment of gatekeepers: obligations

Asymmetric conduct obligations bear on firms designated as gatekeepers. We talk of obligations, not prohibitions, because the DMA is proscriptive and prescriptive. The DMA specifies two types of obligations. The obligations specified in Article 5 are self-executing. They are directly applicable, without a Commission decision. The obligations specified in Article 6 are also self-executing, but they can be further elaborated in a Commission decision. Beyond this difference, there is no other obvious distinction between the lists of obligations found under both provisions. Both lists appear to cover conduct towards business users or end users. Both lists appear to impose obligations seeking to promote fairness and/or contestability. And both lists cover exploitative or exclusionary practices in the core platform market, in 'ancillary' markets 'where the gatekeepers are present', and in 'ancillary' markets in which they are not active. Articles 12 and 13 of the DMA also specify discrete obligations.

In the following sections, we examine the different types of asymmetric conduct obligations furnished by the DMA (i), the legal regime of *per se* application (ii), the specific case of perfectible remedies pursuant to Article 6 (iii), and the complex institutional setting contemplated (iv).

A. Asymmetric conduct obligations

1. The problem of under specification

The DMA obligations follow each other in random order. In a sense, the DMA is a pragmatic instrument. The obligations more or less correspond to the issues that were at the core of past or ongoing competition cases at European and national levels.[42] That said, the main difficulty with a discussion of the obligations of Articles 5 and 6 (and 12 and 13) lies in the absence of an explicit framework that would allow one to organise them rationally. The difficulty is not just analytical. Article 7 requires running the measures that further specify the obligations of Article 6 through an effectiveness and proportionality assessment. Moreover, Articles 7(1) and (7) state that each obligation has a unique objective, when they talk about 'the objective of the relevant obligation'. How is an effectiveness and proportionality test to be done if the DMA does not identify and specify objectives, beyond a broad and inseparable reference to the dual objectives of 'fairness' and 'contestability'? More specified proxies, pragmatic tests, and intermediate objectives are necessary to allow the Commission, the EU Courts, gatekeepers, and third parties to benchmark the effectiveness and proportionality of Article 7 remedies and more generally to evaluate the success of the policy underpinning the DMA. In addition, the text does not always use a language that corresponds to the state of the art in economics, business and management science, and policymaking. For example, the concept of an ancillary market is new and not defined. When the text relies on established terminology, it does not provide a definition. True, one might say, if the terminology is in the state of the art, why bother defining it? But the text will be read by non-specialists, including generalist judges who will have to apply it by virtue of the direct effect attached to EU regulations. Concepts like platforms, tipping or network effects would thus benefit from further definitions and elaboration. We devote the next section to these issues, trying to regroup the DMA obligations by consideration of their nature and purpose. The ambition is to unpack their primary goals and clarify the meaning of their terms.

2. The DMA obligations

a. Unlocking consumer choice. Article 5(a) requires diversified gatekeepers to inform consumers and collect their consent when they plan to combine personal data collected from their core platform service with personal data collected from other services including theirs. The DMA manifests a policy of hostility towards personal data combination. It says that gatekeepers should generally 'refrain from combining personal data'. The relevant example is Facebook's attempted combination of personal data collected on its social network and messaging services, a case that gave rise to administrative intervention and subsequent litigation under German law.[43] The DMA proscription goes further than existing cases in that it

42 Again, for an overview, see de Streel et al (n 24) 16–18.

43 Bundeskartellamt Decision of 6 February 2019, Case B6-22/16, English version available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5.

also applies to all third-party services, not only to those controlled by a gatekeeper. The primary goal of Article 5(a) is to limit consumer exploitation. Consumers must be given a real choice. Moreover, the opt in system of Article 5(a) purports to limit the magnitude and scale at which deep profiling takes place, again placing an indirect limit on consumer exploitation by extractive targeted advertising and personalised pricing. A secondary goal of Article 5(a) is to limit the economies of scope, which can be generated on the supply side through the combination of personal data and to improve contestability conditions for new entrants in the core platform service and adjacent markets.

Article 5(b) restricts gatekeepers' ability to impose restrictions on business users that prevent them from giving better price or terms through online intermediation channels. The text does not clearly say if the obligation prevents gatekeepers from imposing strict distribution exclusivity, through both contractual and technical restrictions, yet any reasonable construction would hint that it does. The text does not prevent gatekeepers from imposing best price or terms restrictions on distribution channels other than online intermediation services, like 'over the counter' trade or through business users' own websites. Put differently, the DMA allows a gatekeeper to restrict the ability of a business user to offer better conditions through its own distribution channels (a practice known as 'narrow Most Favored Nation (MFN) clauses'). The primary goal of Article 5(b) is to ease entry conditions for other online intermediation services that compete against a gatekeeper's distribution platforms, like application stores, intermediation platform, and operating systems. Article 5(b) does not seek to promote competition for distribution by business users themselves. The philosophy is one of inter-platform competition.

Article 5(c) requires gatekeepers to allow out-of-platform distribution of services by a business user to end users, a practice known as side loading and often relevant in the context of application stores. To that end, the provision also adds that gatekeepers should allow in-platform use by end users of services bought out-of-platform. Short of this precision, end users would never buy services out of the platform. The text purports to allow business users to use different channels to sell their services and to give more choice to consumers when they make purchases online. Compared to Article 5(b), the provision benefits a broader class of direct beneficiaries, in that it is not strictly confined to online intermediation services. Article 5(c) talks about 'users acquired', meaning that distinctions might have to be traced between users of free services that are not captive and users that have signed up to, subscribed, or bought a service or product.

Article 5(f) bans gatekeepers from tying one core platform service with another. For example, a provider of an application store should not make access to the service conditional on use of its search engine. The provision applies to obligations to register or subscribe only. This leaves out product integration like the tying of an application store and an operating system. The obligation promotes consumer choice, but tends to reduce inter-platform competition.

Article 6(1)(b) forbids limitations to end users' ability to modify gatekeepers default choices in relation to software applications. Article 6(1)(b) tolerates an exception for software that is critical to operating systems and devices if no equivalent solutions are offered on a standalone basis by other providers.

Article 6(1)(c) requires gatekeepers offering operating systems to allow installation of or interoperability with third-party software applications or software application stores. Article 6(1)(c) also encompasses tying practices whereby a gatekeeper in operating systems only allows access to third-party software through another of its core platform services like, for example, an application store or a cloud system. The obligation in Article 6(1)(c) does not mean that the gatekeeper cannot take measures necessary to protect 'the integrity of the hardware or operating system of the gatekeeper'. It is not clear if the reference to hardware covers third-party hardware or only the gatekeeper's hardware.

Article 6(1)(e) requires gatekeepers offering operating systems to eliminate technical restrictions that prevent a user from switching to software and services distinct from those natively authorised by the platform. For example, a user of an operating system should be free to switch to any word processor if the operating system allows interoperability with or use of word processing.

b. Limiting data extraction and promoting data access and mobility. Article 5(e) bans gatekeepers from imposing use of their own identification service on business users. This, in turn, allows business users to select other identification services and reduces opportunities for the extraction of key data from end users and business users by core platform services. The ban attacks mandatory usage, distribution, or interoperability of the identification service of a core platform.

Article 6(1)(h) requires gatekeepers to provide effective data portability for both business and end users. The obligation specifies that, in so far as end users are concerned, gatekeepers should specifically furnish data portability tools, including tools for continuous and real-time access. Arguably, Article 6(1)(h) works to limit data extraction by allowing cross-platform data usage by end users.

Article 6(1)(i) requires that business users can access aggregated or non-aggregated data that gatekeepers have collected about their own business users and end users. For example, a gatekeeper shall share with a business user data about downloads of its games, including geographies, demographics, and seasonality. The provision requires additional caution in relation to end user data. Data access should only be provided in a context similar to that for which it has been collected and meet the consent requirements of the General Data Protection Regulation.

Article 6(1)(j) creates a specific data access right for search engines. Gatekeepers that provide a search engine must provide fair, reasonable, and non-discriminatory access to ranking, query, click, and view data. The obligation covers both free and paid search. Anonymization of personal data is required.

c. Removing conflicts of interests, discriminatory behaviour, and unfair deplatforming. Article 6(1)(a) concerns situations where gatekeepers compete with business users by vertical integration. The provision bans gatekeeper use of (non-public) activity data produced by business users. The ban ambitions to preserve a level playing field between the gatekeeper and business users by ensuring non-discrimination between the gatekeeper's own service and that of independent third parties. The ban appears to cover all types of data, including legally protected data that is proprietary to the gatekeeper, data that has been contractually transferred to the gatekeeper by contract, or know how and business secrets. In that sense, the provision does not necessarily attempt to prevent free riding. It may appear strange for a gatekeeper to enter into such type of conduct, because it is not a stable equilibrium in the long term. A gatekeeper that signals that it will not ensure a level playing field in its ecosystem should face difficulties in maintaining business user adoption or even experience business user defection. The existence of the practice suggests that the conduct is not self-defeating, hence the justification to introduce it as an obligation. The provision appears to eye towards Chinese walls as possible remedies, though this is not stated in the DMA.[44]

Article 6(1)(d) prohibits gatekeepers that provide ranking services from treating more favourably their own products and services compared to similar products and services. Rankings should be based on fair and non-discriminatory provisions. For instance, in the *Google Shopping* case, Google was accused of unlawful abuse of dominance for displaying prominently and in rich content a shopping unit and for giving less exposition to comparison shopping websites in the list of search results.[45] Discriminatory treatment can occur in the absence of a clear competitive relationship between the gatekeeper product and a third-party product. For example, an application store might not be able to systematically promote its own leisure podcast series on literature at the expense of other third-party leisure podcasts on sports. Similarly, and unlike in competition law, discriminatory treatment can occur in the absence of a trading partner/commercial relationship between the gatekeeper and the third party.

Article 6(1)(f) requires that gatekeepers that supply operating systems ('OS') give to third-party suppliers of ancillary services access to and interoperability with their OS on conditions equal as the ones they apply to their own ancillary services. Like Article 6(1)(d), the provision does not require establishing that the gatekeeper and third parties are in a competitive relationship in ancillary services. The philosophy is one of equal treatment of all ancillary services, not only competitive ones. The requirement of equal access and interoperability concerns not only the operating system, but also complementary hardware and software features.

Article 6(1)(k) enunciates a prohibition of unfair deplatforming. Article 6(1)(k) says that business users should be given access to software applications stores on fair and non-discriminatory conditions. The fact that Article 6(1)(k) accepts the idea of conditions to access means that there is no right of access for business users. A refusal to give access to a platform may be justifiable by numerous reasons other than the purpose of exploiting bargaining power. Moreover, Article 6(1)(k) refers to 'general' conditions of access, leaving the possibility of individualised terms and conditions of access. Concretely, the provision seems addressed to terms of services. There is no explication given for the restriction of its scope to software application stores.

d. Promoting transparency. Article 5(g) provides that gatekeepers that supply advertising services (for example, search engines and social networks) should inform advertisers and publishers concerning the price they pay for advertisement placement. The obligation works upon request from advertisers and publishers. Requests may also ask for information about the remuneration paid to publishers for advertisement display.

Article 6(1)(g) requires that gatekeepers that supply advertising services provide free access to their own performance measuring tool and information to allow them

44 Chinese walls are procedures within an organisation that restrict the flow of information between different sections of the organisation to avoid conflicts of interest.

45 *Google Search (Shopping)* (Case AT.39740) Commission Decision of 27 June 2017.

to independently verify the ad inventory. The obligation works upon request from advertisers and publishers.

Article 5(d) is a general prohibition of restricting business users' right to petition public authorities in relation to gatekeeper practices. Contractual terms between gatekeepers and business users might embody confidentiality requirements as well as penalties or commercial disincentives in case of breach of contract.

Article 12(1) enjoins gatekeepers to inform the Commission of any intended concentration involving another provider of a core platform service or non-core platform service in the digital sector. The notification obligation covers all concentrations as defined in Article 3 of Regulation 139/2004,[46] without a requirement of minimal turnover or users, allowing purposefully the Commission to be informed of acquisition of nascent competitors. At the same time, the notification obligation only concerns mergers accomplished by gatekeepers with **service** providers. Therefore, mergers in which gatekeepers acquire firms that have not started to operate commercially on the market are not covered by the obligation. According to the very language of Article 12(2), gatekeepers shall describe their turnover and users, implying that the goal is to exonerate transactions with startups that have not 'launched' from the notification obligation. To illustrate, mergers with firms that are early in their life cycle, developing technology or a business concept, are not caught.

Like for intended concentrations, Article 13 imposes on gatekeepers a duty to submit every year to the Commission an independent audit of consumer profiling techniques applied to their core platform services.

B. The *per se* regime of Article 5 obligations

The obligations set out in Article 5 do not prescribe an evaluation of effects. Context specificity or the *de minimis* coverage of a practice caught under Article 5 in a particular case do not open opportunities to avoid application of the obligations. Even if effects are insubstantial or if the context is distinct from that conjectured in the DMA, the lawmakers postulate that the costs of error in specific circumstances are more than offset by the benefits of increased fairness and contestability in the economy, as well as the procedural economy savings achieved under the designation-obligation regime compared to traditional competition enforcement. Efficiencies, however, might matter more than what a first reading suggests. While the DMA emphasises that efficiencies are not relevant in the context of a gatekeeping designation, such a limitation is not expressed in relation to Articles 5 and 6.[47] If efficiencies can be relevant under Articles 5 and 6, it remains unclear under which procedure such arguments might be advanced by gatekeepers under Article 5, given that the obligations are fully self-executing. One possibility might be the procedure provided by Article 16 in the context of a market investigation into systematic non-compliance.

Assuming that efficiencies are, however, irrelevant in the context of the *per se* rules of conduct found in Article 5, a plausible evolution of the law under the DMA will involve discussion on formalities. Gatekeepers, plaintiffs, courts, and agencies risk facing discussion about whether a given practice falls outside of the formal requirements set out specifically for each obligation. For instance, when Article 5(c) talks of 'contracts' with end users, a question arises whether a free business model based on a data transfer meets the required degree of contractualization envisioned in the DMA. To put the point in perspective, the first decades of application of the *per se* rule against price fixing or of 'concerted practices' in most antitrust regimes did not lead to discussion about the economic effects of price fixing or 'concerted practices', but about whether loose forms of inter-firm cooperation that influenced prices through indirect means fell within the forbidden category.

C. Perfectible remedies (Article 6)

Like the obligations in Article 5, the obligations set out in Article 6 are directly applicable. But in contrast with the obligations of Article 5, the obligations of Article 6 might require additional specification or narrow tailoring by the Commission. This situation will arise, according to Article 7(2) of the DMA, when the Commission 'finds' that the measures 'do not ensure effective compliance'. The specification of additional compliance measures is assured by adoption of a specific Commission decision, which is subject to judicial control under Article 263 TFEU under a marginal standard of review.[48] The 'specification' decision appears distinct from, but will usually follow, a 'non-compliance' decision, including possibly fines and periodic penalty payments under Articles 25, 26, and 27.

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

47 DMA (n 1) Recital 23, stating that '[a]ny justification on economic grounds seeking to demonstrate efficiencies deriving from a specific type of behaviour by the provider of core platform services should be discarded, as it is **not relevant to the designation as a gatekeeper**', emphasis added.

48 Unlimited jurisdiction is limited to fines or periodic penalty payments by Article 35 of the DMA (n 1).

The formulation of Article 7(2) leaves little doubt that gatekeepers have no right to a specification decision detailing the obligations of Article 6. The Commission may find out about a situation of 'non-compliance' requiring further 'specification' based on its own investigative powers or complaints from third parties. Additionally, Article 7(7) allows a gatekeeper to request the opening of proceedings pursuant to Article 18, with a view to the adoption of a 'specification' decision (by hypothesis, a gatekeeper will not ask the Commission to adopt a 'non-compliance' decision). To support a request, the gatekeeper must produce a 'reasoned submission' that sets out contemplated or implemented compliance measures and how they meet the objective of the particular Article 6 obligation. The Commission has full discretion to adopt a specification decision or refuse to grant one. Its powers are bounded by due process safeguards set out mostly in Article 30 providing a right to be heard and a right of access to the file. Its powers are also limited by the general application of the proportionality principle. If the Commission must ensure that the specified measures meet the 'suitability' test of effectiveness in achieving the objectives of the relevant obligation, they must also not go beyond what is strictly necessary in the specific circumstances of the gatekeeper and the relevant service.[49] The DMA provides implicit indications that the benchmark against which the nine obligations defined at limbs (a) to (i) of Article 6(1) are to be assessed is contestability, whereas Articles 6(1)(j) and (k) 'also' seem to require an additional evaluation in light of the fairness objective. Fairness is not ensured if there is an 'imbalance of rights and obligations' on business users, or a 'disproportionate' advantage to gatekeepers.

V. The multi-level governance system of the DMA

The DMA embodies a complex system of governance. A literal reading of the DMA gives the impression of a very centralised system in which the Commission plays an exclusive role. Most of the system appears designed in the same way as the governance system of Regulation 17/62 in competition law in which the Commission enjoyed a quasi-monopoly on enforcement.[50] This institutional configuration makes a lot of sense at first blush, given the parallels between the novelty of the digital economy and the new challenges that the Commission encountered in the 1960s when it started an unprecedented programme of integration of national economies. Relatedly, there is a perceived necessity to ensure uniformity in enforcement practice in order to assist the creation of a single digital market that provides scaling opportunities to entrepreneurs.[51]

At the same time, the system envisioned in the DMA creates two dynamics of decentralisation. The first decentralisation dynamic stems from Recital 10 of the DMA, which says that the DMA's objective is 'complementary', but 'different from that of protecting undistorted competition'. If the DMA protects 'a different legal interest' from the rules of competition, then Member States retain the freedom to adopt stricter competition rules on digital firms' conduct in accordance with the margin of legislative competence reserved in Article 3(3) of Regulation 1/2003.[52] Recital 10 therefore limits the complete harmonisation effect sought in the DMA, by self-restraining the scope of regulatory pre-emption and by maintaining the exception to the primacy principle found in Regulation 1/2003. The concrete effect of Recital 10 is to allow Member States to adopt sector-specific competition laws for digital services.

The second dynamic of decentralisation concerns judges and national courts. By virtue of the direct effect of the regulation, national courts have the duty to apply the DMA when its application is demanded before them. The judges of national courts will benefit from the possibility to ask preliminary references to the Court of Justice pursuant to Article 267 TFEU, but will not be able to benefit from the cooperation mechanisms established by EU competition law, in particular in Article 15 of Regulation 1/2003. In cases of dual application of Article 102 TFEU and the DMA, this will mean that the dialogue with the Commission cannot encompass issues related to the DMA.

The direct effect of the DMA remains uncertain in relation to Article 6. The obligations formulated in Article 6 might appear clear, precise, and unconditional, but their implementation might not be, as confirmed by Article 7.[53] Therefore, an open question is whether Article 6 can be deemed sufficiently precise to be directly applicable.

49 See for instance DMA (n 1) Recital 33, stating that 'it is necessary to provide for the possibility of a regulatory dialogue with gatekeepers to tailor those obligations that are likely to require specific implementing measures in order to ensure their **effectiveness and proportionality**', emphasis added.

50 Council Regulation (EC) No 17/62 of 21 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/204. In 2004, Regulation 17/62 was replaced by Regulation 1/2003 (n 8).

51 See for instance DMA (n 1) Recitals 6–8.

52 More specifically, Article 3(3) of Regulation 1/2003 (n 8) allows Member States to apply provisions of national law that predominantly pursue an objective different from that pursued by EU competition law.

53 These are the criteria for direct effect established in Case C-26/62, *Van Gend en Loos v Administratie der Belastingen* EU:C:1963:1.

And the DMA contains no provision seeking to expressly regulate situations of double, triple, or quadruple jeopardy raised by the possible cumulative application before courts of (i) the DMA, (ii) national competition law specific to digital markets, (iii) European competition law, and (iv) national competition law.

VI. The choice of economic policy of the DMA

The choice of economic policy explicitly enshrined in the DMA is to improve contestability and fairness without these objectives being conceptualised as alternatives. The concept of contestability used in the DMA appears to envision the promotion of entry of new firms in core and ancillary markets where gatekeepers operate, as well as in other markets where they are not present. The concept of fairness seems to mean that the rules of the game set by gatekeepers should not create imbalances towards business users and end users, or be set in ways that disproportionately advantage them. Under this interpretation, the DMA's fairness objective encompasses both a procedural function, that is to ensure fair participation in core platform services, as well as a distributive function, that is to ensure a fair sharing of economic benefits in the value chain. But the procedural function of fairness seems to dominate the distributive one. The DMA provisions indeed do not provide for direct regulation of platforms' prices and conditions, but instead rely on mechanisms that seek to ensure a 'level playing field', like non-discrimination clauses and rules on conflict of interest. In competition language, the DMA's legal infrastructure leans more heavily towards the 'equality of opportunity' regime found in the law of Article 106 TFEU on undertakings with special and exclusive rights, than towards a system of correction of exploitation of market power as provided under Article 102 TFEU.

Beyond this, however, the DMA does not articulate a clear choice of economic policy. Both the substance and construction of the DMA's text allow one to reach this conclusion. To start, fairness and contestability do not necessarily work in a virtuous circle. If unfair terms can be a sign of narcotic entry, they can also produce a powerful stimulant to entry. Making extant reference to fairness as contestability without further conceptual articulation sends mixed signals.

In addition, each of the DMA's 18 obligations is written in language that denotes an ambition to achieve several policy objectives, but the text of the DMA at the same time hints that each obligation pursues one 'objective'.[54] The structure of the DMA makes it very hard to unpack the primary objective of each obligation. Some obligations are platform-specific, whereas some are not. Some place constraints on platform core services, whereas others focus on ancillary services. Some depend on a competitive relationship with the platform, whereas others are purely duties of third-party assistance. There is no principled way to structure these obligations. There is no explanation as to why some were chosen, whereas others not. To add to this uncertain state of affairs, the DMA draws a legal distinction between the 7 obligations of Article 5 and the 11 obligations of Article 6, though the rationale for this distinction is wholly unclear beyond the disputable notion that the obligations of Article 5 are easier to comply with. Given that some of these obligations will require a proportionality assessment, and possible judicial review, a clear statement of purpose appears to be missing from the text.[55]

VII. Areas for further consideration by lawmakers

The DMA marks a departure from an approach of antitrust enforcement where an exercise of discretion to start cases, declare infringements, and remedy them, is the default modus operandi and where every type of conduct is investigated and subject to challenge. There is no longer discretion in the selection of investigation and examination of cases by the Commission. The DMA comes close to a *per se* regime, but compared to previous law reforms designed to embrace *per se* rules, it is based on very little 'experience' from cases and no feedback from judicial review. The DMA appears built on the logic of removing discretion from gatekeepers to increase third party participation in core platform services.

The relatively limited knowledge on which the DMA is built creates a legitimacy problem which can be overcome by an increase in the clarity of its legal purposes and, in turn, a more explicit formulation of its choice of economic policy.

The clarity of purpose of the DMA would be improved if the instrument made clear reference to its ambition to serve as a competition and market power regulator of gatekeepers with core positions in platform services. This can be achieved by introducing unambiguous language

54 See DMA (n 1) Article 7(1), speaking of 'the objective of the relevant obligation'.

55 Giorgio Monti, 'The Digital Markets Act: Institutional Design and Suggestions for Improvement' (2021) TILEC Discussion Paper, DP 2021-004, 2-3. One recommendation from Monti on how to improve the DMA consists in matching the obligations more clearly with the policy objectives of the DMA.

to the effect that the DMA complements the rules of competition of the Treaty without being different from a competition mandate and introducing express reference to past examples of similar regulatory experiences such as the approach towards 'Significant Market Power' firms in the telecommunications sector or towards credit rating agencies in financial services.[56]

The choice of economic policy could be made more plain by recognising that gatekeepers' monopoly rents in 'tipped' markets should be subject to indirect pressure from the law, by fostering opportunities for direct competition in the core market and indirect Schumpeterian competition in ancillary, complementary, and new markets. With this, the DMA would send a clear signal to gatekeepers that they cannot live the 'quiet life' in their own tipped markets, as John Hicks famously said, and would in turn incentivise them to explore economic opportunities in other digital services markets that may not yet have tipped or that may have tipped to another gatekeeping firm.[57]

In this respect, the formulation of Article 15(4) is problematic. The provision envisions that some of the eight core platform services have not tipped yet or that they will no longer be tipped in the future. This conjecture is perfectly valid. But an issue arises from the opportunity given to the Commission to declare prospectively one firm a gatekeeper in these markets, on the ground that it is 'foreseeable', 'in the near future', that it will 'enjoy an entrenched and durable position in its operations'. In this case, not all 18 obligations of Articles 5 and 6 apply, but only a restricted set comprising Article 5(b) and Article 6(1) points (e), (f), (h), and (i).

There are known economic reasons why this provision is problematic in its implicit equation of tipping with a market failure, but the goal of this paper is mostly to focus on legal administration and interpretation concerns. Against this backdrop, determining whether and when a platform will foreseeably reach a gatekeeping position in the near future is a problem that 'no human ingenuity can solve', to use the words of Justice Holmes, and which explains the existence of market institutions like venture capital.[58]

The provision also creates a problem of inconsistency with the overall spirit of the DMA. Article 15(4) purports to designate upcoming gatekeepers in one of the eight core platform services, meaning by implication services in which there either are incumbent gatekeepers in place or there were gatekeepers in place, but they are falling behind. Under this logic, is Article 15(4) suggesting that other firms (gatekeeping and non-gatekeeping ones) should not compete for gatekeeping positions to replace incumbent firms or to replace marginalised ones? This is antagonist to the very idea of asymmetric regulation carried out in the DMA. And it risks chilling inter-platform competition and competition for the tipped market, which both seem to be selected as relevant modes of competition by the DMA.

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56 Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021), comparing the approach in the DMA to that in the EU telecommunications regime.

57 John Hicks, 'Annual Survey of Economic Theory: The Theory of Monopoly' (1935) 3 Econometrica 1, 8.

58 *International Harvester Co. v Kentucky*, 234 U.S. 216, 223 (1914).