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Centre on Regulation in Europe

ASSESSMENT PAPER

January 2021

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THE EUROPEAN PROPOSAL FOR A DIGITAL MARKETS ACT A FIRST ASSESSMENT



The recommendations presented in this paper were prepared by a team of academics coordinated by the CERRE Academic Co-Director Alexandre de Streel and composed of Bruno Liebhaberg, Amelia Fletcher, Richard Feasey, Jan Krämer and Giorgio Monti.

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Table of contents

Executive Summary	6
1 Introduction.....	9
2 Objectives and principles	9
3 Scope and criteria to designate regulated gatekeepers.....	10
3.1 Services susceptible to ex ante regulation: Core Platform Services	11
3.2 Criteria to designate Gatekeeper of core platform services.....	12
4 Obligations imposed on core services platforms gatekeepers	16
5 Institutions and enforcement.....	23
5.1 Institutional design.....	23
5.2 Oversight and enforcement modes	25



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Executive Summary

The **Digital Markets Act (DMA)** and the **Digital Services Act (DSA)**, which have been proposed by the European Commission in December 2020, will be a paradigm shift in the regulation of online platforms in Europe. With its mission of improving digital industries regulation, CERRE wants to contribute to the key policy debate that has been triggered by those two proposals. Prior to the adoption of the Commission proposals, a group of CERRE Academics made recommendations for a robust DMA and DSA which would stimulate contestability, innovation and fairness in the digital economy as well as ensure safer and trusted Internet where fundamental rights are respected. Now that the Commission proposals have been adopted and are under negotiation in the European Parliament and the Council of Ministers, CERRE will run a series of debates and reflection on those proposals. We kick off this series with a first assessment of the DMA proposal.

Our **main suggestions for improvements** are the following:

1. Regarding the **objectives** of the new proposed rules,

- We think market **contestability is consistent with the main concerns raised in several recent reports on the functioning of digital markets, and in keeping with European ordoliberal tradition**. The DMA should contribute to a good functioning of the markets in the long run, thereby promoting the diversity and the rate of innovation.
- Contestability is a form of ex ante fairness. The new rules also aim to ensure more **ex post fairness**. This second objective **may be justified, provided it is very cautiously crafted and does not lead to legal uncertainty or regulatory creep**.

2. Regarding the **designation of the regulated gatekeeper**,

- We think that **three criteria test** (i.e., significant impact on the internal market, important gateway to reach end-users and entrenched position) is **sound for the purpose of identifying digital platforms with gatekeeper power, although an additional fourth criterion linked to the provision of several digital services** could have been preferable. Implicitly, this would have introduced an ecosystem criterion.
- The reliance on financial and user size thresholds as a rebuttable presumption for meeting the three criteria test speeds up the designation process and incentivises digital platforms to disclose quantitative and qualitative indicators, on which they hold more information than the Commission. However, it should be clear that **size is not directly linked to gatekeeper power**.
- The list of quantitative and qualitative indicators to rebut the presumption reflects the economic theory on gatekeepers. However, as the gatekeeper concept is new in EU law, we recommend that the **Commission adopts a delegated act or guidelines for the way it will use and assess those gatekeeper indicators** in order to enhance legal predictability on such key issues in the DMA.

3. With regard to the **obligations and prohibitions** to which the regulated gatekeepers are subject,

- We recommend **more flexibility in the rules**. The black list should be very limited and only contain obligations which are detailed and which are always detrimental to market contestability and B2B fairness. The grey list should contain obligations which are more generally drafted on the basis of the following theories of harm: lack of transparency, envelopment through bundling and self-preferencing, lack of access to platforms and data, lack of users mobility and lack of fairness.


- We also recommend that the **possibilities for individualisation of the obligation** on the basis of the characteristics of the regulated gatekeeper should be more explicit, and that the **measures to be taken by the gatekeepers to comply with the DMA obligations should be co-determined by the Commission and the gatekeepers themselves.**
- Moreover, the **Commission should also have the possibility of not imposing a specific obligation** to a specific regulated gatekeeper at all, if this is justified on the basis that there is no measure which would be both effective and proportionate.
- We also recommend to introduce explicitly the **possibility for the gatekeeper to bring a defence** in order to escape the application of some obligations by demonstrating that its practices do not harm market contestability and B2B unfairness.

Regarding the ***institutional design,***

- We agree that it is appropriate to have **centralised enforcement** at the EU level and find it pragmatic to confer enforcement power to the Commission. However, this has important consequences for the features and the working methods of the Commission. If the **Commission** wants to share the same characteristics that EU law imposes upon regulatory authorities at the Member State level, it should have **sufficient budgetary and human resources, be independent from the regulated platforms but also from political power and be accountable.**
- Moreover, the Commission should **maximise the synergies between its different powers, in particular the antitrust power and new powers acquired under the DSA** against Very Large Online Platforms; at the same time, the Commission should also be **clear and predictable about how those powers will be applied and combined.**
- Given those synergies, we recommend that a **joint task force composed of DGs CONNECT, COMP and GROW** is in charge of enforcing the DMA.
- We also recommend **a bigger role for national independent authorities** to support the Commission in enforcing the DMA. In particular, national authorities may receive complaints from business users, contribute to the specification of the obligations of the grey list, monitor the compliance with obligations and contribute to the design of remedies in case of non compliance.

Regarding ***oversight and enforcement modes,***

- We think that those modes need to be **cooperative rather than adversarial.** Thus, we recommend **better aligning the DMA modes of oversight and enforcement to what has been proposed in the DSA,** instead of modelling them on antitrust enforcement. In particular, the DMA should require more internal compliance mechanisms such as regular risk assessments, independent audits or the appointment of compliance officers and should rely more on commitments and codes of conduct.
- Next to the regulated gatekeepers, the Commission should also be supported in its difficult enforcement tasks by the business users of the gatekeepers as well as the other digital platforms providing substitute or complementary services. Thus we recommend that the **DMA give a more explicit role for those stakeholders,** in particular in the design of the measures to implement the obligations, and indeed the remedies in case of non compliance.
- We welcome the extensive investigation powers given to the Commission on database and algorithms. To be effectively used, we recommend that **Commission is staffed with more data and AI experts and can partner with vetted independent experts.**

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- Finally, it seems to us that the proposed DMA is not sufficiently responsive to technology and market evolution. Therefore, we recommend introducing a **requirement for the Commission to regularly review the impact** of obligations imposed and measures taken by the gatekeepers to consider whether they are working as intended or, conversely, to allow firms to make representations that they should be modified.

In a nutshell, we think that the DMA proposal goes in the right direction, moving towards making digital markets more contestable and stimulating innovation and fairness in the digital economy. However, we recommend that the European Parliament and the Council **improve the proposal in order, on the one hand, to make the rules more flexible and even more responsive to the inevitable technology and market evolution and, on the other hand, to make oversight and enforcement more cooperative as has been proposed in the DSA.**

1 Introduction

On 15 December 2020, the European Commission adopted the much-awaited proposal for the Digital Markets Act (DMA) the goal of which is to increase the contestability and the fairness of the digital economy in the European Union.¹ The same day, the Commission also adopted the Digital Services Act (DSA) with the aim of ensuring that Europe is a safe, predictable and trusted online environment where fundamental rights are protected.² Those two proposed instruments are now being negotiated by the European Parliament and the Council of Ministers and could be finalised by 2022 with an application in 2023. Together, the two proposals amount to a paradigm shift in the EU regulation of digital platforms and their implementation will define the responsibilities for the largest platform companies of the world when operating in Europe.

In order to contribute to this important policy debate, CERRE adopted a series of policy recommendations for the DMA and the DSA ahead of the Commission proposals. Now that the proposals have been published, this paper aims to give a first assessment of the tabled DMA and to suggest possible improvements for the ongoing legislative negotiations.³ This paper is structured as follows: after this introduction, section 2 deals with the objectives and principles of the new rules. Then, section 3 deals with the digital services targeted by DMA and the criteria to designate the digital platforms that will be regulated. Then, section 4 deals with the obligations to which the regulated platforms will be subject. Finally, section 5 deals with the institutional design and the enforcement methods. Each section briefly summarises the DMA proposal and then makes a first assessment with suggestions for improvements (which are underlined in grey to facilitate the reading).

2 Objectives and principles

The proposed Digital Markets Act aims to achieve **three objectives**:⁴

- To ensure **contestability of digital markets**, which means that markets should remain open to new entrants and innovators offering digital services that may substitute or complement the services already offered by the existing platforms;⁵
- To ensure **fairness of the B2B relationship** between the digital gatekeepers and their business users, which is defined as a balance between the rights and obligations of each party and the absence of a disproportionate advantage in favour of the digital gatekeepers;⁶
- To strengthen the **internal market** by providing harmonised rules across the EU.⁷

Thus, the contestability objective, as a sort of ex ante fairness, is related to the long-term efficiency of the markets (i.e. the future size of the pie) and is probably easier to implement and operationalise than factors like 'impact on innovation, quality or privacy'. The fairness objective, which is more akin to ex post fairness, is more related to the distribution of the value created by digital markets (the distribution of the pie).

¹ [Proposal of the Commission of 15 December 2020 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](#). The Impact Assessment of the Commission services provide very useful background information to better understand the rationale of the proposal: [Impact Assessment Report of the Commission Services on the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services \(Digital Services Act\), SWD\(2020\) 363](#).

² [Proposal of the Commission of 15 December 2020 for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services \(Digital Services Act\) and amending Directive 2000/31, COM\(2020\) 825](#).

³ See de Stree et al. (2020), [Digital Markets Acts: Making Economic Regulation of Platforms Fit for the Digital Age](#), CERRE Report.

⁴ Prop DMA, art.1.1. Those objectives are different from those proposed in the UK for the DMU which are to further the interests of consumers and citizens in digital markets, by promoting competition and innovation, but should nevertheless be broadly consistent with those objectives.

⁵ This is sometimes referred as fairness in some Executive Vice President Vestager speeches.

⁶ Prop DMA, art.10.2 and also art.7(6) and recital 57.

⁷ Those objectives are very similar to those recommended in the CERRE Recommendations, p. 98-99. However, CERRE also proposed empowering users as a fourth objective.

Those three specific objectives aim to achieve a **more general goal**, which is to ensure that the level of innovation, the quality of digital products and services, the degree to which prices are fair and competitive, and the degree to which quality or choice for business users and for end-users is or remains high.⁸

Obviously, other EU laws, such as the competition law, the Platform-to-Business Regulation, the GDPR, the Audiovisual Media Services Directive or the European Electronic Communications Codes, are already contributing to those objectives, but some regulatory gaps remain that the proposed DMA aims to close.⁹ In covering those gaps, the DMA will be a complement – and not a substitute – to those other EU rules.¹⁰

Thus, the proposed **DMA covers the gaps of competition law and intervenes when competition law cannot act and can only act in an ineffective manner in achieving market contestability and B2B contractual fairness.**¹¹ Hence, the DMA will apply adjacent to competition law. It is important to note that in case of parallel applications of both the DMA and competition law, the Court of Justice of the EU has already judged that there is only a very limited regulated conduct defence when compliance with regulation forces the regulated firms to violate competition law.¹² EU Institutions have also adopted a very narrow understanding of the *ne bis in idem* principle which allows the same corporate conduct to be condemned under two different regulatory instruments, such as the DMA and competition law, if they protect different legal interests¹³.

The proposed **DMA also complements the GDPR by strengthening or extending some of its obligations**, in particular the requirement of user consent in case of data lakes, the obligations related to data portability and transparency on consumer profiling algorithms.¹⁴

As the proposed DMA aims to harmonise the obligations applicable to digital gatekeepers, it **prohibits the Member States from imposing further obligations on gatekeepers for the purpose of ensuring contestable and fair markets.**¹⁵ However, Member States remain free to impose obligations which (i) pursue other legitimate interests such as consumer protection or unfair competition, or (ii) which are based on EU competition rules and national competition rules, provided this is allowed under EU law.¹⁶

In pursuing its objectives, the proposed DMA applies two key general **principles** of EU law: ¹⁷

- first the principle of **effectiveness**,
- second, the principle of **proportionality** which implies that the content and form of regulatory obligations should not exceed what is necessary to achieve the objectives of the DMA.¹⁸

⁸ Prop DMA, rec.25 and 79.

⁹ Prop DMA, rec.5, 10-11

¹⁰ Europe has a long tradition of combining antitrust and regulation to pursue similar policy objectives with each of the two instruments focusing on their respective strengths: <https://promarket.org/2021/01/13/digital-markets-act-explainer-european-regulation-big-tech/>.

¹¹ Prop DMA, Rec.9 and 10 and IA, paras 119-124.

¹² Case C-280/08P *Deutsche Telekom*, ECLI:EU:C:2010:603.

¹³ COMP/39.525, *Telekomunikacja Polska*, paras 143-145. This is confirmed by Prop. DMA, rec.10.

¹⁴ Resp. art.5a, art. 6.1h and I and art.13.

¹⁵ Prop DMA, art.1.6.

¹⁶ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. [2003] L 1/1, as amended, art.3(2) provides that: "(...) Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings". Therefore, it seems that that Section 19a of German Competition Law on Abusive Conduct of Undertakings of Paramount Significance for Competition across Markets which is about to be adopted with the 10th Amendment of the Competition law can be applicable next to the DMA as it is based on national competition law.

¹⁷ See in particular, art.7.2 for obligations specifications as well as art.15.1 and 15.2 for additional behavioural and structural remedies in case of systematic non-compliance.

¹⁸ TEU, art.5(4).

Assessment

The objective of **market contestability** is consistent with the main concerns which have been raised by many recent reports on the functioning of digital markets, as well as with the **ordo-liberal tradition of Europe**. It should ensure good functioning of the markets in the long run and favours long-term competition over short-term efficiencies, thereby promoting the diversity and probably the rate of innovation.

The objective of **B2B fairness** is consistent with the national traditions of many Member States, but is **relatively new at the European level**. Indeed EU law in general has tended, so far, to stay away from distributional issues, with competition law in particular tending to prioritise exclusionary abuses over exploitative abuses. This may be justified as the heterogeneity of preferences among Member States is higher for distributional issues than for (short or long term) efficiency issues. However, as bargaining power may be very unbalanced between digital gatekeepers and their users, a fairness objective **may be justified, provided it is very cautiously crafted and does not lead to legal uncertainty or regulatory creep**.

The two main regulatory principles, **effectiveness and proportionality**, are consistent with **general EU law**, as well as with any smart regulatory system.

3 Scope and criteria to designate regulated gatekeepers

3.1 Services susceptible to ex ante regulation: Core Platform Services

The scope of the proposed DMA covers the following closed list of digital services, which are designated as “**Core Platforms Services**” (CPS):¹⁹

- *Online B2C intermediation services*²⁰ which include *marketplaces*²¹ such as Amazon Marketplace and *app stores*²² such as Apple App Store or Google Play store;
- *Online search engines*²³ such as Google search or Microsoft Bing;
- *Online social networks*²⁴ such as Facebook;
- *Video-sharing platform services*²⁵ such as Youtube;

¹⁹ Prop DMA, art.2(2).

²⁰ Defined as an information society service that (i) allows business users to offer goods or services to consumers, with a view to (ii) facilitating the initiating of direct transactions between business users and consumers regardless of whether the transaction is finally concluded offline or online and which (iii) provide services to business users, based on contractual relationships between the platform and the business user: Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/55, art.2(2). As part (i) of the definition refers to consumers (and not end-users), intermediation services do not include B2B intermediation services.

²¹ Defined as an information society service that allows consumers and/or traders to conclude online sales or service contracts with traders either on the online marketplace's website or on a trader's website that uses computing services provided by the online marketplace: Directive 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union [2016] OJ L194/1, art.4(17).

²² Defined as a type of online intermediation services, which is focused on software applications as the intermediated product or service: Prop DMA, art.2.12.

²³ Defined as an information society service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found: Network Information Security Directive, art.4(18).

²⁴ Defined as a platform that enables end-users to connect, share, discover and communicate with each other across multiple devices and, in particular, via chats, posts, videos and recommendations: Prop DMA, art.2.12.

²⁵ Defined as a service where the principle purpose (or a dissociable section thereof), or an essential functionality is the provision of programmes and/or of user-generated videos to the general public for which the platform does not have editorial responsibility but determines the organisation of the content (including by automated means or algorithms in particular by displaying, tagging and sequencing): Directive 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (“Audio-visual Media Services Directive”) [2010] OJ L95/1, as amended by Directive 2018/1808, art.1(1aa).

- Number independent interpersonal communication services²⁶ such as WhatsApp, Skype or Gmail;
- *Cloud computing services*²⁷ such as Amazon webservice or Microsoft Azure;
- *Operating systems*²⁸ such as Google Android, Apple iOS, Microsoft Windows;
- *Advertising services* offered by a provider of any of 7 core platforms services mentioned above including ad networks, ad exchanges and any ad intermediation services such as Google AdSense.

The abovementioned Core Platform Services were **selected by the Commission because of their following characteristics**: extreme economies of scale and scope, important network effects, multi-sidedness of the market, possible user lock-in and absence of multi-homing, vertical integration and data driven advantages. Those characteristics are not new in of themselves, but when they apply cumulatively, they lead to market concentration, as well as dependency and unfairness issues which cannot be addressed effectively by existing EU laws.²⁹ On the basis of such characteristics, the Commission did not select *video streaming and video-on-demand services* such as Netflix because of the absence of multisidedness, nor *B2B industrial platforms* because of the absence of strong bargaining power asymmetry which could lead to unfairness. The Commission neither selected some ancillary services such as payment services, nor identification services.³⁰

The proposed DMA contains an **in-built dynamic mechanism** which allows the European Commission, after a market investigation, to propose to the EU legislature an amendment the DMA in order to include new digital services in the list of CPSs.³¹ As the expansion of CPS should be done with a legislative review and with not a delegated act, this mechanism does not add much to the right of legislative initiative already provided by the EU Treaties to the Commission.³² This Treaty provision, which prevails over the DMA, does not place limits or condition to the right of initiative. Therefore, the Commission could propose new CPS without a market investigation and could also propose to remove existing CPSs from the list.

3.2 Criteria to designate Gatekeeper of core platform services

As the DMA is an asymmetric law, its obligations do not apply to all the providers of the Core Platform Services, but only to the providers which have been **designated as a gatekeeper** for one or several of those digital services. Such designation is done by the European Commission on the basis of a cumulative “**three criteria test**”, namely: **(i) their large size and impact on the EU internal market; (ii) their control of an important gateway for business users to reach end-users; and (iii) whether the control in question is entrenched and durable.**³³

To facilitate and speed up the designation process, the proposed DMA establishes a **rebuttable presumption** that the three criteria test is met when a provider of CPS is above several **size thresholds** for a certain period (most 3 years): (i) for the undertaking to which the CPS provider belongs, a turnover equal or above €6.5bn or market capitalization of at least €65bn *and* the presence in at least three of the 27 Member States of the EU and (ii) for the CPS, a reach of more

²⁶ Defined as service that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons (whereby the persons initiating or participating in the communication determine its recipient) and which does not connect with publicly assigned numbering resources: Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36, art. 2(5) and (7).

²⁷ Defined an information society service that enables access to a scalable and elastic pool of shareable computing resources: Network Information Security Directive, art.4(19).

²⁸ Defined as a system software which controls the basic functions of the hardware or software and enables software applications to run on it: Prop DMA, art.2.10.


²⁹ Prop DMA, rec.2; also Impact Assessment, paras 128-130.

³⁰ Prop DMA, art.2.14 and 2.15.

³¹ Prop. DMA, art.17(a).

³² TEU, art.17(1)

³³ Prop DMA, art.3.1. Those criteria are very similar to the three first criteria recommended in the CERRE Recommendations, p. 100-101.



than 45 million monthly active end-users in the EU (which represent 10% of the EU population)³⁴ as well more than 10,000 active business users on an annualised basis.³⁵ In practice, when a CPS provider meets those size thresholds, it should notify the Commission, providing all the relevant information within three months.³⁶ On that basis, within two months the Commission designates within 2 months this CPS provider as a gatekeeper, unless the provider tries to rebut the presumption.³⁷

The Commission Impact Assessment indicates that the use of those size thresholds could result in the **identification of 10 to 15 CPS providers** but does not give any explanation for this range number.³⁸ Caffara and Scott Morton calculated on a preliminary basis that the thresholds “will capture not only (obviously) the core businesses of the largest players (GAFAM), but perhaps also a few others. Oracle and SAP, for instance, would appear to meet the thresholds, as would AWS and Microsoft Azure. Conversely Twitter, Airbnb, Bing, LinkedIn, Xbox Netflix, Zoom and Expedia do not appear to meet the thresholds at present, and Booking.com, Spotify, Uber, Byte dance/TikTok, Salesforce, Google Cloud and IBM Cloud appear to meet some but not others”.³⁹ However, Oracle and SAP do not appear to offer CPS as they do not operate B2C platforms and do not have separate business users and end-users.

As the size thresholds do not necessarily indicate a gatekeeper position, a CPS provider which is above the thresholds has the possibility to present sufficiently substantiated arguments to rebut the presumption and demonstrate that at least one criterion of the three criteria test is not met.⁴⁰ **Such rebuttal should be based on an open list of quantitative and qualitative indicators** mentioned in the proposed DMA such as the financial size, the number of customers and their lock-in, the entry barriers or the scale and scope effects.⁴¹ Conversely, if a CPS provider is below the thresholds but meets the Three Criteria Test, the Commission may designate within 12 months such provider as gatekeeper on the basis of the same list of indicators.⁴²

The gatekeeper designation only concerns the CPS which meets the three criteria test and does not apply to all the CPSs, let alone all the digital services, provided by the platform. In other words, the gatekeeper designation applies to a service, not to a firm. For instance, if Facebook holds a gatekeeper position for social network services, that does mean that Facebook will also be designated as gatekeeper for its marketplace services.⁴³

Table 1 below summarises the three criteria test to designate the gatekeepers, the size thresholds which establish a rebuttable presumption and the quantitative and qualitative indicators that can be used to rebut the presumption or to designate gatekeepers which are below the thresholds.

³⁴ Note that the same criterion is proposed to designate the Very Large Online Platforms which are subject to additional obligation and a more Europeanised oversight under the DSA: Prop DSA, art.25.2 DSA.

³⁵ Prop DMA, art. 3.2 and rec. 23. The Commission could, in delegated acts, clarify the methodology to measure the size thresholds in order to ensure legal predictability and could also adjust the thresholds: Prop DMA, art. 3.5.

³⁶ Prop DMA, art.3.3.

³⁷ Prop DMA, art.3.4 and 15.3.

³⁸ Impact Assessment, para.148.

³⁹ <https://voxeu.org/article/european-commission-digital-markets-act-translation?s=09#.XS5Rss3Eks.twitter>

⁴⁰ Prop DMA, art.3.4.

⁴¹ Prop DMA, art.3.6 + rec 25.

⁴² Prop DMA, art.3.6 and art.15. Note that three or more Member States may request the Commission to proceed with such designation.

⁴³ Prop. DMA, art.3(7) and rec 29.

Table 1: Criteria, thresholds and indicators to designate existing gatekeeper

Three Criteria Test	Size Thresholds	Quantitative and qualitative indicators
1. Significant impact internal market	<i>Financial and geographical size (at firm level)</i> <ul style="list-style-type: none"> - Annual EEA Turnover (last 3 years) => € 6.5bn OR Market cap (last year) => € 65 bn - AND provides one CPS in at least 3 Member States 	<i>Size, operation and position</i> <ul style="list-style-type: none"> - Very high turnover derived from end-users of a single CPS - Very high market capitalisation - Very high ratio of equity value over profit
2. Important gateway to reach end-users	<i>Users size (at CPS level)</i> <ul style="list-style-type: none"> - Monthly active end-users > 45m - AND Yearly active business users > 10 000 	<i>Number and type users</i> <ul style="list-style-type: none"> - Number of end-users - Number of dependent business users - End-users and business users lock-in, lack of multi-homing
3. Entrenched and durable	CPS user size is kept over the last 3 years	<i>Entry barriers</i> <ul style="list-style-type: none"> - Network effects, data driven, analytics capabilities - Economies of scale and scope (incl. from data)
		<i>Other structural market characteristics</i> <ul style="list-style-type: none"> - High growth rates, or decelerating growth rates read together with profitability growth - Vertical integration

Next to existing gatekeepers, the Commission may also designate an **emerging gatekeeper** when the CPS provider meets the two first criteria (i.e., significant impact and important gateway) and the meeting of the third criterion is foreseeable.⁴⁴ In this case, the emerging gatekeeper is subject to a subset of the obligations imposed on existing gatekeepers with the aim to prevent market tipping.

⁴⁴ Prop DMA, art.15.4, rec 27 and 63.

Assessment

The **three criteria test is sound to identify digital platforms with gatekeeper** power which corresponds, as explained by Caffara and Scott Morton, to “an intermediary who essentially controls access to critical constituencies on either side of a platform that cannot be reached otherwise, and as a result can engage in conduct and impose rules that counterparties cannot avoid.” The test does not explicitly mention market power, as no relevant market needs to be defined in the designation process. However, the second and third criteria implicitly include a notion of market power and several indicators to rebut the presumption are also linked to market power or, in competition law, to the assessment of a dominant position.⁴⁵

However, the **test may not be strict enough** for this first generation of the DMA. In drafting the proposal, the Commission services envisaged a stricter test which would require the gatekeeper to provide at least two CPSs (instead of merely one, as finally proposed).⁴⁶ This additional condition would inevitably have led to a more limited number of regulated platforms, estimated to be between 5-7 (instead of 10-15 under the proposed DMA). Implicitly, such a condition may also have introduced a fourth criterion linked to the control and the orchestration of an ecosystem composed of several CPS.⁴⁷ This would have had the advantage of focusing the DMA (and the limited resources for its enforcement) on the most obvious and pressing contestability issues which are related to the control and the extension of ecosystems in the digital economy.

The reliance on size thresholds, which are relatively easy to determine for the Commission, as a rebuttable presumption for the meeting of three criteria test will **incentivise the digital platforms to disclose the quantitative and qualitative indicators that they know better than the Commission. However, it should be clear that such presumption is only based on size and that size is not directly linked to gatekeeper power.** In particular, the size of a multi-services platform, is not necessarily correlated with the size of a specific CPS, let alone the size of this CPS in Europe. Also the mere number of CPS users does not necessarily reflect the control of a gateway and gateway power derives more from the incentive and the ability of users to switch or multi-home between competing platforms than from the mere number of users.

The **list of quantitative and qualitative indicators** to rebut the size presumption or to designate CPS providers which are below the thresholds **are sound** and reflect the economic theory on gatekeeper. However, as the gatekeeper concept is new in EU law⁴⁸ and the list of indicators proposed in the DMA remains open, the Commission should **enhance legal predictability by adopting a delegated act or guidelines on the way it will use and assess those indicators.**⁴⁹

Finally, a **review cycle of two years for gatekeeper designation⁵⁰ is too short** given the logistical and fact-finding pressures it imposes upon the Commission (especially in the absence of assistance from national authorities) and the fact the timeline for potential competition assessment in antitrust is generally three years. The cycle should be longer, for instance five years as it has been proposed by the CMA or as it is provided for in telecom regulation.⁵¹

⁴⁵ This the case in particular of user lock-in or, more generally, the different types of entry barriers.

⁴⁶ Impact Assessment, paras.148 and 388.

⁴⁷ Such additional criterion was proposed in the CERRE Recommendation, p.101.

⁴⁸ There is no clear definition of gatekeeper in EU law, although the European institutions have used the term in few merger decisions: Case M.2876 *NewsCorp/Telepiu*, para.198, the Commission considered the merging parties would have been “the gatekeeper of a tool (Videoguard CAS) that may facilitate entry for any alternative pay DTH operator and of an infrastructure (the platform) that may ease the conditions for the broadcasting of pay and free TV satellite channels.”

⁴⁹ Those guidelines are often adopted in competition law and in some economic regulation. See for instance, Commission Guidelines of 27 April 2018 on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, OJ [2018] C 159/1. However, those guidelines are usually based on past administrative practice and case-law which is not yet developed for the legal concept of gatekeeper.

⁵⁰ Prop DMA, Art.4.

⁵¹ EECC, art.67.5.

4 Obligations imposed on core services platforms gatekeepers

A digital platform which has been designated as gatekeeper for one or several Core Platforms Services is subject to two lists of obligations. The first list (the black list) comprises seven directly applicable detailed obligations which are in fact mostly prohibitions. The second list (the grey list) comprises 11 more or less detailed obligations which may need to be specified by the Commission. **Both lists apply generally to all the digital platforms which have been designated as gatekeeper** independently of their business models and market characteristics (although several obligations are CPS specific). Also, the application of the lists is **limited to the specific CPS** for which there has been a gatekeeper designation and not to the other CPSs provided by the online platform.

The **black list** comprises the following prohibitions and obligations:

- (a) **Refrain from combining personal data** sourced from CPS with personal data from other services of the gatekeeper or third-parties, and from signing in end-users to other services of the gatekeeper in order to combine personal data, **unless** the **end-user** has been presented with the specific **choice** and provided meaningful consent,⁵² such practice has been condemned under competition law by the German competition authority in the 2019 *Facebook* case⁵³ and under consumer protection law by the by Italian Competition and Consumer Authority;⁵⁴
- (b) **Allow business users to offer the same services to end-users through third-party intermediation** services at different conditions than those offered through the gatekeeper intermediation,⁵⁵ such clauses haven been condemned under competition law in the *Amazon e-book* case⁵⁶, or in several *online hotel booking* cases;⁵⁷
- (c) On the one hand, **allow business users** to promote offers to end-users acquired via the CPS, and to conclude contracts with these end-users regardless of whether for that purpose they use the gatekeepers' CPS (**anti-steering**) and, on the other hand, **allow end-users** to access through the gatekeeper's CPS, content, subscriptions, features or other items by using the apps of a business user, where these items have been acquired by the end-users from the relevant business user without using the gatekeeper CPS⁵⁸, the legality of such clause under competition law is currently being reviewed by the Commission in the *Apple App Store* case;⁵⁹
- (d) **Restricting** business users from **raising issues** related to gatekeepers practices with **public authorities**;⁶⁰
- (e) **Bundling** the CPS for which the online platform has a gatekeeper position **with ID services**;⁶¹

⁵² Prop DMA, art. 5.a.

⁵³ https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html

⁵⁴ <https://en.agcm.it/en/media/press-releases/2017/5/alias-2380> and <https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes>

⁵⁵ Prop DMA, art. 5b. This provision complements P2B Reg, art. 10.

⁵⁶ *Decision of the Commission of 4 May 2017, Case 40 153 Amazon ebooks.*

⁵⁷ See https://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf

⁵⁸ Prop DMA, art. 5c This provision complements P2B Reg, art. 10

⁵⁹ *Case 40 437 Apple - App Store Practices (music streaming).*

⁶⁰ Prop DMA, art. 5d.

⁶¹ Prop DMA, art. 5.e.

- (f) **Bundling several CPSs** offered by the platform and for which the gatekeeper designation applies;⁶² such bundling has been prohibited in the Google Android case;⁶³
- (g) **Provide** advertisers and publishers with **information concerning the price paid by the advertiser and publisher** and remuneration paid to the publisher⁶⁴, such lack of transparency is currently investigated in the Google AdTech case.⁶⁵

The **grey list** comprises the following 11 obligations which may need to be specified:

- (a) **Refrain from using, in competition with business users, any data** not publicly available, which is generated through activities by those business users of its CPS or provided by those business users or their end-users,⁶⁶ such practice is currently analysed in the *Amazon Marketplace* case;⁶⁷
- (b) **Allow end-users to uninstall pre-installed apps** on its CPS;⁶⁸ such practice has been prohibited in the *Microsoft Explorer* and *Google Android* cases;⁶⁹
- (c) **Allow the use of third-party apps and app stores** using, or interoperating with the OS of the gatekeeper and allow these apps and app stores to be accessed by means other than the CPS of the gatekeeper (side loading);⁷⁰ this practice is being reviewed in the *Apple App Store* case;⁷¹
- (d) Refrain from treating more favourably in ranking services offered by the gatekeeper compared to similar services of third parties and **apply FRAND conditions to such ranking**;⁷² this internal discrimination has been prohibited in *Google Shopping*⁷³ and is being reviewed in the *Amazon Buy Box* case;⁷⁴
- (e) **Refrain from technically restricting the ability of end-users to switch** between different apps and services to be accessed with the OS of the gatekeeper;⁷⁵
- (f) **Allow** business users and providers of ancillary services **access to and interoperability with the same OS, hardware or software features** that are used in the provision by the gatekeeper of any ancillary services;⁷⁶ this internal discrimination is analysed in *Apple Pay* ongoing case;⁷⁷
- (g) **Provide advertisers and publishers, free of charge, access to the performance measuring tools** of the gatekeeper and the information necessary to carry out their own independent verification of the ad inventory;⁷⁸

⁶² Prop DMA, art.5.f.

⁶³ and [Commission Decision 18 July 2018, Case 40 099 Google Android](#).

⁶⁴ Prop DMA, art.5.g.

⁶⁵ AT. 40 660 and 40 670.

⁶⁶ Prop DMA, art.6.1a. This provision complements P2B Reg, art.9.

⁶⁷ [Case 40 462 Amazon Marketplace](#).

⁶⁸ Prop DMA, art.6.1b.

⁶⁹ [Commission Decision of 16 December 2009, Case 39 530 Microsoft Explorer](#) and [Commission Decision 18 July 2018, Case 40 099 Google Android](#).

⁷⁰ Prop DMA, art.6.1c.

⁷¹ [Case 40 716 Apple - App Store Practices](#).

⁷² Prop DMA, art.6.1d. This provision complements P2B Reg, art.5 and Commission Guidelines of 7 December 2020 on ranking transparency pursuant to Regulation 2019/1150 of the European Parliament and of the Council, OJ [2020] C 424/1.

⁷³ [Commission Decision of 27 June 2017, Case 39 740 Google Search \(Shopping\)](#).

⁷⁴ [Case 40 703 Amazon - Buy Box](#).

⁷⁵ Prop DMA, art.6.1e.

⁷⁶ Prop DMA, art.6.1f. This provision complement interoperability obligations between number independent communications services provided in EEC, art.61(2c)

⁷⁷ [Case 40 452 Apple - Mobile payments](#). Also German law on access to technical infrastructures supporting payment services.

⁷⁸ Prop DMA, art.6.1g.

- (h) **Provide** effective, continuous and real-time **portability of data** generated through the activity of a business user or its end-user, in particular with tools for end-users to facilitate the exercise of data portability;⁷⁹
- (i) **Provide** business users (or third parties authorised by them) free of charge, with effective, high-quality, continuous and real-time **access to data, that is provided for or generated** in the context of the use of the CPS **by those business users and their end-users**;⁸⁰
- (j) **Provide** to any third-party providers of online **search engines with access on FRAND terms to ranking, query, click and view data** in relation to search generated by end-users on online search engines of the gatekeeper;⁸¹
- (k) **Apply FRAND conditions** (which can be assessed with different benchmarking methods) for the **access by business users to app stores**.⁸²

Although those obligations apply directly to the designated gatekeepers, they may be **specified by the Commission in a regulatory dialogue** with the gatekeeper on the basis of two principles: (i) the effectiveness of the measures in achieving the objectives of the obligation and (ii) the proportionality of the measures given the specific circumstances of the CPS and the gatekeeper.⁸³ Such specification may be done at the Commission's initiative when assessing the measures taken by the gatekeeper. It may also be done at the gatekeeper's request which, on this occasion, may notify to the Commission specific measures to implement the obligations.⁸⁴

The Commission services explain that those 18 obligations were selected because they "are considered unfair by taking into account the features of the digital sector and where 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".⁸⁵ The **selection is thus backward-looking. However, to be forward-looking as well, a flexibility clause provides that the Commission has the power to add new obligations** ensuring market contestability and B2B fairness.⁸⁶ The Commission can do that with a delegated act after having carried out a market investigation. In particular, those new obligations may be necessary when a designated gatekeeper engages in behaviour that is unfair or that limits the contestability of the CPS, but without these behaviours being explicitly covered by the obligations.⁸⁷

⁷⁹ Prop DMA, art.6.1g. This provision extends GDPR, art.20 with regard to the beneficiaries and the obligation. Such extension was also recommended by J. Krämer, P. Senellart and A. de Streel, [Making data portability more effective for the digital economy](#), CERRE Policy Report, June 2020.

⁸⁰ Prop DMA, art.6.1i. CERRE has proposed more extensive but more flexible data sharing obligations in J. Krämer, D. Schnurr and S. Broughton Micova, [The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies](#), CERRE Report, September 2020 and R. Feasey and A. de Streel, [Data sharing for digital markets contestability, Towards a governance framework](#), CERRE Report, September 2020.

⁸¹ Prop DMA, art.6.1j + 7.6. This case is specifically studied in J. Krämer, D. Schnurr and S. Broughton Micova, [The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies](#), CERRE Report, September 2020.

⁸² Prop DMA, Prop DMA, art.6.1k+7.6 and rec.57 providing that: "The following benchmarks can serve as a yardstick to determine the fairness of general access conditions: prices charged or conditions imposed for the same or similar services by other providers of software application stores; prices charged or conditions imposed by the provider of the software application store for different related or similar services or to different types of end users; prices charged or conditions imposed by the provider of the software application store for the same service in different geographic regions; prices charged or conditions imposed by the provider of the software application store for the same service the gatekeeper offers to itself."

⁸³ Prop DMA, art. 7.5.

⁸⁴ Resp. Prop DMA, art. 7.2 and 7.7.

⁸⁵ Impact Assessment, para.153. Also Prop DMA, rec.33.

⁸⁶ Prop DMA, arts. 10 and 17b.

⁸⁷ Prop DMA, rec.66.

In order to better understand the underlying logic of the obligations imposed on gatekeepers, Table 2 attempts to present the 18 obligations according to **four theories of harm** to the market contestability or the B2B fairness:

- **lack of transparency** which is key for digital markets to work properly;
- on the supply side, harmful **platform envelopment** conducts through bundling or self-preferencing and **lack of access to gatekeepers' platforms and data**;
- on the demand side, **lack of mobility** (multi-homing and switching) of business users and end-users (i.e., on both sides of the markets);
- **lack of balance** between the rights and obligations of the gatekeepers and their business users.

Table 2: Obligations and prohibitions applicable to provision of Core Platform Services by designated gatekeepers

	Black-list	Grey-list
Transparency in ad intermediation	- Transparency on price for advertisers and publishers (art.5.g)	- Transparency on performance for advertisers and publishers (6.1g)
Envelopment through bundling or self-preferencing	- Bundling CPS with ID services (5.e)	- Rely on business users' data in dual role setting (6.1a)
Access platforms and data	- Bundling CPSs for which gatekeeper designation apply (5.f)	- App un-installing (art.6.1b)
		- Discriminatory ranking (6.1d)
		- Side loading: interoperability with third-party apps and app stores (6.1c)
		- Business users free of charge access to real-time, data (art.6.1i)
		- Sharing search data (art.6.1j)
End-users and business users mobility	- MFN/parity clause (5b)	- Device neutrality: Prohibition of restricting user apps and services switching on an OS (6.1e)
	- Anti-steering clause (5c)	- Access and interoperability for business users and providers of ancillary services to OS and other features (6.1f)
		- Obligation real-time data portability for business users and end-users (6.1h)
Unfair sensu stricto	- Data fusion/lakes without users choices (5.a)	- FRAND access to app stores (6.1k)
	- Preventing complaints to authorities (art.5d)	

As explained above, the full suite of 18 obligations automatically applies after a gatekeeper designation⁸⁸ **without the possibility for the Commission to pick and choose, on the basis of the proportionality** principle, among the suite according to the characteristics of the markets or

⁸⁸ As mentioned above, some obligations are CPS specific and will thus only apply to the gatekeeper providing those types of digital services.

the gatekeepers. Moreover, there **is no possibility for the gatekeeper to rely on an efficiency defence** (as it is the case in competition law).⁸⁹

Only two very narrow safeguards are provided:

- First, the application of the obligations may be **suspended** at the request of a gatekeeper when the economic viability of its operations in the EU are at risk.⁹⁰ The Impact Assessment gives the example of an unforeseen external shock that temporarily eliminates a significant part of end-user demand for the relevant core platform service.⁹¹ Thus, the possibility of suspension only provides for a very narrow objective justification.
- Second, gatekeepers may be **exempted**, at their request or at the Commission's initiative to protect three public interests regarding morality, health and security.⁹²

Next to the black and grey lists, gatekeepers are also subject to **two additional specific transparency obligations**:

- First, an obligation to inform the Commission of any intended **acquisition of a provider of Information Society Services**.⁹³ This obligation, which goes further than the notification requirement imposed under the Merger Regulation,⁹⁴ will allow the Commission to review gatekeeper designation on the basis of new companies acquired by the gatekeepers (and possibly extend the designation to other CPSs) as well as to monitor more broadly contestability trends in digital markets.⁹⁵
- Second, an obligation to submit to the Commission an **independently audited description of consumer profiling techniques used** in providing the CPS for which a gatekeeper designation applies.⁹⁶ This obligation, which goes further than the transparency and audit requirements of the GDPR,⁹⁷ aims to allow more privacy competition between substitute CPSs and, therefore, to prevent that deep consumer profiling becomes the industry standard.⁹⁸

⁸⁹ Guidance of 3 December 2008 on the Commission's Enforcement Priorities in Applying Articles [102 TFUE] to Abusive Exclusionary Conduct by Dominant Undertakings O.J. [2009] C 45/7, paras.28-31.

⁹⁰ Prop DMA, art.8.

⁹¹ Impact Assessment, para.400

⁹² Prop DMA, art.9.

⁹³ Prop. DMA, art.12. An Information Society Services is defined as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient: Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ [2015] L 241/1.

⁹⁴ Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. [2004] L 25/1, art.1.

⁹⁵ Prop. DMA, rec. 31.

⁹⁶ Prop. DMA, art.13.

⁹⁷ GDPR, art.13.

⁹⁸ Prop. DMA, rec. 61

Assessment⁹⁹

A first feature of the DMA proposal is to **base the list of 18 obligations on past and current antitrust cases** which have proved to be incapable or ineffective in ensuring market contestability and B2B fairness.¹⁰⁰ There is nothing new or problematic in basing a new ex ante regulatory instrument on failed or ineffective antitrust cases. This has happened before, in the telecommunications sector with the regulation of international roaming charges¹⁰¹ or in the financial sector with the regulation of credit card interchange fees.¹⁰² However, as already noted, this makes the DMA **very much backward-looking and may lead to an extensive use of the flexibility clause** to include new obligations in economic sectors which are evolving quickly.

A second feature of the DMA Proposal is that it favours **detailed obligations over general rules**. As recognised in the Impact assessment, there is a trade-off between intervention speed - which is accelerated by detailed rules - and flexibility - which is strengthened with general rules.¹⁰³ More broadly, detailed rules have the following advantages: they increase legal predictability and they can be more easily enforced. Of course, predictability is never perfect and enforcement is rarely easy in a digital markets because the evolution of technology and markets continuously raises new legal interpretation issues. This is well illustrated by the enforcement of the black list of practices contained in the Unfair Commercial Practices Directive¹⁰⁴ in the digital economy, which had to be clarified with Commission guidelines and with soft enforcement against some digital platforms.¹⁰⁵ In the specific EU context, detailed rules have an additional advantage: they achieve more harmonisation when enforced by different national authorities as there is less regulatory discretion. However, detailed rules have also drawbacks: they are less adaptable to markets evolution, they risk of being more subject to intense lobbying during political adoption and they may fail to bring an overall logic and rationale for regulatory intervention.

In the DMA proposal, the Commission chooses a hybrid system with a black list made of detailed rules and a grey list made of more or less detailed rules¹⁰⁶ but, overall, the system leans towards detailed rules. This may not be appropriate for the DMA, because it applies to markets which are extremely dynamic (hence regulatory flexibility is key) and rules are enforced by the Commission (hence there is no risk of divergent national interpretation), hence **more flexibility needs to be introduced**. The hybrid approach could be maintained but needs to be improved in the following manner. **The black list of Article 5 should be very limited and only contain obligations which are detailed and which are always detrimental to market contestability and B2B fairness. The grey list of Article 6 should contain obligations which are more generally drafted** and based on the theories of harm mentioned above *i.e.*, lack of transparency, envelopment through bundling and self-preferencing, lack access to platforms and data, lack of users mobility and lack of fairness.

A third feature of the DMA proposal is to **impose the list of obligations generally to all the designated gatekeepers** independently of their characteristics and business models. Thus, there is

⁹⁹ For this first assessment Report, this section only assesses the general design of the obligation system and not the pros and cons of each obligation and whether each obligation should be included in the black list or in the grey list.

¹⁰⁰ For a series of examples and underlying evidence in the choice of obligation, see Impact Assessment, p.53-60.

¹⁰¹ Regulation 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks, OJ [2012] L 172/10, as amended by Regulation 2015/2120 and Regulation 2017/920.

¹⁰² Regulation 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, OJ [2015] L 123/1.

¹⁰³ Impact Assessment, paras.159-164.

¹⁰⁴ Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ [2005] L 149/22, as amended by Directive 2019/2161, Annex I.

¹⁰⁵ [Commission Staff Working Document of 25 May 2016 on Guidance on the implementation/application of the Directive 2005/29 on Unfair commercial practices, SWD\(2016\) 163](#), Section 5.2; coordinated actions taken by the Consumer Protection Cooperation (CPC) Network: https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions_en

¹⁰⁶ Contrast for instance the obligations regarding business users data use in dual role setting which is very detailed with the obligation of data portability which is more general.

no explicit individualisation of the obligations per gatekeeper as, for instance, foreseen in the Advice of the CMA Digital Markets Taskforce to the UK Government.¹⁰⁷ However, there are **two implicit and indirect possibilities of individualisation**. First, certain obligations only apply to some types of CPS (in particular marketplaces, app stores, search engine, operating systems and AdTech services). Second, the obligations of the grey list may be specified by the Commission according to the circumstances of the CPS and the gatekeeper.¹⁰⁸ In this specification which takes place in dialogue with the gatekeeper and which is to be carried out on the basis of effectiveness and proportionality in the gatekeeper's specific circumstances, the Commission may individualise the obligations.

However those **possibilities of individualisation should be made more explicit and the role of the gatekeepers as well as their business users and competitors in the specification should be made clearer**. The process could be as follows: (i) first, the designated gatekeeper proposes measures to implement the different obligations; (ii) then the Commission tests such measures with the business users and the competitors of the gatekeepers; (iii) then the Commission decides whether the measure are effective to achieve the objective of the obligation and proportionate given the characteristics of the gatekeeper. In practice, this should lead to a **co-determination**, done in a cooperative manner between the Commission and the regulated gatekeepers of the measures to be able to comply with the DMA obligations.

In addition, the Commission should also have the **possibility of not imposing a specific obligation** to a specific regulated gatekeeper at all, if this is justified on the basis that there is no measure which would be both effective and proportionate.¹⁰⁹ This is all the more important given that, under the current proposal, the flexibility clause provides that the Commission may add new obligations to the black and grey lists but it could not remove obligations with a delegated act. Another improvement to the DMA is to **make the flexibility clause less one-sided. This will allow the Commission to remove, with a delegated act, obligations from the black or the grey list** if regulatory enforcement or technology and market evolution make some existing obligations either no longer relevant or no longer effective and proportionate in achieving market contestability and B2B fairness.

A fourth feature of the DMA proposal is that **the regulated gatekeeper cannot rely on an explicit efficiency defence or objective justification** to escape the obligations.¹¹⁰ In the Impact Assessment, the Commission services explain that a possibility for defences was not proposed because "they are often one-sided and do not seem to match the evidence underlying this Impact Assessment including the calls for regulation raised by an overwhelming majority of respondents to the open public consultations; they have also been rejected by the Courts as being unfounded."¹¹¹ Certainly, there is an **implicit and limited possibilities for defence in the grey list**. During the regulatory dialogue which leads to the specification of the obligations by the Commission, it is possible - and indeed probable - that regulated gatekeepers bring efficiency arguments. Such defence is limited as it contributes to shape the obligations but cannot remove them.

Given that many practices in the digital economy have multiple positive and negative effects on contestability and fairness (as well as on welfare and innovation) and the (still) many unknowns in competitive dynamics of digital technologies and markets, it is **appropriate to provide for an explicit and well framed defence that could be brought by the gatekeepers**. Such defence should only be possible for the grey list obligations provided that the black list only contains obligations which are always harmful.

At the substantive level, such defence should **demonstrate convincingly that a practice does not harm market contestability or B2B unfairness**. It should thus not be equivalent to an antitrust

¹⁰⁷ <https://www.gov.uk/cma-cases/digital-markets-taskforce#taskforce-advice>

¹⁰⁸ See Article 3(7) and IA, para.399.

¹⁰⁹ This is the case in telecommunications regulation where the NRA should only apply the obligations which are proportionate: EECC, art.68.

¹¹⁰ As exceptions to this principle, narrow objective justifications are possible for app installing (art.6.1b) and site loading (art.6.1c).

¹¹¹ Impact Assessment, para.158.

efficiency defence. In particular, it would not suffice to show that a practice generates short run efficiencies if, at the same time, the practice increases market power and reduces long term competition and innovation. As already explained, the contestability objective implies, in the Europe ordo-liberal tradition, to favour long term competition over short term efficiencies. This is all the more important, as short-term efficiencies tend to be easier to prove than long term costs. At the procedural level, the defence should be **brought during the specification process and within its timeframe**, so it should not delay the regulatory process.

A fifth feature of the DMA proposal is that **obligations only concern the CPS for which the gatekeeper designation applies and not to other CPS provided by the platform**.¹¹² This allows the gatekeeper to enter in new market/CPS without being subject to obligations. For instance, the prohibition of using business users data to favour its own services may apply to Amazon, but not to Facebook Marketplace. In turn, this stimulates the competition among gatekeeper platforms across different CPSs. However, it excludes the possibility of challenging envelopment strategies which are based on the bundling of a CPS for which a gatekeeper designation apply with another CPS for which gatekeeper does not apply. Here again, **more flexibility should be provided in the DMA**, for instance by moving the bundling prohibition from the black list to the grey list, while making the obligation more general.

5 Institutions and enforcement

5.1 Institutional design

The DMA proposal is based on a centralised enforcement at the EU level.¹¹³ It confers for the first time **fully-fledged regulatory power to the European Commission**, rather than conferring these powers to the national authorities of its Member States. Indeed, the Commission will be able to: (i) designate the gatekeepers, (ii) specify the obligations imposed on them and monitor compliance, (iii) sanction the gatekeepers in case of non-compliance or systematic non-compliance, (iv) adapt, with delegated acts, the size thresholds for gatekeeper designation and the list of obligations to which gatekeepers are subject and (v) do market investigation on gatekeeper designation, on inclusion or new CPS and new obligation and on systematic non compliance. Thus, the EU will have a federal regulator for large digital gatekeepers at the Commission, next to the federal supervisor for systemic banks set up at the European Central Bank in the aftermath of the 2008 financial crisis.¹¹⁴ The Commission will become more similar to the US FTC, with concurrent antitrust and regulatory powers.

Conversely, the **role of the Member States and their national authorities is more limited** than in the other fields of EU law. Member State representatives are merely grouped into a **Digital Markets Advisory Committee** which is new comitology committee.¹¹⁵ This committee will advise, with non-binding opinion, the Commission on the following implementing decisions: designation of gatekeepers on the basis of the quantitative and qualitative indicators; suspension and exemption of obligations; imposition interim measures; make binding gatekeeper commitments; and condemnation for non-compliance or systematic non-compliance.

¹¹² Contrary to telecom regulation where the regulator may impose obligations beyond the SMP designation: art.63.3 EEC.

¹¹³ Such centralized enforcement was also recommended in the CERRE Recommendations, p.105.

¹¹⁴ Council Regulation 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. [2013] L 287/63.

¹¹⁵ Prop. DMA, art.32.

Assessment

As the regulated gatekeepers are big, often global, digital platforms whose practices affect most -if not all - Member States, it is **appropriate to have a centralised enforcement at the EU level. It is also pragmatic to confer enforcement power to the Commission** instead of setting a new EU regulatory agency which would have raised difficult legal and political issues.¹¹⁶ However, those new important powers of the Commission raise several issues.

First, if the Commission wants to share the same characteristics that EU law imposes upon regulatory authorities at the Member State level, it should:

- Have **sufficient budgetary and human resources**: The Commission foresees a team of 80 Full Time Equivalent¹¹⁷ in 2025¹¹⁸ but that may not be sufficient especially given the strict deadlines that the Commission will have to comply with. Moreover, the composition of the staff may be more important than its size and it will be key for the Commission department in charge of the DMA to be composed of IT specialists, data analysts and AI experts.
- Be **independent** from the regulated platforms but also from political power: this independence requirement may be in tension with the geo-political role that the Commission is increasingly eager to play. Thus the old debate on the independence of DG COMP and the need to create a separate EU antitrust agency may come with revenge as the Commission acquires more regulatory power and, at the same time, wants to become more political;
- Be **accountable**: this may imply more hearings of the Commission department in charge of the DMA before the European Parliament and strict judicial review of its decisions by the Court of Justice of the EU.
- Second, the Commission should **maximise the synergies between its different powers** (which are based on different legal instruments) especially when they apply to the same digital platforms while being **clear and predictable about how those powers will be applied and combined**.
- The Commission should explain **how it will apply its concurrent existing antitrust and new regulatory powers** when a designated gatekeeper also enjoys a dominant position. In particular, the Commission should clarify how it will deal with a conduct which harms market contestability or B2B fairness and, at the same time, violates EU competition law.
- The DSA proposal will also confer important new investigation and sanctioning power to the Commission against Very Large Online Platforms which may include some gatekeepers. The DMA should better clarify **how the information received during an DSA investigation could be used for a DMA investigation**. It should also clarify how the obligations imposed under the DSA (in particular the new transparency requirements on online advertising and on recommender systems)¹¹⁹ will complement and support the objectives and obligations imposed under the DMA.¹²⁰
- Given those synergies with the DSA enforcement and the hybrid character of the DMA (which is a regulatory tool with complementary objectives to those of competition law and with many obligations determined on the basis of past antitrust cases), it may be best that, within the

¹¹⁶ Case 9-56, Meroni & co, Industrie Metallurgiche v High Authority of the European Coal and Steel Community, ECLI:EU:C:1958:7 and the evolution of the case-law in Case C-270/12 United Kingdom v. European Parliament and Council, EU:C:2014:18.

¹¹⁷ Full Time Equivalent refers to the unit of measurement that indicates the workload of a single employed person.

¹¹⁸ Commission Explanatory Memorandum to the DMA Proposal, p.11.

¹¹⁹ Prop DSA, arts.29 and 30.

¹²⁰ Although the Impact Assessment (at paras. 410-413) calls for separation of the two enforcement mechanisms because different objectives, competences and level of centralisation.

Commission, a **joint task force composed of DGs CONNECT, COMP and GROW is in charge of enforcing the DMA.**¹²¹

Moreover, while it is necessary that the Commission enforces the DMA given the size of the gatekeepers and the widespread impact of their practices, **more involvement of the national authorities is appropriate given the limited resources of the Commission and the important expertise of many national authorities.** Those national authorities may be particularly useful to receive complaints from business users which can be small and localised, to contribute to the specification of the obligations of the grey list and to support the Commission in monitoring the compliance with obligations.¹²² They may also second national experts to the Commission department in charge of enforcing the DMA.

It is also key that **those authorities are independent from political power** to alleviate a politicisation - or a perception of it - of the interventions against the digital gatekeepers. However, such independence is not required for the national representative participating in a comitology committee.¹²³ The DMA should thus foresee the involvement of independent authorities. Beyond that important requirement, the DMA should **leave to the Member States the choice of deciding which (existing or new) national authorities** should be designated as their National Digital Authority which will support the Commission in enforcing the DMA.

5.2 Oversight and enforcement modes

The **oversight and enforcement modes are modelled on antitrust enforcement**,¹²⁴ hence are more adversarial than the cooperative mode provided in DSA. Indeed, the enforcement steps are the following:

- A **gatekeeper designation** which may be simple and quick on the basis of the size threshold, or more complex and slower after a market investigation during which quantitative and qualitative indicators are examined.
- The **specification of the obligations** of the grey list by the Commission in a regulatory dialogue with the regulated gatekeeper.
- The **monitoring** of the DMA obligations by the Commission, possibly supported by external experts.¹²⁵ To do that, the Commission enjoys extensive investigation powers: request for information, including access to databases and algorithms, interviews and on-site inspections.¹²⁶ During its investigation, the Commission should respect due process: right to be heard and access to file and respect with professional secrecy.¹²⁷
- Possibility to adopt **interim measures** in case of serious and irreparable damage for the users of the gatekeeper and where there is a *prima facie* finding of an infringement of the obligations imposed on the gatekeeper.¹²⁸
- Possibility to accept and make binding **commitments** offered by the regulated gatekeeper to ensure compliance with its DMA obligations.¹²⁹

¹²¹ Similar to the joint task force which was set up in 2003 between DG CONNECT and DG COMP for the review of NRA decision in the telecom sector.

¹²² As it has sometimes be practiced under the Merger control: *NewsCorp/Telepiu*, Decision of 2 April 2003, Case M.2876, para. 259.

¹²³ Regulation 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers OJ [2011] L 55/13, art.2. However, Impact Assessment (at paras. 192 and 409) refers to independent national authorities as member of the Digital Markets Advisory Committee.

¹²⁴ As explained in Impact Assessment, paras.198, 218.

¹²⁵ Prop DMA, art.24.

¹²⁶ Resp. Prop DMA, arts 19, 20 and 21.

¹²⁷ Resp. Prop DMA, art.30 and 31.

¹²⁸ Prop DMA, art.22.

¹²⁹ Prop. DMA, art.23

- In case of **non-compliance**, the Commission may impose cease and desist order and fines up to 10% worldwide turnover as well as periodic penalty payments.¹³⁰
- In case of **systematic non-compliance** which requires (i) three non-compliance decisions within five years and (ii) the strengthening or extension of the gatekeeper position, the Commission may impose more stringent behavioural or, if needed, structural remedies.¹³¹

Assessment

The oversight of the digital gatekeepers and the enforcement of the DMA will be extremely difficult because the digital sector is complex and fast moving, the asymmetry of information between the Commission and the platforms tends to be large and the deadline for action are tight. Therefore, the **enforcement mode needs to be cooperative (without however leading to capture) rather than adversarial**.

The DMA proposal already provides for **some rules which will nudge the regulated gatekeepers to cooperate with the Commission**. The gatekeeper presumption based on financial and user size incentivise the platforms to disclose to the Commission relevant information (for instance, on their users lock-in or the entry barriers) if they want to rebut the presumption. The specification of the grey list obligation encourages a regulatory dialogue. The graduated sanctions in case of violation of the obligations encourage compliance.

However, given the difficulty of enforcement, those rules may not be enough and need to be complemented with other cooperation tools.

- As already mentioned, the **specification process of grey list obligation should more explicitly and clearly involve the regulated gatekeepers**, in particular by requiring a notification of the measures they plan to take to implement the obligation.
- The DMA could also explicitly provide that the Commission can request that a gatekeeper test with its users different design for measures or remedies (**A/B testing**) and report on their effects so the Commission could decide what is the most effective measures or remedies.
- Also, the DMA should impose more **internal compliance mechanisms** like it has been done in the DSA Proposal. Those mechanisms may include the requirement to perform regular risk assessment of the corporate practices,¹³² perform regular independent audit,¹³³ to appoint compliance officers.¹³⁴
- Finally, the DMA could rely more on **co-regulation and codes of conduct** to ensure the compliance with its obligations.¹³⁵

Next to the regulated gatekeepers, the Commission may also be supported in its difficult enforcement tasks by the other stakeholders, in particular the business users of the regulated gatekeepers and digital platforms providing substitute or complementary services. Currently, the DMA Proposal is silent on the very useful role that those stakeholders could play. Hence, the DMA could be improved by giving them a more explicit role in enforcement. In particular, the DMA should clarify how and when business users may lodge confidential complaints without fearing retaliation by the gatekeeper from which they depend. It should also give a role to business users and end-users, as well as to providers of substitute and complementary services in the specifications of the grey list obligation, in the market

¹³⁰ Prop. DMA, art.25-29.

¹³¹ Prop DMA, art.16.

¹³² Prop DSA, art.26. Also GDPR, art.35.

¹³³ Prop DSA, art.28.

¹³⁴ Prop DSA, art.32. Also GDPR, arts.37-39.

¹³⁵ Prop DSA, art.35. Also GDPR, art.40-41.



testing of commitments proposed by the gatekeepers and in the design of remedies in case of non-compliance.

Another feature of the DMA is to give to the Commission extensive **investigation powers on database and algorithms**. Those powers are very welcome given the importance of data and algorithms in the practices and the impact of the gatekeepers, but the real challenge is whether those powers can be used effectively by the Commission. As already mentioned, this requires that the **Commission is staffed with more data and AI experts but also that the Commission develop AI tools** to process all the data they will have to analyse. This may also require that the Commission **partners with vetted independent researchers** to analyse some datasets. In order to facilitate such cooperation, the DMA could include a similar provision on data access and scrutiny than the one foreseen by the DSA Proposal.¹³⁶ Finally, the Commission should build **synergies in the data which will be analysed to monitor the compliance with the DSA** and the one which will be analysed to monitor the compliance with the DMA.

A last feature of the DMA is to review of gatekeeper designation every two years and to review of the whole DMA legislation every three years. However, those few mechanisms may **not be enough to make regulation sufficiently responsive** in sectors which are evolving quickly and sometimes in unpredictable ways. Therefore, the DMA proposal should be complemented with a **requirement for the Commission to regularly review the impact of obligations imposed and measures taken** by the gatekeepers to consider whether they are working as intended or, conversely, to allow firms to make representations that they should be modified.

¹³⁶ Prop DSA, art.31.



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