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ENFORCEMENT AND INSTITUTIONAL ARRANGEMENTS

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1 Introduction

This paper focuses on the enforcement and the institutional arrangements in the DMA.

The paper is divided into five sections: after the Introduction, Sections 2 and 3 deal with public enforcement, its modes, and its degree of centralisation; then Section 4 focuses on private enforcement; and finally, section 5 elaborates on the relationship between the DMA and competition law enforcement. The purpose of each section is to tease out ways in which the proposal may be improved.

2 Public Enforcement: Design and Modes of intervention

2.1 Enforcement pyramid after Article 7

2.1.1 Regulatory design and enforcement pyramid

Gatekeepers have six months after designation to comply (Article 3.8 DMA). In the first issue paper, we suggested that the gatekeeper may seek guidance from the Commission, which would come in the form of a specification decision for Article 6 obligations (building on Article 7.7 DMA). The Commission may also intervene by decision at this early stage without prior notification by the gatekeeper and prescribe a specification (Article 7.2 DMA).

This initial step in compliance (the so-called "regulatory dialogue" referred to in several recitals of the DMA) is the major first step in fixing the way a gatekeeper should comply with the obligations arising from Articles 5 and 6. **The procedures in Article 7 possibly denote the principal step in setting out obligations that respond to the policy goals of the DMA, but at the same time, ensuring that they are designed in a manner that does not unduly hamper the business freedom of the gatekeeper**. As we explained in the first discussion paper, this procedure should be reformed to make the regulatory dialogue more effective.

In this section, we discuss the steps that are set to take place *after* this initial regulatory dialogue has been concluded. The DMA draws on a mix of competition law enforcement features and enforcement styles found in other regulatory fields. However, its regulatory design is unclear. A helpful and widely adopted paradigm in designing enforcement structures is that of **responsive regulation**.[1] This is contrasted with a punitive enforcement structure that we find in antitrust laws. The responsive model matches somewhat the enforcement design in the DMA. Under this framework, the regulator sets up an enforcement pyramid (see Figure 1 below). If the legislator had intended this for the DMA, then the **enforcement pyramid** would have entailed the following elements:

- The assumption that serves as the base of the pyramid is that the gatekeeper wishes to comply; so the regulator engages with the gatekeeper to secure clarity as to what is expected of it;
- If there is a failure to comply, the regulator climbs up the pyramid and has ever-stricter sanctions at its disposal that may be imposed on the gatekeeper to secure compliance;
- At the top of the pyramid is the harshest penalty, a so-called benign big gun (i.e. a remedy which is very intrusive but serves as a credible threat so that its use is only necessary in cases of extreme failures to comply).

The enforcement structure is portrayed as a pyramid because it is expected that most of the enforcement occurs in the lower steps, with fewer cases moving up. The smart regulator will move up and down the pyramid in response to how the gatekeepers react to its signals. The figure below

[1] This draws, generally, on I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford University Press, 1992).

is taken from the work of Ayres and Braithwaite who have pioneered this regulatory style and we have superimposed the enforcement framework of the DMA.

2.1.2 Enforcement steps in the DMA

Turning from the pyramid to the DMA, the Commission's proposal does not correspond precisely to the responsive model outlined above.

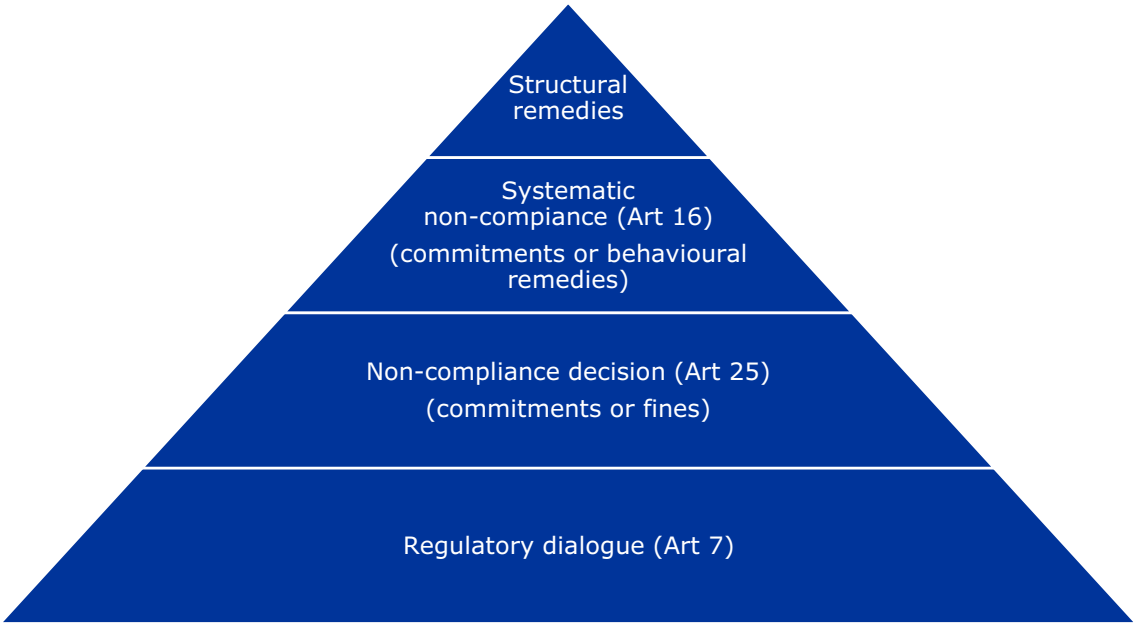

Figure 1: enforcement pyramid in the DMA.

(1) The first step is the *regulatory dialogue* where we expect most of the compliance efforts to be devoted. However, already at this stage, the Commission is empowered to impose, unilaterally, a specification for how a gatekeeper is to comply with Article 7 even when the gatekeeper does not request a specification. This unilateral imposition is premature. It is a step we would expect to be used at the third level of the pyramid, but not here. Instead, Article 7 should allow the gatekeeper to offer commitments. The absence of a commitment path may just be an oversight because the Commission, before adopting a decision, is expected 'to explain the measures it considers to take or it considers the provider of core platform services should take in order to effectively address the preliminary findings.'[2] This appears to be an invitation to make commitments.[3] In sum, **the regulatory dialogue under Article 7 should only allow for a consensual conclusion where the gatekeeper has a say in the design of compliance. The intensity of this dialogue remains up for discussion**:

- A minimalist approach is that parties seeking specification provide the Commission with a proposal, which the Commission may accept or vary;
- An intermediate solution is that parties seeking specification provide the Commission with a proposal, which the Commission may deem insufficient to comply with the gatekeeper's Article 6 obligations, at which stage the gatekeeper may offer commitments;
- A maximalist approach is that parties and the Commission engage in a co-regulatory process where the design of the compliance path is more cooperative. This could be inspired by the approach in the DSA discussed below.

[2] DMA, Article 7(4).
[3] DMA, Article 23 does not foresee commitments for Article 7 procedures. It allows these only for non-compliance and systematic non-compliance decisions.

The **gatekeeper should be able to make commitments during an Article 7 procedure when the Commission initiates it**.[4] As delineated in the first issue paper, this step would also help clarify the cases when the Commission is unlikely to accept commitments (e.g. in cases where compliance was straightforward, the Commission may consider that a fine is an appropriate remedy).[5] To compare, commitments in competition law are said to be acceptable to the Commission only for instances where it does not intend to impose a fine.[6]

Also, the Commission should learn its lessons from the commitments procedure in competition law. Early on the process was unstructured and it was noted that parties might either make commitments that were more than necessary to remove the concerns just to ensure regulatory clearance or exploit the asymmetry of information to make insufficient commitments. A **best practice soft law document** similar to those drafted by some national competition authorities **can assist in making the process clear** for the parties as well as for third parties who should be involved in a market test. **Alternatively, the DMA could itself be more explicit on the different procedural steps to be followed by the Commission before accepting commitments** as it is the case in the new Electronic Communications Code.[7]

(2) The second step empowers the Commission to commence a *non-compliance procedure*, which may be closed by the parties offering commitments. If none are presented or if the commitments offered are rejected, the remedy is a cease and desist order to which a penalty may be added.[8] In keeping up with the spirit of communication, even in cases of an infringement decision, the gatekeeper is obliged to provide 'explanations on how it plans to comply with the decision.'[9]

In this second step, the Commission threatens a punitive measure but remains open to the gatekeeper offering commitments and avoiding the fine. As we suggested in the first paper, however, it **may be preferable that the option to offer commitments at this second stage is reserved for parties who have not received a specification decision during the first step**, i.e. the regulatory dialogue.

(3) In the third and fourth layers of the pyramid, the Commission may step up enforcement if there is *systematic non-compliance*. This is defined both formally (there must have been three non-compliance or fining decisions in the past five years) and by reference to the effects of the conduct in question ('where its impact on the internal market has further increased, its importance as a gateway for business users to reach end-users has further increased or the gatekeeper enjoys a further entrenched and durable position in its operations.')[10] In these situations, the Commission is still open to receiving commitments but if none are forthcoming then it may 'impose on such gatekeeper any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with this Regulation.'[11] The **big stick of behavioural or structural remedies, however, may only be levelled after a market investigation has been undertaken and it looks like a decision that is far down the line given all the options for compliance that the gatekeepers are offered**. Structural remedies are only available when behavioural ones are unsuitable (Article 16.2).

Given the two layers of non-compliance, we would expect lower fines for the first offences, so that the higher levels of fine would only be for instances where the gatekeeper does not comply with behavioural remedies imposed after a market investigation for systematic non-compliance. Conversely, as suggested in the first discussion paper, we would also expect that

[4] An alternative could be that the Commission's power to initiate an Article 7 procedure is removed, after all, it seems unlikely that the Commission will know ex-ante what gatekeepers are planning to do to comply.
[5] First discussion Paper, points 13 and 25
[6] Regulation 1/2003, Recital 13.
[7] EECC, Article 79.
[8] DMA, Articles 25(3) and 26.
[9] DMA, Article 25(3).
[10] DMA, Article 16(3) and (4) respectively.
[11] DMA, Article 16(1).

the Commission would be open to commitment decisions in lieu of fines when parties have not obtained a specification decision.

It may be argued that systematic non-compliance should **prevent the gatekeeper from making commitments**. At this stage, the gatekeeper has revealed an unwillingness to be bound and it may appear overly generous to allow it to make commitments this late in the game. Perhaps the **settlement submission found in competition law (whereby parties agree to a specified compliance path in exchange for a reduced fine) would be a more appropriate mechanism** in the DMA at this final stage.[12] This would retain the responsive element by encouraging gatekeepers to explain how they will change their conduct to comply as well as a punitive element.

2.2 Enforcement modes

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 gatekeepers tends to be large and the deadlines for action are tight. Therefore, oversight and enforcement need to be modelled on regulation rather than antitrust.[13] **DMA enforcement could be made more collaborative (without, however, leading to regulatory capture) and based on an "ecosystem of enforcement" where the regulator orchestrates the meeting of the public interest and the supervision of the rule by the platforms and their (business and end) users.[14]** To achieve such modes, DMA has a lot to learn from the companion DSA proposal.[15]

The DMA proposal already provides for some rules that **incentivise the regulated gatekeepers to cooperate with the Commission**. The gatekeeper presumption based on financial and users size incentivises 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. Similarly, the specification of the obligations encourages the Article 7 regulatory dialogue. Also, the enforcement pyramid with graduated sanctions in case of violation of the obligations encourages compliance.

However, given the difficulty of oversight and enforcement, those rules may not be enough and need to be **complemented with other tools**. As suggested in the first issue paper, the specification process of the obligations should more explicitly and clearly involve the regulated gatekeepers. The DMA could also explicitly provide that the Commission can request that a gatekeeper tests different designs for measures or remedies (A/B testing) and report on their effects so the Commission could decide what are the most effective measures or remedies.[16] Moreover, the DMA could impose more internal compliance mechanisms as has been proposed in the DSA. Those mechanisms may include the requirement to perform regular risk assessment of the corporate practices,[17] perform a regular independent audit,[18] or to appoint compliance officers.[19]

Next to the regulated gatekeepers, the Commission could also be supported by the other stakeholders, in particular the business users of the regulated gatekeepers as well as

[12] This was introduced in CASE AT.39759 *ARA Foreclosure* (2 September 2016). It has been used in a number of instances of vertical restraints, dealing with geo-blocking and resale price maintenance. For discussion, see Monti, 'Keeping Geo-Blocking Practices in Check: Competition Law and Regulation', TILEC Discussion Paper 2021-04.
[13] Regulatory modes are well summarized in Draft BEREC Report of 11 March 2021 on the *ex-ante* regulation of digital gatekeepers, BoR (21) 34, Annex IV. The differences between antitrust and regulator enforcement are well explained P. Larouche, *Competition Law and Regulation in European Telecommunications*, Hart, 2000.
[14] See A. de Streel and M. Ledger, *New Ways of Oversight for the Digital Economy*, CERRE Issue Paper, February 2021; French regulators, New regulatory mechanisms – data-driven regulation, July 2019; World Economic Forum, Agile Regulation for the Fourth Industrial Revolution A Toolkit for Regulators, 2020.
[15] 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.
[16] A/B testing was proposed by R. Feasey and J. Kramer, Implementing effective remedies for anti-competitive intermediation bias on vertically integrated platforms, CERRE Report, November 2019 for implementing effective remedies for anti-competitive intermediation bias on vertically integrated platforms.
[17] DSA Proposal, art.26. Also GDPR, art.35.
[18] DSA Proposal, art.28.
[19] DSA Proposal, art.32. Also GDPR, arts.37-39.

digital platforms providing substitute or complementary services.[20] Currently, the DMA Proposal is silent on the very useful role that those stakeholders could play.

The DMA could clarify how and when business users may lodge confidential complaints without fearing retaliation by the gatekeeper on which they depend, with a process based on the Regulation 773/2004 for competition law infringements.[21] It is vital that a formal channel of communication is established between the Commission and those who wish to signal an infringement. This allows the Commission to design a procedure for making complaints, it gives interested parties the right to participate in proceedings (if they intend to do so) and they can also be informed whether and why their complaint was not followed upon. As opposed to a formal channel, informal means of complaint would damage the integrity of the legal system. The DMA could 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 obligations, in the market testing of commitments proposed by the gatekeepers and in the design of remedies in case of non-compliance.

The Commission also proposes to appoint '**independent external experts and auditors** to assist the Commission to monitor the obligations and measures and to provide specific expertise or knowledge to the Commission.' This expert can assist in monitoring compliance with 'Articles 5 and 6 and the decisions taken pursuant to Articles 7, 16, 22 and 23.'[22] This is a welcomed development as it will strengthen the Commission's capacity to secure compliance.[23] 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.[24]

3 Public enforcement: Degree of centralisation

3.1 Justifications for the Commission's central role

The Commission is the sole agent in charge of the application of the DMA. This model is also found in other EU legislation. For instance, the Commission has exclusive competence for concentrations that have an EU dimension (subject to some exceptions).[25] The European Central Bank has exclusive competence to supervise systemically significant banks.[26] There are clear legal bases in the EU Treaties for these two domains.[27] The Code of Conduct on Computerised Reservation systems for airline tickets also operates in this way, with the Commission auditing compliance.[28] **There is a list of arguments in favour of opting for a centralised model when it comes to the DMA**.[29]

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

- Second, big platforms operate broadly the same systems across all Member States (and indeed globally), due to the economies of scale involved in designing and operating these systems. Therefore, if different National Regulatory Authorities (NRAs) were to require different tailor-made remedies, it would risk leading to a decrease in effectiveness and may be impossible to justify based on proportionality. Decentralisation would require investing in

[20] BEREC Opinion on the European Commission's proposal for a Digital Markets Act: For a swift, effective and future-proof regulatory intervention, BoR (21) 35, section 2.1.
[21] Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. [2004] L 123/18, as amended.
[22] DMA, Article 24.
[23] It is helpful to inscribe this in law to avoid the problem that arose in *Microsoft v Commission*, Case T-201/04, EU:T:2007:289 where the Court quashed the part of the Commission decision requiring the appointment of a monitoring trustee as the Commission had no such powers.
[24] DSA Proposal, art.31.
[25] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.
[26] Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.
[27] Articles 103 and 127(6) TFEU respectively.
[28] Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems OJ L 35, 4.2.2009, p. 47 Articles 13-16.
[29] Also BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 3.

mechanisms to prevent divergence whose operation may delay the imposition of remedies further.

- Third, monitoring compliance is likely to be costly and may require careful large-scale data analysis or direct review of algorithm design. It is highly unlikely that individual national regulators will be well set up to do this, and even if they were it would be highly redundant to do it more than once. This seems to be reflected in the weakness of some national authorities that apply the General Data Protection Regulation.[30]

- Finally, the targets of this regulation will be a fairly small number of firms.[31] Moreover, a single regulator can benefit from managing a set of cases in parallel and learn across the different dossiers.

With the adoption of the DMA, the Commission will acquire substantial new regulatory powers. As explained in the CERRE Recommendation Paper, **if the Commission wants to share the same characteristics that the 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 FTE in 2025[32] but that may not be sufficient given the strict deadlines that the Commission will be subject to.

Moreover, a key feature of the DMA is to give to the **Commission extensive investigation powers on database and algorithms**. Those new powers will be very useful given the importance of data and algorithms in the conducts and the impact of the gatekeepers. However, these investigation powers could only be **exercised effectively if regulators have the human and technical capability of analysing and interpreting the large volumes and variety of data provided by the platforms**.[33] Regarding **human capabilities**, the Commission could set up in-house dedicated teams of data analysis and AI specialists as national authorities are increasingly doing.[34] Regarding **technological capabilities** and following the Commission White Paper on AI,[35] regulators may also develop their own AI tools to process the data to be analysed. In practice, AI techniques are increasingly used by financial regulators[36] and are starting to be used by competition agencies.[37]

The Commission should also be **independent** of the regulated platforms but also from political power: this independence requirement may be in contrast with the geopolitical role that the Commission is increasingly eager to play; thus the old debate on the political independence of DG COMP and the need to create an independent EU antitrust agency may come back with a vengeance as the Commission acquires more regulatory power and, at the same time, wants to become more political. And lastly, the Commission should be **accountable**: this may imply more hearings of the Commission department in charge of the DMA before the Parliament and strict judicial review of its decisions.

The new DMA powers will also have to be combined with the existing competition powers and the new DSA powers. The Commission should **maximise the synergies between its different powers** (which are based on different legal instruments) especially when they apply to the same

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[30] Accessnow, *Two Years Under the EU GDPR: An Implementation Progress Report* (2020).
[31] The Commission suggests 10 to 15 but the basis of this estimate is questioned. See CERRE, above n 4, p.13.
[32] Commission Explanatory Memorandum to the DMA Proposal, p.11.
[33] For instance, in the Google Shopping antitrust investigation, the Commission had to analyse very significant quantities of real-world data including 5.2 Terabytes of actual search results from Google (around 1.7 billion search queries): Commission Press Release of 27 June 2017.
[34] For instance, the French authorities have set up the Pôle d'expertise de la régulation numérique which offers digital expertise to the French regulatory administrations and the French Competition Authority has established a digital unit. In the UK, the CMA has set up CMA's a Data, Technology and Analytics (DaTA) unit and Ofcom has created an Emerging Technology directorate and data science team.
[35] Communication White Paper of 19 February 2020 on Artificial Intelligence - A European approach to excellence and trust, COM(2020) 65, p.8.
[36] See for instance the Data Science/Artificial Intelligence (Datalab) excellence hub created in 2018 within the French financial regulator. See also the Conference organised by the Club of Regulators in cooperation with the OECD Network of Economic Regulators, *RegTechs: Feedback from the First Experiments*, available at: http://chairgovreg.fondation-dauphine.fr/node/708.
[37] See T. Schrepel Computational Antitrust: An Introduction and Research Agenda, Computational Antitrust project at Stanford University, CodeX Centre - The Stanford Centre for Legal Informatics, 2021.

digital platforms while being **clear and predictable about how those powers will be applied and combined**. As explained below, the Commission should clarify how it will apply its concurrent existing antitrust and new regulatory powers when a designated gatekeeper also enjoys a dominant position. 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 - and then the practice Commission - should clarify how the information received during a DSA investigation could be used for a DMA investigation. It should also explicate how the obligations which could be imposed under the DSA (especially the new transparency requirements on online advertising and on recommender systems)[38] will complement and support the objectives and obligations imposed under the DMA.[39]

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), the best solution might be that, within the Commission, a **joint task force composed of DG CONNECT, COMP and GROW** is in charge of enforcing the DMA.[40]

3.2 The role of Member States

Having said that, two countervailing considerations arise. First, the general pattern of EU Law enforcement is decentralised, thus the DMA belongs to the 'minority' of EU rules that are applied centrally. Second, it is not always clear why a particular institutional architecture is chosen.[41] The functional rationales offered above may not play a determinative role as the DMA is negotiated: Member States may prefer more powers for national agencies as a means of exerting control, or they may favour centralising matters in the hands of the Commission to signal a commitment to regulation. It remains to be seen whether the Council or the European Parliament will plead for a decentralised system. **In the Commission proposal, the role of Member States is limited to three main tasks**.

- First, three or more Member States may request that the Commission open a market investigation to determine if a core platform provider should be designated as a gatekeeper.[42]

- Second, Member States partake in the Digital Markets Advisory Committee (DMAC) which is to be instituted to assist the Commission.[43] However, this committee only comes into operation rather late in the process (e.g. in a market investigation or enforcement actions) which may well play a marginal role in the day-to-day supervision of gatekeepers if they are willing to comply.[44]

- Third, if the Commission adds new obligations and prohibitions with a delegated act, the standard dual control by the Member States on the adoption of delegated acts applies: before the adoption of the act, representatives of the Member States should be consulted by the Commission and after the adoption of the act, the Council of the Ministers of the EU may oppose to such an act.[45]

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[38] Prop DSA, arts.29 and 30.
[39] Although the Impact Assessment (at paras. 410-413) calls for separation of the two enforcement mechanisms because of different objectives, competences and level of centralisation.
[40] Similar to the joint Article 7 task force with CONNECT and COMP in telecom in 2003-2006. See also P. Marsden and R. Podszun, *Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement* (Konrad-Adenauer-Stiftung e. V. 2020) ch.4.
[41] See the illuminating discussion by L. Van Kreij, 'Towards a Comprehensive Framework for Understanding EU Enforcement Regimes' (2019) 10 European Journal of Risk Regulation 439.
[42] DMA, Article 33. The logic behind this is that gatekeepers should provide a core platform service in at least three Member States, see Article 3(2)(a).
[43] DMA, Article 32.
[44] This committee will advise, with non-binding opinion, the Commission on the following implementing decisions: designation of gatekeepers; suspension and exemption of obligations; imposition interim measures; acceptance of gatekeeper commitments; and condemnation for non-compliance or systematic non-compliance.
[45] DMA Proposal, art.37(4) and (6).

The involvement of the national authorities through their participation in the DMAC or the ex-ante and ex-post control of delegated acts may not be sufficient given the considerable difficulty of enforcing the DMA obligations effectively. If greater role was sought after by Member States, then a national authority would be entrusted with discharging this role. Two main models are possible.

In the minimalist model (which seems to be favoured by BEREC),[46] **DMA remains enforced centrally by the Commission and the national authorities come in support of the Commission**. National authorities may be particularly helpful for the following tasks for which they may have a comparative advantage vis-à-vis the Commission.

- First, national authorities are more localised than the Commission, hence may receive **complaints** more easily from small and local business users. The national authority may receive such complaints and, when justified, forward them to the Commission for further action.

- Second, national authorities may have expertise and experience which can usefully support the Commission in **specifying the obligations**. Indeed, several national authorities have expertise in dealing with digital platforms as well as data and algorithms; they also have experience in implementing some of the obligations of the DMA proposal such as interoperability, access to data or data portability.

- Third, national authorities may be closer to the 'field' and more easily **monitor the correct implementation** of the imposed obligations.[47] Essentially, as suggested by BEREC, the national authorities may play a key role in running a mechanism to **resolve the dispute** between the designated gatekeepers and their business users.[48]

In the maximalist model (which has been supported by some NCAs), **the DMA would be enforced centrally by the Commission but it could also be enforced locally by the national authorities**. Under this model, the DMA will be enforced in the same manner as EU competition law. Different versions of this model are possible:

- National authorities can apply **all measures of the DMA** in parallel with the Commission, hence they may designate gatekeepers (under article 3) and apply and specify obligations (under articles 5-7);
- National authorities can **apply and specify obligations** (under articles 5-7) in parallel with the Commission, but the Commission keeps the monopoly of gatekeeper designation;
- National authorities **only enforce infringements** - so the Commission is exclusively competent to make the specifications in Article 7 or commitment decisions in non-infringement procedures; once obligations are specified the Commission or NCAs can police these together.

The more powers are given to the national authorities, the greater the risk of divergence and the more investment has to be made in building up cooperation networks, which may be costly to be set up. It also assumes that all national authorities are equally capable, well-resourced and independent to apply the DMA. Furthermore, it is not clear whether a national authority would be able to impose a fine or a remedy outside its borders. Granting enforcement powers to national authorities means that the country of origin principle should apply, by which one national authority would have powers to enforce the DMA against the gatekeeper based established in its Member State, but the remedies would be EU-wide.

[46] BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 3.
[47] As it has sometimes be practiced under the Merger control: *NewsCorp/Telepiu*, Decision of 2 April 2003, Case M.2876, para. 259.
[48] BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 2.5.

Conversely, the less power is given to the national authorities, the fewer incentives they may have to invest time and resources in the DMA implementation. To work effectively, the national regulators would have to be empowered to enforce the DMA against firms directly, with the concomitant need for coordination mechanisms.

Finally, it is key that the **national authorities supporting the Commission are independent of political power to alleviate a politicisation - or a perception of it – of the interventions against the digital gatekeepers**. While such independence is expected by the Commission,[49] it is by no means guaranteed by its proposal because the DMAC is a comitology committee whose members should be representatives from the Member States, but not necessarily from their independent authorities.[50] In practice, national representatives in comitology committees are often coming from Ministries. To deal with such issue, some EU sector-specific regulation such as telecommunications, provides for two different networks of national authorities, one comitology committee and another one composed of independent authorities.[51] In the same vein and as advocated by BEREC,[52] the **DMA could establish, next to the DMAC, a network of independent national digital authorities**. It would then be up to the Member State to decide which (existing or new) national authorities should be designated as their National Digital Authority in such network.

4 Private enforcement

4.1 The role of private enforcement in P2B relations

The **P2B Regulation**, which applies horizontally to the providers of two types of Core Platforms services: intermediation services and search engines, is based on a similar philosophy to the DMA: securing fair relations between platforms and businesses. In order to achieve this, the P2B Regulation **foresees private enforcement**.

- Online intermediation service providers shall provide an **internal system for handling complaints**, and it is expected that the majority of cases are resolved with this procedure;[53]
- Failing this, the terms and conditions should specify a **mediation** procedure;[54]
- Enforcement may also be by representative organizations or public bodies which may take action in **national courts**;[55]
- The Regulation also encourages the development of **codes of conduct**.[56]

In addition, the P2B Regulation requires amendments or additions to national laws. Member States should 'lay down the rules setting out the measures applicable to infringements of this Regulation and should ensure that they are implemented. The measures provided for shall be effective, proportionate and dissuasive.'[57] However, there is no expectation that new enforcement bodies are established, nor that states are required to provide for public enforcement and fines.[58] **Some**

[49] Impact Assessment (at paras. 192 and 409) refers to independent national authorities as member of the Digital Markets Advisory Committee.
[50] 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.
[51] EECC, art.118 establishing the Communications Committee (CoCom) which is a comitology committee and Regulation 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of the European Regulators for Electronic Communications, OJ [2018] L 321/1.
[52] BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 3.
[53] Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57, Article 11, recital 37.
[54] P2B Regulation, Articles 12 and 13.
[55] P2B Regulation, Article 14.
[56] P2B Regulation, Article 17.
[57] P2B Regulation, Article 15
[58] P2B Regulation, Recital 46

Member States may opt for public enforcement, but it suffices that courts are empowered to impose 'effective, proportionate and dissuasive' remedies.[59]

Arguments in favour of relying on private enforcement in the DMA claim that the gatekeepers are best situated to internalise the obligation and adjust their commercial practices to secure compliance, while their clients are in the best position to see if there is non-compliance. Private law remedies would serve to deter such conduct (by the award of damages) and would also facilitate compliance (by the issuance of injunctive relief). In many spheres of EU Law, enforcement is left to private actors who serve as private attorneys-general. The Court of Justice of the EU takes the view that private enforcement serves to safeguard both the subjective rights of the victim and the general interest pursued by EU Law.[60]

However, one of the longstanding enforcement problems in B2B relations is that the two contracting parties are often reluctant to use formal rules to enforce contracts.[61] In some instances, businesses prefer informal methods to solve disputes to maintain good relations between each other,[62] while in others, one of the two sides might have a weaker bargaining position and be concerned of reprisals if it complains (the so-called fear factor).[63] Positions may differ in the kinds of markets outlined in the paper, however.[64] We have seen that some undertakings are quite vocal in asserting their position as to how major platforms are hampering their growth.

4.2 Private enforcement in the DMA

As EU Regulations are directly applicable under Article 288 TFEU, it is clear that **claimants may use the DMA to seek remedies in private law (damages or injunctions)**. The DMA may benefit from an amendment with a provision modelled on the P2B Regulation to confirm the role of national courts: requiring Member States to ensure 'adequate and effective enforcement' and ensuring that **courts are able to provide remedies that are 'effective, proportionate and dissuasive**.'[65]

We are agnostic about whether the DMA should also require a set of **informal internal or external mechanisms for solving disputes**, however, when specifying some of the Article 6 obligations, the gatekeeper arguably might decide that it is expedient to create an internal dispute-settlement system which could provide a speedy way to address minor issues. As suggested by BEREC, the DMA could also include external dispute resolution mechanisms, which have proved to be useful in telecom regulation.[66]

When we speak of private enforcement in EU competition law, it is helpful to distinguish between stand-alone actions and follow-on damages claims. The latter is the most frequent and are used in cartel damages claims: the claimant may rely on a competition authority's infringement decision for a finding of infringement and this facilitates claims considerably. This distinction can prove helpful in discussing private enforcement in the DMA.

4.2.1 Follow-on claims

Follow-on claims will be based on infringement decisions made by the Commission (under Article 25) and possibly also following a decision that results from a market investigation for systematic

[59] P2B Regulation, Article 15(2). A research from Cullen International done in July 2020 in 14 Member States shows that: national courts are given the role of enforcing the regulation in 11 Member States; the Ministry of Economy will enforce the regulation in France; in the Czech Republic enforcement has been entrusted to the national telecoms regulator; and in Ireland enforcement will be dealt with by the competition and consumer authority.
[60] *Francovich and others v Italy*, Joined cases C-6/90 and C-9/90, EU:C:1991:428 para 33, *Courage v Crehan*, Case C-453/99, EU:C:2001:465 para 27.
[61] See CEPS, *Legal framework covering business-to-business unfair trading practices in the retail supply chain*, (Study for the European Commission 2014).
[62] H. Beale and A. Dugdale, "Contracts Between Businessmen" (1975) 2 British Journal of Law and Society 45.
[63] As discussed in Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, SWD(2018) 138 final (part 1/2) p.26.
[64] This is also why the prohibition of restricting business users from raising issues related to gatekeepers practices with public authorities included in art.5(d) of DMA Proposal is key.
[65] P2B Regulation, Article 15.
[66] BEREC Opinion on the European Commission's proposal for a Digital Markets Act, section 2.5.

non-compliance (under Article 16). No provision is made to state that non-compliance decisions by the Commission bind national courts and the constitutional traditions among Member States differ as to whether national courts are bound by administrative acts. However, under the principle of sincere cooperation of Article 4 TEU, national courts are expected not to issue rulings that conflict with Commission decisions. In other words, **the national court cannot declare that conduct does not infringe the DMA when the Commission has ruled that it does and, conversely, cannot declare that a conduct does infringe the DMA when the Commission has ruled that it does not**. This might be strengthened by a provision worded like Article 16 in Regulation 1/2003, providing that national courts 'cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.' This would ensure uniformity.[67]

The major stumbling block for damages claims will be showing a causal link between the infringement and the harm, but it seems premature to build presumptions of harm at this stage, as was done in the Damages Directive.[68]

4.2.2 Stand-alone claims

Some stand-alone claims appear relatively risk-free for the claimant. The **blacklisted clauses of Article 5 are meant to be self-executing** so there is nothing that prevents a business who considers that these have not been complied with to use the courts. **A specification decision under Article 7 will also serve** to crystallize the manner by which the gatekeeper should behave. In these settings, private enforcement would appear fairly straightforward: the affected business can easily show that the conduct of the gatekeeper is out of line with the conduct that is required.

However, **when the Commission resolves an issue with a commitment decision, or where there is no specification decision, then matters are not as straightforward**. In competition law, commitment decisions are not binding on national courts, they have persuasive value only.[69] One would expect the same to apply here.

While it is not impossible for a claimant to run a stand-alone claim for breach of Article 6 of the DMA, this is likely to be costly so we may not expect a significant amount of cases. Moreover, litigation in these instances could yield the risk of divergent interpretations of the DMA. A national court may find an infringement of Article 6 in settings where the Commission might not, or vice versa. In the medium term, we might expect that the Commission issues Guidelines to explain its position on Article 6 and how parties are expected to comply but this does not bind national courts. An amicus curiae provision (like that found in antitrust law) might serve to ensure alignment between the position of the Commission and national courts. However, no hard law alignment is possible in instances where the Commission has not issued a decision.

A further consideration is that a claimant could bring an action using both the DMA and competition law. For example, self-preferencing is also (possibly) an abuse of dominance. This may lead to a situation where the national court rules that there is no breach of the DMA (e.g. the court considers the commitment decision persuasive) but finds an infringement of Article 102 TFEU. This finding may run counter to the Commission's expectation that the conduct at hand falls within the DMA.

5 Relationship with competition law

5.1 Commission concurrent powers

Once the DMA is adopted, the Commission will have concurrent regulatory and competition powers. To **intervene against the conducts of the digital gatekeepers which will (already) be**

[67] A national court uncertain of the soundness Commission decision may make a reference for a preliminary ruling to the ECJ.
[68] Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, O.J. [2014] L 349/1.
[69] *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA*, C-547/16, EU:C:2017:891.

regulated by the DMA, the Commission should rely on its DMA powers as the obligations and prohibitions are compulsory.

The interesting question, however, is **which route the Commission will follow when intervening against courses of conduct that are not (yet) covered by the DMA. Given the concurrency of powers, the Commission should choose between competition law or the DMA**. Under the former, the Commission would open an abuse of dominance case and should build a theory of harm to the requisite legal standard imposed by the EU Courts. Under the latter, the Commission would launch a market investigation and then adopt a delegated act to add the course of conduct under consideration to the list of the DMA obligations. In order to do so, the Commission should prove that such conduct weakens market contestability or creates an imbalance between the rights and the obligations of the gatekeeper and its business users. This standard of intervention will have to be interpreted by the Courts but, on first analysis, it seems to be lower than the legal standards under competition law. This difference in legal standards is not surprising, as the DMA aims to facilitate and speed up intervention compared to competition law, for a subset of firms designated as gatekeepers of core platform services.

However, given such difference in the applicable legal standard, it is reasonable to expect that the Commission will choose between its competition and DMA powers, not only according to the type of gatekeeper conduct at play but also to the function of the ease of intervention. As the DMA standard is lower than the competition standard, we may reasonably expect the Commission to favour market investigation under the DMA over competition law enforcement when intervening against designated gatekeepers. Again, this is not a problem as such, since the regulated platforms have significant market power in their role as gatekeepers. Nonetheless, two important safeguards are necessary to ensure that the Commission does not abuse its extensive concurrent powers and to maintain legal predictability.

To prevent the risk of abuse of power and regulatory creep, the standard of intervention to propose a delegated act expanding the DMA list of obligations should be based on sound economic interpretation of market contestability and B2B fairness. To ensure legal predictability, the Commission should explain in advance the criteria it will use to choose between its regulatory and competition powers.[70] To do that, the Commission may, for instance, rely on the criteria it uses to select markets for ex-ante regulation in telecommunications.[71] Such selection is based on three criteria, and the third one, in particular, indicates that: 'Competition law interventions are likely to be insufficient where for instance the compliance requirements of an intervention to redress persistent market failure(s) are extensive or where frequent and/or timely intervention is indispensable. Thus, ex-ante regulation should be considered an appropriate complement to competition law when competition law alone would not adequately address persistent market failure(s) identified'.[72]

The Commission could also rely on the criteria proposed by Motta and Peitz to determine when a new EU market investigation tool (the so-called New Competition Tool) would be a better route than an Article 102 TFEU enforcement action. This may be the case when a competition law assessment is long, complex and uncertain or when a competition law assessment would not solve a generalized problem, but just deal with one specific conduct or firm.[73] On those bases, possible criteria to favour

[70] In the UK where most of the regulators have concurrent power, they have concluded MoU with the competition authority which clarify how concurrent powers will be exercised. See for instance, Memorandum of understanding of 8 February 2016 between the CMA and Ofcom on concurrent competition powers. Also Crocioni, Ofcom's Record as a Competition Authority: An Assessment of Decisions in Telecoms, EUI Working Paper RSCAS 2019/93.
[71] In telecommunications regulation, the three criteria test placing the frontiers between competition law and regulation is used to select markets for regulation but not the obligations which are imposed on those markets. In the DMA, the criteria should be used to select the obligations to be imposed but not the markets (or Core Platforms Services) on which those obligations will be imposed.
[72] EECC, Article 67(1) clarified by Commission Recommendation 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation, OJ 2020 No. L 439/23, recital 17. Never and Preissl, The three-criteria test and SMP: how to get it right, International Journal of Management and Network Economics, 2008, 100.
[73] M. Motta M and M. Peitz, *Intervention trigger and underlying theories of harm,* Expert Study for the European Commission, October 2020.

a DMA over competition law enforcement could comprise the recurrence or the prevalence a conduct by different types of gatekeepers, or the need to intervene quickly or with remedies that require extensive monitoring.[74]

Adopting such criteria would be useful to ensure legal predictability, but cannot undercut the responsibility of the Commission to apply EU competition law. Indeed, competition law – which is primary law – cannot legally be sacrificed on the altar of the DMA – which is secondary law. More fundamentally, given that the initial list of obligations and prohibitions found in the DMA appears largely based on experience in competition law enforcement, it may seem appropriate to continue to use competition law as the first line of intervention, in order to build up experience and "test-drive" theories of harm in actual cases before courses of conduct are enshrined in the DMA list of prohibitions and obligations.

5.2 Relationship with national competition law

While the DMA proposal prohibits the Member States from imposing further obligations on designated gatekeepers to ensure contestable and fair markets, it does not impede Member States to impose obligations on the basis of EU or national competition rules.[75] Specifically, any obligation imposed on designated gatekeepers under national competition law is allowed provided this is compatible with Regulation 1/2003.[76] For instance, the **parallel imposition of obligations under the DMA and under the newly adopted Section 19a of German Competition Law[77] which targets similar platforms is possible.** 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 which is merely applicable when compliance with regulation forces the regulated firms to violate competition law.[78] 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 interests.[79]

Such parallel imposition, at best, undermines the internal market and, at worst, leads to inconsistency. In order to avoid such pitfalls, good coordination between the Commission as a DMA enforcer and the NCAs is essential. However, there is no obvious existing forum where such coordination should take place. In particular, the ECN and the coordination mechanisms of Regulation 1/2003 are not appropriate because the DMA is not a competition law tool. Thus, a **new permanent cooperation forum where the Commission and the NCAs (possibly with other independent national authorities) meet to discuss the enforcement of the DMA could be established**. Such forum would reduce the risk of divergent or incompatible decisions adopted by the Commission under the DMA and by an NCA under competition law. Such forum would also, as explained earlier in Section 3, allow the NCAs to bring their expertise and legitimacy in support of the enforcement of DMA.

While the establishment of a cooperation forum between the Commission and the NCAs may reduce the risks of divergent or incompatible decisions, it may not alleviate it completely. Therefore, a conflict rule needs to be in place. In that regard, a narrow rule based on the concrete actions of the respective authorities is preferable to an absolute hierarchical rule based on "fields" or

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[74] Those criteria may also be inspired by the reasons mentioned by the Commission services for the insufficiency of competition law in dealing with some structural competition problems in the digital economy: Impact Assessment Report on the DMA Proposal (fn.138), at paras. 119-124.
[75] DMA Proposal, art.1.6.
[76] 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".
[77] See Section 19a of German Competition Law on Abusive Conduct of Undertakings of Paramount Significance for Competition across Markets. An non official English translation is available at: https://www.d-kart.de/wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf
[78] Case C-280/08P *Deutsche Telekom*, EU:C:2010:603.
[79] COMP/39.525, *Telekomunikacja Polska*, paras 143-145. This is confirmed by Prop. DMA, rec.10.

"competences".[80] On that basis, **both competition law and the DMA could apply concurrently, unless their concurrent application puts the regulated gatekeeper in a situation where it cannot comply with both regimes at the same time**. Such cases should be exceptional. There would thus be no conflict if, under one regime, the gatekeeper platform is put under a regulatory obligation, whereas under the other regime, analysis led the platform not to be subjected to any obligation. In such a situation, the platform can comply with both regimes. To the extent that the two regimes are complementary, there should not be any significant proportionality issue, since the respective interventions of each authority are presumably necessary and proportionate to the aims of the respective regimes. Under such a narrow conflict rule, the emphasis would be on institutional mechanisms for the Commission and the NCA to cooperate and coordinate their actions so as to avoid a situation where the regulated platform is put in an impossible bind.

In spite of the point outlined above, should a firm find itself in a position where it cannot comply with one regime without breaching the other, then we would suggest the following conflict rule. Our starting point is the preservation of the single market (which is the objective of the DMA) while respecting the hierarchy of law (i.e., EU competition law – but not national competition law going further than EU law- prevails over the DMA). Therefore, **in case of an incompatibility between an obligation imposed by the Commission under the DMA which apply across the EU and a remedy imposed by an NCA under national competition law going further then EU law which apply only to one Member State, the DMA obligation should prevail**. Alternatively, it may be claimed that under the principle of sincere cooperation of Article 4 TEU, a Member State cannot impose an obligation which undermines EU law. Thus, should a national competition authority impose to a designated gatekeeper an obligation which contradicts the DMA, the gatekeeper could refuse to implement such obligation by claiming that the Member State imposing such obligation violates EU law.[81]

[80] As explained by P. Larouche and A. de Streel, *Interplay between the New Competition Tool and Sector-Specific Regulation in the EU*, Expert Study for the European Commission, October 2020.
[81] Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)*, EU:C:2003:430

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