cerre Centre on Regulation in Europe

RECOMMENDATIONS

May 2021

Alexandre de Streel
Richard Feasey
Jan Krämer
Giorgio Monti

MAKING THE DIGITAL MARKETS ACT MORE RESILIENT AND EFFECTIVE

As provided for in CERRE's by-laws and the procedural rules from its "Transparency & Independence Policy", all CERRE research projects and reports are completed in accordance with the strictest academic independence.

The project, within the framework of which these recommendations have been prepared, has received the support and/or input of the following organisations: AGCOM, Apple, ARCEP, BIPT, Booking.Com, COMREG, Deutsche Telekom, Mediaset, Microsoft, OFCOM, Qualcomm, Spotify, and Vodafone. These organisations bear no responsibility for the contents of these recommendations.

The recommendations were prepared by a team of academics coordinated by CERRE Academic Co-Director, Alexandre de Streel, and including Richard Feasey, Jan Krämer and Giorgio Monti. The academic team also benefited greatly from very useful comments by Amelia Fletcher. The views expressed in these recommendations are attributable only to the authors in a personal capacity and not to any institution with which they are associated. In addition, they do not necessarily correspond either to those of CERRE, or to any sponsor or members of CERRE.

info@cerre.eu
www.cerre.eu

Table of contents

About CERRE

Providing top quality studies and dissemination activities, the Centre on Regulation in Europe (CERRE) promotes robust and consistent regulation in Europe's network and digital industries. CERRE's members are regulatory authorities and operators in those industries as well as universities.

CERRE's added value is based on:

- its original, multidisciplinary and cross-sector approach;
- the academic qualifications and policy experience of its team and associated staff members;
- its scientific independence and impartiality;
- the direct relevance and timeliness of its contributions to the policy and regulatory development process applicable to network industries and the markets for their services.

CERRE's activities include contributions to the development of norms, standards and policy recommendations related to the regulation of service providers, the specification of market rules and the improvement of infrastructure management in a rapidly changing social, political, economic and technological environment. The work of CERRE also aims to refine the respective roles of market operators, governments and regulatory bodies, as well as aiming to improve the expertise of the latter, given that - in many Member States - the regulators are relatively new to the role.

About the authors

Alexandre de Streel is Academic Co-Director at CERRE and a professor of European law at the University of Namur and the Research Centre for Information, Law and Society (CRIDS/NADI). He is a Hauser Global Fellow at New York University (NYU) Law School and visiting professor at the European University Institute, SciencesPo Paris and Barcelona Graduate School of Economics, and also assessor at the Belgian Competition Authority. His main areas of research are regulation and competition policy in the digital economy as well as the legal issues raised by the developments of artificial intelligence. Recently, he advised the European Commission and the European Parliament on the regulation of online platforms. Previously, Alexandre worked for the Belgian Deputy Prime Minister, the Belgian Permanent Representation to the European Union and the European Commission (DG CNECT). He holds a Ph.D. in Law from the European University Institute and a Master's Degree in Economics from the University of Louvain.

Richard Feasey is a CERRE Senior Adviser, an Inquiry Chair at the UK's Competition and Markets Authority and Member of the National Infrastructure Commission for Wales. He lectures at University College and Kings College London and the Judge Business School. He has previously been an adviser to the UK Payments Systems Regulator, the House of Lords EU Sub-Committee and to various international legal and economic advisory firms. He was Director of Public Policy for Vodafone plc between 2001 and 2013.

Jan Krämer is an Academic Co-Director at CERRE and a Professor at the University of Passau, Germany, where he holds the chair of Internet & Telecommunications Business. Previously, he headed a research group on telecommunications markets at the Karlsruhe Institute of Technology (KIT), where he also obtained a diploma degree in Business and Economics Engineering with a focus on computer science, telematics and operations research, and a Ph.D. in Economics, both with distinction. He is editor and author of several interdisciplinary books on the regulation of telecommunications markets and has published numerous articles in the premier scholarly journals in Information Systems, Economics, Management and Marketing research on issues such as net neutrality, data and platform economy, and the design of electronic markets. Professor Krämer has served as academic consultant for leading firms in the telecommunications and Internet industry, as well as for governmental institutions, such as the German Federal Ministry for Economic Affairs and the European Commission. His current research focuses on the role of data for competition and innovation in online markets and the regulation of online platforms.

Giorgio Monti is Professor of Competition Law at Tilburg Law School. He began his career in the UK (Leicester 1993-2001 and London School of Economics (2001-2010) before taking up the Chair in competition law at the European University Institute in Florence, Italy (2010-2019). While at the EUI he helped establish the Florence Competition Program which carries out research and training for judges and executives. He also served as Head of the Law Department at the EUI. His principal field of research is competition law, a subject he enjoys tackling from an economic and a policy perspective. Together with Damian Chalmers and Gareth Davies he is a co-author of European Union Law: Text and Materials (4th ed, Cambridge University Press, 2019), one of the major texts on the subject. He is one of the editors of the Common Market Law Review.

These recommendations have been prepared by a group of CERRE academics[1] on the basis of a series of four issue papers prepared by the group, which are annexed to this report, as well as four internal workshops in which CERRE members participated.[2] The recommendations aim to contribute to the current legislative negotiations between the European Parliament and the Council and to improve the European Commission's proposal for a Digital Markets Act in order to make the new rules more resilient and effective.[3]

After an explanatory statement which develops the main rationale of our recommendations, the next section provides the list of the recommendations with a short justification and follows the order of the Articles of the Commission proposal.

1 Explanatory statement

Our recommendations aim to improve the Commission's proposal **in five main dimensions**. The first dimension is to **clarify the objectives that the DMA aims to achieve and, in doing so, the logic behind the prohibitions and obligations**. While the Commission proposal refers to three objectives (contestability, fairness and internal market), the meaning of contestability and fairness is not fully clear and the relationships between the objectives and the obligations are not always obvious. Moreover, the underlying logic and theories of harms (to contestability or fairness) behind the list of the 18 obligations in Articles 5 and 6 is not obvious. Our first recommendation (on Article 1) aims to clarify the meaning of contestability and fairness to increase legal certainty and to facilitate the enforcement of the DMA, thereby contributing to its effectiveness.

The second dimension is to ensure that the **scope of the DMA minimises the risks of under-inclusiveness and over-inclusiveness**. The first type of risk may be costly because the conduct of some digital platforms which are detrimental to contestability or fairness could not be effectively policed by the DMA. The second type of risk may also be costly as the limited enforcement capabilities should be concentrated on platforms' practices which are the most determinantal to contestability and fairness. Moreover, there is a link between the scope of the DMA and the obligations that may be imposed. Our recommendations (on Articles 2 and 3) aim to find a good balance between the two risks.

The third dimension is to ensure a **good balance between the administrability and the flexibility of the DMA**. On the one hand, in these markets, where gatekeeper positions are already entrenched and risk being extended further, there are serious risks associated with inaction, and a need for rapid intervention. This in turn requires rules which are not too open-ended, so that they are straightforward both for firms to comply with and for the regulator to enforce. On the other hand, digital markets are complex, full of trade-offs, rapidly changing and contain a wide variety of digital platforms with different business models and characteristics. Therefore, rules cannot be 'quick and dirty' with an excessively high risk of type 1 (over-enforcement) and type 2 (under-enforcement) errors. There is thus a difficult balance to be found. Overall, while we think that maintaining compliance and, if necessary, rapid enforcement is essential, our recommendations (on Articles 6a, 6b, 7 and 9a) aim to maintain the straightforward rules proposed by the Commission but to complement them by moving the cursor a little towards increasing flexibility, thereby reducing error risks and recognising individual circumstances.

The fourth dimension is to include more explicit **mechanisms and processes in the DMA with which the authorities enforcing the DMA can learn from experience and improve**

[1] This academic team was coordinated by Alexandre de Streel and composed of Richard Feasey, Jan Kramer and Giorgio Monti. We also greatly benefit from the very useful comments of Amelia Fletcher.
[2] See the previous CERRE contributions on the DMA at: https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/ and https://cerre.eu/publications/digital-markets-act-economic-regulation-platforms-digital-age/
[3] 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; also Impact Assessment Report of the Commission Services on the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363.

regulation over time. In every sector the economy, regulation needs to improve over time, but this is particularly the case for the DMA. Given the novelty and the complexity of the business models and the competitive dynamics of the digital economy, the current design of the rules is bound to be imperfect and enforcers are bound to make mistakes, even though it would be a bigger mistake not to do anything. While errors in the design and the enforcement of the rules are inevitable, it is of the utmost importance that the DMA contains internal mechanisms to help improve rules and enforcement over time as more is known through research and enforcement. Our recommendations (in particular on Articles 6b, 7 and 38) aim to make those mechanisms more explicit.

Finally, the fifth dimension is to ensure a **good institutional design and allocate regulatory tasks according to the comparative advantages in terms of competence and capacity of each EU or national institution**. As foreseen in the Commission proposal, there is an undeniable merit in centralising enforcement at the EU level to avoid divergence and to ensure effective European wide enforcement of the DMA. However, national authorities have some advantages: knowledge of local conditions and proximity to businesses or expertise in designing remedies. Our recommendations (on Articles 18, 33, 33a, 33b) aim to increase the role of national independent authorities and judges in supporting the Commission in centrally enforcing the DMA.

2 Recommendations for improvements

2.1 Chapter I: Subject matter, scope and definitions[4]

2.1.1 New Article 1a: Objectives

The current Article 1(1) should be developed as a stand-alone article clarifying the three objectives of the DMA: contestability, fairness and internal market. The objective of **contestability** should not be limited to contestability on the Core Platform Services (CPS) but should extend to related services and markets. Therefore, contestability should be widened to include both platform disintermediation and limiting unfair leverage by gatekeepers into related markets. Alternatively, if the contestability objective is not widened, the DMA should be more explicit about how leverage is addressed by the fairness objective.

> *Justification: The Commission proposal seems to relate to the contestability of regulated Core Platform Services (CPS) only. This is a narrow approach which seems to exclude two important forms of contestability. First, it is not clear whether contestability encompasses platform disintermediation which is an issue when users lack choice. This can take two forms: either business-users moving to direct supply; or partial disintermediation, whereby business-users utilise an alternative provider for some – but not all - parts of the CPS service. Platform disintermediation may not lead to the entry or expansion of a full-service rival to the gatekeeper but can provide an important competitive constraint on it. Hence, we suggest that platform disintermediation should be recognised as an element of contestability.*
>
> *Second, it is not clear whether contestability of related markets - and therefore unfair leverage by a gatekeeper from the regulated CPS into related markets – is covered. In this context, we note that two key problems with digital platform markets have been identified: first, they tend to tip, being highly concentrated and hard to contest frontally; secondly, the incumbent platforms may leverage unfairly their position into related markets. The contestability objective in the Commission proposal encompasses the former concern, but not the latter (at least directly). However, as competition in the digital economy often comes from adjacent markets, it is important that those adjacent markets remain open and contestable.*

The objective of **fairness** should be clarified by focusing on commercial opportunity and reformulated (from the proposed art.10.2a) in the following manner: "an imbalance of rights and obligations on business-users, which effectively restricts the commercial opportunity open to the

[4] On this matter, see the first Issue Paper on gatekeeper definition and designation.

business-user, and so confers an advantage on the gatekeeper that is disproportionate to the service provided by the gatekeeper to business-users." If so, it could also be clarified that commercial opportunity relates to (i) fair right of access to alternative routes to market, (ii) equitable treatment of third-party business-users relative to the gatekeeper's rival services, (iii) fair transparency about services provided and the terms of those services and (iv) fair rights of expression to public authorities.

> *Justification: The concept of fairness in the DMA should be clarified to increase legal certainty for the designated gatekeepers and their users, as well as to facilitate enforcement by the Commission and the judiciary. This is especially important given the expectation of self-execution of the DMA. It seems that the DMA fairness concept excludes both fairness to end-users and the fair sharing of surplus between commercial firms. These may well be indirect benefits of the DMA, but they do not appear to be direct objectives. This could usefully be made more explicit.*

2.1.2 Article 2: Definition of Core Platform Services

Number-independent interpersonal communication services and cloud computing services should be treated in the same manner as advertising services. They should be considered as **"accessory" CPS** and be regulated only when they are provided by a digital platform that also offers another "primary" CPS.[5]

> *Justification: Core Platforms Services are two-sided while communications services and some cloud services are inherently single-sided. It is far from clear how the wording in Article 3.1.b applies to these services, since they typically act as gateways between end-users or between business-users but not between one group and another. In addition, communications services and cloud services are the CPSs that are subject to the lowest number of obligations currently foreseen in Articles 5 and 6.*[6]

2.2 Chapter II: Gatekeepers[7]

2.2.1 Article 3: Designation of gatekeepers

Concerning the **criteria to designate a gatekeeper**, the wording in Article 3(1b), 'service which serves as' should be changed to 'service or services which serve, individually or jointly, as'.

> *Justification: Some CPS are effectively one-sided networks in themselves but form part of an overall gateway between business users and end-users. For example, it might be said that the CPS of social networks primarily has end-users, while the associated services provide the business users.*

> Moreover, a fourth criteria for gatekeeper designation should be provided in Article 3(1). To be designated as gatekeeper, a **digital platform should control at least two primary or accessory CPS**s and not merely one as currently proposed by the Commission. [8]

> *Justification: This additional condition, which was envisaged by the Commission in preparing the DMA proposal,[9] has the advantage of focusing this first-generation DMA (and the limited*

---

[5] In later reviews of the DMA, the scope might be expanded to include other CPS, or to move 'ancillary' CPS to 'primary' status.
[6] Moreover, those two CPS are already subject to existing EU law that may address some of the concerns of the Commission. Number-independent interpersonal communication services are covered by the EECC and subject to transparency and interoperability obligations: Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ [2018] L 321/36. Cloud services are covered by the Free Flow of Data Regulation which encourages codes of conducts to facilitate the porting of data and the switching between cloud providers: Regulation 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, OJ [2018] L 303/59, art.6.
[7] On this matter, see the first Issue Paper on gatekeeper definition and designation.
[8] In later reviews of the DMA, the scope might be expanded to gatekeeper providing on CPS only.
[9] Impact Assessment, para.148 and 388.

enforcement resources) on the most pressing problems in the digital economy and which have their roots in entrenched control of ecosystems.

The application of the **size presumptive threshold** in Article 3.2 to accessory CPS should relate to the number of business users *or* the number of end users and not, as foreseen in the proposal, to both business and end users.[10]

Justification: As the user threshold relates to end-users and business users, it may be difficult to apply each threshold in isolation to an accessory CPS which is inherently single-sided and not a gateway between end-users and business-users.

The **indicators in Article 3(6)** which can be used to rebut the gatekeeper presumption should explicitly include the presence of effective and meaningful multi-homing for business users and end-users. Moreover, the Commission should adopt guidelines on the manner it will use and assess those indicators.

Justification: Multi-homing is one of the key criteria to determine gatekeeper power and therefore should be included in an Article of the DMA and not merely in a Recital.[11] *Moreover, as the gatekeeper concept is new in EU law and the list of indicators proposed in the DMA remains open, the Commission should enhance legal predictability by adopting guidelines on the manner it will use and assess those indicators. Those guidelines are often adopted in competition law and in some economic regulation.*

The Commission designation decision should **list the commercial services** which are covered by a specific CPS to which the gatekeeper designation applies and which are to be subject to the obligations and prohibitions of the DMA.[12]

Justification: One specific legal CPS may cover several commercial digital services. To ensure legal certainty and proportionality, the Commission should list, in its designation decision, which commercial services will be subject to the DMA prohibitions and obligations. The selection of commercial services should be done on the basis of the user size threshold of Article 3(2b), ensuring that only CPS services which meet or exceed these thresholds will be subject to obligations.

2.2.2 Article 4: Review of the status of gatekeepers

The **review of the gatekeeper designation** should be undertaken every 5 years rather than every 2 years. However, firms designated as gatekeepers could request that the Commission undertake an ad hoc review at any time during this period, but the Commission would be under no obligation to accede to such a request.

Justification: A review cycle of two years for gatekeeper designation is very short given the logistical and fact-finding pressures it imposes upon the Commission 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 is provided for in the EU telecommunications regulation[13]

---

[10] Moreover, concerning Article 3.7, the criterion for designating an accessory CPS should be slightly different. It should not be Article 3.1.b alone, but rather whether the accessory CPS *either* satisfies Art 3.1.b *or* serves as an important gateway between end users or between business users.

[11] In the Commission proposal, multi-homing in only mentioned in recital 25.

[12] Alternatively, obligations apply to all of the services provided by a gatekeeper within a regulated CPS, whether or not they would also justify regulation in their own right, but it should then be possible for the Commission to narrow the scope further through the Article 7 specification process where the specification decision could exclude some commercial services from the obligations, again on the basis of the user size threshold of Article 3(2b). This seems especially justified where services might not be seen as gateway service in their own right but would in combination with another service within the same CPS category (e.g., Instagram).

[13] EECC, art.67(5).

or as it has been proposed in the CMA Advice to balance sufficient time for the effect of regulation to be observed, with the need to ensure the designation remains appropriate.

2.3 Chapter III: Practices of gatekeepers that limit contestability or are unfair[14]

2.3.1 Articles 5: Obligations for gatekeepers

In relation to the **anti-steering prohibition** (art.5.c), it is not currently clear whether the prohibition (art.5.c) applies only to online intermediation services or to other CPSs or how it would apply to another CPS if so. It is also not clear whether the second part of the obligation (to allow users to access items through the platform, even if bought through an alternative route) is limited to items that are also available via the platform, and if not, whether the platform would be expected to invest in any functionality that may be required to enable this.

Justification: Some Article 5 obligations need to be clarified or fine-tuned, especially given that these are intended to be broadly self-executing.

In relation to the **prohibition of MFNs** (art.5.b), we note that this currently covers online intermediation services only. Its applicability could usefully be extended to other CPSs, not least because the first part of this obligation effectively limits exclusive dealing as well as broad MFNs. Also, given the entrenched market position of the gatekeepers, consideration should be given to widening this art.5.b obligation to prohibit narrow as well as broad MFNs.

Justification: Wide MFNs are effectively prohibited under competition law, so it seems strange to limit the scope of that aspect of this obligation. The exclusive dealing element (the first part of the obligation) would also be useful more widely; while exclusive dealing can have pro-competitive benefits, it is highly likely to be unfair and to contribute to a lack of contestability when imposed by a large gatekeeper platform with an entrenched market position. The same is true for narrow MFNs; they can have efficiency benefits but are highly likely – on balance – to harm fairness and contestability for those firms subject to the DMA.

2.3.2 Article 6: Obligations for gatekeepers susceptible to being further specified

Several Article 6 obligations merit **greater upfront clarification**, within the Recitals, or even reformulation. There are certain obligations where the wording is simply unclear, or where greater specification would be helpful. For example:

- Does the **self-preferencing** prohibition (art.6.1d) relate to ranking 'services and products' (i.e. ranking services and ranking products) or ranking services and (any sort of) products?

- For **end user data portability** (art.6.1h), it would be useful to make explicit that the requirement for 'effective' data portability implies a requirement that data should be directly portable, with the end user's consent, to a third party business via an open API (as opposed to having to be downloaded by the end user and reuploaded), and also that end users should have ready access to an appropriate system for viewing and revising their consents.

- For **business user data access** (art.6.1i), the obligation requires the provision of aggregated or non-aggregated data, but it is not clear who decides which.

There are other areas where the scope is ambiguous, in terms of which CPSs are expected to be covered, and arguably extend beyond the particular CPS raising the concerns which motivate the obligation, and therefore could provoke undesirable side-effects. Some of these should be **narrowed**, not least because they do not necessarily make sense in relation to every CPS potentially

[14] On this matter, see the second Issue Paper on DMA architecture and the third Issue Paper on obligations and prohibitions.

covered. Examples could include Art 6.1a (on use of data related to business users), 6.1d (on self-preferencing in ranking), 6.1e (on device neutrality) and 6.1f (on user data portability).[15]

Other obligations may be **broadened** either directly in Article 6 or through the adoption of a new article with more generally defined prohibitions of certain types of conduct that limit contestability and fairness (see below, proposed new Article 6b).

> *Justification: Such modifications aim to ensure a better balance between administrability, legal certainty, and proportionality, as explained in the third issue paper on obligations and prohibitions.*

Finally, more **security and integrity** safeguards should be provided for in specific obligations, particularly in relation to technical restrictions on switching/multi-homing (art. 6.1e) and ancillary service interoperability (art.6.1f). Where integrity safeguards are included, they should be widened to protect against all types of malware, irrespective of whether it 'endangers the integrity of the hardware or operating system'. At the same time, it should be made clear that the gatekeeper has a responsibility to address security and integrity issues, and that it bears the burden of showing that application of the safeguard is justified, necessary and proportionate.[16]

> *Justification: The imposition of Article 6 obligations must not reduce adversely platforms' security and integrity to the detriment of end-users. Therefore, the safeguard clause which is provided for app installing (art. 6.1.b) and side loading (art. 6.1.c) should be extended to other obligations. Given the importance the DMA places on guaranteeing user safety, the interplay between these obligations and the ability of platform operators to protect users against illegal content and fraud should also be taken into consideration.*

2.3.3 New Article 6a: Access obligations that always need to be specified

A new Article 6a subject to a particular specification process should be added with some of the obligations currently in Article 6. They relate to **interoperability obligations** (art.6.1c and art.6.1f) as well as **data access and portability** (art.6.1j, art.6.1i and 6.1h).[17] In addition, those access obligations should be applied on a gatekeeper by gatekeeper basis, rather than being universally applicable as in Articles 5 and 6. In particular, there should be potential for the Commission to narrow the application of these obligations to specific CPSs and specific use cases where interoperability and data portability would genuinely increase contestability.

> *Justification: We propose to develop further the clustering of the obligations according to the specification mode which has already been initiated in the Commission proposal. Therefore, we recommend moving to a new separate Article the obligations currently in Article 6 which aim at supporting entry and at pro-actively supporting competition.[18] Those obligations are different in nature from the other Article 6 obligations, are potentially very wide-reaching and if applied extensively, may impose substantial costs and bring limited benefit. They have to be targeted to where they are most needed. Therefore, unlike Article 6 obligations, those obligations will need to be specified in all cases before being enforceable and such a specification process may take longer than the six months proposed for other obligations. It will also be crucial that the specification process (as described below in Article 7) should be effective and rapid in order not to undermine the effectiveness of Article 6a obligations which are key to ensuring contestability and fairness.*

---

[15] If the proposal below in relation to a new Article 6a is not taken forward, consideration should also be given to narrowing the scope of 6.1f, 6.1h and 6.1i.
[16] In that regard, we note that messages for users highlighting security and integrity risks may be more proportionate than an outright ban (e.g. on side-loading). Any such messages would in turn need to be proportionate to the risks; otherwise, they would likely constitute circumvention under art.11.
[17] Moreover, for the search data access obligation (art 6.1j), it would be useful to clarify that the requirement covers *all* query, click and view data, and not just a subset thereof.
[18] Those types of obligations are named 'pro-competitive interventions' or PCIs in the CMA's Advice.

2.3.4 New Article 6b (replacing Article 10): Generic prohibitions that always need to be specified

Next to a new Article 6a focused on *access obligations*, another new Article 6b should be inserted in the DMA that will be focused on **more generally defined *prohibitions.*** This Article would 'generalise' some of the main conduct targeted by Articles 5 and 6. Thus, it could prohibit conduct having the object or the effect of preventing business users or end users from switching or multi-homing. It could also prohibit conduct aimed at the unfair envelopment of new markets, to the disadvantage of existing or potential competitors, through bundling and self-preferencing. In particular, this would broaden the prohibition of tying between two CPSs for which a gatekeeper designation has been made (art.5.f) and apply it to unfair leverage beyond regulated CPS markets. Alternatively, this new Article could prohibit the conduct which limits the commercial opportunity of business users, by reducing (i) fair right of access to alternative routes to market, (ii) equitable treatment of third-party business users relative to the gatekeeper's rival services, and (iii) fair transparency about services provided and the terms of those services.

The prohibition being defined in more general terms should correlate to the gatekeeper having **more possibilities at their disposal to bring a contestability and fairness defence when it comes to the obligations foreseen in Article 6b**, than the gatekeeper would have under the detailed obligations in Articles 5 and 6[19]. Also as the prohibitions are more general, the scope of the obligations and the measures to be taken will need to be specified by the Commission before being enforceable against individual gatekeepers. As for Article 6a, those general prohibitions should be applied on a gatekeeper by gatekeeper basis, rather than being universally applicable.

> *Justification: The current proposed Article 10 could be interpreted narrowly because the prohibited conducts are an essential element of the DMA that cannot be changed with a Commission delegated act. In this case, it limits the Commission's ability to add new obligations to conduct already foreseen in Articles 5 and 6. With such a narrow interpretation, Article 10 could be redundant with the anti-circumvention clause of Article 11. Alternatively, Article 10 could be interpreted more broadly. In this case, it allows the Commission to add new obligations which contribute to contestability and fairness. With such a broad interpretation, Article 10 gives very large discretion to the Commission. At this stage, it is not clear which interpretation will prevail. Our proposed new Article 6b constitutes a middle ground between those two interpretations or, in other words, between (too) narrow and (too) broad Commission discretion. To do so, we propose to "generalise" some prohibitions already foreseen in Articles 5 and 6. Thereby, it will enable the Commission to specify additional measures, beyond those required to comply with Articles 5 and 6, as new forms of problematic conduct emerge following the implementation of the DMA. Such a specification process could be done under Article 6a or with a market investigation procedure as the Commission had envisaged for Article 10.*

2.3.5 Article 7: Specification decision

The Article 7 process under which a gatekeeper can request a specification decision (or the Commission issue one at its initiative) should apply to obligations in Articles 5, 6, 6a and 6b. The Commission would only be expected to issue a specification decision in relation to Article 5 obligations in very exceptional circumstances. It would enjoy broad discretion in deciding to specify Article 6 obligations and it would always be required to specify Article 6a obligations or Article 6b prohibitions.

[19] See Article 9a below.

The **specification process** should be the following:

- A request for a specification decision could be made by a gatekeeper within [3] months of its designation and should include details of the proportionate measures which the gatekeeper proposes to take and which it considers would ensure effective compliance with the relevant obligation.

- The Commission should respond to a request for a specification decision within [14] days of receipt, confirming whether or not the Commission will initiate a proceeding. A decision by the Commission to decline a request for a specification decision should not be capable of being appealed.

- The Commission should be required to issue the specification decision with proportionate measures within 6 months of opening a proceeding for all obligations except those in Articles 6a for which the specification process can be longer given its complexity. In doing so, the Commission may accept commitments from the gatekeepers in its specification decision.

- Within the timeframe foreseen for its specification decision, the Commission should consult with gatekeepers but also with third parties as well as national independent authorities on its preliminary findings regarding the design of the measures it deems effective and proportionate to achieve the obligations.

- If the Commission declines a request for a specification decision from a recently designated gatekeeper, the gatekeeper will be expected to comply within 6 months of being designated. If the Commission issues a specification decision, it should specify the date by which any measures in the specification decision must be implemented.

- The Commission should publish a non-confidential version of the specification decision within [14] days of it being issued.

This specification process needs to consider **consumer biases** generally, and more specifically ensure that the choice architecture put in place by the gatekeepers are designed in the users' interest. One option would be to require the gatekeepers to design their choice architecture so that it best reflects the decisions that consumers would make if making fully deliberative choices based on complete information. To do so, the Commission should be able to require, when proportionate, gatekeepers to engage in such A/B testing and to provide the results of any such testing to the Commission, including in support of commitments. Therefore, the specification process will require behavioural economic expertise.

Also, the Commission should publish a **report** after 3 years - and every 3 years thereafter - summarising the specification decisions it has made and any wider guidance which it considers gatekeepers should derive from them, such as how specific measures relate to specific objectives of contestability, fairness and internal market.

> *Justification: Such a process aims to ensure a better balance between administrability, legal certainty, and proportionality than the Commission proposal. To ensure administrability, the Commission keeps its discretion to adopt a specification decision (except for art.6a obligations and art.6b prohibitions). To ensure legal certainty and proportionality, the designated gatekeepers of a CPS have a clearer right to request specification. If the Commission does not issue a specification decision and then opens a proceeding for non-compliance, the Commission should be expected to accept commitments when offered by the gatekeeper and when they are effective in complying with the DMA obligations and the Commission should be expected not to impose a fine.*

If, as we proposed under Article 4, the designation process happens every 5 years (instead of 2 years), the Commission should have the **possibility to re-specify the obligations** when, within

this 5-year interval, measures appear not to be effective or proportionate in achieving the goals of the obligations.

> *Justification: This process allows the Commission to learn from their enforcement experience and improve measures over time as well as adapt them to technology and market evolution.*

2.3.6 New Article 9a: Exemption decision[20]

Gatekeepers should be able to request an **'exemption decision'** from the Commission in relation to any obligation under Article 6 if:

- The obligation is not applicable to the Core Platform Service for which the applicant has been designated as a gatekeeper (e.g. art.6.k is inapplicable because the gatekeeper does not provide a software application store).

- The obligation is potentially applicable, but the particular circumstances of the gatekeeper or the CPS mean that adherence to it would severely undermine contestability or fairness rather than contribute to their achievement.

Moreover, a request for an 'exemption decision' from the Commission in relation to any obligation under Articles 5 or 6 should also be possible if the cumulative effects of the application of all the obligations foreseen in Articles 5, 6, 6a and 6b to a specific gatekeeper make the imposition of such an obligation unnecessary or disproportionate for achieving the objectives of contestability or fairness.

An application for an exemption decision would be subject to the **same process as for specification** decisions taken under Article 7.

> *Justification: The exemption option would broaden the possibilities of not applying DMA obligations currently foreseen by Articles 8 and 9 (suspension and exemption). This is necessary given the numerous obligations foreseen and the diversity of business models to which those obligations apply. However, exemption decisions should be limited, on the one hand, to gatekeepers' conduct which does not impede contestability and fairness and, on the other hand, to DMA obligations which would not be effective and proportionate in achieving contestability and fairness. Hence, this exemption possibility does not introduce in the DMA an efficiency defence as applied in competition law.*

2.3.7 Article 11: Anti-circumvention

Article 11 currently relates to the circumvention of the obligations. Depending on precisely how the scope of the CPS to be regulated is defined, there may also be merit in addressing **circumvention of designation** under Article 3.

Moreover, the recitals linked to Article 11 could include wording that makes explicit that firms may not seek to replace proscribed contractual clauses by other practices.

> *Justification: The circumvention clause needs to be improved. For example, it should not be possible to circumvent the ban on MFN clauses with the possibility to offer higher rankings to suppliers that do not charge lower prices on their own website.*

[20] Alternatively, Article 7 could itself be expanded to ensure that a specification decision could include a decision to exempt a gatekeeper from having to comply with the obligation on the two sets of grounds suggested above. These would sit alongside the requirement of Article 7(5) that any measures must be proportionate.

2.4 Chapter IV: Market investigation

2.4.1 Article 16: Systematic non-compliance

No commitments should be available in Article 16 procedures, hence the reference to commitments in Article 16(6) should be deleted.[21]

> *Justification: See justification under Article 23.*

2.5 Chapter V: Investigation, enforcement and monitoring powers[22]

2.5.1 New Article 18a: Complaint mechanism

A **formal procedure** should be established by which business users, end users or competitors[23] can make **complaints** to the Commission or the national independent authority when they consider that a gatekeeper has infringed its obligations under the DMA. Moreover, the Commission or national authority receiving the complaint should offer a well-designed whistleblowing function, whereby complaints can be made in a way that protects the complainant's anonymity.[24]

> *Justification: There is no procedure for complaints in the Commission proposal and this limits the Commission's capacity to secure information about how the obligations are applied in practice and how businesses are affected, as well as identifying other forms of conduct which may be addressed under our proposed new Article 6b. Our recommendation can also facilitate setting enforcement priorities for the Commission. Moreover, while the obligation not to prohibit firms from raising issues with public authorities (in art.5.d) is welcome, it is unlikely to be fully effective until the Commission can offer a well-designed whistleblowing function.*

2.5.2 Article 23: Commitments

The designated gatekeepers should be allowed to offer **commitments** already during the Article 7 specification procedures. Moreover, the Commission should take account of whether or not an Article 7 specification decision has been issued in relation to a particular obligation and gatekeeper when considering whether or not to accept commitments under Article 23 during a non-compliance proceeding.

> *Justification: The DMA appears to be based on a model of responsive regulation by which the starting point is an assumption that parties wish to comply and the role of the Commission should be to indicate a compliance path (the regulatory dialogue). Non-compliance with the obligations leads to increasingly punitive measures as well as to the unilateral imposition of remedies, however, the Commission proposal provides too many options for designated gatekeepers to offer commitments when not complying with their obligations. Our recommendation gradually reduces the option of offering commitments as the gravity of the infringement escalates. At the same time, it affords gatekeepers the option of offering commitments early in the process during the Article 7 procedure, in line with the expectations that gatekeepers at this stage wish to comply.*

The Commission should **consult with third parties**, in particular business users, end users and competitors of the designated gatekeepers, before accepting or rejecting commitments.

> *Justification: Third parties are affected by the conduct of gatekeepers and are well-positioned to comment on whether a gatekeeper's proposed course of conduct is likely to*

---

[21] Recital 67 contains an error: it should read systematic non-compliance, as this is the term used in Article 16.
[22] On this matter, see the fourth Issue Paper on enforcement and institutional arrangements.
[23] A competitor may be defined in Article 2 in the following manner: 'Competitor to the gatekeeper's core platform service' means any natural or legal person acting in a commercial or professional capacity providing a core platform service in the same category as the one of the gatekeepers).
[24] Also, it would be useful to make explicit that the anti-circumvention element of the DMA (Article 11) implies that gatekeepers are prohibited from any retaliation against complainants or whistle-blowers, even if there is no explicit non-complaint clause in their contract.

achieve the aims of the DMA. The market test procedure found in antitrust commitment decisions seems like a model to be followed.[25] It can be set out in a soft law Notice, but reference to a third-party role should be included in the DMA.

2.5.3 Article 24: Monitoring of obligations and measures

The Commission should be able to **rely on information - even confidential information - collected under other investigations**, in particular under competition law or Digital Services Act (DSA) enforcement, to monitor the compliance of the DMA obligations and measures. Moreover, the Commission should be able to share confidential data with vetted researchers while respecting EU rules on confidentiality and trade secrets.[26]

Justification: The Commission will have multiple enforcement powers against the same digital platforms under different EU legal rules (in particular, competition law, DMA and DSA). It is key that the Commission is able to maximise the synergies between those different powers while guaranteeing the fundamental rights of the digital platforms. Therefore, a specific legal basis allowing the exchange of confidential information across enforcement powers is necessary. It is also important that the Commission is able to rely on the support of vetted independent experts to analyse the databases and the algorithms of the designated gatekeepers. For this support to be effective, the researchers should have confidential access to those databases and algorithms.

2.5.4 Article 26: Fines

The Commission should take account of whether or not an **Article 7 specification decision** has been issued in relation to a particular obligation and gatekeeper when considering whether to impose a fine and the level of the fine to be imposed.

Justification: Such a process aims to ensure a better balance between administrability, legal certainty, and proportionality than the Commission proposal. If the Commission did not issue a specification decision, the Commission should be expected to accept effective commitments when offered by the gatekeeper and not to impose a fine.

2.5.5 New Article 31a: Alternative dispute resolution

The DMA should establish an **external alternative dispute resolution** mechanism between the designated gatekeepers and their users under the responsibility of a national independent authority. The national authority can refer the disagreement to the Commission to consider enforcement proceedings.

Justification: Mediation is already provided in the P2B Regulation[27] but is applicable to all big and small platforms covered by the P2B Regulation and it may not be effective enough when applied to the gatekeepers designated under the DMA. Alternative dispute resolution mechanisms have proved to be useful and effective in other EU regulatory frameworks such as the one applicable to electronic communications.[28]

2.5.6 Article 33: Role of national independent authorities

The **role of national independent authorities should be augmented** in the following ways: (i) as an institution to which complaints may be made (new Article 18a) and (ii) as an institution responsible for facilitating alternative dispute resolution (new Article 31a). Moreover, an EU network of independent authorities (as per new art.33a) could play a bigger advisory role during the specification procedure (Article 7) and market investigations (Articles 14-17).

---

[25] DG Competition, Antitrust Manual of Procedures (2012) ch.16.
[26] As foreseen in art. 31 of the DSA Proposal.
[27] P2B Regulation, art.12.
[28] EECC, arts.25-26

It should be left to the Member State to designate which national authorities should have those roles provided they meet minimum requirements which should be defined in the DMA, in particular regarding competence, resources and independence. Thus, it may be existing authorities (such as a competition agency, telecom regulator, privacy regulator, cyber-security agency …) or new ones. Different authorities may be involved in different issues.

> *Justification: There is merit in centralising enforcement in the Commission to avoid divergence and to ensure effective EU-wide enforcement of the DMA. However, national independent authorities have some advantages: knowledge of local conditions and proximity to businesses suggests that they would be well-placed to receive concerns and facilitate alternative dispute resolution. The expertise that some national authorities have gained in digital markets can be used by the Commission in designing remedies. For instance, the Commission should liaise with the system of data protection regulation given that several DMA obligations are likely to be significant issues of GDPR interpretation.*

2.5.7 New Article 33a: EU-network of independent national authorities

The DMA should establish, next to the Digital Markets Advisory Committee (DMAC) foreseen in Article 32, an **EU network of independent national authorities**. It would then be up to each Member State to decide which (existing or new) national authorities should be part of such a network.

> *Justification: It is key that the national authorities supporting the Commission are independent of political power. While such independence is expected by the Commission, 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.[29] In practice, national representatives in comitology committees often come from Ministries. To deal with such an issue, several EU sector-specific regulations provide for two different networks of national authorities, one comitology committee and another one composed of independent authorities.[30]*

2.5.8 New Article 33b: Private enforcement

The DMA should include **more clarification on private enforcement**. It may require the Member States to ensure 'adequate and effective enforcement and ensure that courts can provide remedies that are 'effective, proportionate and dissuasive.'[31] The same provision should prevent national courts from issuing decisions incompatible with actual or contemplated decisions of the Commission.[32]

In parallel, some more **precise safeguards** should be included in the DMA. First, national judges should have no ability to assume designation for a platform that the Commission had not designated. Second, for the obligations that need to be specified by the Commission, private enforcement actions should only be possible after a Commission specification decision has been issued. This is particularly important for our newly proposed Article 6a on access obligations and Article 6b on general prohibitions.

> *Justification: While the involvement of national judges is inevitable if a business wishes to complain, there is also a risk that private enforcement undermines the flexibility of the*

---

[29] 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.

[30] For instance, in telecommunications: 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.

[31] P2B Regulation, Article 15.

[32] Alternatively, revise Article 1(7) to include national courts. For reference, this is the language in Article 16 of Regulation 1/2003: "they 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. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty."

Commission in relation to the Article 7 specification process. Several safeguards need to be created: (i) building on the duty of sincere cooperation (art.5 TEU) to ensure that national courts are reminded of their obligation not to issue decisions that actually or potentially contradict Commission decisions; (ii) ensuring that national judges can only apply the DMA against CPS providers that have been designated by a Commission decision as having a gatekeeper position and (iii) preventing access to courts for obligations which require a specification decision by the Commission. Moreover, the ADR option (in Article 33a) offers a faster and cheaper alternative to courts.

2.5.9 Article 38: Review

The Commission should be able to **add but also to remove obligations** if regulatory experience, market developments, or technological evolution make existing obligations either no longer relevant or no longer effective and proportionate in achieving market contestability and B2B fairness. Also, the review should be undertaken every 5 years instead of every 3.

Justification: The review of some obligations should be more 'symmetric' as regulatory experience and digital markets evolution may require that some obligations are added to the DMA, but also that some obligations are removed. Moreover, given the length and the complexity of the EU legislative process, such a "full review" should only be done every five years. To deal with the more rapid technology and market evolutions, our recommendations propose quicker but more limited adaptation clause with Article 6b (the more generic prohibitions) and Article 7 (possibility for the Commission of re-specify measures).

cerre

Centre on Regulation in Europe

Avenue Louise, 475 (box 10)
1050 Brussels, Belgium

+32 2 230 83 60

info@cerre.eu

cerre.eu

@CERRE_ThinkTank