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DMA COMPASS

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ABOUT CERRE

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1. INTRODUCTION: THE NEED FOR AN IMPLEMENTATION COMPASS[1]

In the course of the Digital Market Act's[2] (DMA) implementation, **numerous interpretation issues will be raised and several trade-offs** will have to be decided in the first instance by the Commission or national courts, and ultimately by the Court of Justice of the European Union (EU). More fundamentally, the DMA is establishing a new field within EU economic regulation, and the first interpretation and enforcement actions by the Commission will determine the direction of future EU digital economic regulation.

Those issues will be **particularly difficult to decide** because the DMA regulates technologies and business models which are diverse, fast-evolving, complex and not always fully understood, while the asymmetry of information between regulators and the regulated platforms is massive. Therefore, an **interpretation and implementation "compass" is needed** for the Commission to effectively enforce the DMA, for the gatekeeper to understand how they should comply with the DMA, and for their business users to understand how the DMA can help them enter the digital markets. Calibrating that compass will not be straightforward, given the structure of the DMA. From the higher-level statement of objectives, on the one hand, down to the three key elements of "core platform services", "gatekeepers" and the list of obligations, on the other, the conceptual chain seems not as strong as it could be. The DMA misses a general definition of core platform services[3] and a general clause tying together the list of 22 obligations,[4] that would link these elements with the objectives. Nevertheless, the compass can be calibrated through deduction from its objectives, some clustering of the obligations, and with the help of regulatory principles that are picked up in the DMA.

[1] This issue paper draws on P. Larouche and A. de Streel, 'A compass on the journey to successful Digital Markets Act implementation', *Review Concurrences*, 2022/3.

[2] Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (Digital Markets Act), OJ [2022] L 265/1.

[3] Outside of the operative clauses, Rec. 13 and 14 provide some characteristics of core platform services.

[4] DMA, Art. 12(5) provides some guidance on the type of practices that would lead to the imposition of supplementary obligations.

2. OBJECTIVES AND NORMATIVE STANDARD FOR INTERVENTION

The DMA has two main overarching aims of "contestability" and "fairness" which are defined in the Recitals of the law.

Contestability is defined as:

> *(…) the **ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper** on the merits of their products and service. (…) This Regulation should therefore ban certain practices by gatekeepers that are liable to increase barriers to entry or expansion, and impose certain obligations on gatekeepers that tend to lower those barriers. The obligations should also **address situations where the position of the gatekeeper may be entrenched to such an extent that inter-platform competition is not effective in the short term, meaning that intra-platform competition needs to be created or increased**.* [5]

Thus, **contestability mostly relates to reducing strategic and some structural barriers to entry**, thereby facilitating market entry on the demand side (by facilitating switching and multi-homing), and on the supply side (by opening up the data and platforms of the gatekeepers). Note that some structural barriers to entry, such as networks and ecosystems, generate efficiencies that should be taken into account when interpreting and implementing the DMAs obligations.

Unfairness is defined as:

> *(…) an **imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage**. Market participants, including business users of core platform services and alternative providers of services provided together with, or in support of, such core platform services, should have the ability to adequately capture the benefits resulting from their innovative or other efforts. Due to their gateway position and superior bargaining power, it is possible that gatekeepers engage in behaviour that does not allow others to capture fully the benefits of their own contributions, and unilaterally set unbalanced conditions for the use of their core platform services or services provided together with, or in support of, their core platform services (…).* [6]

At face value, fairness would be a matter of balance in the business-user-gatekeeper relationship. Yet, there must be some limiting feature, otherwise the DMA would potentially cover countless redistribution issues between business users and gatekeepers, even absent any real impact on competition or, more broadly, on welfare.[7] Rather, as the above excerpt indicates, **fairness becomes**

[5] DMA, recital 32. Also DMA, Art.12(5b).

[6] DMA, recital 33. Also, Art.12(5a).

[7] Indeed there are situations where firms at different levels of the value chain will argue over the distribution of the total profit to be realised on a given product, without the outcome of that argument having any significant impact on the final user in terms of price or otherwise. In such situations, the final distribution will reflect the relative power of firms, and it is difficult to assess that distribution based on objective criteria. An argument has been made that many FRAND disputes between SEP holders and implementors fit that description, and hence that it was not justified to invest competition

an issue where the imbalance between gatekeeper and business user deprives the latter of adequate reward for its efforts. In technical terms, the gatekeeper uses its market power to confiscate producer surplus that would otherwise flow to the business users as a reward for their efforts. Under these circumstances, as the DMA signals, the incentives for business users are adversely affected, especially regarding innovation, with a ripple effect on competition and innovation in the digital economy.[8]

Thus, both objectives should be **understood with a reference to long-term competition**.[9] Moreover, both **objectives are linked[10] and ultimately aim to promote business and end-user choice, as well as the degree and diversity of innovation in the digital economy**.[11] Indeed, the DMA obligations promote, on the one hand, innovation by business users offering complementing services on the regulated platforms and, on the other hand, innovation by disruptive entrants offering alternative services to the regulated platforms.[12]

enforcement time and resources in these disputes. Schweitzer, supra note 18, also suggests to interpret the fairness objective with reference to competition and cautions against a pure distributional interpretation of this objective.

[8] In the same vein, J. Cremer et al,. 'Fairness and Contestability in the Digital Markets Act', Yale Tobin Center for Economic Policy, Policy Discussion Paper 3, 2021, at pg. 6 define fairness as '*the organization of economic activity to the benefit of users in such ways that they reap the just rewards for their contributions to economic and social welfare and that business users are not restricted in their ability to compete*.'

[9] H. Schweitzer, 'The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Market Act Proposal', *ZEuP*, 2021, at pp. 509-518.

[10] DMA, Recital 34.

[11] DMA, Recital 32 states that: '*weak contestability reduces the incentives to innovate and improve products and services for the gatekeeper, its business users, its challengers and customers and thus negatively affects the innovation potential of the wider online platform economy.'* Also see Art.12(5b).

[12] P. Larouche and A de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions', *Journal of European Competition Law & Practice,* Vol. 12, Issue 7, 2021, at pp. 548-552. On the link between contestability, fairness and innovation, see also Cremer et al,. supra.

3. CLUSTERING OBLIGATIONS

The DMA contains a list of **22 prohibitions and obligations included in three separate provisions** (see the Annex to this note).

- Article 5 enumerates 9 items, mostly prohibitions, which are supposed to be self-explanatory and self-executing;
- Article 6 lists 12 items, mostly obligations, which may require additional specificity by the Commission; and
- Finally, Article 7 adds a horizontal interoperability obligation among communications applications, which requires a phased implementation given its complexity.

Even if the DMA itself does not cluster these prohibitions and obligations, it can be useful to **group them around four categories**. This clustering of obligations allows the link between the objectives of the DMA and its substantive part, as well as the relationship between the individual obligations, to be made more explicit.

1. **Preventing anti-competitive leverage from one service to another**. This category includes the prohibition of tying one regulated core platform service (CPS) to another regulated CPS, or tying one CPS to identity or payment services, as well as the prohibition of specific discriminatory or self-preferencing practices.

2. **Facilitating business and end users switching and multi-homing**, thereby reducing entry barriers arising from user demand. This category includes the prohibition of Most Favoured Nation clauses, anti-steering and anti-disintermediating clauses, as well as disproportionate conditions to terminate services. It also includes the obligation to ensure that it is easy to install applications or change defaults, as well as to port data outside of core platform services.

3. **Opening platforms and data**, thereby reducing supply-side entry barriers and facilitating the entry of complementors, competitors and disruptors. This category includes horizontal and vertical interoperability obligations,[13] FRAND access to app stores, search engines and social networks, and data access for business users as well as data sharing among search engines on FRAND terms.

4. **Increasing transparency** in the opaque and concentrated online advertisement value chain. This more specific category includes transparency obligations on price and performance indicators, which are to the benefit of advertisers and publishers.

The first category includes mostly prohibitions that are inspired by competition cases[14] and are hence drafted in a relatively detailed manner. The second and – especially – the third categories include mostly obligations couched in more general terms and sometimes going beyond what could be imposed by way of competition law remedies. Each of these categories points to different aspects of

[13] Resp. DMA, Art.7 for horizontal interoperability and Arts.6(4) and 6(7) for vertical interoperability including side loading.
[14] For a correlation between DMA obligations and antitrust cases, see A. de Streel and P. Larouche, 'The European Digital Markets Act proposal: How to improve a regulatory revolution', *Concurrences*, 2021/2, at pp. 43-63.

contestability and fairness, as defined above. When the obligations are read together with the corresponding recitals, it becomes apparent that almost all of them relate to contestability, and many of them to fairness as well. The justifications set out in the recitals often blend contestability and fairness, underlining that they are indeed linked and that contestability seems to be the leading objective.

4. REGULATORY PRINCIPLES: EFFECTIVENESS, PROPORTIONALITY AND OBJECTIVE JUSTIFICATION

The third group of elements to calibrate the DMA compass rely on the regulatory principles which will guide the intervention of the Commission.

(a) Effectiveness

Article 8 of the DMA provides for a general **effectiveness principle** by stating that**:**

> *1. The gatekeeper shall ensure and demonstrate compliance with the obligations laid down in Articles 5, 6 and 7 of this Regulation. The measures implemented by the gatekeeper to ensure compliance with those Articles shall be effective in achieving the objectives of this Regulation and of the relevant obligation (…)*
>
> *7. In specifying the measures under paragraph 2, the Commission shall ensure that the measures are effective in achieving the objectives of this Regulation and the relevant obligation, and proportionate in the specific circumstances of the gatekeeper and the relevant service.*

Thus, the DMA measures have to be **'effective' in two ways: (i) with regard to the overall objectives of the DMA as a whole and, (ii) with regard to the individual goal of each obligation**. Point (i) is interesting because one can ask questions about the combined effectiveness of all the obligations, but it also shows that the Commission should have some idea of what the overall aim is if it is to apply the DMA properly when reviewing conduct and compliance reports.

Next to this general clause, **some Article 6 obligations specifically refer to the effectiveness** of their implementation. This is the case of (i) access and interoperability of apps and/or app stores (Art 6.4), interoperability for providers of services and hardware (Art 6.7), end-user data portability (Art 6.9), and business user data sharing (Art 6.10).

(b) Proportionality, efficiency defence and objective justifications

The principle of proportionality implies that the **interpretation and implementation of the DMAs obligations should not exceed what is necessary to achieve its objectives**.[15] Thus, proportionality should play a central role since it provides a template for the Commission to apply and specify the DMAs obligations and decide on the trade-offs left open within the DMA, for instance between openness and privacy, or service integrity, or between business users and end users interests.[16]

[15] Proportionality is a general principle of EU law: Art. 5(4) TEU which provides that: ' Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.

[16] DMA, Art.8(7). The companion CERRE issue papers on obligations show how proportionality play a role in specifying the obligations.

Proportionality will also play a central role when the Court of Justice of the EU will have to judge the Commission's decisions.

The proportionality principle implies that contestability and fairness are accepted as valid core goals, and will be key in deciding whether the DMA measure is necessary, considering whether the same result might be achieved through a less intrusive measure.

A related question is the absence of an efficiency defence in the DMA.[17] It might be more accurate to say that, in accordance with the avowedly regulatory nature of the DMA, **the efficiency trade-offs have been decided by the legislator and the efficiency defence as it is raised in individual competition law proceedings,[18] has been replaced with a discussion of proportionality in relation to the measures taken under the DMA**.[19] In other words, any type of "efficiency defence" argument is beside the point, unless it goes to show that the conduct, or the defendant firm, already achieves – in whole or in part – the contestability and fairness objectives as defined in the DMA. The proportionality principle, therefore, allows linking the DMAs objectives directly to its interpretation and implementation. Seen from that perspective, the proportionality principle channels the economic analysis that underpins an efficiency defence into a narrower framework. It also compels the defendant firm to work within the specific set of core goals of the DMA.

While there is no antitrust-type efficiency defence, there are some possibilities of objective justifications. Several Article 6 and 7 obligations explicitly provide for the **possibility of a necessary and proportionate objective justification based on service integrity, security or privacy reasons**. This is in the case of:

- The obligation related to app installation and default setting changes: Art. 6(3);
- Access and vertical interoperability of apps/app stores: Art. 6(4);
- Vertical interoperability for providers of services and hardware: Art. 6(7); and
- Horizontal interoperability obligation: Arts. 7(3) and (6).

More generally, Article 8(1) of the DMA provides that its measures should **comply with several EU laws, in particular regarding privacy and security**. Moreover, some obligations specifically refer to the GDPR requirements,[20] such as the: prohibition on data combination (Art. 5(2)), provision of data access for business users to data associated with their services (Art. 6 (10)) and access to search data (Art. 6(11)).

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[17] DMA, Rec. 10. Some commentators deplored the absence of any efficiency defence: P. Ibáñez Colomo, 'The Draft Digital Markets Act: a legal and institutional analysis', *Jour. of European Competition Law & Practice* 7(12), 2021, at 568 and, for some obligations, L. Cabral, J. Haucap, G. Parker, G. Petropoulos, T. Valletti, M. Van Alstyne (2021), The EU Digital Markets Act A Report from a Panel of Economic Experts, Joint Research Center of the European Commission.

[18] Guidance of 3 December 2008 on the Commission's Enforcement Priorities in Applying Articles [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings O.J. [2009] C 45/7, paras.28-31. Even though the track record of the efficiency defense in formal litigation is meagre, efficiency arguments are probably more successful at the investigation stage.

[19] Some of which are more in the nature of a generally-applicable legislative measure than an individual decision.

[20] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation), OJ [2016] L 199/1.

5. MEASURING COMPLIANCE

The aim of the various obligations that are introduced by the DMA is to influence and alter the conduct of gatekeepers and, by so doing, to advance the overall objectives of contestability and fairness in digital markets. The impact of any changes in the conduct of gatekeepers on downstream markets will also depend upon the conduct of those who might be affected (for example, users or other firms) and upon other factors which influence market performance and outcomes. Whether a gatekeeper is complying with a particular obligation is therefore a question which can, and no doubt will, be subject to differing views and opinions, but is one on which the Commission will ultimately be required to form a view before deciding whether to take enforcement action.

The **assessment of the** measures taken by gatekeepers and their compliance with the DMA could be approached in two different manners:

- One view is that compliance ought to be assessed with reference to the **processes** that are adopted by the gatekeeper, on the assumption that these processes will influence the gatekeeper's conduct; and
- Another view is that compliance should be assessed with reference to **outputs or changes to competitive conditions and outcomes in the markets** which are likely to be affected by the gatekeeper's conduct, with less attention paid to the processes which underpin these changes.

Views also differ as to whether compliance can be determined by reference to the achievement of outcomes or targets which can be specified in advance or whether conversely, the focus should be on changes to the competitive process irrespective of the outcomes this produces. Other approaches lie between these extremes.

To facilitate compliance assessment, the Commission, the gatekeepers and all other stakeholders could agree on a **set quantitative measurements, each relating to a particular obligation or obligations**, on the impact of obligations on relations between the gatekeeper and other relevant parties[21]. One purpose of such measurements is to provide the Commission with data to inform its compliance assessments. However, if the results were published and the measurements consulted upon and agreed with stakeholders in advance, then these measurements may also allow the gatekeeper to better persuade both the Commission and third parties that the measures it has taken are being effective. Alternatively, they may also assist third parties in demonstrating that a particular set of measures have been ineffective. Gatekeepers might themselves use the measurements to monitor their own compliance and to influence conduct within the organisation. Thus, quantitative measurements would **introduce a degree of objectivity and shared factual understanding even if**

[21] An example of a measurement regime intended to assess compliance with non-discrimination obligations can be found in the Commission's 2013 Non-Discrimination and Costing Recommendation for telecommunications operators. Paras 19-26 detail how regulated operators should report against certain KPI measures 'to allow for comparison between services provided internally to the downstream retail arm, of the SMP operator and those provided externally to third party access seekers': Commission Recommendation 2013/466 of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment , O.J. [2013] L 251/13. Some of the DMA obligations address similar access concerns, although others have different objectives and would require different approaches to measurement.

interpretation of the measurements and the conclusions to be drawn from them will remain a matter of contention.

These quantitative measurements would not represent specific targets or thresholds against which compliance would be assessed and nor would they attempt to measure the effect of changes in conduct upon market outcomes for users or competition generally. However, they would allow the Commission to better understand how the obligations in the DMA are affecting the conduct of gatekeepers and others in the affected markets and should help identify instances where further investigation might be required in order to assess compliance. Thus, these quantitative measures would be **one signal among other that need to be considered alongside other evidence**, such as complaints or qualitative representations from affected parties, including gatekeepers. Indeed changes - or lack thereof - in market indicators may take place for reasons that may not directly relate to the effectiveness of DMA as a tool. For example, it could be informed by the lack of business user demand for a specific access, the continued popularity and success of a gatekeeper product and its superior quality or wider economic or societal trends.

6. THE DIRECTION OF EU BIG TECH REGULATION

By including (long-term) competition in the analysis at all stages (objectives, obligations and principles), the DMA should complement competition law in order to make digital markets work better and stimulate inter- and intra-platform competition. The **DMA then comes closer to the 'managed competition' model** that underpins other bodies of EU economic regulation, such as electronic communications law.[22] Managed competition implies that competition plays a central role at all times and that the DMA helps to channel or structure it, or in other words, that regulation aims to support and complement market forces to maximise end-user welfare instead of substituting them.

While 'managing competition' seems to be the best future scenario for the DMA, two other future scenarios are possible but seem less desirable: fossilisation and gatekeeper entrenchment. In the **fossilisation scenario, the detailed rules of the DMA will be, at best, quickly outdated, and at worst, immediately circumvented**. Ultimately, the DMA would remain a piece of paper in the Official Journal, with much ado about nothing. The risk of fossilisation has been taken seriously by EU lawmakers as the DMA provides for a broad anti-circumvention clause and for the possibility of the Commission to update the obligations with a delegated act (which is akin to a simplified and expedited legislative procedure).[23] These mechanisms will have to be used effectively now by the Commission to avert fossilisation. Later on in the future, when the DMA will be revised and experience will have been gained, an evolution towards more flexible and standards-based provisions may be conceivable in order to increase the resilience of the DMA in an environment which is moving rapidly.[24]

In the **gatekeeper entrenchment scenario, the DMA becomes a kind of all-encompassing 'public utility' regulation based on the US model, while the role of competition recedes and fades away**. It is true that, under this scenario, users of the platforms are likely to be well-protected and gatekeeper-user relationships will probably be fair. At the same time, extensive regulation will probably not support entry that could threaten gatekeeper power; rather, it is bound to entrench the gatekeeper position. In other words, the DMA would then protect complementors, but not stimulate market forces to encourage the entry of frontal competitors and diagonal disruptors. This is a scenario that we have seen in some public utilities and from financial sector regulation, where an increase in regulation did not lead to a proportional increase in competition. Given the fact that innovation and competition may potentially be strong in digital markets[25] and that, when platforms and data are open, the benefit of network and ecosystem effects may be combined with competition, a natural monopoly or public utility type of regulation would not be good future prospects for EU digital regulation.[26]

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[22] L. Hancher and P. Larouche, "The coming of age of EU regulation of network industries and services of general economic interest" in P. Craig and G. de Búrca, eds., *The Evolution of EU Law*, 2nd ed, Oxford University Press, 2011, pp. 743-781.

[23] DMA, Art. 12 and Art.13.

[24] A similar evolution has taken place in EU electronic communications law. While the first Directive 97/33 imposing access and interconnection was very much based on detailed rules, since 2002 the successive Directives (2002/21 and now the Electronic Communications Code 2018/1972) are based on broad standards: Hancher and Larouche, supra, note 42.

[25] N. Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario*, Oxford University Press, 2020.

[26] Similarly, Schweitzer, supra, at p. 542 recommends that the DMA should not be read as, or evolve into, a regime of public utility regulation. In the US, W.P. Rogerson and H. Shelanski, 'Antitrust Enforcement, Regulation, and Digital Platforms', *Univ of Pennsylvania Law Rev,* Vol. 168, 2020, pp. 1911-1940, warn against utility regulation-type regulation for the digital

Annex: List of DMA Article 5 and 6 Obligations and Prohibitions

Art.5	9 Prohibitions-obligations
5(2)	**No combination of data** from different services or require logging in and identification without user consent sought once p.a.
5(3)	No wide and narrow **MFNs/parity clauses**
5(4)	**No anti-steering:** allow business users to communicate w users off the platform, free of charge
5(5)	**No anti-disintermediate** : allow access and use by end users of services even if acquired elsewhere
5(6)	**No prevention of raising issues** of non-compliance with public authorities
5(7)	**No tying** of CPS to ID services, web browser engine or payment services
5(8)	**No CPS Tying: n**o requirements to use other core platform services
5(9)	**Online ad transparency for advertisers:** provide for ad placed by the advertisers prices and related metrics free of charge on daily basis
5(10)	**Online ad transparency for publishers:** provide for ad displayed on publisher inventory prices and related metrics free of charge on daily basis
Art.6	**12 Prohibitions and obligations**
6(2)	**No data use in dual role:** do not use data about business users to compete with them
6(3)	- Enable **un-installing of apps** on OS, unless essential to OS/device, - Enable easy **changing of default settings** on OS, virtual assistance or browser and require initial prompt (at first use) for choice of default search engine, virtual assistant and browser
6(4)	Allow **side loading:** enable interoperability for third party apps and app store and allow prompts to users to make these defaults, with integrity/security defence
6(5)	**No self-preferencing** or discrimination in **ranking**, and related indexing and crawling, services and transparency around ranking criteria
6(6)	No restriction of **switching or multi-homing** across services accessed via the CPS – device neutrality
6(7)	**Access and interoperability** for providers of services or hardware to same features of **OS or virtual assistant** that are available to gatekeepers own services and hardware – free, unless impossible for integrity reasons
6(8)	**Online ad transparency** : provide performance tools and access to ad data to publishers, advertisers, free of charge
6(9)	**Data portability** effective, real time, free of charge
6(10)	**Data access for business users to data associated with their services**, real-time free of charge
6(11)	**Data sharing for ranking, query, click and view data** (subject to anonymization for personal data) at ***FRAND***
6(12)	**Access** for business users to **app stores, search engines and social networking services** at FRAND + Requirement for alternative dispute settlement mechanism
6(13)	No disproportionate conditions or process for **termination of service**
Art.7	**1 obligation**
	Horizontal interoperability of basic functionalities for number independent interpersonal communications services

platforms and recommend a 'light-handed pro-competitive regulation' which is similar to our concept of managed competition.

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