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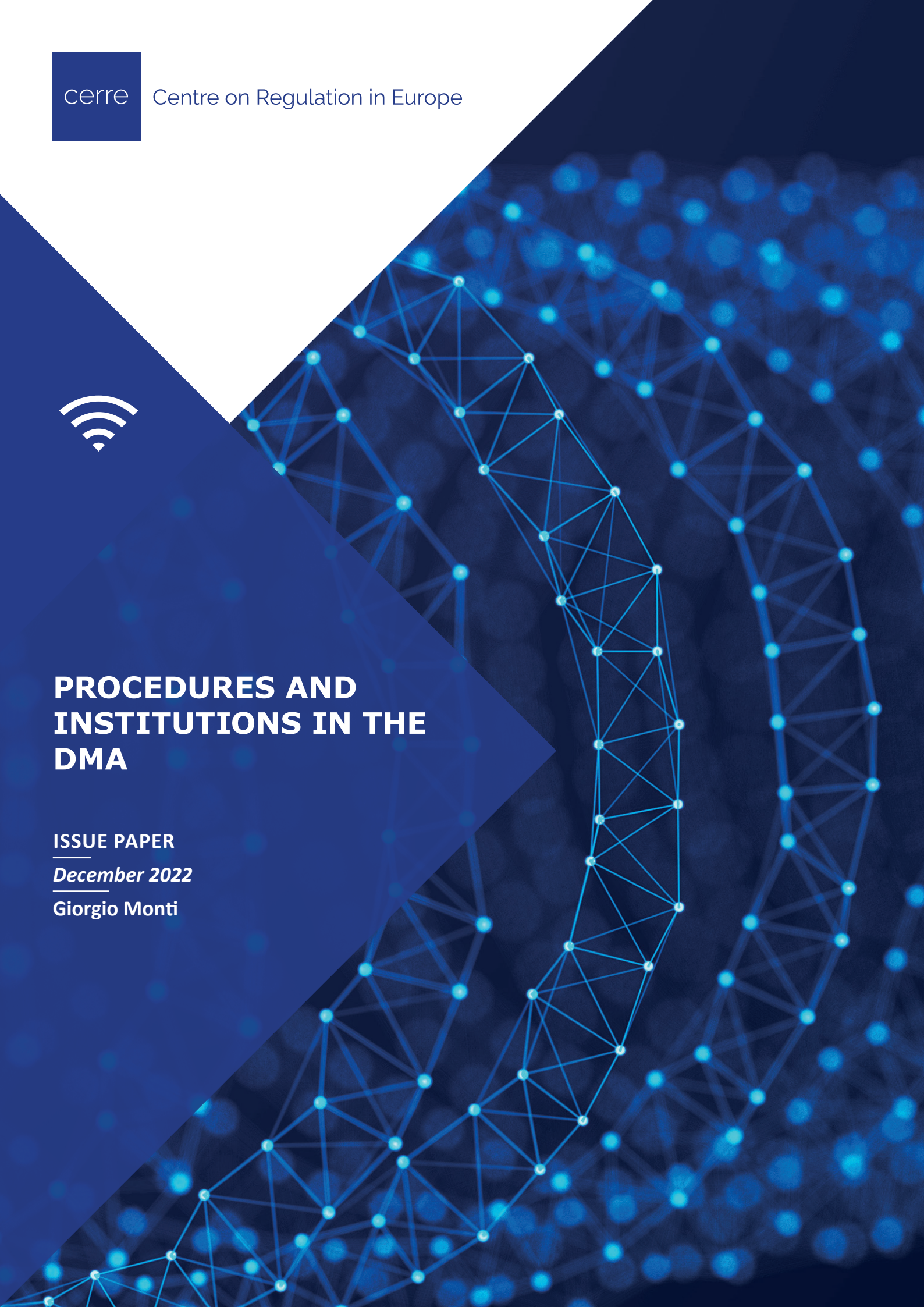

PROCEDURES AND INSTITUTIONS IN THE DMA

ISSUE PAPER

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Giorgio Monti

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TABLE OF CONTENTS

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ABOUT THE AUTHOR

Giorgio Monti is a CERRE Research Fellow and 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 (5th ed, Cambridge University Press, 2023), one of the major texts on the subject. He is one of the editors of the Common Market Law Review.

1. INTRODUCTION

The Digital Markets Act (DMA) creates a new system for the enforcement of European Union (EU) Law.[1] Normally, EU Law is enforced at national level, sometimes by mandating independent authorities that are tasked with the public enforcement of these rules and often relying just on private litigation. National authorities are complemented by EU-level networks that facilitate the sharing of information and identification of good practices as well as adopting soft laws that stimulate convergence. The one exception to this system has always been competition law where enforcement took place at national and European level in parallel, with the Commission dominating enforcement in the early years.[2] Supervision of systemically significant banks is now also centralised,[3] and some other policy fields like trade and the Common Agricultural Policy are also enforced at EU level. However, the bulk of EU rules affecting firms are enforced by national regulators or are left to private enforcement

The DMA instead creates a one-stop shop: designated gatekeepers are asked to inform the European Commission (the Commission) of how they envisage complying with the obligations that apply to them, and the Commission has exclusive competence to enforce the rules. With great power comes great responsibility, not least to ensure that enforcement is both effective and also safeguards the fundamental rights and interests of the gatekeepers, as well as third parties.

The DMA contains a second novelty, for it changes the enforcement culture that gatekeepers are used to under antitrust. It adopts a supervisory mechanism to secure compliance. While this is backed up by a traditional enforcement arsenal which draws on antitrust law, the relationship between gatekeepers and DGs COMP and CNECT is intended to be supervisory, where the compliance efforts of gatekeepers are kept under regular review. The extent to which this materialises depends on the way the Commission and gatekeepers implement the DMA.

This paper is organised in the following manner: We start by considering the supervisory architecture (section 1), followed by the formal enforcement setup (section 2). In section 3 I suggest how these two modes of regulation could be combined. We then discuss the rights of gatekeepers and third parties (section 4), the role of private enforcement (section 5), and the institutional design of the DMA (section 6).

It is worth bearing in mind that the DMA will be accompanied by a procedural regulation, which will likely be similar to that found in antitrust and merger control. Where relevant the paper comments on this, in particular in section 4. The paper focuses on the procedures once the gatekeeper has been designated.

[1] Regulation 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.
[2] Trends and developments are discussed in Monti and de Streel, *Improving EU institutional design to better supervise digital platforms,* (CERRE, 2022).
[3] 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.

2. THE SUPERVISORY STRUCTURE OF THE DMA

2.1. Compliance reports

The DMA sets up a scheme where, after a gatekeeper has been designated, it is expected to comply with the obligations and prohibitions which apply to it and to report how it is complying to the Commission. The reporting obligation is found in Article 11(1). Six months after designation, 'the gatekeeper shall provide a report describing in a detailed and transparent manner the measures it has implemented to ensure compliance with the obligations' in Articles 5-7.

This is perhaps the most important aspect of the enforcement architecture because, when read together with Article 8(1) of the DMA, this report is what ensures and demonstrates compliance. The report must, on this reading, not only describe what the gatekeeper plans to do, but also to demonstrate that the compliance effort is 'effective in achieving the objectives of this Regulation and of the relevant obligation.'[4] This places a heavy burden on the gatekeeper. This is compounded by the objectives of the DMA being open-ended, as was observed in the Compass Paper.[5] For example, when it comes to the obligation in Article 6(3) in terms of which the gatekeeper must 'technically enable end users to easily un-install any software applications on the operating system of the gatekeeper', then a compliance report may provide for technical and procedural steps taken in order to comply. The gatekeeper might in addition provide indicators of compliance, for example by regular submission of data about the number of apps that are uninstalled, if this data is easily available, or a report on the number of complaints or requests for assistance to uninstall an app. Gatekeepers will also be expected to explain how some of their contracts with business users have been modified to secure compliance. These contract modifications will also have to be notified to the businesses concerned.

However, given the vital role that the compliance report is expected to play, it is surprising that there are no penalties that are directly associated with Article 11.[6] In contrast, when the Commission requests information prior to commencing enforcement, it may impose a fine when the gatekeeper provides incomplete, incorrect or misleading information or explanations.[7] Conversely, the submission of an uninformative report is not sanctioned. Arguably, the Commission is able to issue a request for information, based on Article 21, however this is normally a step used to determine whether to commence infringement proceedings and not designed to stimulate *ex ante* the delivery of comprehensive reports.

There is also no clear procedure to govern what happens when the report is unclear, and how far the Commission may request clarifications at an early submission stage before proceeding to enforcement. Alternatively, the Commission could develop a policy whereby an incomplete report forms the basis for starting non-compliance proceedings.

It would thus be desirable if very early on, the Commission were to issue guidelines on the submission of these compliance reports to facilitate the work of gatekeepers as well as to facilitate the

[4] DMA, Article 8(1).
[5] De Streel, *DMA Compass,* (CERRE, 2022).
[6] See DMA Article 30(3) which lists instances where a 1% fine for procedural infringements may be imposed.
[7] DMA, Article 21.

supervisory task of the Commission.[8] These guidelines should be updated frequently as the Commission gains more experience with the contents of these reports. Moreover, after some years of implementation the Commission could suggest specific metrics and indicators that gatekeepers should have in place to demonstrate compliance. This removes the risk of discretionary assessments of compliance by spelling out what results are expected. Specifying results, rather than just processes of compliance, avoids the risk that compliance is only formal.

It is worth adding that what constitutes compliance may change over time: one would expect fewer consumers to uninstall apps in the short term, but after say five years one could expect a greater supply of apps that compete against the gatekeeper and consumers being more used to switching apps to reveal an increase in the number of users uninstalling apps. However, some caution is necessary. First, if the gatekeeper has complied with the DMA by following the formal or informal guidance offered by the Commission, then if the Commission considers that the market is not sufficiently contestable, no fines should be imposed: the gatekeeper has a reasonable expectation that it has complied. Second, the lack of contestability may not be due to the fact that there could be a more effective way to comply: the gatekeeper might just be offering better quality products. Third, just as what constitutes compliance might change, so does consumer behaviour online: it might be that business users and consumers find alternative routes to connect without necessarily relying on the market-opening requirements of the DMA. Finally, it may be that the reason for the lack of progress is that the DMA contains gaps or is inappropriately drawn, which is a signal that some rethinking of the obligation is necessary. As suggested in the final section, it is important that the Commission evaluates the results of DMA compliance early on to diagnose what changes may be needed.

Observe that a non-confidential summary version of the report must also be published and provided to the Commission. This will be made publicly available on the Commission website and it is likely that gatekeepers will also announce their compliance on their websites for the benefit of business users and consumers. This non-confidential summary version is very useful for third parties; however, its value can only be judged once we see how much detail is retained and how much of it is redacted. Generally, the report should be useful for business users to enter the market. This general principle can serve as a guide to determine if the summary is of satisfactory quality. The report can serve three functions: (i) The business user is able to work out how to engage with the gatekeeper on the new terms; (ii) Suppose the party is a client of the gatekeeper and considers that the compliance report reveals that the gatekeeper is in full compliance with the DMA. However, the third party then observes that in its relations with the gatekeeper it does not do what it says in the report. This creates a clear evidentiary base to challenge the gatekeeper in the national courts; and (iii) Suppose that the third party does not consider that the report demonstrates effective compliance. Here the third party may notify the Commission, a national authority or bring legal action. As we discuss in section 4.2, a means of collecting third party concerns should be designed.

[8] DMA, Article 46(1) empowers the implementation of an implementing act but a soft law document seems more helpful as it gives the gatekeeper more flexibility.

2.2. Self-assessment

In addition to the report, gatekeepers have to design a 'compliance function', a group of employees independent from the operational function of the gatekeeper, with one or more compliance officers.[9] This body monitors the compliance of the gatekeeper. Safeguards are set out to ensure this body is well-resourced, independent, and is able to carry out its functions. The idea behind this body is that it helps design and monitor compliance. It can advise management and employees about compliance so as to prevent breaches of the DMA and assess risks of non-compliance when the gatekeeper changes its policies. Compliance officers will likely play a key role in drafting and assessing the compliance report. It is not clear how costly this will be for gatekeepers and how significant a change it brings to what gatekeepers would have done anyway.

The compliance function serves a second function: it may monitor compliance with commitments and co-operate with the Commission. It is not clear what co-operation means – the compliance function office does not report to the Commission, nor is this body necessarily the most useful source of information when investigatory powers are used. In an investigation, the Commission will wish to obtain details from those responsible for the design or the marketing of the relevant gatekeeper service who will know better how the product functions.

2.3. Co-operative compliance

When undertakings are faced with obligations in Articles 6 and 7, and are uncertain about how to comply after a self-assessment, they may request help from the Commission, based on Article 8, where two options are available:

1. **Regulatory dialogue** (Article 8(3)): the gatekeeper requests a discussion with the Commission by which it explains the measures it intends to implement, or has implemented, and asks for the Commission's views.[10] The Commission is not required to engage in this form of dialogue. If the dialogue starts, the gatekeeper has to provide a reasoned submission explaining why the measures it plans or has adopted comply, and a non-confidential version thereof which will be shared with third parties.
2. **Specification decision** (Article 8(2)): the gatekeeper requests the opening of proceedings which may lead to the Commission adopting an implementing act specifying the measures that the gatekeeper must implement to comply effectively. The Commission may also, at its own initiative, open proceedings with a view to issuing a specification decision.

Regrettably, this provision of the DMA suffers from some drafting infelicities in Articles 8(5) and (6). I present the law as set out first, show the problems, and then suggest what was probably intended.

Article 8(5) applies to specification decisions and provides that the Commission is to communicate its preliminary findings to the gatekeeper and the measures it thinks should be taken to comply. Article 8(6) provides that after this the Commission shall publish a non-confidential summary of the case and the measures it considers taking so that third parties may comment. A specification decision then

[9] DMA, Art 28.
[10] This provision was watered down during the legislative process, the sole remaining mention of dialogue is found in DMA, Recital 65.

follows and certain safeguards with respect to the effectiveness of these decisions are found in Articles 8(7) and 8(8). Furthermore, the procedure that led to a specification decision may be reopened upon request (most likely by the parties) or at the Commission's own initiative when there has been a material change in the facts when the decision was based on wrong information, or when the measures specified are not effective.[11]

These supplementary provisions only apply to specification decisions and not to the regulatory dialogue. We know how the dialogue starts, but there are no steps for how it may end. This may have been deliberate, with the European Parliament, in particular, preferring quick enforcement rather than risking that gatekeepers stall compliance during the dialogue. However, this seems to misunderstand the provision on dialogue: it is not designed to stop the clock for the gatekeeper. The gatekeeper is expected to comply according to the DMA timetable but may ask for clarification to ensure that it is doing what is required. What is needed are provisions that help explain how the regulatory dialogue is carried out. Perhaps these can be specified in guidelines or implementing acts. My sense is that a procedure analogous to the one for specification decisions should be followed: the non-confidential version of the proposed compliance issued by the gatekeeper can be market tested and third-party feedback can be obtained before the Commission takes a position. Putting third parties first in this procedure indicates that the Commission will then take these reflections into account when offering its informal advice. If the feedback received raises serious concerns, the Commission may initiate a specification decision. In this way, we can also see a way of sequencing these two possibilities for addressing the doubts gatekeepers raise.

However, it is also arguable that having both of these procedures is unnecessary as they appear to duplicate a very similar process by which gatekeeper doubts are clarified.[12] This is discussed further in section 3 below.

2.4. Enhanced supervision

Article 26(1) gives the Commission powers to take all 'the necessary actions to monitor the effective implementation and compliance with the obligations laid down in Articles 5, 6 and 7 and the decisions taken pursuant to Articles 8, 18, 24, 25 and 29.' My interpretation is that the powers created here only apply when the Commission has made a decision based on the Articles listed here (Article 8 are specification decisions on how the gatekeeper should comply, Article 18 refers to systematic non-compliance, Article 24 refers to interim measures, Article 25 is about commitment decisions, and Article 29 refers to con-compliance decisions).

The necessary actions suggested in Article 26 are that the gatekeeper must retain all documents necessary to assess compliance and that the Commission may appoint an independent external expert and auditor, as well as officials from national competition authorities (NCAs) to help the Commission

[11] DMA, Art 9(9).

[12] In addition, the Commission is also empowered to specify 'the manner in which the obligations laid down in Articles 5 and 6 are to be performed by gatekeepers in order to ensure effective compliance with those obligations' by a delegated act. DMA, Art 12(2)(c). It is not clear what the relationship is betweent this power and that found in Article 8. Arguably delegated acts will be more general and applied to all gatekeepers, while specifications under Article 8 can be tailored to the gatekeeper.

monitor the obligations. These powers are specified because without these the Commission would not be able to appoint an external expert.[13] It is not clear who bears the costs of the work of the independent external expert.

It is also not clear what additional monitoring steps may be identified, but the Commission would have to prove that any added burden is necessary to secure compliance. The Commission would thus have to prove that there is no less restrictive alternative to monitor compliance. If we apply this to the power to appoint an external expert, the Commission would have to prove that the compliance reports and the compliance officer do not provide effective safeguards to secure compliance. It may also have to prove that private litigation would be insufficient to deter the gatekeeper from infringing the DMA. In other words, it seems that the barrier to adopting enhanced supervisory mechanisms is high. It may be easier to secure these in cases of recidivism or systematic non-compliance.

2.5. Detection

Given the obligation in Article 11 which requires a compliance report, this will likely be the first evidentiary base used by the Commission to enforce the DMA.

Other possible sources of information could be whistle-blowers who are protected by provisions of EU Law,[14] or third parties who complain about the measures described in the report or about the conduct of gatekeepers.[15] Third parties may be business users, competitors or end-users. They may inform national authorities or the Commission. The option of informing NCAs is probably there for small and medium enterprises (SMEs) or consumers who may feel more confident informing a national authority and writing in their native language.

However, neither national authorities nor the Commission have any obligation to follow up on the information. There is good reason for this: the experience in antitrust where the Commission has to motivate the decision not to pursue a complaint involves resources and is at times subjected to appeals to the General Court. The legislator clearly intended to avoid these costs.

2.6. The challenges of gatekeeper supervision

This new way of securing compliance is designed to place the burden of showing compliance on the gatekeeper and to allow the Commission to observe the degree of compliance. This does not come without risks. The compliance reports have to be sufficiently transparent to avoid circumvention strategies being missed, and there should be processes by which third parties are able to bring concerns to the attention of the Commission at all stages of the procedure.

Transparency of the process is also essential to ensure that this is legitimate: the Commission for example could have a central repository containing all specification decisions. The Commission can also consult other bodies, for example, the EU platform observatory to secure additional information

[13] *Microsoft v Commission* Case T-201/04, EU:T:2007:289, paras 1251-1279.
[14] Article 43 and Article 51, amending Directive 2019/1937 on the protection of persons who report breaches of Union law [2019] OJ L305/17.
[15] DMA, Article 27.

about the market. The process of supervision is necessarily a process of learning how the market and technology function and of keeping up with developments. Supervision is a dynamic exercise.

There is also a capacity challenge: while much of the evidentiary burden is placed on gatekeepers, there is a risk that supervision of all gatekeeper obligations is impossible. Here, the Commission will have to identify criteria for priorities. Capacity challenges also mean that there is a risk that gatekeepers may offer ineffective remedies, considering that there is a chance their conduct may not be scrutinised. As we discuss in section 6, some assistance may be obtained from national competition authorities.

Third parties can add useful information, but there is also a risk that third parties are not entirely representative of business users and so their comments should be assessed carefully, requiring evidence from them to substantiate their concerns.[16] This obviously adds to the burden of the Commission. Here a useful step has been taken by the German government, seeking to elicit information from a variety of parties.[17] National authorities could serve as a place where complaints and concerns are filtered. Arguably the European Competition Network can be a site where NCAs can discuss best practices in receiving third party notifications under the DMA: systematic evidence collection can help enforcement.

[16] C. Goujard, 'Big Tech accused of shady lobbying in EU Parliament', Politico, 14 October 2022.
[17] Start of the Digital Markets Act: Economic Affairs Ministry launches consultation on experience with digital platforms, Press Release, (13/10/2022).

3. ENFORCEMENT

In order to reach a decision that the parties are not in compliance, impose a fine, or issue a specification decision under Article 8 (discussed in section 1 above), the Commission shall adopt a decision opening proceeding.[18] However, it may use the investigative powers described below before opening proceedings.

3.1. Investigative powers

First, the Commission may request information from the gatekeeper, including access to data, algorithms, and information about testing, and it may request explanations about these items.[19] Second, the Commission may carry out interviews and take statements. It may interview gatekeepers but it is also empowered to interview others.[20] Importantly, it seems that any report of interviews with third parties needs to be made available to the gatekeeper as this may contain exculpatory evidence.[21] This requirement might well deter some complainants from accepting an interview. Third, the Commission is empowered to carry out inspections of an undertaking.[22] This power is similar to that found in antitrust, but with specifications about the importance of digital evidence, thus inspectors are empowered to have access to and explanations of the undertaking's 'organisation, functioning, IT system, algorithms, data-handling and business practices and to record or document the explanations given by any technical means.'[23]

In antitrust, the exercise of these powers has been reviewed by the Court of Justice which has specified how these powers may be exercised, while respecting the fundamental rights of those under investigation, such as the right to silence. It seems that the case-law in antitrust can serve as a guide on how to ensure that these powers are exercised in a manner consistent with the gatekeeper's fundamental rights. In addition to secondary legislation, perhaps a Manual of DMA procedures/best practices could be written up and modelled on a similar manual for the application of EU competition law.

3.2. Interim measures

Interim measures may be adopted by implementing an act in case there is a risk of serious and irreparable damage for business users or end users of gatekeepers. If we look at the experience of the Commission in using interim measures in antirust, three points stand out:

[18] DMA, Article 20(1).
[19] Article 21(1). This may be by simple request or by decision. Under the latter, the party is subjected to periodic penalty payments for delay. Fines accrue for the supply of incomplete, incorrect or misleading information or explanations.
[20] DMA, Article 22.
[21] *Intel v Commission*, C-413/14 P, EU:C:2017:632, paras. 79-107.
[22] DMA, Art 23.
[23] DMA, Art 23(2)(d).

- They have been used very infrequently although it has been argued that this is a policy choice and not mandated by the restrictive test which has to be satisfied ('risk of serious and irreparable damage');[24]
- When they are applied, the remedy is specified with a greater degree of precision than in final decisions. This virtue should be retained but it may prove damaging to the gatekeeper if the method of compliance required ends up being more extensive than that which is necessary. Perhaps the gatekeeper can (as in non-compliance decisions discussed below) be asked to formulate a compliance report, however, this might risk delaying the imposition of interim measures; and
- A number of cases end once interim measures are implemented, suggesting that this intervention is sufficient to secure compliance. However, in antitrust law, there is no public follow-up about how the parties change their conduct after the interim order is issued. It would be desirable that under the DMA, when an interim order is not followed-up with a decision, the gatekeeper, in revising the compliance report, refers to the procedures that led to the interim measures and shows how these have been integrated into its compliance.

3.3. Non-compliance decision

If the gatekeeper does not comply with one or more of the following, a non-compliance decision will be issued: (a) the obligations in Art 5, 6 and 7; (b) specification decisions; (c) remedies imposed based on Article 18(1), (d) interim measures; and (e) commitments that are made legally binding.

There is no deadline for reaching this decision but the Commission should endeavour to adopt a decision within 12 months of the opening of proceedings under Article 20.[25] Given the complexity of some of the issues, this may appear overly optimistic, but recall that there may have been many contacts between the Commission and the gatekeeper before the commencement of proceedings. Before adopting a non-compliance decision, the Commission is obliged to communicate its preliminary findings to the gatekeeper and explain the measures it intends to take or expects the gatekeeper to take.[26]

There are two other parties who are **consulted**: the decision must be submitted to the comitology committee for an opinion (discussed below in section 5), and the Commission may consult third parties.[27] Consultation of third parties is discussed in section 4 below.

A non-compliance decision contains a prohibition and a deadline for the gatekeeper to provide explanations on how it plans to comply. The gatekeeper is required to provide the Commission with a description of the measures that it has taken to comply.[28] This is very important when compared with antitrust law where decisions normally do not specify remedies. Observe how the burden of designing the remedy falls on the gatekeeper. There are two aspects of this procedure that are missing. The first is the option to market-test the remedies proposed by the parties. It is not clear why this is not available here when it is for commitment decisions. The second is that it is not clear what

[24] Ruiz (2020)
[25] DMA, Article 29(2).
[26] DMA, Article 29(3).
[27] DMA, Article 29(4).
[28] DMA, Article 29(5) and (6).

happens if the measures proposed by the gatekeeper are not in compliance. One answer might be that if the Commission is dissatisfied, it commences infringement proceedings again with a view to issuing a second non-infringement decision. This does not seem to be an efficient way of securing compliance. The alternative is to negotiate with the parties to obtain an amendment to the measures proposed. The weakness of this is the absence of transparency in the bargaining process.

3.4. Fines

There are three instances when a fine may be imposed.

- For non-compliance decisions, the maximum fine is 10% of worldwide turnover in the year before the finding that the gatekeeper, whether intentionally or negligently fails to comply with: (a) the obligations in Art 5, 6 and 7; (b) specification decisions; (c) remedies imposed based on Article 18(1), (d) interim measures; and (e) commitments that are made legally binding.[29]
- The Commission may impose a fine of up to 20% of turnover if the gatekeeper has committed the same or similar infringement of an obligation in Articles 5, 6 and 7 in relation to the same core platform where a non-compliance decision was already adopted in the previous 8 years.[30] The thinking here is to penalise recidivism.
- Fines of 1% of turnover apply for breaches of procedural obligations.[31]

Fines for substantive infringements are based on the gravity, duration and recurrence of the infringement(s). In antitrust, the Commission issued Guidelines to increase the transparency of its fining policy.[32] It is recommended that a similar guideline should be introduced here. The antitrust guidelines include provisions allowing fines to be increased for aggravating factors and reduced for mitigating factors. This may also be something to consider under the DMA: a gatekeeper who selectively infringes its obligation *vis-à-vis* undertakings who are likely to steal its market share while treating others in a manner which complies with the DMA may reveal greater exclusionary risk, while a gatekeeper whose compliance is delayed by technical factors might escape with a reduced penalty.

The implication of imposing large fines is that it turns the DMA into a 'criminal law' for the purposes of the European Convention of Human Rights. This means not only that the Commission must respect the fundamental rights of the undertakings it investigates, but also that judicial review must be carried out by a court with full jurisdiction. It means that the General Court is required to scrutinise infringement decisions very attentively. If we go by recent reviews of decisions under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and mergers, this means that every item of evidence will be subjected to close review. One drawback of the current case-law is that by providing an extremely detailed assessment of every piece there is a risk that the General Court loses sight of the bigger picture.

[29] DMA, Article 30(1).
[30] DMA, Article 30(2).
[31] DMA, Article 30(3).
[32] Commission Guidelines of 28 June 2006 on the method of setting fines imposed pursuant to Article 23(2a) of Regulation 1/2003, O.J. [2006] C 210/5.

3.5. Judicial review

Decisions will be reviewed by the General Court on issues of fact and law, and by the Court of Justice on points of law. Decisions may only be upheld or quashed (in whole or in part). Fines may be modified.[33]

In contrast to antitrust law, where the Court is asked to become an economic expert, the form-based approach to obligations and prohibitions means that the Court will be tasked with interpreting provisions that are ambivalent. The Court may need to gain expertise in technology to be able to understand the possible impact of its interpretation of given provisions. On this point, it may well be that the Court adopts a rather deferential approach to the approach taken by the Commission.

3.6. Implementing acts and guidelines

The Commission is empowered to clarify aspects of the DMA in two ways: (i) by implementing acts for a discrete set of issues; and (ii) by writing guidelines on any aspect of the DMA.[34] In antitrust law, where guidelines prevail, there is now a well-established process by which guidelines are issued for public consultation before they are finalised. This practice should be replicated here. For implementing acts, public consultation is provided expressly in the DMA.[35]

Guidelines or implementing acts on procedure are likely to be more helpful in the short term, while explanations on how one might comply with Article 6 obligations may be more effective if they are based on the Commission's experience of handling some cases. Of particular importance, guidelines explaining what is expected in the compliance reports appear necessary. Guidelines might also be useful with respect to Article 7 obligations, which were inserted late in the proceedings and where the legislative intent is not as clear.

[33] DMA, Article 45.
[34] DMA, Articles 46 and 47.
[35] DMA, Article 46(3).

4. RESPONSIVE REGULATION

In sections 1 and 2 I have tried to explain how each section of the DMA can be expected to operate and the problematic issues that may arise. Here I adopt a different approach and suggest how the various procedures set up to secure compliance might be sequenced by the Commission in a manner that ensures they are used effectively.

In earlier work, I drew on the theory of responsive regulation by Ayres and Braithwaite[36] to suggest that the DMA should be designed with the assumption that the gatekeepers wish to comply and that the regulator should stimulate compliance with third-party input in the first instance. The regulator however should be responsive to the actions of the gatekeeper and either facilitate compliance if the gatekeeper wishes to comply or have a big stick of increasingly punitive sanctions to secure compliance. This is often portrayed as a pyramid of enforcement as most enforcement should occur at the base and there should be little use of the strictest sanctions for example – this pyramid is drawn with reference to inspections of care homes.[37]

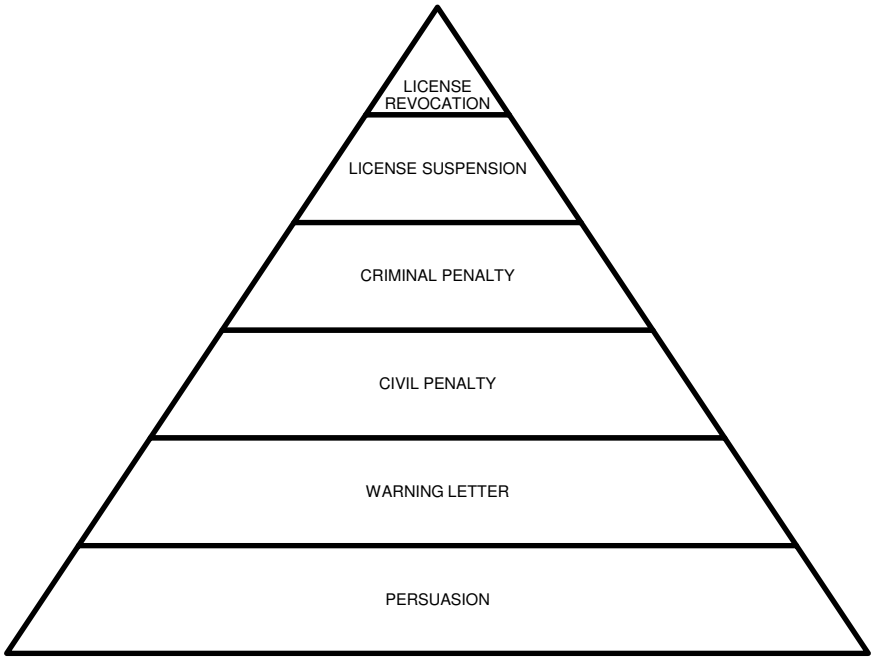

Figure 1: Ayres and Braithwaite's enforcement pyramid.[38]

At the foot of the pyramid is the most often used remedy: observing that the regulated entity is non-compliant, the regulator nudges compliance by persuading them to do so. If this does not work, then the regulator issues a formal warning, and if this does not work then penalties are escalated until the draconian step of removing the actor from the market is taken. The idea behind this framework is that the regulator and regulated entity are interacting repeatedly so that the regulator can respond to the signals it gets from the regulated entity: if persuasion works, then the regulator does not need

[36] I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).
[37] Ibid.
[38] Supra note 36, p. 36.

to escalate. If it does not work, then the regulator can respond to non-compliance. The system is flexible in that if the regulator moves up the pyramid and imposes penalties which make the regulated entity more willing to comply, then the regulator can go back to a strategy of persuasion.

The DMA does not follow this approach completely, but if we break down the various supervision and enforcement approaches, we have the following stages:.

Stage 1: Oversight and persuasion

First, parties decide how to comply and create a mechanism for monitoring compliance, based on Articles 8 and 11. Concomitantly, parties make their compliance transparent so that the Commission, NCAs and third parties can see what is being done.

Second, signals from third parties and the Commission can identify gaps and the Commission can send observations to the gatekeeper who can remedy these without further action. To complete this, what is missing in the DMA is a structured process for assessing compliance reports. How can the Commission persuade a gatekeeper to comply? It is expected that there will be informal contacts between the Commission and gatekeepers, but as noted in section 2 above, the precise form of the regulatory dialogue is not clear. Indeed, the process of persuasion seems to rely on the gatekeeper approaching the Commission with a request for a dialogue.

Stage 2: Non-compliance

The Commission can intervene if it has concerns about compliance and this is gradual: it can issue a specification decision (2A), or it can elect to be more aggressive and issue a non-compliance decision (2B), or even more aggressive and impose fines (2C). Stage 2 is designed to ramp enforcement up the pyramid and deter non-compliance. Note that a non-compliance decision exposes the gatekeeper to follow-on damages actions. In all these steps the role of third parties is vital: it is well-set up for specification decisions and there should be similar types of market tests when a non-compliance decision is issued.

Stage 3: Systemic non-compliance

The top of the enforcement pyramid is systematic non-compliance which allows for a wide range of remedies, including structural ones (stage 3B). However, the party can de-escalate by offering commitments to avoid the most powerful of sanctions (stage 3A). This makes good sense because it maps onto the expectation of a responsive regulator: to de-escalate once the gatekeeper is willing to comply with a less intense means of enforcement.

Reproducing this onto the enforcement pyramid, we see that the model is not reproduced fully but the gist of that approach is present.

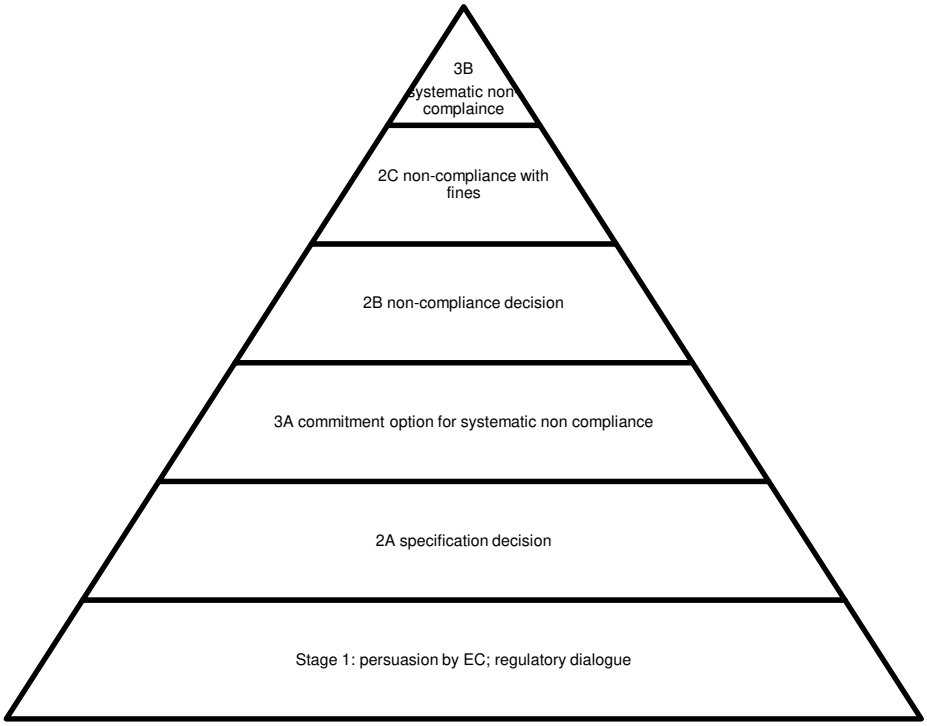

Figure 2: the enforcement pyramid applied to the DMA

The DMA does not replicate the responsive regulation model entirely but in between the Commission's proposal and the final version, the legislator has made the system more streamlined such that this approach to regulation is possible. This has advantages for gatekeepers who are able to participate in shaping their compliance, for the Commission in that negotiation is less costly and possibly more productive than litigation, as well as for third parties. Of course, this form of regulation raises some concerns, not least if the procedures at the bottom of the pyramid are not sufficiently transparent (especially as noted regarding the regulatory dialogue) and the absence of judicial review may raise concerns that the Commission can persuade firms to over-comply.

For completeness, the DMA does not require the Commission to adopt this enforcement strategy. The Commission is free to move directly to apply punitive measures if it so wishes: the DMA does not have a hierarchy of remedies. However, the recommendation here is that exploring the potential of this enforcement model is worthwhile because it avoids lengthy litigation and allows for a closer engagement with gatekeepers.

5. RIGHTS AND INTERESTS

5.1. Fundamental rights of gatekeepers

When it comes to initiating formal procedures, the **DMA has to guarantee the respect of fundamental** rights. These are noted in two recitals:

- Recital 80: In order to ensure effective implementation and compliance with this Regulation, the Commission should have strong investigative and enforcement powers, to allow it to investigate, enforce and monitor the rules laid down in this Regulation, while at the same time ensuring the respect for the fundamental right to be heard and to have access to the file in the context of the enforcement proceedings…
- Recital 109: This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular Articles 16, 47 and 50 thereof. Accordingly, the interpretation and application of this Regulation should respect those rights and principles.

Article 16 is the right to conduct a business, Article 47 is the right to a fair trial, and Article 50 is the right not to be punished twice for the same offence. But there are plenty of other rights that are relevant, such as the right to good administration found in Article 41. There is no doubt that the Commission seeks to respect the fundamental rights of the parties, but as the scope of these rights is often unclear, it is preferable if some are spelt out by way of a procedural regulation, and often their scope is only made clear by the Court of Justice. If we draw from the one applicable in antitrust (Regulation 773/2004),[39] a **few preliminary issues emerge which could be codified** using Article 46 of the DMA which empowers the Commission to issue implementing acts.

- Procedures regulating the power to take statements and oral questions during inspections;
- The right to be heard, set out in Article 34 of the DMA, which applies to: specification decisions (Article 8), suspension decisions (Article 9), exemptions (Article 10), market investigations (Articles 17 and 18), interim measures (Article 24), commitments (Article 25), non-compliance decisions (Article 29) and fines (Articles 30 and 31(2)). Here procedures for written submissions and oral hearings should be established;
- Access to the Commission's file by the gatekeeper.

5.2. Third Parties

By third parties we mean anyone who is not the gatekeeper. The question we look at first is the degree to which the DMA facilitates the participation of third parties, and compare this with antitrust.[40] We then discuss whether additional third-party rights may be warranted.

Third-party as informer

Third parties may inform the Commission of a suspected infringement of the DMA. In antitrust, third parties may ask for anonymity, and a whistleblower tool is set up as well, which also guarantees anonymity. There seems to be nothing to prevent a similar mechanism from being established under

[39] Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18.
[40] See Wils, (2022), for a comprehensive discussion of EU antitrust.

the DMA and it would be desirable if something similar were made available. Some businesses that rely on platforms may be unwilling to complain without these guarantees.[41] A practical issue to consider for informants is that they should advise the Commission if their identity may be inferred from the evidence they submit. If yes, then the Commission has to be cautious about sending this evidence to the gatekeeper and may need to redact it.

As discussed earlier, the Commission has no duty to respond (see section 1.5 above) and the status of a complainant who is entitled to a reasoned rejection of its complaint, does not exist in the DMA. This saves resources, but on the other hand, the duty to give reasons for rejection makes the Commission more accountable and it can then show that its decision to take up a particular complaint is not based on inappropriate factors.

Third-party during the proceedings

In antitrust law, if a party takes advantage of the procedures to become a complainant, then they are entitled to be closely associated with the proceedings.[42] This means they are entitled to receive a copy of a non-confidential version of the statement of objections and they may be allowed to participate in oral hearings. However, they do not have access to the Commission's file and their rights are generally less extensive than those of the addressee of the statement of objections. No comparable entitlement appears to exist for the DMA.

In antitrust, the Commission's powers to send requests for information extend to third parties and the same powers exist in the DMA (Articles 21, 22 and 23, discussed above).

Third parties and the market test

During a specification decision, third parties may comment on the measures that the gatekeeper proposes to take (Article 8(6)) as well as during a commitment decision (Article 18(6)).

Additional role for third parties?

Third parties on both sides of the market (business users and end users) can add value to the assessment of the compliance path selected by the gatekeeper. It may well be that the gatekeeper will test various setups to see how users respond. Thus, the views of third parties could be obtained by the gatekeeper and used as evidence of the effectiveness of the remedy. For example, when implementing a choice screen the gatekeeper can demonstrate compliance by providing evidence of various choice screens that were tested and explaining that it has chosen the one which makes switching easiest for users.

The role of third parties when the Commission is involved might be enhanced. In discussing the suggestions below, one should consider the importance to balance the value of third-party views on the one hand and effective enforcement on the other.

- As mentioned above, there should be a stage where the compliance reports are reviewed and minor changes suggested, which do not require any of the formal procedures. Third-party

[41] Report from the Commission of 5 July 2010, Retail market monitoring report, "Towards more efficient and fairer retail services in the internal market for 2020" COM (2010) 355, p.7. And see A. Renda *et al*., Legal framework covering business-to-business unfair trading practices in the retail supply chain, Study for the European Commission (2014).

[42] Regulation 1/2003, Article 27(1).

involvement here can be helpful in giving a first impression on the measures adopted and the Commission may receive signals of where there may be risks.

- While third-party notifications do not require the Commission to intervene, guidelines might be issued to indicate the kinds of notifications that the Commission would welcome and perhaps even some criteria by which these notifications are assessed. Third parties must substantiate their complaint, and guidance may be offered on what is expected. One additional idea might be that multiple notifications of the same conduct by the same gatekeeper could trigger the Commission into action. Another is that if a notification points to an issue that the parties can resolve bilaterally in court then this indicates that the case is not for the Commission.
- The DMA involves third parties during a specification decision but their input only occurs once, when the Commission has decided on a possible course of action. It may be uneconomical to ask for input before as well but on the other hand, there may be advantages to understanding what users need before designing the remedy.
- The provisions for regulatory dialogue in Article 8(3) are under-specified but since the gatekeeper is asked to provide a non-confidential version of the submission, there should be process by which this can be commented upon by third parties before the Commission communicates its views.[43]
- Third-party consultation in case of an infringement decision seems to occur before the decision. However, given that the parties subject to the non-compliance decision have to then design a remedy, one could include a market test following this stage.[44]
- If guidelines are to be issued, then consultation with third parties is necessary.

More generally, what third parties will be most able to comment on, is the degree to which the remedy succeeds in making the market more contestable and fair. One aspect of the DMA is that we may not know on day one what the appropriate compliance path is – it may be a matter of trial and error. (In antitrust, we have seen this happen in the implementation of Microsoft's interoperability remedy, and in the Google Shopping and Google Android cases.) This has two implications: it might be that at the beginning the Commission is relatively lenient when assessing gatekeeper compliance provided the gatekeeper has done its best to comply. However, in the longer run, the gatekeeper can be expected to continue to ensure that its measures satisfy the aims of the DMA. The second implication is that in this process of trying to identify the most effective approach, third parties can be involved as those who can inform the Commission and gatekeepers about what may be improved in the current compliance measures. This goes back to the point made in section 1 where it is argued that a combined reading of Articles 11 and 8 suggests that the gatekeeper's compliance report should serve to demonstrate compliance.

Some concerns may arise (as discussed in section 1) about whether third parties who are business users are sufficiently representative and if they are likely to be biased in their feedback. This can be countered by consulting other sources: privacy and security experts for example can offer valuable feedback on specific technical issues.

[43] See Article 46(1)(d).
[44] See Article 46(1)(i).

Finally, outside of an enforcement paradigm, consultations with third parties about their business models and their relations with gatekeepers can add a source of information. Some have expressed the view that the workshops organised in order to explore how to implement the Platform to Business (P2B) Regulation were helpful and it appears that similar workshops will be organised to facilitate a better understanding of the DMA.[45] Concomitantly, discussions with gatekeepers can serve the same function. Related to this, it will be helpful to trace the effectiveness of the remedies imposed by the Commission or the compliance measures adopted – the Commission should be learning from the regulatory efforts and this is where third-party input can also be helpful.

[45] See: https://competition-policy.ec.europa.eu/dma/dma-stakeholders-workshop_en

6. PRIVATE ENFORCEMENT

It is clear that courts and arbitrators may be involved in policing the DMA. Indeed, consumers will be able to launch representative actions in those jurisdictions that provide for this.[46] Before discussing this, it is worth bearing in mind that gatekeepers may design their in-house complaints-management system, in particular in respect of business users. This is already required by the Platform to Business Regulation.[47] The DMA's internal compliance mechanism can be added to this. This can serve to avoid costly litigation and is foreseen in Article 5(6) of the DMA.[48]

Turning to private enforcement, a leading scholar has indicated that 'As for Articles 5 and 6, there is no doubt that these are sufficiently unconditional and precise and therefore can be invoked before the national courts by individuals that base rights on them.'[49] As he observes the fact that Article 6 obligations may be further specified is irrelevant to assess their direct effect: a specification merely explains how to comply, it does not change the core nature of the obligation. However, specification decisions are relevant in two ways: first, if there is a specification decision and the gatekeeper has acted in compliance with it, the national court should take this into consideration and may not contradict those decisions. Second, if there is no specification decision, the gatekeeper subject to litigation may try and engage the Commission to start proceedings. If this happens, the national court should stay proceedings pending a decision by the Commission, so as not to impose remedies that are incompatible. However, note that there is nothing in the DMA which can constrain a national court in finding an infringement when the Commission considers there has been compliance but has not stated so expressly. The one limitation is the duty that every actor has (including a national court) to co-operate loyally with other institutions applying EU Law found in Article 4(3) of the Treaty on European Union. This means that the national court cannot impose remedies that would make the DMA work ineffectively.

To avoid the risk of divergent or aberrant national judgements, the DMA contains provisions on co-operation between national courts and the Commission which largely replicate those found in antitrust law. A brief summary and some comments follow based on the experience in antitrust.[50]

- National courts may ask the Commission for information and ask it questions. It is not clear how often this takes place in antitrust.
- Member States shall forward a copy of any judgment applying the DMA. This has not worked in antitrust, with no coherent collection at national level. It is not clear how this can be resolved.
- The Commission may submit written observations to a national court where required to ensure the coherent application of this regulation and may request that the national court transmits information to it. Nearly every time this opinion was submitted in antitrust, the

[46] DMA, Articles 42 and 52 which amend Directive 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1.
[47] Regulation on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57, Articles 11 and 12.
[48] CERRE, DMA Recommendations for the Council and the Parliament, April 2021, p. 72, Draft BEREC Report on the *ex ante* regulation of digital gatekeepers, BoR (21) 34, 11 March, 2021, Annex II.
[49] A. Komninos, The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement, Eleanor M. Fox *Liber Amicorum, Antitrust Ambassador to the World,* (Concurrences, 2021).
[50] DMA, Article 39.

court made a reference for a preliminary ruling to the Court of Justice. The reason in my view is rather obvious: courts are much more comfortable receiving an authoritative answer from the Court of Justice than a non-binding opinion from the Commission.

- Finally, and most importantly, the national court may not give a judgment that runs counter to a decision adopted or contemplated by the Commission. This means that the national court is expected to stay proceedings pending a decision from the Commission or it may make a request for a preliminary ruling. In antitrust this has not caused any notable problems.

Turning from risk management to remedies, parties using courts can seek damages for lost profits or excess charges and they can ask for injunctions to prevent the gatekeeper from acting in a particular way or mandating the gatekeeper to act in a specific manner. A few remarks here: in antitrust I am not aware of a successful damage claim based on lost profits – even in cartel cases this seems hard to prove and claimants seek restitution of the overcharge. When it comes to injunctions, there may be limits under national law as to how much a judge can do, however these limits cannot negate the right to which the party is entitled. Moreover, these remedies might only bind the gatekeeper to act in the way prescribed towards the claimant and not every other user.

- Remedy applies only to benefit the plaintiff: suppose the Commission agrees with a design for Article 6(4): installation and effective use of third-party software applications. Suppose a software provider thinks that the process is not good enough. A court may require that the gatekeeper enable the installation of that third-party software application using a different protocol than that used for all other third-party apps.
- Remedy changes the DMA obligation: a national court finding that there is still self-preferencing contrary to Article 6(5).

Unsurprisingly, there are concerns about fragmentation and a risk that this makes the DMA less effective when there is no Commission decision to constrain national courts. However, as AG Ćapeta has recently remarked, 'the possible occurrence of divergences is part of the regional integration process, such as is present within the European Union.'[51] She takes the view that this possibility is mitigated by coordination processes. Member States might manage this risk further by requiring that cases which raise the DMA are heard by a specific Court or chamber, as is the case for antitrust or economic regulation, because then this court or chamber gains expertise in the field. Parties however might not wish to litigate immediately and might favour an approach by which they 'follow-on' from a Commission infringement decision. This makes it easier to establish that the gatekeeper had in the past infringed the law.

In my view the most common type of private litigation will be in instances where the business user considers that it is being discriminated against: all other business users have access to the gatekeeper, but the gatekeeper treats it differently. If this is uncovered it raises interesting questions about whether compliance is necessarily a one-size-fits-all approach or whether the gatekeeper may (or is expected to) deal with users differently to comply with the DMA.

[51] *DB Station & Service AG v ODEG Ostdeutsche Eisenbahn GmbH*, C-721/20, EU:C:2022:288, para 67.

7. INSTITUTIONAL DESIGN OF THE DMA

The Commission is the principal actor. As has been made clear, the work will be divided between two Directorates-General: DG COMP and DG CNECT, in association with the Legal Service and possibly the JRC European Centre for Algorithmic Transparency.[52] Decisions will be reached by the College of Commissioners with some delegation possibilities. It is clear that the Commission will be under-resourced and a consideration for the future is whether gatekeepers might be asked to pay a supervisory fee, as in the Digital Services Act.[53]

7.1. Co-operation with national authorities

The Commission is expected to co-operate with national authorities. The DMA distinguishes two types of authorities: national competent authorities enforcing the competition rules set out in Article 1(6) who are also expected to be responsible for the DMA (for example, the national competition authority), and other authorities such as the national consumer protection authority, the data protection agency or the telecom regulator. A very detailed provision is made for co-operation with national competition authorities, while for other national bodies the DMA merely requires that the two actors coordinate their enforcement actions to ensure coherent, effective and complementary enforcement. For example, the Commission could coordinate with the agency in charge of the P2B fairness regulation or with the data protection agency where the gatekeeper is established, and examine how far the gatekeeper can comply with the two rules most effectively. In these contexts, the agencies may not exchange confidential information.[54] Parties may waive confidentiality if this helps to ensure a coherent regulatory response. In mergers that are notified in multiple jurisdictions, confidentiality waivers are common to facilitate a quick resolution and coordinated remedies.

As mentioned, the provisions for co-operation with national competition authorities are much more detailed and extensive.

First, there are provisions to co-ordinate enforcement of the DMA and competition law. There is a duty to keep each other informed of enforcement actions and confidential information may be sent to another authority. More specifically: (i) when an NCA intends to launch an investigation on one or more gatekeepers based on national law, the Commission is to be informed and the NCA may also inform other NCAs; (ii) when an NCA intends to impose obligations on gatekeepers based on national law it shall communicate the draft measure to the Commission, even when these are interim measures. Information shared may only be used to co-ordinate enforcement.[55]

But what does co-ordination in these cases mean? The DMA is silent on this. We may expect that the Commission might provide informal advice to the NCA on the application of national laws. The only

[52] See: https://algorithmic-transparency.ec.europa.eu/index_en

[53] This in turn draws on the approach followed by ESMA, see e.g. Commission Delegated Regulation 272/2012 with regard to fees charged by the European Securities and Markets Authority to credit rating agencies [2012] OJ L90/6.

[54] Article 339 TFEU, 'The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.' In the antitrust context, see Regulation 1.2003, Article 12 which limits the exchange of confidential information. This was discussed in, *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others*, Case C-67/91, EU:C:1992:330.

[55] DMA, Article 38 (1), (2), (3) and (5).

mechanism for the Commission to stop an NCA is by starting its own proceedings: once the Commission opens proceedings on the basis of Article 20, the NCAs cannot continue or start an investigation and are expected to report their findings to the Commission.[56] If we compare this to antitrust, there seem to have been some episodes where the Commission has taken over a case started by an NCA, but it is not clear if this was a pre-emptive strike to prevent an NCA from taking a divergent decision.[57]

The benefit of this procedure is that it tries to avoid the imposition of inconsistent regulatory requirements by NCAs, however we might see some bold NCAs eager to impose additional obligations on gatekeepers by applying national competition law.

There is a second co-operation pathway which relates to the enforcement of the DMA and engages the national competition authority, when this is not acting under its competition law powers, in particular: (i) the Commission may ask that authority to support a market investigation;[58] (ii) a national competent authority may conduct an investigation into possible non-compliance with Articles 5, 6 and 7 of the DMA.[59]

It will be recalled that during the negotiations, some Member States wanted to secure a more significant role for national authorities.[60] Arguably, their marginalisation makes sense because national authorities have no powers to impose remedies extraterritorially and this is a matter for national law, so conferring enforcement powers to them under the DMA would have risked that each gatekeeper receives different obligations. However, the compromise in the DMA is unhelpful: it is not clear how one may incentivise a national competent authority to commence a non-compliance investigation if it cannot then get any credit for a decision. Given that NCAs are accountable to Parliament based often on the value for money, it would be bizarre to explain that it is acting to facilitate the enforcement of the DMA by the Commission. Nevertheless, in the current proposal for amending the German competition legislation, provisions are made to empower the Bundeskartellamt to carry out its own investigation into infringements of Articles 5, 6 and 7 of the DMA and for co-operation with the Commission.[61] The incentive for this step is that the national authority can then contribute to shaping the DMA. The advantage is that this can strengthen the resources available to apply the rules. However, it will be important that if the Commission opts for a responsive approach to regulation that this is not thwarted by NCAs beginning investigations when the Commission sees the option of resolving concerns informally.

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[56] DMA, Article 38(7), second sentence.

[57] For example, ebooks was started by the OFT before it moved to the Commission. A laconic press release by the OFT indicated that the case was no longer an enforcement priority because the Commission was well-placed to act (Office of Fair Trading (OFT) closed Competition Act 1998 case, 1 December 2011). The Spanish competition authority stopped its proceedings against Aspen when the Commission decided to investigate concerns about excessive pricing.

[58] DMA, Article 16(5).

[59] DMA, Article 38(6) and (7).

[60] Friends of an effective Digital Markets Act, *Strengthening the Digital Markets Act and Its Enforcement* (the friends are France, Germany and the Netherlands). The non-paper is available at: https://www.bmwk.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4 European Competition Network, Joint paper of the heads of the national competition authorities of the European Union: How national competition agencies can strengthen the DMA (2021).

[61] Referentenentwurf des Bundesministeriums für Wirtschaft und Klimaschutz, Entwurf eines Gesetzes zur Verbesserung der Wettbewerbsstrukturen und zur Abschöpfung von Vorteilen aus Wettbewerbsverstößen, (15 September 2022).

7.2. EU-level co-operation

There are two other bodies: an innovative high-level group and a standard comitology committee.

The one with the most potential is the high-level group for the DMA.[62] which is composed of representatives from the Body of the European Regulators for Electronic Communications, the European Data Protection Supervisor and European Data Protection Board, the European Competition Network, the Consumer Protection Co-operation Network, and the European Regulatory Group of Audio-visual Media Regulators.

The group serves three functions: (i) to offer advice and expertise on the application or enforcement of the DMA; (ii) in market investigations into new services and obligations, it may advise on the need for amending, adding or removing rules in the DMA; and (iii) to promote a consistent regulatory framework.

All can be helpful, but the third is by far the most urgent task since the obligations in the DMA overlap with a number of EU and national rules. The high-level group is expected to identify and assess 'trans-regulatory issues' and may recommend how convergence may be achieved. Annual reports on this matter are expected. This high-level group will grapple with issues that may take years to be resolved by the Court and it should work actively to address possible tensions that may arise in the application of a variety of rules.

One issue which it could usefully work on is how to mainstream data protection in the DMA. In other words, to create a process by which remedies imposed under the DMA are tested for their compliance with the data protection rules. We have seen this issue arise in some abuse of dominance cases where the remedy was the making available of personal data, where co-operation between competition and data protection agencies can ensure coherence, and similar workflows can be proposed here.

The digital services comitology committee is made up of representatives of Member States.[63] The committee plays two roles: as an advisory committee (DMA, Article 50(2)) it provides an opinion which the Commission must take the utmost account of, and as an examination committee (DMA, Article 50(3)) its opinion is binding, meaning that a negative vote stops the proposed act.

There is already another body, the EU platform observatory that would also provide a helpful source of information.[64] What is missing from this list of institutions are processes to carry out *ex-post* analysis of the DMA's impact, as an independent evaluation can help steer enforcement and identify good practices.

[62] DMA, Article 40.
[63] Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13.
[64] See: https://platformobservatory.eu/

cerre Centre on Regulation in Europe

Avenue Louise 475 (box 10)
1050 Brussels, Belgium
+32 2 230 83 60
info@cerre.eu
www.cerre.eu
@CERRE_ThinkTank
Centre on Regulation in Europe (CERRE)
CERRE Think Tank