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DMA PROCESS AND COMPLIANCE

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FOREWORD

In the dynamic landscape of EU digital platforms regulation, we are at a focal point of discussions shaping the future of implementation of the Digital Markets Act – arguably one of the most important pieces of legislation of the current times' digital policy sphere.

With the DMA aiming for contestability and fairness in digital markets, designated gatekeeper platforms are set to unveil their compliance plans on March 2024. The European Commission, in its unique role as an enforcer, will lead the work of determining non-compliance and ensure that the DMA fulfils its ambitious goals.

However, the success of implementation will depend on the principles on which the new law will be applied. This CERRE report recommends that the DMA implementation process should be guided by the substantive principles of effectiveness, proportionality, non-discrimination, legal predictability, and consistency with other EU laws. Furthermore, the Commission will have to approach enforcement taking into account the procedural principles of responsive regulation and participation, due process, and ex ante and ex post evaluation. The report then applies those principles to series of specific DMA obligations: choice architecture, horizontal and vertical interoperability and data related obligations.

It is also essential to agree on how the Commission, gatekeepers, and third parties will engage with each other. The DMA provides a model of compliance which is not based solely on deterrence; instead, the gatekeepers are encouraged to and will comply by engaging co-operatively with the Commission and third parties. However, it is still up for question how this principle will be applied, what it expects from the stakeholders, and how the Commission itself will exercise its deterring powers to enforce compliance.

On top of it all, this CERRE DMA edition is also proposing a set of quantitative measurement indicators, so-called output indicators, each relating to a particular obligation or set of obligations, in order to better understand the impact of obligations on the relations between gatekeepers and third parties. These quantitative indicators will not represent specific targets or thresholds against which compliance should be assessed. They will neither attempt to measure the effect of changes in conduct on market outcomes for users nor, more generally, competition. These quantitative measures will be added to other evidence, such as complaints or qualitative representations from affected parties, including gatekeepers, which the Commission will consider in its compliance assessments.

This report was written in the framework of a 8-month-long, multi-stakeholder CERRE initiative entitled the 'DMA Compliance Forum' that created a neutral and trusted platform and facilitated dialogue among CERRE members and academics to contribute to the effective and proportionate enforcement of the regulation.

Bruno Liebhaberg, CERRE Director General

1. INTRODUCTION

As discussed in previous CERRE reports on the Digital Markets Act (DMA), the Regulation provides for a model of compliance which is not based solely on deterrence.[1] While the European Commission is empowered to investigate gatekeepers, identify non-compliance and impose fines, these powers are not expected to be the principal way through which compliance is secured. The expectation is rather that **gatekeepers are encouraged to and will comply by engaging co-operatively with the Commission and with third parties**, including prior to the implementation of measures to comply with obligations.

Moreover, as will be argued below, compliance is viewed as a process whereby the gatekeeper's efforts to comply are expected to be reviewed internally, are assessed by the Commission and third parties on the basis of information available at a particular point in time and which may therefore be adjusted over time and in light of new evidence or experience of their implementation. In most cases, the Commission is not expected to 'certify' that a particular set of measures are compliant at any given point in time and even measures that the Commission does formally find to be compliant must be revisited by the gatekeeper and/or the Commission if they are subsequently found not to be effective.[2]

This approach might be labelled a form of positive regulation whereby: "corporate capacities to self-regulate are used to the maximum extent."[3] This paper considers the implementation of DMA obligations from this perspective and makes recommendations on how this approach might be applied in light of the challenges faced by the Commission in achieving compliance under the DMA.

Our key recommendation is that, given uncertainty about how positive regulation will work in the context of the DMA and the lack of detail about the process in the Regulation itself, the Commission should provide greater clarity at the outset as to how it expects this approach to regulation and compliance to be applied, what it expects of different participants, and how the Commission itself will exercise its powers to encourage as well as to enforce compliance.

Although it might be argued (as the Commission has done in relation to other guidance that might be developed under the DMA) that we should rely upon an iterative process to discover how to best coordinate the various steps to ensure compliance, we think that in this instance it would be better the Commission to provide greater clarity about the compliance process or procedures at the start of the process. This is for the following reasons:

- It would address concerns about how the considerable discretion accorded to the Commission by the Regulation when assessing compliance or approaching enforcement will be exercised. This should build confidence amongst participants, create positive incentives to comply from the outset, and reduce the risk of actions and decisions taken by the Commission being

[1] G. Monti, 'Procedures and Institutions in the DMA', in A. de Streel et al *Effective and Proportionate Implementation of the DMA* (CERRE, 2023).

[2] DMA, Article 8(9), Template Form for Reporting Pursuant to Article 11 of Regulation 2022/1925 (Compliance Report) (9 October 2023), (hereinafter: Compliance Report Template) p. 2 referring to ongoing reporting to the Commission.

[3] R. Baldwin and M. Cave, *Taming the Corporation* (2023, OUP, Kindle Edition) p. 6.

perceived to be driven by (or in fact being driven by) political considerations (given the Commission's dual role) rather than by clear administrative rules.

It should create incentives for gatekeepers and third parties to participate in the process in an appropriate manner and in good faith from the outset, encouraging good behaviour and discouraging practices which might delay compliance or reduce effectiveness.

It should allow gatekeepers to invest in implementing measures with greater confidence that the results will be viewed as compliant by the Commission (provided the gatekeeper has followed good practice) and allow business users or competitors to make investments required to take advantage of those measures without fear that the Commission may later ask the gatekeeper to change them. In other words, it will help to avoid the risk of sunk costs for both gatekeepers and third parties and accelerate the realisation of benefits envisaged by the measures.[4]

It would ensure that the legal principles of good administration, which the Commission is bound by, are articulated in a manner that is clear to all.

The paper is structured in the following way: the legal framework for compliance is set out in section 2. The types of dialogue that the DMA requires and facilitates are discussed in section 3 where we consider the following dialogues: Commission-gatekeeper, gatekeeper-third parties, and Commission-third parties. Section 4 turns to a discussion of how to create incentives for gatekeepers to comply without the threat of sanctions. Section 5 discusses the importance of ongoing compliance and the role of gatekeepers, the Commission, and third parties in achieving this. Section 6 contains our recommendations on the content of the guidance which we propose the Commission provide as soon as possible.

2. LEGAL FRAMEWORK FOR COMPLIANCE

2.1. Self-assessment

The gatekeeper is responsible for ensuring effective compliance with the obligations in the DMA which apply to it. In addition to this, the DMA sets out two other requirements.

First, **the gatekeeper must demonstrate compliance** by way of a report due six months after designation and annually thereafter.[5] The compliance report is intended to allow the Commission to assess the gatekeeper's conduct. A non-confidential version of this report, which gatekeepers must also produce, is intended to demonstrate compliance to third parties and/or to enable third parties to challenge gatekeepers directly or to signal infringements to the Commission or national competent authorities. The Commission has issued a Template Form for Reporting.[6] This specifies the 'minimum information' that gatekeepers are expected to provide in the report.[7] Section 2 of the Template

[4] Of course the degree of investment required by gatekeeper and third party beneficiaries varies depending on the obligations. For some prohibitions less is expected than for some obligations.

[5] Art. 11 DMA.

[6] Compliance Report Template (9 October 2023).

[7] Ibid., p. 1.

provides a list of information that must be supplied for each core platform service in relation to which an undertaking has been designated as gatekeeper and includes the following (including information which we highlight in bold relating to dialogue with third parties prior to the adoption and implementation of measures):

- A description of the measures taken;
- Any changes in the customer experience that result from this;
- Changes to the contractual relations between gatekeeper and business users that result from compliance;
- Consultation with end users and business users in the process leading up to the elaboration of the measure as well as during its implementation;
- Identification of alternative measures that were considered and why they were not selected;
- Any action taken to inform end-users and business users of the measures, feedback received and responses to that feedback;
- Any market analysis or testing to estimate the expected impact of the measure and to evaluate the actual impact or evolution of the measures taken on the objectives of the DMA;
- An identification of indicators to allow an assessment of effectiveness;
- Internal systems to monitor effectiveness;
- Where third party access is required the procedures, scope, format and other information relating to such access.

Second, the DMA provides that "[t]he measures implemented by the gatekeeper to ensure compliance with [Articles 5, 6, and 7] shall be effective in achieving the objectives of this Regulation and of the relevant obligation."[8] This requirement presents challenges because it creates an expectation that **the gatekeeper should monitor how effective its compliance measures are and adapt** these as time passes. This is explicitly foreseen in the reporting obligation that "[t]he gatekeeper shall update that report and that non-confidential summary at least annually."[9] The challenges of this requirement are discussed further in section 5. It also creates an expectation that the measures will succeed in contributing to greater fairness and contestability from the outset if properly implemented, which we discuss further in section 3. However, this may be an unrealistic expectation for some obligations which may require further changes after the first compliance report has been issued or after third parties have had an opportunity to engage fully with the measures. Changes might be modest or operational in nature or, in exceptional cases, involve more fundamental revisions to extend the scope or effect of certain measures.

[8] Art. 8 DMA.

[9] Art. 11(2) DMA.

2.2. Commission Specification

The Commission has the discretion to intervene and issue an implementing act specifying how the gatekeeper shall comply with the DMA. This intervention may occur at the request of the gatekeeper or on the Commission's own initiative. Both options are discussed below.

2.2.1. Gatekeeper requests specification

For obligations listed in Articles 6 and 7, the gatekeeper has the option to request that the Commission engages in a process to determine whether the measures that the gatekeeper intends to implement or has implemented to ensure compliance "are effective in achieving the objective of the relevant obligation in the specific circumstances of the gatekeeper."[10]

We consider that requesting a **specification does not stop the compliance clock and that the gatekeeper is still expected to change its conduct and comply on the due date even if it is uncertain as to how to best comply**.[11] However, if the Commission accepts a request to engage in the process foreseen by Article 8 and this results in an implementing act specifying how to comply, then the gatekeeper will be obliged to make necessary changes to abide by the specification.

Nothing in the DMA prevents a gatekeeper from making a request for specification before the date when the obligations it has under the DMA must be implemented.[12] However, we are not aware of any such anticipatory request having been made since designations were made by the Commission in September 2023. Specification requests may also be made lawfully after the date when obligations must be implemented (and we discuss the criteria which the Commission might apply when considering such requests below).

The gatekeeper's request for a specification is without prejudice to the Commission's power to investigate (and possibly sanction) the gatekeeper for non-compliance (assuming this request arrives after the date on which compliance is due).[13] However, we think the **Commission should create incentives for gatekeepers to request specifications by stating that it would not expect to initiate non-compliance proceedings in some circumstances**. Without offering an exhaustive list of those circumstances, we consider the following will be relevant:

- Whether the gatekeeper has engaged with third parties actively and in good faith in designing its compliance approach but differences of view have emerged between third parties;
- Whether the gatekeeper has considered various options on how to comply and seeks advice from the Commission on the best approach, and/or

[10] Art. 8(3) DMA.

[11] This is also foreseen in the Template Relating to the Reasoned Request for a Specification Process Pursuant to Article 8(3) of Regulation 2022/1925 (hereinafter Specification Template), section 2.2.

[12] Indeed the Specification Template (Ibid., section 2.2) refers to measures that are intended to be implemented.

[13] Art. 8(4) DMA.

- Whether the request arrives in good time before compliance is due (i.e. allowing the Commission sufficient time to issue guidance and for the gatekeeper to implement ahead of the deadline).

These are factors that individually and cumulatively should determine whether the Commission decides to engage in specification decisions. In addition, if a compliance report has already been submitted it will also contain information that should inform the Commission's decision, such as whether the gatekeeper has carried out market tests that leave it with some uncertainty about how to best comply or whether the gatekeeper has informed users of the measures taken and has received feedback that is ambiguous or contradictory. If so then the Commission should encourage such efforts by accepting the specification request. The list of users consulted can also be a helpful guide and a limited effort at consultation would count against accepting the request.

Thus a **good faith or 'best efforts' approach on the part of a gatekeeper should be rewarded with a positive response from the Commission to a specification request** whereas a 'last-gasp' request for specification made in the context of third party complaints to the Commission and limited prior consultation by the gatekeeper should not prevent or delay the commencement of infringement proceedings.

The **Commission's discretion** in whether to accept a request to issue a specification is also curtailed by the DMA's requirements that in making this choice it respects "the principles of **equal treatment, proportionality and good administration**."[14] Unfortunately, it is not clear how these principles should be interpreted:

- ***Equal treatment*** means, we think, that all requests should be assessed the same way and the same criteria used to evaluate each request. If two gatekeepers seek a specification for the same obligation, equal treatment does not mean that both requests must be accepted: as explained above there should be criteria to determine whether, in light of the prior conduct of the gatekeeper, the Commission will accept or reject. Moreover, equal treatment does not relate here to the content of the specification itself and different measures may be specified for different gatekeepers even if they relate to the same obligation.

- ***Proportionality*** **in this context is less clear**. Again, it relates to the Commission's consideration of the request rather than the measures actually being proposed. One interpretation is to see this requirement as informing a prioritisation policy. For example, it might be that requests which are likely to lead to specifications of relevance to several gatekeepers should have priority over requests which affect only a single gatekeeper or that the Commission will prioritise requests in instances where the harm to third parties might otherwise be large over those where it is less significant. Another is that if the gatekeeper may risk making large investments or changes which are very difficult to reverse, then guidance is more appropriate than if the gatekeeper can more easily modify its implementation measures if they subsequently prove to be non-compliant. Conversely, proportionality might indicate that

[14] Art. 8(3) DMA.

where multiple complaints from different complainants have been submitted to the Commission and it is clear that the gatekeeper's current measures are causing harm to third parties, then the Commission should reject requests for specification and instead move swiftly to infringement proceedings. This suggests that the application of proportionality to specification requests will be a case-specific exercise. Proportionality may also be relevant to the requirement for the gatekeeper to explain why the request for specification should be accepted. This is reflected in the Template for Specification Requests where the undertaking is expected to explain the reasons it considers the specification process is appropriate to ensure effective compliance.[15]

- ***Good administration*** is about impartiality, fairness, and timely decision-making.[16] This requires quick responses to requests for specification. As no specific timescale is provided for a response to a request, this principle stresses the importance of a prompt response by the Commission. Note that the Commission is expected to produce a preliminary assessment within 3 months of opening proceedings.[17] It would be helpful for the Commission to indicate a timescale for when the Commission will respond to a request for specification, when third party input will be expected, and when a final assessment is expected to be issued.

2.2.2. Commission-initiated specifications

The Commission may adopt an implementing act for specifications in **two settings: (i) to specify measures required by a gatekeeper in Articles 6 and 7, and (ii) to specify measures to be taken in Articles 5, 6, and 7 when opening proceedings for circumvention**.[18]

While the second instance is clear and the Commission may consider that it is better for it to specify changes in conduct rather than wait for the gatekeeper to discover them for itself, it is not clear what may trigger the Commission to decide to specify measures in the first scenario. One example could arise if the Commission initiates proceedings and finds an infringement, then the gatekeeper is required to 'cease and desist with the non-compliance and to provide explanations on how it plans to comply with that decision.'[19] Upon receiving this explanation, the Commission may decide that it is appropriate to open specification proceedings having regard to the explanation it has received. However, there may be other instances where if the non-compliance decision reveals that the gatekeeper had already identified an appropriate way to comply but had discarded it then it may be appropriate for the Commission to move straight to specification after an infringement is found to minimise the time required for the gatekeeper to comply.

2.2.3. The process leading to specification

The Commission does not start with a blank slate in the specification process. If a gatekeeper asks for specification it must "provide a reasoned submission to explain the measures that it intends to

[15] Specification Template para 2.1.2
[16] Art. 41 Charter of Fundamental Rights.
[17] Art. 8(5) DMA.
[18] Art. 8(2) DMA.
[19] Art. 29(5) DMA.

implement or has implemented."[20] When the Commission initiates a proceeding, it will likely be reviewing existing measures or proposals and consider whether these are sufficient or a different course of action is required.

It would be helpful for there to be **further guidance on the content of the reasoned submission which the Commission expects to receive from the gatekeeper**. The existing Template merely says that the gatekeeper should explain the measures it has implemented, or intends to implement, how these are expected to comply with the DMA as a whole, how the gatekeeper will monitor these, what alternatives were considered, and why they were discarded. The problem with this list is that it is a request for the gatekeeper to justify its current policy choice. However, the purpose of a specification request is (when this is being sought by the gatekeeper) to seek assistance because the gatekeeper is presumed to be uncertain about the best measures to achieve compliance. Additional questions that could be considered in guidance from the Commission could include the following:

- Must gatekeepers make a case for having the Commission accept their request by showing that there are for example multiple ways of complying and that it needs guidance as to what is most appropriate?
- Must gatekeepers present the pros and cons of different options?
- Must the gatekeeper demonstrate why the request is 'proportionate'? and/or;
- Could a reason be that in its consultation with third parties, the gatekeeper is unable to find consensus and it is for this reason that it wishes to receive a specification decision from the Commission?

Requiring the gatekeeper to address these points would allow the Commission to better judge whether it is appropriate to accept the request and would also provide information necessary for producing a specification decision.

2.2.4. The content of specification decisions

While proportionality is a key concept when discussing the DMA, it is worth noting that it is only under the framework of Article 8 that the Commission is empowered to specify how a gatekeeper must implement an obligation. Thus, only under this procedure must the Commission ensure that the specification is effective and proportionate and the **burden of showing that the conduct specified is proportionate in this procedural setting is therefore with the Commission**.

In all other cases, it is for the gatekeeper to explain how it proposes to comply. In these settings, a gatekeeper can be expected to use proportionality as a reason to challenge an instruction to do more and may, for example, challenge an infringement decision on the basis that its conduct did not infringe the DMA because it was proportionate. In this case, the **burden of proof is with the gatekeeper**. It

[20] Art. 8(3) DMA.

follows that a gatekeeper may well adopt measures that are disproportionate in order to avoid further investigation but that this is a risk for it to judge.[21]

A specification is addressed to the gatekeeper and it is expected that the decision will explain why the conduct specified is necessary to ensure effective compliance and also (if applicable) why the Commission considers that the measures already implemented or proposed by the gatekeeper would not be sufficient to comply with the DMA.

2.2.5. The uniqueness of specification decisions

It is worth highlighting that **the only way for a gatekeeper to obtain a formal statement that its conduct complies with the DMA is through a specification decision**. In this procedural context, the Commission may determine either (i) the conduct that the gatekeeper has described is compliant or (ii) the conduct is not compliant and a decision is issued explaining how to comply. Provided the gatekeeper follows the decision then it can assume that it has complied.

The legal security of a specification decision is, however, limited by Article 8(9) which allows the reopening of proceedings in three circumstances:

- If there has been a material change in any of the facts on which the decision was based;
- If the decision was based on incomplete, incorrect or misleading information, or;
- If the measures specified in the decision are not effective.

A specification decision should therefore include a review clause in which we suggest the Commission could be more specific about the circumstances which might lead to a reopening of the specification. The obvious case is where the specified measure is found not to be effective by the Commission. But the opposite situation might also arise, where the gatekeeper itself asks for the specification procedure to be reopened if it is later discovered that the remedy (or elements of the remedy) is no longer necessary to make markets more fair or contestable and that remedy can be withdrawn. We think it would be helpful for the Commission to elaborate on the criteria and evidence that would be required for the Commission to conclude that aspects of the remedy need to be revisited or that they are no longer required. This may avoid later litigation as to whether the gatekeeper is entitled to ask for a modification of the specification and may save the costs involved in operating this procedure.

No other provision in the DMA empowers the Commission to certify that conduct is compliant. In a non-compliance decision, the onus will be on the gatekeeper to "provide the Commission with a description of the measures that it has taken to ensure compliance."[22] The gatekeeper may ask for a specification as discussed above. It is not clear whether requests for specifications will be denied in

[21] Except if there is some evidence of maladministration by the Commission. See e.g., Case C-202/06P *Cementbow Handel Industire BV v Commission*, EU:C:2007:255, Opinion of AG Kokott, para 69. For an analogy, see e.g., Case C-441/07 P, *Commission v Alrosa*, EU:C:2010:377 in the context of commitment decisions in antitrust law where the risk of over-compliance is on the parties offering commitments.

[22] Art. 29(6) DMA.

instances where the gatekeeper asks for it having been found to be in breach of the DMA. We have suggested earlier that guidance from the Commission on this point and the criteria it would apply in considering such requests would be desirable.

Finally, there are **two other settings where the Commission may determine how far the conduct complies** with the DMA:

- In a *commitment decision* the Commission merely states that "there are no further grounds for action."[23] This does not bind national courts which may decide otherwise.
- In a *market investigation into systematic non-compliance*, the Commission is empowered to impose "any behavioural or structural remedies which are proportionate and necessary to ensure effective compliance with this Regulation."[24] Compliance with this remedy certifies that there is no breach, but this too may be re-opened. Indeed, it seems that a special surveillance regime is in place for gatekeepers who have been found to have systematically failed to comply – Article 18(8) provides for a regular review of the remedies and the power to modify these after a market investigation which finds that they are not effective.

3. DIALOGUES

In addition to the specification process discussed in the previous section, we envisage that **other ongoing interactions or dialogues will need to occur as the DMA is implemented.** We consider these in this section of the paper. They involve interactions between the gatekeeper and the Commission (or national authorities investigating non-compliance pursuant to Article 38(7)) outside of the specification process, interactions between the gatekeeper and third parties and interactions between third parties and the Commission (or national authorities investigating non-compliance pursuant to Article 38(7)[25]).

3.1. Gatekeeper Dialogue with the Commission

The Commission's original proposal for the DMA made reference to a 'regulatory dialogue'. However, this was insufficiently specified and has been omitted from the final version of the text.[26] The **only form of dialogue set out formally in the DMA is that relating to the specification decisions referred to in Article 8** and discussed above.

[23] Art. 25(1) DMA.

[24] Art. 18(1) DMA.

[25] In the case of national authorities, the interactions with gatekeepers and third parties will occur only in relation to investigations into non-compliance which they are undertaking. Our assumption is that the approach adopted by the Commission in its non-compliance investigations would be replicated by national authorities so far as possible and having regard to local judicial standards. We therefore propose that the Commission set this expectation in the guidance we recommend and that they consult with the relevant national authorities before doing so.

[26] G. Monti, 'The digital markets act: Improving its institutional design' (2021) 52 European Competition and Regulatory Review 90.

This noted, there do appear to be **a number of other occasions** where the gatekeeper will be expected to communicate with the Commission:

- **Informally before the deadline for compliance.** In the Compliance Report Template, the Commission states that: '[i]n order to demonstrate compliance as required by Article 8(1) of Regulation 2022/1925, the Commission expects gatekeepers to engage in a regular compliance dialogue with users of the relevant services and with the Commission, including an ongoing reporting to the Commission, in particular when new compliance measures are elaborated and put into place and/or when events impact gatekeepers' compliance with Regulation 2022/1925.'[27] From a legal perspective, it is not clear that gatekeepers can be obliged to communicate with the Commission before the compliance deadline. The DMA does not give the Commission powers to intervene and issue fines or injunctions in the period between designation and the compliance deadline 6 months later. In our view, it would be beneficial for gatekeepers to discuss its proposed compliance measures with the Commission before the deadline but it cannot be obliged to do so. Conversely, below we will argue that there may be instances where an expectation to engage with third parties before the compliance deadline may have some legal consequences subsequently.

- In the context of a **non-compliance decision based on Article 29,** a gatekeeper may engage with the Commission immediately after receiving preliminary findings and this may shape the measures it adopts.[28] Alternatively, the gatekeeper can wait until the cease-and-desist order is made at which point it is obliged to provide the Commission with a description of the steps taken to ensure compliance;[29]

- In **market investigations into systematic non-compliance,** the gatekeeper may offer commitments. We would expect that, as in antitrust, a market test of these proposals is used and that there is some discussion between gatekeeper and Commission to refine the commitments. As with the practice found in DG COMP's *Manual of Antitrust Procedures*, we would expect that the Commission should publish an account of how it expects this process to be carried out.

We think a key requirement should be that any dialogue between the Commission (or national regulators) and the gatekeeper is undertaken on **as transparent a basis as possible** (recognising that commercially sensitive information may be involved and that different interests will therefore need to be balanced). This is necessary to ensure confidence in the overall process and to provide third parties with the ability to properly understand and scrutinise the measures taken or proposed by the gatekeeper. The degree of transparency expected may be linked to the specific procedures. For example in a commitment decision, transparency will be linked to ensuring the market testing is effective whereas a request for specification under Article 8(3) will need to allow third parties to understand the basis of the request. This is in addition to the requirement under Article 11(2) to

[27] Compliance Template, p. 2.
[28] Art. 29(3) DMA.
[29] Art. 29(6) DMA.

publish a non-confidential version of the compliance report, where we consider the Commission may expect greater disclosure of information than is proposed by the gatekeeper if it considers this necessary for third parties to adequately understand and scrutinise the measures which the gatekeeper has taken to comply. We note the Commission has indicated that it will assess confidentiality claims by the gatekeeper in respect of the compliance report in a manner consistent with the approach taken in antitrust and merger decisions.[30] However, we also note that Article 29 does not envisage the Commission being able to bring a non-compliance decision in relation to the publication obligation for compliance reports in Article 11 and so the Commission could only compel disclosure of information through a normal infringement procedure which is likely to be time-consuming.

As we discuss further below, transparency will also be important in interactions between the Commission and third parties to allow the gatekeeper to understand the nature of any complaints being made against it and to allow all parties to understand the basis and evidence on which the Commission makes its decisions.

3.2. Gatekeeper Dialogue with Third Parties

In this Section, we consider the circumstances in which gatekeepers should be expected to engage in dialogue with relevant third parties before adopting and implementing measures to comply with obligations in the DMA and the consequences for gatekeepers of doing or not doing so. This reflects Implementation of the various obligations in Articles 5 and 6 will take a number of different forms. **Our view that the DMA introduces an expectation (but not a formal obligation) that gatekeepers engage in dialogue in relation to some measures, whilst others are expected to be 'self-executing'.** Our overall assessment is summarised in the table below and explained further in the rest of this section:

Measures for which any dialogue would be 'voluntary'	Measures for which the requirement of dialogue is unclear and may depend on the interpretation of the obligation itself	Measures for which no prior dialogue may be one indication of non-compliance
Article 5(2), 5(3) 5(4), 5(5), 5(6), 5(7), 5 (8), 5(9), 5(10)	Article 6(5)	Articles 6(3) part only, 6(4), 6(8), 6(9), 6(10), 6(11)
Articles 6(2), 6(3) part only, 6(6), 6(13)	Article 6(7)	Article 7

[30] The Commission indicates this in para 3.1 of the Template for Requests for Specification.

	Article 6(12)	

3.2.1. Voluntary dialogue

Implementation of the various obligations in Articles 5 and 6 will take a number of different forms. The **obligations in Article 5 and some in Article 6 seem to expect the gatekeeper to alter its own conduct unilaterally and to be 'self-executing'**, either by:

- Ceasing to use data itself in certain ways (Article 5(2) and 6(2)),
- Removing prohibitions on the conduct of business users of the platform (Articles 5(3), 5(4)),
- Removing limitations on the conduct of end users of the platform (Article 5(5) and possibly Article 6(6),[31] or;
- Removing restrictions on both business and end users (Articles 5(6), (7) (8) and Article 6(13)).[32]

In these cases, **any dialogue with third parties may be considered by the Commission as part of its compliance assessment, alongside other factors**.

For some obligations, dialogue may be required for some measures but not others. For example, Article 6(3) refers to uninstalling applications on an operating system (OS) and changing default settings. It seems unlikely that dialogue will be required to ensure that users can easily uninstall applications provided by the gatekeeper themselves and it might be expected that the gatekeeper will have incentives to ensure that rival applications can be easily uninstalled. However, Article 6(3) also requires the gatekeeper to develop and present choice screens comprised of both gatekeeper and third party search engines, web browsers and virtual assistants from which the end user will select a default option. In this case, we consider that a dialogue will be required between the gatekeeper and third party user in order to address various technical and operational matters such as eligibility criteria,

[31] Insofar as Article 6(6) does not require the gatekeeper to enable switching between third party applications and services or from gatekeeper to third party applications and services but simply to remove technical or other barriers which might currently inhibit such switching. It is possible that dialogue with third parties might be required to identify the relevant barriers, although we would generally expect these to already be well understood by the gatekeeper and for third parties to have informed the gatekeeper about them.

[32] Articles 5(9) and (10) are different in nature and involve the provision of information to advertisers and publishers upon request. Agreement over the format and means by which that information will be supplied by the gatekeeper should be relatively straightforward to achieve and we assume the expectations of advertisers and publishers ought to be similar. There may be a case for some kind of standardisation, as discussed further in section 3.2.2. We also note that whilst Article 5(7) prevents the gatekeeper from bundling other services with the CPS, it presupposes that third parties will be able to effectively supply these other services alongside the CPS if the user chooses not to take the gatekeeper's service. For third parties to be able to offer other services alongside the CPS will require dialogue with the gatekeeper but third party indentfication services, browser engines and payment services are likely 'software applicatons' for the purposes of Article 6(3) and 'services' for the purposes of Article 6(7), both of which we consider will require a dialogue between the gatekeeper and third parties in order for compliance to be presumed.

third party widgets/logos for the choice screen, URLs and other technical information, without which default settings cannot be implemented

3.2.2. Requirement for dialogue uncertain

For **some obligations, the requirement for dialogue is unclear and may depend on the interpretation of the obligation itself**.

For example, ***Article 6(5)*** *prohibits self-preferencing* in ranking and indexing and requires a gatekeeper to apply 'transparent, fair and non-discriminatory conditions to such ranking'. This clearly envisages that the gatekeeper will disclose the criteria it applies when ranking (which it may do in any event to allow users to optimise performance) but it is not clear that the gatekeeper is expected to engage in a dialogue with third parties that might then alter the criteria which it has chosen to adopt. In this case, much turns on whether a decision rule can be said to be 'fair' in the absence of a dialogue with those affected by it, or indeed what the term 'fair' might mean in this context.

Article 6(7) raises a different question of interpretation. It requires the gatekeeper to implement technical changes to enable competitors or third parties to interoperate with the gatekeeper's OS or virtual assistants (VA) on the same non-discriminatory basis as the gatekeeper's own hardware and software. In this case, we might expect the gatekeeper to first determine how its own hardware and services interoperate with its OS or VA and then apply the same terms to third parties. That is, nothing in the Article requires the gatekeeper to redesign its own internal interoperability arrangements so as to better accommodate or to specifically benefit third parties. On the other hand, the gatekeeper is required to ensure 'effective' interoperability (echoing 'effective use' in Article 6(4)) and it may be that the provision of interoperability to third parties on the same terms as the gatekeeper currently provides to itself will not enable third party applications to interoperate 'effectively' and that this would be foreseeable if the gatekeeper were to enter into a dialogue with third parties prior to implementing the measures. The Commission will need to take a view based on the specific circumstances of the case.

Article 6(12) illustrates an important point about the steps that a gatekeeper is required to take in order to ensure effectiveness and hence compliance. It requires the gatekeeper to set appropriate terms for business users of its own services. In such cases, engagement with competitors or third parties may not be required but compliance may be more likely if the gatekeeper were to seek views from business users before adopting terms. This would be particularly important if compliance in this context were to reflect an expectation that the gatekeeper is expected to have concluded contracts on compliant terms with potential beneficiaries of the measures before the deadline for compliance (i.e. March 2024) so that their effect would be felt immediately. The alternative interpretation might be that the gatekeeper would publish terms on the compliance date, but that the conclusion of contracts with potential beneficiaries would follow after that.

In order to be able to assess or demonstrate the effectiveness of terms under Article 6(12), we think the Commission ought to expect that gatekeepers engage with third parties prior to the adoption of new contractual terms and not only afterwards, but we recognise that this rests on a particular interpretation of the obligation itself. This suggests that, for at least some obligations, the approach

to compliance may depend upon how a particular obligation is interpreted by the Commission (or by the Courts).

Importantly, this point is not confined to Article 6(12). **Many obligations require the gatekeeper to implement measures which also require action to be taken by third parties in order for them to have an effect. The ability of the third party to act and so benefit from the measure will depend upon the gatekeeper first making available certain information or tools**. One interpretation of an obligation is that the gatekeeper is required to disclose the information or tools at the compliance deadline. According to this view, third parties will require some further time to respond and take action themselves before the measure could be said to be capable of having any effect on contestability or fairness. This would only occur later and after the compliance deadline has passed. An alternative interpretation is that the gatekeeper should anticipate the actions which third parties will need to take in order to take advantage of the measure and should provide the information and tools necessary for them to do so sufficiently in advance of the compliance deadline. According to this view, compliance requires that third parties will benefit from the measure from the outset and that the measure will only be effective if this is the case.

3.2.3. Dialogue as key element of compliance

In some cases, we consider that **prior dialogue with third parties will be essential for effectiveness and hence compliance** and should therefore be regarded as an important factor of the compliance process. This would mean that evidence of a **failure by the gatekeeper to engage in good-faith dialogue with third parties in a timely manner could be one indication, among others, of lack or ineffective e compliance assessment**. This is not of course to exclude the possibility that a gatekeeper may persuade the Commission that it has been able to comply without consultation with third parties, but the Commission's guidance should make it clear that a gatekeeper that relied on such an approach would be taking a greater risk of infringement proceedings.

This could apply in relation to the following obligations:

- Those parts of *Article 6(3)* relating to choice screens, as discussed above.
- *Article 6(4)*, which refers to installing third party app stores and changing default settings and requires users to be able to make effective use of third party applications. We would expect this to necessitate a dialogue between the gatekeeper and third party on various technical and other matters.
- *Article 6(8)*, which requires the provision of performance measuring tools and data to enable advertisers and publishers to undertake verification of their inventory. We would expect

dialogue between the gatekeeper and users of the tools and data to be required in order to ensure that they are provided in a manner and format that can be used effectively.

- *Article 6(9)*, which requires the porting of data in real time to third parties and for which technical interfaces and processes between the gatekeeper and third parties of the kind described in the next Section will be required in order to implement the measure.
- *Article 6(10)*, which requires the sharing of data with business users or authorised third parties for the same reasons as for Article 6(9).
- *Article 6(11)* which requires sharing of click, query, and view data, for the same reasons as for Article 6(9).
- *Article 7*, which requires interoperability for messaging services, for the same reasons as for Article 6(9).

The obligations in **Articles 6(8) to 6(11) and Article 7 are not framed in terms of the gatekeeper ceasing some current practices or supplying a service/interoperating with third parties on the same non-discriminatory basis as it already supplies or interoperates with itself. Instead, they envisage the specification and implementation of a new service or functionality** which third parties are then expected to take actions to engage with and to benefit from. In these cases, it is possible and perhaps likely that several different implementation options will be available and that different third parties will have different views about how the service or technical functions should work or be implemented. Experience from other regulated sectors suggests that in these circumstances, the kind of unilateral implementation by the gatekeeper which may apply for the other obligations, will not be effective.

3.2.4. How should the dialogue work?

In our view and experience, **dialogues between gatekeepers and third parties will need to be carefully structured and governed.** In the Annex to this paper, we discuss in more detail the issues that arise in the implementation of wholesale services in another regulated sector, telecommunication. This is intended to show that the arrangements we envisage are quite different from, for example, the 'DMA industry roundtables' which the European Commission convened in 2022 and early 2023 and involve a more set of structures and processes which are likely to become an important and permanent feature of the DMA landscape.

Third parties who are also competitors (with each other as well with respect to the gatekeeper) may have different or conflicting expectations or requirements as to technical standards, service levels, business processes, or, where appropriate, the commercial terms on which the service is to be provided. A common challenge in these circumstances is, on the one hand, for the gatekeeper to address requests which would otherwise require it to undertake multiple different implementations of the same measure and, on the other hand, to create a forum within which **competitors can co-operate and co-ordinate their interactions with the gatekeeper** in order to narrow down differences and arrive at common positions (without raising competition law concerns). The aim is to have a process which assists the gatekeeper in producing compliant outputs.

Outputs or measures will be compliant if they are effective and, as regards the sub-set of obligations we have identified above, they are more likely to be effective if they are responsive to the requirements and expectations of those who are likely to make use of them. The dialogue process should therefore **allow third parties to provide feedback and views on proposals for implementation before final decisions are taken by the gatekeeper** and in sufficient time before measures are actually implemented. This is so irrespective of whether effective implementation is to be interpreted as requiring third parties to have taken actions to engage with the measure prior to the compliance deadline or to do so afterwards.

Prior dialogue with third parties ought to **reduce the likelihood of subsequent complaints that the measures taken by the gatekeeper are non-compliant** or that they are discriminatory in effect (as against some third parties even if not against all). This risk is reduced (but not eliminated) if potential complainants have been involved in the detailed specification of the wholesale services from an early stage.

When engaging with third parties, we should not expect gatekeepers to engage in unnecessary dialogues or for this to provide a pretext to delaying compliance implementation (recognising that the 6 months compliance deadline following designation may be challenging for some measures and/or some gatekeepers). A **balance needs to be struck between dialogue which may improve the effectiveness of measures** (or reduce the costs for third parties wishing to take advantage of the opportunities they provide) **and dialogue which serves to delay compliance** and so reduces the effectiveness of the DMA, at least in the short term. It is of course possible that any given dialogue may have both effects.

This means that gatekeepers should be able to refuse to engage with parties who have no clear interest in the DMA obligation in question and refuse to engage further with parties whose views it has already given proper consideration to. On the other hand, third parties with legitimate interests should not be excluded. It will be difficult for the Commission to provide detailed guidance on these matters since they will depend upon particular circumstances, but clear principles can be stated. In this context, it is important to stress that **consumer or end user representatives should be presumed to have an interest** in all obligations since consumers are expected to be the ultimate beneficiaries, although we recognise they may be in a better position to contribute in some instances than others in practice. It appears that the Commission will monitor who the gatekeeper consults with through the compliance reports which require among others a list of parties consulted.[33]

Finally, we recognise that a dialogue with third parties may not produce any consensus as to the measures to be adopted or the way in which they are implemented. We explained earlier how we think the Article 8 specification process can play an important role in these circumstances. However, **responsibility for compliance and for adopting measures to achieve it ultimately rests with the gatekeeper, who is free to reject particular requests from third parties or to favour its own approach over those suggested by other parties**. The gatekeeper may have information that individual third parties, or that third parties collectively, do not have (although third parties will also have information

[33] Compliance Template , para 2.1.2(ii)(j).

that the gatekeeper does not otherwise have). Again, we would expect the gatekeeper to explain its decisions in the compliance report.

3.2.5. Standardisation

The issues may become more complex if several gatekeepers were to be designated in relation to the same core platform service (CPS) and so be required to supply similar wholesale services to the same competitors or business users. In these circumstances, there may be a **benefit in having common standards and processes amongst gatekeepers so that third parties can interact with multiple gatekeepers in the same way in relation to the same wholesale services**. This might, for example, allow competitors to more easily aggregate data that they obtain from multiple gatekeeper sources or to use standard APIs to access the same OS or hardware functions operated by different gatekeepers rather than having to develop different versions of the application for each gatekeeper. This might also aid the Commission in assessing compliance or in comparing output indicators (which are the subject of a separate CERRE paper).[34]

In these circumstances, it may be that a dialogue between gatekeepers is required, or develops, and/or that several gatekeepers engage with third parties collectively rather than, or as well as individually.

We recognise that standardisation raises a host of issues and that there is no formal provision or requirement in the DMA that would require a gatekeeper to participate in a sector wide approach of this kind or to adopt industry standards. **Article 48 allows the Commission to "mandate European standardisation** bodies to facilitate the implementation of the obligations set out in this Regulation by developing appropriate standards." However, it is not clear what conditions are required for the Commission to deem it 'appropriate and necessary' to trigger this. For example, some technical features may be more suitable for standardisation than others and standardisation of some features may yield greater benefits than others. There is also a question of timing: standardisation that occurs after gatekeepers have already implemented their own proprietary measures to comply with obligations will likely involve costs for both gatekeepers and third parties, whereas standardisation that precedes implementation will likely involve significant delays in compliance. These trade-offs are well understood but not easy to resolve. It may be preferable for the gatekeepers themselves to request (either individually or collectively in relation to a particular CPS and obligation) that the Commission mandates standards and it would also be open to third parties to do so. Gatekeepers may prefer the use of standardisation bodies to avoid antitrust liability should they co-operate independently instead and might consider that a standardisation body gives greater legitimacy to the final outcome.

[34] In this context, a question may arise as to whether the Commission can require several gatekeepers to align their measures, whether through formal standardisation or via the specification process or the enforcement process, so as to enable third parties to more effectively engage with them (e.g. by avoiding the need of third parties to have different processes when engaging with different gatekeepers). It might be argued that any measures taken by a particular gatekeeper will be more effective if they align with measures taken by other gatekeepers (in relation to the same obligation). On the other hand, it is difficult to see how the assessment of compliance by one gatekeeper can be contingent upon the actions of another gatekeeper.

Furthermore, Article 46 allows the Commission to adopt implementing acts for "the form, content and other details of the technical measures that gatekeepers shall implement in order to ensure compliance with Article 5, 6, or 7."[35] This is a potentially important aspect of the DMA compliance process where further clarity would be useful.

3.2.6. Role of Articles 5(6) and 13(6)

We noted above that the **dialogue between the gatekeeper and third parties is intended to allow a range of technical and non-technical questions to be resolved amongst the interested parties without recourse to the regulator, who is unlikely to be well placed to do so. At the same time, consensus or agreement may not always be possible and intervention by the regulator may then be required** (for example, via the Article 8 specification process or infringement proceedings).

Here there is a difficult balance to be struck between on the one hand ensuring that third parties contribute to a meaningful (i.e. two-way) dialogue by, for example, disclosing information which may assist the gatekeeper (as well as requiring information from the gatekeeper) or giving the gatekeeper an opportunity to resolve issues before the Commission intervenes. On the other hand, the dialogue with the gatekeeper cannot be used to exclude or render the Commission ineffective as a regulator or otherwise to allow the gatekeeper to exploit its market position.

Article 5(6) of the DMA could be seen as seeking to address this issue, at least to some extent. It has two functions. On the one hand, it is designed to ensure business users and end users are able to make complaints to the Commission (or national authorities) when they are dissatisfied with the conduct of gatekeepers and that the gatekeeper is not able to impose gagging clauses upon them. The first sentence of Article 5(6) clarifies that the gatekeeper cannot directly forbid such complaints, which suggests that any contract term that places limits shall be removed.[36] But it is wider than that as it also forbids any indirect restrictions on business users raising non-compliance issues. It should be read together with Article 13(6) by which the gatekeeper shall not degrade the conditions or quality of any of its CPS provided to business users who avail themselves of the DMA (e.g., as a form of retaliation against a user who has complained to the Commission about the gatekeeper).

Second, it allows (but does not require) gatekeepers to establish an alternative dispute resolution mechanism or any other complaint-handling system to resolve concerns by business users. This is another opportunity for dialogue and may help address difficulties in the design of a remedy that might affect some business users in unexpected ways.[37] A specific obligation to provide an alternative dispute settlement mechanism is found in Article 6(12) of the DMA.

The scope of Article 5(6) is potentially quite wide. In terms of scope end-users and business users cannot be prevented from raising any issue pertaining to 'relevant Union or national law'. Its personal

[35] In so far as we are aware, there is no intention on the part of the Commission to do so at this point.

[36] see also recital 42 DMA

[37] This is comparable to the obligations found in the P2B Fairness Regulation. See European Commission, Report on the first preliminary review on the implementation of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services SWD (2023) 300 final, suggesting these measures have had limited impact so far. Article 5(6) may impose additional requirements on gatekeepers.

scope is also quite broad. Article 2(21) defines a business user as 'any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users.' This means that the gatekeeper's obligations in this article apply both to business users who engage directly with a gatekeeper and those who do so indirectly. For example, if a new search engine were to emerge then Article 5(6) would apply to the relationship between a gatekeeper (e.g., the provider of an Operating System) and the search engine, but it also applies to advertisers who wish to use the new search engine.

A possible safeguard against concerns that gatekeepers may seek to limit the ability of third parties to refer to the regulator (either by threatening retaliation or by offering positive inducements or preferential terms) is again **to ensure that the dialogue between the gatekeeper and third parties is as transparent as possible** and for the Commission to indicate that bi-lateral engagements or bespoke arrangements between the gatekeeper and individual third parties should be avoided wherever possible.

3.3. Commission and Third Parties

3.3.1. Channels for the dialogue

The Commission will engage with third parties about their expectations for implementation. Formally, the following channels exist:

- **At any time**, parties may inform the Commission or national competent authorities about the conduct of gatekeepers. Both institutions retain 'full discretion' as regards the measures to take and have no obligation to follow up on the information.[38]

- **During a *specification decision*,** third parties may comment on the preliminary findings because the Commission must provide a non-confidential summary of the case and the measures it considers taking or that the gatekeeper should take.[39] Here, there is a compromise between speed and consultation: third parties are only entitled to one round of comments. This deprives them of the opportunity to respond to any change of position that the Commission seeks to take upon receiving their information.

- During a **market investigation into *systemic non-compliance*,**[40] third parties have a say when the gatekeeper offers commitments: they receive a non-confidential summary of the case and the main content of the commitments. As with specifications, they are allowed to comment only once in order to accelerate the process. More generally when it comes to third parties in commitment

[38] Art. 27 DMA.

[39] Art. 8(6) DMA.

[40] Third parties are also able to participate in market investigations for designating gatekeepers as they may receive a request for information under Art. 21 DMA. We do not deal with designation in this paper.

decisions, if the case law in antitrust is followed, the Commission cannot accept commitments that interfere with existing third party rights.[41]

There is no express provision for third parties to be heard **when a *non-compliance decision* is made**.[42] Here the gatekeeper communicates the changes in conduct to the Commission. It **is arguable, that if third parties are the direct beneficiaries of the DMA, then they should have an opportunity to be heard even if this is not expressly provided for,** because it is a general principle of EU Law. The Court has recognised this right in the past, although in a different setting. In *Air Inter,* for example, the Commission challenged French legislation which infringed European law but which conferred a benefit to Air Inter. It was held that Air Inter as a direct beneficiary of the French rules had a right to be heard.[43] From this, one may elicit a general principle by which even absent a statutory provision, direct beneficiaries of EU Law should also be able to be heard in proceedings that affect them.

3.3.2. Governance of the dialogue

As with engagement between third parties and the gatekeeper, the **Commission will need to ensure that its engagement with third parties contributes towards, rather than delaying, compliance with the DMA**. It is important, for example, that third parties should normally **exhaust the dispute resolution processes** that we envisage will be part of the structured dialogue between the gatekeeper and third parties before they complain to the Commission. However, this should be without prejudice to the business user bypassing or exiting that process and explaining to the Commission or a national authority why the gatekeeper's internal dispute resolution system is insufficient. It is also important that both parties engage properly in the structured dialogue (and in the dispute resolution process offered by the gatekeeper) rather than engaging in strategic behaviour that is intended to produce a particular regulatory outcome (including delaying implementation).

The Commission has **discretion in allocating its resources and in deciding how to respond to complaints that it receives from third parties** and has considerable experience in doing so in other contexts.

We have already made proposals about the Commission's role in **ensuring adequate disclosure to third parties** (e.g., in the non-confidential version of the compliance report but potentially at other stages in the compliance process as well) to enable them to comment constructively and meaningfully upon the actions being taken or proposed by the gatekeeper or their likely effects. The purpose of such disclosures will depend on the procedure being used: in cases of commitment decisions for example, a market test requires that interested parties see what the gatekeeper proposes and the gatekeeper is able to observe and respond to the interventions of third parties. Conversely, Article 34(4) governs access to third party information in the Commission's case file to allow the gatekeeper to understand the case against them in infringement proceedings but it may also be useful to

[41] Case C-132/19 P, *Groupe Canal+ v Commission*, EU:C:2020:1007.

[42] Art. 29(4) DMA: the Commission may consult third parties.

[43] Case T-260/94, *Air Inter v Commission*, EU:T:1997:89.

encourage third parties to disclose information to parties other than the Commission at other stages in the compliance process so as to facilitate dialogue between them.

We have also said that the Commission should be **transparent in its dealings with third parties in the same way as it is in its dealings with gatekeepers**. That said, we also recognise that third parties that are also business users (or even competitors or potential competitors who are not) may be reluctant to engage with the Commission if they fear (legitimately or not) that disclosure of their identity or the nature of their complaint might result in retaliation by the gatekeeper. In these circumstances, we think it will be important and helpful for the Commission to provide **further guidance on how (and when) third parties should engage with the Commission and how the Commission will ensure transparency whilst also protecting third parties from risks of doing so** (i.e. in addition to the provisions in Article 34(4) which relate to the protection of business secrets rather than protection against retaliation).

4. INCENTIVES

4.1. Incentives for Gatekeepers

As we explained earlier, **the DMA does not oblige gatekeepers to engage with third parties who may be affected by measures to comply with obligations**. Article 28(4)(d) requires the "Compliance Officer to [co-operate] with the Commission for the purpose of this Regulation" but does not explain what this might mean in practice. The DMA contains deadlines for compliance (6 months from designation) which apply irrespective of the approach to compliance taken by the gatekeeper.

Other aspects of the DMA **allow the gatekeeper to exercise a degree of discretion** in deciding how to approach compliance with the DMA's obligations. For example:

- *Article 8(3)* contemplates that gatekeepers may request guidance as to whether a particular set of measures which it has implemented or which it proposes to implement to comply with Articles 6 and/or 7 are deemed by the Commission to be effective. If the Commission considers that they are not, the Commission can specify other measures that would be required to ensure effectiveness. Thus, gatekeepers may differ in their approach over whether or not to submit such a request to the Commission, when to do so (before or after measures have been implemented), and whether, if the Commission suggests additional measures are required in its preliminary view, it waits a further 3 months until the final decision or takes pre-emptive action to implement the Commission's proposals.

- If the gatekeeper is subject to a preliminary finding of *non-compliance* under Article 29(3) the gatekeeper may decide to adopt the measures which the Commission considers it should take to ensure compliance and, having done so, it may be that the Commission will decide not to adopt a non-compliance decision or to adopt a decision but not to impose a fine or to impose a lesser fine. There is no guidance in the DMA itself as to the implications of a gatekeeper seeking to pre-emptively resolve non-compliance concerns and, unlike the commitments under Article 25

discussed next, it is not expressly contemplated that gatekeepers would seek to resolve individual (as opposed to systemic) non-compliance proceedings through pre-emptive action.

- If the gatekeeper is subject to a market investigation under Article 18 for *systematic non-compliance*, it may decide to offer commitments under Article 25 to resolve matters without the Commission proceeding to a decision or other actions such as the imposition of additional behavioural or structural remedies. Gatekeepers will therefore have some discretion in first deciding how much risk to assume of being found non-compliant on at least three occasions within eight years (this being the trigger for an Article 18 investigation) and, if they have been, whether or not to offer commitments with a view to closing the investigation.

The **Commission itself has considerably greater discretion in deciding how to engage with a gatekeeper**.[44] For example:

- It can decide whether or not to accept a request from a gatekeeper for *guidance* on the effectiveness of measures under *Article 8(3)* "respecting the principles of equal treatment, proportionality and good administration";
- It can decide whether or not to provide guidance to a gatekeeper under Article 8 (2) without having received a request from the gatekeeper to do so;
- It can decide whether or not to investigate *non-compliance* under Article 20;
- It can decide on the level of *fines* to be imposed in the event of a finding of non-compliance under Article 29;
- It can decide whether or not to investigate *systematic non-compliance* under Article 18 (always provided that the gatekeeper in question has failed to comply on at least three occasions in the preceding eight years).

Given the options available to the gatekeeper and the discretion available to the Commission in deciding how to respond to requests from or actions taken by the gatekeeper at various stages in the process, it is clear that at least some **differences in approach to engagement between the gatekeeper and the regulator are both possible and likely** to be taken. It is also possible the same gatekeeper may decide to adopt different approaches in relation to the implementation of different obligations given different benefit/cost calculus.[45]

[44] We exclude Articles 9 and 10, which allow the gatekeeper to request and/or the Commission to consent to the suspension or non-application of measures to comply with some or all aspects of obligations on the basis that we would expect this to arise only in exceptional and specific circumstances rather than part of a gatekeeper's overall approach to implementation.

[45] For example, some may seek a more co-operative or collaborative engagement with the regulator and/or with third parties who will be affected by the measures the firm proposes to adopt, whilst others may engage less with the regulator and may not engage with third parties at all. The choice of approach is likely to be influenced by the regulated firm's perceptions of the likely outcomes, in terms of substantive measures taken and risks of fines or other costs during the process but also

With this in mind, the **Commission should consider how to incentivise co-operative behaviour on the part of the gatekeeper**. This should be intended to yield benefits for the gatekeeper, third parties and regulator: more predictability and potentially lower costs of implementation for the gatekeeper (with measures that are more likely to reflect their views and less likely to be unilaterally imposed by the Commission), more rapid and effective implementation, and lower cost for the regulator. In order to provide incentives, the Commission will need to reassure gatekeepers that certain forms of conduct will be assessed in certain ways, both positively and negatively. This reassurance will need to be provided at the outset if it is to influence the gatekeepers' behaviour and approach to implementation, as it is intended to do. Having done so, it will also obviously be important that the Commission's subsequent conduct is consistent with the guidance it has provided.

Thus, for example, the Commission could clarify that:

- The Commission will take a gatekeeper's record of implementing measures in a timely and effective manner (i.e., its record on implementation more generally) when considering specific requests from gatekeepers for specification under Article 8.[46]
- The Commission might take the gatekeeper's approach to disclosure, or the quality of its compliance report, into account when considering requests from gatekeepers under Article 8 or when assessing compliance generally on the basis that greater disclosure will enable better scrutiny by third parties.
- As already explained, the Commission will take certain factors into account, such as whether and the extent to which the gatekeeper has proactively and in good faith engaged with third parties in developing its measures to comply, when assessing their effectiveness. Thus, for certain measures, the Commission could state that they will presume non-compliance if the gatekeepers have declined to consult with third parties (and taken their input into account) before implementing measures, whereas, for other obligations, evidence of engagement may form part of the assessment but would not be determinative. Any presumption in relation to any obligation would of course be rebuttable by the gatekeeper demonstrating that its compliance is effective.
- The Commission may take the extent to which the gatekeeper can show third party preferences are reflected in the measures the gatekeeper has chosen to adopt when assessing

in terms of the time that will be required to implement the measures. For example, a regulated firm may adopt measures which fall short of compliance in the expectation that further steps will delay the implementation of effective measures and that this can be achieved without financial penalty. The regulated firm can be expected to weigh upon the financial and other benefits of non-compliance or, more likely, delayed compliance against the potential financial and other costs.

[46] This would be in addition to the guidance we propose that would explain how the Commission will assess requests for specification and what they should contain. The proposal here is not intended to assist gatekeepers in making requests, but to encourage effective compliance with other obligations that can be implemented without specification.

their effectiveness. This may include an assessment of any third party engagement plan that the gatekeeper has decided to publish on a voluntary basis.[47]

- The Commission may consider the extent to which third party complaints were resolved by the gatekeeper through its own dispute process when deciding whether to respond to complaints submitted by third parties to the Commission, or when assessing compliance of the measures to which those complaints relate.

- The Commission may consider early implementation of measures in response to preliminary findings of non-compliance under Article 29 when deciding whether or not to proceed to a final decision and/or to impose a fine and/or the level of such a fine.

We note that it is **quite common for such factors to be taken into account by a regulator and for a regulatory regime to include incentives which are intended to encourage particular modes of engagement** – although we also recognise there are differences between the DMA and other regulatory regimes. For example, the energy and water regulators in the UK both require regulated firms to undertake formal consultative exercises with consumers (or their representatives) and other stakeholders when developing budget proposals which the regulator will then assess for the purposes of setting controls for retail or wholesale prices. Proposals which demonstrate effective engagement with customers will be accorded a higher rating than proposals which do not (other factors being equal) and may contribute to the fast tracking and early settlement of regulation for some regulated firms but not others.[48] Early settlement in this way offers both financial and reputational benefits for those firms that obtain it.[49] Similarly, many regulators and competition authorities, including the Commission, will take account of the extent of co-operation (beyond the legal minimum) in proceedings prior to the finding of non-compliance when assessing the level of the fine.[50] This again provides financial incentives to co-operate and ensure lower costs for all concerned and faster resolution.

Similarly, firms often advocate forms of co-regulation under which firms are collectively left to determine how to implement and enforce measures rather than being subject to a statutory regime which has been designed by the regulator. This may offer greater autonomy to industry participants and may produce better outcomes at a lower cost. However, regulators will generally accept such approaches only under certain conditions and may impose statutory solutions in the event that industry participants fail to deliver the outcomes that have been promised.

4.2. Incentives for Third Parties

We expect that **most third parties will have strong incentives to engage with the gatekeeper and the Commission to ensure that implementation is as effective as possible**. We have also seen that there

[47] This goes a bit further that what is provided on the Template for Compliance section 2.1.2(ii)(i) and (l) (p. 4).

[48] See https://www.ofgem.gov.uk/sites/default/files/docs/2017/01/consumer_engagement_in_the_riio_process_final_0.pdf.

[49] See https://www.nera.com/content/dam/nera/publications/newsletters/energy-regulation-insights/NL_ERI_Issue_42_0116.pdf.

[50] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01), Clause 29.

are opportunities for third parties to participate in informing the way in which gatekeepers comply with their obligations under the DMA, either formally at particular points in the process or as a participant in the dialogue between third parties and the gatekeeper which, as explained earlier, we expect to be presumed for the effective implementation of some of the obligations.

We already noted that the **ability of third parties to engage will be influenced by their access to information about the measures the gatekeeper** has taken or proposes to take to comply, whether provided within the structured dialogue or the compliance report which will, amongst other things, report the outcome of that dialogue. We have also said that engagement, and particularly complaints to the Commission by third parties, may be influenced by fears of adverse commercial consequences, such as retaliation.

While engagement by well-informed third parties will often be valuable and can assist the Commission in overcoming information asymmetries in its engagement with the gatekeeper, the Commission should anticipate that **some third party responses may not always be inspired by the public interest or the wider objectives of the DMA, but by narrower commercial interests**. This is not a new challenge for a regulator or antitrust authority or one that is specific to the DMA and the Commission is well-practised in assessing third party submissions. However, transparency in dealing with a third party may also assist here.[51] Third parties may be reluctant to be revealed as purveyors of exaggerated or unsubstantiated claims and the gatekeeper or other third parties have a better opportunity to rebut them if the dialogue between the third party and Commission is as transparent as practicable.

5. MONITORING AND ADJUSTING

One of the distinctive features of the DMA is that for gatekeeper conduct to be compliant, it must be assessed as being effective in achieving the overall objectives of the DMA (i.e., making markets more contestable and removing unfairness), as well as the specific objectives of the relevant obligation (some of which focus on contestability others on fairness, some on both objectives). This is an obligation to provide a result on the market. Such obligations may be found in some contracts (e.g., where a party commits to deliver goods on Friday, then there is a breach if delivery is delayed) but it is unusual to find this obligation in regulation. The political reason for this may be concerns that antitrust remedies imposed in the past had not been effective.[52]

In line with the recommendations in the other parts of this paper, we suggest that one way of ensuring that conduct is effective is to **treat a gatekeeper's compliance effort with respect to some obligations as an ongoing work-in-progress**, provided that the gatekeeper engages with the Commission and third parties in modifying its conduct when appropriate to do so. In other words, while effective compliance will be expected on the day on which the obligations become binding 6 months after designation, the expectation will also be that gatekeepers may identify (on their own or after prompts from third parties) improvements in light of subsequent experience of implementing the measures and observing

[51] CMA, Market Studies and Market Investigations: Supplemental guidance on the CMA's approach (2017) para 3,32. The CMA also involves third parties in oral hearings.

[52] Monti, Taming Digital Monopolies: A Comparative Account of the Evolution of Antitrust and Regulation in the European Union and the United States (2022) 67(1) Antitrust Bulletin 40.

their effects. This is implied in the tasks of the compliance officers which include organising, monitoring and supervising the measures of the gatekeeper.[53] It is also implied in the reporting obligations in Article 11 as specified in the Compliance Report Template.[54] Taken together, this suggests that compliance is a dynamic exercise during which the Commission will make assessments and reassessments at particular points in time.

For gatekeepers, this means that they are expected to keep the measures they take under review and monitor their effects or effectiveness. For example, if third party business users are regularly complaining about certain terms or certain types of conduct then the gatekeeper is expected to respond promptly. A prompt and effective response following dialogue with third parties should generally enable the gatekeeper to avoid a Commission investigation into past non-compliance.

The degree to which gatekeepers will be expected to review their compliance with obligations will depend on a variety of factors but generally speaking, **the discharge of some obligations is likely to be satisfied with a one-time change, while for others measure to improve compliance in light of new information will be necessary**. To give two examples:

- Securing end-user consent for data collection under Article 5(2*)* is likely to be one example of ongoing work-in-progress where the best choice architecture cannot be easily determined *ex ante*.[55] Moreover, as users' understanding changes if more information is provided this may well mean that less effort is needed by the gatekeeper to secure consent. In this context, a good faith effort by a gatekeeper to provide a clear consent form should not be sanctioned if, after a trial of several multiple months, it is found that end-users remain unable to understand what choices they are making.

- Conversely, building a data silo to comply with Article 6(2) is likely to require a one-time implementation where the gatekeeper determines the relevant data, data uses and authorised and unauthorised data uses and users and builds a system that prevents forbidden uses of data. This too can be regularly tested for errors by the gatekeeper to avoid risks that business user data is utilised to compete against them, but here the design should be relatively clear and fewer errors should be tolerated.

We recognise that this approach is not risk-free as gatekeepers may refuse to improve upon their compliance efforts in light of third party feedback. This risk would be managed by the capacity of the Commission to escalate and impose punitive measures when it comes to gatekeepers who do not make good faith efforts to comply and by exercising its discretion in other ways, as discussed earlier. The Commission also has powers to impose interim measures, and third parties can use courts to enforce their rights.

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[53] Art. 28(5)(b).

[54] For example this requires a report on "any internal systems and tools used to monitor the effectiveness of the measure and the output of such internal systems and tools (section 2.1.2(ii)(s).

[55] This is a measure for which we do not consider gatekeepers need to engage in dialogue with third parties, but this does not mean the gatekeeper will not need to consider feedback and new information about effectiveness which it will be able to obtain for itself.

This approach also impacts the Commission and third parties. **The Commission has several channels at its disposal to secure compliance and to monitor gatekeeper conduct**: in addition to the reports, the Commission may take additional steps to monitor gatekeepers, appointing external experts if necessary,[56] and working with compliance officers.[57] We have also suggested earlier that the Commission may be an observer in the structured dialogues between the gatekeeper and third parties, which will provide the Commission with early visibility of the measures the gatekeeper is proposing to take and is consulting upon with third parties and the concerns that third parties may have in relation to those proposals. This should allow the Commission to exercise influence and indicate its position if the gatekeeper were to pursue one approach rather than another before the gatekeeper has taken any final or irrevocable decisions and in advance of any subsequent intervention following a complaint from third parties or the opening of an infringement proceeding. This should therefore have benefits for the Commission (greater effectiveness and/or earlier intervention) and the gatekeeper (less risk of sunk costs and fines). This should not be seen as preventing the Commission from initiating proceedings for non-compliance if and when a gatekeeper is not responsive to the way the Commission expects it to comply.

Third parties will also have access to information that allows them to observe how gatekeepers have behaved or are behaving (the non-confidential report) but, as or more importantly, the dialogues we propose would mean that many will also be **interacting directly with the gatekeepers prior to any measures being implemented**. To the extent that proposals give rise to concerns, they can seek informal resolutions, first with the gatekeeper themselves and then the Commission, failing which they can trigger the Commission's more formal enforcement powers.[58] Again, this should benefit all parties by improving effectiveness, reducing sunk costs and lowering the overall regulatory burden.

6. RECOMMENDATIONS FOR THE COMMISSION

The initial set of CPS and gatekeepers were designated by the Commission on 6 September 2023. We understand that some of the gatekeepers that have been designated have engaged with third parties to some degree, but others have not. Establishing the working groups and other features of a 'structured dialogue' will take some time and it may not now be feasible to do so (or might jeopardise other steps being taken) prior to the implementation deadline in March 2024.

Although we recognise these concerns, we think it would be unfortunate if the effect of the DMA timelines was to deter gatekeepers from engaging proactively with third parties as we propose or was instead to encourage them to act unilaterally and without consultation during this initial period. The Commission should consider steps to avoid this, or at least to encourage the kind of dialogue we propose in the longer term.

The **Commission could do this by clarifying its stance on the issues we have discussed in this paper and which we summarise below. Our suggestion is that many of these issues can be set out in a Best**

[56] Art. 26 DMA.

[57] Art. 28(5)(d) DMA.

[58] N. Gunningham and D. Sinclair, 'Smart Regulation' who describe this as a process where you shift from one side of a regulatory pyramid (3rd party pressure) to another (government enforcement).

Practice document, which can be revised regularly, as experience in implementing the DMA develops over time.

First, there are several aspects of the **specification process where the Commission enjoys discretion and where guidance would be helpful** (in addition to the information to be provided by the gatekeeper when submitting a request which has been detailed in the recently published Template for specification dialogue request[59]):

- How the Commission will assess requests for specifications from gatekeepers, and what 'equal treatment', 'proportionality' and 'good administration' mean in this context.
- How long the Commission will required to undertake its assessment of the request.
- Whether a gatekeeper can submit a request for specification after having been found to be non-compliant with an obligation and how the Commission would approach its assessment of such a request.
- How long the Commission will require to issue a final decision on specification.
- The role of third parties in the specification process.
- The circumstances in which a gatekeeper may request the Commission to revisit a specification decision which it has previously adopted and the evidence required in such a request.
- The circumstances in which the Commission may itself revisit and amend a specification which it has previously adopted.

In addition, the Commission should provide guidance on **how it will engage with gatekeepers and third parties in a transparent manner.** As part of this, it should elaborate upon its expectations regarding claims for the confidentiality of information**,** both in relation to the compliance report that is to be published by the gatekeeper and in relation to the provision of information by gatekeepers and third parties more generally. The Commission should explain how it will address concerns that disclosure by third parties may facilitate retaliation by a gatekeeper and thereby deter dialogue.

The Commission should clarify its **expectations on engagement or 'structured dialogues' between gatekeepers and third parties** in relation to implementation. In doing so, we suggest:

- It distinguishes between obligations for which engagement is not key in the compliance assessment and may not be required at all and obligations for which engagement is likely to be essential; our proposals in this regard are summarised in the table in section 3.

[59] https://digital-markets-act.ec.europa.eu/document/download/b034f7c4-c877-420c-87fa-0e69f8aea522_en?filename=Article%208%283%29%20DMA%20Template%20%28request%20for%20specification%20dialogue%29_1.pdf.

- It should clarify its expectations on whether third parties should already have been able to take actions prior to the compliance deadline so that those measures have an effect on the market from that date or whether it is sufficient for the gatekeeper to make the opportunity available from that date but that any effects would be seen later and only once third parties had taken the actions (such as ordering services, providing information or agreeing terms) after the compliance deadline.

- It should clarify the meaning of Articles 6(5) and 6(6) and whether or not, in light of this, compliance will necessitate a prior dialogue

- It clarifies that gatekeepers are expected to determine the best form of engagement with third parties and to inform or provide guidance to enable any third party to engage effectively (including timelines) with the gatekeeper on a non-discriminatory basis.

- It clarifies the Commission's expectations of third parties when they engage in dialogue with the gatekeeper (including normally exhausting alternative dispute resolution mechanisms before complaining to the Commission and not engaging in strategic behaviour).

- It highlights some of the issues which such engagement between gatekeepers and third parties is likely to be best placed to address, including the production of a reference offer (formally required by Article 7 but likely also practically necessary to implement Articles 6(7), 6(9) to (11) effectively). The contents of such an offer will likely need to address, inter alia: ordering, fault reporting, testing, forecasting, dispute resolution and other operational matters that are better resolved by dialogue between the gatekeeper and third parties than intervention by the Commission.

- It clarifies that the dialogue between gatekeeper and third parties cannot exclude the Commission from using its powers to intervene to ensure compliance and explains the relevance of Articles 5(6) and 13(6) in safeguarding the interests of third parties in this context.

- It clarifies that the dialogue should be designed to allow both the Commission and third parties to influence the measures that will later be adopted by the gatekeeper so as to improve their effectiveness before they are adopted instead of relying only upon complaints and intervention after they have been adopted.

- It outlines some of the issues which the Commission considers will be important to address before embarking on an effective structured regulatory dialogue (and to which the

Commission would therefore regard when assessing any measures which result from that dialogue) including:

- Criteria for participation in the dialogue
- Arrangements for administrative support and recordkeeping
- Relationship between the dialogue and engagement by gatekeepers and third parties with the Commission and/or engagement by the Commission in the dialogue and
- The role of competition law.

The Commission should explain that it will seek **to encourage 'co-operative conduct'** on the part of gatekeepers which is likely to contribute towards effectiveness and what it means by this. Examples of such conduct might include:

- Early implementation of measures following a preliminary specification decision or a preliminary non-compliance decision.
- Proactive and good faith engagement with third parties and publication of guidance for third parties on how to engage with the gatekeeper.
- Prompt resolution of third party complaints by the gatekeeper, either through the gatekeeper's dispute resolution process or by other means.
- Evidence of third party views and interests informing the measures which the gatekeeper has adopted or proposed to adopt
- Extensive voluntary disclosure in the non-confidential version of the compliance report
- High-quality compliance reports which allow third parties to fully engage in the assessment

The Commission should clarify how it will take 'co-operative conduct' by the gatekeeper (vis-à-vis both the Commission and third parties) into account when:

- Assessing the effectiveness of particular measures and deciding whether or not to commence infringement proceedings.
- Deciding whether to accept or reject a request for specification.
- Deciding whether to proceed to a final non-compliance decision.
- Determining the level of any fines or whether to impose a fine at all.

The Commission should provide more guidance on the **procedure for commitments in an investigation into systematic non-compliance** so gatekeepers and third parties are aware of what is expected of them when making commitments or in assisting the Commission in assessing them.

The Commission should explain the **circumstances under which it might expect to exercise its standardisation powers** under Article 48, including in response to a request to do so from a gatekeeper.

The Commission may explain that **its assessment of compliance may depend not only on the conduct of the gatekeeper in developing and implementing measures initially but also upon conduct over time.** It should explain that some obligations may require an iterative process in which measures change so as to become more effective in light of new experience and feedback from both the gatekeeper and third parties, whilst the Commission would expect others to be fully effective from the outset and unlikely to change thereafter.

7. ANNEX

7.1. 'Structured Dialogue' in the Telecommunications Sector

We have used telecommunications because the implementation of Articles 6(9) and 7 will have some similarity to the implementation of number portability between telecommunications operators or the implementation of interconnection arrangements, although we recognise there will also be important differences. These include the fact that such obligations are generally reciprocal in telecommunications, were implemented based on (at least some) pre-existing technical standards and involved payments between the operators concerned.

For both interconnection and number portability, it has been common for the regulated telecommunications operator to convene (or to be required by the regulator to convene) expert working groups which consist of representatives from the gatekeeper and third parties to oversee the implementation of the new regulatory requirements.[60] In telecommunications, this is normally undertaken at the national level, but in the case of the DMA, we would expect it to be undertaken on a pan-EU basis.

In its report on implementing Article 7 of the DMA, BEREC (the body of European Telecommunications Regulators) has stated:

> BEREC believes that it will be crucial to set up a structured regulatory dialogue with the interested parties (e.g., gatekeepers and providers requesting interoperability), in order to correctly define and update the reference offer. Over the past decades, telecommunication NRAs [National Regulatory Authorities] have organised, chaired or participated in structured multi-stakeholder committees or fora where concerned parties can share valuable information for the definition and update of the reference offer, and where issues and obstacles to its correct implementation can be identified and solved.[61]

Key questions when convening such working groups include:

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[60] As BEREC noted in its opinion on the DMA proposals: 'For instance, in the electronic communications sector, national regulatory authorities (NRAs) have set up, overseen and participated in technical committees with stakeholders and/or experts to collect relevant information needed to ensure an effective and efficient design of their intervention. A typical example is the implementation of number portability, a remedy which has proven to be successful in reducing end-users' switching costs among different providers and fostering competition on the merits. In order to correctly design this remedy, NRAs gathered experts' technical inputs by organising specific fora with stakeholders (e.g., operators and equipment vendors).', BEREC 2021 p. 4, at: https://www.berec.europa.eu/sites/default/files/files/document_register_store/2021/3/BoR%20(21)%2035%20BEREC%20Opinion%20on%20the%20DMA%20-%20final.pdfhttps://www.berec.europa.eu/sites/default/files/files/document_register_store/2021/3/BoR%20(21)%2035%20BEREC%20Opinion%20on%20the%20DMA%20-%20final.pdf.

[61] BEREC Report on interoperability of NI-ICS 2023 p. 34 at : https://www.berec.europa.eu/system/files/2023-06/BoR%20%2823%29%2092%20BEREC%20Report%20on%20interoperability%20of%20NI-ICS.pdf. https://www.berec.europa.eu/system/files/2023-06/BoR%20%2823%29%2092%20BEREC%20Report%20on%20interoperability%20of%20NI-ICS.pdf

- Whether the groups are convened and *chaired* by the regulated firm, the regulator, or some independent party;
- The *scope of work and terms of reference* (with the intention often being, as is often the case with standards organisations such as the IETF, that technical representatives are expected to attend in a personal capacity to collectively solve technical challenges rather than seeking commercial advantage);
- Which *organisations can participate* in the working group (including whether the Commission has an observer or some other role in the group);[62]
- How disagreements or *disputes* within the working group are to be resolved, including escalation to some other oversight body or to the Commission. In the latter case, there is a delicate balance to be struck to ensure that participants do not engage in strategic behaviour or undermine trust inside the working group (e.g., to influence the regulator later in the process) but that the regulator is not excluded from being able to intervene, or participants are not prevented from appealing to the regulator when it is appropriate to do so.[63] We discuss this further below;
- How *competition law* is to be complied with whilst allowing the groups to function effectively.

Sometimes these arrangements are placed on a **more formalised** footing, as illustrated by the creation of the Office of Telecommunications Adjudicator (OTA) in the UK in 2005. The OTA describes its role as facilitating "the swift implementation of processes where necessary to enable a wider range of Communications Providers and End Users to benefit from clear and focussed improvements, in particular where multi-lateral engagement is necessary. The OTA will also be able to bring all parties together to find prompt mediated resolution of working-level implementation issues."[64] The OTA is chaired by a member of a small independent secretariat which is funded by the members and oversees, amongst other things, the implementation of number porting arrangements in the UK.

Although working groups of this kind often focus on **technical issues**, including technical standards, **other non-technical ad hoc groups** may need to be convened to address operational or legal matters. This can include:

- The development of ***a standard contract*** for the provision of the service (referred to as the Reference Offer in Article 7 of the DMA and clearly modelled on the Reference Offers that are

[62] In some cases, it may be that members of the High Level Group established by Article 40 might be more suitable attendees than the Commission itself. For example, BEREC might be involved in the implementation of Article 7 given the work it has already undertaken on it.

[63] Based on experience in telecommunications, conflicts can arise if the gatekeeper has limited resources to allocate and so must decide between competing requests from third parties. The gatekeeper will be expected to ensure that changes do not unduly favour its own services, but the effect of any particular change may still be to benefit some third parties over others. Sometimes requests from one third party may be strongly opposed by another. At other times some parties may argue that implementation should be delayed whilst others want it accelerated. There is no obvious solution to this, but setting out clear guidelines that explain how the gatekeeper will allocate its resources and take decisions, but new functions or capabilities may assist.

[64] See http://www.offta.org.uk/.

required to be produced by the European Electronic Communications Code (EEEC)).[65] This will include standard commercial terms, such as indemnities, IP rights, termination clauses, NDAs etc. We think **reference offers** (whether they called that or not) will also likely be required – as a practical matter - to effectively implement Articles 6(9), (10), and (11) even though this is not expressly envisaged by the DMA;[66]

- ***Ordering and validation processes*** to ensure that the service required is the one being delivered (e.g., in relation to Articles 6(9), (10), and (11) different third parties may have differing data requirements and the gatekeeper may need or wish to offer a limited menu of options rather than bespoke arrangements to meet each request). This aspect may be particularly important if the gatekeepers require third parties to 'pre-qualify' in some way in order to ensure that security, privacy or integrity concerns are addressed;[67]

- The definition of ***service levels*** (e.g., target availability of connections or APIs), service guarantees and key performance indicators (KPI). These may be particularly important when wholesale services are to be provided without charge, since non-price discrimination (or simply poor quality) is then the main risk to effective implementation.

- ***Fault reporting arrangements*** **and escalation processes**. These are important in telecommunications, as it was often unclear whether responsibility for a failure (e.g., to process customer consent to port data) lay with the third party (incorrect submission of the form etc.) or the regulated firm (failure to process a form that was correctly submitted). The same may apply with the DMA.

- ***Testing arrangements*** to be completed by the regulated firm and third party prior to the activation of the service.

- ***Forecasting requirements*** to ensure adequate provisioning of capacity by the regulated firm (including provisions if forecasts subsequently prove inaccurate).

We noted in the introduction that measures to ensure compliance with the DMA are likely to evolve over time (whilst recognising that the assessment of effectiveness and hence compliance will be

[65] Article 69(2) of the EECC allows regulators to require undertakings to publish reference offers whilst 69(3) allows the regulator to impose changes to the reference offer. The latter normally involves requiring amendments to specific provisions to better ensure compliance with obligations rather than the regulator replacing the reference offer produced by the regulated firm with one of its own. The DMA does not address this directly, but we assume the specification process envisaged by Article 8 would allow the Commission to require specific changes to a reference offer. The publication of a reference offer is justified in telecoms on the grounds that it ensures transparency in conditions of supply and guards against discrimination (since all third parties sign the same contract). In practice, reference offers also greatly facilitate the effective and rapid implementation of obligations and avoid duplication and conflict.

[66] We suspect the reason they are not referred to may be that BEREC was less involved in advising the Commission on Article 6 than Article 7.

[67] In other data sharing arrangements, such as Open Banking in the UK, for example, those requesting data must be registered with the regulator and fulfil certain conditions of registration. This does not appear to be anticipated by the obligations in the DMA, although refusals to supply a particular third party would presumably be referred to the Commission or a national authority.

undertaken by the Commission on the basis of the information available to it at a particular point in time). Experience from telecommunications suggests that gatekeepers or third parties may propose **changes to the way in which obligations are implemented in light of the experience of their implementation**. These changes may be mutually beneficial for both the third party and the gatekeeper but are likely to require an agreed process for the receipt and assessment of 'change requests' that are made to or by the gatekeeper. Similarly, it is conceivable that third parties may submit requests to the gatekeeper for additional wholesale services which are not required or currently required by regulation but that the gatekeeper considers it would nonetheless be in their commercial interests to supply. Although this may be unlikely in the short term for the DMA, experience from telecommunications (and Open Banking) suggests that regulated firms often start by supplying the minimum required for compliance but that, over time, other commercial opportunities will be identified alongside those regulatory requirements.[68] Experience also suggests that market participants may be better placed to update the scope and implementation of regulatory obligations than the regulators themselves.

This suggests that the processes and forums that are created to implement the obligations of the DMA are required to allow both the gatekeeper and third parties to oversee the ongoing operation of the arrangements that have been put in place and to develop them further. The intensity and nature of the work may change, but **some structured form of ongoing interaction between the regulated firm and the third parties it supplies is likely to be required for at least some obligations.** A responsive gatekeeper should wait for findings of non-compliance before engaging in such a dialogue.

[68] For example, the Open Banking Implementation Entity in the UK first developed a series of 'regulated products' but is now expected to provide a forum for the development of other services on a purely commercial basis, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1150988/JROC_report_recommendations_and_actions_paper_April_2023.pdf.

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