cerre Centre on Regulation in Europe

SUBSTANTIVE AND PROCEDURAL PRINCIPLES

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ABOUT CERRE

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CERRE's added value is based on:

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

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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. THE FEATURES OF THE DMA

The DMA has **two main objectives**: to ensure contestability (i.e., the reduction of entry barriers) and to ensure fairness (i.e., a balance between the rights and obligations of the gatekeepers and their business users) of EU digital markets.[1] In turn, these objectives should lead to more innovation and choice for end-users.[2]

To achieve those objectives, the DMA imposes **a series of different types of obligations (and therefore different degrees of difficulty in enforcing them).** Some are (i) transparency obligations, in particular regarding online advertisement prices and performance, (ii) others consist of prohibitions which may be contractual and/or technical, and (iii) others consist of obligations to provide access to platforms (vertical or horizontal interoperability) or to data (portability or data sharing).[3]

Some access obligations will require changes in the products and services offered by the regulated gatekeepers. On the one hand, gatekeepers must design new interfaces and architectures to propose and manage more choices for the end users and consent mechanisms where personal data are involved. On the other hand, gatekeepers must also develop new technical tools to enable smooth access to their platforms for business users. These new choice architectures and technical tools for access and interoperability, and more fundamentally the logic of openness, should apply to new products but also to existing ones, leading to the re-engineering of some existing products.

The DMA obligations and the resulting changes in product design (and possibly in business models) are **particularly difficult to enforce,** as some of the biggest companies in the world are subject to them and enforcement may in some cases carry an important cost for these companies. Moreover, intervention needs to be swift and effective, since digital markets can easily tip, a reversal of which may be difficult to achieve.

To reduce these enforcement difficulties, the **DMA is an *ex-ante* legal tool whereby compliance must be demonstrated by the regulated gatekeepers**. Thus, compared to *ex post* competition law, the DMA shifts the burden of proof from the Commission (to show a violation of a competition law prohibition) to the gatekeeper (to show compliance with prohibitions and obligations).[4] This should ease and accelerate enforcement. However, if the Commission wants to condemn a gatekeeper for non or insufficient compliance, it remains subject to the burden of proving that the compliance measures adopted by the gatekeeper are insufficient to meet the obligations of the DMA. Hence, the shift in the burden of proof is obviously not complete.

To ease enforcement, the legislator has also granted **important procedural discretionary powers to the Commission**. For instance, the Commission may or may not take a complaint from a business user,

[1] DMA, Art. 1 (1).

[2] These objectives are implementing the European Declaration of 15 December 2022 on Digital Rights and Principles for the Digital Decade, OJ [2023] C 23/1, Points 10 and 11.

[3] DMA, Arts. 5-7.

[4] DMA, Rec. 5.

it may or may not specify an obligation, either upon the request of a gatekeeper or its own initiative, it may or may not adopt interpretative guidelines. This important procedural discretion is justified by the complexity of the enforcement process, the need to deter non-compliance or ineffective compliance, and the novelty of the law. However, the Commission must exercise its discretion in a non-discriminatory and impartial manner.

The DMA obligations will also be difficult to implement because they apply to digital ecosystems which are complex and constantly evolving, not always fully understood. Therefore, **the DMA obligations inevitably lead to a number of trade-offs**. In particular, there is a trade-off between platform openness and service security, privacy, or integrity. There is also a trade-off between contestability and user autonomy. These trade-offs are acknowledged in the DMA. Some of the connected balancing will have to be done in the implementation process by gatekeepers when adopting their compliance measures, then by the Commission or national Courts when assessing these measures and, ultimately, they will be adjudicated by the Court of Justice of the EU when ultimately interpreting of the DMA.

2. SUBSTANTIVE PRINCIPLES

The implementation of the DMA should respect several substantive principles, which are derived from the theory of good regulation[5] and which are, more or less explicitly, mentioned in the DMA. They are effectiveness, proportionality, non-discrimination, legal predictability, and consistency with other EU laws.

2.1. Effectiveness

Effectiveness is a key principle of the DMA and plays a role at various instances in its implementation.

First, the **gatekeeper must prove that their compliance measures are effective** in two ways: (i) in achieving the objectives of the DMA as a whole (general effectiveness) and (ii) in achieving the objectives of each obligation (specific effectiveness).[6]

- General effectiveness refers to the DMA's two overarching objectives of contestability and fairness. Contestability mostly relates to reducing strategic and some structural entry barriers, while fairness is an issue where the imbalance between gatekeeper and business user deprives the latter of adequate reward for its efforts. In the end, both objectives may be understood with reference to (long-term) competition in digital markets among the gatekeepers and between the gatekeepers and business users.

- Specific effectiveness relates to the objectives of each obligation which can be measured with quantitative metrics on the impact of obligations on relations between the gatekeeper and third parties.

[5] R. Baldwin, M. Cave, M. Lodge, *Understanding Regulation: Theory, Strategy and Practice*, 2nd ed, 2012, Oxford University Press; Viscusi, Harrington and Shappington, *Economics of Regulation and Antitrust*, 5th ed, MIT Press, 2018. Also P. Larouche, Code of conduct & best practices for the setup, operations, and procedure of regulatory authorities, CERRE Report, May 2014.

[6] DMA, Art. 8 (1) and 13 (3).

Second, the **gatekeepers cannot circumvent the obligations** by engaging in conduct of a contractual, commercial, technical, or of any other nature that undermines effective compliance with the DMA obligations.[7]

Third, the **Commission may specify the obligations** contained in Articles 6 and 7 to ensure that measures adopted by the gatekeeper **achieve double effectiveness**.[8] If implementation shows that the initial specification does not lead to effectiveness, the Commission may then re-specify the obligations.[9]

Fourth, if the DMA obligations no longer effectively ensure contestability and fairness, because of the evolutions of technologies and markets, the **Commission may extend the scope of existing obligations in a delegated act**.[10] This aims to maintain the effectiveness of the obligations in rapidly evolving markets.

More generally, effectiveness is a key principle used by the Court of Justice to interpret EU law. Indeed, the Court relies on systemic and teleological interpretation of the law to ensure its effectiveness and does not limit itself to the literal interpretation.[11]

2.2. Proportionality

Proportionality is also a general principle of EU law which requires, according to the EU Treaties, that the content and form of the public intervention should not exceed what is necessary to achieve the objectives of such intervention.[12]

This important principle plays two main roles in the implementation of the DMA.

2.2.1. Proportionality of the compliance measures

First, the **measures adopted by the gatekeepers to comply with the DMA should not exceed what is necessary to achieve contestability and fairness in EU digital markets**. In proposing their compliance measures, gatekeepers have a natural incentive not to go further than what is necessary, and therefore the allocation of the burden of proof in the DMA contributes to the self-execution of the proportionality principle.

When the **Commission specifies the measures required to comply with an obligation**, it should ensure that those measures achieve the double effectiveness mentioned above but also that they are **proportionate in the specific circumstances pertaining to the gatekeeper and the relevant service**.[13]

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[7] DMA, Art. 13(4).

[8] DMA, Art. 8(7).

[9] DMA, Art. 8(8).

[10] DMA, Art. 12.

[11] Such interpretative methods have been used by the Court of Justice since its very early case law, for instance in Case 26/62 *Van Gend en Loos* and in Case 6/64 *Costa v ENEL*.

[12] TEU, Art. 5(4).

[13] DMA, Art. 8(7).

Thus, if multiple measures are equally effective, the Commission should choose the one which is the least intrusive for the gatekeepers.[14]

In doing so, the application of the proportionality principle also contributes to **avoiding or mitigating the risks of unintended consequences** of the DMA implementation, in particular, the reduction of innovation and consumer choice which are the ultimate objectives of the DMA.

2.2.2. Proportionality of the defences

Second, **when the gatekeeper relies on the service integrity, security, or privacy defence allowed in the DMA, it should do so in a proportionate manner**.[15] In this case, it is incumbent for the gatekeepers to show that their measures are strictly necessary and proportionate, to protect the integrity, security, and privacy of their services. Thus, if different measures achieve the same degree of integrity, security, and privacy, the gatekeeper should choose the one which is the least detrimental to contestability and fairness.

In this case, the principle is probably not self-executing as the gatekeepers may not have an incentive to choose the measures which are the least detrimental to contestability and fairness. This is why the Commission should be strict in controlling the use of the defense in the process of assessing the legality of the compliance measures proposed by the gatekeepers or when it specifies the measures to be adopted by the gatekeepers.

In doing so, this **second type of application of the proportionality principle allows the enforcers of the law to balance the different trade-offs of the DMA mentioned above**. It also contributes to **consistency across different legislations** which compose the quickly expanding EU digital platforms acquis and is conducive to solving the tension between different laws with divergent objectives.

2.3. Non-discrimination

Contrary to effectiveness and proportionality, the principle of non-discrimination is not explicitly and directly mentioned in the DMA. However, it is a principle of good regulation and it underpins the contestability objective, as contestability aims to ensure equality of chance among business users and gatekeepers, a form of non-discrimination. It also underpins several DMA obligations, for instance, regarding choice architecture which should avoid discrimination that favours gatekeepers over challengers[16] or the implementation of interoperability obligations.[17]

While the DMA does not necessarily consider gatekeepers as public utilities which are obliged to deal with all users in a neutral way, the **principle of non-discrimination and absence of conflict of interest could play an important role in verifying compliance**. Indeed, a differentiation of treatment between

[14] Specifically, the proportionality principle channels the economic analysis that normally underpins an efficiency defense in antitrust (butis not present in the DMA) into a narrower framework and it compels the defendant firm to work within the specific set of core goals of the DMA.

[15] DMA, Art. 6(3), 6(4), 6(7), 7(3) and 7(6).

[16] Issue paper Choice Architecture for End Users in the DMA, Section 3.3.

[17] Issue paper Horizontal and Vertical Interoperability in the DMA, Section 6.

the gatekeeper and third parties could be seen as a violation of the DMA obligations when it is unjustified.

The application of this principle also means there needs to be a **consistent application of the rules across gatekeepers** and that the Commission should ensure equal treatment among them.

2.4. Legal Predictability

Legal predictability is also a principle of good regulation, as it shapes the expectations and the incentives of the regulated firms (the gatekeepers) as well as the beneficiaries of the regulation (the business users or the gatekeepers entering other markets than those in their core realm of activities). While the Articles of the DMA do not mention legal certainty explicitly, several recitals refer to it.[18] This principle is particularly **important for gatekeepers which may have to significantly re-design their products and services, as well as for entrants which may invest a lot in innovative offerings made possible by the DMA in the course of DMA implementation**.

To achieve this principle, the **Commission has several means to increase legal predictability** and clarifying the interpretation of some obligations with guidelines,[19] individual acts, or generally applicable implementing acts.[20]

However, there is an inevitable **tension between legal predictability and the legal flexibility** which is needed to adapt the regulation to the insight gained from past implementation [21] and to the evolution of technologies and markets. This is why the DMA provides for mechanisms in which the Commission can re-specify the measures needed to comply with regulatory obligations,[22] to extend the scope of existing obligations, or to propose the EU legislature to add or remove obligations.[23] In using those flexibility mechanisms, the Commission should nonetheless be predictable and show how the regulatory adaptations contribute to contestability and fairness as well as to the effectiveness of the rules.

2.5. Coherence with Other Laws

As several DMA prohibitions and obligations relate to rights and interests protected by other EU and national legislative instruments, it is important that the **DMA is implemented in way which is consistent with those other instruments**.

This is obviously the case with competition law, given the antitrust roots of the DMA. But this is also the case for data laws (in particular the GDPR, the Data Governance Act, and the Data Act) and cybersecurity laws (NIS Directive, Cybersecurity Act, etc.). It is **key that the new platform and data**

[18] DMA, Rec. 20, 30, 73, 77, and 103.

[19] DMA, Art. 47

[20] Resp. DMA, Art. 8(2) and 46(1b).

[21] In that regard the Recommendation of the OECD Council of 6 October 2021 for Agile Regulatory Governance to Harness Innovation, OECD/LEGAL/464 advises the regulators to move from a 'regulate and forget' approach to a 'learn and adapt' approach.

[22] DMA, Art. 8(9).

[23] Resp. DMA Art. 12 and 19.

openness and variety in user choices created by the DMA does not undermine data privacy and security, and ultimately the trust of the users in the (big and small) providers of digital services or, more generally, in the digital society overall. For this, the new privacy and security risks should be managed carefully by all stakeholders involved in the DMA implementation and users should be educated on the possibilities and risks associated with their new choices. This is why the DMA should be implemented in a manner consistent with EU laws which deal with those risks, in particular through a close dialogue between the authorities in charge of the different EU laws within the DMA High-level group.[24]

3. PROCEDURAL PRINCIPLES

Next to the substantive principles, the implementation of the DMA should also follow several procedural principles which are similarly derived from good regulatory practices in liberal democracies. Those principles are particularly important because on the one hand, the quality of the process will determine the outcome of the DMA and, on the other hand, the Commission – which is a political institution – enjoys important procedural discretion in implementing the DMA. The principles are: responsive regulation and participation, due process, and *ex ante* and *ex post* evaluation.

3.1. Responsive Regulation and Participation

While the DMA has no hierarchy of enforcement methods, an **approach based on responsive regulation should be deployed**.[25] This system relies on assuming that gatekeepers wish to comply and that third parties have a voice in shaping that compliance effort. It follows that the first stage is to persuade gatekeepers to comply via regulatory dialogue informed by the views of third parties. If this does not secure compliance, then enforcement can become progressively harsher until the gatekeeper responds to these signals and complies. This means that greater recourse is made to the supervisory measures in the DMA than to the punitive measures.

Participation relies on a **number of dialogues, the structure of which should be transparent and give incentives to all stakeholders to effectively increase contestability and fairness** in the EU digital markets. As explained in the companion paper on DMA Process and Compliance, three main dialogues are organised by the DMA:[26]

- First, *a dialogue between the gatekeepers and the Commission* which may be informal or formal in the context of a specification decision (Article 8) or a non-compliance decision (Article 29); such dialogue should be as transparent as possible (while respecting confidentiality of business secrets) and ensure an equal treatment among the different gatekeepers;
- Second, *a dialogue between the gatekeepers and the third parties* which is particularly important for the effectiveness of those DMA obligations which require new product designs

[24] DMA, Art.40.

[25] Issue paper Process and Compliance, Section 2.

[26] Ibid, Section 3.

in the form of new choice architectures and technical tools for access and interoperability; experience in other regulated sectors shows that such dialogue should be carefully structured and steered by the Commission; it should be based on coordination amongst business users before the dialogue with gatekeepers and the establishment of working groups on technical and non-technical issues to address operational and legal matters;

- Third, *a dialogue between the Commission and third parties* which may informally take place at any time, or more formally in the context of a specification decision or a non-compliance decision; such dialogue should ensure that third parties are heard when this is useful for the effectiveness of the implementation of the DMA and that the Commission can prioritise its resources to maximise such effectiveness.

4. EVALUATION OF COMPLIANCE MEASURES

(a) Ex ante evaluation

Before the gatekeeper decides on compliance measures and the Commission judges their legality, **experimental *ex ante* testing is useful. This testing can take three main forms**:[27]

- *Lab experiments* which involve participants being asked to make choices in a clear experimental context;
- *Field trials* (also known as A/B testing or randomised controlled trials/RCTs) which involve trialling different options with real end users, in real choice environments, who are unaware they are part of an experiment, and analysing their reaction;
- *End user surveys* which provide useful directional indicators of how end users may be expected to react to particular measures and can also be valuable for collecting qualitative information.

These different types of testing are complementary, as they may be done by different stakeholders (field trials are best done by gatekeepers, while business users could do lab experiments and user surveys) and give different results. Specifically, field trials involve real choices which is not the case in lab experiments.

The **gatekeepers should be incentivised to run field trials** before determining and reporting on their selected compliance measures, but only in a proportionate manner taking into account the costs of running those trials. The compliance report should contain an explanation of contractual and technical measures which were envisaged, which measures were finally adopted and why.[28] In addition, the Commission and business users may also wish to carry out their own *ex ante* testing, both to understand the likely impact of measures taken by the gatekeepers and more specifically to inform the Commission's oversight of the gatekeepers' own testing programmes.

[27] Issue paper Choice Architecture for End Users in the DMA, Section 4.2.

[28] Commission Template for Compliance Report, point 2.1.2. (i) (o).

(b) Ex post evaluation

As explained above, the gatekeeper has the burden to prove compliance and the compliance report is the key instrument to do so.[29]

The Commission should assess the legality of the selected compliance measures and when not satisfied, the Commission may open a dialogue with the gatekeeper or open a procedure for non-compliance. In that regard, **the output indicators delineated in a companion paper could help the Commission to focus its attention on where additional pieces of evidence may be required to judge DMA compliance; these indicators would not constitute direct evidence of (non) compliance**.[30] Thus, alongside other information submitted by the gatekeeper, third parties, or assembled by the Commission itself, output indicators would inform an overall assessment of whether the gatekeeper has complied with the relevant obligation, and in case of non-compliance, why this has occurred and what steps might be required to remedy any breach.

4.1. Due Process

Because the DMA obligations limit the freedom to conduct business guaranteed by the EU Charter on Fundamental Rights,[31] the **Commission should exercise its DMA implementing powers in full adherence to due process**. In that regard, the DMA contains several provisions, in particular on requests for information, the power to carry out interviews and take statements, powers to conduct inspections, the right to be heard and to access the file, and professional secrecy.[32]

The respect of those principles is particularly important because the Commission does not necessarily meet the independence requirements[33] that EU constitutional and secondary laws generally impose on national regulatory authorities.[34]

In the future, secondary legislation to codify procedures may be required to ensure fundamental rights protection and respect for the principles of good administration. As explained in the companion paper on DMA Process and Compliance, **best practice documents which accompany procedural rules can emerge** as they have in antitrust.[35]

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[29] DMA Art. 8(1) and Compliance Report Template, Section 2.

[30] Issue paper Output indicators.

[31] EU Charter of Fundamental Rights, Art. 16.

[32] DMA, Arts. 21, 22, 23, 34, and 36 respectively.

[33] Speech Commissioner Reynders noting that: "(…) based on Article 8 of the Charter, the enforcer of data protection rules must be ensured by an independent authority. Therefore, the Commission could not have (this) enforcing powers."

[34] On the need of independence for good regulatory enforcement, see C. Decker, *Modern Economic Regulation: An Introduction to Theory and Practice*, Cambridge University Press, 2014, Ch. 7; P. Larouche, C. Hanretty, and A. Reindl, *Independence, Accountability and Perceived Quality of Regulators*, CERRE Report, 2012.

[35] Issue paper on DMA process and compliance, Section 6. https://competition-policy.ec.europa.eu/document/4dece098-82fb-4cdd-bd5c-1176c52e4531_en

4.2. Evaluation of the Effectiveness of the DMA

As is the case for most EU laws, the DMA requires the Commission to do an evaluation of the Regulation every three years to assess whether it achieves its objectives and gauge its impact on business users (in particular SMEs) and end-users.[36]

In its Better Regulation Guidelines, the Commission explains that: "**evaluation is an evidence-based assessment of the extent to which an intervention**: (i) is *effective* in fulfilling expectations and meeting its objectives; (ii) is *efficient* in terms of cost-effectiveness and proportionality of actual costs to benefits; (iii) is *relevant* to current and emerging needs; (iv) is *coherent* (internally and externally) with other EU interventions or international agreements; and (v) has *EU added value,* i.e. produces results beyond what would have been achieved by Member States acting alone."[37]

In the Better Regulation Guidelines, the Commission also notes that: "**a well-designed monitoring system should be governed by the following principles**: (i) *comprehensiveness,* i.e. covering all objectives of the intervention; (ii) *proportionality,* i.e. reflecting the costs of collecting information and the importance placed on different aspects of the intervention; (iii) *minimal overlap,* i.e. avoiding duplication and unnecessary data collection burdens by concentrating only on data gaps; these should be identified through a preliminary analysis of existing data collection; (iv) *timeliness,* not all evidence has to be collected at the same time but should be ready by the time of a planned evaluation; and (v) *accessibility,* in principle, all evidence should be made available to the public with clear information on their specificities and limitations, subject to confidentiality arrangements and rules on data protection."[38]

Therefore, the **Commission should already today prepare the evaluation by determining which indicators should be collected, by whom, and how**. In that regard, the output indicators proposed in a companion paper could inform an overall assessment of the effectiveness of the DMA measures. As the Commission is the enforcer of the DMA, it would be essential that the evaluation of the law is also done by an EU body which is fully independent from the Commission to alleviate any conflict of interest. One option would be the Court of Auditors whose tasks include "the submission of observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Union" and which report to the EU legislature.[39]

[36] DMA, Art. 53.

[37] Commission Staff Working Document of 3 November 2021, Better Regulation Guidelines, SWD (2021) 305, p. 23.

[38] *Ibidem*, p. 40.

[39] TFEU, Art. 287(4). See https://www.eca.europa.eu/en/multiple-reports

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