A compass on the journey to successful DMA implementation

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I. Introduction

1. In July 2022, EU lawmakers adopted The Digital Market Act (DMA) which, will introduce a new regulatory regime for the biggest online platforms active in Europe, with a view to achieving "*contestable and fair markets in the digital sector*," as its long title indicates.[1] This important new EU regulation should be published in the Official Journal in October 2022. It will gradually become applicable in three phases of around six months each. In the first phase, the European Commission will adopt a procedural regulation.[2] In the summer of 2023, undertakings potentially falling under the definition of gatekeeper will notify the Commission, and then the Commission will designate ten to fifteen digital gatekeepers that will be subject to the list of prohibitions and obligations contained in the DMA.[3] Finally, at the beginning of 2024, the designated gatekeepers will have to comply with this list and submit compliance reports to the Commission.[4]

2. As the new EU large platforms regulatory authority, the European Commission will have a full agenda. In the short term, the Commission will designate the gatekeepers, specify some of the Article 6 obligations and review the gatekeepers' compliance reports.[5] In the process, no doubt the Commission will also want to use its power to issue guidelines.[6] As time goes by, the Commission is likely to be concerned with non-compliance with obligations with the possibility of fines[7]—perhaps involving interim measures[8]—or going over to systematic non-compliance with the possibility of commitments.[9] All of those decisions could be appealed to the European courts.[10] Outside the immediate purview of the Commission, business users could rely on the directly applicable DMA in order to request injunctions or damages against gatekeepers before national courts for non-compliance with their obligations under the DMA.[11] Moreover, the DMA also provides for representative actions.[12] These actions could mean that national courts may frequently apply the DMA as well.

3. In the course of all these proceedings, numerous interpretation, implementation and application issues will be raised, to be decided in the first instance by the Commission or national courts, and ultimately by the Court of Justice of the EU. More fundamentally, the DMA is establishing a new field within EU economic regulation, and the first interpretation and enforcement actions by the Commission will determine the direction

1 Regulation 2022/… of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (Digital Markets Act). For an overview of the agreed DMA and the changes introduced by the EU lawmakers, *see* P. Alexiadis and A. de Streel, The EU's Digital Markets Act: Opportunities and Challenges Ahead, *Business Law International*, Vol. 23, Issue 2, 2022, pp. 163–201.

2 Pursuant to Article 46 DMA.

3 Pursuant to Article 3(3) DMA, which will apply six months after the DMA will have entered into force (Article 54 DMA), prospective gatekeepers will have two months to notify the Commission. Article 3(4) DMA gives the Commission forty-five days from the date of notification to formally designate a notifying party as a gatekeeper, unless that party provided sufficiently substantiated arguments to question the application of the presumptive gatekeeper thresholds at Article 3(2) DMA, in which case the longer procedure of Article 17 DMA will be followed to adjudicate on these arguments.

4 Pursuant to Article 3(10) and Article 11(1) DMA, gatekeepers have six months (from their designation) to ensure that they comply with the DMA obligations and begin reporting on their compliance.

5 DMA, Articles 3, 8 and 11 respectively.

6 Ibid., Article 47.

7 Ibid., Articles 29 and 30.

8 Ibid., Article 24.

9 Ibid., Articles 18 and 25.

10 TFEU, Article 263. Alexiadis and de Streel, *supra* note 1, at 169.

11 On the private enforcement of the DMA, *see* A. P. Komninos, The Digital Market Act and Private Enforcement: Proposals for an Optimal System of Enforcement, in Eleanor M. Fox Liber Amicorum: Antitrust Ambassador to the World, Nicolas Charbit and Sébastien Gachot (eds.), Concurrences, New York, 2021, pp. 425–444, and R. Podszun, Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in The Digital Market Act, *JECLAP*, 2021.

12 DMA, Article 42.

for the future of EU digital economy regulation. However, those issues will be particularly difficult to decide because the DMA regulates technologies and business models that are diverse, fast-evolving, complex and not always fully understood. Moreover, in view of the immense stakes for the platform economy and of the almost boundless legal and related professional resources at the disposal of private stakeholders,[13] the DMA will likely spawn a very lively cottage industry of engagement with public authorities, compliance and, of course, legal challenges.[14] This short paper aims to contribute to the emerging discussion on how to ensure a successful journey for the DMA as it enters the interpretation and implementation stage. This journey should not lead the DMA to hit a dead end, or to lose its way in a cacophonic bazaar. In order to avoid these outcomes, an interpretation and implementation "compass" is needed.

II. A compass to enforce the DMA

4. Calibrating that compass will not be straightforward, given the structure of the DMA. From the higher-level statement of objectives, on the one hand, down to the three key elements of "core platform services" (CPS), "gatekeepers" and the list of obligations, on the other, the conceptual chain seems not as strong as it could be. The DMA misses a general definition of core platform services[15] and a general clause tying together the list of twenty-two obligations[16] that would link these elements with the objectives. Nevertheless, the compass can be calibrated through deduction from its objectives, some clustering of the obligations and with the help of general principles of EU law that are picked up in the DMA.

5. The first tool to calibrate the DMA compass comes from its objectives. The final version of the DMA contains new recitals detailing the meaning of the two overarching aims of "contestability" and "fairness."[17] Both objectives should be understood with reference to competition.[18] That is immediately apparent from the definition of "contestability" as "*the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services.*"[19] Contestability extends to inter-platform competition and, if necessary, to intra-platform competition.[20]

6. As for fairness, it is defined as "*an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage*" and the users cannot "*adequately capture the benefits resulting from their innovative or other efforts*."[21] At first read fairness would be a matter of balance in the user-gatekeeper relationship. Yet there must be some limiting feature, since otherwise the DMA would potentially cover countless redistribution issues between business users and gatekeepers, even absent any real impact on competition or more broadly on welfare.[22] Rather, as the above excerpt indicates, fairness becomes an issue where the imbalance between gatekeeper and business user deprives the latter of adequate reward for its efforts. In technical terms, the gatekeeper uses its market power to confiscate producer surplus that would otherwise flow to the business users as a return on their efforts. Under these circumstances, as the DMA signals, the incentives of business users are adversely affected, especially as regards innovation, with a ripple effect on competition and innovation in the digital economy.[23]

7. Both objectives are linked[24] and ultimately aim to promote user choice as well as the degree and the diversity of innovation in the digital economy.[25] We have shown elsewhere how the DMA obligations promote, on the one hand, sustaining innovation by users offering complementing services on the regulated platforms and, on the other hand, disruptive innovation by entrants offering alternative services to the regulated platforms.[26]

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13 For firms, the stakes of DMA implementation and enforcement, in terms of market volume and value, are at least one and often two or more orders of magnitude higher than the costs of professional services involved therein.

14 See, for instance, the remarks of Tim Cook, Apple CEO, at the IAPP conference on 12 April 2022, where he stated that "we are deeply concerned about regulations that would undermine privacy and security in service of some other aim. Here in Washington and elsewhere, policymakers are taking steps, in the name of competition, that would force Apple to let apps onto iPhone that circumvent the App Store through a process called sideloading. (. . .) But if we are forced to let unvetted apps onto iPhone, the unintended consequences will be profound": https://9to5mac.com/2022/04/12/tim-cook-privacy-speech-iapp.

15 Outside of the operative clauses, recitals 13 and 14 provide some characteristics of core platform services.

16 Article 12(5) DMA provides some guidance on the type of practices that would lead to the imposition of supplementary obligations.

17 DMA, recitals 32 and 33. *See also* Article 12(5).

18 H. Schweitzer, The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of The Digital Market Act Proposal, *ZEuP*, No. 3, 2021, pp. 503–544, at 509–518.

19 DMA, recital 32. Also, Article 12(5b).

20 Ibid., recital 32 states that "the position of the gatekeeper may be entrenched to such an extent that inter-platform competition is not effective in the short term, meaning that intra-platform competition needs to be created or increased."

21 Ibid., recital 33. Also, Article 12(5a).

22 Indeed there are situations where firms at different levels of the value chain will argue over the distribution of the total profit to be realized on a given product, without the outcome of that argument having any significant impact on the final user in terms of price or otherwise. In such situations, the final distribution will reflect the relative power of firms, and it is difficult to assess that distribution based on objective criteria. An argument has been made that many FRAND disputes between standard essential patent (SEP) holders and implementors fit that description, and hence that it was not justified to invest competition enforcement time and resources in these disputes. Schweitzer, *supra* note 18, also suggests to interpret the fairness objective with reference to competition and cautions against a pure distributional interpretation of this objective.

23 In the same vein, J. Crémer et al., Fairness and Contestability in The Digital Market Act, Yale Tobin Center for Economic Policy, *Policy Discussion Paper* No. 3, 2021, at 6 define fairness as "*the organization of economic activity to the benefit of users in such ways that they reap the just rewards for their contributions to economic and social welfare and that business users are not restricted in their ability to compete*."

24 DMA, recital 34.

25 Ibid., recital 32 notes that "weak contestability reduces the incentives to innovate and improve products and services for the gatekeeper, its business users, its challengers and customers and thus negatively affects the innovation potential of the wider online platform economy." Also Article 12(5b).

26 P. Larouche and A de Streel, The European Digital Markets Act: A Revolution Grounded on Traditions, *JECLAP*, Vol. 12, Issue 7, 2021, pp. 542–560, at 548–552. On the link between contestability, fairness and innovation, *see also* Crémer et al., *supra* note 23.

8. The second tool to calibrate the DMA compass relates to the obligations. The DMA contains a list of twenty-two prohibitions and obligations included in three separate provisions. Article 5 enumerates nine items, mostly prohibitions, which are supposed to be self-explanatory and self-executing. Article 6 lists twelve items, mostly obligations, which may require additional specification by the Commission. Finally, Article 7 adds a horizontal interoperability obligation among communications apps, which requires a phased implementation given its complexity. Even if the DMA itself does not cluster these prohibitions and obligations,[27] we suggest regrouping them around four categories which are linked to the objectives.

– Preventing anti-competitive leverage from one service to another. This category includes the prohibition on tying one regulated core platform service with another regulated CPS or with identity or payment services,[28] as well as the prohibition of specific discriminatory or self-preferencing practices.[29]

– Facilitating business and end users switching and multi-homing, thereby reducing entry barriers arising from demand. This category includes the prohibition of most-favoured-nation (MFN) clauses, anti-steering and anti-disintermediating clauses or disproportionate conditions to terminate service.[30] It also includes the obligation to ensure that it is easy to install apps or change defaults as well as to port data outside core platform services.[31]

– Opening platforms and data, thereby reducing supply-side entry barriers and facilitating the entry of complementors, competitors and disruptors. This category includes horizontal and vertical interoperability obligations,[32] fair, reasonable and non-discriminatory (FRAND) access to app stores, search engine and social networks,[33] data access for business users and data sharing among search engines on FRAND terms.[34]

– Increasing transparency in the opaque and concentrated online advertisement value chain. This more specific category includes transparency obligations on price and performance indicators to the benefit of advertisers and publishers.[35]

9. The first category includes mostly prohibitions that are inspired by competition cases[36] and are hence drafted in a relatively detailed manner. The second and—especially—the third categories include mostly obligations couched in more general terms and sometimes going beyond what could be imposed by way of competition law remedies. Each of these categories points to different aspects of contestability and fairness, as defined above. When the obligations are read together with the corresponding recitals, it becomes apparent that almost all of them relate to contestability, and many of them to fairness as well. The justifications set out in the recitals often blend contestability and fairness, underlining that they are indeed linked and that contestability seems to be the leading objective.

10. The third tool to calibrate the DMA compass emanates from the regulatory principles, in particular proportionality.[37] The principle of proportionality includes both effectiveness and necessity.[38] In our opinion, proportionality is likely to play a central role in the debates and discussions concerning the interpretation and implementation of the DMA, since it provides a template to analyse and eventually challenge a measure taken under the DMA. In order to understand how that role could unfold, a comparison can be made with the efficiency defence that is now available across all of competition law.

11. Some commentators deplored the absence of any efficiency defence under the DMA.[39] It might be more accurate to say that, in accordance with the avowedly regulatory nature of the DMA, the efficiency defence as it is raised in individual competition law proceedings[40] has been replaced with a discussion of proportionality in relation to the measures taken under the DMA.[41] Whereas the efficiency defence allows the defending firm to challenge the very core of the competition law analysis (is there any reduction of consumer welfare?), a proportionality analysis is more focused. Indeed, under proportionality it is usually assumed that the intervention at issue pursues a legitimate goal, and the only issues are whether that intervention can actually achieve that goal (effectiveness) and whether there is no less restrictive measure to achieve that goal (necessity).

27 For a critique of lack of clustering *see* N. Petit, The Proposed Digital Markets Act (DMA): A Legal and Policy Review, *JECLAP*, Vol. 12, Issue 7, 2021, pp. 529–541.

28 DMA, Article 5(7) and 5(8).

29 Ibid., Article 6(2) regarding the prohibition of data in dual role setting and Article 6(5) regarding the prohibition of self-preferencing in rankings.

30 Ibid., Article 5(3) regarding MFN, Article 5(4) and 5(5) regarding intermediation, and Article 6(13) regarding service termination.

31 Ibid., Article 6(3) and 6(6) regarding app uninstallation and default setting changes and Article 6(9) regarding data portability.

32 Resp. DMA, Article 7 for horizontal interoperability and Article 6(4) and 6(7) for vertical interoperability including side loading.

33 Ibid., Article 6(12).

34 Ibid., Article 6(10) and 6(11).

35 Ibid., Article 5(9) and 5(10) regarding price transparency and Article 6(8) regarding performance transparency.

36 For a correlation between DMA obligations and antitrust cases, *see* A. de Streel and P. Larouche, The European Digital Markets Act proposal: How to improve a regulatory revolution, *Concurrences* No. 2-2021, art. No. 00432, pp. 46–63.

37 In addition to the general principle of proportionality at Article 5(4) TEU and in CJEU case law, the DMA itself states that Commission measures must be proportionate at Articles 8(3), 8(7), 18(1), 18(2), 18(4) and recitals 27–29, 65–67, 75, 86. Conversely, proportionality also applies to the technical measures that gatekeepers can adopt by way of exception to certain obligations: Articles 6(4), 6(7) and 7(9) and recitals 50 and 62.

38 Article 5(4) TEU. The DMA refers to effectiveness and necessity throughout.

39 Among others, P. Ibáñez Colomo, The Draft Digital Markets Act: A Legal and Institutional Analysis, *JECLAP*, Vol. 12, Issue 7, 2021, pp. 561–575, at 568 and, for some obligations, L. Cabral, J. Haucap, G. Parker, G. Petropoulos, T. Valletti, and M. Van Alstyne, *The EU Digital Markets Act: A Report from a Panel of Economic Experts*, Office of the European Union, Luxembourg, 2021.

40 Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7, paras. 28–31. Even though the track record of the efficiency defence in formal litigation is meagre, efficiency arguments are probably more successful at the investigation stage.

41 Some of which are more in the nature of a generally applicable legislative measure than an individual decision.

12. In the context of the DMA, the proportionality principle would imply that contestability and fairness are accepted as valid core goals, and that the only issues are whether the Commission measure effectively leads to contestability and fairness and whether it is necessary, in the sense that the same result might be achieved through market forces alone or through a less intrusive measure. In other words, any type of "efficiency defence" argument is beside the point, unless it goes to show that the conduct or the defendant firm already achieves—in whole or in part—the contestability and fairness objectives as defined in the DMA. The proportionality principle therefore allows linking the DMA objectives directly to its interpretation and implementation. Seen from that perspective, the proportionality principle channels the economic analysis that underpins an efficiency defence into a narrower framework. It also compels the defendant firm to work within the specific set of core goals of the DMA. In that sense, perhaps the proportionality principle can contribute to addressing the main concern that led the EU to enact the DMA—namely, that competition law enforcement was too time – and resource-intensive because of the extended use of economic analysis at every stage.

13. To sum it up, the DMA interpretation and implementation compass can be calibrated with a combination of (i) the objectives of contestability (understood as lowering entry barriers) and fairness (understood as a balanced relationship where the innovation incentives of users are not defeated through confiscation of their reward); (ii) clustered obligations around the prevention of anti-competitive leverage, the facilitation of users switching and the opening of platforms (hence lowering entry barriers on the demand and supply side); and (iii) the proportionality test as a template to ensure that debates take place in the light of DMA objectives. That compass can be used to indicate success, e.g. in the level and the diversity of innovation as well as user choice in the European digital markets.

III. The direction of EU Big Tech regulation

14. In turn, this DMA compass should set the direction for the future of EU digital markets regulation. By including competition in the analysis at all stages (objectives, obligations and proportionality test), the DMA would complement competition law in order to make digital markets work better and stimulate inter and intra-platform competition. The DMA then comes closer to the "managed competition" model that underpins other bodies of EU economic regulation, such as electronic communications law.[42] Managed competition implies that competition plays a central role at all times, but that the regulatory framework helps to channel or structure it.

15. While "managing competition" seems to us the best future for the DMA, two other future scenarios are possible but seem less desirable: fossilization and gatekeeper entrenchment. In the fossilization scenario, the detailed rules of the DMA will be at best quickly outdated and at worst immediately circumvented. Ultimately, the DMA would remain a piece of paper in the Official Journal, with much ado about nothing. The risk of fossilization has been taken seriously by the EU lawmakers as the DMA provides for a broad anti-circumvention clause and for the possibility that the Commission updates the obligations with a delegated act (which is akin to a simplified and expedited legislative procedure).[43] Those will have to be used effectively now by the Commission to avert fossilization. Then in the future, when the DMA is revised and experience has been gained, a move towards more flexible and standards-based provisions may be conceivable in order to increase the resilience of the DMA in an environment that is moving rapidly.[44]

16. In the gatekeeper entrenchment scenario, the DMA becomes a kind of all-encompassing "public utility" regulation on the US model while the role of competition recedes and fades away.[45] It is true that, under this scenario, users of the platforms are likely to be well-protected and gatekeeper-user relationships will probably be fair. At the same time, extensive regulation will probably not support entry that could threaten gatekeeper power; rather, it is bound to entrench the gatekeeper position. In other words, the DMA may well protect complementors but would fail to stimulate market forces and encourage the entry of new platforms either as frontal competitors or as diagonal disruptors. This is a scenario that we have seen in some utilities and financial sector regulation, where an increase of regulation did not lead to a proportional increase in competition. Given the fact that innovation and competition may potentially be strong in the digital markets[46] and that, when platforms and data are open, the benefit of network and ecosystem effects may be combined with competition, we think that a natural monopoly/public utility type of regulation would not necessarily be a good future for EU digital regulation.[47]

42 L. Hancher and P. Larouche, The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest, in *The Evolution of EU Law*, P. Craig and G. de Búrca (eds.), 2nd ed., Oxford University Press, 2011, pp. 743–781.

43 DMA, Articles 12 and 13.

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

45 For requests for a public utilities regulation for digital platforms *see*, among others, F. A. Pasquale, Internet Nondiscrimination Principles Revisited, *Brooklyn Law School Legal Studies Papers* No. 655, 2020.

46 N. Petit, Big Tech and the Digital Economy: The Moligopoly Scenario, Oxford University Press, 2020.

47 Similarly, Schweitzer, *supra* note 18, at 542 recommends that the DMA should not be read as, or evolve into, a regime of public utility regulation. In the US, W. P. Rogerson and H. Shelanski, Antitrust Enforcement, Regulation, and Digital Platforms, *U. Pa. L. Rev.*, Vol. 168, 2020, pp. 1911–1940 warn against public utility type regulation for the digital platforms and recommend a "light-handed pro-competitive regulation," which is similar to our concept of managed competition.

17. If there is a common feature between these two undesirable scenarios, it is probably a confrontational relationship between the regulatory authority and the regulated firms. In the fossilization scenario, the firms end up outsmarting the authority. In the gatekeeper entrenchment scenario, protracted conflict leads the regulatory authority to intervene excessively, with overbearing regulation as a result (and the risk of regulatory capture if the firms do outwit the authority and entrench their position on favourable terms).[48] In the end, the fate of DMA interpretation and enforcement could therefore hinge on whether the European Commission, regulated gatekeepers and users succeed in developing a cooperative relationship that breaks from the more adversarial approach that characterizes competition law enforcement.[49] The institutional framework of the DMA, which has been made more participatory during the legislative negotiations, and our compass can be a guide on that journey. Firms also need to move away from an attitude whereby they expect authorities to spell out every detail of the obligations they must comply with,[50] towards a form of co-ownership of the regulatory process. In that sense, managed competition under the DMA could turn out to be "co-managed" by the authorities and the firms.[51] ■

48 Another possible scenario would be that the authority succeeds to keep its focus on managing competition, but is mired in endless debates with the firms. This would bring us back to the current situation with competition law enforcement.

49 On the need for participatory regulation, A. de Streel and M. Ledger, New Ways of Oversight for the Digital Economy, *CERRE Issue Paper*, February 2021; World Economic Forum, Agile Regulation for the Fourth Industrial Revolution: A Toolkit for Regulators, December 2020.

50 This attitude, common in US enforcement, is already difficult to reconcile with EU competition law, where the dominant firm holds a special responsibility to pay attention to competition in the markets in which it is dominant.

51 The reference to standardization at Article 48 DMA indicates that stakeholders could play a co-regulatory role in designing the technical means by which "managed competition" is implemented.

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