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The expected impact of the DMA on the antitrust enforcement of unilateral practices

Jan Blockx[*]

Abstract:

- *The DMA is unlikely to significantly change abuse of dominance enforcement by the European Commission and by NCAs.*
- *Tensions between the DMA and certain new national prohibitions of uniliteral practices are more likely, with their resolution depending on the interpretation of the Articles 1(5) and 1(6) of the DMA.*
- *In addition, for gatekeepers, the existence of regulatory obligations under the DMA may have an interpretative effect when assessing the existence of an abuse of dominance.*
- *However, spill overs to non-gatekeepers are unlikely.*

I. Introduction

In the digital economy, large internet platforms like Meta, Alphabet, Apple, Microsoft and Amazon (also known under the acronym 'MAAMA' or, by reference to Meta's Facebook and Alphabet's Google businesses, as 'GAFAM') are the pinnacles of economic power. Opinion makers have long disagreed as to whether the role these companies play in the (digital) economy is ultimately beneficial or not, but by 2020, a consensus was emerging in several jurisdictions that certain characteristics and types of behaviour of these large internet platforms are problematic.[1]

At the same time, there was a concern that existing policy tools were insufficient to address these characteristics and types of behaviour. In the European Union in particular, the main policy tool was European competition law, in particular the enforcement of Article 102 TFEU, which prohibits the abuse of dominance. Such enforcement had many shortcomings, however, including that it is time-intensive, intervenes after the fact, and requires the

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[1] See, in particular, the following reports prepared in the UK, the EU and the US respectively: Jason Furman, Diane Coyle, Amelia Fletcher, Derek McAuley and Philip Marsden, *Unlocking Digital Competition*, 2019; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era*, 2019; Fiona Scott Morton, Pascal Bouvier, Ariel Ezrachi, Bruno Jullien, Roberta Katz, Gene Kimmelman, Douglas Melamed, and Jamie Morgenstern, *Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee*, 2019.

definition of relevant markets. Specific legislation that had been adopted in recent years, such as the platform-to-business regulation,[2] also provided limited effectiveness.

At the end of 2020, the European Commission therefore issued a proposal to make digital markets more contestable and fair.[3] Following the ordinary legislative proceeding, the proposal was adopted in first reading by the European Parliament and the Council. On 12 October 2022, the Digital Markets Act (or abbreviated: DMA) was published in the Official Journal of the European Union.[4]

The DMA contains a number of obligations and prohibitions that apply to gatekeepers of so-called 'core platform services'. Core platform services are defined as online intermediation services in the sense of Article 2(2) of the platform-to-business regulation, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services.[5]

An undertaking is considered a gatekeeper of these core platform services if it is designated as such by the European Commission. If an undertaking meet certain quantitative thresholds,[6] it is presumed to act as gatekeeper: it is then required to notify the Commission of this fact and, absent exceptional circumstances, the Commission will designate it as gatekeeper. Since some of these quantitative thresholds are based on data which is not public, it remains to be seen which undertakings fall in this category. Initial studies estimate that 10-15 undertakings would meet these thresholds, including the MAAMA.[7] Furthermore, even if the quantitative thresholds are not met and the presumption does not apply, the Commission can still designate a company as a gatekeeper, following a market investigation.[8]

Undertakings that are designated as gatekeeper of a core platform service are required to comply with the obligations and prohibitions which are contained in the Articles 5 to 7 of the DMA. While Article 5 contains a number of obligations and prohibitions which are meant to be 'self-executing',[9] those in Article 6 are – in the wording of the Article itself – 'susceptible of

[2] Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57.

[3] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final, 3.

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

[5] Article 2(2) of the DMA.

[6] These are contained in Article 3(2) of the DMA: the presumption applies if (a) an undertaking provides the same core platform service in at least three Member States, (b) it provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the EU and at least 10,000 active business users established in the Union, and (c) it achieves an annual EU turnover of at least EUR 7.5 billion in each of the last three financial years or its average market capitalization or equivalent fair market value amounts to at least EUR 75 billion in the last financial year.

[7] See Mario Mariniello and Catarina Martins, 'Which platforms will be caught by the Digital Markets Act? The "gatekeeper" dilemma', *Bruegel* 14 December 2021, available at https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma.

[8] Article 3(8) of the DMA.

[9] Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final, 13.

being further specified'. Article 7 contains obligations as to the interoperability of number-independent interpersonal communications services. Examples of the obligations and prohibitions of the Articles 5 to 7 of the DMA are provided below.

Enforcement of the DMA is largely in the hands of the European Commission, which has extensive powers of investigation for this purpose, including the ability to collect information from gatekeepers and third parties, and the ability to conduct unannounced inspections.[10] If it establishes that a gatekeeper has failed to comply with any of the obligations and prohibitions in the Articles 5 to 7 of the DMA, the Commission can impose fines of up to 10% of the worldwide turnover of the gatekeeper (up to 20% in case of recidivism).[11]

II. The intended relationship between the DMA and the antitrust enforcement of unilateral practices

Recital 10 of the DMA states that it is meant to be 'complementary' to the European and national antitrust rules, including the rules prohibiting the abuse of dominant positions (enshrined in Article 102 TFEU as far as EU law is concerned). Also the Explanatory Memorandum to the European Commission's proposal for the DMA stated that it was meant to complement the antitrust rules because some of the practices covered 'fall outside the existing EU competition rules'.[12]

At the same time, the DMA clearly also covers practices that were prohibited by existing antitrust rules, in particular by Article 102 TFEU. Several commentators indeed observed the similarity between the prohibited practices in the Articles 5 and 6 of the DMA and the enforcement practice of Article 102 TFEU.[13] The most obvious precedents in the Commission decisional practice of Article 102 TFEU for prohibited practices in the Articles 5 and 6 of the DMA are listed in Table 1 below (reference is made to the press release for brevity).

Table 1: Precedents for DMA provisions

DMA provision	Precedent in Article 102 TFEU decisions
Article 5(3)	**EC commitment decision of 4 May 2017 in case AT.40153 *E-book MFNs and related***

[10] See, in particular, the Articles 21 and 23 of the DMA.
[11] Article 30 of the DMA.
[12] Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final, 3.
[13] See, for example, Alexandre de Streel, Bruno Liebhaberg, Amelia Fletcher, Richard Feasey, Jan Krämer and Giorgio Monti, 'The European proposal for a digital markets act: a first assessment', https://cerre.eu/wp-content/uploads/2021/01/CERRE_Digital-Markets-Act_a-first-assessment_January2021.pdf, 16-18 and references there; Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12(7) Journal of European Competition Law & Practice 529, 532; Pinar Akman, 'Regulating competition in digital platform markets: a critical assessment of the framework and approach of the EU Digital Markets Act' (2022) 47(1) European Law Review (85) 94-96; and Giuseppe Colangelo, 'The Digital Markets Act and EU Antitrust Enforcement Double & Triple Jeopardy' ICLE White Paper 2022-03-23. See also OECD, *Competition Enforcement and Regulatory Alternatives* (2022) OECD Competition Committee Discussion Paper, 31-32, http://oe.cd/cera.

'The gatekeeper shall not prevent business users from offering the same products or services to end users through third-party online intermediation services … at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper'	***matters (Amazon)*** (press release IP/17/1223) 'clauses requiring publishers to offer Amazon similar non-price and price terms and conditions as those offered to Amazon's competitors'
Article 5(7) 'The gatekeeper shall not require … business users … to offer … a web browser engine'.	**EC fining decision of 18 July 2018 in case AT.40.009 *Google Android***[14] (press release IP/18/4581) 'required manufacturers to pre-install the … browser app (Chrome)'
Article 6(5) 'The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party'	**EC fining decision of 27 June 2017 in case AT.39.740 *Google Shopping***[15] (press release IP/17/1784) 'has systematically given prominent placement to its own comparison shopping service' 'has demoted rival comparison shopping services in its search results'

In addition, there are a number of ongoing abuse of dominance investigations by the Commission[16] and various decisions (and ongoing investigations) by national competition authorities (NCAs)[17] that concern practices that appear to be covered by the DMA in the future.

To be sure: the Commission has pointed out that the DMA does not merely cover practices that are currently prohibited under the antitrust rules.[18] For example, certain transparency

[14] Largely upheld by the General Court in Case T-604/18 *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541.

[15] Largely upheld by the General Court in Case T-612/17 *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763.

[16] See, for example, Articles 5(4) and (5) of the DMA and the Commission opening of proceedings of 16 June 2020 in Case COMP/AT.40.437 *Apple App Store Practices (Music Streaming)*; Article 5(9) of the DMA and the Commission opening of proceedings of 22 June 2021 in Case COMP/AT.40.670 *Google AdTech and Data Related Practices*; Article 6(2) of the DMA and the Commission opening of proceedings of 17 July 2019 in Case COMP/AT.40.462 *Amazon Marketplace* (in the meantime adopted as commitment Decision of 20 December 2022 in Case COMP/AT.40462 Amazon Marketplace); and Articles 5(7) and 6(12) of the DMA and the Commission opening of proceedings of 16 June 2020 in Case COMP/AT.40.716 *Apple App Store Practices*.

[17] See, for example, Article 5(2) of the DMA and the Decision of the German Federal Cartel Office of 6 February 2019 in Case B6-22/16 *Facebook*; Article 5(3) of the DMA and several investigations into price parity clauses by national competition authorities including the Decision of the German Federal Cartel Office of 20 December 2013 in Case B9-66/10 *HRS*; Article 5(7) and 6(12) of the DMA and the Decision of the Dutch Authority for Consumers and Markets of 24 August 2021 in Case 19/035630 *Apple Dating Apps*.

[18] European Commission, Note for the 71st OECD Working Party 2 meeting on 7 June 2021 on Competition Enforcement and Regulatory Alternatives, 14, https://one.oecd.org/document/DAF/COMP/WP2/WD(2021)13/en/pdf.

obligations contained in the DMA (e.g. in Article 5(9)-(10) and Article 6(8)-(10)), as well as the interoperability obligations of Article 7 seem hard to fit into the existing Article 102 TFEU case law. Furthermore, it has been argued that even provisions in the Articles 5-6 DMA that contain wording that is reminiscent of (Commission decisions and/or case law on) Article 102 TFEU may need to be interpreted differently.[19]

Nevertheless, *to the extent that* the same conduct is prohibited under the DMA as under Article 102 TFEU, the DMA is just another *tool* to address conduct that was already covered by existing rules. This raises the question what the impact will be of the DMA on the enforcement of the antitrust rules, and in particular on prohibitions of certain unilateral practices (including the abuse of dominance)?

This paper looks at two ways this impact may arise. Section III considers how the DMA may impose limits on the antitrust enforcement of the prohibition of unilateral practice, both by the European Commission and by NCAs. Section IV considers the possible effect the DMA may have on the interpretation of prohibitions of unilateral practices in antitrust enforcement, both by the European Commission and by NCAs.

III. Limitations imposed by the DMA on antitrust enforcement

A. Cannibalization of Commission enforcement of abuse of dominance

Article 1(6) of the DMA explicitly provides that it 'is without prejudice to the application of Articles 101 and 102 TFEU' and the merger control rules.[20] There is therefore nothing in the DMA that would prevent the Commission from pursuing a case as an abuse of dominance in the sense of Article 102 TFEU instead of a breach of one of the obligation of the Articles 5-7 of the DMA.

However, as indicated earlier, part of the logic of the proposal and adoption of the DMA is clearly that antitrust investigations are too slow and difficult to adequately address certain conduct of gatekeepers. The DMA is meant to create a more effective enforcement framework for such cases, in particular because (i) it will no longer require the establishment of a dominant position (the designation of gatekeeper of a core platform service suffices) and (ii) it will no longer require that the Commission explains why the conduct is abusive (the prohibition in the Articles 5-7 of the DMA suffices).

In those circumstances, the Commission is likely to prefer to pursue cases under the DMA provided (i) the conduct is attributable to a designated gatekeeper of core platform services and (ii) the conduct clearly falls within the Articles 5-7 of the DMA.[21] How easily these

[19] See also Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2022) European Competition Journal, 8 https://doi.org/10.1080/17441056.2022.2156728.
[20] Article 1(6) of the DMA.
[21] Giorgio Monti, 'The Digital Markets Act: Improving Its Institutional Design' (2021) 5(2) European Competition and Regulatory Law Review (90) 98 even states that the Commission would be 'ill-advised' to resort to Article 102 TFEU in such cases.

conditions will be fulfilled remains to be seen. As to the first condition: rumour has it that potential gatekeepers are already preparing legal challenges against their qualification as such.[22]

On the second condition: while it is often stated that (contrary to Article 102 TFEU) the Articles 5-7 of the DMA do not allow for an efficiency defence,[23] these Articles still leave quite some room for manoeuvre. Indeed, recital (23) of the DMA merely states that alleged efficiencies are irrelevant for the determination of a firm as a gatekeeper; it does not say anything about the role of efficiencies in the conduct covered by the Articles 5-7 of the DMA.[24] These Articles do not mention whether efficiency defences are available or not, in just the same way as Article 102 TFEU – and the latter has been interpreted as incorporating an efficiency defence.[25] In addition, at least in relation to the obligations and prohibitions of Article 6 and 7, the DMA explicitly provides for a regulatory dialogue.[26]

In any event, any preference which the Commission may have to pursue a case under the DMA as opposed to Article 102 TFEU is limited to instances where these two conditions are fulfilled. As is apparent from the cases discussed in Table 1, this would mean that three cases that were investigated in the last few years as an abuse of dominance may in the future be investigated as a breach of the DMA. However, despite the press coverage given to the cases mentioned in Table 1, this is only a small share of all abuse of dominance investigations conducted by the Commission. Indeed, apart from the 3 cases mentioned in Table 1, the Commission adopted 11 other abuse of dominance decisions in the five year period 2017-2021. Most of these cases would not be caught by the DMA simply because they do not concern core platform services. These were cases concerning sports,[27] energy,[28] telecommunication chips,[29] pharma,[30] and various other sectors.

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[22] See Samuel Stolton, 'EU braces for Big Tech's legal backlash against new digital rulebook', *Politico* 10 August 2022, available at https://www.politico.eu/article/eu-brace-legal-assault-against-digital-clampdown.

[23] See, for example, Luis Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso Valletti, Marshall Van Alstyne, *The EU Digital Markets Act: A report from a panel of economic experts*, https://op.europa.eu/o/opportal-service/download-handler?identifier=329fb9b1-6c1a-11eb-aeb5-01aa75ed71a1&format=pdf, 11; Giuseppe Colangelo, 'The Digital Markets Act and EU Antitrust Enforcement Double & Triple Jeopardy' ICLE White Paper 2022-03-23, 8 and 15; and Anne C. Witt, 'Platform regulation in Europe – per se rules to the rescue?' (2022) 18(3) Journal of competition law & economics (670) [page number].

[24] See also Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12(7) Journal of European Competition Law & Practice (529) 538.

[25] See already Case 27/76 *United Brands v Commission*, EU:C:1978:22, para 184, but even more explicitly Case C-95/04 P *British Airways v Commission*, EU:C:2007:166, para 86.

[26] Article 8(3) of the DMA. The functioning of this process is more detailed in the final text of the DMA compared to the original proposal of the Commission (where it was in Article 7(2), although it remains limited in scope. See, for criticism of the original proposal, Giorgio Monti, 'The Digital Markets Act: Improving Its Institutional Design' (2021) 5(2) European Competition and Regulatory Law Review (90) 93-95.

[27] As in the Commission Decision of 8 December 2017 in *International Skating Union's Eligibility rules* (Case COMP/AT.40.208).

[28] As in the Commission Decision of 17 December 2018 in *BEH gas* (Case COMP/AT.39.849).

[29] As in the Commission Decision of 18 July 2019 in *Qualcomm (predation)* (Case COMP/AT.39.711).

[30] As in the Commission Decision of 10 February 2021 in *Aspen* (Case COMP/AT.40.394).

Furthermore, even if a case actually concerns core platform services *and* firms that may well qualify as gatekeepers, that does not mean that the conduct will necessarily fall within the Article 5-7 of the DMA. For example, the Commission's decision in the Google AdSense case[31] concerned, in the words of the press release, 'exclusivity clauses' which 'meant that publishers were prohibited from placing any search adverts from competitors on their search results pages'.[32] While some provisions of the DMA concern access of business users such as publishers to competing services, none of them seems to specifically prohibit this conduct. Therefore, even this case against gatekeeper Google would likely have to continue to be pursued under Article 102 TFEU in the future.

Of course, in cases where the same conduct would be investigated under both the DMA and Article 102 TFEU, care will need to be taken that the Commission complies with the *ne bis in idem* principle (prohibition of double jeopardy).[33] This will be particularly important in instances where gatekeepers of core platform services engage in conduct that partially does and partially does not fall under the Articles 5-7 of the DMA. A detailed discussion of the application of the *ne bis in idem* principle falls outside of the scope of this paper.[34]

In conclusion, the DMA does not limit the Commission's ability to enforce the prohibition of abuse of dominance in Article 102 TFEU. It instead provides the Commission with an additional tool to pursue such cases. Given the advantages of this new tool, the Commission is likely to use it when possible, although the narrow scope of the DMA means that the Commission will continue to (have to) use antitrust enforcement Article 102 TFEU in most instances.

B. Restricting NCA enforcement of unilateral practices

As indicated above, the DMA will be mainly enforced by the European Commission. Recital 91 of the DMA even states that '[t]he Commission is the sole authority empowered to enforce this Regulation.' That means that national (competition) authorities cannot adopt decisions under the DMA. NCAs can nevertheless support the Commission's enforcement in some circumstances: the Commission may request them to assist it in monitoring gatekeepers'

[31] Commission Decision of 20 March 2019 in *Google Search (AdSense)* (Case COMP/AT.40.411).
[32] Commission press release IP/19/1770 of 20 March 2019.
[33] How this principle applies in the case of concurrent application of regulatory obligations and competition law was recently clarified in Case C-117/20 *bpost*, EU:C:2022:202 and Case C-151/20 *Nordzucker and Others*, EU:C:2022:203.
[34] Following the judgments mentioned in the previous footnote, several publications on the application of the *ne bis in idem* principle on parallel proceedings under the DMA and antitrust law were recently published: e.g. Dimitrios Katsifis, 'Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part II', *The Platform Law Blog* (29 March 2022), https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/; Alba Ribera Martinez, 'An inverse analysis of the digital markets act: applying the ne bis in idem principle to enforcement' (2022) European Competition Journal, https://doi.org/10.1080/17441056.2022.2156729.

compliance with obligations under the DMA,[35] in carrying out market investigations[36] and inspections,[37] and NCA officials may attend interviews conducted by the Commission.[38]

The question in this section is whether the DMA restricts the ability of NCAs to pursue unilateral practices under the antitrust rules. In what follows, I distinguish between limitations posed by the DMA on national enforcement of abuse of dominance cases (point i) and national enforcement of other rules prohibiting unilateral practices (point ii).

1. Limitation on NCA abuse of dominance enforcement

Article 1(6) of the DMA not only provides that it is without prejudice to the European antitrust and merger rules, but also to the application of:

> *(a) national competition rules prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions*

Therefore, the DMA does not affect the ability of the NCAs to find and punish infringements committed by non-gatekeeper companies of Article 102 TFEU and national rules prohibiting the abuse of dominance.

On the other hand, if a national competition authority 'intends to launch an investigation on gatekeepers' based on the competition rules, it needs to inform the Commission of this beforehand.[39] The same applies if the national competition authority 'intends to impose obligations on gatekeepers'.[40] This obviously provides an opportunity for the Commission and the national competition authority to discuss the best way of approaching the case. In both instances, the Commission can also relieve the national authority of its enforcement powers but this is not a power that has been granted by the DMA. It is a power that already existed under Regulation 1/2003 and requires the Commission to open its own antitrust investigation into the practices.[41]

Under the DMA, the Commission can only relieve the national authority of its enforcement powers if the national competition authority is conducting an 'investigation into a case of possible non-compliance with Articles 5, 6 and 7 of this Regulation on its territory'.[42] In those circumstances, the Commission can pull the case in by opening an investigation under the DMA.[43] In those specific circumstances, therefore, the institutional structure of the DMA provides for a clear no-conflict rule. Furthermore, even after the Commission has concluded

[35] Article 26(2) of the DMA.
[36] Article 16(5) of the DMA.
[37] Article 23(3) and (7) of the DMA.
[38] Article 22(2) of the DMA.
[39] Article 38(2) of the DMA.
[40] Article 38(3) of the DMA.
[41] See Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
[42] Article 38(7), first paragraph of the DMA.
[43] Article 38(7), second paragraph of the DMA.

an investigation, the DMA avoids conflict by providing that national authorities cannot adopt decisions that run counter to a decision adopted by the Commission under the DMA.[44]

NCAs therefore retain unfettered powers to conduct investigations into behaviour by gatekeepers that is not specifically prohibited by the DMA but that may still constitute an abuse of dominance. As discussed before, the DMA leaves plenty of scope for such investigations. Specific issues may arise, however, in cases where conduct partially falls within and partially outside of the provisions of the Articles 5-7 of the DMA. What if conduct prohibited by the DMA is combined with other abusive conduct, but the damaging effect of the conduct is the result of both? Tricky issues may arise in those circumstances and the national competition authority will in any event need to avoid adopting a decision that runs counter to a decision adopted by the Commission under the DMA. In practice, therefore, the Commission may prefer to deal with such cases under its own antitrust enforcement powers. In any event, to the extent that a national competition authority would open a parallel investigation and would impose a fine for such conduct, it will have to take into account the *ne bis in idem* principle (see above).

2. Limitations on other NCA enforcement of unilateral practices

Article 1(6) of the DMA further provides that it is without prejudice to:

> *(b) national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers*

Regulation 1/2003 specifically allows member states to have stricter rules in relation to unilateral conduct than those provided by Article 102 TFEU.[45] While this possibility was provided by Regulation 1/2003 because some EU member states already had such rules prior to 2004,[46] the number of such stricter rules has grown rapidly in recent years.[47] In many instances, such rules cover unilateral behaviour by companies that do not (necessarily) meet the criteria to be considered 'dominant' in the sense of Article 102 TFEU: they concern abuse of 'economic dependence' or 'relative market power'.

To the extent that such rules are applied to undertakings other than gatekeepers, there is no conflict with the DMA, but Article 1(6)(b) also explicitly allows such additional national rules if they impose further obligations on gatekeepers. Indeed, several member states have

[44] Article 1(7) of the DMA. The same is true of national courts which are nevertheless competent to apply the DMA themselves (see Article 39(5) of the DMA).
[45] See Article 3(2) *in fine* of Regulation 1/2003 of 16 December 2022 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
[46] For example, in Germany where they have existed since 1973, and France where they were introduced in 1986.
[47] Recently such stricter rules were, for example, introduced in Austria (Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021, published in the Bundesgesetblatt für die Republik Österreich on 9 September 2021) and Belgium (Loi modifiant le Code de droit économique en ce qui concerne les abus de dépendance économique, les clauses abusives et les pratiques du marché déloyales entre entreprises, published in the Moniteur belge on 24 May 2019).

considered adopting stricter rules that are specifically targeted at digital platforms which may qualify as gatekeepers in the sense of the DMA.[48] In Italy, this was done through the introduction of a presumption that undertakings using intermediation services provided by a digital platform that plays a decisive role in reaching end users or suppliers (including because of network effects or data availability) are dependent on that platform.[49] In Germany, a new sec. 19(a) was introduced in the Act against Restraints of Competition (GWB) which prohibits certain conduct by 'undertakings of paramount significance for competition across markets'.[50]

Looking only at Article 1(6) of the DMA, these national rules appear to still be permitted by the DMA. However, Article 1(5) of the DMA also provides:

> *In order to avoid the fragmentation of the internal market, Member States shall not impose further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets. Nothing in this Regulation precludes Member States from imposing obligations on undertakings, including undertakings providing core platform services, for matters falling outside the scope of this Regulation, provided that those obligations are compatible with Union law and do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation.*

Article 1(5) and 1(6) of the DMA seem to contradict one another, with the latter 'allowing national competition rules prohibiting unilateral conduct' even if they amount to the 'imposition of further obligations on gatekeepers', while the former prohibits Member States from imposing 'further obligations on gatekeepers … for the purpose of ensuring contestable and fair markets' and any obligations that 'result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation'.

There a few ways to reconcile the two provisions. One possible approach starts from the objective of the rules in question. This is based on the statement in recital (11) of the DMA that it 'pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms'. National rules prohibiting unilateral conduct in order to protect undistorted competition would then fall outside of the scope of Article 1(5) of the DMA and would be permitted by Article 1(6) of the DMA. However, the objectives of the DMA and their relationship with the objectives of the antitrust rules are subject to a lot of controversy in the literature.[51] Determining whether

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[48] It is precisely because of this that Article 114 TFEU could be used as a legal basis per the case law (see in particular Case C-376/98 *Germany v European Parliament and Council (Tobacco Advertising I)*, EU:C:2000:544 and Case C-380/03 *Germany v European Parliament and Council (Tobacco Advertising II)*, EU:C:2006:772). For a more critical view on the legal basis of the DMA, see Alfonso Lamadrid de Pablo and Nieves Bayón Fernández, 'Why the proposed DMA might be illegal under Article 114 TFEU, and how to fix it' (2021) 12(7) Journal of European Competition Law & Practice 576.

[49] Article 33(1)(a) of the Legge n. 118/2022 – Legge annuale per il mercato e la concorrenza 2021, published in the Gazzetta Ufficiale della Repubblica Italiana on 12 August 2022.

[50] Introduced by the 10th GWB Novelle of 18 January 2021 – Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB-Digitalisierungsgesetz).

[51] See, e.g. Or Brook & Magali Eben, 'Who should guard the gatekeepers: does the DMA replicate the unworkable test of Regulation 1/2003 to settle conflicts between EU and national laws' (2022) CPI Chronicle,

national rules prohibiting unilateral conduct such as those in Italy and Germany pursue the objective of undistorted competition, as opposed to contestable and fair markets, is therefore not straightforward.

Another way to reconcile the two provisions would be to focus on the possibility provided by Article 1(5) of imposing obligations on gatekeepers, as long as these 'do not result from the fact that the relevant undertakings have the *status* of a gatekeeper within the meaning of this Regulation' (my emphasis). In that interpretation, national rules that do not build on the gatekeeper *designation* under the DMA, but merely impose obligations on undertaking *who also happen to be gatekeepers,* would still be permissible. This would be then obviously be the case for the Italian and German rules above. This would be a fairly simple solution, although it leaves open the possibility that national rules impose obligations on undertakings based on certain criteria which are similar to the criteria used to designate gatekeepers under the DMA. The latter would increase the chance of conflicts between these national rules and the DMA, and of conflicts between national rules of different Member States (which the DMA purports to overcome).

Finally, recital (10) of the DMA may provide a solution. This recital states the DMA is without prejudice to 'other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question'. If this is indeed the meaning that should be attributed to Article 1(6)(b) of the DMA, then *a contrario* Article 1(5) may be interpreted as prohibiting only national rules which are not based on such an individualised assessment. Article 1(5) of the DMA would then merely prohibit member states from imposing certain obligations on gatekeepers through generally applicable rules, while Article 1(6) of the DMA would allow member states to do so following an individualised assessment.

However, this latter interpretation raises questions as to the compatibility of a rule such as the one in sec. 19(a) GWB with the DMA. There is indeed some doubt whether that German provision is based on such an individualized assessment as it is possible to interpret this provision as containing (quasi) *per se* rules which are mechanically applied with little attention for the investigated conduct's effects on competition.[52] On the other hand, sec. 19(a) GWB allows the undertakings in question to demonstrate that the conduct is objectively justified and therefore at least allows for an individualised assessment on this basis. How this works in practice, remains to be seen: while the German Federal Cartel Office has already designated

https://www.competitionpolicyinternational.com/who-should-guard-the-gatekeepers-does-the-dma-replicate-the-unworkable-test-of-regulation-1-2003-to-settle-conflicts-between-eu-and-national-laws/; Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2022) European Competition Journal, 8 https://doi.org/10.1080/17441056.2022.2156728

[52] See Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12(7) Journal of European competition law & practice (513) 522 and Anne C. Witt, 'Platform regulation in Europe – per se rules to the rescue?' (2022) 18(3) Journal of competition law & economics (670) [page number].

certain undertakings as having paramount significance for competition across markets,[53] it has not yet issued orders obliging these undertakings to terminate certain conduct because it is damaging to competition.

IV. Influencing the interpretation of the prohibition of unilateral practices

The previous section concerned how the DMA may limit the scope of the antitrust enforcement of unilateral practices. But might the DMA also affect the antitrust enforcement that will still take place? This is a question on which the DMA itself has nothing to say and which, therefore, requires more crystal ball gazing. Nevertheless, this section discusses two possible ways in which an indirective, interpretative effect of the DMA on antitrust enforcement might arise.

A. Influence of the DMA as a regulatory standard for gatekeepers

The DMA creates new obligations and prohibitions for gatekeepers. According to the decisional practice and the case law on Article 102 TFEU, the existence of regulatory provisions may be a relevant factor when considering whether an abuse of dominance took place. This can be the case if the regulatory obligations appear to be inconsistent with the antitrust rules: in those circumstances, the CJEU has accepted that (in some circumstances) the antitrust liability of the undertakings may be diminished or absent entirely.[54] Since many obligations and prohibitions of the DMA are inspired by the decisional practice and case law of Article 102 TFEU, this situation is unlikely to arise in practice. Also the central role of the European Commission (and DG Comp staff) in the enforcement of the DMA, diminishes the risk of conflicts between the regulatory and antitrust obligations.[55]

On the other hand, the decisional practice and case law have also recognized that a breach of regulatory obligations may be indicative of a breach of the antitrust rules as well. For example, in *AstraZeneca*, the General Court held that the submission to national patent offices of misleading information in order to obtain supplementary protection certificates could constitute an abuse of dominance.[56] The Court of Justice upheld this ruling by the General Court but it did clarify that the ruling was based on the concrete circumstances of the case

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[53] As of 25 January 2023, the following undertakings were designated as such: Alphabet (Decision B7-61/21 of 30 December 2021), Meta (Decision B6-27/21 of 2 May 2022) and Amazon (Decision B2-55/21 of 5 July 2022).

[54] Liability will be absent entirely in the case of state compulsion: see Case C-198/01 *CIF v AGCM,* EU:C:2003:430, para 20. In the absence of compulsion, the authorization or encouragement by regulatory rules has been accepted as a mitigating factor in the calculation of fines: e.g. recital 212 of Commission Decision of 21 May 2003 in *Deutsche Telecom* (Cases COMP/AT.37451, AT.37578 and AT.37579).

[55] In other instances, conflicts between national regulatory rules and antitrust rules have led to an 'institutional jostling for jurisdiction' (Niamh Dunne, 'The Role of Regulation in EU Competition Law Assessment' (2021) 44(3) World Competition (287) 291). This is apparent in the examples of conflicting national regulatory rules which Dunne discusses, but also in conflicts between the antitrust rules and the EU agricultural rules (see recital 472 of the Commission Decision of 15 October 2008 in *Bananas* (Case COMP/AT.39188)), which may reveal jostling for jurisdiction between different DGs within the European Commission.

[56] Case T-321/05 *AstraZeneca v Commission*, EU:T:2010:266, para 355.

and that not any error in such an submission (even if it were unintentionally and immediately rectified) would give rise to an abuse of dominance.[57] In his opinion in the Facebook case, AG Rantos similarly considers that a company's non-compliance with the General Data Protection Regulation could be 'a vital clue' to determine whether it abused its dominant position, although such non-compliance should 'not [be] taken in isolation but considering all the circumstances of the case'.[58]

In some instances, the case law seems to go even further. In particular, the Court of Justice has accepted that telecom companies can be found to have abused their dominant position if they limit access to the local loop network, to which they are required to grant access pursuant to telecom regulation. In *Telekomunikacja Polska*, for example, the European Commission, supported by the General Court and the Court of Justice, found that non-compliance with this regulatory requirement, constituted an abuse of dominance.[59] A similar conclusion was reached in the *Slovak Telecom* case, where the Court of Justice furthermore ruled that the regulatory obligation to grant access to the local loop network implied that it was no longer necessary to establish that such access was 'indispensable' in order to qualify limitations on such access as abusive in the sense of Article 102 TFEU.[60] It has been suggested that the latter reasoning may limit this stricter approach (i.e. non-compliance with a regulatory obligation equals abuse of dominance) to refusal to deal cases.[61]

Based on this case law, the failure of a gatekeeper to comply with the requirements of the DMA could in be a relevant factor to determine whether it abused a dominant position (although it is not clear whether it could also *ipso facto* constitute such an abuse). The practical effect of this indirect interpretative effect of the DMA may, however, be limited since many of the obligations and prohibitions of the Articles 5 to 7 of the DMA are in any event inspired by the decisional practice on Article 102 TFEU.

B. Influence of the DMA on unilateral practices of non-gatekeepers

Some commentators have suggested that the list of prohibited conduct for gatekeepers in the Articles 5 to 7 of the DMA could have spill over effects for non-gatekeepers as well. [62] The list of practices in these Articles could serve as inspiration for forms of conduct that are

[57] Case C-457/10 P *AstraZeneca v Commission*, EU:C:2012:770, para 99.

[58] Opinion of AG Rantos in Case C-252/21 *Meta v Commission*, EU:C:2022:704, para 23.

[59] Commission Decision of 22 June 2011 in *Telekomunikacja Polska* (Case COMP/AT.39525), upheld in Case T-486/11 *Orange Polska v Commission*, EU:T:2015:1002 and Case C-123/16 P *Orange Polska*, EU:C:2018:590.

[60] Case C-165/19 P *Slovak Telecom v Commission*, EU:C:2021:239, in particular paras 57 and 60. See also Case T-851/14 *Slovak Telecom v Commission*, EU:T:2018:929 and the Commission Decision of 15 October 2014 in *Slovak Telekom* (Case COMP/AT.39523).

[61] Niamh Dunne, 'The Role of Regulation in EU Competition Law Assessment' (2021) 44(3) World Competition (287) 296-297.

[62] See Salomé Cisnal de Ugarte, Melanie Perez and Ivan Pico, 'The Digital Markets Act's Per Se Prohibitions Increase Legal Risks for Non-Gatekeeper Platforms', https://www.kslaw.com/news-and-insights/the-digital-markets-acts-per-se-prohibitions-increase-legal-risks-for-non-gatekeeper-platforms.

considered an abuse of a dominant position, so the argument goes, or even an abuse of a position of economic dependence in jurisdictions that have introduced such an infringement.

In this context, it is also argued that the fact that regulatory obligations may be relevant when determining whether an abuse has taken place (as discussed in section A above) could further increase the risk of such spill over effects. To support this line of argument, reference is made to an *obiter* statement by the General Court in the *Google Shopping* judgment where the Court, 'for the sake of completeness' points to certain regulatory obligations which, although not applicable to Google itself, could be taken into account when assessing its practices.[63]

The interpretation of Article 102 TFEU is indeed not fixed and constantly evolving. In any event, the list it contains of conduct that is considered abusive, is not exhaustive.[64] Nevertheless, I believe any spill over from the DMA to Article 102 TFEU is likely to be limited. First of all, several of the obligations and prohibitions in the Articles 5 to 7 of the DMA are very specific to certain core platform services.[65] Any spill over would therefore in any event be limited to other (non-gatekeeping) providers of these services. Secondly, to the extent that the DMA merely codifies certain practices that were already prohibited for dominant companies under Article 102 TFEU, it can obviously not serve as inspiration for additional abuses. Finally, there is no doubt that an objective justification defence is available under Article 102 TFEU, so this may well be invoked in case of alleged breaches of the DMA by non-gatekeepers.

Spill overs from the DMA to national prohibitions of unilateral practices that are not an abuse of dominance in the sense of Article 102 TFEU (such as abuses of economic dependence) are not more likely, in my view. The main reason for this is that jurisdictions that have introduced a prohibition of abuse of economic dependence, have based their list of such abuses on the list of abuses contained in Article 102 TFEU.[66] These national rules do not expand the type of conduct that is abusive, but rather the type of undertaking to which the prohibition of abuse applies. If the DMA does not spill over into Article 102 TFEU, then it is unlikely to spill over into abuse of economic dependence either.

[63] Salomé Cisnal de Ugarte, Melanie Perez and Ivan Pico, 'The Digital Markets Act's Per Se Prohibitions Increase Legal Risks for Non-Gatekeeper Platforms', https://www.kslaw.com/news-and-insights/the-digital-markets-acts-per-se-prohibitions-increase-legal-risks-for-non-gatekeeper-platforms, 7. See Case T-612/17 *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, para 180.

[64] See already Case 6/72 *Europemballage Corporation and Continental Can Company v Commission*, EU:C:1973:22, para 26.

[65] For example, the Articles 5(9) and 5(10) concern online advertising services, Articles 6(3) and 6(4) concern operating systems, and Article 7 concerns number-independent interpersonal communications services.

[66] In Austria, for example, the Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021 (see footnote 47 above) simply expanded the notion of 'dominance' ('Marktbeherrschung') to also comprise relative market power ('Relative Marktmacht'). In Belgium, the new prohibition of abuse of economic dependence includes examples of abusive conduct which are identical to those listed in Article 102 TFEU with the addition of refusal to supply.

V. Conclusion

The DMA is meant to serve as an additional tool for the European Commission to stop certain practices of gatekeepers of core platform services. When these practices infringe the Articles 5 to 7 of the DMA, the Commission is likely to pursue such cases under the rules provided for by the DMA. However, the vast majority of abuse of dominance investigations conducted by the European Commission do not concern gatekeepers of core platform services, and such cases will therefore continue to occupy Article 102 TFEU enforcement in the future. In addition, the scope of the Articles 5 to 7 of the DMA is limited, so even gatekeepers will continue to be subject to abuse of dominance investigations by the European Commission for other conduct.

The DMA limits the ability of NCAs to bring abuse of dominance cases against undertakings that are designated as gatekeepers under the DMA. If the conduct in question infringes the Articles 5 to 7 of the DMA, the Commission is likely to relieve the NCAs of their power to investigate. However, the national authorities will continue to be able to investigate abuses of dominance by gatekeepers that do not fall under the Articles 5 to 7 of the DMA, as well as abusive conduct by non-gatekeeper undertakings. How the DMA affects the ability of national authorities to investigate other types of unilateral practices by gatekeepers is subject to more uncertainty. The precise scope of the NCAs' national enforcement power in this respect depends on the interpretation of and the relationship between Article 1(5) and Article 1(6) of the DMA.

The DMA may have further indirect interpretative effects on the enforcement of abuse of dominance. This could arise as a result of the case law of the European Court of Justice which provides that the non-compliance with regulatory obligations may, in some circumstances, be a relevant indication for the establishment of an abuse of dominance. However, the practical relevance of this effect will probably be limited since most of the obligations and prohibitions of the Articles 5 to 7 of the DMA are inspired by the decisional practice of Article 102 TFEU. In any event, any spill over effects of the obligations and prohibition of the Articles 5 to 7 of the DMA to non-gatekeepers are likely to be limited given the specific nature of these obligations and prohibitions.