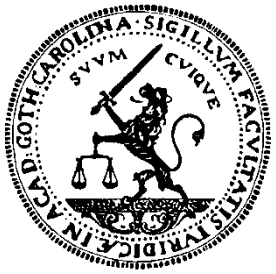


FACULTY OF LAW

Lund University

Arvid Bergh

# The Digital Markets Act

## *The necessary culprit for a Digital Single Market?*

LAGF03 Essay in Legal Science

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# Contents

# Summary

As digitization advances, more and more parts of our lives have been integrated with digital platforms of various kinds, through our use of social media, search engines, price comparison tools, and various other services. That this affects our everyday life can hardly sound surprising – these platforms are so commonplace that we may not give much thought to which apps are pre-installed on our phones, or whether the search results we get online really give us a complete and unbiased supply of information.

The Digital Markets Act, which has recently entered into full force within the European Union, brings about a significant change in the way digital platforms are provided to both consumers and businesses in the digital sphere. As the name implies, the act aims to regulate digital markets, which in practice has meant that a number of companies, which provide what the regulation calls central platform services, have been labelled as so-called gatekeepers. These gatekeepers are currently the companies Alphabet, Amazon, Apple, Meta, Bytedance, Meta and Microsoft.

The Digital Markets Act is new; its effectiveness is a question that time will have to tell. Having said this, an analysis of the regulation nevertheless constitutes a fulfilling task, in order to be able to understand what it actually is and to predict what it will mean in an increasingly digitized world.

# Sammanfattning

I takt med digitaliseringens frammarsch har allt fler delar av våra liv integrerats med digitala plattformar av diverse slag, genom vår användning av sociala medier, sökmotorer, prisjämförelseverktyg m.fl. Att detta påverkar vår vardag kan knappast låta häpnadsväckande – så pass vardagliga är dessa plattformar att vi kanske inte tänker något särskilt på vilka appar som är förinstallerade på våra telefoner, eller huruvida de sökresultat vi får fram på nätet verkligen ger oss ett fullständigt och opartiskt informationsutbud.

Digital Markets Act, som nyligen trätt i fullständig kraft inom Europeiska unionen, medför en betydande förändring i hur digitala plattformar tillhandahålls till såväl konsumenter som affärsverksamheter i den digitala sfären. Som namnet åsyftar så ämnar förordningen att reglera digitala marknader, vilket i praktiken har inneburit att ett antal företag, som tillhandahåller vad förordningen kallar för centrala plattformstjänster, har stämplats som s.k. grindvakter. Dessa grindvakter är i dagsläget företagen Alphabet, Amazon, Apple, Meta, Bytedance, Meta och Microsoft.

Digital Markets Act är ny; dess effektivitet är en fråga som tiden får besvara. Med det sagt så utgör en analys av förordningen likväl en fulländande uppgift, för att kunna förstå vad den faktiskt är, och för att förutspå vad den kommer att innebära i en allt mer digitaliserad värld.

# Abbreviations

| | |
|---|---|
| CJEU | Court of Justice of the European Union |
| CPS | Core Platform Service |
| DMA | Regulation (EU) 2022/1925 of the European Parliament and of the Council 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) |
| EC/Commission | European Commission |
| EU | European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1 Introduction

## 1.1 Subject and background

In the year 2024 it can hardly come as either news or a surprise that humanity finds itself in the midst of rapid technological development, both in the personal as well as the societal and economic spheres.[1] Despite sentiments that changes in behaviour and habits, particularly those exhibited within the digital world, present an increase in well-being and competition,[2] it is self-evident through the actions and opinions of experts, agencies, and the general populace that the pace of technological development poses significant challenges. By virtue of their presence in our everyday lives, digital services are evermore becoming the subject of analysis, and the undeniable influence of their providers has spurred vigorous legal debates, the outcomes of which have caused varying legislative responses across the world.[3]

In Europe, the history of legislative action in the field of digital services is becoming increasingly rich, largely by virtue of the scope and size of its associated actors.[4] The European Commission (EC) has within the boundaries of its authority in the European Union (EU) played a crucial role in taking legislative action against the practices of companies operating within the digital sphere, perhaps the most significant being its instigation in 2012[5] of the implementation of the General Data Protection Regulation (GDPR), adopted in 2017.[6]

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[1] Gerbrandy, *General Principles of European Competition Law and the 'Modern Bigness' of Digital Power: The Missing Link Between General Principles of Public Economic Law and Competition Law,* in Bernitz et al., General Principles of EU Law and the EU Digital Order, Kluwer Law International B.V, Alphen aan den Rijn, the Netherlands, 2020

[2] Ezrachi, Ariel, Stucke, Maurice E., Virtual Competition: The Promise and perils of the algorithm-driven economy, Harvard University Press, Cambridge, Massachusetts, 2016, p.1

[3] H.R.3816—American Choice and Innovation Online Act, 117th Congress (2021–2022)

[4] See *Table 1, Timeframe of EC Platform Cases (2000-2022)* in Bostoen, (2023). Understanding the Digital Markets Act. The Antitrust Bulletin, 68(2), p. 269

[5] Directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data

[6] Regulation(EU) 2016/679 of the European Parliament of and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

Latest in the line of sweeping legislation within the EU (in the field of digitalization) is the Digital Markets act (DMA), which entered into force on 1 November 2022.[7] The DMA as a piece of legislation takes aim at regulating digital platforms operated by the regulations own definition of "gatekeepers", which were designated in their current ensemble as of September 2023.[8] These gatekeepers are as of now: Alphabet, Amazon, Apple, Bytedance, Meta and Microsoft.[9] The designated companies are identified by virtue of the services they provide, which are titled by the EC as Core Platform Services (CPS). The designation of gatekeeper status is one of the competences granted to the EC under the DMA,[10] as well as the pursuit of compliance.

The end goal of measures taken makes itself known through the full title of the DMA, which in actuality is *Regulation on contestable and fair markets in the digital sector*. The perseverance of markets, or rather the single market, is a longstanding ambition not just of the EC, but the whole of the EU.[11] Digitalization is in this regard accounted for by the conceptualization of a *digital single market*.[12] At the time of writing this essay, the DMA only recently entered fully into force (insofar as the gatekeepers are expected to follow their obligations).[13] In turn, this has already sparked non-compliance investigations launched against several gatekeepers as defined under the DMA.[14]

Of interest to an analysis of the eventual potency of these proceedings is whether or not the tools provided by the DMA are fit for purpose, and

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[7] European Commission, *About the Digital Markets Act*<https://digital-markets-act.ec.europa.eu/about-dma_en>, visited 2024-05-06

[8] European Commission, *Gatekeepers* <https://digital-markets-act.ec.europa.eu/gatekeepers_en>, visited 2024-05-06

[9] European Commission, *Digital Markets Act: Commission designates six gatekeepers*<https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328>, visited 2024-05-20

[10] Article 3.4 DMA

[11] European Union, Priorities and actions; *Single market – A single internal market without borders* <https://european-union.europa.eu/priorities-and-actions/actions-topic/single-market_en> , visited 2024-05-06

[12] European Commission, *4. What is the Digital Single Market about?* <https://ec.europa.eu/eurostat/cache/infographs/ict/bloc-4.html>, visited 2024-05-06.

[13] European Commission, *Designated gatekeepers must now comply with all obligations under the Digital Markets Act* < https://ec.europa.eu/commission/presscorner/detail/en/IP_24_1342> , visited 2024-05-14

[14] European Commission, *Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act* <https://digital-markets-act.ec.europa.eu/commission-opens-non-compliance-investigations-against-alphabet-apple-and-meta-under-digital-markets-2024-03-25_en> , visited 2024-05-06

whether or not the legislative course taken by the adoption of the DMA presents a shift in priorities of EU law as a whole – these questions form the basis of further analysis within this essay.

## 1.2 Purpose and Research Questions

This essay sets out to analyse the Digital Markets Act in several ways. At the centre of this analysis lies the intention to properly identify the goals of the act; both considering its self-proclaimed objectives as well as the aims and ambitions that have preceded, and likely, moulded it. The clarification of these desires is in turn meant to underline a continued analysis of the potential benefits and drawbacks of the regulation from a systematic perspective. In this context, the effectiveness of the regulation is to be predicted, both in terms of its ability to fulfil the goals it sets out for itself, but additionally in terms of its ability to foreseeably address concerns that have preceded it, coexisted with it, and eventually might supersede it.

In this endeavour, the following questions are to serve as a guiding hand, by establishing the boundaries and feasibility of further analysis:

- Which are the thoughts and events predating the Digital Markets act?
- What are the goals of the Digital Markets act?
- How does the act aim to achieve these goals?
- What are the eventual risks entailed by the act?
- Is the Digital Markets act fit for purpose, by its own merits or by any other merits surrounding the debate of its inception and further implementation and application?

## 1.3 Delimitations

For a legal act the size of the DMA, delimitations are crucial so as not to overextend oneself in its presentation. Indeed, the Digital Markets act raises concerns across the legal spectrum, not least of all within the field of competition law – a field which the DMA certainly traces its roots to, while nevertheless

eluding outright association with.[15] This diffuse relationship, as briefly illustrated, will be the subject of *some* discussion. The analysis of this essay will, however, be based on the presupposition that the DMA, while certainly reflective of competition law principles and desires, rests primarily inside the scholarly field of EU law separately, although its relevant roots in competition law are unavoidable.

Furthermore, the essay is materially to be delimited in such a way that the DMA is presented concisely, but not exhaustively. An enumeration of the provisions of the regulation in detail would pose a daunting task, and, ultimately, not a wholly necessary one for the purposes of this essay.

## 1.4 Method and Materials

The DMA is in this essay to be studied according to the methodology of the legal field which it finds itself in, namely that of European Union Law. The legal system of the European Union is dynamic in the sense that the varying legal traditions of its constituent states form the basis of an amalgamation which is vertical in nature.[16] Because of this, and in an attempt to concisely identify key components of the DMA, a methodology based on the work of Professor Ulla Neergaard (and associates), more specifically through the theorized perspectives found in the literary work *European Legal Method*, [17] is to be applied. The method as presented does not represent a method of legislation, but rather a method of interpretation.[18] It is with this method of interpretation in mind that a distinction between legal practice and research practice is made,[19] through which the essay will seek to understand the material at hand through a perspective beyond, but not without sight of, questions regarding the validity of law.[20] The writings of Dr. Christina Eckes are of help in this regard, pointing out two

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[15] Larouche & de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions', *Journal of European Competition Law & Practice*, Volume 12, Issue 7, 2021, P. 543

[16] Van Gestel & Micklitz, 'Revitalising Doctrinal Legal Research in Europe: What About Methodology?' in Neergaard, *European Legal Method – Paradoxes and Revitalisation* (2011), p. 57

[17] *European Legal Method* is a compilatory work consisting of multiple volumes within the research project: 'Towards a European legal Method: Synthesis or Fragmentation?'. The volumes utilized in this essay are *European Legal Method – Paradoxes and Revitalisation* and *European Legal Method – towards a New European Legal Realism?*

[18] Roth, *The Importance of the Instruments Provided for in the Treaties for Developing a European Legal Method,* in Neergaard, *European Legal Method – Paradoxes and Revitalisation* p. 76

[19] Neergaard & Nielsen, *Where Did the Spirit and Its Friends go?,* in Neergaard, *European Legal Method – Paradoxes and Revitalisation* p. 76

[20] Ibid, p. 104-105

differing perspectives, namely an internal, primarily doctrinal perspective, and an external perspective, more concerned with normative argumentation asking why the law is as it is, and whether it ought to be this way.[21] As Eckes further points out, Europeanisation and globalisation serve to blur the lines between these distinctions, as legal authority within the EU cannot be determined through sole reliance on traditionally national hierarchies of norms, on account of the plurality formed by the unions member states.[22] It is therefore, with an eye toward the future, that this essay seeks to establish a composite methodology of doctrinal and normative nature.

This essay relies primarily on material that directly relates to the DMA. Due to the recency of the legislation entering into force, time has not been given for the discourse on the legislation to produce extensive works of literature; rather, the main body of information and opinion is most feasibly found in academic articles.

In addition to the material concerning the DMA specifically, a number of literary sources regarding EU law and competition law have been chosen to illustrate the framework in which the DMA might now find itself within. Additionally, case law is applied, although sparingly, in large part to illustrate a history of intense litigation surrounding the concerned parties of the DMA, and a likely continued prevalence of appeals. Mostly in this context, Article 102 of the Treaty on the Functioning of the European Union (TFEU) is actualized as a form of placeholder for current DMA provisions.

Finally, the selected method and materials are to substantively converge through the research questions posed by the essay. Of key interest in this regard are the final two questions, where the composite methodology of *European Legal Method* will be of value to any eventual findings.

[21] Eckes, *European Legal Method – Moving Away From Integration,* in Neergaard, *European Legal Method – Towards a New European Legal Realism?, p.166-167*

[22] Ibid, p. 170

# 2 The road to adoption

As briefly illustrated, the Digital Markets Act was not adopted in a vacuum. The investigations of non-compliance launched under the DMA in March 2024 by the commission[23] all involve actors which have previously found themselves on the receiving end of substantial fines[24], although not unanimously for behaviours falling under the DMA: s prohibitions, or for that matter issued by the EC. Nevertheless, the figuring of these companies on the Commissions radar is a subject which needs to be illustrated, in order to understand why the designation of gatekeeper status is significant not just *within* the DMA, but also outside of it.

## 2.1 The eventual gatekeepers

The gatekeepers are, as previously stated, not unfamiliar with proceedings stemming from their digital market presence. Indeed, almost all current gatekeepers have a history of litigation with the EC specifically;[25] a history of proceedings that, particularly in the case of Google (now Alphabet under the DMA), illustrate the considerable amounts of time and effort dedicated to antitrust enforcement within the field of digital markets.

To properly illustrate the nature of these proceedings, the examples of *Microsoft Corp. v. Commission* (T-201/04) and *Google and Alphabet v. Commission (Google Shopping)* (T-612/17) are to be examined as examples of case law in which the General Court (Court of First Instance until December 2009), as part of the Court of Justice of the European Union (CJEU), confirmed on appeal the fines levied by the EC for abuses of dominant positions according to Article 102 of the Treaty on the Functioning of the European Union (TFEU) (Formerly, and in T-201/04, Article 82 of the Treaty establishing the European Community (EEC Treaty)). These two cases are particularly relevant as they highlight what

[23] European Commission, *Commission opens non-compliance investigations against Alphabet, Apple and Meta* <https://digital-markets-act.ec.europa.eu/commission-opens-non-compliance-investigations-against-alphabet-apple-and-meta-under-digital-markets-2024-03-25_en> visited 2024-05-13

[24] https://ec.europa.eu/commission/presscorner/detail/es/MEMO_17_1785 Google Fined 2024-05-13, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161 Apple Fined 2024-05-13, https://www.edpb.europa.eu/news/news/2023/12-billion-euro-fine-facebook-result-edpb-binding-decision_en Meta Fined 2024-05-13

[25] Bostoen, (2023). Understanding the Digital Markets Act. The Antitrust Bulletin, 68(2), p. 269

would eventually become the DMA:s *do's* in reference to gatekeepers obligation to allow interoperability, and its *don'ts* in reference to gatekeepers prohibition from self-preferencing and tying.

### 2.1.1 Microsoft v Commission

The case of the Commission v. Microsoft goes back to as early as 1998, when on 10 December the company Sun Microsystems lodged complaints to the EC regarding exclusionary practices by Microsoft, prohibited under Article 82 of the EEC Treaty.[26] In the eventual statement of objections levelled by the EC against Microsoft, it specifically mentioned the concern of interoperability with regards to Windows OS.[27] Interoperability was, in this regard, specified as 'interoperability information' which Microsoft had refused to supply its competitors with – an abuse of the dominant position that Microsoft was claimed by the EC to possess on the relevant market, additionally emphasized by the standardized nature of its product (Windows OS) on that market.[28]

Another vital part in connecting the decision at hand to the DMA is found along with the above-mentioned examination of the contested decision by the EC. In addition to interoperability, the CJEU reiterated findings of abusive conduct related to the practice of *technological tying*.[29] This practice according to the EC consisted of the fact that Microsoft had provided the Windows PC operating system with the Windows Media Player pre-installed, which constituted a form of bundling which effectively restricted competition on the market of streaming media players – a market deemed separate from the market of client PC operating systems.

As mentioned, both practices were deemed by the EC as abusive according to Article 82 EEC Treaty, yet with the distinction of being deemed so *ex post*, unlike the regulation of the DMA – this will be elaborated on future chapters of this essay.

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[26] Paragraphs 1-6, T-201/04 *Microsoft v Commission, Judgement of the Court of First Instance (Grand Chamber),* 17 September 2007

[27] Paragraph 8, *Microsoft v Commission Judgement*

[28] Paragraphs 33-34 *Microsoft v Commission Judgement*

[29] Paragraph 43-44 *Microsoft v Commission Judgement*

### 2.1.2 Google/Alphabet v Commission

The case of Google, and later Alphabet as of 2020,[30] is by most metrics a lengthy case, weighing in at more than 6 years, although as assistant professor Friso Bostoen posits it is an outlier in this regard.[31] Proceedings were initiated by the Commission in 2010, leading to a preliminary assessment in 2013 which stated that Google had potentially infringed upon Article 102 TFEU through the practice of preferential search results.[32] The CJEU illustrated the following process and contested decision of the EC, a decision which based on the definition of relevant markets, according to competition rules.[33] Furthermore, the Commission found that Google indeed had abused its dominant position in several member states by directing users of its search engine to its *comparison shopping service*, instead of similar such services provided by competitors.[34]

The case, also referred to as *Google Shopping,*[35] illustrates the intricacy of a company using their platform in seemingly inconspicuous ways, such as displaying "richer graphical features"[36] towards costumers; a consequence of which being that the eventual increase in traffic would in turn provide optimisation through machine learning, essentially honing the product further toward its intended user base.[37] It is in this context that the concept of *network effects* appear, which the EC illustrated in this case as follows:

> […] traffic produced network effects, in that the more a comparison shopping service is visited by internet users, the greater the relevance and usefulness of its services and the more merchants would be inclined to use them, and that that traffic also generated revenue from commissions or advertising that could be used to improve the

[30] Paragraphs 1 & 70, T-617/17 *Google/Alphabet v Commission, Judgement of the General Court (Ninth Chamber, Extended Composition),* 10 November 2021

[31] Bostoen, (2023). Understanding the Digital Markets Act. The Antitrust Bulletin, 68(2), p. 270

[32] Paragraphs 23-24 *Google/Alphabet v Commission Judgement*

[33] Paragraph 40 *Google/Alphabet v Commission Judgement*

[34] Paragraph 55 *Google/Alphabet v Commission Judgement*

[35] Page 67, Crémer, Montjoye & Schweitzer, *Competition Policy for the Digital Era (2019)*

[36] Paragraph 62 *Google/Alphabet v Commission Judgement*

[37] Paragraph 64 *Google/Alphabet v Commission Judgement*

> usefulness of the services provided and thus distinguish that comparison shopping service from competitors.[38]

This effect appears routinely in the DMA, in fact already in its second recital the concept of network effects is highlighted as a potential liability, allowing core platform services to be exploited.[39] This will be further elaborated upon in coming chapters.

## 2.2 Codification

The above illustrated cases show the undeniable traces of competition law that lay before the adoption of the DMA. Beyond litigation, both previous regulation and investigatory work would lay the foundation for the DMA, insofar as they set out to solve what could increasingly be defined as a shortcoming of competition law.[40] In analysing material produced closer in time to the DMA:s adoption, one may find answers as to which path the Act eventually went down.

### 2.2.1 Regulation on platform-to-business relations

In 2019, one might claim that the first steps toward fulfilment of certain goals lined out in the DMA were taken, when the Commission issued the Regulation on platform-to-business relations, also called the P2B regulation – a regulation which, much in line with the eventual ambitions of the DMA, seeks to contest what it deems as "unfair contracts and trading practices in platform-to-business relations.[41] Indeed, this desire for fairness makes itself apparent by the P2B-regulations emphasis on transparency,[42] which appears in its seventh point through the wording:

> A targeted set of mandatory rules should be established at Union level to ensure a fair, predictable, sustainable and trusted online

[38] Paragraph 171 *Google/Alphabet v Commission Judgement*

[39] Recital 2, DMA

[40] Larouche & de Streel, The European Digital Markets Act: A Revolution Grounded on Traditions, Journal of European Competition Law & Practice, Volume 12, Issue 7, September 2021, P. 545

[41] European Commission, *Platform-to-business trading practices* <https://digital-strategy.ec.europa.eu/en/policies/platform-business-trading-practices> , visited 2024-05-18

[42] Bostoen, (2023). Understanding the Digital Markets Act. The Antitrust Bulletin, 68(2), p. 267

> business environment within the internal market. In particular, business users of online intermediation services should be afforded appropriate transparency, […][43]

The P2B-regulation paints a familiar picture of business users being effectively placed at a disadvantage on digital platforms; the regulation does not, however, address the position of consumers on digital platforms, although increased consumer choice is hailed as a byproduct of the regulation.[44]

### 2.2.2 Crémer Report

The P2B-regulation may well represent the first step toward codification of the policy that eventually culminated in the DMA. The more monumentally outspoken changes of priorities during this time must, however, be considered to have been the report *Competition policy for the digital era*, compiled by Jacques Crémer, Yves-Alexandre Montjoye and Heike Schweitzer.[45] While the EU Commissioner for Competition, Margrethe Vestager, had only a year prior to the publication of the report refuted the necessity of a new regime, concerning competition in digital markets, this position had likely changed when she commissioned what is colloquially called the *Crémer Report*.

Of particular interest to the currently illustrated crossroads of policy is chapter V, titled *Competition Law and Regulation*.[46] The authors assert herein that competition law, in the context of digitisation, is merited by its ability to adapt to changes in market conditions through general rules applied case-by-case, while simultaneously falling short in terms of bringing about change swiftly and cost-effectively. This desire for a more proactive approach to problems surrounding digital markets would later manifest itself through an impact assessment launched by the EC in 2020, to determine costs and benefits of *ex ante*[47] regulation of large platforms.[48]

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[43] REGULATION (EU) 2019/1150 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services

[44] Recital 8, P2B regulation

[45] [45] Moreno Belloso, Natalia, Petit, Nicolas, The EU Digital Markets Act (DMA): a competition hand in a regulatory glove, European Law Review, 2023, 48(4), p. 393

[46] Crémer Report, p.52-53

[47] Ex ante regulation in this context refers to the outlining of rules applied *before the fact* – ex post, conversely, refers to rules applied *after the fact*. An example of *fact* in this context is market abuse.

[48] [48] Moreno Belloso, Natalia, Petit, Nicolas, The EU Digital Markets Act (DMA): a competition hand in a regulatory glove, European Law Review, 2023, 48(4), p. 393

With the Crémer Report issued and taken into account by the Commission, the groundwork for the DMA was laid – with the caveat that the report, issued on the subject of competition, implied that measures such as the "implementation and oversight of interoperability mandates" would go beyond competition law enforcement at the time.[49]

[49] Crémer Report, p.126

# 3 The Act

As mentioned initially, the Digital Markets Act only recently started to fully apply to the gatekeepers that it regulates. To offer a perspective on what this means in practice, a two-sided perspective on the rights granted under the Digital Markets Act will be presented to illustrate how the act affects consumers on the one hand, and businesses on the other, with the designated gatekeepers acting as custodians of any such privileges. The concept of "rights" is a convoluted form of speech in this regard, only meant to illustrate privileges unto which an actor is owed.

## 3.1 Consumer Rights

The eighth recital of the DMA proposes that a set of harmonised legal obligations, namely the ones it contains, will be of benefit to the Unions economy and "ultimately of the Union's consumers".[50] Similar claims of consumer welfare surround the DMA,[51] claiming that better services and lower prices are consequences of the act. Such claims of economic efficiency are not to be further analysed in this essay, but ostensibly such measures taken that aim to safeguard competition are generally expected to benefit consumers.

The main benefits of the DMA for consumers might not be found in the DMA at all, but rather its sister regulation, the Digital Services Act (DSA),[52] which was launched alongside the DMA.[53] This regulation takes aim at protecting users of digital services from harmful content, which is more closely related to the concept of digital rights than the primarily economic concerns of the DMA.

[50] Recital 8, DMA

[51] European Commission, A Europe fit for the digital age: new online rules for users <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act/europe-fit-digital-age-new-online-rules-users_en> visited 05-19

[52] Regulation (EU) 2022/2065 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act)

[53] Bostoen, (2023). Understanding the Digital Markets Act. The Antitrust Bulletin, 68(2), p. 264

## 3.2 Businesses Rights

As a progenitor for benefits enjoyed by consumers on digital platforms, it is likely that the prime focus of the DMA:s effectiveness, in regard to consumer welfare, should be on the question of effectiveness. A more poignant examination would go further in analysing the primary policy goals of the DMA, namely *contestability* and *fairness*, as the gateways to understanding rights enjoyed by business users of digital platforms.[54]

Chapter III of the DMA, *Practices of gatekeepers that limit contestability or are unfair,* give clear directions as to how the gatekeepers are prohibited in their conduct (on the core platform services that they provide). The provisions herein are numerous, but certain aspects are of particular interest in understanding the relationship between the gatekeepers and business users of their CPS; the accumulation and manipulation of personal data, particularly under Article 5.2, is prohibited in several ways. A partial precedent for this has already been illustrated in Google/Alphabet v Commission – the processing of data is a vital component of optimisation in digital markets. Another more direct reference to the case is additionally found in Article 6.5, which prohibits self-preferencing in rankings.

## 3.3 Gatekeepers; Designation and Obligations

As illustrated above, the obligations of the gatekeepers under the Digital Markets Act relate rather directly to their treatment of users on their core platform services. With precedents in the form of case law, the DMA could in this sense be viewed as a confirmation of the necessity of regulation.

Article 8.1 of the DMA states that gatekeepers "shall ensure and demonstrate compliance with the obligations laid down in Articles 5, 6 and 7 of this Regulation".[55] Article 8.2, in turn, outlines the EC:s competence to open investigations (through Article 20 DMA) of the kind launched in March 2024 against Alphabet, Apple and Meta.[56] If non-compliance is determined, the EC shall announce these findings through an implementing act according to Article 29, and may in this

[54] Bostoen, (2023). Understanding the Digital Markets Act. The Antitrust Bulletin, 68(2), p. 265

[55] Article 8.1 DMA

[56] European Commission, Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689>

decision implement fines of up to 10% of the targeted gatekeepers total world-wide turnover.

So far, the concept of gatekeepers has only been illustrated merely mentioning which ones are currently designated as such. The DMA provides the process for defining gatekeepers under Article 2.1, as an undertaking providing a core platform service. The designation of gatekeepers follows from Article 3.1, according to which:

> 1. An undertaking shall be designated as a gatekeeper if:
>
> (a) it has a significant impact on the internal market;
>
> (b) it provides a core platform service which is an important gateway for business users to reach end users; and
>
> (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.[57]

All three of these criteria correspond with quantitative thresholds outlined in Article 3.2. The designation of gatekeeper status is dynamic, and more providers of core platform services could fall under the designation in the future.

[57] Article 3.1 DMA

# 4 Analysis and Theorization

## 4.1 The fulfilment of goals

As mentioned in the previous chapter on the rights of business users, the goals of the DMA are clear insofar as contestability and fairness make themselves visible in the provisions of the act. A more analytical approach of precisely what these provisions entail, and whether they are feasible regarding the effect one might expect them to have, can lead the way for theoretical arguments – arguments which in this section will make callbacks to the essay's research method.

Bostoen makes the claim that the goals of fairness and contestability can be properly illustrated through the DMA:s goals of intra- and inter-platform competition, respectively.[58] Intra-platform competition refers to competition between business users (which gatekeepers may be, even while providing the platform) operating on the same CPS, while inter-platform competition refers to the distribution of the same CPS:s by various providers (even between gatekeepers themselves).[59] Fairness as a goal, in the case of intra-platform competition, is best described as the prohibition of conduct that seeks to undermine competition on the platform, specifically through a gatekeeper undermining their competition of business users on it. Contestability in inter-platform competition in turn meant to represent the ability of alternatives to the current CPS:s to enter the market.

Whether fairness and contestability can be measured is a daunting task, however, the eventual entry of new actors to compete with current gatekeeper-provided platforms, or the ability of businesses to thrive unhindered on current core platforms will certainly be measured, not least through the inquisitive work that the Commission is mandated to carry out.

[58] Bostoen, (2023). Understanding the Digital Markets Act. The Antitrust Bulletin, 68(2), p. 303

[59] Moreno Belloso & Petit, The EU Digital Markets Act (DMA): a competition hand in a regulatory glove, European Law Review, 2023, 48(4), p. 403

## 4.2 The future and potential outcomes of current investigations

A starting point in the analysis of the Digital Markets Act may well be found in the highlighted investigations of non-compliance launched against Alphabet, Apple, and Meta. Of particular interest is perhaps the case of Alphabet, for the simple reason that part of the investigations launched against the company relate to the issue of self-preferencing – an issue which in the illustrated case law may appear as recurring. Speculation into what the outcomes of current investigations might be is, of course, entirely hypothetical. What is not hypothetical is, however, the landscape that the investigations find themselves in, particularly in the ways it contrasts the landscape of proceedings predating the DMA.

In the eyes of Moreno Belloso and Petit, the DMA stands currently as "biased against concentration".[60] In what way does such a bias present itself in current investigations? It is clear in the case of Alphabet, Apple and Meta that their designation as gatekeepers already from the outset of investigations places them in a distinct position, compared to what would likely have been a question of defining their individual market positions and abuses of such according to competition law. The function that the gatekeeper designation serves in already defining the actors, as well as their market positions, is in practice a means of elevating the issue of dominance in digital markets beyond competition law, in the sense that a previous division of competences between the Commission and national competition authorities disappears in favour of centralised enforcement.[61]

Without dwelling on competition laws continued relevance, one can safely say that the competence of the Commission to hold gatekeepers accountable for their non-compliance with the DMA breaks new ground, as the EC attains an active role in upholding its views of fairness and contestability in the digital single market through oversight, as opposed to reprimanding its wrongdoers after the fact.

[60] Moreno Belloso & Petit, The EU Digital Markets Act (DMA): a competition hand in a regulatory glove, European Law Review, 2023, 48(4), p. 421

[61] Larouche & de Streel, The European Digital Markets Act: A Revolution Grounded on Traditions, Journal of European Competition Law & Practice, Volume 12, Issue 7, September 2021, P. 558

## 4.3 A different perspective

The essay has hitherto applied a perspective in line with the doctrinal issues and ideas that preceded the DMA, not least by establishing a clear link between past litigation in contrast to that of the moment. To establish a novel view, which perhaps does not appear as linear, it is important to backtrack to a more generalist perspective, as one reiterates the fact that the DMA is, indeed, treading new ground.[62]

The DMA:s designation of gatekeepers could be seen not just as a tool, but certainly as an admission as well, of the fact that the companies in question are monopolistic, and that perhaps this is a sign of the times. Francesco Ducci posits that "[…] policies that address market power while accepting various degrees of efficient concentration become as a whole more desirable," [63], and indeed such a philosophy may be echoed by the DMA. While particularly the goal of contestability with a desire to promote alternatives to the core platform services is in line with the idea that competition furthers innovation as opposed to monopolies (which the entry of new services would aim to hinder),[64] the grade of innovation that this anti-monopolistic stance produces will likely only be determined by the efficiency of the measures themselves.

If regulation as opposed to competition law enforcement is the way paved by the DMA, does this also entail problematization of new issues? Naturally, the DMA as an offshoot of competition law is neither able, nor meant to offer the same role as competition law regulation that preceded it. Perhaps considerations of non-economic problematics[65] will break through as the Digital Markets Act remains contained in only concerning the gatekeepers. Indeed, the positions of

[62] Bostoen, (2023). Understanding the Digital Markets Act. The Antitrust Bulletin, 68(2), p. 303

[63] Ducci, Natural Monopolies in Digital Platform Markets, Cambridge University Press, Cambridge, United Kingdom, 2020, p. 157

[64] Bostoen, (2023). Understanding the Digital Markets Act. The Antitrust Bulletin, 68(2), p. 305

[65] Gerbrandy, *General Principles of European Competition Law and the 'Modern Bigness' of Digital Power: The Missing Link Between General Principles of Public Economic Law and Competition Law,* in Bernitz et al., General Principles of EU Law and the EU Digital Order, Kluwer Law International B.V, Alphen aan den Rijn, the Netherlands, 2020, p 308

these gatekeepers are not only underlined by economic power – their distribution of information and opinion certainly has significant implications regarding integrity, and even democracy.[66]

The DMA does put up quantitative thresholds for gatekeeper status, which appear guided by traditional assessments of market power in competition law, and its objectives are ostensibly quite similar to the ones of that field.[67] In essence however, the designation of gatekeeper status could provide a shift of culture, in which the entrenched positions of the gatekeepers become the basis of further regulation, not to mention changes in attitude from consumer, business users, and the gatekeepers themselves. Ultimately, these changes in attitude will only be what the actors make of it – gatekeepers should for example not adopt a negative attitude toward the DMA if the realization of a fair and contestable digital market entails, for example, goodwill in the form of increased trust or increased innovation across the board.

[66] Ibid, p. 311

[67] Larouche, & de Streel, The European Digital Markets Act: A Revolution Grounded on Traditions, Journal of European Competition Law & Practice, Volume 12, Issue 7, September 2021, P. 580

# 5 Concluding remarks

As the analysis establishes, there is little point in predicting the future of the DMA. Already has its ability to cause litigation been proven, but still remains the question of what type of law the Act will eventually give rise to. The Digital Markets Act has opened the door toward a legal field that quite clearly breaks with competition law in a way that will only further perpetuate itself as time goes on. This conclusion is drawn not only from the fact that competition law remains as a field beside the DMA, but additionally from the conclusions drawn regarding the DMA:s assertions of the state of the digital markets as they are today.

In summary, the DMA does present a shift in priorities for the Commission, the nature of which will only present itself with time, and perhaps most prominently through the case law that is to be established with the DMA in mind. Future regulatory developments are sure to come as the EC shifts its focus from its perceived confines within competition law, to perhaps not only use the DMA as an effective tool in establishing a digital legal order, but also in its ability to further legislate in this field of what might very well become a separate school within the wider field of EU law. As dreadfully repetitive as the sentiment may sound – only time will tell.

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